ADVANCE SHEET– JANUARY 8, 2021

President's Letter

In this issue, we include two notable essays by women.

The first is by an outstanding Baltimorean, Mary Ellen Richmond, the founder of the American social work profession, who had a highly unusual biography. She was orphaned at an early age, was home-schooled by an aunt, and enjoyed only four years of formal education at the former Eastern High School. She was a voracious reader. While employed as a desk clerk at the old Altamount Hotel, which stood at Franklin and Cathedral Streets, later the site of the Y.M.C.A. and now again a hotel, she read an advertisement placed by the Charity Organization Society for an Executive Director. She was then in her early twenties. She was interviewed by Charles J. Bonaparte, who was the U.S. Secretary of the Navy and then Attorney General under Theodore Roosevelt, and so impressed him that she was hired in preference to two young men who were Harvard Ph.Ds. She became successively director of the COS in Baltimore, Philadelphia, and New York and the head of the COS of the Russell Sage Foundation. In 1917 she authored *Social Diagnosis*, a standard social work text still read in the social work schools, and later founded the Columbia School of Social Work, the first social work school. She was a vehement opponent of the mothers' pension laws, which morphed into the AFDC program, favoring work relief, if necessary part-time, over cash relief, and also opposed the 'psychiatrization' of the social work profession. The essay on beggary appearing below written early in her career in Baltimore reflects this preference as well as her distinctive and passionate prose style. It is included in a collection of her writings published as *The Long View* (Russell Sage Foundation, 1930).

The second essay is a chapter on "The Missing Dimension of Sociality" in *Rights Talk: The Impoverishment of Political Discourse* (Free Press, 1991) by Mary Ann Glendon, the Learned Hand Professor of Law at the Harvard Law School. Professor Glendon, with Amitai Etzioni and William Galston, was a leader of the communitarian movement and has been President of the International Association for Comparative Law. In her later career, she was a moderate critic of the Supreme Court's abortion jurisprudence, and became the Vatican representative at the Beijing Women's Conference, President of the Pontifical Academy of Social Science, American Ambassador to the Holy See, and Chair of a State Department Commission on international religious freedom, as well as author of a book on Eleanor Roosevelt and the Universal Declaration of Human Rights.

Our judicial opinion in this issue is another Cardozo opinion, that in *Ultramares v. Touche Niven and Company*, 255 N.Y. 170, 174 N.E. 441 (1932). Common law judges today become celebrated for creation of new causes of action, and Cardozo himself made important contributions to the law of products liability. Unlike too many of them, he also knew how to say no, as this opinion, the bedrock of today's accounting profession, well illustrates.

George W. Liebmann

Book Reviews

In deference to the shut-in state of its members, the Bar Library has somewhat increased its acquisition of general interest books on politics and history for the Horwitz Collection and the Joseph Shelf. Here are some short and undoubtedly idiosyncratic reviews of recent acquisitions, some of them disappointing.

Eric Rauchway, *Winter War: Hoover, Roosevelt, and the First Clash Over the New Deal* (New York: Basic Books, 2018). This book is purportedly an account of the long interregnum between the Hoover and Franklin Roosevelt administrations, a period of some four full months (now a

seemingly interminable two and a half thanks to the lame-duck amendment). Although illuminating in places, it is marred by the author's bias in favor of the New Deal and his eagerness to point morals for our present transition. The book is filled with cheap shots at Hoover. There is no reference to the violent partisanship of the Democratic congress in the last two years of his administration, none to his origination of the Home Owners' Loan Corporation, one of the most popular agencies of the New Deal which arose from Hoover's knowledge of the Credit Agricole in France and which was not supported by Congress until Roosevelt was inaugurated, little reference to his embrace of modest deficit spending for public works and creation of the Reconstruction Finance Corporation. His resistance to direct payments to citizens is portrayed as reactionary, but Roosevelt drifted away from doles, his AFDC program left a bitter aftertaste, and his economic policies were at least as inconstant as Hoover's, though his optimistic personality maintained public morale.

Fredrik Logevall, *JFK: Coming of Age in the American Century* (New York: Random House, 2020). This is the first volume of a projected two-volume biography of JFK, ending with the 1956 election, by an historian, now at Harvard, who wrote an admirable book about the French war in Indochina. It is too hagiographic to be really illuminating on Kennedy's early years; Nigel Hamilton's Reckless Youth (1992) is a useful corrective. It strives to portray the young Kennedy as a thoughtful and historically-minded statesman, but the unintentional result is a portrait of a class-bound opportunist, whose association with others sharing his advantages led to the wreckage of 'the American Century' in the Vietnam War.

Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (New York: Liveright, 2017). This book is an almost definitive collection of housing discrimination horror stories; it lauds Justice Kennedy's sudden embrace of 'disparate impact' doctrine in housing cases in 2015. Its flaw is that its history essentially ends in 1968; the year the Fair Housing Act ended the 'white noose' around central cities, leading to the massive migration of middle-class blacks to the suburbs. The appalling feature of the book is that it takes no notice at all of differing perspectives on the subject with which it deals. Its bibliography, including some 450 publications, does not include any of the writings of centrist or conservative writers on its subject, including Richard Briffault, Robert Ellickson, William Fischel, George Lefcoe, Bernard Siegan, and Charles Tiebout nor the Census of Housing or any government publications other than those issued by the civil rights agencies. In an exercise in academic back-scratching, it acknowledges the assistance of more than 150 persons; it is not reassuring to learn of the author's participation in a year-long seminar "led by Professor (and former Secretary of Labor) Rob Reich at the Institute for Advanced Study in Princeton" where George F. Kennan and J. Robert Oppenheimer once roamed. His policy prescriptions are almost entirely race-based, and therefore politically foredoomed.

Ta-Nehesi Coates, *We Were Eight Years in Power: An American Tragedy* (New York: One World Publishing, 2017). This book, by a much-celebrated Black Baltimorean, is an apologia for the Obama administration. Its title is drawn from a work by W. E. B. DuBois about Radical Reconstruction in the South. The book is in some respects attractive. Coates writes well, and unlike Rothstein makes some effort to engage opposing views, such as those of Daniel Patrick Moynihan. He honestly describes his career trajectory, which resembles that of James Baldwin in the 1960s: from New York cocktail parties and a Mac Arthur Foundation 'genius grant' to the

Aspen Institute and a subsidized exile in Paris, "made possible by The Atlantic, which from fact check to pay check supported me through these eight years." But the apologia for Obama is unconvincing. He does not explain why Obama's priority was a consumer-oriented health program, which did nothing for public health (epidemiology, lead paint encapsulation, venereal disease contact tracing, regulation of saturated fats and sugars) and which avoided reform of America's disastrous public high schools and vocational institutions. He alleges that racism prevented "Obama from saying anything meaningful about present issues charged by race such as mass incarceration or the drug war." He becomingly acknowledges that Jesse Jackson and Al Sharpton were "drifting into self-parody." He credits "better education about contraception" as accounting for a two-thirds drop in teen pregnancies; the Welfare Reform Act of 1996 withdrawing an 18-year guaranteed income from teenage mothers goes unmentioned. He acknowledges Obama's involvement in Middle East wars, without discussing their destabilizing consequence in Europe, and views Trump's election as a repudiation of "good Negro government", not noting Obama's enthusiastic embrace of the 'culture war' as a method of race and gender electoral mobilization.

Rachel Maddow and Michael Yarvitz , *Bag Man: The Wild Crimes, Audacious Cover-Up and Spectacular Downfall of a Brazen Crook in the White House* (New York: Crown, 2020). This account of the fall of Spiro Agnew adds little to the previous work on the subject by Jules Witcover and Richard Cohen (*A Heartbeat Away*, 1974) but is very well written and highly entertaining. Its heroes, justifiably, are George Beall and Eliot Richardson. Its portrayal of Agnew as a total opportunist is a bit unfair, and there is no account of his not discreditable two years as Governor and the Hughes-Agnew tax reform, described by some as 'the Jean Spencer administration' after his principal policy advisor. The book is permeated with schadenfreude; there were, at that time, as Agnew never ceased pleading, equally corrupt Democrats.

Scott Anderson, *The Quiet Americans: Four CIA Spies at the Dawn of the Cold War* (New York: Doubleday, 2020). This account of four CIA operatives adds little to what is disclosed in numerous previous works, most notably Evan Thomas' *The Very Best Men* (2006). There is more in it about America's little-known support of anti-communist forces in the Ukraine and the Baltics in the immediate post-war period than appears elsewhere; the stories involving Albania, Hungary, Iran, The Philippines and Vietnam are generally familiar. The book is well-written, though a bit disorganized; it leaps back and forth among the four figures discussed. Its conclusion that their efforts were both hubristic and counter-productive is a familiar one, and makes the point that means as well as ends are important in politics.

George W. Liebmann

For me, today, much scarier than covid, is the way people are driving. I can and do take precautions against covid such as practicing maximum social distancing, washing my hands frequently, using hand sanitizer and wearing my mask. For my immunity I try to laugh often and average about twenty-two hours of sleep a day. The eating right is not going real well, but, what can I say. There seems to be, however, nothing you can do against what is happening on the roads. I was on the Autobahn the other day, I mean I-95, and everyone seemed intent on breaking the land speed record. Scary does not begin to describe it. Driving around Baltimore City and County you realize how desperate everyone is to have their attention distracted from what is going on since many seem to be practicing the art of distracted driving. When your client comes into the office with their own tale of what happened to them, remember that the Bar Library can provide you with fast and inexpensive information concerning whatever vehicles and drivers might have been involved.

One of the more popular services offered by the Bar Library is providing information on Maryland drivers and registered vehicles. The information, which comes directly from the Maryland Motor Vehicle Administration (sorry we cannot search for out of state drivers or registered vehicles), includes three year driving records as well as information on drivers such as their address. You can find out who owns what vehicles, as well as whether there are any lien holders and who the insurer for a vehicle is. Searches are only thirteen dollars and are done, with very few exceptions, immediately. So, call (410-727-0280) or e-mail (jwbennett@barlib.org) your requests today.

Joe Bennett

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THE PROFESSION AND PRACTICE OF BEGGING

(Hitherto Unpublished)

An address delivered in 1891 before the East Baltimore Business Men's Association. Miss Richmond quoted from this paper in her book, The Good Neighbor.

IN THE popular discussions of beggary and its causes, there are two ways of accounting for the beggar. One is to say that nothing but pure laziness is his reason for being, and the other is to declare that the conditions of society are all wrong, and that to make over these conditions is to transform the vagrant into a useful citizen at once. I cannot accept either of these views myself, without much modification. I know that there are a great many people "born lazy," who will never do one stroke more of the world's work than direct necessity forces them to, but this is a negative characteristic, and even these people have certain positive cravings and instincts. I think I have discovered two in almost every variety of beggar: one is the roving instinct, and another is the gaming instinct.

If you will bear with me a moment, before I turn to the practical part of my subject, I should like to convince you that this is not altogether fanciful. I don't know how many in this audience have had the intention to run away from home one time or another in their childhood, or how many carried the intention into effect, but we all know what a common thing it is for children to attempt to right their wrongs in this way. Maggie Tulliver was not the only little girl who hoped to end all her woes by running away to the gypsies, and gypsies have a fascination for every normal-minded child. I never look into the face of a vagrant and hear his tale of aimless wanderings—and I hear it almost every day in the year—without recognizing this primal instinct of the rover, which is my instinct and your instinct too, only conquered in us by other and stronger motives.

Again, you may never have thought of him in this way, but man is a gaming animal. From the wharf-rat on our docks tossing pennies (heads or tails?) to the millionaire on the stock exchange, what a fascination the uncertainty, the suspense, the fluctuations of luck, the chance of getting something for nothing, has for him! No one is more under the spell of this fascination than the beggar; nothing in the practice of his profession is more attractive to him than its extreme uncertainty—the run of bad luck today, the possibility of a golden harvest tomorrow—all won, every cent of it, by a skillfully played game. A mean, over-reaching instinct, is it not? But which one of us is free from it, held in check though it may be by better and higher impulses? I might go on to show you how each one of us possesses in himself all the possibilities of accomplished beggary; that, given the repression of our better selves and the development of our worse selves, we would all be in a fair way to become a lot of hopeless vagrants, and that our present cash balance in bank would go a very little ways toward saving us. But this is entirely aside from my purpose, and if I have brought you to the point where you are willing to recognize a certain kinship to and personal responsibility for the begging class, I am quite prepared to turn to my subject and give you some brief account of the profession and practice of begging in the past and at present, confining myself for the most part to the Anglo-Saxon beggar.

In England begging has been an organized profession for six hundred years, and we find attempts to repress it by legal enactment as far back as 1349, and in Ribton Turner's monumental work on the subject—to which I should here like to acknowledge my indebtedness—I counted no less than 371 laws since made with the same object. This does not include the Scotch laws, and it is quite probable that I overlooked a number in counting. Yet, with all this legislating, the beggar still flourishes, and it is evident that punishment alone will never exterminate him. What punishment failed to do, the indulgence of the early church did not succeed in doing; in fact it made matters worse, though with the best of intentions, perhaps, by encouraging able-bodied beggars to lead lives of idleness and profligacy upon the charitable bounty of the religious houses. The point of view which holds that the giver is not responsible for the use made of his gift, that what he gives is laid

up to his credit in heaven just the same, belongs to the church of the middle ages. It is distinctly mediæval, and is just as much of an anachronism now as a Queen Elizabeth ruff and farthingale would be. Yet, the modern church gets this old doctrine out, carefully dusts it, and proudly wears it every once and a while. When some one inclines to question the wisdom of such gear, he straightway approves it with a text, crying that, "The poor ye have always with you"; as if that had anything to do with it. Truly, as Professor Ely says, the perverters of Scripture we have always with us too. So, even up to modern times, the beggar, like a wayward child between two unwise parents, petted and coddled by mother Church and punished by father State, has gone on having his own way, for it has never occurred to these parents to combine and reform him.

As the practice of begging flourished and became more and more an art and a profession, it divided into certain natural departments. There were the general practitioners, and gradually there grew up various classes of specialists, according to the diversity of gifts. As early as 1815, an English clergyman recognized four distinct classes of London beggars: the two-penny post beggars, or begging-letter writers; the knocker-beggars, who go from house to house, claiming that Mrs. So-and-So sent them, and so on; the stationary beggars, who have a regular stand, and are most of them maimed in some way or counterfeit deformity; and the movable beggars, who appear at the theater at the time of the play, near the markets on market-days, and in front of the churches at church time. One man of this class would "stand at the door of a Catholic Chapel, petitioning 'for the love of the Holy Virgin,' and other Catholic saints; in half-an-hour afterward he was at the door of a dissenting meeting house bawling 'for the love of Christ.' The evening found him in front of some chapel belonging to the Established Church." They are wonderfully liberal minded, beggars; Catholic or Protestant, Baptist or Presbyterian. It's all one to them, for they run their religion on the simple principle of "piety for revenue only."

One of the most accomplished specialists is the begging-letter writer. "I ought to know something of the begging-letter writer," says Charles Dickens.

He has beseiged my door at all hours of the day and night; he has fought my servant; he has lain in ambush for me, going out and coming in; he has followed me out of town into the country; he has appeared at provincial hotels, where I have been staying only for a few hours; he has written to me from immense distances, when I have been out of England. He has fallen sick; he has died and been buried; he has come to life again, and again departed from this transitory scene; he has been his own son, his own mother, his own baby, his idiot brother, his uncle, his aunt, his aged grandfather. He has wanted a great coat to go to India in; a pound to set him up in life forever; a pair of boots to take him to the coast of China; a hat to get him into a permanent position under government. He has frequently been exactly seven and sixpence short of independence. He has had such openings at Liverpool—posts of great trust and confidence in merchant's houses, which nothing but seven and sixpence was wanting him to secure—that I wonder he is not Mayor of that flourishing town at the present moment.

Dickens' experience is that of every public man of our time. Not a prominent citizen of Baltimore today but gets hundreds of such letters every year filled with the most preposterous demands. And it pays, or people wouldn't continue to write them. I have noticed that one favorite dodge of our own begging-letter writer is to tell you, in a burst of confidence, that his oldest boy is named after you, or that his youngest is about to be christened (as a Baltimorean wrote to a dozen or so of Congressmen last winter), and will be named after the receiver. The twelve Congressmen happened to compare notes in that particular case, and felt the baby would have altogether too much name. Frequently the writer has known your sainted grandfather, or is well aware what a generous, opened-handed, noble-hearted woman your mother was; *she* promptly would have responded to his humble plea, and so forth. There's a weary monotony about these letters, for the most part, and yet some of them sound very plausible.

