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# THE LIBERAL STATE'S RESPONSE TO RELIGIOUS VISIONS OF EDUCATION

JAMES G. DWYER<sup>†</sup>

The principal papers in this symposium offer a rich account of religious perspectives on education. They impress on the reader the great variety of views across and within religious traditions. Significantly, each of the authors, to varying degrees, emphasizes that many people, within the particular religious tradition he or she addresses, and in some cases institutional authorities as well, embrace liberal educational aims. Some go so far as to assert or imply that liberal educational practices predominate within a tradition.

Liberal educational practices, as articulated by certain liberal political theorists,<sup>1</sup> include not just developing basic skills—such as reading, writing, and arithmetic—and providing information in a variety of subject areas. They also include developing advanced intellectual skills, such as critical and independent thinking, problem solving, investigative methods in the sciences and humanities, and synthesis of complex information. They include instruction in broader principles and theories in various subject areas and, at some level of schooling, open debate about the validity of the principles and the soundness of the theories. They encourage creativity and original thinking. At appropriate developmental stages, they expose students to competing views, secular and religious, on contested issues in the various academic disciplines and in public policy, and they afford children a substantial measure of freedom of expression to deliberate about the respective merits of the competing views, while at the same time expecting students to articulate reasons for their own positions, whether they conform

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<sup>1</sup> See HARRY BRIGHOUSE, *SCHOOL CHOICE AND SOCIAL JUSTICE* 1–18 (2000) (discussing the interplay between liberalism and educational policy). See generally MEIRA LEVINSON, *THE DEMANDS OF LIBERAL EDUCATION* (1999) (discussing liberalism and the modification of the liberal education ideal, and proposing steps to implement an autonomy-promoting liberal education).

with mainstream views or not. In these and other ways, liberal educators treat children with respect as unique, valuable, and equal persons. Liberals endorse this type of education because they believe it is most conducive to giving children an opportunity for enjoying a happy and fulfilling life, as well as being a requisite for becoming autonomous. Some liberals also, or instead, emphasize that this type of education is most conducive to children becoming good citizens in a liberal democracy.

Two things are significant about the other participants' efforts to portray attitudes toward children's schooling among members of particular religious groups as largely liberal. One is that they are unsupported; the authors do not cite empirical studies showing what portion of people or what percentage of schools within a religious group hold to certain beliefs about children's education. To the best of my knowledge, there are no such studies. Thus, quantitative claims about the degree to which liberal or illiberal views prevail in the educational philosophy or classroom instruction of any religious group today really cannot be supported. I return to this point below.

The second way in which the emphasis on liberal views is significant is that the authors offer no explanation for it—that is, for why they believe it is important that many people within a faith hold relatively liberal views, or why they think this should be of interest to their readers, including those outside the faith they examine. What business is it of the other authors or of their audience whether most Muslims or Jews or Christians in the United States or elsewhere provide children in the schools they operate with a liberal education, an illiberal education, an exclusively religious education, or any other kind of education? So long as they are not encouraging children to engage in violence or other harmful conduct, and so long as they are not producing graduates incapable of being self-sufficient, why should any other private party or the state care what or how they teach the children or presume to pass judgment on them? Yet one gets the sense from each paper that the author is valorizing liberal approaches to education, and it would have been of interest for them to explain how they would respond to a defender of illiberal childrearing practices who charged them with failing to respect the entitlement of all parents to raise their

children as their convictions instruct them, without critical scrutiny from presumptuous academics.

Also of significance in the principal papers is that none of the authors deny that there are some schools within the faith tradition he or she addresses that follow illiberal practices, such as discouraging children from thinking critically and independently; stifling self-expression and any inclination to question the received wisdom in the sciences, in the humanities, or in the religious tradition; and imposing gender-stereotyped roles on students. At least two of the authors, Professors Afsaruddin and Smolin, explicitly acknowledge that there are illiberal elements within the groups they describe. Yet this acknowledgment is left to recede into the background, not followed by serious consideration of whether someone should do something about the existence of any such schools, or of whether the children subjected to illiberal schooling have some claim on the rest of society that we are failing to recognize. At best, some of the other authors endeavor just to convince readers that illiberal practices are not too widespread.

My own interest is in questions of political theory raised by the existence of any schools with illiberal practices—that is, questions concerning the state's stance toward illiberal schooling. I am curious about the content and style of theological arguments and analyses concerning child rearing, but I am not competent to enter into them, so I confine myself to writing about how the state should respond to them. I approach these questions as a legal academic with an increasingly tenuous claim also to be a political philosopher. I approach them, moreover, as an advocate for children, a sincere and well-intentioned one, but by no means an omniscient one. From the latter perspective, I assume that the life of each child matters morally and therefore that the rest of us, and by implication the state as our agent, should be concerned about any harmful childrearing practices, even if they affect only one child. Thus, it is irrelevant from my perspective whether most or only a few children within Islam, Judaism, Catholicism, or Evangelical Christianity, in the United States or elsewhere, receive a form of schooling that is contrary to some of their interests.<sup>2</sup>

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<sup>2</sup> For the same reason, I deem it irrelevant to state regulatory decision making what standardized tests—even if they were designed to detect the more important aspects of a liberal education identified above, which they are not—reveal about

In my book, *Religious Schools v. Children's Rights*, published in 1998, I summarized the empirical research on Catholic and conservative Christian schools that had been done up to that point and noted that the record was scant and dated; there simply had not been much study of those schools, especially not in recent years.<sup>3</sup> This was itself significant to my mind, that the state did not take enough interest in the quality of education received by the 10 percent of children who do not attend public schools to examine closely the practices of private schools. However, what studies had been done by outside observers were more or less consistent in identifying illiberal practices in some schools, and I suggested in the book that even this scant and dated record should be enough to make the state and the public take notice precisely because every child matters—no child should be left behind.<sup>4</sup> At a minimum, it seemed it should induce states to do some independent investigation of their own to either confirm or refute the depictions in these studies.

There is no reason to believe today that illiberal schooling practices have disappeared, given that much of American society, and much of Evangelical Christianity in particular, appears to have moved in a more conservative direction in the past decade. Illiberal attitudes manifested by the leadership of the Southern Baptist Convention, which represents at least 15 million Americans, and of the Southern Baptist Theological Seminary, surely receive support from and filter back down to a large segment of the population. These attitudes include opposition to women assuming leadership roles and a determination to stifle those who would question this or other positions of the leadership.<sup>5</sup> Presumably, such discriminatory and authoritarian

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average student performance in different categories of schools such as private versus public. It is no more logical to conclude from comparable outcomes in those two sectors that all is well in all private schools than it is to conclude that all is well in all public schools.

<sup>3</sup> JAMES G. DWYER, *RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS* 13–14 (1998).

<sup>4</sup> *See id.* at 7–44.

<sup>5</sup> *See* *BATTLE FOR THE MINDS* (New Day Films 1996) (depicting the conservative takeover of the Convention and the Seminary in a documentary film); *see also* BARRY HANKINS, *UNEASY IN BABYLON: SOUTHERN BAPTIST CONSERVATIVES AND AMERICAN CULTURE* 200–39 (2002); JULIE INGERSOLL, *EVANGELICAL CHRISTIAN WOMEN: WAR STORIES IN THE GENDER BATTLES* 47–59 (2003); CARL L. KELL & L. RAYMOND CAMP, *IN THE NAME OF THE FATHER: THE RHETORIC OF THE NEW SOUTHERN BAPTIST CONVENTION* 77–96 (1999); DAVID T. MORGAN, *SOUTHERN BAPTIST SISTERS: IN SEARCH OF STATUS, 1845–2000*, at 160–62 (2003); JERRY SUTTON, *THE BAPTIST*

attitudes influence the pedagogical approaches and curricular content of some schools that Evangelical Christians operate.<sup>6</sup>

The Catholic Church and Catholic schooling in the United States have gone through significant changes in recent decades towards a more liberal approach from all appearances.<sup>7</sup> There might, therefore, be little for liberals to be concerned about today with respect to Catholic schooling, though the fact that the Church is still characterized by quite visible *de jure* patriarchy suggests at least some lingering cause for concern about what children in Catholic schools learn about gender equality. My perception is that there are still archly conservative groups within Judaism and Islam in the United States that operate schools characterized by pronounced gender discrimination and a pedagogical approach antithetical to development toward moral autonomy. Again, though, it is irrelevant to an analysis of the state's responsibility to children whether there are thousands of schools with illiberal practices or only a few, and I doubt that any reasonable and informed person would claim that there are no such schools.

