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FIFTIETH ANNIVERSARY COLLOQUIUM

INTRODUCTION

The Fiftieth Anniversary of Boston College Law School was the occasion for multiple celebrations. The school has developed well in this short period and its quality and distinction are nationally recognized. During this year we looked backward and prepared a history of the Law School, which gave us valuable insights into its roots and progress. We celebrated with a major convocation for over 2000 guests, at which Senator Edward M. Kennedy was the principal speaker. The Alumni Association, under the leadership of the Honorable Joseph P. Warner, conducted an important professional seminar on criminal practice and ethics and, later, a seminar featuring Robert J. Kutak and members of his American Bar Association Commission discussing the proposed Model Rules of Professional Conduct. At its annual Law Day Dinner the Alumni Association recognized 25 representative alumni and faculty members whose careers have particularly distinguished the Law School.

Honoring what we have been and what we have become constituted a vital part of our celebration. The Law School will not, however, continue its growth without viewing the future as its important challenge. The Fiftieth Anniversary Committee, headed by Rev. Francis J. Nicholson, S.J., determined that one day during the year should be devoted to a Colloquium for the presentation and discussion of scholarly papers. A subcommittee chaired by Professor Sanford N. Katz and Professor Mary Ann Glendon focused this Colloquium on general issues of the family and children, since the school's celebratory year occurred in part in each of the Year of the Child and the Year of the Family. It is also an area in which this Law School is particularly rich in its scholarship and professional influence. The program was designed to give insights into the scholarship in the field from disciplines other than law.

We are particularly grateful to the Lowell Foundation and to another foundation that wishes to remain anonymous for their support of this program. Their grants both provided the stipends that recognized the particularly fine work of the participating scholars and are making it possible to distribute these papers widely within the academic and professional world. The presentations were exciting, informative, challenging and often passionate. Without these very generous grants these presentations could not influence the legal profession and the larger society. We hope that the wide dissemination of these ideas vital to our society will positively influence how this society progresses. We also thank Butterworth & Co. of Canada for a grant that supported various social functions at the Colloquium.

The day of the Colloquium was a day of pride and stimulation for all who attended. We very much hope that those who read these papers will share with us the enjoyment that comes from these new visions and new insights. The thoughts in these papers deserve to be influential in shifting society's approach to the problems they discuss. My final acknowledgement must certainly thus be to those four scholars who were the Colloquium.

RICHARD G. HUBER
Dean

KEYNOTE ADDRESS

LEGAL ETHICS: THE QUESTION OF PRINCIPALITIES AND POWERS†

ROBERT COLES*

For years, in the South, I found myself going into local courts or federal courts, testifying that no, so-and-so who belonged to SNCC (the Student Non-violent Coordinating Committee) wasn't a "sociopath" and was not "crazy," as some courts, aided, I regret to say, by my kind (the normative role of psychiatry in our contemporary life!), were repeatedly wont to conclude; or testifying that yes, I'd been working with black children, in Mississippi and Louisiana and Alabama and Georgia, and they were indeed in trouble, were indeed "suffering" by virtue of the effects of school segregation. I found both kinds of experiences, the "role" of the psychiatrist or that of the "expert witness" extremely unnerving. I wish now I'd dared say (dared realize back then) something quite else—that it was outrageous for me and the Southern white psychiatrists pitted against me in those courtrooms to wrangle over the subtleties of psychiatric nomenclature. Black and white youths I happened to consider ethical and brave (heroes of sorts for taking on various segregationist laws at considerable personal risk) were considered by other doctors to be stubborn, wrong-headed law-breakers, full of mischief, and in a number of cases, worthy of closed-door hospital confinement.

The "problem" was not only the values or the "behavior" of the civil rights activists, but the values and "behavior" of us —the doctors whose insistent, if not self-serving and self-deluding display of "scientific objectivity" was a mask of sorts. We were, each of us, calling upon the language of a privileged profession (medicine) to express deeply felt social views, moral ideas: psychiatric terminology as thinly disguised pejorative designation, and even, occasionally, outright name-calling, or alternatively, that same terminology as a means of celebration. One doctor's "psychopath," in those days, turned out to be another's "mature" individual—and so it commonly still goes. As for the black and white children I was getting to know in those Southern cities and towns, eventually I began to wonder why the federal courts, why the Supreme Court, needed my kind of (social science) testimony. Have we not learned, by now, that the "findings" of social scientists, as with psychiatrists, often tend to respond to personal inclinations or convictions—and naturally so, because the study of "humanity" cannot hope to resolve itself into the reasonably unequivocal certitudes of chemistry or physics formulas? Once, prodded by a federal judge, I tried to disqualify myself—at last, and thank God: "Sir, I believe that the issue of school segregation is a moral one, a constitutional one. If our Constitution, our Bill of Rights, can't guide us to an end of the legally sanctioned segregation we now have here in Geor-

† Keynote Address delivered at Boston College Law School, Fiftieth Anniversary Colloquium, April 25, 1980.

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gia, then I'm quite sure my observations of what is happening to certain children won't be of much use in that regard—and oughtn't be."

Those last three words—the judge asked about them, and I could only say that there is a lot of pain and hurt in this world, and a lot of suffering, some redemptive and some utterly futile, and that ultimately a society has to decide, in a given instance, whether documented anguish is part of the scheme of things, or a violation of deeply felt moral and legal principles. Had I not heard it put that way by poor 'black people themselves? Speaking of whom, here is a woman from Albany, Georgia reflecting on such matters, and too, on the law as a profession: "We believe in God; we go to church, and when we're there we pray hard. We know our Bible. Sometimes I look around me, and I want to sit down and cry—the unfairness in this world, the meanness, the hate in people. Other times I remember what the Lord told us, what His son Jesus Christ said—that we'll always be around, the poor. And didn't He know it. And didn't He choose to be one of us. And didn't He die like a lot of us do, poor and without a friend in the world, and 'despised and scorned' by all the big shots. And didn't He say to the whole world there will be justice alright, but not on this earth. Let me tell you, you won't find justice coming out of that county courthouse, and those sheriffs and deputy sheriffs and prosecutors aren't on the side of justice; they're on the side of the rich white folks. That's the way it is, and that's why we've got to fight for our rights, sure we do. I tell my children not to think there's going to be a 'new heaven and a new earth' while they're here in Albany, Georgia, no sir, and I tell them not to think the Constitution of the United States (that we hear about all the time these days) is suddenly going to run the show here. My cousin works in that courthouse. He sweeps the floors there. He keeps his eyes and ears open. He'll tell you how the law is made, who owns the law. He could teach people, if anyone asked. We have the civil rights people here; they're students, a lot of them. My cousin could teach *them*; he could give a course in the law, the *real* law, yes sir."

Over and over one could hear from her an uncanny mix of the provincial and the profound; an outlook of part resignation, part biblical fatalism espoused as a tight hold on reality, and part activist hope and commitment, in the sense that one tries, one keeps trying, to change this world, even if the prospects for success are not all that promising. As for those pointed observations, laced with accusations, they are the stuff of everyday rural life—a closeness not only to the land, but something else: "When I hear our minister read from the Bible; when I hear him talk about 'principalities and powers,' I'll tell you where my mind goes—it pictures that courthouse. It's all decided there, and people like me, they have to take what's decided, or else; and other people, the ones who run the show, they come in there and they have the law for themselves, and if they want something, or want to keep something they already have, then they quote 'chapter and verse,' like our minister says, but it's not the Lord's Book they call on. My cousin has seen all those law books, and they ratify, that's what they do, they ratify what you already have."

She had picked up that word, ratify, from her minister; he was a continuing source of inspiration, but also, shrewd social and political comment. And then there was her cousin to hear speaking, her cousin who was "culturally

disadvantaged" and "culturally deprived" (so we would have it), her cousin who was a "smart-aleck" to some of the courthouse gang—because, of course, he was wise to all of them. One day they would have that cousin up before the judge, before the law, before those principalities and powers, and he'd end up in prison, along with the cohorts of that notorious law-breaker, Dr. Martin Luther King. In jail, the cousin wondered about big cities, such as Atlanta. Do people like him in such places have to contend with similar legal encounters? Does the brute force of things get expressed so dramatically and concretely? Oh, yes, he was told by his fellow (political activist) prisoners: "They said if you're poor, you watch your step *everywhere*, because the cops are watching, and the welfare people, and everyone whose job it is to keep an eye on us. If you've got money, you get yourself a lawyer, and you keep these people away, all the officials. You get respect that way; they know to be careful with you."

Not a very original or surprising analysis of how it goes here, there, most everywhere; but one wonders whether some of us, so much better educated than he ever could hope to be, manage to keep such obvious matters of central fact right before our eyes, as we go about our reading, our writing, our studying, our practice of one or another profession. The mind has its ways of keeping us from truths, as well as leading us to them. As for that old fashioned word, character, I wish we'd all pay a little more attention to it. What makes for character, and how might we work at home and at school and in various offices to realize more of its presence among us? I read so much in psychiatric journals about "character disorders" even as, these days, judges and lawyers have to endure the term, and other associated ones. But what is the norm—better, the ideal, the moral as well as psychological standard—against which we make these judgments, if not crude and arbitrary categorizations? Have not we all heard someone in a court declared to be in possession of a "character disorder" (with "acting out" as a tendency, say) and found ourselves looking around at a colleague or two, even a neighbor or two, even a prosecuting attorney or judge, even (God forbid!) our own likeness in an unfortunately handy mirror, and wondering a little bit about our own moral soft spots and psychological flaws—masked perhaps by an adroit responsiveness to the prevailing status quo?

Ultimately, as my two Southern teachers, just quoted, had their own way of reminding us, law connects with our daily lives; does so for those who are defenseless, vulnerable indeed; and does so for those who have access to all the advice and representation they want and need (and then some); and does so, not least, for the so-called "practitioner," that dreary, nondescript word that gets applied to so many of us today—doctors and nurses and social workers as well as lawyers. What those two black social observers wanted me to know went something like this, so far as one, but not only one, American profession goes: best to look carefully at the implicit morality of what passes for (is touted as) the objective working out of a (legal) process. If I am a bit more pompous and heavy-handed than they knew to be, then that is itself of interest: the way we use language, sometimes, to soften the edge of things, even to conceal from ourselves the most obvious and pressing and consequential of moral problems, or at a minimum, moral ambiguities. (Actually, as

those two citizens would be the first now to acknowledge, a considerable amount of first-rate justice, as they would define it, eventually did work its way through that courthouse, however gradually and painfully.)

How to do justice, as it were, to that—to the ironies, paradoxes, inconsistencies which are the daily fare of judges, lawyers, clients, not to mention the masses of people (in the abstract, the poor, the so-called minorities) who never personally get to be clients, but who have their complaints, their felt experience of injustice to their credit, and on whose behalf, sometimes at least, cases are fought and fought? I know no better way than through novels—a means by which terribly hard, confusing, complicated moral and philosophical issues get worked into the lives of particular individuals, summoned for us by writers who know that a story can give us subtleties of light and darkness that the categorical clutter, alas, of a good deal of social science is, shall we say, not meant to provide. I think, in the 19th century, of Dickens' *Bleak House*, of Balzac's *A Murky Business*. What did Mr. Dickens want to tell us in that long, taxing, brilliantly demanding novel, with its famous and interminable law suit of Jarndyce and Jarndyce? This great novelist of social affairs, ever alert to the sordid life unacknowledged in the higher realms of the Victorian world, had in mind for us to see the endless wrangling done in the law's name at a given English Chancery Court as an example of something more general in this life: our endless capacity to get lost in procedures, in name-calling, in details that assume control of us, in abstractions and blind spots and dead-ends which, collectively, turn out to be a monstrous injustice, a farce, if not a messy disaster, all rendered in the name of what is "right" or "proper" or "necessary" or "just." Those of us who have in recent decades been entranced, for good reason, with Kafka's rendition of a relentless, inscrutable, and all too cold and aloof legal authority at work, would do well to renew an acquaintance with that English court Dickens gave us—justice as altogether a "Bleak House" indeed.

And across the channel, in that same 19th century, Honoré de Balzac was giving his countrymen one penetrating study after another—in sum, the *Comédie Humaine*. His novel *A Murky Business* (*Une Ténébreuse Affaire*) evokes for us the workings of criminal justice: the conceits and deceptions, the stratagems and tricks that pull strenuously at the high-minded law. Balzac was describing Napoleonic France, but he rather obviously asked us to keep in mind a larger span of time—man's continuing brutishness. He gave us an early version of the *roman policier*, a detective story as an instrument of legal analysis and satire, and too, of moral judgment. His conniving lawyers and politicians, his badly stained juries, his manipulation of the intricacies of the law, which lend themselves to dramatic mysteries, are by no means a matter of history.

Closer to our home and time there is William Faulkner's *Sanctuary*, also "*un roman policier*," André Malraux has told us. Horace Benbow is a lawyer I should think everyone of us, no matter our job, ought to get to know. He is a learned, thoughtful man who gets caught up in a web of guilt, bluff and deception, which he is unable to penetrate successfully. But this is no squeamish or weak-minded lawyer. Though Faulkner had his anti-intellectual side, he was interested in showing not a clever man with no nerve, but rather a decent and capable lawyer struggling hard against the pervasive evils of a

given society. The message, delivered gradually and subtly and with neither rhetoric nor distracting polemics (the virtue of a good novel) is that even the most principled and hard working and intelligent of lawyers (or doctors, or teachers, or journalists) can be stymied by a mix of personal wrongdoing, social hypocrisy, and political venality—elements in life which no one who works in a law office (or again, in a school or a hospital or a newsroom) can afford to ignore. Faulkner wanted to show us, among other things, in his brilliant Southern "country story," that a small-town lawyer, that any lawyer practicing anywhere, had best watch his step, and take little for granted, if he's going to dare move from bookish self-cultivation to an active, professional membership in a given society.

Benbow's frustration, even humiliation, is less dramatic, of course, than the kind of anguish the much better known Atticus Finch, another small-town Southern lawyer, went through in Harper Lee's *To Kill a Mockingbird*. Flannery O'Connor (in *The Habit of Being*) has reminded us that the novel is a children's story of sorts—an observation not meant to be snobbish or condescending at all. Young people crave a clear-cut exposition of the rhythms of the moral order, not to mention the particular social and political reality they will one day inherit. And so did a still young nation, in the 1950's, as it was struggling, literally as well as figuratively, to understand black and white. Southern writers have had all they could do to embody in fiction the region's special moral flaws—now, perhaps, much more the property of the North. Robert Penn Warren, in *All The King's Men*, gave us a glimpse at the moral rot under the high society of Louisiana—Judge Irwin as yet another instance of respectability turning out to be more apparent than, in the clutch, completely real. Lawyers and judges, of course, lend themselves to such purposes of the novelist; they are in a profession that we all want to associate with honesty, patience, ethical concern. But ironies are part of our life, and serve not only our novelists, but anyone who wants to document social reality. Fires get started in fire houses; doctors hurt themselves, fall sick; lawyers and judges break laws. Harper Lee had no such ironies to savor; she thought it was time to paint in the boldest strokes possible. What happens to a respectable man, a lawyer, not when he hides a bad past, but rather when he stands up for the good? What is the nature of a quiet, everyday, undramatic, even reluctant courage? We want questions like those two answered, and not only for the abstract purposes of the intellect. "Character is higher than intellect," Emerson reminded his well educated friends in his essay "The American Scholar," and character is nowhere better tested than in the kind of legal confrontation that takes place in *To Kill a Mockingbird*.

