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001. memo	To Jim Hamilton from Paul Friedman and Ronna Lee Beck re: Analysis of Hillary Rodham Clinton's legal writings (30 pages)	05/07/1992	Personal Misfile
002. letter	To Editor from James d. Weill re: Children's Defense Fund (1 page)	08/13/1992	Personal Misfile

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HILLARY CLINTON, CHILD SAVER

What she values will not help the family
By Christopher Lasch

Articles and speeches by Hillary Clinton discussed in this essay:

"Children Under the Law," *Harvard Educational Review* 43 (1973): 487-514.

"Children's Policies: Abandonment and Neglect," *Yale Law Journal* 86 (1977): 1522-1531.

"Children's Rights: A Legal Perspective," in Patricia A. Vardin and Ilene N. Brody, eds., *Children's Rights: Contemporary Perspectives* (New York: Teachers College Press, 1979).

"Teacher Education," in Shirley M. Hord et al., eds., *Beyond the Looking Glass: Papers From a National Symposium on Teacher Education: Policies, Practices, and Research* (Austin: University of Texas Center for Teacher Education, 1985).

"The Healthy Development of Our Youth" (Remarks presented to the Eighteenth Annual Meeting of the Southeastern Council of Foundations, 1987).

"A Bridge Over the Mississippi" (Keynote address, Second Annual Urban Education Symposium, Memphis State University, 1990).

The Democrats may win this election on economic issues alone, but if they expect to govern the country, they will have to convince a skeptical public that they understand, among other things, why so many parents despair of raising children properly today. Can this country's parents be convinced by Bill Clinton or, more to the point, by Hillary Clinton, a so-called activist on children's issues?

From a parent's point of view, the assertion that we live in a child-centered society—a common description of the United States—is hard to listen to with any patience. Everyday experience indicates otherwise. It is not just that our streets are unsafe, our schools understaffed and under-

funded, our popular culture contaminated by graphic images of sex and violence. The trouble goes deeper; it makes itself felt not merely in the unwholesome influences from which even the most affluent families cannot shelter their young but in the absence of countervailing influences that would make children feel welcome in the world. Americans traveling abroad often remark on the ubiquitous presence of children in public places, where strangers fuss over them like pets. In our country, we prefer to keep them out of sight and out of mind. Our public places bear an invisible inscription: *Children Keep Out*.

Adults are too absorbed in their own pleasures, their own business—in getting and spending—to have much time for children. They try to compensate for this neglect by the invention of "quality time"—a poor substitute for the casual acceptance of children into adult routines, as a consequence of which

children learn what is expected of them. When it comes to the younger generation, American adults do not seem to expect much of anything.

Instead of holding the young up to exacting standards of personal conduct, adults try to make things easy for them—another way of overcompensating for the intermittent quality of their own attention. Every parent feels complicit in this vicious circle of neglect and indulgence. There is no escape from it; it is built into the very marrow of our wasteful, heedless way of life.

Somehow the normal ties between the generations (like the ties between men and women) have frayed to the breaking point. The sense of mutual dependence and obligation has given way to a jealous regard for the rights of individuals, carried to the extreme of mutual animosity and recrimination. The prevailing climate of opinion makes children impatient with parental

Christopher Lasch's books include *Haven in a Heartless World: The Family Besieged*; *The Culture of Narcissism*; and, most recently, *The True and Only Heaven: Progress and Its Critics* (Norton).

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restrictions in any form, while parents resent the constant challenge to their authority. They are saddened by their children's lack of gratitude and respect, even when they suspect that gratitude and respect are undeserved. For their part, the young insist on strict observance of their rights. Family life becomes a matter of nonstop negotiation. Charges and countercharges fill the air. In a society composed of sovereign individuals, the family becomes a political battleground on which the generations confront each other as adversaries, each appealing to outside forces in the hope of showing up their own position. The older generation is attracted to the political slogan of "family values," the younger to the growing campaign to give the rights of children the full protection of the law.

First as a lawyer associated with the Children's Defense Fund and more recently as a senior partner in a prominent Little Rock law firm, Hillary Clinton has had a good deal to say about children's rights. A serious consideration of her views would seem to be called for, and not merely as a mark of respect for a woman too often judged by trivial notions of the conduct becoming to political wives. Hillary Clinton has been writing and lecturing on what she has called the "healthy development of our youth" for nearly twenty years, and both she and her husband have stated that children will be her "issue" should he be elected in November. Her views can thus be seen as an indication of what a Democratic administration might do about the plight of the family.

Garry Wills, writing about Hillary Clinton last spring in *The New York Review of Books*, noted that her plea for a wide-ranging policy on families "will be opposed by traditionalists." Evidently, he assumes that this is a point in its favor. But objections to the kind of family policy she has in mind cannot be dismissed so casually. They need to be stated as clearly as possible, if only because they help to explain the defection of "Reagan Democrats" from a party that no longer seems to care about people engaged in the hard work of raising children. Hillary Clinton's

writings exemplify the view of families that so many working people find objectionable. From her perspective, the "traditional" family is, for the most part, an institution in need of therapy, an institution that stands in the way of children's rights—an obstacle to enlightened progress.

The movement for children's rights, in which Hillary Clinton has played an active part throughout her professional career, reflects the politicization of family life. Clinton regards the children's-rights movement as a logical extension

rationale for depriving people of rights in a dependency relationship is that certain individuals are incapable or undeserving of the right to take care of themselves and consequently need social institutions"—she has in mind slavery and traditional marriage—"specifically designed to safeguard their position." Clinton thinks it unfortunate that children's "relative powerlessness... makes them uniquely vulnerable to this rationale." She grudgingly concedes that the "physical, intellectual, and psychological incapacities of (some) children" may "render them weaker than (some) old-



of earlier movements to give civil rights to slaves and women. The legal presumption of incompetence, which results in children's exclusion from full citizenship, is almost as arbitrary, she argues, as the exclusion of any other category of persons. In "Children's Rights: A Legal Perspective," she writes that "the first thing to be done is to reverse the presumption of incompetence and instead assume all individuals are competent until proven otherwise.... Yet the law basically treats all... children, at their dissimilar stages of life, as incompetent." She insists that the proponents of this unfair discrimination against the young use essentially the same arguments once used to justify discrimination against women and blacks. "The basic

er persons," but the inferior position to which the law assigns them also has to be seen, she argues, "as part of the organization and ideology of the political system itself." As she sees it, the "pretense that children's issues are somehow above or beyond politics"—I am quoting here from "Children Under the Law"—"endures and is reinforced by the belief that families are private, non-political units whose interests subsume those of children." Though Clinton does not press the point, the movement for children's rights, as she describes it, amounts to another stage in the long struggle against patriarchy.

It is her contention, advanced in "Children Under the Law," that since children have "interests demonstrably

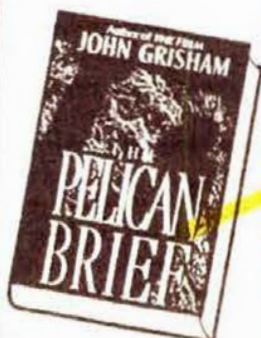
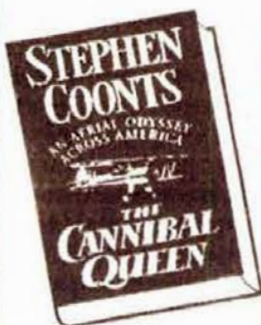
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independent of those of [their] parents," they cannot be represented by anyone other than themselves. This argument, which rests on the classic liberal premise that individuals are the best judge of their own interests, undercuts the authority not only of parents but of the state when it acts in *loco parentis*. Clinton draws heavily here on revisionist histories of the progressive reforms instituted early in this century—reforms that transferred control of delinquent children from parents to the juvenile courts, established a broad array of custodial institutions for children, and made school attendance compulsory, thus preventing parents from exploiting their children's labor, but also cutting into the family's responsibility for education.

The "child savers," as revisionist historians sarcastically refer to these reformers, had unlimited confidence in their ability to act "in the best interests of the child," but their new paternalism was, if anything, even more heavy-handed than the old. Reforms enacted during the progressive era empowered the courts to remove children from "unsuitable homes," to sentence them to indeterminate periods of incarceration, without proving their guilt, and to override the usual legal protections against summary arrest and detention. By replacing adversarial justice with therapeutic justice, these reforms created new varieties of arbitrary power. Neither children nor their parents, it turned out, had much recourse against authorities who were "only trying to help." The state could now segregate deviants for no other reason than that they or their parents refused to cooperate with the juvenile justice system, especially when refusal to cooperate could in itself be construed as evidence of a bad home environment.

Some critics have cited the deplorable effects of bureaucratic intervention as a reason to restore some of the parental responsibility expropriated by the state. Clinton proposes a very different solution. She wants to abolish minority status, to give children and adolescents the same rights as adults, and to integrate them as fully as possible into our adversarial system of justice. She condemns the state's assumption of parental responsibilities,

not because she has any faith in parents themselves but because she is opposed to the principle of parental authority in any form. When we treat young people as dependents, she argues, we discourage them from taking responsibility for themselves. Moreover, the assumption that adults know best is contradicted, in her view, not only by massive evidence of parental incompetence but also by the disagreements that come between parents and children. After all, Clinton argues in "Children Under the Law," children can have "strong opinions" of their own. Why should the law listen only to their elders?

Clinton devotes a good deal of attention to the case of *Wisconsin v. Yoder* (1972), in which the U.S. Supreme Court—unwisely, in her view—allowed three Amish families to keep their children out of high school, notwithstanding a state law compelling attendance. Justice William O. Douglas, dissenting in part, noted that no one had asked two of the children affected by the decision whether they shared their parents' religious views. "[These] children should be entitled to be heard," Douglas wrote in his dissent. Their judgment had to be consulted if they were to become "masters of their own destiny." Indeed, their judgment should count more heavily than that of their parents. A child who aspired to become "a pianist or an astronaut or an oceanographer" would have to "break from the Amish tradition." If children were "harnessed to the Amish way of life," their lives were likely to be "stunted and deformed."

According to Clinton, this "ground-breaking view of the case" lays down principles that ought to guide family policy. Instead of assuming that parents know best, she argues, we should let children speak for themselves. We should recognize their competence to make their own decisions. We should treat them as rights-bearing individuals, not as members of families. We should provide them with legal counsel and the other privileges and immunities enjoyed by citizens. In the *Gault* case (1967), the Supreme Court accepted these principles in theory when it ruled that "neither the Four-

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teenth Amendment nor the Bill of Rights is for adults alone," but the Court has since applied them too cautiously for Clinton's taste. It has refused to require jury trials in juvenile court, to outlaw corporal punishment in schools, or to acknowledge a "fundamental, personal right to education," as Clinton puts it in "Children Under the Law." The Court has resisted the logic of *Gault* and thus held back the children's cause.

In a society that finds appeals to individual rights irresistible, Clinton's position looks attractive at first. Who could object to principles that are designed to protect individuals against arbitrary authority—against the state as well as the family? A careful reading of Clinton's argument, however, shows that she objects to the family much more than she objects to the state. "Unless we have a family policy in this country," she maintains in "Children's Rights: A Legal Perspective," "then whatever we do on behalf of children in relation to their families will continue to be band-aid medicine, lacking clear objectives and subject to great abuse." She criticizes the "decision maker's extreme reluctance to interrupt family life" and calls for a "theory that adequately explains the state's appropriate role in child rearing." Although she warns that the state's authority must be "exercised only in warranted cases," her writings leave the unmistakable impression that it is the family that holds children back, the state that sets them free. The family tries to "harness" them, as Douglas put it, to a narrow, stultifying way of life. The state, on the other hand, gives them educational opportunities that broaden their horizons, integrate them into the exciting culture of modernity, and make it possible for them to become astronauts or oceanographers.

In Clinton's view, formal schooling needs to be supplemented with a range of other programs that will prepare underprivileged children to take advantage of educational opportunities, provide them with proper health care, make sure they get a proper diet, and generally minister to their elaborate and systematically studied requirements. No less than the child savers, she puts her faith in "pro-

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Introduction by Henry Louis Gates, Jr. —

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What are the facts?

What is the purpose of the loan guarantees? For many years, it has been one of the major purposes of U.S. policy to persuade the former Soviet Union to allow free emigration of its citizens. Now that this lofty goal has finally been attained, the Jews of the country, its

most endangered minority, have opted in large numbers to leave. A good number have chosen to come to the United States. The great majority have chosen Israel as their new homeland. So far, about 400,000 have come; a total of 1 million to 1.5 million are expected over the next five years.

Israel has a population of 4 or 5 million. The expected immigration is equivalent to an increase of 50-75 million in the United States—more than the population of our three or four most populous states. These people arrive virtually penniless in Israel. All have to be fed, clothed, housed, educated, jobs have to be found, and infrastructure has to be created to accommodate this huge influx. The United States can take great pride in being an active participant in this humanitarian endeavor.

What will the loan guarantees cost the United States? Misinformation about the loan guarantees abounds. Israel gets guarantees—not loans or grants from the United States. It is equivalent to co-sign-

ing a note for a friend. No money will be transferred to Israel from the U.S. Treasury. There will be some "scoring." But the ultimate cost to the United States will be zero.

In its 40-year history, Israel has never defaulted on a loan. The credit guarantees will not increase the U.S. deficit, nor will they affect domestic programs in any way. The United States routinely grants such

"The loan guarantees will not cost us anything...they will be of great economic benefit to the United States."

loan guarantees. Iraq was granted a \$5 billion guarantee just a few months before the outbreak of the Gulf War; about \$600 billion in domestic guarantees and direct loans are expected to be granted by the U.S. within the next five years.

What's in it for the United States? The loan guarantees are essentially a humanitarian undertaking. But there will be substantial tangible benefits for the United States. Economic activity in Israel, as a result of this immigration, is projected to cause a surge of \$170 billion in imports over the next five years, at least \$30 billion of which is projected to be purchased in the United States. In addition, the U.S. taxpayer will benefit to the tune of several billion dollars from the servicing of the debt, most of which will be placed with U.S. banks. About 70% of the approximately 250,000 housing units required to shelter the immigrants will be purchased in the United States, at a cost of not less than \$5 billion. All of this will create tens of thousands of new U.S. jobs.

Israel's record as a major non-Nato ally is unique in a world of uncertainty and shifting alliances. Our national interest is served in strengthening this ally and in assisting it in the absorption of what may be as many as a million new immigrants. These immigrants will further strengthen the only democracy in the Middle East—politically, economically and militarily, and thus make even more valuable this outpost of Western civilization in an area in which the United States has such a vital stake. The United States can take great credit for the exodus of Jews from the former Soviet Union to Israel. We have assumed the moral obligation to see that migration succeed. The loan guarantees will not cost us anything; on the contrary, they will be of great economic benefit to the United States.

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grams." The proliferation of children's programs—Head Start, day care, prenatal care, maternal care, baby clinics, programs for assessing standards in public schools, immunization programs, child-development programs—serves her as an infallible index of progress.

She opposes bureaucratic intervention, then, only when it becomes explicitly paternalistic. Her position amounts to a defense of bureaucracy disguised as a defense of individual autonomy. She has no objection to bureaucratic control of children as long as it preserves the appearance of treating them as if they were adults. Instead of the paternalism of the family—which at least makes no pretense of being anything else—she gives us a make-believe world in which everybody pretends that distinctions between children and adults have no basis in fact, or at least defy generalization. Exceptions to the presumption of children's legal competence, Clinton asserts in "Children Under the Law," can be justified only by "supportable findings" about the "empirical differences" among children. "The difference between a rebuttable presumption of incompetency," she reasons, "and a presumption of competency is that the former places the burden of proof on children and their allies." By shifting the burden of proof against bureaucratic intervention to parents, the abolition of minority status, like "the abolition of slavery and the emancipation of married women," would have the desirable effect that "children, like other persons," would be presumed "capable of exercising rights and assuming responsibilities until it is proven otherwise."

Clinton wants to protect these children not only against their parents but also against the state, yet the policy she recommends would inevitably strengthen the hand of children's self-appointed "allies." Legal rights are an indispensable safeguard against intrusive state power, but they are not the only safeguard or even the most effective. Indeed, they are not effective at all when it comes to the needs of children. The best defense against the state is the informal authority exercised by the family, the neighborhood, the church, the labor union, and all

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appears frequently in her recent writings and speeches, comes from Israel, where the authorities have set out to teach mothers how to encourage "more critical, analytical thinking" in their offspring. The Israeli program is aimed at "Jewish immigrants from North African countries, many of whom," as she explains in her address "A Bridge Over the Mississippi," came from "very depressed circumstances, were uneducated, had lived a very traditional, almost biblical, life." **These mothers do not understand the importance of talking to their children; and "you will find" the same deficiency, Clinton insists, "in many poor homes in our country."** It is no wonder to her that "our young children today don't have adequate language skills," when their **parents fail to grasp the elementary point that child rearing requires communication.**

Criticism of **parental incompetence** has always been the child savers' stock-in-trade. Such arguments played an important part in the progressive movement, which laid the foundations of the welfare state. Then, as now, criticism was **directed against allegedly benighted, backward peoples who clung to their ancestral ways and resisted assimilation into the dominant culture of the Enlightenment.**

The urban masses, said Washington Gladden, an early exponent of the social gospel, had to be "civilized, educated, inspired with new ideas." Florence Kelley, the child saver par excellence, complained that a typical Italian girl, even when exposed to years of schooling, forgot everything she learned as soon as she married, and proceeded to bring up "in the most unreasonable manner the large family which continues to the second generation in the Italian colonies. She will feed her infants bananas, bologna, beer and coffee; and many of these potential native citizens will perish during their first year, poisoned by the hopeless ignorance of their school-bred mother." **Then it was beer and bananas that came under reformers' censure; today it is a failure of communication skills and, as Hillary Clinton is fond of saying, low "self-esteem."**

The therapeutic campaign against backward, "traditional" families has a long history, which alone should make

us skeptical about the desirability of another campaign along the same lines. After years of bureaucratic experimentation, we are entitled to wonder whether a "comprehensive child care program"—Clinton's panacea—is what the country really needs. Previous efforts to rescue children from "undesirable" families have produced very little in the way of desirable results. A negative verdict on those efforts hardly rests on a "rush to judgment." It rests on experience stretching back to the beginning of the century.

The complaint that the United States has no family policy ignores the policy that has been in operation for a long time, the thrust of which is to transfer control of children from the local community to state-devised institutions designed specifically for that purpose. As Jane Jacobs pointed out more than thirty years ago, a vast amount of "normal, casual manpower for child rearing" is wasted when **reionners seek to replace informal mechanisms of social control with professional supervision.** Healthy neighborhoods, Jacobs demonstrated, teach children a lesson that cannot be taught by educators or professional caretakers: namely, that "people must take a modicum of public responsibility for each other even if they have no ties to each other." Neighborhoods encourage "casual public trust," Jacobs wrote in *The Death and Life of Great American Cities*. When the corner grocer or the locksmith scolds a child for running into the street, the child learns something that "people hired to look after children cannot teach, because the essence of this responsibility is that you do it without being hired."

Ultimately, bureaucratic interference with the family has served not to "empower" children but to weaken the institutions that stand between the child and the greatest threat to the family, our consumer culture. Many parents now see themselves pitted against consumerism "in a struggle for the hearts and minds of their own children," as Barbara Whitehead reports in a publication issued by the Institute for American Values. It is a struggle they seem to be losing. They

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those other intermediary institutions that make it possible for communities to educate, discipline, and take care of themselves without calling on the state. The growth of the welfare state weakens those institutions, and reformers then cite the resulting disarray in order to justify another dose of the same medicine. Far from encouraging individual autonomy, however, the welfare state turns citizens into clients. Clinton thinks it would be a good thing if young people could "organize themselves into a self-interested constituency" like other victims of discrimination. She does not seem to see that dependence on the state is no better than any other form of dependence—worse, in the case of those who are necessarily dependent by virtue of their inexperience.

The most compelling argument against excluding any group from full citizenship is that people learn responsibility only by exercising it. But this argument breaks down in the case of children, who need a long period of tutelage before they are able to take care of themselves. Even John Stuart Mill, who based his political philosophy on the principle that individuals know their own interests and did not hesitate to draw the logical consequence in the case of women, never thought to extend legal rights to children. His common sense told him that it would be quite inappropriate to treat children as if they were adults before the law.

The fiction of legal equality for children ignores the obvious disparities of power and experience that give adults an overwhelming advantage in dealing with children, especially when they come in the seductive guise of liberators. When outsiders side with the child against parental authority, they gain his confidence only to abuse it for their own purposes. Whether these purposes are malignant or benign, commercial or philanthropic, makes very little difference in the end. In either case, the child becomes an unwitting instrument, a means to someone else's ends—selling sneakers, say, or freeing children from a way of life that "stunts" and "deforms" their growth. Parental authority, even

though it is obviously open to terrible abuse, at least acknowledges children's weakness and vulnerability. The notion that children are fully capable of speaking for themselves, on the other hand, makes it possible for ventriloquists to speak through them and thus to disguise their own objectives as the child's.

The social conventions that still guide public policy, even after decades of bureaucratic expansion, assume that parents are competent to raise their children and that the burden of proof lies with those who argue otherwise. But these are the very conventions that Clinton seeks to overturn. In her writings she dismisses them variously as the product of "romanticism about the family," "cherished, albeit fantasized, family values," "recalcitrance" in the face of progress. In "Children's Policies," in which she reviews *The Children's Cause*, a book by Gilbert Steiner published by the Brookings Institution, Clinton criticizes its "pre-disposition toward nonintervention" in family life. Steiner puts a "special burden of proof" on policymakers who demand programs for children that compete with the family. Among the innumerable programs already in existence, only the school lunch program, he thinks, deserves to be considered an unqualified success. Clinton deplores the tendency to judge children's programs "more quickly and harshly than other government programs." They deserve "more time to be tested." The "rush to judgment" leads to premature "disillusionment." We should not be deterred from a "comprehensive child care program," in other words, merely because the existing programs show so little evidence of success.