Of another class of beggar, less skilled but more successful than even the begging-letter writer, the deformed beggar, I hesitate to speak. It is the instinct of every human creature to hide deformity, but when a man deliberately flaunts his infirmities in public for the purpose of exciting sympathy, nothing but moral degradation can come of it. One man in Baltimore, a hopeless cripple, who averaged about $6.00 a day collected in the streets of our city, was known to spend it all in riotous living. And the blind beggars, who make the

strongest possible appeal to every sympathetic heart and who reap the largest harvest for that reason, are much courted by the less fortunate of their fellow-craftsmen and tempted to spend their money in the most degrading ways. So universally is this the case that a gentleman who has worked long and faithfully for the education of the blind, and who has had much practical experience of the pauper class also, declares that he never knew a blind beggar who was not morally diseased. "A few years ago," says Ribton Turner, "there used to be stationed in Portman Square a man commonly known as *Blind Jack*. A friend, who was in the habit of giving him a small weekly sum, was returning on foot from the theater one summer's night when a smart shower overtook him in the neighborhood of Portman Square. He ran into a public-house for shelter, and there found *Blind Jack* considerably advanced in his cups. Accosting him, he told him that he had hitherto been in the habit of assisting him regularly, believing him to be a deserving character, and that he was sorry to be undeceived by finding him in such a condition. "You've been in the habit of assisting me regularly!" said *Blind Jack* with a hiccough, and producing a handful of small silver, "*Then you're a jolly good fellow. What'll you take to drink?*"

We may count as a branch of this same class those who counterfeit deformities, or who purposely maim themselves. Dr. William Turner in his New Book of Spiritual Physic, published in 1555, says, "When, as of later years, I practiced bodily physic in England, in my lord of Somerset's house, divers sick beggars came unto me, and not knowing that I was a physician, asked of me my alms. To whom I offered to heal their diseases for God's sake. But they went by and away from me, and would none of that. For they had much leaver be sick still with ease and idleness than to be whole and, with great pain and labor, to earn honestly their living." A boy is begging on the streets of Baltimore today, giving always a false name and false addresses and usually calling himself Frank Brown, who has been exhibiting the same scalded arm for the last two years. He either inflames it in some way, or paints his arm to simulate inflammation—I don't know which.

A kind-hearted and intelligent woman once said to me, "It's all very well to talk about the folly of giving to beggars, and so far as

adults are concerned I agree with you, but I could never bring myself to refuse a child." Now if any sort of indiscriminate alms is more criminal than another, it's the alms that goes to little children. It does nothing but perpetuate the brutal selfishness which makes a helpless child a decoy and catch-penny for the lazy and vicious. About two years ago a boy of ten was kidnapped in New Jersey, and brought to New York City by a man who made a business of sending children out to beg from a den in the Bowery. The poor little fellow was new to the business and not very successful at first, so his employer burnt his arm with some acid which gradually ate into his flesh with increasing torture. The boy looked miserable because he was so, and the small change rained into his hat from a sympathetic public. When, at last, he was accidentally found, it was too late to save him. The acid had eaten so deep as to cause blood-poisoning and the child died. This is no tale of the dark ages. It happened the year before last in the United States of America, and I am morally certain that everyone who carelessly dropped small change into that suffering child's hand, without taking the trouble to find out how and why he was there, is answerable here and hereafter for a share in that murder. We are told that the man who asked "Am I my brother's keeper?" was the first murderer, and as civilization advances it becomes more clear that we are all of us our brother's keepers, that the only standard of manly living is the life that recognizes its personal responsibility for the misery and suffering and sin of the world and, recognizing that responsibility, will not stoop to buy itself off with gifts of small coins. The war against evil and wrong is our inheritance; we are born into it, pledged from birth to fight somewhere and somehow to make this a better world. Some, like the beggars, openly rebel against such service and go over to the enemy. Some, who would escape this opprobrium, are no better than spys and scouts for the other side. Others, prudent souls, when drafted into the army, prefer to send a substitute in the shape of a check; until at last there are only a few good soldiers left, and that's why the world, although it moves, moves slowly.

But, to return to the question of child-beggars, I should like to give you one more illustration out of many known to me. You may think that gifts of old clothes and cold victuals cannot possibly

do any harm, but the New York Society for the Prevention of Cruelty to Children has unearthed a case which should convince you of the contrary.

An officer of the Society found Thomas and Michael McKenna, aged seven and three years, with a lot of dissipated people at 79 Washington Street. Their mother had been arrested three months before and sent to the workhouse, and the boys were at that time concealed by the neighbors. Since their mother's arrest they had been used as foragers for a crowd of drunken and lazy people, and had been sent out every morning to collect food for them. It required two police officers to tear the boys away from this disorderly crowd; they were too valuable to dispense with, having supplied them with cold victuals during the season. The officers brought the boys to the Society's rooms, and a more miserable pair never crossed its threshold: covered with vermin, hair unkempt and matted, and their few garments, men's sizes, hung upon them, giving them the appearance of miniature scarecrows.

The Hon. Charles S. Fairchilds, commenting upon this incident, asks the very pertinent question "Who was responsible?" and decides that *we* are responsible, we who give our cold victuals to such half-starved looking little strangers and never take the trouble to find out anything about them. But, you may say, I can't leave my business, my domestic duties to walk all over Baltimore making inquiries about a beggar boy, and I'd rather help 99 unworthy cases than miss one worthy one. Well, we'll come to that shortly.

I pass over hastily many varieties of beggars: those who prey upon the clergymen especially, like one woman known to us here, who travels from city to city, rents a house, and, with a plausible tale and the air of a lady who has seen better days, usually fleeces every Episcopal clergyman in the place before removing to another scene of action. Then there is the ex-Confederate soldier, and the man who expects to get a pension, and the respectable artisan looking for work who stops a lady out Charles Street Avenue, and asks for a job at his trade of shipbuilding. She has nothing of the kind handy, and gives him a quarter instead. Many clever beggars nowadays ask for work, but they are terribly disconcerted when you offer it to them. There was a German woman who begged for years in the stores along Baltimore Street, always

asking for work. One day when it was offered to her she became not only abusive but positively profane.

Without dwelling further upon the classification of beggars, we may safely accept Turner's conclusion that "modern begging is quite as much an organized profession as it was more than three hundred years ago. It has, of course, adapted itself to the spirit of the times, but it is wonderful how little adaptation has been called for. The credulity of the charitable is the stock-in-trade of the beggar, and it never fails him. Like the 'confidential trick' of the London sharper, the very staleness and antiquity of the beggar's dodges appear to give them a sanctity in the eyes of many, a sanctity derived from the belief that others might be deceived by counterfeits, but that the person appealed to cannot; he or she has found the genuine, honest, long-suffering and unappreciated object of charity, and having found this priceless treasure is bound to reward it."

No survey of the history of begging would be complete without some attempt to discover what may be earned in the practice of this profession. Like the earnings of all professions, the sums vary greatly with the skill and opportunities of the practitioners, but it has been calculated that beggars in modern times earn from $1.25 to $5.00 a day. As to what they save, they are, for the most part, very improvident; but there are not lacking many instances of well-to-do beggars. Mr. Kellogg, of the New York Charity Organization Society, tells of a woman who recently died and left $18,000 behind her. For many years before her death she had been supported by charity, and was found upon investigation to have received aid from no less than twelve Baptist churches. Another woman, who had been helped by five different New York churches, requested on her death-bed that a hassock she had be buried with her. It was found to be too large to put in the coffin and was cut up with a view to making it smaller, when it was discovered that the stuffing of the cushion was a mass of bank notes. I could give you numberless instances like these, many of them here in Baltimore, but the fact remains that the beggar, though he earns enough to do so, does not usually save, and I have purposely avoided unusual and exceptional illustrations tonight, wishing to keep all my statements well within the bounds of probability.

One case, however, which is exceptional in many ways, I should like to tell you about as briefly as possible. It is the case of an Englishman named George Atkins Brine, whose life was published a few years ago under the title of The King of the Beggars. Brine was a remarkable man. He wrote really fascinating letters, displaying a considerable knowledge of ancient mythology and of the English poets. These were often dated from the almshouse or county jail, and, strange to say, he was by trade a butcher, though above all, a most consummate scoundrel. He had been imprisoned in every county but two in England, and had been incarcerated in all over a hundred times, usually on the charge of vagrancy and drunkenness and sometimes for obtaining money under false pretenses. He had practiced at one time or another every branch of the beggar's profession; he had been a cheap Jack, a hawker, a manslaughtering quack doctor, a cattle drover, a begging-letter impostor, an indigent artisan with three (borrowed) children, a sham sailor, a rheumatic cripple, and, to crown all, a preacher. "This game," he says, speaking of the preaching, "pays well in remote villages on Sunday evenings, provided you are well stocked with tracts; but I was not fit for it; my risibility is too easily tickled, and once, when I was invited to 'hold forth' in a small chapel, I was in no little danger of grinning in the pulpit at my own roguery."

Several gentlemen interested in the reform of the poor laws tried to reform *him*, but without success, and he died in 1881, an old man of over 70 and an irreclaimable rascal. In 1875 he was persuaded to write a detailed account of his career. Coming as this did from such an untrustworthy source, you might think it hardly worth any consideration, but Ribton Turner has carefully investigated every fact contained in this strange document, and finds it a faithful statement of actual experience. The beginning and the end of Brine's paper might each serve as text for a whole volume of sermons. His first statement was this: "I left Sherborne to seek employment at my trade (that of a butcher), and not succeeding for a time, I soon discovered that more money could be got without work than with it." He closes by saying,

There are many remarks I should like to make respecting vagrancy. First, the motive-power must be stopped before the machinery can be

brought to a stand-still. People who indiscriminately give alms are far more to blame than the recipients. Until this truth be widely known and acted upon, mendicity will flourish. This, and this alone, is the greatest obstacle that impedes progress, although, I should say not an insurmountable one.

It seems to me very interesting that this arch-rogue should have stated the whole truth so clearly and forcibly, and this testimony, coming as it does from the other side, carries peculiar weight. My sole purpose tonight is to emphasize his point of view. The responsibility for all this network of deceit and crime of which I have attempted to give you some faint conceptions, the responsibility of it rests with us, the tax-paying and producing class, and the remedy for all these centuries of blundering, inconsiderate almsgiving is in our hands if we choose to use it. Never before have the mass of our countrymen possessed sufficient intelligence and forethought to see their personal responsibility in this matter, but now I am satisfied that it needs nothing but a painstaking presentation of facts, such as each one of you could and should make to all your friends and acquaintances, to bring about a complete revolution in public opinion.

Do I blame the beggars? Not a bit of it. So long as we encourage them to lie and cringe and crawl they will continue to do it; so long as we pay them to beg, they will go on begging. The responsibility rests with us who have the larger light. First and most emphatically then, we must never allow ourselves to give alms to people we don't know all about. England wastes $14,000,000 every year in this way, and of the $100,000,000 spent on charity in the United States yearly, there is no doubt that at least one-fourth of it is hopelessly wasted. So we have $40,000,000 yearly spent by the English-speaking race to encourage idleness, vice, crime, and disease, and to send men down to perdition faster than all the religion of the world can drag them out again.

I would have you remember that not one word I have said tonight applies in any way to the poor who have fallen into misfortune through no fault of their own, and who must never be confounded with the begging class. These would rather starve than beg. "It may seem to some people," says Ribton Turner, "that the opinion I have expressed that the really deserving and necessi-

tous poor never beg is a matter which may admit of debate. All I can say in support of it is, that in the course of my experience, which extends to several thousand cases, I have never yet met with a beggar who was driven to beg by sheer want or misfortune, nor have I encountered any one who after investigation had ever found one in such a case."

Now granting that every beggar is, in the cant phrase of the day, "unworthy," and that to give him what he asks for, is to do him and society a great wrong, it is not possible by a simple refusal to wipe him off the face of the earth, to ignore his existence; and the question naturally arises, what next? This question the Charity Organization Society attempts to answer. Until you have acquired the strength to say "No, not yet," it is utterly helpless, but as soon as you have done this and are willing to find out what would seem to be a wiser way of helping this human being who has placed himself in such a false attitude to you, then the Charity Organization Society will do its very best to help you.

Adopting a system of districting, borrowed from Germany, the Society has divided the city into six districts and has placed a trained agent in each one of these, whose chief duty is to visit the poor in their own homes to find out the sort of help that would, in each individual case, be most likely to raise the receiver, and to furnish this information to all who are charitably disposed. The Society does much more than this, but there is no time to dwell upon other features of the work tonight. It has no desire, however, to discourage individual effort, but merely wishes to supplement it and to do for you what you may not have time to do for yourself.

A man applies to you today, for instance, for alms. You reply to him that it is your invariable rule to give no alms at your door, or anywhere save in the homes of the poor themselves, that if he will give his name and address you will either call very soon yourself or see that someone else does. When you cannot spare the time to go yourself, send the name and address to us, either on a postal card or on one of these blanks which I shall distribute tonight. If there is any unusual and pressing distress our agent is authorized to relieve at once, but there is usually no such thing. Suppose that in this case there are a young husband and three small children, that the man is just beginning to find it easier to beg than to work;

don't you see how by getting at him in his own home you can cut off his begging supplies by communicating through our Society with all the societies, individuals, and churches interested in him? Then give him a chance to work, and secure a wise friend who will visit the young mother, will see that the children are sent to school, that the home is cleaner and more attractive. Show this young man that you expect him to become a man. You may succeed or you may not, but you see at once that it would have been much easier to have given the fellow a quarter and sent him off. But rather than see you do that, the Charity Organization Society will take all the trouble and care of the better method on its own shoulders when you yourself cannot or will not.

Take a less hopeful case. Suppose the man a hardened beggar and trickster and the wife a confirmed drunkard. Isn't it all the more important to get at the family in that case, to get the Society for the Protection of Children after the little ones, to see that they are not raised in vice and crime? Then a man who won't work for himself should be forced to work for the State. That's the only right view of the labor question. If our laws don't enforce that view now, let's combine and reform them. Don't lock such a man up for two weeks and send him out again lazier and more vicious than ever, but make his imprisonment indeterminate and reformatory. If it seems to cost a little more than the present system, why take a few of the many millions I have already shown to be hopelessly wasted upon his kind.

There is no time left to dwell upon this but I can only remind you in closing of my primary statement: the beggar, however depraved, is a human being, with like passions and instincts to our own. Heretofore, we have encouraged the lowest and worst of these; let us now try to arouse the better instincts of his nature. Teach him industry, saving, cleanliness, self-control. I know beyond a shadow of a doubt that this can be done; and where it cannot, let us put him apart where he cannot spread contagion; and for his children let us strain every nerve to save them from the hereditary curse of pauperism. It is no visionary dream to believe that these things can be done. In places where the law, the church, and public opinion have all co-operated to these ends wonderful results have already been obtained. Pauperism has been reduced

in Elberfeld, Germany, 78 per cent in fifteen years; in London, 30 per cent in ten years; in Buffalo, 37 per cent in three years. "Wherever there has been any earnest and intelligent attempt to remedy the evil," writes Professor Ely, "the success has been equal to all the most sanguine could anticipate. I have read accounts of many such attempts to lessen pauperism, and everything that I read has confirmed in my mind the belief that it is a curable evil." Yes, curable beyond a doubt right here in Baltimore, if you will only put aside all denominational, all political, all social prejudices, and all pull together to make public opinion a *unit* on this great and vital question.

The Missing Dimension of Sociality

> In *The Republic* and in *The Laws,* Plato offered a vision of a unified society, where the needs of children are met not by parents but by the Government, and where no intermediate forms of association stand between the individual and the State. The vision is a brilliant one, but it is not our own.
>
> —Justice William J. Brennan[1]

The American dialect of rights talk disserves public deliberation not only through affirmatively promoting an image of the rights-bearer as a radically autonomous individual, but through its corresponding neglect of the social dimensions of human personhood. In his studies of language and thought in simple societies, Claude Lévi-Strauss demonstrated how discourse and syntax can operate in countless ways to color and supplement a group's vocabulary.[2] Though the American rights dialect has little in common with the unwritten languages to which the great anthropologist devoted much of his attention, it is a case in point. Just as our stark rights vocabulary receives subtle amplification from its encoded image of the lone rights-bearer, our weak vocabulary of responsibility is rendered fainter still by our underdeveloped notion of human sociality. Neglect of the social dimension of personhood has made it extremely difficult for us to develop an adequate conceptual apparatus for taking into account the sorts of groups within which human character, competence, and capacity for citizenship are formed. In a society where the seedbeds of civic virtue—families, neighborhoods, religious associations, and other communities—can no longer be taken for granted, this is no trifling matter. For individual freedom

and the general welfare alike depend on the condition of the fine texture of civil society—on a fragile ecology for which we have no name.