But back to Dickens, one more time; for he was obsessed, in all his novels, by the nature of that word "character," by its betrayal at the hands of people who ought to know better, and especially, by its ironic jeopardy in the lives of the lawyer after lawyer he insisted on creating for us. And why not put lawyers in his many novels? He was superbly qualified to do so, by personal experience as well as talent. When he was young, his father went to jail for non-payment of debts. Most of the family joined him there at Marshalsea Debtors' Prison! When Charles Dickens was fifteen he worked in a firm of Gray's Inn attorneys. A short while later he secured a job as a reporter in the

court of Doctors' Commons. He had plenty of opportunities to see them all, the various kinds of 19th-century English lawyers *we* now can see, by virtue of his writing: Sampson Brass, in *The Old Curiosity Shop*, a rather low-life fellow, a consort of crooks, an assistant to the greedy, a man who added burdens to the already miserable without the slightest pangs of regret—and withal, one who had the effrontery to claim the virtue of honesty; Jaggers, in *Great Expectations*, the lawyer as bully and fixer and fibber and imposing debator and mysterious behind-the-scenes operator, as well as agent of a beneficent fate; and Stryver, the unforgettable defender of a thoroughly decent man accused of high treason, in *A Tale of Two Cities*.

These figures are not mere agents of entertainment; they are meant to remind us that the law is one of the highest callings indeed, and therefore peculiarly vulnerable to scandal. Dickens was no gossip or jokester. In his hands comedy brings tears. In his hands lawyers are tested severely—found wanting, found worthy. I've had a fantasy for years: to teach a course in Dickens at a law school—his novels, in their total, a vast moral landscape of the law, and a wonderful means of stimulating ethical reflection upon legal issues, not the least of which would be: what are the special risks that confront a lawyer, if he or she is to keep clean hands, be in a position to look clients, judges and jurors straight in the face, not to mention (since a number of lawyers are to be found in churches on Sunday) sustain the scrutiny of that highest of law-givers, God Almighty?

As with doctors, or any other workers, can a lawyer separate what gets called a personal life from what we refer to as a professional life? In our time and nation, the lawyer and storyteller Louis Auchincloss, with such novels as *Powers of Attorney* and *The Partners*, makes abundantly clear (through a low-key, ironic, wry narrative manner) how intricately our homes, our passions and interests and habits connect with our working lives, in this instance, the lawyer's career. Auchincloss is not one to rail against the privileged Eastern legal establishment, but he can show a stretch of softened underbelly now and then—vanity and stupidity asserting themselves among people beautifully educated, and one might think, well enough endowed in appearance, lineage, and so on, to have no need of what George Eliot called "unreflecting egoism." We could do worse in our professional training than spend an hour or so a week in a discussion that feeds upon the human facts that such fiction continually highlights.

Meanwhile, to move from personal and professional issues to broader social and political ones, today's American law struggles with old polarities which have assumed the particular shape our part of the 20th century has compelled of them: the overriding public interest, as against individual interests; the limits of unimpeachable rights, as against the justification for legally sanctioned remedial justice; the importance of liberty, as against the requirements that significant redress of systematic injustice place upon law enforcement; how ought the law respond as a competitive market economy shifts more and more to a corporate society in uneasy existence with (sometimes collusion with) a bureaucratic, welfare and regulatory state. Once we regarded the legal order as politically neutral, as an expression of an ethic of individual responsibility. Then the law became increasingly preoccupied with

regulatory and utilitarian purposes; private law (the law of torts, contracts, property, or what is called commercial and corporation law) has had to come to terms with a more public law. But the liberal and progressive assaults on 19th-century law, substantial though they were, have given way to new, more radical, critical evaluations. Legal "reality" (that is, a sensible response to the demands of a changing political world) does not satisfy those who question the apparent political "reality" as much as they do the legal one. Justice, for them, means much, much more equity—and a law correspondingly changed with respect to its language, ideas, ideals, and needless to say, its practice: where, for whom, for how much. Meanwhile, interestingly enough, we become increasingly involved, in our national life, with countries for whom law is theocratic, stems from a God who has revealed it to a prophet in a scripture—hence the issue is not legislation or judicial decision, but an examination and interpretation of certain sacred texts. We in America ponder the nature of individual *rights*; in much of the Islamic world, the point is the *duties* imposed by God's law.

But our Bible and the Koran share with those who wrote our Constitution, and its Bill of Rights, a sense of concern for the dignity of each and every human being. We in this nation are said to be endowed by our Creator with certain "inalienable rights," having been "created equal." There were, after all, a few theocratic communities in America during the 18th century, and their acquaintance with Jeremiah and Isaiah and Amos, and Jesus of Nazareth and His Disciples, had an impact on those rational and sometimes skeptical "founding fathers." The men who wrote our Constitution distrusted the "principalities and powers" of their day (Royal England) and had enough historical sense to imagine future threats of a similar, even worse kind, hence the hedges, the qualifications, the reservations—but also, the great silences: acknowledgement that no one, at one point in time, can spell out another generation's imperatives. Ours today have to do with survival—with a kind of equity that presses upon us not so much from within our territorial boundaries (that, too!) but from without. How do we accommodate ourselves, legally and otherwise, to entire nations, entire continents, it seems, for whom we are, collectively, no less than a "principality and power" in the exact Biblical sense of the expression? Will the day come when this planet's secular nations respond with the fire of the prophet Amos, the stunning humility of the itinerant pauper and declared outlaw Jesus—respond legally to the rights of everyone, everywhere: that life not be endangered by supposed law-keepers who contrive in various ways to keep available (or potentially available) food from the hungry, or who enable a few to conspire against (and lord it over) the many, or who risk the entire planet's life because of the whims or terrible fears or haughty demands of a handful of men in a few capital cities?

These are, of course, rhetorical questions—but then, Charles Dickens had a few of them in mind when he surveyed with horror the human devastation he saw over a century ago. And his sadness at the seeming inadequacy of the law, in the face of such conditions, is surely not unfamiliar to some of us today—even as we remind ourselves (correctly, I believe) that there is just so much the law can do. In the end it is we as mothers and fathers, as neighbors, as workers, as voters, as men and women of our word who will make the

ethical, and yes, political difference. We must as individuals, learn to be just with one another. To that end, the law may help, but ultimately the issue is that old fashioned word *character*—the aching need for it among us.

LEGAL HISTORY AND FAMILY HISTORY: THE CHILD, THE FAMILY, AND THE STATE†

STANLEY N. KATZ*

In speaking on the subject of family law to the Boston College Law School community, on the occasion of your fiftieth anniversary, I am reminded of my former colleague Richard Posner's opening line in a review of *The Cost of Accidents* by Guido Calabresi: "Torts is not my field."¹ I am a teacher of torts, but unhappily, I am not a teacher of family law. Nevertheless, I will do my best to rise to the challenge which Professors Katz and Glendon have set me.

Historians, even those who do not teach in law schools, are understandably frustrated by the use courts all too frequently make of historical evidence, and there is a temptation to argue that if lawyers and judges only had a more profound understanding of the past, the quality of their work would improve. For reasons which I will come to in the conclusion of this talk, I do not fully share that view. For both aesthetic and utilitarian purposes, however, it seems useful to review certain aspects of the history of the family in the United States in relation to the history of family law. Indeed, the challenge is especially pertinent at this moment—the history of the family has been radically revised during the past ten years,² while the legal relations of child, family, and state have been modestly revolutionized during the same period of time.

The beginning of this inquiry into the history of the family is traditional. We begin at the end. Last term, the Supreme Court of the United States decided the case of *Parham v. J.R.*³ This case involved a challenge to a Georgia statute which permitted voluntary commitment of children under the age of eighteen to state mental hospitals subsequent to an application for hospitalization signed by a parent or guardian. The plaintiff children contended that this procedure violated their due process rights since it did not provide for an adversary process and a formal hearing prior to commitment. The case

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¹ 37 U. CHI. L. REV. 636 (1970).

² In addition to works cited elsewhere below, see also *Turning Points: Historical and Sociological Essay on the Family*, 84 AM. J. OF SOC. (Demos & Boocock ed. Supp. 1978); *FAMILY AND INHERITANCE: RURAL SOCIETY IN WESTERN EUROPE, 1200-1800* (Goody, Thirsk & Thompson ed. 1976); E. SHORTER, *THE MAKING OF THE MODERN FAMILY* (1975); *THE AMERICAN FAMILY IN SOCIAL-HISTORICAL PERSPECTIVE* (2d ed. M. Gordon 1978); H. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925* (1976); E. ZARETSKY, *CAPITALISM, THE FAMILY AND PERSONAL LIFE* (1976); L. TILLY & J. SCOTT, *WOMEN, WORK AND FAMILY* (1978). For the most extensive examination of the history of family law to date, see M. GROSSBERG, *LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA* (1979) (unpublished Ph.D. dissertation at Brandeis University). For a recent comparative perspective, see J. DONZELOT, *POLICING THE FAMILY* (1980).

³ 442 U.S. 584 (1979).

thus raised a number of issues which traditionally have preoccupied family law—the rights of parents over those of their children; the rights of children against those of their parents; the rights of children against those of the state.

Speaking for the Court, and upholding the constitutionality of the Georgia statute, Chief Justice Burger buttressed his legal reasoning with the contention that “[o]ur jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course. . . .”⁴ Citing Sir William Blackstone and Chancellor Kent, he went on to say that

[t]he law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience and capacity for judgment required for making life’s difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interest of their children.

As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attest to this. That some parents “may at times be acting against the interest of their child” . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child’s best interests. . . . The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.⁵

This is not the place to examine constitutional jurisprudence in order to see whether in fact the Supreme Court has upheld “Western civilization concepts of the family,” whatever they may be. It is worth noting, however, that at least three members of the court—Justices Brennan, Marshall, and Stevens—did not agree, and cited Professor Sanford Katz among other authorities for the contrary result.⁶

Another fairly recent indication of the Court’s attitude towards family related legal issues is the 1977 decision of *Moore v. City of East Cleveland*.⁷ There the Court addressed the question whether a municipality could constitutionally restrict occupants of private dwelling units to members of a single family, where “family” included only closely related persons. In *Moore*, the plaintiff lived in a house with her son and grandsons. Yet she received a notice of violation from the municipality, stating that one of her grandsons was an illegal occupant of the home and ordering her to remove him. The Supreme Court, speaking through Mr. Justice Powell, concluded that the due process clause invalidated the ordinance in question. Once again stressing the importance of the family, the Court stated: “Our decisions establish that the Constitution protects the sanctity of the family precisely because the institu-

⁴ *Id.* at 602.

⁵ *Id.* at 602-03.

⁶ *Id.* at 630 n.16 (Brennan, J., dissenting).

⁷ 431 U.S. 494 (1977).

tion of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."⁸ Justice Powell cited the well known Amish decision *Wisconsin v. Yoder*.⁹ In that case, the parental right to make child-rearing decisions in education was upheld because it reflected a "strong tradition of parental concern for the nurture and upbringing of their children" founded in "the history and culture of Western civilization," and because the parental role "is now established beyond debate as an enduring American tradition."¹⁰

It is my view that the Supreme Court, like inferior federal and state courts, has not defended the unity and authority of parents and the family structure as consistently as these three cases—*Parham*, *Moore*, and *Yoder*—would suggest. I cite them, however, merely to show the extent to which the court is tempted to argue from an idealized version of history in defense of its family law decisions. Indeed, a quick glance at the authority cited for some of the non-legal propositions on which these cases are based demonstrates the extreme unlikelihood that the various commentators cited would agree with one another. Professor Katz, for instance, must feel at least slightly uncomfortable to find himself quartered with Blackstone and Kent.

I agree with Justices Burger, Powell, and their brethren in the assertion that parental authority in the family generally has been honored by American courts. My point is not so much that parental authority has not consistently been respected—although that is true. Rather, my point is that the very meaning of these terms has changed dramatically throughout the course of our history. To assume that "the family" or "the child" are terms with a unitary historical significance or that the family as an institution is monolithic and unchanging is to miss the primary lesson of the new family history. To do so is to adopt an historical determinism that is out of place either in the classroom or in the courtroom.

What I should like to do is to review briefly some of the significant features of the American family during the first two generations of our national history, approximately from the Revolution to the Civil War, in order to suggest some ways in which the *problem* of the family has been truly consistent in American history. I will be talking about the "mainstream" American family, which on the whole means the free, white, middle class family living on or reasonably near the Eastern seaboard. As *Moore v. East Cleveland* recognized, there is a multitude of different family types in the United States today, and the same observation would hold true for the late eighteenth and early nineteenth centuries. Nevertheless, I trust that the generalizations will have some limited utility.

The principal assertion to be made about the family which emerged out of the Revolutionary era is that it was a transitional institution. For reasons both related and unrelated to the political revolution, social, economic, and

⁸ *Id.* at 503-04.

⁹ 406 U.S. 205 (1972).

¹⁰ *Id.* at 232. For a particularly acute analysis of the Supreme Court's family law jurisprudence, see Burt, *The Constitution of the Family*, in 1979 SUP. CT. REV. 329.

intellectual forces were transforming what might be called the pre-modern family into its more or less contemporary form. Perhaps the transformation is perceived most easily with reference to children. As Phillipe Aries¹¹ and his American followers have shown us, the very idea of "childhood" is a modern conception. Pre-modern people did not conceive of childhood as a separate period of life, nor did they attribute to children distinctive roles or rights. Historians are fond of illustrating this point by analyzing family portraits of the pre-modern and modern periods, in which it is striking that in the former children are dressed like little adults, whereas in the latter they wear distinctive garb which sets them off in their new-found status. Children become the objects of new-found attention and, especially, affection. The child-centered family is thus a creation of this Revolutionary period.

