

“The Rights and Duties of Childrearing”, *William and Mary Bill of Rights Journal* 44 (2003)

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Abstract: What rights and duties do adults have with respect to raising children? Who, for example, has the right to decide how and where a particular child will live, be educated, receive health care, and spend recreational time? I argue that neither biological (gene-provider) nor procreative (zygote-producer) parents have in principle any special rights to raise their offspring. Instead, those rights can be legitimately claimed by anyone for whom possession is suitably in the child's best interest. Those who so obtain childrearing rights have a duty to live up to the "basic expectations" for ensuring that their possession of those rights is in the child's best interest, but have no further duties. In particular, they have no duty to do the best they can for the child.

## 1. Introduction

What rights and duties do adults have with respect to raising children? What determines who, for example, has the right to decide how and where a particular child will live, be educated, receive health care, and spend recreational time? More concretely, what determines who a child's initial custodial parents are, who may adopt a given child, who has what custodial rights in the case of divorce, when a neglectful or abusive parent loses her custodial rights over a child, and what visitation rights grandparents have? The commonsense view is that, under normal procreative conditions, the biological parents have the right to raise their children in any way that they see fit as long as they are not physically (or, perhaps, mentally) abusing them. I shall argue that this view is mistaken. Neither biological (gene-provider) nor procreative (zygote-producer) parents have in principle any special rights to raise their offspring. Instead, those rights can

be legitimately claimed by anyone for whom possession is suitably in the child's best interest. Those who so obtain childrearing rights have a duty to live up to the "basic expectations" for ensuring that their possession of those rights is in the child's best interest, but have no further duties. If this is right, then custodial parents have significantly fewer rights over their children than is generally thought.

## 2. Background

I shall assume—controversially—that with respect to *adult-to-adult relations* some form of liberal egalitarianism is correct. More specifically, I shall assume that adults (agents) are protected by certain kinds of general negative rights of personal security (or bodily integrity)<sup>1</sup>, and that, subject to the constraints imposed by these rights, agents have some kind of (perhaps limited) general duty to promote equality of life prospects in some appropriate sense (here left open) by promoting the life prospects of individuals. There is, I shall assume, no general duty to help other adults except as required by the general duty to promote equality—although, of course, there can be various *special* duties to help (based on specific past acts, such as wrongdoings, commitments, etc.). I further assume that agents who violate these rights have a

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<sup>1</sup> For discussion of why some kind of rights of personal security, and self-ownership rights in particular, are needed, see Peter Vallentyne, "Self-Ownership", *Encyclopedia of Ethics*, 2nd edition, edited by Laurence Becker and Charlotte Becker, Garland Publishing (2001), pp. 1561-63.; Peter Vallentyne, "Critical Notice of G.A. Cohen's *Self-Ownership, Freedom, and Equality*", *Canadian Journal of Philosophy* 28 (1998): 609-626; and Peter Vallentyne, "Left-Libertarianism: A Primer", in *Left Libertarianism and Its Critics: The Contemporary Debate*, edited by Peter Vallentyne and Hillel Steiner, Palgrave Publishers Ltd., 2000.

duty to compensate their victims to the extent that they are responsible in a specified sense for the wrongful harms.

These are, of course, controversial assumptions. My purpose here is not to defend them, but rather to defend a view of how childrearing rights and duties fit into this picture.

### 3. The General Rights of Children

Childrearing rights are, I claim, generally subordinate to certain rights that all children have. In this section, I defend the claim that children have certain equality and personal security rights that apply against everyone—including, with a qualification given below, their custodial parents. In the following sections, I discuss the rights and duties of those who raise children.

Children, like adults, have, I claim, certain rights of non-interference and certain rights to have their life prospects improved by others when the demands of equality so require. I thus reject the view that only autonomous agents can have rights. According to this latter view—the *choice-protection* view of rights—the sole purpose of rights is the protection of autonomous choices. Since children and other sentient non-autonomous beings do not have the capacity for autonomous choices, they do not, it is claimed, have any rights, and thus others owe them no duties. Agents may have, on this view, duties to other agents *with respect to* non-agents (e.g., a duty to you not to harm your child), but there are no *duties owed to* non-agents (e.g., no such duty to the child).

This view simply does not make adequate sense of the duties that we have with respect to children (and other sentient animals). We have duties *to*—and not merely with respect to—children and these are grounded in some kind of constraint protecting their interests. These duties are not impersonal duties (owed to no one), because (1) they do not hold when the children benefit suitably (there is no duty to refrain from cutting open a child’s body, when this is part of

a medical operation that will maximally benefit the child), and (2) children are owed compensation when these duties are violated. Nor are these duties (with respect to children) owed to other agents, since they cannot be extinguished by all agents releasing each other from this duty. The view that all rights protect choices fails therefore to capture the sense in which the duties that we have with respect to children are indeed owed to them. Furthermore, the fact that children cannot waive these duties, or even enforce them (e.g. use force to prevent infringement or to extract compensation), is quite irrelevant. The duties of others can be appropriately sensitive to the *interests* of children (e.g., the use of physical force against them is forbidden unless it is suitably in their interest), and other agents can enforce the duties on their behalf.<sup>2</sup>

I agree that the choice-protection view captures the main sorts of rights that autonomous agents have. I see no good reason, however, to assume that there can only be one kind of right. Both conceptions of rights are coherent. The only question is which kind is relevant for a given kind of being. I claim that autonomous agents have (mainly) choice-protecting rights, and non-autonomous sentient beings have interest-protecting rights.<sup>3</sup> Of course, as autonomy develops,

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<sup>2</sup> For discussions of the issues between choice-protecting and interest-protecting conceptions of rights, see Wayne Sumner, *The Moral Foundation of Rights* (Oxford: Oxford University Press, 1987); Hillel Steiner, *An Essay on Rights* (Cambridge, MA: Blackwell Publishers, 1994); Kramer, Matthew H., N.E. Simmonds, and Hillel Steiner, *A Debate over Rights* (Oxford: Oxford University Press, 1998); and Samantha Brennan, "Children's Choices or Children's Interests: Which Do their Rights Protect?" in: *Children and Political Theory* edited by David Archard and Colin MacLeod (Oxford University Press, 2002). For skepticism about whether all duties (and imperfect duties in particular) owed to children can be captured by rights, see Onora O'Neill, "Children's Rights and Children's Lives," *Ethics* 98 (1988): 445-463.

