Stripping Away the Fictions: Interview With Mr. Justice Arthur J. Goldberg*
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Abstract

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KEYWORDS: fictions, interview, stripping
Stripping Away the Fictions: Interview With Mr. Justice Arthur J. Goldberg*

Professor Wisotsky: Mr. Justice Goldberg, in the case of Washington v. Davis, a group of black applicants, unsuccessfully seeking police positions on the District of Columbia Police Force, sued alleging the entrance test, in effect, was racially discriminatory because they failed at a rate much greater than white applicants.

The Supreme Court rejected their claim, saying it wasn’t enough that they failed at a greater rate; there must be some showing of an intention to discriminate against black people. Do you agree with that decision?

Mr. Justice Goldberg: No, I don’t agree with it at all. The most difficult thing to do is establish the intention of local officials, including members of the state legislature. I must confess I don’t know about Florida, but most states in our union keep no record of state legislative proceedings. There certainly are no transcripts kept of proceedings of local authorities.

In law we normally apply a simple rule about human conduct. We say people are presumed to intend the logical, reasonable consequences of their act. So to me the big question is “What is the effect of the official’s action?” not “What is the motivation?”

I recall a dissent I wrote in the reapportionment case Wright v. Rockefeller. I discussed our inability to probe peoples’ mental recesses. We have no tools to do that, and no local official would take the stand to say “I was racially motivated.” So I would judge by effect.

These decisions seem to me a way of ducking the primary issue.

* Former Justice of the United States Supreme Court. This article was adapted from a videotaped interview with Mr. Justice Goldberg by Professors Michael Burns, Robert Marsel and Steven Wisotsky of the Nova University Center for the Study of Law. The interview took place at the Law Center on Sept. 16, 1980, when Mr. Justice Goldberg was Nova’s Distinguished Visiting Professor of Law.

2. 376 U.S. 52, 67 (1964) (Goldberg, J., dissenting).
3. Id. at 73-74.
They resemble a situation we had when I was on the Court in Swain v. Alabama. There, no black person had ever served on a jury for a white defendant; blacks only served for a black defendant. This selective elimination of black jurors was done through the guise of peremptory challenges. To me it was a clear case of racial discrimination. I did not exalt the right to exercise peremptory challenges, nowhere safeguarded in the Constitution, over the right to equal treatment, which the Constitution affords.

Professor Burns: Mr. Justice, in deciding whether females, like blacks, should constitute a suspect class for equal protection purposes, we find ourselves attempting to compare the female experience in the United States with the black experience. What are your observations?

Mr. Justice Goldberg: Of course nothing can approximate the way we treated the black population of this country; they were in slavery. And our slavery, Professor Elkins reported in his book, was the worst slavery in the North and South American continents. We permitted families to be separated; children, wives and husbands were sold separately. In South America, thanks primarily to the Jesuit Church, that practice was not permitted, even though they had slavery.

On the other hand, women are grossly discriminated against to this day. As a former Secretary of Labor, I can say women are still paid substantially less than men for the same jobs. We must recognize that while for many centuries women were not held in physical bondage as slaves, there were many inhibitions against women's freedom.

It's only recently that states have begun adopting a law which should have been long obvious: a woman can accuse her husband of rape. We never allowed that before. So if you read the Forsyte Saga, you recall the famous incident where this man of property, Soames Forsyte, virtually raped his wife. He ruined his marriage by doing so.

Women have traditionally sustained substantial handicaps. They

6. Id. at 69-73.
were denied the right to vote until we had a constitutional amendment. They were denied the right to hold property in many states. Now, much has been corrected; but there is no doubt at this very minute women are not treated on an equal basis with men.

That being so, I believe the Court should opt for a suspect classification. In our jurisprudence it is not necessary to absolutely equate the enormity of black discrimination and gender discrimination. If discrimination is substantial, the Court has a right to move. I regret the Court hasn't done that. It had a duty to say the class is suspect. This doesn't mean compelling reasons may not justify some differences: health standards and the like. But the failure of the Court to fulfill what I conceive to be its constitutional duty has resulted in the Equal Rights Amendment and has led me to support the amendment.

Professor Burns: One controversial focus of the women's movement, shared by American blacks and Jews, among others, is the challenge to exclusionary admission policies of men's clubs. I think we can find these clubs serve as the situs for developing male friendships and ultimately impact on decision-making in business and government. Are there any viable constitutional bases for challenging these admission policies?

