

# AGAINST PARENTAL RIGHTS

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## ABSTRACT:

*This article advances an interpretative account of parental rights and builds a normative case against them. This normative account considers how parental rights function in existing constitutional and family law, and assesses theoretical arguments that seek to justify them.*

*This article begins by describing the most common, child-centered justification for parental rights: that parents are empowered in order to protect children's best interests. I argue that these child-centered accounts do not justify the current legal regime governing parental rights. Instead, current parental rights are better understood as quasi-property interests, residual from historical traditions where children were more explicitly regarded as their parents' property.*

*The middle part of this article advances the thesis that the quasi-property functioning of parental rights is not a contingent feature of American law of parents and children. It is instead characteristic of granting parents separate autonomy interests in determining the path of their children's lives. Parental autonomy rights displace and diminish consideration for children's interests and objectify children. This article introduces the concept of "desire-contingent goods" and argues that parental autonomy rights are paradigmatically the right to choose desire-contingent goods for*

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*children regardless of whether they are desired or not. This denies the equal importance of children's desires, subjective experiences, and perspectives on their own lives. As a consequence, basic doctrines in constitutional and family law cannot be reconciled with liberal and egalitarian commitments.*

*The second half of this article evaluates alternative theoretical justifications for parental rights. These include constitutional and philosophical arguments based on personal liberty and family privacy, as well as philosophical arguments based on relational rights, ethics of care, and the Lockean labor theory of value. These arguments all fall short and, in crucial ways, rely on denying children equal moral consideration. The article concludes with recommendations for legal reform.*

#### CONTENTS:

I.	Introduction .....	2
II.	Making Sense of Parental Legal Rights.....	8
	A. The Extent of Parental Rights Independent From Children's Interests.....	8
	B. Parents' Rights Cannot Be Explained by Protectionist or Paternalist Rationales .....	16
III.	Parental Rights Are Necessarily Incompatible With Egalitarian Justice .....	23
	A. Parental Autonomy Rights as Quasi-Property Interests .....	23
	B. Parental Rights Diminish and Displace Children's Interests and Objectify Children .....	28
	C. Parental Rights Include the Right to Choose What 'Desire-Contingent Goods' a Child Ought to Have, Regardless of the Child's Desires .....	31
IV.	Evaluating Parent-Centered Arguments for Parental Rights .....	35
	A. Personal Liberty-Based Accounts of Parental Rights .....	35
	B. Family Privacy-Based Accounts of Parental Rights.....	42
	C. Relational Rights Accounts of Parental Rights .....	43

D.	Defenses of Parental Rights Appealing to Cultural Diversity, Anti-Colonialism, and the Rights of Minority Communities .....	49
E.	Labor Theory of Property Accounts of Parental Rights .....	57
V.	Conclusion.....	63

## I. INTRODUCTION

Parents exercise tremendous power over their children. While many aspects of parenting are highly politicized, parental power over children is largely immune from criticism in mainstream political and legal discourse.<sup>1</sup> Yet, anyone with liberal or egalitarian political commitments<sup>2</sup> would likely regard it as intolerable for any adult to possess legal powers over another adult comparable to those that parents exercise over children. As a result, if parental rights over children are to be rendered consistent with liberal and egalitarian values, they require special and compelling justification.

This article considers the standard justifications for parental rights in reference to the current legal rights of parents in the United States. In doing so, I aim to show that even if one is not persuaded that children should have rights equal to those enjoyed by adults, the scope and extent of parental rights in American law is deeply problematic and morally indefensible.

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1. There is tremendous political concern for children's welfare, educational quality, and safety, but the basic power relation between parents and children is rarely questioned or problematized.

2. Although people have diverse political values, there is broad agreement that equality under the law is a core value of and prerequisite for democratic society, and that people ought to be regarded as morally equal. This article focuses on parental rights from a perspective committed to, at a minimum, the idea that the state and society should regard people as being of equal moral worth and entitled to equal consideration for their interests. These values are broadly assumed in most contemporary political discourse at least outside of the far right wing, and are implied in the preamble to the United States Declaration of Independence, the Equal Protection Clause of the 14th Amendment of the United States, and Article 1 of the United Nations' Universal Declaration of Human Rights. *See generally* U.S. Const. amend. XIV, § 1; Universal Declaration of Human Rights, G.A. Res. 217A (111), U.N. Doc. A/810 at 71 (1948). For an account of the "liberal conception of morality," *see* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 326–30 (1977).

I argue that parental legal rights are best understood as property interests. Such legal rights are not compatible with normative commitments to equal protection or moral equality between persons.<sup>3</sup> There should therefore be a deliberate effort to roll back the substantive due process rights<sup>4</sup> jurisprudence that constitutionally enshrines parental rights of an independent vitality separate from those that follow from children's rights and interests.

By parental rights, I mean only the special legal powers of parents to control major aspects of their children's lives. I do not refer to constitutional rights that are common to everyone regardless of their parental status such as general rights to privacy, free speech and expression, and free association—rights which are often implicated in parent-child relationships just as they are implicated in other intimate personal relationships. I also do not refer to rights granted to parents that do not directly implicate their powers over their children, such as parental leave, child support and welfare payments, or tax deductions. The parental rights addressed in this article are the rights of parents to “make decisions concerning the care, custody, and control of their children,”<sup>5</sup> and related rights such as parental privilege to discipline as a legal excuse to battery.<sup>6</sup>

Previous authors have recognized that children have historically been treated as property and that particular cases

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3. For discussion of these normative commitments, see PETER SINGER, *ANIMAL LIBERATION* 6–9 (2009) (noting that many philosophers count “the principle of equal consideration of interests” as “a basic moral principle” and describing Jeremy Bentham’s development of this idea). *See also* DWORKIN, *supra* note 2 at 326–27.

4. For examples of cases establishing parental rights over children as grounded in due process protections, see, for example, *Pierce v. Soc’y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925) (finding that parents have a due process liberty interest to direct their children’s education); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (finding that parents have the liberty to control their children’s education). For an outline of parental rights to control their children as constitutionally protected by substantive due process, see *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (concluding that “[i]n light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children”).

5. *Troxel*, 530 U.S. at 66.

6. *See* Deana Pollard-Sacks, *Banning Child Corporal Punishment*, 77 TUL. L. REV. 575, 577 (2003).

recognize property-like rights in children.<sup>7</sup> This article makes a broader argument—framed in terms of egalitarian justice—by evaluating parental rights according to their functional characteristics and normative justifications. This article argues that the problem is not merely that current and historical parental rights function in a property-like manner. Rather, any account of parental rights grounded in a parent’s separate interests supervening on the interests of their children has the effect of denying children equal moral consideration. Granting parents rights that are enforceable against their children according to the parent’s separate interests<sup>8</sup> has the effect of displacing and diminishing consideration for children’s separate interests and rights. This displacement and diminution of children’s rights and interests amounts to denying children equal protection and consideration. Parental rights of this sort must therefore be regarded as incompatible with liberal and egalitarian commitments to the equality of persons.<sup>9</sup> A society committed to extending equal protection and equal moral consideration to all people should therefore reject parental rights on grounds of equality.

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7. See Barbara Bennett Woodhouse, “Who Owns the Child?”: Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995 (1992); see generally JILL ELAINE HASDAY, FAMILY LAW REIMAGINED (2014).

8. In contrast with those interests that are purely parasitic on a child’s interests or rights, such as parents’ interest in being able to provide food and clothing to their children in order to meet their children’s needs, are those rights that are enforceable against a third party, such as parental leave enforceable against employers.

9. Ronald Dworkin explains the liberal conception of equality:  
I presume that we all accept the following postulates of political morality. Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with equal concern and respect. It must not distribute goods or opportunities unequally on the grounds that some citizens are entitled to more because they are worthy of more concern. It must not constrain liberty on the ground that one citizen’s conception of the good life of one group is nobler or superior to another’s. These postulates, taken together, state what might be called the liberal conception of equality; but it is a conception of equality, not of liberty as license, that they state.

DWORKIN, *supra* note 2 at 326–27.

Part One argues that questions of children's legal disabilities, paternalism, and child protection should be distinguished from the question of what legal rights should be extended to parents with regard to their children. Appeals to paternalism and protectionism are inadequate to explain the extent of parental rights as they exist in American law.<sup>10</sup> There is a discontinuity between the standard explanation for parental rights as parasitic on children's best interests and the scope of constitutionally entrenched parental rights. Parental rights are better understood as wholly independent from children's best interests and closer to property rights in function.

Paternalistic perspectives on children provide one of the principle lines of justification for parental rights.<sup>11</sup> Much of the theoretical debate concerning what kind of rights children ought to have and how to conceptualize those rights has been framed since the 1970s as between two competing perspectives: children's liberation and child protectionism.<sup>12</sup> The children's liberation position articulated by John Holt,<sup>13</sup> Howard Cohen,<sup>14</sup> Shulamith Firestone,<sup>15</sup> and Richard Farson<sup>16</sup> generally holds that children are an oppressed caste without morally relevant distinctions justifying their

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10. I believe there is substantial reason to question the validity of current paternalistic and protectionist theories of children's legal rights and interests. However, tackling this is beyond the scope of this article and I intend to address it instead in subsequent work. I began to address some of these issues earlier in Samantha Godwin, *Children's Oppression, Rights and Liberation* 4. NW. INTERDISC. L. REV. 247 (2011), and Samantha Godwin, *Competence, Paternalism, and Dignity* (working paper, presented at the XXVII World Congress of the International Association for the Philosophy of Law and Social Philosophy, July 31, 2015 and the Association for the Study of Law, Culture and the Humanities Conference, March 8, 2015 (as *The Place of Dignity and Autonomy Interests in Child Law*)).

11. An account of protectionist theories about children's rights is provided in CLAIRE BREEN, AGE DISCRIMINATION AND CHILDREN'S RIGHTS: ENSURING EQUALITY AND ACKNOWLEDGING DIFFERENCE 4–5 (2005). I do not myself endorse protectionism as offering an unproblematic conception of children's rights and status, but find it necessary to engage with since it forms one of the principle justifications for parental rights.

12. See *id.*, at 2–8; see also MICHAEL D. A. FREEMAN & PHILIP VEERMAN, IDEOLOGIES OF CHILDREN'S RIGHTS 3 (1992); MALCOLM HILL & KAY TISDALL, CHILDREN AND SOCIETY 26–28 (2d ed. 2014).

13. See JOHN HOLT, ESCAPE FROM CHILDHOOD (1974).

14. See HOWARD COHEN, EQUAL RIGHTS FOR CHILDREN (1980).

15. See SHULAMITH FIRESTONE, THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION (2003).

16. See RICHARD FARSON, BIRTHRIGHTS (1978).

subjugation, and ought to be granted equal rights as adults.<sup>17</sup> In contrast, the child protectionist position, arguably first articulated by John Locke,<sup>18</sup> and more thoroughly developed by Laura Purdy<sup>19</sup> and others,<sup>20</sup> holds that children lack the required rationality and practical maturity to make adult decisions competently. Protectionists therefore see it as a mistake to characterize children's rights in terms of autonomy.<sup>21</sup> Instead, protectionists mostly conceptualize children's rights in terms of what children need in order to develop successfully.<sup>22</sup>

Understanding "children's rights" as matters of children's protection has largely become the prevailing orthodoxy in academia and is implicitly endorsed in the United Nations Convention on the Rights of the Child.<sup>23</sup> Many observers believe that this debate was resolved in favor of the protectionist view of children's rights.<sup>24</sup> Protectionism, in turn, is widely thought to justify the current legal framework for children.<sup>25</sup> Where children's rights need reforming, most recommend modest reform towards greater protection within the current legal framework.<sup>26</sup> Parental powers and legal rights are also frequently articulated as being children's rights.<sup>27</sup>

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17. See BREEN, *supra* note 11, at 6.

18. See JOHN LOCKE, TWO TREATISES ON GOVERNMENT 239 (Peter Laslett ed., 1988) (1690).

19. See generally LAURA M. PURDY, IN THEIR BEST INTEREST? THE CASE AGAINST EQUAL RIGHTS FOR CHILDREN (1992) (refuting the idea that children's current status is unjust and concluding that it would be best for both children's and society's interests for children not to have equal rights).

20. For other examples, see JOHN STUART MILL, ON LIBERTY, 22–23 (Elizabeth Rapaport ed., 1978) (1859). See also JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1984); Joel Feinberg, *Legal Paternalism*, 1 CAN. J. PHIL. 105, 105 (1971); Douglas Husak, *Paternalism and Consent*, in THE ETHICS OF CONSENT: THEORY AND PRACTICE, 107, 108 (Frank Miller & Alan Wertheimer eds., 2010).

21. See BREEN, *supra* note 11, at 3–5.

22. See *id.*

23. See FREEMAN & VEERMAN, *supra* note 12, at 3. For comparable but somewhat different analysis of the United Nations Convention on the Rights of the Child, see HILL & TISDALL *supra* note 12, at 28.

24. See BREEN, *supra* note 11, at 8; *cf.* HILL & TISDALL *supra* note 12, at 28.

25. See BREEN, *supra* note 11, at 8.

26. *Cf.* HILL & TISDALL, *supra* note 12, at 26–28.

27. As described later in this article, framing children's best interests in deference to parental interpretations of those interests, as is required under *Troxel v. Granville*, 530 U.S. 57, 57–58 (2000), is a means of conflating a child's best interests with parental preferences. See *infra* Part II.B.

The protectionist framework is itself vulnerable to criticism from a liberal, egalitarian vantage point for undervaluing the interests that children, like adults, have in liberty, dignity, and freedom from coercion.<sup>28</sup> Because the protectionist framework remains the prevailing lens through which questions of children's status are interpreted however, it is important to consider the protectionist justification for parental rights. Even those committed to a protectionist understanding of children's rights should find parental rights deeply problematic. This is because the powers delegated to parents over their children are vastly more extensive than those that could be defended on protectionist grounds. As a result, protectionist motives cannot offer a justification for a broad swath of parental rights.

Part Two argues that parental rights of an independent vitality are incompatible with extending equal consideration to children's interests. Rather than parental rights deriving from protectionist necessity, the deference granted to parental autonomy in child rearing implies that children are still implicitly accorded a quasi-property like status in law and society. This status is incompatible with broadly shared commitments to human dignity and the equality of persons' moral worth. The legal rights granted to parents equally enable the use of power for paternalism and the use of power for self-interested or arbitrary purposes without distinction. Child protectionist arguments in favor of parental rights cannot explain why parents should be empowered to coerce their children in ways other than those useful for child protection. Therefore, even if one is convinced of the protectionist framework for children's rights, parental rights do not follow from this framework.

After building a case that parental rights of the sort addressed in this article are best understood as quasi-property rights, I argue that recognizing parental autonomy interests in children displaces and diminishes the recognition of children's separate personal interests. Regarding children's interests as modified by those of a third party—their parents—while adults' interests are

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28. How those interests are modified by children's typically diminished capacities is a complicated question, which I intend to address in future work, but is somewhat beyond the scope of this article. See Samantha Godwin, *The Place of Dignity and Autonomy Interests in Child Law* (working paper presented at the Association for the Study of Law, Culture and Humanities Annual Conference, March 2015) (on file with author).



regarded as whole and unimpinged on by others, devalues children's interests in comparison to those of adults. This denigration of children's interests is not a way of caring for children, but a way of caring less for children's interests than the interests of adults. I argue that recognizing parental autonomy interests in children should, moreover, be understood as a form of objectification of children.

In the course of developing this displacement and diminishment thesis I introduce the concept of "desire-contingent goods" to describe the class of activities and choices that are desirable if and only if they are desired by the person engaging in them. Desire-contingent goods as I define them are those personal options that are good for those who desire them, but that are not intrinsically good for anyone who does not. Parental rights of an independent vitality from children's interests are paradigmatically variations on the right to choose desire-contingent goods on behalf of their children. Allowing such choices to be made by parents subordinates children's interests to those of their parents.

Part Three evaluates prominent parent-centered justifications for parental rights. The positions considered include arguments for parental rights from personal liberty, family privacy, relational rights, cultural rights, and the labor theory of value. I argue that these parent-centered arguments do no better in justifying parental rights than protectionist theories: they similarly reflect an implied belief in parent's quasi-property interests in their children, and fail to extend equal moral consideration to children. These parent-centered constitutional and philosophical justifications for parental rights cannot overcome the essential inequality found in recognizing one person's independent autonomy interest in the management of another.

In conclusion, I argue that we should reject parental rights of an independent vitality separate from children's interests. I begin a conversation concerning what legal reforms might extend greater respect for children's separate interests.

## II. MAKING SENSE OF PARENTAL LEGAL RIGHTS

### A. The Extent of Parental Rights Independent From Children's Interests

A principal justification for children's legal disabilities is that children lack the rationality to make key decisions or to care for

themselves adequately. It is thought to follow that it is necessary for competent adults to provide child care and make crucial decisions for children.<sup>29</sup> It is often taken for granted that, as children require care from adults, the status quo of parental powers is a valid means of enabling parents to provide that care. This serves as the foundation for parental power over children. The U.S. Supreme Court described this in *Parham v. J.R.*:

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.<sup>30</sup>

John Locke also described this phenomenon:

Parental power is nothing but that, which parents have over their children, to govern them for the children's good, till they come to the use of reason, or a state of knowledge, wherein they may be supposed capable to understand that rule. . . . [T]he affection and tenderness which God hath planted in the breasts of parents toward their children, makes it evident, that this is not intended to be a severe arbitrary government, but only for the help, instruction, and preservation of their off-spring.<sup>31</sup>

As will be described in this section, the state of parental rights law is deeply disconnected from this paternalist justification.

When evaluating the extent of parents' legal rights, we should not merely consider how ideal parents exercise their power to provide the effective care and guidance children need. The extent of what the law enables imperfect parents to do to their children must also be taken into account. The issue is not only what role we hope that parents play in their children's lives, but how the powers actually granted to parents might be used and abused for better or worse.

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29. See PURDY, *supra* note 19; see also Joel Feinberg, *Legal Paternalism*, 1 CANADIAN J. PHIL. 105, 105 (1971).

30. *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 447 (1765); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 190 (1826)).

31. JOHN LOCKE, TWO TREATISES ON GOVERNMENT 381 (Peter Laslett ed., 1988) (1690).

Thinking only in terms of how the best parents conduct themselves is a mistake; it is also necessary to account for what the worst parents can get away with.

Parents are automatically granted guardianship over their children at birth and with it the power and legal right to make nearly all major and minor decisions for their children.<sup>32</sup> This legal arrangement is widely believed to have its basis in a parent's "natural rights."<sup>33</sup> Courts have found that "[i]t is well-settled that parents are the natural guardians of their children . . . with the legal as well as moral obligation to support . . . educate and care for their children's development and well-being."<sup>34</sup> The Supreme Court has found that there exists a "private realm of family life which the state cannot enter."<sup>35</sup> Parents are said to "have the primary right to raise their children according to the dictates of their own consciences."<sup>36</sup>

The decisions parents are permitted to make range from the most monumental to the most personal. Parents have the legal authority to control and direct their children generally.<sup>37</sup> Parents may determine the course of their child's education.<sup>38</sup> Parents can decide where their child lives,<sup>39</sup> whether that is with the parent or with the

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32. See, e.g., *Parham v. J.R.*, 442 U.S. at 602 ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.").

33. 67A C.J.S. *Parent and Child* § 3 (2015).

34. *Custody of a Minor*, 379 N.E.2d 1053, 1062 (Mass. 1979) (quoting *Richards v. Forrest*, 180 N.E. 508, 511 (Mass. 1932) and citing *Purinton v. Jamrock*, 80 N.E. 802 (Mass. 1907)). For additional support for the notion that a parent is the "natural guardian" of a minor, see *McDonald v. City of Spring Valley*, 120 N.E. 476, 478 (Ill. 1918) ("While the parent of a minor is its natural guardian, he cannot be said to be the agent or attorney for the child.")

35. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

36. *Custody of a Minor*, 379 N.E.2d at 1062; *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The U.S. Supreme Court has found that "it is cardinal with us that the custody, care and nurture of the child reside first in the parents." *Prince*, 321 U.S. at 166.

37. See *Pierce*, 268 U.S. at 534–35; *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1971).

38. See, e.g., *In re Hudson*, 126 P.2d 765 (Wash. 1942) (cited by *Custody of a Minor*, 379 N.E.2d at 1062) ("[I]n the area of medical treatment for minors, courts have shown great reluctance to overturn parental objections to medical treatment where the child's condition is not life-threatening, and where the proposed treatment would expose the child to great risk.").

