LAW AND CONTEMPORARY PROBLEMS

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FOREWORD

Over a century ago, John Stuart Mill observed that "[t]he existing generation is master both of the training and the entire experience of the generation to come."[1] Mill thought this to be true and proper. Our generation appears to be the first in which Mill's proposition will encounter serious challenge, and this symposium represents an early reconaissance in what may prove a long intellectual and ultimately legal and political campaign.

The idea that adults "master" the "training and the entire experience" of children seems empirically wrong both from the perspective of the child's individual psychology and as a matter of social roles. While an infant obviously comes into the world dependent for its survival upon adults, experimental psychologists suggest that even the very young child selectively perceives and interprets situations and events.[2] There is no way for an adult to make sure the child will receive or accept his message because the individual child in part contributes to what he experiences.[3] For this reason, and because environmental events and cultural determinants beyond the purposeful control of adults bear so heavily on the child's experience, the notion that adults somehow control the socialization of the next generation seems dubious. Arguably, the present-day social reality in America would be as accurately described by turning Mill's assertion on its head—children and youth may dominate the experience of their elders. The victims of intergenerational confrontation may include adults as well as children. In all events, Mill's description seems strangely one-sided: the older and younger generations seem in fact inextricably intertwined in a reciprocal relationship where the unique experience of each affects the other.

Apart from the accuracy of Mill's descriptive generalization, could it possibly describe a just relationship among human beings? For children, Mill quite explicitly rejected his own principle of individual liberty on a variety of grounds, the most important of which related to the notion that the child was incapable of self-improvement as a result of rational discussion.[4] Limiting the

1. J. S. MILL, ON LIBERTY 77 (D. Spitz ed. 1975).
2. *See* H. SCHAFFER, THE GROWTH OF SOCIABILITY (1971).
3. *See* A. SKOLNICK, THE INTIMATE ENVIRONMENT 368-75 (1973); Loevinger, *Patterns of Child Rearing as Theories of Learning*, 59 J. ABNORMAL & SOCIAL PSYCHOLOGY 148-50 (1959).
4. *See* J. S. MILL, *supra* note 1, at 11.

freedom of children was therefore, by his lights, necessary both to protect children against "their own actions as well as against external injury"[5] and to protect society from the untutored.[6] Mill rejected, however, the prevalent nineteenth-century notion that parents should have unfettered dominion over their children. He instead thought that the state was justified in using law to limit parental liberty where necessary for the good of the child or society.[7]

How the family and the state dominate the lives of children and whether they should are questions that provide a useful starting point for an examination of children and the law. Law outlines a framework for the distribution of decisional power among the child, the family, and various agencies of the state. While the pattern of the law is complex, it seems plain that children generally have less liberty than adults and are often less accountable. Within the family, parents have legal power to make a wide range of important decisions that affect the life of the child but are held responsible for the child's care and support by the state.[8] Children have the special power to avoid contractual obligations[9] but are not normally entitled to their own earnings[10] and cannot manage their own property.[11] Moreover, on the basis of age-based lines, persons younger than certain statutory limits are not allowed to vote,[12] hold public office,[13] work in various occupations,[14] drive a car,[15] buy liquor,[16] or be sold certain kinds of reading material,[17] quite apart from what either they or their parents may wish.

Because of such legally imposed limitations on the child's power to decide, some reformers suggest that a children's liberation movement should follow

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5. *Id.* at 11. *See also id.* at 75.
6. *See id.* at 100.
7. *See id.* at 96-101.
8. *See, e.g.*, CAL. CIV. CODE § 196 (West 1954); CAL. WELF. & INST'NS CODE § 600 (West 1972).
9. *See, e.g.*, CAL. CIV. CODE §§ 33-38 (West Supp. 1975).
10. *See, e.g.*, CAL. CIV. CODE § 197 (West 1954).
11. While a minor may be able to own property in his own name, *see, e.g.*, WIS. STAT. § 319.19(1) (West 1958); the voidability of a minor's contracts makes it extremely difficult for a minor to manage his property. Parents, as such, generally have no right to manage a minor's property. *See, e.g.*, CAL. CIV. CODE § 202 (West 1954). Therefore, unless the property is held in trust or held under a custodial arrangement pursuant to the Uniform Gift to Minor's Act, court appointment of a guardian of the child's estate is usually necessary for management of the child's property.
12. *See, e.g.*, CAL. CONST. art. II, § 1 (West Supp. 1975); *cf.* Oregon v. Mitchell, 400 U.S. 112 (1970) (upholding congressional power to lower voting age from 21 to 18 for federal but not for state elections).
13. *See, e.g.*, CAL. GOV'T CODE § 1020 (West Supp. 1975) ("A person is incapable of holding a civil office if at the time of his election or appointment he is not 18 years of age. . . .").
14. *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. § 212 (1970); CAL. LABOR CODE §§ 1290-89 (West 1971).
15. *See, e.g.*, CAL. VEHICLES CODE § 12512 (West 1971).
16. *See, e.g.*, CAL. CONST. art. XX, § 22 (West Supp. 1975); CAL. BUS. & PROFESSIONS CODE §§ 25658-65 (West 1964, Supp. 1975).
17. *See* Ginsberg v. New York, 390 U.S. 629 (1968).

the trail blazed by the civil rights and women's movements.[18] At the core of these other movements, however, is the rather straightforward notion that a person's legal autonomy should not be made dependent upon his or her race or sex, at least without some compelling justification. Any broad assertion that age is also irrelevant to legal autonomy inescapably collides with certain biological and economic realities.