At the same time, an intellectual revolution was taking place. Rousseau and other prophets of the Enlightenment conceptualized the child as free, natural, untainted, and innocent—the conception we recognize immediately in the work of William Blake.¹² This was in stark contrast to the dark Protestant view of children that had prevailed during the first 150 years of American history. In that early period, according to traditional Calvinist tenets, children were viewed as innately depraved, infected with original sin, and requiring the breaking of their wills so that they might be forced to submit to what was euphemistically called "Christian liberty." Jonathan Edwards, let us not forget, described unrepentant children as "young vipers and infinitely more hateful than vipers."¹³ One easily can imagine how this new perception of children altered strategies for child rearing. Philip Greven¹⁴ has described graphically how evangelical and even moderate colonial Americans self-consciously attempted to subdue their children's independence and to make them conform to the dictates of divine law and parental wisdom. As long as salvation was generally perceived as dependent upon conversion, it was obviously the parents' highest duty to treat their children in such a manner. For Rousseauian modern parents, however, precisely the opposite was indicated. For them, the child was a fragile flower to be cultivated, nourished, and appreciated so that its finest qualities could realize their potential. The discovery of childhood and an optimistic view of child psychology thus transformed child-parent relations.

Affection rather than power characterized the nature of modern family cohesion as family ties became more emotional. The family also tended to be a unitary group in contrast to the colonial pattern, in which children were

¹¹ P. ARIES, *CENTURIES OF CHILDHOOD* (1965).

¹² For Rousseau, see *Emile*, 5-7 (1911):

Tender anxious mother, I appeal to you. You can remove this young tree from the highway and shield it from the crushing force of social conventions. Tend and water it ere it dies. One day its fruit will reward your care. From the outset raise a wall round your child's soul; another may sketch the plan, you alone should carry it into execution. Plants are fashioned by cultivation, manned by education.

For Blake, see *Songs of Innocence and Experience* (1789).

¹³ Quoted in B. WISHY, *THE CHILD AND THE REPUBLIC* 11 (1968).

¹⁴ P. GREVEN, *THE PROTESTANT TEMPERAMENT* (1977).

"put out" or apprenticed—not so much to learn a trade as to ensure that parental affection would not impede the duty to coerce children into morally correct behavior. Nineteenth century parents felt themselves independently capable of proper child-rearing.

Politics, too, played an important role. First, the theory of republicanism was in itself conducive to modern, generous, and optimistic views of children. Republicans (small "r") emphasized the relationship between individual virtue and the capacity for self-government. The emergent American nation was, after all, an infant—and later a child—among nations, and was engaged in throwing off the bonds of a discredited parent. Here, indeed, was the second lesson of the Revolution for the family—authority is to be obeyed only when it is just. In the truly republican family this would pose no problems, but, to paraphrase Archibald Cox,¹⁵ the idea of independence, once unleashed, is not easily cabined. Thirdly, the Revolution was at least in part an egalitarian revolution. I do not need to lecture this audience on the limitations of egalitarianism in the eighteenth century, for obviously the founding generation did not see fit to treat *all* men—much less women—as equal, but the idea of equality most certainly was set loose in the land. As far as children were concerned, the first and most tangible legal result of egalitarianism was the abolition of primogeniture and the commitment to the equal division of intestate inheritances among all the children in a family.

The economy aided this process. As America grew increasingly urbanized, industrialized and more prosperous, the opportunities for relatively young children to leave the nest and fend for themselves became more common and more attractive. Industrialization also drew fathers and, to a lesser extent, mothers away from the household to work. The economic necessity to remain within the structure of the family was lessened, and to that extent relations between children and their parents were transformed. As Lawrence Stone has reminded us, industrialization did not create the modern family, which predates the Industrial Revolution, but it certainly eased its birth.¹⁶

I have been speaking primarily about children, but the ideas I have been discussing obviously can be applied more generally to the family. As the republican John Adams said in 1778, "the foundations of national morality must be laid in private families."¹⁷ Families were perceived as the keystone of the new republic, and they seemed just as important to the Framers and their generation as they do to the current Supreme Court. The early national period witnessed considerable democratization of the family. As the oft-quoted de Tocqueville observed:

In a democratic family the father exercises no other power than that which is granted to the affection and experience of age; his orders would perhaps be disobeyed, but his advice is for the most part au-

¹⁵ Archibald Cox stated that "[o]nce loosed, the idea of equality is not easily cabined." Cox, *Constitutional Adjudication in the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

¹⁶ L. STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND, 1500-1800* (1977).

¹⁷ Quoted in Flaherty, *Law and the Enforcement of Morals in Early America*, 5 PERSPECTIVES IN AMERICAN HISTORY 247 (1971).

thoritative. Though he is not hedged in with ceremonial respect, his sons at least accord him with confidence; they have no settled form of addressing him, but they speak to him constantly and are ready to consult him every day. The master and the constituted ruler have vanished; the father remains.¹⁸

By "father", de Tocqueville meant the "modern" parent:

I think that in proportion as manners and laws become more democratic, the relation of father and son becomes more intimate and more affectionate; rules and authority are less talked of, confidence and tenderness are often increased, and it would seem that natural bond is drawn closer in proportion as the social bond is loosened.¹⁹

Perhaps the most profound change, however, was the general sociological transformation of the early national family. It was an institution which, as I have noted, was bound together less by ties of authority than by ties of affection. It was also increasingly a *private* institution, a notion which superficially may seem to run against the current of republican and democratic ideas which were contemporaneous with it. What happened, however, was that the pre-modern conception of a unitary, organic social community was, in the nineteenth century, gradually replaced by the idea of a society mechanistically composed of individuals and discrete groups, each pursuing its own interests. It was, in other words, a liberal view of society, one in which the notion of commonwealth was replaced by the notion of "the pursuit of happiness" (and for "happiness" read "interest"). In this new context, the family, both as an economic unit and as an intimate association of affective relationships, was seen as adrift in a competitive sea.

Within the family, the greatest change has been the transformation in the role of the wife—the emergence of "women's sphere." As husbands were more and more engaged in work outside the home, those women who did not have to work outside the home were identified with the home and child-rearing; their role became perceived as something separate and distinctive. To quote Nancy Cott:

Women's sphere was "separate" not only because it was at home but also because it seemed to elude rationalization and the cash nexus, and to integrate labor with life. The home and occupations in it represented an alternative to the emerging pace and division of labor. Symbol and remnant of preindustrial work, perhaps the home commanded men's deepest loyalties, but these were loyalties that conflicted with "modern" forms of employment. To be idealized, yet rejected by men—the object of yearning, and yet of scorn—was the fate of the home-as-workplace.²⁰

The consequences of this transformation were profound both for children and for the marriage relationship. It was now mothers to whom the Rous-

¹⁸ A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1835), quoted in R. BREMNER, 1 *CHILDREN AND YOUTH IN AMERICA* (1600-1865) 349 (1970).

¹⁹ *Id.* at 349.

²⁰ N. COTT, *THE BONDS OF WOMANHOOD* 62 (1977).

seauian task of child-rearing fell, and it was mothers who assumed authority within the family. It is not surprising, therefore, that it was in this period that American courts for the first time turned their backs on the claims of fathers to exclusive custodial rights to children, and perceived that mothers were frequently, if not always, best selected for the role of single parent. Needless to say, although it is well beyond the parameters of this talk, this was also the era in which the women's movement commenced, and in which the still-uncompleted process of the emancipation of the American woman was first begun.

Speaking very crudely, then, the history of the family from the Revolution to the Civil War is the story of the interaction of a number of quite distinct currents: the political effects of the Revolution, the socio-economic effects of urbanization and industrialization, the relative secularization of society and, above all, a transformation of the national value system.

It would be difficult to exaggerate the impact of republicanism on American social values during the first generations of our national existence.²¹ I refer especially to the concept that the political viability of republican government depended upon the cultivation and preservation of virtue among individual citizens. According to republican reasoning, it was only if individuals could perceive the public good as superior to individual good that the open republican polity could operate effectively. Just as soon as individuals saw their individual self-interest as superior to the public interest, faction, party and other antisocial forces would gain the upper hand and rob the polity of its vitality and, ultimately, of its viability. Clearly, as liberal ideas emerged with striking force in the period after 1820, public virtue and the public good were conceptions radically transformed; subsequent appeals to republican virtue generally have fallen on deaf ears in our society. Ironically, however, it was *within* the family that the notion of the common good had its most lasting impact, with the result that it badly undermined pre-modern authoritarian conceptions and, especially, the conception of paternal authority. The new private and affectionate family was, ideally, a republican family. The maternal role, therefore, had a strongly political cast to it, for one of the major purposes of child-rearing was training for democracy. All in all, the new family was therefore entirely different from the colonial family, which had been organized on authoritarian lines and committed, in general, to a rigorously religious view of its social purpose.

Nothing is simple in history or life, however, and of course America was still a Protestant nation in the nineteenth century. While a considerable degree of secularization had occurred in the larger society, most Americans still considered themselves Christians, and their family life reflected this commitment. Yet what had changed was the way in which religion affected their family life. The new view of childhood combined with optimistic views of child psychology led most families to pietistic and moralistic conclusions, to

²¹ G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* (1969); STOURZH, *ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT* (1970).

Bushnellian theories of Christian nurture. These were, in most cases, entirely consonant with the moral side of political republicanism.

The value which would matter most to the American family, in the long run, was that of equality. I have already noted a few of the ways in which egalitarian ideas had an impact upon conceptions of children. Many more could be cited, and of course this is the principal theme of de Tocqueville's writing on the family. In the early nineteenth century, the idea was probably most powerful in launching the reorientation of male-female relations, and especially husband-wife relations. While the law still formally reflected the reactionary Blackstonian view of male dominance and female subordination, the social facts in America were otherwise. Even before the movement for legislative reform of their legal status, American wives began to play determining roles in their families, and in a variety of ways the legal system actually recognized their new status and power. Although it is true that Chancellor Kent himself held to essentially Blackstonian views of the limited legal role of women,²² American case law of the period—and indeed even of the colonial period—paints a much more attractive picture of the comparative legal competence of American womanhood. Equality there was not, and thus the women's movement rightly used the inequities of the legal system as a rallying point for the gathering of political support. Yet the truth of the matter is that American women of that era were treated relatively better than their British sisters. Women and children were not equal to men before the law—indeed antebellum Americans never for a moment believed that *persons* should be equal before the law—but Americans increasingly agreed upon the liberal proposition that individual self-fulfilment within traditional roles was the primary rule of behavior in American society.

It is not surprising, then, that a partially modernized family and a public ideology poised between republicanism and liberalism should have yielded a very mixed set of results in family law. I have not the time, nor really do I know enough, to give a scholarly accounting of the state of antebellum family law, but it seems to me that several propositions are relatively clear. It was in the period under discussion, for instance, that modern notions of child emancipation came into being and were extended. It was at the outset of this era that the law of inheritance was revolutionized, particularly with respect to the abolition of primogeniture and entail. Divorce in its modern form became easier to obtain, and, as Jamil Zainaldin has so elegantly demonstrated, courts systematically undermined the traditional rights of fathers to child custody.²³ Indeed, I suppose that the Massachusetts adoption statute of 1851, the first legalization of adoption in the Anglo-American world, is the most dramatic example of change in this area of law. In addition, one should not overlook

²² KENT, 28 COMMENTARIES ON AMERICAN LAW 107 (11th ed. G. Comstock 1867):

The legal effects of marriage are generally deducible from the principle of the common law, by which the husband and wife are regarded as one person, and her legal existence and authority in a degree lost or suspended, during the continuance of the matrimonial union.

²³ Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038 (1979).

the emergence of public education or a host of legislation affecting the conditions of labor.

It would be very hard to sum up this complex series of developments, especially since contemporaries did not conceive of a distinct set of rules called "family law."²⁴ Rather, these were changes in various aspects of property law, labor law, and the law of domestic relations, all of which bore importantly upon the lives of children and their parents. The mere fact that lawyers did not view the area as sufficient unto itself tells us something about the role of the family in the law of that day, but certain trends seem evident. The authority of married men was considerably eroded by emerging legal protection for their wives and, to a lesser extent, their children. Married women certainly were treated somewhat more generously by the courts and, later, by legislatures. On the whole, however, courts still tended to support parental authority when it was clearly determinable, both against challenges from children and from the state itself. Nevertheless, perhaps the most important development was that of the mediating function of the state, especially in the form of courts. Plaintiffs who sought divorce, adoption, or emancipation, or who were engaged in other legal disputes over the allocation of power and resources within the family increasingly came to the courts for the enforcement of newly-found rights. Resort to state power for the enforcement of these rights had its price, however. The appetite of the state—or at least the capacity of the state—for intervention into family affairs dates from this period, and although its course had not been even, the history has been one of increasing involvement.

Although I find it difficult to tie the conception to a specific event or writing, it seems to me that one strong but subordinate theme in this story of antebellum family law is pervasive fear for the stability of the family and concern for its viability. Time and time again, courts remarked that custody disputes, divorces, and other legal disputes were evidence of the decreasing strength, or increasing fragility, of the family structure. They, like public Americans to this day, stressed the centrality of family strength to social and political stability in America. Nevertheless, given the structure of the legal system, the courts enforced new rights and relationships when they felt compelled to do so, and thus developed new doctrines required in the interests of justice, even when these new developments seemed likely to weaken the family as an institution. The emergence of the "best interest of the child" standard during this period is probably the most telling example.

It was a complex set of concerns for the child, the family, and individual rights which led to some of the most novel legal results, and this continued to be the most revolutionary thrust in family law into the early part of the twentieth century. The story of the "child-saving" movement, the emergence of the juvenile court, and the host of Progressive reforms in behalf of women and children are sufficiently familiar to all of you, I am sure. The rationale of the reformers was some variant of the republican ideology I have already out-

²⁴ Joel Bishop's *COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE* (Boston 1852) appears to be the first modern American treatise. Compare REEVE, *LAW OF BARON AND FEMME* (2d ed. 1846).

lined, though frequently combined with a condescending paternalism. That is to say reformers felt it important not only to treat children (and women) fairly as a matter of individual justice and equity, but also as a matter of political prudence.

As fourteenth amendment protections for individual rights have become available, however, court-enforced defense of the perquisites of individual family members, particularly children, has increasingly seemed to run counter to the cohesion of the family group. "The best interests" of the child are not necessarily "the best interests" of the family, and this fact accounts for the historical platitudes resorted to by the courts in support of family-oriented results. Nevertheless, the childcentric view generally has seemed more compelling ideologically, especially in times of liberal constitutional change. The *Brown* case²⁵ is the leading example.

I have long thought that commentators have ignored the child-centered thrust of the *Brown* opinion. Obviously, it is an opinion about the need for racial equality in the society, but it is first an appeal for racial equality among children in an educational context. You will remember that Chief Justice Warren argued that:

[E]ducation is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.²⁶

We are being told, I think, that the critical matter here is equalizing the potential of children to be good citizens, since it is upon the existence of good citizens that the national and democratic fabric rests. In political theory, then, children and the family have always been core values for Americans and for their legal system.