In order to "overcome the non interventionist impulse," to rise above the "reluctance to interrupt family life," to "undermine the consensus which perpetuates" that reluctance, and to promote a "new social attitude," Clinton asks us to believe that many parents are utterly unqualified to raise children. Her effort to "reverse the presumption of incompetency" in the child requires us to reverse the presumption of competency in the parent. Her favorite example of a successful program for children, one that

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cannot compete with the television set and the peer group, which teach children to want more than is good for them and to acquire a precocious taste for sex, drugs, and excitement. "Parents talk about the pressure on their grade-school children to buy \$65 Reeboks and \$45 stone-washed jeans," Whitehead writes. They are shocked by plans to distribute condoms in the public schools; even if they concede the need for precautions of this kind, they want to know what has brought our society to such a pass.

The culture of consumption, with its unending propaganda of commodities, seduces children at an early age, makes them impatient with parental discipline, and supports their resistance to anyone who interferes with their pleasure. Not only does it corrupt children directly; it undermines the family by constantly raising the definition of a middle-class standard of living. Parents have to work longer and longer hours in order to acquire consumer goods that formerly would have been considered luxuries but are now deemed essential to a good life. In the last twenty years, Americans have added the equivalent of a whole month to the working year, according to Juliet Schor in *The Overworked American*. At a time when their children need guidance more than ever, parents find most of their attention monopolized by the demands of the job.

Yet these parents, perhaps the most conservative group in the country, are poorly served by a conservatism, so called, that begins and ends with a celebration of the free market. Republicans may hate what is happening to our children, but their commitment to the culture of acquisitive individualism makes them reluctant to trace the problem to its source. They glorify the man on the make, the smart operator who stops at nothing in the pursuit of wealth, and then wonder why ghetto children steal and hustle instead of applying themselves to their homework.

The Republicans' unwillingness to indict the market in the collapse of the family gives Democrats a chance to address an issue of fundamental importance and at the same time to retrieve their party's declining fortunes. By looking at the "children's cause" through the eyes of hard-

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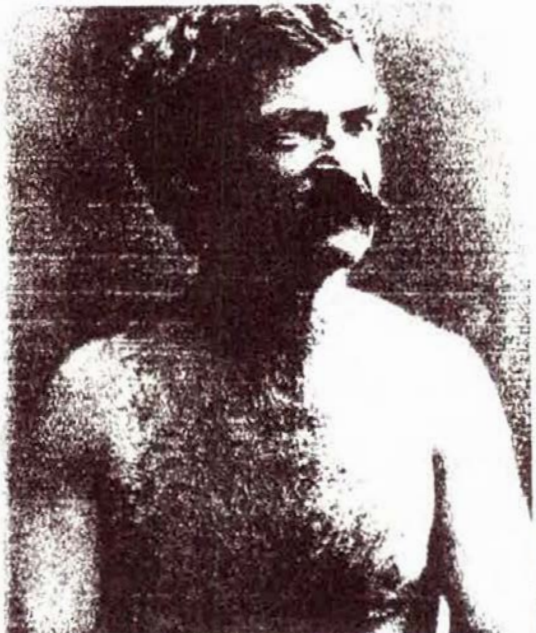
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*I formerly always called dark matter the empty space, undetected clouds of dust and gas, or other components of the universe that we cannot yet observe. B.D.K.

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pressed parents, they can make "family values" more than an empty phrase. They can begin to heal racial divisions by showing that when it comes to children, all families want the same thing: protection from an intrusive commercialism that corrupts the young and undermines parental authority. The plight of a black mother on welfare, whose children confront the culture of immediate gratification in the supremely menacing form of the drugs-crime nexus, is only an exaggerated version of the difficulties faced by parents in a working-class or lower-middle-class neighborhood or for that matter in an upper-middle-class suburb. What they all need is a protected space for their children to grow up in.

Recognition of this common need would do more to overcome class and racial barriers than the tiresome Democratic rhetoric of "compassion"—a word that now reeks of condescension. If the Democrats expect to provide the moral leadership that is so badly needed, they will have to learn that respect is worth more than pity and that respect includes the demand that people live up to impersonal standards instead of making excuses for themselves. They will have to abandon the welfare state in favor of policies designed to strengthen families and neighborhoods. They will have to articulate a critique of the market that does not invite the objection that the alternative—comprehensive social planning by a "new class" of "social engineers"—is even worse.

Eager to recapture the family issue from their opponents, the Democrats think it is enough for Bill and Hillary Clinton to rhapsodize about how much they owe to their mothers. Like so much in the Clinton campaign, this appeal to the oldest of political clichés—I owe it all to Mom—looks too calculating to carry much conviction. Indeed, it invites the suspicion not just of shrewd calculation but of shameless cynicism when it comes from people whose contempt for "traditional" families is part of the public record.

The Clinton campaign has sought to distance itself from this record—from Hillary Clinton's "old" writings about the family. But the Clinton-

Gore ticket has also distanced itself from Tipper Gore's fight to protect children from exposure to commercialized sex and rock and roll lyrics—a campaign that has spoken directly to the concerns of parents with young children. Shortsightedly, the Democrats want to stick to the "bread and butter, kitchen-table issues," as Democratic National Committee chairman Ron Brown calls them. But the commercialized culture that forces children to grow up too quickly may turn out to be the

most important kitchen-table issue of all.

The Democrats have talked a great deal during the campaign about reviving hope, but they never get beyond economics: the loss of jobs, the threat of foreign competition, the erosion of the country's manufacturing base. No one should dream of denying the importance of these issues, but economic decline does not fully account for Americans' loss of confidence in the future. The country has lost all sense of direction and purpose, and the vacuum of moral leadership, I think, troubles people even more deeply than the collapse of the American economy. Even people not directly affected by economic decline worry about the hard, cynical world their children are growing up into. They do not want to hear any more promises, however. Their children hear too many promises as it is, not just from politicians but from educators, advertisers, and anyone else with something to sell. Their children are exposed from an early age to the promise of glamour and excitement, the promise of effortless achievement, the promise of sudden fame, the promise of drug-induced euphoria, the promise of money. Our culture has been corrupted by promises.

When people complain about a loss of "values," they are not referring to a declining rate of economic growth. They are asking whether those who set the tone of American life remember what makes life worth living. They wonder why no one in public life is willing to consider this question. They long for leaders who can offer their children something to live for—the real meaning of hope.

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What Hillary Clinton Really Said

Did Hillary Clinton really write an article that says marriage is like slavery? Did she really say that children should be able to sue their parents over who takes out the garbage? More generally, does she really want government empowered to run roughshod over families? In fact, she said none of these things. I have read all of her published writings on the law relating to children, and her statements bear little resemblance to the campaign rhetoric used to describe them.

Nothing in Mrs. Clinton's publications suggests that she is anti-family or out of the mainstream on children's issues. If political motivations were different, she

Rule of Law

By Douglas Laycock

might be attacked from the left instead of the right. One of her proposals was that states should be much tougher on juvenile delinquents, because "rights are extended on a premise of individual responsibility." (I describe these publications in the past tense, because they all date from the 1970s.)

Almost everyone agrees that the state should protect children from abuse and neglect. The problems are how to define abuse and neglect, and how to identify it. It is very hard for the state to know what is going on inside a family, and the costs of error are very high. Children mistakenly left with their parents may be murdered or maimed, but if children are removed from their parents, both children and parents will suffer emotional pain and loss of basic human rights.

There is no simple solution to these difficulties, and Mrs. Clinton did not purport to offer one. She said the state

should do more to assist intact families, so that it would not so often have to decide whether to remove a child from his family. She proposed to formalize the practice of considering the child's own wishes in cases where the child is competent to express them; most judges and social workers already did that, and state laws required it in many contexts.

Perhaps most important, she proposed to tighten and formalize the standards for coercive state intervention into family life. She argued that "state interference with family privacy should be minimized because of the state's unwillingness, or inability, to care for children as well as most families do." She insisted on "standards that limit the amount of discretion vested in decision-makers."

In many states at the time she wrote, the formal standard for judicial intervention in the parent-child relationship was "the best interest of the child." She rejected that standard because it gave too much discretion to the state; it became "a rationalization by decision-makers justifying their own judgments about a child's future." Five years later, the Supreme Court unanimously said that it too would reject the best-interest standard.

Mrs. Clinton opposed "the various bills of rights" for children proposed by activists in the children's rights movement. These "manifestos" would create "socio-psychological rights" with "vague enforcement guidelines." More generally, she emphasized "the limited ability of the legal system to prescribe and enforce the quality of social arrangements."

Of course it is easier to see the need for objective standards than to formulate them. Mrs. Clinton suggested two standards.

At one point she suggested a purely medical standard: "Parental behavior that does not result in medically diagnosable

harm to a child should not be allowed to trigger intervention, however offensive that behavior may be to the community." In another passage, discussing compulsory education laws, she went beyond the medical model to recognize any harm that is both irreversible and serious. But "if the consequences seem reversible or insubstantial, the assumption that the parent knows best should probably continue to govern."

The closest she came to saying that a child should be able to sue his parents was her suggestion that "a competent child should be permitted to assert his or her own interests." But legally assertible "interests" would be defined by her proposed standards for intervention. That is, the competent child could assert his interests in protection from medically diagnosable or serious and irreversible harm inflicted by his parents. Any lesser interest would not be a ground for coercive state intervention in a family.

Assuming Mrs. Clinton meant to permit children to sue without adult assistance, that would be a change more of form than of substance. Children can already sue their parents, but they must do so in the name of an adult — any interested adult in some states, representatives of social service agencies in others. Judges commonly appoint independent counsel for children when that appears necessary to protect their interests. As a practical matter, a child needs adult assistance to proceed effectively in court, and it makes little difference whether the suit is formally brought in the name of the child or in the name of the child's adult representative.

Mrs. Clinton did compare marriage to slavery, but the comparison was historical and in context entirely uncontroversial. She simply listed legal institutions in which the legal rights of some persons were wholly entrusted to other persons.

Through the mid-19th century, married women were legally subordinate to their husbands. In this one respect, their status was similar to that of slaves and children. Mrs. Clinton's comparison went no further; she did not even hint that most women were treated like most slaves. And she immediately noted that the legal dependency of children is largely explained by their "physical, intellectual, and psychological incapacities."

The modern relevance of this comparison was left implicit. I take her point to have been that good intentions are not enough, that legal regimes to protect dependent persons may harm them instead. The historical examples were simply one more reason to re-examine our law and institutions for protecting children, to see if their original good intentions could be better achieved in practice.

We are long past the time when parents had absolute power over children. There is broad political consensus for child labor laws and for mandatory vaccinations and health checks at the start of the school year. There is consensus for compulsory education, despite deep disagreement about the respective roles of public, private and home schools. And there is overwhelming consensus for state protection against abuse and neglect.

The question is no longer whether the state should sometimes intervene in family life, but when and how and under what standards. Mrs. Clinton's proposed answers to those questions are thoughtful and balanced. Reasonable people can agree or disagree, especially with respect to the inevitable difficulties of implementation. But the charge that she is anti-family is a distortion without basis in her writings.

Mr. Laycock is a law professor at the University of Texas, Austin.

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A SPECIAL ISSUE — PART I

The Rights of Children

WALTER F. MONDALE



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LESTER GRINSPOON and SUSAN B. SINGER

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Children Under the Law

HILLARY RODHAM

Children's Defense Fund

The author examines the changing status of children under the law. Traditionally, the law has reflected a social consensus that children's best interests are synonymous with those of their parents, except under the few circumstances where the state is authorized to intervene in family life under the doctrine of parens patriae. Little consideration has been given to the substantive and procedural rights of children as a discrete interest group. At present, law reform is moving to change children's legal status in two ways: by extending more adult rights to children and by recognizing certain unique needs and interests of children as legally enforceable rights. Ms. Rodham summarizes recent Supreme Court decisions which will influence changes of both kinds, and suggests specific directions reform might take.

The phrase "children's rights" is a slogan in search of definition. Invoked to support such disparate causes as world peace, constitutional guarantees for delinquents, affection for infants, and lowering the voting age, it does not yet reflect any coherent doctrine regarding the status of children as political beings. Asserting that children are entitled to rights and enumerating their needs does not clarify the difficult issues surrounding children's legal status. These issues of family autonomy and privacy, state responsibility, and children's independence are complex, but they determine how children are treated by the nation's legislatures, courts, and administrative agencies.

This paper briefly sets out the legal conception of children's status underlying American public policy and case law, and suggests various ways in which this conception needs major revision. There are important new themes emerging in the

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interpretation of children's status under the law, and several new directions which future litigation and legislation in the interest of children might take. Of particular interest is the trend toward recognizing children's needs and interests as rights under the law.

Attributing a right to a person may involve describing an existing relationship or prescribing the formation of a new one. The prescriptive aspect of right represents a moral judgment about how particular interests should be ordered so that certain ones will be given priority over others. The recent literature on children's rights is filled with such prescriptions, based on arguments from political, legal, and moral philosophy. Rarely, however, do the writers mention the important differences between an existing legal right and other claims of right. A legal right is an enforceable claim to the possession of property or authority, or to the enjoyment of privileges or immunities.¹ Moral prescriptions and political demands, on the other hand, are not formally recognized by the law and have the status of needs or interests, not rights. Adult Americans enjoy the legal rights set forth in the Constitution, statutes, regulations, and the common law of the federal and state governments.² Child citizens, although their needs and interests may be greater than those of adults, have far fewer legal rights (and duties). Indeed, the special needs and interests which distinguish them from adults have served as the basis for not granting them rights and duties, and for entrusting enforcement of the few rights they have to institutional decision-makers.

Current Legal Status of Children

"Children" is sometimes a term of legal classification, but it is more common to find the legal categories of "infancy" or "minority" describing people under twenty-one, or under eighteen for some purposes. The status of infancy, or minority, large-

¹ Defining "right" apart from the general usage which the term enjoys is difficult. The best attempt to unravel the jurisprudence of rights and to elucidate the various meanings which it has acquired in the law is Wesley Newcomb Hohfeld's analysis in *Fundamental Legal Conceptions* (New Haven: Yale University Press, 1919). The definition used here is drawn from the Compact Edition of *Oxford English Dictionary*, v. II, pp. 2546-2547 (New York: Oxford University Press, 1971).

² As one commentator described adult rights: "... today liberty has been extended so far as the law alone may extend it to all adults, white or black, male or female, rich or poor, intelligent or stupid; subordinate relations to private persons must be consensual relations and probably cannot, under the Thirteenth Amendment and common law limitations on the freedom to contract, be total." Andrew Jay Kleinfeld, "The Balance of Power Among Infants, Their Parents and the State, Part II," *Family Law Quarterly*, 4 (December 1970), 409, 410.

ly determines the rights and duties of a child before the law regardless of his or her actual age or particular circumstances. Justifications for such a broad, chronologically determined classification rely on the physical and intellectual differences between adults and children.

There is obviously some sense to this rationale except that the dividing point at twenty-one or eighteen years is artificial and simplistic; it obscures the dramatic differences among children of different ages and the striking similarities between older children and adults. The capacities and the needs of a child of six months differ substantially from those of a child of six or sixteen years.

In eighteenth century English common law, the term children's rights would have been a nonsequitur. Children were regarded as chattels of the family and wards of the state, with no recognized political character or power and few legal rights. Blackstone wrote little about children's rights, instead stressing the duties owed by "prized possessions" to their fathers.³ Early American courts accepted this view.⁴ In this country children have long had certain rights resulting from their attainment of some other legal status, such as parties injured by tortfeasors, legatees under wills, or intestate successors. Even these rights, however, can be exercised only vicariously through adult representatives. Older children have a few additional legal rights, granted by statutes which reflect some legal recognition of their increased competence. Examples include the right to drive a motor vehicle, the right to drop out of school, the right to vote, the right to work, and the right to marry (although before a certain age marriage can be voided in the absence of parental consent). The doctrines of emancipation and implied emancipation release a child from parental control following his or her marriage, after entering military service, or after achieving economic independence or meeting another statutory definition of maturity. Finally, the Supreme Court has held on a few occasions, and with greater frequency in recent years, that the Constitution requires recognition of particular rights of children, among them the right to certain procedural protections in juvenile courts,⁵ the right to refuse to salute the flag in the

³ William Blackstone, *Commentaries on the Laws of England*, Vol. 1, 12th ed. (London: A. Strahan and W. Wordfall for T. Caddell, 1700-1795).

⁴ See, e.g., James Kent, *Commentaries on American Law*, Vol. 1, 14th ed. (Boston: Little Brown, O. W. Holmes ed., 1873).

⁵ *Haley v. Ohio*, 352 US 596 (1956) (protection of Fourteenth Amendment against coerced confession extended to fifteen year old boy in state criminal trial); *Kent v. U.S.*, 383 US 541 (1966) (waiver from juvenile court to adult court has to meet minimum requirements of due process); *In re Gault*, 387 US 1 (1967) (adult procedural protections in criminal trial extended to delinquency proceedings); *In re Winship*, 397 US 358 (1970) (quantum of proof necessary for conviction in juvenile court raised to reasonable doubt standard).

public schools when doing so would violate religious beliefs,⁶ and the right to don a black armband to protest the Vietnam war.⁷

Beyond such instances, the law's concern with children has been confined to those occasions when the state may limit parental control in the interest of necessary protection or justifiable punishment of the child, or in the name of some overriding state interest. The theory of benevolent intrusion into families by the state seems to embody a contradiction. On the one hand, it operates within the context of a powerful social consensus that the proper relationship between parents and the state in their joint exercise of control over a child's life favors parental dominance. On the other hand, the doctrine of *parens patriae* has long justified state interference with parental prerogatives and even termination of all parental rights.

The social consensus that forms the first half of this apparent contradiction includes the following assumptions: a) America is a familial, child-centered society in which parents are responsible for their own children and have primary control over them; b) the community of adults, usually represented by the state, will not assume responsibility for the child unless the parents are unable to do so or will not do so, or until the child breaks a law; c) because ours is a child-loving society, non-parents and other adults representing the state want to and will do what is in the child's "best interests"; and d) children need not or should not be participants with the family and the state in making decisions which affect their lives. The tenets of this consensus, legitimized in the rules of law governing children's affairs, have represented outer limits beyond which child-oriented reforms cannot be effected. The other half of the apparent contradiction, however, involves regular challenges to family authority by state representatives. Certain social norms are enforced at the expense of family privacy, in the name of a child's best interests.

The most striking characteristic of children's law is the large degree of discretion permitted decision-makers in enforcing community norms. When intervention must occur, bureaucratic discretion replaces familial discretion. The statutes authorizing state intervention implicitly accept that the state's representative will know what children need and should not be straight-jacketed by legal technicalities. For example, laws against child neglect or abuse represent a community's decision to intervene in a parent-child relationship. Although the legislative decision favoring intervention may be widely supported, it proves difficult to specify the condi-

⁶ *Board of Education v. Barnette*, 319 US 624 (1943).

⁷ *Tinker v. Des Moines School District*, 395 US 503 (1969).

tions under which it should occur. Our pluralistic beliefs about child-rearing do not lead to a uniform interpretation of the best interests standard. The allowance of some degree of discretion is necessary for any legal system to operate, especially one presumed to deal with the specialized needs of its subjects. When few standards guide the exercise of discretion, however, and when there rarely are careful reviews of the judgments it produces, the legal system will not only be likely to treat individuals capriciously, but will also subject members of social minorities to the prejudices and beliefs of the dominant sector of the community.⁸ This is especially true in children's law, where reservations against state intervention are most easily overcome in cases involving poor, non-white, and unconventional families. Children of these families are perceived as bearers of the sins and disabilities of their fathers, and as burdens which an "enlightened" society must bear." This attitude is especially prominent in regard to the labelling of certain behavior as delinquent. In addition to acts which are criminal for adults (e.g. armed robbery), children may be accused of delinquency for misbehavior that is not criminal for adults. The so-called status offenses, incorrigibility, truancy, running away, sexual precociousness, represent a confused mixture of social control and preventive care that has resulted in the confinement of thousands of children for the crime of having trouble growing up.

In practice, therefore, powerlessness of a family, because of political, psychological, or economic reasons, renders it susceptible to benevolent intrusion. Unfortunately, the state has not proved an adequate substitute parent in many of the cases where intrusion has resulted in the removal of a child from his home. In many instances, states have been guilty of neglect according to their own statutory standards. Fears about arbitrary and harmful state intervention have led to increased rights of parents and custodians so that they are now entitled to certain procedural guarantees before the state may remove their children.¹⁰ Only recently, however, has attention focused on the rights of the children who are the subjects of state intervention, both against their parents and against the state when it assumes the parenting responsibility. This attention is struggling for legal recognition against the

⁸ The amount of discretion necessary in a legal system handling children's needs is very difficult to determine, especially because the options for the exercise of any discretion are so limited by inadequate resources. But the abuses of discretion are well documented. See, e.g. Sanford N. Katz, *When Parents Fail* (Boston: Beacon Press, 1971).

⁹ See, e.g., Ten Broek, "California's Dual System of Family Law: Its Origins, Development and Present State," *Stanford Law Review*, 16 (1964), 257; Anthony Platt, *The Child Savers* (Chicago: University of Chicago Press, 1961), pp. 176-181.