These deficiencies in the deep structure are not readily detectable when we listen to rights talk. It is always harder to discern what is absent than to hear what is present. One becomes aware, however, that something is missing from the underlying assumptions of public discourse, as well as from its basic vocabulary, in many situations where people have difficulty translating an important concern into political or legal language. The flag-burning dispute, to recur to a familiar example, elicited passionate defenses of freedom of expression on the one hand, and equally fervent protests against desecration of the national symbol on the other. The arguments for the former position were easy to make, fitting into familiar First Amendment grooves. They carried the day. The rebuttals tended to have a sputtering quality; they sounded more in emotion than in reason. The problem for the flag defenders, in part, was that the flag-burning controversy pitted individual rights against community standards. Accustomed as we are to the notion that a person's liberty should not be curtailed in the absence of direct and immediate harm to specified others, we can barely find the words to speak of indirect harms, cumulative injury, or damages that appear only long after the acts that precipitated them. The flag dispute was, in fact, a skirmish in what some have called a "culture struggle"—a contest over the fundamental understandings of what kind of society we are, and the role of common moral intuitions in contributing to those understandings.[3]

What was never fully brought to expression in the controversy was the underlying disagreement between those who equate all widely held standards with majoritarian oppression, and those who regard the extension of constitutional protection to, say, flag-burning, child pornography, or sadomasochistic art, as an assault on all the practices and procedures through which a society constantly defines and redefines itself. The maintenance of a vital democratic society, a society with a creative tension between individual freedom and the general welfare, requires that a continuing debate take place about just such matters. If political discourse all but closes out the voices on one side of the debate, liberalism itself is at risk. Yet that is precisely what our simple rights dialect regularly does.

Even more difficult than common moral standards to explain and defend in current political language are the interests of communities and their members in staving off threats to their very existence.

Communities are often caught in a pincer between individual rights on the one hand, and reasons of state on the other. Thus, when Detroit's Poletown residents mounted their campaign to prevent the taking and destruction of their neighborhood, they found that the most readily available vocabulary—that of individual property rights—enabled them to speak about only part of the problem. They could not find a way to communicate effectively with legislators, judges, or the press about other kinds of losses: a rich neighborhood life; shared memories and hopes; roots; a sense of place. When, as a last resort, they brought a lawsuit, they were, in effect, laughed out of court when they resorted to the only legal terms that even came close to enabling them to voice their deepest concerns—the analogy to environmental protection. Nor was Poletown an isolated tragedy. Urban "renewal" programs in the 1950s and 1960s carelessly wiped out many other neighborhoods and destroyed irreplaceable social networks in the name of a cramped (and frequently mistaken) vision of progress.

It has been difficult, similarly, for persons in areas affected by plant closings to air the full range of their concerns within the standard framework of legal and political discourse. When a Youngstown, Ohio, coalition of unions, religious groups, and community organizations went to court to try to delay, and explore alternatives to, the departure of the steel mills that had been the lifeblood of that city since the turn of the century, their arguments were as halting and awkward as the Poletown "environmental" claim. One theory advanced by the Youngstown plaintiffs was that a kind of "community property right" had arisen somehow from the lengthy relationship between the steel companies and the city, a right that gave rise to an obligation on the part of the companies not to leave the city in a state of devastation. The federal appellate judge who denied relief was sympathetic, agreeing that the mill closing was an "economic tragedy of major proportions" for Youngstown.[4] The judge pointed out, however, that American law recognizes no property rights in the "community." Dubbing their lawsuit a "cry for help," he advised the plaintiffs that their plea should be addressed to those bodies where public policy regarding plant closings is formulated—the federal and state legislatures.

But the Youngstown plaintiffs, like the Poletown residents, had already failed to make their case in the ordinary political arena. In Ohio, as in nearly all American states, efforts to draw legislative attention to problems related to plant-closings had been unsuccess-

ful. Legislative discussions of the matter have been framed chiefly in terms of a clash between the need and right of businesses to adapt to new circumstances, on the one hand, and the merely economic interests of individual workers, or organized labor, on the other. It is impossible, of course, to know whether legislative outcomes would have been different if the terms of the discussion had been more capacious. But it is noteworthy that the United States is practically alone among the industrialized nations in lacking broad-gauged legislative programs addressed to the noneconomic as well as economic effects of factory closings on families, communities, and workers.[5]

Once again, from a comparative perspective, we are in the presence of a kind of puzzle. The dislocations caused by plant closings, partial shutdowns, relocations, and mass economic layoffs have given rise everywhere to broadly similar problems. Ripples go out through entire communities when work disappears and workers remain. In the nations of Western Europe, a wide variety of statutory schemes have long been in place to ease the transitions made necessary by obsolescence and competition. These statutes, at a minimum, require that substantial advance notice of proposed closings be given to affected workers and local governments; and that owners and managers consult with worker representatives and local government officials concerning the effects of the closing. Most of those countries, in addition, have established programs for the retraining and, if necessary, relocation of affected workers. Such legislation is not seen as especially "pro-labor," but rather as addressed to the long-term general interest in maintaining the conditions that promote family life, community life, and a productive work force.[6] In the United States, by contrast, a modest federal plant-closing bill that merely requires large companies to give 60 days notice of a proposed major layoff was adopted only in 1988, and even then only over then–President Reagan's veto.

A kind of blind spot seems to float across our political vision where the communal and social, as distinct from individual or strictly economic, dimensions of a problem are concerned. In a leading environmental-law decision, the Supreme Court held that the Sierra Club had no standing to argue for preservation of federal parkland as a *shared* natural resource. The only way the association could remain in court was to establish that particular *individuals* would be harmed by the recreational development proposal it was challenging. Justice Blackmun, in dissent, rhetorically posed the key question: "Must our law be so rigid and our procedural concepts so inflexible that we

render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?"[7] While this question awaits a negative answer, long-term interests are often held hostage to the short-run, and communities are often at a disadvantage when pitted against the state and a large corporation, as in Poletown, or against the market and corporate actors, as in Youngstown. The same is often true when individual rights are in conflict with the general interests of the community of which they are members—as witness a recent Supreme Court decision involving Indian lands. In the late nineteenth century, Congress (in an effort to promote the assimilation of Native Americans into the larger society) had divided some communal reservations of Indian tribes into modest individual land allotments. Over time, as successive generations of owners died, the original parcels were split up through inheritance into ever-smaller fractions. Eventually, some parcels had hundreds, and many had dozens, of co-owners. In such cases, the only way for the "owners" to profit from their holdings is to lease out the land and divide the rental income in proportion to their shares. Even then, an individual's share of the rent is often so small that it is less than the administrative cost of transferring it to him or her. By the 1980s, there was wide recognition that the allotment policy had been "disastrous for the Indians."[8]

To remedy the situation, Congress passed a statute in 1983 that would have begun gradually to reconsolidate the smallest and most unprofitable of these individually owned interests under tribal ownership. The statute provided that any share which constituted less than two percent of the tract to which it belonged, and which had earned less than $100 in the year preceding the death of the owner, would return to the tribe when its owner died, rather than passing by will or intestate succession. This consolidation scheme was challenged by certain heirs and devisees of three deceased members of the Oglala Sioux Tribe. The trial court in South Dakota, close to the situation, ruled against the plaintiffs. As a threshold matter, the trial court found that the plaintiffs had no standing to attack the statute. The deceased property owners may have been deprived of something (the right to pass the property in question on to their heirs), but this deprivation occurred at a time when the plaintiffs had no rights whatsoever in the property. For an heir or devisee has no rights in the property of his ancestor or testator until that person's death. In any event, the court went on, the statute was constitutional under a

long line of cases recognizing that Congress has extensive power to alter the law of intestate succession and testamentary disposition.[9] The statute did not interfere with anyone's ownership rights so long as he or she lived; it merely removed one stick from the owner's bundle of rights—the power to transmit ownership upon death.

The United States Supreme Court agreed that the Congressional aim of encouraging consolidation in the hope "that future generations of Indians would be able to make more productive use of the Indians' ancestral lands" was "a public purpose of high order." The Court noted also that the current state of the law under the "takings" clauses of the Constitution gives legislators "considerable latitude in regulating property in ways that may adversely affect the owners." Furthermore, the Court agreed that the heirs or devisees of the deceased owners had no standing to complain in their own names, for no rights had ever vested in them. Nevertheless, the Court unanimously held that the statute could not stand.

Writing for the Court, Justice O'Connor found that Congress had crossed the line into unconstitutionality by removing one of the components of the ownership rights belonging to the *deceased* Indians. Congress' broad powers to restrict or even eliminate intestate or testamentary succession, she wrote, did not extend to completely extinguishing both kinds of succession, even where a small individual interest and a high public purpose were involved. As for standing, the heirs and devisees could be permitted to assert the rights of the deceased Indians in the same way that an administrator of a decedent's estate can prosecute the dead person's claims and collect his debts. Weighing but "weakly" on the other side, said Justice O'Connor, was the fact that the deceased individuals had belonged to the tribe, and that consolidation of Indian lands in the tribe would benefit the group of which they had been members. That consideration could not prevail against the right of an individual to pass on even a small, unprofitable, fractional share of property. The Indian lands case, together with the *Poletown* case, is revealing of the extreme vulnerability of communities to individual rights on the one hand, and to imperatives of the state on the other.

The catalog is lengthy of instances where the Supreme Court has had difficulty bringing into focus the social dimension of human personhood, and also the kinds of communities that nourish this aspect of an individual's personality. Except for corporations (which the Court has recognized as "persons" and endowed with rights), groups or associations that stand between the individual and the state

all too often meet with judicial incomprehension. Even in labor law, though Congress firmly committed the nation in the 1930s to a policy of protecting employee organizational activity and promoting collective bargaining, the Court's decisions in recent years have increasingly permitted individual rights to erode that policy. One searches these opinions in vain for any significant affirmation of the basic idea of labor law: that the best and surest way to protect individual workers is through protecting their associational activity. The justices often seem to be at odds with the underlying assumption of our labor legislation, that an individual might willingly agree to subordinate her own interests to some extent by casting her lot together with fellow workers in pursuit of common ends which are frequently, but not exclusively, economic. Judicial adroitness at applying the constitutional principles of liberty and equality is rarely matched by a corresponding skill in implementing the congressionally endorsed principle of solidarity.[10]

The linguistic and conceptual deficiency in question here is not confined to the judiciary, as the Poletown and Youngstown situations demonstrate. American political discourse generally seems poorly equipped to take into account social "environments"—the crisscrossing networks of associations and relationships that constitute the fine grain of society. When associations do claim public attention, it is chiefly as "interest groups," that is, as collections of self-seeking individuals pursuing limited, parallel, aims. The connection between the health of the sorts of groups where character, competence, and values are formed, and the problem of maintaining our republican form of government, is generally kept out of sight, and therefore out of mind. An implicit anthropology—an encoded image of the human person as radically alone and as "naturally" at odds with his fellows—certainly contributes to this scotoma in our political and legal vision. Another factor, however, seems to be simply that favorable American circumstances have long fostered a sense of complacency about social environments.

In the beginning, that is, at the Founding, there was no particular reason for American statesmen to pay special attention to families, neighborhoods, or other small associations. These social systems were just there, seemingly "natural," like gravity on whose continued existence we rely to keep us grounded, steady, and attached to our surroundings. In all likelihood, the Founders just took for granted the dense texture of eighteenth-century American society, with its economically interdependent families and its tightknit com-

munities. With most of the population clustered in self-governing towns and cities, the architects of our Constitution would have been hard put to conceive of the degree to which local and state government now has been displaced by federal authority. As for religion, whatever views men like Jefferson and Madison may have entertained personally, they probably supposed that churches deeply embedded in community life would always be around, too. How could they have foreseen that even families would lose much of their importance as determinants of individual social standing and economic security? Living in a country dotted with small farms and businesses, how could they have anticipated the rise and decay of great cities (so despised by Jefferson)? Or the eventual economic dependence of a large proportion of Americans on large, bureaucratic, public and private organizations? Or how much power these organizations would wield? Nor could they have imagined the rise and decline of broadly representative political parties; or the flourishing of public education, followed by its alarming deterioration.

This is not to say that the Founders underestimated the importance of the institutions whose durability they assumed. On the contrary, there is much evidence that they counted on families, custom, religion, and convention to preserve and promote the virtues required by our experiment in ordered liberty. Jefferson, Adams, and especially Madison, knew that the Constitution and laws, the institutionalized checks on power, the army, and the militia could not supply all the conditions required for the success of the new regime. They often explicitly acknowledged the dependence of the entire enterprise on the qualities of mind and character with which they believed the American population had been blessed. Madison, in *Federalist* No. 55, put it most plainly: "As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form." Admitting that he could not foresee whether these qualities would endure as the country grew, Madison expressed great confidence that "the present genius" and "political character" of the American people were equal to the challenge.[11] With a variety of social institutions in place to nourish the "germ" (as Burke called it) of "public affections,"[12] the statesmen of our formative period concentrated their energies on the laws, and produced a remarkable design for government. The notion of civil society did

not enter into the mainstream of American political and legal thought. The social environment, like the natural environment, was simply there. In both respects, we seemed endowed with inexhaustible riches.

On the European continent, by contrast, the French Revolutionaries inadvertently guaranteed that "society," as something quite distinct from the state, would become and remain a major subject of political and legal discourse. In imitation of the program of the Reformation to eliminate institutional intermediaries between man and God, the men of '89 set out to abolish the intermediate groups (*corps intermédiaires*) of the old regime that stood between citizen and state. Feudal statuses, the Church, guilds, and many aspects of family organization were targeted both as oppressive to individuals and as competitors with the state for the loyalty of citizens. In the Napoleonic era, the focus shifted. The revolutionary attack on family, religion, and craft associations lost much of its vigor, but communal and regional centers of power had to bow before the centralization of government. Part of the legacy of the period was an important political discussion that continued throughout the nineteenth century in continental Europe. Tocqueville, Durkheim, Hegel, Marx, Gierke, and others wrote at length about what the relations were or should be among individuals, the institutions of "civil society," and the state.

In France, where state and society first had been placed sharply in confrontation with one another, this theoretical speculation took the form of concern about what might ensue if social institutions became weaker as government became stronger. Examining the same historical developments that many of his contemporaries interpreted, with satisfaction, as effecting a continuous liberation of the free, self-determining individual from family and group ties, Tocqueville expressed some reservations. He pointed out that, with the growth of powerful centralized states, the very same groups that had once seemed to stifle individual development and to obstruct the consolidation of national power, could help to protect personal freedom and to provide useful checks on government. With his astonishing ability to see deeply into the long-term implications of developments that were just gathering momentum in his lifetime, Tocqueville anticipated that the loosening of group ties would present hazards, as well as opportunities, for the cause of human liberty. Like Burke, he insisted on the connection between rootedness and civic virtue:

> For in a community in which the ties of family, of caste, of class, and craft fraternities no longer exist, people are far too much disposed to think exclusively of their own interests, to become self-seekers practicing a narrow individualism and caring nothing for the public good.[13]

He was especially concerned that individualism ("a word unknown to our ancestors"), and excessive preoccupation with material comfort, would render people susceptible to new and insidious forms of tyranny. America, he thought, stood a good chance of forestalling such a fate through its many little associations that served as schools for citizenship. In the settings of townships, families, and other groups, citizens would accumulate "clear, practical ideas about the nature of their duties and the extent of their rights."[14] Each generation would learn anew to appreciate the benefits of, and sacrifices necessary for, a constitutional order. Tocqueville especially admired local governments like those he saw operating in New England, for he feared that destruction of regional and communal centers of power in France would take a heavy toll on democracy there.

> Local institutions are to liberty what primary schools are to science; they put it within the people's reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it. Without local institutions a nation may give itself a free government, but it has not got the spirit of liberty.[15]

Another French social theorist, writing several decades later, warned of a different kind of loss. Emile Durkheim's concern was less for the political, than for the social and personal consequences of the decline of what he called "secondary groups."

> [C]ollective activity is always too complex to be able to be expressed through . . . the State. Moreover, the State is too remote from individuals; its relations with them too external and intermittent to penetrate deeply into individual consciences and socialize them within. Where the State is the only environment in which men can live communal lives, they inevitably lose contact, become detached, and thus society disintegrates. A nation can be maintained only if, between the State and the individual, there is intercalated a whole series of secondary groups near enough to the individuals to attract them strongly in

> their sphere of action and drag them, in this way, into the general torrent of social life.[16]

It was only much later—with the rise of the powerful states and business corporations of the twentieth century—that Tocqueville's and Durkheim's insights could be fully appreciated. Just as certain works of great nineteenth-century mathematicians seemed useless until chaos science and the computer caught up with them,[17] so theories of civil society have only begun to come into their own as social conditions that were imagined a century ago become reality. To a great extent, urbanization, industrialization, bureaucracy, geographic mobility, mass culture, and centralization of political power have accomplished the project of the French revolutionaries, bringing citizens everywhere into ever more unmediated relationships with government. All over the industrialized world, "society" with its particularistic communities of memory and mutual aid, its relationships that cannot be captured in purely economic terms, appears to be in considerable disarray.