Mr. Justice Goldberg: I would think so. I wrote an opinion once, trying to form a majority, in which I said one has a right to be privately prejudiced; I commented on clubs to gain support for the opinion. Right now I am engaged in an effort to overcome this prejudice in Washington's Cosmos Club, where women are only admitted as spouses rather than in their own right. Presently, a cabinet secretary like Patricia Harris cannot enter unless her husband is admitted.

What is the constitutional basis for ending such admission policies? I think several factors activate fourteenth amendment prohibitions. Most clubs enjoy tax exempt status; thus the state is involved. Moreover, clubs benefit from many municipal services, e.g., garbage collection, water service and many others; it would seem there is the requisite degree of state involvement essential for an attack on discriminatory treatment.

9. U.S. CONST. amend. XIX.
10. U.S. CONST. proposed amend. XXVI.
Professor Burns: The right of privacy, while now well estab-
lished, remains unenumerated and, in the minds of some, remains all
too fluid. One controversial area concerns extending the right of pri-
vacy from the traditional marriage and family context to the area of
private homosexual conduct. Do you believe laws which prohibit private
homosexual conduct violate the constitutional right of privacy?

Mr. Justice Goldberg: I do, for adults and consensual relation-
ships between adults. I do not apply this rationale to children. We have
many laws where special regard is paid to children, and rightly so.
Children do not possess the judgment to make informed decisions.

Adults, unless they inflict harm on others, have the right to pursue
privacy, to pursue their own lives. Now, homosexuality is something I
personally do not favor; but I regard it as a psychological and social
problem. I don’t quite agree with those who say it’s a way of life which
should be endorsed, but I do agree it’s a private matter between
adults. 12

Professor Burns: As a Justice known for having great respect for
personal individual liberties, and having a unique international perspec-
tive as a former United Nations ambassador, to what extent to you
believe the recent Haitian and Cuban refugees should be afforded con-
stitutional rights?

Mr. Justice Goldberg: I believe they have substantial constitu-
tional rights. As always, we must refer to the fourteenth amendment
which states: “Nor shall any State deprive any person of life, liberty, or
property without due process of law; nor deny to any person within its
jurisdiction the equal protection of the laws.” The notable thing about
the fourteenth amendment, echoing the fifth amendment, is the term
“any person.” When a person comes to our country we can, through
the application of the immigration laws, deny admission. When a per-
son enters illegally, we can deport the person.

Throughout our early history we have had great waves of immi-
gration, dating back to the founding fathers, the pilgrims. We have

12. I have been told I approved of laws of this type in Griswold v. Connecticut,
381 U.S. 479, 499 (1965) (Goldberg, J., concurring); but I did not. I did quote John
Harlan, who used the word homosexual. Id. at 499 (quoting Poe v. Ullman, 367 U.S.
497, 553 (1961)). Often when one Justice quotes another Justice, he does it to garner
votes. Harlan liked his former dissent, and he was right in result. But I merely quoted
him in my opinion.
enacted amnesty laws permitting immigrants to stay if they entered before a certain date. But in modern times, the recent influx represents something *sui generis* in our country. In spite of the Coast Guard's disapproval, we have permitted Cubans and Haitians to enter; they're here. In my opinion we cannot regard them as illegal immigrants. We are in large part a nation of political refugees; it's our heritage.

Except for a hard core criminal element, who arrived through false pretenses and have been segregated, the Cubans and Haitians who have arrived are now within our jurisdiction. I would brush aside the technicality of whether they're permanent residents or not. We have admitted them; and having admitted them the fourteenth amendment applies.

I'd like to illustrate by a simple analogy. Could anybody deny that if a Cuban or Haitian were charged with a criminal offense he would be entitled to the constitutional safeguards of a fair trial, the appointment of counsel, and the other constitutional guarantees? Of course he would be entitled to them. So I believe in facing this new situation we should say, and I hope the Court would say, the immigration laws apply but are subject to the fourteenth amendment. We've allowed the people to enter and we must give them constitutional safety.

I would like to make another point. I see no basis for distinguishing between Cuban and Haitian refugees. The fourteenth amendment says no person in our jurisdiction shall be denied the equal protection of the laws. The Cubans or Haitians, once here, should be treated equally.