¹⁰ See, e.g., *Stanley v. Illinois*, 405 US 645 (1972).

prevailing assumption in children's law that a child's interests are identical to those of his parents. Even when a child cannot or will not recognize the identity of his interests with his parents', the law ordinarily does so, confident that children usually do not know what is best for themselves. Necessarily, the law must presume that parents or the state as parent do know what is best. The force of this position is weakened by the fact that adults consistently refuse to support programs designed to meet the needs and interests of children either when they are still in their homes or when they are in the state's charge. As a recent history of the White House Conference on Children points out, this country has a "cultural recalcitrance toward assuming public responsibility for children's needs."¹¹

Rewriting laws has not substantially altered the long dominant consensus or dissipated public recalcitrance. The thrust of most reforms, amply supported by demonstrations of children's needs has been to persuade adult society to treat children better, but has not changed the position of children within society or made them capable of securing such treatment for themselves.¹²

Claims of Right

The needs and interests of a powerless individual must be asserted as rights if they are to be considered and eventually accepted as enforceable claims against other persons or institutions. The advocacy of rights for children, coming as it does on the heels of adult rights movements, highlights the political nature of questions about children's status. That children's issues are political may seem obvious. Political theorists from Plato onward have sought to specify proper child-rearing practices and have discussed the proper position of children within society, often coming to conclusions inconsistent with the prevailing American ones.¹³ In the United States, the problems of children have usually been explained without any consideration of children's proper political status. Accordingly, the obstructionist role of the unstated consensus and the laws reflecting it has seldom been appreci-

¹¹ Shelley Kessler, unpublished paper on the past White House Conferences on Children (New Haven, Conn.: Carnegie Council on Children, 1972).

¹² For histories of various child-saving reforms, see Platt, *The Child Savers*; Robert M. Mennell, *Thorns and Thistles* (Hanover, N.H.: University Press of New England, 1973); Robert J. Pickett, *House of Refuge* (Syracuse: Syracuse University Press, 1969); Sanford Fox, "Juvenile Justice Reform: An Historical Perspective," *Stanford Law Review*, 22 (1970), 1187.

¹³ Plato, *The Republic*, 235-264 (New York: Oxford University Press, 1945); Aristotle, *Politics*, 32-33, 316 (Sherman ed.; New York: Oxford University Press, 1962); J. Locke, *Treatise on Civil Government*, 34-50 (Sherman ed.; New York and London: Appleton Century, 1937); J. S. Mill, *On Liberty* (Chicago: Henry Regnery, 1955).

ated. The pretense that children's issues are somehow above or beyond politics endures and is reinforced by the belief that families are private, non-political units whose interests subsume those of children.¹⁴ There is also an abiding belief that any official's failure to do what is best by a child is the exception, not the rule, and is due solely to occasional errors of judgment.¹⁵ Moreover, nothing countervails against this pattern, since children are almost powerless to articulate their own interests or to organize themselves into a self-interested constituency and adults allied with them have seldom exerted an appreciable influence within the political system.

The basic rationale for depriving people of rights in a dependency relationship is that certain individuals are incapable or undeserving of the right to take care of themselves and consequently need social institutions specifically designed to safeguard their position. It is presumed that under the circumstances society is doing what is best for the individuals. Along with the family, past and present examples of such arrangements include marriage, slavery, and the Indian reservation system. The relative powerlessness of children makes them uniquely vulnerable to this rationale. Except for the institutionalized, who live in a state of enforced childishness, no other group is so totally dependent for its well-being on choices made by others. Obviously this dependency can be explained to a significant degree by the physical, intellectual, and psychological incapacities of (some) children which render them weaker than (some) older persons. But the phenomenon must also be seen as part of the organization and ideology of the political system itself.¹⁶ Lacking even the basic power to vote, children are not able to exercise normal constituency powers, articulating self-interests to politicians and working toward specific goals. Young children in particular are probably not capable of organizing themselves into a political group; they must always be represented either by their parents or by established governmental or community groups organized to lobby, litigate, and exhort on their behalf. The causes of younger children have not fared well, partly because these representatives have loyalties diluted by conflicts between children's rights and their own institutional and professional goals. Older children have organized themselves politically with some success, especially on the issues of the eigh-

¹⁴ For a discussion of the reasons why the family, as one of society's private units, is not properly a subject for political analysis, see Sheldon Wolin, *Politics and Vision* (Boston: Little Brown, 1960).

¹⁵ For the argument that the exception is the rule, see Justine Wise Polier, "Problems Involving Family and Child," *Columbia Law Review*, 66 (1966), 305, 306.

¹⁶ Dean Roscoe Pound suggested in a 1916 article, "Individual Interests in the Domestic Relations," *Michigan Law Review*, 14 (1916), 177, 186-87, that the law deprived children of their bargaining power so as to promote social values, like family unity.

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teen-year-old vote, civil liberties of school students, and anti-war activities, but they too have relied heavily on the support of adults. "Successful" reforms on behalf of children—the establishment of juvenile courts, the institution of public schooling, the passage of child labor laws—were effected only after vigorous political struggles.

While these legal reforms may now seem, in the light of revisionist histories,¹⁷ to have been catalyzed by questionable motives, they did give children certain legally enforceable rights not previously held. Moreover, these reforms signalled some change in general public attitudes about children.

Whenever reforms have been enacted, however, the rights they provide are those which the state decides are in the best interests of the public and the child. Age and ability differences have not been entirely ignored, but the use of chronological dividing lines to mark legal distinctions has continued. Nor has the child been given any choice in the exercise of his rights; they are compulsory, not susceptible to waiver. Thus all children below a certain age are forbidden to work, regardless of individual desire, aptitude, and need.¹⁸ Similarly, all children below a certain age are required to attend school.¹⁹ Finally, the institutions created to embody and enforce these rights are endowed with essentially unchecked discretion. Therefore, even though special juvenile proceedings, exemption from work, and compulsory attendance are all rights in the strict sense of legally enforceable claims against the state or third persons, neither their rationales nor their implementation provide models for the rights movement.

Present claims of right follow two general approaches: advocating the extension of adult rights to children, and seeking legally enforceable recognition of children's special needs and interests. The first approach is exemplified by proposals for extending all the rights of adult criminal defendants to accused delinquents, proposals for empowering children to request medical care without parental consent, and proposals for providing a child with legal representation in any situation where his interests are affected. Such rights may either be extended in the precise form exercised by adults, as in recent legislation lowering the voting age, or they

¹⁷ See footnote 12.

¹⁸ In *Prince v. Massachusetts*, 321 US 158 (1944), the Supreme Court held that the application to Jehovah's Witnesses of a state statute providing that no boy under twelve and girl under eighteen should sell periodicals on the street was constitutional. The child involved in the case, a nine-year-old girl, had been selling religious literature with her guardian; both were members of the sect; the child testified as to her religious beliefs; and the guardian was convicted of violating the state Child Labor Law.

¹⁹ When the United Nations General Assembly promulgated the right of every child to a compulsory education in its *Declaration of the Rights of the Child*, a delegate reportedly asked how a person could be given a right that he was compelled to exercise.

may be tailored to special characteristics of children. Tailoring is found in court decisions holding that children have rights of freedom of expression under the First Amendment while at the same time taking children's immaturity and dependent status into account in defining the scope of those rights. Tailored standards are used to regulate exposure to obscenity,²⁰ authorize medical treatment without parental consent,²¹ and determine circumstances under which a child's contract may be binding.²² Even rights which appear to be extended whole cloth to children, with the exception of the right to vote, do not seem to escape modification in practice.

Modification apparently occurs not only because of the actual physical and psychological differences between children and adults, but also because of the discretion in legal proceedings involving children and because adults finally determine what seems best. These practical constraints on extending adult rights to children are illustrated by the experience of the juvenile court system in guaranteeing the right to counsel, as granted by the Supreme Court in *In re Gault*. A study of the actual implementation of *Gault* revealed:

The views of lawyers about the rights of children differ quite fundamentally from those expressed by the Supreme Court and academics. Lawyers apply different standards to juvenile clients, because they are children, not necessarily because lawyers have been constrained by the courts' welfare orientation. A lawyer typically has conscientious reservations about helping a juvenile to 'beat a case,' and, if a case is won on a technicality, he feels obliged personally to warn his client against the danger of future misconduct.²³

Thus, even the child's own lawyer will likely go beyond the scope of his professional responsibility in determining for himself and for the child where the child's best interests lie.

The second approach to children's rights begins with the belief that even if all adult rights were granted to children and were strictly enforced, this would not

²⁰ See, e.g., *Ginsberg v. New York*, 390 US 629 (1968).

²¹ In many states children are allowed to seek treatment for venereal disease and drug addiction without parental permission or knowledge.

²² Although the general rule remains that a child is not liable for his contracts, it is riddled with exceptions: e.g., when the contract is for "necessaries."

²³ This quote is from the summary of two studies that Anthony Platt participated in as reported in his book, *The Child Savers*, p. 167; footnote 108 on page 166. See also, the discussion in *Handbook for New Juvenile Court Judges*, 25 (Winter 1972), pp. 14-15, as to whether or not a juvenile judge has to strictly follow the rulings of the Supreme Court. Even though disregard of Court rulings is not uncommon in adult proceedings, it is there accomplished informally and less visibly, rarely dignified by the professional journals, and confined mostly to critiques of the law, not invitations and rationales for ignoring it.

guarantee that certain critical needs unique to children would be met. This line of reasoning is reflected in the various bills of rights which have been proposed for children, each unveiling a blueprint for the child's fullest development.²⁴ These "need manifestos" proclaim the rights of children to adequate nutrition,²⁵ a healthy environment,²⁶ continuous loving care,²⁷ a sympathetic community,²⁸ intellectual and emotional stimulation,²⁹ and other prerequisites for healthy adulthood. Although a child may be entitled to such rights under theories of natural law or moral philosophy, most claims based on psychological and even physical needs are not yet considered legal rights by our system. Even though such rights are beginning to achieve some recognition, particularly in judicial decisions concerning education and psychological treatment, their scope and content raise troublesome questions.³⁰ Given the great difficulty of specifying psychological prerequisites and devising workable governmental responses for meeting them, a distinction should perhaps be made between claims focusing on psychological needs and those specifying physical ones, because the latter are more easily defined. Many of us might agree that a child should have the right to "grow up in a world free of war,"³¹ or to live in a "reconstituted society,"³² but who should the law hold responsible for seeing that those rights are enforced? Or, how should a "right to be wanted" be defined and enforced? Doubtless there are definitions of these socio-psychological rights,³³ but if the law attempted to incorporate them, the necessarily broad and vague enforcement guidelines could recreate the hazards of current laws, again requiring the state to make broad discretionary judgments about the quality of a child's life. Moreover, the limits of the legal process itself would tend to undermine the integrity and effectiveness of such laws. These limits are rarely appreciated.

²⁴ See generally, Mary Kohler, "The Rights of Children," *Social Policy*, 39 (March/April, 1971); Paul Adams et al., *Children's Rights: Toward the Liberation of the Child* (New York: Praeger, 1971); Henry H. Foster and Doris Jonas Freed, "A Bill of Rights for Children," *Family Law Quarterly*, 6 (1972), 343.

²⁵ *WHERE*, April 1971, publication of Advisory Centre for Education in Cambridge, England.

²⁶ Joint Commission on Mental Health of Children, *Crisis in Child Mental Health: Challenge for the 1970's* (New York: Harper & Row, 1969, 1970), pp. 3-4.

²⁷ *Crisis in Child Mental Health*.

²⁸ 1950 White House Conference on Child Health and Protection.

²⁹ *Crisis in Child Mental Health*, pp. 3-4.

³⁰ For examples of right to education and treatment cases, see: *Pennsylvania Association for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972); *Mills v. Board of Education*, 348 F. Supp. 866 (D.D.C. 1972); *Wyatt v. Stickney*, 325 F. Supp. 781 (1971); 334 F. Supp. 1341 (1972).

³¹ Adams, et al., *Children's Rights*, p. 41.

³² See Joseph Goldstein, Anna Freud, Albert J. Solnit, *Beyond the Best Interests of the Child* (New York: The Free Press, 1973), for a thoughtful discussion of the concept of a "wanted" child and suggestions for incorporating it into the law.

³³ *Crisis in Child Mental Health*, pp. 3-4.

There is attributed to the law a magical power, a capacity to do what is far beyond its means. While the law may claim to establish relationships, it can, in fact, do little more than acknowledge them and give them recognition. It may be able to destroy human relationships, but it cannot compel them to develop.³⁴

It is important to recognize the limited ability of the legal system to prescribe and enforce the quality of social arrangements.

Although many special claims of rights are far from legal recognition, some perhaps fundamentally unsuited for it, this does not mean they should be dismissed as "meaningless exhortations."³⁵ The law is not unresponsive to societal values, and decisions are frequently influenced by notions of conventional morality, occasionally reflecting acceptance of changing morality. In recent years, courts have become somewhat more willing to ask whether children should have additional rights, and if so, how might they be secured. The concept of right is constantly in ferment and Constitutional theory may eventually be expanded to include at least some quality of life claims as citizenship rights. New statutes with enforcement and review mechanisms aimed at limiting state abuses of power may also create such guarantees.

Exemplary Supreme Court Decisions

Judicial decisions concerned with questions of children's rights provide one means for examining relevant legal opinions and conclusions. Because the Supreme Court has been active in this regard and because it remains the final arbiter of the Constitution, it is valuable to review a few of its recent decisions in the field of children's rights. These opinions, sometimes holding with the children's movement, sometimes against, reveal to what extent a more favorable judicial view of children's rights is emerging. Consideration of children's rights before the Supreme Court has primarily been in the areas of education, child welfare, and juvenile court procedures. The Court has avoided "taking the easy way" with a flat holding that all rights constitutionally assured for adults may be extended to children.³⁶ Instead, it has carefully tried to carve out an area between parental dominion and state prerogatives, where certain adult rights can be extended to children under specific circumstances. The Court has also tried to fashion modified versions of other rights.

³⁴ Joseph S. Goldstein, "Finding the Least Detrimental Alternative," *Psychoanalytic Study of the Child* 628, at 637 (1972).

³⁵ *Juvenile Justice Standards Project*, Final Report Planning Phase, 1971-72 (New York: Institute of Judicial Administration, 1972), 72.

³⁶ *McKeiver v. Pennsylvania*, 403 US 528, 545 (1971).

This delicate operation of inserting new elements into the control-of-children equation began during the compulsory schooling controversy. From the first confrontations between parents and the state, education has been the subject of continuous and often bitter struggles, primarily over the proper social role of education and the proper treatment of children within the schools. In enforcing state schooling laws, the Supreme Court took care to reinforce the parental right of supervision over their children's education.³⁷ The education cases reaching the Supreme Court, including the desegregation cases, reflect this emphasis. The significance of early education cases in regard to children's rights, however, rests more on what the Court did *not* consider than what it did consider in its deliberations: "These cases never mention rights or interests of children involved. Since they rest entirely on a doctrine of parental right, the question whether the parent may not be loyal to the interests of his child is not discussed."³⁸ Neither, the author might have added, was any question about the state's loyalty to the interests of the child raised.

But one of the first specific children's rights precedents, *Brown v. Board of Education*, occurred in the area of education.³⁹ In *Brown*, the Court held that the Constitutional rights of black school children were violated by segregated education and emphasized the critical importance of education both to children and to the general public:

Today education is perhaps the most important function of state and local government . . . it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust professionally to his environment. In these days it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all children.⁴⁰

Brown's regard for rights in education and its willingness to enforce those rights with affirmative action mark it as a significant precedent.

Like the public education legislation, laws governing juveniles charged with violations of the law have assumed the benevolence of state action. For a long time these statutes and the case law interpreting them provided no substantive or procedural guarantees for the child. Before the 1960's only a few courts held that the Constitution required recognition of a child's right to procedural protections in

³⁷ See, e.g., *Meyer v. Nebraska*, 262 US 390 (1923); *Pierce v. Society of Sisters*, 268 US 510 (1925).

³⁸ Kleinfeld, Part II, 418.

³⁹ *Brown v. Board of Education*, 347 US 483 (1954).

⁴⁰ *Brown*, 493.

⁴¹ *In re Gault*, 387 US 1 (1967).

any kind of case, civil or criminal. Most courts continued to follow the non-recognition rule implicitly sanctioned by the social consensus.

In 1967 the Supreme Court decided *In re Gault*,⁴¹ the landmark case on procedural rights in juvenile court and still the most famous children's rights case. *Gault* held that children in juvenile court were constitutionally entitled to certain due process guarantees previously granted only to adults in criminal court: a) notice (to both parent and child) adequate to afford reasonable opportunity to prepare a defense, including a sufficient statement of the charge; b) right to counsel, and if the child is indigent, provision for the appointment of counsel; c) privilege against self-incrimination; and d) right to confrontation and cross-examination of witnesses. The Court restricted its holding to precisely these procedural guarantees and not others. It also limited the guarantees to those juveniles facing possible commitment to a state institution. But *Gault* declared, generally, that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."⁴² This and similar language in the opinion suggested future grounds for arguing the constitutional rights of children. In the six years since *Gault*, the Court has continued to hear children's rights cases with mixed and at times incongruous results. The Court has decided that children are "persons" under the Constitution⁴³; it has removed some of the disabilities traditionally imposed upon illegitimate children⁴⁴; it has protected the exercise of some First Amendment rights of students in the public schools⁴⁵; and it has upheld the constitutionality of the eighteen-year-old vote.⁴⁶ On the other hand, during this same short span, the Court has denied that jury trials for alleged delinquents in juvenile court are Constitutionally required⁴⁷; it has declined to review a lower court decision upholding the right of school systems to use corporal punishment for disciplinary purposes⁴⁸; it has rejected the claim, *Brown* notwithstanding, that there is a fundamental, personal right to education under the Constitution⁴⁹; and it has generally revealed an unwillingness to pursue the broad promise of *Gault*.

The Court's present reluctant mood is reflected in Justice Blackmun's plurality

⁴¹ *Gault*, 13.

⁴² *Tinker v. Des Moines School District*, 393 US 503, 515 (1969).

⁴³ See, *Levy v. Louisiana*, 391 US 68 (1968); *Weber v. Aetna Casualty and Surety Company*, 406 U.S. 164 (1972).

⁴⁴ *Tinker*.

⁴⁵ *Oregon v. Mitchell*, 400 US 112 (1970).

⁴⁶ *McKeiver v. Pennsylvania*, 403 US 528 (1971).

⁴⁷ *Ware v. Estes*, 328 F. Supp., 657 (N. I. Tex. 1971), *cert. den.* in 409 U.S. 1027.

⁴⁸ *San Antonio Independent School District v. Rodriguez*, 93 S. Ct. 1278 (1973).

opinion in *McKeiver v. Pennsylvania*,⁵⁰ in which the Court refused to hold that jury trials for juveniles are constitutionally required. Justice Blackmun acknowledged the many defects of the juvenile court system, but denied that they were of "constitutional dimension."⁵¹ He gave the Court's sanction to the juvenile court's rehabilitative goals:

The juvenile court concept held high promise. We are reluctant to say that, despite disappointments of grave dimensions, it still does not hold promise, and we are particularly reluctant to say, as do the Pennsylvania petitioners here, that the system cannot accomplish its rehabilitative goals.⁵²

The present inability of the system to realize its goals was attributed by the plurality to inadequate resources, rather than to any inherent unfairness in the juvenile court system. As one commentator noted:

To say that these shortcomings resulted from lack of resources rather than inherent unfairness seemed irrelevant to those who realized that until such shortcomings were rectified, regardless of their source or cause, there could be no justification for failing to afford juveniles facing incarceration and stigma the same procedural rights accorded adults accused of crime.⁵³

The plurality's answer to that criticism again indicates the Court's reluctance:

If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps *ultimate disillusionment* will come one day, but for the moment we are disinclined to give impetus to it.⁵⁴

Thus the present Supreme Court appears to have "limited efforts toward the 'constitutional domestication' of juvenile procedures begun during the Warren Court years."⁵⁵ This same post-*Gault* restraint can be found in the areas of welfare law and education.

In a 1972 Supreme Court case, *Jefferson v. Hackney*, Justice Rehnquist, writing for the majority, held it consistent with both the Constitution and the Social Security Act that the state of Texas could provide a lower standard of welfare benefits

⁵⁰ *McKeiver v. Pennsylvania*, 403 US 528 (1971).

⁵¹ *Id.*, 547-48.

⁵² *Id.*, 547.

⁵³ Note: "Parents Patriae and Statutory Vagueness in the Juvenile Court," *Yale Law Journal* 82 (1973), 745, 753.

⁵⁴ *McKeiver*, 550-551.

⁵⁵ Note, 82 *Yale L.J.*, 745, 746.

to recipients of AFDC than to eligible or disabled persons receiving welfare assistance under the Act.⁵⁶ The federal program for Aid to Families with Dependent Children is this country's most comprehensive child welfare legislation. Under the program, the care and protection of needy children has been entrusted to states and localities, who in turn have usually relied heavily on private voluntarism. The rights and duties of children under resulting programs have been adjudicated primarily by state courts, with patchwork results. Consequently, to evaluate the status of dependent children the laws and court decisions of fifty states must be examined. A less exhaustive but more manageable approach is to explore congressional and Supreme Court reactions to the problems of dependency, also complex but at least enabling certain generalizations. In passing AFDC legislation the Congress admitted that some children needed assistance because of their family's financial status. They have periodically qualified that admission, however, with a number of value judgments about reasons for a family's poverty. State governments have been given considerable discretion in screening potential welfare recipients and in policing their conduct. The Supreme Court has brought constitutional standards into the process. One result of the Court's decision has been to ensure that irrational state rules against parental behavior would not be allowed to interfere with the rights of dependent children to minimum financial security.

In *Jefferson v. Hackney* the Burger Court refused to "second guess" state officials charged with the difficult task of administering welfare and brushed aside the argument that children might suffer irreparable harm from insufficient welfare benefits.

