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## TO CHOOSE OR NOT TO CHOOSE?

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### **Choice in Social and Political Thought**

For most of Western political history, a majority of individuals had little opportunity to make choices about critical aspects of their lives. Social structure was formal and rigid; one was born into a given social status, with a clear life plan and very limited opportunity to alter its course. Being a good member of one's family, class, gender, and profession involved abiding by strict rules, following a course set by ancestors, social norms, and other dimensions of destiny. Think of *Oliver Twist's* start in life in Charles Dickens's description:

What an excellent example of the power of dress, young Oliver Twist was! Wrapped in the blanket which had hitherto formed his only covering, he might have been the child of a nobleman or a beggar; it would have been hard for the haughtiest stranger to have assigned him his proper station in society. But now that he was enveloped in the old calico robes which had grown yellow in the same service, he was badged and ticketed, and fell into his place at once—a parish child—the orphan of a workhouse—the humble, half-starved drudge—to be cuffed and buffeted through the world—despised by all, and pitied by none. (p. 4)

Oliver's prospects for the future become even more apparent when we compare him to the station of Mr. Fitzwilliam Darcy, an-

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other fictional young man (though not an infant) living outside of London in the early nineteenth century. Here is his first appearance in Jane Austen's *Pride and Prejudice*:

Mr. Darcy soon drew the attention of the room by his fine, tall person, handsome features, noble mien; and the report which was in general circulation within five minutes after his entrance, of his having ten thousand a year. The gentlemen pronounced him to be a fine figure of a man, the ladies declared he was much handsomer than Mr. Bingley, and he was looked at with great admiration for about half the evening, till his manners gave a disgust which turned the tide of his popularity; for he was discovered to be proud, to be above his company, and above being pleased; and not all his large estate in Derbyshire could then save him from having a most forbidding, disagreeable countenance. (p. 7)

In these times, as in many other times and places, an individual's life was largely determined by external circumstances. Of course, one could decide to be "agreeable" to a greater or lesser extent, inasmuch as such traits are within one's control. But these traits account for relatively minor variations within an allotted future. Among other things, one's place of residence, her health, her employment, and other conditions and decisions that create the contours of one's life were often strictly pre-charted before birth. Parental knowledge and social conventions were considered to be better directives than one's own judgment. Traditional groups and societies today impose similar limitations on personal choice, preferring social stability, continuity, and personal submission over self-expression, personal authenticity, ingenuity, and choice.

Strong arguments can be made for either sociopolitical system, and my intention here is not to compare them or to make the case for one over the other. Rather I take as my starting point the contemporary democratic, Western sociopolitical structure and ethos that favors choice over destiny. Freedom, exercised through the choice of a life plan, is the tool for overcoming the social vision of

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inherent inequality or structural stratification, such as the one evident from comparing *Oliver Twist* with *Mr. Darcy*. In contemporary democracies, social mobility is embraced as a manifestation of both liberty and equality. A person is not supposed to be confined to her birthplace and to a life plan sketched for her before birth. In addition to the endorsement of a diversity of aims, democratic discourse tends to assume (even if implicitly) a revisability of ends, accepting the possibility that individuals would at some point(s) in their lives rethink their affiliations, goals, values, and visions of the good life. The combination of value pluralism and the revisability of ends sets the foundation for a social structure in which significant space is provided for individual choice. In the American public sphere, and in much of Western philosophy and politics, the notion of choice serves as a panacea to a host of policy challenges, and as a conclusive response to the predetermined life such as that of the Victorian era or of traditional cultures. Choice offers equality of status, which stands in opposition to premodern and aristocratic visions of destined roles. Allowing individuals to develop a life plan, to chart their own paths, to be the authors of their lives, seems to offer an appropriate way to implement the values of equal standing and equal dignity.

But does choice as constructed in contemporary theory and policy truly provide such a comprehensive response? This book is an attempt to critically examine some of the ways in which choice is framed in contemporary theory and policy, and to suggest an alternative framework that balances choice and intervention in order to better achieve the twin goals of equality and freedom. The critical appraisal of choice developed here is to be understood as a constructive effort to enhance the social and political setting of choice, rather than as a traditionalist (or other) attempt to justify a social order that gives little room for choice. I look at the landscape of choice in search of ways to more fully achieve the promise of choice, namely, equal standing and freedom for all members of society regardless of their contingent, or morally arbitrary, characteristics and circumstances.

