

DECIDING WHAT'S BEST FOR CHILDREN

JOHN E. COONS*
ROBERT H. MNOOKIN**
STEPHEN D. SUGARMAN***

INTRODUCTION

Policy-makers want what is "best" for children, and they adopt programs, laws and regulations in its pursuit. The advocates who lobby policy-makers on behalf of various schemes argue that they will help children flourish, and they spend a great deal of time and money to persuade legislators and bureaucrats to agree with them. These claims are often in conflict. Nevertheless, policy-makers tend to take them seriously; indeed, they often see it as their core responsibility to decide which of the competing advocates is right.

This, however, can put the cart before the horse. Often the first question should not be "what is best for this class of children?" but instead "*who* should *decide* what is best?" Put differently, when confronted with a problem concerning the well-being of children, the policy-maker should initially ask: "Is this a problem I should try to solve by legislating the best answer for every child with this problem, or is the identification of the 'best' something that I should assign, leave, or delegate to someone else to determine?" There are times when policy-makers can sensibly conclude that the decision as to what is best — even for individual children — is properly their own; in that event they should act to promote the specific answer they conclude is correct. But most often their appropriate function in the end is to allocate power and responsibility among others to determine what is best. That is the central point of this article.

We realize, of course, that many policies promoted in the name of the best interest of children are actually intended to serve other interests and purposes; decision-makers have many reasons to vote for or to oppose a measure besides the reasons

* Robert L. Bridges Professor of Law, University of California, Berkeley.

** Samuel Williston Professor of Law, Harvard Law School.

*** Agnes Roddy Robb Professor of Law and Director of the Family Law Program of the Earl Warren Legal Institute, University of California, Berkeley.

given by its advocates. And legislators do not always identify their primary motives. But we put aside political concerns to focus on the ideal — the way that public debate should be framed were the sole question what is in the best interest of children.

Part I of this article contrasts the “what’s best” and “who decides” questions and provides a range of perspectives on the ways in which power and responsibility for children are and could be allocated. We do not claim that merely asking the “who decides” question provides an easy path to the right answer, or that it makes policy-making easier. We do insist that it is irresponsible for the policy-maker not to answer it first.

Part II highlights in quite a different way the importance of starting with “who decides.” It explains two persistent problems that confound the policy-maker who tries to decide directly what’s best for children. They are: (1) the special difficulty of predicting accurately the ultimate consequences of interventions for children; and (2) the lack of an ideological consensus about the proper policy objectives. These problems caution policy-makers against too quickly resolving the first question — “who decides?” — by arrogating responsibility to themselves to determine the actual treatment of children.

We do not argue here for any final and overall answer to the “who decides” question. Instead, we discuss alternatives. We emphasize that, because of differences concerning objectives or the means to reach them, people of good will are often likely to find themselves in disagreement over the answer. Indeed, one of the important reasons for asking the “who decides” question is that it exposes those differences. In short, for now we will be content simply to help get the policy-maker’s job straight. We use the term “policy-maker” to mean that law-making body or person who has authority either to decide how children shall be treated or to empower another to make that decision. Generally speaking, this will be the state legislature, Congress or relevant governmental agency but the question can arise at any level in society.

I. THE FIRST QUESTION: HOW SHOULD POWER AND RESPONSIBILITY TO DECIDE FOR CHILDREN BE ALLOCATED?

It is easy to be deceived by the superficial sameness of our post-industrial society, where so many Americans seem to watch the same TV shows, dress in similar ways, follow the same music and sports heroes, visit the same famous national

attractions, etc. In fact we are a people diverse in our views about what is the appropriate hope for mankind. Our disputes over what children should experience and should become are real, frequent, and significant.

At the level of adult life in America this pluralism helps to maintain a set of laws which contain relatively few restrictions upon adult behavior beyond the basics of interpersonal respect and order, and not always too much of either. Further, aside from law, even the informal social constraints upon adults — so important in many societies — are limited here because of the ease with which Americans can form and terminate associations. In short, for adults the choices of life purpose and life style are many.

The impact of this same pluralism upon children, however, is quite different, and that difference is very important to see. American adults may largely escape value imposition and unwanted indoctrination, but in this society — as in every other — it is the values of others that are experienced by children regardless of their personal preferences. This must be so. Adults have no choice but to act toward children in ways that are either paternalistic or despotic; they rule by ordered principle or by whim — but they rule. And children, at least younger children, have little choice but to have the values of others pressed upon them. The only question is which specific adults should be able to do this with respect to which aspects of life.

Of course, those with political authority may through law simply impose their personal ideas of what is best for children. In some societies they do so. Such leaders may be selected for the very purpose of imposing their private vision of the good including their special wisdom about children. But this is not the theory of government in the United States. In our society, the policy-maker with his own private view of the right answer must first ask a different question: How should the power and responsibility be allocated for deciding what's best for children regarding the particular issue?

Power to decide what is best for children can be variously located. It can go exclusively to parents, to children themselves, to professionals of various sorts, to bureaucrats, to "our forefathers" (through the Constitution), or be kept by the policy-makers themselves. It can also be shared among these actors in a myriad of ways. Only where the policy-makers conclude that all (or most) of the responsibility should be exercised at the top should they cast their lot on the side of one common solution. In all other cases, their critical function is to parcel out the responsibility to decide — and to ensure that

sufficient resources are available to those deciders to effectuate their decisions. Parents may well be the best determiners of diet, but they must have resources to implement their judgments.

Putting the initial emphasis upon the decider instead of the substance of the question need not involve a surrender of society's hope to have children fare well. To the contrary, in cases where the policy-maker can't sensibly say what's best, the *only* promising strategy is to put in charge someone who, in some sense, might know better.

We next want to clarify this difference between deciding what is best and deciding who is best by discussing the sorts of options available to policy-makers when they ask "who decides." We will emphasize that a considerable share of existing policy *already* reflects the latter approach.

