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### Horl Causation and Black Americans

J. Clay Smith Jr.

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## HOWARD UNIVERSITY

2900 VAN NESS STREET, N.W.  
WASHINGTON, D.C. 20008

SCHOOL OF LAW

January 15, 1985

The Honorable Charles Fried  
Deputy U.S. Solicitor General  
Department of Justice  
Washington, D.C.

RE: Moral Causation and  
Black Americans

Dear Mr. Fried:

America was in the midst of a moral crisis in 1964, the year you published "Moral Causation" in the May issue of the Harvard Law Review. That crisis involved the resistance of Black America to race restrictions based upon "mistaken beliefs" that Black Americans were inferior. Mistaken or not, such beliefs were codified in many states, or otherwise made lawful by custom and public acceptance.

Of course, 1964 was not the beginning of the recognition or effects of racial negation based upon existing and foreseeable facts of race difference. Race difference, first codified in our instrument of rule, had always been and no circumstance was supposed to alter this principle of apartheid. History, of course, has clearly established -- much to the credit of persons occupying your office -- that the classification of Blacks as chattels was a "mistaken belief" by which a great nation was to be governed.

Since -- even before -- the emancipation of Black Americans, Blacks, and their allies, have been challenged to make a "rational demonstration" of the rightness of their quest as valued lives in the republic. The burden of establishing moralworthiness to participate in American life has and is today placed upon Blacks with perhaps more weight than any other group in America. Hence, Black progress has been slow. The contradiction is that -- while the process has been understandably slow -- the criticism leveled against Blacks because of such slow pace has been great. So intense has the criticism been by an alarming vocal quarter of America in pointing out the slow pace made by Blacks that they are erroneously making the argument -- or rational demonstration -- that Blacks cannot make it -- with or without government support or its protection or that Blacks, unlike any other group

in America, are -- to their disadvantage -- too dependent on government. There is a "mistaken belief" that without legal protections afforded Blacks in the past that somehow they will catch up despite existing restrictions still too apparent to the naked eye to be a surprise to any person with average vision. There is growing concern among some scholars that the costs of Negro participation in the society -- yes, even their participation in the franchise -- may be too costly to the majority whatever the ultimate and foreseeable good. I hope that you would agree that there is no place in authoritative governments for such thoughts.

I pose to you the question you once posed: "By what means is a man brought to perform acts which are costly to him but on which some good depends?" "Moral Causation" is of particular interest to me now as you occupy a position of public trust as the recently appointed Deputy U. S. Solicitor General of the United States. I wonder what, if any, sense of "obligation" will "push" you to recognize the "mistaken beliefs" long held valid about Blacks -- and move you to act, even when costly, to erode the effects that influence some political, social, and judicial quarters today. This act, even when costly, can only serve to eliminate the heavy weight placed largely upon the backs of Black America to establish its metaphysical worthiness.

A recent article made me wonder what rational demonstrations have been made to you by either presentation, or experience which would cause you to conclude -- as the enclosed Washington Times article reports, that affirmative action and all busing to achieve racial integration is not susceptible to argument? Rogers, Belief in individual and liberty guides deputy solicitor general, The Washington Times, December 17, 1984 at 2A, c.2.

I shudder at the thought that the slave progeny must master your article to find a common ground on which to have a meaningful dialogue with you. Many of America's poor -- Black or White -- would feel overwhelmed by the distinctions you made between psychological and moral causation. However, by your words in your first days at Justice, you seemed to be an advocate -- at least as it relates to Blacks -- for an historical readjustment towards a national moral status which predates 1964. Let me hasten to say that this is not merely a matter of feeling or intuition. Your interview coupled with the drastic and retrogressive advocacy by DOJ to reverse the civil rights gains of Black Americans causes alarm because DOJ actors assert their conclusion as being not susceptible to argument, rational demonstration, or historical fact.

Aside from the lofty discussions on moral causation, there is a more fundamental appeal to be made: that is, can Black Americans be persuaded to trust the fairness or the moral rightness of Charles Fried?

You come to government from several years of pondering the problems of the legal profession, and social issues. I hope that you've come to government with an open mind focused on the need for a diverse society. As to Black America, your initial views -- as reported by the press and others -- gives rise to an uneasiness about your objectivity on questions of racial diversity at every level of our society. How shall Black America be judged by your cognition? Drawing on your words: will you be "moved by a mistaken sense of moral obligation" or will you be moved to consider our cause "by a sense of valid moral obligation?"

As you apparently believe that an actor may be moved to moral acts by a mistaken sense of moral obligation, might you sense or know that limitations on the possibilities of an integrated society is a mistaken sense of moral obligation? There exists mistakes which are presently lodged in the Division of Civil Rights at DOJ. I hope that this is not your personal sense. I hope that your moral obligation is bottomed, as is mine, on the rocks of history which unmistakably demonstrate that no state can call for a colorblind society without taking into account its racist past, and its present effects. I believe that moral obligation is driven by past causation having present effects.

