

Winter 1967

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## Recommended Citation

Foster, Henry H. and Freed, Doris Jonas (1967) "Unequal Protection: Poverty and Family Law," *Indiana Law Journal*: Vol. 42 : Iss. 2 , Article 2.

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# UNEQUAL PROTECTION: POVERTY AND FAMILY LAW

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The 1960's may be memorable, historically, as the decade which shook up the professions. Whether they liked it or not, doctors were confronted with medicare; lawyers with legal aid to the indigent; teachers were challenged by activist students and parents; and the clergy had faith and dogma tested by the ecumenical movement and the slogan that God is dead. Professional autonomy in each instance was threatened by the presumption that the particular profession was a "business affected with a public interest," a quaint concept which otherwise had been relegated to constitutional limbo.<sup>1</sup>

Although the claim has been made that professional autonomy for decision and policy-making is a fundamental freedom in a democratic society,<sup>2</sup> it is obvious that what Edmond Cahn called the "consumer's perspective"<sup>3</sup> is making considerable headway. The imperatives, if not the needs, of patient, client, student, and parishioner, must be served or else competing institutions will appear or governmental regulation will be applied. Courts, legislatures, and executives are becoming more responsive to the legitimate demands of pressure groups, and the power of the establishment is being threatened with dilution and redistribution. It seems to be a safe prediction that what has come to be known as "power," before the 1970's, will be diffused among diverse groups and segments of the population and that its over-concentration in the white Protestant portion of the community will become a thing of the past.

This trend toward viewing professional services from the point of view of individual and social needs, rather than from the practitioner's viewpoint, is most apparent in the case of the legal profession. The so-

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1. See *Nebbia v. New York*, 291 U.S. 502 (1934).

2. See essay by Alfred North Whitehead in *FREEDOM: ITS MEANING* (Anshen ed. 1946). See also Foster, *The Relation and Correlation of Freedom and Security*, 58 W. VA. L. REV. 325 (1956).

3. See CAHN, *THE PREDICAMENT OF MODERN MAN* (1961). Senator Robert F. Kennedy has said that "the poor man looks upon law as an enemy. . . . For him the law is always taking things away." Quoted in WALD, *LAW AND POVERTY* 6 n.13 (1965).

4. The Economic Opportunity Act of 1964, 78 Stat. 516, 42 U.S.C. § 2782(a) (3) (1964), requires the "maximum feasible participation of the poor" in the programs financed by the federal government. However, governors are given a veto power over all OEO programs in their states.

called War Against Poverty, recent Supreme Court decisions,<sup>5</sup> and the civil rights movement, have combined to force a critical examination of the status quo and the institutional capacity of the legal profession to adapt to changing needs. *Gideon's* trumpet may not have blasted down the walls of Jericho, but the message has come through loud and clear that there is a public and professional responsibility to provide legal services to the poor.<sup>6</sup> In this analysis, however, we shall limit our inquiry to poverty and family law and shall examine but a few instances where economic factors, properly or improperly, help determine the processing of family problems. More specifically, we shall attempt to see how poverty relates to the law of marriage and divorce, alimony and support, custody, adoption, and juvenile court procedures. These areas will be explored in general since it is sufficient for present purposes to show that there exists some inequality and operational discrimination based upon financial status. For an in-depth study of the family law of the poor and that other family law for the more fortunate, the reader is referred to the excellent work of Professor Jacobus tenBroek<sup>7</sup> and the California symposium on "Law of the Poor."<sup>8</sup>

#### MARRIAGE, DIVORCE, AND POVERTY

To an appreciable extent the law of marriage and divorce has priced itself out of the market. The financial obligations incurred as an inci-

5. Including: *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1955).

6. See U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, *THE EXTENSION OF LEGAL SERVICES TO THE POOR* (1964); Cahn & Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964); Reich, *The New Property*, 73 YALE L.J. 733 (1964); Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); *Symposium, Justice and the Poor*, 41 NOTRE DAME LAW. 843 (1966). See also Article 22 of the Universal Declaration of Human Rights which provides "everyone, as a member of society has the right to social security and is entitled to realization . . . of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." Concern about legal services for the poor is not new although effective implementation is a recent development. In 1919 Reginald Heber Smith's *Justice and the Poor* was published. The Legal Aid movement is ninety years old and by 1965 there were more than 150 major cities with legal aid agencies, another 215 communities with voluntary legal services of one kind or another, and some 162 defender services for indigents accused of crime. However, Mr. Justice Fortas has estimated that such traditional legal services meet only about 10 per cent of the need for such services. The services currently being provided fall into the four major areas of landlord-tenant law, domestic relations, welfare law, and debtor-creditor. See Voorhees, *The OEO Legal Services Program: Should the Bar Support It?*, 53 A.B.A.J. 23 (1967). See also Carlin & Howard, *Legal Representation and Class Justice*, 12 U.C.L.A. L. REV. 381 (1965).

7. tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257, 900 (1964) (pts. 1-2), 17 STAN. L. REV. 614 (1965) (pt. 3).

8. 54 CALIF. L. REV. 319-1014 (1966).

dent to marriage may make it a luxury that the poor cannot afford and desertion may become the practical way to escape from either a putative or legal marital relationship. In England, before the Matrimonial Causes Act of 1857, desertion was the common mode of terminating an unsatisfactory relationship; dissenting sects and various groups had their own extra-legal customs, and parliamentary divorce was available only to the extremely wealthy.<sup>9</sup> Even annulment or *a mensa et thoro* divorce, the alternatives available in the ecclesiastical courts, were too costly for the average Englishman.<sup>10</sup> Thus, of necessity, all but the wealthy were forced to resort to some form of self-help when a marital situation became intolerable.

In this country, too, among some sub-cultures, custom rather than law traditionally has governed the creation and termination of informal marital relationships.<sup>11</sup> Informal terminations of marriages are not uncommon for those informally entered into, and in the fifteen states retaining the institution of common law marriage there may be difficult factual questions due to the uncertainty of the distinction between legal and putative common law marriage. To the parties involved, "common law marriage" may mean either an at will liaison of uncertain duration, or a private contract of marriage, and especially among the poor, "common law divorce" may be resorted to in either event. There is the superstition in some parts of the country that if a spouse has been absent for five or seven years, the deserted party automatically is entitled to remarry, and there are instances of "law office divorce" where the parties assume that once a divorce complaint has been filed they are free to remarry and that the decree is a mere technicality.<sup>12</sup>

There is a grave danger that something comparable to concubinage may develop in this country due to the financial obligations incurred by marriage and the expense of divorce. In many Latin American countries the children of concubines constitute over 50 percent of all live births.<sup>13</sup> Although the Roman Catholic hierarchy has disapproved of concubinage, unrealistic dogma and poverty have combined to make concubinage a socially acceptable institution for the impoverished masses. Unrealistic

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9. See Mueller, *Inquiry Into the State of a Divorceless Society*, 18 U. PITT. L. REV. 545 (1957).

10. *Ibid.*

11. See Foster, *Common Law Divorce*, 46 MINN. L. REV. 43 (1961).

12. *Ibid.*

13. See Arraros, *Concubinage in Latin America*, 3 J. FAMILY LAW 330 (1964), who reports the illegitimacy rate of all live births in 1958 in Panama was 73.9% and in Guatemala 71.6%. The Antilles, Honduras, Dominican Republic, El Salvador, Nicaragua, and Venezuela, all reported over 50 per cent. Most of the illegitimate children resulted from concubinage, although some were produced by casual meretricious relationships.

divorce laws and poverty in the United States likewise may combine to produce extra-legal relationships and a high rate of illegitimacy.<sup>14</sup>

When one considers that one-fourth to one-third of the American population is afflicted with a combination of low income, low educational attainment, and substandard housing, the inevitability of irregular relationships and illegitimacy becomes apparent. Almost one-third of American families in 1959 had an annual income of less than \$4,000; almost 40 million persons twenty-five years old and over in 1960 had no more than an eighth grade education; and in the same year over a quarter of all housing units in the United States were classified as deteriorated, dilapidated, or lacking in plumbing facilities.<sup>15</sup> Income, education, and housing together with other factors such as age and religious affiliation, are all related to customs regarding marriage and divorce. Actually, socio-economic factors have much more to do with family stability and instability than do the usual symptoms set forth as grounds for divorce.

Sociologists have found that there is a rough inverse correlation between class position and rate of divorce. Those classified as professional, semi-professional, and proprietors are the least divorce prone, while laborers, service workers, and the unskilled or semi-skilled have the highest incidence of divorce.<sup>16</sup> Moreover, the greatest degree of divorce proneness is among the lower income groups.<sup>17</sup> The factors of location and mobility are, however, connected to low income and menial work. Moreover, among the very poor, the expense puts divorce out of the question. It also has been noted that conclusions from such studies may not be applicable to the Negro population which shows no comparable decrease in the incidence of divorce with increased income and educational achievement.<sup>18</sup>

General economic conditions also affect the overall rate of divorce, and it has been said that the incidence of marriage and the incidence of divorce follow the business cycle.<sup>19</sup> The marriage and divorce rates are relatively low in depression years and correspondingly high during years of prosperity. It should not be assumed, however, that economic adversity necessarily draws families closer together, for after the worst of the depression period is passed, there usually is a rapid rise in the divorce

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14. See 1966 Report of the Joint Legislative Committee on Matrimonial and Family Laws to the Legislature of the State of New York 63-64 (dated March 31, 1966).

15. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 117, 333, 759 (83d ed. 1962).

16. GOODE, AFTER DIVORCE 52-53 (1956).

17. *Ibid.*

18. *Id.* at 54. See also Monahan, *Educational Achievement and Family Stability*, 55 J. SOCIAL PSYCHOLOGY 253, 257 (1961).

19. JACOBSON, AMERICAN MARRIAGE AND DIVORCE 95 (1959).

rate.<sup>20</sup> It is likely that embittered and estranged couples merely bide their time until they can afford divorce.