A. *Contrasting the Two Approaches*

Consider these issues commonly put before policy-makers. Are violent TV programs and advertising on children's shows bad for children? Is health care in the community better for mentally ill children than their institutionalization in remote hospitals with better technical resources? Is it good for teenage girls to be on "the pill?" Too often when public issues are cast like this, policy-makers are told in effect by protagonists that their job is to answer the questions. We continue to emphasize that this need not be their role.

Instead of asking whether particular TV shows are bad for children, the responsible statesman first should ask who should be deciding whether or not children see them. Rather than asking whether community mental health care is better than state institutions, he or she should first ask who should be deciding in what sorts of facilities mentally ill children should be treated. The same goes for the question about the pill. Once these "who decides" questions are answered, the policy-maker should then address what, if anything, is needed to empower that decider to make, and take responsibility for, the decision about the individual child or class of children.

Put the contrast somewhat differently. Someone holds a vision of what is best for children and tries to sell it. To whom should he be selling it? Parents? Legislators? Professionals? Is his advice something for intelligent people to consider? Or is it a path to be adopted for all under legal constraint?

There is a world of difference between (a) advising a divorcing couple to pay heed to research that suggests that tak-

ing joint custody of their children can be beneficial and (b) ordering all divorcing parents to share custody whether or not they want to. In one case it is assumed that the parents are supposed to decide on the child custody arrangements, and the advocate or counsellor is only offering an opinion; in the other the enthusiast insists that joint custody be imposed by the state.

In fact, there are a great many ways in which the power and responsibility can be allocated in order to decide upon the custody arrangements of the children of divorcing couples. In America today, legislatures have not determined that one custody arrangement is best for children. In general they have, instead, assigned to judges a broad power to decide the outcome according to what the judge thinks is in the individual child's best interest (perhaps assisted by the advice of a "neutral" social worker who investigates the alternatives and reports to the judge about them). In practice, however, judges almost invariably adopt the solution, if any, agreed to by the divorcing couple, thereby giving cooperative parents *de facto* power over the custody decision.

Historically, the permutations in custody arrangements have been many and rest upon different notions about the child. In the recent American past, the law contained a virtually conclusive presumption that maternal custody was best for children.¹ By contrast, in the more distant past (before this century and for some centuries in England), it was the father who effectively owned the children, having complete power over their custodial arrangements.² Today some American reformers seek to change the law to permit teenage children themselves to determine the custodial parent.³ There is also significant support for a rule in which custody automatically goes to the parent who has been the child's "primary caretaker," while still others would prefer to impose joint custody. The point here is that each policy response represents a profoundly different way of allocating the power to decide the child custody question.

The same point can be illustrated in terms of the controversial issue about whether adoptees should be able to learn about their origins. Some advocates think it good for adoptees themselves to be empowered, if they wish, to identify their bio-

1. See Robert Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226, 235-36.

2. *Id.*

3. In some states, when children are twelve to fourteen or older, their choice is already dispositive. See, e.g., Ohio Rev. Code Ann. § 3109.04 (Anderson 1987 Supp.).

logical parents.⁴ Many states by contrast, divide the authority; they have enacted matching procedures that allow birth mothers and adoptees to register their wishes to find each other; once both have agreed, their contact is facilitated.⁵ Each has a veto. Other reform proposals would divide the pie still further, requiring also the consent of the adopting parents. We should add that, under the existing laws of most states, judges have the power to decide that an extraordinary situation exists (usually a genetic health problem) that justifies the disclosure of the identity of the birth mother.⁶ However, for the usual case, the legislature itself has exercised power via a general rule that bars the use of court or agency records in helping the birth mother and adopted child find each other.⁷ A quite different solution would be to have individual adoption records unsealed and sent to all adoptees at, say, age eighteen. Once more, each solution represents a different allocation of the power to decide whether it is good for adoptees to be able to find out about their birth parents.

This framework may be applied to an endless series of issues, and, indeed, is already implicit in much of our law. Various current policy solutions can be understood only as a complex allocation of the power to decide some important issue. Take, for example, the question of teenage marriage. In a typical state, above age eighteen the young couple can decide for themselves whether to marry; below fourteen the legislature has itself taken the responsibility to preclude any marriage; between fourteen and eighteen, power and responsibility for the decision is jointly shared by the couple and their parents, or alternatively a judge (who must give permission).⁸

The same process is at work when advocacy groups (conservative or liberal) argue to governmental bodies that certain television programming must be curtailed. They are best understood as objecting to the current regime by which parents, children and broadcasters decide what is available and what is watched. These critics want more power exercised at the top by the legislature or, perhaps, want it assigned to some

4. This is the rule in a few states where adult adoptees have unrestricted access to their adoption records or original birth certificates. *See, e.g.*, Alaska Stat. § 18.50.500(a) (1992).

5. *See* ROBERT MNOOKIN & KELLY WEISBERG, *CHILD, FAMILY AND STATE* 701 (2d ed. 1989).

6. *See id.*

7. *Id.* at 700-01.

8. *See* Lynn Wardle, *Rethinking Marital Age Requirements*, 22 J. FAM. L. 1 (1983-84).

board dominated by rules and administrators whose values mesh with their own. Although these groups may invoke conflicting reasons for the claim that current programming is bad for children, their solution is cast in the same general form. They would centralize responsibility for what children see. There are, of course, other allocations of power and responsibility available to policy-makers that would emphasize different theories about who should decide. Government, for example, could provide parents "little black boxes" that would help them better censor what their children watch, or — conversely — provide children places to go like youth lounges, arcades, or schools where they could watch whatever they wanted.

B. *Some Perspectives on the Allocation of Power*

1. Starting Points

In one sense, the three main competitors for power are parents, children, and the state. The state, as we have seen, can act in quite different ways, either centrally or through the agents it employs. But the contrast we wish to emphasize is that between governmental and non-governmental deciders.

