

## PATS FOR PAT<sup>†</sup>

BOOK REVIEW: *Daniel Patrick Moynihan: The Intellectual in Public Life* edited by Robert A. Katzmann (Baltimore: The Johns Hopkins University Press, 1998)

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It was a gray evening on December 11, 1996, the sun had set over the West Wing of the White House, and Senator Daniel Patrick Moynihan had just arrived at Secretary Robert Rubin's private entrance to the Treasury Department on the closed ramp that separates Treasury from the White House. After having written to the President with no direct response, Moynihan, ranking minority member of the Senate Finance Committee, was turning to his closest allies in the Administration, Secretary Rubin and Undersecretary Lawrence Summers, to discuss his fears about the Administration's progress in addressing the Year 2000 Computer Problem.

Moynihan had commissioned a nonpartisan Congressional Research Service Report that had concluded that there was a severe lack of progress throughout the Administration and time was running short. "It's a management problem, not one of technology," Moynihan summarized. "We apparently know how to fix the computers; we just need a coordinated management effort to do so. A 'Y2K' Czar perhaps." Rubin jotted this down on his trademark note card that normally rested in his breast pocket, reserved for only one or two comments in an hour-long meeting.

Undersecretary Summers responded that within Treasury, the IRS was well on their way to addressing the problem. "Yes, of course" Moynihan said, "that is what they do;" meaning they are accustomed to monitoring their programs and creating contingency plans for citizen re-

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sponses to breakdowns. “However,” Moynihan added, “what about those agencies who don’t have functions so related to this, say the Army Corps of Engineers, or SAC [Strategic Air Command]? After all, we do *still* have missiles targeted under SAC, even if they ARE now pointed at the South Pacific Ocean.” Nodding, Rubin agreed. Then smiling, Rubin queried his friend Moynihan, “What are the missiles’ new targets?” “Whales of course,” Moynihan retorted.<sup>1</sup>

## I. INTRODUCTION

As the new century draws nigh, the career of the man whom the *Almanac of American Politics* calls “the nation’s best thinker among politicians since Lincoln and its best politician among thinkers since Jefferson”<sup>2</sup> is coming to a close. Retiring in 2001 from a most coveted Senate seat, Moynihan and his career were at least temporarily overshadowed by the race between his successor Hillary Rodham Clinton and her rival, Rick Lazio. In an offset to the tide of this attention, perhaps, to ride the tide of this attention, Johns Hopkins University Press has published *Daniel Patrick Moynihan: The Intellectual in Public Life*,<sup>3</sup> a probing yet highly celebratory compilation of writings about Moynihan from authors in fields as diverse as Moynihan’s accomplishments. The twelve authors range from former Senator Bill Bradley writing on what it is like to serve with Moynihan in *A Colleague’s Perspective*, to the scholar Nathan Glazer on Moynihan’s contribution to the concept of *Ethnicity*, to NBC’s Tim Russert on *The Wit and Wisdom of DPM* as seen through his twenty-five appearances on *Meet the Press*.

This compilation—a “Festschrift”—not only catalogues Moynihan’s accomplishments,<sup>4</sup> but also explores what it is about Moynihan that has enabled him to be on the vanguard of so many modern issues, and examines why, in a time of bitter partisanship, Moynihan is arguably the most widely respected Senator on both sides of the aisle.

Before turning to a more detailed consideration of the Festschrift, perhaps each of the authors ought to reveal his personal relationship with Moynihan. O’Connell first met Pat when they were both college

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1. Personal recollection of the junior author.

2. MICHAEL BARONE & GRANT UJIFUSA, *THE ALMANAC OF AMERICAN POLITICS* 1994, at 859 (1993).

3. DANIEL PATRICK MOYNIHAN: *THE INTELLECTUAL IN PUBLIC LIFE* (Robert A. Katzmann ed., 1998) [hereinafter *FESTSCHRIFT*]. The book has been strangely overlooked by reviewers especially in contrast to the widespread and immediate attention devoted to a later Moynihan biography by Godfrey Hodgson. GODFREY HODGSON, *THE GENTLEMAN FROM NEW YORK* (2000). This book was reviewed extensively and promptly on its publication. See, e.g., Todd S. Purdum, *The Senate’s Philosopher-King*, N.Y. TIMES, Aug. 13, 2000, at 8 (book review section); Jonathan Yardley, *American Statesman*, WASH. POST, Aug. 13, 2000, at 1 (book world).

4. The original essays were given in celebration of Daniel Patrick Moynihan’s seventieth birthday on March 17, 1997 at the Woodrow Wilson International Center for Scholars, Washington, D.C. “Festschrift” is a combination of the German words “fest” (festival, celebration) with “schrift” (writing). See WEBSTER’S NEW WORLD COLLEGE DICTIONARY 500 (3d ed. 1996).

age through Pat's brother Mike (anyone named Pat Moynihan would have a brother Mike, right?<sup>5</sup>). Pat and Mike at that point were tending bar in their mother's New York City pub near the West Side docks—a pub that catered to the disparate worlds of longshoremen and Pat and Mike's college friends (worlds that, thanks to the Moynihan brothers' ease with both, seemed never to clash). The Moynihans lived above the bar and, like many of their friends, O'Connell remembers sleeping on the floor during a weekend stay.

O'Connell next met Pat (and Pat's wife Liz) some eight years later when Pat and O'Connell's brother Tom were serving together in the administration of Governor Averell Harriman of New York (coincidentally, serving along with Jonathan Bingham, the junior author's grandfather. Indeed, Pat was Bingham's deputy and later successor.)

A few years later, Pat's early writing on auto safety<sup>6</sup> changed O'Connell's career path as a young legal academic. Animated by his penetrating insights, O'Connell then devoted his career to accident law, first concentrating on motor vehicles and later expanding it to include medical malpractice and products liability. In time, Pat was to write discerning forwards to two of O'Connell's books, often seeing with his unusual perceptiveness things about each book that O'Connell had not seen himself.

As was mentioned, Pat worked for Jonathan Bingham in the Harriman Administration and took over the post of Secretary to the Governor when Bingham left to run for the State Senate. Although Bingham lost that race, he was later elected to Congress in a memorable battle with the legendary Bronx Democratic Boss, Charlie Buckley, and went on to serve eighteen years.

A grandson of Bingham, Bland worked for Moynihan as Special Assistant for Grants and Projects, then as a Legislative Aide for the Rules Committee, on judiciary and arts issues, and eventually as Deputy Chief of Staff.

Utilizing close contacts to Moynihan throughout his career, we examine the Festschrift volume and thus, in turn, Moynihan's career. Although we are both clearly Moynihan admirers, we have sought to portray accurately and objectively the complexities of both his successes and (occasional) failures.

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5. Michael Moynihan was an impressive fellow himself, a somewhat smaller, less dramatic version of Pat. For a report on Mike's distinguished career in public relations, see his obituary. See Lawrence Van Gelder, *Michael Moynihan, 68, Free-Trade Champion*, N.Y. TIMES, Nov. 14, 1996, at B15.

6. See Daniel Patrick Moynihan, *The Legal Regulation of Automobile Design*, in PASSENGER CAR DESIGN AND HIGHWAY SAFETY 265 (Association for the Aid of Crippled Children & Consumers Union of U.S., Inc. ed., 1962); Daniel Patrick Moynihan, *Epidemic on the Highways*, REPORTER, Apr. 11, 1959, at 16 [hereinafter Moynihan, *Epidemic*]; Daniel Patrick Moynihan, *Public Health and Traffic Safety*, 51 J. CRIM. L., CRIMINOLOGY & POL. SCI. 93 (1960).

