Introduction

The Editors

PERSONS UNDER THE age of eighteen make up just over a quarter of the United States population.[1] "America's future is forecast in the lives of its children and the ability of their families to raise them."[2] Children become the parents, workers, and leaders upon whom the progress of the nation depends. We continue to hold a special regard for children, and their welfare and well-being remain a primary focus of law and public policy.

The well-being of children depends to a large extent on their rights under the law. Children may be said to have a variety of important rights. These include the right to physical safety, adequate parental supervision and rearing, adequate education, adequate standard of living, adequate health care, freedom from exploitation, freedom of speech and religion, equal treatment, and adequate representation in their own right in legal proceedings.[3] American law guarantees these rights to varying degrees, but never completely.[4]

The law permeates the lives of all children at every turn, but is particularly relevant for the child "at risk." This child comes in many types. A child may be the subject of a custody battle, or be in foster care, or be up for adoption. She may be abused or homeless or ill. She may be a five-year-old living in poverty and dependent on Medicaid, a middle-class teenager, or a public school student. Some children are criminals and delinquents. Many are several of the above.

"Although many children grow up healthy and happy in strong, stable families, far too many do not."[5] As the bipartisan National Commission on Children[6] observed, many children

> grow up in families whose lives are in turmoil. Their parents are too stressed and too drained to provide the nurturing, structure, and security that protect children and prepare them for adulthood. Some of these children are unloved and ill tended. Others are unsafe at home and in their neighborhoods. Many are poor, and some are homeless and hungry. Often, they lack the rudiments of basic health care and a quality education. Almost always, they lack hopes and dreams. . . . America's future depends on these children too.[7]

Perhaps the key theme in the law of children is that children do not act in the legal world in isolation; rather, they are one part of a triangle that also includes the parents and the state. Historically, parental control over children until they reach the age of majority has been very strong. In general, this society has had great respect for the child–parent relationship and for the values of family privacy and freedom from governmental intrusion; accordingly, we are reluctant to intervene in that relationship. Even the U.S. Supreme Court has stated that "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[8]

On the other hand, we have become aware that the family environment and the way a child is treated and reared, especially in her younger years, have a tremendous impact on the child's emotional and physical well-being and her role as a useful member of society. For that reason, the state may sometimes find it appropriate to limit parental discretion in the interest of the child's welfare. In other words, while parental rights are fundamental, they are not absolute.

As a result, laws regulating the child–parent relationship often strike a balance between these two competing interests. State education laws provide a good illustration. Compulsory education laws are more than a century old, and now every state has statutes requiring that children attend school between the ages of six and sixteen, unless the child completes high school earlier.[9] The state's interest here is in a productive and informed citizenry. The state also acts in the best interests of the child against her parents' neglect and apathy. These interests, however, are pitted against societal assumptions about the centrality of the family to the transmission of social values from generation to generation and the paramount interest of parents in making decisions about the education of their children.

Court decisions reflect this balance. While the state may require school attendance, the school need not be a public school.[10] States' control of what is taught in private schools is limited.[11] Parents whose religious beliefs conflict with the concept of compulsory education—the Amish, for example—retain the constitutional right to avoid those laws.[12] Even in public schools, parents retain some control over curriculum and library books, and the attendance of their children in sex education classes. At the same time, parental control is not permitted to interfere with very important state goals such as school desegregation.[13]

Another example of state intervention in the child–parent relationship is in the area of child custody. The courts must intervene on behalf of children when the family unit has to dissolve. "Each year, more than a million American children are affected by their parents' decision to separate or end their marriages."[14] Since about half of all divorces involve children, and since a substantial number of divorced parents bring more than one custody action, the volume of custody litigation is massive.[15]

Early English law had a simple rule that, absent unusual circumstances, the child's father was entitled to custody. This rule did not have a strong hold on American courts. Indeed, until recently, under the so-called tender years doctrine, there was a rebuttable presumption that custody of young children should normally go to the mother.[16] The constitutional mandate for gender equality as well as modification of state laws changed all that. "Nearly all judicial discussion of custody cases begins with the statement that custody must be so awarded as to promote the child's best interests."[17]