We think that most people bring private presumptions to any specific issue. We will here call these presumptions "starting points." Moreover, we believe that one reason for fierce disputes over children's policy issues, where the antagonists often seem to be talking past each other, is that opponents have unacknowledged and different starting points.

Often these starting points draw upon broader political ideologies. Those especially wary of the state seem in general to start with a presumption in favor of giving all the power to the parents. Others who fear the state are libertarians who see parents themselves as just another government; they start with the presumption that children are to be treated like adults. State paternalists, in turn, assume that the only legitimate private power is that which is granted by the collectivity, and that children (or at least "needy children") are to look first to government for guidance, help and protection; the idea of state ownership of children may be traced back at least as far as Plato's *Republic*.⁹

There are those too who would claim to have no starting point at all and to maintain "neutrality" as between child, family and state. But even neutrality must in the end designate

9. For a recent translation, see PLATO, *THE REPUBLIC* (Richard Sterling & William Scott trans., 1985).

some decider, and that decider will have values of his own. So, although one can perhaps avoid a general preference among child, family or state, whichever decider is empowered will have a preference for a specific outcome.

2. Complex Allocations

As already illustrated when we discussed age of marriage and other examples, for any particular policy issue the choice is not exclusively child, parents or government; subtle and complex divisions of power are also possible. This is exemplified in the difficult determination of who gets to decide whether a pregnant minor has an abortion. Let us first set out three stark positions. Obviously, all the power could be allocated to the child; hence a pregnant girl, no matter how young, could be given the right to decide for herself whether or not to have an abortion. Alternatively, all the power could be allocated to the pregnant minor's parents; parental consent would be both a necessary and sufficient condition for an abortion, their daughter's wishes notwithstanding. (For most kinds of medical treatment, this is the rule.) Or, the state could assume the power of decision. The legislature might provide a flat rule either prohibiting or requiring abortions for all minors; alternatively, a state official — a social worker or a doctor — could be given discretionary power to decide whether an abortion was appropriate for a particular girl in particular circumstances.

Decisional power in this case could also be shared in a variety of more complicated ways. For example, obtaining an abortion might require the consent of both the young woman and her parents. This would mean that either could veto the abortion, but neither alone could insist upon it. Some states have in addition tried to require women to obtain the consent of the father of the fetus.¹⁰ Alternatively, the young woman might be given the power to decide whether to have an abortion, but only after her parents are first notified of her intention. As a practical matter, this would give abortion-opposing parents some bargaining chips; although they would lack the legal power to prohibit the abortion, they might be able to persuade their daughter to change her mind. Another complex allocation, adopted in several jurisdictions, permits a young woman seeking an abortion to obtain the consent of a judge if she wishes to keep the matter secret from her parents.¹¹ Typically, the judge initially is to decide whether the young woman is

10. See *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

11. See, e.g., IND. CODE ANN. § 35-1-58.5-2.5(d) (Burns Supp. 1992);

“mature.” If so, then she gets to have the abortion. If the judge finds that she is not mature, then the judge is supposed to decide whether an abortion is in her best interests.

The allocation of power and responsibility for children is complex in still another sense. Although it would be possible to create a fixed allocation of power over all aspects of children's lives, in practice what we find are different allocations for different domains — that is, one regime for medical decisions, another for religious training, still another for schooling, and so on.

3. Formal and Informal Power

We recognize that people do not make decisions indifferent to and uninfluenced by the world around them and the views of others. Popular opinion, professional wisdom, modern advertising, family tradition and the like — that is, culture generally — clearly do impact upon tastes and preferences and on ultimate choices. Only the most hard-boiled determinist, however, would reject the distinction between influencing and dictating choices. In doing so he would remove himself from the debate which assumes that there are real choices to be made by state, family and children.

Conversely, we are aware that investing an individual or family with formal power does not always assure real choice. Direct coercion by others — duress if you like — or the influence of social and economic disadvantage may in some cases deprive the actor of practical alternatives. Here the most important intervention in general may be to empower the decider in some positive way with real options. For children, unfortunately, this may not be possible; whatever the regime, they are likely to be dominated by the adults around them. But advocates of children's rights often seem blind to this easy lesson. They would formally award certain “rights” to little children, under the merest assumption that children have the capacity to use them. At least for younger children, however, the creation of “rights” will leave the real power of choice elsewhere; and, even in the case of teenagers, “rights” do not necessarily add up to autonomy. Pressures of peers, religious teachings, doctors and abortion clinics, for example, will strongly influence how formal power is exercised by the teenager deciding about abortion. So will her ability to pay for it.

4. Two Models of Strong State Power

Strong centralized control over child rearing may be achieved in quite different ways. One regime might include exclusive state schools and churches, mandatory state youth groups, state run TV (and other media — music, newspapers, etc.), mandatory feeding at state cafeterias, state assigned doctors for children, mandatory health screening at state clinics and so on. Of course, such a regime could be directed at a range of rather different outcomes. What the regime wanted children to do (and to be) could vary enormously — as it did in the Soviet Union where little children with varying talents were picked out at an early age and tracked into different careers.

In this model of strong state power, it would be the state policy-makers or state assigned bureaucrats and professionals who would be both making the decisions and carrying them out. Under such arrangements, children might be treated largely the same, being subject to the same diet, health care and uniform, national school curriculum. By contrast, a simple “best interest” standard could locate power in the members of an elite Platonic bureaucracy without requiring agreement among these decision-making bureaucrats on what really is best. The state, in short, could empower each of its agents to impose her own views upon the individual children who happened to fall to her hand.

