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A Need for Caring

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A NEED FOR CARING

Judith Areen*

AIDS AND THE LAW: A GUIDE FOR THE PUBLIC. Edited by *Harlon L. Dalton, Scott Burris, and the Yale AIDS Law Project*. New Haven: Yale University Press. 1987. Pp. vii, 382. \$7.95.

And I looked, and behold, a pale horse: and his name that sat on him was Death, and Hell followed with him. And power was given unto them over the fourth part of the earth, to kill with sword, and with hunger, and with death, and with the beasts of the earth.

Revelation 6:8

AIDS is the modern day equivalent of leprosy. AIDS, or a suspicion of AIDS, can lead to discrimination in employment, education, housing and even medical treatment.

*South Florida Blood Service, Inc. v. Rasmussen*¹

[O]n this earth there are pestilences and there are victims, and it's up to us, so far as possible, not to join forces with the pestilences.

Albert Camus, *The Plague*

Professor Harlon Dalton explains at the outset that this book, *AIDS and the Law: A Guide for the Public*, grew out of the desire of several law students and faculty members at the Yale Law School to "do something" about Acquired Immune Deficiency Syndrome (AIDS) (p. xi). The result is a distinguished compendium of essays by knowledgeable authors that addresses significant legal issues raised by AIDS. One of the real achievements of the book is that even complicated technical matters are discussed in language that is admirably free of jargon, in keeping with the espoused goal of reaching readers who are not "steeped in the law" (p. xi).

The scope of the overall project is refreshingly ambitious. There are the essays one would expect on such practical matters as *AIDS in the Workplace* and *Schoolchildren with AIDS*, but there are also essays that put the matter in a broader context, including a particularly illuminating chapter entitled *A Historical Perspective* by Allan Brandt, and a thoughtful look at professional differences, *Physicians versus Lawyers: A Conflict of Cultures*, by Daniel Fox. There is also a ground-breaking section on groups specially affected by AIDS that in-

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1. 467 So. 2d 798, 802 (1985).

cludes separate essays on intravenous drug users, on the black community, and on the lesbian and gay community.

The decision to isolate these last essays as a separate section, however, underscores one weakness of the collection — the absence of a unifying theme or commentary. In the end, the volume remains a collection of partial solutions rather than an integrated whole. This is, perhaps, understandable given the inconsistencies and discontinuities that have characterized our nation's response to the AIDS epidemic from the very beginning. But even if our society is not yet ready to resolve the myriad public policy issues raised by AIDS, it is unfortunate that this volume did not better integrate the individual essays or, failing that, generate some conversation among the invited authors. Donald Hermann, in the chapter, *Torts: Private Lawsuits about AIDS*, for example, catalogues the various legal doctrines that might be employed to make one person liable for transmitting the AIDS virus to another. No effort is made to reconcile this approach with the caution, voiced by Larry Gostin in his chapter, *Traditional Public Health Strategies*, that such legal strategies may "deter people vulnerable to HIV infection from being tested, seeking advice and treatment, and cooperating with public health programs" (p. 65).

The silence between chapters forces the reader (and reviewer) to grope for linkages, for an integrated perspective, for a sense of what *we* can do.

I. THE DISEASE

The facts about AIDS that bombard us almost daily are sobering. First recognized as a new disease in 1981, the number of AIDS cases initially doubled every six months.² By 1986, cases were doubling only every thirteen months, but as Dr. June Osborn, Dean of the School of Public Health at the University of Michigan, observes, this was of small comfort because more new cases of AIDS were diagnosed in that same year (28,000) than in the prior five years combined (p. 19). By the end of 1987, 49,793 cases of AIDS had been reported in the United States to the Centers for Disease Control (CDC), of whom 27,909 (56 percent) had died.³ The mortality rate is almost 80 percent for people in whom AIDS was diagnosed more than two years ago, and most experts assume it will approach 100 percent over time (p. 19).

2. A damning account of the many unnecessary delays that occurred prior to acknowledging the epidemic or warning potential victims is R. SHILTS, *AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC* (1987).

3. Curran, Jaffe, Hardy, Morgan, Selik & Dondero, *Epidemiology of HIV Infection and AIDS in the United States*, 239 *SCIENCE* 610 (1988) [hereinafter Curran]. The Public Health Service has projected that by 1991, there may be 323,000 reported patients with AIDS and that as many as 200,000 may be dead. Board of Trustees Report, *Prevention and Control of Acquired Immundeficiency Syndrome*, 258 *J. AM. MED. ASSN.* 2097 (1987).

Not everyone who has caught the AIDS virus, or Human Immunodeficiency Virus (HIV) as it has come to be called, has developed AIDS.⁴ Researchers still do not know how many of the people who carry HIV will ultimately develop AIDS. In the book, it is suggested that only 20 percent of gay men with HIV, and an even lower percentage of hemophiliacs, will ultimately develop AIDS (p. 24). Already, those statistics have been overtaken by far more pessimistic projections. The San Francisco City Clinic Cohort Study found that, as of September 30, 1987, after 88 months of infection, 36 percent of the men had developed AIDS, another group of more than 40 percent had other signs or symptoms of infection, and only 20 percent remained completely asymptomatic.⁵ Eyster, Gail, Ballard, Al-Mondhiry and Goedert have estimated that approximately 30 percent of adult hemophiliacs develop AIDS within six years after infection.⁶ Recently, Dr. M. Roy Schwarz, head of the AIDS task force of the American Medical Association, stated, "I see nothing in the immunology of this virus which indicates less than 100 percent expressivity."⁷

Researchers are also challenging the validity of drawing firm distinctions between having HIV and having AIDS. Many HIV carriers develop AIDS-related complex (ARC). ARC has made tens of thousands of Americans seriously ill, and killed many others; but, because the Centers for Disease Control does not include ARC within its definition of "AIDS," those who die from ARC are not normally included in the count of AIDS deaths.⁸ Other studies suggest that HIV causes a loss of mental function long before other symptoms of AIDS surface, and that most HIV carriers show immune system damage within five years of infection even if they have not developed other symptoms of ARC or AIDS.⁹

AIDS is not an easy way to die:

The clinical illness itself typically starts with vague, debilitating symptoms including drenching night sweats, sustained fevers, chronic diarrhea, and weight loss, sometimes associated with generalized enlargement of lymph nodes. . . . Some, but not all, of the individuals who start with that set of symptoms then experience oral "thrush" (yeast

4. HIV was the name chosen as a compromise by an international committee of virologists when Dr. Luc Montagnier of the Pasteur Institute and Dr. Robert Gallo of the National Cancer Institute, who were both claiming to have discovered the virus that causes AIDS, could not agree on a name. For an account that emphasizes the role played by two American lawyers, together with Dr. Jonas Salk, in negotiating a settlement of claims between the French and American researchers, see Judge, *Anatomy of a Settlement*, THE AM. LAW., June 1987, at 88.

5. Curran, *supra* note 3, at 615.

6. Eyster, Gail, Ballard, Al-Mondhiry & Goedert, *Natural History of Human Immunodeficiency Virus Infections in Hemophiliacs*, 107 ANNALS INTERNAL MED. 1 (1987).

7. *Special Report: AMA Forum Told That HIV May Always Lead to AIDS*, AIDS POLICY & LAW, May 6, 1987, at 6.

8. Specter, *View of AIDS Too Narrow, Scientists Say*, Wash. Post, Jan. 13, 1988, at A1, col. 6.

9. *Id.* at A16, col. 1.

infection of the mouth) or develop the purplish skin lesions of a previously rare kind of malignancy called Kaposi's sarcoma. Alternatively — or as well — strange chronic pneumonias develop, caused by microorganisms rarely seen and resistant to treatment. Over time, some AIDS patients also develop confusion and other signs of progressive neurologic degeneration. . . . [F]ull-blown AIDS means a relentlessly downhill clinical course¹⁰

Some people have reacted to these facts with panic and draconian proposals that reflect both fear of disease and hostility to gays. For once, however, more and better information can rebut some of the most offensive reactions.¹¹ Indeed, about the only good news concerning HIV is that it is not transmitted through casual contact. Not only is HIV spread exclusively through blood or semen, but the virus is fragile enough to be destroyed by standard solutions of almost all common disinfectants, such as hydrogen peroxide, bleach, Lysol, or alcohol (p. 33). The most comprehensive study of families of people with AIDS involved ninety-four people who had lived at least three months with a clinically ill AIDS patient, sharing toothbrushes, towels, eating utensils, dishes, drinking glasses, beds, toilets, baths, showers, and kitchens. Seventeen percent of the subjects kissed on the lips. Not one adult contracted the virus. One five-year-old child became ill, but she appeared to have contracted the virus from her mother during pregnancy (pp. 34-35).

These facts should put to rest the unwarranted fears of most co-workers, and of parents of children who have a classmate with HIV, unless the child with HIV is too young to avoid posing a risk of exposure to bodily fluids.¹²

One of the most important chapters in the book is *Education as Prevention*. As long as there is no vaccine or cure for AIDS, education will remain the primary weapon against the disease. There are now encouraging data that show that the virus has stopped spreading as

10. P. 19. One of the most devastating types of pneumonia is *Pneumocystis carinii* pneumonia (often confusingly abbreviated as PCP). Pneumocystis is caused by a microscopic protozoa normally held in check by people's immune systems. An average person has 300 million air pockets in his lungs where oxygen from inhaled breath eases into the blood stream. For some AIDS victims, these air pockets offer a warm, even tropical climate for the protozoa to grow by the millions, slowly suffocating the patient. R. SHILTS, *supra* note 2, at 34.

11. See, e.g., Hiltz, *When Fear of AIDS Freezes an Agency*, Wash. Post, Feb. 4, 1988, at A21, col. 3. This article explains that the turning point for General Accounting Office AIDS task force members was reading the Surgeon General's report that made clear that casual contact would not spread the disease. Consensus soon followed on a policy that states: (1) being AIDS-free is not required for hiring or continued employment; (2) an employee with AIDS is not required to disclose his or her condition to a supervisor or other employees; and (3) efforts to help an employee with AIDS should be the same as efforts to help those with other life-threatening diseases.

12. Guidelines issued by the Centers for Disease Control in 1985 recommend that children with HIV should be permitted to attend school unless the children are preschool-aged, are neurologically handicapped and lacking control of bodily secretions, display behavior such as biting, or have uncoverable, oozing lesions. Pp. 69-70.

rapidly among gay men, although this change has come too late to prevent a substantial proportion of the male homosexual population in some areas from being exposed to the virus. Thus, unless a cure is found, thousands more Americans will become ill and die in the next few years.¹³

Nonetheless, some public officials are expressing cautious optimism on the ground that AIDS will not become an epidemic among the general population. In early 1988, for example, Dr. Otis R. Bowen, Secretary of Health and Human Services, in a striking shift in view, announced that "we do not expect any explosion into the heterosexual population."¹⁴ Only a year before, Dr. Bowen had warned that AIDS would make the Black Plague, which wiped out a third of the population in Western Europe in the fourteenth century, seem "pale by comparison."¹⁵

But HIV continues to infect black and Hispanic drug addicts, their sex partners, and their babies, at tragically high rates.¹⁶ Intravenous drug addicts are likely to be harder to reach and are less likely to change their behavior in response to education than the gay community has been. Worse, as the general public focuses on the new demographic projections for the disease, animosity toward drug users and gays may lessen public support for additional funding for the battle against AIDS.

Law has played an important role in protecting some HIV sufferers from the additional burden of losing a job, of being denied admission to a public school, or of becoming uninsurable (pp. 74-78, 120-21, 190-93). But, as Professor Dalton acknowledges in the introduction to the book, there is no guarantee that in the future law will not come to rest most heavily upon those who already suffer the most (p. xiv), particularly if some of the proposals for large-scale mandatory screening or quarantine of HIV carriers are enacted. He calls for a massive, purposeful, and broadly-supported effort by the whole society to rein in its worst impulses:

Such an effort requires healthy doses of what my former colleague Charles Black has labeled "humane imagination," the ability to comprehend, however dimly, how life is lived by people very different from ourselves. We must struggle to see through the eyes and feel with the hearts of those whom AIDS is most likely to fell. [p. xiv]

13. Boffey, *Spread of AIDS Abating, But Deaths Will Still Soar*, N.Y. Times, Feb. 14, 1988, at A1, col. 3.

14. *Id.*

15. *Id.*

16. Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases, has described the epidemic as "catastrophic" in the male homosexual population and among intravenous drug users. *Id.* at A36, col. 3. AIDS is now the leading cause of death in New York among men 24 to 44 years old and among women 25 to 34. *Id.* at A36, col. 2. One in every 61 babies born in New York City now has the AIDS virus. Lambert, *Study Finds Antibodies for AIDS in 1 in 61 Babies in New York City*, N.Y. Times, Jan. 13, 1988, at A1, col. 2.

In a secular society whose central organizing political and economic image is that of a competitive struggle for survival in a marketplace, what ground can be found for such a set of public and private attitudes and policies? There is a place to turn. It begins with the family.

II. THE CARE PERSPECTIVE

The law's rationale for why (or when) the state is entitled to intrude on family relationships has long been inadequate. The absence of a rationale has particularly serious consequences for parents who must try to defend against having their children taken away by the courts on the basis of an allegation no more specific than parental "neglect" — whatever that means. Moral philosophy, until recently, has paid little attention to the parent-child relationship. Indeed, as Professor Seyla Benhabib has noted, the imaginary world of most moral philosophers is a strange world "in which individuals are grown up before they have been born; in which boys are men before they have been children; a world where neither mother, nor sister, nor wife exist."¹⁷ Perhaps the starkest formulation is that of Thomas Hobbes, who proclaimed: "Let us . . . consider men as if but even now sprung out of the earth, and suddenly, like mushrooms, come to full maturity, without all kind of engagement to each other."¹⁸

Contemporary criticism of philosophy for ignoring the family is not completely unprecedented. David Hume, in the mid-eighteenth century, criticized Hobbes's state-of-nature hypothesis for ignoring the fact that "[m]en are necessarily born in a family-society . . . and are trained up by their parents to some rule of conduct or behaviour."¹⁹ Yet the lack of concern with family or with the nurturing of children has continued in the writings of the principal moral and political philosophers of our time. John Rawls, for example, reserves the "original position" that is central to his theory of justice for fully grown, rational beings.²⁰ As Alasdair MacIntyre has noted, it is "as though we had been shipwrecked on an uninhabited island with a group of other individuals, each of whom is a stranger to me and to all the others."²¹

The moral disposition to be just presupposes not only that the agent is adult and rational and attached to certain abstract concepts or ideals, but, as Flanagan and Jackson have observed, also that the agent . . . is attached to and cares for his community, and that he has

17. Benhabib, *The Generalized and the Concrete Other*, in *WOMEN AND MORAL THEORY* 154, 162 (E. Kittay & D. Meyers eds. 1987).

18. T. HOBBS, *Philosophical Rudiments Concerning Government and Society*, in 2 *THE ENGLISH WORKS OF THOMAS HOBBS* 108-09 (Molesworth ed. 1966).

19. D. HUME, *An Enquiry Concerning the Principles of Morals*, in *HUME'S MORAL AND POLITICAL PHILOSOPHY* 190 (H. Aiken ed. 1948).

20. J. RAWLS, *A THEORY OF JUSTICE* 19 (1971).

21. A. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 250 (2d ed. 1984).

a sense that his own good and that of those he cares for most is associated with general adherence to these ideals. Without such cares and attachments, first to those one loves and secondarily to some wider community to which one's projects and prospects are intimately joined, the moral disposition to justice . . . has no place to take root.²²

These cares and attachments do not develop without a considerable investment of both time and care by parents or others *in loco parentis*. Thus, paradoxically, even the theory of a contractarian like Rawls rests to a considerable, albeit unacknowledged, extent on good parenting. Nonetheless, there has been almost no attention paid by Rawls or most moral or political philosophers to the nature of good parenting.

One probable explanation for the omission is that parenting has traditionally been viewed as women's work. But that is hardly an adequate justification for ignoring parenting. Annette Baier makes the point more bluntly: "A decent morality will *not* depend for its stability on forces to which it gives no moral recognition."²³

The possibility that there is another approach to moral issues, one that uses the parent-child relationship rather than the arm's length transactions of strangers as its fundamental paradigm is gaining currency among philosophers, in large part due to the work of psychologist Carol Gilligan.²⁴ In her studies of the relationship between moral judgment and action, Professor Gilligan found that men more often than women conceive of morality as substantively constituted by obligations and rights and as procedurally constituted by the demands of fairness and impartiality. Women more often than men see moral requirements as emerging from the particular needs of others in the context of particular relationships. Gilligan named the latter orientation the "care perspective" to contrast it with the more rights-oriented approach of the "justice perspective."²⁵

Attention to the parent-child bond has also focused renewed inter-

22. Flanagan & Jackson, *Justice, Care and Gender: The Kohlberg-Gilligan Debate Revisited*, 97 ETHICS 622, 630 (1987).

23. *Id.* at 631.

24. See generally C. GILLIGAN, IN A DIFFERENT VOICE (1982). The most comprehensive exploration of the implications of Gilligan's work for moral philosophy is WOMEN AND MORAL THEORY, *supra* note 17.

25. Critics have complained that Gilligan's data do not support the assertion that caring is biologically determined, see, e.g., Kerber, *Some Cautionary Words for Historians*, 11 SIGNS 304, 305 (1986), and have cautioned that, although women have a greater reputation for altruism and empathy than men, studies do not show that women are any more likely than men to offer help to strangers when given the opportunity. Greeno & Maccoby, *How Different is the "Different Voice"?*, 11 SIGNS 310, 313 (1986) (Whether there is a sex difference with respect to helpful acts directed toward friends and intimates "can be neither confirmed nor refuted."). *Id.* at 314. Gilligan has answered that her intent was to highlight different modes of thought rather than to generalize about either sex. Gilligan, *Reply*, 11 SIGNS 324, 327 (1986).

Women may well be more likely to exhibit a care perspective than men, but this phenomenon is probably due to the fact that society assigns women more of the caring roles, rather than because of differences between the x and y chromosomes. Indeed, Joan Tronto may well be right

est in Hume, who criticized what he termed the "selfish system of morals" of Hobbes and Locke²⁶ by invoking the parent-child relationship:

Tenderness to their offspring, in all sensible beings, is commonly able alone to counterbalance the strongest motives of self-love, and has no manner of dependence on that affection. What interest can a fond mother have in view, who loses her health by assiduous attendance on her sick child, and afterwards languishes and dies of grief when freed by its death from the slavery of that attendance?²⁷

Hume proceeded to use the parent-child bond as a paradigm for the benevolent feelings and acts we should extend not only to friends, but to humanity.

The parent-child relationship is an appealing relationship on which to ground a general moral theory because it is familiar to virtually all human beings. More importantly, it may be a useful model for reconciling dependence and autonomy because parents traditionally care for and about their children in a way that respects and even fosters autonomy in the children.

Consider the list of virtues Sara Ruddick has developed to characterize parenting:²⁸ "*A responsiveness to growth* (and acceptance of change) along with a . . . learning that recognizes change, development and the uniqueness of particular individuals and situations; *resilient good humor and cheerfulness*, even in the face of conflict, the fragility of life and the dangers inherent in the processes of physical and mental growth; *attentive love*, which is responsive to the reality of the child, and is also prepared to give up, let grow, accept detachment; and *humility*, a selfless respect for reality, a practical realism which involves understanding the child and respecting it as a person, without either 'seizing' or 'using' it."²⁹ One drawback of the Ruddick list is that it would be impossible for any parent to exemplify the listed vir-

to suggest that the care perspective is a product of social oppression rather than of gender. Tronto, *Beyond Gender Difference to a Theory of Care*, 12 SIGNS 644, 649 (1987).

26. D. HUME, *supra* note 19, at 271.

27. *Id.* at 274.

28. Ruddick describes them as maternal virtues, but they are virtues that parents of both sexes can, and do, exemplify.

29. J. GRIMSHAW, PHILOSOPHY AND FEMINIST THINKING, 240-41 (1986) (paraphrasing Ruddick, *Maternal Thinking*, 6 FEMINIST STUD. 342 (1980)) (emphasis in original); *cf.* the view of mothering offered by Julian of Norwich in the fourteenth century. Dame Julian was a recluse, or anchoress in St. Julian's Church, Norwich who was praising God by attributing to Him maternal virtues:

To the property of motherhood belong nature, love, wisdom and knowledge . . . The kind, loving mother who knows and sees the need of her child guards it very tenderly, as the nature and condition of motherhood will have. And always as the child grows in age and in stature, she acts differently, but she does not change her love. And when it is even older, she allows it to be chastised to destroy its faults, so as to make the child receive virtues and grace.

THE NORTON ANTHOLOGY OF LITERATURE BY WOMEN 16, 18 (S. Gilbert & S. Gubar eds. 1985).

tues in every interaction with a child. Indeed, to spend all of one's time caring for another in this way is likely to lead to exhaustion and even resentment of the one cared for. Ruddick, herself, had second thoughts about her initial list:

[A]ttentive love calls for a realistic *self*-preservation on the part of the mother, a mother-self that can be seen and identified by the child who is itself learning attentive love. . . . Maternal thinking identifies attentive love as the fulcrum, the foundation of maternal practice; at the same time it identifies chronic self-denial in its many forms as the characteristic temptation of mothers and the besetting vice of maternal work.³⁰

Caring thus has several central characteristics. First, a caring person is responsive to the reality of the person receiving care.³¹ Care is provided at such times and in such a way that the person cared for is assisted without being demeaned. Indeed, a central goal of caring is to respect and foster the autonomy of the person cared for. By contrast, altruism (or charity, its theological cousin) may be satisfied simply on the basis of what the actor believes is good for the other. Caring, properly understood, should avoid the potentially oppressive aspects of such paternalism.

Second, a caring person also cares about herself sufficiently to sustain the physical, mental, and emotional resources needed to care for others. Self-love is not a sufficient end from the care perspective, but neither should self be sacrificed to excessive self-denial. A corollary of this principle is that caring cannot be universalized; it is not possible to care for everyone as a parent cares for his or her child.³²

Third, caring does not always begin or end by choice. Adults in our society may choose when to marry or to divorce and thus begin or end this caring relationship, but parents normally cannot end their caring relationships with their children. Conversely, adult children may be obliged to care for their parents despite the fact that they never voluntarily assumed the obligation.³³ From the care perspective, one should be a good samaritan to a stranger in need if no other assistance

30. Ruddick, *Preservative Love and Military Destruction: Some Reflections on Mothering and Peace*, in *MOTHERING, ESSAYS IN FEMINIST THEORY* 238 (Trebilcot ed. 1984) (emphasis in original).

31. Cf. N. NODDINGS, *CARING, A FEMININE APPROACH TO ETHICS AND MORAL EDUCATION* 16 (1984) ("Apprehending the other's reality, feeling what he feels as nearly as possible, is the essential part of caring . . .").

32. Virginia Held has suggested that caring may provide a new way to resolve the tension between universal obligation and egoism:

Moral theories must pay attention to the neglected realm of particular others in actual contexts. In doing so, problems of egoism vs. the universal moral point of view appear very different, and may recede to the region of background insolubility or relative unimportance. The important problems may then be seen to be how we ought to guide or maintain or reshape the relationships, both close and more distant, that we have or might have with actual human beings.

Held, *Feminism and Moral Theory*, in *WOMEN AND MORAL THEORY*, *supra* note 17, at 118.

33. An excellent discussion of the obligations of adult children to their parents is Sommers, *Filial Morality*, in *WOMEN AND MORAL THEORY*, *supra* note 17, at 69.

is available and if the care provided will not be an undue burden.³⁴

Critics of the care perspective have derided it as mere sentimentality. Neuchterlein has also objected that caring (he uses the term "compassion") has no place in politics because it carries "the unmistakable implication of dependence and piteousness on the part of those on the receiving end of the sentiment."³⁵ His criticism is unfounded if caring is understood to be directed toward producing autonomy, not dependence. Even Neuchterlein concedes, moreover, that caring is a "noble" force and "those who do not participate in it on a community as well as individual basis are morally tone deaf."³⁶

Another common criticism of caring is that it is simply a weak version of virtue theory. This is a devastating criticism in the eyes of those philosophers who have consigned the entire notion of "virtue," and with it the notion of a virtue-based theory, to the scrap pile of outmoded concepts. Aristotle may have been comfortable with the notion that a virtuous actor will know what constitutes right action, but many modern philosophers consider his theory naive; they contend that the morality of particular acts can be determined only by reasoning from moral principles.

The philosophic analysis of caring is in its early stages, so this is not the time or place for a detailed reply. Caring, like justice, may prove to be not merely a virtue, but a source of principles.³⁷ Alternatively, even if caring is a virtue, the philosophic debate about the role of virtues in moral theory is by no means over. Alasdair MacIntyre, for example, one of the modern philosophers interested in revitalizing virtue theory, has defined "virtue" as an acquired human quality which enables us to achieve goods that are internal to practices.³⁸ By a "practice," he means a "complex form of socially established cooperative human activity through which goods internal to that form of activity are realized."³⁹ For MacIntyre, throwing a football is not a practice, but the game of football is; bricklaying is not a practice, but architecture is. Of most relevance, he believes that the sustaining of human communities — including households, cities and nations — is a practice. Caring may well be understood as a virtue as MacIntyre uses the term; indeed it may be the central virtue for sustaining human relationships and communities.

What, then, is the relationship between the caring perspective and

34. Accord Prentice, *Expanding the Duty to Rescue*, 19 SUFFOLK U. L. REV. 15 (1985); Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980).

35. See, e.g., Neuchterlein, *The Feminization of the American Left*, COMMENTARY, Nov. 1987, at 46 (quoting Kaus, *Up From Altruism*, NEW REPUBLIC, Dec. 15, 1986, at 17).

36. *Id.* at 46 (emphasis omitted).

37. Cf. J. RAWLS, *supra* note 20.

38. A. MACINTYRE, *supra* note 21, at 191.

39. *Id.* at 187.

the justice perspective? Their potential incompatibility is an ancient theme. Consider the exchange between Antigone, who wants to fulfill her obligation to care for her family (by burying her brother, Polynices) and Creon, King of Thebes, who has ordered that Polynices not be buried because he was killed attacking Thebes:

Antigone: Even so, we have a duty to the dead.

Creon: Not to give equal honour to good and bad.

Antigone: Who knows? In the country of the dead that may be the law.

Creon: An enemy can't be a friend, even when dead.

Antigone: My way is to share my love, not share my hate.

Creon: Go then, and share your love among the dead. We'll have not woman's law here, while I live.⁴⁰

Gilligan, by contrast, has written that there may be a role for both caring and justice in morality:

Theoretically, the distinction between justice and care cuts across the familiar divisions between thinking and feeling, egoism and altruism, theoretical and practical reasoning. It calls attention to the fact that all human relationships, public and private, can be characterized *both* in terms of equality and in terms of attachment, and that both inequality and detachment constitute grounds for moral concern. Since everyone is vulnerable both to oppression and to abandonment, two moral visions — one of justice and one of care — recur in human experience. The moral injunctions, not to act unfairly toward others, and not to turn away from someone in need, capture these different concerns.⁴¹

A traditional way to resolve the relationship between justice and caring has been to confine caring to the family. Charles Dickens illustrated the dangers of a family life without caring in *Bleak House* through the character of Mrs. Jellyby, the mother who devoted all of her energy to the rights of the foreign poor. When her own son was injured falling down the stairs, "Mrs. Jellyby merely added, with the serene composure with which she said everything, 'Go along, you naughty Peepy!' and fixed her fine eyes on Africa again."⁴²

Excluding justice concerns from the family also creates problems, particularly for women. Women today perform most of the daily caring — for children, for the household, and for the elderly⁴³ despite the fact that more than 50 percent of the mothers with young children also work outside the home. A recent study of men and women between the ages of twenty-five and sixty-four found that the total hours worked by women has increased during the past quarter-century while

40. SOPHOCLES, *Antigone*, in *THE THEBAN PLAYS* 140 (E.F. Watling trans. 1947).

41. Gilligan, *Moral Orientation and Moral Development*, in *WOMEN AND MORAL THEORY* *supra* note 17, at 20 (emphasis in original).