Professor Burns: Mr. Justice, constitutional law students, and I include myself, have never fully understood the ebb and flow in popularity of the three prongs of the fourteenth amendment. Some have suggested the equal protection clause has been stretched as far as will be tolerated, and the privileges or immunities clause is being rejuvenated. What do you think?

Mr. Justice Goldberg: Well, I take the amendment as a whole; I do not like the idea that one part is preferred to another part. Indeed I would have overruled the *Slaughter-House Cases*13 which virtually wrote the privileges or immunities clause out of the Constitution. That clause means something; every word in the Constitution means something. I do not prefer the clause of the fourteenth amendment which

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13. 83 U.S. (16 Wall.) 36 (1873).
says "no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens" over the clause which says "persons," as I said earlier. I believe every person legally in our country, or recognized to be here, is entitled to all constitutional safeguards.

Professor Wisotsky: Mr. Justice Goldberg, the public opinion polls show a large proportion of Americans support capital punishment. In the face of that support, would you be prepared to rule the death penalty . . . unconstitutional? 14

Mr. Justice Goldberg: I think it's clearly unconstitutional. The fact that a transient majority will, from time to time, say yes or no does not determine constitutional questions. About fifteen years ago a poll showed that Americans, by an overwhelming number were prepared to repeal the whole Bill of Rights. Watergate later brought the American public to recognize the Bill of Rights is designed for the protection of all of us, against government and against majorities.

The arguments against capital punishment were pretty well developed in Great Britain by the Royal Commission. 15 Its finding was a simple one, unexpected by many advocates of abolition. After close scrutiny of Great Britain's experience, the Commission found that the death penalty neither deterred nor failed to deter people from committing crimes. The deterrent element could be neither sustained nor defeated.

This is basically what I found in my own analysis expounded in Rudolph v. Alabama, 16 the first decision where a Justice expressed doubts about the death penalty. I agree with the Commission because most murders are family murders, or are due to drunkenness, drugs or passion. Members of the criminal syndicate are rarely indicted for murder, although they are indicted for drugs or other offenses. Without conclusive, compelling proof that the death penalty actually deters murder—a basic requirement, it seems to me, in the administration of criminal justice—it should not be imposed, because of the finality of the penalty.

14. The Gallup Poll, Nov. 12-15, 1980, taken nationally, returned the following figures: In favor of the Death Penalty for murderers . . . 54%
   Opposed to the Death Penalty . . . 43%
   Don't Know . . . 3%
15. ROYAL COMMISSION REPORT ON CAPITAL PUNISHMENT, 1949-1953 (1953).
Also, for me, the institutionalization of taking human life by the state is a dreadful thing. It puts the state's imprimatur upon killing. I would have thought as a result of the Vietnam War, and our reflections upon that terrible incident in American history, we have had too much killing and should follow a different path.

Professor Marsel: Mr. Justice, turning to the first amendment, just a few years ago there was a planned Nazi march in Skokie, Illinois. Do you believe this sort of thing is protected by the first amendment?

Mr. Justice Goldberg: No, I don't, not under the precedents. In Chaplinsky v. New Hampshire, 17 Justice Murphy, writing for the whole Court, said there are such things as fighting words which are not protected. He referred back to Justice Holmes' famous statement "you shall not call fire in a crowded theater." 18 In Chaplinsky, the whole Court, including Justices Black and Douglas, decided the words "you're a damn fascist," and "you're a damn racketeer" 19 were outside the ambit of first amendment protection.

People express themselves in various ways, by words and by certain types of conduct. I regard marching with Nazi uniforms in a predominantly Jewish neighborhood consisting of a large number of refugees to be the equivalent of fighting words. But in deference to the first amendment, I say the marchers must be afforded a suitable way to express their message, benighted as it is. They don't have to march in that particular area; they can march elsewhere. Unless we overrule Chaplinsky, the Court's decision governs in spades.

