

Origins and Departures: Childhood in the Liberal Order

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ABSTRACT

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Central to most forms of liberal social and political philosophy is the idea of the free and equal, self-governing person. And yet we do not come into the world as autonomous and accountable individuals; at best, this is the outcome of a long process of development and education which (in many societies) now extends throughout the first quarter of the average life. During this period of childhood, moreover, we are governed, not by ourselves, but by others. This dissertation examines the paradoxical position of children in liberal theory, who (as Locke put it) though not born *in* a state of freedom and equality, are born *to it*. In particular, the dissertation's three parts examine three interrelated questions. First, what is the basis of the paternalistic authority that is exercised over children? Second, what is the moral basis of the special rights of parents over particular children? And third, when, if ever, are inequalities of education and opportunity justified, when these emerge from decentralized authority over children in families and local communities?

Part I: *On what grounds do we deny children the personal freedom we accord to adults?*

The standard liberal view is that we are “born free as we are born rational” (Locke). That is, we are only born with the *potential* for freedom and rationality. Others ought to respect our liberty once we have, with age, become sufficiently reasonable to govern ourselves. On this view, a person's age matters only insofar as it is correlated with reason. I, on the contrary, argue that we should recognize age to have *independent* moral significance. This is because the educational paternalism at the beginning of a life does not impede our ability to carry out our life plans in the

same way as would similar interference in the middle of a life. This explains why it is appropriate for parents and educators to aspire to more than fostering the *minimal competence* necessary for just getting by in life.

Part II: *What is the moral basis and extent of parental rights?* Typically, liberals assume that governmental authority is only justified insofar as it serves the interests of the governed. Is parental authority the same, or is it partly justified by the interests of the “governors” as well (e.g., the interest parents have in passing on their values to another generation)? While many contemporary philosophers have followed Locke in describing parental authority as a fiduciary power, I suggest that Hegel provides a richer account in two respects. First, because Hegel has a more nuanced account of the differences between natural right, personal morality, and social ethics, he has the resources for a more sophisticated philosophy of moral education than Locke. From this we can derive a more detailed account of parental duties, as well as see why, without the help of schools, individual families are not generally well-suited to educate children for the modern world. Second, Hegel’s conceptions of love and of social roles help illuminate the interests that adults have in rearing their children.

Part III: *When, if ever, are inequalities in the provision of education justified?* While parents have traditionally been responsible for providing for their children’s education, this role has increasingly been taken on by the state. In *Brown v. Board of Education*, the U.S. Supreme Court held that public education must be made available “on equal terms” to all. But how is this to be understood? Does it require that the state spend roughly the same amount on educating every child? Or does it require that the state attempt to compensate children who have fewer educational advantages in the home to even out life chances? Or should educational equality be understood in a more modest way: an equal opportunity for a decent or adequate education? I

claim that, assuming a rich and multi-faceted conception of adequate outcomes, educational inequalities above the adequacy threshold that emerge from differences in native ability or family background are not necessarily unjust. However, a norm of equal treatment establishes a defeasible presumption of resource equality in the public school system, once the adequacy threshold is met. I allow that inequalities between local communities may be justifiable if communities have chosen to tax themselves at different rates, but not if the school-finance system permits some communities to draw on significantly larger revenue bases than others.

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A NOTE ON CITATIONS AND ABBREVIATIONS

Generally, I have cited contemporary sources by author, date, and page number—though sometimes I refer to chapter or section numbers instead. However, this is an inconvenient convention when citing historical texts which have appeared in many different editions with different paginations. Instead, I have cited these texts by title or by an abbreviation of the title. And for these works, where possible, I have referred to standard page numbers and/or to standard chapters, sections, etc. The only contemporary work cited with an abbreviation is John Rawls's *Theory of Justice*, since this makes it easier to give the page numbers for both the original and revised editions, or to give the common chapter or section number. To make it easier to find passages in John Stuart Mill's *On Liberty*, *Utilitarianism*, and *The Subjection of Women*, I have cited the chapter and paragraph number, although editions generally do not actually enumerate the paragraphs. In citing Hegel's *Philosophy of Right* and *Encyclopedia*, I have adopted the following conventions:

R = Remark *A = Addition*

163 + R, A = section 163 along with the accompanying remark and addition

Furthermore, in very long Additions from Hegel's *Encyclopedia*, I have also occasionally cited the page number from the Oxford University Press English translations. Finally, in older English texts and translations, I have modernized the spelling and typography.

Key to Abbreviations

2T = John Locke, *Two Treatises*. Cited by treatise (large roman numeral) and section (arabic numeral) or chapter (small roman numeral).

CLE = Blackstone, *Commentaries on the Laws of England*. Cited by book, chapter, and section.

CW = J.S. Mill, *The Collected Works of John Stuart Mill*. Cited by volume and page number.

DC = Hobbes, *De Cive*. Cited by book and paragraph.

ECHU = Locke, *Essay Concerning Human Understanding*. Cited by book, chapter, and section.

ELN = Locke, *Essays on the Law of Nature*. Cited by essay and page numbers in Locke (1996).

EL = Hegel, *Encyclopedia of the Philosophical Sciences: Logic*. Cited by section.

EN = Hegel, *Encyclopedia of the Philosophical Sciences: Philosophy of Nature*. Cited by section.

EM = Hegel, *Encyclopedia of the Philosophical Sciences: Philosophy of Mind*. Cited by section.

G = Kant, *Groundwork of the Metaphysics of Morals*. Cited by standard Akademie edition volume and page number. Quotations from Kant (1997).

KJV = King James Version of the Bible

Lev = Hobbes, *Leviathan*. Cited by chapter and paragraph. (Not all editions have enumerated the paragraphs).

LNN = Pufendorf, *On the Law of Nature and Nations (De jure naturae et gentium)*. Cited by book, chapter, and section.

MM = Kant, *Metaphysics of Morals*. Cited by standard Akademie edition volume and page number. Quotations from Kant (1997).

NE = Aristotle, *Nicomachean Ethics*. Cited by book and chapter and/or Bekker page number. Quotations from Aristotle (1999).

OL = J.S. Mill, *On Liberty*. Cited by chapter and paragraph and by page number of volume XVIII of *The Collected Works of John Stuart Mill (CW)*.

PH = Hegel, *Philosophy of History*. Cited by page number of Hegel (1956).

PNP = James Tyrrell, *Patriarcha non Monarcha*. Cited by chapter and page number of Tyrrell (1681).

PR = Hegel, *Philosophy of Right*. Cited by section.

PS = Hegel, *Phenomenology of Spirit*. Cited by paragraph.

RSV = Revised Standard Version of the Bible.

RWP = Grotius, *On the Rights of War and Peace (De jure belli ac pacis)*. Cited by book, chapter, and section.

SC = Rousseau, *On the Social Contract*. Cited by book and chapter.

ST = Aquinas, *Summa Theologica*. Cited by part, question, and article.

STCE = Locke, *Some Thoughts Concerning Education*. Cited by section. Quoted from Locke (1823), volume IX.

SW = J.S. Mill, *The Subjection of Women*. Cited by chapter and paragraph and by page number in volume XXI of *The Collected Works of John Stuart Mill (CW)*.

TJ = Rawls, *A Theory of Justice* (cited by section or by page numbers of 1971 and 1999 editions alternately, e.g., TJ: 496/374. Where the text of the editions differ and only one edition is cited, this is marked thus, TJ (1971): 60.

WDM = Pufendorf, *Whole Duty of Man (De officio hominis et civis)*. Cited by book, chapter, and section.

INTRODUCTION

Childhood in the Liberal Order

It is sometimes said that liberalism has special difficulties in handling children. Sanford Levinson, for example, claims that “Liberals are always happier talking about adults, precisely because it is they who can most easily be envisioned as possessing autonomy and giving consent” (1995: 642). Similarly, Susan Moller Okin objects that most political philosophers today, liberals no less than others, “take mature, independent human beings as the subjects of their theories without any mention of how they got that way” (1989: 9). Too often, according to Okin, liberals appear to take on board the simplifying assumption Hobbes once recommended: that we think of the individuals who are about to enter into political relations with one another as if they had simply sprung from the earth “and suddenly, like mushrooms, come to maturity, without all kinds of engagement to each other” (DC: VIII.1).¹

Are these concerns well-founded? Should liberals be embarrassed that their supposedly autonomous “individuals” begin their lives as dependent children and often fashion their lives around supporting children of their own? Of course, the question is vague in that “liberalism” refers to a broad family of views, the members of which differ markedly in both philosophical foundations and political outlooks. For our purposes we can think of liberalism as the tradition of social and political thought that descends from the work of such philosophers as Locke, Kant, Mill, and which is exemplified in recent political philosophy by the likes of John Rawls, Robert

¹ This paragraph owes much to Barry (2001): 200, although I am less dismissive of these concerns than he is.

Nozick, and Ronald Dworkin. In most of its formulations, then, liberalism is committed to broad civil liberties, some interpretation of equality, limited and secular representative government, and (to a greater or lesser extent) the importance of competitive markets and free exchange.² Basic to the liberal understanding of these values and institutions are certain conceptions of free and equal individuals. Children, therefore, pose puzzles and problems for liberal theory largely because they do not fit the mold of the ideal liberal “individual.” However, since different brands of liberalism employ different kinds of individualism, the challenges facing liberal theories regarding children differ as well. In this introduction, I want to briefly situate the topics taken up in the chapters that follow in terms of some of these challenges.

Some versions of liberalism are individualistic in the sense that, in the tradition of Hobbes, they regard morality to be a mutually advantageous agreement amongst individuals, each of whom is only interested in satisfying his own desires (e.g., Gauthier 1986). Since young children cannot make such agreements and do not at first have much to offer adults, they would appear to fall outside the moral community on these theories (along with those adults incompetent to make agreements or unable to benefit others through cooperation).³ Jan Narveson is one philosopher who boldly accepts this conclusion. He argues that, in fact, children have no rights and that they should be regarded as the property of those who made them until they become capable of entering into mutually advantageous agreements with others. Narveson is forced to concede, however, that “the libertarian idea” he defends is intuitively at its most

² Left liberals like Rawls may be open to broad public ownership of the means of production, and yet understand this to be consistent with the use of markets. See Rawls, TJ: §42. Competitive markets are even more important to the thought of John Stuart Mill and Ronald Dworkin. See Mill, *Principles of Political Economy*, esp. II.i xii-xiii, IV.vi-vii, V.xi; and Dworkin (1978) and (1980b).

³ The issue is discussed by Barry (1989); Buchanan (1989); and Nussbaum (2006). See also the discussion of “ethical individualism” in Lukes’s *Individualism* (1973): ch. 15.

strained when it has to deal with “the problem of children” (1988: ch. 19). Indeed, commonsense morality supposes that there are very stringent duties to avoid harming and neglecting vulnerable children. Like many, I think the “strain” Narveson alludes to exceeds credibility, and though I do examine Hobbes’s account of parental authority (in Chapter 7), I devote relatively little space in this dissertation to how children fit into a picture framed by this brand of individualism.

Most liberals—including Locke, Kant, Mill, Rawls, Nozick, and Dworkin— are “moral individualists” in a quite different sense than are Hobbesians. Instead of arguing that morality is a part of the rational self-interest of each individual, these thinkers hold that *individuals* are the loci of ultimate moral value—as opposed to society, the nation, families, or other groups—and that to take up the moral point of view is to consider impartially the interests of all individuals as individuals, not merely as members of larger wholes. Philosophers of this cast of mind have typically assumed that children count as individuals of equal moral worth to adults. But, at least in the case of infants and very young children, this is not without difficulties. The difficulties are especially apparent for those following Locke, Kant, and Rawls in maintaining that human moral status is grounded in the possession of rational and moral agency—something infants and very young children patently lack. Although this is an important and puzzling issue, I deal with the basic moral status of infants and young children in only a cursory fashion here (in Chapter 6).