In my first book, I also expressed the view that it is irrelevant to an analysis of the state's responsibility to children whether schools that have some harmful practices also provide things for children that the state deems valuable.<sup>8</sup> To take an extreme and, so far as I know, entirely hypothetical example, one might imagine a school that does all of the things I listed above as constitutive of a liberal education, but in which teachers and administrators routinely sexually abuse children. Surely we would all say that the state should stop the sexual abuse and not refrain from doing so because the school is otherwise providing a good education. So, in my view, it was enough to generate a

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REFORMATION: THE CONSERVATIVE RESURGENCE IN THE SOUTHERN BAPTIST CONVENTION 259–61 (2000).

<sup>6</sup> See FRANCES R.A. PATERSON, DEMOCRACY AND INTOLERANCE: CHRISTIAN SCHOOL CURRICULA, SCHOOL CHOICE, AND PUBLIC POLICY 14–21 (2003).

<sup>7</sup> See generally CATHOLIC SCHOOLS AT THE CROSSROADS: SURVIVAL AND TRANSFORMATION (James Youniss & John J. Convey eds., 2000) (containing various essays on contemporary changes in modern Catholic education); THE CONTEMPORARY CATHOLIC SCHOOL: CONTEXT, IDENTITY AND DIVERSITY (Terence H. McLaughlin et al. eds., 1996) (including various essays regarding the context, identity, and progression of Catholic schools); ANDREW M. GREELEY, THE CATHOLIC REVOLUTION: NEW WINE, OLD WINESKINS, AND THE SECOND VATICAN COUNCIL (2003).

<sup>8</sup> See DWYER, *supra* note 3, at 15.

philosophical analysis of the state's responsibility to the children in private schools if there was reason to believe that at least one private school in the country was engaging in at least one practice that the state believed to be harmful.

I also deemed irrelevant what goes on in nonreligious schools, including public schools.<sup>9</sup> To return to the extreme hypothetical example above, if the state became aware of routine sexual abuse in a particular religious school, it would clearly be inappropriate for the state to say, "we have no business worrying about those children, because there are some public schools where this goes on as well." Looked at another way, it should be no defense for the administrators of the religious school to say, "some public schools do this, so we should be free to do so until you stop them." If the state deems certain practices harmful to children, then of course it should endeavor to eliminate them from all public schools, but I cannot imagine a sound argument for the conclusion that until it does so completely, the state must ignore the situation of children in private schools.

But why was I personally interested in what might seem to be a relatively minor social problem, if it is a problem at all, in a world where large numbers of children suffer from poverty, physical abuse, parental drug addiction, value-destroying television programming, and unhealthy diets? One reason was that questions about the state's stance toward childrearing practices it deems harmful, when the practices are motivated by religious conviction, provide a great intellectual challenge. No one should act as if the answers are simple and as if anyone who does not agree with them is simpleminded or malicious. At times, my own writing on the subject has had a polemical tone to it, and I regret that. As noted below, personal experience also motivated my interest in the topic, and that personal experience included inculcation of dogmatic attitudes. These questions were sufficiently difficult to answer, that they preoccupied many political theorists throughout the 1990s, and no clear consensus emerged. I found much of the analysis of those questions to be misguided, and I thought that I had something different and better to say, principally concerning the rights-based arguments that were often made. I addressed my own arguments to liberal political theorists, and I did not expect that anyone not operating

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<sup>9</sup> *Id.*

from the perspective of liberal political theory would find much in it persuasive. I am very glad to have the opportunity now, in this journal, to address a readership that I assume to have a primarily religious orientation, though this is not incompatible with also endorsing or operating within the perspective of liberal political theory. I will endeavor to speak more directly to thoughts and concerns that the readers of this journal might have, while recognizing that I likely will not address them all and that I might still be unpersuasive.

Another reason why this topic interested me, if I might wax autobiographical for a paragraph, is that I spent seventeen years in Catholic educational institutions: a preschool at a convent, a parochial elementary school, a diocesan high school, and a Jesuit university. I had some thoughts afterward about the quality of the education I received and about the ways in which teachers and administrators treated pupils in the elementary and secondary schools I attended, some positive thoughts and some negative. Working through a philosophical analysis of the legal environment in which those schools operated was one way of expressing and working through these thoughts. These thoughts were tied to others about being raised in a staunchly conservative Catholic family, in a pervasively Catholic community, and about my own intense experience with Catholicism throughout my childhood, adolescence, and early adulthood, an experience that led me in my early twenties to a decision, later reversed, that I would enter the priesthood. Because of these experiences with Catholicism, I thought I might be able to offer something to the debate among liberal political theorists that few others could—namely, the perspective of someone who was raised in a pervasive and illiberal religious environment and who was once deeply immersed in Christian faith and theology. I cannot say that many, or any, other political theorists are “a product of an intellectual formation largely ignorant of the substantial Christian intellectual heritage” or are incapable of understanding “how any intelligent person of good will can be either a traditionalist Catholic or Evangelical Christian,” as Professor Smolin charges,<sup>10</sup> but I can say that neither is true of me.

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<sup>10</sup> David M. Smolin, *Religion, Education, and the Theoretically Liberal State: Contrasting Evangelical and Secularist Perspectives*, 44 J. CATH. LEGAL STUD. 99 (2005).



What then to make of schools that, as a direct outgrowth of the sincere religious beliefs of their operators and of the parents that patronize them, reject liberal educational aims and/or engage in practices like sexist teaching that liberals believe harmful to children? The adults involved presumably care about the children, want the best for them, and are doing the best they can by their own lights. Are they entitled to be left alone, absent infliction of grievous physical harm on the children, as a matter of religious freedom or parental rights? Or does the state have a right to insist that all children receive more or less the same kind of schooling, a right based perhaps on a perceived need to produce a certain kind of citizen to populate and support a particular kind of society? Or do children have any claims on their parents or on the state to ensure that they receive a particular sort of education and are not treated in certain ways?

One general approach to answering these questions might be to consult one's own ethical convictions, which for most people in the United States would be tied to religious beliefs. As a political philosopher, though, what interests me is not what personal opinions I or anyone else might form about these questions on the basis of religious conviction or any other set of beliefs, but rather how legal decision makers should answer them. This latter inquiry should interest everyone, including those who ordinarily think about children's upbringing exclusively within the framework of their own religious faith. For ultimately the state *must* answer these questions, and *its* answers to them must be what determines whether illiberal schools are able to continue operating as they have. A fatal weakness in much of the theorizing and rhetoric about legal conflicts over illiberal child-rearing practices is the failure to recognize this—the failure to see that the state is inevitably pervasively involved in the lives of children and other non-autonomous persons. How other people treat children and what practical authority anyone has over the lives of children must be governed by laws, and it is the state that creates laws. All participants in debates over these conflicts are demanding some kind of legal rule. Defenders of freedom for parents and religious communities are asking that the state confer a particular set of legal rights on parents and communities, a right to direct children's lives as they wish. Whatever moral rights or natural rights they might believe they

possess, in practice what they need and want to raise children as they wish are state-created legal rights.

Thus, what opponents of regulation and oversight of religious childrearing practices are really demanding is not state inaction, as is sometimes suggested, but rather a different form of state action, a conferral on them of broader legal authority over the lives of children. For the state *truly* to “stay out of child rearing” would mean no regulatory oversight of private schools or other sites of child rearing, but it would also mean that no adults have any legal basis for retaining custody of or control over any children, and so could claim no protection against any efforts by other private parties or by the children themselves to interfere with their efforts to direct the children’s lives. All children would be up for grabs, susceptible to the influence and even physical possession of any adult able to come into contact with them. Surely this is not what anyone wants. No one truly wants the state to stay out of child rearing. What everyone wants is that the state govern child rearing in a particular way, assigning custody to particular adults and conferring some degree of power to direct a child’s upbringing on those adults. Disagreement turns principally on how much power the state should give those adults and, conversely, how much power it should assign to other private parties or retain in its own agencies. Whatever one’s position, it is a position about what the state should do and about what laws should exist. As such, arguments for it must be addressed to the state and must be ones that the state can adopt for itself.