Many Eastern European thinkers have blamed the expansion of the state for the "withering away" of society. Thus Czeslaw Milosz has said:

> Quite contrary to the predictions of Marx, . . . instead of the withering away of the state, the state, like a [cancer], has eaten up all the substance of society. Destroying society, as a matter of fact.[18]

But observers in the West have pointed out that the market economy, too, can take a toll on society, including the family, by orienting human beings to means—especially money and power—rather than to ends.[19] Men and women in capitalist and socialist regimes alike may now glimpse their own reflections in Tocqueville's haunting passage on the loss of civic virtue:

> There are countries in Europe where the inhabitant feels like some sort of farm laborer indifferent to the fate of the place where he dwells. The greatest changes may take place in his country without his concurrence; he does not even know precisely what has happened; . . . Worse still, the condition of his village, the policing of his road, and the repair of his church and parsonage do not concern him; he thinks that all those things have nothing to do with him at all, but belong to a powerful stranger called the government. . . . Furthermore, this man

> who has so completely sacrificed his freedom of will does not like obedience more than the next man. He submits, it is true, to the caprice of a clerk, but as soon as force is withdrawn, he will vaunt his triumph over the law as over a conquered foe. Thus he oscillates the whole time between servility and license.[20]

When nations reach this point, Tocqueville surmised, "either they must modify both laws and mores or they will perish, for the fount of public virtues has run dry; there are subjects still, but no citizens."[21]

Now that so much less "society" flourishes between the individual and the state, certain questions—long unasked in the United States—press for recognition: Where does a republic, depending on a citizenry capable of participating in democratic political processes, find men and women with a grasp of the skills of governing and the willingness to use them in the public service? Where does a welfare state find citizens with enough fellow feeling to reach out to others in need, yet with enough sense of personal responsibility to assume substantial control over their own lives? What, if anything, needs to be done to protect social environments—families, neighborhoods, workplace associations, and religious and other communities of obligation—that traditionally have provided us with our principal opportunities to observe, learn, and practice self-government as well as government of the self?

Though these questions are increasingly urgent, our current public discourse makes it difficult to talk about them. Our legal and political vocabularies deal handily with rights-bearing individuals, market actors, and the state, but they do not afford us a ready way of bringing into focus smaller groups and systems where the values and practices that sustain our republic are shaped, practiced, transformed, and transmitted from one generation to the next.[22] In short, we have a serious and largely overlooked ecological problem, yet our ability to address it lags even behind our halting progress on problems relating to natural environments.[23] Many naturalists have come to the realization that it borders on the bizarre to solemnly debate whether animals and trees have rights, at a time when all interdependent life on the planet is threatened by systematic degradation of the environment—a degradation that is often defended in the name of economic rights. In the human sciences, we have been slower to take a more global view. Consider what is missing from current debates about the smallest and most important of social environments—the family.

"THE WAR OVER THE FAMILY"

At first glance, it might seem that families are neglected neither in political nor legal discourse. "Family values" have long been a staple of American campaign rhetoric; family law is in a state of unprecedented ferment; and a lively discussion of "family policy" is currently taking place. On closer inspection, however, the politicians for the most part are confining themselves to empty platitudes; family law has become a battleground for a struggle between defenders of the "traditional" family and those who would deconstruct families into their individual component parts; and the family policy debate has degenerated into what Brigitte and Peter Berger have called "a vociferous war over the family."[24] Despite its sound and fury, the war over the family has an odd, remote, quality. Its principal partisans often seem more absorbed in their arguments with one another than with families themselves, or with the conditions that families might require in order to flourish. Many of the combatants seem to have achieved the peculiar mental state that the late Thomas Reed Powell associated with lawyers: the ability to think about something that is inextricably connected to something else without thinking about what it is connected to.

The war over the family is, to a great extent, a war of words, and about words. If a speaker consistently refers to "the family" rather than "families," or vice versa, this is often a signal that sides have been taken. (Here, since my intent is to challenge the terms of the debate, I will use these terms interchangeably, with the understanding that "the family" is a social institution—like "the firm" or "the law"—that can take many forms.)

There are four main positions in the conflict which can be briefly summarized as follows:

1. On the cultural right, we find the defenders of what in those circles is apt to be called the "traditional" family, imagined as a household founded on a marriage between a husband-breadwinner and a wife-homemaker. The family, in these quarters, is often said to be the "basic social unit."
2. On the cultural left, the "traditional" family is apt to be characterized as "patriarchal," the artifact of an oppressive male-dominated society, a social construct that both reflects and promotes the systematic subordination of women. Here, one tends to speak of "families" rather than "the family"; the individual is taken to be the basic unit of society; and there is particular solicitude for "nontraditional" family forms.

3. On the economic right, claiming that family poverty and related social ills have actually worsened over the period of greatest governmental attention to them, many conservatives advocate a laissez-faire family policy as a spur to self-reliance, and as the best protection in the long run for family life.
4. On the economic left, the same dismal statistics are widely believed to require redoubled public effort and expense, with the government taking over many of the tasks that family members no longer find it easy to perform.

Thus, one might say, with only a slight degree of caricature, we have the totem vs. the taboo on the culture front; and the heartless vs. the ham-handed on the economic front. Much of the frustration and discontent of American voters stems from having to make choices between these kinds of positions.

Until the 1960s it could be said that the American legal system embodied ideas about "the family" that corresponded fairly closely to those now held on the cultural right. The domestic relations law of the various states was organized around a marriage-centered conception of the family. Marriage was treated as an important support institution, and as a decisive determinant of the social status of spouses and children. The marital relationship was supposed to last until the death of a spouse and was not otherwise terminable, except for serious cause. Within the family, the law gave the husband-father the predominant role in decision making, and imposed on him primary responsibility for the material needs of the family. The wife-mother was to fulfill her role primarily by caring for the household and children. Family solidarity and the community of life between spouses were emphasized over the individual personalities and interests of family members. (Thus, for example, husbands, wives, and children, as a rule, could neither enforce contracts against one another, nor sue each other for personal injury damages.) Procreation and child rearing were assumed to be major purposes of marriage, and sexual relations within marriage were supposed to be exclusive, at least for the wife. Marriage, procreation, and divorce were supposed to take place within legal categories. Children born outside marriage had hardly any legal existence at all.

Obviously, these legal assumptions never corresponded perfectly to family behavior patterns in the United States. By the 1960s, several of them were quite noticeably at variance with the way many Americans were living. Over the past twenty-five years, American family law has been dramatically reshaped by statute and court de-

cision, including constitutional rulings, to the point where it now embodies a set of assumptions closer to those of the cultural left. Divorce has become, in a sense, an individual right now that marriage has increasingly been made terminable on the request of either spouse. Explicitly gender-based legal distinctions have been eradicated from domestic relations law. Family members are, to some extent, able to tailor their relationships by contract, and to sue each other in tort. The legal differences between formal and informal marriage have been blurred, and nearly every vestige of legal discrimination against children born outside of marriage has been held unconstitutional. The old presumption that a husband's duty to support his wife would survive divorce has been replaced by the principles that ex-spouses should be self-sufficient, and that spousal support, if awarded, should be temporary.

In constitutional law, the image of marriage shifted suddenly from a community of life to an alliance of independent individuals. Striking down Connecticut's birth control law in 1965 as an unwarranted interference with the husband-wife relationship, the Supreme Court had waxed eloquent about marriage:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.[25]

Seven years later, extending constitutional privacy protection to unmarried persons in another birth control case, the Court changed its tune. "[T]he married couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up."[26] In a perceptive analysis of Supreme Court cases involving the parent-child relationship, Laurence Tribe has observed that, there too, upon close examination, "what at first may appear to be 'family rights' emerge as rights of individuals only."[27] In these and numerous other ways, the law began to treat families primarily as collections of individuals, bound loosely together with ties that were increasingly fluid, detachable, and interchangeable.

Now that the process of legally dissolving families into their component parts is well-advanced, it is only to be expected that we should see a flurry of disputes contesting the definition of "family" in various statutes and regulations. Confusion currently reigns as

courts and legislatures try to figure out what is or should be considered a "family" for purposes of zoning, employee health and death benefits, succession to rent-controlled residential tenancies, and so on. If married couples, why not unmarried couples? If unmarried heterosexual couples, why not same-sex couples? If same-sex couples, why not friends without sexual relationships? Like "property," "family" has now become a pigeonhole into which lawyers try to fit all sorts of relationships even as the category itself is crumbling.

It is easy these days to see the defects in the idea that "the family" is isomorphic with the homemaker-breadwinner unit. Far from being "traditional," that type of family did not even become possible for large numbers of people until the early part of this century. Today, any discussion that takes sharp sex-role divisions in child raising and income production to be normative leaves most American families out of the picture. Women's educational and economic aspirations, steep increases in female-headed households, and the financial pressures that bear down on all child-raising households make it unlikely that the breadwinner-homemaker model will have a strong resurgence in the foreseeable future. What we do see, though, is the common use of that model—or a close variant of it—for a period of time when a couple's children are small. And this is a point of great importance, often neglected by the deconstructers of the family.

Some of the new legal images of family that are emerging, however, are as flawed as the traditional models had become. In the first place, the idea that existing gender-related differences in child-raising roles and income production can or should be disregarded is as unrealistic as the notion that they can be rigidly prescribed. The new economic interdependence between husbands and wives is highly asymmetrical, with women more vulnerable to divorce and to fluctuations in the labor market. Nowhere is this more evident than between parents of young children. In most such households, both spouses are employed, but the wife is bearing the primary responsibility for child raising, while her outside work yields lower pay, lower status, and less security than the husband's.

The notion that a "family" is whatever one wants it to be, moreover, is unhelpful in analyzing specific policy problems. The difficulty of arriving at an all-purpose definition of "family" need not doom the search for a sensible family policy, nor must it deprive the term of meaningful content in various contexts. Anthropologists and sociologists usefully remind us that, on the one hand, many family

types coexist in every society; and, on the other, that family forms are not infinitely various. Generally, they have reserved the term family to designate groups containing more than one generation. The current legal disputes over the proper interpretation of the word in various contexts are attributable to several relatively recent developments: changes in behavior and attitudes regarding sexuality, procreation, and marriage; heightened awareness of and attention to American diversity; the desire of many persons involved in nontraditional living arrangements to win approval or at least legitimacy for these arrangements; and the efforts of single persons or informal cohabitants of various sorts to secure access to benefits or preferences currently dispensed on the basis of "family" membership. Courts, legislatures, city councils, and employers are in the process of adjusting to these developments. Eventually, it seems likely that "family," for legal purposes, will be defined in different ways, depending on the aims of the rules or programs involved. Many of the problems can and will be handled without using the word at all.

American political discourse permits many things to be said about the competing interests and ideals at stake in these disputes. But our individual rights-laden public language makes it surprisingly difficult to take account of the obvious fact that the public has a much greater interest in the conditions under which children are being raised than in the ways that adults generally choose to arrange their lives. European laws and policies, by contrast, routinely distinguish for many purposes (as sociologists do) between households that are engaged in child rearing and other types of living arrangements. But in the United States, which has never had an explicit national family policy, we are groping toward this useful distinction only slowly, and with more difficulty than seems necessary.

Thus, for example, when an area is zoned for single-family dwellings, it is hard to see any rationale for excluding a grandmother raising her two grandsons. Yet East Cleveland tried to do just that in the 1970s. The case had to go all the way to the United States Supreme Court for it to be settled that a municipality could not constitutionally limit the definition of family for zoning purposes to the so-called nuclear family.[28] American history and traditions, Justice Powell rightly observed, support "a larger conception of the family" in which many relatives and "especially grandparents shar[e] a household along with parents and children." It is doubtful, however, that Justice Powell would have approved expanding the concept of family to include a group of male college student housemates

with four-month renewable leases, as the New Jersey Supreme Court did in 1990.[29] Dimly, one can discern in recent cases and statutes dealing with divorce,[30] unmarried cohabitation,[31] and zoning,[32] a growing sensitivity to the special circumstances of households that are, or have been, engaged in raising children. These developments are the first steps toward a sensible American family policy. Putting children at the center of our family policy does not belittle or degrade childless individuals, or stigmatize other types of living arrangements. It merely recognizes the high public interest in the nurture and education of citizens.

If we are eventually able to move beyond squabbles over what counts as a family, to the question of how best to aid and support child-raising families, we will find ourselves in the midst of other myopic disputes. There is now wide recognition that parents, especially single mothers, are under exceptional financial and personal stress. There is a consensus, too, across the political spectrum, on the necessity of improving and vigorously enforcing the child-support laws. Beyond this, however, there is little common ground. Many on the economic left advocate that government should come to the aid of families with massive public day-care, educational, housing, and assistance programs, while many on the economic right insist that such programs are not only ineffective, but counterproductive; that they foster dependency, rather than strengthening family life.

Though conservatives and liberals wrangle endlessly about the specifics of family policy, their usual explanations of why the matter is worth discussing are remarkably similar: healthy families enable individuals to reach their full potential; dysfunctional families breed delinquency and crime; families are the main source upon which we depend for the work force that funds our social security system and that sustains our competitive position in the world economy. Important as all these social and economic concerns undeniably are, it is nevertheless a striking feature of the current family policy debate that its participants rarely allude, even in passing, to the *political* implications of what appears to be a crisis in nurture and education. It is fair to say that most participants in the war over the family simply assume the existence of a free, democratic, and egalitarian regime as part of the background.

We do not hear very much about the relationship of nurture and education to the maintenance of such a regime. If history teaches us anything, however, it is that a liberal democracy is not just a given; that there seem to be conditions that are more, or less, favorable to

its maintenance, and that these conditions importantly involve character—the character of individual citizens, and the character of those who serve the public in legislative, executive, judicial, or administrative capacities. Character, too, has conditions—residing to no small degree in nurture and education. Thus one can hardly escape from acknowledging the political importance of the family. Yet this is a subject on which family policy antagonists are strangely silent, giving their "war" at times the look of a game of blindman's buff.

Social historians of the future no doubt will be bemused by the fact that we late–twentieth-century Americans found it acceptable to discuss publicly in detail the most intimate aspects of personal life, while maintaining an almost prudish reserve concerning the political significance of family life. There are many plausible explanations for our reticence. One, no doubt, is the defect of our liberal virtues. Most of us aspire seriously to tolerance and broad-mindedness, with the consequence that it is hard to talk about certain matters that involve character. The word "judgmental" has become an epithet in some circles. A second factor that makes this kind of discussion difficult is that many of the changes that have adversely affected the caretaking and socializing capacities of families are associated with developments that few would care to call in question: improvements in the educational and economic position of women; the material benefits that a second family income provides; the ease with which one can terminate an unhappy marriage; and greater individual freedom generally—to realize one's own dreams, hopes, and ambitions, to overcome adversity, to make a fresh start. A third is the celebrated Pogo epiphany: "We have met the enemy and they is us." How many parents, if we are really honest, can say we have not passed the economic or emotional cost of some personal decision on to our children? All in all, it is easier not to talk about such matters.

It has become increasingly clear, however, that whatever can be said, for good or ill, about current patterns of family behavior, they are not optimal—economically or emotionally—for children. In 1990, a national commission on adolescent health reported that, for the first time in American history, a whole generation of American teenagers was "less healthy, less cared for, [and] less prepared for life than their parents were at the same age."[33] Scholarly and popular literature abounds with discussion and speculation concerning the relation between child-raising conditions and crime rates, national competitiveness, and the future of the social security system. Yet the

first question that Tocqueville—or the Founders—would have been likely to ask is the very one we avoid: What are the implications of these conditions for sustaining the American experiment in ordered liberty?

On this score, the 1989 People for the American Way survey of the political attitudes of young Americans was disquieting. A key conclusion they reached was that a sense of the importance of civic participation was almost entirely lacking in "Democracy's Next Generation":

> Young people have learned only half of America's story. Consistent with the priority they place on personal happiness, young people reveal notions of America's unique character that emphasize freedom and license almost to the complete exclusion of service or participation. Although they clearly appreciate the democratic freedoms that, in their view, make theirs the 'best country in the world to live in,' they fail to perceive a need to reciprocate by exercising the duties and responsibilities of good citizenship.[34]

When asked to describe what makes a "good citizen," only 12 percent of the young people surveyed mentioned voting.[35] Fewer than a quarter said that they considered it important to help their community to be a better place.[36] Remarkably, when asked what makes America special, only seven percent mentioned that the United States was a democracy.[37] (One young person, though, replied, "Democracy and rock and roll.")[38] People for the American Way prefaced their report of these findings with the ominous statement: "[I]t is time to sound the alarm about the toll that the growing disconnectedness of America's young people will exact from our democracy."[39]

Though distressed enough to sound an alarm, People for the American Way offered no theory about *why* young people seemed so lacking in a sense of civic responsibility. In fact, one could read their findings and conclude that the attitudes revealed were simply a function of immaturity. The current generation might be no more or less self-centered or politically apathetic than their parents once were.