In the main, I proceed in what follows on the common assumption that children *are* “individuals” with interests of their own, which are worthy of equal moral consideration. A natural corollary of this assumption is that the interests of children can come into conflict with those of their parents and society at large. Thus, the challenge that children pose to “mainstream” liberalism is, in one way, of a familiar sort: what is needed are principles for

resolving conflicts of interests between various parties in a fair and reasonable way. But children do raise a special kind of problem. Central to most forms of liberalism is the idea of the individual as free and self-governing. And yet we do not come into the world as autonomous and accountable persons; at best this is only the outcome of a long process of development and education which (in many societies) now extends throughout the first quarter of the average life. During our minority, moreover, we are governed, not by ourselves, but by others. This dissertation, then, examines the paradoxical position of children in liberal theory: beings who (as Locke put it) though not born *in* a state of freedom and equality, are born *to it*. In particular, the dissertation's three parts examine three interrelated questions about the government of children. First, what accounts for the special paternalistic authority exercised over children? Second, what is the moral basis of the special rights of parents over particular children? And third, when, if ever, are inequalities of education and opportunity justified, when these emerge from the decentralized authority over children in families and local communities? Let me now say something more about the contents of each of these parts in turn.

I

The individual's interest in personal liberty and autonomy is, naturally, central to the liberal outlook. And yet it seems inappropriate to grant children these broad liberty and autonomy rights. In Part I, then, we ask: "What is it that justifies treating children more paternalistically than adults in this way?" After delineating the concept of paternalism in Chapter 1, I consider in Chapters 2 and 3 several versions of the argument that the freedom of children is to be restricted because they will not use it to their own advantage; rather—so the argument goes—the child is better off, especially in the long run, if his activity is restricted and supervised by adults until he is mature enough to make good choices for himself.

But for many liberals, this sort of answer opens up the door to paternalism far too widely. For them, as for Mill, promotion of a person's physical or moral good typically is not a sufficient warrant to restrict his freedom. Instead, individuals have the authority to make their own decisions about their own affairs, even if their decisions are not very wise or prudent. Nevertheless, as children presumably do not enjoy this same authority over themselves, we still need an account as to what characteristics of the person justify the conferral of this authority. Many philosophers insist that age, in itself, cannot be one of the morally relevant differences between children and adults; rather, they hold with Locke that what matters is the child's lack of an adequately developed capacity for rational and moral agency. After discussing this position in Chapter 4, I defend in Chapter 5 the opposing view: that the fact that a person is at the beginning of his life can itself be a morally relevant reason for determining how far we ought to respect his self-regarding choices. This, I claim, allows us to relieve the tension between our ambitious educational ideals and the very modest threshold for competence in a liberal society.

II

Whether or not one accepts my argument in Part I, it is relatively uncontroversial that, as children, we should be subject to the authority of adults. But this raises questions about the character and justification of adult authority, which is the focus of Part II. Most liberals are anxious to deny that children are *owned* by their parents as a form of personal property, since this seems incompatible with respecting the fundamental moral equality of children with adults. For this reason, many follow Locke's lead in characterizing parental authority as a kind of "government" or fiduciary trust, which is to be exercised for the good of the governed or trustee. But others hold that, by assimilating parenthood to a kind of public office, the fiduciary model fails to do justice to the ways in which parenting is a central component of the good life for the

parent. Moreover, if parental authority *is* a kind of fiduciary trust, then how is that trust vested in particular individuals? Do we simply vest authority in whomever is best suited to exercise it? Or do procreators have a special claim over their offspring in virtue of their biological relationship? And to what extent do guardians have the right to make decisions about their children's upbringing, when others might decide more wisely? In that we are concerned here with the authority to make decisions, even when those decisions are the wrong ones, there is an obvious structural similarity between the issues addressed in Parts I and II; the difference is that, in Part II, we are concerned with the contours of an individual's authority, not over herself, but now over her children.

Unlike the chapters of Part I, Part II has a strongly historical character. In the first three chapters (Chapters 6-8), I explore the above questions in the company of Locke and his seventeenth-century contemporaries, such as Grotius, Hobbes, and Pufendorf. Although Locke is much-discussed in the contemporary literature on the rights of parents and children, his position is almost never discussed in its historical context. This is unfortunate. Because seventeenth-century philosophers were seriously concerned with the relation between political and paternal power, the moral foundations of parental authority received unparalleled attention by the best and most original philosophers of the period. Chapters 9 and 10 continue our inquiry into the foundations of parental authority, but introduce the value of intimacy, which is largely missing from the seventeenth-century discussions. Chapter 9 looks at the role of intimacy in some recent arguments about parental rights, while Chapter 10 brings Hegel into the discussion. In dramatic contrast with Locke, Hegel has largely been ignored in the contemporary philosophical literature, and yet he has a conception of the family much more like our own than Locke. Moreover, Hegel's nuanced view about the relation between individuals and institutions

is of special interest as it forces us to critically examine some of the more individualistic assumptions of mainstream liberalism.

III

The liberal value of the most obvious relevance to childhood is equality of opportunity. The idea that a person's origins should not determine her life prospects, and that every child should have an open future, has broad appeal. The most important way that modern societies have attempted to underwrite broad opportunity for all is by ensuring that all children have access to formal education. And, in the words of *Brown v. Board of Education*, it seems that the state ought to make these opportunities "available to all on equal terms." But how is "equal terms" to be understood in this context? Does it require that the state spend roughly the same amount on educating every child? Or does it require that the state attempt to compensate children who have fewer educational advantages in the home? Should equality be understood in a more modest way: as an equal opportunity for a decent or adequate education? These are the questions explored in Part III. The theme of domains of authority, already encountered in Parts I and II, reappears in Part III in a new way. When educational authority is devolved upon families or local communities, differences and inequalities in education are bound to emerge. Under what circumstances, then, are inequalities that emerge from decentralized authority unjust?

Chapter 11 introduces these topics by sketching the ideological origins of public schools in the United States and the legal history of challenges to school-finance systems from the 1970s to the present. Chapter 12 sorts out conceptual issues for talking about distributive justice in education by drawing together tools from the fields of political philosophy and school finance. Chapters 13-15 contain the more philosophically substantive arguments. Chapter 13 examines conceptions of equal treatment and equal chances in education, especially in connection with

Rawls's principle of "Fair Equality of Opportunity." In Chapter 14, I turn to the adequacy approach to thinking about educational justice, with particular attention paid to the work of John Dewey, Amy Gutmann, and Elizabeth Anderson. Finally, in Chapter 15, I defend an account of justice in education that incorporates from both the equity and adequacy approaches.

∴

Although this is not a short dissertation, the selection of topics is nonetheless selective, and there are naturally many important issues of related interest that I have not had the time or space to explore in these pages. (I touch upon some of these in the Epilogue.) Throughout this work, I have developed my own views by engaging critically with previous writers, historical and contemporary. The most constructive discussions are to be found in the last chapter of Parts I and II and the last two chapters in Part III: that is, in Chapters 5, 10, 14-15. In the interests of the selective reader, I have sought to make these chapters stand alone as much as possible. There is also an introduction to each of the three parts, which offers an overview of each topic and additional direction to some of the most important sections. Finally, in the Epilogue I take stock of some of the questions that this dissertation raises, but does not fully answer.

PART I: CHILDREN AND PATERNALISM

Introduction and Overview

Liberalism and paternalism

The value of personal autonomy is central to liberalism. To echo Mill, the liberal believes that each individual has an equal right to pursue his own good in his own way on fair terms with others. This typically makes the liberal wary of *paternalism*—of impeding a person’s freedom for his own good. The very word is evocative of treating a person “like a child,” and that as Tamar Schapiro puts it, seems to mean treating a person “as if her life is not quite her own to lead and as if her choices are not quite her own to make” (1999: 715).

In fact, the insistence that adults not be treated like children should be understood as a basic trope of liberal theory and rhetoric—one that is particularly evident in the writings of Locke, Mill, and Kant. Locke was especially keen to reject the patriarchalist assimilation of paternal and political power. Locke concedes that paternal authority is natural and is based on the child’s inferior capacity for reason, but he also insists that this power lapses when the child reaches maturity. Political authority, on the other hand, is conventional and must garner the consent of adults who are by nature free and equal (2T: II.vi). Kant goes so far as to say that “A government established on the principle of benevolence toward the people like that of a *father* toward his children – that is, a *paternalistic government*..., in which the subjects [are treated] like minor children who cannot distinguish between what is truly useful or harmful to them... –

is the greatest *despotism* thinkable.”¹ But the *locus classicus* of liberal opposition to paternalism is Mill’s *On Liberty*, which defends the view that “the individual is sovereign” over himself, “over his body and mind,” and that a person’s “own good, either physical or moral, is not a sufficient warrant” to compel him to do anything. On the contrary, “it is the privilege and proper condition of a human being, arrived at the maturity of his faculties, to use and interpret experience in his own way” (OL: I, ¶ 9; III, ¶ 3 / CW, XVIII: 223-224, 262).

This heavy reliance on the distinct moral status of the adult vis-à-vis the child, however, forces us to consider the foundation of that dichotomy. Why should it be permissible to treat children any more paternalistically than adults? Why shouldn’t children have the same right to pursue their own good in their own way? What do children lack such that it is appropriate to deny them full liberal autonomy? These are the questions that will occupy us in Part I.

Although the answers may seem obvious, consideration of these questions is important for three reasons. *First*, although it is easy to justify denying full autonomy to young children, the case of adolescents poses harder questions. This is not just a problem of vague boundaries—something I shall not belabor. More significant are the broad social and economic changes that have altered our ideas about familial authority and the nature and boundaries of different stages of life. For instance, the accelerated onset of sexual maturity in women, increased rates of early sexual activity, and greater integration of children in institutions and culture outside the home have all compressed the period of true childhood, while the lengthening period of education necessary for economic self-sufficiency, now extended to both sexes, tends to postpone the independence of adulthood. The consequence has been to extend and make more self-conscious

¹ “On the common saying: that may be true in theory, but it is of no use in practice,” 8:290-291. Quoted from Kant (1997).

the liminal period of “adolescence” between childhood and adulthood (cf. Erikson 1968: 122). Such changes have led some to question whether we treat young people like children, in law and in the family, far longer than is justifiable and whether adolescents are entitled to more freedom than they are now granted. A deeper understanding of the moral significance of becoming an adult can give us some perspective on these controversies. *Second*, it is important to know when, if ever, it is appropriate to treat adults “like children.” This is particularly pressing in the case of adults with serious mental disabilities, whom writers on paternalism often lump together with children as “incompetents.” And *third*, by asking what it means morally to become an adult, we can shed light on the philosophical basis of autonomy rights in general. In this way, our study into the special status of children can make a contribution to a fundamental question in liberal thought.