What can we conclude from this brief resume? If you will permit me two clichés, I can remind you that the task of the historian is to predict the past, but that at the same time the past is prologue to the present. My crystal ball is therefore turned backward, but I do believe that the general continuity which I have attempted to trace is apparent enough. That is to say, the family has remained a central, cherished, political, and nervously-held value for Americans since the time of the American Revolution. In perhaps the most recent of books to be written on family history, by Carl Degler,²⁷ we are given a basically optimistic report on the state of the American family, although the bookstores are at the same time full of tracts informing us that the traditional

²⁵ 347 U.S. 483 (1954).

²⁶ *Id.* at 493. Compare WILSON, LECTURES ON LAW (1804) in 1 THE WORKS OF JAMES WILSON 81 (McCloskey ed. 1967):

In every government, which is not altogether despotal, the institution of youth is of some publick consequence. In a republican government, it is of the greatest. Of no class of citizens can the education be of more publick consequence than that of those, who are destined to take an active part in publick affairs.

²⁷ WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT (1980).

family is on the verge of destruction. Nearly the same divergence of views could be discovered in any period of American history. The probability is that the American family is doing just about as well as it ever did.

At least a couple of trends are quite clear to the historian. The first and primary trend is in the direction of equality among the sexes. From a legal point of view, certainly husbands and wives are now far more equal than at any time in American history. One can argue about a number of matters, and perhaps all our problems would be solved if sex were a "suspect category" or the Equal Rights Amendment were adopted, but certainly there is very substantial equality as between parents. In fact, there are even those who would argue that it is the male who has fallen behind. Secondly, it is quite clear that there has been a genuine revolution in the area of children's rights. While children made important gains in the nineteenth century, there has been a veritable explosion in the legal protection of children over the last eighty years or more. Here again, there is room for debate. Equality is surely not the rule as between parents and children. *Ingraham v. Wright*,²⁸ the case permitting corporal punishment of children in public schools, and other comparable decisions indicate that there is still room for progress. *Ingraham* illustrates a third trend, however, and this one perhaps less benevolent than the other two: the increasing capacity of and opportunity for the state to involve itself in family relationships. In part, this is the natural and inevitable result of the assertion of constitutional rights in the courts by family members. Nevertheless, as in the case of *Doe v. Delaware*,²⁹ currently before the Supreme Court, which tests the constitutionality of the state's power to remove children permanently from the homes of "unfit" parents, extra-familial values and decisions are increasingly imposed upon families. This, obviously, is the price that must be paid for the legalization and, what is more, constitutionalization of relative rights within the family structure.

Much of this change is the result of the one continuing strand of Revolutionary values in this country, and that is egalitarianism. Women's rights and children's rights are, after all, merely expressions of a larger egalitarian trend, and ultimately egalitarianism and family cohesion must reach the point of incompatibility, unless we are talking about a family structure of a kind utterly different from anything we have seen previously in American history. All of this is complicated by what I take to be a growing mistrust of the capacity of the state to act wisely and fairly when dealing with individuals, especially in institutional situations.³⁰

True to human nature, we want it both ways. We would like the state to enforce our own rights against others and yet we are not very happy when the state intrudes into our lives in the process of enforcing the rights of others. We should remember, however, that from the seventeenth century, state intrusion has been the norm rather than the exception in American his-

²⁸ 430 U.S. 651 (1977).

²⁹ 100 S. Ct. 1336 (1980).

³⁰ J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973); J. GOLDSTEIN, A. FREUD, A. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* (1979).

tory. What has changed is the efficiency and legal jurisdiction of the state, not its basic pattern of behavior.

The study of history cannot tell the Supreme Court how to decide *Doe v. Delaware*, nor could it have provided an adequate analysis of *Parham v. J.R.*, *Moore v. East Cleveland*, or *Wisconsin v. Yoder*. Chief Justice Burger is certainly correct in saying "Our jurisprudence historically has reflected . . . concepts of the family as a unit with broad parental authority over minor children,"³¹ but that is about as helpful as saying that our jurisprudence has supported the notion of "free enterprise." Everything depends upon what we mean by the "family unit" and "parental authority." These are concepts which have evolved steadily from 1776 to the present, so that reference to such general values is conclusory. It is for the society, obviously, to determine the policy questions which will resolve such conflicts.

If history tells us anything, it tells us that the American family has been an incredibly flexible institution. The family has evolved with changing values and social needs, and it is not clear to me that at any time it was the family which caused our problems. Quite the contrary, it is the family which characteristically reflects our difficulties. I suppose the question that I am left with as an historian will seem somewhat simple-minded to you. It is this. I see egalitarianism as the most consistent, vigorous, and seemingly inevitable value in our legal tradition. The courts and legislatures have gone a long way in accommodating claims to equal treatment within the family, and I think it predictable that they will go further still. One does not have to side with Mrs. Schlafly³² and those who see ERA as the death knell for the American family to worry that at some point in the not too distant future there will be a fairly dramatic transformation in our family arrangements. Since Americans have always believed that family arrangements were prior to political arrangements, this is a matter which obviously ought to concern all of us. We must not forget, then, that the political function of the family is the aspect of the *new* "modern" family which most needs conceptualization. I come to Boston College Law School optimistic that it is in institutions such as this that appropriate, democratic, and viable solutions will be explored and developed.

³¹ 442 U.S. at 602.

³² P. SCHLAFLY, *THE POWER OF THE POSITIVE WOMAN* (1977).

ECONOMIC DATA, POLICY-MAKING, AND THE LAW†

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The fields of law and economics commingle in a number of specific areas. Taxation, regulation of industry, and health care provide obvious examples. On a functional level the title of this paper expresses the essential relationship between economics and the law. First, with available data economists analyze specific problems. From this analysis, policy options emerge. Finally, the social choice among these policy alternatives is made and expressed in law.¹

For example, in the early sixties economic analysis of a variety of data disclosed a condition of lagging growth. To stimulate growth some economists recommended a tax cut. As a consequence of these recommendations, the administration proposed legislation to cut taxes. When Congress undertook to study and debate this legislation, it discovered that different economists with different analyses favored other policy options. As a result, alternative legislative proposals emerged. Thus, the legislative process provided a method of exposition, generating new information and increased understanding for Congress and the public. Economic data were gathered and analyzed, and from the analysis Congress and the American people were able to make an informed policy choice in enacting the tax cut legislation in its final form.²

If we use this framework in thinking about the next fifty years, we find that much of the data required a decade or three from now already exists. Most of the people who will be alive during the next fifty years are alive today. Although over one hundred million Americans will be born before the year 2030, they will be outnumbered for most of the time between now and then by people who are with us now and who will live and grow older through the next half-century.³ Consequently, if we observe those among us

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¹ This interpretation of the relationship between law and economics stems from the author's acceptance of the need to distinguish, to the extent possible, between economic analysis and economic policy. The latter explicitly incorporates value judgments, which is not to say that the former is entirely value-free. This view depends primarily on Lionel Robbin's essay, *The Nature and Significance of Economic Science* (2d ed. 1935).

² THE ECONOMIC REPORT OF THE PRESIDENT AND THE REPORT OF THE COUNCIL OF ECONOMIC ADVISERS. Washington, D.C. U.S. Government Printing Office, 1962 and the annual issues of these reports for the years 1963, 1964, 1965. See also ALVIN H. HANSEN, *THE POSTWAR AMERICAN ECONOMY*. New York. W.W. Norton & Company, 1964; Paul A. Samuelson, *Functional Fiscal Policy for the 1960's*, Arthur W. Burns, *The Federal Tax Cut and the Economy*, James Tobin, *The Tax-Cut Harvest*, all in ARTHUR OKUN, ED., *THE BATTLE AGAINST UNEMPLOYMENT*. New York. W.W. Norton & Company, 1965; Walter Heller, *The Kemp-Roth-Laffer Free Lunch*, Wall Street Journal, July 12, 1978, at 20.

³ U.S. Bureau of the Census, *Current Population Reports*, Series P-25, No. 704, "Projections of the Population of the United States: 1977 to 2050," U.S. Government Printing Office, Washington, D.C., 1977. The census projects population change and

who will shape the next century, we should be able to predict something about it. From data concerning what is happening to them now we may learn a bit about their future. Most of these people, of course, either are children or have recently attained adulthood.⁴

According to the analysis provided by human capital theory, children have a particular economic significance for the future. Today's children will be tomorrow's workers and their productivity will depend on their health, their education, their mobility and adaptability, and so on. Investments today in children's health, education, and training will provide positive yields tomorrow in the form of greater productivity than would otherwise exist.⁵ We can predict how well off our society will be in the coming decades by examining the kind of investment we are making now in these human capital resources, children.

The object of this paper is to examine, through human capital theory, this nation's current social and economic policy toward its children. Utilizing currently extant economic data, it will be argued that the country's policy, or more accurately its lack thereof, is woefully inadequate, and that our present posture does not bode well for a bright economic future in the twenty-first century. While it is beyond the scope of this paper to propose a specific alternative policy, it does pose some fundamental questions about policy revealed by a careful analysis of current economic data. The paper argues that the answers to these questions today will significantly affect our economy—as well as the quality of life—in the future.

its components by making assumptions about fertility, mortality, and net immigration; three series of projections use different assumptions. For the year 2030, the estimates for total population ranged between 249,315,000 and 392,768,000. Taking the age distribution shown in the middle projection, those over 45 number more than half the adult population; those over 54 slightly less than half. Taking the mid-point of the five-decade period, 2005, those under 25 represented slightly more than one-third of the total population. Not until the year 2020 will people yet to be born outnumber those who are currently living. I conclude, therefore, that the future will be shaped chiefly by those who are alive today.

⁴ The interrelationship of law and economics makes it impossible to quantify this statement. The term *adult* has legal meaning—specifically, age at majority. This may differ from state to state and even within states depending on the substantive field of regulation. The census lists people's chronological age up until the age of 19; older people are counted in groups of 5-year age intervals.

⁵ The concept of human capital has a long tradition in economics, exemplified by the following from Alfred Marshall, the synthesizer of classical economics: "The most valuable of all capital is that invested in human beings; and of that capital the most precious part is the result of the care and influence of the mother, so long as she retains her tender and unselfish instincts, and has not been hardened by the strain and stress of unfeminine work." ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS*, 8th edition, MacMillan, 1920, p. 564. See also the survey of pre-Marshallian economics beginning with Adam Smith, by BERNARD F. KIKER, *HUMAN CAPITAL: IN RETROSPECT*, Columbia: University of South Carolina, Bureau of Business and Economic Research, 1968. The modern exposition of human capital theory owes its existence to Theodore W. Schultz, Nobel prize-winner in economics for 1979. A useful introduction appears in his presidential address to the American Economic Association in 1960, *Investment in Human Capital*, *AMERICAN ECONOMIC REVIEW*, March 1961, pp. 1-17. Later theorists followed the lead of Gary S. Becker; cf. his *HUMAN CAPITAL*, second edition, National Bureau of Economic Research, 1975.

If we examine the data about investments in our children, we discover an alarming and unexpected phenomenon. We are under-investing in a sizable proportion of children—the millions who are poor. More troublesome, the total number of poor children is trending upwards. The poverty population, all the poor people we count, has become largely a population of families with children.⁶ Almost one out of every six children lives in a poor family. Furthermore, the distribution of income has become more unequal between childless families and those with children, *and*, within the group of families with children, between wealthy families and poor ones. There is no indication that the condition of inequality among children or the underinvestment in poor children will change in the immediate future. To the extent that poverty implies neglect of potential human capital, we are neglectful in underinvesting for the future. If the 15 percent of all children who live at poverty levels of income⁷ received the same amount of education and health care, equal conditions of housing environment and family stability, and the same type of employment experience as that invested in children who are not poor, the future economic and social prospect for this country would look much more prosperous.

Using dollar figures in analyzing inequality or poverty among children requires looking at families with children. The census does not pick up income data for individuals under the age of fourteen since such figures would be, for the most part, useless. Economically, as well as legally and psychologi-

⁶ In 1978, of 24.497 million persons living below the poverty level of income, 9.722 million consisted of children under 18 years old; they numbered 16% of all children and 40% of the poverty population. In 1969, by contrast, poor children amounted to only 13.8% of all children: the increase is significantly different, in statistical terms. U.S. Bureau of the Census, *Current Population Reports*, Series P-60, No. 124, "Characteristics of the Population Below the Poverty Level: 1978," U.S. Government Printing Office, Washington, D.C., 1980, Table A, p.2.

⁷ Economists recognize a variety of poverty concepts and measurement, each containing value judgments. Yet most of the public uses terms like "poverty level" or "poverty income" with little understanding of the analytical problems involved. This paper relies on two measures of poverty. The first, used in the text so far, consists of the "official" poverty level of income stated in current dollars. These dollar income figures derive from the poverty index adopted by the Federal Interagency Committee in 1969 and based on the method developed by Mollie Orshansky in her path-breaking article *Counting the Poor*, *SOCIAL SECURITY BULLETIN*, January, 1965, U.S. Department of Health, Education, and Welfare, U.S. Government Printing Office, Washington, D.C. The index yields annually about 120 different dollar incomes, different poverty levels calculated for families differing in size, composition, residence, and age. Unfortunately most people refer to the poverty level, and use the dollar figure for a family with two adults and two children despite the fact that few families, and even fewer poor families, fit this description. The second measure of poverty, used in most of the text's statements about inequality, also provides, annually, dollar income figures; it is calculated as one-half the median income for that year. Unlike the first, this measures relative poverty; it was suggested by Victor Fuchs in *Redefining Poverty and Redistributing Income*, 8 *THE PUBLIC INTEREST* (Summer, 1967) pp. 88-95, following his *Toward a Theory of Poverty*, in *THE CONCEPT OF POVERTY*, Task Force of Economic Growth and Opportunity, Chamber of Commerce of the United States, Washington, D.C. 1965. Fortunately the observations of this paper do not require readers to accept any one method of measuring poverty, because they refer to gross differences in condition, that is, differences so great they are revealed by any accepted measure of "poverty."

cally, children depend on others for the resources that sustain their growth and development. In common-sense terms, because we know families and individuals have different amounts of income, we expect to find children also differing in this regard, some living in more affluent circumstances than others. If incomes are not equal, and are not going to be equal, in this country, then children's "incomes"—the amounts they receive in real resources including food, shelter, and so on—will not be equal.

