## The Great American Public, Mass Society, and the New Constitutional Order

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"It is not impossible to conceive the surprising liberty that the Americans enjoy; some idea may likewise be formed of their extreme equality; but the political activity that pervades the United States must be seen in order to be understood. No sooner do you set foot upon American ground than you are stunned by a kind of tumult; a confused clamor is heard on every side, and a thousand simultaneous voices demand the satisfaction of their social wants. Everything is in motion around you; here the people of one quarter of a town are met to decide upon the building of a church; there the election of a representative is going on; a little farther, the delegates of a district are hastening to the town in order to consult upon some local improvements; in another place, the laborers of a village quit their plows to deliberate upon the project of a road or a public school. Meetings are called for the sole purpose of declaring their disapprobation of the conduct of government; while in other assemblies citizens salute the authorities of the day as the fathers of their country. . ."

Alexis de Tocqueville, DEMOCRACY IN AMERICA, Vol. I, p. 259 (Alfred A. Knopf, 1945).

"Publics live in milieux but they can transcend them – individually by intellectual effort; socially by public action. By reflection and debate and by organized action, a community of publics comes to feel itself and comes in fact to be active at points of structural relevance.

"But members of a mass exist in milieux and cannot get out of them, either by mind or by activity, except – in the extreme case – under the 'organized spontaneity' of the bureaucrat on a motorcycle. We have not yet reached the extreme case, but observing metropolitan man in the American mass we can surely see the psychological preparation for it. . . .

"On the one hand, there is the increased scale and centralization of the structure of decision; and, on the other, the increasingly narrow sorting of men into milieux. From both sides, there is the increased dependence upon the formal media of communication, including those of education itself. But the man in the mass does not gain a transcending view from these media; instead he gets his experience stereotyped, and then he gets sunk further by that experience. He cannot detach himself in order to observe, must less to evaluate, what he is experiencing, much less what he is not experiencing. Rather than that internal discussion we call reflection, he is accompanied through his life-experience with a sort of unconscious, echoing monologue. He has no projects of his own: he fulfills the routines that exist. He does not transcend whatever he is at any moment, because he does not, he cannot, transcend his daily milieux. He is not truly aware of his own daily experience and of its actual standards: he drifts, he fulfills his habits, his behavior a result of a planless mixture of the confused standards and the uncriticized expectations that he has taken over from others whom he no longer really knows or trusts, if indeed he ever really did."

C Wright Mills, THE POWER ELITE pp. 321-322 (1956).

## I. C. Wright Mills Is Alive And Well Today.

Writing in the mid-1950s, well into the constitutional regime established by the Supreme Court's ratification of Franklin Roosevelt's New Deal program, C. Wright Mills explored the fundamental distinction between a community of publics and a mass society. Mills observed that, while a community of publics is "thought to be the seat of all legitimate power" within classical liberal theory, it is in fact a pure type, a hypothesized extreme as unknown to actual social practice as is its polar opposite, mass society.<sup>1</sup> Reality, argued Mills, falls along a continuum between these extremes, and can be described only by attending to four distinct dimensions of social practice.

The first dimension is the "ratio of the givers of opinion to the receivers." In a community of publics, individuals and groups communicate personally, and the speakers and listeners are in roughly equal proportion to one another. In mass society, by contrast, the vast majority of people function as recipients of opinion, impersonally spoken to (or talked at) by a small group of opinion givers who communicate through the various institutions of mass media. "In between these extremes there are assemblages and political rallies, parliamentary sessions, law-court debates, small discussion circles dominated by one man, open discussion circles with talk moving freely back and forth among fifty people, and so on."<sup>2</sup>

<sup>&</sup>lt;sup>1</sup> C. WRIGHT MILLS, THE POWER ELITE 298 (1956).

<sup>&</sup>lt;sup>2</sup> *Id.* at 302.

The second dimension by which Mills's analysis seeks to differentiate a public from a mass involves the degree to which both formal and informal structures are in place to insure that listeners have the "possibility of answering back."<sup>3</sup> In a community of publics, these structures and conventions, governing who can speak, under what circumstances and for how long, help to foster discussion and "uphold the wide and symmetrical formation of opinion."<sup>4</sup> In mass society, by contrast, the givers of opinion hold an essential monopoly over the process by which communication takes place; as a consequence, opinion is not influenced by genuine discussion.

The third – and perhaps most important – dimension describes the relationship, if any, between social discussion, the formation of opinion, and the consequent expression of that opinion in the form of social action. In a society with a vibrant public, there is considerable "opportunity for people to act out their opinions collectively," even when this effective action is inconsistent with the opinions or commitments of those in positions of authority.<sup>5</sup> In mass society, on the other hand, opportunities to translate opinion into action are either highly constrained by authority, circumscribed within narrow structures, or nonexistent.