An overview of the argument of Part I

Because the chapters in Part I form one long argument, let me offer an overview to orient the reader. The central question, once again, is this: *Why is it that there should be a strong presumption against paternalism toward adults on the liberal outlook, but no such presumption with respect to children?* A good place to begin is by asking why paternalism is ever objectionable at all. By *paternalism* I understand, roughly, cases in which P tries to promote Q’s good by restricting Q’s freedom. (This concept of paternalism is discussed in more detail in Chapter 1). Now one might think that, if the paternalistic act really would promote the subject’s good, then there could be nothing objectionable about it. The problem with much paternalism is merely that it tends to interfere “wrongly and in the wrong place,” and thus the paternalist fails to accomplish his object of really helping the subject. Because this way of looking at things considers only reasons appealing to the subject’s good, or well-being, I call this the “welfarist

approach.” On a second view, however, paternalism is generally objectionable because, beneficial or not, it invades the subject’s personal zone of sovereignty or autonomy. Here we invoke a reason that does not appeal to the subject’s well-being. I call this the sovereignty approach. The welfarist and sovereignty approaches face opposite challenges in accounting for the liberal outlook on paternalism. The welfarist approach must explain why paternalism toward adults is so often counterproductive, while the sovereignty approach must explain why there is less reason to respect the autonomy of children than that of adults.

I discuss welfarist arguments for the liberal outlook in Chapters 2 and 3, and turn to the sovereignty approach in Chapter 4. While I am ultimately sympathetic to the sovereignty approach, I do not think that the standard accounts do a good job of explaining the moral difference between adolescence and adulthood. Roughly speaking, such accounts tend to argue that adults, as a group, possess a capacity for agency that children, as a group, lack. But if one were to look at the psychological evidence without preconceptions, I believe one would conclude that, in terms of the capacity for practical reasoning, middle adolescence is the beginning of adulthood, not the end of childhood. In Chapter 5, I offer a different way of thinking about the duty to respect autonomy. Instead of thinking about it as the duty to respect a person’s choices, abstracting from a person’s stage of life, I argue that a person’s position in a lifespan ought to make a difference to the way that we think about her authority over her choices. The idea is that paternalistic restraints in adolescence—coming at the beginning of a life—have a very different character than the same restraints would have in the middle of a life, because they do not undermine the young person’s ability to determine the primary structure or character of her life as a whole. I call this interpretation of respect for autonomy, “respect for life-authorship.”

Let me offer a little guidance for the selective reader. Because Chapter 5 is the most constructive of Part I, I have tried to make it self-standing, and it begins with a summary of the most important points made in Chapters 1-4. The most important sections in the first four chapters are: the very end of 1.4 (where our working-concept of paternalism is defined); 1.5 (which describes what I take to be the “Liberal Outlook” on paternalism); 2.1 (distinguishing the welfarist and sovereignty approaches in more detail); 4.2 (arguing for the intrinsic value of respect for autonomy); and 4.6 (which lays out my criticism of standard sovereignty arguments). The main arguments discussed in Chapters 2 and 3 are briefly outlined in 2.4. Readers interested in the argument about life narratives in 5.3 and 5.4 are directed to the related discussion in 2.6. Overall, next to Chapter 5, Chapter 4 will probably be of the most general interest.

CHAPTER 1: TREATING PEOPLE LIKE CHILDREN

1.1 The Concept of Paternalism

Like many everyday social concepts, the word “paternalism” has a protean character. In ordinary discourse, “paternalism” probably marks a range of concepts linked by family resemblance, rather than a single unified concept. Moreover, because the word has a pejorative connotation, it is often reserved for disapproval. These facts make it unprofitable to attempt to ferret out the “true definition” of paternalism, testing our linguistic intuitions by working through examples and counterexamples. What is important is mainly to be clear about the concept that we shall employ and to explain why the concept is of particular moral importance. I will begin with a simple definition that picks out the focal case of paternalism. Then I will discuss the concept in more detail, taking notice of nuances along the way. At the end of this section, I will offer a more complex definition to replace the simple definition that takes into account these details. The simple definition is as follows:

P acts paternalistically toward Q if and only if P intentionally restricts Q’s freedom in order to promote Q’s good.¹

I will often refer to party P as either the *paternalist* or the *agent* (depending on whether I wish to withhold judgment as to whether or not P is acting paternalistically), and I will refer to party Q as the *subject*. The virtue of this definition is that it directs our attention to conflicts between two

¹ Although it would, of course, be possible to define the principle differently, this is by no means an idiosyncratic definition. Compare, for instance, the definition of paternalism in *The Oxford English Dictionary*: “The policy or practice of restricting the freedoms and responsibilities of subordinates or dependents in what is considered or claimed to be their best interests.”

intuitively important moral values: freedom and a person's good. The issue has considerable theoretical importance, then, since it requires us to organize our ideas about these values and to think about how to handle conflicts between them. I will now flesh out this conception of paternalism by discussing three of its central elements: intention (1.2.), a person's good (1.3), and restrictions on freedom (1.4). In the final section, I characterize what I will call the "Liberal Outlook on paternalism" (1.5).

1.2 Intention

What makes an act paternalistic is generally the *intention* that motivates the act. If P intentionally restricted Q's freedom but only inadvertently benefited Q, then we would not consider that to be paternalistic. The same is true if P intentionally benefited Q, but only inadvertently restricted Q's freedom. What if the agent has multiple intentions in performing a particular act? In that case, the action is more or less paternalistic, depending on the importance of the paternalistic motive in his set of effective reasons for action. In general, we should reserve the label of "paternalistic" for those cases where the paternalistic reason is the primary—or at least a necessary—motivation for acting.² For instance, most people believe that committing a horrible crime, like murder, makes one's life go worse. It would be odd, however, to say that the

² We might propose the following analysis to formulate a rough categorization. Assuming that, amongst a person's reasons, there is at least one paternalistic reason, we can then ask the following two questions: (1) Was the paternalistic motive necessary to motivate the agent to act as he had? (2) Was the paternalistic motive sufficient to motivate the agent to act as he had? If the paternalistic motive is necessary and sufficient, then the act is *strongly paternalistic*. If the paternalistic motive is necessary but not sufficient, then it is *weakly paternalistic*. If the paternalistic motive is not necessary but is sufficient, then it is *marginally paternalistic*. And if the paternalistic motive is neither necessary nor sufficient, then the act is not at all paternalistic. A similar test could be used for assessing how paternalistic an act by a collective agent, like a legislature, ultimately is. Clearly such analyses could be very difficult to carry out in practice, but what is important is to see how they would go in principle.

law prohibiting murder is, for that reason, essentially paternalistic. Even if the paternalistic reason does speak in favor of prohibiting murder, that is not the primary reason for such a law.

Plainly not every case where a person *claims* to act paternalistically is in fact paternalistic. Just as people can misrepresent their motives as benevolent, they can misrepresent their motives as paternalistic. Very often when P restricts the freedom of Q, P will *claim* with less than perfect candor that the restriction is in Q's best interests. In the case of genuine paternalism, therefore, the agent must *sincerely* act on the intention to benefit another by restricting his freedom. There may even be cases where a person deceives himself about his true motives, but this leads to puzzles about self-deception and human motivation, not to puzzles about the concept of paternalism.

Suppose, however, that P does intend to benefit Q by restricting Q's freedom, but fails to actually do so. This might be for two reasons. First, P might employ ineffective means to achieving his end. Second, while P may have the proper *formal aim* (Q's good), he may have the wrong *substantive aim*, which is to say, P may be misguided in his understanding of what Q's good really consists in. Still we would usually call ineffective or misguided attempts to act paternalistically "paternalistic." This, however, leads to some ambiguity between freedom-inhibiting acts that are actually beneficial to Q and those that merely intend to be beneficial to Q. It is useful therefore to distinguish between what we can dub "perfect" and "imperfect" cases of paternalism, where in the latter cases the paternalist genuinely intends to benefit the subject, but actually fails to do so because he employs ineffective means or has the wrong substantive aim.

Sometimes there is a policy already in place and what we are interested in are not the reasons that led to its initial enactment, but the reasons *available to us* for either endorsing or objecting to the policy. In that case, it is not the reasons that feature in the original agent's intention that lead

us to describe the policy as paternalistic, but rather the reasons that feature in our own intentions or attitudes. For instance, we might say that, although a law was passed for paternalistic reasons, it is *not really paternalistic*, because we can endorse it for non-paternalistic reasons (e.g., those of social justice). Or vice versa.³

1.3 A Person's Good

Paternalistic conduct involves not just any restrictions on Q's freedom, but specifically restrictions aimed at promoting or protecting Q's good. Included in this notion of promoting Q's good is that of preventing harm to Q, or generally what is bad for Q. The idea of something being good or bad *for* Q is essential to the concept of paternalism. To restrict someone's freedom to promote the good or to prevent what is bad *from an impersonal point of view* is not paternalistic. To see this, consider the following contrast: If P tries to prevent Q and R from engaging in certain sexual acts because P believes that such acts will make the lives of Q and R worse (perhaps because P believes such acts are degrading), then P *is* acting paternalistically. On the other hand, if P tries to prevent the same conduct simply because P believes it is inherently wicked, or perhaps abhorrent in the eyes of God,⁴ then P is *not* acting paternalistically;

³ This section serves as my answer to the puzzle recently raised by Peter de Marneffe (2006) as to whether the "for a person's own good" clause in the definition of paternalism refers to a policy's motivation or its justification. My view is that one shouldn't get too wrapped up in the question as to whether an action or policy is paternalistic *tout court*. Ultimately, the adjective "paternalistic" refers to a species of practical reason. To say that an action or intervention is paternalistic is always either to refer obliquely to the individual motivations that explain why the intervention happened, or to take up a first person point of view and consider the reasons that exist for acting or for endorsing the actions of others.

⁴ I am assuming here that when P wants to prevent Q from engaging in conduct abhorrent to God, P is simply motivated by a desire to wipe out what is abhorrent or wicked. On the other hand, that some conduct is abhorrent in the eyes of God may mean that it is bad for Q to engage in that conduct. This could be either because God will punish Q or because God finds abhorrent what is independently bad for Q. If P was motivated to prevent Q from engaging in such conduct for either of these reasons, then we could describe his interference as paternalistic.

the evil P wishes to prevent in this second case is not something primarily bad for Q and R, but something bad in itself.

Many philosophers refer to what is *good for* Q as Q's "well-being." If we accept that definition of well-being, then paternalism always involves restricts on Q's freedom aimed at promoting or protecting Q's well-being. In the following chapters, I shall follow this common usage and assume that paternalism is aimed at the promotion of well-being. However, if well-being is understood to refer to a narrower concept than a person's good, then paternalism should be defined in terms of the broader concept of a person's good.

