

NATURE AND NURTURE: LIMITING THE RIGHTS OF PARENTS IN GENETIC ENHANCEMENT

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ABSTRACT: This article examines the rights of parents over the bodily integrity of their children. It begins with a short analysis of some of the new scientific and medical possibilities with regard to genetic manipulation and other enhancement practices. Commercialization, the main vehicle through which much of the public will encounter these new possibilities, is also explored. Finally, the authority of parents in this area is examined, including Supreme Court law as well as recent efforts in legal and political theory to envisage the parent-child relationship as one based on fiduciary models as opposed to hierarchical models.

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In the fall of 2011, the national news media picked up on a story coming out of California that captures some of the new ground being broken in an old debate. Pauline Moreno and Debra Lobel are a lesbian couple raising an eleven-year-old boy named Tommy. Since the age of three, Tommy has indicated to his parents that he wants to be a girl. Moreno and Lobel originally believed this was just a case of mild confusion, but Tommy was so insistent that when he came of age, they began giving him hormone blockers to delay the onset of puberty to allow him time to explore his gender identity and make a choice as to how he would live. Tommy, called Tammy, will remain in a prepubescent state until the age of fourteen or fifteen when Moreno and Lobel think he is more prepared to make the decisions ahead in terms of gender identity. Hormone therapy is a recognized part of gender transition protocols, but given the patient's age, this case attracted significant attention and criticism even among proponents of gender reassignment.

The factors of this particular case can seem overwhelming. Pundits commented on everything from the general public's confusion over gender reassignment to the appropriateness of gay marriage and parenting. There are also medical uncertainties here about the side-effects and long-term risks that may be associated with hormone blockers being given to an adolescent. These are surely pressing issues, but of particular interest here is the question of authority. Who has the right to make these decisions for a minor patient? The judgment of parents is clearly an important aspect of the story, but what is their relationship to the medical

professionals that actually carry out the necessary procedures? What about the child; how much emphasis should be given to his concerns? Even the number of participants in the conversation is a matter of dispute: ethicists, doctors, patients, mental health professionals, interest groups, legislators, and the parents themselves, all have not only an interest but in some cases a responsibility to be part of this and similar discussions.

I. NEW POSSIBILITIES

Even when the case is not quite so inflammatory, the issues here are layered and controversial. While each generation faces new medical possibilities, the twenty-first century is likely to see an increase in both the number and the sheer scope of what is possible. Revolutions in biotechnology and gene therapy point promisingly towards new breakthroughs, not just in the therapeutic treatment of disease and injury but in enhancing our cognitive and physical abilities beyond what we now perceive as "normal limits." Indeed, they may cause us to altogether redefine "normal."¹

Consider the case of human growth hormone (HGH). The pituitary gland at the base of the brain controls the natural production and secretion of growth hormone. Individuals with pituitary deficiencies may be at increased risk for certain kinds of dwarfism

1 MAXWELL MEHLMAN, *WONDERGENES: GENETIC ENHANCEMENT AND THE FUTURE OF SOCIETY* (2003) (Mehlman identifies a number of "revolutions" in various fields that together open new horizons for medical treatments. These include breakthroughs in gleaning genetic information from DNA samples to new therapeutic possibilities through drug production based on recombinant DNA. Mehlman also discusses behavioral genetics, that is, the possibility of changing people's behavior by altering their genetic makeup.).

or other stature-related conditions. Other conditions associated with HGH deficiency include certain congenital malformations or delayed sexual maturity. In the late 1960s, Berkeley biochemist Choh Li unlocked the amino acids that make up growth hormone and successfully synthesized it in 1970. Synthesized human growth hormone, or somatropin, can be injected into individuals with naturally occurring growth hormone deficiencies to treat a variety of conditions, a therapeutic practice approved for children by the U.S. Food and Drug Administration in 1985.² It is not just children with documented conditions that can benefit from a growth hormone regimen. Children with no diagnosable condition can also use HGH to increase their height, but even kids whose stature may fall perfectly within the normal range can use HGH to gain those desired inches. The same is true for young athletes who may already be taller than many of their peers. With the easy availability of HGH online, parents who want their children to have whatever advantage they can for whatever reason they deem appropriate have access to the potential benefits of HGH.³

Though various guidelines exist to protect against the misuse

2 HGH is also used to treat adults for various conditions including Short Bowel Syndrome and AIDS Wasting. It is also used by athletes and bodybuilders to increase muscle mass and performance, though that practice is not sanctioned by the FDA. As such, numerous websites offer to sell HGH without a prescription. In 2007 actor Sylvester Stallone was arrested in Australia for smuggling in nearly 50 vials of HGH, which he subsequently and defiantly admitted using to prepare for one of his recent action films. These uses of HGH are not under direct consideration here.

