

# Michigan Law Review

---

Volume 81 | Issue 4

---

1983

## Who Speaks for the Child: The Problems of Proxy Consent

Michigan Law Review

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Family Law Commons](#), [Health Law and Policy Commons](#), and the [Juvenile Law Commons](#)

---

### Recommended Citation

Michigan Law Review, *Who Speaks for the Child: The Problems of Proxy Consent*, 81 MICH. L. REV. 1083 (1983).

Available at: <https://repository.law.umich.edu/mlr/vol81/iss4/44>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

WHO SPEAKS FOR THE CHILD: THE PROBLEMS OF PROXY CONSENT.  
Edited by *Willard Gaylin* and *Ruth Macklin*. New York: Plenum  
Press. 1982. Pp. xii, 315. \$25.

Commentators often analyze social problems in terms of what should be decided rather than who should decide. But in *Who Speaks for the Child: The Problems of Proxy Consent*, editors Gaylin and Macklin address the question of who shall choose on behalf of a legally incompetent child. As Gaylin observes, this question of proxy consent<sup>1</sup> poses "one of a half dozen most crucial moral problems emerging from the biological revolution" (p. 4). The book includes nine essays that examine the proxy consent issue in the context of medical intervention. The result is a good introduction to the problem, but one too general and uninventive to aid the legal scholar looking for fresh approaches in a developing area of the law. The essays emphasize two central themes. The first involves the competence of the child as a self-decider, while the second concerns the question of who may choose on behalf of a child legally incapable of deciding for itself. In developing these ideas, the essays deal in passing with the consequences of some medical choices, not so much to determine the rightness or wrongness of any alternative, but to establish an inference regarding *who* should decide in a given situation.

The first two chapters, written by editor Willard Gaylin, develop a principle of "variable competence."<sup>2</sup> Gaylin begins by discussing several accepted limits on competence, and in this regard merely attaches new labels to old ideas.<sup>3</sup> He then offers his most interesting contribution, a paradigm for his principle of "variable competence." He argues that the ratio of individual risk to individual gain in a given medical procedure should influence the propriety of state restrictions on the child's capacity to consent (pp. 40-43). For example, if a choice poses a high risk and a low gain, the child's right to take the risk should be limited while its right to refuse should be maximized (p. 43). Although thought provoking, this portion of the book hinges on a fairly simple cost-benefit approach to determine how much autonomy a child ought to have in a particular situation. Consequently, although Gaylin's discussion provides a framework for further analysis, it

---

1. Gaylin describes "proxy consent" as a "confusing and inadequate heading" but states that the issue revolves around "an interrelated set of questions about authority and autonomy: the rights of the individual, or the family, versus the power of the state; the nature of decision making and the values of society . . ." P. 4. As Gerald Dworkin points out in chapter six, the term "proxy consent" is misleading. The incompetent on whose behalf a given choice is made does not delegate his decision-making authority to a proxy, nor is he in a position to consent in his own right. Pp. 196-97. Although the book never expressly defines proxy consent, the term evidently applies to those situations in which a person is called upon to decide for another who lacks the legal competence to choose for himself.

2. Gaylin contends that arbitrary statutory definitions of competence should not determine a minor's capacity to consent to medical treatment, and urges instead that legal competence should vary according to the minor's maturity and the nature of the decision. Pp. 27-29.

3. Gaylin divides competence limiting conditions into six categories: limits of consciousness, intelligence, rationality, perception, experience and age. P. 32.

offers nothing in the way of earth-shattering legal or philosophical exposition.

The second part of *Who Speaks for the Child* departs from theory and addresses substantive legal issues. The first selection in this section, written by Alexander Morgan Capron, deals with the child's capacity to consent to medical intervention. The article surveys the law concerning competence of children by examining the emancipation of minors, the emergency rule, specialized consent, and the mature-minor rule. Capron argues that even though the law generally presumes that minors are incompetent to make their own medical decisions, the legal trend favors granting a child who is intellectually able to give informed consent the legal right to do so (p. 89).

Though this chapter advocates expanded legal capacity for minors, the author structures it more as a survey of the law than as a normative evaluation of legal principles. Thus, the value of this portion of the book lies not in its development of a new measure of capacity, but in its general analysis of the legal considerations that affect competence. In this connection, the chapter comes complete with an Appendix that summarizes in chart form the various state statutes that bear on the minor's competency to consent.<sup>4</sup>

The most provocative portion of *Who Speaks for the Child* appears in chapters four and five, both of which deal with the question of who shall decide on behalf of a child who lacks the legal capacity to choose for itself. The first piece, written by Professor Capron, begins with the assumption that at least some people lack the capacity to decide for themselves about biomedical intervention (p. 117). The author then points out that courts often decide questions concerning medical treatment for incompetents on the basis of "the appropriateness of the choice not of the chooser" (p. 146). He urges that the law should presume that parents act in their child's best interests and that the state should intrude on family autonomy only if clear and convincing proof shows that the parents cannot represent their child (p. 144). The approach is intriguing because it examines the moral implications of proxy consent in terms of who is best able to decide. But Capron's commentary is fairly general, and the only suggestions he offers to courts faced with the problem of proxy consent are that the decision-maker should be vigorous, conscientious, and have no conflict of interest with the incompetent (p. 150). These conclusions, while defensible, do not provide courts with new ways to resolve the proxy consent issue. At best, Capron's discussion develops an intellectual framework from which an interested neophyte can evaluate more detailed discussion of proxy consent.