Why might the concepts of a person's good and a person's well-being come apart? There are two reasons. First, some philosophers use the word "well-being" in a more restricted (and thus more conventional) way, such that well-being refers to a person's state of happiness, health, or prosperity. In that case, well-being may be thought to be only one component of a person's good, where a person's good might also include his freedom or his moral rectitude. As I understand it, paternalism might as well aim to promote a person's future freedom or moral character as his happiness, health, or prosperity. The second reason someone might think that a person's good and his well-being may come apart is more substantive. Several philosophers understand well-being to refer to the quality of a *complete life* (cf. Parfit 1984: Appendix I; Griffin 1986: 34-37; Raz 2004: 276-281). In this respect, they follow Aristotle's thought that *eudaimonia*, or "happiness," is a property of a life as a whole (NE: I.7-8, 10). Now on an atomistic conception of what makes a complete life go well, each individual episode, good or bad, contributes to or detracts from a good life. Thus, if a wasp gives me a painful sting which is sore for a couple of days, this makes my life as a whole go a little bit worse than it would have gone otherwise. If P has an atomistic conception of well-being, then whenever P acts

paternalistically, P acts with the aim of promoting or protecting Q's well-being. But the atomistic view of well-being is controversial. On a global conception of well-being, the overall character of a life is insensitive to minor and isolated pleasures and pains (though it is sensitive to mild *chronic* pain); likewise the overall character of a complete life is insensitive to minor gains and setbacks that don't affect the central aims of my life (cf. esp. Raz 2004). On this kind of non-atomistic view, what is good or bad for Q in a temporally local sense can come apart from Q's well-being. This is not for the obvious reason that present suffering may instrumentally contribute to future well-being; the point is that isolated episodes may simply have no effect on the overall character of a life. But that doesn't mean that such minor and isolated episodes cannot be good or bad for a person locally. Although being stung by a wasp will not affect the quality of my life as a whole, it will significantly affect the quality of my day. If I am stung, I might say, "Today would have been a good day, except that I was stung by a wasp." If this is correct, then what is "good for" Q in a temporally local sense can come apart from Q's well-being (in the sense of what makes Q's life go best overall).⁵ If the concept of Q's well-being is limited what is good for Q in a global sense, then paternalism should be understood to be concerned more broadly with Q's good—whether global or local. Suppose that P forbids Q from cleaning out the barn because P thinks Q will be stung by a wasp if he does so. I think we will want to be able to say that P acts paternalistically, since P restricts Q's freedom to prevent something bad from happening to Q, even if P also acknowledges that the quality of Q's life as a whole will be unaffected either way.

⁵ Alternatively, we might say with Velleman (2000) that we need concepts of both local and global well-being and that global well-being is often more (or less) than the sum of every quantum of local well-being in a life.

For the most part, I shall leave the content of “Q’s good” unanalyzed here. There are many different ideas about what a person’s good consists in. Some people think that a person’s good depends wholly on his desires or on his conscious experience. Other people think that a person’s good depends on certain “objective goods” like being morally good or participation in valuable activities and relationships (see 2.2). Since we have defined paternalism in terms of the reasons or intentions that motivate an agent, it is enough for our purposes to say that P acts paternalistically when P restricts Q’s freedom in order to promote *what P sincerely believes to be Q’s good*. Thus, in order to classify conduct as paternalistic, we don’t need to know whether P’s conception of Q’s good is the best conception. (However, to know what counts as *perfect* paternalism, we would need to know what the best conception of well-being is).

Some writers take a more expansive view of paternalism than the one offered here, in that they do not require that paternalistic conduct be aimed at benefiting the subject. It is sufficient on these more spacious accounts that the conduct fails to respect a person’s capacity for acting or making decisions on his own about matters that *ought* to be left up to his discretion (cf. Shiffrin 2000). Of course, to be complete, these accounts require a further story about what a person’s proper domain of control ought to be, but in many cases we have an everyday sense of what these would look like. For instance, imagine an employer who does not afford his employees any leeway in carrying out their assigned tasks in their own way, or who monitors their every action at work—perhaps even requiring them to get permission before using the restroom. Though such an employer undoubtedly treats his employees like children, he may not be in the least motivated by his employees’ good—far from it, he may be exclusively concerned with productivity and his own gain (cf. Feinberg 1986: 4). Not unreasonably, some would describe this employer’s conduct as “paternalistic,” but insofar as the conduct is not motivated by the

intention to promote the subjects' good, the conduct does not count as paternalistic on the conception that I will be relying upon.

What if someone's freedom is restricted in order "to preserve a wider range of freedom for the individual concerned" (G. Dworkin 1972: 76)? For instance, we prevent children from leaving school partly in order to provide for them a wider sphere of freedom as adults. Is this paternalistic on our conception? While this may be a plausible principle for *justifying* paternalism,⁶ we should regard it to be paternalistic nonetheless. If we restrict Q's present freedom in order to preserve Q's future freedom, then we must surely think that this is *good for Q*, insofar as we are doing it for Q's sake. It would be absurd to undertake such a restriction (for Q's sake) if we thought it made Q *worse off*, and it would be unduly intrusive to intervene if we thought it made Q *neither* better off nor worse off. The best way to think about this, then, is as a limited form of paternalism: freedom may be restricted, not to make a person better off *in any respect*, but only better off in the special respect of having more freedom later.

There are some special reasons for restricting a person's freedom which might seem paternalistic at first glance, but which are probably not best categorized that way. First, sometimes having fewer options improves a party's strategic position or bargaining power vis-à-vis others (Schelling 1960; Elster 1984; 2000). Minimum wage laws, for instance, place a floor beneath which workers cannot bargained. There is a sense in which this is restricting the worker's freedom for his own good, but since the narrow purpose of the restriction is to eliminate options that the worker doesn't want to be forced to choose, such restrictions really are not paternalistic in spirit. Similarly, it is often the case that coercion is necessary to solve

⁶ I touch upon this issue briefly in 4.6.

coordination problems and prisoner's dilemmas. For example, everyone might want to work shorter hours, but if they cannot negotiate these terms individually, legislation might be introduced that sets a limit to the number of hours that anyone can work. Again, the purpose of such restrictions is to help people attain what they really want. Of course, this may not be what *everyone* wants, but then this is just another case where some are forced to contribute to public goods they don't really want. Naturally, restrictions on a person's freedom to protect the interests of *others* are not paternalistic, but sometimes it is necessary to require a person to look after his own welfare for the benefit of society as a whole. Two examples are mandatory vaccinations and mandatory contributions to a social insurance scheme (which could be undermined by adverse selection effects).⁷ Though these measures appear superficially paternalistic, they are not really paternalistic in spirit either.

Finally, some writers take a narrower view on the notion of "a person's good" as far as the concept of paternalism is concerned. This is in two senses. First, some writers define paternalism as essentially concerned with restrictions of freedom aimed at preventing people from *harming* themselves. This is distinguished from a more extensive principle which also permits restrictions of freedom in order to confer positive benefits. Second, some writers think of paternalism as aimed primarily at protecting a person's physical or economic interests, rather than his moral character or his good all-things-considered. Crossing these distinctions, we arrive at four ideal types: (1) non-moralistic, harm-preventing paternalism ("negative paternalism"), (2) non-moralistic, benefit-conferring paternalism ("positive paternalism"), (3) moralistic, harm-preventing paternalism ("moral paternalism"), and (4) moralistic, benefit-conferring paternalism

⁷ On alternative explanations for measures sometimes labeled as paternalistic, see Arneson (1980): 471-472.

(“perfectionism”).⁸ Writers mainly interested in principles regulating the application of the criminal law toward adults often focus on (1)—negative paternalism—which seems to be the least intrusive and the most plausible as a public principle in a modern, pluralistic society (see 1.5 below). However, when we expand our focus to include children, and when we look at paternalism beyond the law, this narrow focus is much less compelling. We often restrict the freedom of children, not only to protect their basic interests, but also to promote their future opportunities and to foster their moral and ethical development. Furthermore, the distinction between harm-prevention and benefit-conferral is not very clear-cut when we are thinking about the development of children. For instance, when we require a child to attend school against his will, are we conferring the benefit of education on the child, or are we preventing the child from harming himself and his future prospects?

1.4 Restriction of a Person’s Freedom

The most elusive part of the definition of paternalism is the interpretation of what is meant by a *restriction on a person’s freedom*. Some writers focus narrowly on “interference with a person’s liberty of action,” especially *legal* interference (G. Dworkin 1972: 65). One reason for adopting this limited focus is simply that it makes discussion more manageable. A second reason is that many liberals think that the justification of coercion, especially state coercion, is the fundamental problem of political philosophy.⁹ Thus, an examination of coercive paternalism,

⁸ This typology is similar to that in Feinberg (1986; 1990). Incidentally, I am using “perfectionism” in a narrower sense here than it is sometimes used. Much of what goes under the label “perfectionism” in contemporary political philosophy is not paternalistic, at least in my sense, since the political goal of helping people to lead good lives may be pursued without restricting freedom. See for instance the discussions in Raz (1986); Hurka (1993); Sher (1997); and Wall (1998).

⁹ See in particular: Kant, MM: 6:229-233; Nagel (1991): ch. 4; Rawls (1993): 136ff., 216ff.; Williams (2005).

and particularly coercive legal paternalism, seems to have a special urgency. In spite of these considerations, I will assume a broader conception of what it means to restrict a person's freedom. First of all, if we are interested in paternalism toward children, then a narrowly legal focus seems inappropriate, since the law is not the main social mechanism by which we govern children. If we want a realistic sense of the freedom that children in our society possess, a very poor method would be to use legal codes, especially the criminal law, as our primary guide. As a society, we assume that children are governed primarily in the family (and secondarily in schools, which in many countries parents have considerable discretion in choosing). True, there are legal limits on parental authority, but by no means is that authority strictly defined by law. Arguably the most important function of the law in this domain is simply to ensure that every child is under the care and guidance of a minimally suitable guardian. To expand our focus beyond the law, but to retain a focus on coercion, is also unsatisfactory. Although parents do force their children to act against their will, the boundaries of what counts as "coercion" are not very clear beyond the paradigmatic cases of threats of violence and criminal sanctions. Moreover, there are important ways of restricting a person's effective freedom other than coercing her in any straightforward sense, and many of these are particularly important for thinking about the freedom that children actually possess.¹⁰

On my conception of paternalism, what is central is the idea of restrictions on, impediments to, or acts undermining, *freedom of choice*. I will discuss the different kinds of restrictions and impediments below under four headings. My strategy is to begin with some of the more literal

¹⁰ Since I am concerned with the morality of personal relations and informal social relations as well as legal institutions, my subject might be called "comprehensive liberalism." Political liberalism might be conceived as a separable "module" of a more comprehensive liberal social outlook (cf. Rawls 1993): 12.

and concrete forms of restricting a person's freedom and move outward to the more peripheral and abstract forms. The most straightforward restrictions are those that involve compulsion, coercion, and other threats. These involve direct interference with a person's agency. Somewhat more subtle are cases that involve interference with the opportunities available to a person. Other restrictions on freedom are not best conceived of as physical impediments to liberty of action, but rather as normative restraints imposed by the exercise of authority. Finally, there are cases of manipulation and deception, many of which involve undermining the conditions for autonomous freedom of choice. Although the primary focus here is on forms of "restricting freedom" generally, I will often take the opportunity to apply these points to particular forms of paternalism, and especially to paternalism toward children.

A corollary of this focus on freedom of choice is that restrictions on liberty that are themselves voluntarily chosen by the subject himself are *not* genuinely paternalistic. To take a familiar example, suppose I know that I am prone to drink too much at parties, so I ask you now not to pour me any more than two drinks tonight, even if I ask for more. Later on, when I ask for a third drink and you decline to give it to me, you are in a straightforward way limiting my current freedom to do what I want. But, of course, you are doing so because of my prior express authorization. We may call these cases of self-binding or pre-commitment (cf. Elster 1984; 2000). Cases with a similar structure can be found in many corners of life.

In light of the phenomenon of pre-commitment, you might think that there could be no such thing as democratically enacted paternalistic laws, since any such restrictions on the freedom of citizens will have been consented to by the citizens. If support for the law were indeed unanimous, then this argument would be sound, but of course this is virtually never the case in

modern societies. Moreover, paternalistic laws sometimes target a particular group of people, and were that group alone consulted, the law might not be enacted.