Because the young are necessarily dependent for some period after birth, the relevant question often is which adult should have the power to decide on behalf of the child. That an element of domination of children by adults is inevitable gives no license to ignore the moral dimension implicit in the advocates' challenge. Moreover, for older children, the emancipators' rhetoric has raised questions worthy of serious examination: In what circumstances should the law give children the power to decide certain things for themselves and to be responsible for their own actions? Are some of the age-based lines drawn too high? What are the advantages and disadvantages of arbitrary lines as opposed to more flexible alternatives? In addressing all these questions, it must be recognized that the legal system reflects at least as much as it shapes the social context in which children grow up. The law's assignment of roles and authority for children of various ages gives expression to society's perception of the child's humanity and importance as an individual.

All of the articles that follow relate to how power and responsibility for children are distributed in our society and how they should be distributed among the relevant triad: the child, the family, and the state. Each of the articles individually addresses somewhat different aspects of a child's life, and no two are written from the same vantage point. Many important topics are not considered, and there has been no attempt to address systematically present-day concerns. As a group, however, the articles should contribute to a better understanding of the assumptions, tensions, and dilemmas that will confront those concerned with how law and legal institutions help define childhood.

Several of the articles provide perspectives on the question of how much power children should have to decide things for themselves. Laurence Tribe analyzes the legal status of children in light of two different strains of constitutional doctrine used earlier by those attacking lines based on race or sex: suspect classifications and conclusive presumptions.[19] How should a court respond when faced with a claim that a particular aspect of the legal system discriminates against a young person and should be strictly scrutinized because children as a group lack political power and thus might be characterized as a "discrete and insular minority"? Is an age-based classification an invalid

18. *See, e.g.*, V. COIGNEY, CHILDREN ARE PEOPLE TOO (1975); R. FARSON, BIRTHRIGHTS (1974).
19. Tribe, *Childhood, Suspect Classifications, and Conclusive Presumptions: Three Linked Riddles*, 39 LAW & CONTEMP. PROB. no. 3, at 8 (1975).

"conclusive presumption" that unfairly denies a young person the opportunity to demonstrate his own competence? Tribe suggests that with regard to children, the Constitution may require that governmental policy-formation and -application follow a process that ensures the decision-maker will keep in touch with society's evolving moral standards.

Laws that at once saddle children with special burdens and disabilities and pamper them with special protections are typically justified by and premised upon the child's assumed deficiencies—intellectual, physical, and moral. The contemporary conception of the child, both reflected in and reenforced by the legal system, is implicitly based on a notion at the core of developmental psychology: a person before reaching adulthood predictably passes through various stages of growth, and has certain, rather well-defined limitations in each stage. Arlene Skolnick's article traces the intellectual history of developmental psychology, shows its relationship to our social conceptions of childhood, and thus exposes for critical analysis some assumptions underlying current social and legal policies that treat young persons as less responsible and make them less free.[20]

F. Raymond Marks's article[21] examines historically how law has shaped, constrained, and mirrored the social role of youth in America. He points out that until the late nineteenth century, young people assumed adults roles, and that the doctrine of legal emancipation permitted substantial flexibility with regard to the legal response to a young person who left home before maturity. The twentieth century has seen, however, a substantial increase in the period of dependence of youth on their families. Marks suggests that although law has recently accorded the teenager greater rights vis-à-vis his community and the state, the legal posture of a seventeen-year-old within the family is very little different from that of a seven-year-old. He asks whether the adolescent should not be permitted greater responsibility for his own actions and his own failures.

The historical changes in the work role of children are described by David Stern, Sandra Smith, and Fred Doolittle.[22] They demonstrate how the child's economic role within the family has substantially changed. In the past, children were economic assets to their parents: young people could work and thus contribute to family support. Grown children frequently contributed to the support of their elderly parents. Now these economic benefits to parents have largely disappeared. While parents still have the legal right to the earn-

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20. Skolnick, *The Limits of Childhood: Conceptions of Child Development and Social Context*, 39 LAW & CONTEMP. PROB. no. 3, at 38 (1975).

21. Marks, *Detours on the Road to Maturity: A View of the Legal Conception of Growing Up and Letting Go*, 39 LAW & CONTEMP. PROB. no. 3, at 78 (1975).