Professor Marsel: Mr. Justice, you mentioned Justice Black. He said he had an absolutist view of the first amendment. 20 Do you agree with that? How do you reconcile that view with the "time, place and manner" restrictions? 21

Mr. Justice Goldberg: Justice Black was my dear friend and I don't think he had an absolutist view. He said he did, but Chaplinsky

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17. 315 U.S. 568 (1942).
18. Id. at 571 n.2 (citing Schenck v. United States, 249 U.S. 47, 52 (1919)).
19. 315 U.S. at 574.
showed he did not. In *Schware v. Board of Bar Examiners*, Black recognized the right of bar associations to investigate people, but not for political reasons. The first amendment has never been construed to cover only political speech, as Dr. Meiklejohn argued. I think it was originally designed for that, but we soon recognized the difficulty of separating novels and other works from political tracts. *Gulliver's Travels* is a political document. So are Charles Dickens' books. So is John Steinbeck's work. You can find examples through the whole history of literature.

Where Justice Black and Justice Douglas asserted absolutist views most vigorously in more recent years was in the obscenity area. These Justices have, in effect, said: since Congress shall make no law, and since the fourteenth amendment applies the prohibition to the states, anything goes. Well of course, our founding fathers would shudder to discover that they, those puritans, countenanced obscenity in the Constitution. The only real justification for Douglas' and Black's position is not absolutism, as they say, because their own record in *Chaplinsky* proves otherwise; it is the inability of the Court to define the word “obscene.” Most obscenity cases involve criminal statutes; people are entitled to reasonable notice of what is obscene. Justice Stewart said: I don't know how to define it, “[b]ut I know it when I see it.” That's a very poor test for constitutional adjudication.

So again, we're in an area, like the homosexual area, where, like it or not, we may have to allow a large amount of freedom for adults. But not for children, who are much more impressionable than adults.

The Supreme Court muddied the waters by its so-called local community standards. With all due respect to the Court, that's absurd in my opinion. The Constitution of the United States applies throughout the country. You cannot have one constitutional rule in Fort Lauderdale and another constitutional rule in San Francisco. That would be an absurdity. And the absurdity was demonstrated with the film, *Carnal Knowledge*. The Justices were confronted with a movie which they all recognized as not obscene under any standard of the test, so they

applied a national standard.\textsuperscript{26} 

It seems to me there can be only one standard, a national standard. Although I supported the \textit{Roth} test, the “utterly without redeeming social importance” test,\textsuperscript{27} today, upon more mature reflection, I would say adults should be able to do what they want in the obscenity area. But this does not apply to children.

Professor Wisotsky: Mr. Justice, continuing our inquiry about the first amendment, there is a lot of friction between members of the public and certain religious groups, such as Hari Krishnas, members of the Unification Church and others who solicit and proselytize in public places such as airports. Do you think they are within their rights or do members of the public have a right not to be disturbed?

Mr. Justice Goldberg: I have never understood this argument, to be very frank. I don’t think there is a first amendment right for any religious group to solicit contributions in an airport. I think they have a right to do it on the public sidewalk. On this point we are unanimous in \textit{Cox v. Louisiana}.\textsuperscript{28} I said there is no constitutional right to hold a street meeting at rush hour in the middle of Times Square if another place is provided, such as Central Park or elsewhere, where any group can exercise its protest and right of free speech.\textsuperscript{29}

Now an airport is designed for passengers, and it is often crowded. Passengers have a right to accomplish their business; the airport has a right to conduct its business. If the Hari Krishnas have a right to solicit there, then the Catholic Church would have the right to conduct a Mass at an airport, which would run afoul of the first amendment’s provisions about establishment of a religion. Or a Jewish group would have a right to assemble a minyan, a proper number of men, and conduct a prayer service. That’s not what airports are for.

Let me put it another way: an airport is a government sanctioned building supported by law. There are many government buildings. I was Secretary of Labor, as I said earlier. I can see no first amendment right to have the same groups solicit in the lobby of the Department of Labor Building. That building is devoted to the business provided by

\begin{itemize}
  \item \textsuperscript{26} Jenkins v. Georgia, 418 U.S. 153 (1974).
  \item \textsuperscript{27} 354 U.S. at 484.
  \item \textsuperscript{28} 379 U.S. 536 (1965).
  \item \textsuperscript{29} \textit{Id.} at 554.
\end{itemize}
law, to carry on the functions of the Department of Labor, to protect working people, and to administer statutes designed for the protection of labor. Airport buildings are for air transportation. Airports have enough problems, including security problems; we shouldn’t permit these solicitors to become an impediment to the flow of commerce. The last time I was in an airport I found six groups soliciting. And I found posters stating the airport disclaimed any support, but was required to allow these groups to exercise their first amendment rights.

