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### *Homeschooling: The History and Philosophy of a Controversial Practice* by James G. Dwyer and Shawn F. Peters, Chicago: University of Chicago Press, 2019

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Review of

## *Homeschooling: The History and Philosophy of a Controversial Practice*

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The ongoing worldwide experiment in homeschooling brought about by the COVID-19 shutdown makes this an interesting time to review *Homeschooling: The History and Philosophy of a Controversial Practice*, the eighth volume in the magisterial History and Philosophy of Education series from the University of Chicago Press. In each volume, an eminent historian partners with a philosopher to address a major issue or theme in American education from an illuminating interdisciplinary perspective. Here, philosopher James G. Dwyer and historian Shawn F. Peters offer an approach to the regulation of homeschooling predicated on the duties of the State as *parens patriae* and the corresponding rights of children. Their claims and conclusions are reasonable, respectful, and consistent with American jurisprudence. If I had the skill and courage of Dwyer and Peters combined, I might have written a book very much like this one.

The authors acknowledge from the start that homeschooling has become so ideologically fraught that reasoned discourse is all but impossible. Many people simply want to know whether you agree or disagree with them (p. 4), and anyone who would deign to defend or even acknowledge the duty of the State to regulate the custodial authority of parents in the interests of children may see their work and their names excoriated by ideologues aligned with, or sympathetic to, the Home School Legal Defense Association (HSLDA).

In an exquisite irony, the release of *Homeschooling* coincides with a global pandemic which has—for the moment, at least—made home-based education the *only* form of schooling available to the vast majority of American children. This situation will surely illustrate some of the problems associated with consigning the education of children to their parents or guardians alone. For a start, the quantity and quality of instruction children receive while confined to their homes will be a function of the willingness and ability of the adult(s) in their lives to provide it, coupled with whatever access to public knowledge and diverse formative influences their particular family circumstances and resources might permit. Children whose family circumstances qualified them for free and healthy meals at school may go hungry. And children who were born or adopted into wealthy or otherwise privileged families will have better outcomes than those who were not in terms of their welfare and development.

Like Dwyer and Peters, I have claimed that it is in no child's interest to consign his or her fate to one or two people, in part because individuals cannot be trusted to make reasonable decisions in the interests of dependent persons who are not fully competent to make decisions for themselves without

public oversight and support (Blokhuys, 2010: 201; see also Curren & Blokhuys, 2011: 7). This is precisely why, in common law jurisdictions throughout the world, the State as *parens patriae* regulates fiduciary relationships, including the custodial authority of parents and other guardians.

Surprisingly, Dwyer and Peters seem to have assumed that readers of *Homeschooling* are either deeply familiar with their previous work or otherwise well-acquainted with the *parens patriae* doctrine and its implications for the legal relationship between parents, children, and the State. For the benefit of those who aren't, I refer to the latest edition of *American Jurisprudence*, perhaps the most authoritative and up-to-date treatise on the subject, which explains:

The State has a duty of paramount importance to protect the child's best interests and welfare. Thus, the State, as *parens patriae*, has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare. [...] The parents, as natural guardians, are responsible to the State for the child's well-being. The natural rights of a parent to the custody and control of his or her infant child are subject to the power of the State and may be restricted and regulated by appropriate legislative or judicial action. (59 Am Jur 2d Parent and Child § 18 (2020))

As Jeffrey Shulman (2014: 3) puts it in *The Constitutional Parent*, which is likewise a joy to read for its solid jurisprudential claims and soaring literary allusions, “What is deeply rooted in our legal traditions and social conscience is the idea that the [S]tate entrusts parents with custody of the child, and the concomitant rule is that [it] does so only as long as parents meet their legal duty to take proper care of the child” (quoted on p. 6). The persistent confusion—in the United States, at least—about the nature of law and the scope of parental authority helps to explain the widespread belief that parents have a legal right to rear their children in exclusive conformity with their own preferences. Although the US Supreme Court has repeatedly affirmed both the *parens patriae* doctrine and the authority of states to regulate schooling, there is clearly a need for a systematic critique of what some parents do in exercising their putative rights.

In the first three chapters, Dwyer and Peters offer an account of homeschooling from the colonial period to the Progressive Era (“Early Homeschooling”), from the Post-WWII Era to the Civil Rights Era (“The Birth of Modern Homeschooling”), and in what I would characterize as the Post-*Yoder* Era (“Homeschooling Comes into Its Own”), to illustrate how parental authority evolved from being “very much about duties rather than rights, with the duties being owed principally to God and the community” (p. 6) to being very much about individual rights claims vis-à-vis the State.

In Chapter One, the authors trace public educational authority from the “first moves toward compulsory schooling” in colonial Massachusetts to Horace Mann’s later efforts to promote common schools as “great equalizers” (p. 11). They then review the expansion of compulsory schooling laws and public school systems throughout the Progressive Era, noting that compulsory schooling laws, child labor laws, and the establishment of juvenile courts and child protection agencies reflected not only public solicitude for the welfare but also concerns about the parenting abilities of industrial workers and immigrants. The professionalization of teaching and bureaucratization of education systems meant that by start of the twentieth century, “[h]ome and school, once indistinguishable, became separated” (p. 22).