## II. THE PARADOX OF MOYNIHAN'S CAREER

Though not in the Festschrift, the opening exchange at the Treasury Department highlights a most consistent theme: Moynihan's singular ability to reframe the debate on a given public-policy problem by relying on data, not ideology, and to do it all with a wry wit and wisdom that cannot escape one's attention. Indeed, after the Treasury meeting, President Clinton, on February 4, 1998, signed an Executive Order creating a Special Presidential Advisor for Y2K who would oversee Y2K operations as Chairman of the Presidential Council on Y2K.<sup>7</sup>

Moynihan's unique skill, however, has proven to be not only his greatest asset but his biggest liability. A social scientist's strict reliance on data over a fifty-year career means that Moynihan's party allegiance to a new proposal, or his role as policy *maker* (not just policy critic), frequently gives way to a principled, if often frustrating, insistence on relying only on what is known about solving a problem and, more importantly, an acknowledgement of what remains unknown.

Moynihan himself summed up this principle best in a July 1993 letter on his misgivings about the President's early welfare plan to Dr. Laura D'Andrea Tyson, the Chair of the President's Council of Economic Advisors.<sup>8</sup> The letter could well have described Moynihan's differences with Clinton over any number of issues (most particularly health care) as well as differences with other politicians throughout his career:

In the last six months I have been repeatedly impressed by the number of members of the Clinton administration who have assured me with great vigor that something or other is known in an area of social policy which, to the best of my understanding, is not known at all. This seems to me perilous. It is quite possible to live with uncertainty, with the possibility, even the likelihood that one is wrong. But beware of certainty where none exists. Ideological certainty easily degenerates into an insistence upon ignorance.

The great strength of political conservatives at this time (and for a generation) is that they are open to the thought that matters are complex. Liberals have got into a reflexive pattern of denying this. I had hoped twelve years in the wilderness [during Republican Presidencies] might have changed this; it may be it has only reinforced it. If this is so, current revival of liberalism will be brief and inconsequential.<sup>9</sup>

Less than a year after this letter, the Democratic majority of Congress was swept out of office in Gingrich's revolution of 1994. In 1993, Moynihan had recommended to Clinton that the President tackle welfare

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7. See Michael McCurry, White House Press Conference (Feb. 4, 1998).

8. See DANIEL PATRICK MOYNIHAN, MILES TO GO: A PERSONAL HISTORY OF SOCIAL POLICY 48-49 (1996) [hereinafter MILES TO GO].

9. *Id.* at 49.

reform first, but the Administration would hear nothing of it.<sup>10</sup> The cover of the December 5, 1994, *New Republic*, highlighted this misstep: “The fundamental strategic mistake of the Clinton Presidency is now clear. If President Clinton had pushed for welfare reform rather than health care reform in 1994, we would be talking about a great Democratic realignment, rather than a great Republican realignment.”<sup>11</sup>

Understanding Moynihan’s cardinal rules of adhering to social-science data and insistence on thinking multivariately,<sup>12</sup> one is less surprised by the breadth of Moynihan’s contributions to contemporary political discourse and the duration of his high level of public service. The book under review is a useful catalogue of this Moynihan phenomenon.

It is well known around Washington (in no small part due to the insistence of the Senator himself) that Moynihan is the only American to have served in the cabinet or subcabinet of four successive presidents—two Democrats (Kennedy and Johnson) and two Republicans (Nixon and Ford).<sup>13</sup> Although most can recall that Moynihan’s fifteen-year stint in the Federal Executive included his authorship of the famous/infamous Moynihan Report on the Negro Family,<sup>14</sup> as well as his post as Nixon’s Assistant for Urban Affairs, others can also remember his service as the Ambassador to the United Nations vigorously rebutting accusations that Zionism was the equivalent of racism; or as Ambassador to India when the first nuclear device was tested in India;<sup>15</sup> or as Assistant Secretary of Labor in November 1963, sitting in the White House, when word came back from Dallas that something terrible had occurred.<sup>16</sup>

In the intellectual arena, a few telling examples: many credit Moynihan, in the “Moynihan Report,” with spotting the dangers of a disastrous decline in two-parent families across the nation, especially disproportionately in African American homes.<sup>17</sup> Later, from his new seat in

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10. See Seymour M. Lipset, *The Prescient Politician*, in Festschrift, *supra* note 3, at 26, 36.

11. Cover, *NEW REPUBLIC*, Dec. 5, 1994.

12. See Lipset, *supra* note 10, at 35. Lipset writes:

Social science at its best teaches its practitioners to think multivariately—that is, to recognize that all behavior is a consequence of many variables, some reinforcing each other, some acting at cross-purposes. It is necessary, therefore, to try to evaluate relationships by using regression analysis or by performing its equivalent by logic, holding qualitative factors constant. Moynihan is a master of this art.

*Id.*

13. See *Biographical Facts: Senator Daniel Patrick Moynihan*, in Festschrift, *supra* note 3, app. A, at 181.

14. See Lipset, *supra* note 10, at 30.

15. See Suzanne R. Garmet, *The American Ambassador*, in Festschrift, *supra* note 3, at 124, 128.

16. Perhaps the first time Moynihan captured national attention was with his arresting appearance on television shortly after President Kennedy’s death, when he was interviewed by his friend Sander Van Occur. Said Moynihan: “We all of us know down here that politics is a rough game. And I don’t think there’s any point in being Irish if you don’t know that the world is going to break your heart eventually. I guess we thought we had a little more time . . . . So did he.” DOUG SCHOEN, *PAT: A BIOGRAPHY OF DANIEL PATRICK MOYNIHAN* 81 (1979).

17. See Lipset, *supra* note 10, at 30; see also Michael A. Fletcher, *Coalition Pushes Initiatives for Black Fathers*, *WASH. POST*, June 17, 1999, at A6.

the Senate, Moynihan spent much of the 1980s predicting the downfall of the Soviet Union—at a time when most, especially the Intelligence Establishment, was warning of the U.S.S.R.'s immense growth.<sup>18</sup> Most recently in the Senate, Moynihan coined the widely adopted phrase “defining deviancy down.”<sup>19</sup>

Moynihan's congressional peers, too, have relied on his knowledge, using Moynihan floor speeches as a historical overview on innumerable policies;<sup>20</sup> or turning to Moynihan the author of eighteen books ranging from ethnicity in international politics<sup>21</sup> (no small cause, of course, of all Balkan conflicts) to the perils of secrecy and unrestrained classification in the U.S. government.<sup>22</sup>

Yet, the largely unanswered paradox in scholarship is how Moynihan has maintained his standing with both his peers and the public despite his often contrarian stance?

### III. THE MOYNIHAN MODEL

Being celebratory, the Festschrift volume<sup>23</sup> is in no way an objective critique of Moynihan's work, and might well be read with some critical detachment. The book's value lies instead in its description of the breadth of Moynihan's career, the successful predictions he has made in all areas of policy, and the legacy he leaves behind.

Largely overlooked by the essays are the critics. From the left, there has been the refrain that Moynihan's chosen role as strict adherent to data and principle, and somewhat pessimistic approach to social policy, has been a cover for laziness in actual legislating;<sup>24</sup> and that adherence to “his principles [get] him—and New York—nowhere.”<sup>25</sup> Meanwhile from the right, critics argue that Moynihan, once viewed as a neoconservative, only gives the “appearance of independence, then retreat[s] to the party,” and has thus traded conservative “principle after principle for a cozy life in an unthreatened seat” from a largely liberal state.<sup>26</sup> Whom are we to believe? There seems to be something about

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18. See Daniel Patrick Moynihan, *Asking the Right Questions: Will Russia Blow Up?*, NEWSWEEK, Nov. 19, 1979, at 146–47.

19. Daniel Patrick Moynihan, *Defining Deviancy Down*, 62 AM. SCHOLAR 17 (1993).

20. See Bill Bradley, *A Colleague's Perspective*, in Festschrift, *supra* note 3, at 165, 168–69.

21. See DANIEL PATRICK MOYNIHAN, PANDAEMONIUM: ETHNICITY IN INTERNATIONAL POLITICS (1993).

22. See DANIEL PATRICK MOYNIHAN, SECRECY: THE AMERICAN EXPERIENCE (1998).

23. See Festschrift, *supra* note 3, *passim*.

24. See Mickey Kaus, *Senator Daniel Patrick Moynihan's Disappointing Welfare Reform Ideas*, NEW REPUBLIC, June 5, 1995, at 4.