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At first glance, choice does seem like an appropriate, straightforward solution to the shortcomings of the alternative, choice-less vision of the predestined life. The rationale for choice and its realization are enticingly simple and direct: the state should respect individuals by letting them develop and realize their preferences through making choices, thereby expressing and implementing equal dignity and opportunity. Their dignity as individuals and their equal status as citizens are expressed in their responsibility for their decisions and their consequences. The state should not limit choices; it should not intervene in the personal process of preference development and expression. It should keep its proverbial hands, or policies, out of the private business of pursuing what each individual sets as her goals, aspirations, and values.

But another look reveals that the state can grant various forms of freedom to choose, and it can frame and shape them in a variety of ways through social policies. The state's (or government's) decision to regulate or avoid regulating a particular realm—like marriage, for example, or mortgage lending—organizes that realm, providing individuals, groups, and institutions with a particular landscape in which to make their choices. Regulating marriage means that only certain people can marry (those who meet the criteria of that state at that time, possibly including race, age, and sexual identity) while keeping others outside that institution. The state can decide to avoid regulating the institution of marriage, and allow anyone to form relationships and families as they see fit. It can still forbid pedophilia, thus maintaining the age limitation on marriage, or it can ban homosexuality, thus maintaining the sexuality barrier to relationship. Any one of these actions by the state, including the deregulation or the decision to not regulate personal-social institutions like marriage, has significant consequences in shaping the landscape of options individuals face in this realm, thus shaping their identity, their preferences, and their actions. Similarly, in realms like banking or mortgage lending, the decision of whether and how the state regulates the conduct of private institutions affects the landscape of choices that both these institutions

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and the individuals they serve face. The ubiquity of sub-prime and insolvent mortgages is to a large extent the result of a decision to deregulate this field, or to lift previously existing regulations on mortgage lending institutions. The landscape of choice is thus significantly controlled by the state, through its legislative and regulatory systems, and its decisions, including decisions to not regulate or not to take action, form this landscape in which individuals and organizations make their choices.<sup>1</sup> The next questions to grapple with, thus, are: How is individual choice shaped by social policies? How do social policies limit or expand the landscape of individual choice, and how can such limitations and expansions be justified? To begin answering this question, which is at the heart of this book, I consider the role of choice in the liberal-democratic project.

The place of choice in contemporary political philosophy was etched by one of its most ardent proponents, John Stuart Mill. In *On Liberty*, Mill focuses on the view that liberty is of value as it facilitates individuality, which is to be understood centrally as self-creation, or as the opportunity to make one's own life. (Mill is also an advocate of the state's role in the flourishing and well-being of individuals, a point that he does not fully argue, and which will receive attention here.) Contemporary liberalism focuses on his harm principle, or the suggestion that one can make any choice about one's actions so long as others are not harmed by those choices and actions. The promise of this principle is that of self-authorship, the epitomized consequence of liberty and autonomy. Liberal democracies develop a host of policies on the basis of these values.

Implicit in the democratic ideal is the suggestion that citizens should be self-ruling both as a group and as individuals. This self-rule is often translated into, or equated with, an ability to choose. Respect for individuals is thus expressed by a refrain from intervention in the processes and outcomes of their choices. Decisions made through proper choosing processes are deemed justified and legitimate. Institutions that leave room for choice are perceived as

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more desirable, a priori, than ones that direct individuals toward a specified outcome. In the American public debate, groups that favor making abortion available frame their position as “pro-choice”; school voucher supporters describe their position as allowing for “school choice”; attempts to reform health care falter time and again over the concern that reform would limit or eliminate individuals’ opportunity to choose among health plans or doctors. The repeated reference to choice expresses an appeal to a shared value, echoing a valorization of the act of choosing. It reverberates in the public sphere in ways that intensify and further centralize the place of choice in the public consciousness. Hence, it is important to clarify the way this value functions in contemporary democracies, to sketch its advantages and limitations, or what it can do for us, and to examine ways in which it can better fulfill its promise.