With reference to educational achievement and family breakdown, in general there appears to be a correlation between degree of education and marriage stability. However, it is difficult to isolate the educational factor from other ones such as occupation, income, housing, social background, and age.<sup>21</sup> One study reports that "not only are grammar-school educated persons more likely to *divorce* (at twice the *rate* of those of college education) but that they divorce on the average nine years earlier than do college people who divorce."<sup>22</sup> Another study, however, showed that by educational level "divorcees" divided into 10 percent for the grade school group, 71 percent for the high school class, and 19 percent for the college grade.<sup>23</sup> From these studies, and others, it has been concluded that "to some extent as regards divorce, family stability may be associated with higher educational accomplishment at the college level, but not at the high school level."<sup>24</sup> In the case of Negroes, the divorce rate appears to remain approximately the same without reference to the amount of formal education.<sup>25</sup>

Housing conditions obviously have a great impact upon both marriage and divorce. The availability of and means to pay for suitable living accommodations often are major factors in determining when couples will marry. Substandard housing or lack of separate living accommodations are important elements in family breakdown.<sup>26</sup> The current programs for slum clearance, public housing, and relocation have as one objective the provision of better housing to increase family stability.

The inter-relation between poverty and family instability may be approached from another angle. Professor tenBroek cites a 1962 California study<sup>27</sup> of some 86,000 AFDC families (aid to families with dependent children program) which disclosed that of that number 77,000

20. *Ibid.*

21. GOODE, *op. cit. supra* note 16, at 40.

22. Monahan, *supra* note 18, at 255.

23. *Ibid.*

24. *Id.* at 261.

25. *Id.* at 257. See also GOODE, *op. cit. supra* note 16, at 54, where he says that among Negroes, with increasing education, there appears to be an increasing proneness to divorce. However, it should be noted that Negroes may marry at an earlier age and that the psychological pressures on middle-class Negroes are greater than those on most middle-class white couples.

26. See GOLDSTEIN & KATZ, *THE FAMILY AND THE LAW* 412-13 (1965); Berman v. Berman, 277 App. Div. 560, 101 N.Y.S.2d 206 (1950). See also Kubie, *The Disintegrating Impact of "Modern Life" on the Family in America and its Explosive Repercussions*, printed in LIEBMAN, *EMOTIONAL FORCES IN THE FAMILY* 140-43 (1959).

27. tenBroek (pt. 3), *supra* note 7, at 618. The AFDC (Aid to Families with Dependent Children) program is provided for in 49 Stat. 627 (1935), as amended, 42 U.S.C. §§ 601-09 (1964), as amended, 42 U.S.C. §§ 602-06 (Supp. I, 1965).

were cases where the father was absent from the home. In 9,000 of those cases the fathers were absent because they were deceased, imprisoned, or had been deported or excluded, and in the remaining 68,355 cases they were "voluntarily absent." In the latter category of "voluntarily absent" fathers there were some 18,429 who were separated by divorce, annulment, or judicial separation; 10,473 who had separated without court decree; 5,647 cases of illegal desertion; 25,721 cases where the couples were never married and never lived together; and, 8,085 cases where they had never married but lived together. The same study also reported that of the 249,000 children in California who in 1962 received AFDC, 37.2 percent were born to parents who never were married to each other. Insofar as compliance with marriage and divorce law is concerned, 49,000 of the 77,000 absent father cases were ones where there never had been a legal marriage, or there was desertion or separation without a court decree.

The California study also made a breakdown by ethnic background for the percentage of "voluntarily absent" fathers, *i.e.*, those not deceased, imprisoned, or deported, as compared with the total receiving AFDC. It was found that 68 percent of the white fathers were voluntarily absent from the home, 71 percent of the Mexican fathers, and 89 percent of the Negro fathers. In addition, half of the white fathers who were estranged were divorced or legally separated, as compared with 19.1 percent of the Mexican fathers, and 14.3 percent of the Negro fathers. While only 25.1 percent of the white fathers had never been married to the mother, 57.4 percent of the Mexican fathers and 62.3 percent of the Negro fathers had never been married to the mothers.<sup>28</sup>

Although the California report, and other studies such as the Moynihan Report, are significant in disclosing the extent to which ethnic background is related to family patterns, poverty is much more widespread among Mexicans and Negroes, and their opportunity for economic advancement has been rare.<sup>29</sup> It appears that a combination of economic, historical, and cultural reasons account for the relative frequency of resort to custom instead of law on the part of some ethnic groups. When free legal aid services are made available to the poor, experience shows that they will resort to the legal processes, and in the case of divorce, the recent report from the "judicare" program in twenty-six rural counties

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28. tenBroek (pt. 3), *supra* note 7, at 619.

29. See Miller, *Race, Poverty, and the Law*, 54 CALIF. L. REV. 386 (1966). Negro unemployment hovers around two to three times that of white workmen and that which is described as "employment" for Negroes is all too often marginal work that requires supplemental aid or assistance. Address by President Lyndon B. Johnson, Howard University, June 4, 1965. See also YOUNG, *TO BE EQUAL* ch. 3 (1964).

in Wisconsin shows that the greatest demand for legal services on the part of indigents is in regard to family problems.<sup>30</sup> In its first six weeks of operation, 84 percent of the cases were requests for divorce. Of eighty-six cases, sixty-three were for divorce, and nine were custody and support actions. This startling experience had its counterpart in England where in 1950, when legal services were provided for the poor, 80 percent of the cases first reported were for divorce, although the percentage subsequently leveled off at about 40 percent.<sup>31</sup>

In New York City, the experience of the Mobilization for Youth project has been that the poor, if they ever consult lawyers, tend to delay until they are confronted with a crisis. Domestic relations cases and claims for support predominate "because the lower the average income the higher the rate of broken families."<sup>32</sup> Before the advent of the poverty program, however, legal aid services in the vast majority of cities having legal aid were not provided for divorce or annulment cases, although in some instances non-support cases were handled by legal aid. Regardless of the motivations or rationale behind the policy decision not to provide legal aid for divorce cases, the practical consequence inevitably was to force the poor to by-pass law and to perpetuate "common law" marriage and "common law" divorce.

Law in operation may be discriminatory not only when like things are treated differently but also when different things are treated the same, and it also is true that legislative inaction may constitute a taking of sides. The latter situation is illustrated by Mr. Justice Stone's famous decision in *Miller v. Schoene*,<sup>33</sup> where Virginia had to choose between cedar trees and apple trees. If free legal aid services are not provided to the indigent for matrimonial relief, the effect of the policy decision is to force the poor to live outside the ambit of regular family law. The irony of one law for the rich and the poor was commented upon by Justice Maule at the Warwick Spring Assizes in 1845. In *Regina v. Hall*,<sup>34</sup> it appeared that Hall's first wife had turned out to be wantonly promiscuous, whereupon he left her. Later Hall met Maria, told her he was a bachelor, and soon they were married. When Hall was prosecuted, Jus-

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30. Graham, *Judicare—Or How to Get a Free Divorce*, N.Y. Times, Sept. 4, 1966, § 4, p. 6, cols. 5-7. For a recent discussion of legal aid and "judicare" for the poor, see Voorhees, *supra* note 6.

31. *Ibid.*

32. N.Y. Times, Nov. 13, 1966, p. 39, cols. 3-4.

33. 276 U.S. 272 (1928).

34. This case, which is not in the official reports, is discussed in POUND, *THE SPIRIT OF THE COMMON LAW* 211-12 (1921). The judge's remarks about one law for the rich and the poor recalls the statement attributed to Anatole France that French laws were fair because they forbade both rich and poor men from sleeping under bridges on rainy nights.



tice Maule expressed regret that he had to pronounce sentence and pointed out that Hall should have gone to the courts to obtain (1) damages in an action for criminal conversation against one of his wife's paramours, then (2) a divorce *a mensa et thoro* from the ecclesiastical court, and finally (3) a bill of divorcement from Parliament, all at a cost of over £1,000. Poor Hall's weekly wage was hardly in excess of £1.

*Regina v. Hall* is a landmark case in the history of English divorce law because it was highly publicized and created widespread indignation which eventually found expression in the Matrimonial Causes Act of 1857. The modern sequel of *Regina v. Hall* is the recent New York decision in *Rosenstiel v. Rosenstiel*,<sup>35</sup> which extended comity to bilateral Mexican divorces and thus guaranteed a safe escape hatch for those peregrinating New Yorkers who could afford a round trip ticket to El Paso, cross the border to Juarez, visit a lawyer's office, and within a matter of hours be on the return flight to New York. Thus, the two essentials for severing the bonds of acrimony, insofar as New York was concerned, were enough money to cover plane fare for one and legal fees for two, and agreement by both that divorce was the way out of holy deadlock. The latter was essential because the absentee spouse had to execute a power of attorney authorizing the appearance of Mexican counsel, otherwise the divorce would not be "bilateral" unless both flew to Mexico and submitted to the jurisdiction of the court. Of course, under the New York divorce law that had remained substantially unchanged since Alexander Hamilton obtained its enactment in 1787, there also was the possibility that divorce could be obtained in New York on the real or trumped-up ground of adultery, or that an annulment on the ground of fraud could be made out.<sup>36</sup> If uncontested, such matrimonial relief was less expensive than the added cost of a Mexican or sister state junket, although it would take longer. Attorney fees, even for an uncontested case, however, are beyond the means of the poor, the minimum fee in New York City running between \$350 and \$500 for uncontested cases, with some lawyers charging eight weeks pay.<sup>37</sup>

Although minimum legal fees in New York City may be the highest in the nation, divorce is an expensive proposition everywhere. The unemployed worker in Pittsburgh or Los Angeles may not be able to afford a somewhat smaller minimum fee for divorce. The economic factor in some cases may be more significant than the substantive or procedural

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35. 16 N.Y.2d 64, 262 N.Y.S.2d 86, 209 N.E.2d 709 (Ct. App. 1965).

36. See BLAKE, *THE ROAD TO RENO* ch. 13 (1962), which contains an excellent discussion of the fraud, perjury, and collusion indigenous to New York divorce law.