42. C. DICKENS, *BLEAK HOUSE* 38 (Oxford Univ. Press 1948).

43. "More than 70 percent of those who provide free home care to disabled elderly people are women, usually wives or daughters . . ." Rich, *Study Says Women Provide Most Home Care for Elderly*, *Wash. Post*, Aug. 4, 1986, at A3, col. 5.

the total hours worked by men fell. In 1959, women on average spent 572 hours in market work, 1,423 hours on housework, and 266 hours on child care, for a total of 2,261 hours annually. By 1983, the hours spent in each category were 929, 1,252, and 201, for a total of 2,383. Men, by contrast, in 1983 spent 1,667 hours in market work, but only 560 on housework, and 59 on child care (down from 76 in 1959), for a total of 2286.⁴⁴ This imbalance is likely to change only when it is accepted that men as well as women can provide caring in the family.

If family life without caring seems impoverished, should we not be equally wary of a society without caring, a nation in which individuals feel no moral duty to one another other than to avoid harming each other? If a justice perspective might usefully supplement caring within the family,⁴⁵ might not caring be an important complement to justice outside of it? Caring and justice are best understood as mutually reinforcing perspectives. Each compensates for weaknesses in the other.

It is one thing to conclude that caring should be extended beyond family relationships, and quite another to know how to apply the caring perspective in the public sphere. A natural extension would encompass friendship.⁴⁶ Many of the ways we relate to friends parallel our family relationships. Indeed, friendship may be a particularly important context in which to develop a more complete account of caring because it is not characterized by the inequality which lies at the heart of the parent-child relationship. It is more difficult to know how to apply the care perspective beyond family and friends to issues in the larger community,⁴⁷ but AIDS presents an important reason to learn.

III. CARING AND AIDS

As Professor Dalton has suggested, society needs to find a way to

44. Fuchs, *Sex Differences in Economic Well-Being*, 232 *SCIENCE* 459 (1986).

45. Seasoning caring with justice within the family challenges the notion that caring should only be done by women; and, by emphasizing that self and other are equal, it enables care givers to avoid excessive self-sacrifice. Cf. C. GILLIGAN, *supra* note 24, at 149:

Among college students in the 1970s, the concept of rights entered into their thinking to challenge a morality of self-sacrificing and self-abnegation. . . . [T]he notion of care expands from the paralyzing injunction not to hurt others to an injunction to act responsively toward self and others and thus to sustain connection.

46. See generally L. BLUM, *FRIENDSHIP, ALTRUISM, AND MORALITY* (1980).

47. There has been a resurgence of interest in public virtue theory. See generally M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); Gutmann, *Communitarian Critics of Liberalism*, 14 *PHIL. & PUB. AFF.* 308 (1985). As Professor Seidman has cautioned, however, there is a tension between the particularist ideal of relationships characterized by caring and intimacy and the universalist ideal of equal beneficence toward all members of a community. Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 *YALE L.J.* 1006, 1007 (1987). It is true that governments and institutions are by nature impersonal, and, therefore, incapable of caring in the way that members of families do, but public policies can be designed so as to foster caring human relationships. The deeper moral tension between any individual's duties to humanity in general and his or her duties toward those with whom he or she stands in a special relationship may well be a permanently unresolvable feature of the moral life.

rein in its worst impulses if the battle against AIDS is not to become a war against the people infected (p. xiv). In other words, what is needed is a change in attitude or perspective. Public policies, rules of law, patterns of institutional and group behavior will reflect the fundamental perspective adopted by society. Here is where the adoption of the care perspective can make a difference.

According to the care perspective, people who might have HIV ought to care enough for and about those not infected to ascertain their HIV status and, if it is positive, avoid transmitting it to others. Governments could assist them by providing voluntary screening and education programs. Conversely, people without HIV ought to care enough about those with HIV to protect them from discrimination (in housing, employment, insurance, etc.) and to provide adequate care (medical, financial, and emotional) when they become ill. There is a mutuality to the care analysis: people with HIV are most likely to be responsible enough to ascertain their HIV status if they know they will be cared for and about by those without HIV.

A care perspective does not mean that people without HIV must rely only on the altruism of those with HIV. Caring includes caring for oneself. Accordingly, anyone who has not been exposed to HIV should avoid unprotected encounters with HIV-contaminated bodily fluids. What is to be avoided, however, is the virus, not people infected with the virus. Here, too, governmental education programs can play an important role in facilitating the care perspective.

A justice perspective, by contrast, would ignore the need of people with HIV for care, beyond ensuring that they are not discriminated against in the provision of medical services or in other ways.⁴⁸ The focus would be on deterring such individuals from harming others by transmitting the virus. Public policy founded on a justice perspective, therefore, would emphasize punishing the knowing transmission of HIV. Repeat offenders might even be quarantined.

A major problem with a public policy preoccupied with punishing the deliberate transmission of HIV is that such a policy would probably discourage individuals at high risk for HIV from determining their antibody status. In response, the government might impose mandatory screening requirements, but such a step would likely be

48. The attribution of particular characteristics to the justice perspective is a risky endeavor because there are numerous accounts of what constitutes "justice." I have chosen to focus on equal treatment as the central characteristic of the justice perspective for purpose of comparing it to the care perspective. Supporters of particular versions of justice might well contend that their approach to justice demands more. A strict egalitarian like Robert Veatch, for example, argues that society ought to provide the retarded and others who have "lost in the natural lottery" (presumably including many of those with AIDS) with enough compensation to get them to the point that they have an opportunity for equality of outcomes; subject to the constraint that the compensation provided should not exceed "the point where others would be reduced to a level of well-being equal to the one being compensated." R. VEATCH, *THE FOUNDATIONS OF JUSTICE: WHY THE RETARDED AND THE REST OF US HAVE CLAIMS TO EQUALITY* 158-59 (1986).

both prohibitively expensive⁴⁹ and involve unacceptably intrusive governmental regulation of private conduct for a democratic society that has traditionally placed a high value on individual liberty.

Although critics have charged that the care perspective has no role outside the intimate confines of family relationships, a comparison of the care perspective and the justice perspective on AIDS reveals that the caring approach is likely to be the more effective of the two at stemming the spread of this deadly virus, as well as the more humane approach for those who do contract HIV.

The inadequacies of relying on a justice perspective without attention to caring can also be seen within the medical professions. When growing numbers of physicians, nurses, and other health care personnel began to refuse to care for AIDS patients, the deans of several major medical schools announced that, henceforth, offenders would be dismissed.⁵⁰ Their goal might be laudable from a care perspective, but punitive enforcement of caring policies is not the most effective way to encourage caring — particularly when the caring burden is not shared equitably because it falls more heavily on health care professionals than on other individuals, and more on some areas of the country than others. The apparent result of the punitive approach embraced by the deans has been a decrease in applications for internships and residencies at institutions in areas with a significant number of AIDS patients.⁵¹ Fear of contracting AIDS may also be contributing to the

49. See Cleary, Barry, Mayer, Brandt, Gostin & Fineberg, *Compulsory Premarital Screening for the Human Immunodeficiency Virus*, 258 J. AM. MED. ASSN. 1757 (1987) (“[M]andatory premarital screening in a population with a low prevalence of infection is a relatively ineffective and inefficient use of resources.”).

50. Sullivan, *13 Medical Colleges Say Staffs Must Treat AIDS*, N.Y. Times, Dec. 9, 1987, at B2, col. 1. Physician refusal to treat is not a new phenomenon. When the bubonic plague arrived in Europe in 1347, “writer after writer lamented the avarice and cowardice of doctors in times of plague. . . . Some of the doctors who did not actually leave the city locked themselves in their houses and refused to come out.” Zugar & Miles, *Physicians, AIDS and Occupational Risk*, 258 J. AM. MED. ASSN. 1924 (1987) (footnotes omitted). When yellow fever broke out in Philadelphia in the summer of 1793, three of the city’s best known physicians fled to the countryside. *Id.* at 1925.

Some are now arguing that although physicians today have no legal obligation to begin to treat any patient (unless they are employed in emergency departments or in public hospitals), they have a professional obligation that grows out of their commitment to the *profession* of healing. See, e.g., *id.* at 1927; Pellegrino, *Altruism, Self-interest, and Medical Ethics*, 258 J. AM. MED. ASSN. 1939 (1987); cf. Walters, *Ethical Issues in the Prevention and Treatment of HIV Infection and AIDS*, 239 SCIENCE 597, 600 (1988):

A reasonable ethic for health care workers will not require of them heroic self-sacrifice or works of supererogation. . . . On the other hand, a reasonable ethic will not allow people who are in need of care to be refused treatment or abandoned solely because they are infectious. Such refusal and abandonment would violate the principle of beneficence.

51. Avoidance of AIDS has been cited as the reason why some of the best physician training programs in the country failed to fill all their positions in 1987. Specter, *Medical Profession Confronts New Generation’s Fears of AIDS*, Wash. Post, Jan. 20, 1988, at A1, col. 1. One doctor in a Bronx hospital stated, “People will tell you it’s the quality of life in New York, or the long hours, or the facilities, but that’s not it at all. It’s just AIDS.” *Id.* at A6, col. 2.

continuing decline in applications to medical schools, generally.⁵²

A second problem with the justice perspective can be seen in physicians' attitudes toward patients with AIDS. Physicians have come to expect success in their battle against disease. Paradoxically, it is the enormous success that medicine has experienced in this century in fighting contagious disease (through the introduction of antibiotics and the development of vaccines to protect against such major childhood killers as whooping cough and polio) that has bred an expectation of success that approached hubris. Even for those health care professionals ready and willing to care for AIDS patients, the absence of a cure, or even of effective palliatives, has led many physicians to feel they are of no use to the patients.

It is time for them to remember that for most of history, physicians have provided more care than cure. Lewis Thomas in his autobiography documents how recently medicine developed the ability to cure that we now take for granted.⁵³ He recalls, for example, accompanying his physician father on house calls in 1918 when about the only thing a physician could do was to diagnose.⁵⁴ But his father, and many other dedicated physicians understood that they still provided something of great value to patients and their families:

[W]hen I was on the faculty at Tulane Medical School and totally involved in the science of medicine, . . . I [was] asked to come to the annual meeting of a county medical society in the center of Mississippi, to deliver an address on antibiotics. . . . [M]y host was the newly elected president of the society, a general practitioner in his forties, a successful physician whose career was to be capped that evening, after the banquet, by his inauguration; to be the president of the county medical society was a major honor in that part of the world. During the dinner he was called to the telephone and came back to the head table a few minutes later to apologize; he had an emergency call to make. The dinner progressed, the ceremony of his induction as president was conducted awkwardly in his absence, I made my speech, the evening ended, and just as people were going out the door he reappeared, looking harassed and tired. I asked him what the call had been. It was an old woman, he said, a patient he'd looked after for years; early that evening she had died, that was the telephone call. He knew the family was in distress and

52. In 1974 there were more than three applications for every space in an American medical school. Now the ratio is less than two to one. *Id.* at A1, col. 1.

53. L. THOMAS, *THE YOUNGEST SCIENCE: NOTES OF A MEDICINE-WATCHER* (1983).

54. I'm quite sure my father always hoped I would want to become a doctor, and that must have been part of the reason for taking me along on his visits. But the general drift of his conversation was intended to make clear to me, early on, the aspect of medicine that troubled him most all through his professional life; there were so many people needing help, and so little that he could do for any of them. It was necessary for him to be available, and to make all these calls at their homes, but I was not to have the idea that he could do anything much to change the course of their illnesses. It was important to my father that I understand this; it was a central feature of the profession, and a doctor should not only be prepared for it but be even more prepared to be honest with himself about it.

Id. at 13.

needed him, he said, so he had to go. He was sorry to have missed the evening, he had looked forward to it all year, but some things can't be helped, he said.

That was in the early 1950s, when medicine was turning into a science, but the old art was still in place.⁵⁵

Tens of thousands have already died of AIDS. Hundreds of thousands more will die in the United States alone.⁵⁶ The dying need justice, but they also need caring, both from physicians and other health care workers, and from the community.

One possible future was chosen in Arcadia, Florida, where the home of three boys with the AIDS virus was burned, presumably by frightened neighbors. Another has been pioneered in Denton, Maryland, population just under 2000, where the single mother of a boy with hemophilia learned that her son had been exposed to HIV by a blood transfusion. After she sent him to kindergarten at Denton Elementary School, rumors began to spread. When a PTA meeting was arranged to discuss the situation, almost five-hundred people showed up. The county health officer explained why school officials had decided it was safe to have the boy attend school. Others suggested that the assembled parents should think about how they would feel if the boy were their own child. In the end, reason and calm have prevailed in Denton.⁵⁷

AIDS, like the plagues of the past, presents an opportunity for heroism or for scapegoating. As we decide whether Arcadia or Denton will serve as our national model, the need for caring as well as justice is clear.

55. *Id.* at 10-11.

56. For an estimate of world incidence see Pio, Plummer, Mhalu, Lamboray, Chin & Mann, *AIDS: An International Perspective*, 239 *SCIENCE* 573 (1988).

57. Kastor, *The Town That Wouldn't Give in to Fear*, Wash. Post, Dec. 21, 1987, at B1, col. 1.

THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION

*Robert L. Carter**

THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950. By *Mark Tushnet*. Chapel Hill: University of North Carolina Press. 1987. Pp. ix, 222. Cloth, \$29.95; paper, \$9.95.

It may be doing Professor Tushnet a disservice for me to review his book since I was one of the lawyers involved in the planning and execution of the "strategy" he seeks to explore. Yet, I suppose that one in my position should be able to appraise more closely the accuracy, if not the merits, of such an examination.¹

Much of the historical ground covered by Professor Tushnet's study has been plowed rather thoroughly. Richard Kluger's *Simple Justice*² and Robert Rabin's *Lawyers for Social Change: Perspectives on Public Interest Law*³ are prime examples. Since Kluger's study narrated many of the events that Tushnet covers, and Rabin used the NAACP staff as a model for public interest law activity, any author would be somewhat pressed to add much of anything new.

Professor Tushnet seems, in particular, to be constantly looking over his shoulder at Kluger's *Simple Justice* in an attempt to stake out a territory of his own. He states:

[M]y narrative has a narrower scope than [Kluger's *Simple Justice*] in regard to both the period of time covered and the subject matter discussed. It is informed by a concern for the constraints placed on the litigation strategy by organizational needs, and for the significance of the NAACP campaign as it applies to the theory and practice of public interest law in general. It is, therefore, an interpretation as well as a narrative of events. [p. xi]

While I appreciate the extent to which one's present personal recollection of events long past is suspect, I am convinced that in this instance the written record does not provide a full picture of the events

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1. I am somewhat troubled by one thing which I did not recall and do not now recall even after learning from a reference in the book that it occurred. P. 191, n.12. Professor Tushnet interviewed me in 1980 in the course of preparing this treatise. I have no recollection of it or him, and as far as I can tell, he uses the interview only to support the written record of my firm commitment to a direct attack on school segregation. It seems evident, therefore, that the interview did not influence the writing of the book or its review.

2. R. KLUGER, *SIMPLE JUSTICE* (1975).

3. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 *STAN. L. REV.* 207 (1970).

and decisions forming the legal strategy about which Tushnet writes.⁴ Tushnet sometimes reaches conclusions that are at odds with what I believe took place. This is most notably true in his reliance, for example, on letters exchanged among Thurgood Marshall, William Hastie and others, in apparent support of Tushnet's conclusion⁵ as to how and why "strategy" was affected or modified. Unfortunately, there is no record of oral staff discussions, debates, or determinations. While Marshall solicited advice and comments from a great many people, I know of no decision on legal strategy in the school cases, or indeed in any other area, that he made during my tenure (and I was on the staff from the mid-forties through the period covered here) that was at odds with the staff's view. Even when his chief outside advisors (Hastie, Robert Ming, and William Coleman) favored a course opposed by his staff, Marshall allowed his staff's view to prevail.

Professor Tushnet's narrative traces the NAACP's program to outlaw segregation in education from its origin pursuant to a 1930 grant from the American Fund for Public Service, founded by Charles Garland ("The Garland Fund"), to the institution of the school-segregation litigation in Kansas and South Carolina in 1950. The Garland Fund pledged \$100,000 to the NAACP. Only about \$20,000 of that grant was actually disbursed. Nonetheless, upon obtaining the money in 1930, the NAACP was able to hire Nathan Margold, a prominent New York lawyer, for a three-month period. Margold's contribution was the submission of a proposed plan of attack on "segregation irredeemably coupled with discrimination" in the public schools (p. 27). Margold, did not remain involved long enough, however, to do anything other than devise the proposal. The NAACP lacked funds to pay him beyond the three-month period.

Thereafter, Charles Houston became the NAACP's chief counsel. Houston put Margold's plan into operation, but not at the public school level. Rather, Houston's strategy was to have qualified blacks

4. For his historical data, Professor Tushnet seems to rely almost wholly on the written record — documents (correspondence, memoranda) in the files of the NAACP and Legal Defense Fund now in the Library of Congress. When the manuscript was being written, Tushnet notes, many of the documents of the Legal Defense Fund were inaccessible. They had not been sorted and were stored in boxes piled from floor to ceiling without any labelling. I do not know whether a review of these documents would have added anything to his narrative or conclusions. The documents he was able to study were those available to Kluger, and additional material donated to the Library of Congress subsequent to Kluger's study.

5. Pp. 105-37. Tushnet gives the impression that the sudden constraints of trial preparation in the *Sweatt* case, *Sweatt v. Painter*, 339 U.S. 629 (1950) affected the NAACP's strategy. Pp. 126-29. I do not believe that observation is correct. The all-out-attack position had been articulated in the *Mendez* case, *Westminster School Dist. v. Mendez*, 161 F.2d 749 (9th Cir. 1947). The national staff had been at work in researching historical materials, legal and otherwise, supporting the invalidity of enforced segregation. Moreover, the sociological approach had been decided upon and we were waiting for a case that would enable us to make a record of our sociological thesis. The *Sweatt* trial provided that opportunity. Thus, all we needed when *Sweatt* was being readied for trial was to secure the necessary expert witnesses.

apply for graduate and professional training in the states where blacks were barred from existing state graduate and professional institutions and in which no "separate but equal" facility for blacks had been established.⁶ Houston's aim was to undermine segregation by forcing states that practiced segregation to establish graduate and professional schools for blacks, with the expectation that the economic costs would be such that state authorities would themselves decide to desegregate the existing facilities. Thurgood Marshall followed Houston as the organization's chief counsel, and under his stewardship the program culminated in the United States Supreme Court's historic decision in *Brown v. Board of Education*.⁷ While Margold focused on the public schools, Houston on the full equalization of facilities at the graduate school level, and Marshall on the desegregation of law schools, graduate schools and finally public schools, the ultimate goal of all three was to have the enforced separation of black and white students in public institutions declared unconstitutional. Viewed in this light, the NAACP's legal strategy to outlaw segregated education followed a cohesive, unitary course from Margold to Marshall.

Professor Tushnet has done a service, I believe, in illuminating the politics surrounding the Garland Fund grant to the NAACP. That grant could be said to mark the genesis of the NAACP's paid national legal staff. Controversy raged between Roger Baldwin, subsequently the long-time director of the American Civil Liberties Union, and Walter White, Executive Director of the NAACP, over the use of the Garland Fund grant. Tushnet cites W.E.B. DuBois' disapproval of the NAACP's proposed use of the grant to attack segregated education. He points out that DuBois at the time believed that discrimination in education, rather than segregation, should be fought.⁸ The author proceeds to address the Margold proposal and Houston's and Marshall's subsequent activities. The general outline of all of these

6. See, e.g., *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Bluford v. Canada*, 32 F. Supp. 707 (W.D. Mo. 1940). Charles Houston left the NAACP staff in 1940, and never had any official connection with it during my tenure, which began in 1945.

7. 347 U.S. 483 (1954), *affd. on rehearing*, 349 U.S. 294 (1955) (Brown II).

8. However, I believe that Tushnet, at pages 8-10, provides a misleading impression of DuBois' views. One would conclude from the quoted material and discussion that DuBois favored a legal strategy seeking equal educational facilities only, leaving *Plessy v. Ferguson's* separate-but-equal doctrine undisturbed. See *Plessy v. Ferguson*, 163 U.S. 537 (1896). My own understanding is that his views were more complex. Despite the quotes from DuBois' editorial in the January 1934 issue of the *Crisis* (pp. 8-9), DuBois' primary point was that blacks needed "neither segregated schools nor mixed schools. What [blacks need] is Education." DuBois, *Does the Negro Need Separate Schools*, 4 J. NEGRO EDUC. 328, 335 (1935) reprinted in 2 THE SEVENTH SON, THE THOUGHTS AND WRITINGS OF W.E.B. DUBOIS 408 (J. Lester ed. 1971). DuBois' eventual break with the NAACP came about because he felt the organization's basic emphasis was solely on integration. His belief was that the goal should be equal education however it could be achieved — without segregation, if possible, but if not, with segregation as long as the black child was educated.

events is known; the details that Tushnet describes, however, are much less familiar and are of considerable interest.

The interpretive prong of Professor Tushnet's thesis — less successful than the narrative one — attempts to show that the NAACP's legal strategy for desegregation was ad hoc, pragmatic, and subject to shifts and modifications influenced by organizational needs. I am not persuaded by this thesis, principally for two reasons. The first is that Professor Tushnet couples the university and public school cases, which sought to undermine the constitutionality of segregation in education, with litigation that sought to secure equal pay for black teachers. He therefore treats these two independent litigation programs as if they were one. The second source of my dissatisfaction is Professor Tushnet's failure to account for or to understand the reasons that led the NAACP's national legal staff not simply to advocate "separate but equal" facilities, but to press relentlessly for a direct attack on *Plessy v. Ferguson*.⁹

Tushnet's emphasis on the teachers'-salary litigation and the initial failure of litigation in North Carolina and Tennessee to redress university segregation does not make his intended point.¹⁰ The teachers'-salary litigation and the university and school cases were a breed apart. The litigation to equalize the pay of black teachers was not an attack on segregation in education. Nor was it an effort to integrate teaching staffs. It simply sought to upgrade the pay scale of black teachers to that of white teachers. The only justification I can discern for lumping the school segregation and teacher-pay litigation together is that the teachers'-salary cases advance the book's thesis that the NAACP's legal strategy was subject to mutation as demanded by organizational requisites.

In the teachers'-salary litigation, the named teacher-plaintiff was exposed and vulnerable. No such vulnerability was present for the university-plaintiff. Admittedly, she or he might have faced mob attack upon seeking to enter school after a victory in court. This was the case at the Universities of Georgia¹¹ and Alabama.¹² But a student's economic base was not threatened. Moreover, the teacher-plaintiff did not necessarily come to the NAACP through its local units. At the time, there were black teacher organizations in each state. Their members had a paramount interest in the issue of equal

9. 163 U.S. 537 (1896).

10. See pp. 52-55. Despite the decision in *Pearson v. Murray*, 169 Md. 478, 182 A. 590 (1936), the separate-but-equal doctrine was still firmly entrenched. No court insisted on equal facilities as requisite to enforcement of the doctrine until 1938, when the Supreme Court decided *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337. Therefore, I am not certain that the result would have made a difference even absent the deficiencies the author points out.

11. See, e.g., *Holmes v. Danner*, 191 F. Supp. 394 (M.D. Ga. 1961).

12. See, e.g., *Lucy v. Adams*, 350 U.S. 1 (1955), *affg. per curiam*, 134 F. Supp. 235 (N.D. La. 1955).

pay. Usually, such organizations found a teacher willing to take the risk of becoming a plaintiff. The organization would agree to insure the teacher a year's salary if fired. Then, the teachers' group would ask the NAACP to take on the litigation. After 1945, with the one exception cited below, none of these cases was handled by the national legal staff.¹³

When I came to the NAACP after the war, the focus had already shifted to securing the admission of blacks to law schools and graduate schools in the South. Teachers'-salary litigation as an NAACP enterprise was then winding down. Litigation had been instituted in most states; the NAACP, at the request of the teachers, had sponsored suits in states where none had been filed. Constance Motley and I tried one such case in Jackson, Mississippi, for example, the only such case either of us ever handled, as I recall. It was, I am certain, the last such case sponsored by the national legal staff. During my tenure we were primarily engaged in attacking segregation in housing,¹⁴ transportation,¹⁵ and education.¹⁶

The key point that must be grasped concerning the relationship between organizational needs and legal strategy is not, as Professor Tushnet would have it, that NAACP litigators and local branches conformed their approach to the short-term desires of black Southern communities in order to increase the Association's organizational base among that constituency. Rather, the organization's staff took the lead in setting an agenda at the local level. If organizational needs

13. See, e.g., *Bates v. Batte*, 187 F.2d 142 (5th Cir. 1951) (handled by national staff); *Cook v. Davis*, 178 F.2d 595 (5th Cir. 1950) (handled by A.T. Walden of Atlanta, Georgia, and Oliver W. Hill of Richmond, Virginia); *Reynolds v. Board of Pub. Instruction*, 148 F.2d 754 (5th Cir. 1945) (handled by Florida counsel); *Carter v. School Bd.*, 87 F. Supp. 745 (E.D. Va. 1949) (handled by Hill, Martin & Robinson of Richmond, Virginia); *Butler v. Wilemon*, 86 F. Supp. 397 (N.D. Tex. 1949) (handled by Dallas counsel); *Pitts v. Board of Trustees*, 84 F. Supp. 975 (E.D. Ark. 1949) (handled by Arkansas counsel); *Freeman v. County School Bd.*, 82 F. Supp. 167 (E.D. Va. 1948) (handled by Hill, Martin & Robinson); *Whitmyer v. Lillian Parish School Bd.*, 75 F. Supp. 686 (W.D. La. 1948) (handled by A.P. Tureaud and Louis Berry of New Orleans and Thurgood Marshall of New York City).

14. See, e.g., *Shelly v. Kramer*, 334 U.S. 1 (1948) (restrictive covenant); *Birmingham v. Monk*, 185 F.2d 859 (5th Cir. 1951); *Detroit Hous. Commn. v. Lewis*, 226 F.2d 180 (6th Cir. 1955); *Heywood v. Public Hous. Admin.*, 135 F. Supp. 217 (E.D. Ga. 1955); *Johnson v. Levitt & Sons*, 131 F. Supp. 114 (E.D. Pa. 1955); *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949); *Northwest Civic Assn. v. Sheldon*, 217 Mich. 416, 27 N.W.2d 36 (1947) (restrictive covenant).

15. See, e.g., *Morgan v. Virginia*, 328 U.S. 373 (1946); *Westside v. Southern Bus Lines*, 177 F.2d 949 (6th Cir. 1949); *Flemming v. South Carolina Elec. & Gas Co.*, 224 F.2d 752 (4th Cir. 1955), *revd. on reh.*, 239 F.2d 277 (4th Cir. 1956), *appeal dismissed*, 351 U.S. 901 (1956).