The Uniform Marriage and Divorce Act defines the child's best interests as follows:

> (1) the wishes of the child's parent or parents as to his custody; (2) the wishes of the child as to his custodian; (3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest; (4) the child's adjustment to his home, school and community; (5) the mental and physical health of all individuals involved. The court shall not consider conduct of a present or proposed custodian that does not affect his relationship to the child.[18]

In addition to custody cases, courts apply this standard in cases of adoption, cases in which neither natural parent is available or fit to have custody, and cases in which a natural parent is engaged in a custody dispute with a foster parent, a grandparent, or other nonparent.

A new breed of cases may soon become common: cases where children sue on their own behalf to determine who will have custody of them. Two recent celebrated examples are the case of "Gregory K," a twelve-year-old boy who wished to "divorce" his natural mother in order to remain permanently with his foster family, and the case of Kimberly Mays, the fourteen-year-old who wished to remain with the man who raised her, after an inadvertent switch at birth in a hospital, rather than live with, or spend any time with, her biological parents. While the courts in both cases did the children's bidding, the concept of a child suing on his own behalf in a custody battle met considerable resistance.[19]

The best interests standard is decidedly vague. Custody litigation therefore has a certain ad hoc quality and is very fact-intensive. Factors considered in the best interests calculus include continuity, stability, and permanence. If the child is mature enough, courts take her preferences into account. But in any event the meaning of the standard remains a major question in the law of children.

Along with custody decisions, courts must issue property distribution, alimony, and child support decisions. These decisions, again, are multifactorial and made on a case by case basis. It is widely known that divorce frequently results in a precipitous decline in the former wife's standard of living. Since custody is usually given to the mother, the children suffer equally. Child support awards are usually adequate on paper, but the enforcement of these awards is frequently difficult and thorny. A network of state and federal laws exist to maximize enforcement. The federal government has an interest in proper child support enforcement to decrease the burdens on federal welfare programs. Thus, the federal government assists the individual states in locating the defaulting parents.

The child–parent relationship breaks down in other ways that bring the child into the hands of the state and its social service system. One unfortunate but particularly common form of breakdown is child abuse and neglect. Reports of child maltreatment have been increasing in recent years. "In 1974, there were about 60,000 cases reported, a number that rose to 1.1 million in 1980 and more than doubled during the 1980s to 2.4 million."[20] This increase reflects to some extent an increase in public awareness, but there is still much reason to believe that the reported cases constitute just a fraction of the actual incidence of abuse and neglect.[21]

Every state has in place a number of mechanisms to deal with the problem. Child protection systems investigate allegations of abuse and neglect and intervene if needed. Because of respect for the integrity of the family and the child–parent relationship, these systems' first preference is to address the abusive situation while keeping the child with her parents. Indeed, the law requires child protection workers to make reasonable efforts to keep families together. Thus, child protection systems may provide home-based services to troubled families, day care and homemaker services, counseling and other therapeutic services, parent education, and other forms of support.

Child protection agencies resort to criminal sanctions only in extreme situations of abuse and neglect, and even within the repertoire of civil remedies, child protection workers proceed with caution. They do not resort lightly to such drastic remedies as depriving the parent of her parental rights and assuming full control of the abused or neglected child. Even when they do so, federal and state laws have a presumption in favor of reuniting the child with the abusive parent whenever possible. In accord with this presumption, the U.S. Supreme Court decided in 1982 that the state must meet a high standard of proof before terminating parental rights.[22]

When it becomes impossible for the abused or neglected child to stay in the parental home, the child is placed elsewhere. Foster care is a common form of out-of-home placement, since it assumes the possibility of future reunification of parent and child should circumstances permit. Child protection agencies expend much time and energy recruiting and training foster parents. If abusive parents relinquish their parental rights or if these rights are terminated, adoption becomes possible. Again, much effort is spent to find suitable adoptive homes. Finding such homes for minority children is difficult; it is particularly challenging

for special needs children whose handicap or ill health requires committed and well-trained adoptive parents.