37. For an excellent discussion of the matrimonial bar, see O'GORMAN, *LAWYERS AND MATRIMONIAL CASES* (1963).

law of divorce because, although divorce theoretically is readily obtainable, few can afford it.<sup>38</sup> In the Soviet Union, according to one report,<sup>39</sup> the cost is prohibitive for a contested divorce, and a sociologist reports the inhibitory effect among primitive people where the bride price must be returned if a marriage is terminated.<sup>40</sup>

It may be argued that economic compulsion to remain married and the expense of divorce serve the socially desirable purpose of promoting family stability. In our society, however, such rarely is the case. In real life, the parties become estranged, and when able to do so form new informal family relationships. Poverty usually promotes extra-legal action rather than a resignation to and endurance of an intolerable situation. The poor resort to desertion and propagate illegitimate children in large measure because law has priced itself out of the market. The law itself is not discriminatory, but in operation it produces discrimination because historically the indigent cannot afford the luxury of formal justice.

#### ALIMONY, SUPPORT, AND POVERTY

Professor tenBroek in his discussion and analysis of the origin, development, and present status of a "dual system" of family law, summarizes the differences between the two systems as follows:

One is public, the other private. One deals with expenditure and conservation of public funds and is heavily political and measurably penal. The other deals with the distribution of family funds, focuses on the rights and responsibilities of family members, and is civil, nonpolitical, and less penal. One is for underprivileged and deprived families; the other for the more comfortable and fortunate.<sup>41</sup>

The historical origins of public assistance and the husband's duty to support his family are traced to the Elizabethan Poor Laws, whereas matrimonial property law and alimony are derived from the common law and statute. Professor tenBroek's conclusion that these separate systems are "inherently unequal" and that poverty is always an arbitrary criterion for governmental classification that poses an issue under the equal pro-

38. See Rheinstein, *Challenge and Response in Family Law*, 17 VAND. L. REV. 239 (1963).

39. Juviler, *Marriage and Divorce in the USSR*, 48 SURVEY 104, 107 (1963), says "The total minimum cost for divorce in Moscow, then, is 100 rubles, not counting lawyers' fees. If publication is in a provincial paper and costs less, say 10 rubles, then the minimum cost is 70 rubles."

40. See 1 HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS 247-48 (5th ed. 1925).

41. tenBroek (pt. 1), *supra* note 7, at 257-58.

tection clause, has been challenged.<sup>42</sup> In fact it has been said in rebuttal that "indigence is not yet the source of a right to demand benefits, supported by a correlative governmental duty to provide them. But no one can doubt that government may choose to create certain benefits and make them available only to the indigent; too much governmental action is based on the essentially unchallenged assumption that it may."<sup>43</sup>

Although at this moment the above criticism of a portion of tenBroek's thesis may be technically correct, it is by no means certain that a whole new set of premises are not being formulated in the welfare field. Socialization of the law has been accelerated during the past decade. There is emerging authority to the effect that welfare recipients have legal as well as moral rights and that government has a moral if not legal duty to provide for destitute families, without arbitrary and unreasonable limitations and conditions.<sup>44</sup> It is a safe prediction that as legal services are provided for the poor, what formerly were regarded as "benefits" will be transformed into "rights" that receive direct and indirect legal recognition. In a society where automation, discrimination, and lack of opportunity, impose dire economic consequences on the victims and rejects of our industrial age, lawyers should not have too much trouble in convincing courts that clients' welfare is public welfare. Moreover, judges habitually condemn capriciousness wherever they find it and are apt to be impatient with arbitrary rules and regulations which may serve the whims or convenience of administrators at the expense of those whom they are supposed to serve.<sup>45</sup> Judicial review of a bad social work philosophy and administrative injustice presumably will draw upon the familiar tenets of procedural due process.

However, although we agree with some if not most of the implications of tenBroek's thesis, it does not follow that welfare law and the law of support on the one hand, and matrimonial property law and alimony

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42. Lewis & Levy, *Family Law and Welfare Policies—The Case for "Dual Systems,"* 54 CALIF. L. REV. 751 (1966). See also the concurring opinion by Mr. Justice Jackson in *Edwards v. California*, 314 U.S. 160, 184-85 (1941), where he said "a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States. 'Indigence' in itself is neither a source of rights nor a basis for denying them. The mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color."

43. Lewis & Levy, *supra* note 42, at 754. See also Weyrauch, *Dual Systems of Family Law: A Comment*, 54 CALIF. L. REV. 781 (1966), where the author attempts to reconcile the disagreement of his colleagues on the basis that tenBroek makes an historical analysis and empirical approach whereas Lewis and Levy make an analytical approach.

44. See Bendich, *Privacy, Poverty, and the Constitution*, 54 CALIF. L. REV. 407 (1966); O'Neil, *Unconstitutional Conditions: Welfare Benefits and Strings Attached*, 54 CALIF. L. REV. 443 (1966); Handler, *Controlling Official Behavior in Welfare Administration*, 54 CALIF. L. REV. 479 (1966).

45. See Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965).

on the other, should be administered on the same basis. In fact, the dual system probably should be retained, but, in each case, altered so as to better accomplish different economic and social objectives. Welfare law, as tenBroek points out, should accept and implement the philosophy derived from the Poor Laws that the public has the responsibility to aid the indigent and handicapped, but it should discard the penny-pinching "conservation of public funds" emphasis and "man in the home" nonsense where such frustrates basic welfare objectives and demeans human beings. We no longer need tolerate throwbacks to the time when paupers had to wear a large letter "P" on their right sleeve and the pre-social security days when relief was limited to deserving widows and orphans of good moral character.<sup>46</sup> It would be naive, however, to expect the public and legislators to disregard the cost of welfare programs or to relegate the factor of public expense to relative insignificance.

What may happen, of course, is that Congress eventually will overhaul social security and welfare laws and substitute some scheme, such as a negative income tax or guaranteed annual income, to bring all families up to a minimum standard of living. In any case, because poverty is so widespread in our affluent society and spawns so many social ills, substantial changes in welfare laws are inevitable. These changes will result from humanitarian considerations and the need to conserve human resources and, ultimately, from the necessity of self-preservation. In time, self-interest if not logic will compel our politicians to perceive the causal connection between poverty, riots, and other threats to the established order. The alms-giving or charity approach already is *passé* and no longer has vitality in the public sector. A welfare system that merely averts starvation for those who conform to the system is no longer acceptable in the revolutionary sixties.

But perhaps we should be more specific. How does the dual system perceived by tenBroek work out in practice? He points out that the family law of the poor reflects a different conception of marital rights and duties relating to property and support. Husband and wife are not seen as semi-independent partners, standing in a contractual relationship to each other, but as having a single, undivided, and unseparated interest in a common pool of family resources derived from the income of both spouses. The family law of the poor places greater emphasis upon the community, less upon the individuals; greater emphasis upon meeting the needs of both spouses for support, less upon individual rights to sepa-

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46. See the Pennsylvania Poor Law Amendment Act of 1718, 3 Pa. Stat. at Large 1712-1724, at 221 (1896), and the Indiana Poor Law of 1807, Ind. Acts 1807, ch. 22, § 3, under which a pauper could be farmed out to the highest bidder, cited in RIESENFELD & MAXWELL, *MODERN SOCIAL LEGISLATION* 709 (1950).

rate property and income. Only after family resources are depleted may public assistance be obtained. All of this, according to tenBroek, flows from the traditional policy of minimizing the public cost of supporting the poor and first tapping whatever family resources are available.<sup>47</sup>

It is true that initially, under the Poor Laws, the husband's obligation to support his family was imposed by the temporal courts in order to reimburse the parish for its expenditures in maintaining his family. The common law action by creditors for necessaries was the only other sanction recognized.<sup>48</sup> The ecclesiastical courts, however, also recognized a husband's moral obligation to support his family and applied their own sanctions to compel him to do so. It also should be remembered that the duty to support and the sanctions for its enforcement were developed at a time when the husband was lord and master and upon marriage acquired the wife's personalty, except her paraphernalia, and took over the management of her realty, pocketing the rents and profits therefrom. This vestige of feudalism, although mitigated for the wealthy by trustee devices recognized in chancery, had profound consequences under the common law, and despite Married Women's Property Acts, traces of it persist to this day. For purposes of the present discussion, however, the important thing is that although reimbursement of the parish may have been the original basis for the husband's duty to support his family, in time his duty to support came to be regarded as reciprocal to his control, management, and ownership of matrimonial property. Such was true, with qualifications, with reference to both his duty to support and his duty to pay alimony in the event of a divorce *a mensa et thoro*. Perhaps there was no early common law sanction closely resembling those imposed under modern support and welfare laws because the ecclesiastical courts claimed jurisdiction over such marital offenses as desertion and non-support, and there was no temporal interest perceived until parish expenditures under the Poor Laws led naturally to a demand for reimbursement instead of the ecclesiastical sanction of penance.

Insofar as the Poor Laws and welfare legislation treat husband and wife as partners and as having a single, undivided, and unseparated interest in a common pool of family resources, it may be argued that this system better reflects contemporary social and individual values. The com-

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47. tenBroek (pt. 3), *supra* note 7, at 624.

48. Paulsen, *Support Rights and Duties*, 9 VAND. L. REV. 709 (1956). It has been suggested that the duty of support flows from the wife's common law position as a near-chattel. Crozier, *Marital Support*, 15 B.U.L. REV. 28 (1935). It also has been claimed that the duty is founded on feudal principles. *A Reconsideration of Husband's Duty to Support and Wife's Duty to Render Services*, 29 VA. L. REV. 857 (1943). Actually, however, the true basis for the duty is that it is a fair return for the ownership and control over her property which he obtains by marriage.

munity property regime may be more in accord with the expectations and roles of modern middle class Americans who tend to view marriage as a partnership enterprise with a division of labor and as entailing mutual obligations and privileges.<sup>49</sup> In practice, the matrimonial property law of a majority of states tends to favor the husband at the expense of the wife, although such undue preference may be compensated for in the rules pertaining to alimony.<sup>50</sup> It might be socially desirable to place alimony on a more realistic basis by which actual need and ability to pay are the paramount considerations (and the award may be to either spouse),<sup>51</sup> but also to adopt the community property concept for the distribution of property upon divorce and annulment.<sup>52</sup> The current utilization of alimony to compensate for the inequity occasioned by obsolete matrimonial property laws causes a great deal of difficulty and confusion, whereas if the termination of a marriage were viewed as the dissolution of a partnership, contemporary notions of the economic nature of the marriage relationship would be better served.