16. See, e.g., *Sipuel v. Board of Regents*, 332 U.S. 631 (1948), *petition for writ of mandamus denied sub nom. Fisher v. Hurst*, 333 U.S. 147 (1948); see also, e.g., *McKissick v. Carmichael*, 187 F.2d 949 (4th Cir. 1951); *Gray v. Board of Trustees*, 97 F. Supp. 463 (E.D. Tenn. 1951), *affd.*, 100 F. Supp. 113 (E.D. Tenn. 1951), *vacated and dismissed as moot*, 342 U.S. 517 (1952). Compare *Westminster School Dist. v. Mendez*, 161 F.2d 774 (9th Cir. 1947), where the NAACP's amicus brief was the forerunner of its brief in *Brown v. Board of Education* arguing that segregation *per se* violated due process and equal protection guarantees.

dictated legal strategy, that was because the legal strategy was *ab initio* the product of institutional necessities. After all, the organizational purpose of the NAACP was to secure equal citizenship rights for blacks, and among those rights was the right to equal educational opportunity. That litigation thus fulfilled one of the organization's most basic functions.

Thus, the education cases, at both the university and grade school levels were the products of local NAACP efforts to implement national policy. Local branches stimulated opposition to school segregation and encouraged their members to challenge segregation in schools, housing, and transportation in accord with national NAACP policy. Such local efforts encouraged members of the branches, or the friends or acquaintances of members, to come forward as plaintiffs to prosecute the litigation. It is true that economic pressure was placed on the parents of children involved in South Carolina and Virginia school desegregation cases in an attempt to derail the litigation. However, in those cases, so many plaintiffs were enlisted that opponents were never able to frighten off all of them in any case.

The NAACP certainly sought followers, money, and influence, but the hope was that success in the courts would bring them to bear. That Professor Tushnet has inverted the true relationship between national strategy and local organizational needs is best illustrated by the decision in 1950 to pursue a "direct attack" on school segregation, the strategy that culminated in *Brown v. Board of Education*. I believe that the Association could have held back on its all-out attack on segregation without adverse organizational effect. While the national staff was committed to an attack on segregation *per se*, there was no compelling demand from the local units that such an attack be launched. Local units would have been satisfied at the time if the organization had opted for litigation merely to upgrade the black schools. Indeed, black teachers and principals were very wary about an attack on segregation, and with good reason. Our success cost a number of them their jobs,¹⁷ even if they benefited in the long run.

Tushnet gives considerable attention to Carter Wesley's¹⁸ dispute with Marshall over the merits of a direct challenge to segregation as opposed to an effort to obtain equal school facilities. The black community was divided on the issue. Some felt very strongly that a direct

17. See, e.g., *Rolfé v. County Bd. of Educ.*, 391 F.2d 77 (6th Cir. 1968); *Wall v. Stanley County Bd. of Educ.*, 378 F.2d 275 (4th Cir. 1967); *Smith v. Board of Educ.*, 365 F.2d 770 (8th Cir. 1966); *Chambers v. Hendersonville Bd. of Educ.*, 364 F.2d 189 (4th Cir. 1966); see also N. DORSEN, P. BENDER, B. NEUBORNE & S. LAW, 2 EMERSON, HABER & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 754 (4th ed. 1979) (reporting that HEW data from Alabama, Florida, Georgia, Louisiana, Mississippi and Texas showed that the number of black teachers declined by 5% between 1968 and 1970, and the ratio of black to white teachers declined by 69% during the same period).

18. Wesley was editor of an influential black newspaper published in Houston and was one of the most influential men in the Texas black community. See pp. 107-09.

attack on segregation would be irresponsible because of the possibility of failure, while others were convinced that such an attack was the only prudent course. I believe that the majority sentiment in the black community was a desire to secure for blacks all of the educational nurturing available to whites. If ending school segregation was the way to that objective, fine; if, on the other hand, securing equal facilities was the way, that too was fine.

Far from being preordained by organizational considerations, the direct-attack strategy actually cost the Association, for a time, the services of some of our best-trained lawyers in the South. These lawyers refused to continue working with us when we determined that no more equal facilities cases would be brought under NAACP auspices.¹⁹ Indeed, as late as the announcement by the Supreme Court that it would hear argument in *McLaurin v. Oklahoma State Rights*²⁰ and *Sweatt v. Painter*,²¹ opposition to the NAACP's strategy of an all-out attack on segregation was so strong that Thurgood Marshall felt the need to hold a conference at Howard University in Washington, D.C., to afford advocates of the strategy an opportunity to make their case and counter the opposing sentiment. Interestingly enough, W.E.B. DuBois' presentation at the conference was among the most influential in gaining support for the all-out attack. (His presence lends support to my challenge of Tushnet's interpretation of DuBois' views.)²² While he did not address himself to the merits of the controversy, DuBois spoke eloquently about the economic exploitation and degradation of blacks and advised the audience that blacks had to become knowledgeable about the ways and means of such exploitation in order to free themselves from bondage. He certainly understood the purpose of the conference, and his participation in it indicated to the conferees and the public his support for a direct attack on segregation.

It is true that in all but the last of its briefs filed in the United States Supreme Court in the cases grouped together as *Brown v. Board of Education*, the NAACP straddled the issue — arguing that segregation was, itself, invalid and arguing as well that the state had failed to provide equal facilities. Nonetheless, the NAACP's public posture from 1950 onward was that an all-out attack on segregation was being waged. The equal-facilities arguments were retained only out of the lawyers' sense of caution, not because of any need to appease local organizational sentiment. On the contrary, my perception is that the

19. Lewis Hill and Martin Martin of the Hill, Martin, Robinson firm in Richmond refused to abide by the NAACP policy adopted by the Board in 1950, providing that the organization would thereafter handle cases attacking segregation *per se*. After about a year or two, however, those and other lawyers resumed their cooperation with the NAACP.

20. 339 U.S. 637 (1950).

21. 339 U.S. 629 (1950).

22. See note 8 *supra*.

national office took a stand against any form of segregation and led its local constituency to accept that view.

When the NAACP made its commitment in 1930 to an attack on segregation in education, Charles Houston stood alone as its legal staff. Later he was assisted and then succeeded by Thurgood Marshall. Marshall began to build a paid legal staff during World War II. He hired Milton Konvitz²³ and Edward Dudley²⁴ as full-time assistants in the early 1940s. Konvitz left in mid-1940 and I joined the staff. By 1950, the staff had grown to about ten lawyers.²⁵

Houston and Marshall were extraordinary men — brilliant lawyers, charismatic, and politically astute. They had help from the Howard University Law Faculty, principally William Hastie and Leon Ransom, also extraordinary men. Indeed, while Hastie and Marshall are generally acknowledged as being among the best legal minds of their generation, until recently only insiders recognized the brilliance of Houston and Ransom. Despite such formidable talent on the national level, there was no cadre of reliable local talent to turn to in the South. Therefore, the litigation effort was, of necessity, severely circumscribed. Moreover, Hastie and Ransom had other full-time employment and could devote only part of their time to NAACP causes.

This situation did not begin to change until early 1940, as a national staff began to form. However, finding competent local counsel remained a problem. Except for cases brought in Virginia (which were handled by the firm of Hill, Martin & Robinson) and Delaware (where Lewis Redding supervised the cases locally), local counsel required close supervision from New York until late in my tenure on the staff. In short, the NAACP's commitment to a direct attack on segregated education did not get off the ground until 1945 or 1946, when, as I have indicated, the equal-pay teacher cases were no longer part of the national staff's agenda.

The book's theoretical agenda is grander than suggested by the foregoing discussion, however, for in his conclusion, Professor Tushnet offers some general speculations on the practice of public-in-

23. Konvitz, subsequent to leaving the NAACP, taught at the Cornell School for Industrial and Labor Relations and the Cornell Law School.

24. Edward Dudley left the staff to serve as Ambassador to Liberia during President Truman's administration. Thereafter, he returned to the staff for a brief period, was appointed to New York City Family Court, became President of the Borough of Manhattan, and was subsequently elected to the New York State Supreme Court.

25. Among those on the staff were Constance Baker Motley, who became President of the Borough of Manhattan, and subsequently Chief Judge of the Southern District of New York until taking senior status in 1987; Franklin H. Williams, who subsequently was assistant to the first director of the Peace Corps, United States Ambassador to the United Nations, then to Ghana, and is now president of the Phelps Stokes Fund; Jack Greenberg, who became Director of the NAACP Legal Defense Fund after Marshall and is now teaching at Columbia Law School; and Marian Wyn Perry, who later married and became a housewife. Other lawyers were also hired, all after 1950.

terest law. Since I discerned no deeper unity in his conclusions than that of a series of unlinked observations, I will limit myself to addressing the particular ones with which I take issue.

Professor Tushnet seems to believe that if the NAACP had lowered its sights and pressed for equal facilities, whites might have been more sympathetic and success more likely. But what is there in our experience to validate that supposition? While residential patterns of segregation and the neighborhood-school policy have produced more segregated schools today than existed before *Brown*, little effort at equalization seems to have been made. So vast is the economic cost of equalization that there is no public will to expend such money, particularly when the funds are viewed as benefiting chiefly blacks, Hispanics and poor children. Thus far, efforts to equalize facilities or to provide equal education have been meager throughout the country. The assumption appears to have been that less rigorous educational training is needed in the schools that are predominantly black. The belief that an equal-facilities strategy would have produced greater rewards for black children in the upper South by 1970 is myth. I can understand the impulse to retreat to fantasy when one faces the studied indifference of the white majority to the educational neglect of black children and a callousness which justifies that neglect with the racist notion that black children are uneducable. Still, residential segregation in the urban North produces segregated and unequal schools as relentlessly as did the dual-school system in the South. The Public Education Association conducted a study of New York City schools in 1955 and found the predominantly black schools unequal to the predominantly white schools in the three R's, as measured by standardized achievement tests. A follow-up study in 1965 found no improvement over the ten-year interval.²⁶

Perhaps an even firmer rejection of Tushnet's conjecture results from a reading of *Hobson v. Hansen*.²⁷ Judge Skelly Wright's opinion in that case is a thorough exposé of the methodology utilized in urban school districts to maintain white school enclosures, to restrict high-quality educational offerings to those schools, and deliberately to insure low-quality educational offerings in predominantly black schools.

In *Hobson*, a neighborhood school policy insured racial segregation

26. The Public Education Association assisted by the New York University Research Center for Human Relations prepared two reports in 1955: *The Status of the Public School Education of Negro and Puerto Rican Children in New York City* and *Quality of Education Offered to Majority and Minority (Negro, Puerto Rican) Children in New York City's Public Schools*. The latter study, at pages 35-37, showed that based on the results of standardized achievement tests, schools which were predominantly black and Puerto Rican were behind predominantly white schools by a half year in reading and arithmetic at the third grade level, one and one-third years behind at the sixth grade level, and two years behind at the eighth grade level.

27. 269 F. Supp. 401 (D.D.C. 1967), *cert. dismissed*, 308 U.S. 801 (1968), *affid. sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969) (en banc). There were many other decisions published in this case, but the one cited is for our purposes of primary interest.

in the system, but various options enabled white children to avoid attending their neighborhood schools if they were predominantly black. Moreover, the students were educated on a track system which had the effect of resegregating the races within individual schools based on ability groupings. There were four tracks — a track for gifted students, a college preparatory track, a general track for those who did not plan to go to college, and a basic track for slow learners and the academically retarded. Judge Wright found a socioeconomic correlation between the percentage of children in a given track and the income level of the neighborhood served. The higher the median income, the greater the percentage of children in the high tracks. The percentage of blacks enrolled in the “basic track” exceeded their proportionate representation in the student body. Moreover, Judge Wright found that at every level of comparison — in terms of physical adequacy, quality of the faculty, textbooks, supplies, curricula and special programs — the predominantly black schools were shortchanged.

At another point Tushnet notes that equalization would not have been compatible with the ideal of equality embodied in *Brown*, but claims that “there was no relatively fixed ideal of equality with which racial discrimination was incompatible” (p. 160). He describes as arbitrary the Supreme Court’s rejection of out-of-state scholarships for blacks in compliance with the states’ requirement to provide equality for blacks.²⁸ Unless one is prepared to perpetuate an abstraction on the order of *Plessy v. Ferguson*, equality in a Constitutional sense can only have a meaning that effectuates equality in real life.

28. See pp. 160-61, citing *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). The *Gaines* Court stated:

Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities — each responsible for its own laws establishing the rights and duties of persons within its borders. It is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do. That separate responsibility of each State within its own sphere is of the essence of statehood maintained under our dual system. It seems to be implicit in respondents’ argument that if other States did not provide courses for legal education, it would nevertheless be the constitutional duty of Missouri when it supplied such courses for white students to make equivalent provision for negroes [sic]. But the plain duty would exist because it rested upon the State independently of the action of other States. We find it impossible to conclude that what otherwise would be an unconstitutional discrimination, with respect to the legal right to the enjoyment of opportunities within the State, can be justified by requiring resort to opportunities elsewhere. That resort may mitigate the inconvenience of the discrimination but cannot serve to validate it.

305 U.S. at 350. The above is a reasoned argument, clearly setting out the basis for the Court’s holding that out-of-state scholarships do not satisfy the states’ obligation to provide equal treatment for blacks. The dissent does not make a reasoned argument to the contrary. Justice McReynolds merely makes a conclusory statement that the problem “obviously is a difficult and highly practical one. A fair effort to solve it has been made by offering adequate opportunity for study when sought in good faith. The State should not be unduly hampered through the theorization inadequately restrained by experience.” 305 U.S. at 354 (McReynolds, J., dissenting).

A state builds a university with tax funds to which blacks contribute, yet Tushnet implies that barring blacks from their home-state university and giving them scholarships to secure their education elsewhere need not be in absolute conflict with equality. For the Court to hold that a state could not condition its own constitutional obligations on what another state might do — in this instance, erect no barriers to admissions of blacks to institutions of higher learning within its borders — seems entirely principled. The text from Chief Justice Hughes' opinion in *Gaines*²⁹ provides powerful justification in support of the thesis that "out of state scholarships" were constitutionally insufficient. "Arbitrariness" more aptly describes Tushnet's unusual notion that out-of-state scholarships could fulfill the state's obligation to provide equal treatment for its black citizenry.

He chides the Court for its emphasis in *Sweatt* and *McLaurin* on the intangibles rather than on the finite facilities in determining educational equality.³⁰ But what makes a university great are undoubtedly the intangibles — its reputation, the success and power of its alumni, the prestige of its faculty, and the public perception of its institutional quality. To be sure, material endowments may, over time, upgrade an institution to the highest rank. In the process, however, the intangibles are upgraded as well. Professor Tushnet, in suggesting that intangibles might be disregarded as part of the equation which defines educational equality, is again giving equality an abstract, sterile and enfeebled connotation.

In the final analysis, what I find most troubling about the treatise is Tushnet's argument that such a sterile and abstract approach to equal educational opportunity by the Court in 1954 could have satisfied fourteenth amendment guarantees (pp. 160-61) admittedly designed, at a minimum, to bar state-ordered discrimination. The Court, on the other hand, rightfully sought to give the clause a twentieth-century dimension with pragmatic effect.

Tushnet also speculates that the attack on segregation undermined some of the institutions within the black community (pp. 164-65), but he gives no examples of this. I do not know of any viable black community institution that *Brown* leveled. Perhaps the black teacher organizations constitute the exception. Some black public and private colleges are indeed under severe stress today, but that stress results

29. See note 28 *supra*.

30. P. 161. Tushnet states that "accepting the NAACP's sociological argument was an innovation," and that the sociological evidence was used to challenge legislative policy as being inconsistent with "a higher norm of equality." P. 161. I do not understand what that means. He says this argument could have been resisted and the intangibles stressed in *Sweatt* and *McLaurin* could have been seen as the result of economies of scale in education. It is true that economies of scale could have led to a determination that the low level of demand at the university level was the basis for the gap in intangibles. But at the grade school level where compulsory schooling is enforced, that argument would not work. Indeed, if the basis is economies of scale, racially separate schooling would be doomed. The cost would outweigh the benefit.

from a lack of financial support. We do not know whether the strictures which some of the black institutions now suffer would have occurred in any event. The 1964 Civil Rights Act did much to enlarge a black middle class that had heretofore been virtually static. This greatly enlarged group would have sought to secure admission to colleges and universities with national prestige in the North and West even if *Brown* had not been decided. Moreover, affirmative action requirements imposed by Title VII of the Civil Rights Act probably did more to spur white universities to seek more black applicants than did the *Brown* decision.

Tushnet seems to believe that some of the new NAACP staff members, having lived in New York before joining the staff, "enthusiastically favored the direct attack" on segregation and may not have fully appreciated the difficulty the litigation might cause for blacks in the South (p. 111). There is no basis for that conjecture. The potentially dire implications for participants in the South Carolina and Virginia cases were carefully explained to them by national staff lawyers. Before these cases were filed, the challenge to segregation had intensified in all areas — at the university level, in interstate and intrastate commerce, and even in regard to recreational facilities. White resistance was also intensifying. The cases were filed at a time when economic pressure was being exerted on blacks to curb their new militancy. In that climate, it was necessary for national staff lawyers to meet with the parents of all putative plaintiffs before the complaint was filed in South Carolina or Virginia to point out the risks being taken in joining a lawsuit as threatening as one challenging segregation and to afford them the opportunity to give the matter careful, further consideration before making a final commitment to join in the litigation. That so few stepped back still astounds me. Undoubtedly, they felt that the only hope for their children lay in putting themselves at economic risk.

I believe the treatise is largely accurate in its narrative of the events that constituted the organization's legal activity in the university and school cases, the origin of the program and its early developments. It is also a serious effort to provide a full and fair presentation of the surrounding events. However, Tushnet's interpretation gives a narrow and constricted reading of the import and meaning to blacks and to the country of the long struggle he discusses. Blacks clearly would have been in no worse position today, in terms of educational benefits in the public school arena, if we had concentrated on an equal facilities goal. This is so because *Brown*, seen solely as a school case, must be considered a failure. What makes *Brown* historic, however, is its fall-out effect. It transformed and radicalized race relations in this country, removing blacks from the status of supplicants to full citizenship under law, with entitlement by law to all the rights and privileges of all other citizens. Equal citizenship is not yet a reality, but blacks can

now contend that the reality is contrary to the law.³¹ This is a powerful argument — a potent force that an equal facilities victory could not have produced.

What for me is the most basic defect in Professor Tushnet's thesis is his fundamental misunderstanding of the NAACP strategy. True, the strategy was to attack segregation in education, but the real agenda was the removal of the basic barrier to full and equal citizenship rights for blacks in this country. With segregation eliminated, blacks, it was thought, would have an unrestricted opportunity to function in America on equal terms with whites. We now know, of course, that the NAACP lawyers erred. The lawyers did not understand then how effective white power could be in preventing full implementation of the law; nor did they realize at the time that the basic barrier to full equality for blacks was not racial segregation, a symptom, but white supremacy, the disease. Although any thoughtful person might readily see that fact now, it took the removal of constitutional support for racial segregation to make clear that black subordination is a national, not a regional, problem. At any rate, NAACP aims, misconceived though they may have been, were far grander than Professor Tushnet's discussion implies.

31. The same point was made in this publication about 20 years ago. See Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237 (1968).

LAW, SCIENCE, AND HISTORY: REFLECTIONS UPON *IN THE BEST INTERESTS OF THE CHILD*

Peggy C. Davis*

IN THE BEST INTERESTS OF THE CHILD. By Joseph Goldstein, Anna Freud, Albert J. Solnit, and Sonja Goldstein. New York: The Free Press. 1986. Pp. xix, 236. Cloth, \$15.95; paper, \$8.95.

“GoldsteinFreudandSolnit” is a common term in the parlance of lawyers concerned with child custody and parental rights. It evokes a familiar set of beliefs about child development and child placement decisionmaking. The term is regularly intoned in family proceedings as authority for the view that assuring continuity of care should be the virtually exclusive criterion for child placement determinations. It is invoked to urge a process of identifying the adult with whom a child is primarily bonded — the child’s “psychological parent” — and protecting the permanence and autonomy of the psychological parent-child relationship.¹

Goldstein, Freud, and Solnit have promoted these beliefs in concise, accessible volumes addressed to legal, child welfare, and mental health professionals.² In the legal context, the authors’ goal has been “to provide a basis for critically evaluating and revising [consistently with their beliefs about psychological parenthood] the procedure and substance of court decisions, as well as statutes.”³ In this, they have had notable success. The theories and recommendations of these scholars have stimulated a significant, albeit incomplete, restructuring of statutes and common law governing child placement decisionmaking.⁴ The effect of psychological parent theory upon legislative

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1. It is also invoked — rightly, but too infrequently — to urge haste in determining child placement issues. See J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 40-49 (1979) [hereinafter *BEYOND THE BEST INTERESTS*].

2. See *BEYOND THE BEST INTERESTS*, *supra* note 1; J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* (1979). Sonja Goldstein was not an author of the earlier works.

3. *BEYOND THE BEST INTERESTS*, *supra* note 1, at 5.

4. See Davis, “*There Is A Book Out . . .*”: *An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987) [hereinafter Davis]; Taub, *Assessing the Impact of Goldstein, Freud, and Solnit’s Proposals: An Introductory Overview*, 12 N.Y.U. REV. L. & SOC. CHANGE 485 (1983-84).

schemes has been complex and interesting.⁵ Its effect upon judicial applications and elaborations of law has been more controversial.⁶ Like other conspicuous demonstrations of the power of a scientific theory to influence the law, the impact of psychological parent theory upon judicial decision making has led — predictably and appropriately — to concern about the processes by which outcomes are determined and changes in law are effected.

Professors Goldstein and Solnit are distinguished legal scholars, and their view that judge-made law must change in response to psychological parent theory is expressed with an uncommon sophistication about legal process. That sophistication has been enriched by their frequent participation in child placement litigation. However, the earlier books of Goldstein, Freud, and Solnit were not critiques of legal process, but works of advocacy. In the course of advocating law reform, these authors were mindful, but not critical, of the processes by which scientific theory affects legal decisionmaking. They displayed the legal technician's proficiency at marshalling and characterizing precedent to facilitate a desired result, and spoke eloquently of the process:

There is in law, as psychoanalysis teaches that there is in man, a rich residue which each generation preserves from the past, modifies for the now, and in turn leaves for the future. Law is, after all, a continuous process for meeting society's need for stability by providing authority and precedent and, at the same time, meeting its need for flexibility and change by providing for each authority a counterauthority and for each precedent a counterprecedent. The living law thus seeks to secure an environment conducive to society's healthy growth and development.⁷

They also argued that, regardless of the availability of controlling "counterprecedent," judges are justified in providing for "the now" by modifying rules of law "[o]n the basis of knowledge extrapolated from [the social sciences]."⁸

In the Best Interests of the Child addresses more carefully the processes by which judges, in collaboration with lawyers and social scientists, apply and alter law. Its prescription for assuring just and accurate results in those collaborations is a scrupulous attention to interdisciplinary boundaries (pp. 120-21). The central message of the book is that professionals involved in child welfare matters must be disciplined to work within the limitations of their respective fields.

The book concludes with two appendices: Stephen Gould's scath-

5. See Davis, *supra* note 4, at 1569-79; Taub, *supra* note 4; Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 449-53 (1983).

6. See Davis, *supra* note 4, at 1593-98.

7. BEYOND THE BEST INTERESTS, *supra* note 1, at 80-81.

8. *Id.* at 94.

ing critique of *Buck v. Bell*,⁹ and a poignant passage from *The Autobiography of Malcolm X*.¹⁰ The Gould critique describes a collaboration between law and social science in which early (and now discredited) teachings of eugenics informed a Supreme Court decision to deny constitutional protection of a fundamental right of family — the right to procreate. The Malcolm X passage describes a collaboration between law and social science in which child welfare and mental health experts informed a lower court decision to sever the legal bonds that preserved a troubled, but arguably viable, family unit, institutionalize the mother, and place the children in various foster and adoptive homes. The appendices receive little attention in the text. These powerful and powerfully told stories are simply offered; their implications for lawyers and scientists working across disciplinary boundaries are not probed. Yet, by their independent force, they enrich our understanding of the dimensions of difficulty involved in integrating law and science without sacrificing justice or oversimplifying notions of accuracy.

This review essay consists of two parts. Part I examines the boundary adherence techniques advocated in *In the Best Interests of the Child* and discusses their potential as controls against inappropriate judicial incorporation or rejection of scientific knowledge. It argues that when science becomes relevant to lawyering or to judging, it is wise, but insufficient, to leave the law to the legal professionals and the science to the scientists. The difficulties of assuring just and accurate results in these interactions require that professionals find objective measures of the reliability and impartiality of scientific judgments and screen out those judgments that fail to meet the measure.

Part II takes the appendices as a focal point for examining a second dimension of difficulty in law-science interactions. The appendices demonstrate that deference to the teachings of social science can lead courts to compromise deeply valued rights of family autonomy. Part II argues that lawyering and judging at the borders of law and science require recognition of this possibility. It is not sufficient that scientific judgments be professionally made and screened for accuracy. The shaping and application of law in response to scientific truths are complex, multidisciplinary processes that require circumspection: for accuracy is elusive, truths are neither timeless nor absolute, and claims of science may be in tension with compelling, historically based claims of political and legal theory. The excerpt from *The Autobiography of Malcolm X* describes the destruction of

9. P. 127, appendix 1 (reprinting Gould, *Carrie Buck's Daughter*, 93 NATURAL HISTORY 14 (July 1984)) (examining the lives affected by *Buck v. Bell*, 274 U.S. 200 (1927)).

10. P. 142, appendix 2 (reprinting MALCOLM X & A. HALEY, *THE AUTOBIOGRAPHY OF MALCOLM X* 12-21 (1965)).

Malcolm X's family as "modern day slavery."¹¹ The analogy is surprisingly rich. The fourteenth amendment was conceived by people who regarded slavery's denial of family rights as a uniquely deplorable usurpation of fundamental human entitlements. Rights of family were explicitly included among the rights that the fourteenth amendment was designed to safeguard. Part II draws upon the slavery analogy to offer a previously unrecognized constitutional basis for cautious judicial scrutiny of scientifically supported infringements upon rights of family.¹²

I. LAW, SCIENCE, AND THE LESSON OF BOUNDARY ADHERENCE

At one level, the maxim, "Thou shalt not lightly cross professional boundaries," has self-evident merit. Few lawyers and judges are professionally trained in the sciences. With respect to a child welfare issue, humility vis-à-vis the child development specialist is appropriate. Few scientists are professionally trained in the law. With respect to questions of law, humility vis-à-vis the legal specialist is appropriate.

The authors enrich this maxim by adding a valuable corollary. When law and science professionals collaborate to resolve a controversy, it is important that they expose particular sorts of professional premises that might be relied upon in fashioning a resolution (pp. 58-59, 74). This technique of explicating premises is applied differently with respect to legal and scientific disciplines.

Scientific experts are encouraged to communicate scientific conclusions fully, and to report any reliance upon lay understandings of legal rules (p. 74). The belief that experts must expose scientific premises to legal professionals stems from two axioms of legal process. First, scientific judgments may be relevant to the determination of a matter under existing legal standards. When this is so, the risk of an erroneous determination is reduced to the extent that scientific expertise is fully available to legal professionals. Second, law may, and should under some circumstances, change to reflect knowledge gleaned from the sciences.¹³ Expert knowledge that appropriately commands adjustment of legal rules is, therefore, equally necessary to the lawyering and judging functions.

The authors' insistence that scientists expose reliance upon lay interpretations of the law stems from a wish to avoid inappropriate self-censorship. The concern is that scientific opinions will be withheld because of a belief that legal rules or customs require their rejection (pp. 70-74). Self-censorship of this kind would result in withholding

11. *Id.* at 146 (reprinting p. 21).

12. The constitutional theory set forth in Part II provides an alternative to the theory of "penumbral" privacy that served as a basis for the elaboration of family rights in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and subsequent cases.

13. See *Davis*, *supra* note 4, at 1540-41.

from the legal process potentially useful information. An expert in law may see, where a lay person would fail to see, room for incorporation of scientific knowledge to influence an outcome or to advance legal doctrine.