<sup>3</sup> Throughout I remain neutral on what the child's interests are. More specifically, I remain

the interest-protecting duties owed to children are gradually supplanted by choice-protecting duties owed to agents, but I shall not address the important issue of how and when this happens.<sup>4</sup> For simplicity, I shall implicitly focus on the interest-protecting rights of non-autonomous children.

Children, then, have some rights, but what rights do they have? We are, recall, assuming that adult agents have certain rights of personal security (e.g., against non-consensual contact with the body) and certain equality rights.<sup>5</sup> Children, I claim, have both as well—although

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neutral on whether these necessarily include interests in the development of agency in addition to interests in well-being. Hence, I remain neutral on the extent to which the child's best interests typically require a suitably open future (and thus a certain kind of neutrality in socialization). For a defense of the importance of ensuring a suitably open future, see Amy Gutmann, "Children, Paternalism, and Education: A Liberal Argument," *Philosophy and Public Affairs* 9 (1980): 338-358. For criticism and refinement of this view, see Colin MacLeod, "Conceptions of Parental Autonomy," *Politics & Society* (1997): 117-40.

<sup>4</sup> The crucial point is that, when one becomes sufficiently autonomous for certain kinds of decisions, one's consent becomes required to waive the right rather than mere non-harm. Although the capacity for well-being is still present, its moral significance is overridden by the capacity for autonomous choice when the latter is present. For further discussion, see Hugh LaFollete, "Circumscribed Autonomy: Children, Care, and Custody," in *Having and Raising Children: Unconventional Families, Hard Choices, and the Social Good* edited by Uma Narayan and Julia J. Bartkowiak (University Park, PA: Pennsylvania State University Press, 1999).

<sup>5</sup> Elsewhere, I have argued that those who procreate have a duty to their offspring—even if they do not raise them—to ensure that their life prospects are non-negative (worth living). This is another right of children that childrearing rights must respect, but for simplicity I shall ignore it

understood in interest-protecting terms.<sup>6</sup>

Consider, for example, a child's interest-protecting right of personal security. It is exactly like the adult right of personal security except that it does not rule out contact when the child's interests are not adversely affected (as opposed to when the child has consented). Performing maximally beneficial surgery on a 4-year old against her will does not violate her rights of personal security, whereas it would normally violate those of an adult. Performing pointless or needlessly dangerous surgery on a 4-year old, on the other hand, does violate her rights of personal security—even with her consent. The relevant conception of harm here is the long-term setback of interests. Thus, the mere presence of a short-term harm (the pain of surgery) is weighed against long-term benefits. Agents are permitted to impose short-term bodily harms on children—as long as the net long-term effects are suitably non-harmful.<sup>7</sup>

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here. See Peter Vallentyne, "Equality and the Duties of Procreators", in *Children and Political Theory* edited by David Archard and Colin MacLeod (Oxford: Oxford University Press, 2002).

<sup>6</sup> Child-liberationists argue that child have the same rights of self-determination as adults. They thus implicitly endorse choice-protecting rights for children with at least a basic rational competency. No one, however, endorses choice-protecting rights for neonates. For an argument against choice-protecting rights for children, see Laura Purdy, *In Their Best Interest? The Case Against Equal Rights for Children* (Ithaca: Cornell University Press, 1992).

<sup>7</sup> I assume throughout that the interest-protecting rights of children protect their interests *directly* in the sense that whether a right is infringed by a particular action is determined by the impact of that action on the holder's well-being. Rights so understood are not infringed when no harm is done to the holder. Indirect interest-protecting rights, by contrast, ground the content of rights in the instrumental benefits to the holder of *having* those rights, and such rights may be infringed even if the holder is not harmed. A full defense of the proposed view would thus require a

The crucial point is that once one recognizes that adults have rights of equality and personal security, that an interest-protecting conception of rights is possible, and that children have interests (which no one contests), it is arbitrary and implausible not to hold that children have those same rights understood in interest-protecting terms. Rights place constraints on what others may do to the right-holder. Such protection is important for beings with interests even if they are not autonomous. For autonomous beings, this protection is controlled by their will (e.g., their valid consent is necessary for permissible breach). For non-autonomous beings with interests, the protection is sensitive to their interests. There is no reason for only autonomous beings to be protected by rights. Children, I conclude, have rights of personal security and of equality.

Whatever rights custodial parents have, then, they are constrained (although with a qualification given below) by the rights of children to personal security and equality. The rights of personal security place limits on the rights of parents to use physical force against their children. The rights of equality place limits on the rights of parents to prevent others from providing equality benefits to which the child is entitled. (Indeed, the parent often has a duty to the child to provide such benefits. We'll examine the duties of parents in a later section.) Thus, for example, a Jehovah's Witness has no right to prevent others from providing medical treatment to her child when the child's equality rights require that others provide such treatment. Nor does an Amish parent have any right to prevent others from providing a high school education to her child when the child has an equality right to such an education. Of course, not all medical treatments and not all forms of education are required by the equality rights of a given child, but, for those that are, parents have no rights to prevent others from providing such benefits. I shall not attempt here to spell out in detail the exact content of the equality rights that

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defense of the direct view against indirect views.

children (and adults) have. My claim is simply that, whatever they are (and I believe that that they are fairly robust), they constrain the childrearing rights of parents (with an important qualification to be given below).

#### 4. Childrearing Rights

Who has the right to raise a given child, and what rights do they have over the child? I shall defend a radically strong child-centered conception of childrearing rights. More specifically, I shall argue (roughly) that childrearing rights over a given child belong to those for whom possession is suitably in the child's best interest.<sup>8</sup> In the next section, I will address the duties of those with childrearing rights. Here I focus on the rights.