It may be persuasively argued that the economics of family law in most states illustrate two wrongs trying to make it right. The wife ordinarily is at a disadvantage insofar as distribution or partitioning of property is concerned; the husband frequently is victimized by the law of support and alimony. Because of Married Women's Property Acts, there no longer is a reciprocal basis for the husband's support and alimony obligation. The notion that such duties persist without regard to the means or earning potential of the wife is difficult to justify in an era when employment opportunities for women may be equal to or exceed those for men.<sup>53</sup>

Another difference between support obligations under welfare laws and those imposed by other laws is the effect given to marital fault. Fault may be relatively insignificant under welfare laws, and a wronged spouse may be required to pay minimal support to a wrongdoer.<sup>54</sup> Al-

49. See Daggett, *Division of Property Upon Dissolution of Marriage*, 6 LAW & CONTEMP. PROB. 255 (1939); Comment, *Contemporary Alimony*, 38 N.E. L. REV. 782, 790-91 (1959).

50. See Dean, *Economic Relations Between Husband and Wife in New York*, 41 CORNELL L.Q. 188 (1956).

51. Eighteen states, under some circumstances, permit alimony to be awarded to husbands. See PLOSCOWE & FREED, *FAMILY LAW* 284 (1963).

52. For a partnership approach to the distribution of property upon annulment, see *Sciamberg v. Sciamberg*, 220 Ind. 209, 41 N.E.2d 801 (1942).

53. See Rheinstejn, *supra* note 38, at 239. See also statistics cited in FOSTER & FREED, 2 LAW AND THE FAMILY xiii (1966).

54. In New York, under § 101 of the Social Welfare Law, if a designated relative is of "sufficient ability" he will be relieved of the support obligation only under the most extreme circumstances. For example, in *In re Garrison*, 171 Misc. 983, 14 N.Y.S.2d 803 (Columbia County Ct. 1939), it was held that the wife had no duty to support a needy

though such a policy may have been motivated by the desire to decrease assistance costs, it makes good sense to stress actual need and ability to pay, since such issues are easier to resolve than the elusive problem of marital fault. In the case of alimony, and to some extent in non-support cases, fault becomes a crucial issue and a red herring that impairs economic justice. Moreover, fault need not be given such effect, for even under parliamentary divorce the guilty wife got a "compassionate allowance."

In addition to the greater emphasis on fault in divorce law, there also are differences as to the criteria employed for determining what the extent of the obligation is, who the obligors are, and which courts process the case. The so-called "means test," that is, whether a person has sufficient means and falls within a designated family relationship, controls the support obligation under welfare legislation.<sup>55</sup> In the case of alimony, the commonly accepted standard is that the wife, where possible, is to be awarded a sum that will enable her to live in the style and manner she enjoyed during coverture.<sup>56</sup> In most states alimony is awarded only to a wife or former wife, whereas under welfare legislation a wife of sufficient means may be ordered to contribute minimal support for a destitute husband. Some welfare laws also compel either or both parents to contribute to the support or maintenance of adult children who otherwise may become public charges, or compel children to contribute to the support of destitute parents.<sup>57</sup> The legal obligation also may be extended to step-parents and may run between grandparents and grandchildren. In states such as New York, a different court processes support cases; divorce cases are handled by a higher court in the judicial hierarchy. The

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husband who had abandoned her for twenty-three years, and in *Houg v. Houg*, 159 Misc. 894, 289 N.Y. Supp. 27 (Dom. Rel. Ct. 1936), that a husband need not support a wife who had committed bigamy and had engaged in prostitution. However, even these extreme cases involved judicial construction for § 101 does not provide for an exemption if the relative has "sufficient ability."

55. For example, see the New York Family Court Act § 412: "A husband is chargeable with the support of his wife and, if possessed of sufficient means or able to earn such means, may be required to pay for her support a fair and reasonable sum, as the court may determine, having due regard to the circumstances of the respective parties." See also tenBroek & Matson, *The Disabled and the Law of Welfare*, 54 CALIF. L. REV. 809, 822 (1966).

56. The leading recent case on factors to be considered in awarding alimony is *McDonald v. McDonald*, 120 Utah 573, 236 P.2d 1066 (1951). For an excellent study and critique, see Hopson, *Economics of a Divorce: A Pilot Empirical Study at the Trial Court Level*, 11 KAN. L. REV. 107 (1962).

57. tenBroek (pt. 3), *supra* note 7, at 645-46, criticizes saddling relatives with responsibility and cites welfare authorities to the same effect. He says that "liability of relatives creates and increases family dissension and controversy, weakens and destroys family ties at the very time and in the very circumstances when they are most needed, imposes an undue burden on the poor . . . and is therefore socially undesirable, financially unproductive, and administratively unfeasible."

clientele, procedure, and courtroom atmosphere is substantially different in the two courts, the support court ordinarily serving a lower socio-economic strata than the divorce court. Typically, in metropolitan support courts, irate wives queue up for the "instant justice" that is forced down the throats of embittered husbands.

In the case of the very poor, contact with family law, when it does occur, usually is made in support court, where the "means test" is employed and the question of marital fault may not be relevant, and where the primary purpose is to tap a possible source of funds before the destitute relative is entitled to public assistance. Although this primary purpose for invoking the jurisdiction of the support court is properly challenged by tenBroek and defended by others, both the "means test" and the subordination of the fault issue are concepts which could improve the rules pertaining to alimony.

Only historical accident can account for the illogical, anachronistic, and unjust law of alimony as it is administered in most states.<sup>58</sup> We have seen that the concept of alimony is derived from ecclesiastical law in divorce *a mensa et thoro* cases as it existed before Married Women's Property Acts, when the husband owned or controlled matrimonial property and a duty to pay alimony to the wife was reciprocal to such status. Apparently, without thinking through the matter, alimony was adopted for the totally different situation where there was absolute divorce, not mere judicial separation, and the ex-wife retained the ownership of her separate property. No longer is there a reciprocal basis for the duty, and the only justifiable social and economic purposes for alimony are to keep former wives off relief or to compensate for the inadequacies of matrimonial property law. The latter purpose would be better served, as previously stated, by an adaptation of community property principles and an approach similar to the dissolution of a partnership.

The assumption in both our welfare law and alimony law that upon marriage a husband is saddled with a lifelong duty to support a wife or ex-wife who does not remarry is most questionable in an age when women have clamored for and achieved equality. Such an assumption makes women more equal than equal. Even if the husband's obligation is conditioned upon actual need and ability to pay, the assumed obligation is questionable. It is an incident of status rather than of contract. Even the economic basis of the assumption is suspect, due to the notorious difficulties in collecting support and alimony awards. In Lake County, Indiana, for example, it was reported a few years ago that there were arrearages or no collections in 89 percent of the cases and that in 47 per-

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58. See Paulsen, *supra* note 48.



cent no support or alimony payments were made even though the court order directed payment to the clerk of court.<sup>59</sup> Other reports indicate that there are arrearages in at least 50 percent of support and alimony cases.<sup>60</sup> This unprecedented wholesale defiance of court orders by embittered men may be accounted for, at least in part, by the failure of courts to be realistic and to appreciate that an automatic imposition of the support duty is not in accord with current values and in many cases is highly penal.

In the case of the more prosperous, the husband's duty to support or pay alimony may be an unpleasant but tolerable burden, but where a poor or low income husband is involved, even a minimal order may constitute a great hardship or impossible burden. Of necessity, he may become a fugitive. Moreover, if he remarries or establishes a new family, further complications inevitably arise, making his primary obligation to the first family unrealistic. In short, both support and alimony law occasion hardship to poor and lower income husbands and in application often force the man into defiance of the law or prevent him from living in dignity. Either a "means test" should be employed in a realistic fashion, or a new approach should be made to the problem of separated or divorced families. It might be possible to follow the example of unemployment compensation and to devise some form of social security insurance against family breakdown. Husbands might welcome such a plan; it might be actuarially sound, and it would be more certain than compliance with support orders. The objection that such an insurance plan would precipitate divorce or family breakdown is unrealistic.

It remains to be seen whether tenBroek's constitutional arguments based upon the equal protection clause will have general application to the obligations imposed by welfare laws. In the *Kirchner* case,<sup>61</sup> the California court held that a statute imposing liability for the care and maintenance of a mentally ill relative committed to a state institution violated the state constitutional guarantee of equal protection. More recently, however, the California court narrowly construed the principle of *Kirchner* and held that a father was responsible for the support of a minor in a juvenile correctional institution and must reimburse the state for his maintenance.<sup>62</sup> The son had been committed by order of the juvenile

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59. See Study of Divorce and Support Orders in Lake County, Indiana, 1956-1957, by Fred H. Steininger, submitted to Lake County Welfare Board (mimeographed).

60. See Foster, *Dependent Children and the Law*, 18 U. Prrt. L. Rev. 579 (1957).

61. Department of Mental Hygiene v. Kirchner, 60 Cal. 2d 722, 388 P.2d 724 (1964).

62. County of Alameda v. Espinoza, 243 Cal. App. 2d 685, 52 Cal. Rptr. 480 (Dist. Ct. App. 1966).

court for assault with intent to murder. Apparently, California is making a distinction based upon the dominant purpose of the commitment. If the "dominant purpose" is to protect the public, a relative may not be charged with reimbursement, but if it is to reform and rehabilitate "to the end that he may return to the family," or for that purpose and to protect the public, an order for reimbursement does not violate California's equal protection clause.