Finally, Mills suggests that a community of publics is distinguished from mass society by its degree of autonomy from institutional authority. In its most extreme form, mass society tends to be deeply penetrated by agents of authority who undermine public trust and sow suspicion and terror, thereby making difficult or impossible the formation of opinion through discussion.

 $<sup>^{3}</sup>$  *Id.*  $^{4}$  *Id.* at 303.

Standing at mid-century, Mills's judgment was that American society had moved a considerable distance on the continuum from a community of publics to a mass society. The popular take on his work has come to center on the concentration of power among a group of elites located both within government and in allied (private) institutions. For present purposes, however, the more important elements of his analysis are his characterizations of the role of voluntary associations in then-contemporary America, his description of the hyper-segregation of primary groups within the community, and his account of the mass media. Together, Mills's assessment of these elements begins to capture what I have described elsewhere as a diminution of public space.<sup>6</sup> It is not my intention in this brief paper to make the case for Mills's account of contemporary American society, athough I believe it largely is accurate and that subsequent events have moved us even further along the continuum toward mass society. Instead, I wish only to set out a quick summary of this portion of Mills's analysis, and then to employ it to frame some observations about diminished public space and our new constitutional order.

With respect to voluntary associations, Mills's essential point was that the United States of the 1950s had few effective vehicles for mediating "between the state and the economy on the one hand, and the family and the individual in the primary group on the other."<sup>7</sup> Descriptively, Mills argued that voluntary associations had either become ineffectual as a means of influencing the decisions of those holding concentrated authority within the state, the corporations, and the military, or had become larger and more impersonal in order to remain efficacious. In the latter instance, he asserted, these associations had become inaccessible to their individual members and thus not amenable

<sup>&</sup>lt;sup>6</sup> See, Richard C. Boldt, Public Education As Public Space: Some Reflections On The Unfinished Work of Marc Feldman, 61 MD. L. REV. 13 (2002).

<sup>&</sup>lt;sup>7</sup> Mills, *supra* at 306.

to influence by them. In effect, these voluntary associations, including community groups, labor unions, local schools and the like, through which Americans traditionally had turned discussion into opinion and opinion into social action, had either become irrelevant socially and politically or had themselves become distant concentrations guided by elites who sold opinion to their mass membership rather than taking the members' opinions into account.

According to Mills, two consequences flow from the loss of effective voluntary associations. The first has to do with the ways in which authentic group membership and genuine discourse help to render individuals reflective, autonomous and capable of transcending their narrow social positions. In the absence of authentic human associations, which form the "psychological center" for individuals in a healthy society, citizens loose the opportunity to shape the thinking and feeling of their fellow citizens and loose the opportunity to be shaped by the experiences and perspectives of others.<sup>8</sup> A second, related consequence of the diminished public space brought about by the loss of intermediary associations is a transformation in the practice of politics itself. In Mills's account, the unavailability of mediating institutions, and the consequent disconnection of individuals, families and local communities from "effective units of power," serves to transform democratic political practice into a kind of unilateral management of society from above, in which individuals in their primary groups cease to be a source of public opinion and cease to play an engaged role in the development of public policy.<sup>9</sup>

A second component of Mills's analysis of mid-century America was the increasing tendency of individuals to live and work in highly segregated social and

 $<sup>{}^{8}</sup>Id.$  at 308.

<sup>&</sup>lt;sup>9</sup> Id.

geographic spaces. Although most pronounced in the "bedroom belt" of American suburbia, this cabining of individual lives within highly fragmented milieux was and is an abiding feature of life for most people in the United States.

"Sunk in their routines, they do not transcend, even by discussion, much less by action, their more or less narrow lives. They do not gain a view of the structure of their society and of their role as a public within it. The city is a structure composed of such little environments, and the people in them tend to be detached from one another. The 'stimulating variety' of the city does not stimulate the men and women of 'the bedroom belt,' the one-class suburbs, who can go through life knowing only their own kind. If they do reach for one another, they do so only thorough stereotypes and prejudiced images of the creatures of other milieux."<sup>10</sup>

These ideas have been taken up recently by the legal academic Jerry Frug and the social psychologist Richard Sennett.<sup>11</sup> They follow Mills by painting a picture of contemporary urban and suburban America in which individuals lead isolated lives within narrow social spaces rigidly segregated by class and race. Frug argues that current government policies promote the division of American metropolitan areas "into districts that are so different from each other they seem to be different worlds." In his view, these divisions diminish the potential of cities to be places where "the being together of strangers" can take place. Employing the work of Sennett, Frug explains that such avoidance is adolescent because, like adolescents who "fear being overwhelmed by life's painful uncertainties and complexities," it permits people to "organize their lives to

<sup>10</sup> *Id.* at 320.