What then should the state make of these various religious visions of education? How, if at all, should awareness of those visions influence state decision making? As an initial matter, I believe that the readers of this journal will agree that the state in this nation may not adopt one of those religious visions *per se* as its own. In other words, a legislature may not declare that henceforth its educational policy will be dictated by the teachings of the Catholic Church or by the Koran. This would be so even if all the members of a legislature were themselves Catholics or Muslims. In their jobs as legislators, they are agents for the entire populace, and the populace is heterogeneous with respect to religious belief, with a significant percentage of the population being nonreligious. In recognition of this ideological diversity, and of the fact that life goes better for everyone when the state

takes no side in disputations over religious questions, we in America have created and continue to endorse a so-called "secular state," meaning at least a state that is not affiliated with any religious institution and that does not endorse particular religious beliefs *per se* or take positions on religious questions. This does not make the liberal state value-neutral, but the state compensates for its adopting a secular rather than theocratic character by leaving substantial space in private life for persons of faith to direct their own lives by their own lights.

Does this mean that state actors must, in their deliberations and decision making, entirely ignore statements of a religious vision of education? No. Does it mean that state actors must assume that children have no spiritual interests and should not be taught religious beliefs? No. What it means is simply that state actors are constrained to make decisions about what laws will govern children's lives on bases other than religious belief. In doing so, they certainly may take into account that most citizens, including most of the adults upon whom the state has conferred the status of legal parenthood, have religious beliefs, including beliefs that children have spiritual interests of a particular sort. But in their official capacity, state actors may not themselves assume that any of those beliefs are true and, on that basis, act in accordance with them. If they did so they would of course have to pick and choose, and any selected beliefs would conflict with others that some persons hold fervently. This might inhibit the religious freedom or sense of belonging of those persons. Selected beliefs might also conflict with the beliefs that today's children will hold later in their lives. State actors must instead seek out and base their decisions about laws and policies on secular values and beliefs.<sup>11</sup> Among those secular values would be life, liberty, and the pursuit of happiness. And among those secular beliefs would be an understanding that most people place great importance on religious freedom among all the liberties, and that experiences of spirituality and religious devotion produce great happiness for many people.

If what is at issue were simply how adults should conduct their own lives, state decision makers would not have much difficulty in establishing basic rules of conduct. Based on

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<sup>11</sup> I consider below the fact that these values and beliefs are not universal, and the fact that some so-called secular values might be tied to, and even originate in, religious belief.

reasoning of the sort John Stuart Mill offered for maximizing human happiness or the reasoning of the sort John Locke and, in our own day, John Rawls presented for respecting the autonomy of persons, state actors would establish a scheme of legally protected, extensive personal liberty in matters of religious belief and exercise. That liberty would be limited only to the extent necessary to ensure that all autonomous persons, as moral equals, enjoy an equal measure of liberty, and to prevent persons from inflicting tangible harms on others. This is, more or less, the scheme that the United States Supreme Court has fashioned over time in its First Amendment jurisprudence. Difficulty arises at the margins, especially where there is disagreement about what constitutes harm to others and where specific religious beliefs or practices conflict with public projects like eradicating drug use or building roads.<sup>12</sup> For the most part though, the boundaries of religious freedom outside the context of child rearing are well established and uncontroversial, and the vast majority of Americans are able to exercise their religious beliefs without ever coming into conflict with other private parties or the state.

The problem in the context of education is that child rearing is not about adults conducting just their own lives. It is about their directing the lives of children. So then the question arises as to how the state should view children—as equivalent or analogous to property or appendages of parents, or as separate persons. If the former, then child rearing might not require a different kind of analysis or set of legal rules relative to those pertaining to adults' self-determination. Parents might have the legal power to do whatever they want with children so long as they do not cause harm to persons outside the family. But if the latter is true, serious thought would need to be given to the implications of children's separate personhood, including whether parental behavior toward children should be treated in some ways like adults' behavior in relation to persons who are

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<sup>12</sup> See *Employment Div. v. Smith*, 494 U.S. 872, 890 (1990) (rejecting a free-exercise challenge to the denial of unemployment benefits to Native Americans fired for ingesting peyote in violation of state law); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 447 (1988) (rejecting a Native American tribe's free exercise challenge to the U.S. Forest Service's construction of a logging road through land sacred to the tribe).

not “their” children, such as other competent adults, incompetent adults, and other children.

It would certainly be easier to answer the question of children’s status as property or persons if one could appeal to a clear statement on the issue from some authoritative text. In some religious traditions there might be some statement of this sort in a religious text. But the question here is how the state should view children, and even on so fundamental a question as who has personhood status in our society, we should all be uncomfortable about state actors adopting a religious authority as their own, even if today it would be a religious authority that we personally share. We should be uncomfortable about it not only because tomorrow it might be a religious authority that we do not share and that takes a position directly contrary to our own convictions, including one that excludes *us* from the category of persons, but also because of the impact it would likely have on some fellow members of our society who are from a different religious tradition and whose equal personhood and citizenship we respect. We should all prefer that the state appeal to some nonreligious basis for taking a position on the status of children and other beings, including ourselves, at least so long as that basis generates conclusions not too dissimilar from our personal views. But what if there is no other basis? There is certainly no statement on the issue in our written social contract—that is, the Constitution. Where else is a legislator to look?

In a forthcoming book, I develop a nonreligious account of children’s moral status that the state could endorse, by cataloging the characteristics of beings that ordinarily cause human moral agents to have basic intuitions that other beings matter morally.<sup>13</sup> I conclude on that basis that the moral status of children, in general, is actually *higher* than that of adults, and, accordingly, that their interests should receive *greater* weight in our moral deliberations than those of adults. This is consistent with the intuition that many parents have with respect to their own children, that their children’s interests matter more morally than do their own, and my analysis would generate a similar view at a collective, societal level. I cannot reproduce that analysis here, and I would not claim that it is likely to convince

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<sup>13</sup> See JAMES G. DWYER, ON THE SUPERIORITY OF YOUTH: MORAL STATUS AND HOW WE TREAT CHILDREN (unpublished manuscript, on file with author).

many people. But really it would seem unnecessary to argue the point here, for there is no suggestion by the other participants in the symposium, and I anticipate none from the journal's readers, that children are not persons or that the state should treat children as if they were property or appendages of their parents rather than as morally distinct persons.

In fact, there would appear to be an "overlapping consensus" among people from a broad range of moral outlooks on the proposition that children, though not autonomous,<sup>14</sup> are persons, and on the assumption that children, though dependent upon and psychologically and emotionally intertwined with their parents and other family members, are morally distinct persons. Such an overlapping consensus might itself constitute a basis for state actors adopting those assumptions. That children occupy a *superior* moral status is not widely believed, however, so I will assume for the present just that children are equal persons which means that state actors must afford them respect equal to that given other persons, and must assign their interests weight equal to that accorded interests of adults. This is not equivalent to saying that children should be treated the same way adults are treated, with all the same freedoms and responsibilities that adults possess; in fact, because their interests differ in important respects from those of adults, giving equal consideration to their interests would require treating them differently in important ways.

Therefore, if you, the reader, were a legislator contemplating the situation of children in your jurisdiction who are being raised by parents of greatly diverse ideological perspectives, you would need to figure out what legal rights, if any, those children should have with respect to their education given the assumption that they are morally equal, yet non-autonomous, persons. To do that, you must adopt some assumptions about what is good and bad for them. You must make such assumptions with respect to other aspects of their lives as well. For example, you must decide whether whipping of or intercourse with a ten year-old child is good or bad for him or her. On what basis would you decide such things?

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<sup>14</sup> For the sake of simplicity I confine my analysis here to elementary school aged children and put aside consideration of older children who are closer to being autonomous.

Importantly, no decision you reach on any aspect of children's welfare is likely to be consistent with the preferences of 100 percent of your constituents. Indeed, if there were no inclination in any persons to do a certain thing to a child, there would be no need for you, as a legislator, to make any decision about it. And as to just about any aspect of children's lives, a decision you make about what is good and bad will conflict with preferences of some people that are grounded in religious belief. As to just about every item in a state's child welfare laws and regulations, one could find someone somewhere who says that his or her religion commands doing what the law prohibits or not doing what the law commands. So every decision you make as a legislator about children's welfare is likely to conflict with someone's sincere convictions. This is true of legal regulations more generally, including others pertaining to family life, such as restrictions on how spouses may treat each other, as well as laws governing treatment of co-workers and employees, laws prohibiting discrimination on various bases in public places, laws concerning sexual freedom, and so forth. What are you to do?