These are not the only ways to envision a regime of strong state control, however. The state might ostensibly leave decisions up to parents (and/or children) and private institutions but in fact leave no room for choice at all; this could be accomplished by coercively intervening or threatening to do so whenever the parents, children or other private actors choose something inconsistent with a state dictated solution. Under this model, there might be little state operation of the institutions which interact with children. Direct state control would be imposed only upon the deviants. This approach might work best where either the state requirements are congenial to the mass of private actors anyway (as in a relatively homogeneous society) or where the punishment of deviance is swift and certain (hence dissent can effectively be stamped out).

5. Broad and Narrow Delegation

When power is delegated — whether to a parent or a state official — that person’s discretion may be very broad or, alternatively, may be subject to substantial constraints. For example, a law giving parents the discretion to block a child’s

marriage is unconditional and allows them to draw on any reason they wish in withholding their consent. Telling a judge to decide which custody arrangement is in the best interest of a particular child caught up in a divorce dispute is also virtually unconstraining, so long as the judge is given no guidance about how "best interest" is to be defined and such decisions are unreviewed by higher courts. In these situations the discretion granted is so plenary as to make the delegate with the power a virtual sovereign in the relevant field.

On the other hand, an examiner who is deciding whether a sixteen-year-old should get a driver's license is probably far more constrained. To be sure, there is some discretion to be exercised, but "what counts" is far clearer and more objective, and internal administrative guidelines and paperwork requirements help hold the examiner to those criteria.

6. State Control v. State Support

To advocate an important role for the state does not necessarily mean that one supposes the state to be a wiser decider or that one prefers a strict paternalism. To the contrary, one can see the state simply as the guarantor of the resources necessary to the minimum enjoyment of liberty. It may thus be government's primary role, not to direct and command, but to provide money and/or information that helps parents to make decisions for themselves; it can lend its authority to help parents control their children. So, too, the state can use its power to try to liberate children from parents.

7. The Need for Effective Intervention

Although there may in fact be great disagreement about the hour at which children of a given age should be in bed, suppose for the moment that there were strong consensus that 9:00 p.m. is the limit for those ten and under. At the same time, suppose we knew that a small but significant number of parents were keeping their young children up later, either intentionally or through indifference. That by itself would not necessarily make it sensible to impose a legal sanction on parents (or children) who fail to conform. An extension of the curfew laws inside the home might carry too great a price. First, detection of violations is likely to be spotty, thus running the risk of arbitrary or discriminatory enforcement. Second, even moderately effective enforcement of the rule is likely to be very costly in terms of both financial outlay and loss of privacy. Third, societal coercion as to a child's bedtime may well under-

mine the general effectiveness of parents to the net detriment of children — either because the coerced parents become demoralized or because their resistance leads to financial penalties or even loss of child custody.

This example suggests that so long as children are going to live with their parents, some socially undesirable treatment of children by parents is probably going to have to be tolerated as the lesser of evils. Perhaps this helps make it understandable why child neglect laws have traditionally been reserved for cases of immediate and substantial physical risks to the children.

8. Limits to Children's Self-Determination

Were children indistinguishable from adults, the general American solution would let them decide for themselves what is in their own best interest, where this threatened no direct harm to others. There might be roles for government in assuring their empowerment. The state might provide children with information to inform their choices and might assure them the necessary resources to realize those choices in a market economy. But these actions would be in furtherance of their autonomy in a manner that is familiar from policies directed to adults.

The problem is that children are frequently too immature to decide what is best for themselves. They might sensibly be allowed to select from a closed set of benign choices, but the old problem remains — who defines the set? Over the years the child will by stages become mature enough to decide particular matters for himself. But who decides when a child is ready to decide which matters? Even in a society which wants to empower children, someone has to decide when each is ready for each responsibility. Hence one aspect of the who decides question is to inquire as to who decides when children are ready to decide for themselves. That could be parents, or public officials, or legislatures (or some combination of them); but it can't prudently be left to children themselves.

II. TWO PROBLEMS WITH POLICY-MAKERS DECIDING WHAT'S "BEST" FOR CHILDREN

We have explained what we mean by the "who decides" question and have suggested why it is the first question to be asked. We have also untangled some of the many ways to answer it. Now in Part II we will try to illuminate two impor-

tant difficulties or dangers facing those policy-makers tempted to decide what in fact is best.

A. *Insufficient Understanding*

In order to decide whether one alternative or another best serves the interests of children, the policy-maker must first be able to predict the consequences of the decision. Assistance from experts is often sought in making such predictions. Unfortunately, when it comes to matters involving children, the expert's power of prediction often turns out to be quite imperfect.

To be sure, expertise is sometimes sufficient to make the proper policy choice clear. The desirability of vaccinations against the risks of childhood disease (e.g., polio) seems a good example. But, alas, the level of certitude required for such a decision is rare in the children's policy arena. At the extreme are problems where there is simply no plausible expert prediction. A prime example is the long range effect of television upon children.

In some cases, happily, expertise can clearly identify what does *not* work. This at least can diffuse some ill-founded policy proposals. For example, such knowledge could keep policy-makers from foolishly mandating tonsillectomies for all children. But, the mere elimination of one policy alternative does not solve the original problem; children will still endure the consequences of infected tonsils.

Often, only preliminary research findings are available. These may be worse than nothing. The temptation to seek refuge in whatever calls itself science is a weakness common to decision-makers ranging from members of Congress to mothers-in-law. If the doctor says so, that can settle it for the uncomfortable decider. This tendency to over-value expert opinion and forego other sources is not special to the profession of child rearing, but it is an inescapable feature of the environment within which the contributions of experts are to be evaluated.