Most legal issues surrounding these procedures are straightforward and largely settled. The chronic problems associated with child protection services are usually ones of adequate funding and staffing, especially in the face of one of the most daunting social problems of our time. The funding crisis has spawned in recent years a special type of litigation in which children, through a guardian or advocate, sue the state. In these suits the children allege that the state has been negligent in not intervening quickly enough to stop their abuse at the hands of a parent or foster parent. The more elaborate of these suits try to prove a pattern of inadequacy and ask for court orders obligating the child protection systems to accomplish a number of specified changes and improvements.

In a landmark 1989 case,[23] by a vote of 5 to 4, the U.S. Supreme Court closed the door to suits filed on behalf of abused children against child protection agencies alleging that these agencies negligently failed to stop the abuse and demanding damages for these children. Suits against the state on behalf of children are permitted to some extent in the case of foster children. Very delicate issues come to the fore in this context: Financially strapped child welfare systems have now to deal with court orders specifying areas of needed change, poorly compensated social workers become the target of child advocates, and courts start dabbling with the business of running complex bureaucracies.

The law and policy behind these suits raise timely questions of extreme importance. For example, the federal courts are split on whether child victims of sexual abuse may sue the state when the abuse was committed in a public school.[24] The U.S. Supreme Court may have to take up the question in the near future.

For those children not faced with threats to their very safety, education is a paramount issue. As the National Commission on Children recently noted, "American students continue to lag behind their counterparts in many developed and developing nations. . . . Far too many of the nation's youth drop out of school, and even among those who complete high school, a substantial number lack the basic skills and knowledge needed to get a job."[25] Their parents' poverty or lack of education, or other problems in the home, cause many children to be ill prepared for school. In other cases, the commission points the finger of blame at the schools:

> Many schools across the country lack the basic ingredients and flexibility to be lively, innovative learning centers. They often lack a common educational vision and strong leadership. They fail to set rigorous academic standards and do little to foster initiative, innovation, and creativity among teachers and staff. Many do not encourage parents to be active partners in their children's education, and some are unable to maintain order and discipline.[26]

Often this state of affairs reflects inadequate funding.

In the constitutional lexicon, education is not a "fundamental right" in the way speech, privacy, and freedom of religion are. For example, disparities in the

quality of education across school districts do not raise federal constitutional concerns. The most interesting education-related litigation, therefore, is occurring in state courts. In these cases, students and their advocates sue the state based on state constitutions and state statutes. The most celebrated cases are those in which courts interpret the state constitutional guarantee of equal treatment under the law to compel the state to eliminate financial disparities between school districts. In Texas, for example, public education is financed with taxes on property. Consequently, poorer parts of the state necessarily operate with smaller budgets. The Texas Supreme Court held that this situation was inconsistent with the state constitution's guarantee of equality under the law.[27]

Another paramount issue for children is health care. Health care is one of the most complex policy issues of our time. The health status of children is a key indicator of how well we as a society and polity are treating them, and the current picture is not encouraging. Between 8 and 10 million children have no form of health insurance.[28] The infant mortality rate in this country remains higher than that in twenty-one other industrialized nations, and more than forty thousand babies a year die before their first birthday.[29] Low birth weight is associated with poor health and reduced chances of survival among infants. The rate of low birth weight is high, and "[n]o progress has been made since 1980 in reducing the rate of babies born with low weights; for black babies, the rate has risen."[30] The National Commission on Children has attributed these figures to the relative unavailability of early prenatal care for women without health insurance and to the "growing epidemic of alcohol and illegal drug use, especially use of crack cocaine, by pregnant women [which] severely threatens the health and development of as many as 375,000 babies each year."[31]

Children currently have health insurance either under Medicaid or under private insurance policies held by their parents, usually in an employment context. Many children, as we saw above, are uninsured. But even for those insured under Medicaid, access remains problematic. This is so because, in contrast to Medicare (the federal insurance program that serves the elderly), Medicaid is poorly funded, and low reimbursement rates make many health care providers unwilling to treat large numbers of Medicaid patients.