39. Although a limitation to this rule is that there are some restrictions in some states for sending a child out of state during disputes. See *Restatement (Second) of Conflict of Laws* § 22 (1971).

parent's preferred friend, relative, or even an institution. A parent in the United States can, for example, send their child to a mental institution against the child's will under "voluntary committal," bypassing the due process rights afforded in involuntary civil commitment proceedings.<sup>40</sup> More recently, parents have availed themselves of the "troubled teen" boot camp industry, where companies often literally abduct teenagers by force from their rooms at night and imprison them in inhumane conditions until their parents decide to have them released or they turn eighteen.<sup>41</sup> Parents also have extensive legal rights to require their children to participate in their religious practices and inculcate them into their preferred religious beliefs.<sup>42</sup> Parents are entitled to decide personal, everyday decisions for their children, such as who their children visit,<sup>43</sup> what ideas they are exposed to,<sup>44</sup> what they eat, who they are allowed to associate with and befriend, when they go to sleep and get up in the morning, what they are allowed to wear, and what films and literature they are allowed to see and read.<sup>45</sup> The rights of parents, described as the legal status of custody, are summarized in *American Jurisprudence* as follows:

Custody embraces the sum of parental rights with respect to the rearing of a child, including his care. It includes the right to the child's services and earnings,

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40. See *Parham v. J.R.*, 442 U.S. 584 (1979).

41. These practices are detailed in MAIA SZALAVITZ, *HELP AT ANY COST: HOW THE TROUBLED-TEEN INDUSTRY CONS PARENTS AND HURTS KIDS* (2006).

42. See e.g., *Pater v. Pater*, 588 N.E.2d 794, 798–800 (Ohio 1992) (finding that a Jehovah's Witness parent has a right to actively forbid their child to "celebrate birthdays and holidays, sing the national anthem, salute the flag, participate in extracurricular activities, socialize with non-Witnesses, or attend college" as part of the practice of their religious beliefs); *Yoder*, 406 U.S. at 233 (interpreting *Pierce*'s parental "duty to prepare the child for 'additional obligations'" as including "the inculcation of moral standards [and] religious beliefs").

43. See *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (affirming on federal constitutional grounds a Washington Supreme Court holding that "[p]arents have a right to limit visitation of their children with third persons,' and that between parents and judges, 'the parents should be the ones to choose whether to expose their children to certain people or ideas'").

44. *Id.*

45. In *Brown v. Entm't Merchs. Ass'n*, the United States Supreme Court considered the constitutionality of a California law designed to assist parents in deciding what media their children consume. 131 S.Ct. 2729 (2011). While the Court struck down the law as overbroad, it recognized "helping concerned parents [to] control their children's access to media]" as a "legitimate" end. *Id.* at 2741.

and the right to direct his activities and make decisions regarding his care and control, education, health, and religion.<sup>46</sup>

These decisions and powers do not need to be made according to any set of philosophically defensible principles, rules, or outlooks. Although there are a variety of theories concerning how parental power should be employed, parents are under no obligation to follow any of them. Even if parental power is thought to be just when decisions are made in a manner consistent with principles of egalitarian or liberal justice,<sup>47</sup> or in order to maximize the child's ability to develop into an autonomous person,<sup>48</sup> or according to current medical and psychological evidence and theories,<sup>49</sup> parental power need not be exercised according to those accounts or any other set of defensible principles. No reasoning at all is required. As much as it might be hoped that parents make these decisions in a child's "best interest," or according to another preferred basis, parents are not legally required to do so. Except for disputes raised by another parent,<sup>50</sup> their decisions have virtually no chance of ever being reviewed or effectively challenged in court.<sup>51</sup> While adoptive parents

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46. 59 AM. JUR. 2d *Parent and Child* § 26 (2015).

47. As described, for example, in BRUCE ACKERMAN, *SOCIAL JUSTICE AND THE LIBERAL STATE* 139–65 (1980).

48. For example, along the lines described in Joel Feinberg, *The Child's Right to an Open Future*, in *PHILOSOPHY OF EDUCATION: AN ANTHOLOGY* (Randall Curren ed., 2007).

49. Such as those described in JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1980).

50. Some states also permit an adult with standing to petition for custody or visitation to challenge a parent's decisions. These are exceptions under rare circumstances, however, and almost always require that there be prior questions raised with regard to the parent's fitness to make these decisions. Parents' decisions may also fall under judicial scrutiny during medical emergencies or if their child commits certain status offenses such as truancy violations. These are, however, extremely rare circumstances when compared to the norm of unreviewable parental decisions.

51. See, e.g., *Parham v. J.R.* 442 U.S. 584, 603 (1979) (holding, in the context of considering parental "voluntary" admission of children into psychiatric hospitalization, "Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer power to make that decision from the parents to some agency or officer of the state . . . . The fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents' authority to decide what is best for the child . . . . Neither state officials nor federal courts are equipped to review such parental decisions.").

are typically subject to rigorous vetting processes to protect the welfare of their children, no qualifications, training, licensing or background checks are required for biological parents to exercise the same extremely extensive legal power over their children. Although presumed natural, the exact package of legal rights parents are entitled to is necessarily a matter of government policy and judicial recognition.<sup>52</sup>

When two biological parents dispute custody, courts will determine which parent is granted physical custody according to a “best interests of the child” standard.<sup>53</sup> This standard, however, cannot represent a general basis for parental power because it ordinarily enters into consideration only when custody is disputed between parents.<sup>54</sup> Custody or visitation cannot be modified if a child or third party demonstrates that it is in the child’s best interests to be under the care of someone other than their parents.<sup>55</sup> Moreover, courts will not ordinarily make any meaningful attempt to determine what custodial arrangement is in the best interests of a child when both parents voluntarily consent to a custody and visitation arrangement.<sup>56</sup> For a parent to actually lose custody of a child in other circumstances requires severe or chronic abuse or neglect, rather than custody simply not being in the child’s best interests.<sup>57</sup> The New Jersey Supreme Court summarized this point:

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52. These ideas are discussed in Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319, 321 n.6 (1993).

53. See 27a C.J.S. *Divorce* § 1000 (2015). Common factors considered in making a determination of the best interests of the child include “the interaction and interrelationship of the child with his or her parents, siblings, and any other person who may significantly affect the child’s best interest. . . . Other factors that may be considered when determining the best interests of the child include continuity of care, parenting skills, each parent’s employment responsibilities, physical and mental health, and moral fitness, and the stability of the home environment.” *Id.*

54. See, e.g., *In the Matter of Baby M*, 537 A.2d 1227, 1251 (N.J. 1988); *In re Custody of Shields*, 136 P.3d 117, 118 (Wash. 2006) (holding that “a court may award custody of a child to a nonparent in a custody dispute between a parent and a nonparent only if a parent having physical custody of the child is ‘unfit,’ and that the trial court abused its discretion when the court erroneously applied the ‘best interests of the child’ standard in making its custody decision”).

55. Cf. *Troxel v. Granville*, 530 U.S. 57 (2000).

56. See Noel Semple, *Judicial Settlement-Seeking in Parenting Disputes: Consensus and Controversy*, 29 CONFLICT RESOL. Q. 309, 311 (2012).

57. See *Santosky v. Kramer*, 455 U.S. 745 (1982).

[T]he question of best interests of the child is dispositive of the custody issue in a dispute between natural parents, [but] it does not govern the question of termination. It has long been decided that the mere fact that a child would be better off with one set of parents than with another is an insufficient basis for terminating the natural parent's rights. . . . It must be noted, despite some language to the contrary, that the interests of the child are not the only interests involved when termination issues are raised. The parent's rights, both constitutional and statutory, have their own independent vitality.<sup>58</sup>

The "best interests of the child" determination therefore serves only as a tiebreaker to resolve a dispute between two people who each have an independent claim to custody of the child. Each parent's independent claims to the child prior to dispute resolution do not rely on the child's best interests and are functionally separate from it. Similarly, children's best interests only serve to determine custody between claimants of equal legal standing—when potential custody claimants have unequal standing (such as between a parent and a grandparent), best interest considerations do not enter the picture.<sup>59</sup>

In *Prince v. Massachusetts*, a case involving parents who were using their child to sell religious literature in violation of a Massachusetts labor law, the Supreme Court's reasoning was perhaps even more striking. The Court noted that:

On one side is the obviously earnest claim for freedom of conscience and religious practice. With it is allied the parent's claim to authority in her own household and in the rearing of her children. The parent's conflict with the state over control of the child and his training is serious enough when only secular matters are concerned. It becomes the more so when an element of religious conviction enters. Against these sacred private interests, basic in a democracy, stand the interests of society to protect the welfare of children, and the state's assertion of authority to that end, made here in a manner conceded valid if only secular things were involved.<sup>60</sup>

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58. *Baby M*, 537 A.2d at 1252.

59. *Troxel*, 530 U.S. at 57.

60. *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

In *Prince*, the parents' claim to authority over their child was not only recognized as utterly distinct and distinguishable from society's interest in protecting the child's welfare, rather than as merely a way of ensuring child welfare, but as a competing interest that *stands against* the child's welfare interest.

In *Reno v. Flores*, a case involving a due process challenge to an U.S. Immigration and Naturalization Service policy of only releasing juvenile detainees to their parents or relatives the Supreme Court found that:

Similarly, "the best interests of the child" is not the legal standard that governs parents' or guardians' exercise of their custody: So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves.<sup>61</sup>

The *Reno* holding suggests that not only are parent's rights distinct from and not dependent on a children's best interests, but that they can come into competition with a child's best interests and indeed may take priority.

In *Troxel v. Granville*, the U.S. Supreme Court upheld the Washington State Supreme Court judgment that the Federal Constitution prohibited states from enacting a statute enabling third parties to seek child visitation against a parent's wishes, even when that visitation was determined by a court to be in a child's best interests.<sup>62</sup> The *Troxel* Court explained this by recognizing a "fundamental right of parents to make decisions concerning the care, custody and control of their children"<sup>63</sup> that trumped any best interests of the child considerations. The Washington State Supreme Court reasoned that the United States Constitution "permits a State to interfere with the right of parents to rear their children only to prevent harm or potential harm to a child" and that a finding that "interfere[nce]" was in a child's best interest would be constitutionally insufficient.<sup>64</sup>

The Connecticut Supreme Court, determining that a child's best interests are secondary to a parent's rights with respect to

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61. *Reno v. Flores*, 507 U.S. 292, 304 (1993).

62. *Troxel*, 530 U.S. at 57, 63.

63. *Id.* at 60.

64. *Id.* at 63.



visitation by third parties in *Roth v. Weston*, surveyed the position of other state supreme courts:

The constitutional issue, however, is not whether children should have the benefit of relationships with persons other than their parents or whether a judge considers that a parent is acting capriciously. In light of the compelling interest at stake [in determining visitation], the best interests of the child are secondary to the parents' rights. *Brooks v. Parkerson*, [454 S.E.2d 769, 773 (Ga. 1995)], *cert. denied*, [516 U.S. 942 (1995)], (finding it "irrelevant" to constitutional analysis that visitation may be in best interest of child); *Rideout v. Riendeau*, [761 A.2d 291, 301 (Me. 2000)], ("something more than the best interest of the child must be at stake in order to establish a compelling state interest"); *In re Herbst*, 971 P.2d 395, 399 (Okla. 1998) (noting that court does not reach best interest analysis without showing of harm; absent harm, no compelling interest); *Hawk v. Hawk*, 855 S.W.2d 573, 579 (Tenn. 1993) (holding that best interest of child is not compelling interest warranting state intervention absent showing of harm).<sup>65</sup>

Parents' legal rights cannot provide an effective means of providing for children's best interests when they may be independently weighed against a child's best interest where the two conflict. Moreover, if the principal reason for the state granting and enforcing parental power over children is to serve children's best interests, then the legal rule that a child's best interests are insufficient to warrant state intervention makes little sense. If parental rights were parasitic on children's best interests then we would expect them to extend only so far as is consistent with a child's best interest. As a result, parental rights in American law cannot be regarded as deriving from children's interests.

Parents' right to control nearly every aspect of a child's life is held not only against the state and other adults, but also against their own children.<sup>66</sup> In every American jurisdiction, parents have a

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65. *Roth v. Weston*, 789 A.2d 431, 443–44 (Conn. 2002).

66. I mean this in the Hohfeldian sense that legal rights impose correlative duties, and legal powers impose correlative liabilities on other persons or entities. See generally Wesley N. Hohfeld, *Fundamental Legal Concepts as Applied in Judicial Reasoning*, 26 YALE L. J. 710 (1917).

privilege to commit assault and battery against their children under the parental discipline exception that would otherwise be prosecutable as domestic violence, and their children lack the protection from law enforcement that adults enjoy when attacked.<sup>67</sup> Although defenders of “corporal punishment” may conceive of it as a means for parents to instill necessary discipline in children, statutes are written in such a way that parents are free to mete out ad hoc “punishment” without due process, limited only by the high threshold of child abuse.<sup>68</sup> Any inquiry or review into whether such battery actually served a disciplinary purpose is unlikely, absent disagreement by a child’s other parent, due in part to there being virtually no serious legal standards defining when and whether “discipline” is reasonable.<sup>69</sup> Parents may legally hit their children for violating ad hoc rules—or no rules at all—so long as they plausibly believe this to be necessary to control, train or educate their child.<sup>70</sup> Parents can also confine their children and commit what would otherwise be kidnapping against them.<sup>71</sup>

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67. See Deana Pollard-Sacks, *Banning Child Corporal Punishment*, 77 TUL. L. REV. 575 (2003); Kyli L. Willis, *Willis v. State: Condoning Child Abuse as Discipline*, 14 U.C. DAVIS J. JUV. L. & POL’Y 59 (2010); see also, e.g., Emery v. Emery, 289 P.2d 218 (1955). The parental discipline exception is of course, not an absolute license to commit any and all violence by parents against their children. See Mary J. Cavins, Annotation, *Physical Abuse of Child by Parent as Ground for Termination of Parent’s Right to Child*, 53 A.L.R. 3d 605, 607 (1973); but see Scott A. Davidson, Note, *When Is Parental Discipline Child Abuse? The Vagueness of Child Abuse Laws*, 34 U. LOUISVILLE J. FAM. L. 403 (1995–96). Nonetheless, the parental discipline exception and corresponding privilege to do what would otherwise be battery exposes children to violence and the threat of violence without legal recourse in a way that adults are not. Cavins, *Physical Abuse of Child* at 636–639. Adults in contrast are afforded heightened protections against assault and battery by their relatives in the form of domestic violence laws and protective orders. *Id.* at 639–640; see also 28 C.J.S. *Domestic Abuse and Violence* § 7 (2015).

68. The standard for the parental discipline exception has been restated as: “A parent is privileged to apply such reasonable force or to impose such reasonable confinement upon his child as he reasonably believes to be necessary for its proper control, training, or education.” RESTATEMENT (SECOND) OF TORTS § 147(1) (1965). The vagueness and under-determinacy of this standard has been widely noted. See, e.g., Davidson, *supra* note 67; Kandice K. Johnson, *Crime or Punishment: The Parental Corporal Punishment Defense—Reasonable and Necessary, Or Excused Abuse?*, 1998 U. ILL. L. REV. 413 (1998).

69. See Johnson, *supra* note 68, at 417.

70. *C.f. id.* at 442–45.

71. See RESTATEMENT (SECOND) OF TORTS § 147(1) (1965).

These parental powers over children effectively enable parents to use the threat of violence or confinement to force their children to do whatever the parent desires, so long as it falls outside of narrowly-defined abuse statutes. Likewise, children can be forced by their parents to abstain from anything they are not legally required to do, such as attend school, no matter how unhelpful this is for them. Children can be coerced in this way into participating in nearly all varieties of illiberal indoctrination, from ex-gay movement conversion camps<sup>72</sup> to reactionary political or religious programs, to more seemingly innocuous activities like sports, music lessons, or compelled social bonding with relatives that would nonetheless be degrading to an unwilling participant.<sup>73</sup> That people commonly express toleration for even those parenting choices they profoundly disagree with under the belief that it is not right to tell someone how to raise their “own” children<sup>74</sup> reflects how pervasively accepted parental powers are.

Depriving children of the equal protection of the laws by privileging parents to commit what would otherwise be battery, domestic violence, kidnapping, and false arrest under the parental discipline exception is far from the only way the state grants parents rights against their children. The state also directly imposes legal duties on children to obey parental authority. The most dramatic examples of these legal duties are found in the ungovernable, unruly, or incorrigible minor laws, where children who disobey their parents may be charged with a juvenile status offense.<sup>75</sup> Defying parents under these status offense laws can trigger direct state coercion against children in the form of court-mandated probation or even imprisonment in a juvenile detention facility.<sup>76</sup> A significant number

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72. However, a handful of jurisdictions, including California and Washington, D.C., are moving to outlaw this specific practice. See Clay Calvert et al., *Conversion Therapy and Free Speech: A Doctrinal and Theoretical First Amendment Analysis*, 20 WM. & MARY J. WOMEN & L. 525 (2013).

73. John Holt drew attention to the objectifying nature of compelling children to express emotional intimacy towards relatives. HOLT, *supra* note 13, at 102–12.

74. A belief even shared by putative parenting experts. See Pam Alldred, *Whose Expertise? Conceptualizing Resistance to Advice About Childrearing*, in *PSYCHOLOGY DISCOURSE PRACTICE: FROM REGULATION TO RESISTANCE* 133, 139 (Erica Burman et al. ed., 1996).

75. See 42 C.J.S. *Infants* § 16 (2015).

76. For a detailed discussion of unruly, ungovernable, and incorrigible minor laws, see DEVELOPMENT SERVICES GROUP, INC., *UNGOVERNABLE/INCORRIGIBLE*

of states continue to maintain runaway laws that allow conviction of a child away from home without parental permission for a juvenile status offense.<sup>77</sup> Most states that do not define this as a formal offense will nonetheless have procedures for police to detain children who are away from home without parental permission.<sup>78</sup> Children who repeatedly run away are often regarded as children in need of services and may be forcibly confined to the same detention facilities where juvenile offenders are incarcerated.<sup>79</sup> It is a crime in most places in the United States to aid a runaway, contribute to the delinquency of a minor, or both.<sup>80</sup>

B. Parents' Rights Cannot Be Explained by Protectionist or Paternalist Rationales

If parental powers over children were merely a matter of ensuring that a child's best interests were provided for or that children were adequately protected, we would not expect to see a system granting tremendous amounts of discretion to parents. We would instead expect limits on parental power such that parents could only lawfully use their parent-specific powers to achieve recognized protectionist aims. For example, under a protection-based system of parental powers, it would make sense for parents to be exempt from laws on battery when seizing an oblivious child about to leap onto subway tracks. A doctrine parallel to the necessity defense could be developed, possibly allowing for a greater margin for error given the special protective responsibilities of parents to children. In a system where parental powers were rooted in child protection, however, it would not make sense to permit exemptions from laws on

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YOUTH LITERATURE REVIEW (Oct. 15, 2009), <http://www2.dsgonline.com/dso/Ungovernable%20Youth%20Literature%20Review.pdf>.

77. See 47 AM. JUR. 2d *Juvenile Courts, Etc.* § 24 (2015); Alecia Humphrey, *The Criminalization of Survival Attempts: Locking Up Female Runaways and Other Status Offenders*, 15 HASTINGS WOMEN'S L.J. 165 (2004) (describing problems with runaway laws.), (2015); see also, e.g., *Van v. Scott*, 467 F.2d 1235 (7th Cir. 1972); *Matter of Daniel I.* 871 N.Y.S.2d 183 (N.Y. App. Div. 2008); *In re David S.* 91 Cal. Rptr. 261 (Cal. Ct. App. 1970).

78. For a discussion of this practice, see Jessica R. Kendall, *Juvenile Status Offenses: Treatment and Early Intervention*, TECHNICAL ASSISTANCE BULL. (A.B.A. Div. Pub. Educ., Chicago, Ill.), no. 29, 2007, at 3, <http://www.americanbar.org/content/dam/aba/migrated/publiced/tab29.authcheckdam.pdf>.