One response to recognition of this problem would be to create an exception to every rule for anyone who has a religious objection, or any sort of ideological objection, or who simply does not want to comply. This would, of course, eviscerate the rule to a large degree, or completely, depending on the breadth of the exception. At the extreme, it would mean laws apply only to those who do not want to do what is proscribed anyway. More importantly, it would be difficult to justify doing this in terms of children's welfare. Because you cannot, as a state actor, adopt the views of parents who object on religious grounds, nor assume that their beliefs are true, you would need some other reason to conclude that those children should not receive legal protection of the interests that you assume, based on secular beliefs about the world and human welfare, children typically possess. And this is where your thinking as a legislator becomes philosophically interesting. What reasons can you legitimately adopt for sacrificing what you believe, based on empirical information supplied to you by child welfare professionals and researchers, to be an aspect of children's welfare?

One reason might be that you do not have great confidence in your beliefs about children's welfare, perhaps because there is not widespread consensus among those with secular views on the

subject. Child development scholars and researchers, or other professionals, might disagree about whether a certain input into children's lives is beneficial or whether a certain way of treating them is harmful. There is substantial disagreement on secular grounds, for example, about the use of phonics-based instruction for reading, about the value of certain vaccinations for any individual child, and about the wisdom of giving extraordinarily active children suppressants like Ritalin.

I do not believe, however, that there is substantial disagreement on secular grounds about the value for children of any aspect of the liberal education I described above. In particular, autonomy is quite widely regarded in our society as an important good for humans. In fact, I doubt that those who would oppose the kind of education I described would say that autonomy in general is not good; they would likely claim that they themselves are autonomous and so acknowledge that being autonomous is a good thing. Many even couch their objection to limitations on their childrearing choices, mistakenly, as a matter of *their* autonomy. This is a mistaken, even conceptually incoherent, claim because autonomy means self-determination, and controlling another person's life, whether it is one's child or one's spouse or one's neighbor, is not *self*-determination. There is also widespread agreement among those operating from a secular perspective on what sort of preparation is needed to attend the better-regarded universities and to pursue various careers, and on the negative consequences for girls, and boys, of being subjected to sexist teaching.<sup>15</sup>

Defenders of illiberal schooling practices might instead contend that the need for their children, throughout their lives, to believe the tenets of their parents' faith so that they can enjoy whatever spiritual benefits come from being believers, is of greater importance than the children's becoming autonomous or being able to pursue professional careers or feeling free to reject traditional gender roles. However, this is a position that you, as a legislator, cannot share. There is no secular basis for concluding that any person must hold a particular set of religious beliefs throughout his or her life. Alternatively, they might

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<sup>15</sup> See DWYER, *supra* note 3, at 8–10; James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321, 1332–38 (1996) (discussing the harm students incur from sexist instruction).



contend that their preferred form of schooling is more conducive to a child's becoming autonomous later in life than is what I have described as a liberal education. This contention you, as a legislator, would have to regard as implausible because it is contrary to the prevailing views of educational theorists who operate within a secular perspective and contrary to the legislative findings underlying existing statutory and administrative rules for the public schools that educate 90 percent of children. There can be reasonable disagreement on secular grounds about some pedagogical details, such as the precise age at which it is best to present children with particular sorts of challenges, and everyone should be free to voice their views about such things. However, there is no plausible basis for contending that schooling with basic aims and orientation largely or entirely antithetical to that described above is as conducive as a liberal education to fostering autonomy and to affording children with an equal opportunity to pursue careers and ways of life consistent with their talents, abilities, and freely-endorsed conception of the good. As I stated at the outset, the other participants in the symposium appear to concede this by their implicit or explicit valorizing of liberal education.

It bears emphasis here that the prescription for liberal education that I outlined at the outset does not preclude religious instruction, and in none of my writings have I suggested that no school should be able to teach religion or that religious school teachers or parents should themselves be prohibited from trying to advance what they understand to be children's spiritual interests. Rather, I concluded that the state, based on suppositions about the temporal well-being of children, should require every school to allow students some opportunity to question religious teachings, in a respectful manner, if and when the students become so inclined, and to foster critical thinking skills in children more generally, using *some* subject matter for that purpose but not necessarily religious instruction.<sup>16</sup> In fact, in my second book, I argued that the state not only may, but *must* provide financial assistance to religious schools—that is, to schools that teach religious beliefs to students, as well as to other private schools, so long as the schools are also providing secular instruction in the standard subjects and providing other

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<sup>16</sup> See DWYER, *supra* note 3, at 180.

components of a liberal education, and so long as the funding would be used to improve the secular components of the education provided.<sup>17</sup> I based this argument not on supposed rights of parents, as most proponents of school vouchers have done, but rather on the equal protection rights of the children whose parents place them in religious schools. I argued that the state violates the rights of children in religious schools not only by failing to exercise oversight of the schools' educational practices, but also by denying these children a share of the state's funding of education.<sup>18</sup>

Moreover, I did not include among the aims of liberal education disabusing children of religious faith, but rather included the aim of ensuring that all children would progress toward autonomy and ultimately become capable of critically examining their beliefs and making a free and informed decision as to whether they would continue to hold the beliefs that their parents and schools taught them. I know of no philosopher today who denies that children need some set of beliefs and values initially *given* to them, on the basis of which they can form an initial self-conception and evaluate other beliefs and values.<sup>19</sup> I did contend, however, that *some* religious beliefs are, from a secular perspective, inherently bad for children to have instilled in them—for example, a belief that females are morally or socially inferior to males, or are less suitable than males for positions of leadership or for the various professions.<sup>20</sup> The reader can undoubtedly think of other examples of things that the state should deem harmful to teach children. As such, I suggested that ideally a liberal state would proscribe teaching such beliefs to children altogether, though in practice it might be counterproductive from a secular child welfare perspective to try

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<sup>17</sup> JAMES G. DWYER, *VOUCHERS WITHIN REASON: A CHILD-CENTERED APPROACH TO EDUCATION REFORM* 161–63 (2002).

<sup>18</sup> See *id.* at 159–67.

<sup>19</sup> See MILTON C. REGAN, JR., *ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE* 15–29 (1999) (providing an account of how autonomy works, with a person holding most of his or her values, beliefs, and commitments constant and unquestioned—that is, taking an “internal stance” toward them—while subjecting some subset of all his or her values, beliefs, or commitments to critical scrutiny—that is, taking an “external stance” toward them). I am not familiar with the idea of “radical autonomy” that Professor Smolin attacks.

<sup>20</sup> See DWYER, *supra* note 17, at 12, 184–85.

to enforce such a proscription, at least in the home, because it would require too great an interference with family life.<sup>21</sup>

I also contended, importantly, that allowing parents extensive freedom to convey their religious beliefs to their children when the children are not in school, and allowing private schools substantial freedom to convey religious beliefs as well, subject to the requirements noted above, creates more than enough opportunity for parents and religious communities to instill their beliefs and values in children.<sup>22</sup> What a liberal approach to child-rearing rules out are simply measures designed to prevent children ever from questioning beliefs given to them and from ultimately reaching their own independent conclusions about matters of faith and value. Such measures include preventing children from being exposed to views inconsistent with those of their parents and warning children of dire consequences, such as spending eternity in hell, for those who reject the teachings of the parents' faith.

In view of the limited nature of the regulations I proposed for private schools, and in light of the fact that less than 20 percent of children's awake hours are spent in school, it is absurd to suggest that the state regulation of curriculum and pedagogical practices in private schools that I urged would amount to a state monopoly over children's upbringing. What I recommended is simply some effort on the part of the state to ensure that *no parents have a monopoly* over their children's upbringing, that in the less than 20 percent of their daily lives when children are in school they receive some influence other than that of their parents and their parents' religious community, and that they receive instruction designed to foster a capacity to take an external stance toward the beliefs and values impressed on them by their parents and by other members of their parents' community. This should include exposure to some range of perspectives in our society that diverge from that of the parents, presented in a way that encourages the students to see why reasonable people might hold them and that challenges students to evaluate the respective merits of various worldviews or specific beliefs from a standpoint other than just their parents' conception of the good or religious authority. Naturally, children

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<sup>21</sup> See *id.* at 11–12, 184–85.

<sup>22</sup> See *id.* at 106–11.

in public schools should have this experience as well, and I regard it as a deficiency in the education many public schools provide that it does not include teaching about religion in a serious way.<sup>23</sup> Again, though, it would be illogical to contend that the state should not require private schools to provide an autonomy-fostering education because not all public schools do it. And it is also irrelevant whether many religious schools already provide that sort of education; as long as some do not, the state has reason to establish a legal requirement that all do so.