Let us call a person with childrearing rights over a given child *a custodial parent*. There are two kinds of childrearing rights that we must consider: (1) rights against *others* that they not interact with the child except with permission of the custodial parents (e.g., that others not take the child to the beach without the custodial parents' permission), and (2) special rights against the *child* (e.g., the liberty to punish her in ways that are normally ruled out by the child's personal security rights). We shall consider each in turn.

##### 4.1 Childrearing Rights Against Others

Childrearing rights against others are, as indicated above, restricted by the rights of children to personal security and equality. First, others are not permitted to violate the child's rights—even with the custodial parent's permission. Second, others are permitted to interact with

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<sup>8</sup> For excellent discussions of childrearing and related rights, see Jeffrey Blustein, *Parents and Children: The Ethics of the Family* (New York: Oxford University Press, 1982); and David Archard, *Children: Rights and Childhood* (New York: Routledge Inc., 1993).



the child in ways to which the child has a (e.g., equality) right—even without the custodial parent’s permission. More generally, others are permitted to have contact with the child if and only if (1) it does not infringe the child’s rights and (2) either (a) they have permission to do so from the custodial parents, or (b) they have a duty to the child to have such contact (in which case custodial parents have no authority to block such contact and their permission is not needed).

Typically, it is in children's interests to have an autonomous agent (or small set thereof) have rights to control their interactions with others. This is typically valuable because the agent overseeing these interactions will look out for the child’s interest and because this will help develop special bonds of affection that are in the child’s interest. The benefits to the child are, I shall argue, the main justification for childrearing rights. They are not, however, the sole justificatory consideration. Also relevant is the expected effect of the childrearing rights on the child's disposition to violate the rights of others. An individual acquires, that is, childrearing rights just in case her possession of those rights, in a precise manner that I will explain below, suitably ensures that the child will respect the rights of others and suitably promotes the child’s interests.

Let me start by explaining the condition concerning the child’s disposition to violate the rights of others. The condition that I shall impose is relatively weak in order to give more strength to the child’s best interest condition. First, the rights violation condition is concerned with expected *compensation shortfalls* from rights violations—as opposed to rights violations as such. It is not concerned, that is, with cases where the child goes on (as an adult or partially autonomous child) to violate the rights of others and then fully compensates all the victims. It is, of course, better that there be no rights violations than that there be rights violations with full compensation. The weaker condition (which only concerns rights violation for which full

compensation is not provided) is, I shall argue, nonetheless more plausible because it gives more room for taking the child's best interests into account. A second way that the proposed rights violation condition is relatively weak is that it requires that the compensation shortfalls be no worse than they would be if *no one* had child-rearing rights, but not that the shortfalls be as low as possible. Again, this leaves appropriate room, I claim, for the child's best interests to be taken into account. I shall defend these aspects below.

Under what conditions, then, does a person acquire childrearing rights against others? A person acquires such rights, I shall argue, just in case she claims those rights and the following three conditions are met. First, possession of the childrearing rights by this person is no worse for the child, and no worse for others with respect to compensation shortfalls from the child's rights violations, than having no one possess childrearing rights over the child. Call this *the no custodian condition*. It requires that the expected benefit for the child be no less, and that the expected compensation shortfalls to each other person be no greater, than they respectively would be if no one were to possess childrearing rights against others with respect to the child. Second, possession of the childrearing rights by this person must be at least as good for the child (in terms of expected benefits) as possession by anyone else who both claims the rights and satisfies the no custodian condition. Call this *the best custodian condition*. Together these conditions hold that a person has childrearing rights over a child only if she claims them and it is in the (expected) *best interests of the child* for this person to have these childrearing rights—compared with having no custodian and compared with other interested custodians for whom the no custodian condition is satisfied. These two conditions are sufficient to justify childrearing rights in cases where there is no tie for the best interests of the child. Where there is a tie, a third condition is needed. Call this the *tie-breaking condition*. I'm inclined to defend the view that in cases of ties, the person who first claims the childrearing rights acquires those rights, but there

are other possibilities. One is that the claimant who would get the greatest benefit acquires those rights. I will not attempt to resolve this issue, and shall leave open the exact nature of the tie-breaking condition. For brevity, below I shall ignore this condition.

The basic picture, then, is this. If no one claims childrearing rights over a child (e.g., an abandoned child or an orphan), everyone may do anything she wants with the child as long as doing so does not infringe the child's equality and personal security rights. Typically, of course, the procreative parents will claim the rights to raise the child. If, however, the possession of these rights would be worse for the child or produce an expected compensation shortfall for someone that is greater than the no custodian level (this will be true only for parents who are incredibly bad influences on their children!), then the procreative parents have no childrearing rights over their offspring. If, on the other hand, the procreators pass the no custodian test, then they must meet a second condition. Their possession of the childrearing rights must be at least as good for the child as possession by anyone else who claims the rights and passes the no custodian test. If the interests of the child would be better served by some other interested party having the childrearing rights, then the procreators do not have childrearing rights. If, however, the parents uniquely satisfy the best interests of the child condition, then the procreators have the rights to raise the child.

Once acquired, for how long do childrearing rights last? One view is that they last only for as long as the no custodian and best custodian conditions continue to hold. On this view, if someone shows up and claims the childrearing rights and they would be a better custodial parent, then the previous custodial parents lose their childrearing rights. The problem with this view is that it may be in the child's interest for the childrearing rights to be more secure. The problem here is not that that a change in custodian parents could be highly damaging to the child (given her need for secure, long-term, intimate bonds). For this very important consideration can be

factored in, and doing so makes it unlikely that a change in custody will be in the child's interest. The problem here is rather that, under some conditions, some individuals who would be superb custodian parents may not desire to be so in light of the possibly temporary nature of the rights. A more permanent set of custodial rights, that is, might increase the pool of parties interested in claiming those rights, and thus be in the better interests of the child.