The degree of income inequality between one group and another can be great or minimal and can change over time. A visit to Versailles vividly illustrates the point. The economic gulf that existed between the kings and courtiers living in the palace and the peasants who moved the orange trees from greenhouse to courtyard must have been beyond our comprehension. Such inequality, the gross distance between the economic circumstances of rich and poor, does not now exist in France, or in this country. A visit to an underdeveloped economy like Haiti or Morocco emphasizes the point. Such countries contain homes and lifestyles exceeding in luxury those of millionaires in the United States, yet in the urban slums of these countries people pick garbage for food. The distance between rich and poor in an underdeveloped country is that between wealthy landowner and starving peasant. Inequality can be seen by looking. In most respects the distance between rich and poor in this country is not so obvious.⁸

One social goal of this country has been to reduce the conditions of inequality and this value presumably holds today. We need not divide the pie into equal shares in order to prevent it from consisting of one large share and all the rest in crumbs. I know of no sentiment that exists for widening the circumstances between rich and poor, yet within the past fifteen years, families with children have moved farther and farther apart on the income scale. Table I illustrates this development by showing the relative income measure applied to families with children, as well as the number of children below this measure, *i.e.*, fifty percent of the median income.

Unlike data using poverty incomes, the information in this table does not rely on any judgment about "the necessities of life." Although the official poverty income figures show one type of inequality, unlike the relative measure used here they do not reveal anything about the distribution of those incomes above the calculated dollar minimum, who may be just above poverty or comfortably well off. The index used in Table I reflects the entire income distribution and it enables year-by-year comparisons without correcting for price changes.

In any distribution of families or persons by income, one-half of all the units counted fall below the median income and one-half fall above. Hence, taking one-half of the current dollar median as a cutoff point allows a valid comparison of the number below this level in successive years as income and

⁸ Death from famine does not occur in this country; most deaths from malnutrition have occurred in cases of criminal child abuse. A more homely example exists on most college campuses, where the millionaire's daughter cannot easily be distinguished from the daughter of a welfare mother. Only the college financial aid office knows the difference.

TABLE I

THE RELATIVE INCOME INDEX, FAMILIES WITH CHILDREN,
SELECTED YEARS (POPULATION FIGURES IN THOUSANDS)

	1959	1965	1977
(1) Number of families with children	26,994	28,101	31,637
(2) Number of children	64,015	69,684	62,823
(3) Median income, families with children	\$5,483	\$7,110	\$16,009
(4) Fifty percent of median income, families with children (Line (3) ÷ 2)	\$2,741	\$3,555	\$8,004
(5) Number of families with incomes lower than line (4)	4,360	4,449	7,065
(6) Number of children in families with income under fifty percent of median income	11,138	11,916	12,648

Source: U.S. Bureau of the Census, *Current Population Reports*, Series P-60, No. 51, 118, "Money Income in 1959, 1965, 1977 of Families and Persons in the United States." U.S. Government Printing Office, 1979. Lines 4-6 calculated by the author.

price change. For example, if incomes increased from one year to the next, but everyone's income rose equally, the number or percentage of the total population falling below one-half the median income would remain constant. That clearly has not occurred in the United States during the past generation. Instead, comparing three years shows that inequality has risen significantly, especially since the mid-sixties.

Additionally, the table shows that the greater total of children living at the low end of the income scale today does not mean poor families have a greater number of children than they did formerly. In fact, not only do the data show that the average family size has dropped, but that the number of large families with 4, 5, 6, or more children, has dropped even more.⁹

Finally, the table shows another dimension of inequality by contrasting

⁹ In 1977 the number of poor families with three and four children was 1,296,000 compared to 1,854,000 in 1959. In that year families below the poverty level which contained five or more children numbered 1,131,000; by 1977 the number of such families had dropped to 413,000. U.S. Bureau of the Census, *Current Population Reports*, Series P-60, No. 124, "Characteristics of the Population Below the Poverty Level: 1978," U.S. Government Printing Office, Washington, D.C., Table 5, p. 23.

the rise in the number of *poor* children with the fall in the total number of children. The declining birthrate has brought yearly decreases in the population under eighteen, but not in the low-income population under eighteen. Furthermore, there has not been any general increase in the inequality of income distribution. The past decade has continued a long period of rising economic growth with increasing real incomes. Despite recent substantial price rises people are better off in real terms, living above the levels of the forties, fifties, or sixties, and the growth of prosperity has been widely shared. In fact, the distribution of income by quintiles or deciles has shown little change since the late forties.¹⁰ This means that poverty as measured by the official dollar figures has declined. It has decreased least, however, among families with children.¹¹

Alarming as these figures on inequality may be as indicators of current economic and social conditions, their significance for the future holds more import because the amount of investment in a child's human capital depends so much on the current economic status of that child. The resources devoted to children's health, education, housing, living conditions, employment opportunities, and other experience can yield a return in the future level of earnings generated by the human capital involved.¹² To measure the inequality in human capital investment among children goes well beyond the scope of this paper, but some illustrative data may be useful.

¹⁰ See any of the *Current Population Reports*, Series P-60, entitled "Money Income of Families and Persons in the United States." The following data come from No. 119, cited in text *supra*.

DISTRIBUTION OF AGGREGATE INCOME BY FIFTHS AND TO THE TOP FIVE PERCENT, FAMILIES AND UNRELATED INDIVIDUALS, FOR SELECTED YEARS.

Percent Distribution of Aggregate Income

Years	Lowest Fifth	Second Fifth	Middle Fifth	Fourth Fifth	Highest Fifth	Top Five Percent
1959	3.2%	10.6%	17.7%	24.7%	43.9%	17.1%
1965	3.6	10.6	17.5	24.8	43.6	16.6
1977	3.8	9.7	16.5	24.9	45.2	17.3

It must be remembered that any particular individual or family may change position in this array from year to year, so the persistence of income inequality does not mean income stability for all units, although it does mean that the pie is shared in the same way.

¹¹ *Id.* at 5. In 1959 about 22% of the population was counted below the poverty level, some 39 million persons. In 1977 only 25 million persons fell in the poverty population, about 11.6% of the total.

¹² Human capital theory has come to encompass a very wide area. Modern analysis began, as noted previously, with the link between education and the productivity of labor which seemed analogous to the link between technology and the productivity of capital. But once the notion of human capital became widespread, similar links were perceived between labor productivity and such factors as health, mobility, marital status, and a spectrum of situational variables hitherto regarded as "socio-economic characteristics" exogenous to economic theory. The empirical work of testing hypotheses drawn from human capital theory contains far more studies of education than of any other type of investment, partly because data on the number of years of school

Education, as a location of inequality, was one of the earliest areas of concern for children. The civil rights movement during the sixties focused on racial segregation, and inequality among groups was defined in terms of race. But after the 1954 decision of *Brown v. Board of Education*¹³ attention turned to the resources devoted to education, particularly the school systems financed by states and localities. Inequality became framed in economic terms, and in the particular economics of school finance.

The California case of *Serrano v. Priest*¹⁴ provided increased impetus for research, by economists and legal and administrative experts, as well as for action, primarily by state legislators.¹⁵ Inequality is no longer defined purely in terms of race, for children of the same race go to schools that differ widely in what they offer. To some considerable extent, but not invariably, differences in school finance represent differences in the resource base, that is, the economic circumstances of the locality.¹⁶ Nonetheless, school expenditures, per pupil, provide one quantitative measure of inequality in education.

Analyzing the amount of disparity is itself a problem area,¹⁷ but one study using only comparable data found only "a slight lessening of disparity nationally." The analysts also noted that the states with the least disparity operated relatively few school systems and tended to be the smallest in popula-

completed abound and these could be used to represent education. Similar data for health or mobility remain extremely scarce, primarily because of the difficulty in quantifying these conditions. At the National Bureau of Economic Research, an ongoing program of research on the development of the American economy uses quantitative data on height, by age, as indicators of people's health and nutrition. Preliminary findings suggest that this approach will prove fruitful in tracing the link between investment in improved nutrition and health and its presumed payoff in greater labor productivity.

If the hypothesis of this paper about children were to be tested, we might investigate the nutritional composition of the diets of families with children to see if inequality exists. We could compare nutritional data over time to find out if inequality has intensified in recent years. Similar studies could be formulated for other types of investment in children's human capital. For example, the work of child psychologists in studying the "formative years" translates easily into human capital terms. The scope of this paper, however, is limited to a few existing human capital indicators and attempts primarily to focus attention on the distribution of investment among children.

¹³ *Brown v. Board of Education*, 347 U.S. 483 (1954).

¹⁴ *Serrano v. Priest*, 487 P.2d 1241 (1971).

¹⁵ B. LEVIN, ED., *FUTURE DIRECTIONS IN SCHOOL FINANCE REFORM*, Lexington, Mass. Lexington Books, 1974; W.N. GRUBB & S. MICHELSON, *STATES AND SCHOOLS*, Lexington, Mass. Lexington Books, 1974; E.O. TRON, ED., *SELECTED PAPERS IN SCHOOL FINANCE*, Washington, D.C. U.S. Office of Education, 1974; C. JENCKS ET AL., *INEQUALITY*, New York. Harper and Row, 1972; J. CALLAHAN & W. WILKEN, EDs., *SCHOOL FINANCE REFORM: A LEGISLATOR'S HANDBOOK*, Washington, D.C. National Conference of State Legislatures, 1976.

¹⁶ Helen F. Ladd, *Local Education Expenditures, Fiscal Capacity, and the Composition of the Property Tax Base*, 18 NATIONAL TAX JOURNAL 145-58, 1975 and Martin Feldstein, *Wealth Neutrality and Local Choice in Public Education*, 65 AMERICAN ECONOMIC REVIEW, 75-89, March 1975 are useful introductions to this analysis.

¹⁷ Lee S. Friedman and Michael Wiseman, *Toward Understanding the Equity Consequences of School Finance Reform*, EDUCATION FINANCE AND ORGANIZATION, National Institute of Education, Washington, D.C. U.S. Government Printing Office, 1980; CAROLYN SHAW BELL, *THE ECONOMICS OF THE GHETTO*, Bobbs-Merrill, 1970, pp. 195-208.

tion size.¹⁸ By another test, the authors found a slight improvement in the disparity between wealthy and poor areas within states, but conclude nonetheless that "[w]ealth-related disparity in 1975 can be regarded as very severe."¹⁹ Other research studies confirm the general statement that no trend to more equality of education in the schools has yet appeared.²⁰

Above the elementary grades, the growth of economic inequality among families with children can only lead to wider inequalities of educational achievement. While federal programs for grants and loans benefit poor families, they also help those higher up in the income distribution. The vast expansion of public higher education in state colleges and universities represents a massive redistribution of income from lower-income taxpayers to higher-income families whose children acquire the human capital investment of higher education.²¹ It is still true that college enrollment reflects income more than ability. The high school drop-outs, the children testing below grade average, and those with some college but no degree are largely from the low end of the income distribution rather than from the middle and upper ranges of the scale distribution.²²

Beyond education, employment opportunities for middle and upper income teenagers are also better than those for youths from poor families. This inequality of employment opportunities for teenagers developed after a remarkable shift in social attitudes toward education and employment as alternative occupations for young people. Prior to 1930, the decennial census figures show that about one out of two young men, aged 16-19, and one out of four young women in the same age group were in the labor force.²³ At the same time, high school graduates were a small minority: less than 10% of all seventeen-year-olds before 1913 and less than 50% as late as 1942.²⁴ In that year college entrants, as a percentage of all those entering the fifth grade, were only 20%.²⁵ These data present a life-cycle pattern for most young people that called for full-time employment after leaving school among males,

¹⁸ Lawrence L. Brown, III, Alan L. Ginsburg, J. Neil Killalea, Richard A. Rosthal, and Esther O. Tron, *School Finance Reform in the Seventies: Achievements and Failures Selected Papers in School Finance* 1978, U.S. Department of Health, Education, and Welfare, Washington, D.C., 1978, p. 60.

¹⁹ *Id.* at 64.

²⁰ Education Commission of the States, *SCHOOL FINANCE REFORM IN THE STATES*, 1976-77; JENCKS, *supra* *America in the Seventies: Some Social Indicators*, *Annals of the American Academy of Political and Social Science*, January, 1978 [hereinafter cited as *Annals*].

²¹ J. PECHMAN & B. A. OKNER, *WHO BEARS THE TAX BURDEN?*, Washington, D.C. The Brookings Institution, 1974; W. LEE HANSEN & B. WEISBROD, *BENEFITS, COSTS, AND FINANCE OF PUBLIC HIGHER EDUCATION*, Chicago. Markham, 1969.

²² U.S. Bureau of the Census, *Current Population Reports*, Series P-20, No. 333, "School Enrollment—Social and Economic Characteristics of Students: October, 1977," Washington, D.C., U.S. Government Printing Office, 1979; Abbott L. Ferriss, "Education and Training," in *Annals*, *supra*.

²³ U.S. Bureau of the Census, *Historical Statistics of the United States*, 3rd edition, Washington, D.C., U.S. Government Printing Office, 1975, Series D 29-41, Vol. 1, p. 132.

²⁴ *Id.*, Series H598-601, Vol. 1, p. 379.

²⁵ *Id.*, Series H587-597, Vol. 1, p. 379.

and for either employment or marriage among females, preceded either by a short period of employment or by full-time household duties in the family. Those attending school and college came primarily from the middle and upper income classes, and the children of such families were not expected to be employed.²⁶

Especially during the depression years of the thirties, a middle-income teenager wanting a job would have been caught up short by disapproving parents. No respectable father able to support his family would allow daughters or sons to work after school, nor was it appropriate for his children to want such experience. Jobs were scarce and reserved for grown men with families to support.²⁷

During the years since World War II, both family and children have acquired different perceptions of the relationship between employment and education.²⁸ On the one hand, the explosion of post-secondary educational systems in community colleges, junior colleges, and universities provided new opportunities for those of all income levels to attend college. The data show a steady rise in the percentage of young people graduating from high school and enrolled in college.²⁹ At the same time, the growth of distribution and other service industries meant rising opportunities for part-time employment.

Labor-force participation by teenagers today represents primarily part-time work: youngsters work after school and during vacation and most are not school dropouts.³⁰ Between 1949 and 1978 labor-force participation rates for young people who were also enrolled in school went up by fifty percent for males and more than doubled among females.³¹ This increase in part-time work is also reflected in data showing that teenagers with some work experience during the year numbered over 50% for sixteen- and seventeen-year-olds, and almost 80% for eighteen- and nineteen-year-olds.³² Yet at the same time, school enrollment rates were almost 90% for the sixteen- and seventeen-year age group and almost 50% for the older teenagers.³³

Teenage employment, as long as it does not replace education, provides highly rewarding capital for the future. Young people learn about different types of jobs and employers, they explore their own capabilities, and they become familiar with some routines of the workplace. When they enter full-

²⁶ L. I. DUBLIN & A. J. LOTKA, *THE MONEY VALUE OF A MAN*, New York, The Ronald Press, 1930; J. B. PEIXOTTO, *GETTING AND SPENDING AT THE PROFESSIONAL STANDARD OF LIVING*, New York; MacMillan, 1927.