I have not yet considered, though, the most commonly advanced argument against state efforts to regulate the practices of religious schools to require the things that I said are constitutive of liberal education. This is the argument that parents are entitled to do what they want with their children regardless of what legislators or so-called experts in child welfare think is good or bad for the children. It is an argument many parents and religious organizations have advanced in state and federal courts in this country on the rare occasion when states have attempted to require parents or private schools to do something with respect to children's education that they did not want to do.

Many people overstate the courts' responses to those arguments, contending that the courts have established a constitutional right of parents to depart from secular standards of child rearing when their religious beliefs so require. The courts have recognized that parents have a right to object on their own behalf to state child welfare laws that conflict with their religious beliefs, but have given effect to that right principally, and exclusively at the Supreme Court level, when the state could not, in the courts' view, show that the challenged laws in fact served children's temporal welfare. Thus, in each of the principal Supreme Court decisions striking down state education laws or requiring that some parents be exempted from them—*Meyer v. Nebraska*,<sup>24</sup> *Pierce v. Society of Sisters*,<sup>25</sup> and *Wisconsin v. Yoder*<sup>26</sup>—the Court reasoned that enforcing the laws in

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<sup>23</sup> See Emile Lester, *Gratitude and Parents' Rights over Their Children's Religious Upbringing*, 25 J. BELIEFS & VALUES 295, 297–98, 303–04 (2004); Emile Lester, *Religious Autonomy and World Religions Education*, 31 RELIGION & EDUC. 62 (2004).

<sup>24</sup> 262 U.S. 390 (1923).

<sup>25</sup> 268 U.S. 510 (1925).

<sup>26</sup> 406 U.S. 205 (1972).

question served no legitimate state aim, because the states had not shown that any harm would befall the children at issue if the laws in question did not exist or were not applied to the parents involved.<sup>27</sup> Even in *Yoder*—which many scholars treat as a *Magna Carta* of parental free-exercise rights even though the Court carefully limited its holding to the Amish—the Court emphasized that parental freedom and power, even when tied to religious belief, are constrained by what the state views as the welfare of children.<sup>28</sup> In contrast, in the two cases the Supreme Court decided in which the state was able to show that the challenged law did, from a secular perspective, protect children's welfare—*Prince v. Massachusetts*<sup>29</sup> and *Jehovah's Witnesses v. King County Hospital*<sup>30</sup>—the Court upheld the challenged law and rejected the parental free exercise claim. Thus, Supreme Court jurisprudence suggests that a parent's constitutional child-rearing right operates only to resist application of laws that do not serve children's welfare from a secular perspective, even when parents object on the basis of religious belief. It does not entitle parents to choose or act in ways the state deems contrary to their children's welfare.

Nevertheless, many people might claim that parents have a moral right against state regulation of the private schools that parents choose, even if the schools engage in practices that the state can show conflict with children's welfare as the state sees it. Some parents might, out of religious conviction, disvalue certain things the state believes all children should have—for example, exercises designed to foster critical thinking and instruction in gender equality. As to other things that the state

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<sup>27</sup> See *Yoder*, 406 U.S. at 229–30, 233–34. “This case, of course, is not one in which any harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been demonstrated or may be properly inferred.” *Id.* at 230; *Pierce*, 268 U.S. at 534 (noting that nothing in the record indicated any educational deprivation of students at private schools); *Meyer*, 262 U.S. at 403 (concluding that a prohibition of German language instruction was “arbitrary and without reasonable relation to any end within the competency of the state,” because “there seems no adequate foundation for the suggestion that the purpose was to protect the child's health”).

<sup>28</sup> *Yoder*, 406 U.S. at 233–34.

<sup>29</sup> 321 U.S. 158 (1944). “Acting to guard the general interest in youth's well-being, the state as *parens patriae* may restrict the parent's control . . . [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare . . .” *Id.* at 166–67.

<sup>30</sup> 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968).

would require, some parents might see them as having some value but might believe that value outweighed by spiritual exigencies. For example, they might perceive some value in children learning scientific methods as soon as they are able to comprehend them, because they want their children to succeed academically and to be able to pursue careers that require a science background, but they might also perceive spiritual danger in such instruction because they fear children will develop an overly rationalistic outlook or will apply scientific methods to deconstruct certain religious beliefs that have scientific implications. Many people might say that such parents are morally entitled to decide whether their children will receive such instruction, based on the parents' own balancing of the various interests they believe their children have, including spiritual interests. Parents claim such an entitlement, not only in connection with children's education, but also in connection with children's health care and other aspects of children's lives.

In *Religious Schools v. Children's Rights*, I explained why the very idea of parental child-rearing *rights* is wrong and why the Supreme Court's creation of a constitutional parental right, however limited, was a mistake from the outset.<sup>31</sup> The explanation rests on certain subtle, but important, distinctions. Importantly, though, it does not rest on a belief that children ought to be liberated from all governance or should be made "creatures of the state." One important distinction is that between exercising authority as a matter of one's own entitlement and exercising authority and providing care for another as a matter of privilege and in a fiduciary capacity. This is a familiar distinction, one often applied to leadership positions, including leadership positions within religious communities; those in positions of power are said to be stewards, not entitled to the offices they hold or to any powers attached to those offices but rather called upon to serve as agents for those whom they serve and/or for the higher authority that selected them for the office. Professor Broyde draws this distinction and, significantly, suggests that Jewish law conceptualizes the parental role with respect to education as a fiduciary one.<sup>32</sup> Another distinction is between parents objecting to laws or to behavior by other persons

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<sup>31</sup> See DWYER, *supra* note 3, at 62–67.

<sup>32</sup> See Michael J. Broyde, *Why Educate?: A Jewish Law Perspective*, 44 J. CATH. LEGAL STUD. 179 (2005).

with respect to children on the basis of the parents' own interests and rights, on the one hand, and on the other hand, parents or other agents objecting to laws or behaviors impacting children on the basis of rights *of the children*. With respect to each distinction, I argued that adopting the latter approach was morally and legally requisite because of the moral and legal standing of children as distinct persons.<sup>33</sup>

The first step in this argument was to show how entirely anomalous parental control rights are. In every other area of life, including the care of incompetent adults, our legal and moral cultures reject the idea that any person is entitled to control the life of another. We long ago rejected the idea that husbands are entitled to control the lives of their wives. And even when persons become caretakers for an elderly parent, or become or remain caretakers for a mentally disabled offspring who has passed the age of majority, we do not speak of those caretakers, in law or in public discourse, as having a *right*—that is, an entitlement in their own name—to decide what church the incompetent adults will belong to or what medical care they will receive. Rather, we speak of the caretakers as having authority to make some decisions in behalf of their wards because, and only because and to the extent that, it is in the best interests of the persons cared for, from a secular perspective, that the caretakers have that authority. And the law constrains that authority within bounds established by the state's own judgment of the incompetent adult's welfare. Thus, for example, if the law mandated certain vaccinations for residents of nursing homes, we would be taken aback by someone whose parent is a resident and unable to make medical decisions for herself coming forward and claiming that this law violates his—that is, the offspring's—rights. We would think that person failed to understand something very basic about the nature and purpose of rights. And we see in court battles over medical care of incompetent adults—for example, parental requests for sterilization of mentally disabled daughters and parental requests to continue or discontinue artificial life support for an adult offspring in a persistent vegetative state—that the legal analysis and public

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<sup>33</sup> See DWYER, *supra* note 3, at 121–22.

discussion attribute rights only to the incompetent adult and not to her parents or other guardian.<sup>34</sup>

I extracted from various court opinions and philosophical writings the moral reasoning underlying the rejection of other-determining rights in contexts other than child rearing. The reasoning was in part simply that, as a historical matter, the posited moral basis for any of us having any legal rights is a moral entitlement to personal integrity or self-determination, a moral basis that does not encompass control over the body, mind, or life course of another person. This puts the burden on defenders of parental rights to demonstrate the moral appropriateness of extending the concept of a right beyond the scope of its historical moral justification, to demonstrate that moral entitlements can arise on some grounds other than the integrity of one's own self and control over just one's own life—that is, one's own beliefs and decisions as to one's own career, residence, attendance at religious services, and so forth.