79. See *id.* at 1.

80. See 47 AM. JUR. 2d *Juvenile Courts, Etc.* § 137 (2015).

battery for a parent who “disciplines” a child for speaking in a manner the parent regards as impudent, or in response to a child acting in ways that are lawful and safe but perceived as annoying, disrespectful, or contrary to the value systems of the parent. Parental powers may however be lawfully employed in these ways in practice precisely because they do not stem from protectionist objectives.

Assuming *arguendo* that there are certain objectively necessary<sup>81</sup> elements of a child’s upbringing that must be provided paternalistically, only those parental powers that clearly promote this baseline would be justified. In such a system, parents might have the responsibility and corresponding right to provide food, clothing, shelter, emotional support, and basic education needed for a child to function successfully in society. People entrusted to care for infants, toddlers, and very young children, whether parents or otherwise, likely need to be able to make a large range of decisions and judgment calls to meet the basic physical and emotional needs of their children. Beyond that baseline required to meet a child’s basic needs however, a child protectionist conception of children’s rights cannot tell us why parents ought to be empowered by the state as a matter of law to impose their non-neutral and often idiosyncratic or even demonstrably harmful values on their children. It certainly does not provide a basis for parental rights expressly distinct from, and potentially in conflict with, children’s rights.

Alternatively, if the goal was to provide not only what is objectively necessary for a child’s upbringing, but also an optimal upbringing, parental powers would be justified only if employed according to the identified optimum standard. This would not lend support to discretionary use of parental powers according the personal tastes of particular parents any more than a minimum necessary standard motive.

A parent’s legally recognized authority to determine which religion their child participates in<sup>82</sup> serves as a prime example of this

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81. This is not to say that I actually believe that it is possible to access and reliably recognize what is “objectively necessary.” Nonetheless, there are some social goods that are very broadly shared that would be of importance to everyone or nearly everyone, such as personal survival.

82. See 59 AM. JUR. 2d *Parent and Child* § 24 (2015) (“[T]he religious training of minor children, or lack of it, is a matter solely within the parents’ or the legal custodian’s control, one over which the courts generally have no authority, and parents have standing to protect that constitutionally guaranteed right.” (internal citations omitted)).

issue. Any justification as to why a parent can force their child to attend evangelical church rather than Catholic church cannot be justified on the grounds of the child's protection or best interests. From the external vantage point of a secular state, neither religion is the "right" religion. Any belief that it is in fact in the best interests of a child to adhere to evangelical practices only makes sense if those evangelical practices are believed to be best. This is consistent with the vantage point of an evangelical church but not consistent with a secular state that takes a neutral position with regard to religious belief.

Alternatively, a belief that it is in the best interests of children to practice the religion that their parents want them to practice only makes sense if it is taken as a given that what parents want for their children with regard to their religion necessarily corresponds to their children's best interests. It would, however, be extremely remarkable and implausible to think that some set of children are best off as Unitarian Universalists while another set of children are best off as fundamentalist Mormons, where the determining variable is not a characteristic of the children but instead a matter of their parents' opinion. This would be a way of conflating a child's best interests with parental preferences.<sup>83</sup>

Additionally, a child protectionist framework might provide reasons for a child's primary or active *caregiver* to have legal rights with regard to that child that enable them to provide care. Parental rights, however, are not derived from or dependent on a caretaking role. The distinction between legal and physical custody<sup>84</sup> decouples the parental power to make value-laden decisions over a child's life from actively providing day-to-day care for that child. Even if caregivers require rights and powers to effectively provide care and

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83. Under *Troxel v. Granville*, courts are effectively required to conflate children's best interests with parental preferences by granting deference to parents to determine what a child's best interests are. See *Troxel v. Granville*, 530 U.S. 57, 67 (2000).

84. "The term 'legal custody' is defined as the legal right to make major decisions affecting the best interest of the minor child, including, but not limited to, medical, religious and educational decisions. The term 'physical custody' refers to the actual physical possession and control of a child." 15A SUMM. PA. JUR. 2d *Family Law* § 10:48 (2015) (internal citations omitted). Cf. 8 CONN. PRAC. *Family Law & Prac.* § 42:6 (3d ed. 2014); 27C C.J.S. *Divorce* § 997 (2015).

protection for children,<sup>85</sup> this does not explain a parent's legal right to remotely control the life of a child who is not in their care. A child's non-parental caretaker does not possess the rights of a parent, and parents need not actively or directly take care of their children in order to retain the right to control them.<sup>86</sup> Parents are free to assign caretaking tasks to others without diminishing their own parental rights.

Parental visitation rights by a parent without physical custody, as distinct from legal custody rights, are also not clearly derivable from a child's needs for care and protection since visitation rights entitle parental access even if someone else provides for childcare and protection.<sup>87</sup> Parental visitation rights are nearly always granted absent extraordinary demonstrations of harm.<sup>88</sup>

Even in those instances where a "best interest" standard is actually applied, it is problematic and conceptually confused. Best interests are rarely if ever determinate and mean different things to different people.<sup>89</sup> It is not clear if it is possible, even in principle, to identify people's best interests as distinct from the varieties of competing interests they might have, or from their subjective preferences. Even if a theory of how a person's best interests can be systematically determined can be made defensible, there may be other overriding normative reasons why decision-making according to best interests might be suspect.

If "best interests" can be rendered less vague and more specific in some non-arbitrary, philosophically defensible way, it is not clear who would be a genuinely competent judge of another's best interests, or how such competence could be reliably recognized by others. The history of allegedly paternalistic treatment of

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85. Though these are not necessarily the same rights as those accorded to parents. Rights genuinely following from caregiving might be more likely to include the financial and material resources needed to provide care, for example, but not the right to indoctrinate children into a preferred belief system.

86. This is seen in a parental right to assign a child to the care of a nanny, relative, or boarding school.

87. See *Roth v. Weston*, 789 A.2d 431, 443–44 (Conn. 2002).

88. See *id.*

89. This dilemma is analyzed in Richard Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 229 (1975).

subordinated people<sup>90</sup> has given us reason to doubt the authoritativeness of our own judgments for others even when we attempt to adopt an impartial vantage point.<sup>91</sup>

The particular “best interest” concept used by American courts is even more problematic than the theoretical concept of best interests. Parents are granted a legal presumption that they act in the best interests of their children.<sup>92</sup> This presumption is justified according to the belief that parental affection leads parents to act in the best interests of their children.<sup>93</sup> As a result, a court’s consideration of a child’s best interest is determined with deference to the parent’s view of the child’s best interests.<sup>94</sup>

This sort of logic problematically conflates two senses of “best interests.” In order for it to make sense that a child’s best interests require parental rights and power, that arrangement must *actually* be in a child’s best interests in some independent sense. If parents are driven by affection to *want* to act in their children’s best interests, however, this does not provide a compelling reason to think that they correctly identify what their child’s best interests are. Even if it is presumed that parents *aspire* to act in their child’s best interests, it does not credibly follow that parents *actually succeed* in acting in the child’s best interests or in identifying those interests. At most, parental affection provides a reason to think that parents will consider their personal perception of their child’s best interests as a factor in their decisions. Parental affection does not provide a reason to think that parental perception of a child’s best interests approximate those best interests in some independent sense, or that this perception should be a lens through which best interests are determined.

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90. Paternalism can be employed as a justification for self-interested or bigoted policies that do not possess the beneficent element of paternalism.

91. Different jurisdictions employ a variety of statutory factors for judges to weigh in cases where they must come to a best interest determination.

92. See *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (recognizing a “traditional presumption that the parents act in the best interests of their child”).

93. See *id.* at 602 (“[H]istorically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children.”).

94. See *Troxel v. Granville*, 530 U.S. 57, 57–58 (2000) (criticizing a Washington statute where a “parent’s estimation of the child’s best interest is accorded no deference” and finding it problematic that a court could fail to give “special weight to [a mother’s] determination of her daughters’ best interests”).



Parents often radically disagree over what is best for their children, and this disagreement is very frequently based not on the idiosyncrasies of their particular children but on philosophical, religious, and cultural attitudes and beliefs about children. This range of beliefs can be seen in the multitude of parenting advice books that range from the punitive and authoritarian philosophy of Michael and Debi Pearl's *To Train Up a Child*<sup>95</sup> to the comparatively liberal and permissive philosophy of Lenore Skenazy's *Free-Range Kids*.<sup>96</sup> Parental affection for children gives some reason to think that parents will try to pick the best approach, but it does not give reason to think that the approach they pick will actually be best, even if they follow it consistently.

On a more general level, it would not ordinarily seem at all reasonable to grant someone great power over another on the mere basis that they would always, consistently and without conflict, use that power according to what they genuinely think is best for that other person. Even in cases where it is thought that a person's agency is compromised (such as the unconscious or profoundly mentally disabled), it would be reckless to entrust power over them to a person purely on the basis of that person's good intentions.<sup>97</sup> To grant parents power over children on such a basis is to extend a lower standard of scrutiny and concern for children than would be extended to others similarly situated. In nearly all other cases where power is granted to one person over another, the people given power are selected and screened according to standards beyond good intentions, they can only exercise their power within defined sets of rules, and their use of power is meaningfully reviewable or checked. For example, it would be seen as unacceptable if police officers were appointed on a purely volunteer basis, having demonstrated their

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95. MICHAEL PEARL & DEBI PEARL, *TO TRAIN UP A CHILD: TURNING THE HEARTS OF FATHERS TO THE CHILDREN* (No Greater Joy Ministries, 17th ed. 1994).

96. LENORE SKENAZY, *FREE RANGE KIDS, HOW TO RAISE SAFE, SELF-RELIANT CHILDREN (WITHOUT GOING NUTS WITH WORRY)* (Jossey-Bass, 2010).

97. Although, as I have argued elsewhere, involuntary civil commitment poses serious problems for egalitarian and liberal conceptions of justice; people who are committed to mental institutions involuntarily at least have the benefit of being under the power of rigorously screened, trained, regulated, and rule-bound staff, rather than people who simply volunteer out of affection to do what they think is best. See Samantha Godwin, *Bad Science Makes Bad Law: How the Deference Afforded to Psychiatry Undermines Civil Liberties*, 10 SEATTLE J. SOC. JUSTICE 647 (2012).

good intentions, and if, once appointed, they could order people to do whatever the officers think is best for them without any appeals or review absent significant physical abuse or neglect.

Parents in the real world are additionally not consistently or exclusively motivated by their child's perceived best interests. Parents have their own needs, interests, and desires that are not identical to the best interests of their children. Furthermore, parents often have to weigh the interests of one child against another and may (intentionally or not) do so in an unequal fashion that does not serve the best interests of at least one child. Some non-negligible minority of parents may also simply not be especially driven to serve the best interests of their children, and may be far more concerned with other aims, consciously or otherwise. There is also a general tendency for people to interpret reality in ways biased towards their own wishes.<sup>98</sup> Given that parental interests are thoroughly implicated in childcare decisions, parents are likely to interpret their children's interests in a manner consistent with their own wishes—whether these interpretations are meaningfully true or not. Although someone bound by affection towards another might be motivated to act according to what they think the other's best interests are, affection is no reliable safeguard against abuse either, as people often abuse and seek to control those they love.<sup>99</sup> When courts ostensibly make decisions according to a child's "best interests" but then defer to parents to define those interests, courts are in effect making decisions according to parental preferences that may or may not have anything to do with a child's best interests.

It is commonly believed that parents have a privileged understanding of their children's individual interests, but this is highly questionable. Some parents surely do; others may not. The individual relationships of parents and children can provide a potential for insight and empathy, as well as biases and conflicts of interest. In the abstract, it is hard to determine which would prevail in any particular question of what is best for a given child, especially

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98. See Elisha Babad & Yosi Katz, *Wishful Thinking—Against All Odds*, 21 J. APPLIED SOC. PSYCHOL. 1921 (1991); Raymond Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998).

99. See, e.g., Sue Jackson, *Happily Never After: Young Women's Stories of Abuse in Heterosexual Love Relationships*, 11 FEMINISM PSYCHOL. 305 (2001) (examining the "love/abuse contradiction" in adolescent relationships in which promises of "perfect" relationships coincided with instances of sexual, emotional, and physical abuse).

since best interests are often disputable and difficult to meaningfully determine. It is not plausible to assume that the individual and distinctive values of a parent (whether religious, moral, aesthetic, social, or relational) correspond to the individual and distinctive interests of their children, especially as those parental values often predate their children.

Returning to the religion example, if an evangelical parent feels that her child should be raised as an evangelical, and a Catholic parent believes that her child should be raised as a Catholic, we should not infer from this that it is in the individual best interests of the first child to be evangelical and in the individual best interests of the second child to be Catholic. It would instead be more reasonable to think that although each parent wants to raise her child in her own religion, the substantive content of that religious inculcation is a matter of the parent's beliefs and desires as opposed to her child's interests. Of course, everyone has a legal right to proselytize to someone willing to listen,<sup>100</sup> and to deny parents that opportunity would be to deprive them of the rights that people ordinarily enjoy. But to enable parents to compel unwilling children to engage in religious practices, attend church, or receive religious education makes sense from a secular perspective only if we wish to vindicate the parents' interests in propagating their belief system.<sup>101</sup> It does not make sense that inculcation into that belief system is itself in the child's own best interests. Such parental power is a privilege or prerogative of the parent, not a matter of the child's interests.<sup>102</sup>

The same can be said for the sets of secular practices, values, and belief systems that a state should respect and tolerate but not require of its citizens. It may be possible to advance compelling, reasoned arguments for why a particular normative or aesthetic agenda should be put into practice by a state. Such arguments,

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100. This right is constitutionally enshrined under the free-exercise and free-speech clauses of the First Amendment of the United States Constitution. U.S. CONST. amend. I.

101. See, e.g., *In re Marriage of McSoud*, 131 P.3d 1208, 1215 (Colo. App. 2006) ("A parent's right to determine the religious upbringing of a child derives from the parent's right both to exercise religion freely and to the care, custody, and control of a child."). See also *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) ("a State's interest in universal education . . . is not totally free from a balancing process when it impinges . . . [on] the traditional interest of parents with respect to the religious upbringing of their children").

102. See *Yoder*, 406 U.S. 205 at 214.

however, hinge on the substantive soundness, desirability, or benefits of those normative and aesthetic commitments and not on the fact that particular people are committed to them. To accept appeals to private authority of that sort would be to privilege certain people above others in a manner incompatible with equality between people by holding that some people's subjective values should count more than others. Granting parents' subjective values absolute priority over children's subjective values can therefore be seen as an undervaluation of children's subjective experience and interests.

Child protection and best interest justifications also cannot justify parental power to punish a child's failure to conform to arbitrary and potentially shifting standards of respect or deference,<sup>103</sup> or the failure to do any number of things that only serve to benefit the parent (whether the parent is able to imagine a possible, though incorrect, sense in which such things benefits their child or not). Paternalism and protectionism likewise do not explain why parents should be permitted to forbid their children from engaging in demonstrably harmless activities—such as forbidding a child from reading popular children's literature at school that they believe will corrupt them.<sup>104</sup> It certainly does not provide a basis for granting parents the power to do any number of damaging things to their children that fall short of the chronic and severe abuse or neglect required for termination of parental rights. It likewise does not provide grounds for requiring that such termination proceedings must be proven to a "clear and convincing" evidence standard rather than the preponderance of the evidence standard<sup>105</sup> favored in civil actions when considering two equal parties.<sup>106</sup>

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103. In conservative households, these standards for conduct are often servile rather than mature in character and exceed that expected by any adult outside of the military in their severity. For a widely read text describing and advocating for such profoundly submissive and servile behavior by children towards their parents, see PEARL & PEARL, *supra* note 95.

104. See Jennifer Holland, *Parents Protest Harry Potter Books*, WASH. POST (Oct. 13, 1999), [http://www.washingtonpost.com/wp-srv/aponline/19991013/aponline085127\\_000.htm](http://www.washingtonpost.com/wp-srv/aponline/19991013/aponline085127_000.htm).

105. See *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982).

106. A "preponderance-of-the-evidence standard of proof . . . essentially allocates the risk of error equally among the parties." 32A C.J.S. *Evidence* § 1627. By implication, requiring a clear and convincing evidence standard allocates the risk of error unevenly in favor of sustaining a parent's rights.

### III. PARENTAL RIGHTS ARE NECESSARILY INCOMPATIBLE WITH EGALITARIAN JUSTICE

#### A. Parental Autonomy Rights as Quasi-Property Interests

As argued in the previous section, there is a significant disjunction between child protectionist theory and rhetoric and the extent of parental powers. The extensive deference to parental preference and discretion seems to have little to do with preserving children's interests and more to do with parental autonomy. We must conclude that only respect for parental autonomy and freedom, rather than child protection, would lead to the belief that parents ought to be granted rights beyond those narrowly derivable from a child's interests. This is true not only of the particular legally recognized parents' rights found in American case law, but also more generally for any conception of parental rights of an independent vitality. This raises normative problems for any version of parental rights independent from children's interests.

When the domain of a person's freedom is thought to extend beyond their body to include the exclusive control of physical things in the world, we think of those things as being their possessions. For example, someone who owns a car is legally at liberty to do with it things that non-owners are not free to do with the car. Car owners are not necessarily at liberty to do *everything* physically possible to their car—they cannot legally set it on fire in the middle of a city street or drive it past the speed limit while intoxicated. The car's owner is, however, legally permitted to drive it (if licensed) and to exert control over it in ways that other people who are not its owner may not.<sup>107</sup> Car owners can do these things because their car *belongs* to them. It is *their car* in the sense of it being a possession and not just having a certain relationship to them.

Restricting what an owner can do with their car, or imposing requirements for car ownership, is thought to restrict the car owner's freedom and autonomy, although such restrictions may be justified in reference to other values. In contrast, if a non-owner is restricted from using the same car without the owner's permission, their

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107. In some ways the usage of cars is far more regulated than the usage of children in that there is no licensing requirement for competence and safety for parents as there is for drivers.

freedom is not thought compromised in the same way, because their unauthorized actions are considered theft, conversion, or vandalism. Such actions are beyond what is thought to constitute the domain of the non-owners freedom with regard to someone else's car precisely because it *belongs* to someone else and does not *belong* to them.

Parents' prerogatives with regard to *their own* children that adults do not generally have with regard to *someone else's* children are construed in a parallel manner. Just as the most basic and general rule of property is that owners may exert exclusive control over that which is their property, the basic attitude of most adults towards children is that it is not right to tell someone how to raise *their own* child or to try to do it for them.<sup>108</sup> Just as a car thief violates the rights of the owner and not the car, the non-parent acting in deference to parental authority typically understands this deference as respecting the parent.

Relatively few in the political mainstream today speak of parents as the owners of their children,<sup>109</sup> but the implied logic of parental rights suggests a type of ownership or quasi-property interest in children. In many regards, this allocation of powers to parents functions as a sort of ownership, and some (though not all) of the putative legal interests that parents have in their children can be compared to property interests. For example, that the religious education of a particular parent's child is purportedly a matter of that parent's freedom, but the religious education of *someone else's* child is not, makes sense only if one accepts that in some way children *belong* to their parents as possessions that the scope of their freedom extends over. The idea that parents can impose on their child what others cannot, because that child is *their* child and *belongs* to them, and not to others, amounts to a belief that parents are functionally related to their children as car owners are to their cars. This is of course not to say that quasi-ownership is the *only* dimension of how parents relate to children legally or socially, but that it is a

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108. Cf. Alldred, *supra* note 74.

109. But see, e.g., Elizabeth Stoker Bruenig, *Libertarians Have a History of Horrifying Views on Parenting*, NEW REPUBLIC (Feb. 4, 2015), <http://www.newrepublic.com/article/120965/rand-paul-libertarians-have-long-had-horrifying-view-parenting> (describing Sen. Rand Paul's statements that "the state doesn't own your children, parents own the children."); Dara Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645, 648 (2014).

significant element in the function and legitimacy of parent-child power dynamics.

People often speak in possessive terms about people who are not their children—for example, “my friend,” “my niece,” “my dentist,” “my employer”—without implying a possessory interest to control the friend, niece, dentist, or employer. Parental possessory interests, however, are much more than linguistic conventions. It is never thought to be a matter of an aunt’s freedom that she should be able to compel her niece to visit a disliked family friend or to forbid her niece from associating with a child whom she distrusts. To do so would be thought to trespass on the niece’s parent’s rights to make choices for the niece. This is closely parallel to the way that using someone’s chattel property without their permission would be a trespass against the owner’s property rights. In both instances the actual interests of the possession in question does not directly enter into the equation—even if the aunt were acting in the niece’s best interests, she would have no defense to violating the parents’ interests in their child.