²⁷ J. A. GARRATY, *UNEMPLOYMENT IN HISTORY*, New York, Harper, 1979, pp. 191-93.

²⁸ *Historical Statistics of the United States*, *supra*, Series H 689-699, Vol. 1, pp. 382-83.

²⁹ *Id.*, Series H587-597, H598-601, Vol. 1, p. 379.

³⁰ William V. Deuterman, Jr., and Scott Campbell Brown, *Voluntary Part-time Workers: A Growing Part of the Labor Force*, MONTHLY LABOR REVIEW, June, 1978; *Employment and Training Report of the President*, Washington, D.C., U.S. Government Printing Office, pp. 12-14, 85-87.

³¹ *Id.*, Table B-6, p. 299.

³² *Id.*, Table B-15, p. 314.

³³ U.S. Bureau of the Census, *Current Population Reports*, Series P-20, No. 333, *supra*, Table 2.

time employment their experience pays off both in more satisfying work and in higher wages.³⁴

Like educational capital, the valuable resource of teenage employment experience is not now distributed equally. It has always been true that whites find jobs more easily than blacks, and that boys and men become employed more quickly than girls and women. But these gaps were narrowing among teenagers as total employment soared during the fifties and early sixties. As the civil rights movement opened opportunities for higher education to more black teenagers, the total number of this group employed dropped, while unemployment fell also, approaching rates for white teenagers. In the late sixties, however, coinciding with the significant change in the relative income index, noted earlier, teenage employment experience began to diverge sharply by race and sex. Depending on the short-run state of the economy, unemployment rates among whites fluctuated between 11 and 14%, but unemployment among blacks rose steadily from 24% ten years ago to about 40% today.³⁵ A black male highschooler, ten years ago, was half as likely to find a job as his white counterpart; today his chances are four times worse relative to whites, and the inequality between white and black teenage women, has widened even more.

The distribution of inequality is not, however, entirely along lines of race and sex. We also know that more teenagers from upper income families find work than those from lower income families.³⁶ Thus, the children from families already providing a rich source of human capital in education and income can add to this the experience of learning about work. It is the children who are better off who are most likely to have the opportunity to benefit from earning their own incomes. As a result, they are likely to be even better off, relative to poor children in the future.

The data quoted, however, do not tell the full story. Using such comparative data for any one year can be misleading when examining a trend through time. The economic status of families is not necessarily as static as a superficial

³⁴ Richard B. Freeman and David A. Wise, *Youth Unemployment*, National Bureau of Economic Research, 1980; B. ANDERSON & I. V. SAWHILL, *YOUTH EMPLOYMENT AND PUBLIC POLICY*, Prentice-Hall, 1980, ch. 6.

³⁵ *Employment and Training Report of the President*, *supra* pp. 268-69. *Id.*, at 268-70. During the 1960's female white teenage unemployment ranged between 10% and 17%, compared to a range of 24% to 40% for their black counterparts. By the end of the '70's white female teenage unemployment ranged between 12% and 19% but the rates for blacks had soared to between 35% and 46%. Comparable figures for males show a range during the early period of 13% to 18% for whites and 20% to 32% for blacks; by the late '70's white teenage male unemployment ranged between 11% and 19% but the rates for blacks lay between 31% and 40%. Between 1973 and 1978 unemployment for black teenagers rose from 31% to 40%, but this represented an increase for males of 27% to 37%, while for females, unemployment rates rose much higher, 36% to 43%. See also Orley Ashenfelter, *What Do Teenage Unemployment Statistics Measure?*, in NAOMI BERGER DAVIDSON, ED., *SUPPLEMENTARY PAPERS FROM THE CONFERENCE ON YOUTH UNEMPLOYMENT*, Washington, D.C. U.S. Department of Labor, Employment and Training Administration, 1978.

³⁶ Freeman and Wise, *supra* note 34; see also Carolyn Shaw Bell, *Minimum Wages and Personal Income*, forthcoming in a volume to be published by the American Enterprise Institute, Washington, D.C.

review of the figures might indicate. For example, if last year 35% of black teenagers looking for work were unsuccessful and this year the percentage of those without jobs has risen to 40%, it does not mean that the unemployed youngsters of a year ago are still looking, with their numbers reinforced by more. Similarly, the 15% of the children who were poor in 1965 were not the same children as the 15% who were poor in 1967. Many of those counted at the low end of the income distribution ten years ago were much better off five years ago and may even be rich today. On the other hand, some of those who were in comfortable circumstances a decade ago may have experienced years of severe economic loss, and only now may be beginning to fight their way back up from reduced or poverty-stricken living conditions. The inequality problem among children does not, primarily, concern a perpetual underclass, born, raised, and living as adults in the same economic circumstances.³⁷

It does, however, imply yet another kind of equality, that of instability of income or living conditions. Income change affects a person's economic welfare or sense of well-being. As one analyst put it, "[i]ndividuals with the same permanent income levels may be at different levels of well-being depending on their temporal income uncertainty. . . . Thus, in order to describe an individual's welfare position more completely, we must consider not only the level of his income but also the uncertainty associated with that level."³⁸

Consequently, the distribution of income security or economic stability among children, along with the distribution of income and the distribution of human capital investment in various forms, must be considered to evaluate fully the impact of a child's present economic status on his or her future productivity. Families with children may experience changing economic circumstances for a variety of reasons. First, they may be affected by general economic conditions, as when the nation or an entire community suffers severe unemployment. On the other hand, a family with children may suffer severe economic disruption as the result of a more particular economic condition, as when an individual earner's job skills become obsolete. Researchers have found, however, that changes in family composition have the strongest effect on the economic well-being of the family.³⁹ Evidently, therefore, the

³⁷ This statement is based on observations first made by James Morgan, *Change in Global Measures*, in *FIVE THOUSAND AMERICAN FAMILIES—PATTERNS OF ECONOMIC PROGRESS*, Volume I, Institute of Social Research, the University of Michigan, Ann Arbor, Michigan, 1974, reporting a longitudinal survey of families. Other data confirm the statement. See subsequent volumes in the *FIVE THOUSAND AMERICAN FAMILIES* series and the literature review provided by Sharon M. Oster, Elizabeth M. Lake, Conchita Gene Oksman, *The Turnover Rates of Poor Families*, in *THE DEFINITION AND MEASUREMENT OF POVERTY*, Westview Press, 1978.

³⁸ Jacob Benus, *Income Instability*, *FIVE THOUSAND AMERICAN FAMILIES*, Vol. 1, p. 277. See also much of the work of S. M. Miller. E.g., S. MILLER and P. ROBY, *THE FUTURE OF INEQUALITY*, Basic Books, Inc., 1970.

³⁹ This finding appeared after the first five years of the study of income dynamics at Michigan's Survey Research Center, previously referred to as the Five Thousand American Families longitudinal survey. "Family composition change is the most important of all the variables we include in our analysis of changed well-being." Vol. I, p. 337. After a much longer period, the same finding held, "Various types of family composition changes bring about dramatic and often detrimental changes in well-being." Vol. V, p. 19.

distribution of economic stability will be closely related to the distribution of family stability.

For children, family stability and continuity of circumstances have great significance. First, the security of home environment contributes to the child's development, and any period of disruption looms much larger in the life of a child than in the life of an adult.⁴⁰ Next, the years of childhood are years of investment. They are the time when learning takes place that will affect the child's future well-being. The home environment of the child itself provides one type of experience, but it also affects what the child takes from other sources, from the experiences formally and informally structured and planned in the streets, the schools, and the playgrounds. Whether or not children become productive adults, independent and functioning as whole individuals; whether they earn a satisfactory income or live by sharing income earned by someone else; whether they move to wider options in education or drop out of school; and whether they have choices of employment or settle for a second-class exploited existence depends on their childhood experience—the human capital they accumulate. The effect of changing family composition and of changing economic well-being on these investment processes may have very long-lasting results.

Even a cursory look at the data reveals that the distribution of economic security and family stability is extremely unequal. The most dramatic difference in economic security and family stability as a function of family composition is that between two-parent families and single-parent families. Two-parent families tend to provide for their children with their own resources and it is common for a family member to take another job to help pay for a better home in which to raise children or for the education of the children. Additionally, two-parent families have built-in insurance against the threat of economic insecurity from job loss. Since two earners (or potential earners) exist, the family need not suffer a total loss of income from the unemployment of one earner.⁴¹

Families with children used to consist primarily of two parents and their offspring, but the new class of single-parent families is now growing faster than any other type. Moreover, modern single-parent families differ from those that existed previously. Traditionally, single-parent families were composed of orphaned children and fatherless infants whose mothers were widows. Today's single-parent families, however, contain children who lack

⁴⁰ "The 'family,' however defined by society, is generally perceived as the fundamental unit responsible for and capable of providing a child on a continuing basis with an environment which services his . . . needs. . . . Continuity of relationships, surroundings, and environmental influence are essential for a child's normal development. . . . A child's sense of time is an integral part of the continuity concept." Joseph Goldstein, Anna Freud, Albert J. Solnit, *Beyond the Best Interests of the Child*, The Free Press, 1973, pp. 13, 31-32, 40.

⁴¹ As of March, 1979, 51% of all the children under 18 lived in families with working mothers; 52% of all the mothers with children under 18 were in the labor force. Beverly L. Johnson, *Marital and Family Characteristics of the Labor Force, March, 1979*, in U.S. Department of Labor, Bureau of Labor Statistics, *MONTHLY LABOR REVIEW*, April, 1980, pp. 48-52.

TABLE II

NUMBER AND PERCENT OF CHILDREN IN FAMILIES BELOW AND ABOVE
POVERTY INCOMES, BY TYPE OF FAMILY, 1977

SIZE OF FAMILY INCOME COMPARED TO POVERTY LEVEL INCOME

(POPULATION FIGURES IN THOUSANDS)

Type of Family	Total		Less than Poverty Income		Above but less than two times Poverty Income		Twice but less than three times Poverty Income		Three or more times Poverty Income	
	Number	Per- cent	Number	Per- cent	Number	Per- cent	Number	Per- cent	Number	Per- cent
Husband- wife	51,585	100	4,371	8	12,032	23	14,295	28	20,886	40
Female head	11,238	100	5,658	50	4,225	38	1,431	13	926	8

Source: U.S. Bureau of the Census, *Current Population Reports*, Series P-60, No. 119, "Characteristics of the Population Below the Poverty Level; 1977." U.S. Government Printing Office, Washington, D.C., 1979.

fathers because of desertion, divorce, separation, or because their mothers were never married, and the first three of these events represent changes in family composition that were discovered by the Michigan researchers to be closely tied to economic instability. Some indication of the dimension of change comes from a survey of women covering the last year in which they were living with their husbands and the first year in which they were no longer with their husbands. "In the short run, the economic traumas associated with leaving an intact marriage can be extremely serious. . . . White family income decline[d] from about \$10,000 to \$5,300 (in 1967 dollars) in the 1-year transition period . . . [and] for black women, family income declined from about \$7,100 to \$4,400."⁴²

In most single-parent homes, children know their mothers are dependent. Over half receive income from public sources or other people's efforts. Children in families on welfare, the major form of public assistance, know about things hidden from other children their age—about social workers and the power of the welfare office, about living in a project and going to a clinic. Children in families on welfare see their mothers using food stamps in supermarkets and hear the comments of other shoppers. They know that their environment is different and that *they* are different from other children.

The difference, to *children*, between living in a family with two parents and living in a one-parent family appears dramatically in Table II. This inequality of incomes for *children* reaches above as well as below the poverty level of income. In two-parent households the majority of children live with incomes exceeding three times those of poverty while in families dependent upon women only one out of five children enjoy such economic well-being. Additionally, in two-parent families only 8% of the children live below the poverty level of incomes, but in families dependent on women half the children are poor.

The *trend*, for children, that appeared in Table I is underscored by the data on single-parent families for the past two years in Table III.

TABLE III

INCOME DIFFERENTIAL FOR CHILDREN, HUSBAND-WIFE FAMILIES
AND FAMILIES WITH FEMALE HEADS, 1977 AND 1979

Type of Family	1977		1979	
	Median Income	Mean Number of Children	Median Income	Mean Number of Children
Husband-Wife	\$17,056	2.04	\$20,447	1.97
Female head	6,346	2.05	7,514	1.96

Source: U.S. Bureau of the Census, *Current Population Reports*, Series P-60, "Money Income of . . . Households in the United States," No. 109, 1978 and No. 121, 1980. U.S. Government Printing Office, Washington, D.C.

⁴² U.S. Department of Labor, Employment and Training Administration, *The Socioeconomic Status of Households Headed by Women*, R & D Monograph 72, U.S. Government Printing Office, Washington, D.C., 1979, p. xi.

Thus when all the data on inequality among children are considered, it seems that the single most important variable increasing income inequality and preventing the reduction of poverty among children has been the steady growth of single-parent families.

Even where single parents can support their children without the economic assistance of welfare, however, inequalities still exist. The greatest of these is time, for single-parent families are "time-poor."⁴³ Whether we dignify the housewife's tasks by the term "household production" or "consumer maintenance," the fact is that the system of income distribution which relies on families to redistribute the earnings of workers almost necessitates that there be a housewife for each family. Certainly where there are children, their care seems to be a full-time job, and it combines rather efficiently with other home-centered jobs of cleaning, marketing, and food preparation that need doing. If the "traditional" family has provided a neat division of labor between the sexes with men being economic providers and women the homemakers,⁴⁴ then a single-parent family by definition is unequal to one with two adults, for no such division of labor is possible. The extra burden on a single parent of caring and coping along with managing the household stems from the lack of another adult and has inevitable impact upon the children. The resources devoted to investment in children also may differ in the amount and the quality of parenting provided. The attention from adults, the home surroundings, and the stability and security of the family of course varies among individual homes, but such variance rarely outweighs the difference between what the two types of families can provide a child, especially in terms of economic security.

Although such inequality cannot be expressed in dollar figures, we know that it has increased sharply, because the number of single-parent families has grown so rapidly in the recent past. Between 1970 and 1979 the number of families with children dependent solely upon a mother almost doubled. The number of two-parent families with children actually declined during the same time-period.⁴⁵ The conditions making for such expansion in the numbers of single-parent families have not disappeared and show no indication of immediate change.

In addition to the more traditional forms of human capital deprivation—income, education, employment, and time—the current rise of the single-parent family and the concomitant rise in the inequality of human investment among children has provided a new dimension of poverty among children, consisting of the real costs in time and lost opportunities when pregnancy and childbearing occurs among sexually active children. The sexual

⁴³ Clair Vickery, *The Time-Poor: A New Look at Poverty*, JOURNAL OF HUMAN RESOURCES, 1977, XII:1:27-49.