3 There are guidelines in place for who can be prescribed HGH for stature-related issues. Children with diagnosed conditions such as Turner syndrome or Prader-Willi syndrome are approved candidates, as are children who are more than two standard-deviations below the average for their age and sex.

of somotropin and similar treatments, studies suggest that as much as 30% of growth hormone prescriptions in the United States are for uses not approved by the FDA. HGH is popular among bodybuilders and athletes for its ability to increase muscle mass, and its reputation as an anti-aging wonder is well documented. Online testimonials credit it with everything from tightening the skin to promoting better sleep, from increasing mental clarity to improving vision. There are even pyramid schemes in which one enrolls as a promoter of HGH and receives commissions from the producer for any recommendation that results in a purchase. Anecdotal evidence aside, there are documented benefits to an HGH regimen, but studies also show that the benefits may be only temporary. Additionally, there are known adverse effects associated with HGH, including increased risks of carpal tunnel syndrome, diabetes, and even cancer for some long-term users.⁴

Adults seeking to combat the effects of aging are perhaps the main target audience of those that promote off-label use of HGH, but they are not the only potential source of revenue. In 2007 the Public Broadcasting System's Religion and Ethics Newsweekly reported the case of Mitchell Greenwood, a then twelve-year-old boy who took daily injections of HGH to add a couple of inches to his projected height. Mitchell's parents are both shorter than average (neither was over five foot four inches tall), and Mitch-

4 Thomas Perls, Neal Reisman & S. Jay Olshansky, *Provision or Distribution of Growth Hormone for Anti-Aging: Clinical and Legal Issues*, 294 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 2086 (2005). See also S.J. Olshansky & T. Perls, *New Developments in the Illegal Provision of Growth Hormone for "Anti-Aging" and Bodybuilding*, 299 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 2792 (2008).

ell's doctor had suggested that without treatment, Mitchell may not have exceeded five feet one inch. Mitchell's HGH regimen may add one or two inches to his height, but is unlikely to do more than that. It will certainly not make him above average height, and thus, given the expense and at least some measure of increased risk, the Greenwoods' decision may be difficult for some to understand. In explaining their course of action, Mitchell's mom opined that most parents will always do what they can to give their children every chance for success and happiness.⁵

This tendency of parents to seek a benefit for their child is at the heart of Harvard political theorist Michael Sandel's concerns about an enhancement arms race as parents give in to the temptation to go off label in an effort to give their children a competitive advantage. If and when medical science permits anxious parents to increase their children's height, muscle mass, or intellectual aptitude through genetic manipulation, what is to prevent them from

5 Unfortunately, the Greenwoods' concerns are not without foundation. In a consumer-oriented, image-conscious society like ours the psychological and social wellbeing of children, to say nothing of their opportunities for material success, are surely impacted by characteristics such as height. Studies show benefits associated with increased height range from subjective measures such as increased enjoyment of life and happiness, and also related to objective measures such as higher incomes. There are numerous variables at play in the relationship between height and economic success, but one should not too quickly dismiss increased self-esteem and less risk of discrimination faced by taller individuals. These are exactly the sort of factors that families such as the Greenwoods take into account in making their decisions. See Anne Case & Christina Paxson, *Height, Health, and Cognitive Function at Older Ages*, 98:2 AMERICAN ECONOMIC REVIEW PAPERS AND PROCEEDINGS 463 (2008). See also Angus Deaton & Raksha Arora, *Life at the Top: The Benefits of Height* (National Bureau of Economic Research, Working Paper Series No. 15090, 2009).