A) Compulsion, coercion, and other threats

The most straightforward kind of restriction on freedom is direct physical compulsion and restraint. This is to restrict liberty in Hobbes's literal sense of "external impediments to movement," and it consists in literally overpowering a person's will with opposing physical force.¹¹ Mill gives a classic example of compulsive paternalism, in which an official or bystander sees a person "attempting to cross a bridge which had been ascertained to be unsafe" and seizes the person to prevent him from crossing it (OL: V, ¶ 5 / CW, XVIII: 294). This kind of restraint is especially common with young children of course, as when parents prevent children from running out into the street. More subtly, it is possible to "push" someone into doing something by constant and aggressive badgering and pestering. Joel Feinberg tells the story of Steve Lewis, an ill-fated stuntman who was to appear on a dare-devil television show. Lewis's intended feat was to leap over two cars as they drove toward him at one-hundred miles per hour. "When the cameras began to roll, [Lewis] got cold feet, told the director he 'didn't feel comfortable,' and asked for a postponement of the jump." The uncompromising director, however, screamed at Lewis, "I want you to jump now! We have a plane to catch. It's getting dark... Wrap it up; wrap it up. Jump! Jump!" Lewis was cowed, attempted the jump, but failed to entirely clear the oncoming cars. He suffered serious injuries and his mangled foot had to be

¹¹ "Liberty, or freedom, signifieth (properly) the absence of opposition; (by opposition I mean external Impediments to motion;) and may be applied no less to irrational, and inanimate creatures, than to rational. For whatsoever is so tied, or environed, as it cannot move, but within a certain space, which space is determined by the opposition of some external body, we say it hath not liberty to go further" (Lev: XXI.1). To be sure, this is not the only way that Hobbes speaks of liberty, for later in the same chapter (XXI.4) he describes covenants and laws as "artificial chains" which also restrict liberty.

amputated.¹² Although such “psychological compulsion” is seldom thought to violate a person’s legal rights, it is a common way of “forcing” someone to do something in personal relationships. Young children, who are emotionally vulnerable to their parents to a very high degree, are particularly susceptible to psychological compulsion.

Besides direct compulsion, we also say that P forced Q to do something, when P gets Q to act by threatening Q. The idea here is that Q is not “pulled” by the desirability of performing a particular action, but rather is “pushed” to do so in his desire to avoid the consequence that Q threatens to bring about. Some threats, we say, are “coercive.” Clear instances of coercion involve threats to employ violence and (by extension) criminal sanctions. Paradigmatic of coercive legal *paternalism* are laws that require motorists to wear seatbelts and motorcyclists, helmets.

Though there are these uncontroversial examples of coercive threats, it is not easy to delineate the families of coercive and non-coercive threats. Some writers suggest that P coerces Q whenever P communicates to Q his intention to bring about a consequence that Q believes will leave him worse off unless Q performs some required action.¹³ But making all threats *coercive* seems inflationary and revisionary. I find that very few people regard as coercive, for instance, an employee’s threat to quit unless she receives a raise, or a woman’s threat to leave her lover unless he stops drinking. A second suggestion is that coercive threats are those where the consequences threatened are *prima facie* wrong to bring about. The background picture here is something like this. First we define the permissible actions for people to perform at will and

¹² Feinberg (1986): 156, quoting the *Arizona Daily Star*, July 14, 1981.

¹³ For this suggestion, see Nozick (1969); Raz (1986): 148-151; and, in an effort to apply the concept of coercion to parental discipline, Clayton (2006): 97.

without any special justification. Call these actions a person's "pure liberties." Generally, one is within one's rights to perform a pure liberty, although it is not always the right thing to do. That is, no one has any personal grievance against me when I act within the bounds of my pure liberties, although someone may blame me for acting badly or inappropriately. On the other hand, to perform an act that does not belong to the set of pure liberties is *prima facie* wrong and does need special justification. For instance, you may not ordinarily kick a person, but it may be justifiable to do so in self-defense. This would seem to explain why threats in our above examples do not intuitively count as coercive: the consequences they threaten may permissibly be brought about at will and without any special justification.¹⁴

If the above analysis is on the right track, however, then the concept of coercion seems to have only tangential relevance to the issue of paternalism. This is because it is possible to apply threats and to pressure someone in ways that effectively restrict a person's freedom for his own good without stepping beyond the boundaries of one's pure liberties. For instance, suppose the woman in our previous example is motivated primarily by a desire to prevent her lover from ruining himself, and that the best leverage she has for pressuring him (within her rights) is to threaten to leave him. The lover may well feel cornered, and that he has been left with no palatable option but to commit himself to reforming his behavior. There seems to be no problem with saying that the pressure that the woman applies in this case is paternalistic, even though most people would not judge it to rise to the level of coercion. We may allow, however, that

¹⁴ The point, once again, is not that there are no moral rules that apply to P's bringing about these consequences, but only that P (in some sense) "has a right" to bring these consequences about at will. Doing so may nonetheless be inappropriate or blamable. It is possible to be uncomfortable with extending this juridical notion of "having a right" beyond the law to more informal parts of morality. It is worth observing, though, that the notion is not a recent philosophical innovation, but is well entrenched in ordinary moral language and consciousness.

(other things equal) coercive paternalism may set a higher bar for justification than non-coercive paternalism.

Children, because they are relatively weak and dependent on adults, tend to be particularly vulnerable to threats, coercive or otherwise. Just to give one example, a child who is economically dependent on his parents can be pressured and disciplined without resort to violence by threats to withhold an allowance or by withholding access to the things that money can buy. In most cases where parental discipline is justified, it is at least partly paternalistic in character.

B) Interference with opportunities

Compulsion and coercion are the most direct ways of interfering with a person's freedom. In cases of compulsion, a person is physically (or perhaps psychologically) overpowered. In cases of coercion, a person's will is forced. But it is also possible to reduce a person's effective freedom by interfering with his opportunities in a more indirect or remote way. These cases are particularly important with respect to paternalism, since efforts to promote someone's well-being by directly interfering with his liberty, or by penalizing him, often do more harm than good.

At the outset, we have to distinguish between intentionally interfering with a person's options and doing so as a byproduct of some other act. Many actions inadvertently restrict the options of others. If Perkins buys the last glass of bourbon at the bar, then he has reduced the options available to the next patron, Quinsby (perhaps even foreseeably so), but since he does so as an unintended byproduct of his desire for a drink, it would be unusual to say that Perkins has interfered with or restricted Quinsby's freedom—though of course there is a sense in which that is true. On the other hand, to take a fantastical example, if Perkins went to Quinsby's favorite

bar and bought up all the bourbon just to prevent Quinsby from having any, then it *would* be natural to say that Perkins has interfered with Quinsby's freedom. We are interested only in cases of the latter sort here: cases where P deliberately restricts the freedom of Q by interfering with Q's option set.

Our treatment of children provides numerous examples of this kind of intentional manipulation of a person's option set. John Dewey, for instance, emphasized the centrality to education of controlling the influences and options in a child's environment:

The only way in which adults consciously control the kind of education which the immature get is by controlling the environment in which they act, and hence think and feel. We never educate directly, but indirectly by means of the environment. Whether we permit chance environments to do the work, or whether we design environments for the purpose makes a great difference. And any environment is a chance environment so far as its educative influence is concerned unless it has been deliberately regulated with reference to its educative effect. An intelligent home differs from an unintelligent one chiefly in that the habits of life and intercourse which prevail are chosen, or at least colored, by the thought of their bearing upon the development of children. But schools remain, of course, the typical instance of environments framed with express reference to influencing the mental and moral disposition of their members (1916: 18-19).

Such controlled environments have an interesting relationship to liberty. By controlling the child's environment, both in terms of what can influence the child, and the options available to the child, the adult clearly restricts the child's freedom. But in another sense, since his environment is controlled, the child may be allowed more liberty to act without direct interference, than he could be permitted in an uncontrolled environment.

The same logic is relevant to paternalism toward adults. Liberals can make social conservatism look absurd when the issue is framed around the question as to whether individuals should be forced, one-by-one, to lead good lives. Surely the harm of punishment will far outweigh almost any benefit one might want to confer on the person concerned. But the most

plausible versions of social conservatism take a more holistic view: they essentially extend Dewey's notion of a controlled environment to society at large. Punishment simply becomes one (and probably not the most important) of the tools for controlling a "moral ecology" conducive to soulcraft. As Robert George sees it:

[A]ll rational human beings are capable of understanding moral reasons; yet all require guidance, support, and assistance from others. All are susceptible to moral failure, even serious moral failure; and all are capable of benefiting from a milieu which is more or less free from powerful inducements to vice. All require freedom if they are to flourish; but unlimited freedom is the enemy, not the friend, of everyone's well-being (1993: 40).

One important way that coercion can be used to control a person's opportunities is to penalize a second party for engaging in certain consensual transactions or activities with a person. The wording of the Eighteenth Amendment to the U.S. Constitution is a good example: It prohibited the "manufacture, sale, and transportation of intoxicating liquors" within the United States. It did not directly prohibit the consumption of alcohol, though of course its aim was plainly to remove the option of alcohol consumption. In similar fashion, in order to protect minors from alcohol and tobacco, we might rely more on the punishment of vendors who sell those products to minors than on the direct punishment of the minors themselves. If effective, this strategy would have the benefit of not punishing the same people we intend to protect. Another good example of this are those laws that limit or prohibit child labor. These laws are paternalistic in arguably three respects. First and most obviously, they prevent minors from consenting to possibly harmful or exploitative employment conditions. Second, they discourage children from sacrificing their long-term interest in education for short-term profits. Third, they lengthen the time minors are economically dependent on their parents. This has the effect of enhancing parental power and authority over adolescents, who might be capable of economic independence but for these legal restrictions. But this restriction of the child's option set is

accomplished by imposing penalties on employers and perhaps parents, rather than directly on children.

Options usually have opportunity costs. The higher the cost, the more the selection of that option restricts one's subsequent freedom. Therefore, another way to effectively restrict a person's opportunity set is to impose extra costs on choosing certain options. Indeed, Mill thought that policies that imposed extra costs on conduct were a kind of graduated prohibition, since "every increase in cost is a prohibition, to those whose means do not come up to the augmented price" (OL: V, ¶ 9 / CW, XVIII: 298). The most common method of imposing extra costs on activities is to levy special taxes on the purchase of relevant products or services. A protective tariff is a non-paternalistic example of a tax meant to discourage certain choices, while a "sin tax" is the paternalistic variety.¹⁵ Sin taxes seem to be especially useful in discouraging minors from making certain market choices: for example, proponents of raising the tax on tobacco often point out that children and adolescents, having limited means, are particularly sensitive to price increases.

Some ways of "manipulating" a person's options do not really restrict freedom, and so they are not paternalistic on my conception—at least not paradigmatically so.¹⁶ For instance, instead of imposing extra costs on bad options, a government might subsidize or incentivize good options. Someone might say that (like directly imposing extra costs on bad options)

¹⁵ True sin taxes are paternalistic, but they must be distinguished from two other kinds of tax. First, some taxes are used to internalize externalities. For instance, if smokers use more medical resources without paying for them, then a tax on tobacco to fund health care might internalize the costs smokers are imposing on others. Second, luxury taxes are placed on non-essential products. The idea is that it is fairer to raise money by taxing products that people buy with disposable income. Of course, in practice, taxes may be intended to serve more than one of these purposes.