Doubt was cast on that semi-comforting interpretation, however, by a second study released in June 1990 by the Times Mirror Center.[40] The Times-Mirror study, too, reported a widespread indifference among young adults toward government, politics, public affairs,—and even to news about the outside world. Unlike People for the American Way, the Times-Mirror group searched back

through 50 years of public opinion data to compare today's young people with Americans of the past. They concluded that the current cohort knows less, cares less, votes less, and is less critical of its leaders and institutions than young people have been at any time over the past five decades. Furthermore, although younger members of the public in the past "have been at least as well informed as older people," that is no longer the case with the current generation. Without purporting to provide an explanation of why this might be so, the Times-Mirror group did speculate off-handedly that the "decline of the family" might have played a role, along with "television" and the "lack of mobilizing issues."

The question of whether there is a connection between the civic apathy of many young people and current conditions of family life would seem at least to merit attention. Where do citizens acquire the capacity to care about the common good? Where do people learn to view others with respect and concern, rather than to regard them as objects, means, or obstacles? Where does a boy or girl develop the healthy independence of mind and self-confidence that enable men and women to participate effectively in government and to exercise responsible leadership? As Tocqueville cautioned, if democratic nations should fail in "imparting to all citizens those ideas and sentiments which first prepare them for freedom and then allow them to enjoy it, there will be no independence left for anybody, . . . neither for the poor nor for the rich, but only an equal tyranny for all."[41] Even under the best of conditions, he pointed out that the task would not be an easy one: "It is hard to make the people take a share in government; it is even harder to provide them with the experience and to inspire them with the feelings they need to govern well."[42]

Like many other high-minded nineteenth-century intellectuals, Tocqueville assumed that the family would be a dependable force in the service of these tasks. It was in the nation's homes where children would acquire the republican virtues of cooperation and self-restraint. It is strange, in a way, that he who had seen further than most of his contemporaries into the transformative effects of individualism and egalitarianism on traditional social arrangements, did not pursue the logic of his own analysis into the domain of family life. The reason, apparently, is that there seemed to him to be a self-evident distinction between bonds that were merely legal or social (like those between master and servant), and those he called "natural." He could thus write (and presumably believe) that, in general, "Democracy loosens social ties, but it tightens natural ones.

At the same time that it separates citizens, it brings kindred closer together."[43] That the great observer nodded here is now plain. But the aspects of current patterns of family organization that would have seemed admonitory to him are obscured for us by a nostalgic attachment to the "traditional" family on the one hand, and, on the other, by a relentless deconstruction of the family into collections of loosely affiliated individuals pursuing their own aims and interests.

ENVIRONMENTS WITHIN ENVIRONMENTS

To move from a verbal war over the family to sitting down and reasoning together about conditions of family life, it would be helpful to step back a few paces for a more comprehensive view of the problems. What is needed, in other words, is a shift from family *policy* to family *ecology*. Before we can frame "policy" for an institution that is inextricably connected to other institutions, we need to think more carefully than we have to date about connectedness. Family policy is not only a matter of responding to the present crisis, but of setting conditions and shifting probabilities for the future. Thus, as Urie Bronfenbrenner suggests in his important book on the ecology of human development, it is not enough to study a developing child alone, nor even to study a child within the setting of a family, for children and families are crucially affected by conditions in a host of interconnected environments.[44] Just as individual identity and well-being are influenced by conditions within families, families themselves are sensitive to conditions within surrounding networks of groups—neighborhoods, workplaces, churches, schools, and other associations. Public deliberation about family issues therefore needs to encompass such environments.

The importance of keeping these interacting social subsystems in view has been vividly illustrated by a path-breaking study of the effects of adversity in early childhood on human development.[45] In the early 1950s, an ambitious team of California researchers decided to begin following closely the development—from prenatal history to adulthood—of the entire group of children born in 1955 in a moderate-sized American community. The team selected the Hawaiian island of Kauai, with a population of about 45,000, as the location for the study. The island's multiracial population afforded the opportunity to take a variety of cultural differences in child-rearing

practices into account, and its low geographic mobility was expected to and did facilitate follow-up. Health, educational, and social services on Kauai were comparable to those in communities of similar size on the mainland United States.

Sad to say, in this island paradise, nearly a third of the 698 children born in 1955 were classified at some point as in a "high risk" category; that is, they were exposed to four or more such drawbacks as physical disability, family discord, chronic poverty, and parents who were alcoholic, undereducated, or mentally disturbed. (Studies from the 1950s indicate that Kauai was similar in this respect to mainland communities.) As the years went by, the researchers were struck by the fact that many of the children they had identified as subject to severe disadvantages were able to lead personally satisfying and socially productive lives as adults. Remarkably, one out of three of these seriously disadvantaged children "went on to develop healthy personalities, stable careers and strong interpersonal relations."

The contribution of the Kauai project to social ecology is that, by closely monitoring the development of a large group at regular intervals from birth forward, the researchers were able to identify certain "protective factors" that can help children to survive and thrive *despite* early adverse conditions. These factors fall into three broad groups. The first, relating to the intelligence and other personal characteristics of the child, is largely beyond anyone's control. Some fortunate children apparently possess, even in infancy, engaging temperamental qualities that enable them to elicit positive responses from others. A second group of factors, not surprisingly, concerns the family setting. The Kauai investigators affirmed received wisdom that children, in general, benefit from having a stable, interactive, intact household; from having at least one caretaker (not necessarily a parent) with whom they can establish a close bond; and from having structure and rules in their milieu. The better the quality of the home environment, the more competence was displayed by the children.

Bearing in mind, however, that elements of the home environments of high-risk children are usually part of what places them at risk, it is the third group of protective factors identified in the study that is of potential importance to policy makers. This third group includes various support systems external to the family that may be affected to some extent, for better or worse, by governmental action or abstention. School, for example, played a crucial role in the lives of many of the survivor-children who saw it as a "home away from

home, a refuge from a disordered household." Several youngsters also found role models, mentors, confidants, and opportunities for friendship in church groups, the YMCA or YWCA, 4-H groups, Boy and Girl Scouts, athletic groups, and the like. As Dr. Emmy Werner, the director of the project, put it, "With the help of these support networks, the resilient children developed a sense of meaning in their lives and a belief that they could control their fate." Active participation in a church (especially one providing intense activity, acceptance, and a sense of mission) was often a "critical turning point" in a child's life.[46] Interestingly, neither formal social service agencies nor mental health professionals were found to have played a significant role in enabling the children to cope with adversity.[47] In adulthood, too, most of the "survivor" individuals, in times of need, turned to informal sources of support and to other family members, rather than to the helping professions. This led Dr. Werner to suggest that, "In many situations it might make better sense and be less costly as well to strengthen such available informal ties to kin and community than it would to introduce additional layers of bureaucracy into delivery of services." Dr. Werner is careful to point out, however, that this does not mean that successful governmental programs like Headstart and the food plan for poor women and infant children (WIC) should be abandoned. What is needed, rather, is a more diversified family policy, fitting public and private initiatives together in creative ways.

The significance of the Kauai study was increased by a fortuitous accident of timing. The Kauai researchers tracked a group of children who, with hindsight, can be seen to have been pioneers in uncharted territory. For the 1955 cohort entered adolescence just at the beginning of a period of sudden demographic change that swept the entire industrialized world. The major shifts in birth rates, marriage rates, and divorce rates that began in the mid-1960s caught population experts everywhere by surprise. Looking back on a two-decade period, the French demographer Louis Roussel has written:

> What we have seen between 1965 and the present, among the billion or so people who inhabit the industrialized nations, is . . . a general upheaval across the whole set of demographic indicators, a phenomenon rare in the history of populations.
>
> In barely twenty years, the birth rate and the marriage rate have tumbled, while divorces and illegitimate births have increased rapidly. All these changes have been substantial, with increases or decreases of more than fifty percent. They have also been sudden, since the process

> of change has only lasted about fifteen years. And they have been general, because all industrialized countries have been affected beginning around 1965.[48]

The children in the Kauai cohort were born just in time to experience the great demographic upheavals and the ambitious Great Society programs of the 1960s. When the winds of social change began to blow, the study reveals that families on Kauai experienced the same stresses as American families generally.

It was just in this period, too, that we witnessed "the breakdown of traditional ways of handling distress," ways that "are located in the family primarily, but also in the ethnic group, the neighborhood, the church."[49] The phenomena were not unrelated. As the writer of an unsigned essay in *The New Yorker* put it, we have experienced a "fraying of the net of connections between people at many critical intersections. . . ."

> Each fraying connection accelerates the others. A break in one connection, such as attachment to a stable community, puts pressure on other connections: marriage, the relationship between parents and children, religious affiliation, a feeling of connection with the past—even citizenship, that sense of membership in a large community which grows best when it is grounded in membership in a small one.[50]

In retrospect, it is apparent that many of the mutually reinforcing protective factors that had been found to promote the welfare of a significant minority of high-risk children in Kauai are far less securely in place now than they were for the 1955 cohort.

Indeed, all indications are that even more American children today are at "high risk," while less protection is available to them. In 1960, for example, fewer than 10 percent of American children lived in a single-parent home; by 1988, that figure had risen to nearly one-quarter,[51] and more than half of all children born in the 1980s are expected to spend at least part of the years before they reach 18 in a one-parent household.[52] The overwhelming majority of these homes, now as previously, are headed by women, and their economic circumstances are notoriously precarious. Nearly half of all female-headed families with children under six live in poverty.[53] Though rapid increases in women's labor force participation have been a positive development for families in many ways, they have profoundly affected the caretaking capacity of two- as well as one-

parent homes. While the proportion of American mothers with children under six who are in the labor force has increased from 30 percent in 1970 to 56 percent in 1988, adequate child care substitutes have not increased correspondingly.[54]

Under the current circumstances, then, external support systems like those identified in the Kauai study seem more necessary today than ever—to help intact and functioning families to keep going, as well as to assist members of families that are broken or faltering. The problem, however, is that schools, churches, youth groups, and so on, not only served as reinforcements for, but themselves depended on, families, neighborhoods, and each other for personnel and reinforcement. They, too, are now under stress to a degree that would have been hard to imagine in the mid-1950s. It is sobering to reflect that the typical child-abuser is (as Randy DeShaney was) a loner, a socially isolated individual without a support system.[55]

By demonstrating the importance, not only of well-known factors in the home environment to children, but of supportive external communities to families and children alike, the Kauai study challenges us to reflect on the relative absence of public deliberation concerning the state of the social structures within which we learn the liberal virtues and practice the skills of government; the mediating institutions that stand as buffers between individuals and the state; the diverse groups that share with families the task of nurturing, educating and inspiring the next generation.

Even if public discourse came to focus on such matters, however, it must be acknowledged that it is difficult to imagine at this stage what specific measures would flow from a more ecological approach to family policy. What little we do know suggests that we should not hold exaggerated expectations of what law and government can accomplish on their own. But there are a number of ways in which law and government might do better for child-raising families. They could at least endeavor to avoid undermining the social structures on which families rely, and to surmount the present-mindedness that characterizes so much of our public policy-making. Recognizing the primitive state of our knowledge about the likely long-term effects of changes in these areas, an ecological approach to family policy would proceed modestly, encouraging local experiments, and avoiding the court-imposed uniformity that would follow from excessive constitutionalization of family issues.

With these general principles in mind, one might begin by eliminating the appearance of public indifference created when we treat

child raising as though it were just one more "life-style" as to which the state must be "neutral." At the same time, we should endeavor to remove the appearance of sanctioning parental irresponsibility (as we did for so long in the area of child support), and as we do when we fail to respond to the Joshua DeShaneys brutalized by the very persons on whom they are dependent. Now that the two-earner child-raising family has become typical, government, employers, and unions must recognize that most employees, male and female, have family roles in addition to their work roles. Government must give more attention to the likely impact of tax, employment, zoning, and social assistance laws and policies on families. We urgently need to consider how government and employers can assist men and women to carry out the family responsibilities that most of them bear; how men can be persuaded to share with women more of the double burden of wage-work and homework; and how family members who perform caretaking roles can be protected from the risks entailed by their asymmetrical dependence on the principal family earner. At a minimum, we must be attentive to the ways in which governmental or employer policies may inadvertently be discouraging, impeding, or even penalizing those who are responsibly trying to carry out family roles.

We should not have to apologize for defining our society as one that relies heavily on families to socialize its young citizens, and that encourages, aids and rewards persons who perform family obligations. But an indispensable element of any such efforts to improve conditions for the nurture of citizens must be to attend more closely to the structures of civil society with which families are in a symbiotic relationship.

Admittedly, as in the case of natural ecological systems, the possibility exists that disintegration of family life, and the fraying of other social networks, has proceeded to the point where public deliberation, law, and government are powerless to help them. If American society already is producing too many individuals who are incapable of responsible parenthood, or of sustaining personal relationships, or of participating in civic life, it is rather late to worry about the state of our political discourse. In this connection, Nathan Glazer has written in a pessimistic vein:

> [There is much to be said both] for the insistence on a radical and egalitarian individualism, and for the defense of complex institutions and social bonds. . . . But if the first side wins out, as it is doing, the

> hope that social policy will assist in creating more harmonious social relations, better working social institutions, broadly accepted as the decent and right way to order society, cannot be realized.[56]

But is it the case that "radical and egalitarian individualism" is "winning out"? Or is the individualism of our public discourse and our legal system more thoroughgoing than that which actually exists in our culture? It is true that Americans have a special history of what Michael Walzer has called the "four mobilities"—geographic, social, political, and marital.[57] Walzer has warned communitarians to face the fact that "there is no one out there" except Americans—"separated, rights-bearing, voluntarily associating, freely speaking, liberal" Americans.[58] Still, he adds:

> [C]ommunal feeling and belief seem considerably more stable than we once thought they would be, and the proliferation of secondary associations in liberal society is remarkable—even if many of them have short lives and transient memberships. One has the sense of people working together and trying to cope, and not . . . just getting by on their own, by themselves, one by one.[59]

What Walzer calls communal feeling might better be thought of as human sociality, the trait of individuals which still impels most Americans to seek to develop their own special qualities within various networks of relationships, beginning with emotionally and economically interdependent households, and fanning outward. Seemingly converging with the persistent efforts of Americans to perpetuate or form communities of memory and mutual aid, there are, on the political horizon, scattered traces of a groping search for civil society.

SEARCHING FOR CIVIL SOCIETY

The lack of a well-developed discourse about civil society has made it easy for Americans to overlook the costs exacted by the modern state and the market on the family and its surrounding communities of memory and mutual aid. Yet the evidence is mounting that we have been living for quite some time on inherited social capital, consuming our resources without replenishing them. It is symptomatic of the impoverishment of our political discourse that,

as challengers to the individual-state-market mental grid have begun to appear, they have often turned instinctively to rights talk. Aside from heightening the cacophony of public discourse, however, "group rights" concepts are at least as problematic as our stripped-down, overly simple, versions of individual rights. Some forms of communitarianism, for example, would make majority rule normative as such, or would exalt groups and communities over the individual human beings who compose them.

Rights asserted on behalf of groups tend to pit group against individual, one group against another, and group against state. They thus raise spectres of individual oppression, of new tribalism, and of the old problem of faction. Endowing groups or communities with rights thus seems an unsatisfactory way to recognize the facts that human beings are social as well as self-determining, and that small social settings are conducive to human flourishing. Furthermore, to make families, neighborhoods, churches, unions, and so on, into group rights-bearers is to render them abstract and fungible. Yet these associations themselves are the varied and changing concrete manifestations of the efforts of men and women to order their lives in collaboration with one another. Like individuals and states, they too are subject to pathologies. Excessive preoccupation with one's immediate community can foster intolerance or indifference to the general welfare, as witness the proliferation of NIMBY (not-in-my-backyard) movements when new locations for prisons, group homes for the mentally retarded, and other public works are proposed. Undue deference to family autonomy can leave abused or neglected children at the mercy of their tormentors.

What we need therefore is not a new portfolio of "group rights," but a fuller concept of human personhood and a more ecological way of thinking about social policy. Groups are important, not for their own sake, but for their roles in setting the conditions under which individuals can flourish and order their lives together. Because individuals are partly constituted in and through their relationships with others, a liberal politics dedicated to full and free human development cannot afford to ignore the settings that are most conducive to the fulfillment of that ideal. In so doing, liberal politics neglects the conditions for its own maintenance. For the institutions of civil society help to sustain a democratic order, by relativizing the power of both the market and the state, and by helping to counter both consumerist and totalitarian tendencies.[60] The myriad associations that generate social norms are the invisible supports of, and the *sine qua*

non for, a regime in which individuals have rights. Neither the older political and civil rights, nor the newer economic and social rights, can be secure in the absence of social arrangements that induce those who are disadvantaged by the rights of others to accept the restrictions and interferences that such rights entail.[61] When individual rights are permitted to undermine the communities that are the sources of such practices, they thus destroy their own surest underpinning. The paradox of liberalism seems to be that the strong state, the free market, and a vital civil society are all potential threats to individual citizens and to each other, yet a serious weakness in any one of them puts the entire democratic enterprise in jeopardy.