⁴⁴ A useful summary and introduction is provided by Harriet B. Presser *et al.*, *Household Structure*, in ISSUES IN STATISTICAL NEEDS RELATING TO WOMEN, *Current Population Reports*, Series P-23, No. 83, U.S. Bureau of the Census, U.S. Government Printing Office, Washington, D.C., 1979.

⁴⁵ U.S. Bureau of the Census, *Current Population Reports*, "Household and Family Characteristics: March 1979," Washington, D.C., U.S. Government Printing Office, p. 3.

revolution of recent years appears most dramatically in teenage experience. By the mid-1970's premarital intercourse before the age of eighteen had become almost standard and certainly accepted behavior.⁴⁶ Because most discussion has been couched in terms of "teenagers" or "adolescents," it avoids the reality that these young people are children themselves. Some data present figures on "expectant mothers" even when they refer to fourteen-year-old girls who are pregnant. The data on "childbearing females" do not suggest the possibility of children undergoing traumatic experiences. Indeed, one might wonder about the impact of simply reissuing the data under such titles as "Children Bearing Children," or "The Incidence of Poor Health Among Children: The Case of Pregnancy."

The first cost of the sexual revolution, and it is difficult to quantify this cost, falls upon the children whose intercourse leads to pregnancy. It has been reliably documented in a variety of sources, which reveal poverty not in dollar figures but in real terms, that most of the cost burden falls on female children.⁴⁷ Furthermore, because high rates of infant mortality, low birthrate, and low rates of child development occur when teenage pregnancy leads to childbirth,⁴⁸ this phenomenon is not only costly to the child-parent, but establishes a basis on which any inequality may be perpetuated for yet another generation. Loss of education, of employment experience, and of teenage development occurs for the children who become, biologically, parents.⁴⁹ The rate of sexual activity and pregnancy has risen sharply over the past decade, but since it falls short of 100%, it defines another area of inequality among children.

The future implications of this development should be considered in the light of three factors. First, the number of "teenage" pregnancies includes more and more younger children below the age of 17 (some 12.5 thousand children between 10 and 14 gave birth in 1975).⁵⁰ Second, the *rate* of teen-

⁴⁶ Catherine S. Chilman, *Adolescent Sexuality in a Changing American Society: Social and Psychological Perspectives*, U.S. Department of Health, Education, and Welfare, Washington, D.C., 1978.

⁴⁷ "There is increasing awareness and more extensive documentation of the serious problems subsequent to adolescent childbearing, especially for the teenage mother." James McCarthy and Jane Menken, *Marriage, Remarriage, Marital Disruption and Age at First Birth*, FAMILY PLANNING PERSPECTIVES, (Jan/Feb 1979) p.21; "With increasing precision, researchers have been able to document the commonsensical notion that early unscheduled childbearing curtails the life chance of the young mother. . . . Less evidence exists on the impact of early childbearing on the father, but there are strong indications that the male's economic and family position may be damaged as well." Frank F. Furstenberg, Jr. and Albert G. Crawford, *Family Support: Helping Teenage Mothers to Cope*, FAMILY PLANNING PERSPECTIVES, (Nov/Dec 1978) p. 322.

⁴⁸ U.S. Department of Health, Education, and Welfare, National Center for Health Statistics, *Vital Statistics Report*, "Natality Statistics," Vol. 26, No. 5, Supplement, 1977, pp. 7-8.

⁴⁹ Kristin A. Moore, "The Economic Consequences of Teenage Childbearing," U.S. House of Representatives, Select Committee on Population, Feb. 28, 1978; James McCarthy and Jane Menken, *supra* note 47; Frank Furstenberg, Jr. and Albert G. Crawford, *supra* note 47.

⁵⁰ U.S. Department of Health, Education, and Welfare, National Center for Health Statistics, *Vital Statistics Report*, "Natality Statistics," Vol. 26, No. 5, Supplement, 1977.

age pregnancy is increasing among white girls and decreasing among black girls, although black rates are still about three times as great as those for white teenagers.⁵¹ Third, when the outcome of teenage pregnancy consists of childbirth, a growing proportion of the single mothers choose to keep their children.⁵² Because single teenage parents are likely to produce a family environment that minimizes the human capital investment in their children, these factors may be important clues to future economic trends.

In sum, the data imply that our present policies of social welfare have failed to address the issues posed by single-parent families and their increasing number. These policies have been wrongly focused, and have overlooked a major responsibility of any society. We need to change policy and to redirect our systems of social welfare. Rather than aiming at reducing poverty, or providing jobs, or even maintaining families, our policies and legislation should aim to protect children's well-being. Since family disruption and economic instability go together, a social policy designed for children should attempt to equalize the investment in children's human capital, or at least reduce the inequalities that now exist. These inequalities do not consist simply of low incomes. Thus, anti-poverty policies developed in the early sixties cannot solve the problems of inequality, especially among children. To the extent that social policy consists of tinkering with established anti-poverty measures, of attempting to reform "the welfare mess," it will probably continue largely to overlook children, who should be the essential target.

The basic assumption of existing social welfare policies is that income derives from work, that earnings from a job should provide for workers and their families, and that where such provision clearly is inadequate the remedy consists either of raising wages or increasing the productivity of the worker. The major welfare program for poor children, Aid to Families of Dependent Children, provides merely a floor under income while programs to create jobs, to make single mothers work, to retrain high school dropouts proliferate. Such an approach misses the basic inequalities between two-parent and single-parent families.⁵³ Existing policies assume that people need help when they are poor, and that society should provide services to enable them to help themselves. None of them address the inequalities existing among children, who cannot help themselves.

⁵¹ *Id.*

⁵² Ross and Sawhill, *supra* Appendix 2; R. B. HILL, *THE STRENGTHS OF BLACK FAMILIES*, New York, Emerson Hall Publishers, 1971, table 5.

⁵³ The recommendations of the Carnegie Council on Children provide a case in point, and also illustrate the need for minute examination of the data. Using much of the same cross-sectional statistics presented in this paper, Kenneth Keniston's *All Our Children* proposal of a guaranteed income for families overlooks the growing significance of the single-parent family, and does not deal with the issue that families with children move in and out of poverty. Inequality is not a static phenomenon but affects different people at different times. Richard DeLone states, for example, "Since the great majority of families in this country are white families with two parents the greatest number of poor children come from white two-parent households." (*SMALL FUTURES*, Harcourt Brace Jovanovich, 1978, p. 16.) This was true in the early sixties but the steady rise in the number of working wives since that time has reduced the number of two-parent families in poverty. The number of children in poor families

There always has been another approach to helping people when they are poor, which is to give them money. In this country, a strong sentiment against this approach exists for complicated reasons. As far as children are concerned the sentiment consists of a conviction that parents should be responsible for their children, and that society should not reward irresponsibility. But if these sentiments are proper, surely they apply only to adults, and do not justify perpetuating inequality among children. Human capital theory reminds us that we, as members of society, have a direct self-interest in the young members of this society, the children who represent investment for the future.

Therefore, economics and the law must unite to refocus our social policies on the future, and design a system of protection for children. Whether we call it children's allowances, which exist in every developed country except the United States, or whether we invent a new name, we must provide a means of providing for children.

Considerable thinking has already been given to various proposals. If we have unemployment insurance to help tide workers over when they lose their jobs, why not income insurance for children to help them escape periods of poverty and dependence, especially when they arise from family disruption? If we insist on tying adult income to work, why not recognize that women's work in their own homes justifies earnings? If we want to pursue absent fathers for economic support of their children, why not automatic payroll deductions handled through the Internal Revenue Service? If we take children to be society's concern yet wish not to relieve parents of all responsibility, why not an automatic tax on *all* parents, with exemptions or payouts to those actually caring for children? The technicalities of designing a transfer system to protect children are not beyond the capabilities of lawyers and economists.

The policy options that might result from such a cooperative attack on the problems of providing for children cannot here be envisaged, but the direction of these options is clear. Rather than review the same data or rewrite the existing legislation, economists and lawyers should begin by formulating the relevant questions. These concern the future, not the past, and productivity, not regression. They are questions of investment in human capital, and the answers involve children.

with only a mother began to outnumber those in two-parent families at the beginning of the seventies, a time when, as other data have shown, the growth of the single-parent family accelerated. Furthermore, much of the analysis of the Council relies on poverty levels and family needs calculated for the "typical" four-person family, consisting of an employed father, with mother at home caring for two children. Such families number less than 7% of all families, and contain about 9% of all poor children. U.S. Bureau of the Census, *Current Population Reports*, "Characteristics of the Population Below the Poverty Level: 1977," Series P-60, No. 119, U.S. Government Printing Office, Washington, D.C., 1979.

ETHICS FOR THE SURVIVAL OF THE HUMAN FAMILY†

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The human family of today faces a tremendous challenge to its very survival. I speak of the human family in terms of the 4.2 billion people—sisters and brothers—on the face of the globe at this time, a family which in the next fifty years will number over 8 billion. I also speak of survival in terms of basic human decency and dignity, material and spiritual well-being.

This afternoon, to a Law School community of students, faculty, administration, alumni, and friends, celebrating fifty years of education for the legal profession, the question I pose is quite simple: what relevance, if any, does Boston College Law School have to the issue of the future survival of the human family? This is a simple question, but one with no simple answers. Yet it is a question that has to be asked, if this celebration of fifty years is not to be an occasion of commemorating the past while ignoring the future. In my opinion, at least, how you answer the question of the relevance of your enterprise here to the global challenge of today will determine your future.

As a human family, we are increasingly an endangered species. In today's world, war and famine, the twin scourges of humankind's history, loom before us with the possibility of nuclear holocaust on the one hand and widespread structural hunger on the other. The legal profession, explicitly concerned with a centuries-old tradition of justice, has its practice contextualized in such a world. Whatever its practice, it does not operate in a vacuum. Hence the significance of the question of relevance is obvious.

I want to suggest one approach to examining the question of relevance of Boston College Law School to the survival of the human family. I want to look at the adequacy and/or inadequacy of ethical stances toward today's global challenges, and explore with you the implications of these ethical stances for the legal profession. I do this not as a lawyer but as a political scientist—albeit a political scientist who spent a year and a half in the Law School of the University of Chicago writing a dissertation on constitutional law. I do this as a United States citizen—currently a very worried United States citizen—not ignoring the responsibilities of other countries, but mindful that I have an obligation to look at my own country's practices first. Finally, I do this as a Roman Catholic priest, a member of the Jesuit Order, an Order which has historic connections with this particular law school and which recently has emphasized the integral link, the essential bonding, in its mission, between the service of the faith and the promotion of justice.

Let me begin with a story. A few years ago, I was offering testimony before a committee in the House of Representatives, on the topic of food and population interrelationships. I was urging a "social justice approach" to stabilizing population, one which takes into account that children for poor people are

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riches and that, unless we address their poverty, asking them to have fewer children is asking them to be poorer. When I had finished my testimony, the senior member of the committee asked me very pointedly just what I had meant by the phrase "social justice." I briefly explained an ethical position which was rooted in the dignity of the human person, and emphasized that linkage between human rights and basic needs which is so powerfully articulated in the Universal Declaration on Human Rights. The Representative cut me short with the rejoinder, "If by social justice you mean socialism, then I'm not for it!" He then proceeded to lecture me for twenty minutes on the evils of "share-the-wealth" schemes and my attempts to change the way things are. The basic premise of his argument was: "The poor you have always with you, you know!"

I tell this story here because for me it exemplifies well one of the most serious obstacles to the survival of the human family: an inadequate ethics to cope with the global challenges of the future. Can we point to this inadequacy? Can we offer some alternative approaches? This afternoon I want to try in brief fashion to sketch some answers to these questions, since I am convinced that the task which confronts us is at root an ethical task. The basic kinds of decisions to be made in a world threatened by nuclear holocaust, ecological disintegration, exhaustion of resources, population pressures, and revolt against oppressive structures are *value* decisions. The global society of the future is dependent on more than physical rearrangements, institutional adaptations, and technological breakthroughs. Basically it is dependent upon the ethics that do—or do not—hold it all together.

I. AN INADEQUATE ETHICS

In recent years, value discussions—and hence ethics—have arisen in very concrete policy situations. The crises of hunger, unemployment, pollution, and energy—multiple crises, the "crisis of crises"—focus the value discussions. There are, of course, elaborate academic debates over values and ethics. John Rawls and Robert Nozick, for example, have fascinated many of us with their intricate theories of justice. I have my doubts, however, as to how much clarity of vision or decisiveness of action has been stimulated by the theoretic discussions. I don't speak critically of theory or analysis in itself, but of a certain type of theory or analysis which is heavily abstract and naively a-historical. Today and in the future we need something more concrete.

Let me suggest three ethical stances which I feel are inadequate in facing the future challenges. Then let me ask you if anything exists in your own legal background, training, experience, or orientation that reflects these stances. The first is a personalistic—indeed, privatistic—ethic which is apparent in our evaluation of people, decisions, and situations. We tend to view ethics as something which guides individual actions, and not to see it as something which touches on the structures of society around us (political, economic, social, and cultural).

For example, I recall a recent conversation with an executive of a large multinational firm. The executive assured me that business ethics was a prime concern for his corporation, and referred to the "Codes of Conduct" recently

adopted which forbade the taking or offering of bribes, required honest reporting of any conflict of interest, and instructed employees to be courteous and respectful of cultural differences. Nothing was said, however, about the ethical questions, such as employment policies and pollution effects, which inevitably would arise from a corporation's presence and practices in another country. There also was no reference to the corporation's stance toward development, including capital intensive and "trickle down." These were "structural" issues, outside the purview of an ethics conceived in personalistic terms. When I spoke of "corporate social responsibility," the executive cited the playing fields which the firm had constructed for its employees—again, a personalistic approach. However laudable playing fields might or might not be in a given situation, "corporate social responsibility" in terms of the deeper societal questions of pricing policies, hiring of women and minorities, and impact on social climate went unaddressed.

The religious community of church and synagogue in the United States has often contributed to this inadequate ethic by emphasizing a personalistic morality. Private probity—usually overly-accented on sexual mores—has been preached readily from most pulpits. Social responsibility, however, is a topic which only recently has been developed in religious terms, and with admittedly mixed results. An assumption underlying this personalistic ethic seems to be the traditional *liberal* belief that individuals acting morally in their own private affairs will contribute to the moral well-being of the whole society. It is a variation of Adam Smith's argument that an "invisible hand" assures that things will work out for the best in the economic sphere so long as individuals pursue their own private interests. Just as this economic argument has proven bankrupt in a world of increasing scarcities and interdependencies, so this ethical position is inadequate to deal with the intricacies of today.