making sure their children have just a bit more of the desirable characteristics than their neighbors' children? But if the neighbors' children are themselves enhanced, then we set in motion a potentially never-ending race to the top of the genetic pyramid. While many Americans would favor the use of something like HGH to help individuals on a therapeutic level, when these treatments are used to enhance otherwise "normal" individuals, the consensus breaks down. Discussing a number of concerns for this and other forms of genetic enhancement, Sandel warns that the quest for mastery over the genetic lottery that up to now has been an unavoidable aspect of parenthood may place nearly impossible burdens on parents. Additionally, while all parents hope the best for their children before and after they are born, there is, in having children, an openness to the vagaries of chance. Indeed, the norm of unconditional parental love is in part a response to the fact that our children may not always be what we want them to be. The expectations surrounding genetic enhancement may undermine that norm if the child is not all the geneticist promised, leaving parents to grapple with a new level of frustration and disappointment.⁶ Some children may have to live with the realization that their parents are disappointed in them at the most fundamental level, that of their genes. Or consider the plight of the adolescent whose parents gave her every athletically-oriented enhancement available but simply does not enjoy competitive sports. While these dynamics are part of family life in the status quo, genetic

6 MICHAEL SANDEL, *THE CASE AGAINST PERFECTION: ETHICS IN THE AGE OF GENETIC ENGINEERING* (2007).

enhancement may lead them into uncharted territory in the relationship between parents and their children.

There is another dimension to the kind of treatments Sandel has in mind as well. In January of 2009, doctors in London delivered the first “cancer-free” baby known to be born in Britain. Nine months earlier an embryo had been screened for the BRCA-1 gene, known to be linked to breast and ovarian cancer. The Medical Director of the Assisted Conception Unit, Dr. Paul Serhal, perhaps inadvertently gave rise to a set of policy considerations that have yet to be fully understood, much less explored: “The parents will have been spared the risk of *inflicting* [emphasis mine] this disease on their daughter. The lasting legacy is the eradication of the transmission of this form of cancer that has blighted these families for generations.”⁷ By this reasoning, parents who could have screened and treated an embryo to avoid an illness but did not do so for whatever reason have “inflicted” a disease on their children. Child abuse is currently defined as “an act, or failure to act, on the part of parent or caretaker that results in the death, serious physical or emotional harm, sexual abuse, or exploitation of a child, or which places the child in an imminent risk of serious harm.”⁸ Experimenting with untested or unproven genetic enhancement at the potential expense of the well-being of the child/subject would surely qualify as a form of abuse. But with the line between enhancement and therapy less clear than

7 *Cancer Free Baby Born in London*, CNNHEALTH (Jan. 9, 2009), http://articles.cnn.com/2009-01-09/health/uk.cancerfree.baby_1_cancer-gene-brca-1-testing-embryos?_s=PM:HEALTH (last visited Jan. 26, 2012).

8 42 U.S.C.A. § 5106g (West 2010).

ever before, one can imagine a situation in which failure to intervene could be considered a potential form of child abuse. The law already defines withholding medical treatment from children as potentially criminal. Normally associated with things like refusing blood transfusions for religious reasons,⁹ the “withholding of medically indicated treatment” addresses the “failure to respond to the infant’s life-threatening conditions by providing treatment (including appropriate nutrition, hydration, and medication) which, in the treating physician’s or physicians’ reasonable medical judgment, will be most likely to be effective in ameliorating or correcting all such conditions.”¹⁰

Other policy implications are equally murky. Could insurance companies refuse to pay for treatment if a given condition could have been avoided through various means (up to and including abortion)? Could medical professionals intervene over the wishes of parents if, in their reasonable medical judgment, they deemed it in the best interest of the child in terms of social advantages and competitive wellbeing, even if the child’s life is not under threat? As happens in this field, our technology may be moving faster than our moral, legal, and political reasoning.

Another set of concerns is raised by biomedical ethicist, legal expert, and policy advisor Maxwell Mehlman. Taking it for granted that various kinds of enhancements will be available in the relatively near future, Mehlman focuses on how the advan-

9 On religious liberty and medical treatment, *see* Courtney Campbell, *Religious Liberty and Authority in Biomedical Ethics*, in *CHURCH-STATE ISSUES IN AMERICAN TODAY* 247-77 (Ann Duncan & Steven Jones eds., 2008).