Frequently, a decider (who may be state, parent or child) is also confronted with conflicting and inconsistent advice from experts. There may be research which — though "sound" — is in a state of discord. Experts can disagree about methodology, substance, or both. Consider the battle waged in courts and in legislatures over the issue of whether spending more money on

education will increase student achievement.¹² One of the many contending experts may be correct, but often the decider has no accurate way to settle such disputes. In that event, the decider is simply snared in contradiction. She may, of course, accept the opinion of one of the conflicting experts as "correct" in the sense that the decision taken is consistent with that view. It is hard, however, to treat this as reliance upon "science;" it is merely the taking of a course which is consistent with one scientist's opinion and inconsistent with another's.

General ignorance and conflict among experts are, of course, common experiences both in individual decisions and in policy-making. There are several reasons, however, why these intellectual barriers are especially strong where the object is children's welfare. One reason is the need to make predictions about remote futures; some ideal state of affairs a generation hence is the target of much intervention concerning children. And the crystal ball is cloudy. Will fluoride produce intolerable side effects while it toughens our children's teeth? How will the elimination of a foreign language requirement in school affect the adult capacity to relate to other cultures? Is corporal punishment the tap root of a violent adult society or a contribution to civil order? The longer range the prediction, the more difficult it becomes.

This problem of prediction is common to all policy-making. For example, it looms high when society addresses the question whether conditions at the work place must be changed because of the risk of a higher incidence of cancer twenty years from today. A choice about the distant future must be made now. Such choices, however, are especially common for those who must decide about children.

It might be possible to learn more about the effects of policies on children by experimentation, which, after all, is the heartbeat of scientific progress. But here we encounter a second problem. Our society has grave doubts about the extent to which experts should be permitted to experiment on children. Unlike willing and altruistic adults (or dogs and planets), children are not allowed to be subjected to many potentially important experiments;¹³ experimental science thus confronts the formal barrier of the law of consent. Society is willing to

12. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); see also John L. Coons, *Recent Trends in Science Fiction: Serrano Among the People of Number*, 6 J. LAW & EDUC. 23 (1977).

13. See ROBERT J. LEVINE, *ETHICS AND REGULATION OF CLINICAL RESEARCH* 239-41 (2d ed. 1986).

have them participate — even with parental approval — only in circumstances where there is little or no danger. And the concept of danger includes not merely the risk of physical harm but also such psychic risks as exposure to embarrassment and invasions of privacy.

Still a third barrier to knowledge is the faster and variable rate of physical and mental change in children. Not only do children change more rapidly than adults, but they also change at rates different from one another. Thus, what a researcher knows about the average child may be of limited use. For example, to steer children into school together by their birthdays on the assumption of commonality among age peers can be cutting the pattern to fit the cloth. This may be necessary if the process of making individual judgments about children is too complex or beyond our administrative power, but we pay a price.

A related problem is the strong shift of the onset of puberty toward an earlier age. As a result, models of maturation that fit one historical epoch can be outmoded in the next. In a reversal of the traditional sequence of work and reproduction, adolescents are now physically ready for parenting long before they can obtain a job that could support a family. It is not easy to determine a policy for fifteen-year-olds when we have relatively little social experience with the psychology of this new breed.

Much the same could be said of the effect of higher infant survival rates upon the psychology of parenting. Only recently has it become the assumption of parents that they will raise to adulthood all the children who are born to them. This outlook has altered the basic data of family psychology, and society has lost the security of its collective experience. We do not know whether parents are more emotionally connected to their children than formerly was the case. Nor do we know how an increase in affection within the family might influence the tensions and pain of parents whose work separates them from the child.

The intimacy of the family is a fourth barrier that screens the researcher from much of the most significant interaction that the child experiences with his parents and siblings. Children spend much of their time within the family, and these relationships may well be the primary determinants of basic attitudes, beliefs, and behavior. Piercing this veil of privacy imposes severe methodological demands on the expert. Moreover, even when successful in penetrating the child's private world, the investigator may find that young children (because

they do not understand the object of the inquiry) are unable to cooperate and thus facilitate the research. The researcher himself may also have great difficulty in understanding the meaning children ascribe to their own behavior but cannot communicate in words. This is a problem familiar to the anthropologist who must resist the temptation to interpret external behavior according to its meaning in his own culture.

The physical, medical, and social sciences have made important contributions to children's policy and they can be expected to make more. But their task is often heroic, and heroism must not be mistaken for understanding. The impediments to research foretell substantial and permanent limits to society's knowledge about children. Those who are responsible for framing our laws and those responsible for helping individual children need to appreciate that they will very often decide upon a course of action with little or no guidance from science about how to achieve the child's best interest.

B. *Value Pluralism*

In some societies basic values are widely shared, and there is general agreement about the nature of the good life. The stereotype of China under Mao exemplifies a society of this sort. It suggests a consensus concerning the proper ends of individual action. Variations exist, but the commonalities dominate. A similar value consensus seems to mark many pre-industrial societies where unchallenged custom limits the models of behavior available to the individual.

Where such homogeneous value systems prevail, the uniformities of childhood experience are maintained by collective pressures. These are not necessarily formal legal structures; the consensus may be reinforced through positive law where the state is strong, but, where it is not, there are informal constraints of a purely social character. These may, indeed, be the more effective, being easily mistaken for the natural order. More likely, however, the society will link law with custom in a seamless web of sanctions preserving the system of normalities.

In societies so structured there is little question about the mission and status of the family; it is an agent of the larger order. It may have some discretion about the objectives of childrearing, but this discretion is trifling in scope, and substantial departures from the norm are difficult or even perilous for the individual.

The United States is very much the polar opposite of such societies. America is a menagerie of values. Its citizens divide

over the nature of the good life in ways both numerous and significant, approaching Madison's ideal of a society "broken into so many . . . interests . . . that the rights of individuals, or of the minority, will be in little danger from interested combinations . . ." ¹⁴ The catalogue of those incompatible interests is encyclopedic. On the one hand, this society comprises a range of hedonistic ambitions undreamt by a Hefner. Where else could it be credibly proffered as a norm that "If you've got your health, you've got everything?," or a woman be praised because "she really takes care of herself?" On the other hand, the same television that offers snake oil to the sensualist offers brimstone to the Puritan. The media knows its people, and their name is legion.