I think this is a time, place and manner problem. As long as a reasonable place is provided for these groups to solicit and proselytize, the airport should be devoted to the business of selling tickets, processing long lines of people, and boarding passengers on the planes.

Professor Marsel: Mr. Justice, Justice Frankfurter was a great exponent of judicial restraint. What’s your assessment of his philosophy?

Mr. Justice Goldberg: I never believed very much in that philosophy, because it is not a philosophy of general application. There is great room for judicial restraint in the form of non-intervention with social and economic legislation. It’s not the business of the courts to decide those matters reserved to Congress and the states. As we said when I was on the Court, in Ferguson v. Skrupka,30 the Court is not a super legislature. There is a non-intervention policy beyond judicial restraint.

On the other hand, there is an area where the courts are compelled to intervene, and intervene actively, and that area is protection of the fundamental rights, guaranteed under the Bill of Rights, of those who live in our country. That’s why the Bill of Rights was adopted. There’s no excuse for not being an activist in protecting those constitutional rights.

The Bill of Rights is lawyers’ material, judges’ material. Lawyers and judges understand the legal process, the right of counsel and the right of fair trial. Essentially the Bill of Rights is a number of procedural provisions. But the Court has had trouble with the one substantive provision of the Bill of Rights, the first amendment, in obscenity cases and establishment of religion cases.

But I actually distrust judicial activism. I prefer judicial courage

to vindicate rights. The most activist Court in the history of the Supreme Court, the 1930 Court, was also the most erroneous. Among the worst decisions of the Supreme Court are those in which the 1930 Court invalidated all of the New Deal legislation until Justice Roberts switched his vote.

Professor Marsel: It sounds as if you've been describing the role the Supreme Court is supposed to play in the United States. Perhaps you can compare what the Warren Court did with what the Burger Court did. How do you assess the two courts?

Mr. Justice Goldberg: I would say the indicia of the Warren Court was its willingness to be forthright in protection of fundamental rights, starting with Brown v. Board of Education,\textsuperscript{31} Fay v. Noia,\textsuperscript{32} the habeas corpus decision, Reynolds v. Sims,\textsuperscript{33} and others. The characteristic of those decisions was not merely judicial courage. Many people, Frankfurter among them, thought the court should stay out of the political thicket on reapportionment. But we entered the political thicket; there's nothing new about that. De Tocqueville said the judicial resolution of political questions is fundamental in our republic.\textsuperscript{34} In America there's scarcely a question which goes to court that isn't political in nature; that's the nature of the Constitution. But the indicia of the Warren Court was not only courage in vindicating human rights. It was realism: Brush aside legal fictions.

For example, in Betts v. Brady,\textsuperscript{35} the Court said a criminal defendant in a felony case could defend himself. The result was that although theoretically everybody had the right to counsel, the poor couldn't exercise that right. A poor defendant had to defend himself; counsel was not provided. We overruled that situation in the famous case of Gideon v. Wainwright.\textsuperscript{36} We said Betts was unrealistic.

I'll give you another illustration of the realism of the Warren Court. The Warren Court itself decided, in Wolf v. Colorado,\textsuperscript{37} when evidence was tainted because the government acted illegally, the court

\textsuperscript{31} 347 U.S. 483 (1954).
\textsuperscript{32} 372 U.S. 391 (1963).
\textsuperscript{33} 377 U.S. 533 (1964).
\textsuperscript{34} A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 290 (P. Bradley ed. 1954).
\textsuperscript{35} 316 U.S. 455 (1942).
\textsuperscript{36} 372 U.S. 335 (1963).
\textsuperscript{37} 338 U.S. 25 (1949).
would admit the evidence but would punish the constable. Some years later the Court reviewed the situation and found nobody actually punished policemen, which may be justified. The few who were punished were poor policemen who had overstepped the constitutional bounds very greatly. Therefore the Warren Court, in *Mapp v. Ohio*,⁵⁸ said the only way to hold the government to proper standards (because as Brandeis said, "Government is . . . the omnipresent teacher . . . [f]or good or evil")⁵⁹ was to adopt the rule: if evidence is illegally obtained by the government, it is not admissible. That, in my opinion, is the nature of the approach of the Warren Court.