John Holt aptly observed that “the family was not invented, nor has it evolved, to make children happy or to provide a secure emotional and psychological background to grow up in.”<sup>110</sup> If it just so happened that families based on parental domination over children were in fact the optimal legal arrangement for children, it would be a coincidence. Parents generally, and fathers in particular, have held dominion over their children for far longer than the “best interests of the child” rhetoric has been at the fore of legal and political discourse around children. Under ancient Roman law, fathers had the right to kill their children,<sup>111</sup> and in the Massachusetts Bay Colony, children could be put to death for disobeying their parents under laws informed by a belief that children are born in sin and must therefore submit to adult authority.<sup>112</sup>

Rather than viewing children within a protectionist framework, at least prior to the 17th century, children were regarded

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110. HOLT, *supra* note 13, at 46.

111. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 452 (Edward Christian ed., 15th ed. London, A. Strahan 1809) (“[t]he antient [sic] Roman laws gave the father a power of life and death over his children”).

112. See ROBERT REGOLI, JOHN HEWITT, & MATT DELISI, DELINQUENCY IN SOCIETY: THE ESSENTIALS 14 (2010).

as the property of their fathers.<sup>113</sup> In the 15th century, it was typical in England for fathers to contract out their children into indentured servitude in other adult's homes from the age of seven or nine until they were between fourteen and eighteen.<sup>114</sup> Widely-cited historian of childhood Philippe Aries noted these arrangements in the Middle Ages were not thought to have anything to do with ensuring children's best interests, welfare, or optimal psychological development.<sup>115</sup> Instead, adults could receive better service from children if they sent their own children to work for other adults while taking in others' children to work for them.<sup>116</sup>

Contemporary parental rights—though no longer expressly articulated as property rights—continue to function much the same although diminished in scope. Unlike in the 17th century, given that it is now seen as morally abhorrent to regard people as chattel, the rhetoric and justificatory framework has changed completely while the scope of parents' pseudo-property rights in their children has been only modestly curtailed. In other words, parental rights were property rights and remain functionally property rights, but it has become so taboo to speak of them as such, so that the way parental power actually functions has become obscure.

Many rights given to parents are especially property-like. Just as coverture laws historically held that a married woman's rights were subsumed into her husband's, such that her property belonged to her husband, in the U.S., parents have a "right to the child's services and earnings"<sup>117</sup> in 47 of 50 states.<sup>118</sup> Barnett and

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113. See Stuart N. Hart, *From Property to Person Status: Historical Perspective on Children's Rights*, 46 AM. PSYCHOL. 53, 53 (1991); MARY ANN MASON, *FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS* (reissue ed. 1996); see also JOHN LOCKE, *TWO TREATISES OF GOVERNMENT, WITH A SUPPLEMENT, PATRIARCHA*, BY ROBERT FILMER, 52–53 (1947) (1689) (detailing Filmer's position that fathers should be regarded as having absolute power and unlimited authority over their children).

114. See PHILIPPE ARIES, *CENTURIES OF CHILDHOOD* 353 (Pimlico, London, 1996) (1962).

115. See *id.* at 354.

116. See *id.*

117. *Burge v. City and County of San Francisco*, 262 P.2d 6, 12 (Cal. 1953) (citing CAL. CIV. CODE § 197 (West Supp. 1992) (repealed 1992) (now CAL. FAM. CODE § 7500(a) (2005))).

118. See Jules D. Barnett & Daniel K. Spradlin, *Enslavement in the Twentieth Century: The Right of Parents to Retain Their Children's Earnings*, 5 PEPP. L.



Spradlin have pointed out that being able to order a child to work and then seizing their earnings is in effect a type of economic slavery.<sup>119</sup> The procedure for a child to be rid of parental custody is called emancipation,<sup>120</sup> not coincidentally the term used to describe freeing slaves.<sup>121</sup> Emancipation frequently requires that the parents have effectively abandoned their child or that the child has married with parental permission,<sup>122</sup> reflecting very anachronistic notions of patriarchal property and power.

Although there is no free market in the sale of children, commercial gestational surrogacy is a lawful transaction in some U.S. states (such as California).<sup>123</sup> The official understanding in many states is that surrogates are paid for their services, but in effect surrogates are paid to produce and surrender babies to someone else.<sup>124</sup>

Richard Posner has argued that understanding surrogacy as a form of “baby selling” is mere “argumentation by epithet” and that what a surrogate sells “is not the baby but her parental rights.”<sup>125</sup> When one person sells her property to another, the sale legally transfers not the item itself (possession of which might be physically transferred without a sale, through theft or lending), but rather the legal property rights concerning the item. Property ownership of

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REV. 673, 675–76 n.7 (1978) (listing the states which, in 1979, granted parents the right to their child’s services earnings).

119. See *id.* at 674.

120. See DONALD T. KRAMER, *LEGAL RIGHTS OF CHILDREN* § 15:3 (2d ed. 2014) (providing grounds for common law emancipation).

121. See Matthew Bennett, *Methods of Emancipation: Today’s Children, Yesterday’s Slaves* 11 J. CONTEMP. LEGAL ISSUES 632 (2000) (analyzing legal similarities between the contemporary law of emancipation of minors and the historical antebellum Southern law of emancipation of enslaved people, suggesting that these similarities provide reason to think that children are regarded as property-like.)

122. See 67A C.J.S. *Parent and Child* § 27 (2015) (“The marriage of a minor child with the consent of the parent works an emancipation of the child although there is authority that emancipation occurs even though the parent does not consent to the marriage of the child.”). Statutes concerning the marriage of minors often require parental consent to marriage. 55 C.J.S. *Marriage* § 21 (2015).

123. Many U.S. states do consider surrogacy to be unlawful baby selling. See Dale Elizabeth Lawrence, *Surrogacy in California: Genetic and Gestational Rights*, 21 GOLDEN GATE U. L. REV. 525, 534–35 (1991).

124. Many other states do consider surrogacy to be unlawful baby selling. *Id.*

125. Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL’Y 21, 28 (1989).

chattel is not mere possession, but the *legal* right to control it, use it within the bounds of the law, and exclude others from using it without permission, and it is this bundle of legal rights that is transferred by sale.<sup>126</sup> Likewise, parental rights include the right to control a child and to exclude others from accessing that child.<sup>127</sup> In this regard, arguing that commercial surrogacy sells not children but parental rights makes little sense: selling parental rights is selling the legal right to control a child, just as selling chattel property is selling the legal right to control the chattel property.

Even in states that prohibit surrogacy, parents are permitted other means of transferring rights over their children in a property-like fashion. Parents can “give up a child” for adoption by an adult of their choice, demonstrating a right similar to the right to alienate property through a gift (though not a sale).<sup>128</sup> Children have no parallel right to claim adoption by a preferred potential parent. Parents can even decide who should “inherit” their children if they die while their children are minors by naming guardians in their wills, just as they can name beneficiaries to receive their personal property.<sup>129</sup>

Although it is uncommon to expressly consider children as “property,” it is not uncommon to think of children as possessions. Malfrid Grude Flekkoy argued:

Many adults, some on the basis of teachings of their religion, others in spite of intellectual acceptance of the opposite, feel that they have the same right of possession to the child-product as to other products, or that the ownership right to their child is stronger than other rights of possession, even comparing these

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126. Morris Cohen observed that “a property right is a relation not between an owner and a thing, but between the owner and other individuals in reference to things. A right is always against one or more individuals.” Morris Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 12 (1927). See Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923), for a related and complementary account of property.

127. See *Troxel v. Granville*, 530 U.S. 57, 65–67 (2000) (recognizing the fundamental rights of parents to custody and control of their children).

128. See 2 AM. JUR. 2d *Adoption* § 67 (2015) (requiring consent of parents to terminate their parental rights and duties, or proof that they forfeit their rights).

129. This is termed the appointment of a testamentary guardian. See 39 C.J.S. *Guardian & Wards* § 21 (2015).

rights with the legal rights connected with some other products.<sup>130</sup>

There was substantial discussion in the popular media in 2013 of whether or not children “belong to their parents” after MSNBC news anchor Melissa Harris-Perry stated in a promotional that “we have to break though our private idea that kids belong to their parents or kids belong to their families and recognize that kids belong to whole communities.”<sup>131</sup> Although describing children as belonging to the community is also problematic in that it objectifies children as common resources, conservative media figures reacted with outrage of a different sort, believing that children do in fact belong to their parents.<sup>132</sup> More recently, libertarian Senator Rand Paul made this point explicitly by making the statement that “the state doesn’t own your children, parents own the children.”<sup>133</sup>

That parents’ legal interests in children *function* as property rights does not of course imply that children are property as a matter of law on a *formal* level. There are also numerous ways in which children’s status is not analogous to most forms of property. For example, although parents have some rights to transfer their child to another guardian, most property can be expressly sold, and few forms of property place nearly such substantial legal duties on owners as child custody places on parents. It is also of vital social relevance that while parents are often possessive of their children, they do not tend to conceptualize children literally as property and most would likely

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130. Malfrid Grude Flekkoy, *Attitudes to Children—Their Consequences for Work for Children*, in *THE IDEOLOGIES OF CHILDREN’S RIGHTS* 135, 136 (Michael Freeman & Philip Veerman eds., 1992).

131. Jack Mirkinson, *Melissa Harris-Perry Stands By Promo: ‘Our Children Are Not Our Private Property’*, HUFFINGTON POST (Apr. 13, 2013, 10:50 AM), [http://www.huffingtonpost.com/2013/04/13/melissa-harris-perry-promo-children-msnbc\\_n\\_3076195.html](http://www.huffingtonpost.com/2013/04/13/melissa-harris-perry-promo-children-msnbc_n_3076195.html).

132. See Hollie McKay, *Critics Slam MSNBC Host’s Claim That Kids Belong to Community, Not Parents*, FOX NEWS (Apr. 9, 2013) <http://www.foxnews.com/entertainment/2013/04/09/critics-slam-msnbc-hosts-claim-that-kids-belong-to-community-not-parents>; see also Conor Friedersdorf, *Thank Goodness Kids Do Belong to Their Parents*, THE ATLANTIC (Apr. 10, 2013), <http://www.theatlantic.com/politics/archive/2013/04/thank-goodness-kids-em-do-em-belong-to-their-parents/274840/>.

133. Bruenig, *supra* note 109 (Senator Paul’s comments came in the context of the debate over parental opt-outs of vaccinations for children).

find terming them as such objectionable.<sup>134</sup> Children also have legal claims on their parents.<sup>135</sup> Nonetheless, to the extent that parental legal rights are in effect possessory interests or quasi-property rights, this ought to be a basis for regarding them as illegitimate and unwarranted.

B. Parental Rights Diminish and Displace Children's Interests and Objectify Children

A legal right for parents to control their children, regardless of how it is socially conceptualized, is incompatible with extending equal moral consideration to children's interests. Recognizing one person's autonomy interests in another through law, even if those interests are conceived of in non-possessory terms, is an affront to their dignity and humanity—it is fundamentally incompatible with a belief in the equality of persons as possessors of morally equal interests, worth, and standing.

Although people are granted authority over others outside of the parent-child relationship, they are not afforded authority to vindicate their personal autonomy interests in another person. The authority of public officials is, at least in theory, limited to implementing rules ultimately determined, directly or indirectly, through elections, and applicable to everyone on an equal basis.<sup>136</sup> Their authority is not based on their personal autonomy interests, but rather on fulfilling their proscribed public role for the public good. Likewise, an agent to principal, such as an attorney or a healthcare proxy, is granted authority not out of deference to the agent's heightened personal interests in deciding for their principal, but in order to further their principal's interests. If parental authority was limited to ministerial, non-discretionary caretaking functions or actions that were demonstrably required to further children's interests, then, while problems might remain, the institution of

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134. This perhaps suggests that if the property-like nature of parental rights is more broadly recognized, people, including parents, might be willing to reform it.

135. Though these still are hardly symmetrical since they are mostly only enforceable by other adults and through other adults—as in the case of child support.

136. Of course there are numerous instances of failures in democratic accountability or in public officials treating people unequally in a discriminatory or arbitrary fashion, but these are uncontroversially regarded as wrong, as deviations from the ideal, and as abuses of discretion.

parental authority would not necessarily imply diminished regard for children's interests.

When a private individual is granted a right to autonomously control another person according to his or her own interests, discretion, and tastes, the interests of the person under their control are correspondingly displaced and diminished. When most people are regarded as having unmodified interests of their own, but some have their interests at least partially displaced by a third party claim, the later set of people are given fundamentally lesser regard than the former. In this manner, the recognition of parental interests in children comes at the expense of recognizing children's own interests in themselves. This entails according a diminished recognition of children's interests compared with the interests of other people. Adults' interests in themselves are treated as whole and without encumbrances, but children's interests in themselves are considered in relation to their parents' competing interests in them. Such parental interests in children partially subsume a child's own interests when considering how that child ought to be treated.<sup>137</sup>

Moreover, to think that a parent should have discretionary or personal autonomy-based control over a child because that child is theirs and belongs to them is a type of objectification. We objectify children when we regard them in effect as things that parents can use for their purposes, even benign or admirable purposes, rather than as persons with their own agendas. The concept of objectifying a person is most commonly recognized in the context of sexual objectification, but a more general notion of objectification can clarify part of what is normatively objectionable about parental rights.<sup>138</sup> Martha Nussbaum identified several component notions of objectification, including instrumentality ("the objectifier treats the object as a tool of his or her purposes"), denial of autonomy ("the objectifier treats the object as lacking in autonomy and self-determination"), violability ("the objectifier treats the object as lacking in boundary-integrity"), ownership ("the objectifier treats the

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137. There might be an analogy to coverture where married women's legal personalities were subsumed into their husband's. See Claudia Zaher, *When a Woman's Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 LAW LIBR. J. 459 (2002).

138. An objectifying dimension of adult attitudes towards children was first articulated, if somewhat narrowly, by John Holt in his account of children as "love objects" onto whom adults feel entitled to express affection without adequate regard to whether or not it is reciprocated. HOLT, *supra* note 13, at 102–12, 126.

object as something that is owned by another”), and denial of subjectivity (“the objectifier treats the object as something whose experience and feelings . . . need not be taken into account”).<sup>139</sup>

Treating children as owned by parents is itself a *prima facie* sort of objectification, but using Nussbaum’s schema, children are also routinely objectified in other ways by the current legal and social arrangement. Parents are encouraged to craft children into the kind of people they want them to grow up to be.<sup>140</sup> This prompts parents to treat their children as instruments in the project of fulfilling the parents’ personal ambitions, rather than as persons unto themselves. As such, this could be regarded as an instrumentalizing form of objectification.

Children’s subjectivity is also frequently denied in the sense that their feelings about what is best for themselves tend not to be taken very seriously.<sup>141</sup> Even children’s visceral emotional responses are frequently trivialized—especially feelings of embarrassment and shame.<sup>142</sup> As such, children’s subjective experience is accorded lesser weight than that of adults generally and their parents in particular.

The lack of respect for children’s bodily integrity demonstrated by the parental discipline privilege likewise implies a view of children as violable, or in any case having far less boundary-integrity than adults.

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139. Martha C. Nussbaum, *Objectification*, 24 PHIL. & PUB. AFF. 249, 257 (1995).

140. Bruce A. Ackerman criticized the view that parents are entitled to this practice as seeking to engage in a kind of “horticulture.” See ACKERMAN, *supra* note 47, at 139–43.

141. See, e.g., Joan Meier, *Parental Alienation Syndrome and Parental Alienation: Research Reviews*, VAWNET APPLIED RESEARCH FORUM (Jan. 2009), <http://www.ilfvcc.org/meetings/handoutsapril2011/PAS%20research%20VAWnet.pdf>

142. As John Holt observed:

Once, coming into an airport, I saw just ahead of me a girl of about seven or eight. Hurrying up the carpeted ramp, she tripped and fell down. She did not hurt herself but quickly picked herself up and walked on. But looking around on everyone’s face I saw indulgent smiles, expressions of “Isn’t that cute?” They would not have thought it funny or cute if an adult had fallen down but would have worried about his pain and embarrassment.

HOLT, *supra* note 13, at 116.

It likewise objectifies children to deny them their agency and autonomy, and to presume that parents' values, culture, and belief system can be imputed onto children. A central part of a liberal, pluralistic society is the belief that people should be able to choose values for themselves among competing conceptions of the good.<sup>143</sup> This is often appealed to as a basis for permitting parents the freedom to choose from a diverse range of educational and cultural options for their children and to otherwise raise their children as they see fit according to their values.<sup>144</sup> But this raises the question of *whose* freedom and *whose* values should be considered. An implication of the idea that people should be able to choose values for themselves is that they should not be able to choose for other people since this would negate the other person's choice. Even if a person has a diminished capacity to reflect on their choice of values, for someone else to impose their values on them constitutes exactly the kind of imposition that is most troubling about intolerant societies and states. Even assuming *arguendo* that children are unable to fully formulate a view of the good life during their childhood, why should parents have the legal authority to impose their own particular views on their children against their children's wills?<sup>145</sup> Such impositions if done coercively to the exclusion of other possibilities will often tend to shape and limit a child's views in the future.

C. Parental Rights Include the Right to Choose What 'Desire-Contingent Goods' a Child Ought to Have, Regardless of the Child's Desires

There can be wide disagreement over the content of a good life and what social and personal goods are essential to living a good life. Under nearly any such theory, however, there is a large class of important and trivial life choices and activities that are neither

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143. See generally WILLIAM A. GALSTON, LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE (2002).

144. See *id.* at 102. See also EAMONN CALLAN, CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY 143 (2003) (arguing that parents' rights to raise their children according to their moral beliefs is an expression of their own conscience that should be protected).

145. This is in contrast to merely allowing parents to attempt to persuade children of their views by the consensual means that anyone use to try to persuade anyone else, or requiring that children be raised in a manner designed to maximize their opportunities and potential.

inherently good nor bad. This class of activities or choices are desirable if and only if they are desired by the people participating in them. From the standpoint of a state with any pretext of leaving its subjects at liberty to pursue their own goals, this class of goods, that might be called “*desire-contingent goods*,” are, absent externalities, good for the people who desire them and are not good for people who do not.<sup>146</sup>

Some desire-contingent goods, from the standpoint of a state neutral to their substantive values, would include learning to play the saxophone, participating in a Wiccan celebration, or watching the latest Hollywood romantic comedy. There can be grounds for argument and disagreement over which goods are desire-contingent and which are inherent goods (a Wiccan theocracy might, for example, believe rightly or wrongly that participating in a Wiccan celebration is inherently good)—but, in nearly any account with any room for personal agency and choice, some goods will count as desire-contingent.

If prohibited from engaging in a desire-contingent good that harms no one else, someone might rightly feel that their liberty was unnecessary infringed on, but there is likewise no inherent benefit to foisting such desire-contingent goods on an unwilling participant. When someone is coerced into participating in a desire-contingent good against their will they experience the anguish of being coerced but do not derive meaningful benefit because this class of good, to someone who does not desire it, is not a good at all.

Most of us can implicitly recognize that desire-contingent goods can contribute to a person’s life going well when they are deeply desired, but their absence does not inherently diminish a person’s life who does not want them. For example, someone who fulfills a desire to play the saxophone with great skill and joy could clearly gain a tremendous personal benefit from it – it could even form the basis of a lucrative career and contribute to personal life satisfaction. However, someone who has no desire to play saxophone and, as such, fails to learn it, cannot be meaningfully said to have life that is going fundamentally less well. This is because saxophone skill is a value

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146. Thus desire-contingent goods contrast with what John Rawls described as “primary goods,” such as rights, liberties, income, wealth, health, and self-respect, which are those things which every rational person is presumed to want and benefit from. See JOHN RAWLS, A THEORY OF JUSTICE, 54–55 (revised ed. 2009).



entirely contingent on whether or not it is subjectively desired, not an absolute, universal, or perspective independent value. This is all the more clearly true if the time a person might have spent learning the saxophone is instead spent on pursuits that are meaningful and satisfying to them. It would be hard to imagine compelling justification for conscripting unwilling people into learning the saxophone. Learning the saxophone is something that is good if desired, and not good if it is not desired.