10 42 U.S.C.A. § 5106g, *supra* note 8.

tages of enhancement will be distributed in a society with notable inequality. Free-market approaches run the risk of creating or at least reinforcing an actual genetic basis for inequality, and should provoke dialogue in a society concerned with equal opportunity.¹¹ Outright bans are also problematic in light of the difficulties associated with preventing those with means from either obtaining enhancements on the black market or traveling to parts of the world where the enhancement market is less regulated. Mehlman finds merit in licensing enhancements before they are made available to individuals, thus bringing into existence some sort of review board that could require a "socially beneficial" purpose before granting a license. The full scope of this board is left open in Mehlman's analysis, as is any real discussion of what may constitute a socially beneficial purpose.

Government-funded distribution would likely be way too expensive to be palatable to taxpayers, but even if the government were to control enhancement distribution, Mehlman sees more problems on the horizon. Practices that offer whatever enhancements are necessary to satisfy individual citizen's wants or perceived needs, so-called welfare egalitarian approaches would result in very unequal distribution with some people wanting more and more, while others, content with less, foot the bill. Resource egalitarians, those who favor equal distribution regardless of one's starting position, still result in inequality in terms of

11 It is worth noting here that those societies that promoted the idea that some members were genetically superior to others are among some of the most reviled of the contemporary period, from World-War-Two-era Germany to Apartheid to the Jim Crow South.

outcome. Even John Rawls' veil of ignorance in which goods such as enhancements are distributed without knowledge of the identity or even the social location of the eventual recipient does not satisfy the concerns of equality. Given that we may be talking about inheritable increased physical or mental capacity, the possibilities for expanding social inequality are considerable.

II. COMMODITIZED GENES

Even while the various ethical and social considerations are debated, the science moves ahead. Every month it seems as if new discoveries are made in terms of what genes are responsible for what characteristics or conditions. Increasingly, we are learning how to manipulate genes as well, turning them "on" or "off" so as to better control our own genetic future and that of our offspring. The commercial implications of all of this have not gone unnoticed. Numerous companies already advertise their laboratory's ability to test potential parents for the likelihood that their children may inherit certain genetic conditions. For instance, 23andMe offers its clients the opportunity to test their own genetic material to find out their carrier status for more than forty inheritable conditions, including Cystic Fibrosis, Tay-Sachs, and Sickle Cell Anemia. Starter kits are priced as low as \$99, but can be bundled with other services such as a year-long subscription to their Personal Genome Service for just over \$200. Their website is complete with testimonials from grateful customers and video tutorials. Other companies do not offer direct-to-the-consumer services (their services must be ordered by a physician or genetic

counselor), but still advertise their ability to test for hundreds of disorders.¹²

Counsyl, a California start-up, has gone further, claiming that their efforts can help eradicate various diseases by weeding them out of the gene pool. Their website informs potential clients of the “new medical consensus” that all adults of reproductive age should seek genetic counseling before starting a family and warns readers that they may unknowingly be carriers of genetic conditions that could affect their children. Clients are also informed that with testing, they can “prevent” diseases such as Spinal Muscular Atrophy through the use of pre-implantation genetic diagnosis done in conjunction with in vitro fertilization. Counsyl’s Universal Genetic Test offers clients the opportunity to prevent diseases that, they assure you, cannot be cured. Their mission is “to scale up the Jewish community’s successful campaign of universal carrier screening for Tay-Sachs by expanding coverage and accessibility.” To this end, Counsyl’s value statement affirms that “[they] believe that genetic counseling is a human right, not a luxury...[that] children deserve healthy lives, free from genetic disease...[and in] universal access, especially for those most in need.”¹³ Counsyl markets their tests to both doctors who join their network, and to individuals who can, through their website, find a participating physician or encourage their own doctor to join Counsyl’s team. Characterizing their efforts as a campaign against inheritable diseases, the website explains:

12 See 23ANDME, www.23andme.com (last visited on Mar. 1, 2012).

13 See CONSYL, www.counsly.com, (last visited on Feb. 27, 2012).

The organization was founded by social entrepreneurs and philanthropists with the audacious belief that every child deserves a chance in life. It is something new, born of the realization that cutting-edge science and market forces can actually *increase* equality and promote social justice. It is a cause, a campaign to finally end the needless suffering of preventable genetic disease. And most of all, it is you. Call us idealistic, but we believe that everyone loves their children and will do the right thing when it comes to safeguarding their future.¹⁴