The relations among these three spheres may be characterized by creative tension or they may degenerate into mutual destruction. Thus, when the structures of one sector are becoming weak in relation to the others, the problem for statecraft becomes one of determining whether and how law and policy might help to revitalize, or to refrain from harming, the endangered one. Unfortunately, we do not know very much about how to support, or reinforce, or even how to avoid damage to the ongoing, mutually conditioning systems of civil society. The problems of protecting social environments are in many ways comparable to those of safeguarding natural environments. If democratic states need individual citizens with an array of qualities that—so far as we know—can best be nurtured within reasonably stable families; if families, in order to function effectively, need to be composed of individuals capable of commitment, and supported by communities of various sorts; and if communities in turn require certain kinds of individuals and families, public deliberation must make room for an ecological perspective.

Fortunately, there are a few signs of a shift to such a perspective on the part of public officials in both parties and in all branches of government, with the most encouraging of them occurring in the much-maligned legislative process. The 1990 child care legislation is a heartening example of a new way of thinking about social problems. Since the government has remained largely aloof from the problem of providing day care for the 55 percent of preschool children whose mothers work outside the home,[62] we have a pretty good idea of what is yielded by the hands-off approach favored by many conservatives: too much day care is being provided by poorly qualified persons for whom it is just a minimum-wage job, and too many children are simply left alone while their parent or parents work. Yet, conditions in the public schools have given rise to rea-

sonable fears about direct governmental provision of day-care services, even if funds were to be made available for such a purpose.

In 1990, Congress came up with a bipartisan approach that was a credit to democratic politics. Described by *The New York Times* as "a monumental triumph,"[63] the child welfare legislation adopted that year took a diversified approach to the problem of day care. One important feature of the act was to bolster an existing and successful program, Headstart, so as to make it possible to enroll every eligible child by 1994. Its principal innovation, however, was to authorize federal funding for state-subsidized child care for working parents regardless of income (though with a recommendation that preference be given to low-income families). Congress gave the states discretion either to distribute money directly to day-care centers, or to issue vouchers that permit parents to choose their own day-care providers, including church-run centers that may take religious affiliation into consideration in their hiring practices.

This sensible legislation recognizes that nongovernmental community-based groups often can deliver services such as education and child care better and more efficiently than the state can.[64] This shift was long in coming, due to traditional hostility to social welfare spending in some quarters, and to reflexive opposition to voucher plans involving religious groups in others. Yet it seems plain that community-based day care will serve a double ecological purpose by aiding child-raising families, while helping to promote the vitality of the communities upon which many families depend. Day care can provide meaningful work for members of the community (especially older people), while responding to one of the most pressing needs of young parents. Government, in acting as a supporter of the provision of day care by persons well qualified and highly motivated to furnish it, thus can move simultaneously on a number of levels to set conditions and shift probabilities relating to the welfare of children. The years of struggle that preceded the adoption of these modest child-welfare measures in the United States (decades after more far-reaching legislation was in place in most other liberal democracies) illustrate our difficulties in moving beyond the impasse between those who oppose social spending, and those who favor direct governmental provision of services. These difficulties were intensified by our lack of a political language of human sociality and civil society.

The kind of debate that formed around Congressional attempts to develop new approaches to the problems of adolescent pregnancy

is another case in point. In the late 1960s, the federal government had experimented with introducing important roles for citizen participation, non-governmental organizations, and local governments in social programs.[65] In 1981, taking the ideas behind these "community action" programs somewhat further, Congress adopted the Adolescent Family Life Act (AFLA), authorizing a series of grants to nonprofit private organizations, as well as to public bodies, for the development of programs to provide assistance to pregnant teenagers and adolescent parents.[66] In addition to providing funds for specific services, the act commissioned research directed to the discovery of fundamental causes and remedial measures. Congress identified the following long-range purposes: to promote "self-discipline and other prudent approaches to the problem of adolescent premarital sexual relations;" to promote adoption as an alternative for adolescent parents; to develop new approaches to the delivery of care to pregnant teenage girls; and to support research and demonstration projects "concerning the societal causes and consequences of adolescent premarital sexual relations, contraceptive use, pregnancy, and child rearing."[67]

This legislation quickly attracted wide attention and discussion, but not because of its innovative extension of participatory and community-based approaches to a serious and seemingly intractable social problem. Rather, supporters and opponents alike focused on a single provision of the act, specifying that grants may not be authorized for programs or projects that provide abortions or abortion counselling, or that actively promote abortion, nor for family planning services, unless such services are not otherwise available in the community.[68] Participants on both sides of the rights-based abortion debate immediately set the tone for the treatment of the adolescent pregnancy statute in the press. As a result, hardly any notice was taken of what is potentially the most important feature of the act: express Congressional endorsement of the view that it is desirable for government to support the efforts of nongovernmental and nonmarket groups to address a major social problem.

Whether or not it was wise to exclude funding for abortion and birth control, the Adolescent Family Life Act is an encouraging sign for social ecology. Like the national labor relations legislation of the 1930s, the statute represents a significant Congressional effort to address a social ill by trying to strengthen the resistance of the body social. The Senate Committee Report was refreshingly frank in acknowledging "the limitations of Government in dealing with a prob-

lem that has complex moral and social dimensions. . . ."[69] Unlike the superficially similar "community-based" programs of the 1960s and 70s, the AFLA does not set out to "organize" communities. Rather, it contemplates implementation by community groups that are already (if precariously) in place. Specifically, the act affirmatively sets out to "emphasize" the roles of family members, as well as those of religious, charitable and other voluntary associations.[70] Grant applicants are required to describe how families and "religious and charitable organizations, voluntary associations, and other groups in the private sector as well as services provided by publicly sponsored initiatives" will be included in their proposed activities.[71] AFLA, in other words, tries to work from the bottom up, not the top down. Its express inclusion of religious organizations and families suggests that the protection of neighborhood organizations, churches, families, and other such small-scale communities, is, if not a direct aim of the statute, at least a likely by-product.

The explicit reference by Congress to religious associations, however, provided the occasion for several advocacy groups to attack the act on constitutional grounds. Funding under the AFLA went, as Congress intended, to a wide variety of recipients—including state and local health agencies, private hospitals, community health associations, privately operated health care centers, and community and charitable organizations, many of them with ties to religious denominations. In due course, a lawsuit challenging the constitutionality of the AFLA was brought on the ground that the Establishment Clause of the First Amendment was violated by the inclusion of religious organizations among the participants.

In a decision that is an encouraging indicator of the Court's receptiveness to Congressional efforts to transcend the state-market framework, the Supreme Court held (5–4) in *Bowen v. Kendrick* that the AFLA is constitutional.[72] By holding that the statute, at least on its face,[73] did not foster "excessive entanglement" between church and state,[74] the Court has sent a signal to the elected branches that more creative uses of the structures of civil society may now be permissible in the American welfare state. According to Chief Justice Rehnquist, Congress's 1981 decision to augment the role of religious and other organizations in tackling the social and economic problems associated with teenage pregnancy, sexuality, and parenthood reflected "the entirely appropriate aim of increasing broad-based community involvement. . . ."[75] He went on to say, with respect to religious organizations in particular,

> Nothing in our previous cases prevents Congress from . . . recognizing the important part that religion or religious organizations may play in resolving certain secular problems. Particularly when, as Congress found, 'prevention of adolescent sexual activity and adolescent pregnancy depends primarily upon developing strong family values and close family ties' . . . , it seems quite sensible for Congress to recognize that religious organizations can influence values and can have some influence on family life, including parents' relations with their adolescent children.[76]

Reviewing the Court's checkered pattern of church-state decisions over the past 40 years, the Chief Justice was able to pick out a few strands of common sense and practical reason. He pointed to the "long history of cooperation and interdependency between governments and charitable or religious organizations," and to the fact that social services have long been furnished through religiously affiliated charitable groups without controversy and with community support.[77] He noted that "this Court has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs."[78]

Former Justice Brennan, though he joined the dissenters in the *Kendrick* case, has been eloquent on various occasions, too, in recognizing the importance of families and their supporting communities to the maintenance of a liberal society. The American social vision, as he wrote in the epigraph to this chapter, is not that "of a unified society, where the needs of children are met . . . by the Government, and where no intermediate forms of association stand between the individual and the State."[79] Indeed, Justice Brennan often emphasized in his opinions that the law sometimes must attend to the conditions that communities require in order to flourish. He pointed out the paradoxical dependence of individual freedom on groups where such freedom may not be the primary value in a decision upholding the right of a Mormon religious institution to favor its own members in making employment decisions: "Solicitude for a church's ability to [maintain its own definition of itself] reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well."[80]

It is thus apparent that, even on an ideologically diverse Supreme Court, there are glimpses of a growing appreciation of the importance of the structures and institutions of civil society. Meanwhile, a surge of "communitarian" and "republican" scholarship in the nation's law schools likewise seems to be seeking for some way to

temper radical individualism and to tend the seedbeds of civic virtue. These efforts, however, remain countercurrents to the prevailing judicial and academic tendency to cling to the familiar individual-state-market grid. Just as mainstream contemporary moral philosophy has little conceptual place for a notion of the good,[81] contemporary law and politics still have little room for consideration of the sorts of institutions where notions of the good are generated, regenerated, and transmitted.

This is not to say that law and government alone could reinvigorate the seedbeds of civic virtue. Some years ago, on the eve of the rights revolution, a respected American judge warned new American citizens against treating the legal system as the ultimate bulwark of freedom:

> I often wonder whether we do not rest our hopes too much on constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.[82]

Judge Learned Hand's reminder of the limits of law needs to be tempered, however, with the recognition that constitutions, laws, and courts do have a modest bearing on habits and attitudes. And nowhere are these legal influences more a factor to be reckoned with than in the legalistic society of the United States.

The inadequate attention to human sociality and civil society in mainstream American law and political theory have practical consequences. The lack of public discourse regarding responsibility, sociality, and civil society, leaves us to work out our own vision of the kind of people we are and the kind of society we want to become, mainly in terms of the individual, the state, and the market. Our overblown rights rhetoric and our vision of the rights-bearer as an autonomous individual channel our thoughts away from what we have in common and focus them on what separates us. They draw us away from participation in public life and point us toward the maximization of private satisfactions. They incline us to shift the costs and risks of current policies regarding natural resources, pollution, public indebtedness, social security, and public health onto our children and future generations.[83] In these respects, the American rights dialect poorly serves our historic commitment to representative gov-

ernment, our post–New Deal acceptance of a form of welfare state, and our constitutional aspiration to "secure the blessings of liberty to ourselves and our posterity."

Our ability to escape this mental prison, by imagining a regime of rights where freedom, responsibility, privacy, and sociality could coexist in fruitful dialogue is diminished by another distinctive feature of our rights discourse: its insularity. Ironically, many other countries have been able to refine their rhetoric of rights and to enrich their public discourse by reflecting on American constitutionalism. We, for the most part, have remained resolutely turned inward. Yet, the experience of other liberal democracies suggests that forceful rights talk need not exclude a well-developed language of responsibility; that rights need not be formulated in absolute terms to be effective and strong; and that the rights-bearer can be imagined as both social and self-determining.

ULTRAMARES CORPORATION

v.

TOUCHE et al.

January 6, 1931.

Synopsis

Action by the Ultramares Corporation against George A. Touche and others, copartners doing business under the firm name of Touche, Niven & Co. From that part of the judgment of the Appellate Division (229 App. Div. 581, 243 N. Y. S. 179), which reversed a judgment of the Trial Term dismissing the complaint as to the first cause of action, reinstated a verdict in favor of the plaintiff, and gave judgment thereon in the sum of $203,058.97, defendants appeal, and, from that part of the judgment of the Appellate Division which affirmed a judgment of the Trial Term dismissing the complaint as to the second cause of action, the plaintiff appeals.

Reversed on defendant's appeal, and reversed and new trial granted on plaintiff's appeal.

Appeal from Supreme Court, Appellate Division, First Department.

Attorneys and Law Firms

Herbert R. Limburg, Martin Conboy, David L. Podell, Joseph L. Weiner, and Lionel S. Popkin, all of New York City, for plaintiffs-appellants-respondents.

Samuel Untermyer, John W. Davis, and James Marshall, all of New York City, for defendants-respondents-appellants.

Roger S. Baldwin, of New York City, J. Harry Covington, of Washington, D. C., and Kenneth McEwen, of New York City, amici curiae, for American Institute of Accountants.

Opinion

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CARDOZO, C. J.

The action is in tort for damages suffered through the misrepresentations of accountants, the first cause of action being for misrepresentations that were merely negligent, and the second for misrepresentations charged to have been fraudulent.

In January, 1924, the defendants, a firm of public accountants, were employed by Fred Stern & Co., Inc., to prepare and certify a balance sheet exhibiting the condition of its business as of December 31, 1923. They had been employed at the end of each of the three years preceding to

render a like service. Fred Stern & Co., Inc., which was in substance Stern himself, was engaged in the importation and sale of rubber. To finance its operations, it required extensive credit and borrowed large sums of money from banks and other lenders. All this was known to the defendants. The defendants knew also that in the usual course of business the balance sheet when certified would be exhibited by the Stern Company to banks, creditors, stockholders, purchasers, or sellers, according to the needs of the occasion, as the basis of financial dealings. Accordingly, when the balance sheet was made up, the defendants supplied the Stern Company with thirty-two copies certified with serial numbers as counterpart originals. Nothing was said as to the persons to whom these counterparts would be shown or the extent or number of the transactions in which they would be used. In particular there was no mention of the plaintiff, a corporation doing business chiefly as a factor, which till then had never made advances to the Stern Company, though it had sold merchandise in small amounts. The range of the transactions in which a certificate of audit might be expected to play a part was as indefinite and wide as the possibilities of the business that was mirrored in the summary.

By February 26, 1924, the audit was finished and the balance sheet made up. It stated assets in the sum of $2,550,671.88 and liabilities other than capital and surplus in the sum of $1,479,956.62, thus showing a net worth of $1,070,715.26. Attached to the balance sheet was a certificate as follows:

‘Touche, Niven & Co.

‘Public Accountants

‘Eighty Maiden Lane

‘New York

‘February 26, 1924.

‘Certificate of Auditors

‘We have examined the accounts of Fred Stern & Co., Inc., for the year ending December 31, 1923, and hereby certify that the annexed balance sheet is in accordance therewith and with the information and explanations given us. We further certify that, subject to provision for federal taxes on income, the said statement, in our opinion, presents a true and correct view of the financial condition of Fred Stern & Co., Inc., as at December 31, 1923.

‘Touche, Niven & Co.

‘Public Accountants.’

Capital and surplus were intact if the balance sheet was accurate. In reality both had been wiped out, and the corporation was insolvent. The books had been falsified by those in charge of the business so as to set forth accounts receivable and other assets which turned out to be fictitious.

The plaintiff maintains that the certificate of audit was erroneous in both its branches. The first branch, the asserted correspondence between the accounts and the balance sheet, is one purporting to be made as of the knowledge of the auditors. The second branch, which certifies to a belief that the condition reflected in the balance sheet presents a true and correct picture of the resources of the business, is stated as a matter of opinion. In the view of the plaintiff, both branches of the certificate are either fraudulent or negligent. As to one class of assets, the item of accounts receivable, if not also as to others, there was no real correspondence, we are told, between balance sheet and books, or so the triers of the facts might find. If correspondence, however, be assumed, a closer examination of supporting invoices and records, or a fuller inquiry directed to the persons appearing on the books as creditors or debtors, would have exhibited the truth.

The plaintiff, a corporation engaged in business as a factor, was approached by Stern in March, 1924, with a request for loans of money to finance the sales of rubber. Up to that time the dealings between the two houses were on a cash basis and trifling in amount. As a condition of any loans the plaintiff insisted that it receive a balance sheet certified by public accountants, and in response to that demand it was given one of the certificates signed by the defendants and then in Stern's possession. On the faith of that certificate the plaintiff made a loan which was followed by many others. The course of business was for Stern to deliver to the plaintiff documents described as trust receipts which in effect were executory assignments of the moneys payable by purchasers for goods thereafter to be sold. When the purchase price was due, the plaintiff received the payment, reimbursing itself therefrom for its advances and commissions. Some of these transactions were effected without loss. Nearly a year later, in December, 1924, the house of cards collapsed. In that month, plaintiff made three loans to the Stern Company, one of $100,000, a second of $25,000, and a third of $40,000. For some of these loans no security was received. For some of the earlier loans the security was inadequate. On January 2, 1925, the Stern Company was declared a bankrupt.