Health care for children raises the same issues as our health care system as a whole. It is widely held that the system has twin problems: inadequate access, in that some people have no insurance, and high cost, in that individuals have difficulty affording health insurance and government spending on health care is increasing more rapidly than other areas of the budget. Solving one problem, however, exacerbates the other. If we are to insure everyone fully, the government will spend more. If we are to contain costs, we will have to provide fewer services for the poor or provide services to fewer of them.

In the past few years, the federal government has put in place some cost-containment measures. In the mid-1980s, the government introduced the Diagnosis Related Group (DRG) method of payment into the Medicare program. Under the DRG system, government regulators could now decide how much the typical case of every illness should cost, and reimburse hospitals for no more than

that amount. Ostensibly, this fosters efficiency and cost consciousness. A few years later, the government turned its attention to physician fees. Empowered by Congress to address, in a budget-neutral fashion, the income disparities between generalists and specialists, government regulators went further. Rules issued in 1991 cut physician income under Medicare across the board, including the incomes of general internists.

The individual states have also sought ways to save money. In a particularly controversial proposal, Oregon set out to cover more people under its Medicaid program by providing fewer services to each of them. It has engaged in a complicated ranking of medical interventions so that only the more "useful" and "cost-effective" ones are covered. The Oregon plan received the blessing of the Clinton administration,[32] preventing a full Congressional debate on the issues involved.[33] Implementation of the plan will be closely watched, since it will inform the ongoing intense debate[34] over the general concept of rationing health care. A variety of options for improving the health status of children continue to be discussed as society and government tackle the complex task of designing an optimal health care system.

Beyond what we do and do not do for and to young people, many legal issues arise out of what they do to others. Too many juveniles are finding themselves on the wrong side of the law. "Today, younger and younger children are committing more serious and violent crimes than in years past. Assaults, robberies, and murders have become commonplace on many city streets and even in schools. Today, more teenage boys in the United States die of gunshot wounds than of all natural causes combined."[35]

In most cases, juveniles accused of crime are processed in the juvenile court. This court's raison d'être is to handle a variety of issues related to the young, including abuse and neglect, foster care, truancy, and running away from home. In dealing with juvenile crime, the juvenile court's watchword is rehabilitation. "Since 1899 when the first juvenile court was founded, society's commitment to young people charged with the commission of a crime has been to rehabilitate rather than to punish them."[36] Indeed, one key assumption underlies the treatment of juvenile delinquents and criminals in this country: We assume that minors are immature and impressionable and thus should not be held to the same standards of culpability and responsibility as adults. Accordingly, we punish juvenile crime less severely, and, indeed, often opt for rehabilitation as the only means of dealing with juvenile crime.

Originally, it was believed that the court's emphasis on the best interests of the child and on a decided preference for rehabilitation over punishment made elaborate procedural safeguards unnecessary. In 1967, however, the U.S. Supreme Court heard the appeal of Gerald Gault, a fifteen-year-old who, after making a number of obscene phone calls to a neighbor, was adjudged a delinquent and committed to a state rehabilitation institution for six years, the remainder of his minority. An adult committing the same offense would have been fined up to fifty dollars and imprisoned a maximum of two months.[37] The Supreme Court found that "[d]epartures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness."[38]

The Court has since extended to juveniles such rights as representation by counsel and conviction beyond a reasonable doubt. It has, however, balked at extending other rights, such as trial by jury[39] and the use of strict standards before the accused is confined pending trial.[40] There is still a tradeoff between benevolent treatment and procedural rights.

For very serious crimes, the state is permitted to "waive" the accused juvenile into criminal court, after sufficient hearings, so that the juvenile may be tried as an adult. In that situation, the juvenile enjoys all the procedural protections, constitutional and otherwise, afforded criminal defendants. In return, the juvenile is subject to severe punishment, including, in rare cases, the death penalty.