III. PARENTAL AUTHORITY

All of this has the potential to change the terrain of the old nature-nurture debate. In trying to determine why people do what they do, the old, probably over-simplified answers stressed either one's biology or the environment in which one was raised. The assumptions behind whole academic disciplines sometimes tilt toward one explanation or the other. Sociology, for instance, might stress the nurture side of the equation, while biology may especially emphasize nature. Even as the whole binary structure of this debate gives way to far more nuanced positions, medical science may be undermining the old logic. Nature, it was widely assumed, was more fixed than nurture. Everyone recognized that social environments, the nurture side, could vary across time and space. Indeed, that was part of its explanatory power. Social norms and values vary from society to society, and thus, people behave differently. But now nature itself is at least potentially malleable.

14 *Id.*

Gender, for example, may be a social construction that varies with time and place, but now sex itself, as a biological characteristic, is subject to change. This may have profound implications for how we think about a number of issues, not least of all the relationship between children's rights, parental authority, and the law.

With reference to the control over the environment in which children are raised, there exists a broadly recognized and affirmed set of cultural and legal assumptions that give considerable discretion to parents. Justice O'Connor clearly stated as much in *Troxel v. Granville*, a case affirming the authority of parents to regulate the visitation rights of grandparents: "The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."¹⁵ She went on to cite some 75 years of precedent upholding not just the rights of individual parents but the foundational assumptions in which they are rooted. The broad range of issues covered in her narrative is instructive in that it shows how consistently parental prerogatives have been recognized and upheld. O'Connor cited two cases from the 1920s, *Meyer v. Nebraska* and *Pierce v. Society of Sisters*.¹⁶ The right of parents to establish and maintain a home in which they directed the upbringing of their own children was recognized in *Meyer*, while *Pierce*, in overturning Oregon's law requiring all students to attend public schools, stated clearly that "the child is not the mere creature of the state; those who nurture him and direct his destiny

15 *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

16 *Meyer v. Nebraska*, 262 U.S. 390 (1923).

have the right coupled with the high duty to recognize and prepare him for additional obligations."¹⁷

American jurisprudence is not alone in this recognition of parental prerogatives. The Universal Declaration of Human Rights, adopted by the United Nations in 1948, established education as part of the "inherent dignity and inalienable rights of all members of the human family" and one of the means through which freedom, as the "highest aspiration of the common people" will be achieved. Article 26 declares:

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.¹⁸

17 *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1926).

18 *See* United Nations Declaration of Human Rights, <http://www.un.org/en/>

Though the Declaration is without ambiguity, the practice of education by member states has a far murkier past. The third paragraph, establishing the “prior right” of parents to direct what sort of education their children receive has been especially problematic, even in the enlightened and rights-conscious West.

The Court has also upheld parental prerogatives in areas other than education. O’Connor cited the Court’s confirmation of the Constitutional dimension to parental rights in *Prince v. Massachusetts*, a 1944 case that recognized the rights of parents even as it upheld a Massachusetts law restricting the abilities of children to distribute religious literature in public spaces. Parental control over the medical treatment of children also has a long history in American jurisprudence. For most of American history it was all but a non-issue. Of course, parents were the primary decision-makers for their children, at least in terms of consent, if not for the efficacy of treatment options. As early as 1912 a state court in Pennsylvania ruled that parents could refuse their consent for a surgical procedure aimed at remedying the effects of rickets on the legs of a seven-year-old boy, Tony Tuttendario. The Society for the Prevention of Cruelty to Children sought permission in the courts to have Tony’s care entrusted to them so that his parents’ objections would be rendered moot. The Pennsylvania court ruled against the Society’s request, stating that the uncertain prognosis for the surgery coupled with their respect for the natural love found between parents and children required a rejection of the

"Spartan rule" that children belonged to the state.¹⁹ Later courts, under different circumstances, found that the rights of parents could be limited if the wellbeing of the child was threatened by parental action, or in some cases, inaction. The well-known cases of Jehovah Witnesses parents who refuse blood transfusions for their children, a position they take from their reading of scripture, confirm that the rights of parents to control the medical care of children are not absolute, even when foundational issues such as religious freedom are at stake.²⁰