25. Hanna Rosin, *Senator Superfluous*, NEW YORK, Sept. 29, 1997, at 24.

26. Jay Nordlinger, *NeoCon: Pat Moynihan Tease and Heartbreaker*, NAT'L REV., Feb. 8, 1999, at 25. For a highly critical appraisal of Moynihan, slanted neither right nor left, especially of his later Senate career, appearing, surprisingly enough, in Moynihan's “revered” *New York Times*, see Jacob Weisberg, *For the Sake of Argument*, N.Y. TIMES, Nov. 5, 2000, § 6, (Magazine), at 48. As to Moynihan's reverence for the *New York Times*, see *infra* notes 71–75 and accompanying text.

Moynihan that offends both political extremes but is nevertheless largely respected by his peers as well as the electorate.

The concept of an intellectual in public life, common at the founding of the American Republic in the likes of Jefferson, Madison, and Adams, is much rarer in modern times. In the Introduction to the Festschrift, editor Robert Katzmann<sup>27</sup> explains this absence of the scholar-politician as a result of what Richard Hofstadter termed the modern intellectual's struggle between "alienation and conformity."<sup>28</sup> Katzmann writes:

On the one hand, . . . [intellectuals] seek acceptance of their ideas; on the other hand, they believe that fierce critical detachment, indeed alienation, is necessary for the exercise of their creative juices. For the intellectual in politics, life is lived on a slippery tightrope, on which balance is difficult to maintain for very long.<sup>29</sup>

Moynihan has thrived on this tightrope and has had the skills to maintain, literally and figuratively, his standing at the acme of both political and academic arenas. In the Festschrift-book's appendix one notes that Moynihan is the recipient of *sixty* honorary degrees and such prestigious academic awards as the Thomas Jefferson Medal of the American Philosophical Society and the Britannica Medal for the Dissemination of Learning.<sup>30</sup>

Thomas Jefferson's ideal legislator was the "deliberative representative," who would recognize his constituents' needs but ponder how those needs could be molded for the common good and only then form his position. In contrast, Alexander Hamilton's and James Madison's pluralist vision of representatives viewed the member representing his constituents directly, thereby guaranteeing a natural battle of factions. This, in turn, would be guarded by a separation of powers, with checks and balances, including an independent judiciary. The deliberative versus pluralist model is perhaps the single most consistent dilemma for legislators throughout American history.<sup>31</sup> The Virginia Plan compromise of a bicameral legislature seemed to give the Senate, with its dis-

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27. Robert Katzmann, formerly Walsh Professor of Government, Law and Public Policy at Georgetown University, was nominated by President Clinton (at the behest of Senator Moynihan) on March 8, 1999, to the U.S. Court of Appeals for the Second Circuit. He was confirmed by the U.S. Senate on July 14, 1999. On Katzmann's nomination, Senator Moynihan said in a press release: "Robert Katzmann is the finest lawyer/scholar of his generation. He will serve the Court of Learned Hand with honor, distinction, and energy." Press Release, Daniel Patrick Moynihan, Senator New York, Moynihan Hails Nomination of Robert Katzmann by President Clinton to Court of Appeals (Mar. 8, 1999) (on file with the *University of Illinois Law Review*).

28. Robert A. Katzmann, *Introduction—The Intellectual in Public Life: A Tribute to Daniel Patrick Moynihan*, in Festschrift, *supra* note 3, at 1.

29. *Id.*

30. See *Biographical Facts: Senator Daniel Patrick Moynihan*, *supra* note 13, app. A, at 188–94.

31. See Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31–33 (1985).

proportionate two senators for every state, a more Jeffersonian, “deliberative” role.<sup>32</sup>

Moynihan, by siding with Jefferson as his chosen model, but even more with his fellow New Yorker, Hamilton, in his ideology, has struck a precarious but successful balance between scholarly pursuits and political survival. Take, for example, Moynihan’s original choice of committee assignments in the Senate as recounted by Michael Barone, in his Festschrift essay *A Renaissance Man in the Senate*:

Moynihan’s first and perhaps most important decisions were what committees to serve on. He had confronted the question in a debate in the 1976 primary, unsure at first how to answer. His opponents gave predictable answers: labor, said one, because that is where the great urban-aid programs are drawn up; foreign relations, said another, the forum for the great debates on the Vietnam War; another said judiciary, which handled civil rights. Moynihan’s [Hamiltonian] answer: “Finance. Because that’s where the money is.”

Actually, it was the Banking Committee that handled aid to New York City, the great local issue of the day. But in the longer run, Finance, which has jurisdiction over taxes, Social Security, and Medicare does far more to channel the vast flows of money through the government and through society . . . .

Moynihan’s other committee was Environment and Public Works [EPW]—an even unlikelier choice, it seemed, for a New Yorker. Yet, it tracked long-standing interest in transportation, going back to his work for Governor Averell Harriman in the 1950s, when the New York Thruway was opened, and to his 1950s studies on automobile traffic deaths. It is worth remembering that Moynihan is officially an upstater, not a city resident; if he knows every one of New York’s sixty-two county courthouses, he also knows that five are in New York City, four are in suburbs, and fifty three are upstate.<sup>33</sup>

(Upstate New York counties, save those with metropolitan areas, are of course traditionally more conservative than the few downstate.)

Moynihan’s assignment on Finance allowed him to help control the vast flows of money in and out of the Treasury as well as to frame the debate on some of the most vexing social-policy issues of the day, many of which (taxation, welfare, Social Security, and Medicare) came within the committee’s bailiwick. With an assignment on EPW, he as well could maintain his dedication to reforming transportation policy and to deliver significant public-works projects to every county in New York (not to mention indulging his aesthetic passion for encouraging superior architecture in federal buildings).

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32. See *id.* at 43, 63.

33. Michael Barone, *A Renaissance Man in the Senate*, in Festschrift, *supra* note 3, at 134, 136–37.

As to Moynihan's critics from the left that he "was an idealist and controversialist, a theory-bound professor who enjoyed argument and relished grand gestures in defeat," Barone in his essay writes:

There is some truth to this, perhaps. But Senator Moynihan has also been a skilled legislative politician, capable of building a consensus around ideas, marshaling support in committee, assembling a coalition, seizing the right moment to take a measure to the floor. So it went on the Welfare Reform Act of 1988 and on the Intermodal Surface Transportation Efficiency Act of 1991 [ISTEA]<sup>34</sup> . . . .<sup>35</sup>

ISTEA is now the essential method through which states get money for transportation projects. In addition, Barone notes, both the 1988 Welfare Act and the ISTEA bill were passed by a Democratic majority in Congress but signed by Republican presidents, testimony both to Moynihan's role as a legislator and the respect for him in Republican circles.<sup>36</sup> Other essayists in the book add to the list of *legislative* achievements by noting: Moynihan's role in passing the Social Security Amendments of 1983 with Senator Bob Dole, the Tax Reform Act of 1986 signed by President Reagan, and in ushering the Deficit Reduction Package of 1993—arguably Clinton's most seminal accomplishment—out of the Finance Committee and onto passage by one vote in the Senate (the deciding vote being cast by Moynihan's friend Senator Bob Kerrey after a fabled call from Liz Moynihan).<sup>37</sup>

Even so, Moynihan is known for his distaste for lobbying other Senators over causes in which he believes. This book pays scant attention to recent and even more heightened criticism, as those on the left again labeled Moynihan an unduly pessimistic idealist in the renewed welfare-reform debate of 1995. In June of that year, a front-page story in the *New York Times* summarized this criticism—and Moynihan's response:

Critics argue that he has allowed the debate to pass him by, missing opportunities to take the edge off the most radical Republican proposals. . . .