The Burger Court is a departure from that concept. The pendulum hasn’t swung all the way back; but *Fay v. Noia*⁴⁰ has been emasculated. The defendant’s right to have a federal court review state court proceedings, when there is a violation of fundamental constitutional rights, has been substantially undermined by recent decisions. I regret that, because often in state court, there is not a full exploration of the case, due to the nature of the counsel employed, or because the facts haven’t come sufficiently to light. By bringing habeas corpus actions into federal court the defendant is finally afforded a full examination of his case.

I remember a case, *Townsend v. Sain*,⁴¹ when I was on the Court. A man addicted to drugs was charged with murder. According to narcotics experts, an addict in the hands of authorities and doctors becomes quite malleable. The addict knows medical treatment can be given or withheld. This man soon confessed to several murders in Chicago, which was very convenient for the police.⁴² But on habeas corpus in federal court, it was demonstrated the defendant could not have committed several of the murders he confessed to. That case clearly demonstrated the great benefit of exploration of the facts by an independent federal tribunal unaffected by local considerations.

Local considerations do enter judicial proceedings; we cannot gainsay that. In Fort Lauderdale, I see judges are elected. And I see by

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39. *Id.* at 659 (quoting *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).
42. *Id.* at 307.
their ads they also want to be reelected. Those judges cannot always provide a full safeguard of our Constitutional rights, and that is true all the way up to the highest court in the state. Federal review limited to certiorari is not always adequate because the full record may not have been developed. In *Townsend* we had the court record and we had evidence not present in state court, that the defendant was out of the state when several of the murders were committed.

The next area of difference between the Warren and Burger Courts is racial segregation. The Warren Court said, in *Brown v. Board of Education*,43 separate can never be equal. In the history of our country that was repeatedly demonstrated. Law schools were an early example: it was proved they were not equal.44 At the time Texas had no black law school and sent blacks out of the state, which is unthinkable today.45 The Court found such an arrangement unconstitutional.

We were always unanimous in civil rights cases during my period and during most of the Warren Court period. We thought it important to strive for a consensus, knowing racial matters create high emotions. The present court is widely divided which I regret. It means the public understandably becomes confused. For example, the issues of busing schoolchildren to the suburbs and the associated zoning and tax questions are now in confusion. Citizens' civil rights are losing their solid protection because the old unanimity which carried great weight has been lost.

One of the principal shifts in judicial policy I regret to find happening on the Burger Court is the reemergent use of legal fictions. The question of standing is a good example. When I was on the Court, a criminal died in prison. His children wanted to continue his lawsuit to vindicate the reputation of their father. Realistically, if a father has committed a crime, his reputation does reflect on the children: Whether we like it or not, the sins of the father are visited on the children. We held the children could continue the suit.46 The old rule, that death ended standing, was overruled. The Warren Court saw the children had

45. *Id.* at 631-33.
a stake; they would argue vigorously against the state and thus the adversary system was served.

Now there is a resurrection of defining standing narrowly. Courts use various tests for standing, all lawyer’s jargon. To me standing should be defined as it was in the Warren period. Does the person have a real stake in the outcome of the case? Will his stake compel him to present the adversary position? There’s no need for all the other jargon.

Professor Wisotsky: A moment ago you referred to the added weight a unanimous decision carries. In the famous 1954 school desegregation case of Brown v. Board of Education,47 Chief Justice Warren was said to have lobbied the other Justices to achieve a unanimous opinion. In contrast, the fragmentation of the Burger Court is widely criticized. In another race case, Regents of the University of California v. Bakke,48 with six separate opinions, the so-called opinion of the Court by Justice Powell speaks only for himself. Would you comment upon the qualities of leadership a Chief Justice should have and compare the leadership qualities of Chief Justices Warren and Burger.

Mr. Justice Goldberg: I strongly doubt Warren did much lobbying. I was not on the Court at the time; but lobbying is generally not very effective in the Supreme Court. The Justices of the Court are pretty independent-minded people, and ought to be. I think the consensus developed in Brown v. Board of Education was not the result of lobbying. It was the result of a common realization the time had come to overrule the separate but equal rule of Plessy v. Ferguson,49 to remove the blight of racial segregation from our society.