So it is throughout the society; famous and lionized individuals enshrine very different models: Mother Theresa is revered for her unselfishness and Donald Trump for successful greed; Mrs. Bush for supporting her husband and Cher for dishing hers; Reverend Graham for preaching purity and Andy Warhol for preaching prurience; General Schwartzkopf for aggressive patriotism and Dorothy Day for aggressive pacifism; Jimmy Carter for his compulsive labor and his brother Billy for his sloth; Bryan because he believed and Darrow because he didn't; President Bush for heroism in war and President Clinton for managing to avoid it.

These models translate into conflicting positions on very specific issues of personal and public morality. Is abortion a convenience, a necessary misfortune, or the murder of innocents? There are many Americans in each camp. Is our ubiquitous pornography a healthy cathartic, a nuisance to be tolerated for liberty's sake, or the terminal cancer of civilized order? What is the ideal for sexual behavior? How hard should a person work? Is intellectualism a virtue, a bore, or the snare of pride? Who are the moral defectives — the AFDC mothers or those who rail against them? Is God to be feared, loved, tolerated, denied, or ignored?

Americans are also divided over what we will call their time consciousness. Our meaning here can be clarified by another comparison to Mao's China. There the common outlook was said to be future oriented; individuals perceived their task as one of contributing to an irresistible movement toward some vaguely defined collective social perfection of tomorrow. Some Americans share such a utopian orientation. They see us

14. THE FEDERALIST No. 51, at 339 (James Madison) (Random House ed., 1937).

embarked together upon a voyage of discovery and fulfillment. There is some better place to be, and as a people we must steer ourselves and our children in that direction.

But in contemporary American society this collective-futuristic attitude competes with a hope for individual perfection and fulfillment that is achievable only by oneself and in one's lifetime. The commitment to individual self-fulfillment comes in many shapes and sizes. For some it means little more than the achievement of objective self-defined secular goals — money, fame, political reform, or fun. For others self-perfection lies not in external achievement but subjectively in the development of character, in the stoic acceptance of finitude, or in salvation in an eternal order.

C. *Three Examples*

1. Baby Selling

Consider the question of whether those who want children should be permitted to arrange privately to obtain them from others. Traditionally, advocates of such a market imagined the "buyers" to be couples who either could not bear children or did not want to (perhaps because of reasons of health or, even, of convenience). They imagined the "sellers" to be women who found themselves pregnant but not wanting to parent the child. In this imagined market, willing sellers would give birth to the child, surrender their parental rights, and turn the child over to the willing buyers for adoption — with fees paid if the market so required. This was all hypothetical. Traditionally, such transactions have been forbidden by law, and those who participate in them risk criminal prosecution.¹⁵

Instead, the state created a special bureaucratic system for matching these sorts of parties. Those wanting children traditionally have had to go through certified public or non-profit adoption channels, have their qualifications approved and have their child selected for them. Some such applicants for parenthood, of course, are deemed unfit; others wait for years; still others obtain a child who isn't quite what they had hoped for. As part of this regime, those pregnant women not wanting their children have to surrender them up to the adoption agencies (or keep them anyway, or abort them).

As medical technology has changed, however, more complicated contractual arrangements have become possible and

15. See MNOOKIN & WEISBERG, *supra* note 5, at 692; J. Robert S. Prichard, *A Market For Babies?*, 34 U. TORONTO L.J. 341 (1984).

plausibly legal. First, an adoption might be arranged in advance of conception with the male of the buying couple providing the sperm through artificial insemination, and the selling mother providing her egg and womb. More recently, the female of the buying couple has become able in some cases to provide the egg, which is then implanted in the womb of the seller (or perhaps "lessor" is a better metaphor). With these developments policy-makers have been confronted with demands that these forms of "surrogate" mothering also be banned or that they be allowed but carefully regulated along the lines of traditional stranger adoptions. Conversely, the favorable reception generally given such high-tech arrangements has renewed the call by others that ordinary baby selling between biological strangers should no longer be forbidden.

Legal developments in many states have already turned policy in that general direction. "Independent" adoption statutes have made illegal baby selling difficult to identify.¹⁶ In a typical independent adoption, a lawyer or other go-between matches up the acquiring parents with a pregnant woman whose care during pregnancy (and expenses of birth) are often generously funded by the adopters; they, after all, are probably eager for first class pre-natal care in order to maximize the health of what will be their child. In such arrangements, it is not entirely clear just how the adopters are selected (apart from ability to pay), although sometimes the birth mother (possibly with the help of the father) makes the choice. The lawyer is presumably in it for a profit, and who is to say whether or not the pregnant woman is as well? And should it matter if it were so?

Some, of course, find horrifying the idea that helpless infants (and fetuses) would be bargained for and sold like beef. Rather than legalization, they want more regulation and stepped up enforcement of existing criminal sanctions. They find the hyper-rationality of the enterprise highly disquieting. They fear, among other things, that legalization would mean that most stranger adoptions would involve contracting in advance for the seller to conceive, rather than adoptions from women who want to deliver their babies but not keep them. Is that likely to happen, or are the physical and psychological costs of bearing a child for another far greater than the financial benefits most women could hope to gain as part of a planned transaction? Does it happen much now in secret? We simply do not know.

16. See MNOOKIN & WEISBERG, *supra* note 5, at 692.

Nor is it known (or perhaps knowable) how much harm, if any, is done (or would be done) to children by practices now technically illegal. Are we to assume that people who can afford to raise children, and who badly want them, abuse those they acquire in the market? Common experience suggests that people willing to buy an infant are likely to treat him better than the parent who is willing to sell him. And the child is presumably better off having been sold than aborted. But were the practice made legal, is there a genuine risk that people would enter "the market" in order to acquire young "slaves?" Or do "child abuse" laws sufficiently protect against this?