. . . .

For his part, Mr. Moynihan . . . argued that the defining characteristics of modern poverty—chronic dependency and the breakdown of the family—were extraordinarily complex and that the 1988 welfare overhaul that he sponsored reflected "about as much as anybody knows" concerning the remedies. He has proposed a bill that would expand that law—which pushes states to develop a variety of jobs programs for welfare recipients—"on the not-very-inspiring grounds that that's all we know."

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34. Pub. L. No. 102-240, 105 Stat. 1914 (1991).

35. Barone, *supra* note 33, at 140–41.

36. *See id.* at 141.

37. Anecdote recounted by both Elizabeth Moynihan and Daniel Patrick Moynihan to the junior author.

Mr. Moynihan erupted when a reporter suggested that his stance was being perceived as defeatist, a throwing-up-the-hands rationale for abandoning efforts at another major overhaul.

“That is not a defeatist message,” he said, his voice rising in anger, but instead the message of people who have studied the issue “for 35 years, who saw it coming and have been marking it along while everyone else was in denial.”

“People who say that nothing can be worse than the present system, just you wait and see,” he added. “We are dealing with a profound social change. And those of us who first spotted it [the two-parent family breakdown] are entitled to be heard a generation later, when we are saying we still don’t understand it.”

To many on Capitol Hill, though, Mr. Moynihan is out of step with an era in which 9 in 10 Americans say they want fundamental changes in the welfare system.<sup>38</sup>

So Moynihan’s opposition seemed to some, at least, defeatist. Again, however, this was due not to legislative torpor, but to the Moynihan model in action, adhering to his most cherished principles: consistent, historical reliance on data and the limited, if crucial, role of social science in policy making. As to the latter, Seymour Martin Lipset, in his essay *The Prescient Politician*, best encapsulated this little understood, but critical element of Moynihan’s beliefs:

[Moynihan] argued that social science rarely comes up with sufficient evidence to provide a scientific underpinning for broad policy changes, whether presented by liberals or conservatives. Research generally sustains the null hypothesis—that is, not proven. He, therefore, laid down the dictum, which has become highly controversial, that “the role of social science lies not in the formation of social policy, but in the measurement of its results.” Then and later he argued that while social science “can call attention to some probable consequences of certain types of actions,” it cannot and should not formulate policy.<sup>39</sup>

Although Lipset’s description was of Moynihan’s response to the poverty programs of 1963 to 1964, it could also describe Moynihan’s approach to the Welfare Reform Bill of 1996. As in his 1993 letter to Laura D’Andrea Tyson on health care,<sup>40</sup> Moynihan maintained that a responsible politician must acknowledge both the history of findings on the subject, and the limited nature that policy change can have on changing human behavior like illegitimacy—no matter what the political sentiment at the time.

Here some background may be helpful: In his 1965 report, *The Negro Family: A Case for National Action* (better known as “The Moyni-

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38. Robin Toner, *Moynihan Battles View He Gave Up on Welfare Fight*, N.Y. TIMES, June 18, 1995, at A1.

39. Lipset, *supra* note 10, at 29.

40. See MILES TO GO, *supra* note 8, at 48–49.

han Report”),<sup>41</sup> Moynihan had taken pains to point out that family structure is sensitive to variables of family income and employment.<sup>42</sup> He was blaming not the victim, but what he termed a “tangle of pathology.”<sup>43</sup> The authors of the most extensive and objective account of the Moynihan Report, William Yancey and Lee Rainwater, pointed out that oversimplification by the press was the central cause for the outrage that followed:

Taken as a whole, the effect of the press coverage of the Moynihan Report was to subtly exaggerate the already dramatic and sensational aspects of Moynihan’s presentation and as a result to considerably deepen the impression that the report dealt almost exclusively with the [Negro] family, its “pathology,” and “instability,” as *the cause of the problems Negroes have*.<sup>44</sup>

Thus, one finds William Ryan, a psychology professor at Harvard Medical School, in the most widely distributed reaction to the Report, writing in both the *Nation* and the *Crisis* (a publication of the NAACP), that Moynihan’s report “encourages (no doubt unintentionally) a new form of subtle racism.”<sup>45</sup>

According to Rainwater and Yancey: “Only in the longer treatments of the report, or for the careful reader (which no journalist can count on) of some of the shorter articles, was there any clear communication of the vicious cycle with which Moynihan sought to deal.”<sup>46</sup> Lipset then does an admirable job in clearing up the confusion:

[Moynihan] did stress the higher rates of family instability and illegitimacy among African Americans, which, he emphasized, contributed strongly to the inability of many black youth to perform well in school and in the labor market. But, as noted, family conditions are intervening variables. The causes of disproportionate instability lay in black communities, according to Moynihan, in external social factors and economic conditions . . . . Clearly he was not blaming the victim; he was blaming the society, the white society.<sup>47</sup>

Come 1995, in the debate over welfare reform, Moynihan felt the AFDC safety net had to be maintained because no amount of incentives could reverse this extremely complex, and now half-a-century-long, trend of social pathology exemplified by illegitimacy.

In 2000, four years after the 1996 welfare reform, a booming economy may have helped prove otherwise. Since 1993, welfare rolls have

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41. OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEP’T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION, reprinted in LEE RAINWATER & WILLIAM L. YANCEY, THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY 39 (1967) [hereinafter RAINWATER & YANCEY].

42. See Lipset, *supra* note 10, at 29–30.

43. *Id.* at 31.

44. RAINWATER & YANCEY, *supra* note 41, at 153.

45. SCHOEN, *supra* note 16, at 458.

46. RAINWATER & YANCEY, *supra* note 41, at 153.

47. Lipset, *supra* note 10, at 30–31.

been cut nearly in half, by 6.5 million people.<sup>48</sup> Advocates of the reform say work incentives, along with tougher cutoffs, force recipients into a new mindset about welfare as a temporary handout rather than a permanent entitlement.<sup>49</sup> The long-standing, so-called “AFDC incentive” to have more children out of wedlock was removed. Yet, Moynihan still warns that a “huge hidden calamity”<sup>50</sup> could arise after any downcycles in the economy have occurred.<sup>51</sup>

Even so, Moynihan refused to work with the left-wing opposition to Clinton’s welfare-reform efforts, based not just on its refusal to compromise in years prior, but more importantly on its past disloyalty to Moynihan. The two incidents from the 1960s, when the left turned on Moynihan—deeply wounding him as to whom he trusts and to whom he is loyal—included not only the 1965 report on the Negro Family, with its furious backlash against him from the left,<sup>52</sup> but a second scarring incident four years later in 1969, when Moynihan wrote a confidential, but leaked, memorandum to President Nixon encouraging the President to allow the heated racial rhetoric in the nation to cool down. In the memo, Moynihan wrote:

The time may have come when the issue of race could benefit from a period of “benign neglect.” The subject has been too much talked about. . . . We may need a period in which Negro progress continues and racial rhetoric fades. . . . [The administration] should avoid situations in which extremists of either race are given opportunities for martyrdom, heroics, histrionics, or whatever.<sup>53</sup>

According to Moynihan, the term “benign neglect” came from the nineteenth-century British minister Lord Durham in his 1849 report to Queen Victoria on how to quell the divisiveness between French- and English-speaking Canadians in Upper and Lower Canada.<sup>54</sup> (It should be noted that after six months of research including an aide being assigned to read the entire “Durham Report of 1849” no such phrase as “benign neglect” could be found.) Moynihan had been arguing for three years that similarly divisive rhetoric in America from both the right and the left was making racial progress more difficult.<sup>55</sup> He was worried about such rhetoric heating up and vindicating anger and unrest in the black community. Again, Moynihan in the memo:

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48. *Radio Address of President Clinton to the Nation* (Apr. 10, 1999).