Parham v. J.R. More approached the ground under discussion here in that it dealt with the rights of parents in the medical care of their children. In *Parham*, the Supreme Court upheld the rights of parents when it comes to determining some aspects of their children's medical care, and reaffirmed the basic supposition that parents would act in the best interests of their children.²¹ These cases, and others cited by O'Connor, establish an "extensive precedent," making it clear that "the Due Process clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."²² Of course, there have been exceptions to the reasoning O'Connor found so prevalent in the Court's history. Justice Stevens' dissent in *Troxel* recognizes that parental liberties might, in some cases, not serve the best interests of their children. In his

19 Walter Wadlington, *Medical Decision Making for and by Children: Tensions Between Parent, State and Child*, 1994 U. ILL. L. REV. 311 (1994).

20 *Prince v. Massachusetts*, 321 U.S. 158 (1944).

21 *Parham v. J.R.*, 442 U.S. 584 (1979).

22 *Granville*, 528 U.S. at 66.

view the Court had “never held that the parent’s liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a threshold finding of harm.”²³ Justice Douglas’ dissent in the 1972 *Yoder* case is also interesting. He argued that self-determination rights of “mature minors” should be constitutionally protected when they come into conflict with the rights of parents, and though the specific context of his dissent focused on education (nurture), the issues he raised have implications well beyond schooling. A number of academic fields have, over the past several decades, come to see children’s input, and perhaps consent, as critical to legitimate decisions regarding their welfare. As a general principle children are still subject to the legal authority of various adults (parents or various agents of the state), but increasingly legal and political theorists, as well as child development experts from various fields, have held that children should be more involved in decision-making regarding their welfare, a move that may have inverse implications for the rights of parents.

Advances in modern medicine like those described earlier in this essay have made these issues even more difficult. We now have the ability to shape children through surgical and/or medicinal treatments that would scarcely have been imaginable to earlier generations. Indeed, a mid-century study of the connections between law, public policy, and public opinion as they related to parental authority asked only one question about medical care,

23 *Id.* at 86 (Stevens, J., dissenting).

focusing instead on issues related to child labor and education.²⁴ Now, with so many heretofore-unimagined capabilities in front of us, there are more questions than answers. How then should we think about the rights of parents in these contexts?

Historically, most models of the family have been based on a clear hierarchy with the rights and autonomy of parents clearly trumping those of the child. The zone of autonomy and privacy that surrounded family was a recognized social space, and though the state could intervene into this space, the justifications of such intervention had to be compelling indeed. Today the recognition of parental authority is still the norm, though I believe that advances in medical science raise troubling questions about limitations on parental authority. In her discussion of the United States Supreme Court's decision in *Parham*, Alicia Ouellette noted that though this is usually recognized as a case endorsing parents' rights, the Court also recognized that the rights of parents are not necessarily coterminous with those of children, a recognition that helped lay the groundwork for a legal revolution in our thinking about how to evaluate the best interests of children. She advances the "non-subordination principle" to address the restrictions on one person's liberty required to recognize and protect the liberty of another.²⁵

The exact parameters of this or similar principles are the

24 JULIUS COHEN, REGINALD ROBSON & ALAN BATES, *PARENTAL AUTHORITY; THE COMMUNITY AND THE LAW* (1958) (Interestingly, the study found that the public was quite willing to put aside the rights of parents if the well-being of the child was at stake, but the question itself was formulated in such a way as to make that the obvious response.).

25 Alicia Ouellette, *Shaping Parental Authority over Children's Bodies*, 85 *IND. L.J.* 955 (2010).

subject of many a political theory class, but applying it to the parent-child relationship is particularly difficult given the responsibilities of parents to raise their children. Every decision made by parents can be understood as affecting the future of the child, and in that sense may limit their ability to make free and unfettered decisions when they reach the age of legal adulthood. Recent debates over the proposed ban on circumcision in San Francisco revolved around just these claims. Circumcision is often carried out before infant males even leave the hospital, obviously well before any sort of consent from the child could even be discussed, much less made determinative. Once done, the procedure does render future deliberation by the child on this permanent issue of bodily integrity moot. Accordingly, critics of the procedure held that the interests of the child were being subjugated to the rights or norms of parental authority.