### **Autonomy, Freedom, Opportunity**

Most theoretical and empirical studies on choice focus on two related conditions for its implementation, namely, autonomy and freedom. The mainstream scholarly and political view on choice sees it as derivative of conditions of freedom and as based on the capabilities of individuals to autonomously express and execute their preferences.

A more elaborate account of the conditions of choice would suggest that for choice to be properly available in a democratic society, three types of conditions need to be satisfied. First, philosophically (and psychologically), autonomy needs to be developed and exercised. The basic properties of autonomy would include the development of an ability to discern and consider options, and the capability to act according to one’s preferences. The second condition of choice is political: freedom must be part of the institutional ethos, allowing for the realization of rights, which in turn have to be engraved in the political structure. A third and less often con-

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sidered condition for choice is the social one. Socially, opportunity must exist, or the availability of multiple relevant options for the individual to choose from (this third point is historically related to what T. H. Marshal terms “social rights”). To define opportunity in this context of choice-related policies, I consider *X* to have an opportunity to *Y* if *Y* is part of a choice set that is available and accessible to *X*.<sup>2</sup>

Absent one of these conditions— autonomy, freedom, and opportunity—choice is hampered, or becomes unavailable as a practice. These three aspects of choice are not independent, but neither can they be described as derivative of each other. For choice to be feasible and accessible, all three components need to be present, and moreover, they must augment each other. In other words, the fulfillment of all three conditions—autonomy, freedom, and opportunity—is necessary for the achievement of choice. The main challenge in conceptualizing the conditions for choice is the balance among the three, as well as the priorities set among them. Most liberal theorists suggest that ethical individualism, or the primacy of the individual over the group (including the state), justifies a prioritizing to autonomy as a manifestation of liberty and an expression of respect; in fact, many regard the legitimacy of the state to be conditioned upon the autonomy of its citizens. Counter to this widely held argument, I suggest that preferring opportunity, and prioritizing it (for the purpose of social policy making) over autonomy, can advance both equal respect to individuals and freedom. Autonomy in its minimal form is sufficiently available to individuals in democratic society; opportunity, on the other hand, is necessary for utilizing many forms of decision making that result from autonomous thinking. Consequently, facilitating opportunity can better implement both freedom and equality in a democratic society, and thus strengthen the legitimacy of the democratic state. As a result, civic equality should be understood as tied not only to autonomy and freedom but also to the conditions for well-being that are satisfied when appropriate opportunities are present in the individual’s landscape of choice.

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This book explores the impact of this restructured view of choice on policies, and the role that these policies in turn have on the landscape in which individuals make decisions and choices. In examining justifications for choice-related policies, the following chapters consider the merits of a change of focus from an emphasis on freedom and autonomy to an emphasis on the facilitation of opportunity as part of the conditions of civic equality. While freedom and autonomy are clearly valuable goals, prioritizing them when constructing a theory of choice that could serve as a framework for policy making can obscure some crucial aspects of choice, including those tied to identity, belonging, and affiliation. Prioritizing autonomy creates further risks, such as elitism and discrimination, if autonomy is understood as a condition for acquiring the policy's benefits. It can also undermine diversity by failing to appreciate those who do not espouse autonomy as a value. Logically speaking, autonomy is not a necessary condition for opportunity. While autonomy is commonly understood as a desirable personal trait or skill, opportunity is a condition offered through institutional structure and policy decisions. Such policies can assume the existence of autonomy or aspire to establish it, but they are not required to do either (and as I suggest later on, it is sometimes better if they do not). Therefore, the current discussion focuses on the expansion of opportunities that choice policies can provide when properly constructed, and considers autonomy as well as freedom either as background conditions for opportunities or as potential results, but not as preconditions or ultimate aims.

What difference does priority make in endorsing and expressing freedom, autonomy, and opportunity? The order of priority among these sometimes competing, sometimes complementing, values is expressed through policies that support the facilitation and protection of autonomy or the provision of opportunities according to perceived needs and specified circumstances. A policy that prioritizes autonomy would generally take one of two possible forms. First, it could be based on the assumption that individuals are already autonomous, and thus focus on nonintervention and

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liberty. Alternatively, it could express a perfectionist view that aspires to facilitate or develop autonomy in individuals. In this case, it would be more interventionist and would perceive of freedom as a positive value rather than as a state of nonintervention.