Of course, the notion of parental rights also has a long historical pedigree. The argument is that there is an inconsistency in our cultural practices, an incompatibility between our general principles concerning respect for persons and concerning the nature of rights, on the one hand, and our specific attitudes toward, and treatment of, children. It is precisely by identifying and rectifying such incongruities between general principles and specific practices that we have improved ourselves as moral persons and as a moral community over the centuries. This is, for example, how we eventually came to embrace social and legal equality for African-Americans and for women in this country; we recognized the contradictions in our beliefs and behaviors. Rights of dominion over African-Americans and women also seemed natural and divinely ordained to people in this country at one time. Is treatment of children as objects of others' rights another instance of an indefensible inconsistency in our moral practices? Or is there a good argument to be made for retaining this anomalous practice?

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<sup>34</sup> See James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1416–20 (1994) (reviewing the Supreme Court's treatment of incompetent adults and children); Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 821–22 (1986) (indicating that the parents' interests will not be considered in protecting their mentally retarded child from an unwanted pregnancy).



Recall that any such argument would have to be addressed to state actors, because the ultimate question is whether the law should recognize a right of parents to control their children's upbringing, a right that would operate to enable parents to act in opposition to what state decision makers find to be conducive to children's welfare. Why should a legislator or judge establish such a right rather than embodying in the law only rights for children themselves in connection with their education and other aspects of their upbringing? Rights for children would be, at least for young children, not choice-protecting rights—that is, rights to decide for themselves what sort of school they would attend—but rather interest-protecting rights, such as a right to a form of schooling that satisfies their developmental interests. Children's rights would likely entail assigning some decision-making authority to parents because, and insofar as, this is conducive to the children's welfare, but they would also likely constrain parental authority in significant ways, just as they constrain the authority of caretakers for incompetent adults. What justification could legislators or courts have for conferring rights on parents instead of on children in connection with fundamental aspects of children's lives such as their education?

A few arguments are easily dismissed. One is that God says it should be so. As noted above, state actors, while recognizing that most citizens do believe in a god or gods, are not free to make decisions themselves, in their official capacity, on the basis of assumptions about what any one of those gods has commanded. None of us should be comfortable with state actors doing that even if today they are likely to do so on the basis of what we believe God has said rather than on the basis of what someone else believes God has said. Tomorrow it might be otherwise, and today it would constitute too great a threat to the sense of security and belongingness of some of our fellow citizens and would be contrary to a proper respect for their equal personhood. To avoid religious civil war, to facilitate harmonious social interaction in an ideologically diverse world, and to respect the equal standing of those who do not share our conception of the good, we expect our legislators and judges to find more neutral justifications for their decisions, and we believe that we have found that in secular understandings of human welfare. No one expects that this political principle will be fully satisfying to all persons at all times, but liberal political theorists believe all

reasonable persons should accept it as a compromise that is better in a practical sense than the alternative of majoritarian theocracy and that expresses the respect we should have for each other as morally equal persons.

An argument somewhat akin to, and often “code” for, an argument based on divine command is one based on natural law or natural rights. Many people, recognizing that no one will be persuaded if they base a claim on an assertion that “my god says so,” translate that assertion into one that “nature says so.” There is a large literature today on the validity of natural law or natural rights claims. There are questions about what “nature” means, how it speaks to us, and who is competent to interpret what it says. The basis usually offered for discerning a command of natural law, when religious authority is not appealed to, is historical social practice or tradition, on the implicit assumption that whatever practices have evolved are “natural” in some sense.

Even if we concede some authority to history and tradition, as moral agents we are expected to step back from what we have done in the past and to reassess it, and doing so has led to what we regard as moral progress over the centuries. As suggested above, some practices and attitudes that most people in the United States today regard as immoral—slavery and subordination of women being standard examples—were once defended as natural, as dictated by natural law and the natural order of things, and were firmly grounded in tradition. So too was instrumental and inhumane treatment of incompetent adults. We have rejected specific beliefs and practices after concluding that they were inconsistent with general principles that themselves are the outgrowth of our collective history. Our history does not reflect perfect moral consistency, because we are not perfect beings. Part of our perceived mission in the world is to achieve greater moral consistency, to advance each generation in our moral understandings and in our ethics, rather than to remain always at the level achieved by our forbearers, however much we admire them. The claim here is that making children the objects of others’ rights, even if those others are loving parents, is inconsistent with what we—including those attracted to the idea of natural law—generally believe is entailed in respecting the personhood of others.

Another easily dismissed argument for making an exception to general principles concerning rights in the case of parents raising children is that children are incapable of possessing rights because they are not autonomous. The reality today is that children have many legal rights, just as incompetent adults have many legal rights, and others can be and are given the legal power to act in behalf of children to effectuate those rights. For example, a newborn, like an elderly person who has lost his mental capacity and like a mentally handicapped adult, can hold property rights. And, in fact, many state laws speak of children having a right to an education. Moreover, talk of children having moral rights of various sorts is quite common, even among those who are proponents of strong parental rights. So a defense of parental rights cannot rest on a supposition that someone needs rights against state action impacting children and that children themselves cannot be the bearers of those rights. They can be, and in contexts other than parental objections to state child-rearing norms they are viewed as such.<sup>35</sup>

Thus, whatever protections there need to be for children's interests *can* be embodied in rights for children themselves. This belies the most common argument for parents' rights—namely, that they are necessary to protect children's interests. Any interests the state perceives children to have it can protect by recognizing a right of the children and by authorizing certain persons, such as parents or guardians *ad litem*, to assert those rights in legal forums. If parents believe a particular regulation applied to private schools is contrary to their children's well-being, they should be able to go to court and assert that the state is violating their children's rights because the regulation is contrary to certain of their children's interests. The difficulty for many parents, though, would be in identifying interests of their children that a court could deem to exist and that are connected with their—the parents'—religious beliefs. They would need to convince a court to accept that the children have certain interests even if the court does not itself adopt, as it must not, the parents' religious beliefs. They would need to have some non-religious foundation for ascribing certain interests to their children, and perhaps to children in general.

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<sup>35</sup> I present a more extended analysis of this issue in a forthcoming book, JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* (forthcoming 2006).

But what if the only interests of their children that they believe are threatened are spiritual interests? I have said that the state cannot assume that children have particular spiritual interests, because that would require the state to assume the truth of particular religious beliefs, which means that the state cannot create rights for children designed to protect particular spiritual interests. But if children *do have* spiritual interests, how are they to be served? For the state to ignore them entirely could result in state action that harms those interests. Is that what liberalism requires, that what might be children's most vital interests are put at serious risk by making the state act as if it is agnostic about religious belief? Or must it allow parents to define those interests and to direct children's lives accordingly?

These are not easy questions, and I think Professor Scaperlanda underestimates the difficulty in answering them. He assumes that children do have spiritual interests, and spiritual interests of a particular sort, without explaining why the state should agree with him or should assume that (all?) parents are correct in their own views about children's spiritual interests, a view that would be incoherent or radically relativistic. He leaps too readily from the premise that children do have spiritual interests, and from the premise that the state cannot fulfill children's spiritual needs, to the conclusion that parents are entitled to define and to act as they see fit to fulfill such needs. And he offers us no way to think about the bounds of parental entitlement. Yet presumably he and Professor Smolin, like all other defenders of parental free exercise rights whom I have encountered, believe there must be *some* bounds, that parents should not be entitled to do absolutely whatever they believe to be required by divine command. Defenders of such rights usually throw out some vague standard like "grievous harm," "excessive harm," or "unreasonable conduct" to define their position on permissible legal restrictions on parental child-rearing freedom. They not only decline to give enough content to the standard to make it meaningful, but they also decline to provide any normative basis for imposing *any* standard or limitation. Who says what is harmful? Who says how much harm is grievous or excessive? Who balances such supposed harm against what the parents believe are the child's spiritual interests? Who says what is reasonable? One sometimes gets the impression that advocates for parental religious rights

believe they themselves, and they alone, are in a position to decide such matters. It is not so simple.

Suppose, for example, that the state petitioned to terminate the parental rights of Abraham after learning that he had prepared to burn to death his son Isaac. The state assumes on secular grounds that it is in Isaac's interests to stay alive and not to feel that his life is constantly in danger because his father's god might change its mind and command that Abraham go through with the killing next time. Today, in the real world, in the United States, preparing to burn one's child to death would certainly lead state authorities to remove the child from one's custody, and it would likely lead to termination of parental rights absent strong evidence that one was firmly committed to never again pursue such an aim regardless of what one might believe one's god has commanded.