Drawing on many of the points just discussed, this book addresses some of the most important and timely issues related to law and policy affecting children. The book is intended to be as comprehensive as possible, and to represent a variety of viewpoints and perspectives. Three questions resonate throughout and arise, in some form or another, in most of the contexts we address. What rights do children have? How similarly to adults should they be treated? How subject to the will of adults should they be?

This book has five parts. Part I is concerned with the regulation of the child–parent relationship, especially when there is a need to decide anew who should perform parenting functions for a child. As we noted earlier, in making custody decisions after divorce, courts have as their guidepost the best interests of the child. Similar concerns govern decisions about adoption and deprivation of parental rights. Part I discusses the many meanings of this standard both in theory and in reality, and such special problems as the use of religion as a factor in custody decisions, the impact of a parent's homosexuality on custody decisions, the role of race and race matching in adoption, and the particularly vexing issue of drug-addicted pregnant women.

Part II looks at children's interactions with the social service system. Child abuse is prominent here. These chapters consider the legal and, perhaps more importantly, the policy issues that child advocates have to contend with in their efforts to negotiate this problem. We concentrate on suits filed on behalf of children alleging a pattern of defective governmental response to child abuse and demanding significant restructuring of the system. Two perspectives are presented: that of concerned advocates and that of welfare system workers doing the best they can with the resources they have. In addition, contributors to Part II address the particular difficulties homeless families face and the legal and policy issues affecting them.

Part III discusses children and schools. The state of our public school system is the main issue here, but the role of state and federal policies in improving the system and recent controversies about inequities in the financing of public schools are addressed as well.

Part III also addresses, briefly, the issue of students' free speech rights. A series of Supreme Court decisions give school authorities significant leeway in controlling what students can write about for the consumption of other students.

This matter is not only important in itself, but also represents one side of a coin, the other side of which is the exclusion of library and curriculum books by school authorities. The recent controversy about whether, in requiring first graders to learn about homosexuality and AIDS, the New York school system is making students know *too much* incorporates values and conflicts integral to the debate about student speech rights.

Part IV tackles the interaction of children with the health care system. The section entitled "Paying for Children's Health Care" focuses on the availability of health insurance to children and provides the legal background against which current policy options should be considered. This extremely complex area is covered as thoroughly as possible.

Another important health-related issue is the allocation of the power to make decisions about medical care among children, parents, and third parties, including the state. Part IV specifically addresses seriously ill newborns and the right of adolescents to consent to or decline care. Three chapters concern children with AIDS, with emphasis on schoolchildren who have the disease.

The last part discusses children and the criminal justice system. Part V starts with a debate about the assumptions and workings of the juvenile court. One contributor argues that the juvenile court has outlived its usefulness, while others argue that juveniles are indeed different from adults and that as a society we recognize that difference in many ways.

The chapters then briefly consider two situations in which our basic assumptions about juveniles and the tradeoff between punishment and procedure are played out. The first is pretrial detention, which affects many thousands of juveniles and is permitted by the Supreme Court under much looser standards than would apply to adults.[41] The debate about pretrial detention mirrors and illustrates in concrete terms the conflict about how we treat our juvenile delinquents. In the chapters on the death penalty, we deal with the most serious crimes that juveniles commit and ask what is literally a life or death question: How much responsibility are we entitled to expect of this society's youth? And does it make much sense to speak of impressionable, misunderstood youngsters when they commit the most horrendous crimes?

Issues related to the place of children in society have implications for both law and policy. The editors have, therefore, designed the book to appeal to readers from a variety of backgrounds: law, medicine, education, social work, sociology, psychology, public health, and other social sciences. We hope that the book will fulfill our intentions.

NOTES

1. *See* Center for the Study of Social Policy, Kids Count Databook: State Profiles of Child Wellbeing 9 (1991).
2. National Commission on Children, Beyond Rhetoric: A New American Agenda for Children and Families 2 (1991) [hereinafter Beyond Rhetoric].