¹⁶ We may allow that there is a more extended notion, where any kind of benevolent manipulation of options counts as paternalistic. This extended form of paternalism is worthy of attention, but since these cases do not involve conflicts between freedom and a person's good, they fall outside the conception that I will employ here.

incentivizing good options effectively raises the price of the bad options vis-à-vis the good ones, and for this reason such incentives ought to be considered paternalistic. On my view, the question is whether the government (or other party) has made any choices more costly in an absolute sense. If the government has made certain choices less costly, then—by expanding the opportunity set—it has enhanced freedom, not restricted it.¹⁷ The main exceptions to this are cases where the subject has no realistic choices except those that the government (or other party) makes affordable. People dependent on welfare services may be in this situation, as are economically dependent children with respect to their parents. In cases of extreme dependency, such “incentives” may assume the character of “coercive offers,” since they cannot really be refused (cf. Feinberg 1986: ch. 24). Cass Sunstein and Richard Thaler (2008) propose an even subtler form of choice manipulation. Since there are common circumstances in which ordinary people make predictably bad decisions according to their own better judgment, Sunstein and Thaler recommend that public and private institutions structure the menu of options in ways that will influence or “nudge” choosers to make better decisions as judged by those very choosers. For instance, rearrange the display of food available in a cafeteria without actually eliminating any options and you can (in the aggregate) encourage patrons to make healthier choices. Sunstein and Thaler call this “choice architecture.” As they emphasize, this is “a relatively weak, soft, and nonintrusive type of paternalism because choices are not blocked, fenced off, or significantly burdened” (2008: 5). They nonetheless think of it as paternalistic since choice architects are “self-consciously attempting to move people in directions that will make their lives better” (6). Since the range of options is not actually restricted or burdened, this brand of

¹⁷ This, however, is to ignore the question as to where the government revenues for the subsidy come from. Insofar as these revenues come from taxes on the very people whose behavior the subsidies are intended to affect, then the government’s overall policy is straightforwardly paternalistic.

“libertarian paternalism” is *so soft* as to not really count as paternalistic at all on our conception. Choice architecture would come closest to counting as paternalistic on my terms if we came to suspect that choosers were not only being “nudged,” but that their standing preferences were being manipulated as well. In this case it would be a form of manipulation which I discuss below.

C) *The exercise of authority*

When we think about a person’s freedom, we often think about what he has an opportunity to do without “physical” interference or impediment (or the threat thereof). But we can also think about a person’s freedom from a normative or “rule-based” point of view: What is a person authoritatively forbidden or prevented from doing (or disempowered from doing)?

The most direct way that one party can exercise authority over another is by issuing commands. A party issues a command when she instructs the subject to do something, expects compliance on the basis of that instruction, and regards the person as insubordinate if he acts otherwise. Assuming the authority of the party issuing commands is valid, the subject is thereby under an obligation to obey, and we typically think of this as a restriction on the subject’s freedom, although it is not, of course, a physical restraint. (Etymologically, to *obligate* is to bind someone to something.) A person may be bound by many obligations, but be subject to few physical restraints, or vice versa. In political theory, we don’t always bother to distinguish between the ways that our *de jure* liberty is limited by law and the way that our *de facto* liberty is limited by the coercive sanctions standing behind the law. The distinction is more important when we think about parental authority, however, since that authority is often effective in controlling conduct without any direct appeal to sanctions. Usually, children cannot simply cast off the parent’s authority at will. The child may chafe against parental authority while still

recognizing it, since even the disobedient child will recognize the parent's authority to discipline (at least, as long as he is not in open rebellion). That is why parents can often "ground" their children on command without having to lock them away in the cellar or to station an armed guard outside the child's bedroom.¹⁸

Of course, someone may issue commands delicately or imperiously. For instance, a parent may give a child the choice to do x or y , but the parent has nonetheless implicitly invoked her authority by determining the initial range of options. Issuing a command does not preclude giving the reasons behind one's decision to issue the command, and indeed, for parents it is often pedagogically important to do so. If the person commanded is convinced on the basis of this explanation, then that is all the better, but it is nonetheless a command if the person is expected to obey even if he disagrees with the judgment of the person who issued the instruction.

Not only may an authority permit or forbid certain acts, the authority may also affect an agent's ability to act by conferring or withholding normative powers.¹⁹ This is probably clearest in formal systems of rules like the law. For example, children are legally denied the powers to make binding contracts, to vote, to marry, and to consent to things like medical procedures and sexual intercourse. Denying a person the use of such powers does not restrict a person's "liberty of action" or "natural liberty" in a direct way, but it does restrict a person's opportunity set by preventing him from altering his normative or legal relationship with others. For example, if a

¹⁸ Obviously, parents guide their children in many ways other than issuing commands. For instance, parents reason with their children, give them advice, and make requests. All of these differ from issuing commands in that a child who ignores reason, advice, or request may be foolish, impertinent, or inconsiderate, but is not *insubordinate*. Consequently, parents are likely to continue to reason with their children, give them advice, and make requests of them even once they are mature. But in our society at least, parents are much less likely to issue authoritative commands to their mature offspring.

¹⁹ On normative and legal powers, see Hart (1961): ch. 5; Raz (1975): ch. 3; and Sumner (1987): ch. 2.

child cannot bind himself by contract, others are unlikely to engage in transactions with him where some assurance of performance is necessary. Limitations on the freedom of contract routinely raise questions about legitimate paternalism. For instance, should a person be able to contract into slavery? What about a marriage contract without the possibility of divorce?²⁰

More subtly, the law might restrict one party's freedom by authorizing or requiring a second party to restrict the first party's freedom. Again, this authority to assign powers and impose special duties is particularly important for thinking about children. For example, the law gives parents broad discretion in disciplining children and in making decisions for them, and it *requires* parents to ensure that their children are educated, against the child's will if necessary (these being powers and duties that adults do not typically have with respect to one another).

D) Manipulation and deception:

I come at last to cases of manipulation and deception, which are probably the least straightforward instances of restricting or interfering with a person's freedom. Manipulation is a loose term and it is difficult to characterize it precisely. We have already discussed some things that are called manipulation, such as the removal of options from a person's opportunity set or the imposition of extra costs on the selection of some options. Here I am interested in a narrower sense of manipulation: roughly, cases where P tries to manufacture particular wants or intentions in Q in a non-rational way and without Q's awareness that P is doing so. Rousseau gives us a striking description of paternalistic manipulation in *Emile*:

Let [your pupil] always believe he is the master, and let it always be you who are. There is no subjection so perfect as that which keeps the appearance of freedom. Thus the will

²⁰ On paternalism and contracts, see Mill, OL: V, ¶ 11 / CW, XVIII: 299-301; Feinberg (1986): 71-79; and Shiffrin (2000).

itself is made captive.... Doubtless he ought to do only what he wants; but he ought to want only what you want him to do (Bk. II, p. 120).

To be sure, this is not a focal case of *restricting a person's freedom*, since nothing is done against the child's will. However, we are inclined to say that insofar the tutor's will controls the pupil's will, the pupil is not really free either. The tutor seems to be undermining the pupil's ability to form a will of his own (though this might be in the service of promoting the child's *future* autonomy). Although this is not exactly the same thing as restricting a person's freedom, it bears enough of a family resemblance to it to warrant the extension of our concept of paternalism to cover manipulation of a person for his own good. Another way of thinking about this is to compare manipulation to coercion. Like coercion, manipulation is a way of subjecting one person to the will of another. The difference is only that the subject of manipulation doesn't recognize that he is subject to the will of another, but thinks he is acting freely.

Paternalistic manipulation, as in the passage from *Emile*, may sound quite insidious, but at least in the case of children, it need not always be so. Most people accept that a part of the parent's role is encouraging the child to develop the right preferences and values, and this is certainly not always to be accomplished by the rational presentation of alternatives. On the other hand, it is plain enough that adults often object to being manipulated, especially for their own good.

Finally, there are cases of deception. Many forms of deception are essentially species of manipulation and, therefore, can be understood as undermining autonomy in the same way. In this category, we have Kant's well-known example of the person who obtains a loan by making the lying promise that he will repay. With this kind of example in mind, Christine Korsgaard compares deception to coercion:

The idea of deciding for yourself whether you will contribute to a given end can be represented as a decision whether to initiate that causal chain which constitutes your contribution. Any action which prevents or diverts you from making this initiating decision is one that treats you as a mediate rather than a first cause; hence as a mere means, a thing, a tool. Coercion and deception both do this. And deception treats you as a mediate cause in a specific way: it treats your reason as a mediate cause. The false promiser thinks: if I tell her I will pay her back next week, then she will choose to give me the money. Your reason is worked, like a machine: the deceiver tries to determine what levers to pull to get the desired results from you. Physical coercion treats someone's person as a tool; lying treats someone's *reason* as a tool. This is why Kant finds it so horrifying; it is a direct violation of autonomy (Korsgaard 1996a: 141).

This is a fine analysis of manipulative deception, but not all deception is geared toward getting someone *to do something* at all. This is especially the case with *paternalistic* deception, where P gets Q to believe something that is false, because P believes that Q will be better off not knowing the truth. Some such lies are simply told to spare a person from the ugly truth. Sidgwick, for instance, suggests that no one “shrinks from telling fictions to children, on matters upon which it is thought well that they should not know the truth.” He also mentions the sort of scenario now often debated by medical ethicists: telling someone in a critical medical condition a falsehood in order to conceal “facts that might produce a dangerous shock” (1907: 316). Expanding on this kind of case, Bernard Gert and Charles Culver (1979) describe a woman seriously injured in a car accident, whose “very tenuous hold on life might be weakened by the shock of hearing of her children's conditions.” Since these forms of deception are not aimed at getting people to perform any action at all, they cannot be analyzed as ways of getting people to contribute to ends that they do not consent to.

Does all deception nonetheless infringe upon or undermine a person's autonomy—at least presumptively? Arguably it does, although perhaps in a peripheral sense. When P deceives Q, P (to put it roughly) interferes with Q's *access to the truth*. Deception, we can say, interferes with

a person's ability "to use and interpret experience in his own way," as Mill put it (OL: III, ¶ 3 / CW, XVIII: 262). This is most obvious when Q is actively seeking the truth, for then P's deception seems to block Q from attaining his aim. P's "interference" seems even more intrusive when the deceit has to do with what we understand to be Q's own affairs (like Q's health status or the safety of Q's children).²¹

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Having discussed the nuances of the conception that I will be relying on in the following, I can now offer a more careful definition of paternalism:

P acts paternalistically toward Q if and only if P

- (a) intentionally restricts Q's freedom of choice (or restricts the scope of Q's freedom of choice, or undermines Q's ability to freely form his own choice),
- (b) without Q's consent,
- (c) in order to promote (what P sincerely believes to be) Q's good.

For convenience, I will usually employ the simpler formulation—*that P acts paternalistically toward Q if and only if P intentionally restricts Q's freedom in order to promote Q's good (or well-being)*—but this more complete definition should be taken as read.

1.5 The Liberal Outlook on Paternalism

In the following chapters, we will be looking for a justification of the "Liberal Outlook," which holds that paternalism, while generally objectionable, is appropriate when exercised toward children. We now have in hand a conception of paternalism, but just what is "the Liberal

²¹ It may fairly be asked why I am interested in assimilating deception to interference with a person's freedom at all. Is this not like the absurdly intellectualistic claim that torture is wrong because it interferes with a person's autonomy to decide for himself which activities to participate in? My claim is not that deception is wrong only because it constitutes a kind of interference with freedom. My claim is that insofar as non-manipulative deception can be paternalistic, we may understand its paternalistic character as consisting in the fact that it impedes a person's access to the truth for his own good.