Applying the traditional standard of review under that [14th] Amendment, we cannot say that Texas' decision to provide somewhat lower benefits for AFDC recipients is invidious or irrational. Since budgetary restraints do not allow the payment of the full standard of need for all welfare recipients, the state may have concluded that the aged and infirmed are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living. While different policy judgments are of course possible, it is not irrational for the state to believe that the young are more adaptable than the sick and elderly, especially because the latter have less hope of improving their situation in the years remaining to them. Whether or not one agrees with this state determination there is nothing in the Constitution which forbids it.⁵⁷

Setting aside issues of constitutional and statutory interpretation, Justice Rehn-

⁵⁶ *Jefferson v. Hackney*, 406 US 535 (1971).

⁵⁷ *Id.*, 549.

quist's view that the state's decision to provide needy and eligible children an inadequate standard of living was "not irrational" reveals a grim adherence to the convention that the authorities know what they are doing and will not harm the children whose needs they are charged with meeting. In this opinion there is also a heavy dose of the old-time belief that for the young, however poor, survival is only a bootstrap away. Justice Marshall, in a vigorous dissent, asserted that the Texas policy was inconsistent with a congressional finding in the legislative history of the AFDC Act: "Many of these children will be seriously handicapped as adults because as children they are not receiving proper and sufficient food, clothing, medical attention, and the other bare necessities of life."⁵⁸

The logic of *Jefferson v. Hackney* was extended in the recent education case, *San Antonio Independent School District v. Rodriguez*.⁵⁹ That case arose out of the claim that the Texas method of financing public education through the property tax, which resulted in widely varying per pupil expenditures, violated the constitutional rights of students in San Antonio's poorest, lowest tax base district to equal protection of the laws and to education itself. The Supreme Court denied the claim, reversing a three-judge Texas district court. Writing for the majority, Justice Powell held first that the students of the school district in question were not a suspect class under the Equal Protection Clause, and thus were not entitled to a strict judicial review of the Texas financing scheme, and second that the Constitution provides no explicit right to education, nor can education be construed as an implicit, fundamental right under the Constitution, "essential to the effective exercise of First Amendment freedoms and to the intelligent utilization of the right to vote."⁶⁰ Instead, the majority held that the importance of education for the effective exercise of rights is arguably less than the significance of adequate food, clothing, and housing, none of which are constitutionally protected rights.⁶¹ Thus the Court declined to invalidate the Texas scheme, leaving the matter of educational finance to the discretion of the state:

The very complexity of the problems of financing and managing a statewide public school system suggest that 'there will be more than one constitutionally permissible method of solving them,' and that, within the limits of rationality, 'the legislature's efforts to tackle the problems' should be entitled to respect.⁶²

⁵⁸ *Id.*, 581.

⁵⁹ *San Antonio Independent School District v. Rodriguez*, 99 S.Ct. 1278 (1973).

⁶⁰ *Id.*, 1298.

⁶¹ *Id.*, 1299.

Justices White, Brennan, Marshall, and Douglas dissented, asserting that invalidation of the Texas scheme was compelled. They each gave somewhat different reasons for disagreeing with the majority opinion, but four reasons predominated. First, some took direct issue with the argument that education is not a fundamental, Constitutionally recognized interest, "inextricably linked to the right to participate in the electoral process and the rights of free speech and free association guaranteed by the First Amendment." Instead, it was argued that "any classification affecting education must be subjected to strict judicial scrutiny,"⁶³ i.e., the state must prove that the financing system does *not* discriminate against poorer students and their parents. Second, the school children in poorer districts and their parents are indeed a suspect class under the Fourteenth Amendment because they are allocated school funds under the Texas law on the basis of wealth, and therefore the strict scrutiny standard applies.⁶⁴ Third, regardless of whether a fundamental right to education exists, there are rights in education, once the state has undertaken to provide it, which, under *Brown*, "must be made available to all on equal terms."⁶⁵ Finally, even if plaintiffs are not a suspect class, education not a fundamental right, and the *Brown* test not controlling on the issue of educational finance, the Texas law must meet the rationality test of the Fourteenth Amendment. While Texas's objective in preserving local control over the public schools is a constitutionally permissible one, the financing scheme is not rationally related to it because it accords "different treatment . . . to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute."⁶⁶

In the *Rodriguez* case, the Court was unwilling to restrict the scope of the state's discretion by defining the educational needs and interests of children as rights. Even when the Court is prepared to limit state control, however, it often avoids formalizing the status of such needs and interests. Decisions are inclined to follow the traditional formula of balancing the state's interests with those of the parents, simply assuming that these reflect what is best for the child. This method was employed by the Court in *Wisconsin v. Yoder*,⁶⁷ even though in that case the children whose interests were at stake had the capacity to evaluate their interests for themselves. It was by no means evident that the interests of the children were identical

⁶³ *Id.*, 1501-2.

⁶⁴ *Id.*, 1512 (J. Brennan's dissent).

⁶⁵ *Id.*, 1536 (J. Marshall's dissent).

⁶⁶ *Id.*, 1539 (J. Marshall's dissent).

⁶⁷ *Id.*, 1514 (J. White's dissent).

⁶⁸ *Wisconsin v. Yoder*, 406 US 205 (1972).

to those of their parents. *Wisconsin v. Yoder* involved a challenge by several Old Order Amish parents to Wisconsin's statute which imposed an affirmative duty on parents to require their children to attend high school, and made violation of this duty a crime. Three parents, Mr. Yoder, Mr. Miller, and Mr. Yutzy, claimed that the compulsory school law violated their religious freedom and that of their children. Only one of the children, however, actually testified in court that she shared her parents' religious views and did not wish to continue to attend school. The other two children did not testify.

Chief Justice Burger, writing for the majority, upheld the right of the Amish parents to exemption from the statute. The opinion held that this exemption was necessary to promote free exercise of religion. The Chief Justice took pains to distinguish the genuine religious claims of the Amish from those of others who merely had unconventional life styles and might also be tempted to seek such a First Amendment exemption from compulsory schooling laws.⁶⁸ Having made this distinction, the majority opinion then reaffirmed the Amish parents' rights to control the upbringing of their children—to the point of depriving them of an advanced, worldly education.

Justice Douglas took a different and ground-breaking view of the case. He joined the Court's opinion only regarding the schooling of the child who had publicly subscribed to her parents' religious objections.⁶⁹ As to the children of the other two defendants, Justice Douglas dissented from the majority. He held that the majority opinion was inadequate because these defendants had raised their children's religious beliefs in defense but had not brought their children to testify. Reviewing various cases holding that "children themselves have constitutionally protectible interests,"⁷⁰ Douglas asserted first that the critical interests at stake were those of the children, not those of their parents, and second that the dispute could not be properly resolved until the children had represented their own interests in court.

I agree with the Court that the religious scruples of the Amish are opposed to the education of their children beyond the grade schools, yet I disagree with the Court's conclusion that the matter is within the dispensation of parents alone. The Court assumes that the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other. The difficulty with this approach is that, despite the Court's claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children. . . .

⁶⁸ *Id.*, 215-219.

⁶⁹ *Id.*, 243.

⁷⁰ *Id.*, 243.

⁷¹ *Id.*, 241-42, 44-46.

On this important and vital matter of education, I think the children should be entitled to be heard. While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an oceanographer. To do so, he will have to break from the Amish tradition.

It is the future of the student, not the future of the parents, that is imperilled in today's decision. . . . It is the student's judgment, not his parent's, that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today.⁷¹

Douglas based his opinion not only on available legal precedents, but on psychological and sociological findings that children of the relevant ages possess the moral and intellectual judgment necessary for making responsible decisions on matters of religion and education. To rebut the presumption that children lack sufficient maturity to make such decisions, Douglas relied on the works of Piaget, Kohlberg, Kay, Gesell, and Ilg. He also argued that "the maturity of Amish youth, who identify with and assume adult roles from early childhood . . . is certainly not less than that of children in the general population."⁷²

The majority opinion does not deal with the merits of Douglas' views; it only notes that the children are not parties to the litigation.⁷³ Only two justices, Brennan and Stewart, acknowledged in their concurring opinions that the issues raised by Douglas "are interesting and important."⁷⁴ They agreed with the majority, however, that these issues should not be before the Court because "there is no suggestion whatever in the record that the religious beliefs of the children here concerned differ in any way from those of their parents."⁷⁵ This statement reiterates the presumption of identity of interests between parent and child, and here the consequences of acting in accord with the family's religion may be quite different for children than for their parents.

Establishing the Rights of Children

These opinions illustrate two persistent, general problems of legal theory which children's rights advocates seek to overcome. First, legal policy is ambivalent about

⁷¹ *Id.*, 245-246, footnote 3.

⁷² *Id.*, 230-31.

⁷³ *Id.*, 237 (Justices Brennan and Stewart concurring).

⁷⁴ *Id.*, 237.

the limitation of parental control and the assertion of state control over children. There is an absence of fair, workable, and realistic standards for limiting parental discretion and guiding state intervention. Second, the state generally fails to evaluate a child's independent interests, giving a competent child the chance to articulate his interests for himself.

Ascribing rights to children will not immediately solve these problems, or undermine the consensus which perpetuates them. It will, however, force from the judiciary and the legislature institutional support for the child's point of view. As was once said, in another context: "rights to have any meaning must adhere to particular institutions: the rights of Englishmen are indeed, necessarily more secure than the 'Rights of Man.'"⁷⁶ Children's rights cannot be secured until some particular institution has recognized them and assumed responsibility for enforcing them. In the past, adult institutions have not performed this function, partly, as we have seen, because it was thought children had few rights to secure. Unfortunately, the institutions designed specifically for children also have failed to accomplish this aim, largely because they were established to safeguard interests, not to enforce rights, on the assumption that the former could be done without the latter.

Securing children's rights through the legislatures and the courts will include generating new lines of legal theory, grounded in past-precedent but building on it to more reasonable laws and legal interpretations for the future. Certain interesting legal theories have been introduced already, which are being utilized by children's rights advocates in pressing further claims, and which, if accepted, could resolve the theoretical problems outlined above. While the resolution of theoretical problems may not eliminate the main obstacles to the enforcement of children's legal rights or to the creation of services to meet their needs, it will at least strip away the legalistic camouflage surrounding the continuing problems of unchecked discretion, inadequate resources, and widespread public indifference.

As stated earlier, claims of rights for children fall into two broad categories: claims that the rights which adults enjoy be granted to children, and claims that the special needs and interests of children be recognized as rights. Legislation granting rights in either category probably is preferable to judicial opinions decreeing them, but both governmental branches should be pressed to reexamine and revise children's status under the law. Legal positions will contribute to a new social attitude toward children's rights.

Turning to the first strategy for obtaining new rights, the following three posi-

⁷⁶ Bernard Crick, *In Defense of Politics* (London: Penguin Books, 1962), p. 48.

tions focus attention on the independent status of children: a) the legal status of infancy, or minority, should be abolished and the presumption of incompetency reversed; b) all procedural rights guaranteed to adults under the Constitution should be granted to children whenever the state or a third party moves against them, judicially or administratively; and c) the presumption of identity of interests between parents and their children should be rejected whenever the child has interests demonstrably independent of those of his parents (as determined by the consequences to both of the action in question), and a competent child should be permitted to assert his or her own interests.

Devising acceptable arguments to support recognition of special rights based on physical and psychological needs is more difficult. Rather than specifying particular needs that the legal system could meet, the following suggestions concern a methodology for constitutionalizing such rights and a procedural device for overseeing the needs of children for whom the state assumes primary responsibility. The strictures of the new equal protection theory should apply to children, i. e., classifications of children *qua* children, or of certain classes of children, should be considered suspect, and needs which from a developmental standpoint are fundamental should be protected as fundamental interests under the Constitution. Also, in areas where decision makers will necessarily continue to exercise discretion they should no longer just be guided by the best interests of the child standard, but should be subjected to a review process which focuses not only on the child but also on the state's responsibility as a substitute parent.

These arguments will now be discussed more fully.

Abolition of minority status

Age may be a valid criterion for determining the distribution of legal benefits and burdens, but before it is used its application should be subjected to a test of rationality. Assessing the rationality of age classifications could be expedited by legislative abolition of the general status of minority and adoption of an area-by-area approach (as has already been done to a degree, for example, in the motor vehicle statutes). It could also be accomplished by judicial declaration that the present classification scheme is over-inclusive, after which the state would bear the burden of justifying its restrictions on infants. As Foster and Freed point out, "... the arguments for and against perpetuation of minority status have a familiar ring. In good measure they are the same arguments that were advanced over the issues of slavery and the emancipation of married women."⁷⁷ The abolition of slavery and the emancipation

⁷⁷ Foster and Freed, p. 343.

of married women did not automatically invest previously "inferior" persons with full adult citizenship rights, but the state at least had to begin to rationalize its treatment of those groups. The abolition of minority, more justifiably, need not mean that children become full-fledged miniature adults before the law. Their substantive and procedural rights could still be limited or modified on the basis of supportable findings about needs and capacities at various ages.

If the law were to abolish the status of minority and to reverse its underlying presumption of children's incompetency, the result would be an implicit presumption that children, like other persons, are capable of exercising rights and assuming responsibilities until it is proven otherwise. Empirical differences among children would then serve as the grounds for making exceptions to this presumption and for justifying rational state restrictions. For example, in his dissent in *Wisconsin v. Yoder*,⁷⁸ Justice Douglas presumed that the children involved in the case were intelligent and mature enough to express opinion when their interests were affected. In essence, Douglas reversed the presumption of incompetency. He then looked for evidence to contradict the presumption of competency and when he found none, he argued that the children should be given full rights as parties to a lawsuit. If the children involved had been younger, Douglas might have concluded that the presumption of competency should have been suspended. However, young children are known to possess strong opinions on some issues, and many such opinions may have a rational basis. In custody suits, for example, many states now require that the opinions of children over twelve be followed and that the opinions of younger children be accepted as evidence in a case. Feelings of the young should at least be recorded and weighed. This argument is reinforced by the fact that very young children have at times been found competent to give evidence in trials where adult interests are at stake.

The difference between a rebuttable presumption of incompetency and a presumption of competency is that the former places the burden of proof on children and their allies, while the latter shifts it to the opponents of changing children's status. Many legislatures now regard the presumption of incompetency as rebuttable and are legislatively removing some of children's legal disabilities. When Congress and the states extended the right to vote to eighteen-year-olds through the Voting Rights Act of 1970 and the Twenty-Sixth Amendment to the Constitution, they went through the process of reversing the presumption of incompetency regarding enfranchisement. Through hearings and other fact finding procedures, a

⁷⁸ See pp. 504-505 in text; *Wisconsin v. Yoder*, 406 US 205, 240-246.

majority of Congressmen and state legislators were persuaded by available evidence that the presumption should be rebutted, and voting rights granted in the same form enjoyed by adults.

Granting all procedural rights

The argument for this position is simple. A child is now considered a **person under the Constitution**. When the State moves against persons and threatens to take away their liberties or otherwise affect their interests adversely, they are entitled to the protective procedures of the Bill of Rights, as applied to the states through the Fourteenth Amendment. As the late Mr. Justice Black said, concurring in *In re Gault*:

When a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the State to be confined for six years, I think the Constitution requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights made applicable to the States by the Fourteenth Amendment. . . . Appellants are entitled to these rights not because 'fairness, impartiality, and orderliness—in short, the essentials of due process'—require them and not because they are 'the procedural rules which have been fashioned from the generality of due process,' but because they are specifically and unequivocally granted by provisions of the Fifth and Sixth Amendments which the Fourteenth Amendment makes applicable to the States.

Undoubtedly this (entitlement to Constitutional guarantees) would be true of an adult defendant, and it would be a plain denial of equal protection of the laws—an invidious discrimination—to hold that others subject to heavier punishments could, *because they are children*, be denied these same constitutional safeguards.⁷⁹

The only effective means for securing these Bill of Rights guarantees in our current legal system is by the provision of **legal counsel**. Although the introduction of the adversarial system into **juvenile court proceedings** is deplored by many, lawyers representing children should ensure three critical prerequisites for fairness. First, they can articulate and argue the child's position, even though filtered through their own adult and professional perspectives. Second, they can require that the law be strictly followed. And third, they can make new law in the area by appealing cases and lobbying for statutory changes. Independent counsel for children should not be restricted to children accused of delinquency, but should be required in any case where a child's interests are being adjudicated. The courts must become more

⁷⁹ *In re Gault*, 387 US 1, 61 (1967). Cf., also, J. Douglas's dissent joined by J. Black and J. Marshall in *McKeiver v. Pennsylvania* arguing the same point.

sensitive to such cases, recognizing that children in neglect or custody proceedings may have interests independent of their parents or the state.

Substitution of an evaluation of consequences for the implied identity of interests between parents and children

This point was treated clearly and at length by Justice Douglas in his opinion in *Wisconsin v. Yoder*.⁸⁰ Only one aspect of the arguments requires further stress. Justice Douglas chided the majority for subsuming the rights of school children under their parents' rights, and for not giving the children the opportunity to be heard. Justice Douglas might have added that the majority presumed an identity of religious opinions was the same as an identity of interests. In general, it is not clear whether the implied identity of interests operates as a legal presumption or only a permissible assumption in the absence of contrary evidence. Regardless, the values it represents should be treated only as an assumption, and in cases of potential conflict between parent and child the consequences to the child of parental action or inaction should be considered. Where the consequences appear irreversible, the assumption should be discarded in favor of an extrafamilial decision that takes into account the opinions of all interested parties. If the consequences seem reversible or insubstantial, the assumption that the parent knows best should probably continue to govern.

Application of the new equal protection theory

The Equal Protection Clause of the Fourteenth Amendment guarantees that all people similarly situated will be treated alike by the state. The Supreme Court and lower federal courts use two standards of judicial review for assessing the constitutionality of state action under this clause. Under traditional equal protection analysis, a state has broad discretion to classify persons, so long as the classification bears a reasonable relationship to a permissible state objective. The measure of reasonableness is "the degree of its success in treating similarly those similarly situated."⁸¹ A classification, under this standard, is unreasonable if it is over- or under-inclusive or in some other way not rationally related to the achievement of a legitimate state objective. Under the so-called new equal protection analysis, the state bears the burden of justifying its classification on grounds of a "compelling state interest" whenever that classification is suspect because of its effects on the group of persons in the class or whenever it seems to be in conflict with a funda-

⁸⁰ See, pp. 504-505 in text.

⁸¹ Tussman and Ten Broek, *The Equal Protection of the Laws, Selected Essays 1938-62*, 789 (1963).

mental personal interest. The Supreme Court has been restrained in its use of this strict form of judicial review.

The argument for defining various developmental needs of children as fundamental interests is well-stated, with respect to education and AFDC benefits, in the opinions of Justices Marshall and Brennan, quoted above.⁸² Under their test of fundamentality, a child's need or interest only has to be shown to relate to "the effectuation of those rights which are in fact constitutionally guaranteed."⁸³ Thus, "... as the nexus between the specific constitutional guarantee and the non-constitutional interest draws closer, the non-constitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly."⁸⁴ The argument that certain types of children form suspect classifications is also made in the dissenting opinion of Justice Marshall in the *Rodriguez* case, with respect to poor children living in low tax base school districts.⁸⁵ The courts already recognize as suspect those classifications based on race,⁸⁶ national origin,⁸⁷ alienage,⁸⁸ indigency,⁸⁹ and illegitimacy.⁹⁰ Thus, application of the doctrine to poor school children is arguably within its traditional scope. The *Rodriguez* majority disagreed with this application, however, apparently on the theory that economic deprivation is suspect only when actual or functional indigency obtains and not when there is "comparative poverty vis-a-vis comparative affluence."⁹¹ Some courts have found classes of retarded or handicapped children suspect, which supports strict judicial scrutiny of the state's treatment of them.⁹²

There is less support for the contention that children *qua* children should be treated as a suspect class, but an argument may be constructed using the original rationale for suspect classifications. The suspect character of classifications based on racial or ethnic characteristics or wealth differentiations originated in the recog-

⁸² See, pp. 502-503 in text.

⁸³ *Rodriguez*, 41 LW 4407, 4426.

⁸⁴ *Id.*, 4426.

⁸⁵ *Id.*, 4441.

⁸⁶ See, e.g., *Brown v. Board of Education*, 347 US 483 (1954); *McLaughlin v. Florida*, 379 US 181 (1964).

⁸⁷ See, e.g., *Oyama v. California*, 332 US 633 (1948).

⁸⁸ See, e.g., *Graham v. Richardson*, 403 US 365 (1971).

⁸⁹ See, e.g., *Griffin v. Illinois*, 351 US 12 (1956).

⁹⁰ *Weber v. Aetna Casualty & Surety Company*, 406 US 164 (1972).

⁹¹ *Rodriguez*, 93 S. Ct. 1278, footnote 6, 1311 (Stewart, J. concurring); see the majority opinion discussion, 1290-94.

⁹² See, e.g., *Colorado Association for Retarded Children v. Colorado*, C.A. No. C-4620 (N. Colo., filed Dec. 22, 1972).

dition that certain groups of persons comprise "discrete and insular"⁹³ minorities who are relatively powerless to protect their interests in the political process. The use of age as a classifying characteristic has rarely been questioned.

In his dissent to the Supreme Court case upholding the constitutionality of the eighteen-year-old vote in federal elections, Justice Stewart flatly asserts that: "The establishment of an age qualification is not state action aimed at any discrete and insular minority."⁹⁴ But age categories should be open to scrutiny for some of the same reasons well established suspect classifications are. The assumption that age qualifications are generally rational is not borne out by much of the evidence about the abilities of children at various ages and developmental stages before twenty-one. Thus, a group discriminated against on the basis of age could constitute a discrete and insular minority if their access to the political system were limited solely because they were young. They might possess the requisite rationality to participate, but be forbidden to do so. If this were the case, then they would be a suspect minority and state action affecting their interests should be required to demonstrate a compelling governmental interest in maintaining legal disabilities. If, however, some or all of the members of the age-defined minority were not rational or mature enough to participate in the political process, then state action affecting them should also be subjected to strict judicial scrutiny, because of their powerlessness. On the basis of either set of conclusions about children's abilities, the state should no longer be allowed to assume the rationality of regulations based on age, and should at least be required to justify its action on the basis of modern legislative or administrative findings. Under the new equal protection doctrine, it would additionally have to demonstrate a compelling state interest in its legislative objective.