When we allow parents to make this class of decision for their children, we face the following problem: because desire-contingent goods are not inherently desirable but desirable only if desired, the benefits of participating do not run to a child if the child does not desire to participate. The coerced imposition of desire-contingent goods on a child is therefore not desirable in the ordinary sense—it is not beneficial to or even for the child. It is beneficial only for the parent.

In most close relationships there is some negotiated give and take, some altruistic participation in shared activities that another desires for the sake of the other. When a legal regime, however, gives parents the exclusive and unilateral ability to choose desire-contingent goods for their children, it has the effect of subordinating the interests of children to the interests of parents. This is because children, like everyone else, have an interest in being free from the subjective anguish that accompanies the experience of being instrumentally coerced to benefit another. A child's participation in a parent's preferred desire-contingent good benefits the parent by fulfilling the parent's wishes but does not benefit the child, since desire-contingent goods are by definition not the sorts of things that have inherent benefits or benefit those who do not desire them. As such, children experience a detriment of being coerced without resulting benefit.

Parental rights to make life choices for children and to raise them according to their values are paradigmatically the power to choose which desire-contingent goods a child participates in or experiences. The powers, resources, and authorities needed to provide children with the necessities of life, such as food and clothing, or to provide needed emotional support, can, to the extent actually necessary to insure a child's welfare, be understood as contingent on the child's needs rather than the parent's preferences. This set of powers and resources are not necessarily parental rights as such, since they are not based on parents' particular and individual interests but derivative of the interests of their child. The parental

power to choose for their children a selection of desire-contingent goods to the exclusion of other harmless choices characterizes those parental rights that do not depend on children's separate needs. Examples of these parental choices include choice of school among different adequate schools,<sup>147</sup> the choice of religious attendance,<sup>148</sup> management of a child's affect and manners among the diversity of legally permissible manners, choice of extra-curricular activities, and choice of what ideas<sup>149</sup> and people a child is exposed to<sup>150</sup> even if alternative ideas and people are harmless.

One might object that even if this analysis is correct, children might be much better off if they participate in some selection of desire-contingent goods and that, being children, they cannot effectively analyze the costs and benefits of each of these opportunities. Maybe, for example, a child cannot appreciate saxophone lessons initially given deficits in their long-term thinking abilities, but if coerced to take saxophone lessons, will come to greatly appreciate them at some point in the future. Failure to coerce a child into taking saxophone lessons might therefore deprive the child's future self of personally valuable skills, experiences, and memories.

Setting aside for a moment what might be questionable assumptions about children's ability for agency, such an argument relies on making decisions based on an unknowable future where the coerced child actually comes to appreciate their parent's preferred desire-contingent goods. This is often not the case and since it cannot be known *ex ante* when coerced choices will be appreciated and when they won't be.<sup>151</sup> Mere parental preference is a poor predictor.<sup>152</sup> Given limited time and resources, the choice of one desire-contingent good often precludes the ability to choose to pursue another, and there is no way to know if a child might have received even more future

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147. *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

148. *See id.*; *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

149. *Yoder*, 406 U.S. at 230; *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2734 (2011).

150. *Troxel v. Granville*, 530 U.S. 57, 70 (2000).

151. Douglas Husak analyzed defenses of paternalism appealing to "future-oriented consent" offered by Gerald Dworkin by arguing along these lines. *See* Douglas Husak, *Paternalism and Consent*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE*, 107, 108 (Frank Miller & Alan Wertheimer eds., 2009).

152. It is common to hear people express both appreciation and profound resentment for choices foisted on them as children. It should then be clear that mere parental preference is a poor predictor of a child's future attitudes.

enjoyment and satisfaction from the choice of a desire-contingent good other than that which their parent chose for them.

It might also be objected that parents choose desire-contingent goods for their children not for their own benefit, but because these are the goods that they think are best for their children (or at least that this is the presumed aspiration). The first problem with this objection is that a parental right to choose desire-contingent goods for their children is not contingent on a good faith belief that the choice, in the universe of possible choices, is actually best for their children. Even if parents in fact have such a belief, that belief may be mistaken and, since choosing one option precludes choosing others, it is not possible to verify how often parents choose best in the long term. At least in the short term, it should be clear that even young children are the best experts on what they actually desire since desire is a subjective mental state.<sup>153</sup> This is of course not to say that either children or adults always desire what will actually most benefit them, but that goods of the sort which are only beneficial when desired can necessarily only benefit someone who actually desires them. Even if someone does not know what is “best” for them, they can still have desires and, absent cases of actual ambivalence, even young children can unambiguously communicate their desires and lack thereof. Treating a child’s subjective experience of desire and non-desire as immaterial to choosing desire-contingent goods is a means of objectifying the child since it implicitly denies the existence or importance of the child’s perspective.

Even if it is true that choosing some desire-contingent goods in childhood is beneficial in the long run, this does not provide an argument that parents should have a legally protected right to make such decisions for their children. Rather, to the extent that resources permit, there should be a social and legal framework for enabling children to choose among a menu of potentially beneficial options. Of course, in any such framework parents could still express nonbinding preferences and attempt to persuade their children of the value of their preferences, given that parents, even without parental rights of an independent vitality, would retain their ordinary rights of free expression. Likewise, choices that require adult assistance might be unavailable to children even in a scheme most respectful of children’s equal interests if no one can be convinced to facilitate them, since

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153. There might be accounts of revealed preferences, but these are not really relevant for making desire-contingent goods subjectively good.

requiring parents to facilitate some choices might involve a major loss of personal liberty common to people whether or not they are parents. The exact details of any such framework would necessarily be contingent on many social, economic, and political factors and is as such beyond the scope of this paper.

One major area where current law already places the choice between two mutually exclusive desire-contingent goods in the hands of minors rather than parents is in abortion rights. At least in theory, under current United States Supreme Court jurisprudence, parental notification and consent laws for abortion must include a judicial bypass provision where a minor unable to get consent from her parents can still choose to get an abortion upon a judicial determination that the decision is either in her best interest and/or that she is of sufficient competence to make the decision for herself.<sup>154</sup> Likewise, a parent cannot require a minor to have an abortion she does not desire.<sup>155</sup> The choice to have a child or to terminate a pregnancy is a clear case of a choice between two mutually exclusive desire-contingent goods.<sup>156</sup> To someone who wants a child, having one can be one of the most profoundly positive life choices—but to someone who does not want a child, being forced to give birth can be one of the most profoundly traumatizing and degrading personal violations. Whether carrying a pregnancy to term or ending it is beneficial is contingent on the desires of the pregnant woman in question. If, as the current law holds and many social progressives believe, it makes sense for this extremely consequential choice between two desire-contingent goods to be allocated to minors rather than their parents, it makes little sense to empower parents to coercively choose among all the less consequential desire-contingent goods.

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154. *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 477 (1983); *Planned Parenthood v. Casey*, 505 U.S. 833, 899 (1992); *H. L. v. Matheson*, 450 U.S. 398, 408–09 (1981).

155. *See Matter of Mary P.*, 444 N.Y.S. 2d 545 (N.Y. Fam. Ct. 1981).

156. At least if we set aside pro-natalist and anti-natalist arguments to the contrary and do not here address arguments that abortion is inherently bad. These are topics for another article.

#### IV. EVALUATING PARENT-CENTERED ARGUMENTS FOR PARENTAL RIGHTS

Parental legal rights are structured to protect parental autonomy rather than to protect children's interests. This focus on parental autonomy in turn implies that parental legal interests in children are analogous to interests in property. Such interests, I argue, illegitimately fail to extend equal moral consideration to children, and they degrade and objectify children. If parental legal rights are not well justified on protectionist or children's best interest considerations, however, they may still be justified on other grounds. It is necessary to consider alternative arguments for parental rights that are not directly parasitic on children's best interests or child protection. I will suggest, however, that many of these more parent-centered arguments for parents' rights are also incompatible with extending equal concern for children, and many problematically imply a property-like interest for parents in children.

##### A. Personal Liberty-Based Accounts of Parental Rights

U.S. family law often conceptualizes parents' right to control their children as a liberty interest for the parent.<sup>157</sup> This liberty interest in turn provides the basis for constitutional protection of parental rights under the due process clause of the 14th Amendment.<sup>158</sup> The United States Supreme Court surveyed the extensive history of the judicially recognized "liberty interest" of parents in the "care, custody, and control of their children"<sup>159</sup> in *Troxel v. Granville*:

The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental

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157. *See* *Odell v. Lutz*, 177 P.2d 628, 629 (Cal. Ct. App. 1947) ("The supremacy of the mother and father in their own home in regard to the control of their children is generally recognized. 'It is said that the natural rights of a father . . . are greater than those which any guardian can have. . . . The legal obligations of parenthood include the duties of support, of care and protection, and of education. As compensation therefor, the law recognizes certain rights in the parent. . . . So fundamental are the rights of parenthood that infringements thereof have been held to constitute encroachment on the personal liberty of the parent forbidden by the Constitution.'" (citing 39 AM. JUR. §§ 593, 594 (1942))).

158. *See id.*; *see also* *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

159. *Troxel*, 530 U.S. at 57.

liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska*, [262 U.S. 390, 399, 401, (1923)], we held that the “liberty” protected by the Due Process Clause includes the right of parents to “establish a home and bring up children” and “to control the education of their own.” Two years later, in *Pierce v. Society of Sisters*, [268 U.S. 510, 534–35, (1925)], we again held that the “liberty of parents and guardians” includes the right “to direct the upbringing and education of children under their control.” We explained in *Pierce* that “[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” [*Id.*, at 535.] We returned to the subject in *Prince v. Massachusetts*, [321 U.S. 158 (1944)], and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” [*Id.* at 166.]<sup>160</sup>

Likewise, in *Santosky v. Kramer*, the United States Supreme Court discussed “the fundamental liberty interest of natural parents in the care, custody and management of their child.”<sup>161</sup> *Washington v. Glucksberg* noted that “the ‘liberty’ specially protected by the Due Process Clause includes the rights . . . to direct the education and upbringing of one’s children.”<sup>162</sup> Except for references to long-held established traditions and values, it is rarely the case that courts provide a complete explanation or defense of why the right to control one’s children ought to be considered a matter of fundamental liberty.

Despite the extensive history of liberty-based arguments for parental rights to control their children, the Court has rarely adequately developed philosophical justifications for this view. *Meyer v. Nebraska* asserted that “[w]ithout a doubt, [the liberty guaranteed in the Fourteenth Amendment due process clause] denotes not merely

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160. *Id.* at 65–66.

161. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

162. *Washington v. Gluckberg*, 521 U.S. 702, 720 (1997) (citing *Meyer v. Nebraska* 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

freedom from bodily restraint but also the right of the individual . . . to marry, to establish a home and bring up children”<sup>163</sup> and “[c]orresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life.”<sup>164</sup> Although the *Meyer* Court made reference to the limits of the state’s role in individual lives under the U.S. Constitution<sup>165</sup> and that the language teaching Nebraska prohibited was harmless,<sup>166</sup> it did not clearly explain why the particular list of liberties it identified ought to be given special judicial protection under the Fourteenth Amendment.

More complete explanations for how personal liberty could lead to parental rights have been offered in liberal philosophical literature. In *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice*, William Galston argues that a parent’s right to determine a child’s upbringing and education is a matter of “expressive liberty.”<sup>167</sup> Eamonn Callan advanced a very similar view in *Creating Citizens*.<sup>168</sup> Galston describes expressive liberty as the “absence of constraints imposed by some individuals or groups on others that make it impossible or significantly more difficult for the affected individuals or groups to live their lives in ways that express their deepest beliefs about what gives meaning and value to life.”<sup>169</sup> He argues that expressive liberty is an essential value because it is a requirement for leading a “complete and satisfying life . . . [because] part of what it means to have deep beliefs about how one should live is the desire to live in accordance with them.”<sup>170</sup> This expressive liberty is only possible “within societies whose members do not needlessly impede one another’s opportunity to live their lives as they see fit.”<sup>171</sup>

Galston suggests that parents’ ability to raise children in a way consistent with their commitments is a core part of expressive

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163. *Meyer v. Nebraska* 262 U.S. 390, 399 (1923) (a list of other rights described here is omitted).

164. *Id.* at 400.

165. *See id.* at 401–02.

166. *See id.* at 400, 403.

167. GALSTON, *supra* note 143, at 101.

168. CALLAN, *supra* note 144, at 145.

169. GALSTON, *supra* note 143, at 101.

170. *Id.*

171. *Id.* at 102.

liberty.<sup>172</sup> Citing Callan's similar views, Galston notes that parenting is one of the "central meaning-giving tasks of our lives" and as such, "we cannot detach our aspirations for our children from our understanding of what is good and virtuous."<sup>173</sup> Moreover, Galston suggests that "loving and nurturing a child cannot in practice be divorced from shaping that child's values."<sup>174</sup> Parents also hope for "relations of intimacy" with their children.<sup>175</sup> Galston insists that "it is understandable for parents to fear that their children may become embroiled in ways of life they regard as alien and distasteful and, within limits, to act to reduce the risk that this fear will be realized."<sup>176</sup>

Galston and Callan endorse what they term a reciprocal role for parents and children. Callan argues that while any moral theory that interprets a child's role as merely instruments of their parents would be objectionable, it would also be objectionable to view a parent's role in ways that reduce parents to mere instruments of their children's interests.<sup>177</sup> Instead, parents should have discretion that does justice to their hopes and aspirations.<sup>178</sup> Callan further contends that a concept of parental rights in child-rearing that respects the expressive significance of parenting must "protect their sincere judgment about what is best for their children in many situations where their judgment looks just plain wrong to outsiders."<sup>179</sup>

For Galston, this reciprocity model "must do justice to the particularity of the relationship between specific parents and specific children."<sup>180</sup> He goes on to suggest that:

Everyone can agree that children are not the "property" of their parents. Still, when I say that this child is "mine," I am both acknowledging responsibilities and asserting authority beyond what I owe or claim vis-à-vis children in general. As a parent I am more than the child's caretaker or teacher, and I am not simply a representative of the state delegated

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172. *See id.*

173. *Id.*

174. *Id.*

175. GALSTON, *supra* note 143, at 102.

176. *Id.*

177. CALLAN, *supra* note 144, at 145.

178. *Id.*

179. *Id.* at 146.

180. GALSTON, *supra* note 143, at 103.



to prepare the child for citizenship. The hopes and sacrifices to which Callan refers reflect the intimate particularity of the parent–child bond, the fact that the child is in part (though only in part) an extension of ourselves.<sup>181</sup>

Galston and Callan’s expressive liberty-based defense of parental rights surely touches on sincerely felt parental desires, but it does not provide a compelling reason to grant priority to those desires over those of others. If expressive liberty is of essential importance, then we should be very careful about depriving some people of that liberty in order to give more of that liberty to other people. Even if one believes that children have many special vulnerabilities, such that they must be protected from potential exploitation, it does not then follow that children, at least those old enough to articulate their wishes, do not or should not have their own lives to live. If it is as important as Galston suggests that members of society not needlessly impair others’ opportunities to live as they see fit, then we should apply this consideration to parents’ impact on children as well, rather than only considering society’s impact on parents with regard to their children. Value-expressive liberties of this sort can be understood as types of desire-contingent goods and as such should be the province of parental choice only to the extent that children’s parallel value expressive liberties are not displaced.

There may be cases where the interests of other people, or interests common to society, are sufficiently great that they outweigh an individual’s interests in making her own life choices such that the state has legitimate grounds to override an individual’s will. This goes for children as well as adults, though the specific circumstances may be different. But, when it comes to the varieties of personal choices that are generally tolerated in a liberal society,<sup>182</sup> and that most centrally affect a child’s life and living conditions, why should choosing among these options always be a matter of the parent’s liberty and not the child’s?

For example, if in a liberal society it is thought acceptable for a child to attend either a Catholic parochial school or a secular Sudbury school, why should the choice between the two be up to the

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181. *Id.*

182. The easiest examples are variations in harmless personal choices, such as choosing to spend time playing basketball rather than practicing the piano or learning a foreign language.

parent rather than the child when their preferences conflict—at least where the child’s choice would not require significant added resources or effort by the parent?<sup>183</sup> Even if one were convinced that the parent had a greater depth of experience or reasoning faculties, the worst result that would happen if the child’s choice were prioritized would be that the child would end up in an educational situation that is still entirely acceptable from an external perspective. Both would be educational situations that a parent could permissibly choose for their child under current social and legal norms. Personal beliefs and value judgments of this sort are not matters of some special faculty of reason that adults have and children lack. Value judgments of lifestyle are typically matters of personal preference and desires, or what I have described as desire-contingent goods, and often reflect idiosyncratic personal feelings and personality differences rather than a technocratic skill universal among adults and absent in children.

Even if it were possible to identify some acquirable skill for identifying the “right” life goals and purposes according to some external standard,<sup>184</sup> this would be poor grounds to give those better able to do so the power to choose for those less able. The ability to choose how to live one’s life is not highly valued because people have some special aptitude or skill for making those choices. It is valued because the pursuit of one’s own self-defined purposes in life, rather than those of someone else, is essential to developing a satisfying sense of self, life fulfillment, and personal growth.

The contention that parents are injured if children express contrary values and seek opportunities to live their lives in ways not conforming with parental wishes only makes sense if it is assumed that children’s wills and life preferences should be subsumed into

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183. The fact that most children do not have the financial and transport means to effect school choice, even if they were legally entitled to do so independently of their parents, is a separate issue that would need to be addressed elsewhere. Whose consent is needed to enroll a child in a school—the child, the parents, or both—is a prior question.

184. When it comes to what the right life goals and purposes are, most people would profess skepticism that any external or “objective” standard could be identified. However, when the question is raised as to a child’s life goals and values, people seem to be quicker to think that they will only develop the “correct” values if brought up “right” by their parents . . . but of course those “correct” values would be nothing more than the particular and diverse values of their parents.

those of their parents. This is a very objectifying assumption. It also has obvious historical parallels to the old patriarchal common law notion of spousal relations as subsuming the wife into the husband's person such that they were one person as a matter of law.<sup>185</sup> While Galston states matter-of-factly that children are in part an extension of their parents, this is not actually a material fact of the world, but rather a widespread attitude towards children. Viewing children as mere extensions of their parents, or characters in the story of their parents' lives, is a means of denying children equal personhood. It is certainly to deny them any agency or authorship of their own lives. Children's agency is not socially recognized to the same extent as adults' agency,<sup>186</sup> but this is not because, at least among children old enough to express themselves clearly, children actually lack wills, opinions, preferences, and the ability to make choices. It is because opportunities to act on them are routinely denied in cases where they would not be denied to adults, and whether children can make reasoned choices is often in doubt.<sup>187</sup> Whether or not children can make *well-reasoned* choices, however, should not be an issue when it comes to the value judgments that people are permitted to make for themselves without needing to arrive at them through well-reasoned consideration. When people are denied the opportunity to make choices for which there is *no wrong choice*, this does not imply treating them as if they cannot make the "right" choice, since there is no right choice as such. It is instead to diminish their dignity and standing. It is to prioritize one person's subjective desires over one's own.

If the Galston argument is used to defend and justify parental rights, it is circular to implicitly start from the premise that existing parental interests in children are legitimate. The fact that people do assert authority over particular children that they claim as "theirs," and that they find this gratifying, is not a good reason for why this should be the case when questioning the premise that the law should

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185. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*452. Blackstone made the comparison the other way around—that a husband's power over his wife is analogous to his power over his apprentices and children.

186. Except when it is convenient to do so for the purposes of charging children with a crime as an adult or attributing tort liability to children engaged in putatively adult conduct.

187. Often with good reason—but then, adults too often act irrationally and unreasonably, as has been widely recognized in behavioral economics literature. See, e.g., DAN ARIELY, PREDICTABLY IRRATIONAL (2008).

grant parents autonomy rights of an independent vitality. Surely part of the reason why exercising this authority is felt to be a central life-giving task is because it is a socially encouraged option, and that these feelings are regarded as positive and important in a society where child-parent legal relationships include extensive parental control over children. If the arrangement were different—less hierarchical and more geared towards respecting children as separate persons and not mere extensions of their parents—people would likely adopt different attitudes towards what they expect and need from their relationships with their children.

Wanting to have power over someone, even wanting very badly to have power over them, is not generally sufficient for giving someone that power. Recognizing that parents often want special authority over their children does not by itself provide a sufficient justification for that power, any more than the fact that someone might very badly want power over any other person would serve as a reason to grant it to them.

