

A Blueprint for Limiting Leviathan

By CARL F. HOROWITZ

In the world of the thinking Right, Charles Murray for at least 30 years has ranked as a top figure. A social scientist and policy wonk, he calls to mind the late philosopher Robert Nozick. He makes libertarianism fun and practical, and without reverting to the taunting, pugilistic dogmatism that renders so many other libertarians about as substantial as bumper sticker sloganeers. Murray's latest book, *By the People*, embodies much that is right—and, unfortunately, wrong—with libertarianism.

Let us first examine the positives, of which there are many. *By the People* is an admirable work. The subtitle alone is an apt summation. Our country was not set up so that people have to ask permission from government every time they have a bright idea or a creative impulse. It's the other way around: Government must receive permission from its citizens in order to govern. Yet for several decades we have moved into opposite territory, redefining law in highly subjective ways that blur distinctions between lawful and unlawful activities. Our "lawless legal system," as the author terms it, now metes out punishment for the most petty and even nonexistent offenses. And equally disturbing, it causes us to apply reflexive self-censorship when contemplating a "controversial" remark. Of such stuff, police states are born.

A skeptic would respond that American has a long way to go before it becomes a police state. Formally, that's true. Yet public policy is far more about anticipating consequences than fixing them. And given the demonstrated ease by which nations elsewhere have descended into tyranny, it would be presumptuous to say we are immune from such a fate.

The main trigger for State excess, Murray argues, was the revolution in constitutional thinking embodied in a series of Supreme Court decisions during 1937–42.

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By aggressively expanding the contours of contractual obligation and liability, the Court gave the executive branch, Congress, and future Supreme Courts, not to mention state and local governments, unprecedented leeway to transform law into a vehicle for political and economic advantage. This was the antithesis of rule of law, a primary principle of which is that no one class of citizens ought to be treated differently than others. The original jurisprudence superseded, the main burden of proof as to the necessity of a law or regulation now would fall upon those who object to government action rather than upon government itself.

BY THE PEOPLE

Rebuilding Liberty Without Permission

Charles Murray

New York: Crown Forum, 2015

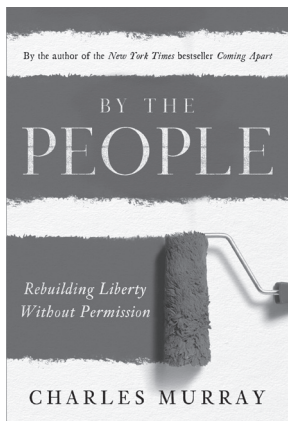
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This legal revolution was accelerated by the social revolutions of the Sixties and Seventies that emphasized equality of result over equality under law. Enduring results have included: an explosion in social welfare expenditures which disproportionately benefit blacks and Hispanics; mandatory affirmative action quotas in employment, contracting, and college admissions; and increased exposure of businesses to spurious claims of civil liability, with the looming threat of trial-lawyer-driven supersized jury awards (and thus the added incentive for business owners to settle). Bad ideas have consequences, argues Murray: "To have *done nothing wrong* but rather to have failed to take an alternative course of action that might (but not necessarily) have avoided a bad outcome, and then be taken to court—and occasionally even to prison—for it is to enter a Bizarro world that bears no resemblance to what most people have in mind when they think of 'the rule of law.' And it happens in today's America."

Lawmakers have the formal authority to reverse this trend, but are unlikely to use it. Under the current system, much of politics, especially at the national level,

has come to resemble organized corruption. Lobbyists engage in legalized bribery and extortion on behalf of favored candidates. Their clients dutifully pay the toll as the price of gaining access to Capitol Hill. Electing the “right” people, Murray argues, won’t change much. In rhetoric, at least, Republicans, more than Democrats, emphasize the importance of limited government. Yet in practice, the party often abandons ship, even when holding a majority in both houses of Congress. During 1995-2006, when Republicans controlled the House of Representatives (and by definition the appropriations process), the practice of earmarking funds for preferred constituents exploded. Murray writes: “Republicans



not only multiplied the use of earmarks in the cabinet departments that had seen the most in the past—Energy and Defense—they also took earmarks into departments that had been virtually ignored. Democrats joined in the spree... but Republicans led the way.” The author has particular scorn for then-House Republican Whip Tom DeLay (R-TX), who

transformed GOP fundraising into a fine-tooled machine for shaking down corporate lobbyists, especially during the presidency of George W. Bush. “(I)n the six years from 2001 to 2006,” he notes, “when the Republicans held the White House and both houses of Congress, not only did the GOP fail to limit government, but it’s hard to find evidence that its leaders wanted to. And the systemic corruption was untouched.”