Moving away from the "best interests" standard

The argument against the continued reliance on the "best interests" standard has particular reference to instances of state intervention when a child is "neglected," "dependent," "abused," "in need of supervision," or "wayward." The statutory descriptions fitting these labels are imprecise, often deliberately so, in order that concerned state agents will not be hampered in their efforts to free a child from an unhealthy or dangerous family environment. Some children, of course, do suffer incalculable harm while in the custody of their parents, and the community should protect these children from the harm which would result were

⁹³ The quote is from *United States v. Carolene Products Co.*, 304 US 144, 152, n. 4 (1938). See generally the discussions in *Serrano v. Priest*, 5 Cal. 3d 584, 487 P 2d 1241, 1265 (1971); Note, "Developments in the Law-Equal Protection," *Harvard Law Review* 82 (1969) 1065, 1124-26; Merle McClung, "School Classification: Some Legal Approaches to Labels," *Inequality in Education*, 14 (July 1973), pp. 17-37.

⁹⁴ *Oregon v. Mitchell*, 400 US 112 (1970).

parental discretion left unchecked. But the unchecked discretion of the state has vices of its own. The best interests standard, initially followed in most state interventions and explicitly used as the standard for adjudicating children's interests in proceedings evaluating parental care, is not properly a standard. Instead, it is a rationalization by decision-makers justifying their judgments about a child's future, like an empty vessel into which adult perceptions and prejudices are poured. It does not offer guidelines for how adult powers should be exercised. Seductively, it implies that there is a best alternative for children deprived of their family. This implication prevents both the decision-maker and those to whom he is accountable from carefully weighing the possible negative impact of any decision.

Recognizing the weaknesses of the best interests standard, Professor Joseph Goldstein has suggested another guideline for decision-makers in custody cases: "that which is least detrimental among available alternatives for the child."⁹⁵ Although this guideline may appear only a semantic change, Goldstein argues that:

Introducing the idea of 'available alternatives' should force into focus from the child's vantage point consideration of the advantages and disadvantages of the actual real options to be measured in terms of that which is least likely to preclude the chances of the child becoming 'wanted.' The proposed standard is less awesome, more realistic, and thus more amenable to relevant data gathering than 'best interest.' No magic is to be attributed to the new formulation, but there is in any new set of guiding words an opportunity at least for courts and agencies to re-examine their tasks and thus possibly to force into view factors of low visibility which seem frequently to have resulted in decisions actually in conflict with 'the best interests of the child.'⁹⁶

Goldstein's guideline may result in a new focus on the probable harm of state intervention into a parent-child relationship, but it still falls short because it does not specify the standards which should govern such intervention. The principles which compete whenever there are efforts to draft workable standards are not amenable to any comfortable resolution.

Sentiment against state intervention stems from the state's poor record in caring for children removed from their families. Restricting state intervention to instances where there is evidence of physical abuse would eliminate from judicial jurisdiction cases of emotional or psychological neglect. Ironically, reaction against state intervention in cases of non-physical abuse is consistent with consensus romanticism about the family, accepting as inevitable that families can deny children rights. Even though state interference with family privacy should be minimized because of the state's unwillingness, or inability, to care for children as well as most families

⁹⁵ Goldstein, "Finding the Least . . .," p. 633.

⁹⁶ Goldstein, "Finding the Least . . .," p. 637.

do, the state, representing the community of adults, has the responsibility to intervene in cases of severe emotional deprivation or psychological damage if it is likely that a child's development will be substantially harmed by his continued presence in the family. The state not only has the responsibility to intervene, but to nurture the child after intervention. The absence of a commitment to post-intervention care does not necessarily negate the reasons for the original intervention. Some children, even in these days of inadequate services, do benefit from a temporary or permanent removal from their families.

The principal challenge lies in determining which children could benefit from removal. Standards that limit the amount of discretion vested in decision-makers must be drafted. This will involve specifying acceptable reasons for intervention and providing workable review mechanisms for both the initial decision and the child's placement. Intervention should be allowed only after the state has attempted to provide services for the child and his parents aimed at ameliorating the conditions of neglect. Only medically justifiable reasons for intervention should be acceptable. Such reasons should include inadequate psychological care, as in cases of children presenting symptoms of maternal deprivation or severe emotional disturbance. Parental behavior that does not result in medically diagnosable harm to a child should not be allowed to trigger intervention, however offensive that behavior may be to the community.

A common complaint about the exercise of discretion in neglect cases is that alien values, usually middle-class, are used to judge a family's child-rearing practices. One way to answer that complaint is to entrust the discretion necessary for evaluating a child's needs to persons representing the milieu in which a family lives. Boards composed of citizens representing identifiable constituencies—racial, religious, ethnic, geographical—could make the initial decision regarding intervention or review judicial decisions. Additionally, they should be responsible for periodically reviewing placements and making recommendations about terminating parental rights. The board membership should include parent and professional representatives, perhaps children as well. Decisions to intervene and to terminate parental rights should require a three-fourths vote to overcome the presumption against intervention. Membership might be elected and should rotate often to avoid institutional calcification. Providing a check on judicial and bureaucratic discretion, this form of community involvement also might broaden the constituency of adults actively concerned about services for children. Without an increase in community involvement, the best drafted laws and most eloquent judicial opinions will merely recycle past disappointments.

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2 Children's Rights:

A Legal Perspective

HILLARY RODHAM

SEVERAL years ago I wrote an article in which I stated that "The phrase 'children's rights' is a slogan in search of a definition."¹ Although that search is still continuing, there has been significant progress in our efforts to define and achieve children's rights. I would like to discuss several aspects of that search and to raise questions about the future of the children's rights movement.

It is important to clarify at the outset the difference between a legal right and other claims of right because we still find persons discussing children's rights without any clear notion of whether they are referring to a legal right, enforceable under our laws, or a description of needs and interests. A legal right is an enforceable claim to the possession of property or authority, or to the enjoyment of privileges or immunities. In the field of children's rights, we are not dealing primarily with existing legal rights but with children's needs and interests and attempts to transform these into enforceable rights. We are talking about everything from compulsory school attendance to driving privileges to nurturing requirements.

Children's rights refer to a series of relations. This is not unusual, for in the law we often discuss a person's legal position vis-à-vis a certain set of circumstances. One has certain legal rights as a citizen, as an employee, as an heir, as a criminal defendant, and in other roles within society. Let us

think about children's rights in relation to the situation out of which they come, or against which they must be exercised. Children's relations fall within four broad categories of relations, which suggest certain rights:

1. Children's rights in relation to the family
2. The rights of children without families
3. Children's rights in juvenile-oriented institutions
4. Children's rights in society

We cannot possibly cover all of the ramifications for children's rights or any particular individual child's rights in each of these relations within the scope of this chapter, but we can raise questions and look at the subissues that each relationship suggests.

CHILDREN'S RIGHTS AND THE FAMILY

State Intervention

The first subissue concerns the situations in which family breakdown necessitates state intervention, either in response to voluntary requests for assistance by the family or decisions by government representatives to intervene between a family and a child. Through child abuse and neglect statutes society has attempted to define the occasions when intervention in a family on behalf of a child is required. In addition to the situations governed by those statutes, intervention may occur under the authority given the state to respond to parental requests for intervention as when a parent tries to turn a child over to an institution or requests assistance in raising a child because of the child's alleged incorrigibility. The guiding principle by which decisions in this area are to be measured is the "best interests of the child." But there is extraordinary flexibility inherent in this concept and the discretion afforded to any decision maker authorized to enforce it. Although the imprecision of our understanding of human behavior and of the

tools we possess for intervening in families in trouble requires considerable flexibility, the main complaints that have arisen against the state's exercise of its intervening powers are that the authority has been abused. All too often intervention in those families that are most vulnerable to state control, such as the poor or unconventional or ethnic and racial minorities, occurs principally because of the family's powerlessness rather than because of their needs.

This and other indictments of intervention are all too true. However, they must be balanced against the fact that too often, on occasions when intervention is necessary, it does not occur because of the decision maker's extreme reluctance to interrupt family life. What is needed is a theory that adequately explains the state's appropriate role in child rearing and provides sufficient checks on the exercise of discretion to ensure that authority is exercised only in warranted cases. The law, unfortunately, is not an exact science and regardless of how careful one tries to be mistakes will still be made. That is, I submit, a risk or cost we have to accept until we develop a family policy in this country that provides stigma-free assistance to families in trouble before their problems reach the extreme point of requiring wholesale intervention.

Although it is not a good analogy, one might liken the state's intervention in conditions of extremity with the state's power to condemn. It took years to develop a public policy on private property that would permit limited state intervention in the use of that property. For example, zoning restrictions and scenic easements are relatively new features of property law. The development of such intermediary actions and remedies eliminated the necessity for the state to choose between the extreme measure of condemnation or no control measures at all.

Private property is probably second only in importance in most people's cultural framework to the family. It has taken us a considerably longer time to reach a stage where we recognize that each family at some time needs a certain amount of

assistance from the community or government to care for the needs of its members. Many families are able to pay for their needs whether they be medical care or special homemaking services, but all too many cannot. A poor family situation may be allowed to deteriorate because of the lack of available assistance; a disaster area is thus created ripe for "condemnation" by state agencies that can act lawfully only after it is too late for intermediary assistance.

Now you might ask, What does all this have to do with children's rights? I believe that when we speak about the rights of children in relation to their families under conditions of family failures, we are really talking about the needs of children to be cared for in order for their own families to function successfully. If those needs are not met, many of the rights later available to the children will be exercised ineffectively or not at all. Unless we have a family policy in this country, then whatever we do on behalf of children in relation to their families will continue to be band-aid medicine, lacking clear objectives and subject to great abuse. And, if we do not know what we expect from our families, then we are unlikely to be able to provide to children without families the kind of care under state parenting they would receive in a good family. As discussed later, this inability has created some of our greatest abuses and has called for the creation of specific rights for children without families.

Independent Decisions by Children

The second subissue is whether and to what extent children have a right to make decisions that conflict with the decisions that their parents or other guardians wish made. Disagreements between children and their parents are a common occurrence and usually do not rise to the level of a legal question. However, several such disagreements have reached the courts, and a body of case law has developed around them.

Many of the modern conflicts between parents and children arise because of the "invention" of adolescence. Children in

the Middle Ages became adults at the age of seven, at which time a boy was apprenticed to a tradesman, or otherwise sent out to find his fortune, and a girl was trained for future domestic responsibilities. The concept of childhood gradually was expanded until children became more and more dependent on their parents and parents became less and less dependent on their children for economic support and sustenance. During the nineteenth century in this country, the idea of compulsory education provided an opportunity for children to be trained, and took them out of an increasingly smaller work force, so that they would not compete with adults. Child labor laws continued this trend and so did the imposition of age requirements for school attendance. All of these developments ran parallel with the accelerated industrialization and shrinking frontiers of the twentieth century. A boy or girl of fifteen who wished to seek his or her fortune in the nineteenth century or even more recently might have run off to sea or otherwise absented himself or herself from home without becoming a status offender or causing family disagreements that could become legal problems.

Because children now remain in the family for longer periods, during which they are still dependent but becoming more and more adult, the opportunities for intrafamily disputes have increased dramatically. The fears that many people have about the formulation of a family policy or a law of children's rights arise from their concern about increasing government control over such intrafamily disputes. A letter sent out several years ago about the Child and Family Development Act urged persons to oppose the proposed bill because it would, according to the writers, allow children to take parents to court if they were ordered to take out the garbage. Family disagreements that result in legal battles are, of course, of a more serious nature. There are, for instance, a line of cases in which a child either wished or required a certain medical procedure that his or her parents refused to provide.² In some cases, the disagreement was between the child and his

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or her parents and in others between the parents and medical experts.³ In both types of cases, the state often enforced a child's right to receive necessary care. The most recent example of disagreement between parent and child is found in the abortion cases recently decided by the United States Supreme Court.⁴ The Court held that a minor child might seek an abortion without her parents' consent and over her parents' objections if a court believed it to be in the child's best interests. In the second line of cases, the issue most frequently arose in the context of religious objections to medical surgery, as in the cases of Jehovah's Witnesses refusing to allow blood transfusions to their children. The courts almost unanimously have ordered that, despite parents' strong religious feelings, medical necessity required that the child be treated.

Even among persons in the children's rights movement, there is a concern that extending rights to children against their parents is too difficult to control, and in all but the most extreme cases such questions should be resolved by the families, not the courts. I prefer that intervention into an ongoing family be limited to decisions that could have long-term and possibly irreparable effects if they were not resolved. Decisions about motherhood and abortion, schooling, cosmetic surgery, treatment of venereal disease, or employment, and others where the decision or lack of one will significantly affect the child's future should not be made unilaterally by parents. Children should have a right to be permitted to decide their own future if they are competent.

RIGHTS OF CHILDREN WITHOUT FAMILIES

Hundreds of thousands of children live in foster homes, training schools, orphanages, and other substitute family environments. When a state intervenes in a family and removes a child from its parents' care or otherwise takes control over a child's life, it does so under the theory of *parens patriae* and under the promise that it will act *in loco parentis*. When it fails to fulfill these promises, the child is generally left without re-

Parent
no shows
not
made.

course. The typical child has his or her family to protect him or her against outside or external threats, but who protects the child given over to the state? In the last several years a series of lawsuits have challenged the treatment of children in government-sponsored settings because of violations of their rights.¹ In some cases, the rights that were violated were similar to rights adults might claim in analogous situations, such as in training schools where children were subjected to cruel and unusual punishment or in mental institutions where children were deprived of due process and protection.

It is, however, difficult to fashion a legal right to more than custodial care. If a child is not given adequate food and shelter or is physically mistreated, then the courts are willing to intervene even against the state and order that minimal necessities be met. What do we do, however, in cases where children's minimal necessities are met, but those necessities are not sufficient to meet their needs? How do we fashion those needs into legal, enforceable rights?

In response to constitutional challenges to institutionalized care, courts have tried to fashion remedies requiring specific kinds of treatment. They have ordered that a certain number of psychiatrists be available for a certain number of patients and rehabilitation programs be available to inmates. Most of these cases have been in reference to institutionalized adults, but some of them have been directly applicable to children. The difficulty in fashioning a right goes beyond the initial definitional problems into administrative and resource issues. Even if a court orders an institution to maintain a certain staff-child ratio, will a legislature fund the necessary positions? Will the staff be adequate to the task of serving as substitute parents? Who will hold the institution and staff accountable? At the present time, these are questions for the future. We are still struggling to convince courts and government agencies to look beyond minimal necessities. I was recently involved in custody litigation in which I had an expert testify about a typical child's physical and psychological development. After

the expert testified, the representatives of the State Social Services told him they found his testimony very interesting and sure wished someone had told them all that before they had decided to remove a child from the only home it had known since the age of six months. If the adults charged with the responsibility of acting as and supervising the state's substitute parents do not know even the basic facts of child development, how can we expect judges and legislators to make informed decisions? The educational job facing us is enormous.

CHILDREN'S RIGHTS IN INSTITUTIONS

Children's rights in schools and courts involve both procedural and substantive issues. Much of our interest in children's rights is traceable to a 1967 United States Supreme Court case, *In Re Gault*,⁶ in which the Court extended to juveniles certain of the rights adults charged with crimes possessed under the Constitution. Until that case, it was not even clear that children were persons under the Constitution. Since then, many children's rights advocates have focused on a child's rights within the institutions that principally affect them: juvenile courts and schools.

Although the extension of rights to children in juvenile court may have generated more controversy than any other recent extension of rights, in many ways the juvenile court was the easiest target available. It became painfully obvious that the dream behind the original juvenile court in Cook County, Illinois to treat each child individually and to provide special attention to his or her needs so as to rehabilitate or socialize him or her was falling short of realization because of inadequate resources, imprecise legal standards, poorly trained personnel, and unchecked discretion. The next step had to be either the abolition of the court itself and the return to a single system of criminal justice or the extension to children of those rights that safeguarded an individual's position in an adult court. The *Gault* case ordered that juveniles threatened with

incarceration were entitled under the due process clause to notice, the right to counsel, the privilege against self-incrimination, and the right to confront one's accusers and to cross-examine witnesses. Since then, the Court has also required that juveniles have to be proven delinquent by the same standard—beyond a reasonable doubt—as adults. However, the Court has stopped short at extending all adult procedural rights to children. For example, the Court has not extended the right to a jury trial to juveniles.⁷ In this decision, the Court reviewed the development of the juvenile court and refused to alter it by requiring jury trials until the court had had an opportunity to live up to constitutional obligations. Children have also been extended constitutional rights within schools so that they can express their own individuality, such as the length of their hair, exercise their First Amendment rights, and be freed from arbitrary and unreasonable punishment.

However, within a space of three years, the United States Supreme Court decided two apparently conflicting cases as to a child's rights within schools. On the one hand, the Court ordered that a child could not be expelled or suspended without being given an adequate chance to respond to the charges against him.⁸ On the other hand, the Court reviewed a case in which a student challenged the severe corporal punishment that had been inflicted on him and decided that, absent excessive physical harm, corporal punishment was permissible under the Eighth Amendment of the Constitution.⁹ These decisions represent the confusion and conflicting goals besetting the Court as it tries to strike a balance between a child's alleged rights and the administrative needs of the institutions against whom those rights would be exercised.

CHILDREN'S RIGHTS IN SOCIETY

The issues involved with children's rights within society are complex and hard to define. In this category fall all the various declarations of rights such as the United Nations Declaration

of Rights. That and similar efforts are attempts to translate into legal rights the environmental rights we believe children must have in order to develop successfully. The United Nations Declaration, for example, says that each child has a right to grow up in a world at peace. All of us would hope to have that right, but none of us, so far as I know, has figured out a way to enforce it. Courts and legislatures have already recognized certain claims of rights on behalf of a child as a citizen. Such rights include a child heir's claim to an inheritance, a minor's right to sue for damages resulting from an automobile collision, or even an infant's action for damages because of injuries suffered in his or her mother's womb. In addition to such rights, many of which have long been recognized by the law, there are also recommendations that a child be given certain rights as against future technological changes that might damage him or her. Even though the development of such a legal cause of action seems unlikely, children and adults might have special standing to question the proliferation of nuclear power or junk food because of the potential impact or at least unpredictable impact on their and their children's future development.¹⁰

This general discussion of four categories of children's rights raises additional considerations I want to treat briefly. The question of enforcement of these rights that exist and those that may be created is an extremely difficult one. Even after the United States Supreme Court ordered juvenile judges to ensure the presence of counsel in cases with incarceration as a possible punishment, many judges resisted the directive, continued holding court without lawyers and decided on their own what should be done with a juvenile appearing before them. Lawsuits were sometimes brought to enforce the Supreme Court's mandate. Where there was an adult willing to assume enforcement powers, children were accorded their constitutional rights; where there was not, they were not. The principal difficulty in enforcing children's rights

is that, except for a very few, they are enforceable only vicariously. Children are dependent on adults to represent them in claims to achieve their rights. Most states do not even permit a child to appear in his or her own name in court but only through a guardian ad litem or other custodian. A right without enforcement is little better than no right at all, and, until we are able to enforce even the simplest of rights, such as the presence of counsel, we are unlikely to be successful in enforcing the more-difficult-to-define rights such as the right to adequate care from substitute parents.

FASHIONING RIGHTS FOR CHILDREN

There are three basic approaches to the fashioning of rights for children. First, adult rights can be extended wholecloth to children so that a right to counsel for a child means the same thing as it does for an adult. This approach prevails in delinquency law. Second, adult rights can be tailored to fit a child's special needs. The United States Supreme Court tailored First Amendment rights when it decided children possessed such rights but not to the extent that adults did. They were not, for example, able to have access to as wide a range of materials alleged to be obscene as adults were. Every state has tailored employment laws by setting ages at which children may legally work and placing conditions on their employment. Third, special rights for children can be created. Even if a child were given every right now possessed by an adult, there are few of us who would agree mere legal rights alone met a child's needs and interests. A child has special needs and the legal question they present is whether these needs are translatable into enforceable rights. It is in this area of special rights that most of us feel the greatest challenge lies and where, thus far, we have encountered the greatest disappointment. The disappointment arises not just from an inability to articulate standards but also from the resistance within the professions to rationalize their practices. (Within the special rights approach is a subcategory that covers special children—handicapped

children or institutionalized children who are atypical and require additional safeguards to ensure their needs are met.)

Children's Rights and Responsibilities

Rights carry with them responsibilities, even when—or especially when—we are discussing their applicability to children. A curious thing occurs when a society denies legal rights to certain citizens because they are thought incapable or underserving of the right to take care of themselves or make decisions on their own behalf and consequently need social institutions specifically designed to safeguard their position. It is presumed that under the circumstances society is doing the best for the individuals, whether they be wives, welfare recipients, or Indians on reservations. The relative powerlessness of children makes them uniquely vulnerable to this social rationale and no group except for the institutionalized, who live in a state of enforced childishness, is so totally dependent for its well-being on choices made by others. Children are in fact presumed incompetent, and incompetents do not exercise responsibilities, either because they are not extended such responsibilities or because they refuse or are unable to assume them. This presumption of incompetency has profound significance not just because children are reliant on adults to exercise their rights for them, but because a child denied the opportunity to exercise responsibilities is effectively denied the opportunity to mature into a responsible adult.