It may be the case that nurturing a child cannot in practice be separated from shaping that child's values. It does not follow from this recognition, however, that the state should grant parents additional power over their children, so that they have more leverage with which to shape their children's values. As considered in more detail in the conclusion of this article, parents with greatly reduced power could and would still exert significant influence over their children's values; they would simply be limited to non-coercive means. Even without any special parental rights to compel obedience to a parent's value system, parents would retain the general free-speech right to voice their values and attempt to persuade their children and others to adopt them.

With regard to the fear mentioned by Galston that children might become involved with ways of life that their parents regard as "alien and distasteful," living in a liberal society requires permitting people to express values not one's own, rather than repressing exploration of other ways of living. It is entirely illiberal to allow parents who fear their children's alternative values to impose their own value judgments on future generations with the aid of state power. Allowing parents to impose their personal values on children is to deny equal moral consideration for children's values and to deny children the equal protection of the law. This is because it exposes children to an additional liability in the form of the coercive imposition of the personal values of others in a manner that adults are not so exposed. A better and more liberal approach would be to

recognize the value of parents practicing toleration and, where possible, acceptance of the ways their children differ while retaining the right to express their own values non-coercively.

Fears that loss of parental powers would result in a loss of emotional intimacy between parents and children follows the same pattern as the historical fear that loss of husbands' patriarchal power would result in a breakdown of marriage. The abolition of coverture laws and other powers of husbands<sup>188</sup> demonstrates that people do not need their family members' legal personalities subsumed into their own in order to have meaningful and fulfilling intimate relationships with them.<sup>189</sup> Parents might believe that being able to avail themselves of the current extraordinary range of parental powers makes dealing with children easier than it would be if their powers were more limited. However, an arrangement that privileges some or most parents' preferred experience over that of their children's for no other reason than that they are parents is not consistent with basic principles of equality of persons.<sup>190</sup>

#### B. Family Privacy–Based Accounts of Parental Rights

Appeals to privacy are also among the most influential accounts of parental rights. In *Smith v. Organization of Foster Families*, the United States Supreme Court found that “the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in ‘this Nation’s history and tradition.’”<sup>191</sup> Earlier, the Supreme Court held in *Prince v. Massachusetts* that “[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.”<sup>192</sup>

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188. For a survey of this history, see Zaher, *supra* note 137, at 459.

189. Contrary to what past opponents of women’s rights feared.

190. Absent an additional explanation for why parents’ preferences should be valued more, parental status is a morally arbitrary basis for conferring privilege.

191. *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 845 (1977) (internal citations omitted).

192. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (internal citation omitted).

Privacy is not a value that can be applied neutrally where multiple people are concerned. What someone demarcates as private largely depends on what they want to preserve from “outside interference.” Appealing to privacy does not therefore provide independent guidance into what it is morally permissible interference. Frances Olsen argues that what power is classified as private as opposed to public is not a natural or material attribute of power, but a political and contestable designation.<sup>193</sup> When people are able to characterize their power over others as “private” and the power used against them to mitigate that power as “not private,” they gain a degree of rhetorical legitimacy and insulation from criticism.<sup>194</sup> As Olsen puts it,

For most of us, what *we* want to do and be left alone to do seems like private action. . . . The laws that facilitate the injury of one person by another seem like state action when they seem unjust, but go unnoticed or are treated as a neutral background of law to those who support the rules.<sup>195</sup>

Privacy may be a defensible right when it involves only one person and harms no one else, such as the privacy of someone’s personal journal. When appeals to a right to privacy are used as a rhetorical screen for protecting one person’s power over another—for instance, when employed in opposition to domestic violence laws between spouses under the theory that the home is inviolable and spousal disputes are a private matter—privacy should not seem like a compelling reason to ignore the less powerful person’s rights and interests. Appeals to privacy in such instances are in effect arguments for prioritizing the choices of the more powerful person in a relationship or sphere of putative privacy over those of the less powerful person.

Demanding noninterference in private affairs because they are private already assumes that there will be no “outside” scrutiny of them—otherwise they would not be considered private. As Olsen noted, what receives scrutiny and what is shielded as “private” is a political choice and not a matter of material reality.<sup>196</sup> What is private

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193. Olsen, *supra* note 52, at 319.

194. *See id.*

195. *Id.* at 324–25.

196. “On the second level of criticism, ‘public’ and ‘private’ are shown not to be analytic categories at all. On this level of critique, the problem is not just that private actions can be made to look like

and what is not private depends on what is regarded as permissible and what is regarded as impermissible, so asserting a claim that something is private cannot explain why that thing should be permissible. If it were regarded as impermissible, it also would not be regarded as merely a matter of private concern. Arguments from privacy can therefore be seen as requiring circular or question-begging reasoning. Privacy is therefore not an independently compelling reason for deference to parental autonomy rights when they come into conflict with children's rights.

### C. Relational Rights Accounts of Parental Rights

Harry Brighouse and Adam Swift have developed another account of parental rights and the value of families, which they term the "familial relationship goods" account.<sup>197</sup> Brighouse and Swift state that:

We believe that the family is justified because it provides an institution in which children's interests can be well met, and one in which adults' interest in having a parental relationship with a child, which makes a distinctive and important contribution to adult flourishing, can be well realized . . . . The institution of the family allows [the parent] to have a relationship of a kind that cannot be substituted for by relationships with other adults, for example . . . . Our additional claim is that parents have a non-fiduciary interest in being able to play the fiduciary role; it is valuable for their children that they play it well, but it is also a distinctive source of their own flourishing that they play it. In order to provide this good for adults, the institution for child-rearing needs

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state action and vice versa, but rather that there really is no way to say that certain action is private action. . . . For most of us, what we want to do and be left alone to do seems like private action. . . . The laws that facilitate the injury of one person by another seem like state action when they seem unjust, but go unnoticed or are treated as a neutral background of law to those who support the rules."

*Id.*

197. Harry Brighouse & Adam Swift, *Family Values and School Policy: Shaping Values and Conferring Advantage*, in EDUCATION, JUSTICE, AND DEMOCRACY 199, 201 (Danielle Allen & Rob Reich eds., 2013).

to be the family, or something that mimics the family very closely.<sup>198</sup>

For Brighthouse and Swift, the “the core right that parents have is a right to an intimate relationship of a certain kind with their children,”<sup>199</sup> a right that vindicates an interest based not on association, expression, or liberty but simply on the interest in that type of relationship.<sup>200</sup> According to Brighthouse and Swift, this core right implies a set of associational rights required to protect that relationship.<sup>201</sup> Such associational rights include spending a significant part of the day with one’s child so one can get to know him or her, living with one’s child, and sharing one’s enthusiasms with him or her.<sup>202</sup> Brighthouse and Swift offer two paradigmatic cases: parents reading bedtime stories to a child and parents bringing a child to a place of worship with them.<sup>203</sup> If parents were prohibited from engaging in such activities with their children it would not be possible for them to attain the familial relationship goods that give the family its value.<sup>204</sup>

It is certainly true that parents and children often realize significant benefits from having unique relationships with each other. Recognizing that much would be lost if parent–child relationships were *prohibited* by the state does not provide a good reason by itself for *mandating* that a child has a particular sort of relationship with their parent. This also does not provide a reason for why the current power dynamics within that relationship must be maintained. If there is good reason to recognize a right to a parenting relationship with a child, this raises the question of against whom these rights should impose corresponding duties.<sup>205</sup> The state should not be permitted to prohibit parents from having relationships with their children, including relationships based on value-sharing activities, unless there is a very compelling harm to the children, parents, or others. Recognizing that parents and children should jointly have rights enforceable against the state to preserve a mutually desired

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198. *Id.* at 204–205.

199. *Id.* at 206.

200. *Id.* at 207.

201. *Id.* at 206.

202. *See id.*

203. *See id.*

204. *See id.* at 207.

205. Given the Hohfeldian notion that rights imply and impose correlative duties. *See generally* Hohfeld, *supra* note 66.



relationship should not, however, imply that parents ought to have rights enforceable against their children by the state to preserve that relationship. It would also certainly not imply that the state should confer special powers to parents to assist them in imposing an unwanted relationship on their children.

The interest in having a certain kind of relationship with children is not of course the only type of interest in intimate interpersonal relationships. There are also special goods that come from friendships and romantic relationships. It would be a profound violation of people's rights and dignity for the state to prohibit consenting people from forming friendships or romantic relationships and participating in activities together through which they realize the special goods of those relationships. However, this duty of the state to respect *consensual* relationships does not imply that there is a reciprocal duty of a potential or actual friend or romantic partner to continue to be a friend or partner and engage in the activities of friendship or romance. A person's interest in romantic relationships and friendships and the right against state interference with those relationships does not mean that anyone has a duty, and certainly not a legally enforceable duty, to be someone's romantic partner or friend. Likewise, Brighthouse and Swift's position can be taken to offer a basis for rights against the state breaking up families or otherwise significantly interfering with them against the will of all family members, but not as a basis for parental rights enforceable against children. To the extent that adults realize a special good through parenting, they should realize that good with the consent of their children, at least at the point when their children can clearly express objections.

Another line of argument in defense of parental rights along relational lines appeals to human evolutionary history. Humans require intense and constant care as infants and toddlers and would not survive and thrive if it were not for parents investing tremendous effort in their care.<sup>206</sup> As a result, we have reason to believe that our psychology has been molded by natural selection to favor people who feel deeply obligated to care for their offspring.<sup>207</sup> This evolved psychological trait may underlie the widely shared moral intuitions

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206. See Michael Ruse, *Evolutionary Ethics: A Phoenix Arisen*, 21 ZYGON J. SCI. & RELIG. 95, 105 (1986).

207. *Id.*

that parents, in caring intensely for their children, are entitled to feel possessive towards them.

This evolutionary psychology version of the argument from parental desire shares with other arguments from evolutionary history a reliance on a natural fallacy. Assuming *arguendo* that it is natural to feel possessive and controlling towards one's children, the fact that people do feel this way does not imply that they ought to feel this way, nor does it imply that the state should grant their desires legal force. Many desires and behaviors that conferred an adaptive, reproductive, or survival advantage in the history of human evolution would today be considered immoral and an improper basis for legislation.

If anything, knowing that our evolutionary history likely selected for motivations and desires leading to immoral behavior<sup>208</sup> may give us additional reason to be suspicious of the morality of our intuitions that likely confer a survival or reproductive advantage. For example, the jealous desire to kill romantic rivals could easily confer an obvious natural selection advantage in a pre-state society (at least if it could be accomplished secretly) but this hardly provides a reason for excusing such behavior. While there are clearly adaptive advantages to cooperation in certain instances, it is also easy to imagine cases where selfish behavior improves survival or reproductive odds, and likewise many or most people often act according to selfish motives. It would make little sense, however, to think that the fact that people do act selfishly and might (both now and in our evolutionary past) benefit from selfishness should give us reason to endorse selfish behavior, since this would conflate what is with what ought to be.

Feminist legal theory concerning ethics of care and relational rights might also give reasons to consider relationship-based parental rights. Ethics of care theory recognizes that people exist in relations of dependence and interdependence and expresses skepticism that an individualist rights framework is the best way to address human needs.<sup>209</sup> Some have argued that children's rights are better

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208. For example, in-group favoritism likely confers adaptive advantages. See Jim Everett et al., *Preferences and Beliefs in Ingroup Favoritism*, 9 FRONTIERS IN BEHAV. NEUROSCI. 15 (2015).

209. Although individual rights may still have a role in some ethics of care models. See, e.g., Robin West, *Jurisprudence and Gender*, 55 U. CHI. L.REV. 1,

conceptualized as “relational rights” rather than “individual rights” and that children’s dependent status makes the preservation of their relationships of care the central question for children’s rights.<sup>210</sup> For example, Ruth Zafran suggested that “[t]he child’s existing rights [ought to be] construed to require protection of her relationships with others . . . [and] applied in a manner that recognizes responsibilities toward maintaining nurturing personal and family relationships.”<sup>211</sup>

Even if one is convinced that the human condition generally and children’s in particular can only be properly understood through recognizing the centrality of relationships of dependence and interdependence, this does not provide a separate basis for parental legal rights over children. This is because such a relational rights model does not resolve what the distribution of legal power ought to be within a relationship. Such questions are unavoidable. However important relationships are, people still act within them to each other according to parameters mediated by law and social norms. The normative questions of how people should act towards others when in relationships, what they can do legally, and how power should be distributed between them remain even when relationships are thought to be of prime importance. The history of family law reform from coverture to formally equal marriages demonstrates that changing the legal distribution of power within a relationship towards one of greater equality does not need to threaten positive family relations.

Arguments that “individual rights” ought to be rejected in a family law context in favor of extending legal protection to the rights or interests of a “family” or a “relationship” do a disservice to the less powerful individual members of families and relationships by nullifying their particular interests in favor of those of the family or relationship. The more powerful members of the family or a relationship are positioned to publicly define and voice what interests, values, and needs are taken to be the interests, values, and

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37–38 (1988) (comparing the self described by liberal theory to the self described in feminist theory); CAROL GILLIGAN, IN A DIFFERENT VOICE 136 (1982).

210. See, e.g., Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children’s Rights*, 9 HARV. WOMEN’S L.J. 1 (1986); Pamela Laufer-Ukeles, *The Case Against Separating the Care From the Caregiver: Reuniting Caregivers’ Rights and Children’s Rights*, 15 NEV. L.J. 236, 282–83 (2014); Ruth Zafran, *Children’s Rights as Relational Rights: The Case of Relocation*, 18 AM. U. J. GENDER SOC. POL’Y & L. 163, 167 (2010).

211. Zafran, *supra* note 210, at 167.

needs of the family or relationship. The less powerful members are not similarly situated. This results in a scenario where the voices of the more powerful members of a family are given rhetorical privilege by being rearticulated as the “interests of the family,” while the voices of the less powerful members are erased. While often thought of as a feminist position, re-centering legal and political entitlements on caregiving relationships or families rather than individuals suggests a position parallel to coverture. Under coverture, husbands and wives were metaphorically and legally regarded as a single inseparable unit of one legal personality.<sup>212</sup> The effect of course was a legal regime where the practical rights of husbands expanded at the expense of the rights of their wives.<sup>213</sup> When people of greatly unequal power are regarded as having rights principally through their relationship rather than as separate individuals, the consequence is to further diminish the position of the weaker party since the more powerful individual is the one who exercises the rights ascribed to the relationship or the family.<sup>214</sup>

That children are dependent on caretakers<sup>215</sup> does not imply that children should not have rights separate from and enforceable against their caretakers. Continuous and reliable caretaking for children by parents or parent-like figures may be a vitally necessary component in healthy childhood development.<sup>216</sup> There may therefore

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212. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 430 (1765). See also Zaher, *supra* note 137, at 460.

213. Such as the right to manage a wife’s premarital property and the marital rape exception. Zaher, *supra* note 137, at 462, 473-75; see generally Reva Siegel, “The Rule of Love”: Wife Beating as Prerogative and Privacy, 105 YALE L. J. 2117 (1996); Jill Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000).

214. Patricia Williams argued along related lines that legal relations structured by formal individual, personal rights, rather than loose relationally-based understandings, are needed to protect less powerful members of transactional relationships. See Patricia Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. REV. 401 (1987).

215. The extent to which children are necessarily dependent rather than dependent by operation of law and social convention varies by age, individual differences, and cultural expectations. What level of dependency is unavoidable and what is a culturally contingent phenomenon is likely an empirical question too difficult to answer.

216. See ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS 16-20 (2004) (explaining how continuity of care fosters children’s development and protects children’s interests).

be good reasons to legally recognize parental caretaking obligations and lend support to parents to the extent necessary to fulfill those obligations.<sup>217</sup> It does not follow, however, that because individuals are not able to function independently and autonomously that they cannot have independent rights separate from their caregivers.

Robin West vividly describes the ways that mothers experience an imperative (whether biological or cultural) to care for their children and how this imperative places them in a position of vulnerability and dependence.<sup>218</sup> West argues that in order to ward off the rational fear of abandonment by the men upon whom they depend, mothers may redefine themselves as giving by nature rather than as individualistic.<sup>219</sup> This “giving self constituted through duressed private altruism becomes in a literal sense *incapable* of the self-regarding acts that are constitutive of the liberal self—and that . . . is the harm that these acts occasion.”<sup>220</sup> As West described it, a “giving self” characterized by self-abasement through quasi-coerced acts of apparent altruism lacks the opportunity to live and feel free, to control one’s destiny, or to maintain self-possession and integrity.<sup>221</sup>

We might consider the possibility that children experience a parallel sort of negation of the self through being defined as dependent and cared-for by nature rather than individualistic. When a children are situated in relationships where they are defined by their dependence and where they may fear abandonment or reduction in care—as nearly all children are—they are likewise in no position to maintain self-possession or integrity, but rather have a tenuous social existence contingent on others. This tenuous position implies that children too must be other-regarding rather than self-regarding since their continued physical and emotional sustenance depends on maintaining their caregivers’ good will. Just as mothers placed in positions of dependence in West’s model suffer from coerced other-regarding altruism, children may suffer from other-regarding approval-seeking and model themselves in ways designed to please their parents rather than themselves. Such a vulnerability is not a

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217. See *id.* at 9–10 (proposing programs that provide parents with financial resources to lighten the burden of child rearing).

218. See ROBIN WEST, *CARING FOR JUSTICE* 117–19 (1997).

219. *Id.* at 119.

220. *Id.* at 120 (emphasis in original).

221. *Id.* at 126.

reason to deny children independent rights separate from their caregivers, but instead to insist that children should have some rights to care and security not fully contingent on a single caregiver's ongoing willingness to be supportive.<sup>222</sup>

Believing that the individual rights paradigm of liberalism can apply only to fully autonomous, independent atomistic individuals who somehow exist without relationships of dependency or attachment<sup>223</sup> is a mistake. Nearly everyone is dependent or interdependent on others in various ways and has numerous attachments.<sup>224</sup> Still, the state must determine how powers, liabilities, legal rights, and duties are distributed between people within dependent and interdependent relationships. The lack of autonomy does not imply the lack of distinct and separable interests that can be protected by individual rights and duties. Connections between people, their lives, and their interests do not reduce two or more people to one in the same such that no meaningful distinctions can be made between them.

The legal status of elderly and disabled people provides a telling contrast. Many elderly and disabled people also require substantial caretaking to live decent lives. However, caretakers of the elderly and disabled are not accorded the whole suite of rights that parents currently wield over their children. The caretakers of elderly and disabled people are not granted possessory rights in the people who they care for, or interests of an independent vitality in managing their lives in idiosyncratic ways beyond what is necessary for their care. Likewise, the extent that children require caretakers should not imply that their caretakers require rights to the children under their care beyond those required for providing necessary care to children. We can infer that the parental "discipline" exception is unnecessary for childcare since many parents and other caretakers successfully care for their children without any use of corporal punishment. We can likewise infer that the 24/7 surveillance model of contemporary

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222. In the long term, the best solution might be to institute a social security and childcare safety net for children that is not contingent on parental cooperation—just as elderly people receive social security and, if necessary, publicly funded nursing homes, rather than being entirely dependent on the good will of their offspring or spouses.

223. See MINOW, *supra* note 210, at 18.

224. See, e.g., WEST, *supra* note 209; Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1 (2008).

intensive parenting is beyond what is necessary to care for children since this is a recent cultural convention and children of past generations enjoyed far greater physical autonomy, unstructured time, and liberty to explore on their own.<sup>225</sup>

D. Defenses of Parental Rights Appealing to Cultural Diversity, Anti-Colonialism, and the Rights of Minority Communities

A desire to respect cultural autonomy and diversity and to oppose cultural imperialism may also seem to provide avenues to defend parental rights.<sup>226</sup> Cases where states have been understood to undermine a parent's ability to inculcate their children into the culture of their choice form the core of the United States Supreme Court's parental rights jurisprudence. In *Meyer v. Nebraska*, after Nebraska banned the teaching of foreign languages in schools in an attempt to require that children of immigrants grow up as native English speakers, the Supreme Court established that parents have a liberty interest in the "control of the education" of their children.<sup>227</sup> In *Pierce v. Society of the Sisters*, a Roman Catholic educational organization providing "[s]ystematic religious instruction and moral training according to the tenets of the Roman Catholic Church" successfully challenged the Oregon Compulsory Education Act requiring that children between eight and sixteen attend public schools, alleging among other things that the act deprived parents of the right to choose where their children will receive religious

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225. See Jamie Chamberlin, *Childhood Revisited*, 37 MONITOR ON PSYCHOLOGY 64 (Mar. 2006), <http://www.apa.org/monitor/mar06/childhood.aspx>.