Whether you will be moved by the historical, moral appeal of Black America is an open question. You safely left the possibility of persuasion (as based on the appeal in this letter) open in your article on "moral causation." You stated, "If a principle is right, it always has been and always will be right although changing circumstances may require changing conclusions from the application of the same principle." During this administration, it has been the perception of Black America that it is the subject of "changing conclusions." Such conclusions have sought to apply the immutable principle that all men are created equal as if that principle were an infant concept on the American legal matrix. I agree with the principle of equality. This principle is right; it always has been and always will be right. However, there exists a "psychological push" by DOJ to place its blinders on all past discrimination and to start over in America without regard to needed remedies to advance the slave progeny beyond a minimal level of democratic and economic involvement. It seems that there is no longer a factual or moral obligation at DOJ to accomodate large, existing gaps of injustice affecting Black

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Americans due to past discrimination.

I hope that this is not your view of the moral imperative, your view of governance, or your interpretation of moral causation as applied to Black America.

Sincerely,

*J. Clay Smith, Jr.*

J. Clay Smith, Jr.  
Professor of Law

Enclosure

## National

# Belief in individual and liberty guides deputy solicitor general

By Ed Rogers  
THE WASHINGTON TIMES

Charles Fried came to America as a boy when his parents fled the Nazis in Czechoslovakia. Today, the new deputy U.S. solicitor general reflects often on the meaning of liberty.

"I think of myself as a legal intellectual, as much a philosopher as a lawyer," he said. "My principal orientation has been in the direction of working out the possibility for a regime of liberty. I believe in liberty and the individual, and those two principles have guided my intellectual work."

As a Harvard law professor, Mr. Fried, 49, was widely viewed as a conservative. Now, he works for Solicitor General Rex Lee, who forms policies for handling government court cases and presents cases to the Supreme Court.

"I have been a very public supporter of the Reagan administration since prior to the president's nomination in 1980," said Mr. Fried in a telephone interview.

He has defended the administration's opposition to racial hiring quotas in the name of equal job opportunity, and has defended its efforts to abolish the Legal Services Corp.

When bureaucrats or judges dictate business hiring policies, Mr.

Fried wrote in a recent essay, "we are taking a large step in the direction of a command economy, an economy where the bureaucracy replaces market forces."

As to the Legal Services Corp. and "public interest" law firms, Mr. Fried commented, "These institutions represent the lawyers' reflex to cure social problems — poverty, pollution, neglect of children — by throwing not money but lawyers at them."

In fact, the law professor wrote on another occasion, we have a "lawyer-ridden society" — one lawyer for every 600 people, compared with one per 12,000 in Japan.

Mr. Fried also has said the concept of "comparable worth," which is now being promoted as a means of gaining equal pay for women, involves the impossible task of determining a job's "intrinsic" value.

Substituting that concept for the forces of supply and demand in the job market would give the federal bureaucracy "exactly that power which characterizes a command economy," Mr. Fried wrote.

In a paper on medical care that he presented at a National Academy of Sciences meeting in 1975, he wrote:

"To say there is a right to health care does not imply a right to equal access.

... The slogan of equal access to the best available is just that, a dangerous slogan that could be translated into reality only if we submitted to intolerable government controls of medical practice or a thoroughly unreasonable burden of expense."

His writings often contain surprising insights that he discovers in well-worn topics. One example cropped up in a discussion of the measures totalitarian governments take to prevent people from fleeing.

The youths who moved from the United States to avoid military service in the Vietnam War, he wrote in the New Republic, were "perhaps the only set of political refugees to flee America in our recent history. . . ."

In the latest issue of The New Republic, he wrote that the Vietnam War era "was in part a school for contempt, disaffection and even disloyalty. It seemed to authorize a rejection of America and its symbols altogether."

Mr. Fried also can portray deep emotion with artistic delicacy, as he did in using Frederic Remington's painting, "Evening on a Canadian Lake," to explain what it means to be able to live in the land of your choice.

Two men, "their birch canoe stopped by the painter's eye, fix me with their stares, . . ." he wrote last January.



Photo by Willard Votz/The Washington Times

Charles Fried

"I stare back at them, feeling — incredibly — a bond."

The bond, Mr. Fried explained, was this: "We both chose this land — they [the canoists] as much as I. Thirty-five years ago, a 12-year-old boy, I took an oath and became an American."

"We love it as a lover would, not as a child loves the parents he never chose," Mr. Fried wrote.

Mr. Fried was born in Prague, Czechoslovakia. His late father, Anthony Fried, a Czech patriot who was put to flight once by the Nazis, came to America in 1941.