This action, brought against the accountants in November, 1926, to recover the loss suffered by the plaintiff in reliance upon the audit, was in its inception one for negligence. On the trial there was added a second cause of action asserting fraud also. The trial judge dismissed the second cause of action without submitting it to the jury. As to the first cause of action, he reserved his decision on the defendants' motion to dismiss, and took the jury's verdict. They were told that the defendants might be held liable if with knowledge that the results of the audit would be communicated to creditors they did the work negligently, and that negligence was the omission to use reasonable and ordinary care. The verdict was in favor of the plaintiff for $187,576.32. On the coming in of the verdict, the judge granted the reserved motion. The Appellate Division (229 App. Div. 581, 243 N. Y. S. 179) affirmed the dismissal of the cause of action for fraud, but reversed the dismissal of the cause of action for negligence, and reinstated the verdict. The case is here on cross-appeals.

The two causes of action will be considered in succession, first the one for negligence and second that for fraud.

1. We think the evidence supports a finding that the audit was negligently made, though in so saying we put aside for the moment the question whether negligence, even if it existed, was a wrong to the plaintiff. To explain fully or adequately how the defendants were at fault would carry this opinion beyond reasonable bounds. A sketch, however, there must be, at least in respect of some features of the audit, for the nature of the fault, when understood, is helpful in defining the ambit of the duty.

We begin with the item of accounts receivable. At the start of the defendant's audit, there had been no posting of the general ledger since April, 1923. Siess, a junior accountant, was assigned by the defendants to the performance of that work. On Sunday, February 3, 1924, he had finished the task of posting, and was ready the next day to begin with his associates the preparation of the balance sheet and the audit of its items. The total of the accounts receivable for December, 1923, as thus posted by Siess from the entries in the journal, was $644,758.17. At some time on February 3, Romberg, an employee of the Stern Company, who had general charge of its accounts, placed below that total another item to represent additional accounts receivable growing out of the transactions of the month. This new item, $706,843.07, Romberg entered in his own handwriting. The sales that it represented were, each and all, fictitious. Opposite the entry were placed other figures (12–29), indicating or supposed to indicate a reference to the journal. Siess when he resumed his work saw the entries thus added, and included the new item in making up his footings, with the result of an apparent increase of over $700,000 in the assets of the business. He says that in doing this he supposed the entries to be correct, and that, his task at the moment being merely to post the books, he thought the work of audit or verification might come later, and put it off accordingly. The time sheets, which are in evidence, show very clearly that this was the order of time in which the parts of the work were done. Verification, however, there never was either by Siess or by his superiors, or so the triers of the facts might say. If any had been attempted, or any that was adequate, an examiner would have found that the entry in the ledger was not supported by any entry in the journal. If from the journal he had gone to the book from which the journal was made up, described as ‘the debit memo book,’ support would still have failed. Going farther, he would have found invoices, seventeen in number, which amounted in the aggregate to the interpolated item, but scrutiny of these invoices would have disclosed suspicious features in that they had no shipping number nor a customer's order number and varied in terms of credit and in other respects from those usual in the business. A mere glance reveals the difference.

The December entry of accounts receivable was not the only item that a careful and skillful auditor would have desired to investigate. There was ground for suspicion as to an item of $113,199.60, included in the accounts payable as due from the Baltic Corporation. As to this the defendants received an explanation, not very convincing, from Stern and Romberg. A cautious auditor might have been dissatisfied and have uncovered what was wrong. There was ground for

suspicion also because of the inflation of the inventory. The inventory as it was given to the auditors, was totaled at $347,219.08. The defendants discovered errors in the sum of $303,863.20, and adjusted the balance sheet accordingly. Both the extent of the discrepancy and its causes might have been found to cast discredit upon the business and the books. There was ground for suspicion again in the record of assigned accounts. Inquiry of the creditors gave notice to the defendants that the same accounts had been pledged to two, three, and four banks at the same time. The pledges did not diminish the value of the assets, but made in such circumstances they might well evoke a doubt as to the solvency of a business where such conduct was permitted. There was an explanation by Romberg which the defendants accepted as sufficient. Caution and diligence might have pressed investigation farther.

If the defendants owed a duty to the plaintiff to act with the same care that would have been due under a contract of employment, a jury was at liberty to find a verdict of negligence upon a showing of a scrutiny so imperfect and perfunctory. No doubt the extent to which inquiry must be pressed beyond appearances is a question of judgment, as to which opinions will often differ. No doubt the wisdom that is born after the event will engender suspicion and distrust when old acquaintance and good repute may have silenced doubt at the beginning. All this is to be weighed by a jury in applying its standard of behavior, the state of mind, and conduct of the reasonable man. Even so, the adverse verdict, when rendered, imports an alignment of the weights in their proper places in the balance and a reckoning thereafter. The reckoning was not wrong upon the evidence before us, if duty be assumed.

We are brought to the question of duty, its origin and measure.

The defendants owed to their employer a duty imposed by law to make their certificate without fraud, and a duty growing out of contract to make it with the care and caution proper to their calling. Fraud includes the pretense of knowledge when knowledge there is none. To creditors and investors to whom the employer exhibited the certificate, the defendants owed a like duty to make it without fraud, since there was notice in the circumstances of its making that the employer did not intend to keep it to himself. Eaton, Cole & Burnham Co. v. Avery, 83 N. Y. 31, 38 Am. Rep. 389; Tindle v. Birkett, 171 N. Y. 520, 64 N. E. 210, 89 Am. St. Rep. 822. A different question develops when we ask whether they owed a duty to these to make it without negligence. If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences. We put aside for the moment any statement in the certificate which involves the representation of a fact as true to the knowledge of the auditors. If such a statement was made, whether believed to be true or not, the defendants are liable for deceit in the event that it was false. The plaintiff does not need the invention of novel doctrine to help it out in such conditions. The case was submitted to the jury, and the verdict was returned upon the theory that, even in the absence of a misstatement of a fact,

there is a liability also for erroneous opinion. The expression of an opinion is to be subject to a warranty implied by law. What, then, is the warranty, as yet unformulated, to be? Is it merely that the opinion is honestly conceived and that the preliminary inquiry has been honestly pursued, that a halt has not been made without a genuine belief that the search has been reasonably adequate to bring disclosure of the truth? Or does it go farther and involve the assumption of a liability for any blunder or inattention that could fairly be spoken of as negligence if the controversy were one between accountant and employer for breach of a contract to render services for pay?

The assault upon the citadel of privity is proceeding in these days apace. How far the inroads shall extend is now a favorite subject of juridical discussion. Williston, Liability for Honest Misrepresentation, 24 Harv. L. Rev. 415, 433; Bohlen, Studies in the Law of Torts, pp. 150, 151; Bohlen, Misrepresentation as Deceit, Negligence or Warranty, 42 Harv. L. Rev. 733; Smith, Liability for Negligent Language, 14 Harv. L. Rev. 184; Green, Judge and Jury, chapter Deceit, p. 280; 16 Va. Law Rev. 749. In the field of the law of contract there has been a gradual widening of the doctrine of Lawrence v. Fox, 20 N. Y. 268, until today the beneficiary of a promise, clearly designated as such, is seldom left without a remedy. Seaver v. Ransom, 224 N. Y. 233, 238, 120 N. E. 639, 2 A. L. R. 1187. Even in that field, however, the remedy is narrower where the beneficiaries of the promise are indeterminate or general. Something more must then appear than an intention that the promise shall redound to the benefit of the public or to that of a class of indefinite extension. The promise must be such as to 'bespeak the assumption of a duty to make reparation directly to the individual members of the public if the benefit is lost.' Moch Co. v. Rensselaer Water Co., 247 N. Y. 160, 164, 159 N. E. 896, 897, 62 A. L. R. 1199; American Law Institute, Restatement of the Law of Contracts, § 145. In the field of the law of torts a manufacturer who is negligent in the manufacture of a chattel in circumstances pointing to an unreasonable risk of serious bodily harm to those using it thereafter may be liable for negligence though privity is lacking between manufacturer and user. MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F, 696, Ann. Cas. 1916C, 440; American Law Institute, Restatement of the Law of Torts, § 262. A force or instrument of harm having been launched with potentialities of danger manifest to the eye of prudence, the one who launches it is under a duty to keep it within bounds. Moch Co. v. Rensselaer Water Co., supra, at page 168 of 247 N. Y., 159 N. E. 896, 898. Even so, the question is still open whether the potentialities of danger that will charge with liability are confined to harm to the person, or include injury to property. Pine Grove Poultry Farm v. Newtown ByProducts Mfg. Co., 248 N. Y. 293, 296, 162 N. E. 84; Robins Dry Dock & Repair Co. v. Flint, 275 U. S. 303, 48 S. Ct. 134, 72 L. Ed. 290; American Law Institute, Restatement of the Law of Torts, supra. In either view, however, what is released or set in motion is a physical force. We are now asked to say that a like liability attaches to the circulation of a thought or a release of the explosive power resident in words.

Three cases in this court are said by the plaintiff to have committed us to the doctrine that words, written or oral, if negligently published with the expectation that the reader or listener will transmit them to another, will lay a basis for liability though privity be lacking. These are Glanzer v. Shepard, 233 N. Y. 236, 238, 135 N. E. 275, 23 A. L. R. 1425; International Products Co. v. Erie R. R. Co., 244 N. Y. 331, 155 N. E. 662, 56 A. L. R. 1377, and Doyle v. Chatham & Phenix Nat. Bank, 253 N. Y. 369, 171 N. E. 574.

In Glanzer v. Shepard, the seller of beans requested the defendants, public weighers, to make return of the weight and furnish the buyer with a copy. This the defendants did. Their return, which was made out in duplicate, one copy to the seller and the other to the buyer, recites that it was made by order of the former for the use of the latter. The buyer paid the seller on the faith of the certificate which turned out to be erroneous. We held that the weighers were liable at the suit of the buyer for the moneys overpaid. Here was something more than the rendition of a service in the expectation that the one who ordered the certificate would use it thereafter in the operations of his business as occasion might require. Here was a case where the transmission of the certificate to another was not merely one possibility among many, but the 'end and aim of the transaction,' as certain and immediate and deliberately willed as if a husband were to order a gown to be delivered to his wife, or a telegraph company, contracting with the sender of a message, were to telegraph it wrongly to the damage of the person expected to receive it. Wolfskehl v. Western Union Tel. Co., 46 Hun 542; DeRutte v. New York, Albany & Buffalo Electro Magnetic Telegraph Co., 1 Daly, 547; Milliken v. Western Union Tel. Co., 110 N. Y. 403, 410, 18 N. E. 251, 1 L. R. A. 281. The intimacy of the resulting nexus is attested by the fact that, after stating the case in terms of legal duty, we went on to point out that viewing it as a phase or extension of Lawrence v. Fox, supra, or Seaver v. Ransom, supra, we could reach the same result by stating it in terms of contract. Cf. Economy Building & Loan Ass'n v. West Jersey Title Co., 64 N. J. Law, 27, 44 A. 854; Young v. Lohr, 118 Iowa, 624, 92 N. W. 684; Murphy v. Fidelity Abstract & Title Co., 114 Wash. 77, 194 P. 591. The bond was so close as to approach that of privity, if not completely one with it. Not so in the case at hand. No one would be likely to urge that there was a contractual relation, or even one approaching it, at the root of any duty that was owing from the defendants now before us to the indeterminate class of persons who, presently or in the future, might deal with the Stern Company in reliance on the audit. In a word, the service rendered by the defendant in Glanzer v. Shepard was primarily for the information of a third person, in effect, if not in name, a party to the contract, and only incidentally for that of the formal promisee. In the case at hand, the service was primarily for the benefit of the Stern Company, a convenient instrumentality for use in the development of the business, and only incidentally or collaterally for the use of those to whom Stern and his associates might exhibit it hereafter. Foresight of these possibilities may charge with liability for fraud. The conclusion does not follow that it will charge with liability for negligence.

In the next of the three cases (International Products Co. v. Erie R. R. Co., supra) the plaintiff, an importer, had an agreement with the defendant, a railroad company, that the latter would act as

bailee of goods arriving from abroad. The importer, to protect the goods by suitable insurance, made inquiry of the bailee as to the location of the storage. The warehouse was incorrectly named, and the policy did not attach. Here was a determinate relation, that of bailor and bailee, either present or prospective, with peculiar opportunity for knowledge on the part of the bailee as to the subject-matter of the statement and with a continuing duty to correct it if erroneous. Even the narrowest holdings as to liability for unintentional misstatement concede that a representation in such circumstances may be equivalent to a warranty. There is a class of cases 'where a person within whose special province it lay to know a particular fact, has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurance he has given.' Herschell, L. C., in Derry v. Peek, [L. R.] 14 A. C. 337, 360. So in Burrowes v. Lock, 10 Ves. 470, a trustee was asked by one who expected to make a loan upon the security of a trust fund whether notice of any prior incumbrance upon the fund had been given to him. An action for damages was upheld, though the false answer was made honestly in the belief that it was true. Cf. Brownlie v. Campbell, [L. R.] 5 A. C. 925, 935; Doyle v. Chatham & Phenix Nat. Bank, supra, at page 379 of 253 N. Y., 171 N. E. 574, 578.

In one respect the decision in International Products Co. v. Erie R. R. Co. is in advance of anything decided in Glanzer v. Shepard. The latter case suggests that the liability there enforced was not one for the mere utterance of words without due consideration, but for a negligent service, the act of weighing, which happened to find in the words of the certificate its culmination and its summary. This was said in the endeavor to emphasize the character of the certificate as a business transaction, an act in the law, and not a mere casual response to a request for information. The ruling in the case of the Erie Railroad shows that the rendition of a service is at most a mere circumstance and not an indispensable condition. The Erie was not held for negligence in the rendition of a service. It was held for words and nothing more. So in the case at hand. If liability for the consequences of a negligent certificate may be enforced by any member of an indeterminate class of creditors, present and prospective, known and unknown, the existence or nonexistence of a preliminary act of service will not affect the cause of action. The service may have been rendered as carefully as you please, and its quality will count for nothing if there was negligence thereafter in distributing the summary.

Doyle v. Chatham & Phenix Nat. Bank, supra, the third of the cases cited, is even more plainly indecisive. A trust company was a trustee under a deed of trust to secure an issue of bonds. It was held liable to a subscriber for the bonds when it certified them falsely. A representation by a trustee intended to sway action had been addressed to a person who by the act of subscription was to become a party to the deed and a cestui que trust.

The antidote to these decisions and to the overuse of the doctrine of liability for negligent misstatement may be found in Jaillet v. Cashman, 235 N. Y. 511, 139 N. E. 714, and Courteen Seed Co. v. Hong Kong & Shanghai Banking Corporation, 245 N. Y. 377, 381, 157 N. E. 272, 273, 56 A. L. R. 1186. In the first of these cases the defendant supplying ticker service to brokers

was held not liable in damages to one of the broker's customers for the consequences of reliance upon a report negligently published on the ticker. If liability had been upheld, the step would have been a short one to the declaration of a like liability on the part of proprietors of newspapers. In the second the principle was clearly stated by Pound, J., that 'negligent words are not actionable unless they are uttered directly, with knowledge or notice that they will be acted on, to one to whom the speaker is bound by some relation of duty, arising out of public calling, contract or otherwise, to act with care if he acts at all.'

From the foregoing analysis the conclusion is, we think, inevitable that nothing in our previous decisions commits us to a holding of liability for negligence in the circumstances of the case at hand, and that such liability, if recognized, will be an extension of the principle of those decisions to different conditions, even if more or less analogous. The question then is whether such an extension shall be made.