Outlook on paternalism”)? Earlier I invoked the staunch antipathy to paternalism of liberals like Kant and Mill.²² But many liberals today take a more tolerant view of paternalism than Mill and Kant did. (Brian Barry calls it “the relatively trivial issue of so-called paternalism” much discussed “by Americans, who seem quite obsessed by it” [1995: 87]). Fifty years ago H.L.A. Hart suggested that Mill’s hard-line anti-paternalism was a relic of a bygone, more optimistic era:

Paternalism—the protection of people against themselves—is a perfectly coherent policy. Indeed, it seems very strange in the mid-twentieth century to insist upon this, for the wane of laissez faire since Mill’s day is one of the commonplaces of social history, and instances of paternalism now abound in our law, criminal and civil....In Chapter 5 of [*On Liberty*] Mill carried his protests against paternalism to lengths that may now appear to us fantastic. He cites the example of restrictions of the sale of drugs, and criticizes them as interferences with the liberty of the would-be purchaser rather than with that of the seller. No doubt if we no longer sympathize with this criticism this is due, in part, to a general decline in the belief that individuals know their own interests best, and to an increased awareness of a great range of factors which diminish the significance to be attached to an apparently freed choice or to consent (1963: 31-32).²³

²² Here a note on vocabulary may be welcome: The word “paternalism” is not used by Locke or Mill, nor (of course) by Kant. According to the *Oxford English Dictionary*, “paternalism” only enters the English language in 1873. We are therefore forced to ask: Did these writers really share our concept of paternalism? Mill certainly did. In spite of lacking the word, his harm principle is largely designed to exclude restrictions of liberty for a person’s own good—something he repeatedly says is appropriate only with respect to children. Locke’s principles of liberty and toleration have anti-paternalistic implications, but when he spoke of “paternal power,” he was literally concerned with the authority of fathers and the kings who posed as the fathers of their people. With the exception of religious meddling, he was less concerned with the extensive and benevolent regulation of personal liberty that worried Mill—perhaps because that was primarily a nineteenth-century development. Where Gregor translates Kant in “Theory and Practice” as speaking of a “paternalistic government” (8:290-291; see pp. 9-10 above), the German reads *väterlich Regierung*, and what he has in mind is probably (like Locke) not entirely figurative. But Gregor’s translation is not misleading since Kant is speaking of an authority who treats his subjects benevolently, but without respect for their practical judgment. Moreover, Kant’s moral philosophy, with its emphasis on autonomy, is strongly anti-paternalistic (in the modern sense). In sum, anti-paternalism is an evolving trope in liberal thought. Whereas earlier writers were often literally criticizing attempts to base political power on the authority of fathers, later writers were more likely to use that image of a “paternal” government in a more figurative or rhetorical way to attack supposedly benevolently motivated forms of subordination and restrictions on freedom.

²³ The passage is from Hart’s debate with Patrick Devlin on the legal enforcement of morality. The context is this: Devlin (1968) had argued that the fact that the victim’s consent is not a defense for a murder charge shows that the law is concerned, not only with the protection of individual rights, but with the enforcement of morality and the punishment of wrongdoing. Hart’s reply is that the example can be explained as an instance of the more limited

Although there are contemporary philosophers sympathetic to the hard anti-paternalism of Mill and Kant (many of whom write on paternalism),²⁴ a fair number of prominent liberal philosophers share Hart's perspective.²⁵ Kwame Anthony Appiah captures this more tolerant liberal attitude to paternalism well:

Most modern citizens are little worried by laws that take aim at self-regarding harm, so long as they do not interfere with our ability to make a life. In the face of human irrationality, then, we have helmet laws and seatbelt laws, and we typically see them as enforcing rational behavior, not promoting any particular conception of the good (2005: 160).

In light of this divergence of opinion within the liberal camp, you might wonder whether there is really anything we can say in general about *the Liberal Outlook on paternalism* other than it would permit considerably more paternalism toward children than toward adults. But *that* after all doesn't seem to be an exclusively liberal perspective.

In fact, at least three more generalizations can be made. First, with respect to adults, liberals are generally more tolerant of paternalism that aims only at securing or protecting certain primary goods or basic interests that everyone (or nearly everyone) is presumed to want whatever else they want—that is, things like health, safety, and economic security. Above I called this “non-moralistic” paternalism (1.3). Liberals are usually quite intolerant, on the other hand, of “moral paternalism,” which would restrict an adult's freedom to act in ways that are presumed to harm his moral character. This is not limited to controversial ethical or religious conceptions; though liberals may believe it permissible to promote civic virtue in the adult

doctrine of legal paternalism (which prevents people from harming themselves) rather than legal moralism (which enforces positive morality).

²⁴ See especially Feinberg (1971; 1986); VanDeVeer (1980); Arneson (1980); and Shiffrin (2000).

²⁵ For example, see R. Dworkin (2000): 264-265.

population, liberals are generally opposed to pursuing this by restricting or interfering with the freedom of adults.²⁶

Second, with respect to non-moralistic interests, the liberal is far more likely to accept measures aimed at preventing an adult from *harming* these interests than he is to accept measures aimed at *conferring benefits* on the person. For instance, the liberal is more likely to accept paternalistic restraints intended to protect a person from serious injury or illness than he is to accept restraints intended to promote a high degree of healthiness. Putting these last two points together, liberals typically only endorse what we have called “negative paternalism” toward adults (1.3).

Third, insofar as the liberal accepts any paternalistic restraints on the freedom of adults, he will (as Appiah suggests) generally only accept those that are relatively non-intrusive and impose only minor inconveniences (like requiring drivers to wear seatbelts). He is much more unlikely to accept any paternalistic interference that would require reshaping the individual’s everyday life or stand in his way of making major life choices (such as those about sexuality and marriage, career, or family). This is connected with both of the previous points. Other things equal, non-moralistic paternalism seems less intrusive than moral paternalism, and harm-preventing paternalism seems generally less intrusive than benefit-conferring paternalism. The liberal will also often object to forms of paternalism that are coercive and will usually object to those that undermine a person’s autonomy in a serious manner, like manipulation and deception, since these forms of paternalistic interference seem especially intrusive. True, the liberal will probably be *more* tolerant of paternalism by one adult toward another in personal (especially intimate)

²⁶ On liberal civic virtue, see Macedo (1990): esp. chs. 1 and 7 and Rawls (1993): 190-195. On the education of adults and the problem of coercion, see especially Gutmann (1987): ch. 9 and Coleman (2002).

relations than he will be of legal paternalism. But that tolerance too is strictly limited. This is particularly apparent if we compare modern individualistic social mores to those that prevailed in societies committed to hierarchical social orders. This contrast is most visible when we look at points in history where the more individualistic social mores are just emerging. Consider, for example, Gordon Wood's description of the emergence of republican society in early America:

The Revolution had represented an attack on patriarchal monarchy, and that attack began to ramify throughout the society. In vain did conservatives complain that too many people had been captivated by 'false ideas of liberty.' By collapsing all the different dependencies in the society into either freemen or slaves, the Revolution made it increasingly impossible for white males to accept any dependent status whatsoever. They were, as they told superiors who paternalistically tried to intervene in their private affairs, "free and independent" (2009: 345).

Another way in which informal paternalism is limited in liberal societies is that many social mores are attached to roles that individuals (at least ostensibly) choose to fill. For instance, a church congregation may monitor the private behavior of its members (although that too is rare today), but this is a community the individual has in at least some sense chosen to join.

In the case of children, on the other hand, the Liberal Outlook accepts a much more radical and far-reaching paternalism. He will likely accept that children's freedom is properly restricted, not only to protect his basic interests, but his moral character as well. Likewise, the liberal will surely accept paternalistic restraints aimed at promoting the child's positive good, and not just those that attempt to prevent serious harms. Putting these last two ideas together, the liberal will generally accept that the child's freedom (quite unlike the adults) may be restricted for the purpose of improving the child's moral character—what I called "perfectionism" above (1.3). Finally, the liberal accepts that paternalistic restraints on children quite routinely prevent them from making substantial life choices. Paternalism toward children is not limited to trivial

interferences that hardly affect the shape of the child's everyday life, and it is certainly not the case that children choose their subordinate roles.

We have now laid out the concept of paternalism and the outlines of the Liberal Outlook on paternalism. Having put our ideas in order, we can move on in the next chapter to begin working toward an answer to our central question: *Why should there be a strong presumption, on the Liberal Outlook, against paternalism toward adults, but not against paternalism toward children?*²⁷

²⁷ To be clear, I am not asking the much-discussed question as to whether infants and children can be rights-holders. I assume that they can be. I am only interested in the grounds for denying children the right to exercise autonomy. Some, on the other hand, think that children cannot have rights at all, since they think that rights always protect the power to make choices and that children cannot make choices. See for instance Sumner (1987) and Griffin (2002). For the argument that, because young children *obviously* have rights, rights cannot be analyzed as protecting choices, but must be analyzed as protecting interests, see MacCormick (1982).

CHAPTER 2: WELFARISM AND PATERNALISM

2.1 Introduction: The Welfarist and Sovereignty Approaches

To treat someone *paternalistically* is (in the central cases) to restrict that person's freedom, or to undermine his capacity or opportunity for free choice, for his own good (1.1-4). The *Liberal Outlook* tends to be wary of paternalism toward adults, but accepting of rather extensive paternalism toward children (that is, all those we consider "minors") (1.5).¹ Assuming provisionally that the Liberal Outlook is substantially correct, what justifies it? *Why should there be a strong presumption in practice against paternalism toward adults, but not against paternalism toward children?*² What is the morally relevant difference—or differences—between adults and children that accounts for this difference in treatment? Answering this question will shed light, not only on the issue of paternalism, but also on the philosophical basis of freedom more generally. Furthermore, our answer will give us a perspective from which to address some contested practical questions, such as when and in what respects we ought to treat young people, especially adolescents, like adults. Of course, we may also find out that the Liberal Outlook is groundless, or at least misguided in some ways; by taking the Liberal Outlook as our point of departure, we do not foreclose those conclusions.

¹ It may be that what I have called the "Liberal Outlook" on paternalism is far more widespread than its name suggests. No doubt it is true that all cultures treat children *more* paternalistically than adults. Central to the Liberal Outlook, however, is a somewhat stronger claim: Paternalism toward adults (i.e., toward men *and* women of *all* social stations) is *generally* objectionable.

² I say "in practice" so as not to foreclose the possibility that the reasons for treating adults and children paternalistically (or not) are, in principle, the same.

A good place to begin is simply by asking what it is that ever makes paternalism objectionable at all. Indeed, if the paternalist sincerely acts to promote the subject's good, what could be wrong with that? Certainly it is not wrong in the same way that many acts are wrong: by pursuing one's own good at the expense of someone else. There are two important approaches to answering this question.

Before I explain the first approach, let me introduce a bit of terminology. Let us distinguish between the paternalist's formal aim and his substantive aim. His *formal aim* is to promote the subject's good or well-being,³ while his *substantive aim* is a thicker description of the sense in which the subject's well-being is to be promoted. By definition, all paternalists (indeed, everyone acting out of benevolence) share the same formal aim. Someone who didn't care about promoting the subject's true good or well-being, whatever that is, is not acting paternalistically. But paternalists will often differ in their substantive aims, in that they differ in their understanding of what the subject's well-being really consists in. For instance, you and I may both wish to promote Quinsby's well-being paternalistically, but your substantive aim may be to improve his mood, while mine may be to enhance his ability to do what he wants in the future.