49. *See id.* For a contrary opinion, see Peter Edelman, *Making Welfare Work: Clinton’s Cosmetic Poverty Tour*, N.Y. TIMES, July 8, 1999, at A27. For a relatively balanced view of welfare reform, see Michael Wassing, *The End of Welfare?*, N.Y. REV., Oct. 7, 1999, at 22.

50. James Dao, *Moynihan Reflects on Career as Scholarly, Puckish Power*, N.Y. TIMES, Nov. 15, 1998, at A37.

51. For further criticism of the relative success of the 1996 welfare reform bill, see Peter Edelman, *supra* note 49, and Editorial, *Welfare Happy Talk*, WASH. POST, Aug. 25, 1999, at A16.

52. For a full discussion of the outcry, see RAINWATER & YANCEY, *supra* note 41, at 188.

53. SCHOEN, *supra* note 16, at 167.

54. Personal recollection of the junior author.

55. *See* SCHOEN, *supra* note 49, at 165–66.

With no real evidence I would nonetheless suggest that a great deal of the crime, the fire-setting, the rampant school violence, and other such phenomena in the black community have become quasi-politicized. Hatred, revenge against whites is now an acceptable excuse for what might have been done anyway.<sup>56</sup>

But, “benign neglect” as a phrase lost any historical context and was instead heard by a civil-rights leadership, already skeptical of Moynihan after the 1965 Negro Family Report, as an abandonment of the plight of poor blacks. Moynihan responded that he was merely seeking to dampen the rhetoric by paying less attention to the extremes, while quietly maintaining important governmental efforts on behalf of poor blacks through a dialogue with more stable and respected Black leaders. Indeed, one month prior to the memo, Moynihan had adamantly maintained that “poverty and social isolation of minority groups is the single most urgent problem of the American cities today.”<sup>57</sup> But, Moynihan’s choice of phrasing, especially the word “neglect,” was seen as implying both adequate progress and insensitivity.

However wise/unwise the counsel of a period of “benign neglect,” Moynihan worried (and still worries) that the two incidents “ruined him in the Democratic party.”<sup>58</sup> Such was the sting Moynihan felt because of these reactions that the 1965 report and the “benign neglect” memo are the only major topics that neither reporter nor staffer can broach with Moynihan even today.<sup>59</sup> Furthermore, in perhaps a nod to this wound, the essayists in the Festschrift also avoid discussing the notorious memo to Nixon. For a loyal man like Moynihan, having lost the faith of the most liberal elements in his own party twice in four years, the loud cries of racism from those on the rigid left meant that he felt he could never fully trust them again— even as *allies* in opposing welfare-reform in 1996, nearly three decades later.

As to the criticism that his refusal to depart from principle has meant disadvantages for New York, a rebuttal can be found in his continuous re-elections. Although a tally in public works delivered by Moynihan to New York would be substantial, it is perhaps more important to recognize that New Yorkers prefer even more his role as national statesman, or, as one columnist put it, “New York’s gift to the nation.”<sup>60</sup>

On the other hand, there have always been those political situations, such as a 1998 meeting of the “North 40” county Democratic Convention when, according to the *New York Times*, Moynihan, “[h]aving come prepared to address the state Democratic convention about the party’s need to build support upstate . . . instead veered off into a 20-minute disserta-

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56. *Id.* at 167.

57. *Id.* at 166.

58. Dao, *supra* note 50, at A37.

59. *See id.*

60. Rosin, *supra* note 25, at 24.

tion on the threat of nuclear war in South Asia and the Middle East.”<sup>61</sup> Many at the Convention fretted that this was evidence of Moynihan’s abdication of his party-building responsibilities.<sup>62</sup> Yet even amidst the loud criticism at the convention, there was also an abiding sentiment summarized by one state assemblyman: “He wasn’t elected as a political person. You elect him because he’s the brightest guy down there. And when all is said and done, they will see he is the best candidate for the party.”<sup>63</sup>

Indeed, Moynihan’s elections do speak for themselves. In 1988, he received the highest vote total for any candidate for statewide office in New York State history;<sup>64</sup> he also received the largest margin of victory in U.S. Senate history, winning sixty-one of sixty-two counties.<sup>65</sup> In 1994, he defied the nationwide anti-incumbent, anti-Democratic mood, and became only the third New Yorker ever elected to four terms in the Senate. In September of that year, the *New York Daily News* editorialized: “Three term Senator Daniel Patrick Moynihan has become an institution. And deservedly so. A true intellectual and a pragmatic protector of New York interests, this engineer of health care, Social Security and welfare reform legislation exemplifies the serious work of Washington.”<sup>66</sup>

If Moynihan has benefited consistently from a lack of credible Republican challengers (State Assemblywoman Florence Sullivan in 1982, after former Congressman Bruce Caputo withdrew; Long Island attorney Robert Macmillan in 1988; and furniture-fortune heiress, Bernadette Castro in 1994), this can be seen as a testimony to Moynihan’s strength, not necessarily Republican weakness. For example, in 1988, the twenty-nine possible Republican opponents who bowed out at some stage of the senatorial campaign included U.S. Attorney Rudy Giuliani, Representative Jack Kemp, and former Secretary of State Henry Kissinger.<sup>67</sup>

The criticism from the right in Moynihan’s career has been from those who see a betrayal by one of their own. After all, Moynihan had been a post-Woodstock Neoconservative in the 1970s, a founder of the publication entitled the *Public Interest* with neoconservatives such as Irving Kristol. And who could forget Moynihan’s characteristically crisp declaration on national TV in June of 1994, speaking as the Democrat whose committee had jurisdiction over health care in the height of the debate, that there was no chance that Congress would pass the Clinton

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61. James Dao, *Moynihan’s Lofty View Leaves Democrats Grumbling*, N.Y. TIMES, May 29, 1998, at B5.

62. *See id.*

63. *Id.*

64. *See* MOYNIHAN COMM., THE MOYNIHAN CAMPAIGN COMMITTEE REPORT 2 (1988).

65. *See id.*

66. MOYNIHAN COMM., MOYNIHAN: THE UNITED STATES SENATE RACE IN NEW YORK 1994, at 19 (1996) (quoting Editorial, DAILY NEWS, Sept. 12, 1994).

67. *See* MOYNIHAN COMM., *supra* note 64, at 7.

bill that would provide universal health care.<sup>68</sup> What other public official other than Moynihan ever answered a question on one of these shows with a simple declarative conclusory sentence?

As Jay Nordlinger wrote to his fellow rightists in the *National Review*, “[Conservatives] like him personally (as who apparently could not?). But they speak virtually as one in lamenting the course of this former golden boy, a figure so dazzling, so energetic, so capable, that some allowed themselves to dream of a second Jefferson in the White House.”<sup>69</sup>

The criticism thus amounts to a lamentation [from the right] for what could have been done but was not, given some of Moynihan’s stated conservative positions like limited restrictions on abortion, exploratory educational-tuition tax credits, tort reform, and condemnation of Clinton’s conduct leading to impeachment.

Over time three essential factors consistently kept Moynihan from swaying too far to the right: his upbringing, the *New York Times*, and old-fashioned Democratic loyalty.