It is obvious that California's distinction between protection of the public and benefit to the family is artificial and that the labels employed are arbitrary. There is a public and social interest in the family and in the health and behavior of individuals; there is a family and individual interest in the health and behavior of family members who pose a threat to the public.<sup>63</sup> The policy issue which should be faced, in the legislature as well as in the courts, is the problem of whether any reimbursement duties should be imposed under welfare laws. It would seem that the California distinction as to "dominant purpose" is possibly itself an arbitrary classification under equal protection principles. Commitments to either a mental institution or a correctional facility presumably are for both public and private benefit, and the determination of disposition to one or the other may be somewhat fortuitous.<sup>64</sup> In principle, only where one receives a special benefit should he be singled out for a special contribution. This is the obverse of the rule that in a just society citizens should be compensated for special loss inflicted by governmental activity or the exercise of eminent domain.<sup>65</sup> It is one thing to shoulder a common burden; it is another to be singled out and subjected to a disproportionate and special burden.

The equal protection arguments of Professor tenBroek, and rationale of the *Kirchner* case, may not stand up under close analysis. However, this criticism does not impair the larger thesis that alimony and support laws are discriminatory in application. Discrimination abounds under both of the dual systems of family law. The "man in the home" disqualification under welfare laws,<sup>66</sup> especially where it leads to midnight raids,<sup>67</sup> is imposed in the name of economy at the expense of pri-

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63. See Pound, *A Theory of Social Interests*, 15 PAPERS AND PROCEEDINGS OF THE AMERICAN SOCIOLOGICAL SOCIETY 16 (1921), reprinted in HALL, READINGS IN JURISPRUDENCE 238-46 (1921).

64. See *In re Maddox*, 351 Mich. 358, 88 N.W.2d 470 (1958).

65. See Foster, *Tort Liability Under Damage Clauses*, 5 OKLA. L. REV. 1 (1952).

66. See discussion by Lewis & Levy, *supra* note 42, at 772-74, 777-80.

67. See Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1346 (1963); tenBroek (pt. 3), *supra* note 7, at 667-71. Miller, *supra* note 29, at 397, points out "Current mores condone, even honor, the rich taxpayer whose lawyers and accountants find loopholes in the law that enables him to avoid income tax payments,

vacy and human dignity. Under the alimony statutes of New York, the ex-wife may be deprived of alimony only upon proof "that the wife is habitually living with another man and holding herself out as his wife."<sup>68</sup> If, in the name of economy, or conventional morality, the support obligation is to be passed to the man in the home and welfare is to be terminated, such should occur only where a de facto family has been established and the man has means for support. Even then the "man in the home" policy may occasion more harm than good.

Moreover, it is doubtful that tenBroek is correct when he assumes that alimony is "less penal" than welfare law. Wherever courts fail to give priority to actual need and ability to pay and concentrate on the fault issue, the result is apt to be an alimony award that in effect is an amercement, comparable to a criminal fine, but without benefit of a jury trial.<sup>69</sup>

Effective criticism of welfare laws and their administration should be directed at their basic philosophy and at bureaucratic rules and regulations. The philosophy should be that public assistance for the poor and handicapped is a public responsibility. As in the case of alimony, actual need and ability to pay should be the primary considerations, and punitive features should be eliminated. But in the case of welfare, it is the ability of the state to pay that is relevant. The destitute should be regarded as having a just claim for, if not a legal right to, assistance, and welfare administrators should be further oriented to think in terms of help and service rather than paring relief rolls. If the recipients of assistance are "clients," welfare officials should regard them as such rather than as panhandlers. Effective legal representation for welfare recipients and repercussions from the poverty program may bring about a change in emphasis in both underlying philosophy and administration.

#### CHILD CUSTODY AND POVERTY

Custody disputes are rarely litigated among the poor and when they do arise they usually occur otherwise than as an incident to divorce. Of course, with increased free legal services to the poor, it may be anticipated that there will be an increase in such litigation. At the present time, however, a non-judicial issue over custody is more apt to arise as an incident in the administration of the AFDC program.

For example, welfare regulations may require that before AFDC

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but the welfare recipient who finds a loophole that enables her to increase aid to her children is an object of public wrath."

68. N.Y. DOM. REL. LAW § 248.

69. See Peele, *Social and Psychological Effects of Alimony*, 6 LAW & CONTEMP. PROB. 283 (1939).

may be awarded, the case worker must decide whether a bona fide offer of a free home made by a parent, relative, or other person should be considered a "resource."<sup>70</sup> A mother who has become destitute may be denied AFDC because of the availability of other resources. Such denials may be a lever to force the mother to give custody to the father or some other relative. Obviously, the child's best interests should be the controlling principle, and the grant or withdrawal of AFDC funds should not be utilized to control custody or to force a mother to give up her children. Nor should withdrawal of assistance funds be used as leverage to force marital reconciliations.

The actual custody of children also is affected in some states by a one-year residency requirement for granting public assistance. This requirement is an inhospitable survivor of the Elizabethan Poor Law's "settlement" principle. The migration of the mother may be inhibited and she may be deterred from moving to a better labor market, or she may have to place her children with someone else if she moves, because AFDC will be unavailable at the new location.<sup>71</sup> Both the "free home" and residency limitations reflect the economizing or "minimizing the cost" orientation of our welfare laws and in operation lend themselves to prejudiced application.

It should be noted, however, that the AFDC program, designed to permit children to be cared for in the home, is a tremendous improvement over the situation which prevailed when poor children were placed in orphanages. Under AFDC the mother may be able to maintain the household, although to some extent her parental control is subject to the guidance of social workers who may intervene and give advice or pass judgment upon household management, child rearing, and budget matters.<sup>72</sup> Such intervention may be a welcome service or busybody snooping, depending upon the circumstances.

In a few custody cases poverty may be a factor in determining placement. To some extent it is tied in with such proper criteria as the wholesomeness of the home environment and other factors pertaining to the child's welfare. For example, in a recent North Carolina case the custody of a child was transferred from the mother to the father where it was shown that the mother lived in a trailer, worked long hours as a waitress, and earned only \$17.96 a week.<sup>73</sup> The father lived with his parents in a large house where the child would have her own room. In

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70. Kay & Philips, *Poverty and the Law of Custody*, 54 CALIF. L. REV. 717, 727 (1966).

71. *Id.* at 732.

72. tenBroek (pt. 3), *supra* note 7, at 649.

73. *Matter of Teresa Ann Bowman*, 142 S.E.2d 349 (N.C. 1965).

another recent case,<sup>74</sup> the court refused to change custody from the father where he maintained a good home and the mother, who had remarried, worked from late afternoon until midnight. The California court in *Harris v. Harris*,<sup>75</sup> changed custody from the mother to the father, who was a doctor with a good income, where it was shown that the children were neglected, dressed poorly, and lived in a house without toilet facilities, and that the mother when drunk lay around the house nude, and sometimes stayed out all night with men. A Pennsylvania mother, who lived in a trailer camp, also lost the custody of her six-year-old daughter to the father where it was shown that she neglected the child and frequently took her to bars.<sup>76</sup>

There is a danger in such cases that the decision of what is or is not a suitable home or parent may be determined by middle class values, and that a social worker's report or court decision may reflect class prejudices. Those who place cleanliness next to godliness may be entitled to their preference but undue self-righteousness may lead to such extreme statements as those contained in the Iowa court's opinion in *Painter v. Banister*.<sup>77</sup> To the extent that poverty accounts for the negative factors in the home, it should be taken into account in evaluating suitability and fitness. Deliberate neglect or abuse is one thing, incidents of poverty are another.

#### SOCIAL CLASS AND ADOPTION

Class and race distinctions have a profound effect upon placement and adoption. There is a constant demand for, and a relatively short supply of, white children born to middle class mothers. There also may be a lesser market for the children of poor white mothers. In the case of non-white poverty groups, however, there is virtually no demand.<sup>78</sup> Mothers from the latter class often are not permitted to relinquish their children to agencies for adoption because of the practical impossibility of locating adoptive homes. About 90 percent of adopted children are white although 60 percent of all illegitimate children are non-white. Probably no more than 500 to 1,000 families in the United States have taken multiracial children for adoption.<sup>79</sup>

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74. *Croce v. Cummings*, 179 So. 2d 836 (Miss. 1965).

75. 186 Cal. App. 2d 788, 9 Cal. Rptr. 300 (Dist. Ct. App. 1960).

76. *Commonwealth v. Sabo*, 198 Pa. Super. 161, 181 A.2d 921 (1962).

77. 140 N.W.2d 152 (Iowa 1966). Professor tenBroek contends that the presumption of parental fitness applies mainly to members of the middle classes, but is substantially relaxed as to the poor. In cases involving the poor, "parental fitness" is examined rather than presumed. tenBroek (pt. 3), *supra* note 7, at 676. See also Katz, *Foster Parents Versus Agencies*, 65 MICH. L. REV. 145, 158 (1966).

78. See Kay & Philips, *supra* note 70, at 738.

79. *Time*, January 27, 1967, p. 76.

In addition to the discriminatory effect of current demand, the rules for matching the adopted child to the adopting parents may have the same effect, whether intended or not. The attempt to match ethnic background, religion, physical characteristics, intelligence, and the like restricts the opportunity for placement and the opportunity to adopt. Probably, in most states welfare agencies would not place a Negro child in a white home, or a white child in a Negro home, regardless of the wishes of the parties or the suitability of the home.<sup>80</sup> Due to the lobbying of religious groups, "where practicable" there must be a matching of religion. The dogma appears to be that there is a covenant running with the child to the faith.<sup>81</sup> Hopefully, such irreligious nonsense may eventually be held to violate the first amendment.