A policy that prioritizes opportunity would be based on a more robust responsibility of society toward the individual and on an active attempt to achieve civic equality, understood to include well-being. The suggestion that the state and society have an obligation to provide opportunities is an expansion of, rather than a substitution for, the state's obligation to support freedom and the facilitation of autonomy. Focusing on choice, with its normative and practical dimensions, requires greater emphasis on the state's responsibility to provide equal standing, choice sets, and opportunities to choose for all members.

These ideals are facilitated and pursued through the regulation of opportunities and choices, or, metaphorically, through cultivating a fruitful landscape of choice. At the center of the current investigation are policies and state-sanctioned regulations of choice; however, a fuller understanding of the conditions of choice would require an examination of the ways choices are made by individuals. Because many instances of choice boil down to the individual decision maker, the personal process of choosing merits a closer look. I therefore look beyond policy making and regulation, and consider cognitive, cultural, and intimate factors that affect the choices individuals make.

The two domains making up the landscape of choice—the political and the personal—converge in the realm of education, where individuals learn the skills and attitudes necessary for informed choice, and where policies that reflect society's priorities among the conditions of choice are negotiated and expressed. In the following chapters, I look at those instances of choice in which the tension between personal makeup and regulation is most significant; these cases seem to me to be most revealing when considering the proper balance between regulation and freedom, autonomy and equality, individuality and affiliation. Looking at decisions in

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which parenthood, culture, or religious belief are at stake can reveal the complex landscape of choice with its theoretical, personal, and policy dimensions. Moreover, these areas of choice require the most attention to individual differences. Individuals face choices in many other areas of their lives—which insurance policy to choose, for example, which car to buy, or which candidate or party to vote for. Some of these decisions will bear important consequences for their lives and the lives of others. However, decisions of this type do not require policy makers to devote as much attention to individual identities. They require less information about personal background, preferences, and connection. The tension between regulation and freedom in these cases is thus not as pronounced as in the cases of choosing how to educate one’s children, or whether to leave an abusive relationship. These latter cases can thus tell us more about how personal desires and individual well-being are affected by social policies, and how social policies should be responsive to these personal differences, through being cognizant of their impact on the landscape of choice.

### **Motivation, Intervention, Regulation**

Individual differences are most pronounced in circumstances of choice through variations in motivation. The reasons we have for choosing one option over another are broadly referred to as motivation, with the understanding that reasons can be influenced and shaped by external forces. The discussion of paternalism in the next chapter considers ways in which regulatory procedures, or forms of intervention, can shape individual preferences and thus motivation for action. Motivation is often not a proper target for regulatory policies, because directly affecting individuals’ motivations could in many cases require a normative judgment by the state of the values they hold, their vision of the good life, and other dimensions of their personal, moral, or community-related identity. However, institutions and regulatory procedures can affect the

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level of participation in voluntary actions, without directly intervening in the internal life of the choosing individuals. For example, default rules—a form of regulatory policy—greatly affect participation in a host of programs, from savings to organ donation to attending neighborhood schools. Take the case of organ donation as an example. Recent studies show the effect of forms of registration on the level of participation, in comparing, on the one hand, states in which assumed consent is a default for all individuals (or all drivers), to states demanding expressed consent, or a conscious decision by individuals to register for the organ donation program.<sup>3</sup> While motivation to be a designated organ donor may not have changed as a result of the state instituting a new default rule according to which all drivers would be donors (unless they opt out), the actual participation of individuals in the organ donation program significantly increased as a result. Public campaigns and other educational interventions have a far less impressive effect on participation in comparable programs.

Note that if an individual holds a principled view on organ donation, her motivation will remain constant and so will her participation. For example, if she believes that it might harm her chances to go to heaven, or her reincarnation, or even if she is opposed to organ donation because of a sense of revulsion, she would opt out of the program. Others, who have a weaker motivation for or against organ donation, would opt for the default rule, whatever it may be. Thus, through instituting default rules, the state (or employer, or other regulator) can affect levels of participation in different programs, thus advancing what seems to be preferable—like organ donations—without imposing a change of motivation or preference on individuals, and without infringing upon their freedom.