The authors impose upon law professionals a more limited obligation to explicate premises. Legal professionals are urged to be explicit concerning any *scientific* premises upon which they may rely (pp. 58-59). This infrequent but laudable practice is advocated because it exposes lay opinion on scientific questions to critical expert evaluation, minimizing the risk that legal determinations will be made on the basis of misinformation or uninformed judgment (pp. 58-59). The authors do not, however, identify a need to inform scientists of the bases of legal judgments. Their only expressed concern with respect to the scientist's understanding of law is that communication of scientific knowledge not be deterred by inexpert determinations that the legal system cannot, or will not, utilize the information.¹⁴

The value of these prescriptions of boundary adherence and interdisciplinary communication is not to be gainsaid. The fault of *In the Best Interests of the Child* is that its focus and structure result in an overstatement of that value. The reader is left with an inappropriate confidence that justice and children will be served if lawyers lawyer, judges judge, and scientists inform. This occurs because the critique of interdisciplinary exchanges is compromised by an understandable but disabling failure to set aside substantive convictions in the interest of assuring rigor in the analysis of process. As we have seen, the authors have firm convictions concerning the appropriate disposition of a broad category of child placement matters.¹⁵ In broaching the subjects of interdisciplinary boundary adherence and communication, they set a goal of objectivity: "We have been careful not to let the force of our convictions and the temptation to reinforce the proposals we made in the earlier books lead us to find only good practices in decisions that we like and only poor practices in decisions we dislike" (p. 12). The goal proves elusive. *In the Best Interests of the Child* consists almost entirely of critical reviews of case histories. Good practices are repeatedly illustrated by decisions that are consistent with the authors' convictions.¹⁶ Poor practices are repeatedly illustrated by decisions that are inconsistent with the authors' convictions.¹⁷

This skewed result flags two artificialities in the sample of cases

14. Pp. 70-74. Part II of this review argues that legal principles require cautious scrutiny of scientific claims that are offered to justify compromises of fundamental rights. These legal principles should be understood by scientists and taken into account when scientific opinion is marshalled in the service of legal argument. Law professionals relying upon these principles should therefore assume a duty to explicate legal premises for the benefit of the scientific community.

15. See notes 1-3 *supra* and accompanying text.

16. *E.g.*, pp. 44-53, 56-57, 57-62, 62-64, 64-67, 97-98.

17. *E.g.*, pp. 21-28, 31, 34-37, 70-71, 72-74, 74-78.

reviewed in the book. First, the sample is virtually devoid of expert evidence that is inconsistent with the authors' positions.¹⁸ Only one of the cases reviewed involves an expert who holds a professional view contrary to those expressed in the earlier works of Goldstein, Freud, and Solnit.¹⁹

Second, professionals who disagree with the authors' child development theories are presumed to act without scientific basis, while professionals who agree with their theories are presumed to act consistently with scientific wisdom. When legal professionals look beyond expert witness advice to reach results that are consistent with psychological parent theory, they are described as having crossed professional boundaries in appropriate ways (pp. 57-67). These legal professionals are credited with having properly applied principles of child development.²⁰ Legal professionals who rest their decisions upon independently held scientific theories that are inconsistent with the authors' positions are condemned for having usurped the clinical role (pp. 21-37). The possibility of correct reliance upon independently acquired expert views that are inconsistent with the views of the authors is not considered. The legal professionals involved in these cases *have* violated the rule of explication of scientific premises. Whether they have silently deferred to extra-record scientific knowledge, we cannot know.

As a result of these artificialities, the authors have created a universe in which law and science interact in only three scenarios: (1) Law professionals learn from expert witnesses who are almost always right in their scientific judgments; (2) Law professionals learn from reading or associating over time with scientists who are always right in their scientific judgments; and (3) As a result of independent evaluation of scientific matters, law professionals make scientific judgments that are always wrong. In this universe, all is well if professional boundaries are respected and law professionals receive, accept, and follow the teachings of science. The real world is a different place, and the differences are telling.

18. Pp. 34-37. There is a body of expert opinion that contradicts the authors' views. See Davis, *supra* note 4, at 1545-46.

19. This expert is a case worker who is faulted for her failure to seek the advice of a mental health professional. Pp. 34-37. All other experts accused of improper practices are doctors and social workers who adhered to the views of Goldstein, Freud, and Solnit, but failed to advance those views on the ground that the law, the participating lawyers or the assigned judge was hostile to the "right" result. Pp. 70, 72-74, 74-78. These clinicians are criticized for having misused knowledge of law, such as the fact "that the court 'never' denied fathers the right to visit unless . . . there was evidence of physical abuse," (pp. 70-71); that a particular court demanded clinical assessments even when they were useless and detrimental, (pp. 71-72); or that biological parents would eventually achieve custody of their children regardless of clinical counterindications, (p. 73).

20. The authors commended, for example, a judge's ability to learn "from their work with child development experts . . . that the custody of a child who has thrived in long-term care with the same foster family cannot be changed without harming him." P. 55.

A. *Expert Witnesses Are Not Always (or Almost Always) Right*

One of the greatest mistakes we can make is to regard as simple what is complex. If psychiatrists and psychologists *knew* how to achieve a child's best interests, deciding child custody cases would be comparable to diagnosing and treating a known medical condition. But psychiatrists and psychologists *don't* know²¹

The court quoted above rested its assertion of the fallibility of expert judgments upon a record of expert disagreement in the case before it.²² When a legal matter involves a battle of experts, it is obvious that experts can err, and it is inevitable that the legal professionals' approach to expert evidence will be critical, rather than simply deferential. This is desirable. The rights of parties and the development of law are as easily compromised by deference to mistaken or incomplete scientific judgments as by ignorance.

Unfortunately, evenly matched expert battles are not an inevitable feature of the adversary system. This point is particularly telling in the context in which the authors consider law and science interactions. Child placement matters are rarely litigated with luxurious legal and expert resources. Expert evidence is frequently available only to one side or only to the court, exercising its power to solicit independent professional evaluations. As a result, the maxim of deference to expert opinion is not regularly moderated by the reality of conflicting expert evidence.

To recognize the desirability of moderation and amplification of the maxim is not to overlook its importance. Deferential and critical postures can be consistent. Although the mental health professional is less than perfect in her ability to determine the best course of child development, her determination is more richly informed than that of a lay person. Nevertheless, experts are fallible. Legal professionals are obliged, therefore, to be sensitive to factors that affect the reliability of expert opinion.²³

Some of these factors are inherent in adversarial legal process. When law and science interactions occur in litigation, there is a risk that expert opinion is biased or shaded by the expert's association with one of the competing adversaries. There is the additional risk that resource imbalances will preclude or impede challenges of expert evidence offered by the more richly endowed litigator.

Other risk factors are inherent in the scientific process. The want of omniscient experts requires sensitivity to the risks that expert opinion is biased for reasons that precede the assumption of an adversarial

21. *In re Donna W.*, 325 Pa. Super. 39, 58, 472 A.2d 635, 645 (1984) (emphasis in original).

22. 325 Pa. Super. at 58, 472 A.2d at 645.

23. This is important when expert opinion shapes the interpretation of facts relevant to application of established rules of law. It is imperative when expert opinion informs the development or alteration of rules of law. See Davis, *supra* note 4, at 1600-02.

position in litigation; is based upon theoretical premises that are unsound; or is based upon factual premises that are inaccurate. The obligation of the legal professional is not automatic deference, but respectful, critical scrutiny.

B. *Nonwitness Experts Are Not Always (or Almost Always) Right*

The authors accurately observe that in interpreting and shaping legal rules legal professionals rely upon information that is extra-judicially acquired. As we have seen, *In the Best Interests of the Child* applauds this sort of boundary crossing; other legal scholarship has persuasively established its inevitability.²⁴

Of course, scientific information acquired outside the courtroom is no less fallible than that acquired inside the courtroom. There is a consequent risk that independently acquired scientific knowledge will be mistaken or incomplete. There is the further risk that it will be misused or misunderstood by the legal professional working in an unmastered discipline. The authors find the technique of explicating premises adequate to address these risks. They offer the case of *Ross v. Hoffman*²⁵ as a model of appropriate judicial use of independently acquired scientific information. The *Ross* judge is commended for having explicated extra-record scientific premises as he announced his decision. In awarding custody to a long-term caretaker pitted against a biological mother, the judge noted the reliance upon scientific information acquired by judicial notice:

[T]here is a book out, which is widely read, by three very well respected professional doctors, Drs. Goldstein, Freud and Solnick [sic], called 'Beyond the Best Interests of the Child' and in that book they point out that whether any adult becomes a psychological parent over the child is based upon a day-to-day interaction, companionship and shared experiences. And if you look at it from that view, Mrs. Hoffman has had this advantage.²⁶

The judge surmised that this theory was what a trial expert "had in mind" when he testified that there was risk in moving the child from a known to an unknown environment.²⁷ The action of this trial judge

24. It is conventional wisdom today to observe that judges not only are charged to find what the law is, but must regularly make new law when deciding upon the constitutional validity of a statute, interpreting a statute, or extending or restricting a common law rule. The very nature of the judicial process necessitates that judges be guided, as legislators are, by considerations of expediency and public policy. They must, in the nature of things, act either upon knowledge already possessed or upon assumptions, or upon investigation of the pertinent general facts, social, economic, political, or scientific.

E. CLEARY, MCCORMICK ON EVIDENCE 928 (3d ed. 1984) (footnotes omitted). See also Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402 (1942).

25. 33 Md. App. 333, 364 A.2d 596 (Md. Ct. Spec. App. 1976), *affd. as modified*, 280 Md. 172, 372 A.2d 582 (1977).

26. 33 Md. App. at 336-36, 364 A.2d at 599 (quoting the Chancellor below).

27. 33 Md. App. at 333, 364 A.2d at 600.

was affirmed by two appellate courts²⁸ and is applauded by the authors as an appropriate crossing of professional boundaries. *In the Best Interests of the Child* reports that this was a case in which scientific knowledge not only affected an outcome, but also changed the law:

The precedent established in *Ross v. Hoffman* incorporates generally accepted and generally applicable knowledge from the field of child development. These precedents, in some cases, enable lawyers to argue against and qualify courts to overturn, without hearing expert testimony, the presumption in favor of natural parents. Lawyers and judges on their own can come to recognize many "parent"-child relationships that should normally not be disturbed. Thus, through judicial precedent the borders between the professions are opened and may legitimately be crossed under certain circumstances. [p. 60]

In supporting the *Ross* outcome and agreeing with its scientific premises, the appellate courts and the authors of *In the Best Interests of the Child* have confronted a bypass of legal process and chosen to applaud, rather than correct it. It is laudable that the *Ross* trial judge "recogniz[ed] and express[ed] that which helped him to decide."²⁹ But the expression came too late. Ms. Ross legitimately complained that she lacked a pre-decision opportunity to challenge the controversial³⁰ theories upon which her custodial rights ultimately turned. She was not alerted to the need to seek or offer expert criticism of psychological parent theory. She was not alerted to the need to seek or offer evidence that it had been misapplied to her situation. If competing theories were offered in the appellate process, the opinions give no hint of their consideration. The timing of the explication of scientific premises precluded or compromised use of the mechanisms upon which the adversarial system relies to promote accuracy and fairness.

After-the-fact admission of professional boundary crossing is preferable to silence, but sound decisionmaking and principled development of the law require more. They require that the parties be alerted to judicial consideration of extra-record scientific information in time to refute it. They require inquiry to determine whether the party against whom the information is to be used has the resources to evaluate and challenge it. They require that extra-record scientific information be tested against a measure of general acceptance within the relevant discipline. They require attention to the risks that the immediate parties lack the ability or motivation to address the ramifications of enshrinement in precedent of a principle that may be insufficiently certain or potent to resolve the range of future cases to which it will be applied.

28. See note 25 *supra*.

29. 33 Md. App. at 338, 364 A.2d at 600.

30. *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 844 n.52 (1977) ("*Beyond the Best Interests of the Child* . . . is indeed controversial.>").

C. *The Sources of Legal Judgments Concerning Scientific Matters Are Various and Ambiguous*

In cases, like *Ross*, in which boundary crossings by law professionals are approved, the authors applaud after-the-fact explication and unquestioning acceptance of scientific authority. In cases in which legal boundary crossings are condemned, the authors identify and denounce an unexplicated result, assuming that full explication would reveal no scientific authority to which deference has been paid by law professionals. In fact, unexplained scientific opinions offered by lawyers and judges are often grounded, as the *Ross* opinion was grounded, upon a combination of informally acquired scientific knowledge, common sense, and lay speculation. The authors' segregation of these two categories — appropriately deferential crossing of professional boundaries on the one hand and inappropriate inexpert practice of science on the other — is misleading. Cases in which judges resort to extra-judicially informed scientific conclusions are more usefully viewed as a single category as to which the prescriptions of identification, explication, and respectfully critical evaluation of scientific opinion should be uniformly applied.

The example of inappropriate boundary crossing, identified by the authors as the case of *Lisa Stone*, illustrates this point. Counsel for a child who was the subject of a visitation dispute took the position that his client's opposition to visitation by a noncustodial parent was pathological (p. 32). Reasoning from their view that psychological parents must be autonomous, Goldstein, Freud, and Solnit have categorically opposed court-ordered visitation.³¹ They find the contrary position of the child's attorney unscientific and wrong (pp. 33-34). The authors may be right. It may also be that the attorney relied upon independently acquired scientific evidence that maximum contact with noncustodial parents reduces the emotional harm that children suffer as a result of divorce.³² It may be that he relied upon a scientist's belief that in the bitter aftermath of marital dissolution children are commonly influenced, to their emotional detriment, to resent and reject the noncustodial parent.³³ These scientific views are differently evaluated and reconciled by different experts. Were the attorney for the child to adhere to the limited terms of the prescriptions of explication and deference, he would have only to identify scientific authority for his views. His obligation is greater. It is to seek out the conflicting expert opinions that bear upon his client's situation and subject those views to critical evaluation. The corresponding judicial obligation is

31. BEYOND THE BEST INTERESTS, *supra* note 1, at 116-33.

32. See, e.g., GROUP FOR THE ADVANCEMENT OF PSYCHIATRY No. 106, DIVORCE, CHILD CUSTODY AND THE FAMILY 882-87 (1980).

33. See, e.g., Goodstein, *Psychoanalytic Perspectives on Divorce and the Psychological Development of Children*, in OBJECT LOSS IN CHILDREN (M. Scharfman ed.) (forthcoming).

to assure that this process occurs; that it includes adversarial challenge; and that the solicitation, evaluation, and advocacy of competing expert views is not impeded by resource limitations.

II. LAW, SCIENCE, AND THE LESSONS OF HISTORY

If lawyers lawyer, judges judge, and scientists inform, then interdisciplinary collaborations may improve case-specific decisionmaking and the development of law. This result is not, however, inevitable. As Part I establishes, the principle of boundary adherence wants elaboration. Interdisciplinary collaboration is more likely to improve legal decisionmaking if information from the sciences is examined critically. The story of Carrie Buck gives urgency to the appeal for critical evaluation of scientific opinion. The story of Malcolm X evokes a historical legacy that provides the nucleus of an argument that critical judicial evaluation of scientific opinion is constitutionally required when claims of science challenge claims of family integrity and autonomy.

A. *The Stories of Carrie Buck and Malcolm X*

Carrie Buck appealed to the Supreme Court of the United States for protection of her right to bear children. She was the first target of compulsory sterilization laws enacted in Virginia in 1924 (p. 132). The Court denied Carrie Buck's appeal. Its opinion was grounded in scientific evidence that she, her mother, and her only child were "imbeciles," (p. 134) and in scientific knowledge that imbecility is heritable (p. 134). Declaring that "[t]hree generations of imbeciles are enough,"³⁴ the Court established society's right to "prevent those who are manifestly unfit from continuing their kind."³⁵ It deterred or defused constitutional challenge of involuntary sterilizations — of which there were 63,678 between 1907 and 1964.³⁶ It has not been overruled.

Scientists working five decades later have concluded that "there were no imbeciles, not a one, among the three generations of Bucks," (p. 141) and there is now a scientific consensus that although "[s]ome forms of mental deficiency are passed by inheritance in family lines, . . . most are not" (p. 133). Yet, the science that underlay the *Buck* opinion was generally accepted in its day,³⁷ and the initial diagnoses of Carrie Buck and of her mother were the product of measurement by the then relatively new, but altogether respectable Stanford-Binet I.Q.

34. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

35. 274 U.S. at 207.

36. Ferster, *Eliminating the Unfit — Is Sterilization the Answer?*, 27 OHIO ST. L.J. 591, 632 (1966).

37. J. AREEN, *FAMILY LAW: CASES & MATERIALS* 832-33 (2d ed. 1985) [hereinafter J. AREEN] (citing HUMAN BETTERMENT ASSOCIATION OF AMERICA, *SUMMARY OF UNITED STATES STERILIZATION LAWS* (1952)).

test.³⁸

The story of Carrie Buck may teach nothing more than that scientific insights deepen and improve over time. If this is so, then we may rest content in the hope that law grounded in scientific knowledge will be altered by reasonably paced responses to scientific advances. Professor Gould's telling of the *Buck* story offers a different lesson and calls for a less complacent response:

When we understand why Carrie Buck was committed in January 1924, we can finally comprehend the hidden meaning of her case and its message for us today. The silent key, again and as always, is her daughter Vivian Carrie Buck was one of several illegitimate children borne by her mother, Emma. She grew up with foster parents . . . and continued to live with them, helping out with chores around the house. She was apparently raped by a relative of her foster parents, then blamed for her resultant pregnancy. Almost surely, she was (as they used to say) committed to hide her shame (and her rapist's identity), not because enlightened science had just discovered her true mental status. In short, she was sent away to have her baby. Her case never was about mental deficiency; it was always a matter of sexual morality and social deviance. The annals of her trial and hearing reek with the contempt of the well-off and well-bred for poor people of "loose morals." Who really cared whether Vivian was a baby of normal intelligence; she was the illegitimate child of an illegitimate woman. Two generations of bastards are enough. [An expert witness for the state] began his "family history" of the Bucks by writing: "These people belong to the shiftless, ignorant and worthless class of anti-social whites of the South."³⁹

If, as Gould believes, social bias infects and hides behind scientific judgments,⁴⁰ then law professionals are obliged to evaluate scientific knowledge with this possibility in mind. The conclusion that "[t]hree generations of imbeciles are enough"⁴¹ was not simply wrong. It was both wrong and too lightly made. The Court dealt with a right that is universally cherished.⁴² Yet, compromise of the right was easily justi-

38. See Ferster, *supra* note 36, at 603-04.

39. P. 137. Attorneys for Carrie Buck offered no challenge of her diagnosis or of the heritability of her alleged condition. Brief for Petitioner, *Buck v. Bell*, 274 U.S. 200 (1927) (No. 292). As evidence of the certainty of the scientific underpinnings of the challenged law, Respondent offered the opinion of Professor East of Harvard University that "[i]n a quarter of a century laws of heredity . . . [had] been formulated as definite and precise as those of physics and chemistry." Brief for Respondent at 10, *Buck v. Bell*, *supra*.

40. Gould notes in this regard:

Science, since people must do it, is a socially embedded activity. It progresses by hunch, vision, and intuition. Much of its change through time does not record a closer approach to absolute truth, but the alteration of cultural contexts that influence it so strongly. Facts are not pure and unsullied bits of information; culture also influences what we see and how we see it. Theories, moreover, are not inexorable inductions from facts. The most creative theories are often imaginative visions imposed upon facts; the source of imagination is also strongly cultural.

S. GOULD, *THE Mismeasure of Man* 21-22 (1981).

41. *Buck v. Bell*, 274 U.S. at 207.

42. Indeed, the right of procreation was the first right to which the test of strict scrutiny was

fied because social bias inhibited deference to a basic human entitlement of the affected class and facilitated acceptance of questionable scientific “truths.”

The story of Malcolm X is also the story of state intervention to affect the lives of members of a disparaged group. It, too, involves family rights of fundamental character. It, too, may involve scientific judgments too lightly made. It does not, however, involve a scientific judgment now “known” to be wrong. It provides, therefore, a more difficult test of the argument for skeptical scrutiny when science is offered to justify limitation of the fundamental rights of a class that is the subject of social bias.

Malcolm X describes a childhood prematurely ended and a family divided by the racially motivated murder of his father and the exercise of state authority. El-Hajj Malik El-Shabazz, as he later came to be known, spoke with bitterness of the role of the state in the destruction of his family. After his father’s death in 1931, Malcolm’s mother was repeatedly fired as white employers learned that she was the widow of a “troublemaker.” The family was forced to accept welfare payments. For Malcolm, these payments represented sustenance less than they represented the beginning of a “psychological deterioration [that] hit our family circle and began to eat away at our pride.”⁴³ We know the story of the destruction of the family only through the memory of the man who survived it — to become first a petty criminal and then a human rights activist of international prominence. It is best told in his words:

When the state Welfare people began coming to our house [t]hey acted and looked at . . . [my mother] and at us, and around in our house, in a way that had about it the feeling — at least for me — that we were not people.

. . . .

. . . My mother was, above everything else, a proud woman, and it took its toll on her that she was accepting charity. And her feelings were communicated to us.

. . . She would talk back sharply to the state Welfare people, telling them that she was a grown woman, able to raise her children, that it wasn’t necessary for them to keep coming around so much, meddling in our lives. And they didn’t like that.

But the monthly Welfare check was their pass. They acted as if they owned us, as if we were their private property. As much as my mother would have liked to, she couldn’t keep them out. She would get particularly incensed when they began insisting upon drawing us older children

applied. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1941). The *Skinner* court described procreation as a “basic civil right[] of man. . . . fundamental to the very existence and survival of the race.”

43. MALCOLM X & A. HALEY, *supra* note 10, at 14 (not excerpted in appendix).

aside, one at a time, . . . and asking us questions, or telling us things — against our mother and against each other.

. . . We really couldn't understand. What I later understood was that my mother was making a desperate effort to preserve her pride — and ours.

. . . .

. . . [T]he state Welfare people kept after my mother. By now she didn't make it any secret that she hated them, and didn't want them in her house. But they exerted their right to come

I think they felt that getting children into foster homes was a legitimate part of their function, and the result would be less troublesome, however they went about it.

And when my mother fought them, they went after her

I'm not sure just how or when the idea was first dropped by the Welfare workers that our mother was losing her mind.

But I can distinctly remember hearing "crazy" applied to her by them when they learned that the Negro farmer who was in the next house down the road from us had offered to give us some butchered pork . . . and she had refused. . . . It meant nothing to them even when she explained that . . . it was against her religion as a Seventh Day Adventist.

They were vicious as vultures. They had no feelings, understanding, compassion, or respect for my mother. They told us, "She's crazy for refusing food." Right then was when our home, our unity, began to disintegrate. We were having a hard time, and I wasn't helping. But we could have made it, we could have stayed together. As bad as I was, as much trouble and worry as I caused my mother, I loved her.⁴⁴

A year or so later, Malcolm was placed in a foster home. Eventually, his mother was committed to a state mental hospital. Malcolm X described the subsequent order making each of her eight children a ward of the state as "[n]othing but legal, modern slavery — however kindly intentioned."⁴⁵

We have too little information to know whether the intrusion upon this woman's parental rights was in the best interests of her children. We do not know her condition, whether it was objectively diagnosed or whether it was appropriately treated. We do not know what assessments were made by mental health and child welfare professionals or what theories of child development supported the removal of the children and the termination of her parental rights. We do not know whether conditions in the household would have been more disabling to the children than the trauma of family dismemberment. But we can learn from her extraordinary son to appreciate more deeply the value of rights lost with the scientific and legal judgments to supplant, rather than support, the family.

44. *Id.* at 12-18 (portions excerpted in appendix).

45. *Id.* at 21.

B. *The Lessons of the Slavery Analogy*

El-Hajj Malik El-Shabazz recalls the orders assigning new familial ties for himself and his siblings and equates them to slavery. This is a startling insight. It evokes an American historical legacy, a legacy that is crucial to appreciation of the appropriate scope of constitutional rights of family: It provides guidance, grounded in history and political theory, for legal professionals who must weigh scientific claims against fundamental rights of family. It addresses contemporary arguments that certain rights of family are not “‘deeply rooted in this Nation’s history and tradition’”⁴⁶ and that their enforcement “‘represent[s] choices that the people have never made.’”⁴⁷ It therefore warrants detailed presentation.

The relationship between denial of family integrity and slave status is well recognized in the scholarship of slavery. Indeed, denial of rights of family is regarded as a hallmark of slavery:

[T]he slave was always a deracinated outsider — an outsider first in the sense that he originated from outside the society into which he was introduced as a slave, second in the sense that *he was denied the most elementary of social bonds, kinship*. “*Quem patrem, qui servos est?*” (Plautus, *Captiva* 574). “What father, when he is a slave?”⁴⁸

American slavery followed this pattern.

The condition of the American slave family was a mixed issue of law and practice. Descriptions of the relevant law are found in treatises of both uncritical and abolitionist scholars. In the former category, Thomas R.R. Cobb, confessing a bias “by . . . birth and education in [the] slaveholding State [of Georgia],”⁴⁹ reported that the slave had no legally cognizable right of marriage, family inheritance, or parental custody.⁵⁰

46. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 792 (1985) (White, J. dissenting) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

47. 476 U.S. at 787. Justice White’s dissent in this abortion case reflects a continuing debate concerning the validity of the Supreme Court’s recognition of unenumerated rights of family privacy, integrity, and autonomy. See also Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. REV. 12 (1971); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

48. M. FINLEY, *ANCIENT SLAVERY AND MODERN IDEOLOGY* 75 (1980) (emphasis added) (citation omitted).

49. 1 T.R.R. COBB, *AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA* at x (1858).

50. “The inability of the slave to contract extends to the marriage contract, and hence there is no recognized marriage relation in law between slaves.” *Id.* at 242-43.

The contract of marriage not being recognized among slaves, of course none of its consequences follow from the contubernial state existing between them. Their issue, though emancipated, have no inheritable blood.

. . . How far this contubernial relation between slaves may be recognized and protected by law, is a question of exceeding nicety and difficulty. The unnecessary and wanton separation of persons standing in the relation of husband and wife, though it may rarely, if ever, occur in actual practice, is an event which, if possible, should be guarded against by the law. And yet, on the other hand, to fasten upon a master of a female slave, a vicious, corrupting

William Goodell, writing as an abolitionist,⁵¹ saw the matter no differently with respect to the legal rights of slaves:

"A slave cannot even contract matrimony, the association which takes place among slaves, and is *called* marriage, being properly designated by the word *contubernium*, a relation which has no sanctity, and to which no civil rights are attached."⁵²

. . . .

. . . "[T]hese laws do not recognize the *parental* relation, as belonging to slaves. A slave has no more legal authority over his child than a cow has over her calf."⁵³

. . . .

"In the slaveholding States, except in Louisiana, no law exists to prevent the violent separation of parents from their children, or even from each other."⁵⁴

"Slaves may be sold and transferred from one to another without any statutory restriction or limitation, as to the separation of parents and children, [etc.], except in the State of Louisiana."⁵⁵

Goodell supports the view that slave family relations were no more honored in practice than in legal theory.⁵⁶ Literature of the mid-nineteenth century reflects the prevalence of this view and suggests the extent to which it influenced abolitionists' understanding of the evils of slavery and the importance of family rights to the definition of citizenship. Frederick Douglass, for example, had written that upon the death of a master he was:

immediately sent [forth] to be valued and divided with the other property. . . . No one could tell amongst which pile of chattels I might be flung. Thus early, I got a foretaste of that painful uncertainty which in one form or another was ever obtruding itself in the pathway of the slave. It furnished me a new insight into the *unnatural power* to which I was subjected. Sickness, adversity, and death may interfere with the

negro, sowing discord, and dissatisfaction among all his slaves; or else a thief, or a cut-throat, and to provide no relief against such a nuisance, would be to make the holding of slaves a curse to the master.