If we apply Cahn's "consumer's perspective" and direct our attention to the needs of children and the commendable desires of adoptive parents, and reject as irrelevant class, race, and religious prejudices, the best interests of children and parents will be served. There is a need for critical judicial and legislative re-evaluation of the criteria applied in adoption and custody placements to discern which rules are reasonable or unreasonable in a democratic society. It is not surprising that the press and the public became angry over Commissioner Fitzsimmon's initial refusal to permit the adoption of four-year-old, blonde Beth Liuni by forty-eight-year-old, dark complexioned parents.<sup>82</sup> The irrelevancy of coloration in that case was obvious when compared with their shared mutual love and affection. The point is, however, race and religion, under the same circumstances, would be just as irrelevant. Due process and equal protection concepts should be applied to child placement. It is a violation of religious freedom, or the establishment of religion, to bar an adoption solely because of differences in religion. It is a denial of equal protec-

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80. See Katz, *Judicial and Statutory Trends in the Law of Adoption*, 51 *Geo. L.J.* 64, 75-77 (1962), and for an enlightened decision, see *In re Adoption of a Minor*, 228 F.2d 446 (D.C. Cir. 1955). The Standards for Adoption promulgated by the Childhood Welfare League of America state that racial background in itself should not be a major criterion in the selection of a home for a child.

81. See Katz, *supra* note 80, at 70-75. See also Ramsey, *Legal Imputation of Religion to an Infant in Adoption Proceedings*, 34 *N.Y.U.L. Rev.* 649 (1959). Compare *Matter of Maxwell*, 4 *N.Y.2d* 429, 151 *N.E.2d* 848, 176 *N.Y.S.2d* 281 (Ct. App. 1958), with *Petition of Goldman*, 331 *Mass.* 647, 121 *N.E.2d* 843 (1954), *cert. denied*, 348 *U.S.* 942 (1955).

82. See *Fitzsimmons v. Liuni*, 51 *Misc. 2d* 96 (Family Ct., Ulster County 1966), *rev'd*, 274 *N.Y.S.2d* 798 (App. Div. 1966). The January 17, 1967, issue of *The New York Times* reported that Commissioner Fitzsimmons reluctantly signed the necessary papers so that Beth might be adopted by the Liuni family with whom she has lived for four and a half years, having been placed in that home when she was five days old. Commissioner Fitzsimmons had opposed the adoption as an "improper placement" because of the difference in color of Beth and the Liunis, the age (48) of the adopting parents, and Mrs. Liuni's prior hospitalization for emotional or mental illness.

tion to discriminate by arbitrary classification so that Negro children cannot be placed in white homes that welcome them.

So far we have been looking at the function of the agency and the courts' function in adoption cases and the discrimination that may be built into the law or rules and regulations. It also is of interest that the institution of adoption may mean different things in different social classes. Professor Jeffery, a distinguished sociologist, has pointed out that the adoptive parents from the upper class usually are childless and unrelated to the out-of-wedlock children they adopt, and that the adoption is for the purpose of acquiring a child for the family, *i.e.*, to create a new social and familial relationship where one did not previously exist.<sup>83</sup> The middle class, however, usually adopts from the "divorce" and "parent" rather than the "out-of-wedlock" category, and typically the natural mother after divorce remarries and the second husband adopts the child. The social function is to legalize an existing social relationship. Lower class adoptions usually are from the "other" and "family" categories; the typical case is one where the children are in the care of relatives. The purpose may be to qualify for relief benefits, and the social function may be to provide a type of social service for dependent and neglected children.

According to this study, in their operation adoption laws tend to accord a service to middle and upper class families. Unwed middle and upper class mothers have a seller's market for their illegitimate offspring. The children of the poor and minority groups do not enjoy similar advantages. The consequences of illegitimacy are alleviated for some, but not for others. The unwanted child of a college co-ed may readily find a good home, but the chances are that the child of a domestic must be absorbed into a family which already has too many mouths to feed. Of course, in human terms, the latter home may be better because of warmth and affection, but it also may be an environment which spawns desperation and delinquency. We do not begrudge any children their opportunity to acquire adoptive parents; we merely lament the fact that the opportunity is not open to all and that arbitrary or discriminatory barriers all too often have been raised to prevent the placement of children in good homes.<sup>84</sup>

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83. See Jeffery, *Social Class and Adoption Petitioners*, 9 SOCIAL PROBLEMS 354 (1962).

84. For a devastating critique of a bureaucratic approach to placement and adoption, see Katz, *supra* note 77, commenting upon *In re Jewish Child Care Association*, 5 N.Y.2d 222, 183 N.Y.S.2d 65, 156 N.E.2d 700 (Ct. App. 1959).

## POVERTY, DELINQUENCY, DEPENDENCY, AND NEGLECT

Within the past decade we have become increasingly aware of the shortcomings of the juvenile court system and the need for a re-examination of its operation and its basic premises.<sup>85</sup> The slogans of *parens patriae* and "treatment not punishment"<sup>86</sup> are no longer taken at face value. The sociological facade of some of these courts is being penetrated and old fashioned lawyers' notions of due process are being raised in juvenile cases. The former isolation from the mainstream of judicial theory and values is a thing of the past, and we may be sure that the equilibrium of intake and case workers is being shaken if not toppled. Professor Monrad Paulsen has summarized the ferment and change in juvenile court procedures as follows:

Today there is really no doubt that the Constitution requires 'due process of law' to be observed in juvenile courts. . . . The 'due process' idea is making headway with legislatures as well as with courts. In California a right to counsel was expressly written into the law in 1960. In New York, in 1961, a system of law guardians was created. . . . Juvenile respondents in each case in New York are now told by legislative order that they have a right to counsel, a right to remain silent and a right to a state-paid lawyer if they have no money to hire one.<sup>87</sup>

At this writing, the Supreme Court has not handed down its decision in *Matter of Gault*.<sup>88</sup> It is expected that at a minimum the Court will hold that all *relevant* due process principles apply to juvenile court proceedings and that at a maximum it will hold where commitment to an institution may be the disposition juveniles are entitled to *all* of the rights that pertain in criminal court procedure.

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85. See Paulsen, *Juvenile Courts, Family Courts, and the Poor Man*, 54 CALIF. L. REV. 694 (1966). A juvenile court judge has pointed out that "The real dilemma concerns not the philosophy of the juvenile court, but whether the composite results of its performance justify continued reliance upon the *parens patriae* theory. . . . If the court interferes unjustifiably in the private lives of juveniles and their families, makes determinations which it lacks the facilities to implement effectively and imposes sanctions without techniques capable of producing effective rehabilitation, then nothing is lost by subjecting youthful offenders to the criminal process." Polow, *The Juvenile Court: Effective Justice or Benevolent Despotism?*, 53 A.B.A.J. 31, 33 (1967).

86. For a comment on the history of *parens patriae*, see Note, *The Parens Patriae Theory and Its Effect on the Constitutional Limits of Juvenile Court Powers*, 27 U. PITT L. REV. 894 (1966).

87. Paulsen, *The Juvenile Court and the Law*, 11 WAYNE L. REV. 597, 608-09 (1965).

88. 99 Ariz. 180, 407 P.2d 760 (1965), *prob. juris. noted* 384 U.S. 997 (1966). See also *Kent v. United States*, 383 U.S. 541 (1966), where Mr. Justice Fortas questioned the premises of the *parens patriae* theory and intimated that due process might require a right to counsel in juvenile courts, as did the applicable statute.



The procedure and working of the juvenile court and juvenile authorities have special relevancy when we examine their clientele. It is notorious that in the past, and prior to the recent "epidemic" of suburban delinquency, social class was a major factor in determining which delinquents were taken to the police station or detention center, processed through the juvenile court, and placed on probation or sent off to institutions. One result of this differentiated selectivity in processing youthful offenders through the juvenile court was the erroneous conclusion that delinquency was almost exclusively a slum problem. As late as 1964, it was reported that delinquency, as seen from juvenile court data, was concentrated in urban areas in certain sections where there was a high percentage of economically deprived breadwinners, poorly assimilated *in-migrants*, poor housing, and broken homes.<sup>89</sup> More recently, however, there have been discussions about "hidden delinquency" which does not appear on the police blotter or in juvenile court records. A 1965 series on delinquency in suburbia reports:

All suburban statistics are clouded to some extent by the question of "hidden delinquency"—offenses committed by middle and upper class children that never find their way onto police blotters, court calendars, or even juvenile and bureau files. Cover-up on these cases is usually associated with village or private police forces, whose members are likely to know the offending youth or his parents, or whose officials are more concerned with community image than with accurate records.<sup>90</sup>

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89. Perlman, *Antisocial Behavior of the Minor in the United States*, 28 FED. PROB. 23, 27-28 (1964). For a comparison of middle and upper class delinquents with lower class delinquents, see Shanley, Lefever, & Rice, *The Aggressive Middle-Class Delinquent* 57 J. CRIM. L., C. & P. S. 145 (1966). It was found that law violation patterns of these groups were comparable in terms of both frequency and seriousness.

90. Abrams, *Crime in Suburbia*, NEWSDAY, Sept. 20, 1965, p. 48. It is reported that "From Long Island to Los Angeles, the suburbs—traditionally regarded as bastions of respectability—produced in 1964 the fastest rising rate of crime in the Nation. And in the first half of 1965, when crime in the Nation's urban areas leveled off, suburban offenses continued to mount at an unprecedented pace, although they still remain well below urban rates. . . . Nassau police statistics indicate . . . that the per capita crime rate for youths under 21 also has jumped up sharply. The figures show that out of every 100,000 Nassau youths, 315 were arrested in 1960; in 1964, that number had increased to 489—a rise of 55 per cent. . . . Youths between 13 and 21 accounted for most of Long Island's 10,000 burglaries and 3,600 auto thefts . . . reported last year, according to police. They are responsible for more than 40 per cent of all Long Island crime . . . although they comprise less than 20 per cent of the total population. Surveys . . . indicate that most of these offenders are white collar youths who come from comfortable private homes where the income is good and the family is both small and intact." See also Hechinger, *Affluent Delinquency*, N.Y. Times, Sept. 20, 1963, p. 25, cols. 5-6; Lelyveld, *The Paradoxical Case of the Affluent Delinquent*, N.Y. Times Sunday Magazine section, Oct. 4, 1964.