Like Theodore Lowi’s *The End of Liberalism*, Robert Higgs’ *Crisis and Leviathan*, and Walter Olson’s *The Litigation Explosion*, Charles Murray’s *By the People* is an effective polemic against the decay of American rule of law and the transformation of our polity into a racket driven by political connections and an ability to hire clever lawyers. Yes, the system “works,” but only when it is absolutely forced to.

To restore classical principles, Murray proposes a counterweight in the form of a megaton nonprofit legal entity, the Madison Fund, to defend citizens from excessive and punitive regulation, a group that would “pour sugar into the regulatory state’s gas tank.” If even just one wealthy American could provide a few hundred million dollars in seed money, he believes, the fund could attain liftoff. Murray acknowledges the work of the Pacific Legal Foundation, the Institute for Justice, and other such groups in this endeavor, but notes that their combined funding is minuscule compared to that mus-

tered by the Left. Something big, bold, and visible like the Madison Fund might cause regulators to think twice about drafting unjustified rules and enforcing them in arbitrary ways.

This is an intriguing idea, but it raises questions as well as hopes about the possibility of tangible victories. An organization of this size is more than likely to become a source of unprincipled self-enrichment among partisans. This is especially true because the American Right long has consisted of competing factions underneath all those affectations of “unity.” The Madison Fund inevitably will attract different factions, each claiming a greater legitimacy of grievance than the rest. To keep the operation together, almost by necessity it must function as the corporate wing of the Republican Party, all but in name.

There are other, less speculative problems with *By the People*. For one thing, Murray exhibits a typical libertarian blind spot for coercion when imposed by sources outside the State. Examples of “soft” coercion abound. Private community associations routinely dictate to resident homeowners how they can modify their dwellings, and in ways more restrictive than those found in county building codes. Retail store chains require high levels of subservience from employees in face-to-face customer interactions, with employers often monitoring employee service by hiring outside undercover “mystery shoppers” (i.e., spies). And telemarketers aim their annoying, misleading, and at times abusive pitches at tens of millions of households, even those who have placed their names on the federal “Do Not Call” registry. The point here is that though a great many Americans feel put upon by their government, that doesn’t automatically translate into a desire for an absence of government.

As for “hard” coercion (i.e., crime) masquerading as liberty, Murray likewise has little or nothing to say. It is difficult to justify the rash of cases of extreme child abuse inflicted by parents under the pretext of “homeschooling” and given cover of law in a number of states thanks to the Home School Legal Defense Association’s lobbying to ban social worker visits. Likewise, it is difficult to remain silent over the upsurge in forced female genital mutilation, a practice entirely driven by immigrants from misogynistic tribal cultures. To those libertarians who defend such behavior—and some actually have—one must respond that government has an obligation to establish and enforce sanctions against domestic crimes. Liberty is more than simply the absence of State intimidation; it is the absence of *all* intimidation.

Even more distressing, Murray does not acknowledge that the loss of liberty is a by-product of a lack of immigration control and enforced assimilation.