<sup>&</sup>lt;sup>11</sup> See Jerry Frug, *The Geography of Community*, 48 STAN.L. REV. 1047 (1996); RICHARD SENNETT, THE CONSCIENCE OF THE EYE: THE DESIGN AND SOCIAL LIFE OF CITIES (1990).

preclude exposure to the unknown or the bewildering."<sup>12</sup> As a consequence, individuals once again loose the opportunity to absorb the perspectives and experiences of others in the socially mediated process by which each person develops his or her own sense of self.

The third and final element in Mills's account of the transformation of the American public into a mass society is his assessment of the mass media. Tushnet also discusses this topic, particularly the absorption of the news media into the entertainment function. While recognizing that this process has influenced the behavior of public officials by encouraging them to craft their messages (and their policies) to play to the strengths of the medium, he mostly emphasizes the consumer's experience of politics as depicted through the mass media as "a soap opera of some modest entertainment value but without much effect on the lives of the American people."<sup>13</sup>

Mills's analysis, by contrast, does not focus on the trivialization of politics, but rather on the impact that the mass media have on those who are its consumers. The media, often the dominant source of information about one's own community, other communities and the country as a whole, had become increasingly powerful in the United States of the 1950s, a society with rigid class and race segregation and few effective voluntary associations to mediate between primary groups and central institutions. Given this power, Mills was especially concerned that the print and broadcast media had become an instrument through which the powerful few could deliver opinions to a passive mass society incapable of answering back. In addition to concerns about the accuracy of the information conveyed and about the concentration of media outlets in few

<sup>&</sup>lt;sup>12</sup> Frug, *supra* at 1047 to 1052.

<sup>&</sup>lt;sup>13</sup> MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER, Chapter One.

hands, Mills argued that the mass media fostered a sort of "psychological illiteracy" in which

"[v]ery little of what we think we know of the social realities of the world have we found out first-hand. Most of the 'pictures in our heads' we have gained from these media – even to the point where we often do not really believe what we see before us until we read about it in the paper or hear about it on the radio."<sup>14</sup>

Given the continued decline of effective voluntary associations, the persistence of hyper-segregation, and the expanding role of the media in shaping our understandings of ourselves and our fellow citizens, there is very little reason to believe that Americans today are any more psychologically literate than we were a half century ago. Indeed, with the possible exception of the internet, it is likely that contemporary society offers individuals considerably fewer opportunities for first-hand social interaction with others not in their primary group than did the America depicted in *The Power Elite*.

## II. A Constitutional Order For Mass Society.

In his new manuscript Mark Tushnet has described a constitutional order for a society with dwindling public space. He characterizes the animating principles of this constitutional order as "chastened" versions of the values that guided the previous New Deal/Great Society order. Policy outcomes are said to reflect moderately conservative preferences for market-based approaches and notions of individual responsibility.

It is difficult to say whether these constitutional values really do represent the considered judgment of most Americans, or even whether most Americans have

<sup>&</sup>lt;sup>14</sup>Mills, *supra* at 311.

considered, well-formed opinions about the proper direction of the country. For the most part, however, Tushnet puts aside questions about the content of the new order, and chooses to focus instead on the institutions that generate government policy and on the underlying dynamics that have led those institutions to assume the form he describes.

The story Tushnet tells about the Congress, the Supreme Court, the President, and the political environment within which they operate is a story that is unsurprising in a society with little public discourse, few effective mediating institutions, rigid segregation of primary communities by class and race, and dampened expectations all around that popular opinion will find expression in social action. Take, for example, his description of Congress and Congressional politics within the new constitutional order:

"[T]he new order contains a public that does not participate in politics. This contributes to the development of weak *congressional* parties, whose members run campaigns almost as independent entrepreneurs. The congressional parties may be weak as parties, but they are ideologically coherent. They are also highly partisan because candidates must obtain nomination by appealing to the most active, and therefore most partisan, of their constituents, in districts that have themselves become more ideologically homogeneous."<sup>15</sup>

In this brief passage we have many of the elements that Mills suggests one is likely to find in a society far down the continuum away from a community of publics. To say that voters do not participate in politics is, in part, to report that many (most?) in society understand themselves as receivers and not generators of opinion. That parties are weak should not surprise us, given that very few mediating institutions – especially

<sup>&</sup>lt;sup>15</sup> MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER, Chapter One.

ideologically polygenous institutions – exist in contemporary society. The extreme partisanship of members of Congress may reflect the stance of a small number of party activists, but it has far more to do with residential segregation and the attendant homogenization of Congressional districts. Interest group bargaining may still take place as a residual effect of embedded New Deal arrangements, but most policy-making at the national level now results from ideologically-driven behavior on the part of elected officials that itself is the indirect product of phenomena such a voter dealignment, alienation and disinterest.