Undoubtedly, police and juvenile court records do give a false impression with reference to the incidence of youthful offenses among the middle and upper classes. Juvenile court cases represent the top of the iceberg of the delinquency problem. On the other hand, it also is true that "the tendency among law-enforcement personnel, in the main, is to overlook much more in poorer neighborhoods than in those which are better off. In the poorer neighborhoods police are inundated by so much antisocial activity that they tend to take cognizance only of that which is most pressing."<sup>91</sup> In other words, in both slum and suburban areas police officers have been selective in the cases processed, in the urban area because antisocial behavior is so rampant, and in the suburban area because in better neighborhoods it has been the custom to informally resolve all but the most serious cases by contacting parents.<sup>92</sup> Depending upon many variables, police failure to process serious juvenile misbehavior through the juvenile court may have harmful consequences for the public or the juvenile.

There also is the problem of how "delinquency" is defined by statute and construed by officers and courts. Quite obviously, terms such as "persons in need of supervision," "incorrigible," "out of control," and "habitually truant," permit considerable leeway in application. In one sense, such statutory vagueness is necessary, for the implications of comparable behavior may differ between both individuals and neighborhoods. On the other hand, individualization of treatment carries with it the seeds of resentment. Underprivileged youths in the slums who face arrest and reform school for an offense that is overlooked or results in probation for a middle or upper class boy, may have understandable embitterment and resentment.<sup>93</sup> It is difficult to strike a judicious balance between even justice and appropriate individualized disposition. It also is true that most law-abiding adults in their youth committed offenses, and that what we recall as boyish scrapes or "letting off steam" falls squarely within the vague definition of delinquency.

A 1963 comparison of unreported juvenile offenses admitted on a questionnaire by a group of college students and reported offenses for

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91. Chwast, *Alienation as a Factor in Delinquency*, 28 FED. PROB. 25 (1964).

92. See Note, *Juvenile Delinquency: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775 (1966).

93. Paulsen, *supra* note 85, at 696-97, also points out that emphasis on treatment rather than punishment may be puzzling or seem foolish to juveniles who expect swift retribution, and that juveniles may resent being treated as children. Parents may resent a probation officer taking over the functions of parenthood. Paulsen, *id.* at 699, concludes that "a child of parents who are very poor stands in danger of a court-ordered separation from his parents to an extent which children of middle and upper classes do not." See also Ketcham, *Legal Renaissance in the Juvenile Court*, 60 NW. U.L. REV. 585, 595 (1965).

which 2,049 children were being charged in the Juvenile Court at Fort Worth, disclosed that the unreported offenses were as serious in nature as those for which the Fort Wayne children were being charged.<sup>94</sup> The author concluded that there is a differential selection of juvenile offenders on the basis of the social importance of the child's family. A good family was identified as one in which parents held positions of responsibility, and 54 percent of the police officers interviewed reported that they would not report to the juvenile court a child coming from such a home. The failure to report such cases was justified by the officers on the grounds that experience indicated "boys from good families straighten out in a couple of years and become respectable citizens," and that there was no need to embarrass a good family when the parents were cooperative.

Although in the past it might have been true that juvenile offenders from "good homes" often by-passed the juvenile court process, and that the cop on the beat in a ghetto area overlooked trivial offenses, the increased concern over the depredations of youthful offenders is bound to reduce the "differential selection" referred to above.<sup>95</sup> Parental promises to send teenagers off to boarding school or to a psychiatrist no longer seem adequate in communities where juveniles are responsible for a substantial proportion of local crime.<sup>96</sup> Presumably, more teenagers from well-off families will be sent to correctional institutions.

Insofar as the disposition of cases is concerned, probably any close look at those cases that result in incarceration, probation, or dismissal will reveal a pattern of economic and social differentiation. Although it is desirable to take home environment into account, there is danger that conscious or unconscious bias may influence evaluation and disposition. Juvenile delinquency laws are peculiarly vulnerable to abuse and misapplication because of vague statutory terminology and the informality of procedures.<sup>97</sup> Participants in civil rights or other protest demonstrations may be railroaded as delinquents under the broad discretion committed to juvenile courts. This danger is so extreme that it may be ar-

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94. See Goldman, *The Differentiated Selection of Juvenile Offenders for Court Appearances* (1950) (unpublished thesis in Sociology Dep't, University of Chicago), in turn citing the study by Porterfield.

95. See Note, *Juvenile Delinquent: The Police, State Courts, and Individualized Justice*, *supra* note 92.

96. See note 83 *supra*.

97. See U.S. COMM'N ON CIVIL RIGHTS, LAW ENFORCEMENT, *A REPORT ON EQUAL PROTECTION IN THE SOUTH 80-83* (1965): juveniles arrested for civil rights demonstrations in Jackson, Mississippi, Americus, Georgia, and St. Augustine, Florida, "were threatened with imprisonment and, as a condition of exoneration or release, were forced to promise that they would not participate in future civil rights activities." See also Paulsen, *supra* note 85, at 707-08.

gued that limitations must be placed on juvenile court discretion by legislatures or appellate courts or we may find we have created another Star Chamber.

De facto segregation also is prevalent in juvenile institutions. Judge Justine Wise Polier has pointed out that Negro and Puerto Rican delinquents from New York City fill the state-operated institutions while white delinquents usually end up at private or church-operated institutions.<sup>98</sup> Such segregation, although accidental or fortuitous, may well reinforce antisocial attitudes.<sup>99</sup>

The conclusion is inescapable that poverty, race, and social class enter into each stage of the processing of juvenile offenses. The police officer and desk sergeant, who without court referral handle 60 to 70 percent of all juvenile cases,<sup>100</sup> have a broad discretion. The intake department of the juvenile court has a similar discretion, and the juvenile court judge has virtually unlimited authority to dispose of cases as he sees fit. Although broad discretions also exist in the criminal process applicable to adults, there are fewer precedents, standards, and guidelines for juvenile cases. In the juvenile courts in some metropolitan areas delinquency cases are heard and disposed of at the rate of thirty an hour before a single judge.<sup>101</sup> The most practicable safeguard against abuse of discretion may be the formulation and application of standards for processing at each stage, and the use of law guardians to represent juveniles. This may reduce but not eliminate the danger of discriminatory differential treatment based upon poverty, race, or social class.

Dependency and neglect cases in the juvenile courts also reveal the relationship between poverty and juvenile court jurisdiction. Professor Herma Kay gives the following breakdown for Alameda County, California: of 2,356 referrals for neglected and dependent children in 1964, there were 952 referrals for unfit home situations; 601 referrals due to lack of parental control and supervision; 365 referrals because of no parent or guardian; 303 referrals because a parent was ill or incapacitated; 65 referrals where the child was a victim of rape or molestation; 49 protective referrals; 20 referrals where the child was unhappy with the home situation; and 10 referrals where there were suicide attempts.<sup>102</sup> Economic deprivation is the common thread running through most of

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98. POLIER, A VIEW FROM THE BENCH 26 (1964).

99. Voorhees, *supra* note 6, at 24, says "Above all, there is bitterness, deep-seated and bordering on hatred, against the whole apparatus of the law. The policeman ('the Man'), the police court, the magistrate, the constable and the process server are the enemy. They are thought of as oppressors or the servants of oppressors."

100. See note 95 *supra*.

101. Voorhees, *supra* note 6, at 25 n.11.

102. See Kay & Phillips, *supra* note 70, at 735.

the above categories, although as we have seen, it should not be assumed that delinquency, dependency, and neglect are the exclusive lot of the poor.

The most egregious example of parental neglect is the so-called "battered child syndrome."<sup>103</sup> The evaluation and case studies of this phenomenon by Elizabeth Elmer show that the prototype of child abusers is a poor, young, white, Protestant mother on relief, who is mentally ill or retarded, alienated from social groups, has had several children too close together, usually illegitimately and has been confronted with multiple crises.<sup>104</sup> To date the "battered child" statutes, which since 1960 have been passed in all but one or two American jurisdictions, tend to concentrate on requirements for reporting suspected cases to police authorities, and usually are limited to physical abuse. A few of those statutes recognize the need for social services for such families rather than a strictly penal approach,<sup>105</sup> and in a few instances "neglect" as well as physical abuse must be reported by those subject to the obligation to report.<sup>106</sup> Presumably, "neglect" may include psychic as well as physical abuse. In theory this should be so but there is danger that a Pandora's Box might be opened to cranks or those who have preconceived notions on child rearing. In any event, what has been called the "Beverly Hills syndrome,"<sup>107</sup> *i.e.*, child neglect in better neighborhoods, is related to the overall problem of mores and antisocial behavior in suburbia.

In practice, it may be somewhat arbitrary to classify a particular family problem as one of "delinquency," "dependency," or "neglect." Moreover, the juvenile's problem may be but one facet of a larger family, neighborhood, or community problem. The classification made, however, may determine disposition and consequences. It is tragic that all too often a particular court looks at and treats only one segment of a larger problem and hence nothing meaningful is accomplished. Fragmented jurisdiction over family problems inevitably leads to partial or inadequate solutions.<sup>108</sup> It is doubtful that urban social problems can be substan-

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103. See Foster & Freed, *The Battered Child*, 3 TRIAL 33 (1967); McCoid, *Battered Children*, 50 MINN. L. REV. 1 (1965); Paulsen, Parker, & Adelman, *Child Abuse Reporting Laws—Some Legislative History*, 34 G.W.L. REV. 482 (1966).

104. Elmer, *Identification of Abused Children*, CHILDREN'S BUREAU, U.S. DEP'T HEALTH, EDUCATION, AND WELFARE BULL. (1965).

105. See Foster & Freed, *supra* note 103, at 36. Colorado, Illinois, New Jersey, and North Dakota statutes specifically refer to the use of social agencies in child abuse cases.