In Chapter Two, the authors faithfully detail the myriad reasons why members of various groups chose to educate their children at home in the post-WWII era, including: desegregation and busing, anti-establishment thinking in the wake of Vietnam, secularization, sex education, and a “holy crusade”

(p. 63) to dismantle compulsory schooling laws orchestrated by the HSLDA and others aligned with the Religious Right. In Chapter Three, Dwyer and Peters identify and describe further reasons why ever higher numbers of parents, mostly conservative Christians, chose to educate their children at home in the post-*Yoder* era, including: school violence, drugs, bullying, bureaucratic indifference, bad teachers, zero tolerance policies, vaccination policies, tax policies, technology, and a host of pedagogical and ideological debates.

In a brief transitional chapter (“Common Themes and Disparate Concerns”), the authors “switch gears” (p. 109) from history to philosophy. Most states have abandoned the fate of children to the idiosyncratic beliefs and choices of their parents, “not actually holding parents at all accountable for the choices they make regarding their children’s education,” despite the fact that they retain both the constitutional authority and a *parens patriae* duty “to substantially supervise and regulate all forms of education and even to mandate that all children attend regular school” (pp. 108-9). The authors’ interpretation is clearly supported by *American Jurisprudence*, which explains: “Parents do not have a fundamental right to direct their children’s secular education free of reasonable government regulation and there is no fundamental right to home schooling” (67B Am Jur 2d Schools § 268 (2020)).

After a normative assessment of the approaches American states have taken in response to parents seeking to educate their children at home, the authors present proposals for what states ought to do based on the *parens patriae* doctrine. This approach makes *Homeschooling* a work of analytical jurisprudence, “a method of legal study that concentrates on the logical structure of law, the meanings and uses of its concepts, and the terms and modes of its operation” (Garner, 1999: 858); and of ethical jurisprudence, “a branch of legal philosophy concerned with the law from the viewpoint of its ethical significance and adequacy” (Garner, 1999, p. 858; see Blokhuis, 2015, p. 65).

In the ensuing philosophical chapters, the authors show that putative parental rights claims, no matter how often or stridently repeated, are inconsistent with US constitutional law and common morality. Indeed, claims that parents have a fundamental constitutional right to direct the education of the children in their care are not only false but also profoundly illiberal. Dwyer and Peters remind readers, especially those who view government with suspicion, that ‘the State’ is “not an entity with its own interests” but “an agent for society – that is, for us members of American society, collectively” (p. 120). We live in a society of laws, not a state of nature; “no sane person truly wants” such a thing (p. 121). Complete state detachment from children’s education is “not possible,” and people who think otherwise are “confused” (p. 120). For it is the State that “makes people legal parents and gives them the legal tools they need to carry on a custodial, caregiving relationship” (p. 121). And it is a fundamental principle in common law jurisdictions that “every human being after birth is a distinct legal person” who “stands in a direct legal relationship to the [S]tate” (p. 122).

The authors accordingly base their analysis of homeschooling on six carefully explained and broadly incontrovertible normative and empirical assumptions (p. 156):

1. Children are persons
2. No one has a ‘right’ to control the life of another person
3. The child has the greatest interests at stake in connection with schooling
4. The state must have the ultimate authority to determine what children’s interests are
5. The state may not act on the basis of religious beliefs
6. In establishing laws about schooling, the state acts as a fiduciary for children.

The State serves as a fiduciary for everyone in exercising its police powers, and as a fiduciary for all dependent persons in exercising its *parens patriae* duties (p. 152). Ultimately, laws requiring schooling of some kind for children are justifiable only on *parens patriae* grounds. The State, “having placed children in the custody and control of certain persons... bears an ongoing obligation to the children to ensure that those custodians meet the children’s basic needs and respect... [their] rights to learn, explore, associate with others, think independently... and more” (p. 198).

I would pause here for a moment to note that most of the normative assumptions and all of the children’s rights listed by Dwyer and Peters have been recognized by all UN member states but one—the United States—in ratifying the United Nations Convention on the Rights of the Child (1990). Because the United States is an outlier when it comes to children’s rights, the authors’ conclusions will not come as a surprise to Canadian readers. I am a little surprised that *Wisconsin v. Yoder* (1972) did not figure more prominently, not least because Peters (2003) authored a comprehensive historical account of that watershed case. The Supreme Court ruling, which carved out a narrow constitutional exemption from compulsory schooling laws for Amish families, was a seminal decision for the ensuing parental rights movement and for transforming homeschooling into a predominantly Christian phenomenon led by the HSLDA. *Yoder* altered American jurisprudence on the *parens patriae* doctrine and public educational authority, putting it out of step with other common law jurisdictions and, in erecting barriers to the ratification of the Convention on the Rights of the Child, out of step with the entire world.

Overall, the authors have drawn effectively on their impressive body of work (Dwyer, 1996; 2006; Peters, 2003) to produce a volume that is a joy to read. While the practical problems associated with homeschooling may be apparent to many of us—especially after a few weeks or months of sheltering in place with our children—this book provides a jurisprudentially sound account of the rights of children to an education and upbringing supervised by the State as *parens patriae* in accordance with their publicly-determined best interests.

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