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Who Made the State the Ultimate Parent? by Sheldon Richman

When an opponent declares, "I will not come over to your side," I calmly say, "Your child belongs to us already."

— Adolf Hitler [November 6, 1933]

If you believe that parents have a fundamental, natural right (recognized in the Constitution) to raise their children as they see fit, a federal appellate judge recently issued a reminder of just how wrong you are. After reading his lengthy recitation of all the ways the government may legally override parents' supposed rights, one is impressed by how empty of meaning the concept *right* now is. A "right" that is subject to unending grounds for state interference is a logical absurdity.

The occasion for U.S. Ninth Circuit Appellate Judge Stephen Reinhardt's stern reminder was not a case involving child abuse or neglect. Quite the contrary, it was a case of parents objecting to a school's asking, without express consent, their 7- to 10-year-old children questions about sex.

In 2001 the Palmdale School District, in Los Angeles County, California, had a graduate student in psychology design a survey for children in the first, third, and fifth grades. In a notice to parents, the district said the 79-question survey was intended to "establish a community baseline measure of children's exposure to early trauma (for example, violence)" and to "identify internal behaviors such as anxiety and depression and external behaviors such as aggression and verbal abuse." The notice told the parents that they could opt out of the survey and included a letter of consent, which stated, "I understand answering questions may make my child feel uncomfortable. If this occurs, then, Kristi Seymour, the research study coordinator, will assist us in locating a therapist for further psychological help if necessary." (Note the presumptuousness!)

The letter made no reference to the sexual content of the survey. Only "violence" was specified as a subject of questioning. Parents did not learn the actual nature of the survey until their children told them after the fact. Questions alluded to suicide, wanting to harm others, and bad dreams, but 10 were sexually explicit. Children were asked to rate, from "never" to "almost

all the time,” such things as “Touching my private parts too much,” “Thinking about touching other people’s private parts,” and “Thinking about sex when I don’t want to.”

After filing an unsuccessful complaint with the school district, several parents went into federal court for an injunction and damages, charging that the school violated their rights to privacy and “to control the upbringing of their children by introducing them to matters of and relating to sex.” The district and appellate courts rejected those claims. At this writing, the plaintiffs have not decided whether to appeal to the U.S. Supreme Court.

In this article I will avoid the federalism issue, that is, whether the Tenth or Fourteenth Amendment governs. Some libertarians will applaud the 3-0 ruling on the grounds that the federal courts have no business interfering with local school districts or state laws. (Some will applaud it because more parents will become alienated from the government’s schools.) I ignore the issue because Judge Reinhardt’s opinion gives us much to critique, and I would hate to pass up the opportunity. Suffice it to say that the judge did not side with the school district on Tenth Amendment grounds.

Two issues above all deserve attention: (1) the judge’s claim that parents’ freedom regarding education is limited to choosing the schools to which they send their children; and (2) the doctrine of *parens patriae*, under which Judge Reinhardt ruled that the school district has the legitimate authority to look after not only the education of children, but also their mental health.

Freedom of choice?

Imagine a Wal-Mart customer demanding, as a matter of right, that the store manager carry certain items or not carry others. Such a claim would be laughable. Most people understand that a customer’s right consists in patronizing or not patronizing the store. If he enters, he takes the store as he finds it. He is free to offer suggestions, but may not go beyond that. If he dislikes the store, he is free to go elsewhere.

Judge Reinhardt believes that parents, in educating their children, are in the same position as the Wal-Mart customer. He writes,

[Once] parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished. The constitution does not vest parents with the authority to interfere with a public school’s decision as to how it will provide information to its students or what information it will provide, in its classrooms or otherwise.

Further he writes, quoting a recent appellate decision,

While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child.

Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or, as here, a dress code, these issues of public education are generally ‘committed to the control of state and local authorities.’

In other words,

Schools cannot be expected to accommodate the personal, moral or religious concerns of every parent. Such an obligation would not only contravene the educational mission of the public schools, but also would be impossible to satisfy.

This reasoning is plausible — except for one large detail. Parents don’t choose schools the way they choose other things, such as where to shop. When Judge Reinhardt refers to parents’ choice in schools, he means they can choose private schools or home-schooling instead of the public school. But he left out an important point: money and the coercive manner of its collection. No matter what parents choose, *they will have to pay school taxes*. To talk about choice as though it were free, when it is distorted by the violence of taxation is disingenuous. Many parents can’t afford private schools or home-schooling because they have to pay taxes to the government’s system. The “choice” is rigged in favor of the government’s schools, even if parents have a formal “right” to select alternatives.

If parents could quit a school and *take their money elsewhere*, issues such as the sex survey would not arise, or if they did arise, they would be resolved contractually. Thus, when the judge says that “we affirm that the [parental] right does not extend beyond the threshold of the school door,” his position is exposed as hollow.

The doctrine of *parens patriae*

The second issue is the doctrine of *parens patriae*, or “father of the country.” This is the doctrine that the state is the ultimate guardian of children (and other “incompetents”). Judge Reinhardt invoked *parens patriae* after arguing that the school district is immune from the parents’ lawsuit because it has the legal authority to do anything reasonably related to its educational mission. “[The] psychological survey’s ultimate objective was ... to improve students’ ability to learn,” he said. But the district did not need to argue that, because, he added,

the questioning can also be justified on the basis of an alternative state interest — namely, *parens patriae*.... [The] School District’s interest in the mental health of its students falls well within the state’s authority as *parens patriae*. As such, the School District may legitimately play a role in the care and nurture of children entrusted to them for schooling.

Notice that the judge relies on his earlier “choice” argument when he uses the word “entrusted.” Do parents have any choice but to entrust their children to the state?

Parens patriae is one of those high-sounding doctrines (the Latin helps) that comes down to this: the state is more powerful than anyone with the audacity to reject the doctrine. Did you consent to *parens patriae*? If not, then by what authority does it apply to your children?

It is no surprise that the issue here is “mental health.” Given the fraudulent nature of the concept, it functions well as a pretext for virtually any exercise of government power — this is what Thomas Szasz has dubbed the Therapeutic State. The Bush administration is pushing for mental-health screening of children (and the rest of us), but as we can see, government schools don’t need to be pushed.

Judge Reinhardt’s ruling is a helpful reminder about the need to be radical. If you accept statist premises, objection to specific policies is impotent. We must reject statism at its deepest roots. We must reject government schooling entirely, with its premise that the state is the ultimate parent.

A final note: conservatives are upset by the ruling in *Fields et al. v. Palmdale School District*, seeing it as yet another example of activist lawmaking by unelected judges. But they are wrong. The judges chose not to interfere with the decision of a school governed by an *elected* school board. That, my conservative friends, is called judicial restraint. Robert Bork and Justice Scalia should be smiling.

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