Id. at 245-46 (citations omitted).

51. W. GOODELL, *THE AMERICAN SLAVE CODE IN THEORY AND PRACTICE* 17 (1853) ("We propose . . . by an exhibition of the American Slave Code, to test the moral character of American slaveholding."). The work was published by the American and Foreign Anti-Slavery Society.

52. *Id.* at 106 (citing G. STROUD, *SKETCH OF THE SLAVE LAWS* 61 (1827)) (emphasis in original).

53. *Id.* at 113 (citing W. JAY, *JAY'S INQUIRY* 132 (2d ed. 1835)).

54. *Id.* at 114 (citing G. STROUD, *supra* note 52, at 50).

55. *Id.* (citing J. WHEELER, *A PRACTICAL TREATISE OF THE LAW OF SLAVERY* 41 (1837)).

56. *Id.* at 115-21. Anecdotal accounts portray families separated by sale or distanced by the demands of servitude. Advertisements from southern newspapers offer rewards for the capture or killing of slaves reported to have run away in order to join family members. For further evidence of the frequency of slave family disruption, see authorities cited in J. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 38 (1988).

plans and purposes of all, but the slave had the added danger of changing homes, in the separations unknown to other men.

. . . One word of the appraisers, against all preferences and prayers, could sunder all the ties of friendship and affection, even to separating husbands and wives, parents and children.⁵⁷

This aspect of slave life was “the greatest perceived sin of American slavery.”⁵⁸ As such, it was a central concern of abolitionists. Harriet Beecher Stowe wrote in 1853 that “[t]he worst abuse of the system of slavery is its outrage upon the family; and, as the writer views the subject, it is one which is more notorious and undeniable than any other.”⁵⁹ An anonymous article in the *Antislavery Record* of 1836 said that “American slavery, both in theory and practice is nothing but a system of *tearing asunder the family ties*,”⁶⁰ and described the bonds among family members as manifestations of “sacred law which slavery scornfully sets at nought.”⁶¹

Abolitionists believed that the evils of denying slaves the right of family went beyond the deprivation suffered by the slave.

Families of both races felt the evil effects of slavery;^[62] but, more

57. F. DOUGLASS, *LIFE AND TIMES OF FREDERICK DOUGLASS* 95-96 (1962) (emphasis added).

58. J. MCPHERSON, *supra* note 56, at 37.

59. H. STOWE, *THE KEY TO UNCLE TOM'S CABIN* 237 (1853). Stowe writes in response to charges that family separations depicted in *Uncle Tom's Cabin* were unrealistic or atypical. Her evidence of the prevalence of slave family disruption includes eyewitness accounts of family separations resulting from slave auctions and advertisements for the sale of slaves. *Id.* at 259-67, 268-76.

60. *The Disruption of Family Ties*, *ANTISLAVERY RECORD*, Mar., 1836, at 9 (emphasis in original). The author asserts that in slaveholding states, “the principal business by which wealth is acquired is the *breeding of slaves*.” Observing that “this trade takes off not usually whole families, but the young and the strong,” the author says, “[n]ot a slave mother does there live in the slave-breeding district, who is not liable to lose her son or her daughter the moment her master shall think it for his interest to sell.” *Id.*

61. *Id.* at 11. These and other abolitionist views on the family are collected and discussed in R. WALTERS, *THE ANTISLAVERY APPEAL* (1976).

62. Abolitionists took the view that slavery corrupted both white and black family values. They also argued that slavery inhibited the liberty of whites. Goodell wrote of a slaveholder without liberty to control the education of his children.

Here is a waiting-maid, discreet and pious; or here is a nurse, whom all her owner's children call “Mammy.” A little knowledge of letters would qualify one or both of them to teach the little white masters and misses their alphabet. . . . [W]here is the legal protection of [the owner's] right to select a teacher of the alphabet to his own children? In Louisiana, he would be subject to one year's imprisonment for teaching such a slave to read! He enjoys *liberty*, does he?

W. GOODELL, *supra* note 51, at 374. This liberty interest was subsequently recognized as being embodied in the fourteenth amendment. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In further support of the argument that slavery compromised the family values of whites, Goodell cited an incident apparently much discussed among his contemporaries:

Look then at the dying Thomas Jefferson, the penman of the declaration that “all men are created equal,” now penning a clause of his last will and testament, conferring freedom (as common report says) on his own enslaved offspring, so far as the Slave Code permitted him to do it, supplying the lack of power by “*humbly*” imploring the Legislature of Virginia to confirm the bequests, “with permission to remain in the State, where their families and

important, so did society. "The Family is the head, the heart, the fountain of society," proclaimed one abolitionist, "and it has not a privilege that slavery does not nullify, a right that it does not counteract, nor a hope that it does not put out in darkness."

Destruction of the home fit with slavery's symbolic function as the exemplar of what could go wrong with society.⁶³

The attention abolitionists gave to the slave family paralleled an attentiveness throughout antebellum America to the institution of the family. It reflected a belief — held within and without abolitionist circles — that the family was not only sacred, but also the foundation of social order and moral development and the source of individual comfort and satisfaction.⁶⁴

It was in this context of general concern for the family as a social institution and particular concern for the deprivation of slave family rights that Congress addressed the slavery question. Family rights were an explicit concern when Congress acted, through the thirteenth amendment, to abolish slavery. Family rights were an explicit concern when Congress acted, through the Civil Rights Act of 1866 and the Freedmen's Bureau Bill, to define the rights of freedmen and other national citizens. Family rights were therefore encompassed when rights of national citizenship were given constitutional status with ratification of the fourteenth amendment.⁶⁵

connections are" — then dying, under the uncertainty whether his requests would be granted or his children sold into the rice swamps!

W. GOODELL, *supra* note 51, at 375. The literature of the time also included de Tocqueville's account of an

old man, in the South of the Union, who had lived in illicit intercourse with one of his Negresses and had had several children by her, who were born the slaves of their father. He had, indeed, frequently thought of bequeathing to them at least their liberty; but years had elapsed before he could surmount the legal obstacles to their emancipation, and meanwhile his old age had come and he was about to die. He pictured to himself his sons dragged from market to market and passing from the authority of a parent to the rod of the stranger, until these horrid anticipations worked his expiring imagination into frenzy.

1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 380 (P. Bradley ed. 1956).

63. R. WALTERS, *supra* note 61, at 58.

64. It is surprising, but important, that feminists and anti-feminists, abolitionists and anti-abolitionists, reformers and anti-reformers all directed their attention to the same institution. Rather than being a mere sentimental convention, concern for the family was bound up with the most serious social and cultural debates in antebellum America:

Virtually everybody assumed that, when properly structured, the family was crucial to social stability and to social improvement. . . . There was . . . more unity here than mere ritual expression of the importance of family life: the family, and relationships usually comprehended within it, were almost uniformly presented as vehicles of social and individual salvation.

Walters, *The Family and Ante-bellum Reform: An Interpretation*, 3 *SOCIETAS* 221, 225 (1973).

65. The fourteenth amendment was designed to give constitutional status to the rights conferred by the Civil Rights and Freedmen's Bureau legislation of 1866. This is "[t]he one point upon which historians of the Fourteenth Amendment all agree, and indeed, which the evidence places beyond cavil." tenBroek, *Thirteenth Amendment to the Constitution of the United States*, 39 *CALIF. L. REV.* 171, 200 (1951).

1. *The Thirteenth Amendment Debates*

Concerns for the protection of family rights were regularly reflected in the debates concerning the thirteenth amendment.⁶⁶ The debates reflected more than concern regarding the condition of the slave family. They reflected also the conviction that the familial rights denied to the slave were fundamental and inalienable. The remarks of Congressman Ingersoll are typical: "I believe that the black man has certain inalienable rights, which are as sacred in the sight of Heaven as those of any other race . . . and no white man has any right to rob him of or infringe upon any of these blessings."⁶⁷ Senator Sumner asked that his colleagues imagine an extraterrestrial visitor beholding the spectacle of slavery:

[A]stonishment . . . would swell to marvel as he learned that in this republic, which has arrested his admiration, where there was neither king nor noble, but the schoolmaster instead, there were four million human beings in abject bondage, degraded to be chattels, . . . despoiled of all rights, even the right of knowledge and the sacred right of family; so that the relation of husband and wife was impossible and no parent could claim his own child.⁶⁸

Senator Wilson declared that upon ratification of the thirteenth amendment

The sharp cry of the agonizing hearts of severed families will cease to vex the weary ear of the nation Then the sacred rights of human nature, the hallowed family relations of husband and wife, parent and child, will be protected by the guardian spirit of that law which makes sacred alike the proud homes and lowly cabins of freedom.⁶⁹

66. See, e.g., CONG. GLOBE, 38th Cong., 2d Sess. 120 (1865):

The slave could sustain none of those relations which give life all its charms. He could not say my home, my father, my mother, my wife, my child, my body. It is for God to judge whether he could say my soul. The law pronounced him a chattel, and these are not the rights or attributes of chattels.

(statement of Rep. Creswell); CONG. GLOBE, 38th Cong., 1st Sess. 1369 (1864) ("[Slavery] has destroyed the sanctity of marriage, and sundered and broken the domestic ties.") (statement of Sen. Clark); CONG. GLOBE, 38th Cong., 2nd Sess. 221 (1865)

It is strange that an appeal should be made to humanity in favor of an institution which allows the husband to be separated from the wife, that allows the children to be taken from the mother; ah! that allows the very children of the deceased slaveholder himself to be sold to satisfy his merciless creditors.

(statement of Rep. Broomall); CONG. GLOBE, 38th Cong., 1st Sess. 2948 (1864) ("It has been asserted . . . that this thing, slavery, was of divine origin. . . . What divinity [is there] in tearing from the mother's arms the sucking child, and selling them to different and distant owners?") (statement of Rep. Shannon); CONG. GLOBE, 38th Cong., 1st Sess. 2984 (1864)

[T]he condition of . . . slaves has been attended with circumstances which not only deprive them of the common blessings that they were by nature entitled to, but has cast them into the deepest afflictions, by an unnatural separation and sale of husband and wife from each other and from their children"

(statement of Rep. Kelly) (quoting the Preamble to an Act for the abolition of Slavery in Pennsylvania).

67. CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864).

68. CONG. GLOBE, 38th Cong., 1st Sess. 1479 (1864).

69. CONG. GLOBE, 38th Cong., 1st Sess. 1324 (1864).

Senator Harlan described and condemned as contrary to natural law the "incidents of slavery." The first two incidents related to rights of family. The Senator spoke first of marriage:

Some of the incidents of slavery may be stated as follows: it necessarily abolishes the conjugal relation. . . . [I]n none of the slave States was this relation tolerated in opposition to the will of the slave-owner

The existence of this institution therefore requires the existence of a law that annuls the law of God establishing the relation of man and wife, which is taught by the churches to be a sacrament as holy in its nature and its designs as the eucharist itself.⁷⁰

Senator Harlan spoke next of the parent-child relationship:

Another incident is the abolition practically of the parental relation, robbing the offspring of the care and attention of his parents, severing a relation which is universally cited as the emblem of the relation sustained by the Creator to the human family. And yet, according to the matured judgment of these slave States, this guardianship of the parent over his own children must be abrogated to secure the perpetuity of slavery.⁷¹

For Harlan, and for other abolitionists, the slaveholder's claim of property rights was illegitimate because it stood in conflict with superior and "inalienable" human rights of the slave — rights that were "sacred," denied only by laws "shocking to human nature itself," rights that were "holy," "necessary to the preservation of virtue in civil society," and emblematic of the relationship between God and man. Representative Farnsworth put it in these terms:

What vested rights [are] so high or so sacred as a man's right to himself, to his wife and children, to his liberty, and to the fruits of his own industry? Did not our fathers declare that those rights were inalienable? And if a man cannot himself alienate those rights, how can another man alienate them without being himself a robber of the vested rights of his brother man?⁷²

The status attributed to family rights by proponents of the thirteenth amendment was asserted even more clearly by Congressman Kasson:

[T]here are three great fundamental natural rights of human society which you cannot take away without striking a vital blow at the rights of white men as well as black. They are the rights of a husband to his wife — the marital relation; the right of father to his child — the parental relation; and the right of a man to the personal liberty with which he was endowed by nature and by God, and which the best judicial authorities of England have for a hundred years declared he could not alienate even by his own consent.⁷³

70. CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864).

71. CONG. GLOBE, 38th Cong., 1st Sess. 1439 (1864).

72. CONG. GLOBE, 38th Cong., 2d Sess. 200 (1865).

73. CONG. GLOBE, 38th Cong., 2d Sess. 193 (1865).

2. *The Debates of the Thirty-Ninth Congress*

Congressional debate concerning the reach of the thirteenth amendment did not end with the amendment's passage.

The congressional battle that raged around . . . [the Civil Rights Bill and the Freedmen's Bureau Act] constituted . . . [an] important debate over the Thirteenth Amendment. By the Amendment, the principle of universal liberty had been established. The Freedmen's Bureau and Civil Rights bills represented the efforts of the Amendment's framers, acting contemporaneously with its ratification, to implement the Amendment and define the principle.⁷⁴

Implementation of the amendment involved containment of the effects of the Black Codes, by which Southern states sought to perpetuate incidents of slavery. These codes included measures that compromised the family rights of former slaves.⁷⁵ When Congress acted to invalidate the Black Codes and to interpret and enforce the thirteenth amendment guarantee of liberty, family rights were again addressed. In these debates, as in the thirteenth amendment debates, members of Congress explicitly recognized the fundamental importance of family rights to the concept of freedom:

Slavery cannot know a home. Where the wife is the property of the husband's master, and may be used at will; where children are bred, like stock, for sale; where man and woman, after twenty years of faithful service from the time when the priest with the owner's sanction by mock ceremonies pretended to unite them, are parted and sold at that owner's will, there can be no such thing as home. Sir, no act of ours can fitly enforce their freedom that does not contemplate for them the security of

74. tenBroek, *supra* note 65, at 186.

75. The codes uniformly provided for the legitimization of slave marriages. H.R. EXEC. DOC. NO. 118, 39th Cong., 1st Sess. (1866). However, Senator Windom reported from correspondence describing the Black Codes of Mississippi that "Section third [of the freedmen's bill] compels all freedmen to marry whomsoever they may now be living with, and to support the issue of what was in many cases compulsory cohabitation." CONG. GLOBE, 39th Cong., 1st Sess. 1160 (1866) (quoting from letter from Lt. Stewart Eldridge to Maj. Gen. Howard (Nov. 28, 1865)). In some jurisdictions, slavery was effectively continued through the device of making black children the wards or apprentices of whites. The procedure by which this was done differed from apprenticeship arrangements involving white children in that parental consent was not required. An example of legislation establishing this device was offered by Senator Sumner to illustrate the evils of the Black Codes. CONG. GLOBE, 39th Cong., 1st Sess. 93 (1865). Senator Donnelly reported that "[t]he black code of Tennessee provides that . . . children [of the vagrant Negro] may be bound out against his wish to a master by the county court . . ." CONG. GLOBE, 39th Cong., 1st Sess. 589 (1865). Similar apprenticeship arrangements were held, in an opinion by Chief Justice Chase, sitting in the Circuit of Maryland, to violate the thirteenth amendment. *In re Turner*, 24 F. Cas. 337 (C.C.D.Md. 1867) (No. 14,247). *Turner* has been incorrectly cited as an opinion of the Supreme Court abolishing these apprenticeship practices. See, e.g., H. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM* 410 (1976). The effect of *Turner* is not entirely misperceived as a result of this error. An excerpt from a subsequent district court opinion, transmitted to Congress in 1868, says of the case, "This decision . . . will govern me in all future applications of a similar character, unless a different opinion shall be pronounced by the Supreme Court." S. Misc. Doc. No. 24, 40th Cong., 2d Sess. 6 (1868).

home.⁷⁶

The first version of the Civil Rights Act spoke in terms of discrimination, prohibiting "any inequality of civil rights and immunities among the inhabitants of [former Confederate] States."⁷⁷ Senator Sherman proposed that the Act be amended to "secure to the freedmen of the southern States certain rights, naming them, defining precisely what they should be, [and including] the right . . . to be protected in their homes and family [as a] . . . natural right[] of free men."⁷⁸ Senator Sumner also urged specification of the rights of freedmen, including among them the rights "to contract marriage, and to make any arrangement whatever concerning their family affairs. . . ."⁷⁹

The Act was amended to specify rights to which freedmen were entitled. The specification included the rights

to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as it is enjoyed by white citizens, and . . . [to] be subject to like punishment, pains, and penalties, and to none other.⁸⁰

It was understood that the rights of contract,⁸¹ of property⁸² and of equal benefit of law⁸³ encompassed rights of marriage⁸⁴ and family

76. CONG. GLOBE, 39th Cong., 1st Sess. 2779 (1866) (statement of Rep. Eliot, speaking with respect to the homestead provisions of the Freedmen's Bureau Bill).

77. CONG. GLOBE, 39th Cong., 1st Sess. 39 (1865).

78. CONG. GLOBE, 39th Cong., 1st Sess. 42 (1865).

79. CONG. GLOBE, 39th Cong., 1st Sess. 91 (1865) (quoting regulations accompanying the 1861 Proclamation emancipating the serfs of Prussia).

80. CONG. GLOBE, 39th Cong., 1st Sess. 42 (1865).

81. The deprivation of all slave family rights was traced to denial of the right to enter the contract of marriage. See note 50 *supra*.

82. Rights of family were, in the nineteenth century, regarded as aspects of the property rights of men. The language of Representative Wood, speaking in opposition to the thirteenth amendment, illustrates the point. "The social and domestic relations are equally matters of individual ownership with flocks and herds, houses and lands. The affections of a man's wife and children are among the dearest of his possessions, and as such are under the protection of the law." CONG. GLOBE, 38th Cong., 1st Sess. 2941 (1864).

83. The application of the equal protection concept to family rights is illustrated in the full text of the debates cited at note 84 *infra*.

84. The understanding that the thirteenth amendment and enforcing legislation affected the right to marry sparked heated controversy in the Freedmen's Bureau Bill debates over the prospect of miscegenation. In this context, we find two congressmen denying that the right to marry was conferred by the language of the bill. See CONG. GLOBE, 39th Cong., 1st Sess. 632 (1866) (statement of Rep. Moulton, denying that the right of marriage was a civil right within the meaning of the Freedmen's Bureau Bill); CONG. GLOBE, 39th Cong., 1st Sess., Appendix at 75 (1866) (statement of Rep. Phelps, denying that the Bill encompassed a right to marry). But most who spoke on the subject argued or acknowledged that the bill affected marriage rights. Opponents of the bill complained against its scope. See CONG. GLOBE, 39th Cong., 1st Sess. 318 (1866) (statement of Sen. Hendricks, arguing that "[m]arriage is a civil contract, and to marry according to one's choice is a civil right"); CONG. GLOBE, 39th Cong., 1st Sess. 505 (1866) (statement of Sen. Johnson, arguing that the right to make and enforce contracts encompasses the right of interracial marriage); CONG. GLOBE, 39th Cong., 1st Sess. 418 (1866) (statement of

integrity.⁸⁵

The thirty-ninth Congress went beyond assuring former slaves the enumerated rights set forth in the Civil Rights Act (and, in slightly modified form, in the fourteenth amendment). It made them citizens. Rights of family were understood not only as components of rights of property, contract, and equal protection, but also as components of the liberty interests inherent in citizenship status. Senator Trumbull offered the amendment to the Civil Rights Act that conferred citizenship rights upon freedmen.⁸⁶ His subsequent remarks describe the intended scope of the rights to be conferred:

It is difficult, perhaps, to define accurately what slavery is and what liberty is. Liberty and slavery are opposite terms; one is opposed to the other.

. . . Civil liberty . . . is thus defined by Blackstone:

“Civil liberty is no other than natural liberty, so far restrained by human laws and no further, as is necessary and expedient for the general advantage of the public.” That is the liberty to which *every citizen* is entitled⁸⁷

When consideration of the Trumbull amendment resumed on the following day, Senator Howard responded to those who argued that Congress lacked the authority to enforce general citizenship rights in behalf of freedmen; he spoke specifically of rights of family:

[The slave] had no rights, nor nothing which he could call his own. He had not the right to become a husband or a father in the eye of the law, he had no child, he was not at liberty to indulge the natural affections of the human heart for children, for wife, or even for friend.

. . . .

. . . Is a free man to be deprived of the right of acquiring property, of the right of having a family, a wife, children, home? What definition will you attach to the word “freeman” that does not include these ideas? The once slave is no longer a slave; he has become, by means of emancipation, a free man. If such be the case, then in all common sense is he not entitled to those rights which we concede to a man who is free?⁸⁸

Sen. Davis, arguing that the right of interracial marriage is a consequence of the law). Supporters of the bill acknowledged that the right to marry was implicated, and addressed the miscegenation fear by positing a “separate-but-equal” approach to marriage rights. CONG. GLOBE, 39th Cong., 1st Sess. 505 (1866) (statement of Sen. Fessenden, arguing that “[the black man] has the same right to make a contract of marriage with a white woman that a white man has with a black woman”); CONG. GLOBE, 39th Cong., 1st Sess. 322, 420 (1866) (statement of Sen. Trumbull, arguing that the right of marriage, encompassed by the bill, did not include the right of interracial marriage).

85. Rights of family integrity were understood to flow from the right to create a family by marriage. See note 50 *supra*.

86. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

87. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (emphasis added).

88. CONG. GLOBE, 39th Cong., 1st Sess. 504 (1866).

3. *The Fourteenth Amendment — A Third Force in Law-Science Interactions Touching Family Life*

In this country, the meaning of citizenship developed with reference to the experience of slavery. It was in the process of abolition that rights of national citizenship were articulated and given protection against encroachment by the states. The fourteenth amendment assured the constitutional status of fundamental rights that were identified in the thirteenth amendment debates as having been trampled by slavery, and decreed by the civil rights legislation of 1866 to be the entitlement of free people.⁸⁹

The debates of the thirty-eighth Congress have prompted the observation that "[t]he opposite of slavery is liberty."⁹⁰ Denial of rights of family is of the essence of slavery. It was a prominent and uniquely detestable feature of American slavery.⁹¹ Appreciation of the need to protect rights of family is a legacy of the progression from a slaveholding nation to a nation in which citizenship is a human birthright.

The fourteenth amendment, understood as an embodiment of that legacy, serves to insulate rights of family. When claims of science seem to justify curtailment of those rights, special scrutiny is required to test the objectivity and accuracy of the scientific judgment and the balance between liberty lost and public policy advanced. Scrutiny of this sort would have heightened judicial appreciation of the value to Carrie Buck of the liberty to bear children and the value to Malcolm X's family of the right to survive as a family. Scrutiny of this sort would have encouraged critical judicial examination of scientific prognoses with respect to the unborn children of Carrie Buck and the uprooted children of Malcolm X's mother.

Goldstein, Freud, Solnit, and Goldstein have enriched the store of scientific knowledge upon which lawmakers may draw in advancing the public good and promoting the interests of children. Their unexplained offering of the stories of Carrie Buck and Malcolm X suggests that they sense the dangers of uncritical reliance upon that knowledge. Both the science and the dangers must be appreciated. Law-science collaborations that affect fundamental rights require more than that

89. See notes 73-88 *supra* and accompanying text.

90. tenBroek, *supra* note 65, at 179.

91. The legacy of this feature of slavery is described from the perspective of a principal character in Toni Morrison's novel of motherhood and slavery:

Anybody Baby Suggs knew, let alone loved, who hadn't run off or been hanged, got rented out, loaned out, bought up, brought back, stored up, mortgaged, won, stolen or seized. . . . What she called the nastiness of life was the shock she received upon learning that nobody stopped playing checkers just because the pieces included her children. Halle she was able to keep the longest. Twenty years. A lifetime. Given to her, no doubt, to make up for *hearing* that her two girls, neither of whom had their adult teeth, were sold and gone and she had not been able to wave goodbye. . . . "God take what He would," she said. And He did, and He did, and He did . . ."

T. MORRISON, *BELOVED* 23 (1987).

lawyers and scientists know their respective places. They require critical analysis of the competing claims of science and law; humble evaluation of the power of scientists to know; and cautious delineation of the rights and responsibilities of individuals, functioning within the "private realm of family life"⁹² and of the collective, acting upon scientific knowledge to assure or enhance the well-being of its members.

92. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1943).

LEGISLATURES AND LEGAL CHANGE: THE REFORM OF DIVORCE LAW

*Carl E. Schneider**

A SILENT REVOLUTION: ROUTINE POLICY MAKING AND THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES. By *Herbert Jacob*. Chicago: University of Chicago Press. 1988. Pp. 184. \$19.95.

It is now widely understood that in the last two decades American family law has been transformed. What is not widely understood is how that transformation occurred. It is a transformation of remarkable scope, a scope yet more striking for having been made not in one national decision, but in fifty state legislatures. And the obvious explanations do not fully account for the transformation. True, social attitudes and social behavior have shifted dramatically; but to say that is not to explain why the law changed. No bureaucracy made divorce reform its business. No interest group on the model of the civil rights or ecology movements demanded changes. Indeed, far from being politically controverted, much of the transformation went almost unnoticed. In *A Silent Revolution*, a political scientist, Professor Herbert Jacob, contributes notably to our understanding of this puzzling transformation. The purpose of this review is to make the fact, the substance, and the quality of that contribution better known among lawyers and legal academics.

Professor Jacob's book examines perhaps the central aspect of the transformation of American family law — the reworking in the last two decades of the law surrounding divorce. Until the mid-1960s, America thought of itself as having "fault-based" divorce. Divorce was an adversary proceeding in which one spouse alleged that the other had violated a basic obligation of marriage in some serious way, usually by committing adultery, by deserting his or her family, or by treating his or her spouse cruelly. By the mid-1970s, however, America could think of itself as having "no-fault" divorce. To obtain a divorce a spouse had only to allege, in some form, that the marriage had broken down. This triumph of no-fault divorce alone was impressive, and it was made more so by accompanying revisions of the principles of the law governing alimony, the division of marital property, and child custody.

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Reforms of such magnitude are likely to rest on large-scale social changes, and, as Professor Jacob notes, twentieth-century America has been prolific of changes in family life. Longer life-spans and smaller families have meant that couples generally live together longer, and particularly live together longer after their children have left them. Women have increasingly entered the workforce, not just before they have children and after their children have left home, but while their children are young. Further, women have increasingly found better-paying jobs. These economic changes, Professor Jacob suggests, have both worsened tensions within marriages and made it easier — economically, socially, and psychologically — for women to leave them. The revival of feminism in the early 1960s heightened these effects. And social and personal expectations of marriage — that it be intensely rewarding, that it be a partnership of equals — grew at the same time that divorce came to seem less wrong and even less harmful personally and socially. These movements in social attitudes and structure were reflected in changing views about divorce laws: in 1966, only thirteen percent of the population believed divorce laws were too strict; in 1974, after no-fault divorce had become widely available, one-third of the population thought so.

Changing social facts, and even changing opinions about law, do not by themselves change law. What transformed new attitudes toward divorce into new law? Professor Jacob begins that story in New York. New York notoriously had the most restrictive divorce law in the country; adultery was the only ground for divorce. And New York notoriously had the most flouted divorce law in the country; the same kind of fraudulent adultery that was long the stuff of English novels and life was regularly confected in New York. The delicate-minded (and well-to-do) New Yorker went to Reno, for Nevada had a short residency requirement and a liberal divorce statute. The gap between the law on the books and the law in action distressed many who knew about it and particularly distressed the lawyers and judges who collaborated in or countenanced the hypocrisy and perjury which made the system work.