106. See Foster & Freed, *Battered Child Legislation and Professional Immunity*, 52 A.B.A.J. 1071, 1073 (1966).

107. See *The Beverly Hills Syndrome*, unpublished proceedings of the Conference on Probation and the Law sponsored by the California Department of Health and Welfare, San Francisco, April, 1963, cited by Kay & Philips, *supra* note 70, at 739.

108. See GELLHORN, CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY ch. 15 (1954).

tially alleviated until all levels of government and interested agencies unite in a concerted attack upon poverty, ignorance, crime, and disease. At the present time there is little coordination of effort; various agencies concentrate on facets and remain oblivious to the larger dimensions of chronic problems.

#### CONCLUSION

An attempt has been made to sketch some of the areas of family law where a different law applies to the poor or disadvantaged. To the extent that there are meaningful differences calling for different treatment or disposition, distinctions are not invidious. It is where discriminatory consequences are visited upon the poor because they are poor that our democratic commitments are violated. Moreover, we may not in good conscience object to self-help where the law is structured so that only the well-to-do can afford to resort to it.

Only a total war on poverty, in lieu of the present guerrilla warfare, has a chance for substantial success. In the meantime, however, it may be wise to improvise and improve the situation at the most acute pressure points. One of the most important of these is our administration of welfare legislation and family law. We can reduce or eliminate some injustice and better effectuate our moral pretensions and avowed public policy.

A good example of a needed reform, which is within the realm of the possible, is the inclusion of de facto or "common law" families under the benefits conferred by workmen's compensation, social security, and similar statutes providing for dependents. Illegitimate children and de facto wives usually are excluded from many or most of the benefits given dependents under state or federal law.<sup>109</sup> In the case of children, it is difficult to show social justification for the dichotomy between legitimate and illegitimate, and it may be primarily a vestige of that status which Blackstone called "filius nullius" or an expression of Victorian morality. The harsh consequence is that the innocent victims of parental sin, unfortunate circumstances, or unrealistic divorce laws are penalized. It is absurd to assume as some moralists do that the stigma of illegitimacy will deter illicit propagation.

There is a great deal of misunderstanding regarding the stability of some irregular family relationships. Many unmarried couples maintain

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109. See Comment, *The Rights of Illegitimates Under Federal Statutes*, 76 HARV. L. REV. 337 (1962). Miller, *supra* note 29, at 404, claims "my own preliminary studies on the basis of census data indicate that the illegitimate birth rate varies little as between racial groups within the same income range. There is every probability that the same thing is true as respects juvenile delinquency and crime rates."

a stable family relationship for a long period of time. tenBroek's study quotes a California Welfare Department report as stating,

The duration of these [informal] alliances is surprisingly long in view of the number of strikes against them. The statistics on such families known to AFDC shows that 16% have been together eight or more years, nearly 30% more than five years, and almost half . . . at least three years.<sup>110</sup>

At least where there is a stable relationship and actual dependence upon the breadwinner, the family and society would be better off if legal recognition were given to the family unit. Such recognition could be accorded in several ways. The presumption that a valid marriage in fact occurred could protect the dependents and would be difficult to rebut.<sup>111</sup> Unless statutory language forbids, "dependent" could be construed to include putative families. The Tennessee court, reasoning from a questionable analogy, held that imposition of the duty to support an illegitimate child was evidence of a public policy that an illegitimate child was a "dependent" under the workmen's compensation act.<sup>112</sup> In most instances, however, courts, without sufficient regard to practical consequences, have been legalistic rather than humane and have held that a natural child or non-wife are not "dependents" under the law.<sup>113</sup>

The punishment of innocent children for parental sin found its most vicious expression under the "suitable home" test incident to Title IV of the Social Security Act. Some twenty-five states passed "suitable home" provisions in setting up local standards for public assistance.<sup>114</sup> Under these provisions a home could be declared "unsuitable" for a variety of reasons, including the conduct of a parent or guardian. As part of its campaign against the civil rights movement and desegregation, Louisiana in 1960 amended its law to deny all benefits to any child living with its mother if she had an illegitimate child after having received assistance, or to any illegitimate child whose mother had had two previous illegitimate children.<sup>115</sup> All aid would be denied solely because of the mother's pre-

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110. tenBroek (pt. 3), *supra* note 7, at 617 n.751.

111. See Note, *The Conflict of Presumptions on Successive Marriages by the Same Person*, 30 HARV. L. REV. 500 (1917), reprinted in SELECTED ESSAYS ON FAMILY LAW 287 (1950). See also Annot., 34 A.L.R. 464 (1925).

112. *Shelley v. Central Woodwork, Inc.*, 340 S.W.2d 896 (Tenn. 1960), noted 29 TENN. L. REV. 600 (1962).

113. For example, see *Humphreys v. Marquette Casualty Co.*, 95 So. 2d 872 (La. App. 1957). In Kentucky, however, common law marriages are specifically recognized by statute for workmen's compensation but not other cases. See *Gilbert v. Gilbert*, 275 Ky. 559, 122 S.W.2d 137 (1938).

114. See Comment, *"Suitable Home" Tests Under Social Security: A Functional Approach to Equal Protection*, 70 YALE L.J. 1192, 1193 (1961).

115. *Id.* at 1193, citing and discussing LA. REV. STAT. ANN. § 46:233 (Supp. 1960).

vious conduct.

In 1961, the Secretary of Health, Education and Welfare issued a directive withholding federal funds from states imposing such arbitrary eligibility requirements on recipients of social security benefits.<sup>116</sup> He decided that state plans which deny assistance to a child on the basis of the suitability of its home without removing the child from that home would no longer qualify for federal assistance. Seven states, including Louisiana, had such plans. The decision was based on the ground that such plans impose "a condition of eligibility that bears no just relationship to the Aid to Dependent Children program." It was not contended that states could not pursue their own interests in economy and in the regulation of morality, but it was held that the federal purpose could not be directly contravened by excluding a considerable segment of the class intended to be favored, while leaving them in "unsuitable" homes. In addition to the rationale of the Secretary, the Louisiana statute posed constitutional problems under the due process and equal protection clauses.<sup>117</sup>

It will be difficult if not impossible to provide opportunity and rehabilitation for the poor or disadvantaged until we eradicate the punitive and almsgiving philosophy of some politicians. The premise should be that there is a public responsibility to alleviate suffering and misery, and that each citizen has a right to human dignity, assistance, and opportunity to improve his lot. Welfare workers should strive for the image of counselor and helper and truly treat their clientele as "clients." In fact, we may need a new profession, or a new orientation of the present profession, including law and social work, to safeguard and protect the legal and moral rights of citizens who happen to be poor.<sup>118</sup> We need to think more about the rights of citizens and the duties of government, and the responsibilities of both. Philosophically, it is time to abandon the idea that poverty is deserved and the Puritan notion that idleness and depravity are self-inflicted or incurred as a divine punishment.

In order to create a new profession or to re-orient existing professions to protect the citizens and to help him secure his just rights against the welfare state, we must teach to students of law and social work the rule of law and its application to judicial, administrative, and bureau-

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116. *Id.* at 1194. It also should be noted that Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. §§ 2000d, d-1 (1964), forbids any discrimination in federally assisted programs and empowers various federal agencies to adopt guidelines prescribing the method of enforcement. Under the guidelines of the Department of Health, Education and Welfare, states are required to file statements of compliance describing an area of discrimination and steps taken to correct it.

117. *Id.* at 1195.

118. See Foster, *The Law and Social Work*, 53 Ky. L.J. 229 (1965).



cratic procedures.<sup>119</sup> Our courts are beginning to take cognizance of revolutionary changes and the emerging concept of public responsibility. *Gideon's*<sup>120</sup> trumpet is being heard in various kinds of proceedings; *Griswold's*<sup>121</sup> right of privacy is being extended beyond the bedroom; and the sanctity of contracts is becoming less sacred where unconscionable terms are imposed upon installment buyers.<sup>122</sup>

There is hope; there is movement; and in the space age, when men reach for the stars, it is not too much to expect that we can eliminate some of the more obvious discriminations visited by law upon the poor. Long ago an English judge observed that "necessitous men are not free men." If the War on Poverty and the role of spokespersonship for the free world are to be more than clichés, necessity must beget invention. We must invent and adapt techniques, means, and controls so that freedom from discrimination is not the exclusive prerogative of a fortunate few, but is extended to any and all who share in the adventure of living in the modern world. For that difficult task lawyers are best equipped to give effective representation at all levels of government, and concepts of due process will provide the guiding principles. The poor more surely will gain fair treatment as citizens when counsel is provided not only for indigent defendants in criminal cases but also for civil cases, juvenile court proceedings, commitment hearings, and governmental agency proceedings. We conclude with a statement from former Attorney General Katzenbach who summarized our thoughts when he said:

We are coming to recognize that the legal assistance we have given some poor men has been only a beginning. . . . [W]e are coming to recognize how fundamental is the role of law in providing every man membership—and not merely existence—in our society. . . . The scales are now tipped against the poor. . . . The solution is not charity, but justice.<sup>123</sup>

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119. *Ibid.* See also *Symposium: Law of the Poor*, 54 CALIF. L. REV. 319 (1966), which contains much valuable material on the administration of welfare laws. See also *The Role of the Welfare Client's Lawyer*, 12 U.C.L.A.L. REV. 361 (1963).

120. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

121. *Griswold v. Connecticut*, 381 U.S. 479 (1965). For a provocative discussion of Supreme Court doctrine, see Bendich, *Privacy, Poverty, and the Constitution*, 54 CALIF. L. REV. 407 (1966), where current doctrine is traced back to *Edwards v. California*, 314 U.S. 160 (1941), and *Griffin v. Illinois*, 351 U.S. 12 (1956).

122. See UNIFORM COMMERCIAL CODE § 2-302, and N.Y.U. WELFARE LAW BULL. No. 2, at 7 (1966).

123. Address by then Attorney General Nicholas deB. Katzenbach to the National Conference on Law and Poverty, Washington, D. C., June 24, 1965, pp. 1, 4.

# INDIANA LAW JOURNAL

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Volume 42

WINTER 1967

Number 2

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