22. Stern, Smith, & Doolittle, *How Children Used to Work*, 39 LAW & CONTEMP. PROB. no. 3, at 93 (1975).

ings of their minor children, few children can have earnings that substantially contribute to the family pot, given the constraints imposed by compulsory education, child-labor prohibitions, and the increased specialization of work roles. Moreover, social security and pension funds appear to be displacing the family as the primary source of old-age assistance. Thomas Hobbes's assertion that "there is not reason why any man should desire to have children or to take care to nourish them if afterwards to have no other benefit from them than from other men"[23] suggests that the dissappearance of these economic benefits poses difficult questions. In an age when the economic benefits to parents of having children are largely gone, should society bear a larger share of the cost of child-raising? Are parents as a group more trustworthy, given the absence of opportunities for economic exploitation of their children and the primacy of noneconomic motivation to have them in the first place? Or must the state assume a more active role because of the diminution of an economic motive for parents themselves to "invest" in their own children?

The remaining articles all relate rather directly to the question of how law distributes power and responsibility for the child between the family and the state. Robert Burt's article analyzes those Supreme Court decisions indicating that the Federal Constitution itself vests rights in both parents and children that limit state intrusion into the family on behalf of the child.[24] The facts of several of the principle cases suggest to him that each may represent "a symbolic battle between adults, each using children as sacrificial pawns."[25] His analysis goes forward to expose the tensions between the doctrine that parents have a constitutionally sanctioned role in their children's lives and the principle that the state has some responsibility for the protection of children. Burt prefers a presumption favoring parents when the state attempts to intervene in child rearing, but he argues that there should be no conclusive answer favoring either contestant: "When . . . battle lines for resolution seem clearly drawn—when the state is patently attempting to override individual parental subculture group norms for child rearing and when the latter are patently resisting—it is important to assure that none of the claimants for control conclusively ousts the others."[26]

If one were to analyze how law should distribute power and responsibility for a child's education, two critical questions would be: Who should decide whether and where a child should go to school? Who should pay for a child's education? Three salient characteristics of the present-day American educational system are: (1) compulsory-education laws generally requiring school

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23. T. HOBBES, LEVIATHAN 329 (W. Molesworth ed. 1839-45).
24. Burt, *Developing Constitutional Rights of, In, and for Children*, 39 LAW & CONTEMP. PROB. no. 3, at 118 (1975).
25. *Id.* at 123.
26. *Id.* at 131.

attendance for children below a certain age; (2) "free" public schools paid for through taxes and supplied locally, largely by local government; and (3) a constitutionally based prohibition against the abolition of private education and a state school monopoly. Stephen Sugarman and David Kirp provide an analytical framework to analyze critically each of these three characteristics.[27] By first asking what a world would be like if parents were free to decide in a market economy whether and how their children would be educated, they proceed to analyze the reasons that society might collectively take an active role in the educational process and the alternative means by which that intervention might occur. In light of their model, they examine the existing American system and comment on three current reform proposals: the abolition of compulsory education; educational vouchers; and "appropriate" education for handicapped children.

My article examines the state's role in child custody disputes.[28] It develops two themes. The first is that the determination of what is "best" or "least detrimental" for a particular child is usually indeterminate and speculative because existing psychological theories do not allow confident prediction of the effects of alternative custody dispositions and because society lacks a clear-cut consensus about what values should inform the determination of what is "best" or "least detrimental." The second is that courts perform two very different functions in the resolution of child custody disputes: *private dispute settlement* (where the court must choose between two or more private individuals who must each claim an associational interest with a child) and *child protection* (which involves the judicial enforcement of standards of parental behavior believed necessary to safeguard the child). The article uses these two themes to explore existing custody law and to analyze the implications of indeterminacy for each of the two functions. The analysis suggests a dilemma that may extend well beyond the child-custody area: how is one to make policy with regard to children if there is very little basis for determining what is best for an individual child or children as a group?

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27. Sugarman & Kirp, *Rethinking Collective Responsibility for Education*, 39 LAW & CONTEMP. PROB. no. 3, at 144 (1975).

28. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROB. no. 3, at 226 (1975).

for the issue, I would like to give special thanks to Professor Melvin G. Shimm—this journal's General Editor—for his confidence, energy, and help.

The legal rights of children present a fascinating context to explore the relationship between legal standards on the one hand, and social values and behavior on the other. As a general proposition, one would expect that law, particularly in an area so intimately related to the family, would largely reflect the dominant cultural norms and would have a rather limited capacity to change those norms or shape individual behavior. Nevertheless, it is part of a well-established American tradition to view law as a means of producing cultural change and political response. As a general proposition, it appears that the legal process is used increasingly as a forum for debate over competing perceptions of the world, where the protagonists hope to affect on a broad scale both social values and behavior. Plainly much of the debate over children's "rights" has ramifications that are not strictly legal, and indeed these nonlegal consequences may be the primary goal for some child advocates. This is not a bad thing, provided questions about the limits of what can and ought to be accomplished by law are not overlooked. Ignoring these limits, however, risks demanding too much of law and legal institutions. While these essays provide no grand strategy or precise road map for those who choose to champion the rights of children, it is hoped that this symposium will better expose a range of important questions relating to children, and to the law, as well as to children and the law.

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