The catalyst of divorce reform in New York was a public relations man and law student who was a Democratic member of the New York legislature. Quite by chance, he came upon the issue and, in the hope of attracting attention and promoting his career, embraced it. He found that divorce reform won him little attention. But he did find an ally in an admiralty lawyer who was chairman of a special committee on family law of the elite Bar Association of the City of New York, which was concerned about the fraud that suffused New York divorce law. The legislator and the lawyer went to Professor Henry Foster, of the New York University Law School, an expert in family law. Professor Foster drafted both a bill and a legislative committee's report on

the bill, a report which emphasized the problem of fraud and of public confidence in the law.

In the legislature, the bill attracted bipartisan support and little opposition, even from the Catholic Church. The Church's power had long been feared by proponents of divorce reform in New York, but its political strength had recently been eroded and its efforts were directed to battles over abortion and parochial school aid. Legislators who disliked the bill because it made divorce easier were accorded an amendment providing for compulsory conciliation proceedings. The press ignored the issue. Thus, even though the Bar Association of the City of New York was the only interest group actively backing the bill, it became law in 1966. The statute was justified as improving the honesty of divorce proceedings, not as introducing no-fault divorce. But when, a few years later, the waiting period for divorce after separation was reduced to one year, it was widely said that no-fault divorce had come to New York.

While New York had had perhaps the most conservative divorce law in the country, California had, at least in practice, one of the most liberal. Nevertheless, California's was a fault-based statute. In the early 1960s, a group of elite matrimonial lawyers from the San Francisco Bay area who felt that the law invited dishonesty and exacerbated the hostility between divorcing spouses began to work toward reform. They were joined by a similar group from Los Angeles. They testified before a legislative committee to advocate reforms, including no-fault divorce. In 1966, Governor Edmund Brown appointed a Commission on the Family which included members of both the San Francisco and Los Angeles groups. Arguing that no-fault divorce was already effectively available, the Commission (in the most conservative of terms and tones) advocated eliminating fault grounds altogether and altering a number of other aspects of California's divorce law. In 1967, these proposals were in their essentials introduced into the legislature by a conservative Republican. As in New York, the bill was presented as primarily a technical and limited reform of the law, and it attracted little notice and little opposition. The bill passed and was signed into law by Governor Ronald Reagan.

The next stage of the transformation of divorce law involved the National Conference of Commissioners on Uniform State Laws. The NCCUSL was founded in 1892 as a quasi-public group of law professors, elite lawyers, and legislators funded by appropriations from the states and by grants from private sources. It was intended to promote uniform state laws by proposing (in conjunction with the American Bar Association) drafts of laws in areas in which uniformity among the states might be desirable. The NCCUSL had been interested in divorce law since its inception, and by the mid-1960s a group of elite divorce lawyers and law professors had convinced the Conference that

the widespread dishonesty in divorce proceedings, the unduly adversarial nature of divorce proceedings, and the great diversity of divorce standards among the states justified another try at formulating a uniform statute. Once again, in other words, the problem was formulated by lawyers in relatively technical lawyer's terms.

Elite law-reform organizations like the NCCUSL and the American Law Institute usually work through a committee staffed by a "reporter" who is commonly a law professor expert in the relevant field. In this case, the co-reporters were Professor Robert Levy, who was and is a family law specialist at the University of Minnesota Law School, and Professor Herma Hill Kay, who taught and teaches family law at Boalt Hall and who had been prominent in the reform of California divorce law. The reporters drafted, and the committee and the Conference adopted, the Uniform Marriage and Divorce Act. The UMDA not only offered states a model no-fault divorce statute, it proposed an entire body of family law, one including reforms of the law of marital property, alimony, and child custody. Yet despite the UMDA's sweep, debate over it was primarily technical and ignored the many difficult social issues the UMDA implicated. Approval by the ABA's House of Delegates, while inhibited by institutional and personal conflicts, came in 1973, reasonably easily and without discussion of any underlying social issues.

It is hard to say how much influence the UMDA had and how much its advocacy of no-fault divorce simply reflected the temper of the times. The endorsement of no-fault divorce by such respectable and conservative institutions as the NCCUSL and the ABA at least promoted a trend toward reform that had already gathered considerable momentum: By 1974, forty-five states had what could be described as no-fault divorce. By 1985, every state had no-fault divorce grounds, although many states also retained fault grounds. This description of reform's extent is somewhat misleading, however, since "no-fault" is an ambiguous term. Pure no-fault statutes permit divorce if the marriage has irretrievably broken down, but statutes allowing divorce after separation for a defined period are also often considered no-fault statutes. By the latter standard, a number of states had had no-fault divorce well before the 1960s. Even in those states, however, the 1960s and 1970s brought an increased receptivity to rapid divorce on demand.

The UMDA also contributed to the reform of the other significant components of divorce law: the law of marital property, alimony, and child support. Except in a few community property states, property had traditionally been allocated to the spouse who owned it at the time of the divorce, an allocation heavily influenced by the name in which the property was held. In the 1970s, this rule was increasingly abandoned in favor of systems that were more inclined to treat property as

marital rather than as the property of individuals, that explicitly recognized in economic terms nonfinancial contributions to a family's well-being, that ignored marital fault in allocating property, and that gave judges discretion to divide property "equitably." Alimony had, in principle, traditionally been available to wives innocent of marital fault until they remarried. This rule was increasingly abandoned in favor of rehabilitative alimony — alimony designed only to help a spouse (whether maritally at fault or not) regain the ability to support himself or herself. Finally, custody of children had traditionally gone to the mother. In the 1970s and 1980s, this maternal presumption weakened and various forms of joint custody grew more appealing.

How, then, does Professor Jacob explain the transformation of divorce law? First, it is worth noting several forces that played a smaller part than might be expected. The Roman Catholic Church, whose opposition to divorce was well-established and well-known, had little effect on the legislative debates of most states. Feminism had a somewhat greater impact, but the feminist position on these issues was undeveloped, and there were feminists on both sides. Further, the women's movement was absorbed in other issues, like the Equal Rights Amendment. Indeed, no interest group, to say nothing of any mass movement, was deeply committed to reforming divorce law. Bar associations were involved in every state's reform effort, but not intensively: divorce law is a relatively low-status practice, and not all divorce lawyers favored no-fault divorce. Even the press widely ignored the reform. And because of the low visibility of divorce reform, it was not an issue which legislators could use to advance their careers.

So let us repeat the question. How does Professor Jacob believe the transformation was worked? Changes in social structure and social attitudes made the transformation certainly less controversial and perhaps plainly desirable. Reform cost the fisc nothing and gained in respectability and even in appeal as more and more states adopted it. Reform cost almost nothing politically too, since the absence of publicity about it helped ensure the absence of opposition to it. All these factors allowed a minute number of reformers, often lawyers with professional interests in divorce law, to work with a small number of legislators to achieve their goals. They succeeded because they did nothing to alter the conditions I have just described: they carefully defined their proposals as conservative, incremental, and technical changes in the law; they denied they were dealing with any significant social problems; they strove not to stir up interest-group opposition and worked assiduously to propitiate the likeliest powerful opponent, the Catholic Church; and they asserted their special expertise against the claims of laymen.

In sum, Professor Jacob argues, the transformation of American divorce law exemplifies "routine policymaking." Professor Jacob

notes that we ordinarily think of policy as created in a fierce conflict between deeply motivated interest groups. But legislatures could not accomplish all they need to if all policy were made that way. In fact, much policy is made quite routinely—reforms are drawn narrowly and described as conservative, experts are prominently relied on, the costs of reforms are kept low, and public attention is avoided.

But even if divorce reform was achieved through routine policymaking, its effects were not trivial: no-fault divorce was universalized, the common law principles for dividing property on divorce were widely abandoned, alimony became rarer and shorter, and joint custody of the children of divorced parents made maternal custody less automatic. *A Silent Revolution* thus closes by evaluating these reforms. Professor Jacob observes that assessments of divorce reform depend on who you ask and what they thought the reforms were meant to do. The kind of lawyers who advocated no-fault divorce have not systematically evaluated divorce reform, but their general impression is that no-fault has reduced fraud and acrimony in divorce proceedings. The most extensive and best publicized consideration of the new laws by a social scientist has been Lenore Weitzman's *The Divorce Revolution* (1985). Professor Weitzman argued that reform has generally disserved women by reducing the sense that marriage is for life, by depriving wives of the bargaining chip that fault-based divorce often provided, and by eliminating the advantages that the innocent wife had under no-fault divorce. Professor Weitzman also reported that rehabilitative alimony terminates sooner than traditional alimony and that it often fails of its rehabilitative purpose. Finally, she noted that the weakening of the presumption that mothers get custody gave fathers a bargaining chip they had not had before. Professor Weitzman's figures suggested that, one year after a divorce, men's standard of living had risen forty-two percent, while women's had fallen seventy-three percent. Professor Jacob is skeptical of Professor Weitzman's conclusions. He observes that her data are from California, whose laws are less favorable to women than those of many other states, and that other studies reach different results. He sketches national data he has examined which indicate that any difference that no-fault divorce has made is slight and is in women's favor.

I hope that this all-too-abbreviated survey of Professor Jacob's book has convinced you that it warrants reading. The book is not, of course, without faults. But its faults are largely amiable ones, often the product of its admirable ambition. Professor Jacob has, after all, not only undertaken to investigate three major reforms — those of no-fault divorce, of marital property and alimony, and of child custody — each with a different legislative career, but also to develop an analysis of "routine policymaking." The book's scope deters some of its parts from being as fully developed as the reader might wish. For instance, Professor Jacob describes the legislative adoption of no-fault divorce

with uncommon efficiency (such stories are usually related in such stupefying detail that their structure is wholly obscured). But he does not attempt an equally enlightening account of how marital-property and child-custody law were rewritten.

Professor Jacob's exploration of whether the changes he describes can aptly be called a "revolution" is also somewhat limited. This question is important because it speaks to his suggestion that revolutionary change can be achieved through routine policymaking. As he notes, many features of the reform were part of the law of some jurisdictions well before the 1960s. Some of the "revolution" in divorce grounds, for example, was accomplished by simply relabelling as "no-fault" statutes which permitted divorce where couples had been living apart. This prefiguring of reforms is, after all, what made it possible to describe them as merely incremental. Furthermore, a great deal of old doctrine still persists — some states did not abolish fault grounds when they adopted no-fault grounds, and many states have not drastically revised their law of marital property and child custody. Even where doctrine has clearly changed, judicial behavior may not have. Judicial resistance is always a possible impediment to reform, particularly where, as in family law, judges are accorded wide discretion. Most of the reform statutes are notably undirective. For example, the UMDA's marital property and child custody provisions offer judges only a long list of criteria, without explaining a criterion's intended effect or weight. With statutes so vague, and with the circumstances of families varying so much, appellate courts cannot readily supervise trial courts or develop systematic standards which might guide them. Further, most families do not have enough property for courts to divide and do not dispute who is to have custody of the children. And most of the post-divorce relations between parties are negotiated, not set by courts, although legal rules presumably affect negotiations. In sum, we are left wondering how effective the revolution Professor Jacob describes can be and thus what the scope of routine policymaking is.

My own sense is that the changes in family law have been greater than these considerations would suggest. The revolution is, I think, sparked and sustained by a set of ideological assumptions which are widely shared among many elite segments of society, assumptions having to do with egalitarianism and with psychologically derived views of human nature. Professor Jacob tends to neglect such factors. While he is sensitive to the broad social changes that underlay the legislative reforms, he only hints at the process by which particular groups of people perceived those social changes, conceptualized them, brought them into social discourse, and proposed legislative responses to them. For instance, we are told that experts in family law were central in the reform process, but we are not told about the law review literature that preceded the reforms. I suspect that had Professor Ja-

cob pursued these questions further, both his explanation of the reforms and his description of their scope would have been more fully textured and convincing.

The reader is also left tantalized by the chapter which evaluates the various reforms. Professor Jacob, of course, is hampered by the fact that the reforms are so recent. This has meant, for example, that studies of joint custody are largely meaningless, since parents pioneering joint custody have tended to be self-selected enthusiasts, since the social scientists studying them have tended to be partisan, and since it is too early to measure the long-term effects on children. Similarly, studies of the financial consequences of divorce reform have generally been of single jurisdictions, and it is too early to tell yet, for example, which effects are the effects of no-fault divorce and which are the effects of changes in marital property law. Professor Jacob does give us a glimpse of his own intriguing study, which uses national data, but it is only a glimpse.

Finally, the reader is left hungry for a more extensive discussion of Professor Jacob's intriguing ideas about routine policymaking. Perhaps because the case-study format is limiting, many questions are not fully addressed: What are other examples of routine policymaking? When is it likely to occur? What are its strengths? What are its limits? I particularly wonder whether "routine policymaking" is not a somewhat inaccurate label and one that covers too many different ways of making policy. Consider the example of divorce reform. The move to no-fault divorce can in some ways be called routine. The issue of how easy divorce should be had long and widely been controverted. By mid-century, those in favor of easier divorce clearly predominated, if only because it had become plain that the enforcement problems of strict divorce were unmanageable. The divorce rate rose inexorably despite all attempts to stem it. States like Nevada undercut the restrictive statutes of states like New York. Perjury became common in states like New York. Courts acceded to pressure for easier divorce by manipulating divorce grounds like mental cruelty. By the time of the social and ideological changes of the 1960s, the way had been well prepared for no-fault divorce, and its adoption can reasonably be called the routine political implementation of a social decision. On the other hand, no such preparation paved the way for changes in marital property and child custody law. Neither aspect of the law had been debated on any broad scale since the nineteenth century. Thus legislatures seem to have had a more active role in actually developing policy, and the changes they made seem correspondingly more vulnerable. Professor Jacob apparently denominates the latter role "routine" because it did not involve conflict. But if "routine" policymaking is simply any nonconflictual policymaking, the category is so broad that it needs further development.

To criticize a book for not doing more of what it already does well is surely to praise with faint damns. And praise is the note on which I wish to close. Professor Jacob has provided us with a fair-minded, and illuminating book which much needed to be written. Students of family law will find it a valuable history of the recent transformation of their subject. They will also find it an admirable corrective to the two heroic views of how legal change can and should occur. The first such view is that legislative change happens only at the behest of aroused interest groups. The second is that legislative change happens only at the behest of aroused courts. Professor Jacob shows us that a third, if less heroic, view is possible and demands our attention.

AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE. By *Derrick A. Bell*. New York: Basic Books. 1987. Pp. xii, 288. \$19.95.

If a book could be said to have a personality, then Derrick Bell's *And We Are Not Saved* could certainly be classified as a schizophrenic. Part fable, part legal scholarship, combining a pessimistic diagnosis of American race relations and a more optimistic prognosis for the eventual attainment of racial justice, Bell's latest work is simultaneously a frightening, objective demythologization of American civil rights law, and a brave and awful personal search "for completeness by allowing a dialogue with opposites within himself."¹ It is a search that is not entirely successful but one which yields provocative insights into the often contradictory thinking of a renowned legal scholar.²

And We Are Not Saved is an expanded version of the author's foreword to the *Harvard Law Review's* 1985 Supreme Court issue.³ There, Bell, long known as an innovative legal writer,⁴ created the character of Geneva Crenshaw, narrator of the *Civil Rights Chronicles* and foil to Bell's rapier-sharp dissection of current civil rights litigation strategies and their prospects for success. Through the telling of her chronicles, Geneva deftly decorticates the layers of myth and fantasy which envelop American civil rights law and proposes radical alternatives to traditional litigation strategies, thus allowing Bell to reconstruct the quest for racial justice from his vantage point as a disappointed and disillusioned veteran of that long march. Although Geneva eventually (and unconvincingly) converts to Bell's point of view, it is from the interplay of her cynical observations and Bell's tempered optimism that the book derives much of its dynamism.

The book-length version of the *Chronicles* is divided into three parts: *The Legal Hurdles to Racial Justice*, *The Social Affliction of Racism*, and *Divining a Nation's Salvation*. These are further subdivided into ten chronicles addressing the subjects of the constitutional foundations of racism (in *The Chronicle of the Constitutional Contradiction*), the limitations of civil rights litigation as a means of obtaining

1. De Gidjo, *Remarks on the Civil Rights Chronicles*, 3 HARV. BLACKLETTER J. 56, 56 (1986).

2. Bell is a professor at the Harvard Law School and former dean and professor at the University of Oregon School of Law. He has served in a number of governmental and public organizations including the United States Department of Justice and the National Association for the Advancement of Colored People (NAACP).

3. Bell, *The Supreme Court, 1984 Term — Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985).

4. See, e.g., Brittain, Book Review, 14 CONN. L. REV. 457 (1982); Freeman, Book Review, 90 YALE L.J. 1880 (1981); Wilhelm, Book Review, 79 MICH. L. REV. 847 (1981).

racial justice (in *The Chronicle of the Celestial Curia*), the dilution of black voting power (in *The Chronicle of the Ultimate Voting Rights Act*), the fallacy that desegregation promotes educational equality (in *The Chronicle of the Sacrificed Black Schoolchildren*), the economic barriers to racial equality (in *The Chronicle of the Black Reparations Foundation*), the dangers of affirmative action (in *The Chronicle of the DeVine Gift*), the potential for inter-racial cooperation (in *The Chronicle of the Amber Cloud*), relations between black men and black women (in *The Chronicle of the Twenty-Seventh-Year Syndrome*), black cultural autonomy and white cultural domination (in *The Chronicle of the Slave Scrolls*), and the ultimate emptiness of any racial reforms which are unaccompanied by fundamental changes in social and cultural values (in *The Chronicle of the Black Crime Cure*).

This sprawling, patulous approach to civil rights issues gains thematic strength and coherence from Bell's radical belief that because of the inherent limitations of litigation, past attempts to obtain racial equality have had but limited success and current strategies promise little more than the alleviation of isolated inequalities, leaving the overall situation of racial injustice unaltered.⁵ Indeed, according to Bell, many of the solutions sought by civil rights groups exacerbate the misery of the victims of racial discrimination, rendering them more vulnerable to the injustices of a racist society.

This viewpoint is most powerfully expressed by Bell in his discussions of school desegregation and affirmative action.⁶ Bell has previously⁷ analyzed and critiqued the litigation strategies leading up to, and policies flowing from the Supreme Court's decision in *Brown v. Board of Education*.⁸ *The Chronicle of the Sacrificed Black Schoolchildren*, in addition to developing these arguments, is a particularly stirring indictment of school desegregation and a poignant description of the plight of "invisible"⁹ black schoolchildren who, more than a quarter-century after *Brown*, await, with the "[p]atience . . . necessary . . . for those who rely on the law"¹⁰ the harvest of educational equality allegedly sown by the decision.

School desegregation, argues Bell, must be viewed as just one part of the civil rights litigation of the 1950s. Schools were seen as "the weak link in the 'separate but equal' chain" (p. 111). In their determi-

5. See also Bell, *Private Clubs and Public Judges: A Nonsubstantive Debate About Symbols*, 59 TEXAS L. REV. 733 (1981).

6. These topics are addressed in chapters 2, 4, and 6.

7. See SHADES OF BROWN, NEW PERSPECTIVES ON SCHOOL DESEGREGATION (D. Bell ed. 1980); Bell, *The Dialectics of School Desegregation*, 32 ALA. L. REV. 281 (1981); Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, (Comment), 93 HARV. L. REV. 518 (1980).

8. 347 U.S. 483 (1954).

9. P. 110 (citing R. RIST, *THE INVISIBLE CHILDREN* (1978)).

10. Bell, *An Issue On Race Relations — Foreword*, 61 OR. L. REV. 151 (1982).

nation to overturn that doctrine as it applied to a broad array of activities, civil rights litigators failed to consider the possibility that equality in education might best be accomplished through means other than desegregation. Experience suggests that, rather than depend on social science data demonstrating the adverse effects of segregation, civil rights activists should have persuaded the Court that "equal education in its constitutional dimensions must, at the very least, conform to the contours of equal education as defined by the educators."¹¹ A segregated school provided with adequate resources, sympathetic teachers, and a commitment to preserving and enriching black culture might better obtain the educational equality sought by *Brown*. Citing W.E.B. DuBois, Bell notes, "Other things being equal, the mixed school is the broader, more natural basis for the education of all youth. . . . But other things seldom are equal, and in that case, Sympathy, Knowledge, and Truth, outweigh all that the mixed school can offer" (p. 121).

Although Bell does not expressly reject desegregation and racial balance as appropriate goals for school systems, his description of the aleatory effects of school desegregation — the closure of black schools, the firing of black teachers and demotion of black school administrators, the disruption of black student life, and the disappearance of black community and cultural values which black schools served to protect (pp. 109-10) — casts into doubt the contention that desegregation is an unalloyedly correct method of rectifying educational inequalities. Moreover, desegregation serves other purposes for white elites who fear the potential rebelliousness of discontented black masses (pp. 60-62) and who employ desegregation programs to achieve their own agendas (pp. 107-11).

Affirmative action programs have similarly resulted in only limited benefits for blacks, benefits which again accrue to white elites as well. These programs tend to benefit only a small number of blacks, usually those with greater degrees of education and skill. Noting William J. Wilson's argument that "affirmative action programs are not designed to deal with the problem of the disproportionate concentration of blacks in the low-wage labor market" (p. 48), Bell contends that affirmative action creates economic schisms within the black community, dilutes the achievements of successful blacks, and denies society's sympathy to that segment of the black community most deserving of support (p. 49).

Furthermore, the unspoken limits on affirmative action (*i.e.*, tokenism) create problems not amenable to court-ordered remediation. This is especially true, Bell ironically points out, in just those professional fields where blacks have made their greatest gains. For exam-

11. P. 110 (quoting Carter, *A Reassessment of Brown v. Board*, in *SHADES OF BROWN: NEW PERSPECTIVES IN SCHOOL DESEGREGATION* 27 (D. Bell ed. 1980)).

ple, Bell describes the dilemmas faced by black law professors who see the rejection of other qualified minorities as silent criticism of their own performances (p. 148). As token minorities on law school faculties, black professors must confront the possibility that their presence confers legitimacy and respectability upon racist institutions (p. 146). Even where they are able to overcome the judicial system's reluctance to impose affirmative action requirements on elite professions (p. 149), blacks must fear the gradual attainment of employment levels beyond the "tipping point,"¹² that is, beyond some theoretical point at which the white institution begins to lose its identity as "white," thus justifying, in the minds of white administrators, purposeful racial discrimination (pp. 151-56).

The limited success of desegregation and affirmative action, as well as the denial of even the meager benefits of such programs to the black underclass, is what leads Geneva or, more accurately, Bell to consider the alternatives to "the leaky boat of litigation" (p. 71). Yet aside from some casual references to Frances Fox Piven and Richard Cloward (who believe that mass protest is a better strategy than reform politics for empowering blacks) (p. 58) and an altogether unsatisfying discussion of Marcus Garvey's "back to Africa" movement (p. 187), these alternatives remain largely unexamined. Piven and Cloward are only two of a significant number of scholars, whose ranks include Paolo Freire and John Gaventa,¹³ who argue that only rebellion can empower the large masses of poor, disenfranchised citizens of Western and Third World countries. Bell's treatment of these theories has the quality of a "straw man" argument, superficially presented in order to assert the ultimate correctness of his own preference for continued litigation. Similarly, Garvey's emigration proposals, while hardly a panacea for American racism, could have been more effectively employed to illustrate the depth of frustration and disillusionment now confronting civil rights activists.

The superficial examination of these alternatives to continued litigation lends Geneva's final conversion to Bell's viewpoint a somewhat shallow and unconvincing character. The tension between her desire for violent change and Bell's commitment to legal reform is a simmering conflict which remains unresolved until the final paragraphs of the book. Then, in a divine revelation which concludes her tales, Geneva discovers a "Third Way" (p. 251). She accepts that racial equality must be pursued through the traditional means of litigation but insists that economic equality be recognized as a concurrently achievable goal. Just as the civil rights movement has transformed the Constitu-

12. See also Bell, *Application of the "Tipping Point" Principle to Law Faculty Hiring Policies*, 10 NOVA L.J. 319 (1986).

13. See, e.g., P. FREIRE, *THE PEDAGOGY OF THE OPPRESSED* (1972); J. GAVENTA, *POWER AND POWERLESSNESS* (1980).

tion from a document concerned with property rights into a document concerned with human rights (p. 252), the "Third Way" must now force the courts to develop a perspective emphasizing economic as well as political equality.

Just why the creation of such novel legal rights and remedies will have greater success than previous attempts to achieve racial justice is left unclear. But Bell is obviously optimistic. For him, the struggle against all forms of inequality — racial, sexual, and economic — is a battle from which "I never will turn back. Oh, I will go. I shall go. To see what the end will be" (p. 258).

This final outburst of unrestrained optimism stands in dire contrast to the bleak despair of the titular epigram¹⁴ and is but one of the contradictory or ambivalent qualities in Bell's writing. While the use of Geneva as a noetic antithesis to the author's defense of litigation serves to illuminate and enucleate the tensions at the core of Bell's thought, the dramatized internal dialogue is often distracting. The conversations between Bell and Geneva are frequently strained, the prose often stilted and unnatural.¹⁵

Moreover, the artificial bifurcation of "Geneva" and "Bell" allows Bell to enjoy the luxury of not confronting the contradictory arguments in his analyses. It sometimes seems that where those contradictions are hard to resolve, Bell simply has his characters move on to a new topic of conversation or part company. Bell must have reveled in this freedom from the rigors of scholasticism, but he has gained that freedom at a cost to some of his arguments' clarity and cogency.

Finally, the diatribes in which Geneva and Bell engage occasionally do more to obfuscate than to elucidate current judicial policy. This is especially true in Bell's analysis of voting rights. This complex area of litigation is not well served by Bell's cursory and dramatized presentation. Nor do his footnotes sufficiently expand upon the fictionalized material. (In fact, Bell's footnotes are generally too pithy to be of great value.) It would be interesting and fruitful scholarship were Bell to bring his considerable analytical skills to bear on this issue in a more rigorous and methodical manner.

Yet, despite these flaws, perhaps because of them, *And We Are Not Saved* offers much that is thought-provoking, penetrating, and profound. Bell's apparent ambivalence towards and qualified acceptance of the wisdom of continued legal reforms represents a deep-seated frustration that many civil rights activists must experience in attempting to push America away from its racist roots and in the direction of a just society. Still, his ultimate faith is that of a man "with

14. *Jeremiah* 8:20: "The harvest is past, the summer is ended, and we are not saved."

15. Bell himself seems to recognize this. See, e.g., Bell, *The Civil Rights Chronicles Revisited: Comments and Introduction*, 3 HARV. BLACKLETTER J. 46, 48 (1986) (where Bell describes his prose as "courageous legalese").

[his] mind set on freedom.”¹⁶ Such faith may well prove to be our nation’s salvation.

— Kevin Edward Kennedy

THE CLOSING OF THE AMERICAN MIND: HOW HIGHER EDUCATION HAS FAILED DEMOCRACY AND IMPOVERISHED THE SOULS OF TODAY’S STUDENTS. By *Allan Bloom*. New York: Simon and Schuster. 1987. Pp. 392. \$18.95.

Bacon, Descartes, T.S. Eliot, Hobbes, Leibniz, Locke, Machiavelli, Jacques Maritain, Christopher Marlowe, Montesquieu, Newton, Rousseau, Socrates, and Voltaire . . . Readers should be forewarned that they will encounter the teachings of such great thinkers when they pick up Allan Bloom’s *The Closing of the American Mind*.¹ In fact, they will encounter all of these on one page, 292. And this is not an atypical page — except for the omission of Nietzsche, whose influence permeates the book.²

If American education has really reached the depths Bloom depicts, such a difficult book should have no audience. After all, a reader needs a good foundation in both Greek literature and European — especially German — philosophy in order to appreciate Bloom’s insights. Yet the book has stayed on the *New York Times* best-seller list for many months. Can Bloom be mistaken about the lack of culture in America? How has the book found so many readers?