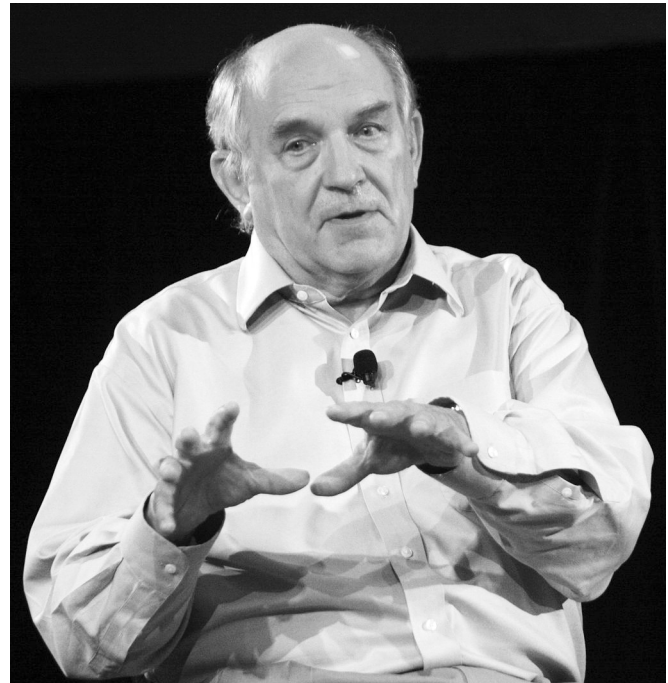
In fact, he goes the opposite way on both counts, lamenting the decline of European-derived cultural diversity in America during the early- and mid-twentieth century this way:

...World War I triggered an anti-German reaction that all but destroyed the distinctive German culture. In the 1920s, new immigration laws choked off almost all immigration from everywhere except Britain and northern Europe, and even that was reduced. With each passing year more children of immigrants married native-born Americans and fewer grandchildren of immigrants grew up to carry on the distinctive features of their Old World culture. By the middle of the century, the percentages of Americans who were immigrants or even the children of immigrants were at all-time lows. Most of the once-vibrant ethnic communities of the great cities had faded to shadows. No longer could you find yourself in an American street scene indistinguishable from one in Palermo or the Warsaw ghetto.

Murray treats our nation's absorption of heterogeneous and often mutually hostile foreign-born populations as something to lament. In fact, it is something to celebrate. The United States would have had far greater difficulty staying a nation had it not taken dramatic steps to limit immigration. And he gets some facts wrong along the way. The Johnson-Reed Act of 1924 did not choke off immigration. It simply reduced it to manageable levels, giving our country time to adjust to wrenching changes over the previous few decades. As for Murray's disappointment over our "failure" to preserve urban islands of unassimilated ethnic populations, such tightly knit communities are far from extinct—try visiting Los Angeles sometime soon. And even if they were extinct, America is under no obligation to recreate them. To capture the feeling of walking through Palermo or Warsaw, one always can visit Palermo or Warsaw.

The author doesn't have much critical to say about the huge increase in Third World populations, the most palpable legacy of the 1965 Immigration and Naturalization Act amendments and a string of amnesties for illegal immigrants starting in the late Eighties. He should. Not only has this demographic transformation thrown roadblocks into the assimilation process far more daunting than did the Eastern and Southern European immigration of a century ago, it also has fueled an expansion of the welfare state to unimagined levels—high irony, indeed, given that Murray's 1984 book, *Losing Ground*, was a prime catalyst for the sweeping welfare reform legislation of 1996. Very recently, Steven Cama-

rota, research chief for the Center for Immigration Studies, analyzing data from the Census Bureau's Survey of Income and Program Participation, concluded that 51 percent of immigrant-headed U.S. households (the figure was 73 percent for those headed by Central Americans and Mexicans) at some point during 2012 used at least one of the following types of public welfare programs: food, housing, Medicaid, and cash. By contrast, only 30 percent of native-born households did so. These figures don't even include spending on bilingual education, a particularly insidious form of social welfare. In 2010, the Federation for American Immigration Reform released a study estimating that annual combined direct and indirect public spending of bilingual education for illegal-immigrant students alone reached a staggering \$113 billion, with state and local governments picking up most of the tab.