A more plausible approach is that the duration of the childrearing rights is a contingent matter that is determined at the time of acquisition by the best interests of the child. Under some conditions (e.g., ones in which there is a high demand for childrearing rights), the rights may hold only for as long as the no custodian and best custodian conditions continue to hold. Under other conditions (e.g., where there is a low demand for childrearing rights), the rights may continue relatively unconditionally until the child reaches adulthood. In what follows, I shall assume that in the real world, in general, childrearing rights, once acquired, are relatively permanent. Even so, the rights are still conditional on living up—as I shall explain in detail in the section on childrearing duties—to the basic expectations implicit in the justification of their acquisition (i.e., the no custodian and best custodian conditions). Parents who do not live up to those expectations that justified their acquisition of childrearing rights lose those rights (if someone else would be a better parent). We will return to this point below.

Childrearing rights, then, are acquired by those for whom possession is in the best interests of the child. The claim is *not* that children have a right to be brought up by those who would give them the best upbringing. It is only that they have an immunity right not to be brought up by certain individuals when other willing individuals would do a better job for the child. Those for whom possession of childrearing rights would best promote the child's interests have the moral power to obtain those rights, but they do not in general have a duty to exercise that power and acquire the childrearing rights. Agents do have duties to promote equality and

sometimes this will require them to raise certain children, but this is not always so. The proposed view concerns who *may* acquire childrearing rights over a child, and not who has a *duty* to take on those rights.

Note also that the claim is not that those who have childrearing rights have a duty to provide the best upbringing they can for the child. No claim is being made here about the duties of custodial parents. This will be addressed below. The claim so far only concerns the conditions under which one can acquire childrearing rights over a child.

Above, and in what follows, I write as if the rights to raise a child are an indivisible bundle of rights. Of course, this is not so. It may be in the child's best interest to have some (or all) of the childrearing rights divided among various individuals. For example, it may be in the child's best interest for the rights to raise her to be divided among a couple, the parents of the couple (the grandparents), and certain state officials. Of course, the possibility of dividing up the rights introduces many complications. One of them is that the relevant test for a given child-rearing right would have to be whether possession is part of a rights divisions scheme (of which there will be many) that is in the child's best interests. For simplicity I shall write as if childrearing rights are not to be divided up, and will be instead held entirely by some person or set of persons. In so doing, I am admittedly covering up many important issues that need to be addressed.

The proposed view of child-rearing rights can be criticized (1) for not adequately recognizing the child-rearing rights of biological, procreative, or custodial parents, (2) for not adequately recognizing societal interests, (3) for not adequately recognizing child interests, and (4) for giving undue advantage to the rich. We shall consider each in turn.

The proposed view, it may be objected, fails to give biological and procreative parents any special rights to raise their offspring. This flies in the face of commonsense. I agree, but

unreflective commonsense is, I shall argue, mistaken.

An extreme way of generating special child-raising rights for biological or procreative parents is to hold that they *fully own* their children either on the ground (for biological parents) that they owned the material resources (germs cells) that were the origin of the child or on the ground (for procreative parents) that they performed the actions that created the child. (A person who donates or sells his/her germs cells to others may not be a procreative parent.) If this claimed full ownership of offspring concerns offspring who have no moral standing (e.g., zygotes, on some views), this view may not be implausible. It is, however, grossly implausible as it concerns children with moral standing. Such children cannot be fully owned by another.<sup>9</sup>

There is, however, a weaker way of grounding special child-rearing rights for biological or procreative parents. It is to claim that the children are *partially* owned by their biological or procreative parents (depending on the account offered). These parents have full private ownership of their non-adult offspring except as constrained by the rights of the children. The view here corresponds to the proposed view except that it claims that those rights are held by the

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<sup>9</sup> Hillel Steiner defends the view that procreators own their very young children on the ground that they own the factors of their production. See ch. 7 of Hillel Steiner, *An Essay on Rights* (Cambridge, MA: Blackwell Publishers, 1994); and Hillel Steiner, "Silver Spoons And Golden Genes: Talent Differentials and Distributive Justice," in *The Genetic Revolution and Human Rights: The Oxford Amnesty Lectures 1998*, edited by Justine Burley (Oxford: Oxford University Press, 1999). For elaboration on the criticism of the ownership argument, as well as on the appeal to the best interests of the child, see David Archard, "What's Blood Got to Do with It? The Significance of Natural Parenthood," *Res Publica* 1 (1995): 91-106; ch. 8 of David Archard, *Children: Rights and Childhood* (New York: Routledge Inc., 1993); and ch. 4 of Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989).

biological or procreative parents and not by the claimant whose possession of the rights is in the child's best interest. Both views recognize the rights of the child. The difference concerns whether the biological or procreative parents hold the residual rights over the child or whether those rights are held by the interested person(s) for whom possession is in the child's best interest.

Why, then, might one think that procreative or biological parents partially own their children? It is presumably based on the idea that those who own all the factors of production (labor, raw materials, etc.) for a given product also own the product. At least where a child is intentionally produced (and perhaps in a much wider range of cases), this provides a reason for thinking that procreators typically partially own their offspring.<sup>10</sup> Many will, of course, reject the general producer-ownership principle, but I'm inclined to grant its plausibility where the products have no moral standing. In the case of children who have moral standing, an unqualified version of this principle would say that procreators fully own their children, but this is just plain crazy. We are therefore considering a qualified version that grants ownership only to the extent it is compatible with the rights of the child.

My claim is that the child's best interests determine who has the right to raise the child, and not facts about biological or procreative origin. This is not to deny that facts about biological and procreative origin are relevant for determining who has the right to raise a given child. They may well be. If (as seems highly plausible), for example, biological or procreative parents tend, all else being equal, to better look after the child, then they will tend to have the right to raise their children. Biological or procreative parenthood, however, are not directly relevant, but only indirectly (only because of the connection with effectiveness in promoting the child's interests), and such status is only one among many factors in this regard. Of course, given the limitations in

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<sup>10</sup> See ch. 7 of Hillel Steiner, *An Essay on Rights*.

our knowledge about the impact on the child of various child-raising arrangements, it is plausible on pragmatic grounds to presume that biological or procreative parents (I leave open which) have the right to raise their child, with the burden of proof lying with others who want to raise the child instead. In principle, however, biological and procreative parents as such have no special right to raise their child.