Perhaps the answer is that it appeals to several audiences for different reasons. Although the circle of Bloom’s soulmates may be growing older and narrower daily, there are many others who will read — or at least buy — his book:

16. Bell, *A Hurdle Too High: Class-based Roadblocks to Racial Remediation*, 33 BUFFALO L. REV. 1, 2 (1984).

1. Bloom, the author of critiques of Rousseau and Shakespeare, is a professor of social thought at the University of Chicago.

2. Nietzsche’s influence is typified in this quote:

At the very best, it is clear to me now that nature needs the cooperation of convention, just as man’s art is needed to found the political order that is the condition of his natural completeness. At worst, I fear that spiritual entropy or an evaporation of the soul’s boiling blood is taking place, a fear that Nietzsche thought justified and made the center of all his thought. He argued that the spirit’s bow was being unbent and risked being permanently unstrung. Its activity, he believed, comes from culture, and the decay of culture meant not only the decay of man in this culture but the decay of man simply. This is the crisis he tried to face resolutely: the very existence of man as man, as a noble being, depended on him and on men like him — so he thought. He may not have been right, but his case looks stronger all the time.

P. 51. Other notable names omitted from page 292 that dot the pages elsewhere in the book are Woody Allen, Aristotle, Freud, Hegel, Heidegger, Plato, Shakespeare, Swift, and Tocqueville.

* College administrators and faculty leaders who see the subtitle and feel compelled to read it in order to keep abreast of the latest attacks on their livelihood.

* Feminists who have heard that Bloom calls feminism “[t]he latest enemy of the vitality of the classic texts” (p. 65) and says that women no longer need the National Organization for Women (p. 107).

* Would-be censors of music and other diversions of the youth culture who can bolster their arguments with passages such as this:

Picture a thirteen-year-old boy sitting in the living room of his family home doing his math assignment while wearing his Walkman headphones or watching MTV. He enjoys the liberties hard won over centuries by the alliance of philosophic genius and political heroism, consecrated by the blood of martyrs; he is provided with comfort and leisure by the most productive economy ever known to mankind; science has penetrated the secrets of nature in order to provide him with the marvelous, lifelike, electronic sound and image reproduction he is enjoying. And in what does progress culminate? A pubescent child whose body throbs with orgasmic rhythms; whose feelings are made articulate in hymns to the joys of onanism or the killing of parents; whose ambition is to win fame and wealth in imitating the drag-queen who makes the music. In short, life is made into a nonstop, commercially prepackaged masturbational fantasy. [pp. 74-75]

* Those who yearn for a kind of erudition they lack but who can fantasize that they are members of a dying elite while they turn page after page with little comprehension.

* Name-droppers who will read just enough of the first third of the book³ to impress people at cocktail parties.

* Ostentatious social climbers who frankly have no intention of reading the book but who like to decorate their coffee tables with the most impressive ornaments from the best-seller lists.

Those who actually read *The Closing of the American Mind* will find it by turns stimulating, erudite, provocative, quotable, dated, simplistic, and boring. Bloom has taught for nearly three decades in some of the “best” colleges in this country as well as abroad,⁴ and he has observed students closely. The book’s strongest section is the first, where he describes the students he has seen over the years. Part 2, *Nihilism, American Style*, is the most demanding and will probably find the fewest readers. Part 3 is entitled *The University*; its final two chapters (*The Sixties* and *The Student and the University*) are also

3. Part 1, *Students*, covers pages 47-137 and is by far the most concrete — and therefore readable — section.

4. Many of the references are to Bloom’s experiences at Cornell, where he taught during the 1969 student takeover. This incident appears to have had a profound effect on Bloom that pervades his writings. He has also taught at Yale and at the University of Chicago — where he is currently codirector of the John M. Olin Center for Inquiry into the Theory and Practice of Democracy — as well as at the University of Toronto, the University of Paris, and Tel Aviv University.

closely tied to Bloom's experiences, and their concreteness makes them readable. Those who merely want to learn what is wrong with American colleges may be unprepared for a seminar in European philosophy before they can discover the answer. If they are unwilling to plod through the lengthy middle section, they may just skip to the last two chapters.

So who is to blame for the failure of higher education? The usual suspects are the faculty, the students, and society, and Bloom distributes blame among all three. The faculty, for example, shamed itself in the sixties by capitulating to demands for relevance and by letting militant students run the schools.⁵ But he devotes more time to analyzing the failures of the students and the society that has spawned them.

His summation of today's students may strike many readers as apt: Students these days are, in general, nice. I choose the word carefully. They are not particularly moral or noble. Such niceness is a facet of democratic character when times are good. Neither war nor tyranny nor want has hardened them or made demands on them. The wounds and rivalries caused by class distinction have disappeared along with any strong sense of class (as it once existed in universities in America and as it still does, poisonously, in England). Students are free of most constraints, and their families make sacrifices for them without asking for much in the way of obedience or respect. . . . The drugs and the sex once thought to be forbidden are available in the quantities required for sensible use. A few radical feminists still feel the old-time religion, but most of the women are comfortably assured that not much stands in the way of their careers. . . . Students these days are pleasant, friendly and, if not great-souled, at least not particularly mean-spirited. Their primary preoccupation is themselves, understood in the narrowest sense. [pp. 82-83]

Students come to college with no values, have no sense of right and wrong, view everything as relative, and feel no urge to judge others. They come to college sexually sated, with no innocence.⁶ They are self-centered and self-satisfied. Indeed, "the self is the modern substitute for the soul" (p. 173). Their self-satisfaction extends to their country. "The longing for Europe has been all but extinguished in the young" (p. 320), according to Bloom. Students are the products of their society, a society destroyed by the effects of feminism, divorce, two-career families, a polluted language, and a retreat from the liberal arts in favor of professional training.⁷

5. For Bloom, the late sixties were the Dark Ages of education, and universities have yet to recover. P. 319.

6. Bloom's favorite students are the few remaining virgins:

I believe that the most interesting students are those who have not settled the sexual problem, who are still young, even look young for their age, who think there is much to look forward to and much they must yet grow up to, fresh and naive, excited by the mysteries to which they have not yet been fully initiated.

P. 134.

7. Bloom's discussion of many of these problems can be found in sections entitled "Divorce" and "Love" that span pages 118 to 132.

Bloom finds students disappointing because they are bland, homogenized, without "cultural baggage" (p. 89), prejudices, or any real fears.⁸ Are these really the typical students of 1987? Perhaps Bloom's exposure has been limited to the sons and daughters of the rich. Had he taught in some less elite institutions, he might have seen students with real prejudices, real fears. Even at the top universities today, these seem to be resurfacing. Racial unrest is reappearing, and the sexual revolution has met with at least a temporary obstacle in the AIDS crisis.⁹ Perhaps Bloom is unaware of some of these changes because, as codirector of the John M. Olin Center for Inquiry into the Theory and Practice of Democracy at the University of Chicago, he has fewer chances to get to know undergraduates than he once had.

When these nice but dull students reach the university, what awaits them? Not, Bloom regrets, the cultural storehouses to which students of the forties and fifties were exposed.¹⁰ Instead, "[t]he humanists are old maid librarians" (p. 136), and preprofessionalism has taken over the campus. Particularly heinous examples, in Bloom's eyes, are the MBA programs:

[A] great disaster has occurred. It is the establishment during the last decade or so of the MBA as the moral equivalent of the MD or the law degree, meaning a way of insuring a lucrative living by the mere fact of a diploma that is not a mark of scholarly achievement. It is a general rule that the students who have any chance of getting a liberal education are those who do not have a fixed career goal, or at least those for whom the university is not merely a training ground for a profession. . . . The effect of the MBA is to corral a horde of students who want to get into business school and to put the blinders on them, to legislate an illiberal, officially approved undergraduate program for them at the outset, like premeds who usually disappear into their required courses and are never heard from again.¹¹

8. He pooh-poohs the suggestion that today's students fear nuclear war. *See* p. 83.

9. A single footnote on page 106 acknowledges this fear: "It remains to be seen what effect AIDS will have. The wave of publicity about herpes a couple of years ago had almost no discernible psychological fallout."

10. Bloom, who was an undergraduate in the 1940s and 1950s, may be striking a nostalgic note when he says,

As I reflect on it, the last fertile moment when student and university made a match was the fling with Freud during the forties and fifties. He advertised a real psychology, a version of the age-old investigation of the soul's phenomena adjusted to the palate of modern man. Today one can hardly imagine the excitement. What a thrill it was when my first college girlfriend told me that the university's bell tower was a phallic symbol. This was a real mix of my secret obsessions and the high seriousness I expected to get from the university. High school was never like this. It was hard to tell whether the meaning of it all was that I was about to lose my virginity or to penetrate the mysteries of being.

P. 136.

11. Pp. 369-70. He is less critical of prelaw programs: "Prelaw students are more visible in a variety of liberal courses because law schools are less fixed in their prerequisites; they are only seeking bright students." P. 370. In general, Bloom fails to acknowledge that students are being forced into professional and preprofessional programs by an inability to earn a living commensurate with the costs of an undergraduate program otherwise.

Such an institution is not well-equipped to accomplish what Bloom sees as its main task: "always to maintain the permanent questions front and center" (p. 252).

Surprisingly, Bloom does not give up in despair at this point. After a lengthy discussion of Plato, Aristotle, Nietzsche, and Heidegger, he comes to the unexpected conclusion that there is hope for the future. "For the first time in four hundred years, it seems possible and imperative to begin all over again, to try to figure out what Plato was talking about, because it might be the best thing available" (p. 310). Only if we reassess the university's vocation, returning it to its traditional role, can we avoid a repetition of the destruction of the universities that occurred in Germany in the thirties, according to Bloom (p. 312).

Anyone with influence in the universities who reads Bloom for answers to the question "What should we do to save higher education?" will probably be disappointed. His solutions are difficult to find and hard to swallow. They boil down to a Great Books approach designed for the few students making up the intellectual elite. The university must

intervene most vigorously in the education of those few who come to the university with a strong urge for *un je ne sais quoi*, who fear that they may fail to discover it, and that the cultivation of their minds is required for the success of their quest. We are long past the age when a whole tradition could be stored up in all students, to be fruitfully used later by some. Only those who are willing to take risks and are ready to believe the implausible are now fit for a bookish adventure. The desire must come from within. [pp. 64-65]

Bloom acknowledges the objections to a Great Books curriculum¹² but still concludes that making these readings the core studies will once again excite students. They will recognize and appreciate the unique experience the university is providing for them. Students will rediscover a respect for study as an end in itself (p. 344). He does not appear to acknowledge that one reason for this success is the self-selection process that matches students with such a curriculum.

Although Bloom's treatise may turn out to be the "bible of a whole class of righteous intellectuals,"¹³ it is unlikely that many changes will occur in the universities because of it. The "back to basics" movement

12. He admits to agreeing with these objections:

It is amateurish; it encourages an autodidact's self-assurance without competence; one cannot read all of the Great Books carefully; if one only reads Great Books, one can never know what a great, as opposed to an ordinary, book is; there is no way of determining who is to decide what a Great Book or what the canon is; books are made the ends and not the means; the whole movement has a certain coarse evangelistic tone that is the opposite of good taste; it engenders a spurious intimacy with greatness; and so forth.

P. 344.

13. Pattison, *On the Finn Syndrome and the Shakespeare Paradox*, 244 THE NATION 710, 714 (1987).

may find some fuel in its pages, and a few more committees may be appointed to decide what should be done to insure balanced graduation requirements. A handful of schools may reinstitute a foreign language requirement, spurred on by Bloom's enthusiasm for European culture. A few readers may be stimulated by *The Closing of the American Mind* and may decide to reread the classics Bloom mentions — or to read them for the first time.¹⁴ But few readers are likely to be inspired, and many copies of the book will perhaps gather dust on coffee tables until the best-seller list produces some equally impressive tome. Will Bloom care?

Bloom is primarily a teacher, and he frequently draws analogies to the role of a teacher. At various times he describes the teacher as both pimp and midwife (p. 20), ministering to the needs of the students who lust for knowledge. In the past, the teacher's "joy was in hearing the ecstatic 'Oh, yes!'" as he dished up Shakespeare and Hegel to minister to their need. Pimp and midwife really described him well" (p. 136). Perhaps, like the pimp and midwife, Bloom can perform his service and then move on. Perhaps the sales that have driven Bloom's book to the top of the charts are now providing him an ecstatic "Oh, yes!"

— Maureen P. Taylor

DEMOCRATIC EDUCATION. By *Amy Gutmann*. Princeton: Princeton University Press. 1987. Pp. xii, 291. \$19.95.

Educational policy is simultaneously a subject of great dispute and of unparalleled significance. More than preparing children to "function in society," education shapes the attitudes and preferences of future citizens. In a democratic society the views of citizens become the policies of a nation, and for this reason education has the potential to determine America's political future. Amy Gutmann¹ recognizes this power and in *Democratic Education* proposes a theory of education which distributes educational authority in a manner she believes to be consistent with democratic government.

Gutmann contends that a comprehensive theory of education is necessary if citizens are to assess and judge policy options. Rather than arguing in favor of any particular vision of the morally ideal education, Gutmann attempts to answer the following question: Who

14. This task could easily occupy most of a lifetime, as the authors he reveres could fill a library.

1. Amy Gutmann is an Associate Professor of Politics at Princeton University and the author of *LIBERAL EQUALITY* (1980).

should make educational policy? She asserts that these policy decisions should be the result of democratic consensus. Educational practices must reconcile the competing claims of parental authority, responsible citizenship, and individual liberty. She concludes that political majorities should decide educational policy as long as that policy is not repressive or discriminatory. Gutmann's theory of education additionally requires that future citizens be taught the skills and values necessary to democratic processes. Schools must teach these abilities not only because our society values democratic methods, but also because future citizens will have to make democratic decisions about the education of the next generation.

Chapter 1 explains and defends the theory against more traditional views. Gutmann goes on to consider the implications of her principles and to refine them by evaluating their practical consequences. She accomplishes this "translation of political principles into practice" (p. 17) through a discussion of the democratic purposes of primary schooling (ch. 2). Gutmann uses this "groundwork" for consideration of the dimensions of democratic participation (ch. 3), the limits of democratic authority (ch. 4), and the distribution of primary schooling (ch. 5). She then applies democratic principles to higher education (chs. 6 and 7), educational institutions other than schools (ch. 8), and adult education (ch. 9). She concludes by showing how democratic education is consistent with the assertion that politics is a form of education. While Gutmann provides a comprehensive discussion of educational policy, her conclusions are not always consistent with the democratic theory she advocates. A detailed explanation of her theoretical development and an analysis of her conclusions demonstrate this weakness.

In chapter 1 Gutmann begins her explication of democratic education by considering three traditional views of the control of education. She rejects each in turn but takes principles from each which help forge her democratic theory. She describes these alternatives as the family state, the state of families, and the state of individuals (p. 22). The family state seeks to foster a "like-mindedness and camaraderie among citizens that most of us expect to find only within families" (p. 23). All members are educated to accept the single, "correct" vision of the good life.² State control over education is absolute and its aim is to inculcate in children a desire to pursue the true good life rather than other inferior alternatives. Gutmann rejects the family state because, even if there is such a thing as *the* good life (which she doubts) (pp. 28, 44), parents and citizens have differing conceptions as to what

2. For discussion of the "family state" approach see PLATO, *Crito*, in *THE LAST DAYS OF SOCRATES* (H. Tredennick trans. 1969); PLATO, *THE REPUBLIC* (B. Jowett trans. 1941); B. WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* (1985); B. WILLIAMS, *The Truth in Relativism*, in *MORAL LUCK* (1981); K. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* (5th ed. 1966).

constitutes a just society for them and their children. Adult citizens who have not yet discovered *the* good life, have a right to try to perpetuate their vision. For this reason they are entitled to a share of educational authority which undermines the state's claim to total control.

The state of families is at the opposite extreme.³ It places exclusive responsibility for education in the hands of parents. They may thus predispose their children to choose a way of life consistent with their preferences. Gutmann condemns the insulation of children from exposure to different attitudes and preferences. Rather, an education must develop the ability to choose among competing conceptions of the good life. Since children are members of both families and the state, both have a claim to educational authority.⁴

While the family state and the state of families justify instruction that biases children towards some conceptions of the good life, the state of individuals demands absolute neutrality in the teaching of values.⁵ It supposes that all understandings of the good life are valid and that education should not bias children toward any particular view.⁶ Educational authority in the state of individuals should be exercised exclusively by professional educators who not only must avoid bias, but also must teach the skills necessary to individual choice among differing conceptions. Gutmann's criticism of this view of educational control is that we value education not just for the liberty of choice that it encourages, but for the virtue that it bestows on children. Society has an interest in predisposing children to only a select range of choices that will allow them to flourish and function in a democratic society. Additionally, she notes that neutrality among virtues is itself controversial. Indifference among virtues offends supporters of moral education as much as instruction in only one view of the good life represses those who favor a different view.⁷

3. For discussion of the "state of families," see M. FRIEDMAN, *CAPITALISM AND FREEDOM* (1962); J. COONS & S. SUGARMAN, *EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL* (1978); Schrag, *The Right to Educate*, 79 *SCH. REV.* 359 (1971); C. FRIED, *RIGHT AND WRONG* (1978); J. LOCKE, *TWO TREATISES OF GOVERNMENT* (Second Treatise) (P. Laslett rev. ed. 1963); N. TARCOV, *LOCKE'S EDUCATION FOR LIBERTY* (1984).

4. *But see* Wisconsin v. Yoder, 406 U.S. 205 (1972). In *Yoder*, the Supreme Court considered the state's interest in having all of its citizens reasonably well educated so that they could participate in political affairs and become economically self-sufficient. However, that interest was not sufficient to deny the rights of the Amish to the free exercise of their religion. Thus the parent's claim to educational authority overrode the state's interests.

5. See B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980), for a defense of liberal neutrality.

6. For discussion of the "state of individuals" see J.S. MILL, *On Liberty*, in *UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT* (E.P. Dutton ed. 1951); I. KANT, *THE EDUCATIONAL THEORY OF IMMANUEL KANT* (E.F. Buchner trans. 1904); B. ACKERMAN, *supra* note 5.

7. Gutmann has changed her views on this approach to education. At one time she favored only those educational techniques that maximized the future freedom of children. See Gutmann, *Children, Paternalism, and Education: A Liberal Argument*, 9 *PHIL. & PUB. AFF.* 338 (1980).

Gutmann finds none of the three traditional views satisfying. The problem remains: education cannot and should not be morally neutral. How then should society determine which values to teach future citizens? Gutmann first defines an inclusive ground on which to justify non-neutral education — a commonly held virtue broad enough to permit differing views of the good life to flourish. That virtue is a commitment to “conscious social reproduction.” She states, “We are committed to collectively re-creating the society that we share. Although we are not collectively committed to any particular set of educational aims, we are committed to arriving at an agreement on our educational aims” (p. 39). Therefore, while education cannot avoid biases towards some conceptions, differing views of virtue, the good life, and moral character can coexist within the notion of conscious social reproduction. The principle leaves room for citizens collectively to shape education in their society. Each view may be put forward in the democratic process, and while those preferred by the majority will be favored in our schools, no view may be repressed. At the same time all children must be educated so that they can share in consciously reproducing their society when they become adults. Future citizens must learn the skills that allow them to represent their views in the democratic process and the attitudes that make them tolerant of differences as well as democratic outcomes.

Democratic education combines many aspects of the three traditional approaches which Gutmann rejects. Educational authority is shared by the state, parents and professional educators. Like the family state a democratic state seeks to teach a societal virtue — the democratic virtue of conscious social reproduction, which aims to predispose children towards those values consistent with the sharing of rights and responsibilities in a democratic society. Like the state of families, the democratic state recognizes that parents have an interest in shaping the education of their children, but only within the limits set by democracy. Like the state of individuals, a democratic state favors participation of professional educators in developing choice among “good lives.” But it is the ability to evaluate these choices and to appreciate moral values common to this society that democracy respects, not the neutrality among all moral views that is the basis of the state of individuals.

The primary purpose of democratic education is to develop what Gutmann calls “deliberative” or “democratic” character. Nurturing democratic character involves two crucial components. First, schools must teach moral reasoning; second, they must inculcate moral character. Moral reasoning includes thinking critically about authority and permits future citizens to evaluate competing moral claims and choose among them. Consequently they can understand their own preferences and participate in developing social preferences. Moral character, on the other hand, fosters behavior in accordance with au-

thority (p. 51). Society has an interest in perpetuating certain moral values. Schools must teach these values, but only in conjunction with instilling the ability to think critically about the moral appropriateness of authority.

While Gutmann favors a democratic procedure for choosing among programs of moral education, there are two limits on the democratic authority that she advocates. The first, nonrepression, prevents society from restricting rational deliberation among competing conceptions of the good life. The second, nondiscrimination, prohibits society from excluding educable citizens from adequate education. Both are essential to conscious social reproduction and both prevent the majority from implementing educational policies that are undemocratic.

Throughout the work, Gutmann uses her democratic theory to consider numerous contemporary educational controversies. For example, in chapter 5 she considers the distribution of primary education and the funding of public schools. Her funding formula calls on the state to identify schools that provide an adequate education. In order for democratic education to be adequate, it must do more than produce functionally literate students who can find employment; it must also demand from students the ability to think about democratic politics, and must develop deliberative skills so that future citizens can effectively participate in conscious social reproduction. Gutmann defines this level of education as the "democratic threshold." Once the state identifies schools which produce children at the democratic threshold, it must then increase funding to inadequate schools such that they can meet this level of education. All funding above the democratic threshold is a matter of democratic discretion. But she also envisions a nondiscretionary element to funding decisions. Implicit, but never defended, is the assumption that increased funds will permit all schools to provide a democratically satisfactory education.

Gutmann considers additional controversies through her democratic analysis including bilingualism (ch. 3), book banning (ch. 4), sex education and sexist education (ch. 4), the role of private schools (ch. 4), school desegregation (ch. 5), the purpose, funding, and admissions practices of institutions of higher education (chs. 6 and 7), the educational role and permissibility of government regulation of libraries and television (ch. 8) and adult education (ch. 9). The theory comfortably answers many of the vexing, current educational problems. However, her answers do not always appear consistent with her democratic theory; ultimately they may only justify her own moral preferences.

The incongruity between theory and application may follow from the fact that while Gutmann proposes a procedure to make educational policy, her procedure is not principle-neutral. The biases of her theory result from the contention that one of the purposes of educa-

tion is to instill certain moral attitudes. Evidently these attitudes should be democratically determined. But while education can be biased towards values favored by the majority, it should follow from her theory that the *process* itself should be morally neutral and should permit the teaching of any values which are not repressive or discriminatory. The difficulty is that the bases of her democratic analysis are the "deepest, shared moral commitments" of American society.⁸ For Gutmann these appear to involve adherence to traditional liberal values.⁹ Yet she is unable to separate the kind of education her theory would produce from the values of her theory of educational authority. Although her theory of decisionmaking should permit a broad range of outcomes, her values infect the process. In essence Gutmann uses notions of our "deepest, shared moral commitments" manifested through the principles of nonrepression and nondiscrimination to support her own moral preferences.

Her preferences are most noticeable in the case she makes against the teaching of creationism in public schools. She contends that schools are prevented by the principle of nonrepression from teaching creationism even if the subject is favored by a democratic majority. The principle is violated by the indirect imposition of the religious views of some on all children in the guise of science (p. 103). She finds that the indirect "result of establishing religion in public schools would be to restrict rational deliberation among competing ways of life" (p. 104). She assumes that religious attitudes are intolerant of differences and that the idea of creationism cannot be taught without restricting opposite views. But this does not on its face appear to be the case. It seems possible at least that creationism could be taught as an alternative, even if unconvincing, view in addition to the theory of evolution. Of course, schools would also have to develop the reasoning skills necessary for each child to make a choice, but it does not follow that the choice is restricted by the introduction of a competing conception of human origin. Gutmann lets her biases show when she suggests that schools are bound not "to teach *false* doctrines that threaten to undermine the future prospects of a common democratic education" (p. 103; emphasis added). She thus would prevent the teaching of a doctrine with which she disagrees on the grounds of "nonrepression."

Her probable response to this suggestion would demonstrate the problems discussed above. She states, the case against the teaching of creationism "rests instead on the claim that secular standards consti-

8. P. 21. Gutmann looks to "the most commonly held theories concerning educational purposes, authorities and distributions" in order to develop her own theory.

9. Gutmann admits the need to "use some form of philosophical analysis to defend a set of principles or to determine which set of principles and whose interpretation of them ought to rule." P. 21.

tute a better basis upon which to build a common education for citizenship than any set of sectarian religious beliefs — better because secular standards are both fairer and a firmer basis for peacefully reconciling our differences” (p. 103). Her prohibition of religious instruction is consistent with the admission that her theory rests on principles drawn from our deeply held common values. America has a long history of the separation of church and state. However, if democratic authority is limited only by nonrepression and nondiscrimination, it is difficult to resist a majority decision to teach creationism in the schools. It appears at least possible to teach creationism in a manner which does not limit consideration of other views of the good life. If educational authority truly conformed to the theory Gutmann proposes, it would have to allow creationism in schools if favored by a majority. But as it appears that deeply held common values can also trump democratic decisions, how these “values” are defined determines educational content. The problem for Gutmann is that these values are not set by democratic process.

It is because many will find Gutmann’s version of our deeply held common values intuitively satisfying that *Democratic Education* will be most appealing to an American audience.¹⁰ Gutmann’s principle of conscious social reproduction justifies democratic control over educational authority, limited only by the principles of nonrepression and nondiscrimination. Gutmann would claim that by “conscious social reproduction” she means the fostering of the ability in future citizens to deliberate about moral alternatives and arrive at a societal consensus. However, given the extent to which her theory is shaped by current, American, liberal values (which, for her, represent our deeply held common values), Gutmann underestimates the significance of the “reproduction” component. Future citizens who have had democratic educations will favor the reproduction of the society of the previous generation. Although Gutmann’s theory permits the teaching of radical visions of the good life, it appears unlikely to create future citizens who will desire to implement those visions. While one may not find

10. Indeed, Gutmann finds American federalism particularly well suited to fostering democratic participation in the making of education policy. Local public schools under the control of elected school boards can respond to the collective preferences of local communities. Such authority permits more effective control, allows content to vary with area preferences, and facilitates citizen participation. At the same time higher levels of government can set limits on local authority in order to cultivate a common societal culture, teach democratic values, and insure that local preferences are nonrepressive and nondiscriminatory. Professional authority may be exercised through the pressure of teacher’s unions. Unions can demand conditions under which teachers are better able to develop democratic character. There is room as well for student participation which itself can foster the participatory virtues of democratic character.

such a consequence troubling, it is naive to assume that such a result would be the product of a neutral process.

— Jonathan Marks

THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY. By Joel F. Handler. New York: Russell Sage Foundation. 1986. Pp. xi, 327. \$27.50.

There have been profound changes in our legal culture over the past several decades. One of the most important developments has been the proliferation of statutory entitlements and due process remedies.¹ However, Joel F. Handler² argues that the American system of rights and procedural remedies has not worked, and that “despite the impressive changes in our legal culture, justice remains largely unavailable to large sections of the population” (p. 2).

Handler is concerned with justice in administrative decisionmaking. He argues that in certain contexts administrative decisionmaking necessarily involves a great deal of uncertainty, both in the factual determinations made and the legal standards applied. In such situations, the adversary system of procedural due process is inadequate because it fails to appreciate the uncertainty inherent in the decision and tends to cut off much needed communication between the client and the agency.