AEI Scholar and Author Charles Murray

Such figures should trouble all libertarians. Yet usually they don't. Why doesn't Murray call for rolling back immigration, especially from culturally incompatible nations? Why doesn't he at least see the mortal threats to liberty from native-born blacks, especially "civil rights" leaders, who habitually press demands upon the State and hint at riots if those demands aren't met? Projecting motive is a risky venture. Yet it would be fair to assert that Murray, the W. H. Brady Scholar at the American Enterprise Institute, has been circumspect on race and ethnicity in the aftermath of the intense backlash against *The Bell Curve*, a book which he and Harvard psychologist Richard Herrnstein co-authored slightly over two decades ago. That landmark 845-page tome, of which Herrnstein was the principal author, had

the temerity to argue, and support with exhaustive data, that human intelligence to some extent is a function of race and other biological factors. Professor Herrnstein, inconveniently, died just prior to its hardcover release, leaving Murray to fend for himself against egalitarian hanging juries in and out of academia. Though Murray has not disavowed the importance of IQ and other cognitive testing, by any number of accounts he was taken aback by the rebukes from peers. The experience understandably left him with a reluctance to revisit the experience.

A lot of sensible people these days, in fact, are reluctant to go there, especially since our nation increasingly is punishing “micro-aggressions” (i.e., opinions) against nonwhites, women, gays, and other populations presumably possessed of pariah status. By assuming that social inequality is unacceptable, and that unregulated voluntary behavior is part of the problem, the State has expanded, enabling interest groups who benefit from restricting expression to grow with it. The public choice economists have had it right: The problem isn’t government so much as it is the plethora of interest groups who see government as a flag to be captured for their own benefit. The proliferation of affirmative action, for example, happened because Congress, cowed by non-white “civil rights” activists, enacted statutes that gave the executive branch broad rulemaking authority. The U.S. Department of Housing and Urban Development spends about \$15 billion to \$20 billion annually on rental housing vouchers because housing authorities, mayors, property managers, tenant groups, civil rights activists, and anti-homelessness activists each want a big slice of that money. The growth in bilingual education didn’t happen because public school officials are thrilled to pay the salaries and benefits of teachers fluent in Spanish, Creole, Farsi, Tagalog, or Urdu, but because ethnic activists, many of them first- and second-generation immigrants, have demanded such education as a means of maintaining in perpetuity the cultures of their respective home countries. One should not have to guess why new federal regulations regarding police body cameras may be just over the horizon.

The capture of the State by ideologically motivated interest groups (often led by charismatic demagogues such as Reverend Al Sharpton) goes a long way in explaining why government seems so costly and unwieldy these days. It is especially difficult to achieve a rollback when

“private” interests fight such efforts and, toward that end, government hires from their ranks—and vice versa. The U.S. Department of Justice’s Civil Rights Division, for one, is a career-builder for ideological (i.e., anti-white) lawyers who come over from nonprofit legal groups. In turn, nonprofit entities often hire directly from DOJ, all the better to enhance their expertise in filing punitive lawsuits and maximizing possibilities for “discovering” smoking guns. Such lawyers may rationalize their work as serving the public interest, but they amount to little more than political activists who use law to realize a set of idealized outcomes. Anyone doubting the existence of this revolving door should read John Fund and Hans von Spakovsky’s 2014 book, *Obama’s Enforcer: Eric Holder’s Justice Department*.

Standard libertarianism has had only limited success in slowing this juggernaut. Its advocates, so focused on shrinking government per se, often fail to see government expansion as a product of external pressure. They cannot grasp that the end game of shakedown artists is triumph, not equality. And triumph looms every time political leaders capitulate.

The Republican presidential candidacy of Donald Trump, in this light, is a welcome and overdue corrective. Refreshing in his bluntness, the multibillionaire real estate mogul speaks, however impetuously, on issues on which most people have learned to keep mum lest they risk a civil suit, criminal prosecution, social ostracism, or career implosion. As of this writing, Trump is polling well ahead of other candidates in his party. That’s no mystery. A lot of people out there sense he has the will and wealth to challenge the culture of egalitarian intimidation masquerading as high principle. America’s emergent “Don’t sweat the big stuff/Punish the small stuff” public philosophy—or what the late essayist Samuel Francis called “anarcho-tyranny”—isn’t just an explanation for contemporary government overreach. It *is* contemporary government overreach. And Trump and his supporters are pushing back.

Within the boundaries of conventional libertarianism, *By the People* is an excellent survey of why so much of our governance is lawless. Spontaneous behavior, except in clear instances of objective harm, should not require outside permission. Our Constitution is an expression of this view. Yet the book may be remembered as much for what it leaves out as for what it includes. ■