The effects of default rules and other regulatory procedures on personal decisions provide us with a glimpse of the state's role in the construction of the landscape of choice. A careful consideration of these effects can provide some normative tools for assessing policies that affect this landscape. Considering what impact

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policies have on personal choices makes it possible to distinguish among various levels of motivation, and thus among various forms of justified and unjustified intervention. Consider the person who is adamantly opposed to organ donation for religious, aesthetic, or other reasons. Her freedom is maintained by the default rule of becoming an organ donor, as long as there is an opt-out option.<sup>4</sup> By instituting this rule, the state expresses a clear preference for organ donation, along with respect to those whose identities and views prohibit them from sharing this preference. Those whose motivations are weak and do not constitute a significant dimension of their (religious or other) identity are encouraged to share the preferred view (i.e., a positive vision on organ donation). Clearly, such regulated prioritizing of a preferred view requires some justification in itself. Mostly it will make sense in areas where properly deliberated expert opinion or strongly shared communal values can provide a solid basis for preferring one option—donating organs, saving for retirement—over others. These options too are context-based: in countries where the majority culture or religion opposes organ donation, or where the state provides for retirees through existing mechanisms, the preferred view on these matters may be different than in countries with no such shared values or existing mechanisms.

Even with this context-dependence caveat, some may be reluctant to trust “authorities,” experts, or the state with such power. But it should be noted first that the state (and in other cases, other authorities—for example, employers or local government) already holds these powers. Moreover, failing to prioritize one option over others is often equivalent to actively mandating a preferred view, as the case of the mechanisms for designating organ donors makes clear. By not creating a default rule by which all drivers will be designated donors, the state does not step back and practice nonintervention. Rather, it endorses an opposition to organ donation by effectively instituting a default rule by which all drivers will not be organ donors unless they opt into the program. Therefore, the need to carefully design policies that generate, endorse, and imple-

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ment a preferred view through creating an appropriate choice set, and, where appropriate, default rules and other mechanisms, does not expand the state's power. Rather, this approach simply requires the state to use its existing power more carefully and thoughtfully, and to spell out the values that its policy expresses.

The discussion of destructive intimate choices further complicates the picture. What should be made of choices that seem to be clearly bad for the individual who makes them, and sometimes destructive for others? How should these choices and acts be analyzed, and what would be a justified response to them, considering that these decisions can be closely aligned with the individual's deep sense of personal identity, self-worth, or moral vision? In the third chapter, I develop the view that while paternalism may be justified in regulating intimate choices, it should rarely take the form of criminalization. In other words, when the state is responding to destructive choices individuals make in the intimate sphere, intervention should be less blunt than the tools the criminal law and criminal justice system can offer. Using "softer" tools of regulation properly addresses the understanding of choices as tied to personal identity in ways that the state has little to contribute to (and sometimes little jurisdiction over). Intimate choices are at the borders of the landscape of choice, which is open to state regulation. Expressing this understanding by using appropriate regulatory tools would also prove more justified and productive as a public policy.

Throughout the book, the distinction between paternalism toward adults and that toward children is considered. Forming preferences and developing tools to reflect on them and express them is an essential part of the process of growing up. Choice-related policies should reflect this distinction between adults and children and address it directly. Adults too, however, often amend and revise their motivations and preferences, reconsider them, and look for new ways of expressing them. It is thus important to reflect on the ways in which adults and children differ, and the areas in which they should be regarded by the state similarly or distinctly.

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In the various areas of policy that this book explores, it is mostly in search of a midway, perhaps a golden path, between unmitigated freedom and heavy regulation. In the realm of financial exchanges and the economy broadly, the search for a golden path draws the attention of economists and policy makers. In looking at policies beyond economics, the discussion here focuses on decision making in areas where personal identity is formed and expressed, and aims to implement similar visions of this golden path in areas of personal and social life as well.