If parents could buy and sell without restraint — especially if they could transfer children of any age — should we not be concerned about possible psychic consequences to children when they become aware of this possibility? Or does this merely suggest that sales should be allowed but only until the child is a year old? (Or a month old?)

Would the handicapped child who now gets adopted be ignored if a real market in healthy babies got going? If so, should the potential happiness of one group of babies be foregone because it is not available to the other? Would a baby market discriminate against the poor who wished to adopt? Probably, but would there be more or less such discrimination than is practiced today by adoption agencies? Many think that such agencies have a very middle-class outlook and a strong preference for middle-class adopters. If we are interested in the child's material welfare, how much does this matter?

Perhaps the biggest barrier to a legal market in babies is the assumption of the media and politicians that most adult citizens object to the private transfer of "ownership" of a human person if any cash changes hands; somehow it suggests the idea of slavery. But how widely felt is this alleged revulsion? And could this mind-set be altered by gradual re-education? Would it help if it became obvious that the private transfer of children was a promising avenue of upward mobility for the offspring of the poor? These questions are presently without answers and seem likely to remain so.

The only clear fact is that the present rules concerning the voluntary transfer of a child from one parent to another cannot be said to rest upon scientific findings. For the most part the necessary knowledge does not exist and would be difficult to acquire. The transactions that now occur and that scientists wish to study are shrouded in secrecy. And the psychic phenomena at stake remain inscrutable. By the same token, pre-

dicting the consequences of a change in the law would also be terribly difficult.

So, too, although it is not easy to identify a groundswell of opposition to the ban on baby selling, many are clearly offended by the ban. Some want to adopt but are not allowed to; perhaps they are single, gays or lesbians, couples of mixed race or religion, too old, or whatever criteria now disqualify them from the formal process. All prospective adopters are to some degree injured by the artificial shortage created by the law. Surely there would be more potential sellers if mothers were allowed to help choose and bargain with the adopting couple. Is the frustration of the wishes of these adults in the best interest of children — or contrary to it? Is it a necessary harm to children that serves some greater good? Who can say?

Disputes over baby selling are fraught with indeterminacies over what would actually occur were the practice made legal, and sharp value disputes over whether the various possible consequences are desirable or not. In this situation, we do not believe it can be coherently stated that a legal regime allowing regulated baby selling is or is not in the best interests of children.

2. Required and Prohibited Reading

Although everyone agrees that children should learn how to read, there is great disagreement over what they should read. Some think all children should simply decide for themselves. There is a practical difficulty with this view because of the problems of access, especially for younger readers; but it is a fairly common sentiment. Many other people, however, have a list of “musts” and/or categories of “forbidden reading.” For them the child’s choice should definitely be promoted and/or restricted. Some would insist that children read the “great books;” others comic books. Some believe the Bible is essential; for others the Nancy Drew series is the bible.

Many communities and families have had considerable strife over the issue of what should be forbidden. Some citizens hold that children should not be allowed to read or see material that they (the critics) consider to be pornographic. Indeed, in furtherance of this objective, and with the Supreme Court’s approval, a number of legislative bodies across America have made it illegal to sell this sort of material to children (including books and magazines that are not obscene for First Amendment purposes and hence could not be restricted

in their sale to adults).¹⁷ The "adult bookstore" is a manifestation of this kind of censorship.

Many bitter battles have been fought in local schools and libraries. In a typical fracas in Island Trees, New York, some parents strongly objected to a number of books they found in the high school and junior high school libraries, after determining that these books were on a list of offending books they had obtained from a politically conservative parents organization.¹⁸ A committee reviewed the books on behalf of the Board, recommending retention of some, and disposal of others, while ignoring still others. Exercising its own discretion, the Board largely rejected the committee's recommendations and decided that almost all of the books at issue should be removed from the libraries, asserting that these books were vulgar, immoral and in bad taste and hence educationally unsuitable for the district's children. The U.S. Supreme Court eventually decided that if the board's real motivation was educational suitability or a concern for pervasive vulgarity, then it had the right to remove the books; but that if the Board's real motivation was to deny children access to ideas with which the Board disagreed, then the First Amendment barred the removal of the books from the libraries. The case was then remanded to determine the Board's true intentions.

Even more consequential than such local scrimmages are the systems of school textbook selection which operate at the state level in large states like California and which determine what is available in the national market. In California a state-level committee holds public hearings on the guidelines to be issued to publishers and upon the appropriateness of the products they offer.¹⁹ Selection for the short list of approved works can be more rewarding than winning the state lottery. Consequently publishers are careful not to offend unions, Christians, Jews, blacks, feminists, traditionalists, evolutionists, creationists and a considerable collection of other "ists."

The result is not publicly called "censorship" but that is, of course, the nature of the process. For example, in a recent protracted struggle over the question of how to treat evolution, the

17. *Ginsberg v. New York*, 390 U.S. 629 (1968).

18. *Board of Educ. v. Pico*, 457 U.S. 853 (1982); see also John E. Coons, *Intellectual Liberty and the Schools*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 495 (1985).

19. See David L. Kirp, *Textbooks and Tribalism in California*, PUB. INT., Summer 1991, at 20-36. For a general discussion of legal challenges to textbook selections and the textbook selection process, see MARK G. YUDOF ET AL., *EDUCATIONAL POLICY AND THE LAW* 232-35 (3d ed. 1992).

evolution side was ultimately able to triumph to the virtual exclusion of competing explanations of species. Yet, in a carefully nuanced rule, although no other theory may be presented, the texts and the teachers are not permitted to teach evolution as a fact.²⁰ What is interesting from our perspective is that the question of who should decide was largely swamped by claims pro and con about what evidence supported what theory. It was in any case assumed that neither parents nor classroom teachers were the proper locus of decision.