226. See, e.g., Martha Minow, *About Women, About Culture: About Them, About Us*, in 129 DAEDALUS, THE END OF TOLERANCE: ENGAGING CULTURAL DIFFERENCES 252, 264 (2000) (arguing that we should learn from the predictable moves in debates over women and cultural accommodation when addressing questions about children and child rearing); Ron Frey, *The Practice of Discipline: The Child's Right to a Culture vs. the Child's Right to Safety*, in THE COMPLEXITIES OF RACISM: PROCEEDINGS OF THE SECOND INTERNATIONAL CONFERENCE ON "RACISMS IN THE NEW WORLD ORDER" 16, 24 (Hurriyet Babacan & Narayan Gopalkrishnan eds., 2008) (examining the need for cross-cultural discussions about the purpose of parenting children); Elaine M. Chiu, *The Cultural Differential in Parental Autonomy*, 41 U. CAL. DAVIS L. REV. 1773 (2008) (claiming that parents from different cultures enjoy different amounts of autonomy in making parenting decisions).

227. *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923).

training.<sup>228</sup> The Oregon law was struck down as violating parent's constitutional right to direct the upbringing and education of their children.<sup>229</sup> In *Yoder*, Amish parents successfully sought to be exempted from compulsory secondary education which, unlike basic education, would on their view "expose their children to worldly values or interfere with their development in the Amish community during the crucial adolescent period" since they believed that "higher learning tends to develop values they reject as influences that alienate man from God."<sup>230</sup> Scholars such as Woodhouse have noted that a large part of the reason why *Meyer* and *Pierce* and perhaps *Yoder* were regarded as such bulwarks of liberal constitutionalism is that they constitutionalized property-like parental rights in the context of defending cultural pluralism and diversity.<sup>231</sup>

Deference to parental cultural differences has been seen as a potentially compelling obstacle for extending full protections to children's individual rights against their parents. Ron Frey suggests that "[p]rofessionals often find themselves in very real dilemmas which often seem to involve making a choice between the child's right to safety and the belief that the professional should not intervene in accepted cultural practices."<sup>232</sup> Martha Minow observes that children are at the center of disputes between liberalism and demands for the preservation of cultural and group interests because cultural groups understand "passing on their ways to the next generation" as "their most important mission."<sup>233</sup> "Parental autonomy," Minow remarks, along with the free exercise of religion is "the chief instrument of cultural pluralism" in the United States. What Minow describes as a "culture defender" perspective holds that Western liberals wrongly criticize the oppressive practices of other cultures while neglecting sufficient attention to oppression in their own culture.<sup>234</sup> A more extreme version of this position can be found in the claim that "Westerners have no right to criticize institutions and practices like female genital mutilation [and] *suttee*" of minority or non-Western

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228. *Pierce v. Society of the Sisters*, 268 U.S. 510, 532 (1925).

229. *Id.* at 534–35.

230. *Wisconsin v. Yoder*, 406 U.S. 205, 212 (1972).

231. *See, e.g.,* Woodhouse, *supra* note 7.

232. Frey, *supra* note 226, at 16.

233. Minow, *supra* note 226, at 137.

234. *Id.* at 130.



cultures.<sup>235</sup> Some versions of this standpoint hold that liberal individual rights are really western cultural artifacts and we ought to instead be more concerned with the collective interests of cultural self-preservation.<sup>236</sup>

A full engagement with the ongoing debates between the liberal egalitarian view of law and politics on the one hand and communitarian, group rights, and cultural rights views on the other is beyond the scope of this article.<sup>237</sup> As applied to the law of a state formally committed to equal protection and individual rights, this constellation of culture rights arguments is non-egalitarian in three important ways. First, it has the effect of protecting minority children to a lesser extent than children of the dominant culture, because it implies that their parents should be licensed to harm them in ways that majority culture parents would not be licensed to harm their children. Second, it prioritizes the cultural preferences and identifications of parents over the ability of children to develop their own cultural identity, wrongfully conflating a parent's cultural attachments with those of their children. Third, such arguments direct Westerners and members of cultural majorities to extend lesser legal, political, and personal consideration to children of non-Western or minority backgrounds than to children from Western and dominant cultures. This effectively directs people to engage in a racist

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235. Lawrence E. Harrison, *Culture Matters*, 60 NAT'L INT., 55, 61 (2008). Similar perspectives have been described in Renata Salecl, *Cut in the Body: from Clitorectomy to Body Art*, in THINKING THROUGH THE SKIN 21, 22 (Sarah Ahmed & Jackie Stacey eds., 2001), and in Minow, *supra* note 226, at 130 ("Cultural defenders, in response, answer that Western liberals wrongly criticize other cultures for gender oppression and other injustices while neglecting the form such oppression takes in their own culture.").

236. Minow, *supra* note 226, at 130 ("Cultural defenders also warn of the costs of a Western emphasis on individualism and the subordination of relationships and collective life."); Chiu, *supra* note 226, at 1777 ("[M]any jurists view the goal of the child welfare system as the protection of the rights of children against the conflicting rights of parents. The dominance of the rights paradigm reflects the value placed on individual rights by Anglo American culture"). Susan Okin describes a version of multiculturalism that holds that "minority cultures or ways of life are not sufficiently protected by the practice of ensuring the individual rights of their members, and as a consequence these should be protected through special *group* rights or privileges." SUSAN OKIN, IS MULTICULTURALISM BAD FOR WOMEN 10–11 (1999) (emphasis in original).

237. For an overview of the arguments exchanged between liberal and cultural rights paradigms, see, for example, Minow, *supra* note 226. For a liberal feminist argument against group cultural rights, see OKIN, *supra* note 236.

prioritization of people of their own culture. Finally, the complaint that an individual rights framework fails to recognize group rights and cultural rights has the effect of privileging the views and interests of the most powerful group members, since they are able to define what the group's interests and views are thought to be. The prioritization of group interests over individual interests therefore comes at the expense of erasing the separate interests of children and other less powerful people born into those groups.<sup>238</sup>

Arguments appealing to pluralism and individualized justice that the criminal justice system should recognize culture-based excuses or justifications for assailants putatively motivated by cultural practices typically arise in the context of domestic violence.<sup>239</sup> It is implausible to think that an appeal to an assailant's cultural beliefs would seem remotely credible for unrelated victims who do not share their beliefs. For example, if a defendant who killed a stranger claims that they lack the necessary *mens rea* for murder since they were motivated by a cultural and religious requirement to forcibly convert or kill non-believers and their actions were fully justified within the context of their minority cultural-religious beliefs, few would find this persuasive.<sup>240</sup> Permitting such a defense would expose everyone who did not share the defendant's beliefs to the threat of violence without state protection. It would also require either arbitrary preference between cultural practices, or a suspension of the state's basic social protection function when different mutually

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238. The argument that groups and not individuals should possess rights suffers from the same problem that the argument that relationships not individuals should possess rights as described in the proceeding section. *See supra* Section IV.C.

239. *See, e.g.,* Elaine M. Chiu, *Culture as Justification, Not Excuse*, 43 AM. CRIM. L. REV. 1317 (2006) (arguing that criminal law should "make doctrinal room for defendants to argue that their allegedly criminal acts are justified acts, and not excused acts, based on the values and norms of their minority cultures"); Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293 (1986) (analyzing cultural factors in criminal law). As Susan Okin observed, many or most cultural traditions, including Western traditions, involve prescriptions for controlling women and girls generally and with regard to reproduction and sexuality in particular. *See OKIN, supra* note 236, at 14.

240. This is of course a belief that not insignificant numbers of people from multiple religious traditions and cultures have in fact claimed to possess. While some have actually argued for cultural defenses even with regard to violence against strangers who do not share their values, *see Chiu, supra* note 236, this is not the most common form of this argument.

exclusive cultural/religious claims come into conflict.<sup>241</sup> A claim that people should have the right to perform culturally significant practices even when doing so negates another person's performance of their culturally significant practices will clearly lead to a self-defeating and internally contradictory position. Any right to cultural expression and practices needs to end where other people's bodily integrity or personal liberty begins or appeals to culture provide a license by some people to dominate others, a prospect incompatible with equal legal protection and undermining of the very pluralism to which advocates of cultural rights appeal.

The position that pluralism or respect for cultural differences and autonomy should keep the state from "interfering" in minority or non-Western cultural practices of parents that the state would otherwise have child protection grounds for prohibiting amounts to arguing that the state should protect minority or non-Western children to a lesser degree than other children. If parents acting according to the putative traditions or practices of their minority or non-Western cultures have an excuse for doing to their children what would otherwise be subject to state prohibition, then their children are exposed to harms and risks to which children from majority cultures are not exposed. In *Yoder*, because Amish parents had a religious and cultural explanation for why they wanted to deprive their children of access to secondary education, their children were exposed to a type of potentially damaging deprivation from which the children of non-Amish parents were protected.<sup>242</sup> This amounts to according children of Amish parents fewer rights and protections than other children out of deference to their parents. The same logic can and should be extended to cultural excuses for female genital

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241. Such as in cases where people from two groups separately insist that their religious or cultural commitments require that they have exclusive control over the same location or resource through violence if necessary, or people claim that their cultural practices require that they suppress an activity that others hold to be vital to their cultural practices. Some of these cases can occur in scenarios where credible arguments can be advanced that both conflicting cultural groups suffered from historic persecution.

242. It is of course possible to argue about what things are harmful or damaging, but if the state recognizes some things as harms worth prohibiting generally but offers certain perpetrators dispensation for committing those harms against certain victims, then the state has offered those victims a reduced level of protection compared with everyone else.

mutilation, corporal “punishment,”<sup>243</sup> coerced marriage, coerced participation in religiously mandated labor,<sup>244</sup> and other forms of educational deprivation.

In this way, extending special rights to cultural minority parents with regard to the treatment of their children has the corresponding effect of state discrimination against minority children. The additional powers parents might be given over their children on culturally specific grounds correspond to additional liabilities imposed on children<sup>245</sup> due to their minority status—a type of discrimination that would be utterly unacceptable if applied to adults.

Arguments from culture often appeal to the entirely understandable liberal suspicion of cultural bias against minority communities. Such arguments, however, not only discriminate against children from minority or non-Western backgrounds by extending them less protection, they also reflect a patronizing double standard in attitudes towards parental responsibility and practices. Western history is replete with abusive culturally relevant social practices, such as anti-sodomy laws, coverture, marital rape, arranged marriages, right of conquest, and slavery.<sup>246</sup> Arguing that such practices should be tolerated out of respect for western cultural traditions until an overwhelming consensus repudiates them would be unpersuasive to anyone not already convinced of those traditions substantive acceptability. In *Baskin v. Bogan*, Judge Posner, in rejecting the argument that limiting marriage to opposite sex couples was “traditional,” noted that “the limitation of marriage to persons of the same race was traditional . . . when the Supreme Court

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243. I place “punishment” in scare quotes when speaking of corporal “punishment” since referring to parental violence against children as “punishment” implies that it might be a potentially legitimate or deserved sanction for the victim’s behavior. This has the effect of rhetorically normalizing domestic violence against children in a manner that domestic violence between adults (or indeed, violence between strangers) is not normalized. If someone conceptualizes their acts of violence against another person as “punishment” for that other person’s indiscretions, we would not normally credit the assailant’s vantage point by referring to it as “punishment” rather than “violence,” and therefore I will not do so here. For my earlier writing on this issue, see Godwin, *Children’s Oppression, Rights and Liberation*, *supra* note 10, at 288–89.

244. Such as in the case of *Prince v. Massachusetts*, 321 U.S. 158, 165–69 (1944).

245. For an account of the Hohfeldian concept of liabilities, see generally Hohfeld, *supra* note 66.

246. See OKIN, *supra* note 236, at 12–16.

invalidated it. There are good traditions [and] . . . bad traditions . . . and traditions that from a public-policy standpoint are neither good nor bad. . . . Tradition *per se* therefore cannot be a lawful ground for discrimination.”<sup>247</sup> Appeals to traditional Western culture are clearly not legally, politically, or socially credible as an excuse for harmful conduct or an argument for a policy. The mere fact that some people wish to engage in a traditional Western cultural practice does not provide a reason for continuing to allow them to do so when harmful to others. Rather than viewing these harmful and discriminatory historic practices as endemic to Western culture, we instead recognize that culture can and must evolve. Conceptualizing an act as a cultural practice does not transform a harmful act into a harmless one.

If the mere fact that a practice is culturally significant in a non-Western or minority tradition is thought to be a reason for preserving it, this implies a belief that these cultures are essentially fixed in their present form. This is to insist that these cultures ought to be crystalized and preserved in an artificial way rather than subject to demands for political reformation towards greater justice the way we would subject Western traditions. The refusal to subject non-Western cultural practices, when harmful, reflects a form of patronizing bias that presumes that those cultures are so fragile that scrutinizing the discriminatory or harmful practices found within them might threaten their existence, as if those non-Western cultures were reducible to their harmful practices. We would not interpret Western culture in such a poor and demeaning way.

Even asserting that certain harmful practices are the “cultural practices” of a given culture is to potentially engage in an essentializing sort of cultural paternalism. Cultures are not monolithic entities with an official set of members and practices. Instead, what counts as a practice of any given culture is debatable, and ascribing harmful practices to a particular culture so as to insulate those practices from outside criticism has the simultaneous implication of disparaging that culture by associating it with a harmful practice.<sup>248</sup>

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247. *Baskin v. Bogan*, 766 F.3d 648, 666 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 316 (2014) and *cert. denied sub nom. Walker v. Wolf*, 135 S. Ct. 316 (2014).

248. For example, while it has been claimed that parental corporal “punishment” of children is an element of African American culture as a means of staving off criticism of corporal “punishment,” several commentators have pointed

It does little moral work to insist that liabilities imposed on children in reference to parental culture are non-discriminatory because the child is of the parents' culture and within their culture has no right to be free of those liabilities. Such an argument assumes that a parent's interest in expressing their cultural values can be merged into a child's interest in the same values, but as described in the earlier section on arguments from parental liberty, conflating a parent's expressive interests with those of their child is unjustifiable. Privileging a parent to impose cultural practices on their child, if done coercively so as to exclude the child from forming their own cultural identification, diminishes a child's right to choose among different possible cultural values.

Returning to *Yoder*, the Amish litigants' desire to prevent their children from being exposed to "worldly" influences that conflict with their beliefs so as to better ensure that their children practice Amish culture as adults has the correlative effect of undermining their children's opportunity to learn about other cultures and religions that they might prefer to practice.<sup>249</sup> To recognize that parents have not only a right to practice a culture of their choosing and share it with their children, but also a special right to prevent their children from having the same opportunity to practice or even learn about other cultures, implies that cultural rights for parents over children negate children's own rights to cultural exploration and expression. In *Meyer*, it was rightly regarded as xenophobic and biased to ban foreign language instruction in schools so as to repress the German language.<sup>250</sup> However, if parents can not only choose what language to communicate with their child at home (as is clearly a matter of their expressive rights), but may also choose to keep their children from hearing other languages at school,<sup>251</sup> then their

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out that the disparity in attitudes about corporal "punishment" between white Americans and African Americans is slight and disparities in attitudes between regions are greater. See, e.g., Aaron Blake, *Why Cris Carter Is Right About Adrian Peterson, and Charles Barkley Isn't*, WASH. POST (Sept. 16, 2014), <http://www.washingtonpost.com/news/the-fix/wp/2014/09/16/why-cris-carter-is-right-about-adrian-peterson-and-charles-barkley-isnt/>; Jamelle Bouie, *Blacks Don't Have a Corporal Punishment Problem*, SLATE (Sept. 19, 2014), [http://www.slate.com/articles/news\\_and\\_politics/politics/2014/09/blacks\\_and\\_corporal\\_punishment\\_why\\_we\\_invent\\_black\\_pathologies.html](http://www.slate.com/articles/news_and_politics/politics/2014/09/blacks_and_corporal_punishment_why_we_invent_black_pathologies.html).

249. *Wisconsin v. Yoder*, 406 U.S. 205, 210–12 (1971).

250. *Meyer v. Nebraska*, 262 U.S. 390, 397–98 (1923).

251. A possibility implicitly contemplated by Justice Holmes when dissenting in *Meyer v. Nebraska* and *Bartels v. State of Iowa*; in the latter, he argued, "Youth

children would lose out on opportunities to participate in the wider culture with full fluency.

For a right to cultural expression to make sense, it must be a right to choose among multiple potential forms of cultural expression, otherwise it is no personal right at all, but rather a compulsory mandate. Few advocates of cultural rights would insist that adults should be conscripted by the state into performing the practices and norms of a particular culture in order to enable its preservation. Parents, like everyone else, should be free to try to impart their cultural values onto others in a consensual, non-coercive way. When parents are given distinct powers to coercively require their children to participate in their chosen cultural practices, or to deprive their children of exposure to or participation in other harmless cultural practices, however, then the appeal to cultural rights for parents has the function of negating parallel cultural rights for children.

The fact that cultural identifications and practices are often transmitted from parents to children does not mean this is the only way to transmit culture; nor does it mean that coercive rather than merely persuasive powers are required for parents to do so. The notion that children are a proper and necessary resource for the continuation of a culture<sup>252</sup> naturalizes the fact that children have been treated as quasi-property of their parents and thus an available resource for the propagation of their parents' culture. Children should be no more regarded as property of a culture than they should be regarded as property of their parents. As with other arguments from tradition, the fact that coercively requiring a child to participate in a parent's preferred cultural practices has been a norm for transmitting culture does not provide an argument for why it should continue to be the norm. In a pluralistic society, people can and do adopt appealing cultural practices outside of their parents' traditions, and people commonly abandon the norms that their parents tried to impose on them as children. From the perspective of a pluralistic, liberal state, varieties of cultural expression are desire-contingent goods—to enthusiastic participants they can contribute to a meaningful and

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is the time when familiarity with a language is established and if there are section in the State where a child would hear only Polish or French or German spoken at home I am not prepared to say that it is unreasonable to provide that in his early years he shall hear and speak only English at school." *Bartels v. State of Iowa*, 262 U.S. 404, 412 (1923) (Holmes, J., dissenting).

252. See *Adoptive Couple v. Baby Girl* 133 S.Ct. 2552, 2573 (2013) (Sotomayor, J, dissenting).

satisfying life, but there is no benefit to coercively requiring people to express themselves in culturally specific ways.

The claim that Westerners should restrict their criticism and regulation of parenting practices to parents from Western or majority cultures and should refrain from criticizing the ostensibly culturally relevant practices of minority parents<sup>253</sup> amounts to a demand that Westerners show political and legal partiality towards cultural majority children and discriminatory disregard for children from cultural minorities. In any other context, this would be correctly recognized as a racist prioritization of the rights of people from one's own culture over others. That the people in question are children does not excuse this discriminatory attitude. Rather, the fact that showing greater concern for children of the cultural majority is not immediately recognizable as a form of discrimination speaks to the extent to which children are in general dehumanized and their interests are conflated with the interests of their parents.

There is an entirely understandable and justified suspicion of cultural bias and arbitrary imposition of majority cultural norms to the exclusion of harmless minority and non-Western cultural practices. It is necessary to guard against such discriminatory practices by insuring that minority communities are not subject to any form of elevated scrutiny. Failing to extend the same standards of protection to minority children as those offered to majority children out of a belief that their parent's cultural differences place them outside the scope of proper political concern is likewise discriminatory. Both are ways of treating people from minority cultural backgrounds worse than those of the cultural majority.

From the standpoint of someone concerned with treating everyone equally or a state concerned with extending equal protection of the law to everyone within its jurisdiction, a child's cultural background cannot be a basis for failing to extend equally rigorous concern for her safety, welfare, and personal rights. To propose that Westerners and Western states should only concern themselves about the practices of other Westerners or the state's cultural majority is to insist on reduced state protection and political consideration for children from minority backgrounds. For Westerners to show more concern for the treatment of children more culturally like themselves

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253. *See supra*, Section IV.D.



than the treatment of children from other backgrounds would be to engage in a paradigmatically discriminatory attitude.