According to the aforementioned authors of the most comprehensive book on the Moynihan Report, William Yancey and Lee Rainwater, Moynihan’s core dedication to a social safety net was a product of his (legendary, if none too accurate) Hell’s Kitchen upbringing and his steadfast Catholic beliefs.<sup>70</sup> For political survival, Moynihan has also never strayed far from the left leaning *New York Times* editorial page—the result of his witnessing its power after gaining its endorsement in his original 1976 narrow primary victory over Bella Abzug.<sup>71</sup>

Parenthetically, this decision of the *New York Times* to endorse Moynihan had split John Oakes, the editor of the editorial page who favored the ultra liberal Abzug, from “Punch” Sulzbeger, publisher of the *New York Times* and Oakes’s cousin, who trumped Oakes’s preference.<sup>72</sup> Oakes thereupon considered resigning and would write in retrospect, “I damn near died,” characterizing Moynihan as, “that rambunctious child of the sidewalks of New York.”<sup>73</sup> Moynihan barely won the primary with thirty-six percent of the vote to Abzug’s thirty-five percent. In the most important political race of Moynihan’s career, the *New York Times* had essentially cast the deciding vote. Moynihan staffers would learn of his reverence for the paper “of record,” as he called the *New York Times*, when they would futilely try to convince him that four or five “mentions” in upstate newspapers were equivalent to one mention in the *New York*

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68. See *Meet the Press: Senator Daniel Patrick Moynihan and Congressman Newt Gingrich Discuss Health Care, Welfare, Korea, and Hillary Clinton* (NBC News, June 19, 1994).

69. Nordlinger, *supra* note 26, at 26.

70. See RAINWATER & YANCEY, *supra* note 41, at 153.

71. See Nordlinger, *supra* note 26, at 26.

72. See SUSAN E. TIFFT & ALEX S. JONES, *THE TRUST: THE PRIVATE AND POWERFUL FAMILIES BEHIND THE NEW YORK TIMES* 520–22 (1999).

73. *Id.* at 520.

*Times*.<sup>74</sup> To Moynihan, the national statesman, absence from the *New York Times* was paramount to being absent from the debate.

Moynihan's alliance with, and reverence for, the *New York Times* since its original endorsement of him reflects his steadfast belief in loyalty to those who helped him along the way. This characteristic, in turn, helps answer criticism from those who might think "Moynihan the Scholar" has no allegiances. As Bill Bradley recounts in his Festschrift essay:

I asked . . . [Moynihan] once, "Are you staying with the labor guys on trade again?"

He said, "Yes."

I said, "Why?"

He said, "Because they were with me in 1976 when I needed them."<sup>75</sup>

Another facet of the Moynihan model that attracts conservatives to him, is his acute appreciation of history. Santayana's edict notwithstanding,<sup>76</sup> Congress often suffers from a lack of historical perspective. Thus, Moynihan has served as an historical source on many policies (though on occasion irritably pedantic to his colleagues), constantly reminding his peers of past unsuccessful legislative forays into various fields of policy. The editor of the Festschrift cites conservative columnist George Will on this aspect of why the Moynihan model is essential for national politics:

Moynihan "is at the top of the short—the very short—list of indispensable senators. They are indispensable in part because they do important things that would not get done if they were not there. . . . And in a town that is, in matters of the mind, constantly [re]inventing the wheel, he supplies an unrivaled sense of intellectual and institutional history."<sup>77</sup>

Yet, beyond Moynihan's belief in history as prologue; in his reliance on data; in his loyalty to his roots in the Democratic party, to the *New York Times* and his Catholic faith, there is the immeasurable and inimitable appeal of Moynihan's style. At a time when few senators are known for their wit, off-the-cuff remarks, or a courageous willingness to speak candidly, Moynihan shines in liberal and conservative circles alike. Nordlinger cites two critics who answered why Moynihan remains the liberal politician whom conservatives love best. "Style," said one; "[h]e's a glittering dinner companion, an astounding intellect, whose knowledge is unparalleled . . .;" another added, "He's one of us. He's not Al D'Amato; he's a professor. It's a little like the *New Republic*: They have

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74. Personal recollection of the junior author.

75. Bradley, *supra* note 20, at 171.

76. "Those who cannot remember the past are condemned to repeat it." George Santayana, *The Life of Reason Vol. 1, Reason in Common Sense*, in JOHN BARLETT, FAMILIAR QUOTATIONS 588 (Justin Kaplan ed., 16th ed. 1992).

77. Katzmann, *supra* note 28, at 2.

a thousand interesting things to say, even if they wind up— you know— being for Mondale.”<sup>78</sup> This style has been Moynihan’s trademark throughout his career. Steven Hess recounts President Nixon at Moynihan’s departure from his administration: “I disagreed with a lot of what he said— but he certainly did light up the place!”<sup>79</sup>

One example of his style was Moynihan’s response to an unveiling of a new and expensive governmental edifice:

In the Spring of 1981, construction was nearing completion of the . . . Hart Senate Office Building. All winter, the scaffolding had been sheathed in heavy plastic against the weather to allow the exterior marble to be installed. One day, the plastic came off. Moynihan promptly introduced a resolution: “Whereas the plastic cover has now been removed revealing, as feared, a building whose banality is exceeded only by its expense; and Whereas even in a democracy there are things it is as well the people do not know about their government: Now, therefore, be it *Resolved*, That it is the sense of the Senate that the plastic cover be put back.”<sup>80</sup>

(This incident also raises Moynihan’s seminal influence on architecture as seen by his impact on the renovations of Union Station and Pennsylvania Avenue in Washington D.C.; and Grand Central Station and Pennsylvania Station in New York—the last of which his New York Senatorial colleague Charles Schumer has proposed naming after Moynihan.)

The Moynihan mode combining a wit’s style with a scholar’s approach may have attracted criticism from the extremes but in the end was also his greatest asset in the eyes of many in both parties and the electorate. Furthermore, Moynihan’s scholarly detachment was never likely to change. Stung by both sides in his career, he always kept a reminder of this history in the most private area of his Capitol office; in his washroom hung two magazine covers: one, a 1979 issue of the *Nation* entitled *The Conscience of a Neoconservative* and a 1981 issue of the *New Republic* entitled, *Pat Moynihan, Neo-Liberal*.<sup>81</sup>

A strength of this Festschrift compilation lies in its multifarious purposes. It serves as a catalogue of Moynihan’s diverse career, it describes many aspects of the Moynihan method of operation, and it provides a compendium of many of the ideas where Moynihan has transformed the debate. It is to those ideas that we turn next.

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78. Nordlinger, *supra* note 26, at 28.

79. Stephen Hess, *The Federal Executive*, in FESTSCHRIFT, *supra* note 3, at 113, 120.

80. Robert A. Peck, *Daniel Patrick Moynihan and the Fall and Rise of Public Works*, in FESTSCHRIFT, *supra* note 3, at 68, 89.

81. Personal recollection of the junior author; *see also* Jeffrey Toobin, *Pat N’ Bill*, *NEW YORKER*, Feb. 8, 1999, at 29.

## IV. MOYNIHAN PRESCIENCE

Based on, among other things, his work on the driving force of ethnicity in international politics, Moynihan realized early on that neither the Soviet Union nor Marxism elsewhere could ultimately succeed. As Nathan Glazer writes: "Others had to discover [after Moynihan] that the prospect of workers joining together across ancient or even not-so-ancient national and ethnic boundaries to advance common class interests was generally a chimera."<sup>82</sup>

As long ago as November of 1979, in a *Newsweek* issue dedicated to the upcoming decade of the 1980s, Moynihan was asked "What does the new decade have in store for America and the world?"<sup>83</sup> "The Soviet empire," he replied, "is coming under tremendous strain. It could blow up."<sup>84</sup> Pointing to an actual decline in productivity, a horrific *rise* in Soviet mortality rates and most importantly ethnic nationalism, Moynihan predicted the Soviet Union's demise.<sup>85</sup> Having spotted the import of an anomalous rise in mortality rates for the adult population in a modern society, along with an increase in infant mortality (at more than ten percent per year in 1979), Moynihan wrote, "the moment came when it became clear that the promises of the revolution, especially the economic promises, were not being kept and would not be."<sup>86</sup> In addition, Moynihan's heightened sense of ethnic nationalism, stemming from his work in *Beyond the Melting Pot* with Nathan Glazer, convinced him that the Soviet Union could burst.<sup>87</sup>

But despite Moynihan spending the 1980s on the floor of the Senate doggedly adhering to this refrain,<sup>88</sup> few in the opposition were ready to concede come 1989 that Moynihan had been right all along. One exception, however, was Henry Kissinger. According to Nathan Glazer:

When in early 1992 [Moynihan] presented a doubting Henry Kissinger with evidence that some people at least had seen what was coming in the Soviet Union, he received what is probably the shortest, and certainly the humblest, letter from his former Harvard and government colleague: "Dear Pat: I stand corrected. Your crystal ball was better than mine."<sup>89</sup>

The subject of subsequent vindication raises again the "Moynihan Report of 1965." Unfortunately, it took a sustained growth in illegiti-

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82. Nathan Glazer, *Daniel P. Moynihan on Ethnicity*, in *FESTSCHRIFT*, *supra* note 3, at 15, 21.