Analyses about the malfunctioning juvenile justice system appear all over the country. An article involving New York was focused on a young man with a history of violence who had never been held responsible nor placed into a position where he had to be responsible.¹¹ Despite having been caught up in the juvenile justice system for most of his life, he had walked away from it with the apparent belief he would not be held accountable for his actions. Even when he eventually killed another person, he was never adequately punished nor rehabilitated. The impression was that the entire system wished

to avoid responsibility: responsibility for the problems of juvenile crime, responsibility for running its own institutions, responsibility for dealing with the needs of the juveniles coming into it, and in general responsibility for any aspect of the social system it was established to handle. I do not doubt that the system of juvenile justice in New York is beset by extraordinarily difficult problems, but a system that refuses to accept responsibility cannot hope to instill responsibility. And without responsibility, the extension of rights to children in their various relations is a meaningless exercise because rights are extended on a premise of individual responsibility. Philosophers debate whether under any circumstances children are able to exercise responsibilities sufficient for them to assume rights. The debate usually is unsatisfactory since children will and have to exercise certain responsibilities; it should be phrased not in absolute terms but in more conditional ones.

There are certain children at certain ages in certain circumstances who can and should exercise responsibilities. The task is to determine what those conditions are.

The first thing to be done is to reverse the presumption of incompetency and instead assume all individuals are competent until proven otherwise. It is not difficult to presume a newborn child is incompetent, in the sense of exercising responsibilities and caring for himself or herself. It is more difficult, however, to prove a twelve-year-old child totally incompetent and I think impossible to presume the typical sixteen-year-old incompetent. Yet the law basically treats all these children, at their dissimilar stages of life, as incompetent and ignores psychological and social realities. If we were able to fashion laws that decided on the basis of available knowledge which children were competent and which were not, we could begin assigning responsibilities as well as rights and expect both to be fulfilled and enforced.

Although there are difficulties attached to making the law more discriminating, they do not seem to be any greater than the problems lawmakers confront in many other areas. Decid-

ing what kinds of crop aid should be given for a particular year to various regions affected by different weather, pests, and prices is not easy either, but it gets done. Mistakes are made, but they are inevitable in any complex decision carried out over time under unpredictable circumstances, and which affect a great number of people. Political decisions about children's rights are not any more difficult than many politicians have to face; they are just more controversial. But there are some steps supported by common sense and legal precedent we could take now. All procedural rights should be extended to children. They are entitled to legal representation in any proceeding in which their interests are at stake. This includes not just the rights available in juvenile court, but in every judicial or administrative setting. There may still be certain procedural rights one could argue should not be extended to children, but these should be examined on a right-by-right basis and withheld or granted according to the situation in which they would be exercised and the age of the child to whom they would be accorded.

Finally, I think that if we hope to influence public policy on behalf of children so that additional rights and responsibilities will be created, we need to become better advocates. Although advice on strategy may not at first impression appear to fit within a discussion of children's legal status, it seems to me to be the critical issue underlying every aspect of child advocacy. It is especially pertinent to a lawyer's role. The lawyer who best serves the client is the one who understands the legal and political realities surrounding a problem and who perceives the various routes open to solving it. Lawsuits are only one approach to problem solving in the law; a lawyer might instead decide to pursue administrative, legislative, or political action to achieve the objective. The children's rights movement must be as flexible and as realistic.

All too often, proponents of children's programs substitute emotionalism for rationality and believe altruism is an alterna-

tive to effectiveness. A recent book, *The Children's Cause*, by Gilbert Steiner and Pauline H. Milius, subjects federal children's programs, their supporters and administrators, to rigorous scrutiny and concludes that the only programs that have been justified and administered adequately are certain categorical grants to children with obvious physical and mental needs.¹² The authors claim that a comprehensive approach to children and family policy has not been made and that the proponents of one are either too busy fighting among themselves or too fuzzy-headed or too politically naive to carry the burden of proof. That is, of course, a generalization that leaves out some of the leading spokespersons for children's rights, but my experience supports the book's conclusions.¹³

The only federal program that adopted a comprehensive approach that the authors believe succeeded is the national school lunch program. The authors argue it became politically acceptable not because of arguments about hungry children, but because of an alliance between children's advocates and the association of school cafeteria workers who seized the opportunity to increase its membership.

Since children, with or without rights, will remain dependent on adults to secure the assistance they require, they deserve competent and effective advocates. Interested adults should be alerted to the work that must be done to inform the public and decision makers about children's needs, interests, rights, and responsibilities and to secure positive action.

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THE FRENCH-AMERICAN FOUNDATION

The New York Times

SATURDAY, APRIL 7, 1990

In France, Day Care Is Every Child's Right

By Hillary Rodham Clinton

TITTLE ROCK, Ark. — In years after the U.S. started talking about "family values," many wonder why we are still unable to provide decent education, health care and opportunity for all of our children.

The House and Senate are about to confer on child care legislation and review a range of options. At this pivotal moment, much can be learned by comparing America's child care system to France's. Of course, given the differences in political philosophies and tax structures between our nations we should not duplicate the French system here — wholesale.

Recently, I joined a study team of child care professionals who spent two weeks in France, under the auspices of the French-American Foundation, which promotes various ties between the two nations.

Our group — including a pediatrician, a Senate aide, a state government official, academics, day care administrators and representatives

Hillary Rodham Clinton is chairman of the board of the Children's Defense

from organized labor and business — visited schools and spoke with ministry officials, elected office-holders, educators, health professionals, business and labor representatives.

What we saw was a coordinated, comprehensive system, supported across the political spectrum, that links day care, early education and health care — and is accessible to virtually every child.

Much more significant, though, are the pervasive beliefs in France that children are a precious national resource for which society has collective responsibility, and that one goal of a child care system is to help children develop and thrive.

We found sharp contrasts between the French and U.S. child care systems.

In France, mandated paid parental leave for child birth and adoption acknowledges society's obligation to nurture strong parent-child ties.

In the U.S., where only a few states require employers to grant parental leave for child birth or adoption — usually without pay — the cost and disruption of child bearing is viewed as a private choice and responsibility.

France, where preventive health services are integrated with child care programs, ranks fourth lowest in infant mortality among industrial nations. The U.S. ranks 19th lowest

and health care are largely separate, ranks 19th lowest.

French pre-school and elementary school teachers earn comparable salaries and receive subsidized training. As a result, pre-school teacher turnover is low.

In the U.S., where salaries and training levels are low, annual day care staff turnover is 40 percent or higher.

The U.S. has much to learn.

In France, virtually all home-based day care providers are licensed, receive benefits including social security, paid sick leave and vacations, and are visited periodically by specially trained pediatric nurses.

American parents use home-based day care twice as much as center care but have difficulty finding such arrangements. An estimated 80 percent of home-based day care operations in the U.S. are neither licensed nor monitored, and the turnover rate

for care given is 60 percent.

France's system has taken years to evolve, as has its emphasis on the needs and perspectives of children.

Today, the system goes far beyond our own in providing children with basic intellectual and social skills they'll need to succeed in grade school, high school and adult life.

Throughout the 1980's, debate over child care in the U.S. always seemed to focus on "family values." This assumes that parents alone can always determine and then provide — personally or through the marketplace — what's best for their children and, hence, society.

But this view has allowed our Government and, to a much larger extent, business to ignore the needs of America's children and their parents. It also discounts the extent to which economic realities determine access to quality child care.

Child care is not just a family matter. To do our children and our country justice, we need to develop a nationwide consensus on how to best nurture our children, and, through that nurturing, prevent the personal and social costs we all pay when children's needs are not met.

Before we lock ourselves into a makeshift, inadequate child care policy, we ought to consider valuing children. French-style.

HANDBOOK
on
LEGAL
RIGHTS
for
ARKANSAS
WOMEN

Arkansas Department of Labor
Bill Clinton, Governor
Dewey D. Stiles, Director

HANDBOOK

ON

LEGAL

RIGHTS

FOR

ARKANSAS

WOMEN

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FOREWORD

In January 1972, the legal task
force of the Governor's Commission
on the Status of Women issued a
pamphlet entitled The Legal Status
of Women in Arkansas.

In September 1977, the Handbook on
Legal Rights for Arkansas Women
was issued as a project of the
Governor's Commission on the Status
of Women, Harryette Dorchester,
Chair. Union National Bank, Little
Rock, printed the handbook with
special assistance of Elizabeth
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assistance of Deborah Mathis, and
cover design by Karen Miller.
Drawing on the cover was by George
Fisher.

Authors of the handbook included:
Carolyn Armbrust Witherspoon
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The Handbook on Legal Rights for
Arkansas Women was revised and
reprinted in June 1980 by the
Arkansas Department of Labor,
Office on Women and Work.

In April 1987, the Handbook on
Legal Rights for Arkansas Women
was updated and revised as a
project of Arkansas Women's Rights,
Inc., and printed by the State of
Arkansas, Arkansas Department of
Labor.

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apply to a husband who's eligible for benefits.)

For more details on Social Security coverage refer to:

SSA Publication No. 05-10065

SSA Publication No. 05-10072

SSA Publication No. 05-10127

Q. Where should one go for help on Social Security problems?

A. For more information about Social Security or Medicare, contact your local Social Security office. The address and phone number of the office are listed in your telephone book under "Social Security Administration" or "U.S. Government." Phone numbers for these offices are listed below:

Batesville	(501) 793-7380
Blytheville	(501) 763-8943
Camden	(501) 836-7438
Conway	(501) 327-1374
El Dorado	(501) 862-7811
Fayetteville	(501) 521-8605
Forrest City	(501) 633-8855
Fort Smith	(501) 783-5825
Harrison	(501) 741-5119
Helena	(501) 338-3795
Hot Springs	(501) 624-3317
Jonesboro	(501) 972-4651
Little Rock	(501) 378-5771
N. Little Rock	(501) 378-6073
Pine Bluff	(501) 534-0431
Russellville	(501) 968-7122
Searcy	(501) 268-5601
West Memphis	(501) 735-7772

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Project of:
Arkansas Women's Rights, Inc.

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A Bridge over the Mississippi

Keynote Speech Delivered by Hillary Rodham Clinton

Second Annual Urban Education Symposium
Memphis State University
January 24, 1990

I am very pleased to be here and be part of this collaboration between Memphis State University and Goals for Memphis and the larger education and business community, as well as the parents and student who are hopeful for the results of such a symposium. I appreciate that much too kind introduction and I hasten to add that I was not the only Arkansas lawyer on the list. There weren't very many Tennessee lawyers on the list, but there were lots of Arkansas lawyers. I couldn't resist. I'm sorry.

This is a real opportunity for me and what I would like to do this evening is cover quite a bit of ground in as pointed and focused way as I can, and then to have an opportunity for some conversation with some of you ^{who} that have thoughts on your mind.

The issue of urban education and the challenges it poses for all our communities, is one that has to be approached with a continuing sense of the challenge it presents. I don't think there is any one answer. I don't think there is any answer that will remain an answer for an indefinite period of time. We are living in a changing environment and the challenge to us is to learn what we can from our past, and our values but apply it in the dynamic, changing environment we find today. So what we need to be doing is asking ourselves all the time, every single day, "What can we do better to educate our children? And what particularly can we do better to help those families who are unable themselves to be advocates for their own children's education, health and well being?" And because that question has to be asked every day I start with a position that asks all of us to challenge the established order wherever we find it. We have to be willing to ask ourselves, whether we are the dean of a college of education, or the chair of the board of a large corporation, or the principal of a school, or a citizen concerned about the future of Memphis, "What can we do better?" And we have to be willing to take a hard look at ourselves as well as others to come up with some answers. And then we have to continue to evaluate what we are doing.

Let me say at the outset that one of the biggest challenges we face is the inherent contradiction that is presented by the education system to itself. By that I mean that the education system has been designed to perpetuate and pass on the learning, the wisdom, the values of the past. That is what it is designed to do. It is based on a model that arose from an industrializing America. You can see that from the way the school year is broken up, with three months off each year because that is when children had to be out working in the fields. You can see it in the hours that are spent. You can see it in the way most schools

are still organized on a factory model, with a principal and a hierarchical line of authority coming down. The education system was established to provide this kind of model and transmit those values. And yet what we are saying now is that we have to rethink how we deliver education, not just to the poor children among us but to all of our children.

Imagine if you will what it is like to be an educator today, especially a veteran educator who has seen fads come and go, has seen conventional wisdom change as some researcher has come up with yet another new idea, and has survived largely by just staying the course that had been taught by the college of education, based on the experience of the past. And then to know that there are all kinds of symposia like this going on all over the U.S. saying, "You have to do things differently. What we are doing is not working." So there is an inherent tension in what we are about today, and that tension is good and it's healthy, as long as we use it to create positive energy. So at the outset let me just acknowledge that - that we need to talk about what needs to be done with education. And it's not just education that needs to change the way it does its business. All sectors of our society are in the midst of great change and challenge, and it is a mistake to single out education and make it separate from what is going on in the family, the workplace and the political system. All of that is part of a whole, and has to be seen as interconnected. But we are focusing a lot of our attention on education because we believe that it is through education that we will be able to ameliorate the effects of a lot of what is going on in the family and in the larger society, and that if we get a better result from our education system many of our other problems will take care of themselves. So although we want to focus on education tonight, we need to see it as part of a whole. We need to recognize that we have asked it to do one thing traditionally, and that we are now asking it to free itself in many ways from its traditions, and go about the business of teaching young people in a time of rapid change, using new ideas, new approaches, or applying and having the freedom to apply old ones. And that there is that contradiction.

It helps me when I think about the challenges to urban education to think about a child. And let's for a few minutes think about that child and particularly let's think about the many thousands and thousands of poor children in your state and mine today. Because we have to recognize that we cannot improve the education system without taking a look at the entire environment of the children who are the subjects of it. So let's think about a child from before birth through school. And there are some very specific issues that have to be addressed that directly relate to what kind of education system we are going to have.

Very briefly, what kind of prenatal care does the pregnant mother receive? What kind of support is she given for the medical and other needs that she has, particularly if she is a teenager, if she never graduated from high school, if she is on a job that provides no health insurance, if she has no husband to assist her in this process. What kind of help do we give her? Some people might say, "What does that have to do with education?" We begin the process of educating young children in our country at approximately their

fifth year. More than 50% of the learning that any of us will ever acquire happens by the time we are five. The acquisition of language, the ability to begin to think critically, learning motor skills (which we may not remember how difficult that was unless we again see a year-old child trying to master that). The amount of learning that takes place in those first five years will determine to a large extent what kind of capacity and opportunities that young child will be able to take advantage of. And yes, we may be able to do remediation, and we may be able to do intensive work, but the health and well being of that child upon the first day of entry into school will be a critical factor in how successful our education system is.

So I suggest that those of us ^{who} ~~that~~ are concerned about education think about the very beginning of that child's life, and we need to do better than we do in our country, in Memphis, in Arkansas, in ensuring that as many children as we are able to reach are born as healthy as they can be. And we don't do that right now. Neither your state nor mine, provides enough of a safety net for poor mothers. In this country as a whole we rank 19th in infant mortality, and for black children it's an even higher number, and so we lose a lot of babies. And then those we don't lose who are born premature, born with other kinds of preventable problems, often again to the teenage mother, cost us not only a lot of money, but also are themselves burdened with problems from the beginning of their life. During the first year of life we don't have in our country a comprehensive public health system that ensures that the kind of well-baby care that every child needs is provided or required. We have begun to decrease in the percentage of our immunizations for young children. We are beginning to fall behind much less developed countries. We are not producing the serums for the immunizations. We are not staffing our public health facilities. We are not doing the outreach. We are beginning to see the results of mini-epidemics in the inner cities of things like measles, which can carry a great cost for young children. So the whole health care system provides us, if you want to be crass about it, with the raw material that walks into the doors of our schools.

In addition to that is what happens in the home to help prepare and stimulate the young child to be ready for school. Our country and South Africa are the only industrialized nations in the world without any kind of comprehensive system of childcare. We are still debating whether it's proper when we have 52% of the mothers of children under the age of one in the workforce. And we have a patchwork of childcare that not only interferes with those mothers' productivity, but I believe interferes in many instances, because of the lack of quality care, with the development of the children. We have no system of parental or maternity leave that gives working mothers the support they need to feel comfortable about making a commitment to their young children. If we compare our parenting policies in the workplace with those available in our industrialized competitors around the globe, we seem to put less actual value on the act of parenting than any other - despite our rhetoric, despite the political talk about who can be more pro-family than the next politician. When it comes to either government or corporate policies, we don't put our money, or our time or our commitment where our mouths are.

So we put our families, particularly single parents, in an impossible bind from the moment they have what should be a joyous event in their lives. They begin to worry about how will they care for this child, especially if they have to get back to work in two weeks, or four weeks, or six weeks. Most infant care is hard to find and most which is available does not really want to take children under six months. So we, from the very beginning create this tension in our homes. Now, many people say we could solve that real easily, if mothers would just go back to being full time mothers. And I think that more women would at least take more time to be full time mothers if: 1) they were not the sole support of their children and themselves at a certain point in their lives; 2) they believed that their commitment to mothering would be valued and validated by the larger society; and 3) they believed they would not be penalized economically if they stepped off the wage earning or career track long enough to commit themselves to their children. But the message from this society, day in and day out as evidenced by workplace policies and government policies, is that yes, we think it's important to parent, but do it on your own time.

So what we are left with, from the beginning of a child's experience, is this ambivalence that we have created in this society about the importance of parenting. And we can hold a million conferences about how important it is to be a parent but the message that comes through loud and clear day in and day out is that you can't afford to do it economically, you don't get validated for it emotionally or psychologically, and if you are lucky enough to be able to afford to stay at home, you just better hope you don't get divorced. That's what we are dealing with.

So when we talk about what we need to do about education, we have to think about health and we have to think about what is really going on in the homes and families of this country right now. And what is going on is a tremendous amount of stress over the responsibilities of parenting. And that stress is clearly documented when one looks at the kind of outcomes that we see in very young children, in the research that we are now collecting about what is happening to them in their lives. And the stress is elevated the poorer the family is, because the poorer the family is, the least likely they are able to be able to afford financially or summon up psychologically the resources to deal with the stresses they are under in today's world.

One other issue I think we need to address is economics. If you look at what has happened in the last ten years in our country, in the midst of one of the most phenomenal periods of employment and job growth, you can see a very clear income differentiation occurring in our country. The people who are well educated, those of us in this room, those of us with at least some years of college, or maybe a college degree and beyond, have done quite well, thank you, in the last decade. We are among the forty percent or so of Americans whose incomes have risen and who have not been hurt by changes in the tax laws. Forty percent of other Americans, however, primarily those with a high school degree or less,

have had a cut that amounts to about, depending on their level of education, ten to forty percent of their real income. So that 40% of Americans in the last ten years have had a decline in their income, and 20% have sort of held on. So you've got 60% who have not done better economically. That's even with their pursuing strategies such as postponing childrearing, having smaller families, and having both the husband and wife go to work - because it takes two service sector jobs to make up for one lost manufacturing job.

Inflation hasn't stood still. It's been creeping slowly, luckily not the way it was in the late '70's but it still is taking a bite. Certain costs such as medical care have skyrocketed. The bottom line for many families is that economically they are just barely hanging on. And the people that impacts on the most are young families with minimal education (high school) and poor families, primarily female head-of-household families, so that economically, at the time when all of this stress is occurring, when services are not reaching out and able to take care of a lot of their needs, whether it's child care or health care, economically a lot of these families find themselves less financially able to go out and buy what they might need in the marketplace. So there is a tremendous amount of economic pressure on lower middle class and below working families, and the poor of course, as always, feel the brunt of it.

So if you look at a broad set of issues such as these, you then can begin to say to yourself, "What can we do to try to ameliorate the effects of those trends and circumstances, so that the children whom we have in the schools are better prepared to take advantage of what goes on inside the schools?" That is one big set of issues. The second big set is: what does the school need to do to do a better job with whatever child they get? But let's just finish on this first set for a minute. Improved access to health care and better outreach, better enforcement of child support, better corporate policies in the workplace that encourage parenting whether it's something as simple as giving time off to go to student teacher conferences, providing medical benefits for all workers, providing parental leave, whatever it might be - actually supporting the responsibility of parenting. Better access to quality child care and specific programs that try to help overcome whatever disadvantages children in poor, fairly uneducated families might have. And with these programs it is important to recognize that we have two targets. One target is the child. What can we do for this child? The second target is the family. What does it need? What can we do to help change the attitude towards education? What can we do to motivate the family to help the child?

I want to talk briefly about a program that will be discussed in more depth tomorrow because it symbolizes this approach that I think we have to adopt strategically. And that is the HIPPY program, which stands for Home Instruction Program for Preschool Youngsters. It's a program that I first learned about in 1985, from reading about it in the newspaper. What intrigued me about it is that it was a program created in Israel, in response to a very real need. Israel in the late '60's began to have an influx

of Jewish immigrants from North African countries, many of whom came from very depressed circumstances, were uneducated, had lived a very traditional, almost biblical, life and were seeking their religious homeland. The children of these immigrants were placed into the programs that Israel had, because they provide nearly universal childcare, available to most preschool children. And they were given health care and a lot of those things that I advocate that we need to give to our children. But they were still not performing well academically, so that when they moved into the early grades in the Israeli schools, they just weren't doing well. They came from families that might not have spoken Hebrew or any English. They came from families where the parents were uneducated, and somehow the work just on the child wasn't doing what the Israeli educators thought needed to be done.

So some researchers at Hebrew University devised a program aimed at changing the dynamic within the family by working with the mother, and enabling that mother to work with her own child. It's a highly structured program. Paraprofessionals from the community are hired and trained. They then take very structured lesson plans out to work with the mother in a role-playing way, so that the mother is asked to act like the child and the paraprofessional acts like the mother and they go through the class for the day -five to ten classes for one or two weeks. The mother is asked to commit fifteen minutes each day to her child. That may not sound like a lot to you, but the average American mother spends about eleven minutes a day talking to her child. The average American father, if he is available, spends maybe five, and the average child watches six and one-half to seven hours of TV per day. So fifteen minutes may not sound like a lot but, in terms of actually interacting between mother and child, it is above the current norm in our society.