This story, of constitutionalism in a world with a withered public, contrasts dramatically with the constitutional theory offered by Bruce Ackerman. Like other constitutional theories rooted in liberal thinking, Ackerman's version is built upon the premise of a vibrant community of publics. During periods of ordinary politics, Ackerman suggests that interest groups are likely to form coalitions, to lobby against the claims of other interest groups and coalitions, and generally to press their claims in the hopes that they will find expression in government outcomes. To be sure, Ackerman's interest groups, like Madison's factions, are motivated by self-interest. But, importantly, they understand themselves as generators of opinion, and they proceed on the hope and expectation that their preferences will be translated into social action.

Even more striking is the contrast between Ackerman's constitutional politics and the politics of Tushnet's new constitutional order. During constitutional moments, Ackerman suggests, the people assume a stance as THE PEOPLE, as a quintessentially public public. At these moments, a number of factions coalesce into a supermajority attending to constitutional principle instead of narrow self-interest. Not only is this

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popular assumption of civic responsibility understood as efficacious in the here and now, it also is treated as binding the practices of future publics and the outcomes of future governments.

Reasonable people can disagree about whether Ackerman has accurately described the process by which constitutional regimes have been established and operationalized in American history. His narrative may or may not capture what happened following the Civil War and during the New Deal and the Great Society. He does, however, provide a normative point of view, not only seeking to explain how one generation can bind the choices of later ones, but also founding that solution in classical liberal theory.

Tushnet's account of the new constitutional order, on the other hand, does not attempt to lay a normative foundation for either the adoption of chastened constitutional values or the institutional arrangements that currently prevail.<sup>16</sup> Such a foundation might be discoverable, although I suspect it would not be within traditional liberal theory. But the fundamental absence I have identified – the absence of a functioning community of publics – means that governmental actors within the new constitutional order cannot legitimately base their authority upon claims of popular sovereignty.

Even more to the point, this absence makes me far less sanguine than Tushnet about the possibilities for what he terms a "modest progressive reformist element in the new constitutional order."<sup>17</sup> One passing example of the sort of democratic experimentalism he envisions, the development of drug courts, is instead an example of the profound limits on progressive government activity in a social and political

<sup>&</sup>lt;sup>16</sup> He does engage in normative analysis in MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

<sup>&</sup>lt;sup>17</sup> MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER, Conclusion.

environment characterized by diminished public space. Tushnet offers the example mostly to flag the danger that democratic experimentalism may cause localized deliberations to "end with an apparent though false consensus, elicited by the participants' agreement, often unstated, to take some possible solutions off the table as unreasonable or unachievable."<sup>18</sup> In the case of the drug court movement, this narrowing of the range of possible solutions resulted in undermining calls for the decriminalization (or medicalization) of drugs.

As I have made clear in an article on the subject of drug courts, the inattention to decriminalization as a policy response to the problem of drug addiction has had less to do with a premature narrowing of public discussion than with the absence of genuine public discourse altogether in this area.<sup>19</sup> In my previous work I have sought to demonstrate that the drug court movement (and the War on Drugs out of which it emerged) has been driven by a perverse media caricature of drug addiction as a problem largely confined to inner city persons of color, and by the bureaucratic needs of officials in the criminal and public health systems. Neither the specific negotiations that have led to the establishment of drug courts in most American jurisdictions, nor the larger conversations about drug policy and criminal enforcement policy that have framed this movement, have included anything like the broad array of perspectives and experiences that one would expect to find in a process that is both democratic and progressive. Before such a public conversation can take place with respect to this or many other issues of pressing importance in contemporary society, considerable advance work will have to take place directed toward building the very public spaces within which the various stakeholders can

<sup>18</sup> *Id*.

<sup>&</sup>lt;sup>19</sup> See Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L. Q. 1205 (1998).

meet to work out their competing pictures of social reality. I suspect that a society in which a community of publics really existed would hammer out a very different drug policy than the one we currently have, and a very different constitutional order than the one Tushnet has described. Whether such a community of publics is possible, I leave to a future discussion.