In *Critique*, the first part of Handler's book, he focuses upon the interaction between a large-scale public agency and an individual, where the decisions to be made are largely discretionary, *i.e.*, not subject to solution by rule. Handler argues that such decisions require a system based on communication and cooperation (p. 7). In the second part, *Construction*, Handler proposes such a system, using the special education program of the Madison, Wisconsin School District as a model (p. 9). He uses special education as his primary example because it involves relationships between individuals and agencies which

1. P. 1. As Handler notes, Professor Charles A. Reich referred to these entitlements and remedies as “The New Property.” Handler summarizes Reich's argument that “[i]n the modern social welfare state, relations with government in regard to welfare, education, health, and so forth, involve new forms of property, and government ought to be held to the same standards of law as with conventional or traditional property.” P. 1. See Reich, *The New Property*, 73 YALE L.J. 733 (1964).

2. Professor of Law, U.C.L.A. School of Law. A.B. 1954, Princeton University; J.D. 1957, Harvard Law School. Professor Handler's recent works include: POOR CLIENTS WITHOUT LAWYERS: WHAT CAN BE DONE? (1985) (edited with Louise Trubek); and LAST RESORTS: EMERGENCY ASSISTANCE AND SPECIAL NEEDS PROGRAMS IN PUBLIC WELFARE (1983) (with Michael Sosin).

are characterized by high amounts of discretion and continuity (pp. 2-3).

Handler's criticism of the adversary system of due process is reasonable and convincing. At its best, the system is flawed by maldistributions of resources and by its dependence upon the relative knowledge and experience of the participants. These problems are exacerbated by the ambiguity and uncertainty inherent in discretionary decisionmaking. Handler purports to address these weaknesses with his alternative system of justice. However, his system also has its weaknesses, some of which Handler fails to recognize.

In *Critique*, Handler argues that administrative justice requires the sharing of power: the individual and the official must reach a mutual agreement on important decisions affecting the individual (p. 4). In fact, Handler's concept of justice is analogous to informed consent (as it exists in theory, rather than in its flawed application to medical decisionmaking). Informed consent is itself based upon two ideas: individuality and social relationships (pp. 4-5). Handler argues that the adversary system fails to resolve the tension between these two ideas. He views the adversary system of due process as the embodiment of liberal legalism, the objective of which is the protection of the rights of the individual. However, Handler asserts that the system fails to respond adequately to the role and responsibilities of the individual as a member of society (pp. 4-5).

In discussing the flaws of the adversary system and the general weaknesses of liberalism, Handler notes with some approval the work of dignitary theorists.³ According to dignitary theory, justice requires that certain dignitary values be maintained in procedural due process remedies. In other words, the effects of the process upon the participants, rather than just the outcome must be considered. Although Handler apparently draws upon this concept to some extent in developing his alternative approach, he asserts that dignitary theorists also ultimately fail to resolve the conflicts between the individual and society (p. 129).

Despite the weaknesses of liberalism, and the flaws of the adversary system, as Handler acknowledges, the system does work well in deciding factual questions and enforcing legal norms or claims of right. The system "contemplates a definitive decision that either ends the controversy or alters it significantly" (pp. 43-44). Thus, the adversary system is an effective means of establishing liability, assessing damages, and determining criminal liability.

3. Pp. 124-29. Handler asserts that the "most thoughtful work so far dealing with dignitary values" is by Professor Jerry L. Mashaw. Handler states that the "'unifying thread' among the dignitary theorists [is] a perception that the 'effects of process on participants, not just the rationality of substantive results, must be considered in judging the legitimacy of public decisionmaking.'" P. 125 (quoting Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 886 (1981)).

However, special education decisions present the worst possible conditions for the functioning of the adversary system. The substantive questions for each case are: (1) what is the nature of the problem with the child; and (2) what should be done about the problem? The answers to these questions are fraught with ambiguity and uncertainty. The legal standard is also indeterminate. A handicapped child has a right to an "appropriate education."⁴ Given the ambiguity and uncertainty as to the causes of and proper responses to poor academic performance, the decision as to what constitutes an "appropriate education" necessarily involves the exercise of discretion. Handler argues that where the relations between the citizen and the state are discretionary and continuous, as in special education, the adversary system often "exacerbates rather than settles" disputes and tends to cut off ongoing communication (p. 44).

The system's failure is due, in part, to the reluctance of officials to allow participation and, in part, to their ability to thwart the intent of the law.⁵ In special education, a due process hearing is seen as a challenge to the decisionmaker. Parents who seek hearings are viewed as malcontents or troublemakers. Furthermore, even if school officials make a good faith effort to encourage parental participation, the system depends upon the ability of the parents to take advantage of procedural remedies (pp. 62-63). The likelihood that parents will be able to overcome the system's barriers and to be "rights bearing" citizens is extremely low.⁶

Handler argues that the adversary system fails to appreciate both the social context within which decisions are made and how that context fatally undermines the procedure (p. 43). The system assumes that parties have adequate resources and that the judge is independent, contemplative, and deliberative. In fact, individuals often lack the knowledge and resources necessary to avail themselves of the procedural remedies. Furthermore, administrative hearing procedures are actually parts of larger bureaucratic systems, within which the hear-

4. P. 44. See The Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773 (codified in scattered sections of 20 U.S.C.) [hereinafter P.L. 94-142].

5. Extensive procedural remedies are provided by P.L. 94-142. Informed parental consent and participation is required throughout the process. Pp. 60-61. However, research indicates that, although P.L. 94-142 seems to have resulted in more parental contact with school authorities, there has not been much change in parental involvement in the actual decisionmaking process. The most important decisions are typically made by school personnel prior to the required "participation and consultation" with parents. In large school districts, committees spend an average of only 2.5 minutes per decision. Pp. 66-69.

6. Handler notes that in order for the due process system to work, the following conditions must be present:

[C]lients have to be aware that an injury has occurred; they have to think that the agency is at fault; they have to be aware of the existence of a remedy; they have to have the resources with which to pursue that remedy; and finally, they have to make a calculation that the benefits of pursuing the remedy outweigh its costs.

P. 22.

ings are only incidental. Consequently, agencies will attempt to alter the due process model to fit their institutional goals (pp. 34-36).

Handler does not advocate the complete abandonment of the adversary system of due process. He recognizes that, despite its faults, it may still be useful in particular situations when more informal procedures have failed. However, he believes that formal adversary proceedings should recede in importance and no longer dominate the relationship between the agency and the client (p. 20).

In *Construction*, Handler proposes, as an alternative to the adversary system of procedural due process, an approach which takes account of context and fosters cooperation and increased communication between agency and client. Handler bases his approach upon his observations of the special education program of the Madison, Wisconsin School District. As Handler describes that program, parents are viewed by the school district as part of the solution, rather than as the problem. Flexibility is maintained in performing evaluations and developing programs. Additionally, the system requires communicative conflict. In other words, parents communicate and cooperate with school officials while maintaining their autonomy and without sacrificing their own interests (p. 9).

Handler observes that the Madison system has been very successful. He attributes its success to four basic factors, represented by his "conditions of discretion," which are the embodiment of his alternative approach. He explains, "[b]y conditions of discretion, I mean justice, the sharing of power, in the context of the discretionary decision" (p. 160). Handler's four conditions of discretion are actually descriptions of environmental and systemic factors requisite to the facilitation and effective use of discretionary decisionmaking. Although phrased in terms of their application to a special education program, they are not limited to the special education context.

The first condition requires organizational change within the bureaucracy. The bureaucracy must want the participation of clients in deciding substantive issues. Handler's approach cannot succeed without the cooperation of the bureaucracy (p. 12).

The second condition requires a decentralized system. Handler argues that the Weberian model does not describe reality. "Organizations are not hierarchical, formalized, rational, efficient collectivities; rather, they are loose collections of multiple centers of power, shifting coalitions, adapting and readapting to environmental influences" (p. 195). Handler asserts that the "loosely coupled open system" is the appropriate form of organization to accomplish the goals of justice in the context of the discretionary decision (p. 195). Handler's goal is to strengthen the exercise of discretion, but in ways that preserve and enhance the protection of individual rights in the relationship between the client and the agency (p. 195).

The third condition, the activity of social movement groups, is essential to changing the environmental influences upon the organization at both the societal and local levels. Social movement groups are independent organizations that have two primary and potentially conflicting functions. Under Handler's system, these organizations participate in the formation of policy and the implementation process. However, at the same time, they represent individuals in their relations with the agency. For example, in the Madison School District such groups provide advocates to represent parents and to aid them in understanding and in working with the special education program. Social movement groups are required to create demands for change and to work for organizational and institutional support (pp. 217-18).

The fourth condition is social autonomy. Handler describes this condition in terms of Kant's categorical imperative: each person is to be treated as an end, never as a means.⁷ However, Handler argues that the classic concepts of individualism are incomplete. Handler states, "I begin not with the independent, free-standing person, but rather with a person in a social relationship. The concern is not with the conditions of independence but with the conditions of *interdependence*" (p. 265; emphasis in original).

Handler's criticisms of the adversary system of procedural due process are valid and timely. The adversary system is certainly imperfect. But Handler goes beyond the familiar complaints, such as the maldistribution of resources and the excessive costs of litigation. He argues that the system is structurally unsound in the context of administrative decisionmaking, as it fails to consider the individual as a member of society. Handler purports to remedy these weaknesses with his alternative system of justice. However, Handler's system has its own weaknesses.

Handler recognizes several problems with his approach. The most paradoxical problem is that the system's own success may ultimately undermine its performance. Handler's system relies on informed consent: parties must reach a mutual agreement on important decisions. However, as school officials disclose more information and increasingly encourage parental participation, parents may come to trust the school officials and to rely upon their opinions, thus effectively defeating the goals of the system. Furthermore, as the organization acquires a reputation for success, it may be perceived as unacceptable within the community to question its decisions (pp. 108-09).

Additionally, the threat of cooptation is a primary risk running throughout the system (pp. 243-44). Assuming that the bureaucracy

7. P. 123. See also p. 264 ("To treat a person merely as a means involves a violation of autonomy, because the person is then being treated in accordance with a rule not of his own choosing") (citing T. BEAUCHAMP & J. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 58 (1983)).

wants the participation of the social movement groups, it is easy to foresee an overzealous bureaucracy actually capturing the groups in its desire to accommodate them. Furthermore, if the bureaucracy does not want the participation of the social movement groups, cooptation is an obvious means of circumventing the system.

Handler also recognizes that additional problems are raised specifically by the use of social movement groups. First, interest group representation is suspect in democratic theory because the group represents special interests rather than the general interest. However, Handler reconciles the activities of social movement groups with democratic theory by requiring that the criteria of interest representation be embedded in the substantive standards of the policy (pp. 256-57).

A second problem is that as a result of the discretion involved in decisionmaking, public policy is necessarily contingent, *i.e.*, not subject to strict control or prediction. Handler asserts that, within special education, contingency is both inevitable and desirable. Nevertheless, discretion should be maintained within certain parameters (p. 257). Handler argues that the requirement of including interest representation in the substantive standards of the policy will also meet objections as to the contingency of public policy.

The third problem raised by the use of social movement groups is that such groups "may suppress dissent; they may coopt or capture rather than represent." This must be avoided. Handler argues that in this case the end of group behavior is autonomy, not cooperation. The basic goal is "to enhance the individual bargaining position" of each parent (p. 258).

In addition to the problems recognized by Handler, his approach also suffers from other weaknesses that he fails to address. For instance, his system is completely dependent upon the bureaucracy's understanding and support. Handler asserts that parental participation will yield "better results" for the agency. This promise of increased success is to serve as an incentive for the agency to maintain the required degree of communicative conflict and to ensure the autonomy of the social movement group. However, Handler fails to define "better results" and to give empirical support for the proposition that parental participation actually will yield such results. As the bureaucracy now effectively disregards the law's requirements that there be parental participation and informed consent, it is reasonable to question whether the bureaucracy actually believes that such action will lead to better results (at least as it defines them).

Even if this proposition can be adequately supported to convince the bureaucracy, there are other factors which may undermine Handler's approach. In times of deficit spending and demands for greater fiscal accountability, it will be increasingly difficult to maintain decentralization and to tolerate otherwise desirable uncertainty. Addition-

ally, Handler rejects the Weberian model as not descriptive of reality, but does not adequately address the concerns of natural systems theorists.⁸ Bureaucrats intent on ensuring their own survival are not likely to be enthusiastic about sharing decisionmaking power and accepting uncertainty as an inevitable and desirable part of the system. In fact, it is questionable to what extent the bureaucracy is motivated by the desire to achieve "better results" at all.

Furthermore, given the emphasis on the organizational incentive of improved results, it is unclear what importance dignitary values ultimately serve in Handler's system. The bureaucracy apparently heeds such concerns only to encourage parents to participate. Dignitary values are thus used as means and are not "ends in themselves, goals without regard to substantive outcomes," as dignitary theorists insist they should be (p. 148).

Handler also fails to address adequately the problems of cooptation. The risk of cooptation runs throughout his system, especially in Handler's reconciliation of the role of social movement groups with democratic theory. Interest groups are required to adhere to criteria specified in the policy. It is questionable whether government could monitor such adherence or whether deviation could be corrected without cooptation by the bureaucracy.

As Handler acknowledges, his approach is based upon a very optimistic view of humanity, "a conception of people who are capable of altruism and individuality, trust and autonomy, respect, responsibility, and morality" (p. 300). It is doubtful that this is an accurate description of the administrative state. Furthermore, his approach is dependent upon the bureaucracy and social movement groups maintaining an ideal level of both cooperation and conflict. Too much of either would result in failure. Given the conflicting demands upon both entities and the underlying inequality in their bargaining positions, it is unlikely that such a tenuous relationship could be achieved and maintained.

Furthermore, there are great risks involved. Despite the flaws of the adversary system, many people have won important substantive rights. Such gains were the result of the aggressive use of a formal adversary system, based upon the protection of individual rights. Although the system is not as effective as it should be in addressing the needs of lower economic classes, it does provide at least some identifiable limitation upon the actions of the bureaucracy. It is possible that informalism will inevitably lead to increased domination of the lower economic classes.

Handler's response to this threat is to reserve the adversary system

8. Natural systems theorists view organizations in terms of "self-maintaining systems, whose one overriding goal is survival as an end in itself rather than achieving agreed upon goals." P. 200.

for those situations in which it is most needed. However, this merely distances individuals from their rights and increases the obstacles they must overcome to be "rights bearing" citizens. Although improvement in substantive decisionmaking is certainly desirable, sweeping change in the procedures and protections defining the relationships between agencies and clients should be approached with caution.

Handler addresses an important and serious flaw in our system of administrative justice. His book is worth reading for its discussion of the issues and its summary of the various theories proposed. However, while his approach offers valuable insight into the weaknesses of the adversarial system, it is not without weaknesses of its own.

— Steven F. Cherry

FAMILIES IN PERIL. By *Marian Wright Edelman*. Cambridge, Mass.: Harvard University Press. 1987. Pp. xii, 127. \$15.00.

Families in Peril by Marian Wright Edelman¹ deals with one of this nation's most critical problems, child poverty. What begins as an empirical, intellectual, relatively uncontroversial, and potentially useful appraisal of the current condition of the American family, however, unfortunately results in little more than Edelman's Last Stand on the (Ultra) Liberal Platform. This is unfortunate primarily because Edelman destroys much of the credibility she earns throughout the book. While chapters 2 and 3 focus on presenting statistical information, the bulk of chapters 4 and 5 plunge head first into the age-old diatribe on social welfare policy on an emotive rather than cerebral level.² In addition, Edelman's tone wavers throughout the book. She begins with an impartial analysis and ultimately concludes with an

1. Marian Wright Edelman, Spelman College and Yale Law School graduate, has been President of the Children's Defense Fund since 1973. In 1986, she delivered the W.E.B. Du Bois Lectures on which this book was based. Her accomplishments include the opening of the NAACP Legal Defense and Educational Fund Office in Jackson, Mississippi and involvement in the establishment of the Head Start program for pre-school children in that state.

2. For example, in discussing the merits of supporting those whom she deems the "underclass" — that group of families with a parent who is physically able yet unwilling to work — she offers the following resolution: "[I]t is more important to our society that every child has enough to eat than that every parent be forced to work." P. 87. In making such a remark, she ignores the concerns addressed by many who take a more conservative posture; namely, that it is simply "unfair" or socialistic to force taxpayers to support those who voluntarily choose not to make an effort to support themselves.

In addition, in setting the tone of chapter 5, she remarks that "[o]ur political leaders are turning this nation's plowshares into swords and bringing good news to the rich at the expense of the poor." P. 95. The following passage captures the essence of the entire book:

Feeding a hungry child or preventing needless infant deaths in a decent, rich society should not require detailed policy analysis or quantifiable outcome goals or endless commissions.

impassioned plea to save the family and alleviate the “widespread suffering in our city streets and farmlands” (p. x). The result of this drastic style switch is that runaway, impassioned pleas dilute her analytical credibility. Edelman’s ultimate goal is simple and uncontroversial: She wishes to eradicate poverty and all of its consequences and to create a society in which every child can live a decent life and possess realistic hope for the future. Her proposal for achieving this result, however, is far from simple and further yet from uncontroversial.

The book begins, appropriately, with an essential, although somewhat convoluted, discussion of the facts; more accurately, the discussion sets forth hardcore statistics. Edelman devotes the bulk of the first chapter to an elaborate presentation and discussion of the statistics relating to the black family in America. She uses these statistics expertly to accomplish two main goals. First, she carefully attempts to draw causal connections between certain prevalent characteristics of black families and their (relatively) bleak condition. She then attempts to use the statistics to eradicate societal myths regarding the poor generally, and blacks specifically.

With respect to the first of these objectives, the conclusions she derives from her analysis can be summed up as follows: The primary reason why the condition of black families, as compared to white families, is so grim is that young black marriages simply fail to form as easily as white marriages (p. 6). This, coupled with the relatively higher rate of adolescent pregnancy and births among black females, results in a disproportionately high number of unmarried black mothers. The causes and effects of this situation are thus tightly intertwined and often indistinguishable. Edelman urges that the chicken and egg inquiry be ended, and that efforts be directed at solving the problem rather than at attaining a theoretically precise evaluation of the interaction of its components (p. 9).

The ancillary question of why there are so many fatherless black families is answered by the same conclusion — first marriages among blacks fail to form easily. Upon examining other factors contributing to this dilemma (such as the higher rate of institutionalization among black males, a higher death rate among black males, and the large number of black males who are apparently “missing” from the census), Edelman concludes that such factors are relatively minor contributions to the problem of fatherless families (p. 12). In addition, she draws a direct correlation between declining black male employment and declining marriage rates among young blacks. This correlation ultimately leads to her proposed solution: “[T]he key to bolstering black families, alleviating the growth in female-headed households,

They require compassionate action. . . . [L]et us be careful not to hide behind cost-benefit analyses when human survival is at issue.

and reducing black child poverty lies in improved education, training, and employment opportunities for black males and females" (p. 14). Therefore, her recommendation, drawing upon that of William Wilson,³ is that the black unemployment problem be given top priority in "public policy agendas designed to enhance the status of families" (p. 15).

Another objective Edelman seeks to achieve by application of statistical analysis is the shattering of commonly held myths about the poor and about blacks. The best example of this is Edelman's use of facts and statistics to dispel the myths surrounding the social welfare system, particularly Aid to Families with Dependent Children (AFDC) and the motivation and behavior attributed to welfare recipients. For instance, Edelman adeptly illustrates how the contention that welfare is a huge drain on public resources and that families on AFDC are living "too well" is an exaggerated, if not unsupported, statement. Her criticism, through the use of facts and figures, of the "total-cost" argument—which contends that the combined benefit levels to a family are extremely high—is convincing, although somewhat unnecessarily accusatory.⁴ Some of her statistics are quite illuminating: The bulk (72%) of Medicaid expenditures in 1984 went to elderly or disabled recipients, none of whom were on AFDC and many of whom were white; in 1984, more than 50% of the foodstamp recipients were not in AFDC households; the combined value of AFDC and food stamps is insufficient to lift families out of poverty;⁵ and finally, less than 25% of the families on AFDC receive housing assistance (pp. 69-70).

In examining the child poverty crisis in America, Edelman presents several reasons why we should invest in all our children. First, and foremost, there is a moral obligation on the part of adults to meet the needs of those who cannot provide for themselves by virtue of their youth. Second, it is socially desirable to provide opportunities for children to obtain the education and skills necessary if they are to be expected to participate in, and contribute to, society during their adult lives. Third, a reciprocation factor exists by which our self-interest is furthered by ensuring a future pool of supportive adults. Fourth, society needs the contributions of an increasingly scarce supply of youth. And finally, the cost to society of *not* investing in our children is greater than the cost of investing in them.⁶

Edelman's analysis of child poverty, its causes, and alternative so-

3. Mr. Wilson is a member of the Department of Sociology at the University of Chicago and an analyst of black family and civil rights organizations.

4. "The total-cost argument is a shell game, with the administration betting that it can move the pea faster than the public eye can follow." P. 69.

5. Poverty in this sense is determined by the designated poverty level of income for a family of a given size.

6. Pp. 30-31. Edelman illustrates this last point through a series of examples that depict a

lutions, ultimately leads her to place most of the blame on the government for its "misguided budget priorities" (p. 44). Although she acknowledges from the beginning that efforts from both the public and private sectors must be made to alleviate the dire circumstances of so many children (and parents), her examination of causes and solutions lapses into a blame-the-government mode very quickly. For example, she condemns the government for decreasing its support to children and their families during their time of need, when economic recession, unemployment, low wages, and increased taxes have placed incredible burdens on families struggling to survive (p. 40). She denounces past and present budget priorities as indicative of "perverse national values" (p. 37) that essentially lend support to a "make the rich richer and the poor poorer" public policy.⁷ She argues that the government's role in addressing and adequately responding to the crisis requires that certain affirmative steps be taken by the public sector and facilitated by the private sector. She labels essential such affirmative steps as (1) creating jobs in the public and private sectors through the expansion of job training programs both for the minority poor and for youth, (2) raising the minimum wage to a point that would allow a full-time worker to support a family above the poverty level, (3) guaranteeing health insurance for all, (4) insuring affordable, quality childcare, (5) restoring (and increasing) the social welfare benefits cut by the post-1980 budget, including an expansion of Medicaid, reformation of the AFDC programs, and the enactment of a minimum national benefit level, (6) expanding the Head Start program for comprehensive early childhood development, (7) relieving the tax burden on the poor by increasing the value of tax provisions that benefit them the most, such as the standard deduction, personal exemption, and Earned Income Tax Credit, and (8) initiating sex education and access to family planning services and counseling in the public schools (pp. 45-46; 54; 85-86).

But the end of the book digresses further and further into an emotionally-laden, impassioned appeal to human compassion, taking Edelman further and further away from the goals she initially targets. It becomes increasingly apparent that this book is Edelman's ideological statement to society. The arguments she makes on behalf of those she defends fall strictly within the realm of public policy debate. It is therefore impossible to engage in an objective evaluation of her reasoning without involving oneself as an advocate in the political debate, albeit unintentionally. There is nothing wrong with making a political statement, but the problem with evaluating such a statement is that

greater cost to the public over the long run of "curing" rather than "preventing" in areas of health, education, employment, and family stability. Pp. 31-32.

7. As a result, she observes a "new American apartheid between rich and poor, white and black, old and young, government and needy, corporation and individual, military and domestic needs." P. 37.

there is no "right" answer, no precedent to examine, no statute to interpret. While it is difficult to imagine anyone contending that it is desirable to raise impoverished, abused, malnourished, unloved, and uneducated children, ensuring that this does not happen in our society may create conflicts with other values equally strong or even stronger than those relating to the condition of children. For example, a capitalistic society values greatly the individual's freedom to determine, in essence, her own destiny through labor, intellect, and perseverance, and sees efforts by government to reduce the inequitable, yet inevitable, results of such a system as a threat of socialism. Differences in fundamental human values are ultimately at the core of the controversy — for some, "unfairness" means allowing those who cannot (for whatever reason) provide for themselves to suffer; for others, "unfairness" means forcing those who *can* provide for themselves, to support those who don't.

With this in mind, the fundamental flaw in Edelman's book is lack of focus, or more precisely, scattered focus. The messages she conveys are too numerous, too controversial, and conveyed much too passionately to conform to the documentary style the book initially seems to adopt. She runs the risk of losing the credibility she attains in the "informative" chapters by regressing into scathing attacks on the current administration, resorting to an appeal to compassion rather than to intellect and logic, and circumventing the strongest arguments against her position. At one level, she purports to engage strictly in a campaign for children by addressing their rights and needs. On another level, her goal seems to be to convince her audience that the Reagan administration is the greatest evil the poor have ever had to contend with, exemplified by its "misguided budget priorities" of increased military spending and decreased spending on social welfare programs.⁸ On yet another level, her goal seems to be to arouse support and sympathy for the predicament of blacks in this country and to defuse typical stereotypes, prejudices, and biases while at the same time garnering support for an increased allocation of resources to programs that primarily benefit blacks. There is nothing at all objectionable about any of these goals, but piling them all under the auspices of a crusade for children leaves the reader feeling as if she has been led astray.

Edelman's tactics for persuading her audience to support one side of a traditionally controversial issue, whether deliberate or not, come across as somewhat dishonest. She realizes that the people she needs to reach the most, the conservatives, are typically a white, middle-

8. Ms. Edelman also finds little redeeming value in the Gramm-Rudman-Hollings balanced budget amendment: "This morally bankrupt law seeks mindlessly to lower a \$200 billion annual deficit, which sick and hungry children did not cause and which we cannot solve by hurting them." P. 96.

class group of people who have varying suspicions and biases about the welfare system. She also seems to realize that traditional liberal arguments regarding a moral duty to provide everyone in this wealthy society with a decent life have not successfully convinced the steadfast conservatives. She must overcome the "socialism" stigma associated with the actions she endorses.

Edelman's tactics for overcoming this incredible barrier focus upon concerns central to the white, conservative, middle- and upper-class. First, she places children at the forefront of her discussion as a primary concern. This is not to imply that her concern for children is anything but genuine. Nonetheless, children make a convenient common denominator that attracts the attention, sympathy, and compassion of everyone, even the white middle-class. And one becomes suspicious about her professed intent to raise the nation's consciousness regarding the problem of child poverty when she devotes such a great deal of discussion to other social problems such as racism, discrimination, tax burdens on the poor, and wealth disparity in this country. Admittedly, anything that affects parents will ultimately affect children. However, Edelman seems to be taking on what is really a broader objective than merely helping children: She advocates just as strongly liberal methods for curing the assorted social evils that accompany poverty, racial discrimination, and unequal opportunity.

Edelman also attempts to persuade her readers that we will all benefit from increasing benefits to the poor, by adopting what she calls a pro-family policy. However, Edelman completely ignores some very crucial stumbling blocks to an acceptance of her proposals: The economic costs to many people are not only real but may include a threat to their perception of a democratic form of government. Edelman's casual statement that the expanded "Social-Security-like" (p. 84) system she would like to see implemented would leave the economy unharmed is questionable at best. Furthermore, she never addresses many people's primary objection to the welfare system: its susceptibility to abuse.

In the final two chapters of the book Edelman explodes into action, attacking everyone and everything that can possibly have an effect on the situation of the poor. She accuses the "greedy military weasel" (p. 99), the "unfairness weasel" (p. 101), the "bystander weasel" (p. 101), and the "ineffectiveness weasel" (p. 102), of "gnawing away at the rights of our children and the moral underpinnings of our democratic society" (p. 99). As a last resort she appeals to compassion: "We could act out an old-fashioned notion — one of those traditional notions of which President Reagan is so fond. It is called compassion" (p. 87).

In the final analysis, Edelman has made a commendable effort to expose the unpleasant and sobering truth about the state of the Ameri-

can family today. However, it is disappointing that in the end she undermines the persuasiveness of her analytical conclusions, the solutions she proposes, and her overall message, by trying to fight too many battles at the same time.

— *Nellie Pappas*