But suppose Abraham defends himself by saying not just that God commanded him to kill Isaac and that he himself would have suffered divine retribution if he had disobeyed, which is the only motivation apparent from the Old Testament account,<sup>36</sup> but also that he believed that Isaac would be better off if God's command were obeyed—for example, that God would give Isaac eternal bliss in heaven if Abraham sacrificed him. Furthermore, Abraham says he would only kill Isaac in the future if he believed that to be true, because he loves Isaac very much and would never do anything he thought harmful to Isaac. How should the state respond to this defense? Many proponents of parental religious rights cite religiously-motivated killing of children, or allowing children to die from curable illness, as examples of something they would legally prohibit, and I suspect most would endorse the existing rule, as described above, which would likely result in the removal of Isaac and termination of Abraham's parental rights. But why? Why should the state elevate what it believes to be the secular interests of the child above what the parent believes to be the child's spiritual interests in this or any other type of case? If it does so in this case, why not also when what is at issue is whether girls attending religious schools learn that they are as good in every

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<sup>36</sup> See *Genesis* 22:1–19 (New American). Indeed, this account creates an impression of remarkable callousness on the part of Abraham with respect to his son's life.

way as boys and can pursue any occupations and roles in life that they wish?

The two cases cannot be distinguished on the basis of societal consensus—that is, on the basis of an assertion that there is a consensus in our society today that killing children is bad but not a consensus on gender equality. Many laws and regulations, including regulations governing the public schools that educate 90 percent of the nation's children, reflect a consensus concerning gender equality.<sup>37</sup> The same is true of autonomy-promoting education. Those who oppose these things are a small minority. So head counting is not a promising route for those who would defend a parental right to exemption from such education regulations but not a parental right to exemption from legal prohibitions on endangering children's lives. Certainly universal acceptance cannot be the general standard for legal regulation of conduct, for then, as noted above, religious objectors should have an exemption not only to every legal rule about parents' treatment of their own children but also to laws designed to protect children who are not in one's custody and laws designed to protect other adults, including spouses, co-workers, pregnant women, and so forth.<sup>38</sup>

This last point suggests another distinction that defenders of parental religious rights must make—namely, between one's views about the spiritual interests of children in one's custody and one's views about the spiritual interests of anyone else in the world. I am not entitled to define my neighbor's spiritual interests, or my co-workers' spiritual interests, or even my spouse's spiritual interests, and on that basis to command an exemption from generally applicable laws restricting my treatment of those people. It is not sufficient, to make this distinction, to point out that my neighbors, co-workers, and spouse are able to determine their own spiritual interests. First, it is also true with respect to incompetent adults that no one else, not even their guardians, is deemed entitled to define their spiritual interests and to have the law accommodate the

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<sup>37</sup> See Dwyer, *supra* note 15, at 1332–38 (reviewing statutory provisions that promote equality among students).

<sup>38</sup> With respect to abortion, there are good arguments to be made that women should not be able to do it—especially arguments appealing to the rights of unborn children—but what is universally recognized not to be a good argument is: “I personally am entitled to stop women from doing this because my religion commands me to do so.”

conclusions reached about that. Second, my neighbor's newborn child is also not able to determine his or her own spiritual interests, so why should I not be entitled to do so, and on that basis determine, for example, whether the child will receive vaccinations? Third, other competent adults could be wrong about their own spiritual interests, or might, like a newborn child, simply never think about spiritual interests. Why would I not have a right to decide for them if either of those things is true or if I believe either to be true?

The only practical and potentially relevant differences between a child in one's custody, who might or might not be one's biological offspring, and most of these other categories of people, are that the child is in one's possession and one has legal obligations to that child as a result of that possession, that entrustment. The latter cannot suffice to support objections to state regulation of parenting, however, because the essence of those claims is a request to be exempted from certain legal obligations, and it makes no sense to say that one is entitled to depart from one's legal obligations toward one's child because one has legal obligations to the child. The fact that one is under legal duties is a basis for demanding freedom from interference in carrying out those legal duties, but not a basis for insisting that one should not have those duties. What about a claim on the basis of moral obligations? Well, in effect, parents' legal obligations reflect a legislative judgment about the moral obligations parents owe to children, or, in other words, about the moral rights of the children. So a parental-rights argument founded on the parents' view of their moral obligation is an argument that the state should accept the parents' moral outlook in the specific case of their children. And that just begs the question of why the state should adopt or defer to individual parents' views, particularly where the parents' moral outlook is contrary to what the state believes to be the moral rights of the child.

Here one might object that my reasoning rests on a supposition that the state, while eschewing any authority to decide religious questions and remaining agnostic about religious beliefs, is competent to decide moral questions. Moral beliefs are also contested and, in fact, many believe, must be grounded in religious belief. There seems something illicit in relying in one part of my argument on state neutrality with respect to religion

and in another part relying on state judgments about moral rights and duties. Here is how I would respond to this seeming inconsistency: First, I would point out that a great number of our laws rest on these two suppositions even though they stand somewhat in tension with each other—that is, that the state may not adopt or endorse religious beliefs, and that the law should embody moral beliefs. Racial discrimination is unlawful because it violates the moral rights of individuals, not because it is contrary to the Bible *per se*. Women are legally entitled to pursue careers outside the home even after marrying, because they have a moral right to do so regardless of what the Bible or the Koran might have to say about that.

Second, I would suggest that state conclusions about moral rights and duties emerge from perceiving an overlapping consensus among people holding diverse conceptions of the good, a consensus around principles that can be explained in terms of shared values like happiness, autonomy, and respect for personhood that are generally viewed today as not requiring reference to religious texts or divine authority for their legitimacy and force. At the same time, the state must sometimes reject more specific beliefs about moral rights and duties, even when they are widely held, because they are inconsistent with more general widely-held moral principles. That is what I suggested above must be done in defining the respective rights of children and parents. The more general principle that no person should be made the object of another's rights, a principle that we today apply even to non-autonomous persons who are adults, I have argued, should be applied also to children. At the most basic level, the state and private parties should treat every person as an end in himself or herself, and not as an instrument for the expression or gratification of others, no matter how well intentioned those others are.

Thus, even if one assumes that parents' possession of, and obligations with respect to, children make child rearing distinguishable from all other situations, the argument for parents' rights based on parents' legal and moral obligations fails. But these facts actually do not distinguish child rearing from every other context considered above, because incompetent adults can also be in the possession and care of others, including their legal parents. Yet, as noted, in that context we have collectively rejected the idea that persons cared for should be



viewed and treated as objects of others' rights. We view incompetent adults themselves as rights holders in connection with their care and the course of their lives, and we view their caretakers as fiduciaries.

Parents' rights thus cannot be defended as necessary to protect the interests of children. Arguments for parents' rights based on interests of persons other than the children also fail. Parents' own interests are insufficient, just as the interests anyone might have in dictating the life of other persons who are not their children, no matter how strong those interests, do not justify assigning them other-determining rights. I might believe that I have as great an interest in dictating the course of my elderly parents' life or the life of my neighbor's children or the actions of pregnant women as I have in directing the lives of my daughters. Yet a claim for a right based on those interests would be a non-starter in our legal and moral culture today, no matter how much I have given to or sacrificed for the person whose life I wish to control. To make others objects of my rights in order to serve my interests would be clearly to treat them instrumentally, contrary to the respect they are owed as persons. The same is true of arguments based on supposed societal interests such as diversity. For the state to act to sacrifice what it views as the welfare of individual children in order to serve such corporate interests would also treat the children instrumentally and therefore morally inappropriately. We competent adults would surely be offended if someone suggested giving others a right of control over *our* lives in order to serve such societal aims, even if the right would arise only if and when we became unable to direct our own lives.<sup>39</sup>

In sum, defenders of parental entitlement, as distinguished from a parental privilege to exercise authority for the furtherance of children's welfare and rights, need to supply a plausible argument for such an entitlement that would not, if its premises were generalized, also justify giving some persons an entitlement to control the lives of others who are not their children. The things people ordinarily think of as justifying parental rights—children's dependency, parents' sacrifices and sense of responsibility, and the value of diversity—would apply

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<sup>39</sup> I also reject the empirical claim that entitling parents to choose illiberal schools for their children is conducive to diversity. See DWYER, *supra* note 3, at 97–99.

equally to some other categories of persons with respect to whom we have rejected the idea that others are entitled to direct their lives. The closest analogy is to incompetent adults, as to whom we have adopted a fiduciary, rather than an ownership or entitlement, model of care giving.