Going beyond your question for a moment, it has been said the decision has not really been effective in integrating schools. There is some merit in that position, considering the flight to the suburbs and so on. But what is overlooked is the impact of the decision in eliminating segregation in many other aspects of our society and in various sections of the country. Interestingly enough, the impact may have been greater in the South than in the North. I have a farm in Virginia, and in the local area there was a black school and a white school. That duplication of facilities was eliminated. Since busing is natural in an agricul-

49. 163 U.S. 537 (1896).
tural community, everybody is now bused to one high school.

In *Watson v. City of Memphis*, we held that all public facilities must be desegregated. Today that would seem to be obvious. But the Supreme Court later heard an important case where the issue was raised again in Mississippi. I thought we decided the issue, but apparently not directly. The city desegregated all public facilities, as directed, but closed the swimming pool. Obviously the closing was racially motivated; but the city council claimed they hadn’t the money to run the pool or things like that. So the situation still exists.

There’s a lot written about *Brown*, so I would like to emphasize it hasn’t achieved the total objective. But as to racial matters, I would like to compare our country today, with all its shortcomings, with what it was when *Brown* was decided. It’s a tremendous difference and a great step forward.

As far as comparing Chief Justices Warren and Burger, I can’t judge. I’m not on the Court now and I haven’t experienced Burger’s leadership style. But the question relates to what I said about the independence of Justices. I think the public and maybe the academicians place too much stress on leadership. The Chief Justice is only first among equals. He has the same voice; he has the same vote. He can assign opinions if he’s in the majority, and he runs the building and presides over the judicial conference. Beyond that he doesn’t affect the vote or views of any member of the Court. Based on my own experience, I didn’t see any ability to affect Justices in the Warren Court, and I have the greatest admiration and affection and love for Chief Justice Warren.

Professor Marsel: You said Justices were very independent; and

50. 373 U.S. 526 (1963). Justice Goldberg believes that the crucial difference between *Watson*, and *Brown*, is that the Goldberg opinion in *Watson* demanded desegregation for “the here and now,” 373 U.S. at 533, while the Warren opinion in *Brown* laid down the less stringent standard of desegregation with “all deliberate speed”. 349 U.S. at 301.


Justice Powell has said there are nine small law firms at the Court. When you were serving, did you get to know your colleagues well, both as men and jurists?

Mr. Justice Goldberg: Powell’s assessment was right in one respect and wrong in another. I have been senior partner of a law firm with 180 lawyers, and I have run a small firm. A large firm is a conglomerate. A case revolves around a senior partner, with the aid of a junior partner and a few associates. This group handles the case throughout; consultation about the case with other partners is minimal if it exists at all.

The Court has increased the number of law clerks, creating more of a law office atmosphere. But a Justice does his work alone. He did it alone in the Warren era, he does it alone in the Burger era. Once he has an assignment, he works on an opinion and circulates it to see if he can keep his majority.

There’s one great difference between a law firm and the Court which Powell overlooked: the judicial conference. In a law firm the partners don’t sit down together to vote on how to handle a case. I think Powell overlooked that when he made the comparison.

Professor Marsel: Mr. Justice, I understand Florida is a state in the forefront of the movement to allow cameras in the courtroom. What do you think of this practice and what effect do you think it has on the jurisprudence of courts?

Mr. Justice Goldberg: I have been opposed to using cameras in the courtroom ever since I was on the Warren Court; all of us were opposed at that time including Chief Justice Warren. Our reason was not any hostility to television. In fact we made it clear television reporters could stand outside and interview people; we would not interfere with that. Our basic reason for banning cameras was to insure the constitutional guarantee of a fair trial.

Everybody who participates in a trial is human. Judges are human; prosecutors are human; defense lawyers are human; witnesses are human; jurors are human. The net result of permitting televising

54. FLA. CODE OF JUD. CONDUCT Cannon 3-A(7) (1973); Petition of Post-Newsweek Stations of Fla., Inc., 370 So. 2d 764 (Fla. 1979).
from a courtroom, in my opinion, is to convert a solemn trial into entertainment.

Television is essentially an entertainment industry; television officials would readily concede that. A trial is not entertainment. It's serious business.

Viewing broadcasts of actual events is interesting for the people. I am in favor of televising the legislature because that does not involve any Constitutional inhibition. But in a courtroom, we can endanger a Constitutional protection: fair trials.