83. Moynihan, *supra* note 18, at 136.

84. *Id.* at 146.

85. *See id.* at 146-47.

86. *Id.* at 147.

87. *See id.*

88. As in January of 1980, when he noted: "The defining event of the decade might well be the breakup of the Soviet Empire." Lipset, *supra* note 10, at 27.

89. Glazer, *supra* note 82, at 22 (Nathan Glazer citing Adam Roberts of Balliol College, Oxford, who wrote this passage in the Introduction to Moynihan's 1993 book, *PANDAEMONIUM: ETHNICITY IN INTERNATIONAL POLITICS*).

macy for Moynihan's critics to recognize the validity of the findings in his report. The proportion of black children born out of wedlock today is near seventy percent.<sup>90</sup> Both the African American leadership and many liberal scholars now recognize that Moynihan was right and acknowledge the need to deal with family dysfunction. In just one week in June of 1999, the Ford Foundation released a report concluding the devastating consequences of fatherlessness,<sup>91</sup> the *Washington Post* reported on the new-found political will to tackle the problem,<sup>92</sup> *National Journal* editor, Michael Kelly, wrote of the problem,<sup>93</sup> and the authors of the Ford report wrote in a separate letter to the *Washington Post* of the widespread responses to fatherlessness by various departments in the Clinton administration.<sup>94</sup> Though not as direct as Kissinger's reply, all this vindicated Moynihan, albeit thirty-five years later.

In 1993, Moynihan went on to coin one of the single most popular phrases of the 1990s, titling his *American Scholar* article *Defining Deviancy Down*. Basing his theory on sociologist Kai Erikson's work, Moynihan wrote that "we have been redefining deviancy so as to exempt much conduct previously stigmatized, and also quietly raising the 'normal' level in categories where behavior is abnormal by any earlier standard."<sup>95</sup>

Moynihan then used the essay as the basis for a much publicized speech in New York City during his 1994 Senatorial campaign, declaring there should be a new *intolerance* of petty crimes.<sup>96</sup> Society had defined deviant behavior to be merely violent crime, he argued, thereby causing an escalation of all manners of crime, and a subsequent deterioration of city life.<sup>97</sup> Mayor Dinkins saw the speech as an attack on his approach to policing and was "seething mad."<sup>98</sup> Mayoral candidate Rudolph Giuliani, on the other hand, "seized on this issue and use[d] . . . *Defining Deviancy Down* as a sacred text," according to Joe Klein in *Newsweek*.<sup>99</sup> George Kelling and Catherine Coles's *Fixing Broken Windows*<sup>100</sup> and New York Police Commissioner William Bratton would build on Moynihan's theory: New York was subsequently blessed with an enormous decline in

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90. See Lipset, *supra* note 10, at 31.

91. See Ronald Mincy & Zobie Clayton, *Turning the Corner on Father Absence in Black America*, in REPORT OF THE FORD FOUNDATION AND THE MOORHOUSE RESEARCH INSTITUTE (1999).

92. See Michael A. Fletcher, *Coalition Pushes Initiatives for Black Fathers*, WASH. POST, June 17, 1999, at A6.

93. See Michael Kelly, Opinion/Editorial, *A National Calamity*, WASH. POST, June 16, 1999, at A37.

94. See Ronald Mincy & Zobie Clayton, Letter to the Editor, *Doing Something about Fatherlessness*, WASH. POST, June 23, 1999, at A20.

95. Nicholas N. Eberstadt, *Daniel Patrick Moynihan, Epidemiologist*, in Festschrift, *supra* note 3, at 44, 60 (quoting Moynihan's *American Scholar* article).

96. See MILES TO GO, *supra* note 8, at 164-65.

97. See *id.* at 165-67.

98. *Id.* at 165.

99. Joe Klein, *Dinkins's Fractured Mosaic*, NEWSWEEK, Oct. 11, 1993, at 35.

100. GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS* (1998).

crime rates. Moynihan's phrase became a rallying cry. A recent Lexis-Nexis search of all news media revealed 420 mentions of "defining deviancy down" in the first half of 1999 alone.<sup>101</sup> Moynihan had touched another nerve, but in this case, his idea sparked quick political success for those like Giuliani who recognized its resonance in the electorate. (Even so, Moynihan loyally endorsed as his successor Democrat Hillary Rodham Clinton, not her then-opponent, Republican Rudolph Giuliani, his protégé on this issue.<sup>102</sup>)

But what about those ideas that Moynihan still feels are immensely important to our society and that have seen less response from the political establishment? The pernicious escalation of secrecy in government and some form of Social Security privatization are two examples of Moynihan's latest potentially prescient ideas.

But his concerns that entail technical legal issues, most suitable perhaps for discussion in a law review, are traffic safety and auto-insurance reform.

A student of traffic safety and related matters since his work as Secretary to New York Governor Averill Harriman in the 1950s, Moynihan wrote three seminal works for the general public that would forecast a storm ahead. In 1959, he wrote a piece for the *Reporter* entitled, *Epidemic on the Highways*,<sup>103</sup> in 1966, he wrote, *The War Against the Automobile* for the journal the *Public Interest*,<sup>104</sup> and in 1967, he wrote *Next: A New Auto Insurance Policy* for the *New York Times*.<sup>105</sup>

According to noted AEI scholar Nicholas Eberstadt:

The central insight in [*The War Against the Automobile*] is derived directly from basic epidemiological teaching: namely, that there was nothing accidental about traffic "accidents." In any given episode, a car crash or a collision with a pedestrian might seem a random and inexplicable tragedy. But when viewed in the aggregate (remember that the epidemiological method examines "groups of persons, not separate individuals"), quite predictable overall patterns of risk could be discerned . . . .<sup>106</sup>

Moynihan is fond of pointing out that the very notion of "accidents" has been proved flawed from the start. "In 1896, when there were four motor vehicles in the United States," Moynihan wrote, "two were in St. Louis. They managed to collide with such impact as to injure both driv-

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101. Lexis/Nexis on-line search, July 23, 1999, conducted by the junior author, in the source file, "All News Group," for the period January 1, 1999 to July 23, 1999, revealing 420 "hits" of the term "defining deviancy down."

102. See Adam Nagourney, *Hillary Clinton Begins Pre-Campaign in a New Role for Her*, N.Y. TIMES, July 8, 1999, at B1.

103. Moynihan, *Epidemic*, *supra* note 6, at 16.

104. Daniel P. Moynihan, *The War Against the Automobile*, PUB. INTEREST, Spring 1966, at 10.

105. See Eberstadt, *supra* note 95, at 46.

106. *Id.* at 47.

ers, one seriously.”<sup>107</sup> Thus, the logical progression of this epidemiological approach was to forego overwhelming emphasis on such tactics as police arrests for individual traffic violations or driver training and instead to demand that automobile manufacturers pay more attention to the design of cars to withstand the inevitable toll of accidents through padded dashboards, pop-out windshields, harness belts, and airbags, etc. Not until 1966, when Congress mandated this approach in the Auto Safety Act, was the design of cars radically altered to lessen injuries on impact.