Finally, the complaint that collective or group rights ought to be prioritized over individualistic personal rights of children can also be regarded as a way of prioritizing the interests of parents and adults while devaluing the rights and interests of children. Groups of all sizes are comprised of individuals and must rely on individuals or sets of individuals to voice, define, and articulate the group's values and interests.<sup>254</sup> Recognizing group rights or cultural rights claims enables the most powerful members of groups to speak with special rhetorical privilege, such that their preferred set of values or interests are granted the additional authority of being the values of the group. Children, who lack the power to authoritatively define, articulate, and voice the group's values or interests see their interests correspondingly diminished in such a model. Appeals to group rights or cultural rights to the exclusion of personal rights therefore pose the same dilemma that appeals to relational rights or family rights: they further elevate the interests of the people who already have the most power while erasing the separate interests of children and less powerful group members.

#### E. Labor Theory of Property Accounts of Parental Rights

Most people share a great intuition that biological parents have an initial, natural right to raise their children.<sup>255</sup> Despite this intuition, it is not difficult to imagine other hypothetical ways to arrange for childcare. There is already precedent for granting intentional communities the responsibility to care for children in communal child-rearing arrangements.<sup>256</sup> The state might hypothetically require that people responsible for children pass some sort of qualifying process, and childcare might be delegated to people who have trained to provide for children's best interests, who may or

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254. OKIN, *supra* note 236 at 12 (noting that "the more powerful, male members of groups are those who are generally in a position to determine and articulate the group's beliefs, practices and interests").

255. Barbara Hall, *The Origin of Parental Rights*, 13 PUB. AFFAIRS Q. 73, 74 (1999); Dara Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 646 FLORIDA STATE L. REV. 645, 648 (2014).

256. For descriptions of communal parenting arrangements, see generally Judith Blanton, *Communal Child Rearing*, 3 J. OF FAM. & ECON. ISSUES 87 (1980); Elizabeth E. Irvine, *Observations on the Aims and Methods of Child Rearing in Communal Settlements in Israel*, 5 HUMAN RELATIONS 247 (1952).

may not be their biological parents. As previously described, there have been times when fathers held exclusive dominion over their children, and under Roman law a patriarchal *paterfamilias* who could be a child's father, grandfather, or great uncle, would hold ultimate parental responsibility rather than their parents.<sup>257</sup>

Barbara Hall argues that we must have reasons for this intuition. In *The Origin of Parental Rights*, she explains the belief that biological parents should have rights over their children as an application of the Locke's labor theory of property.<sup>258</sup> The Lockean notion of property is grounded on an initial assertion that people possess self-ownership.<sup>259</sup> An implication of owning oneself for Locke is that people have a property interest in the actions they take, particularly their labor.<sup>260</sup> According to Locke, when people mix their labor with natural materials in a way that contributes to and improves that material, the resulting product becomes their property. Hall applies this position to parental rights in the following way:

The fact that the *child represents a genetic part of its parents is what fuels* [the intuition that genetic parents ought to be granted an initial opportunity to raise their children.] Parents are entitled to *their* children for the same reasons that they are entitled to anything that is a part of themselves. *Thus, it is ultimately a belief in the notion of self-ownership or self-integrity that fuels our presumption in favor of a natural parent's entitlement to her child.* If the concept of self-ownership is valid, then certainly whatever is constitutive of a person's body belongs to that person. . . .

Here, my claim is not about ownership of our labor, but about ownership of our genetic material. . . .

When we say that B is A and C's child, we are saying that B is (composed) of A and C and that A and C,

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257. For discussion of the varieties of *paterfamilias* roles and interpretations as practiced in ancient Rome, see generally Richard P. Saller, *Pater Familias, Mater Familias, and the Gendered Semantics of the Roman Household*, 94 CLASSICAL PHILOLOGY 182 (1999).

258. HALL, *supra* note 255, at 74.

259. See JOHN LOCKE, SECOND TREATISE ON GOVERNMENT 19 (Hackett Pub. Co., 1980).

260. See *id.*

therefore, are presumed to have certain privileges regarding B that no one else can initially claim.<sup>261</sup>

Hall devises two thought experiments to support this argument.<sup>262</sup> In Hall's first thought experiment, an evil scientist discovers a means of secretly harvesting people's organs without being detected.<sup>263</sup> The evil scientist manages to steal several people's non-vital organs, but fortunately the authorities catch him and seize the organs before they can be resold.<sup>264</sup> What should the authorities do with the recovered organs? Hall argues that justice necessitates that the organs be returned to the people from whom they were stolen.<sup>265</sup> She explains that this is because "the concept of self-ownership (or self-possession) gives them a superior claim to the organs from their bodies."<sup>266</sup>

Hall's second thought experiment expands this conclusion to parenthood. In the second thought experiment, the evil scientist plans to create designer babies in a lab from gamete cells secretly stolen from innocent victims.<sup>267</sup> The Genetic Crimes Police discover the plot, catch the evil scientist, and find the babies.<sup>268</sup> To whom should the authorities give the babies? Hall argues that the people whose genetic material was stolen should receive the babies if they want to have them.<sup>269</sup> This is because the evil scientist's victims had their genetic material stolen from them and as such, suffered a loss. The victims must therefore be able to recover the product of what was stolen from them, or else it would be the equivalent of denying that they had a loss at all.<sup>270</sup>

Hall's thought experiments, if persuasive, imply that parents own or should be thought of as owning their children in the manner that someone owns other things they create. As previously argued, claiming property interests in another person is necessarily incompatible with upholding the equal moral worth of persons and is profoundly objectifying. The moral intuition that it is unacceptable to

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261. HALL, *supra* note 255, at 76, 79.

262. *Id.* at 77.

263. *See id.* at 76–77.

264. *Id.* at 77.

265. *See id.*

266. *Id.* at 77.

267. HALL, *supra* note 255, at 77.

268. *See id.*

269. *See id.*

270. *See id.*

own another person is almost certainly stronger than the intuition that genetic parents should have special authority or rights over their children. If labor theories of property make their case for parental rights through implying actual or metaphorical ownership of children, they cannot claim to find support from widely held intuitions.<sup>271</sup>

Even if the idea of self-ownership is accepted *arguendo*,<sup>272</sup> this should not lead to a position that people own anything and everything that they have mixed with their labor. Robert Nozick provided a well-known and effective counterargument to this conception of property rights:

But why isn't mixing what I own with what I don't own a way of losing what I own rather than a way of gaining what I don't? If I own a can of tomato juice and spill it in the sea so that its molecules (made radioactive, so I can check this) mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?<sup>273</sup>

Even if we accept that people own themselves, their bodies, and their gametes, even when those gametes are separated from their body, when the matter from their gametes is combined with many magnitudes-larger amounts of biological material, do they still own the whole result of that combination, or instead, has their property claim dissipated? There is no persuasive reason to believe that just because someone once owned something, that they should then own the entirety of a larger, more important entity of which that thing becomes a constitutive part. Just as no one would be compelled to think that dumping a can of tomato juice into the ocean implies that the ocean now belongs to the owner of the tomato juice, there is no compelling reason to think that contributing DNA to a child implies that the child must therefore belong to the "owner" of the DNA.

Even more problematic for Hall's position is the issue of how parents' ownership of their children can be reconciled with a child's self-ownership, given that Hall's entire position is grounded on the

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271. Which is not to say that arguments must be intuitive to be correct, but that appeals to intuition do not evidence an argument when that argument's implications are less intuitive than the initial appeal.

272. And it is debatable whether it is a useful or valid way to think about personal rights and individuals.

273. ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 174-75 (Basic Books, Inc., 1974).

belief that people own themselves.<sup>274</sup> This is a question that Hall anticipates and frames as “[h]ow do we come to own ourselves, given our parents’ prior claim?”<sup>275</sup> Hall attempts to resolve this dilemma by arguing that “as the child grows it becomes less physically derivative of the parents and more self-constituted. By the child’s age of majority the genetic substance actually derived from the parents constitutes a truly minimal part of the adult progeny.”<sup>276</sup>

This solution is conveniently consistent with the legal status quo, but it does not make very much sense. If Hall’s solution is taken to mean that as matter of physical volume or mass, the DNA from a child’s parents becomes decreasingly substantial—a parents’ DNA, by volume and mass, already represents only a tiny fraction of even an embryo.<sup>277</sup> The portion of a person’s physical mass and volume taken up by their DNA also remains more or less the same over the course of a lifetime.<sup>278</sup>

More plausibly, Hall’s argument could be understood as describing children’s genetic composition rather than their physical composition. In this account, the parental property interest is not found in the physical DNA, but rather in the “genetic makeup” of the DNA that substantially determines a child’s growth and development.<sup>279</sup> Such an argument might be additionally appealing as a way of justifying a grandparent’s interests in their children.<sup>280</sup> However, this version of the argument is vulnerable to similar problems as the physical composition: The extent to which a person’s genes come from their parents does not decline substantially,<sup>281</sup> so the

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274. See *id.*; see also Hall, *supra* note 255, at 79-80 (anticipating this problem).

275. Hall, *supra* note 255, at 79.

276. *Id.* at 79–80.

277. See Avery Kolers & Tim Bayne, “Are You My Mommy?": On the Genetic Basis of Parenthood, 18 J. APPLIED PHILOSOPHY, 273, 276 (2001) (arguing that the proportion of the genetic material in the newborn infant is already minuscule, and that it is a negligible part of the material constitution of the child or even the fetus).

278. To an extent larger people have more cells than smaller people, but these cells all contain around the same amount of DNA in their nuclei. There is therefore no reason to think that the percentage of a person that their DNA takes up reduces over time.

279. See Hall, *supra* note 255, at 277.

280. See *id.*

281. Parents’ genetic contribution could also possibly be said to decline slightly as a result of random mutation during a lifetime. Such mutations are not,

argument from genetic composition would also fail to explain how and why a parent's property interests in their child should decline as the child grows up.<sup>282</sup>

How can the problems of Hall's position with regard to children be reconciled with the reasonable intuition in Hall's first evil scientist thought experiment that the stolen organs should be returned to the people they were taken from? This intuition is only compelling in a version of the thought experiment where there are no other competing bodily integrity issue at stake. Imagine a modified version of Hall's first thought experiment where the evil scientist decided to transplant the stolen organs into innocent and unknowing people suffering from otherwise terminal organ failure. Returning the organs to their original "owners" would seem intuitively wrong since it would involve violating the innocent organ recipients' bodily integrity. Regardless of how substantial the initial victim's claim on their organs was, people are not reducible to objects. Violating someone else's body to reclaim "stolen property" would be more morally offensive than denying the initial victim the opportunity to recover what they lost.

In the case of a child, likewise, whatever property interest a parent might have had in their DNA or gamete cells, the child has a far more intimate claim to them more closely tied to personal interests superior to property rights. It would also be very odd to believe that in the modified organ theft scenario, although the organ theft victims should be denied a right to retrieve their organs from the recipients,<sup>283</sup> the initial victims should be given guardianship of the organ recipients and permitted to impose their personal values on them. Likewise, even if Hall's evaluation of her first organ theft thought experiment is correct, it is unclear why this should lead to the conclusion that parents should be granted the full set of parental legal rights over their children simply because their children received their DNA.

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however, organism-wide events but rather are limited to particular cells, and aside from cancerous tumors, do not affect a person's phenotype—so parental contribution through DNA to the character and phenotype of a person does not appreciably decline.

282. Kolers & Bayne, *supra* note 277, at 277.

283. Perhaps this runs parallel to the belief that although parents should be permitted extensive control over their children, they should not have the powers of life and death over them, as people might with a farm animal.

It is possible to agree that a particular act constitutes a loss and an injury without agreeing on the correct form of compensation the victim should receive. Having gamete cells surgically “stolen” might be better understood as a type of battery, rather than a theft. If an assailant cuts a victim with a knife resulting in that victim’s blood falling on and staining a carpet, the victim could be compensated for the injury, suffering, and medical expenses according to the tort laws of assault and battery. It would be bizarre however to compensate the victim by giving her ownership of the carpet, under a theory that her blood belonged to her, and having mixed with the carpet, therefore could only be returned to her by giving her the carpet. Besides being bizarre, compensation of that type would be unjust if a third party had a separate claim to the carpet. Likewise, children cannot be offered to parents to compensate them for their labor, their physical investment or their genes, because children necessarily have a more direct and intimate claim to themselves than their parents do to them.

Another version of parental rights deriving from a labor theory of property relies on parental labor, including gestational and caretaking labor, rather than a parent’s biological investment. Dara Purvis contrasts this parental labor-based property view with what she describes as a more anachronistic “bodily unity” account of property interests in children.<sup>284</sup> For Purvis, actual caretaking labor invested in a child represents a much more relevant factor for determining parental rights.<sup>285</sup> In a system where it is already accepted that some parent will have property-like rights over a child, there might be some greater fairness in awarding those rights to someone who has invested their gestational and/or caretaking labor in growing and raising that child.

Using caretaking or gestational labor as the relevant currency for parental ownership rather than genetics, however, alleviates none of the problems found in the genetic version of the labor theory of property account of parental rights. Susan Okin, in *Justice, Gender and the Family*, notes that pregnancy and birth are paradigmatic examples of making something through one’s labor.<sup>286</sup> It follows that, if one found the labor theory of property persuasive, one would likely

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284. Purvis, *supra* note 255, at 653.

285. *See id.* at 651.

286. *See* SUSAN OKIN, *JUSTICE, GENDER AND THE FAMILY* 83–85 (2008).

have to conclude that women own the children they give birth to.<sup>287</sup> This conclusion is, for Okin, absurd and necessarily self-contradictory since it would entail that people do not “own” themselves, and so she finds it necessary to reject the labor theory of value altogether.<sup>288</sup>

The effort invested in a child does not provide a good reason to start thinking of that child as an ownable object any more than investing effort into the development or preservation of an adult would. A surgeon, for example, literally engages in physical labor upon the body of another person, and if a surgeon intervenes to prevent a patient’s death, they are the but-for cause of that person’s continued existence. It does not follow that a surgeon owns the patients they save, possesses any property interest in them or right to dictate certain things about their lifestyle, or even to maintain an ongoing friendly acquaintance relationship with them. There may be strong arguments for why parents should be financially compensated for childcare,<sup>289</sup> but the mere fact of parental labor does not provide a compelling reason to recognize a property-like interest in children.

## V. CONCLUSION

Parental autonomy rights have been justified on both child-centered grounds focused on children’s need for protection and parent-centered grounds appealing to a variety of putative parental interests independent of the interests of children. When evaluating the status quo of parental rights claims, it is necessary to disentangle them from the separate arguments for protectionism or paternalism as the principle frame for children’s legal status. This is because parental rights as they presently exist enable powers over children well beyond those that might follow from a child protectionist agenda. They can and sometimes are used to damage as well as protect children’s interests. The legal rule for parental rights should not be based on an idealized model of parental behavior, but instead should protect children’s rights against parents who would act against their interests. Parents’ legal rights as currently practiced more closely

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287. *See id.*

288. *See id.* at 86.

289. *See, e.g.,* ANNE ALSTOTT, NO EXIT (2004) (arguing for a financial compensation from the society to the caretakers, including parents and guardians, of every child); Robin West, *A Right to Care*, BOSTON REV. (April/May 2004), <http://new.bostonreview.net/BR29.2/west.html> (describing Alstott’s argument that the caretaker’s labor should be financially compensated from the public purse).



resemble quasi-property interests in children than either rights designed to support a child's best interests, or philosophically defensible personal rights.

An essential part of long-term reform of American family law should include eroding and ultimately overruling existing case law holding that parents have a constitutionally protected substantive due process right to the custody and control of their children.<sup>290</sup> Such a right is an invention of the courts with no meaningful textual basis in the Constitution. It also relies on reasoning concerning personal liberty and family privacy that is deeply flawed and unpersuasive. Constitutionalizing the suite of existing quasi-property parental rights should be recognized as a judicial political decision that should not constrain future judges, lawyers, politicians, and activists. Ending due process-based constitutional rights for parents would free up the states to consider different parental rights regimes.

Ambitious, long-term, perhaps multi-generational, reform projects might be needed to make parent-child legal relations truly just. Such projects would likely be politically impossible in the foreseeable future and require difficult-to-predict social contingencies. Nonetheless, once the problems of parental rights are identified, we should consider directions to try to move towards to the extent that the political and legal climate allows it.

Even from within the widely accepted protectionist framework, substantial improvement is possible with regard to parental authority. Were children's legal status and parental rights genuinely motivated by protectionist impulses, it would be possible to imagine other arrangements for childcare. Rather than leaving children at the mercy of parental discretion out of respect for parental autonomy, parents could be limited in what they can do to their children in the same way that teachers are extensively limited in what they can do to the children they supervise. In many cases, teachers and other caretakers are permitted to paternalistically prevent children from injuring themselves, restraining them to do so if necessary, and are required to see to their welfare, but are not permitted to mete out ad hoc "justice" or to impose their personal

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290. This would not likely be a viable project in the short term given the current composition of the United States Supreme Court but rather, and like most constitutional reforms concerning basic rights, something to build towards over many years or decades.

values onto the children they care for.<sup>291</sup> The use of power by teachers is typically bound by rules that apply equally and evenly to all students within the teacher's jurisdiction. Teachers limited in such a manner may nonetheless be of great influence on their students.

Similar principles might be applied in reworking the legal status of parents. Rather than a system of expansive rights for parents, parents might be empowered only to the extent necessary to provide developmentally appropriate care and support for their children. Although describing a complete framework for accomplishing this is beyond the scope of this article, one way to begin reforming the special rights and duties concerning children would be for a more limited, need-focused set of rights and duties to attach to caregivers as fiduciaries, rather than according to parental status. This could entail abolishing the category of legal custody as distinct from physical custody.

A place to begin would be abolishing the affirmative defense of parental discipline to crimes like battery and domestic violence that parents can presently employ. Eliminating parental rights to coercively impose their values on children while allowing parents the opportunity to express their values through persuasion and by setting examples that their children will want to emulate would enable parent-child relationships based on greater respect for each parties' equal dignity. A majority of European countries have either prohibited corporal "punishment" of children by parents, or committed to eliminate it, as have some Latin American countries, and Sweden has had a ban on corporal "punishment" of children by parents for over thirty years.<sup>292</sup>

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291. The ways teachers of children act towards their students in conventional schools may pose their own set of problems, but consideration of these problems is beyond the scope of this article.

292. See, e.g., Cecilia Modig, *Never Violence: Thirty Years on From Sweden's Abolition of Corporal Punishment*, Government Offices of Sweden and Save the Children Sweden (2009), <http://www.endcorporalpunishment.org/pages/pdfs/NeverViolenceSweden2009.pdf> (discussing the Swedish and European cases); Global Initiative to End All Corporal Punishment of Children, *Global Initiative Newsletter* (February 2008), <http://www.endcorporalpunishment.org/resources/newsletters/document-store/global-newsletter-issue-1.pdf> (listing the 23 states which have outlawed corporal "punishment" of children by parents or other adults as of 2007 as Austria, Bulgaria, Chile, Croatia, Cyprus, Denmark, Finland, Germany, Greece, Hungary, Iceland, Israel, Latvia, Netherlands, New Zealand, Norway, Portugal, Romania, Spain, Sweden, Ukraine, Uruguay, and Venezuela).

Just as marriage survived the introduction of domestic violence laws (over the objection of patriarchal fears for the preservation of marriage),<sup>293</sup> there is no reason to equate greatly curtailing parental power with ending the family. The elements of parent-child relationships founded on mutual consent that provide care, enjoyment, support, and love would remain intact. Requiring parents to negotiate with and persuade their children rather than commanding obedience backed by an implied or express threat of state sanctioned violence is likely to encourage mutual understanding and appreciation.<sup>294</sup> Children and parents may have closer relationships in a legal regime that respects children as persons, not property or extensions of their parents' interests.

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293. For discussion on historical responses to domestic violence laws as threats to the institution of marriage, see Bernadette Dunn Sewell, *History of Abuse: Societal, Judicial, and Legislative Responses to the Problem of Wife Beating*, 23 SUFFOLK U. L. REV. 983, 986–98 (1989).

294. For a review of the potential for “corporal punishment” to undermine parent-child relationships, see Elizabeth Gershoff, *Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-Analytic and Theoretical Review*, 128 PSYCHOLOGICAL BULLETIN 539, 542 (2002).