A more sophisticated approach appears in the following chapter, written by Joseph Goldstein.<sup>5</sup> Professor Goldstein balances state intervention in medical decisions against parental autonomy, and concludes that because the law cannot supervise effectively the interaction between parent and child, the only justifiable policy favors minimum state intervention (pp. 160-61). Goldstein argues for a paradigm in which the state can overcome

---

4. Although the chart is convenient, it is also limited because it does not identify common-law rules of consent, and because the drafters have excluded certain types of statutes from consideration. Pp. 91-92.

5. This chapter also appears as Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 *YALE L.J.* 645 (1977).

the presumption of parental autonomy only if it establishes (1) that the medical profession agrees about what constitutes proper treatment for the child; (2) that the expected outcome of the treatment is a chance for normal, healthy growth or at least a life worth living; and (3) that the expected outcome of denial of treatment would be death for the child (p. 163). The author contends that in the absence of any of these elements, the state should not prevent parents from choosing on behalf of their child: “[p]ut somewhat more starkly, how can parents in such situation give the wrong answer since there is no way of knowing the right answer?” (p. 166).

Several chapters in Part II, labelled “The Values at Stake,” support Goldstein’s analysis. For example, Margaret O’Brien Steinfeld discusses family autonomy. She surveys legal issues affecting children’s rights, and concludes that family autonomy is essential to avoid “abandoning children to their rights” (p. 245). And editor Ruth Macklin’s critique in chapter nine places Goldstein’s contribution in perspective. She disputes his conclusions on the ground that “granting parents the procedural right and responsibility to decide for their children does not automatically confer substantive rightness on anything they may decide” (p. 276). Regardless of how the reader resolves the issue, Macklin’s response to several of Goldstein’s assumptions effectively introduces the underlying moral implications of determining who shall choose.<sup>6</sup>

At times, the book’s discussion will not prove particularly valuable to the lawyer. For example, the seventh chapter, by Peter Brown, discusses “the principles that should govern a parental decision to grant or withhold consent” (p. 209). Brown’s analysis focuses on the idea that parents should make decisions that secure for children what John Rawls described as “primary goods.”<sup>7</sup> Although this discussion may prove useful to the philosopher, it lacks the practical grounding that characterizes most of the book.

The book’s final chapter, written by editor Ruth Macklin, defends decisions made in the child’s best interest. Macklin evaluates many of the key arguments advanced by other contributors and concludes that the “best interest of the child . . . should prevail” (p. 301). Her discussion returns to the substantive aspect of proxy consent, and provides yet another perspective on the procedural question of who should decide.

Several criticisms apply to *Who Speaks for the Child* as a whole. First, the book provides only a general treatment of a complex subject. Although the articles are well written and organized, the reader cannot escape the impression that the book merely outlines the dimensions of a far greater problem. Overlap among chapters enhances this sense of incompleteness. Different contributors occasionally discuss the same case or issue in a similar fashion and the resulting duplication repeats analysis at the expense of

---

6. As Macklin acknowledges, however, Goldstein’s views “are well documented and fully elaborated” in J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1979). P. 288. Nevertheless, Goldstein’s contribution to *Who Speaks for the Child* is a valuable if brief introduction to the central issues surrounding the proxy consent question. See also J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* (1979).

7. P. 213. “The primary social goods, to give them in broad categories, are rights and liberties, opportunities and powers, income and wealth.” J. RAWLS, *A THEORY OF JUSTICE* 92 (1971).

depth. Second, the fact that the articles range from philosophical to legal in their emphasis detracts from the thoroughness with which the contributors explore any given dimension of the problem.

*Who Speaks for the Child* does possess at least two virtues. First, it is a readable general introduction to the problem of proxy consent. Second, it shifts the center of analysis from the substantive issue of what shall be decided on behalf of the child to a discussion of who shall decide. But at some level, virtue becomes vice; because the book treats the subject of proxy consent in a general way, it will not be useful to those already familiar with the problem. Although *Who Speaks for the Child* makes interesting reading, it does less to suggest directions toward a satisfying solution to the challenge of proxy consent than it does to confirm the elusiveness of any such truly compelling approach.