### **A Note on Empirical Studies and Normative Theories**

What should knowledge about the ways individuals choose tell us about policies that can best reflect respect for autonomy and rationality? Should liberal theory, with its strong emphasis on values such as freedom and respect, be altered to incorporate an empirical view on choice? I turn to Isaiah Berlin, who in his introduction to the *Essays on Liberty* responds to similar concerns:

Finally one may ask what value is in liberty as such. Is it a response to a basic need of men, or only something presupposed by other fundamental demands? And further, is it an empirical question, to which psychological, anthropological, sociological, historical facts are relevant? Or is it a purely philosophical question, the solution of which lies in the correct analysis of our basic concepts, and does the answer to which the production of examples, whether real or imaginary, and not the factual evidence demanded by empirical enquiries, is sufficient and appropriate? . . . could it be the case that if the evidence of the facts should go against us, we should have to revise our ideas, or withdraw them altogether . . . ? Or is their authority shown by philosophical analysis which convinces us that indifference to freedom is abnormal, that is, offends against what we conceive of as being spe-

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cifically human, or at least, fully human . . . ? To this it is sufficient, perhaps, to say that those who have ever valued liberty for its own sake believed that to be free to choose, and not to be chosen for, is an inalienable ingredient in what makes human beings human.<sup>5</sup>

Berlin's position reflects a common liberal view, namely, that the normative power of choice overwhelms any empirical input into the question of its role in human society. But this argument can be adjusted to accommodate the suggestion that a deeper and more accurate understanding of "psychological, anthropological, sociological, historical facts" can inform the theoretical argument for choice. It can make the case for choice as an expression of freedom in a way that would support its proper implementation in social policy. Allowing research on the ways in which individuals choose to inform normative theories about freedom could generate a powerful connection between theories of freedom and social policies that can express and enhance that freedom.

The motivation for introducing these studies into the normative debate on choice is not, as Berlin warns, to "revise our ideas, or withdraw them altogether" but rather to create a more solid connection between the ideal of freedom and choice on the one hand, and social policies that aim to implement it on the other. This connection, when it relies on a realistic perspective on the ways individuals choose, can prove to be a helpful tool for strengthening choice in the arena of social policy making.

Normative theories of freedom and choice can benefit from utilizing a foundation in the empirical study of human behavior, particularly as it addresses rationality and choice. While normative theories' relation to empirical data is not a clear and direct one, and the history of philosophy is fraught with arguments about the justified disconnect between the descriptive and the prescriptive, the "is" and the "ought," there is a case to be made for considering the study of human behavior when structuring a normative theory of public policy. If government—and public policy as the expression

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of its intentions—are meant to shape society and direct it, theories and analyses of public policies can benefit from considering the psychology and sociology of human behavior as a factor in the structure and implementation of its policies. As far as normative theory is meant to inform government and public policy, as far as theories of justice aspire to affect the ways in which society is governed and its operations, the reflective equilibrium between the descriptive and the normative can prove to be a productive way of thinking about both.

The introduction of empirical research to the liberal-democratic conceptualizations of freedom and choice as attempted here suggests that the conditions of choice should be reconsidered if they are to satisfy the requirements of freedom. In other words, for individuals to be able to choose in a meaningful way, social policies should be designed in ways that maintain a principled commitment to freedom as a core value of democracy, while reflecting more directly actual processes of choice, rather than idealized notions of freedom or autonomy.

The main aim of this book is to analyze the landscape of choice both theoretically and from a policy perspective, and to provide a justificatory account of structured paternalism as a tool for enhancing opportunity and thus expanding the horizons of choice. The analysis includes both political and personal dimensions of choice, and culminates in a critical consideration of the role of education as a site where regulative policies and personal choice are both expressed and shaped.

In the next chapter I define and examine the concept of paternalism, and offer a modest defense of paternalism as a tool in social policy making. Chapter 3 considers the implications of this endorsement of paternalism to the area of intimate choices, including those taken about an individual's body and her sexual and familial relations. Chapter 4 considers paternalism as a practice unique to the relations of adults with children. It suggests that the differences between adults and children merit some special considerations for children, but that certain forms of paternalism can

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constitute appropriate dimensions of both adult-adult and adult-child relations.

The subsequent two chapters consider specific contexts in which social policies affect individuals' choice sets and the processes of decision making among those choices. Chapter 5 looks at choices about cultural affiliation and cultural, including religious, practices. Chapter 6 examines the unique case of choosing a school for one's child, where the considerations from previous chapters—on intimacy, family, and culture—coincide. The conclusion summarizes the view that structured paternalism, as exemplified in these areas of social interaction, can protect individuals from harm and enhance their opportunity to improve their well-being and their standing as civic equals by properly constructing their landscape of choice.