A second and closely related objection is that the proposed view does not adequately recognize the very profound interest that many people have in raising children—especially their biological/procreative offspring.<sup>11</sup> Some, for example, have argued that the right to raise one's (biological/procreative) offspring follows from the parents' rights of non-interference when pursuing their own projects (e.g., forming intimate relationships).<sup>12</sup> A first reply is that the proposed view is sensitive to this fact. It allows people to acquire childrearing rights over

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<sup>11</sup> For arguments in favor of the fundamental relevance of parental interests (in addition to child interests) in determining childrearing rights, see Don Hubin, "From Children's Rights to Parent's Rights," unpublished, Ohio State University, [hubin.1@osu.edu](mailto:hubin.1@osu.edu) (2000); Samantha Brennan and Robert Noggle, "The Moral Status of Children: Children's Rights, Parents' Rights, and Family Justice," *Social Theory and Practice* 23 (1997): 1-26; and Ch. 6 of Allen Buchanan, Dan Brock, Norman Daniels, and Daniel Walker, *From Chance to Choice: Genetics and Justice* (Cambridge: Cambridge University Press, 2000).

<sup>12</sup> See, for example, Charles Fried, *Right and Wrong* (Cambridge: Harvard University Press, 1978), p. 152. For criticism of this view, see Amy Gutmann, "Children, Paternalism, and Education: A Liberal Argument," *Philosophy and Public Affairs* 9 (1980): 338-358; David Archard, *Children: Rights and Childhood* (New York: Routledge Inc., 1993), chs. 8 and 10; and Joel Feinberg, "The Child's Right to an Open Future," in *Whose Child? Children's Rights, Parental Authority, and State Power* (Totowa: Littlefield, Adams, & Co., 1980).



children under appropriate conditions. The only issue concerns what the appropriate conditions are. No one thinks that anyone who wants to raise a given child (even if it is his/her biological/procreative offspring) has a right to do so. If the person is likely to physically abuse the child, he/she is likely to have no such right. The issue thus concerns the qualifications that an individual must have in order to have the rights to raise a particular child. The proposed view admittedly places very strong child-centered conditions: possession of the childrearing rights must be suitably in the child's best interest. Those who have a deep interest in raising some particular child therefore have a strong incentive for ensuring that they meet this condition. Of course, this won't always be possible. When it is not, there is a conflict between the prospective parent's interests and the child's interests. Given that the child has independent moral standing, and the rights at issue are rights to control access to the child, it is quite plausible, I claim, that the child's interests take priority over the potential custodial parent's interests. A man's profound interest in having a relationship with a given woman does not give him any rights to control access to her. The situation with children is no different.

A third objection challenges the legitimacy of childrearing claim-rights in general. James Dwyer, for example has argued that custodial parents have a presumptive *privilege* (or liberty) to raise their children, but they have no claim-rights against interference from others when doing so. Custodial parents are presumptively permitted to raise their children in various ways, but, if they are not doing a good job, others (e.g., agents of the state) are also permitted to intervene and restrict or eliminate the parental influence. Dwyer rejects claim-rights over children on several grounds<sup>13</sup>. First, the primacy of the child's interests generates rights for the child—and not any

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<sup>13</sup> See, for example, ch. 3 of James Dwyer, *Religious Schools v. Children's Rights* (Ithaca: Cornell University Press, 1998). Although the specifics of his approach are very different from those defended here, he too defends a radically child-centered approach to child-rearing rights.

claim-rights of custodial parents. I fully agree that children have rights and that these rights are essential for protecting their interests. The only question is whether childrearing rights by others are *also* a useful way of protecting children's interests. Dwyer argues that parental motivation and behavior are unlikely to be affected by whether they have a mere privilege to raise their children or a claim-right to do so. I suspect that he is mistaken on this factual issue, but the crucial point is that it is not necessarily true. It is at least possible that the interests of children will be better promoted by someone having a right to control access to them than by simply having a privilege to do so. When this is so, and the expected compensation shortfalls of others are not adversely affected, then childrearing rights are justified. The best interests of the child require this.

Dwyer suggests, however, that even here childrearing rights are illegitimate on the ground that an agent having the right to control access to a child is incompatible with respecting the equal personhood (or status as end-in-itself) of the child and the agent. I fully agree that it is incompatible with equal moral status if one *agent* non-consensually has the right to control access to another *agent*. I also fully agree that children are ends-in-themselves. I deny, however, that non-autonomous sentient beings—such as children—have *equal* moral status with agents. Precisely because they are not capable of autonomous choice, their will does not have the same moral significance as it does for agents. Children have, we can say, *comparable* moral status as agents, where this means that they have the same rights except understood in interest-protecting rather than choice-protecting terms. One agent having rights to control access to a child, however, is compatible with the comparable moral status of children and agents. First of all, such childrearing rights are constrained by the basic rights (e.g., of personal security and equality) of the children. Second, the childrearing rights hold only where their possession is suitably in the best interest of the child. Together these features ensure that children are treated as comparable

ends-in-themselves. There is thus no conceptual error or illegitimacy in agents having childrearing rights.

A fourth objection grants that custodial parents have certain childrearing rights but claims that the rights are not as strong as posited by the proposed view. The child's custodial parents may have, on the proposed view, the right to refuse to provide various benefits to the child (for example, a beneficial medical treatment or educational experience) and the right to prevent others from providing such benefits. This may seem to give inadequate consideration to the interests of the child. There are two relevant points to be made here. First, if the child is entitled to these benefits because she is suitably below average (if she has an equality right to them), then the parents may have an equality duty to provide the benefits and definitely have no right to prevent those who have such a duty from providing them. Therefore, the objection only applies to benefits to which the child has no equality right. Second, if the parent is systematically failing to provide benefits and preventing the provision of such benefits by others, then it becomes more likely she will cease to have the right to raise the child. For it makes it more likely that she will not live up to the basic expectations that justified her possession of the right childrearing rights. Thus, to the extent that others are interested in raising the child, there is a natural limit to the extent to which custodial parents can refuse or prevent the provision of benefits to the child. Once these two points are taken into consideration, the posited childrearing rights can be seen, I claim, not to be too strong.