Ouellette holds that the non-subordination principle "should be embedded in legal models for evaluating the scope of parental power,"²⁶ explicitly challenging the hierarchical model of decision-making in which the concerns of parents are paramount. Such approaches are part of a larger shift in family law towards recognizing children as full partners in family life with interests of their own.²⁷ Going further, Ouellette identifies several models of the family that she believes may be helpful in that they recognize the child as a complete individual within a functioning social unit in a way that approaches focusing on parental rights do not.

26 *Id.* at 985.

27 MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989).

These models, many of which hold that parenthood may be understood as a form of trust in which the best interests of the child at some future date (when they have reached the age of majority, for instance), often protect autonomy interests for the child above particular interests of the parents. Thus, parental decision-making that would limit the future autonomy of the child should be carefully considered, even regulated, by the state out of respect for the child's interests later on. In her work, this includes so-called shaping cases in which children are subjected to often invasive medical procedures to fit parental desires or expectations. The use of human growth hormone is a case in point.

IV. CONCLUDING REMARKS

With Ouellette I would limit the ability of parents to physically shape their children's bodies and genetic inheritance more broadly, but her reasoning does not support the family policy goals I want to recommend. Limiting the rights of parents in the nature sphere, which Ouellette and I both advocate, could be prologue to further restrictions on parents in the nurture sphere. Parental prerogatives in education, for instance, or religious training, could be undermined if parents are restricted from making decisions for their children that might limit the child's ability to choose for themselves later on, one of the guiding principles of those family models that treat parenthood as a trust.²⁸ Protecting the future

28 Some political, educational, and legal theorists have already moved in this direction when it comes to religious schooling. For discussion, see STEVEN JONES, *RELIGIOUS SCHOOLING IN AMERICA: PRIVATE EDUCATION AND PUBLIC LIFE* (2008).

autonomy of children is a worthy goal, but it should not trump the prerogatives, and duties, of parents to raise their children in accordance with deeply held religious, philosophical, and political convictions. At the bottom of Ouellette's position is an understanding of individual personhood rooted in, and pointed towards, the fully autonomous individual. Actions that limit the future autonomy of the child, in these cases the right to control one's own body, are violations of this goal.

While some of her analysis is compelling, there is reason to be concerned about what these models would do to undermine the private social space that surrounds the natural family and more particularly the rights of parents to raise their children in accordance with deeply held religious and philosophical convictions. This private social space cannot be absolutely inviolable, but policy preferences that favor familial structures with a proven track record of rooting children in the communities and norms that most contribute to their well-being should not be too quickly discarded.

Social science evidence confirms that people benefit from attachments to authoritative communities, including families, that help pass on spiritual, philosophical, and moral precepts. These communities are critical to human wellbeing and thus policies that even inadvertently weaken these communities and institutions may undermine the full potential for human thriving. Legal and philosophical understandings of the family that lean towards the emancipation of children from their parents, or that see the sort of thick ties parents often try to foster between their children, and say, religious communities, as potential limitations on

an individual's future autonomy, need to be checked against an impressive body of research from the social and behavioral sciences. There is an emerging consensus that children do better on a host of indicators ranging from school performance to avoidance of drugs and delinquency when they have strong attachments to *primordial institutions* such as the family and the church. While models of the family that protect the future autonomy of children are not necessarily antagonistic to such institutions, it is also true that such models are a relatively untested experiment, the social costs of which could be quite high.²⁹

This short essay has raised more questions than it has answered, but I hope it will serve as a catalyst for further discussion of the sort of policy considerations that will need to be addressed as our society moves forward with genetic enhancement. If it also promotes dialogue between legal theorists, policy makers, and social scientists about the intersection of their respective domains, then so much the better.

29 See, e.g., *Hardwired to Connect: The New Scientific Case for Authoritative Communities* (2003). This report was a joint effort of the Institute for American Values, Dartmouth Medical School, and the YMCA of the United States that reviewed both medical science, especially neuroscience, and the social sciences to identify a new scholarly consensus around the benefits of strong attachments between individuals and communities.