What the Israelis found is that as the mother's self esteem and interest in education rose, so did the child's. Why should that be such a surprise? Yet we have to keep learning that over and over again. And in this country we have to learn it over and over again. So when I decided that I wanted to do that in Arkansas, because I viewed what was happening with the mother as key to the sustaining of interest in education among the children, we began to implement the program in Arkansas. It is now operating in 20 counties, in many different forms, some sponsored by schools, some by Head Start programs, some by community action groups. But the message is all the same, and that is the educators reach out to the parent and say, "We believe you are an important part of your child's education." And the result for us, as in Israel, has been that mothers have gone back to school, they've gotten jobs, they've gotten off of Welfare. They have gotten their GED's. Some have even started to go to college, Vo-Tech schools, or community colleges. And what they report to us is that they never knew they had anything to teach their children before.

Now, what is it they teach in these little lessons? They teach things that you and I, coming from the families we came from, were taught without anybody knowing they were teaching it. The lessons are

very simple ones and can be done with whatever is found in the house. The mother is told to get a knife, a fork and a spoon, to hold them up to the child and say, "Are these the same or are they different?" The mother is told to go to the T.V. and turn it up and down on the volume, and to say "Is it louder or is it softer?" What that does is lay the groundwork for not only more critical, analytical thinking but the ability to make differentiations and to be more comfortable with the use of language. Because what you will find in many poor homes in our country, as they found in Israel, or you can find anywhere in this world, is there is not much language going on between the adults and the children.

I have been, as many of you have been, in and out of housing projects and small rural homesteads, and talked to people who lived in cars, and in nearly any other kind of setting. And I have been struck over and over again, when I ask a simple question of the mother, who is clearly doing the best she can to care for this child, "Do you talk to your baby?" And the response has been, "Talk to him? Why should I talk to him? He's just a baby." When you can't yet understand that one of your main jobs as a parent is to model language, is it any wonder that so many of our young children today don't have adequate language skills? So these simple little lessons that we just did as a matter of course, or were done to us and for us, is what so many parents in our society right now need.

The great irony of living in a culture like ours which is saturated by the television and the mass media is that it has in my view, and I have no research for this, but in my view having that television set on in many homes twenty-four hours a day has severely diminished whatever conversation ever did take place in homes like that, and has made the acquisition of language a one-way street, strictly aural, passive. People don't need to talk to one another because the T.V. is talking to them. One of the biggest problems we've got with many of our youngsters coming in, particularly from disadvantaged backgrounds, is the inability to think and articulate well enough to be able to take advantage of what is offered to them. So I commend to you programs like the HIPPO program, which try to help deal with the family environment and do what it can to help support that and change it to be more motivating for the child's education.

Well, there are many other things that need to go on in those preschool years if they are really to give all children the chance that you and I want for our own. Let's talk now about what needs to go on in the school. One of the things is that the school has to become more of a center for coordinating and delivering services in addition to educational services that disadvantaged children particularly need. When I was working on the education standards in Arkansas, we had hearings in all 75 counties, but then we had two days of hearings with groups of educators. The top request from elementary school teachers in our state was for elementary school counselors. The teachers believed that they were deluged with the health, and social, and economic problems of their students, and they couldn't do what they needed to do for all of those students with all of those needs. And so we did, we required elementary school counselors. And it's one of those things that I'm most pleased about doing, because we now have at

least, where it works, somebody in each elementary school responsible for helping to get the services that every child who is in need requires.

But school is going to have to be even more open to that. And the lines between professionals, and the turfs and the jurisdiction battles that go on between social welfare workers who were trained one way, and medical personnel who were trained another way, and educators who were trained another way have got to stop and there has to be a more open and flexible understanding about how to cut through the red tape and the bureaucracy to deliver services in a coordinated coherent way to children and families. If I hear one more educator complain to me about social workers, and doctors with their medical models, and one more social worker complain to me about educators with their view about what's appropriate learning, I don't know what I'm going to do. You may read about it in the newspaper. My response is that you are the adults in this situation, you are the professionals, you figure out how to work together. You start breaking down the barriers that prevent you from delivering services across those artificial lines. In every community, the school district, the social welfare agency, the public health people, the local hospital should have a working group which comes together periodically and ^{discusses} ~~says~~ the kind of questions that I said to you early at the beginning: "What are we doing to help our children?" "How can we help our schools do a better job?" "What can the school do for us?" We should begin to implement some of those great ideas that once they're laid out on the table seem to go nowhere, and we need to see the school as more of a delivery site.

We also need to figure out why it is, in my experience, most educators are reluctant to implement or to try proven new ideas if they worked somewhere else. I have had countless conversations with principals and superintendents and school board members about models that work well for disadvantaged children and I've asked, "Why don't you do it in your school, in your district?" And invariably I get a response something on the order of either, "Well it's only worked for a couple of years; it will probably fail," or "You know we are not real happy about taking ideas from those people; we kind of like to think about what is right for our kids because, you know, our kids are different from those kids." And sometimes we hear, "Well you know, they are claiming that works, but I'm sure that they are lying about it and we don't want to get caught in that." And my response is: "Well, if you don't like that model go find another one!"

We have a little school district in east Arkansas called Bald Knob, that's its real name Bald Knob, and its superintendent decided a few years ago that they had to be able to be doing a better job with their Chapter One and their Special Ed. and their LD kids than they were. So he called up the State Department and he said, "I want a Federal Waiver so that I can put back into the classroom my Chapter One teachers and my Special Ed. teachers and my librarians and everybody else I can get into that classroom, and I want them spending all their time with the kids that are there. And I want them to be doing team teaching and I want peer tutoring"...all the things that he'd heard about that he was willing to try. So we helped

him get that and get it set up and, sure enough, within a year the test scores were up for everybody, including the Special Ed kids. The Chapter One kids did a whole lot better in that setting than they did in the pull out program. And the morale among both the teachers and the children was much higher. We were just there the other day talking to their parent/teacher organization.

But I found myself at a conference of other Arkansas superintendents a few months ago and I said "You know what's happening at Bald Knob? Have you seen their tests results? Have you talked to their teachers? They were really excited about this," I said. "Have any of you thought about going over and visiting?" and one superintendent from a larger district said "You think I'm nuts? You think I'm going to the board and say I learned anything about education from Bald Knob?" I said, "Then where are you learning about education from? What are you exposing yourself to?"

I can guarantee you, if you have a conference about new and proven models that work in education in Tennessee, and invite every superintendent, you will get the same handful of superintendents who always come to whatever is new because every other one of them doesn't think he has anything to learn. What was good enough ten years ago is good enough now and all this talk about education reform, if he just waits long enough and lives to retirement, will pass him by.

And part of the problem is that there are no incentives in the system for changing the way the system operates. Now, you all in this state have worked very hard on a Career Ladder which provides incentive to individual teachers. I commend you for that, but we have to figure out how to change the entire system in which the individual teachers work. You and I know a lot of teachers who are first-rate teachers who have figured out how to avoid ever coming into contact with any principal or superintendent or school board member. And they will tell you that they have their strategy very well worked out to be able to shut the door in September and open it in June because that's the only way, they think, they are ever going to be able to accomplish anything with their students. There is no sense of collegiality; there is no sense of risk taking; there are no incentives for them to take on what they consider the thankless job of dealing with the education bureaucracy. And so they do the best they can and maybe they, in Tennessee, apply for Career Ladder.

But the whole system is not being challenged and not being given incentives to change. One of the primary issues, for urban education and American education in general, is what kinds of incentives for change and for decentralization and for even some risk taking can we provide American educators? What is it that we can do for them as policy makers, as corporations, as citizens that will say to them: "We want you to be like Bald Knob, or be yourself and do whatever it is that works better." Instead you and I know that the status quo is rewarded day in and day out. Any of you who saw that wonderful movie about Jaime Escalante, the calculus teacher in Los Angeles - well, he and his principal have been basically

exiled to Siberia within the L.A. school system. The principal who let him do all this and get all this attention and shake up the establishment went off to get an advanced degree and came back and was assigned to the asbestos regulating department in the L. A. school district. Jaime Escalante has had every road block thrown in his way.

What is it about excitement and excellence and yes, even eccentricity, among good teachers - what is it that drives principals, superintendents, and school board members crazy? What is it that prevents them from giving rewards to people who get the results we want? That man should have his face on Mount Rushmore! He took those poor Hispanic kids, and convinced them that they were as good as anybody who went to school anywhere in this country, and had the results to show for it. Is he rewarded by the system in which he operates? Not on your life! He is considered a problem that needs to be dealt with, and just as soon as everybody can get back to thinking that all these kids are dumb, the better off we'll be. I don't think that's an overstatement, and it is not just the education bureaucracy, it is any bureaucracy which has a vested interest in perpetuating itself and not rocking any boat. We will never solve the problems in Memphis, Arkansas or anywhere else if we don't rock some boats. We have to figure out how we can redo the incentives so that educators themselves feel comfortable getting out and rocking it.

But finally, let me just say something about what the expectations and attitudes of all of us should be. My feeling is that we are still selling thousands and thousands of children short. When I went around to those 75 counties and talked about requiring certain core curriculum for high school graduation, and talked about raising standards across the board, and talked about an eighth grade exit exam (which we have, before they can get to ninth grade), what I was told repeatedly - by educators, not by parents but by educators - is that I just didn't understand how hard I was making it for all those poor children because look who they were, look who their parents were, look where they came from. We couldn't really expect much from them. We have over the last twenty years, largely because of our inability to come to grips with desegregation, made all kinds of excuses to avoid holding children, black and white, rich and poor, accountable to high standards. We've excused it by saying, "Well they can't really do it anyway, so why try?" We've excused it by saying, "We'll probably end up in court if we try." We've excused it by saying, "It won't make any difference in the long run."

So our expectations...if all of us really were hooked up to a lie detector machine tonight and everyone in our heart of hearts were asked, "Do you really believe that the poor black children in Memphis or the poor white children in north Arkansas can really make it in today's world, and succeed educationally?" - despite all of our best intentions a lot of us, if we said yes, would be shown to be liars. We do not yet believe that we need all these children and that they all can succeed if we give them the right combination of discipline, expectation and love.

Any solution to the urban education problem ultimately comes down to how we treat our children on a one-to-one basis, and what we think about them. We are not doing them any favors by letting them get away with things. We are not doing them any favors by letting them go to school in unsafe schools. We are not doing them any favors by expecting that they can't achieve.

When we implemented the eighth grade test I was apprehensive, because my view of it was that eventually young people would begin to realize that there was something at stake here, that they weren't just passing time, and that they would live up to that higher expectation. A lot of my friends said, "You know, what you've done is drive up the dropout rate dramatically. They won't be able to do it and they will be gone." The first year that we gave it for real - we gave about a year or two of practice tests - ~~but first year we gave it for real~~, there was a pretty high failure rate. In some of our districts, 20% of the eighth graders failed it, and I mean this was a basic test. And some of those eighth graders were interviewed by ~~some of~~ the news media and they said things like, "I never knew I was supposed to know all that stuff.," or "Nobody ever told me that," or "I guess I didn't take it very seriously." They had two more chances over the summer to pass to be able to go on to ninth grade and every year that we've given it fewer of them have failed. They have expressed more of a willingness to try to pass it. They've gone for the extra tutoring that we give during the summer. But the bottom line for me is that we set some standards for all of them and didn't make excuses for any of them.

And so many of our children today, living in disorganized families, in violent and dangerous environments, don't have any standard set for them at all. If the school doesn't structure their day and help set some expectations, it's unlikely anybody will. But the school has to do it in a spirit of love. Much of what we are talking about today and tomorrow at this conference is real old fashioned. How do we get parents to take responsibility? How do we insure that children are given the health care that they deserve to have? How do we give incentives to our educators and our school systems to reach out to all of these children and to care about them and not make excuses for them? And how do we instill in our children the belief that education for them is important, that it is the way out, and that they will not be scorned by their community and their family if they commit themselves to learning.

There is more than enough work for all of us to do for a lifetime, but there are also lots of little steps each of us can take. What I hope is that over the next day with the various forums that are held, each of us will find a way about what step we can take wherever we are. We really don't have a whole lot of time. We can look at it from an economic perspective and say that by the middle of this decade only 20% of the new entrants into the job market will be white, native, male Americans; 80% will be women, minorities, and immigrants, and economically we are going to need every person we can get to be as well educated as we can help them be. And we can look at it socially and say, "You know, we cannot continue

BEYOND THE LOOKING GLASS

PAPERS FROM A NATIONAL SYMPOSIUM ON
TEACHER EDUCATION POLICIES, PRACTICES & RESEARCH

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A NATIONAL SYMPOSIUM HOSTED BY
THE RESEARCH & DEVELOPMENT CENTER FOR TEACHER EDUCATION
SOUTHWEST EDUCATIONAL DEVELOPMENT LABORATORY
WITH THE SUPPORT OF THE NATIONAL INSTITUTE OF EDUCATION

TEACHER EDUCATION: OF THE PEOPLE,
BY THE PEOPLE, AND FOR THE PEOPLE

Hillary Rodham Clinton
Education Standards Committee, Arkansas

Teacher education, both preparatory and during service, will continue to be affected by the education renewal movement that is sweeping the country. That movement, largely inspired by forces outside the existing public education system, demands more public participation in and accountability from our public schools. Community involvement in the public schools is a welcome change from the decreasing public support for education that we have seen in recent years and should be applauded by teachers, administrators, and university professors. And, although much of the reform thus far has focused on raising standards for curricular offerings and student achievement as a first step toward reversing lowered expectations about student capacity for learning, the winds of reform are also upsetting the status quo in teacher education.

In Arkansas, we have worked to (1) require greater accountability from all elements within the public education system, (2) focus more attention and targeted assistance on each individual student, and (3) increase the rigor of the courses required and the performance expected of our students. In addition, a committee appointed by Governor Clinton, which will be making its report within the next two months, is addressing changes needed in teacher education, certification, and evaluation. Its chairman, Ann Henry, was present at this conference and served remarkably well in the difficult undertaking of presiding over the diverse interests and points of view represented on the committee addressing those subjects.

We recognize in Arkansas that the effectiveness of the reforms passed by our legislature and adopted by our state board of education will be determined largely by the teachers and administrators already in our schools. One of the keys to insuring that the reforms are implemented is a good inservice education program tied both to the goals of the education system and to the needs of educators.

There are, in my opinion, six basic policy assumptions about the kind of inservice education program we need in public education. First, the content of teacher education, either before or during service, cannot and should not be solely determined by educators. Second, inservice education programs must be related to furthering a state's, school district's, and individual school's educational goals. Third, inservice education programs should address both the needs expressed by educators for further education in particular areas and the deficiencies in functioning revealed by needs assessments participated in by teachers, administrators, outside evaluators, patrons, and, when appropriate, students. Fourth, assessment and evaluation are critical components in any inservice education program. Fifth, the state should require each district to have ongoing inservice programs and should provide financial support to assist districts in designing, conducting, and evaluating them. And sixth, statewide programs for career ladders, master teachers, or merit pay should be tied to functioning and effective inservice programs. I want to discuss these policy assumptions and my reasons for each.

The first assumption concerns the role of persons other than educators in the design and conduct of inservice education programs. I believe strongly in the widest possible support for and participation in the public education system. That belief is founded on my understanding of the dependence of a democratic form of government (especially in a pluralistic society) on its public schools and my common-sense political experience that the surest way to ensure broad community support for a policy is to work toward broad-based community involvement. For example, when we began our effort in Arkansas to reach a consensus on quality education standards, we worked very hard and spent an enormous amount of time to involve as many people as possible. We held a public hearing in every one of the 75 counties, invited representatives of education organizations and experts to our meetings, and used the media extensively to create a two-way channel of communication about education issues. People came forward with all sorts of ideas, some meritorious, others not, but all expressing real concerns. When we sifted through the recommendations to arrive at our own conclusions, we had the benefit of many ideas and the confidence that our views did not arise in a vacuum.

The model is not so different for involving noneducators with inservice education. The new Arkansas Education Standards for Accrediting Public Schools require each district and school to set educational goals and adopt strategies for achieving those goals, using processes that require public involvement. One of

the strategies for achieving goals should be a program of continuing inservice education, and another strategy should be evaluation of the effectiveness of inservice education. The public should be involved through committees in formulating both the program and the evaluation measures.

The public should also be involved in ongoing efforts to assess the needs of local school districts. I reject the view held by some within our schools that persons on the outside neither know nor care about the problems faced every day in the classroom. In fact, I believe that often an outside perspective can be useful in identifying needs which may not even be perceived by teachers and administrators.

Once needs are identified, noneducators may also be very useful in conducting programs that address those needs. There are, for example, communications experts who could assist educators in improving their abilities to communicate effectively. Private businesses use such assistance all the time in their continuing education--why not schools? Social workers and child psychologists could provide valuable information about children's problems and development. Management and motivation seminars used by businesses could also assist administrators in learning more effective means of management and personnel motivation than are usually practiced within our schools. These are just three ways that noneducators could assist in the design and delivery of inservice education to educators. A policy that assumes the legitimacy of such involvement and requires educators to seek outside assistance would result in more effective and better supported inservice programs.

The second policy assumption, that inservice education programs should further state, school district, and individual school educational goals, may seem obvious and not worth mentioning. However, I have often observed that programs labeled "inservice education" do little to address district or school problems or to further their educational objectives. A well-designed inservice education program should be part of a strategy adopted to meet particular educational goals. Although the goals of school districts and of individual schools within a district may differ depending upon the instructional leadership available, the student population, and other characteristics, it is essential that inservice education be tied to meeting each one's goals, whatever they might be.

For example, a state might adopt a goal that all its students will meet certain levels of achievement on standardized tests by a specified date. If that is the goal, then inservice education ought to address the various ways educators

can assist students to improve their performance toward meeting that goal. A school district with a high population of disadvantaged students might have a goal of enabling a certain percentage of all its students to read at their grade level. Certainly, that district's inservice education program should focus on training teachers to help slower students improve their reading and on assisting administrators in providing instructional leadership that will support teachers in their efforts. A school with an affluent population might have a goal of providing a more challenging curriculum for its students, and its inservice education program would focus on curriculum innovation. In other words, inservice education must be married to educational goals or it risks being irrelevant both to the individual educator and to the setting in which it occurs.

Third, I assume that inservice education programs should address both the needs that educators themselves express and their needs as perceived by others. The question about who should define needs is a variation of the old "chicken and egg" problem. We often do not know what we do not know, and so have difficulty articulating what our needs might be. I am confident that educators understand many of their needs and can design programs that address those needs, but I also believe that certain deficiencies or problems within a district may not be well perceived by educators themselves and may best be articulated by persons other than teachers. For example, teachers may well perceive that they need training in techniques of classroom management or discipline, but they may not perceive that enhanced collegiality within the teaching corps and improved lines of communication between teachers and administrators would assist them in enforcing school discipline policies. Teachers may also recognize that they need alternative methods of reading instruction but may not perceive that more effective communication between school personnel and parents would resolve some of the problems associated with poor reading achievement. An inservice education program that provides a comprehensive approach to school needs must be designed with the input of both those who will participate in the program and those who will benefit from it.

My fourth policy assumption concerns the critical importance of assessment and evaluation in all aspects of public education, including inservice education programs. Assessment and evaluation measures are necessary in designing a continuing education program. An assessment and evaluation process must have the confidence of those who support the public education system. Arkansas was the first state to require that administrators and teachers be tested on their basic

skills as a means for determining who needs assistance to remedy deficiencies in those skills. We consider the test to be part of an ongoing process for assessing our educators' needs and for designing inservice programs to address them. Under the law, all teachers and administrators will be tested in the spring of 1985, except for those who have obtained certification in the last four years by having successfully passed the National Teachers Examination.

The Arkansas test is being developed by a committee of teachers and administrators in cooperation with a nationally recognized testing and research firm. Teachers or administrators who do not pass the basic skills test in the spring of 1985 will have two years to upgrade their skills. They must pass the test by June 1, 1987, the date on which the new Arkansas Education Standards for Accrediting Public Schools will come into effect. Teachers who do not pass the basic skills test by this date will not be certified to teach in the Arkansas public schools. In addition to the basic skills test, the state is requiring educators either to pass a test in their principal subject area of certification or to return to an institution of higher education to take additional course credits and complete them successfully.

Why did we adopt the test? The need for assessment of basic teaching skills became apparent through public involvement in our process to reach consensus about what Arkansas needed to improve education. Therefore, the Arkansas governor and legislature decided to establish state assessment of basic skills and to set a benchmark for measuring them. The reasons for requiring the test were political and substantive.

Politically, the public is justified in requiring more accountability in return for greater investment in education, and that accountability requires assessment and evaluation which the public can understand. The people, through their legislators, voted to raise the sales tax for the first time in 26 years and to devote every penny of that raise to education. Seventy percent of the money appropriated for public schools is to be spent on increasing inadequate teacher salaries. In return for their investment, the taxpayers demanded assurances that teacher competency will be improved. The test offers part of that assurance, and will increase public support for teachers.

Substantively, the state cannot require inservice education programs in each district unless it has a statewide needs assessment of teachers' basic skills. Without such a benchmark, the state cannot design or fund a program furthering its goal of improving educational performance. If our educators have deficiencies in

basic skills, as the public widely believes, that problem must be addressed before other needs can be met; if the public's belief is not well founded, it has to be refuted so that the state can move on to address other pressing problems.

The test will not determine who is a good teacher but will identify those who need improved basic skills in order to function more effectively in the classroom. University and college as well as inservice programs are now helping to prepare educators for the test and will provide remedial assistance to any who fail. The state is currently considering other assessment and evaluation processes that will be used after the test to help educators improve communications, discipline, management, and substantive skills.