A fifth objection is that the proposed view does not adequately take into account the societal interest in having children raised to be morally virtuous adults or at least to respect the rights of others. It is true that the conditions justifying childrearing rights are based primarily on the interests of the child, but the societal interest in having the child raised to respect rights is taken into consideration—although admittedly in a very weak manner. For a necessary condition

for possession of childrearing rights is the no custodian condition, which holds in part that possession of the childrearing rights by person must not increase anyone's expected compensation shortfall from the child beyond what it would be if no one possessed childrearing rights. This rules out custodial rights for those who would have an extremely corrupting influence on the child.

Still, the no custodian condition is, at least for very young children, extremely weak, and it will be objected that a much stronger condition is needed. One kind of objection holds that possession of childrearing rights does not depend merely on how well one could reduce rights violations and failures of compensation by the offspring. It also depends on how virtuous the custodial parent is likely to make the child. Another kind of objection holds that the focus should be on rights violations rather than compensation shortfalls. A third kind of objection is that even if the focus is solely on compensation shortfalls, this concern should require minimization of expected compensation shortfalls (prior to taking the child's interests into account) rather than merely not increasing them from their no custodian levels. The core reply to each of these objections is the same. Any strengthening of the condition concerning societal interests weakens the role of the child's interests. This is inappropriate given that the child has independent moral standing and childrearing rights give someone rights to control access to the child. Such control needs to be justified almost exclusively in terms of the benefits to the child. Furthermore, societal interests in how the child is raised can be accommodated by providing incentives and opportunities for the child to develop in the desired ways (through parental training programs, preschool and school programs, etc.). The very weak no custodian condition is thus not too weak in this regard.

A sixth and final objection to the proposed view is that it unfairly disadvantages those who are already disadvantaged. For a child's interests will, all else being equal, typically be

better served by having rich, educated, and otherwise privileged custodial parents than by having poor, uneducated, and otherwise disadvantaged parents. Thus, privileged individuals are more likely to obtain childrearing rights than disadvantaged ones. Given the centrality of childrearing to many people's life plans, many egalitarians will object to this anti-egalitarian feature. A first reply is that in a world in which everyone fulfills their duties—including their egalitarian duties—this situation will not arise, at least not in any significant way. To the extent that the situation of the disadvantaged is magnified by the greater difficulty in obtaining childrearing rights, the demands of equality to help them will increase. Thus, in a world of full compliance, this is unlikely to be a significant problem.

In the real world, of course, the proposed account may indeed magnify the disadvantage of the already disadvantaged. Unconstrained egalitarians would hold that sometimes the interests of the child must be sacrificed to help the severely disadvantaged who desperately want to raise the child (but for whom custodial rights are not in the best interests of the child). This reflects the fact that unconstrained egalitarianism does not place constraints on how equality may be promoted. Unconstrained egalitarianism is for that reason, I believe, implausible. Torturing innocents to promote equality, for example, is not permissible. Given that children have moral standing with rights, and given that childrearing rights are rights to control access to children, the acquisition of childrearing rights must be grounded in the best interests of the child. Although this account of childrearing rights is less egalitarian than an account that allocates rights solely on the basis of what would maximize equality, it is in accord with the general spirit of the form of liberal egalitarianism that I am presupposing. A defense of this general view is beyond the scope of this paper.

This concludes my discussion of childrearing rights against others. Let us now briefly consider childrearing rights against the child.

## 4.2 Childrearing Rights Against the Child

So far, we have focused on the rights of custodian parents to control the access of others to the child. I shall now briefly address two kinds of childrearing right against the child herself.

One kind of childrearing right against the child is a claim-right against the child that the child obey custodial parent. This, of course, makes sense only if the child is capable of having duties. It doesn't make sense for very young children. The issue of what duties children have to their parents is one, I would argue (but won't here), that is handled by the justificatory conditions introduced above. If the imposition of duties of the child to the parent is in the best interests of the child—for example, if it would attract better qualified parties, or if it would increase the motivation of the interested parties—then the child acquires certain duties in exchange for the benefits of the duties acquired by the custodian parents. Exactly what duties the child acquires is a contingent matter and largely influenced by convention. Although I shall not argue it here, it seems plausible that in the real world children do, while still children, have some duties of obedience to their parents. More controversial, and here left unsettled, is whether they have duties of obedience or duties to look after their parents, after children become adults.

A second kind of childrearing right that custodial parents could have against their wards is a liberty to treat them in ways that would normally violate their rights of equality or personal security (e.g., to punish them when this is not in the child's best interest). Under certain (unlikely) circumstances, it might be in a child's best interests for the custodial parents to have such liberties (and for the child to lose the corresponding right). For example, it might arise that someone would be a much more beneficial custodial parent for the child than anyone else (and better for the child than having no custodial parent), but that this person would not undertake the task of raising the child unless she had the unrestricted right to beat the child. Even after

factoring in the bad of effects of such beatings, the net benefits for the child that this person would provide as custodial parent might be much greater than other feasible arrangement. Under such conditions, I claim, the custodian parent acquires a liberty to treat the child in ways that would normally be impermissible.

A full defense of this view would require addressing several further issues. One is the possibility that the child has an *impersonal* immunity to loss of first order rights. Such an immunity is not a right because it is not sensitive to the interests or the choices of the holder. Strict inalienability of a right is an impersonal immunity. I would argue against this view on the ground that there are no impersonal immunities (nor any impersonal duties, etc.). All normative protections are grounded in the interests or choices of individuals, and immunities in particular are grounded in the interests or choices of the individuals having the immunity. Obviously, this is a highly controversial claim and I shall not defend it here.

I shall not pursue the issue of the immunity of the child to the loss of first order rights, because in practice it is unlikely to be relevant. Cases in which it is in a child's interest to lose certain rights against someone (e.g., custodial parent) are sure to be extremely rare, and even when they occur we are unlikely to have sufficient evidence that they have occurred. Hence, for practical purposes we can, I believe, assume that in general the first order rights of children apply even against custodial parents.