The evolution example may be untypical because it ended in a fairly clear victory for one view. In many cases the curious overall effect of the state's system of censorship is that, in the public school curriculum, issues of great moment tend to be assigned to Limbo. More than anything else the forces arrayed in opposition to one another generate political fear. The consequence is what we sometimes call the "Vanilla Curriculum" — utterly inoffensive, and challenging in like proportion.

These disputes over children's reading material — involving parents, teachers, librarians, textbook committees, publishers, politicians, interest groups and the like — do not turn on which books best help children learn to read. They are rather about what children shall know and to what ideas they will be exposed. In short, they are disputes about values. As such, in a democratic society how can it be said that there is a social answer to whether inclusion or exclusion of any particular book is or is not in the best interest of children?

3. Child Care Arrangements

There is a great diversity of value-based opinion over what are prized child care arrangements for under-fives. Some people think young children should stay home with Mom so that, among other things, the child will be trained to behave in the ways thought proper by his or her parents. Others, who also support home child care, think it crucial that Dad take substantial responsibility for the job so that, among things, the child gets a "modern view" of sex roles.

Some people, on the other hand, think it essential that children be cared for by someone other than a parent for a substantial portion of the week. But reasons for such views — and in turn the kinds of environments favored — vary dramatically. Some want children to have one or two other children as intimates, fostering the relation through a small, warm and loving

20. See Diane Curtis, *State Board OKs Guidelines on Evolution*, S.F. CHRON., Nov. 10, 1989, at A1.

family day care home. Others seek as their primary objective the exposure of children to youngsters of other races and ethnic groups. Others want young children to experience large group socialization at either day care centers or big play groups.

What then should public policy be with respect to child care? Should parents who care for their young children at home be eligible for the same financial benefits, if any, provided to those parents who turn the care of their children over to others (as Republican Administrations from time to time seem to suggest)?²¹ Such an approach might call for tax credits or children's allowances paid to all parents of young children. Alternatively, should only some types of child care attract public subsidy, and if so, which ones? Wealthy people and high income two-earner couples often use nannies, pricey family day care and formal nursery schools as their young children age. Should this be taken as the standard for all children? That might leave out Head Start, which is widely thought to be educationally effective for the children of the poor. (Or does this rather imply that all children should be enrolled in Head Start?)

Should those who care for the children of others be subjected to regulation through licensure requirements not imposed on parents? If so, on what basis? The educational credentials of the care givers? The square footage of the place of care? Its policy on vaccinations and sick children? The educational and/or religious content of its program? Its selection practices? Its fees? How many children are cared for together?

Plainly, it is not easy to insist that any solution is in the best interest of children, not only because of differing conceptions of the object of such care, but also because of our uncertainty about the positive and negative impacts of any specific regime or set of rules. As with our other examples, policy-makers who would try to settle upon a single solution to the child care debate face enormous difficulties in deciding which is best for children.

21. For a description and discussion of former President Bush's proposals, see Julie Johnson, *Child Care: No Shortage of Proposals*, N.Y. TIMES, Mar. 26, 1989, § 4, at 5; *The Candidates on the Issues*, N.Y. TIMES, Sept. 25, 1988, § 1, at 24; Louis Uchitelle, *Rival Views on Economy: To Nurture, or to Prune?*, N.Y. TIMES, Nov. 3, 1988, at A1.

CONCLUSION

If society appears to lack a common view of whether a certain objective is best for the child, or if the most effective means to achieve that objective is in doubt, what should we as a people do? Such an intellectual impasse does not take the policy-maker off the hook, for inaction is itself a decision. A choice will be made one way or the other through the private discretion of the person who enjoys the most effective access to the individual child (not necessarily the parent). For this reason, we can attach no virtue to government inattention as such. Policy-makers may, of course, responsibly choose not to disturb the status quo concerning children, but that requires a conscious decision in favor of inaction.

Deciding how much power should go to children, to parents, and to public officials is often a difficult question for policy-makers. They must contend with contrasting starting points rooted in deep value differences. They must proceed frequently knowing that they themselves don't really know what is best. Parents may look attractive as deciders, because they can be expected to have intimate knowledge, as well as a general concern for their children, and will probably suffer along with the child when a bad decision is made. Parents may provide the most appropriate sheltering environment in which children can be gradually empowered and liberated as they are ready to take on responsibility for themselves. And, of course, if humanity is to have a future, we must give people some good reasons to want to be parents. Yet some parents just don't seem to care; others appear incompetent; still others lack the resources to act effectively upon choices they would make for their children.

Professionals have expert knowledge and they can provide objective judgment. Their advice can, of course, be offered to parents voluntarily in a market exchange; indeed, various experts (from music teachers to child psychologists) are routinely employed by parents in the course of exercising their own power. As between parents and professionals, then, the real question is when the state should empower the latter compulsorily to override the former.

Surely, every thoughtful person who cares about children would admit that a compulsory override of parents is sometimes desirable. Put most starkly, no friend of children can favor child abuse. Furthermore, at some point in time we need to override parents even in the name of child liberation. Who thinks that 30-year-olds should have no more rights than 3-

year-olds? But when and in what domains is liberation to be assured when parents themselves do not think the child ready?

As we have earlier demonstrated, many areas of children's policy already reflect societal decisions about the allocation of power. What we need now is more self-conscious attention to those decisions, more systematic evaluation of positive and negative attributes of those who would gain power and responsibility over children in varying settings, and more open recognition of the value differences that lead people to favor one decider over another. This heightened scrutiny of the "who decides" question does not guarantee that better children's policies will actually be adopted, but it should make their adoption more honest. Moreover, it should help avoid mindless drift towards the centralization of power and responsibility in cases where more reflective policy-makers would themselves conclude that it is better for children for someone else to decide what's best for them.