The next step, as Moynihan saw it, was to address a similar societal myopia in the inefficiency of focusing the judicial process on individual driver error in allocating the costs of motor-vehicle crashes case by case. As far back as 1971, Moynihan wrote:

The judicial system cannot [allocate the cost of motor vehicle crashes] . . . efficiently or even, it would appear, fairly. The rules of evidence and the legal fictions about the nature of the events under scrutiny are such that it just doesn't come out right. Who can reconstruct a complex accident? “Tell the jury which way the bullet was travelling when it entered the victim's heart.” “At what approximate speed would you say the bullet was moving at the time of entry?” . . .

....

. . . Just as in the case of traffic safety, the most serious consequences of our present system of allocating collision costs is that it has brought on a near breakdown in the judicial system itself. The courts are overwhelmed, swamped, inundated, choked. In a futile quest to carry out a mundane mission—deciding who hit whom on the highway when every day there will be thousands and thousands of such events routinely arising from a particular transportation system—we are sacrificing the most precious of our institutions: the independent judiciary, which dispenses justice and maintains the presumption and perception of a just social order that is fundamental to a democratic political system.

*This* is what is at issue [in the debate over auto accident compensation].<sup>108</sup>

In addition, Moynihan pointed out that the result of all this effort from such a constricted focus was that “about [forty-five] percent of those seriously injured in traffic accidents [get] . . . absolutely nothing from automobile liability insurance.”<sup>109</sup> Litigating car accidents requires a complicated examination of fault that more often than not provides little compensation, does not discover who actually was at fault and needlessly drives up the price of auto insurance. Or as Moynihan would later

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107. Daniel Patrick Moynihan, *Foreword* to JEFFREY O'CONNELL, *THE INJURY INDUSTRY* viii (1971).

108. *Id.* at xi–xii.

109. *Id.* (quoting O'Connell).

put it, using the courts to sue over car accidents was like “litigating the common cold.”<sup>110</sup>

In his 1967 *New York Times* article, Moynihan highlighted the ensuing high costs of the current state of auto insurance on motorists and on the judiciary itself: “Automobile accident litigation has become a twentieth-century equivalent of Dickens’s Court of Chancery, eating up the pittance of widows and orphans, a vale from which few return with their respect for justice undiminished.” He went on to explain, that:

[N]o one involved (in the insurance system) has any incentive to moderation or reasonableness. The victim has every reason to exaggerate his losses. It is some other person’s insurance company who must pay. The company has every reason to resist. It is somebody else’s customer who is making the claim.<sup>111</sup>

If anything, things have grown much worse in this area since 1967. Excessive litigation, costly legal fees, and inefficient, delayed inequitable compensation are ever more the norm—all further driving up insurance rates to ever more forbidding levels. Only a few states, however, (including Moynihan’s own New York) have even made a stab at enacting meaningful auto-insurance reform. Moynihan introduced Federal legislation<sup>112</sup> (largely based on work by the senior author) that would give motorists the option of choosing not to sue or be sued based on fault for pain and suffering damages after auto accidents. In return, they would be assured of payments regardless of fault for their medical expense and lost wages and at a much lower annual premium.

The savings, according to a Congressional Joint Economic Committee Study, could amount to as much as thirty-two percent of auto-insurance premiums nationally or \$45 billion a year.<sup>113</sup>

Whence then comes the opposition? Obviously, trial lawyers stand to lose hugely. Auto crashes mean billions of dollars for claimants’ lawyers annually. A tremendously influential lobby, the trial lawyers benefit from being a single-issue group that asks only that politicians *refrain* from acting (merely maintaining the status quo tort system). The influence of personal-injury lawyers on Democrats is especially pervasive—but not on Moynihan who was one of only three Democrats in either chamber (one other was Joe Lieberman) to take on the tort bar on this issue.<sup>114</sup>

If Moynihan’s effect on the automobile safety was clear, his effect on the high cost of auto insurance and the inequitable state of tort law remains to be seen. It may take further demonstration of the inequity

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110. Personal recollection of the senior author.

111. Press Release, Daniel Patrick Moynihan, Senator New York, Statement on Joint Economic Committee Report, *Auto Choice: Impact on Cities and the Poor* (Mar. 10, 1998).

112. See S. 837, 106th Cong. (1999).

113. See Mitch McConnell, Daniel Patrick Moynihan & Joseph I. Lieberman, *Auto Insurance: A Better Way*, WALL ST. J., Sept. 22, 1997, at A22.

114. See *id.*

and waste of the tort system and an even higher rise in auto-insurance rates to spur action.

It is important to note that the type of tort reform that Moynihan advocates is not one, as is true of so many proposals emanating from conservative circles, that would simply make it harder for injured parties to be paid or just to pay them less when they are paid. Rather the quid pro quo is that every person giving up common-law claims, with all their disputation, receives prompt automatic payment of out-of-pocket losses under the bill Moynihan proposes, just as with workers' compensation.<sup>115</sup>

Moynihan in the past has also broadened his concern for the inequity and inefficiency of auto insurance to focus on medical-malpractice litigation. Speaking of proposals to simplify such litigation by a law to encourage prompt payment of many patients' economic losses (financed, as with no-fault workers' compensation and auto plans, by eliminating payments of pain and suffering and reduced lawyers' fees), Moynihan has written:

[Such a proposal] . . . values highly those things the legal system can do, and . . . is concerned that [the legal system] not seek to overdo. An overextended system, dealing with ever more peripheral issues, eventually becomes incapable of dealing with those vital and central issues for which it was created. . . . [This means] litigating ourselves into a stalemated and paranoid society. We could do so. We could take all the fun out of it, all the pride out of it, and that would be such a waste, such a loss.

. . . [Some time ago] . . . a congressional study on medical malpractice [was submitted], subtitled "The Patient Versus the Physician." This is a relation [we do] *not* want. It won't help doctors and it won't help patients. Similar confrontational, adversary relations are developing seemingly everywhere. They can't succeed. When everyone sues, no one gets satisfied. Our experience with the automobile brought us after the fact to that realization. . . . The legal system becomes ever more encumbered . . . . Justice . . . is not done . . . . Free systems come more and more to be seen as threatening . . . . This is the way systems die.<sup>116</sup>

With genuinely balanced civil-justice reform, Moynihan again, as with issue after issue in his career, has been able to see "old things in [a] new light and show[] the way to the future."<sup>117</sup> Now it will be up to his successors to follow his path of uncovering hidden truths on which to base beneficent public policy.

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115. See JEFFREY O'CONNELL & C. BRIAN KELLY, *THE BLAME GAME: INJURIES, INSURANCE, AND INJUSTICE* 129, 134 (1987).

116. Daniel Patrick Moynihan, *Foreword* to JEFFREY O'CONNELL, *ENDING INSULT TO INJURY: NO FAULT INSURANCE FOR PRODUCTS AND SERVICES* at xx (1975).

117. Barone, *supra* note 33, at 139.

## V. CONCLUSION

If Moynihan's Festschrift has its shortcomings, most notably critical gaps in an objective discussion of Moynihan's entire career, it nonetheless is a justifiable celebration of an extraordinarily distinguished public servant that is a joy to read. Senator Moynihan will, no doubt, have some notable and influential pronouncements in his remaining years. But regardless of his many likely future efforts, the compilation in this Festschrift, demonstrating the intellectual-as-public-servant, will admirably serve those who seek to chronicle or perhaps emulate the career of a man who is fond of reciting from memory on the floor of the Senate the oath of ancient Athens:

We will ever strive for the ideals and sacred things of the city,  
both alone and with many;

We will unceasingly seek to quicken the sense of public duty;

We will revere and obey the city's laws;

We will transmit this city not only not less, but greater, better  
and more beautiful than it was transmitted to us.<sup>118</sup>

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118. Robert A. Peck, *Daniel Patrick Moynihan and the Fall and Rise of Public Works*, in *FESTSCHRIFT*, *supra* note 3, at 68, 93.