Let us now consider childrearing duties.

## 5. Childrearing Duties

Procreative parents (those who bring a child into existence) have various duties to their offspring and these may well include raising the child if no other interested party would do a better job. I

have addressed this issue elsewhere<sup>14</sup> and will not here explore the specifics. Individuals in general also have a duty to promote equality of life prospects and often this duty will require that one raise children that one did not create. Children are especially likely to be beneficiaries of people's duty to promote equality because typically, for a given resource expenditure, one can have a much greater impact on people's life prospects when they are young than when they are old. The duty to raise children is exhausted, I believe, by the special duties of procreative parents and the general duties to promote equality. I shall not, however, defend this view here. Instead, I shall focus on the duties of those who, for whatever reason, acquire childrearing rights.

What child-raising duties do custodial parents have? As argued above, they have (with the qualification given above) the general duties that everyone has to respect the rights of the children to personal security and to equality. The only special child-raising duties that custodial parents have, I shall argue, are those based on commitments and the basic expectations that justified their acquisition of childrearing rights. Because these expectations involve both the provision of benefits to the child and steps to limit the child's compensation shortfalls to others, custodial parents have special duties both to the child and to others.

The basic idea is this: Those with childrearing rights acquire them primarily because (1) their possession is no worse for the child and no worse for others with respect to compensation shortfalls than no one possessing those rights, and (2) their possession of the rights is expected to be in the child's best interests relative those who satisfy the first condition and are interested in possessing those rights. One way that individuals may make it more likely that these conditions are satisfied is by making binding commitments to the child or to others to do various things for the child. Moreover, prospective and current custodial parents of a child may make binding commitments to each other as a way of protecting the interests of the child that they love. If

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<sup>14</sup> See Peter Vallentyne, "Equality and the Duties of Procreators".



individuals voluntarily make such commitments, they do indeed have an obligation to honor them. In addition, even where no commitment to others has been made concerning aspects of the parenting activities, there are the expectations on the basis of which the childrearing rights were permissibly acquired. In exchange for the childrearing rights over the child, the custodial parents acquire the duty to live up to those expectations. Custodial parents have no duty in general to live up to *all* these expectations, but they do have a duty to the child to live up to enough of the expectations so as to satisfy the original justificatory conditions. Thus, for example, if the original expectations only barely met the justificatory conditions, then all these expectations must be met. If, however, the original expectations exceeded the justificatory conditions, then some of them need not be met. Except as required by the basic expectations, custodial parents have, however, no *special* duty (in virtue of being the custodial parents) to the child to ensure that all a child's needs are met, to do the best they can for the child, or to ensure that the child's life prospects are at least average.<sup>15</sup>

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<sup>15</sup> The proposed view holds that acquiring childrearing rights generates certain duties (to live up to basic expectations). An alternative view holds that taking on custodial *duties* generates certain rights. I reject the latter view, since I deny that a person who takes on certain custodial duties has any childrearing rights if his/her possession is not in the best interests of the child. For discussion of this opposing view, see David Archard, "Child Abuse: Parental Rights and the Interests of the Child," in *Children's Rights Re-Visioned* (Belmont: Wadsworth Publishing Co, 1996); ch. 8 of David Archard, *Children: Rights and Childhood* (New York: Routledge Inc., 1993); and Jeffrey Blustein, *Parents and Children: The Ethics of the Family* (New York: Oxford University Press, 1982), Part II, ch. 1. Note, however, that in *Children: Rights and Childhood*, p. 138, Archard also holds that the right to rear is conditional upon the discharge of the duty to give the child the best possible upbringing. Therefore, the differences in the two approaches may not be as great as it

Most will object that the proposed view imposes too few duties on custodial parents, but first let us consider the objection that it imposes too many. Francis Schrag, for example, has argued that children have no rights against their parents on the ground that rights fail to take into account adequately, and even interfere with, the important affective relationship between parent and child.<sup>16</sup> This objection can take the extreme form of saying that children literally have no rights against their custodial parents—not even rights of personal security—or the more moderate form of saying that children have no special rights against their custodial parents. Under normal circumstances, neither form of the objection is plausible. Normally, custodial parents are not permitted to beat their children when it is harmful to them, and custodial parents have a duty to provide at least some kind care-giving. Furthermore, these duties are not merely impersonal duties; they are owed to the children.

Let us now consider some objections that the proposed view is too weak. It may be objected that the proposed view requires too little of custodial parents with respect to promoting the child's interests. Children, it might be claimed, have a right against their custodial parents to the upbringing that (within the limits of morally permissible behavior) is in their best interest—or at least to an upbringing that ensures that their basic needs are met (e.g., nutrition, shelter, basic medical care and basic education). On the proposed view, however, the duties of custodial parents to their wards are based on the basic expectations involved in their acquisition of the childrearing rights. These duties can be minimal if no one else wants to raise the child (e.g., if the child has features that repel most people).

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may seem.

<sup>16</sup> See, Francis Schrag, "Children: Their Rights and Needs," in *Whose Child: Children's Rights, Parental Authority, and State Power*, edited by William Aiken and Hugh LaFollette (Totowa: Littlefield, Adams & Co., 1980).

Several points, however, makes the proposed view plausible. First, it is implausible to hold that custodial parents (always) owe their wards the best possible upbringing that they can provide. This would be extremely demanding of them. It would require custodial parents to give almost no consideration (except as a tiebreaker) to their own interests. It is implausible that custody always requires such a radical sacrifice. The proposed view allows that the duties of custodial parents may indeed be quite onerous, but, where this is so, it is because there are many highly qualified people interested in having the childrearing rights over the child. In such cases, the basic expectations implicit in the justificatory conditions for childrearing rights may be quite demanding. In such cases, it would be unfair to the child not to require the custodial parents to live up to these basic expectations. There is, however, no reason to think that in general—or even in such cases—custodial parents must always do what is best for their ward.