3. This list parallels the list of rights outlined by the United Nations Convention on the Rights of the Child. *See* Children's Rights in America: U.N. Convention on the Rights of the Child Compared with United States Law (C. Cohen & H. Davidson eds., 1990). This convention is the "gold standard" that might be used to evaluate any society's performance in guaranteeing children's legal rights.
4. *Id.*
5. Beyond Rhetoric, *supra* note 2, at vii.
6. The commission was set up in 1989 to serve as a forum on behalf of the children of the nation. Its thirty-four members were appointed by the President, the President *pro tempore* of the Senate, and the Speaker of the House of Representatives. The commission was chaired by Senator Jay Rockefeller of West Virginia. Then-Governor Bill Clinton was a member.
7. Beyond Rhetoric, *supra* note 2, at 2.
8. Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).
9. *See* 2 H. Clark, The Law of Domestic Relations in the United States § 20.4 (2d ed. 1988).
10. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925).
11. *See* Meyer v. Nebraska, 262 U.S. 390 (1923).
12. *See Yoder.*
13. *See* H. Krause, Family Law in a Nutshell 200–201 (1986).
14. Beyond Rhetoric, *supra* note 2, at 6.
15. *See* Clark, Law of Domestic Relations, *supra* note 9, at 476–77.
16. *See id.* at 477.
17. *Id.* at 479 (footnote omitted).
18. § 402, Uniform Marriage and Divorce Act.
19. The trial court in the Gregory K. case gave him the right to sue on his own behalf to determine his own custody status. On appeal, a Florida appellate court held that Gregory had no such right, and that children may not sue to deprive their parents of their parental rights. The court left Gregory with his foster family on other grounds. *See* Kingsley v. Kingsley, 1993 Fla. App. LEXIS 8645 (Fla. Ct. App. Aug. 18, 1993). Likewise, the court in the Mays case acceded to Kimberly's wishes, but sidestepped the issue of whether she could sue on her own behalf to determine her custody status.
20. U.S. Advisory Board on Child Abuse and Neglect, Child Abuse and Neglect: Critical First Steps in Response to a National Emergency, at x (1990).
21. *See id.*
22. *See* Santosky v. Kramer, 455 U.S. 745 (1982) (holding that the state must prove by "clear and convincing evidence" that a child was abused or neglected before parental rights are terminated).
23. *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).
24. *See* Doe v. Taylor Indep. Sch. Dist., 975 F.2d 137 (5th Cir. 1992) (holding that public school student's constitutional rights were violated when she was sexually molested by a teacher); D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364 (3d Cir. 1992) (reaching the opposite conclusion).
25. Beyond Rhetoric, *supra* note 2, at 48.
26. *Id.* at 49–50.
27. *See* Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491 (Tex. 1991).

28. *See* Children's Defense Fund, The State of America's Children 1991, at 56 (1991); Beyond Rhetoric, *supra* note 2, at 12.
29. *See* Beyond Rhetoric, *supra* note 2, at 12.
30. *Id.* (endnote omitted).
31. *Id.* (endnote omitted).
32. The Bush administration had denied Oregon an administrative waiver on the ground that the rationing plan would violate the Americans with Disabilities Act.
33. Since the Oregon plan affects beneficiaries of Medicaid, a joint federal–state program, Oregon could not act alone. The federal government—either the administration or Congress—had to approve the plan before it could go forward.

The place of health rationing in any reform scheme Congress will adopt remains unclear.

34. *See* Symposium, The Law and Policy of Health Care Rationing: Models and Accountability, 140 U. Pa. L. Rev. 1505 (1992).
35. *Id.* at 13 (endnote omitted).
36. T. Stein, Child Welfare and the Law 28 (1991).
37. *See id.*
38. *In re* Gault, 387 U.S. 1, 19 (1967).
39. McKeiver v. Pennsylvania, 403 U.S. 528 (1971).
40. *See* Schall v. Martin, 467 U.S. 253 (1984).
41. *See id.*

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