The fifth policy assumption is that the state should require continuing inservice education. The Arkansas Education Standards for Accrediting Public Schools contain the following standard on staff development and inservice training:

1. Each school district shall develop and implement a plan for professional staff development and inservice training based on local educational needs and state educational goals. The plan shall be subject to review by the state department of education. The plan shall provide education and training for school board members, school and district administrators, teachers and support staff on a continuing and regular basis throughout the school year. Teachers shall be involved in the development of the plan for their own inservice education. All programs for staff development and inservice training shall be evaluated by the participants in each program.
2. Each school district shall have flexibility in establishing plans for staff development and inservice training, provided the plans meet standards for inservice education as developed by the state department of education.

The Arkansas Education Standards Committee and the State Board of Education believe that staff development for teachers and other school personnel is essential in developing effective schools. Teachers need continuing access to new techniques and knowledge in order to do a better job in the classroom. Administrators should continue to improve their skills in management and information sharing. As instructional leaders, they must also understand the functions and content of instruction. Both teachers and administrators should know how to involve parents and the community to maintain their support for public schools. School board members should be required to take inservice training in developing policy. Support staff and other school personnel must also have

inservice education programs appropriate to their responsibilities. Each local school district is responsible under the Arkansas standards to provide appropriate ongoing education. The state does not mandate the program or subject area because inservice education should be tailored to district or school needs and goals.

I strongly support state leadership in inservice education, but I do not believe the federal government should establish inservice policies. In certain programs traditionally supported by federal funds, such as Chapter One funding for disadvantaged students, inservice training in the goals and objectives of the program may well be part of the federal government's requirements for granting funds. But otherwise, I think the state should set the ground rules for inservice education and the local district should be responsible for designing and implementing appropriate programs.

The sixth policy assumption concerns the relationship between inservice education programs and proposals for career ladders, master teachers, or merit pay for teachers. I do not believe we can have effective career ladders or fair and acceptable criteria for designating master teachers and allocating merit pay without inservice education that meets the requirements for these programs and satisfies the expectations of evaluators and peers. It is also essential that persons responsible for implementing such programs be required to obtain the necessary inservice education enabling them to evaluate their programs.

If these policy assumptions govern the design and implementation of inservice education, I am confident that both educators and the public will be pleased to make the investment of time and money necessary to do a first-rate job of educating students.



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Children's Policies: Abandonment and Neglect

The Children's Cause. By Gilbert Y. Steiner, with the assistance of Pauline H. Milius. Washington, D.C.: Brookings Institution, 1976. Pp. viii, 265. \$9.95 cloth; \$3.95 paper.

Reviewed by Hillary Rodham[†]

Reviewing a book about children for a law journal is like talking to W. C. Fields about the subject: one senses that the audience is not enthralled. By and large, the legal profession considers children—when it considers them at all—as objects of domestic relations and inheritance laws or as victims of the cycle of neglect, abuse, and delinquency. Yet the law's treatment of children is undergoing great challenge and change.¹ Presumptions about children's capacities are being rebutted; the legal rights of children are being expanded. As the structure of family life and the role of children within it evolves, the law is likely to become ever more embroiled in social and psychological disputes about the proper relationship between government and family. The task for lawmakers will be to draw the line between public and private responsibility for children.

The task will not be easy, for the rising debate over public intervention in family life has been emotionally charged. To some extent this is unavoidable. The very questions being asked invite fear and confusion, since they touch deeply held and often conflicting convictions about family autonomy and childhood needs. There are as many policy proposals as there are theories of child-rearing. Adults advance opinions about public policy that they consider validated by their own personal experience as children. Professional surrogates for children claim to want "'everything good for kids.'" ² The meandering road toward a comprehensive children's policy is paved with good intentions, most of them "as resistant to translation into legislative policy as [they are] unexceptionable."³

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1. See Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487 (1973).

2. G. STEINER, *THE CHILDREN'S CAUSE* 241 (1976) [hereinafter cited by page number only].

3. *Id.*

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The difficulties in shaping children's policy stem not only from the sentiments that attach to the issues but also from a cultural reluctance to make children's needs a public responsibility. Politicians, not wishing to appear as advocates of interference with the family, balk at turning their Boys Town rhetoric into public commitments on any but the safest of issues. Besides, for most public officials the idea of a federal policy for children is alien. In a recent address to a conference I attended on children's needs, a United States senator admitted he knew nothing about the subject and would have felt more comfortable discussing energy. Policymakers are simply not accustomed to thinking about children's needs in the same ways they think about missile development, dam construction, or even old-age assistance.

Despite the variety of obstacles it has confronted in its infancy, public policy toward children is maturing into a serious political issue. One sign of that maturity is the timely publication of *The Children's Cause*, by Gilbert Y. Steiner, Director of Governmental Studies at the Brookings Institution, with the assistance of Pauline H. Milius. Steiner brings to his inquiry into the origin, organization, and success of children's policies considerable experience in the political analysis of federal programs. If the book were merely a history of certain federal policies toward children, together with substantive information about specific programs, it would be well worth reading. But the book strives for more.

As Steiner describes it, "the book deals with social altruism and self-interest as factors in the development of federal public policy affecting children, with stability and change in intervention policy, with the goals and the techniques of groups in and out of government that are concerned with making and implementing that policy."⁴ By subjecting the last decade of children's programs, as well as their supporters and administrators, to rigorous scrutiny and by treating the subject with the professional respect due serious political issues, Steiner succeeds in stripping away much of the sentimentality, political naiveté, and excuse-making that have served as camouflage for ineffectiveness, waste, and fuzzy thinking.

The book excels as both an introduction to the policy issues surrounding children's needs and a primer for political action that draws lessons from numerous mistakes and a few successes. It is not meant to be a "catalog of federal programs relating to children,"⁵ but it does provide substantive policy information about school feeding, child

4. P. 13.

5. *Id.*

health, and preschool services, especially out-of-home child care. The histories of the Children's Bureau, the Office of Child Development (OCD), and the Senate Subcommittee on Children and Youth are told with insightful commentary on their roles in the development of federal policies. Policymaking by commission, committee, and conference is reviewed and properly criticized for vague recommendations and lack of follow-through. Three private organizations established since 1970 to work on behalf of children are evaluated, and the activities of the most successful of these, the Children's Defense Fund of the Washington Research Project (CDF), and of its director, Marian Wright Edelman, are used to illustrate effective techniques of children's advocacy.⁶

On the whole, the book's conclusions, set forth in a chapter entitled "Is a Children's Policy Feasible?," are sound and probably applicable not only to the children's movement but also to reform efforts generally. For example, Steiner urges activists to build coalitions with groups whose self-interest would be furthered by new policies for children. Steiner draws this recommendation directly from the experience of the school feeding programs, expanded in large part because of the combined pressure of school cafeteria workers and "social altruists[ts]."⁷ By analogy, he suggests that the only route to comprehensive day care services lies along a way built by the teachers' unions, which seek jobs for their members, and those day care proponents who eventually agree to let the schools assume responsibility for whatever program is undertaken.

Steiner makes a number of other informed recommendations. The proponents of programs should set appropriate agendas for action by picking realistic goals from the list of "everything good for kids." The "jurisdictional quandary" in Congress,⁸ where no committee or individual has responsibility for children's programs, needs attention and perhaps could be a subject for congressional reorganization efforts. The Executive Branch should centralize responsibility for children's programs, or at least the children's lobby should monitor the directorship and activities of OCD. These and other more specific recommendations, coinciding as they do with a new Congress, a new President, and new leadership at HEW, will likely find a receptive audience.

The Carter Administration is on record as supporting efforts to

6. Pp. 158-75.

7. P. 244. See pp. 188-97.

8. P. 250.

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strengthen the family unit. Since many of its top policymakers are reportedly inclined favorably toward children's programs, "saving the family" may become the justification for, rather than remain the nemesis of, those programs. If statistics about the declining state of the American family are believed, a widely held perception of national emergency, so helpful to any reform cause, may also be emerging. At any rate, government officials charged with the task of devising programs to reverse the tide toward family disintegration certainly will be reading *The Children's Cause*. Unfortunately, although the book is in many respects useful, it may serve to perpetuate certain views about children's policy in general and about the comprehensive approach toward children's services in particular that demand more critical scrutiny than Steiner provides.

At the outset Steiner posits that "nonintervention serves as a basic guiding principle rather than an absolute."⁹ Steiner's rejection of absolutism is welcome, but it is his cautious attitude toward governmental involvement in child-rearing that implicitly molds his analysis. At critical junctures in the book's evaluation of children's programs that have been or might have been, the noninterventionist principle silently tips the scales, leading ultimately to Steiner's conclusion that it would be unwise to embark on "a far more complex, universal program" than presently exists.¹⁰ Throughout the book Steiner seems to be saying that, on the basis of available evidence, more comprehensive, innovative proposals are politically impractical after the Nixon veto of the Comprehensive Child Development Act of 1971,¹¹ and may be ill-advised on the merits as well. Accordingly, he urges children's advocates to temper their demands, sharpen their practical political skills, and work to improve and expand existing programs for "demonstrably unlucky children whose bodies or minds are sick or whose families are unstable or in poverty."¹²

There is nothing wrong with pressing for better programs for the needy, but Steiner sets his sights too low. Steiner's own arguments do

9. P. 1.

10. P. 255.

11. The Act, § 6(a) of the Economic Opportunity Amendments of 1971, S. 2007, 92d Cong., 1st Sess., 117 Cong. Rec. 31248, 31249-56 (1971), was the first attempt to make policy for children and their families on a comprehensive rather than piecemeal basis. After being modified in conference, see *id.* at 43498, 43500-04 (joint explanatory statement of conference committee), the bill was sent to the President. The Nixon veto message, which charged that the Act would "commit the vast moral authority of the National Government to the side of communal approaches to child rearing over against the family-centered approach," *id.* at 46059, was a stunning rebuff not only to the Act itself but also to the very concept of a comprehensive approach.

12. P. 255.

not require an exclusive choice between compensatory programs—those that attempt to remedy deficiencies in a particular child population—and comprehensive programs—those that provide services for the entire child population. Indeed, they suggest the need for further efforts in both areas. Regrettably, Steiner's conclusion may well become a self-fulfilling prophecy unless the flaws in his analysis are exposed.

The flaws can be pinpointed by examining two familiar corollaries of the noninterventionist principle, both of which help shape Steiner's evaluation of federal policy toward children. The first corollary is that in order to overcome the noninterventionist impulse the evidence supporting proposed or ongoing children's programs must be greater than that necessary to overcome resistance to change in other areas of public policy. Whether the greater burden borne by proponents of children's programs is appropriate is rarely questioned, though it warrants consideration. After all, no new policy is fail-safe. Legislators and executives take risks of all kinds when they decide to build a nuclear plant or introduce a deadly pesticide or advocate no-fault insurance. There is no way to predict fully the effects of a policy that is ambitious, yet untried, especially one taking shape amidst the conflicting claims of proponents who foresee extraordinary benefits and opponents who see the handwriting on the wall and the dominoes on the table.

Several federal initiatives for children have been dragged down by this special burden of proof. For his part, Steiner seems agreeable, or perhaps oblivious, to this situation; for whatever reason, he does not protest. In discussing the program of early and periodic screening, diagnosis, and treatment (EPSDT), which was mandated as one of several 1967 amendments to the Social Security Act, Steiner first notes that Congress did not fully consider the costs or scope of EPSDT; by default HEW was given considerable responsibility to define and defend the program. Steiner then describes at length "an apparent decision by HEW to flout the law"¹³ by bureaucratic procrastination: final EPSDT regulations were not issued by the Department until seven years after Congress enacted the program. Nevertheless, Steiner concludes that "[t]he obvious lesson [of EPSDT] is that providing health services to poor children is too complex, too expensive, and too consequential a matter to be legislated without a plan."¹⁴ A balanced critique of EPSDT might properly take Congress to task for laying an inadequate legislative foundation for program implementation.

13. P. 224.

14. P. 230.

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Surely, however, there have been instances where an energetic and imaginative administration has overcome poorly drafted legislation. To suggest that EPSDT was doomed by its authorizing legislation is to discount the destructive role of the program's administrators, who never gave it a chance to succeed.

Sometimes even successful children's programs cannot bear the burden imposed by the first corollary. After tracing the rise and fall of maternal and child health project grants, for example, Steiner concludes that the program "seemed to show important success in preventive health care" but it "was never considered for a multi-year extension."¹⁵ Indeed, by 1975 the Ford Administration was proposing "sharp cuts in federal financing of community health services, including the now-unified maternal and child health grants,"¹⁶ based on the unfounded belief that recipients of care and insurers would pick up the difference. Although the disorganization among grants supporters and the lack of concerted congressional action are evidence of the program's political weakness, the first corollary must be given its due in explaining why successful programs for children suffer the same fate as unproven ones.

The second corollary underlying the book's critique is that children's programs, once underway, should be judged more quickly and harshly than other programs. Perhaps because of the initial ambivalence toward the introduction of a new program, support for the program rests on a shaky consensus easily shattered if the promised goals are not speedily and smoothly achieved. That the rush to judgment has occurred in a number of instances is unquestionable. Whether it is appropriate is worthy of more discussion than the book provides.

One of the clearest examples of this second corollary in operation is Steiner's treatment of the Head Start program. Before Head Start, federal support for child care was always linked to national emergencies like the Depression or World War II. Arguments favoring the provision of child care services stressed the need to put women to work in WPA projects or armaments production or remove them from swollen welfare rolls. Before the 1960s, the potential benefits of such services to the children themselves clearly were not a primary consideration. New psychological theories challenging traditional beliefs in fixed intelligence and predetermined development coincided with the Kennedy and Johnson Administrations. In the climate of a society

15. P. 238.

16. *Id.*

discovering hunger and poverty, these theories flourished and assumed political as well as scientific significance. If a child's intelligence could be improved through extrafamilial services, could a government refrain from establishing them? The answer from the generals of the War on Poverty was predictable: they decided to offer unprecedented public services to preschool children, primarily from poor families. Congress and affected parents supported the effort, according to Steiner, largely because of the claims that substantial individual cognitive gains would result.¹⁷ Therefore, when preliminary evaluation of Head Start, especially the Westinghouse study,¹⁸ failed to corroborate those claims, disillusionment dampened the program's widespread popularity.¹⁹

Steiner recognizes that the program commands sufficient political support to resist attempted cutbacks and that it provides "intellectual respectability to out-of-home child care under public auspices."²⁰ Nevertheless, Steiner shares the disappointment of some early Head Start backers and downplays the significance of positive findings about the program's effects in areas other than cognitive development. His uncritical acceptance of the Westinghouse study findings reflects the force of the second corollary, that children's programs may properly be judged more quickly and harshly than other government programs. Head Start embodied a theory about the sources and quality of intelligence whose validity was not confirmed in the first years of the experiment. But this should have been neither surprising nor disillusioning. Analyses in other policy areas presume difficulties in program design and implementation; years may be spent testing and revising a theory. Surely a theory about children's intelligence deserves more time to be tested than either the adherents of the Westinghouse report or Steiner give it. This is especially true in the light of studies completed since Westinghouse, which call into question the Westinghouse conclusion that the full-year Head Start program is only "marginally effective in producing gains in cognitive development."²¹ Apparently we share so

17. See pp. 29-35.

18. Westinghouse Learning Corp. & Ohio University, *The Impact of Head Start: An Evaluation of the Effects of Head Start On Children's Cognitive and Affective Development 2-7* (June 1969) (executive summary). The report presents the results of a study comparing Head Start participants with children in a control group. The study concluded that the summer Head Start program had no significant impact on learning readiness or academic achievement and that, in most cases, the rather small cognitive gains achieved by the children in full-year Head Start programs faded after the children entered school.

19. For example, a planned endorsement of Head Start by President Nixon was diluted. Pp. 32-33.

20. P. 35.

21. Westinghouse Learning Corp. & Ohio University, *supra* note 18, at 7. See, e.g., A. Mann *et al.*, *A Review of Head Start Research Since 1969: Working Draft* (Social Re-

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much apprehension about potential harm to cherished, albeit fantasized, family values that programs for children must demonstrate immediate success or risk extinction, even in the face of subsequent evidence of achievement.

The book's comparison of fledgling proposals for day care services with the well-established school lunch program exemplifies the folly of judging developments in this field too hastily. Steiner calls the national school lunch program "the success story of the children's cause."²² He observes that "[w]hile comprehensive child development, child-care centers, and child welfare services have floundered, school lunch has flourished."²³ Steiner traces the school lunch program's development from a form of farm relief to a middle class subsidy with nutritional justifications to a broad-based feeding effort giving priority to needy children and providing breakfast and summer feeding services as well. Farmers, congressmen, school cafeteria workers, private lobbies, and citizens concerned about the effect of malnutrition on school achievement formed a coalition over a number of years. The coalition gradually built toward the legislative activity between 1970 and 1975 that resulted in an expanded feeding program. During these five years the number of free and reduced-price lunches and breakfasts increased despite the declining school population.²⁴ Now that most of the children who need a *free* lunch have access to one, Steiner concludes that reformers should turn their attention to the "timely and politically realistic" goal of broader access to reduced-price lunches and breakfasts.²⁵ This goal may be timely and realistic today, but it took 40 years of incremental, sometimes uncertain progress to reach this point. The feeding programs once had to overcome congressional concerns about "further federal participation in 'providing food, clothing, and the other necessities of life.'"²⁶ It is premature to suggest that current proposals for child care, which face the very same concerns, cannot likewise surmount them.

Steiner's predisposition toward nonintervention distorts not only his evaluation of past and present children's policies but also his assessment of the prospects for a comprehensive approach to children's needs in the future. The need for a comprehensive child care program was

search Group, George Washington University Dec. 1976). Remarkably, although the Westinghouse findings have been challenged repeatedly since their publication, Steiner does not mention any post-1970 studies of Head Start's impact on cognitive gains.

22. P. 176.

23. *Id.*

24. P. 198.

25. P. 205.

26. P. 183.

accepted by a majority of Congress just six years ago. The legislative purpose was to assist the American family to meet children's needs, not because Congress questioned the traditional role of the family but because it perceived unprecedented challenges to many families' abilities and resources.²⁷ Within Congress there was much disagreement about the appropriate system for delivering services, but very little about the propriety of or necessity for extending them.²⁸

Steiner attributes passage of the bill not to its merits but to its disorganized opposition, which coalesced too late to secure any action short of a presidential veto. But the lack of organized opposition and the other favorable circumstances Steiner cites to explain the bill's success do not refute the case for the bill made in weeks of investigation and testimony. Had serious and timely questions been raised, the case could have been sharpened and the flaws in the bill corrected, but the Nixon veto message was totally unexpected. When it came, according to Steiner, it proved embarrassing even to some Republicans.²⁹

If Steiner's information is correct, the veto was not really a rejection of child development policy but merely a sop to opponents of the President's new China policy.³⁰ Nevertheless, Steiner seems to regard the veto as a true measure of enduring political opposition to comprehensive children's policies. But before assuming that the veto message nailed the coffin on comprehensive children's policies, changes in the political constellation since 1971 should be surveyed. Richard Nixon is no longer President; James Buckley, the force behind the veto message, has been replaced in the Senate by Daniel Patrick Moynihan, who was, while serving in the Nixon Administration, a supporter of the comprehensive services approach. These changes will not in themselves guarantee the passage of a comprehensive child development bill or other sweeping legislation, but they are indicative of a much more favorable climate than Steiner discerns.

Even if a full-fledged comprehensive program were not immediately feasible or desirable, surrender to a piecemeal approach would be unwarranted. Given the legislative and administrative inexperience with comprehensive children's programs, it might be wise to begin on a limited, experimental scale. Proponents of different types of programs could assume responsibility for testing them under competent govern-

27. Statement of Findings and Purpose, Comprehensive Child Development Act of 1971, S. 2007, 92d Cong., 1st Sess. § 6(a), 117 CONG. REC. 31248, 31249 (1971).

28. See pp. 105-13.

29. P. 114.

30. Pp. 114-15.

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ment auspices. If Albert Shanker wants the teachers to control day care programs, let him have an experimental grant for a few years to explore how he and those with whom he works would administer the program and what benefits would accrue to children. Bettye Caldwell's landmark child development project is part of the Little Rock, Arkansas school district and might provide a model for similar efforts in other environments. The Children's Defense Fund could be given financial support to coordinate projects under various community control models, thereby affording an opportunity to evaluate the claims CDF makes for that form of public intervention. If these kinds of experiments were adequately funded and patiently observed, they would do much to generate the reliable evidence needed to make informed assessments of alternative public policies.

Refinement of established programs, such as Head Start, may provide another avenue for experimentation in child development policy. Recent evidence indicates that Head Start is achieving not only its original purpose, namely cognitive gains, but also improvements in children's social behavior, parental attitudes, community involvement, and children's health.³¹ This successful evolution suggests that the program should be strengthened and expanded within its present structure with an eye to testing the comprehensive approach.

In light of these opportunities for change, Steiner's failure to endorse a comprehensive approach to children's policies is disappointing. In advocating more of the same compensatory programs, Steiner fails to recognize that the compensatory and comprehensive approaches are complementary and should be pursued simultaneously. By the same token, incremental programs can be expanded into more comprehensive ones, and even limited comprehensive programs like Head Start may form a unified framework within which both established and emerging programs can flourish. Nevertheless, despite Steiner's unnecessarily cautious recommendations his book is a welcome addition to the all too limited body of literature in this field. It will be of significant assistance to children's lobbyists and policymakers, as well as to citizens ready to join the debate about the future of children's policy.

31. See A. Mann *et al.*, *supra* note 21, at 8, 21-29 (cognitive gains); *id.* at 9, 34-35 (children's social behavior); *id.* at 12, 38-39 (parental attitudes); *id.* at 15, 42-43 (community involvement); *id.* at 16, 45-46 (children's health).

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