There is still the very large question of what content the state should give to children's rights. Many parents might accept the idea that child rearing should be about their children's interests and rights, not their own, and might accept that they should think less about what is owed to them—which would be the corollary of *their* having rights—and more about what they owe to their children. Yet they might insist that they are in the best position to identify their children's interests and so to give content to their children's rights. They know their children intimately, and they love their children like no one else does. The state, on the other hand, is a stranger to their children. How can it be consistent with a concern for children to give an impersonal stranger a substantial role in shaping their lives?

I addressed this question to some extent above, in discussing children's spiritual interests. Here I will elaborate further on that issue and address some others as well. There are several points to be made in response to the "parents know best" line of reasoning. First, as noted above, no one seriously maintains that the state should not set the parameters of parental freedom. This is in part because everyone knows that not all parents love their children enough to refrain from acting in ways that the parents themselves know is harmful to the children.

Second, the claim that parents know their children best is overstated. It is true that most parents are more familiar with the individual personalities of their children and with the past events of their children's lives than is anyone else. But many aspects of children's welfare are generic or nearly so—that is, certain things are true of all or most children. Thus, knowledge of those aspects of children's well-being does not depend on intimacy. In fact, many generic aspects of children's lives are known only by people who have devoted an extraordinary amount of time, even their entire careers, to learning about them. This is true of much of children's development and health. It would be a rare parent indeed who was not only an expert with respect to her children's personalities and histories, but also with respect to developmental psychology, educational theory,

medicine, and nutrition. With respect to each major area of children's lives, it seems safe to say that the vast majority of parents know quite little. Very few parents know as much about how to educate children as do professional educators, and most parents implicitly recognize this by seeking schools for their children that employ well-trained and credentialed teachers. Very few parents know as much about health care as do doctors. The state has agencies that employ and draw information from people whose careers are devoted to studying children's welfare, including their cognitive development, and it is largely for that reason that we repose some trust in state agencies to establish minimum requirements for care and treatment of children.

Third, what is typically at stake in religiously-charged controversies over child rearing is not parental love or parental knowledge; rather, it is ideology and a clash of religious and secular values. Reference to parental love and knowledge is impertinent in these situations. The state's objection to certain illiberal practices is not that it believes that the parents do not love their children, nor that the parents are ignorant; it is that those practices are harmful to the children from a secular perspective and that the parents are not entitled to say that their religious perspective must control. If one accepts the explanation above as to why the very idea of parents' rights is misguided, one must, in order to defend the claim that the parents' religious perspective must control, explain why *children* have a right to that outcome. The state's position might be understood to assert that children have a right to protection of their secular interests until they become adults capable of deciding for themselves what religious beliefs, if any, they will hold, and what role any such beliefs will play in their lives, including whether they will sacrifice what is generally believed to be in their secular interests for the sake of religious duty or spiritual aspiration. Those who reject this position need to construct an argument to the effect that children have a right to have their secular interests sacrificed for the sake of what their parents believe to be required by religious command. And that argument needs to be one the state can accept and would find convincing, for as noted above, what religious objectors to state regulation of child rearing are demanding is not state inaction, but rather state action of a particular sort—namely, a state conferral on them of more extensive power over children's lives. I am not aware that

anyone has ever attempted to construct such an argument, and I very much doubt that it can successfully be done.

One way to think about the content of children's rights that I find helpful is to imagine what rules I would want to apply to my situation if I were told that tomorrow I would be born again, in the temporal sense that I would start all over in my human life as a newborn child, and if I did not know anything else about my individual circumstances—in particular, not knowing who among the vast number of potential parents in our society would become my legal parents. The parents I will have could be people belonging to any one of the tremendous variety of religious denominations in America, people who have a very individualized set of religious beliefs, people who have no religious beliefs, or people who are atheistic. They could be Satanists or sun-worshippers, people who believe that one should eat nothing but lettuce, or people who believe children grow spiritually through sexual intercourse with adults. In light of the enormous variety of possibilities, how would I want the state to go about deciding what the limits of parental power and freedom should be in the world I am about to reenter?

I believe this thought experiment would lead to a conclusion that the state should rely on widely shared secular views of children's welfare or interests, but not on any particular religious beliefs *per se*. Unless one ascribes to a view that every child just has whatever interests are specified by the conception of the good of his or her parents, or that all efforts to identify interests of children are futile, one would want to guard against the possibility that the parents to whom one is assigned have beliefs inconsistent with one's interests. Everyone involved in these debates concedes this possibility when thinking about religious practices that seriously threaten children's health or safety, but without explanation, some refuse to acknowledge that the same possibility exists with respect to children's schooling. I believe that anyone reading this essay who thinks seriously about the prospect of reentering the world and being assigned to parents of unknown ideological outlook—parents whose beliefs could diverge widely not only from secular views about children's welfare but also from any religious beliefs the reader now holds—will come to endorse a legal regime in which the state adopts the prevailing secular views concerning children's temporal welfare

and imposes on all parents restrictions on their child-rearing choices that reflect such views.<sup>40</sup>

That thought experiment is designed to model the reality of every newborn child today, to facilitate our putting ourselves in the place of each person who is actually entering the world now. It encourages us to see each newborn child as a morally distinct and equal person and to recognize the great hazard the state creates for children now by assigning them to parents adhering to any one of a vast variety of conceptions of the good without constraining in a significant way parental choices regarding children's intellectual, psychological, and emotional development. Another useful thought experiment might be to imagine that your own children, or your own nephews and nieces are, for some reason—for example, a family tragedy—randomly reassigned to another set of parents in our society—for example, through the adoption process. How comfortable would you be with the thought that they could be assigned to fundamentalist Muslims, fundamentalist Christians, parents in a cult like the Branch Davidians, members of the Ku Klux Klan, or parents adhering to any other lifestyle and ideological view? Would you not want the state to impose some restrictions and requirements with respect to their upbringing, including the kind of education they receive, to at least ensure that they will develop the capacity to question the beliefs their parents instill in them and perhaps also to ensure that they are prepared—even if they are girls—to pursue whatever careers are well suited to their native talents and abilities and self-chosen values?

I will close by reiterating that ensuring every child a liberal education would not amount to standardizing children. Those adults who attended public schools ought to resent the frequent suggestion that state influence on education results in children being standardized, their individuality expunged. In addition, in and of itself, imposing certain requirements on private schools has no implications for children's home life or for the freedom of parents to teach and model their beliefs and values. Again, the experience of the 90 percent of adults in this country who attended public schools is telling; the vast majority describe

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<sup>40</sup> I develop this line of reasoning, which was inspired by John Rawls's idea of deciding on basic principles for a society behind a hypothetical veil of ignorance as to one's individual characteristics, more fully in chapter 6 of *Religious Schools v. Children's Rights*. See DWYER, *supra* note 3, at 148–77.

themselves as religious, and I have never heard of any who complained that they were deprived of the opportunity to have a religious upbringing insulated from liberal ideas and secular views and values. In fact, Catholic parents are increasingly comfortable sending their children to public schools, believing that their children can still have a Catholic upbringing, can still learn the tenets of the Catholic faith, and can still live their lives as Catholics, because these parents recognize that they still control most of their children's daily lives and still have the opportunity to spend a great amount of time instructing their children and modeling their beliefs. I have argued simply that no parent is entitled to complete control over children's intellectual development and that children cannot plausibly be said to have a right that their parents have such complete control. Rather, every child has a moral right that at least this one limited aspect of their lives—their schooling—be governed by liberal principles whether or not their parents accept those principles.

I am not aware of any religion whose basic precepts are inherently opposed to this position. I would be very interested to see a theological analysis within the religious traditions addressed by the other contributors or any other tradition of what adherents should believe about the respective authority of parents and the rest of society, as represented by the state, over child rearing, and of what specific restrictions the state ought to impose on parental freedom, if they accepted certain of the assumptions and conclusions relied on above—for example, that children are neither property nor appendages of their parents, that children's separate personhood gives rise to some moral obligations both on the part of parents and on the part of the state, that some parents manifest little love for their children, that most parents are not experts regarding many aspects of child rearing, that the state cannot be expected to adopt any parent's religious beliefs or assume that such beliefs are true, and that the beliefs parents in our society have about what God commands and about the spiritual interests of their children are infinitely varied and in some cases directly contrary to empirically supported secular views about children's welfare. It is not obvious to me, based on my limited understanding of various faiths, that such an analysis would necessarily lead in many instances to conclusions much different from my own.