Still, one might object that custodial parents at least owe their wards a duty to ensure that their basic needs are met. This is indeed part of commonsense, but commonsense is mistaken. In addition to the duties custodial parents owe a given child, there are the duties that the procreative parents (who need not be the custodial parents) owe her, and perhaps (if she is sufficiently disadvantaged) the equality duties that others owe her. If there is a duty to ensure that a child's basic needs are met, it is held either by the procreative parents or by agents in general. If the procreative parents deliberately and needlessly brought the child into existence with severe disabilities or into a world of severe scarcity of resources, they may be responsible for meeting the basic needs of the child. If the child has severe unmet needs because bad brute luck (e.g., unforeseeable disease), then everyone may have an equality duty to help ensure that her needs are met. There is no reason, however, to single out the custodial parents as such. They have the childrearing rights because their possession is in the best interests of the child. They do indeed have various special duties to the child, but there is no reason to suppose that these duties must

include the duty to ensure that all needs met. Typically, they will include these duties, but if the circumstances are dire, they may not. This is not to deny, of course, that good parents will always try to ensure that their children's needs are met. It is only to deny that they always have a duty to do so.

A second objection is that the proposed views requires too little of custodial parents with respect to raising the child to be good citizens. Not only does it not require custodial parents to raise the child to be as virtuous as possible, it doesn't even require them to raise the child to respect the rights of others.<sup>17</sup> All that is required is that the custodial parents not increase the offspring's expected compensation shortfall to anyone from what it would be if no one were the custodial parent of the child from that point forward. Given that children without custodial parents are likely to engage in lots of rights violations, that's an extremely low standard. Typically, however, it will not be as low as it seems. First, if the police and prison systems, as well as social sanctioning practices, are reasonably effective, then it will generally be in the child's interest to be raised to respect the rights of others. Thus, to the extent that custodial parents are required to look out for the child's interest, they will tend to have a duty to foster a respect for the rights of others. Second, it will also tend to be in the custodial parent's interest

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<sup>17</sup> Paul Churchill argues that parents have a duty to raise their children to be as virtuous as possible to the extent this is compatible with the child being as happy and as autonomous as possible. This view is compatible with most of the spirit of the proposed view in that it does not impose duties to others to make the child more virtuous when this involves sacrificing the child's interests. For simplicity, I ignore this very weak, lexical posterior, duty to others. See, R. Paul Churchill, "The Obligation of Parents to Raise Their Children as Altruists," in *Moral, Marriage, and Parenthood: An Introduction to Family Ethics*, edited by Laurence D. Houlgate (Belmont, CA: Wadsworth Publishing Company, 1999).

simply because they will tend to want their child to respect rights. Third, it is in the interests of members of society in general to provide incentives for custodial parents to raise their children to respect rights.<sup>18</sup>

The point remains, however, that under some circumstance the proposed view could impose very weak duties on custodial parents to raise their children to respect rights. The crucial point in defense of this view is that custodial parents as such (as opposed to procreative parents as such) did not bring the child into existence and have no duties to others to reduce the rights violations of the child (although they do have a duty not to increase the compensation shortfalls). Furthermore, given that custodial parents have the rights to control access to the child, and the child has moral standing, these rights, which restrict the opportunities of the child, must be justified primarily in terms of the benefits to the child. Children are not (as utilitarians, for example, would hold) mere pawns for promoting societal interests. The proposed view, I claim, gets this right.

## 6. Conclusion

The proposed view of the childrearing rights and duties agrees with commonsense that (except under extremely rare circumstances) children have certain rights that even their custodial parents may not infringe and that custodial parents have various duties to look after their wards. The proposed view, however, holds that children have a much stronger independent moral status than generally supposed. This greater independence entails both that it is more difficult for individuals to acquire childrearing rights over them and that the duties owed to children by those who

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<sup>18</sup> In “Equality and the Duties of Procreators”, I argue that procreative parents have an obligation to cover that portion of compensation shortfalls of their offspring that would have arisen had the child been raised by no one.

acquire such rights depend crucially on how much demand there is to acquire these rights. On the one hand, individuals can acquire childrearing rights over a child only if their possession of such rights is suitably in the best interest of the child. Procreative and biological parenthood do not automatically generate these rights. On the other hand, the special duties of custodial parents to their wards are limited to the commitments and basic expectations involved in the acquisition of these rights—which can be minimal if few people want those rights.

Throughout I have focused on the moral rights and duties of childrearing. Although I have defended the child’s best interests as a moral standard, I have not defended it as a legal standard.<sup>19</sup> It may not be a standard that we should adopt legally. Although each of the rights I have discussed is, I would argue, legitimately enforceable, it does not follow that we *should* enforce them (via the law or otherwise). The duty to promote equality will impose some duties to enforce rights, but, where tradeoffs must be made in promoting equality, some rights violations may have to be ignored. Assessing whether the best interests of the child should be adopted as a legal standard would require factoring in problems of limited information, bias (e.g., against single mothers, minority ethnic groups, and gay/lesbians), administrative costs, incentive effects, and other matters.<sup>20</sup> Extending the proposed view to a theory of legal rights is thus the topic for another paper.<sup>21</sup>

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<sup>19</sup> Something like a children’s best interest legal standard is defended by James Dwyer in “Children’s Relationship Rights,” this issue of this journal.

<sup>20</sup> For arguments that children’s best interests may not be best served by a legal best interest standard, see Elizabeth Scott, “Parental Autonomy and Children’s Welfare”, and Emily Buss, “Children’s Associational Rights? Why Less is More”, both in this issue of this journal.

<sup>21</sup> For their insightful comments, I thank David Archard, Dani Attas, Samantha Brennan, Paula Casal, Tom Christiano, Roger Crisp, James Dwyer, Tony Ellis, Brad Hooker, Matthew

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Kramer, Colin MacLeod, Andy Mason, Trenton Merricks, Gene Mills, Eric Rakowski, Hillel Steiner, Andrew Williams, and the audiences at the University of Arizona's Rogers Institute colloquium and at the conference at the School of Law, College of William & Mary.