A nationalist outlook, rather than a global one, is another ethical stance insufficient to meet the challenges of tomorrow. Our ethical vision too frequently tends to take as its prime point of reference the national boundaries of our own country. By that I do not mean that our citizens fail to look with concern at the needs of people overseas. To be truthful, we are indeed aware of suffering in the Third World, and in many instances have responded generously. Yet often the assumption underlying our ethical stance is a "we/they" dichotomy which both narrows our understanding of the problems and limits the range of our responses.

In my own experiences of international conferences and contacts, I have heard repeated discussion about what "they" in the developing countries should do to improve their well-being, discussions which sometimes sound as if their problems were unrelated—through either historical or present structures—to our politics and our practices. During the 1974 World Population Year, for example, I participated in the United Nations World Population Conference in Bucharest. The "population problem" was, for many United States citizens and officials, defined as "their" problem—that is, the problem of the poor in the Third World. It was difficult for these citizens and officials to conceive of an ethical position which pointed to "over-consumption" in the rich countries as being as serious—if not more serious—a threat to global ecological sustainability than "over-population" in

the poor countries. The people in the Third World had to change, not us. Today, however, we *all* have to change, and our ethical stances must take that fact into account.

A nationalistic ethic also is inadequate in recognizing that the "nation" is a composite of many diverse social forces—"social classes"—which are not all in harmony. A policy which is said to be in the "national interest" of the United States, such as free trade, may not in fact be in the interest of many of our citizens, such as displaced workers. Similarly, the "national interest" of some particular developing countries may only be in the expressed interest of powerful minority elites—for example, industrialization along capital- and technology-intensive lines. To speak of nations without paying attention to classes is misleading because it blurs significant differences within countries and ignores significant linkages among countries.

Lastly, a partial rather than holistic ethical stance is also inadequate to face the challenges of the future. Because we in the United States are a very pragmatic people, we easily approach issues in an *ad hoc*, piecemeal fashion. We have been remarkably successful with a "mission impossible" mindset which looks at individual aspects of the whole and designs immediate solutions. We have been less successful in grasping the whole and its many interrelationships. Witness, for example, our foreign policy difficulties. This pragmatic stance has important consequences for the ethics which guide us. An ethics that focuses on individual issues outside of an integrating framework is a partial ethics. Its piecemeal approach offers no guarantee that the pieces ever will add up to a meaningful whole. An example of a "partial ethics" would be an ethical approach which examined the value issues raised by the energy crisis—for instance, gasoline shortages and increases in fuel oil prices—but was reluctant to explore the ways in which these issues put fundamental questions to our present economic system.

The difficulty with taking a more holistic approach is, quite frankly, that it is more radical. It is radical in the sense that it goes to the root of the issues and problems by seeing the interrelationships, linkages, and cause-effect connections. Being radical, it can also be frightening. How ready are we to accept public discourse that responsibly challenges basic economic and legal myths such as freedom of opportunity? In addition, how prepared are we to question seriously a "free enterprise" system that requires for its supposedly healthy and beneficial operation such efforts as (1) demeaning advertising, (2) aggressive fighting of social regulations, and (3) final reliance upon federal doles? For me, a very significant obstacle to our working for the societal transition we need today is the reluctance to be ethically radical in the sense of being ethically holistic. At times we appear to be fearful not simply of being called "radical" but of being called something much worse—"unrealistic." This fear can keep us from probing old boundaries or imagining new approaches.

II. TOWARD A MORE ADEQUATE ETHICS

If many of the ethical stances which guide us today are inadequate for meeting the challenge to the survival of the global family, what stances do I suggest? Obviously, I can't begin constructing a whole new ethical system

here. Not only am I not competent to do so, but many of the elements of the ethics I feel is necessary already have been set forth with great cogency elsewhere. Let me briefly suggest, however, the character of the ethics which I believe would be more adequate to the period we are entering. In addressing the topic of ethics, I do not speak here of specifically religious themes, such as the basic Christian belief in a Parenthood of God which implies that we are all sons and daughters and hence that we are all brothers and sisters. Nevertheless, this brotherhood and sisterhood must have structural consequences for the constitution and operation of society—that is, in the promotion of social justice—if it is not to become untruthful and alienating rhetoric. Thus, such religious themes certainly do influence me strongly, and that will be quite evident in what follows.

One aspect of the ethics I advocate focuses on the ethics of community. The "human community" is an abstraction. Brothers and sisters with names and faces are specific, concrete entities. As such they are the bases for an ethics which is instrumental in ensuring the survival of the human family. Once we begin to look at concrete and historical persons, we note that the community is highly differentiated with respect to who benefits from the changes which are occurring. Not all within the community share equally the advantages and disadvantages of "progress."

To pay adequate attention to community, then, one must take into account the existence of classes within society. Divisions on the basis of race, sex, religion, ethnic background, socio-economic status, and geography have always existed and will always exist. In addition, there are "dominator/dominated" relationships among the classes. A simple "class analysis" to assist in the ethical evaluation of any important decision should ask three questions: (1) who makes the decision?, (2) who benefits from the decision?, and (3) who bears the burden of the decision?

Certainly an ethics of community must take as a prime guideline for action/evaluation the principle that the poor must not pay the major cost of the transition to a sustainable society. For example, curbing of current growth patterns, especially in the industrialized world, will have consequences on areas of vital importance to the poor, such as employment, services, expenses, and taxes. Similarly, conserving energy will mean higher prices for fuel, which always hits the poor—individuals and nations—the hardest. Moreover, movement to new patterns of ecological sanity will require new systems of incentives and penalties. Simple operation of the market mechanism offers no guarantee that both the economic and social costs of the necessary steps toward transition will be borne equally and equitably by all sectors of global and national society. It is therefore important to articulate an ethics of community which pays particular attention to the poor. Historically, the poor have paid the major costs of such key societal transformations as the Industrial Revolution. Any contemporary transformation that would repeat this sordid story is ethically unacceptable.

Another key to an ethics of community is a solidarity marked by both space and time dimensions of community. The space dimension of community stresses that no geographic limit can be put on the individuals to whom we extend our concern for fulfilling human rights and basic needs. In a global

village, all are our sisters and brothers; on a spaceship earth, there can be no first and second class divisions. To ignore the rights and needs of some humans because they live far away is not only immoral but also foolish in an interdependent world. It ignores the reality of a global community.

The time dimension of community means that the present generation evaluates its actions at least partially in terms of impact upon the human rights and basic needs of future generations. I recall a popular article of a few years ago which provocatively asked in its title, "What has posterity ever done for me?" It seems to me that an ethics of community argues that the answer to this question is complex but nonetheless compelling: the quality of present civilization is highly influenced by the character of commitment to the future. If human responsibility is contracted by time limits—"who cares what happens after I'm gone?"—then it becomes so weakened that it loses its effective force even in the present. True community is fractured.

Emphasis on the space and time dimensions of community, however, does not deny a principle of "proportionate response." Under this principle, the expectation is that an individual is proportionately more responsive to those she or he is proportionately closer to, geographically and temporally. The ethics of community does not suggest that we ignore the neighbor of here and now, but neither does it allow us to limit our responsible concern to the here and now.

Closely linked to an ethics of community is an ethics of responsibility. The importance of the latter can be discerned by considering that one of the most serious problems confronting us today and in the future is the lack of accountability to communities of ordinary people by many of the major actors in today's politics and economics. Technology, for example, has a great and immediate impact on the lives and environment of people. But to whom is this technology responsible? To whom is it accountable? Take the very relevant instance of technologies relating to energy. The decisions which lock a community into hard energy paths are most frequently presented as inevitable; the nuclear reactor is seen as the logical outcome of choices already made. Nevertheless, the questions raised by this ethics of responsibility challenge the "inevitable" and the "logical" by asking who is responsible for the decisions made and who is to be held accountable for the consequences that result.

Capital is another example. In a time of capital scarcity, to whom is capital accountable? Do ordinary communities of people have a say in the kinds of decisions which forcefully impact upon their lives? The recent case of Youngstown, Ohio, comes quickly to mind as one of the better-known examples of a situation where a community did not have a responsible say in a major decision determining its livelihood. The principal controllers of capital which have such an effect on people's lives—large banks, large corporations, large government—cannot be regarded as ethically neutral entities.

Power is another category which an ethics of responsibility takes very seriously. Again and again, we hear calls for a "restructuring of the national and international orders." Yet we hear very little about the power that brings about these changes. We need ethical analysis of who holds the power and how it is being used. What political alliances are necessary, with what

groups, for what trade-offs? Where are the principal institutional obstacles to change? Who are the significant carriers of change?

To speak of an ethics of responsibility, however, is to become very quickly controversial. We cannot ignore this. The ethics of responsibility requires us to move into the realm of political economy, and to focus on the power relationships within and among the accepted institutions of our society. This is an ethics which is "radical" and will stir opposition. Nevertheless, it is critically necessary if we are to move effectively toward meeting the challenge of human survival.

Many times in recent years when I have spoken to audiences about some of the ethical themes and imperatives I have briefly discussed here, I have been challenged by someone's calling my approach "utopian." I have decided to answer the challenge by simply acknowledging its truth and accepting the name. Yes, my approach is utopian, in the sense of being visionary. We desperately need visions today. The future of our limited and locked finite and interdependent world presents us with challenges that are simply without precedent. We have no tested models, ready-made answers, scientific certitudes, with which to face these challenges. Consequently, our vision must be utopian, daring to think new thoughts and scheme innovative schemes. A utopian vision will stimulate the social imagination in ways which break the old patterns of response—so frequently summed up by "we've always done it this way." Such a vision also will enable us to formulate approaches that are creative and risking.

For instance, we need to be creative enough to assert that the survival of the human family will require much more than a global equality of opportunity. Because equality of opportunity does little to assure the economic rights of the less privileged groups, the goal we must strive for is an equality of results, which is essential to guaranteeing socio-economic rights. Yet does the achievement of this goal mean an "egalitarianism"? Although I see that an absolute egalitarianism is neither feasible nor desirable, I propose that a very realistic ethical guideline should be: "A floor demands a ceiling." For fulfillment of the basic human needs of the world's population, a minimal "floor"—of food, shelter, education, and other basics—is necessary. In order to achieve that, however, a maximal "ceiling" must also be imposed. The minimum/maximum argument clearly is not an argument for absolute egalitarianism, since there is a distinct distance between the floor and the ceiling. Nevertheless—and this is the most important point—in a humane and sustainable society that gap is not as great as it is today in a world where hundreds of millions of people waste away in malnourishment while millions of others simply waste in meaningless affluent consumption.

Such an ethics of utopia inevitably has religious overtones, and today I don't hesitate to admit that. We are seeing around the world a resurgence of religious feelings, with consequences sometimes advantageous to the human project and sometimes disadvantageous. The Islamic revival, for example, has dramatically called our attention to both the advantages and the disadvantages. There is what I would call a "resilience of tradition" which can be a powerful force in promoting utopian visions because it enables us to draw upon the deepest of our myths and symbols to move us forward.

In speaking as a Christian, as a Roman Catholic, as a Jesuit, I am aware of the wealth of biblical insights and church social teaching which emphasizes the ethics of justice I have been discussing here. Indeed it may not be out of place to point out to a legal audience that the theology of justice which is based in the Sacred Scriptures takes seriously the idea that there is no valid law which does not serve the people. Perhaps, at an institution with Catholic connections, it also helps to be mindful that the great recent tradition of church teaching bears far more heavily on the social than on the sexual, on orthopraxis than on orthodoxy, on a Reign of God with implications for the public order than on a personalistic refuge in an other-worldly pietism. A simple glance at last fall's eloquent statements by Pope John Paul II at the United Nations, Yankee Stadium, the Organization of American States, and the White House, for example, reveals the major ethical thrust of the social teaching of the Church.

CONCLUSION

Perhaps my immediately preceding remarks about an "ethics of utopia" suggest a very important question to ask in concluding our reflections here. What is the value of ethics in reaching the actual decisions necessary for the survival of the human family? Does it really make any difference whether we are guided by what I have referred to here as an "inadequate" or an "adequate ethics"? In addition, what are the implications for the legal profession, and more specifically, what relevance does Boston College Law School have to the survival of the human family? I believe that there are at least three significant contributions which can be made by the type of ethics I've been exploring with you this afternoon.

First, an ethics which describes the desirable states of community, responsibility, and utopia such as I have sketched here provides a "pressure function" in our thinking and action. It can enable us to enlarge our perceptions and push further our commitments. By going beyond merely technical considerations, such an ethics demands a more profound, more humane, consideration of the issues at hand. My question for the law profession—students, faculty, practitioners—is: does the prevailing environment of your profession pay serious attention to this "pressure function" of ethics?

Second, introduction of such an ethics into public discourse creates a milieu in which major human questions can be debated. The value issues are seen to be central to the meaning of a situation, and not merely peripheral. Considering the ethical then may force us to focus on what really is happening to people, to our sisters and brothers in the human family. Thus I ask if lawyers, especially those engaged in public or political activities, are sensitive to the human questions of policy-making? Are they asking the basic question: what is happening to people?

Third, I believe that the value of such an ethics is that it provides an antidote to a brand of "neo-conservatism" very prevalent today in the United States. This "neo-conservatism" would dismiss community as unfeasible, challenge responsibility as dangerous, and criticize utopia as unrealistic. In place of the ethics advocated here, many "neo-conservatives" would exalt a rather

hard-hearted approach which sees the transition to a sustainable society as probably coming at the expense of a human society. Do lawyers who graduate from Boston College Law School reinforce that "neo-conservatism" mood, or do they challenge it with an ethical stance adequate to the future situation of our globe?

I began my remarks this afternoon by stating that the human family of today faces a tremendous challenge to its very survival. I believe we all know that these days. I certainly feel in the war atmosphere of Washington, D.C., a deep sense of foreboding, of pessimism, of fear. Even if the world escapes war, it still faces famine. The case for survival is very fragile indeed. The ethics which should pervade this law school, and your own legal profession, must bolster that case for survival, or you yourselves are not only irrelevant, but dangerous.

Let me illustrate my concluding point with a story you may have heard before. The eminent English philosopher-scientist, Lord C.P. Snow, was asked several years ago what he thought would be the most terrible thing that could happen to us in the years ahead. Was it that millions of people would die of starvation? Snow's answer was not that millions of people would die of starvation, but that millions would die of starvation and we would watch them die on colored television. He reasoned that by observing them die, we would die too, for what does it mean—in terms of basic human survival, in terms of the ethics of the human family—if some few live at the expense of many others.

We are celebrating today fifty years of service by this law school to the legal profession and to the wider society. We celebrate the occasion under the challenging rubric of "The Next Fifty Years." I believe that I can state with accuracy and with confidence that not only the tone but the very possibility of your celebration of 100 years will depend largely on how you answer, in light of the ethical points I have explored with you this afternoon, my basic question: what is the relevance of Boston College Law School to the issue of the future survival of the human family? Good luck on the next fifty years!

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