The extension, if made, will so expand the field of liability for negligent speech as to make it nearly, if not quite, coterminous with that of liability for fraud. Again and again, in decisions of this court, the bounds of this latter liability have been set up, with futility the fate of every endeavor to dislodge them. Scienter has been declared to be an indispensable element, except where the representation has been put forward as true of one's own knowledge (Hadcock v. Osmer, 153 N. Y. 604, 47 N. E. 923), or in circumstances where the expression of opinion was a dishonorable pretense (3 Williston, Contracts, § 1494; Smith v. Land & House Property Corporation, [L. R.] 28 Ch. Div. 7, 15; Sleeper v. Smith, 77 N. H. 337, 91 A. 866; Andrews v. Jackson, 168 Mass. 266, 47 N. E. 412, 37 L. R. A. 402, 60 Am. St. Rep. 390; People ex rel. Gellis v. Sheriff of Westchester County, 251 N. Y. 33, 37, 166 N. E. 795; Hickey v. Morrell, 102 N. Y. 454, 463, 7 N. E. 321, 55 Am. Rep. 824; Merry Realty Co. v. Martin, 103 Misc. Rep. 9, 14, 169 N. Y. S. 696; Merry Realty Co. v. Shamokin & Hollis Real Estate Co., 186 App. Div. 538, 174 N. Y. S. 627). Even an opinion, especially an opinion by an expert, may be found to be fraudulent if the grounds supporting it are so flimsy as to lead to the conclusion that there was no genuine belief back of it. Further than that this court has never gone. Directors of corporations have been acquitted of liability for deceit, though they have been lax in investigation and negligent in speech. Reno v. Bull, 226 N. Y. 546, 124 N. E. 144, and cases there cited; Kountze v. Kennedy, 147 N. Y. 124, 129, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. Rep. 651. This has not meant, to be sure, that negligence may not be evidence from which a trier of the facts may draw an inference of fraud (Derry v. Peek, [L. R.] 14 A. C. 337, 369, 375, 376), but merely that, if that inference is rejected, or, in the light of all the circumstances, is found to be unreasonable, negligence alone is not a substitute for fraud. Many also are the cases that have distinguished between the willful or reckless representation essential to the maintenance at law of an action for deceit, and the misrepresentation, negligent or innocent, that will lay a sufficient basis for rescission in equity. Bloomquist v. Farson, 222 N. Y. 375, 118 N. E. 855; Seneca Wire & Mfg. Co. v. A. B. Leach & Co., 247 N. Y. 1, 159 N. E. 700. If this action is well conceived, all these principles and distinctions, so nicely wrought and formulated, have been a waste of time and

effort. They have even been a snare, entrapping litigants and lawyers into an abandonment of the true remedy lying ready to the call. The suitors thrown out of court because they proved negligence, and nothing else, in an action for deceit, might have ridden to triumphant victory if they had proved the self-same facts, but had given the wrong another label, and all this in a state where forms of action have been abolished. So to hold is near to saying that we have been paltering with justice. A word of caution or suggestion would have set the erring suitor right. Many pages of opinion were written by judges the most eminent, yet the word was never spoken. We may not speak it now. A change so revolutionary, if expedient, must be wrought by legislation. Landell v. Lybrand, 264 Pa. 406, 107 A. 783, 8 A. L. R. 461.

We have said that the duty to refrain from negligent representation would become coincident or nearly so with the duty to refrain from fraud if this action could be maintained. A representation, even though knowingly false, does not constitute ground for an action of deceit unless made with the intent to be communicated to the persons or class of persons who act upon it to their prejudice. Eaton, Cole & Burnham Co. v. Avery, supra. Affirmance of this judgment would require us to hold that all or nearly all the persons so situated would suffer an impairment of an interest legally protected if the representation had been negligent. We speak of all 'or nearly all,' for cases can be imagined where a casual response, made in circumstances insufficient to indicate that care should be expected, would permit recovery for fraud if willfully deceitful. Cases of fraud between persons so circumstanced are, however, too infrequent and exceptional to make the radii greatly different if the fields of liability for negligence and deceit be figured as concentric circles. The like may be said of the possibility that the negligence of the injured party, contributing to the result, may avail to overcome the one remedy, though unavailing to defeat the other.

Neither of these possibilities is noted by the plaintiff in its answer to the suggestion that the two fields would be coincident. Its answer has been merely this, first, that the duty to speak with care does not arise unless the words are the culmination of a service, and, second, that it does not arise unless the service is rendered in the pursuit of an independent calling, characterized as public. As to the first of these suggestions, we have already had occasion to observe that given a relation making diligence a duty, speech as well as conduct must conform to that exacting standard. International Products Co. v. Erie R. R. Co., supra. As to the second of the two suggestions, public accountants are public only in the sense that their services are offered to any one who chooses to employ them. This is far from saying that those who do not employ them are in the same position as those who do.

Liability for negligence if adjudged in this case will extend to many callings other than an auditor's. Lawyers who certify their opinion as to the validity of municipal or corporate bonds, with knowledge that the opinion will be brought to the notice of the public, will become liable to the investors, if they have overlooked a statute or a decision, to the same extent as if the controversy were one between client and adviser. Title companies insuring titles to a tract of land, with knowledge that at an approaching auction the fact that they have insured will be stated

to the bidders, will become liable to purchasers who may wish the benefit of a policy without payment of a premium. These illustrations may seem to be extreme, but they go little, if any, farther than we are invited to go now. Negligence, moreover, will have one standard when viewed in relation to the employer, and another and at times a stricter standard when viewed in relation to the public. Explanations that might seem plausible, omissions that might be reasonable, if the duty is confined to the employer, conducting a business that presumably at least is not a fraud upon his creditors, might wear another aspect if an independent duty to be suspicious even of one's principal is owing to investors. 'Every one making a promise having the quality of a contract will be under a duty to the promisee by virtue of the promise, but under another duty, apart from contract, to an indefinite number of potential beneficiaries when performance has begun. The assumption of one relation will mean the involuntary assumption of a series of new relations, inescapably hooked together' Moch Co. v. Rensselaer Water Co., supra, at page 168 of 247 N. Y., 159 N. E. 896, 899. 'The law does not spread its protection so far' Robins Dry Dock & Repair Co. v. Flint, supra, at page 309 of 275 U. S., 48 S. Ct. 134, 135.

Our holding does not emancipate accountants from the consequences of fraud. It does not relieve them if their audit has been so negligent as to justify a finding that they had no genuine belief in its adequacy, for this again is fraud. It does no more than say that, if less than this is proved, if there has been neither reckless misstatement nor insincere profession of an opinion, but only honest blunder, the ensuing liability for negligence is one that is bounded by the contract, and is to be enforced between the parties by whom the contract has been made. We doubt whether the average business man receiving a certificate without paying for it, and receiving it merely as one among a multitude of possible investors, would look for anything more.

2. The second cause of action is yet to be considered.

The defendants certified as a fact, true to their own knowledge, that the balance sheet was in accordance with the books of account. If their statement was false, they are not to be exonerated because they believed it to be true. Hadcock v. Osmer, supra; Lehigh Zinc & Iron Co. v. Bamford, 150 U. S. 665, 673, 14 S. Ct. 219, 37 L. Ed. 1215; Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 18 N. E. 168, 9 Am. St. Rep. 727; Arnold v. Richardson, 74 App. Div. 581, 77 N. Y. S. 763. We think the triers of the facts might hold it to be false.

Correspondence between the balance sheet and the books imports something more, or so the triers of the facts might say, than correspondence between the balance sheet and the general ledger, unsupported or even contradicted by every other record. The correspondence to be of any moment may not unreasonably be held to signify a correspondence between the statement and the books of original entry, the books taken as a whole. If that is what the certificate means, a jury could find that the correspondence did not exist, and that the defendants signed the certificates without knowing it to exist and even without reasonable grounds for belief in its existence. The item of $706,000, representing fictitious accounts receivable, was entered in the ledger after defendant's employee Siess had posted the December sales. He knew of the

interpolation, and knew that there was need to verify the entry by reference to books other than the ledger before the books could be found to be in agreement with the balance sheet. The evidence would sustain a finding that this was never done. By concession the interpolated item had no support in the journal, or in any journal voucher, or in the debit memo book, which was a summary of the invoices, or in any thing except the invoices themselves. The defendants do not say that they ever looked at the invoices, seventeen in number, representing these accounts. They profess to be unable to recall whether they did so or not. They admit, however, that, if they had looked, they would have found omissions and irregularities so many and unusual as to have called for further investigation. When we couple the refusal to say that they did look with the admission that, if they had looked, they would or could have seen, the situation is revealed as one in which a jury might reasonably find that in truth they did not look, but certified the correspondence without testing its existence.

In this connection we are to bear in mind the principle already stated in the course of this opinion that negligence or blindness, even when not equivalent to fraud, is none the less evidence to sustain an inference of fraud. At least this is so if the negligence is gross. Not a little confusion has at times resulted from an undiscriminating quotation of statements in Kountze v. Kennedy, supra, statements proper enough in their setting, but capable of misleading when extracted and considered by themselves. 'Misjudgment, however gross,' it was there observed, 'or want of caution, however marked, is not fraud.' This was said in a case where the trier of the facts had held the defendants guiltless. The judgment in this court amounted merely to a holding that a finding of fraud did not follow as an inference of law. There was no holding that the evidence would have required a reversal of the judgment if the finding as to guilt had been the other way. Even Derry v. Peek, as we have seen, asserts the probative effect of negligence as an evidentiary fact. We had no thought in Kountze v. Kennedy, of upholding a doctrine more favorable to wrongdoers, though there was a reservation suggesting the approval of a rule more rigorous. The opinion of this court cites Derry v. Peek, and states the holding there made that an action would not lie if the defendant believed the representation made by him to be true, although without reasonable cause for such belief. 'It is not necessary,' we said, 'to go to this extent to uphold the present judgment, for the referee, as has been stated, found that the belief of Kennedy * * * was based upon reasonable grounds.' The setting of the occasion justified the inference that the representations did not involve a profession of knowledge as distinguished from belief. 147 N. Y. at page 133, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. Rep. 651. No such charity of construction exonerates accountants, who by the very nature of their calling profess to speak with knowledge when certifying to an agreement between the audit and the entries.

The defendants attempt to excuse the omission of an inspection of the invoices proved to be fictitious by invoking a practice known as that of testing and sampling. A random choice of accounts is made from the total number on the books, and these, if found to be regular when inspected and investigated, are taken as a fair indication of the quality of the mass. The defendants say that about 200 invoices were examined in accordance with this practice, but they

do not assert that any of the seventeen invoices supporting the fictitious sales were among the number so selected. Verification by test and sample was very likely a sufficient audit as to accounts regularly entered upon the books in the usual course of business. It was plainly insufficient, however, as to accounts not entered upon the books where inspection of the invoices was necessary, not as a check upon accounts fair upon their face, but in order to ascertain whether there were any accounts at all. If the only invoices inspected were invoices unrelated to the interpolated entry, the result was to certify a correspondence between the books and the balance sheet without any effort by the auditors, as to $706,000 of accounts, to ascertain whether the certified agreement was in accordance with the truth. How far books of account fair upon their face are to be probed by accountants, in an effort to ascertain whether the transactions back of them are in accordance with the entries, involves to some extent the exercise of judgment and discretion. Not so, however, the inquiry whether the entries certified as there, are there in very truth, there in the form and in the places where men of business training would expect them to be, The defendants were put on their guard by the circumstances touching the December accounts receivable to scrutinize with special care. A jury might find that, with suspicions thus awakened, they closed their eyes to the obvious, and blindly gave assent.

We conclude, to sum up the situation, that in certifying to the correspondence between balance sheet and accounts the defendants made a statement as true to their own knowledge, when they had, as a jury might find, no knowledge on the subject. If that is so, they may also be found to have acted without information leading to a sincere or genuine belief when they certified to an opinion that the balance sheet faithfully reflected the condition of the business.

Whatever wrong was committed by the defendants was not their personal act or omission, but that of their subordinates. This does not relieve them, however, of liability to answer in damages for the consequences of the wrong, if wrong there shall be found to be. It is not a question of constructive notice, as where facts are brought home to the knowledge of subordinates whose interests are adverse to those of the employer. Henry v. Allen, 15§ N. Y. 1, 45 N. E. 355, 36 L. R. A. 658; see, however, American Law Institute, Restatement of the Law of Agency, § 506, subd. 2-a. These subordinates, so far as the record shows, had no interests adverse to the defendants', nor any thought in what they did to be unfaithful to their trust. The question is merely this, whether the defendants, having delegated the performance of this work to agents of their own selection, are responsible for the manner in which the business of the agency was done. As to that the answer is not doubtful. Fifth Avenue Bank of New York v. Forty-Second St. & G. St. Ferry R. R. Co., 137 N. Y. 231, 33 N. E. 378, 19 L. R. A. 331, 33 Am. St. Rep. 712; Gleason v. Seaboard Air Line Ry. Co., 278 U. S. 349, 356, 49 S. Ct. 161, 73 L. Ed. 415; American Law Institute, Restatement of the Law of Agency, § 481.

Upon the defendants' appeal as to the first cause of action, the judgment of the Appellate Division should be reversed, and that of the Trial Term affirmed, with costs in the Appellate Division and in this court.

Upon the plaintiff's appeal as to the second cause of action, the judgment of the Appellate Division and that of the Trial Term should be reversed, and a new trial granted, with costs to abide the event.

POUND, CRANE, LEHMAN, KELLOGG, O'BRIEN, and HUBBS, JJ., concur.

Judgment accordingly.

LEGAL SPECTATOR & MORE

Jacob A. Stein

OUTRAGEOUS IN NEW YORK

Some weeks ago I had a meeting in New York City that took me to Foley Square, where the courts are located. I had planned to take the shuttle back to Washington when the meeting was concluded. But it began to drizzle. It was Friday. Rainy weather on a Friday afternoon is not a good time for the shuttle. Long delays, lots of tension, and a general uncertainty concerning the takeoff and landing. The waiting area fills with anxious commuters using personal telephones to investigate other arrangements and cancel appointments.

Experience has taught me to arrange a backup plan when I am in New York on a Friday. The backup plan is a reserve seat on the three o'clock Metroliner. The train ride is pleasant, and when it is raining along the eastern corridor it is time to take a nap and then meditate on ultimate issues, such as how the traveler who commences from he knoweth not where only to arrive at a destination he knoweth not can ever be said to have lost his way in this life of ours.

So there I was with a few hours on my hands until train time. My first thought was to take a cab to the Strand Bookshop at 12th and Broadway. It advertises itself as the largest used bookstore in the whole world. It may be. I know of none bigger. The Strand is not an easy place to leave once it draws you in. It requires an hour just to examine the books on the tables and then hours more to examine the shelves. Well, there was not enough time to do justice to the Strand.

What to do? I decided to walk in on one of the local trial courts. New York trial lawyers have an intuitive grasp of the adversary system. There is always something to learn from them.

So I found a courtroom and took a seat. The trial judge was conducting status hearings. As he called each case on the calendar, the lawyers walked forward. The judge asked what the case was all about, giving the clear impression that he was unfamiliar with the file. His procedure was to listen to a few facts and then annotate the facts with comments concerning law and procedure. He kept the lawyers off balance by citing cases he said were decisive on the points in issue. Most of the time the lawyers did not know the cases cited. The judge acknowledged the ignorance and suggested that the lawyers look into the law a little more carefully. They would be well advised to be better prepared the next time the case was called.

In one of the cases, the judge was told by the plaintiff's lawyer that he was there on a very serious case. It involved the unlawful termination of an employee. The lawyer then said, "Judge, the termination was not only unlawful—the notice of termination was submitted to my client on the day his father died. Judge, what do you think of that?"

The judge replied, "Well, I wouldn't do anything like that, but what are the damages?"

"The damages are the intentional infliction of emotional harm."

The judge then said, "Sir, where are you?" The lawyer was taken by surprise. He did not answer. The judge said, "Sir, you are in New York City. Do you understand that?" Now the lawyer understood he was to be made the centerpiece of the judge's performance. The less said, the better.

The judge continued. "Sir, in order to make a case of intentional infliction of emotional harm, you must show that the conduct is outrageous measured by the community standard. Sir, you are in New York City. Outrageous conduct is everywhere. It might be the norm. Did you read the *New York Times* today? Now I want you to know that I can read lips. I have learned to be a lip reader as I sit up here and watch you lawyers whispering to each other. Right here in this courtroom I have watched lawyers whispering that *I* am outrageous. Sir, I want you to take a seat in this courtroom and listen to the balance of the calendar. I assure you we shall bear witness to the most outrageous claims and defenses imaginable. And if that is not enough, when you get back to your office I suggest you take a look at *Friehofer v. Hearst*." I made a note of the case.

The judge, exhausted by his own performance, announced a recess. I went outside and mixed with the lawyers. I asked whether what I saw was unusual. No, it was not unusual. This judge had his own way of moving his calendar. He knew by heart a large part of the New York statutes and case law. He saw weaknesses in the cases that the lawyers had not seen or chose to ignore. As he exposed these weaknesses, many of the cases would settle.

When I got back to the office, I pulled up on Lexis the case the judge cited. It says that the plaintiff, in a case alleging

the intentional infliction of emotional harm, must show that the defendant engaged in extreme and outrageous conduct that so transcends the bounds of decency as to be regarded as atrocious and intolerable in any civilized society. When this standard is applied, few cases of intentional infliction of emotional harm survive a motion to dismiss. Lexis did turn up one case that survived and the conduct, even judged by a New York community standard, was atrocious. I cannot bring myself to repeat the facts. They are just too outrageous.

Jacob Stein took part in the Bar Library Lecture Series on January 21, 2009 with a presentation on "Perjury, False Statements & Obstruction of Justice." Generous with his time, Mr. Stein was generous in other ways as well as indicated by the language in the preface to the third volume of *Legal Spectator* from which the following was taken. Mr. Stein wrote "This book is not copyrighted. Its contents may be reproduced without the express permission of, but with acknowledgement to, the author. Take what you want and as much as you want." The works featured in the *Legal Spectator*, originally appeared in the *Washington Lawyer*, the *American Scholar*, the *Times Literary Supplement*, the *Wilson Quarterly*, and the ABA Litigation Section's publication. I want to thank Bar Library Board of Director Henry R. Lord for his time and efforts in reviewing the writings of Mr. Stein for inclusion in the *Advance Sheet*.