We do not want to encourage people to play act; it would have serious consequences on the legal system. We want to insure that the jury is primarily a group of men and women who apply the law given them by the judge, who decide the case according to the law and the evidence. We don't sequester all juries, and jurors talk to their neighbors afterwards. Jurors don't want to look like soft-hearted knee-jerk liberals. We don't want to put them in a position where they will decide cases on the basis of neighborhood approval.

The same is true of judges. And witnesses too, once they take the stand, know, even if they have not been told, the camera is focused on them. So they also tend to act.

In my view a trial is not acting; it is serious business.

Professor Burns: Mr. Justice, which decisions do you believe were the most important of the Warren era?

Mr. Justice Goldberg: Of course, you have to start with Brown v. Board of Education as a landmark decision, followed by Reynolds v. Sims, the reapportionment case, and Gideon v. Wainwright, establishing the right of counsel—and injecting a concept whose scope is still unrealized: the extent to which poverty is an element in equal protection and due process.

I would say those three; and then a fourth, the Colorado River controversy. That case looms so large because it shows the power of the Court. Seven of us heard the case. I thought to myself, "this case

60. Chief Justice Warren did not participate because he had been Governor of
represents the essence of our system.” California, one of the biggest states of the union, Arizona, one of the smallest, and others, a total of eleven states were submitting to seven fallible people the question of allotment of the waters of the Colorado River. My reading, later confirmed by my international experience, showed water rights are responsible for most wars in recent times. Yet it was accepted that these seven men would determine the question. We split four to three, so four members of the Court decided it. I have always regarded that case to be symbolically one of the most important decisions of the Court.

Professor Marsel: As you look back over the many opinions you wrote, sir, which do you think was the most significant?

Mr. Justice Goldberg: I would say Griswold. I feel strongly I was right in my concurring opinion. The area of privacy is protected by the ninth amendment; it’s important to reassert that and extend it to the fundamental rights not specifically enumerated in the Bill of Rights. I think that’s right historically and right on its merits.

I think Bell v. Maryland was an important decision. I believe the right of equal accommodations for Americans rests on the Constitution. We did not need a statute to that end, although fortunately Congress did pass the statute. But I thought the whole constitutional concept of equal protection afforded every American the right to equal accommodations. And Watson v. City of Memphis, desegregating public facilities, was important.

My opinion in Kennedy v. Mendoza-Martinez demonstrated our quest for legal realities, saying “forget the symbols”. Academicians argued about what constituted a sanction. But a man was automatically stripped of his citizenship because he fled the draft; I said it was unconstitutional, a terrible sanction. If the government must act, indict the person for draft evasion, a criminal violation, and let him make a defense. I also said in that case that the Constitution is not a suicide

California; Justice White disqualified himself because his law firm had handled part of the case.

61. 381 U.S. 479, 486 (1965) (Goldberg, J., concurring).
64. 373 U.S. 526 (1963).
pact;\textsuperscript{66} it affords Americans protections even during periods of national emergency. The Court said as much in \textit{Ex parte Milligan},\textsuperscript{67} where it stopped President Lincoln from suspending the writ of habeas corpus in the District of Columbia in the middle of the Civil War.

Interestingly enough, I thought the opinion I wrote in \textit{United States v. Barnett}\textsuperscript{68} was important. I didn’t like Barnett, I felt he was a racist governor. He denied James Meredith admission to Mississippi State University, violating an injunction, and was held in criminal contempt for doing so. I said he was entitled to a jury trial, but could only get three other votes. Stripping fictions aside, my view was he would go to jail, thus the Constitutional protections should apply. I recalled some communists who jumped bail under the Smith Act and were sentenced to longer sentences for criminal contempt than they would have been under the statute for skipping bail.\textsuperscript{69} I thought it was an important distinction to make. The court has pretty well adopted it now, but they did not adopt it then.\textsuperscript{70}

Dean Lewis: Mr. Justice, we appreciate very much your willingness to share your insights with us. Thank you.

\textsuperscript{66} \textit{Id.} at 160.
\textsuperscript{67} 71 U.S. (4 Wall.) 2 (1866).
\textsuperscript{68} 376 U.S. 681, 728 (1964) (Goldberg, J., dissenting).
\textsuperscript{69} \textit{Id.} at 739-40.