The first approach to justifying the Liberal Outlook accepts, at least for the sake of argument, the propriety of the paternalist's formal aim: to do what will promote the subject's well-being. What is objectionable are cases in which the paternalist fails to accomplish this formal aim. This could happen in two ways. It could be that the paternalist is employing ineffective or

³ Henceforth, I will assume that Q's well-being and Q's good are equivalent expressions. At 1.3 I observe that this may not always be true, in which case it is better to define paternalism in the more abstract terms of the subject's good. But from now on, I shall ignore this complication.

counterproductive means in promoting his substantive end (or will tend to do so as a rule).⁴ Or it could be that, while the paternalist will succeed in accomplishing his substantive aim, he has the wrong conception of what the subject's good really consists in; thus, in accomplishing his substantive aim, he fails to accomplish his formal aim (to promote the actual good of the subject). To use the terminology I introduced in Chapter 1, what makes paternalism objectionable in these cases is that it is "imperfect."⁵ Because these arguments ultimately turn on whether or not the subject's well-being is actually promoted (or will tend to be so as a rule), let us call them "welfarist" arguments and this the welfarist approach (without implying that such arguments appeal to *subjective welfare*, or "utility," rather than to a more objective conception of well-being). Because the welfarist approach accepts the paternalist's formal aim, explaining why paternalism toward children is appropriate seems straightforward. The challenge is to explain why paternalism toward adults is often objectionable and, then, why these considerations do not also apply to children.

The second approach holds that paternalism is (at least *pro tanto*) objectionable in principle because it fails to respect the subject's right to freedom or autonomy in matters that affect only, or chiefly, the subject himself.⁶ On this view, the point is not that the right to freedom or autonomy is an element of, or in any way furthers, the subject's well-being, but simply that the

⁴ That is, someone may object to paternalistic conduct on an act or on a rule basis. I shall not always add this qualification, but it should be taken as read throughout.

⁵ Perfect cases of paternalism, recall, are those in which the paternalist's intervention actually promotes the subject's genuine good. Imperfect cases of paternalism are those in which the paternalist intends to promote the subject's good, but fails to actually do so because he has the wrong idea of what the subject's good really consists in and/or because he employs ineffective means (see 1.2).

⁶ Some people object that there are virtually no actions that a person commits which affect only himself. "No man is an island," is their slogan. Be that as it may, justifying a restriction on someone's freedom because of the effects on others is not a *paternalistic* argument. I shall not discuss the problem of the impact on others of largely self-regarding actions, but the best recent discussion of the problem that I know of is Shiffrin (2000).

subject has, or should have, a kind of *sovereign control* over his own choices and life. Kant refers to this condition of independence from the constraint of another's choices as that of being "one's own master" (MM: 6:237-238). I will call this the "sovereignty approach" (cf. Feinberg 1986: 47-51; Ripstein 2006). Explaining why paternalism toward adults is often objectionable is straightforward on the sovereignty approach. The difficulty for this view is in explaining intuitively permissible cases of paternalism—and given our interests, paternalism toward children in particular.⁷ I will discuss the sovereignty approach in more detail in Chapter 4.

How do the welfarist and sovereignty approaches relate to one another? Some philosophers are "welfarists" in that they want all moral arguments to ultimately appeal to considerations of well-being. This is a common view in the utilitarian tradition as well as in certain strands of Aristotelian "eudaimonism." Philosophers who tack in exactly the opposite direction and *never* want to appeal to "well-being" in moral argument are less common. But the welfarist and sovereignty approaches are not necessarily incompatible, and a pluralist might appeal to both kinds of argument. On one brand of pluralism, sovereignty trumps welfarist considerations,⁸ while on a more moderate view, welfarist considerations may sometimes override personal

⁷ The sovereignty approach may seem to be "deontological," while the welfarist approach, "consequentialist." If consequentialism is defined narrowly (i.e., in the traditional way) such that only the *consequences of actions* are of intrinsic value (e.g., effects on well-being), as opposed to the performance of actions as such (e.g., lying, killing, or interference with autonomy), then this would be accurate. But it is common now to define consequentialism broadly, so that all that it means is that we all have the same (agent-neutral) ultimate moral aim, which is to promote the best state of affairs in the world. On the expansive notion of consequentialism, one thing that could make the state of affairs better or worse is the performance of certain kinds of intrinsically good and bad actions. So understood, the only thing that consequentialism rules out are "agent-relative" restrictions: e.g., the duty not to kill, even if by doing so you would prevent more killing (Scheffler 1982). On this broad rendering, the sovereignty approach is consistent with consequentialism. In short, then, the much-debated question about agent-neutral versus agent-relative duties is orthogonal to the question at issue between the sovereignty and welfarist approaches.

⁸ Kant is a "trumping pluralist" in this sense. Cf. Kant, MM: 6:390 and the discussion in Hill (1980).

sovereignty, especially in cases where the costs in well-being are very great.⁹ Another alternative (familiar from rule-consequentialism) is to defend a two-stage theory, in which there *is* a right to personal sovereignty that trumps welfarist considerations in ordinary circumstances, but where that right is ultimately justified on welfarist grounds. Different versions of the two-stage approach allow the strength of the trump to vary. Mill's *On Liberty*, for existence, tries to defend a very strong right to personal sovereignty on utilitarian grounds. Finally, it is possible to “embed” the right of personal sovereignty as an ideal element in a conception of well-being. In contrast to the two-stage approach, in which the value of sovereignty is ultimately reducible to considerations of well-being (where well-being is independently defined), the embedding approach makes personal sovereignty an irreducible component of well-being, such that well-being cannot be fully defined without invoking the idea of personal sovereignty. On this view, a person's life goes worse *ipso facto* if his sovereignty is infringed, even if it doesn't have any further harmful consequences. Again, various versions of this approach can differ in giving different weights to the right of personal sovereignty as a component of well-being. I am inclined to think that pluralistic approaches and embedding approaches are ultimately inter-translatable and are not really different in substance. Because a person's good is not defined independently of his rights on the embedding approach, I will not consider it to be a pure form of the welfarist approach.

The central argument that I will make in Chapter 5 for the Liberal Outlook on Paternalism belongs to the sovereignty approach. In this chapter and the next, however, I want to explore the

⁹ Since welfarist considerations are almost always in play, one cannot easily maintain both that sovereignty is an important value and that *welfarist* considerations trump sovereignty. *In theory*, one could say that sovereignty only matters as a “tie-breaker” when the welfarist considerations for two courses of action are on a par, but I have never seen this view defended. Virtually all thinkers who give any weight to sovereignty think it is of great importance.

welfarist approach to justifying the Liberal Outlook. There are three reasons for doing so. First, the arguments are of interest in their own right, and the best of them seem to be a part of the best overall pluralist view. Second, a discussion of the welfarist arguments helps to bring the sovereignty approach into sharper focus. The third reason is the most critical however: Ultimately I think that even the best welfarist arguments fall short of justifying the Liberal Outlook on Paternalism. In holding this opinion, of course, I am not alone. But most writers inclined to what I have called the sovereignty approach dismiss welfarist views in a very peremptory way, often suggesting that welfarism is limited to something like Benthamite utilitarianism. But the range of welfarist views is far richer than this allows, so I have tried to do justice to some of these more complex forms of welfarist argument in this chapter and the next. Finally, let me say that because most welfarist arguments depend on difficult-to-ascertain empirical claims, there is something unsatisfying about the resolution of some of the discussions that follow. For instance, to what extent is it true that adults tend to be the best judges of where their own good lies? We can list considerations on both sides of the question, but to give a determinate final answer is extremely difficult. In many cases, then, I have had to rest content in showing why welfarist arguments are weaker or more doubtful than they are often presented to be.

2.2 Conceptions of Well-Being

The extent to which “perfect” paternalism (i.e., effective and not-misguided paternalism) is possible depends a great deal on what well-being actually consists in. It will facilitate our subsequent discussion to lay out the main kinds of theory at the outset. I shall understand a person’s “well-being” in the conventional way to refer to what is *good for* a person or what

benefits that person.¹⁰ I would endorse Stephen Darwall’s suggestion that a good way to get a handle on the formal concept is to approach it from the third-person perspective: a person’s well-being is *what we should want for a person insofar as we care about his good for his own sake* (2002: esp. 11-12). It is common to divide up substantive conceptions of well-being into three main categories—mental state accounts, desire-fulfillment accounts, and objective (or “objective list”) accounts—and I shall employ that taxonomy as well (cf. Parfit 1984: Appendix I; Griffin 1986: chs. 1-4).

A) Mental state accounts

A perennially attractive view about well-being is that it consists in “happiness,” where that is understood as a positive mental state. The view is probably best-known to us from the classical utilitarians, for whom happiness was understood hedonistically as “pleasure and the absence of pain” (Mill, *Utilitarianism*, II, ¶ 2 / CW, X: 210). One potential problem with this account is that it is hard to believe that everything that is good for us can really be described as pleasurable, without stretching the meaning of that word beyond all recognition. James Griffin gives the example of Freud, who in his last days refused powerful narcotics to allay the pain of his mouth cancer: “ ‘I prefer,’ he said, ‘to think in torment than not to be able to think clearly’ ” (1986: 8). It is hard to describe Freud in this case as preferring what is more pleasurable. There are two ways of trying to deal with this objection within the framework of a mental state account. One could try to say that what is good is not a “first-order” sensation, but a “second-order” felt quality that is characteristic of all good experiences, namely the second-order quale of *enjoyment*. As Roger Crisp puts it, “Eating, reading, and working ... are very different from one

¹⁰ For qualifications, once again, see 1.3.

another. But if you experience each, I may ask you: ‘Did you enjoy those activities? ... Did your experiences in each case have the *same felt property*—that of being enjoyable?’” (2006: 103-111). The other response, sometimes called “preference hedonism,” is to say (with Sidgwick) that what makes a mental state good for someone is that he desires it.¹¹ On this second response, it is not a felt-quality that makes experiences good, but the “external” contribution of desire.

B) Desire-fulfillment accounts

An alternative conception of well-being is to retain the focus on desire, as in preference hedonism, but then to reject the idea that we only desire certain mental states. On this view, my well-being is to be equated with the actual fulfillment of my desires in the world—a view advocated by many twentieth-century utilitarians and those coming out of that tradition. One reason for adopting a desire-fulfillment account over preference hedonism is simply that we seem to want things other than mental states. I don’t just want to *believe* that I am loved, respected, and that I have achieved valuable things; I really want the world to be such that I am loved and respected and that I have achieved things of value.¹² In one regard, then, desire-fulfillment views are “less subjective” than mental state views: that is, my well-being is not understood simply as a subjective mental state, but rather as an objective state of the world. In another regard, however, desire-fulfillment views are “more subjective” than mental state accounts (at least on hedonistic versions), since what my good is on the desire-fulfillment

¹¹ Sidgwick (1907): 127-129; cf. also Parfit (1984): 493-494 and Griffin (1986): 9-10.

¹² This point was made particularly vivid by Nozick with his “experience machine” thought experiment (1974): 42-45.

account actually depends on what I happen to want.¹³ Thus, whether or not pleasure is my good depends on whether pleasure is what I desire. In virtue of this, desire-fulfillment accounts may be “more subjective” than hedonistic accounts in a still further sense as well. It is open to someone who holds a hedonistic account of well-being to hold rather narrow views about what will actually make people happy (Epicurus is an example), but that kind of monism about the good life is less plausible on a desire-fulfillment account.

Is it the satisfaction of *all* of my desires that contributes to my well-being, or is it only the satisfaction of some restricted set of them? There are three issues that I will discuss in more detail in 3.4, since they are relevant to the issue of paternalism: (1) whether my desires can be mistaken?; (2) whether every local desire should count, or only my more global desires?; and (3) whether future desires should count, or only my present desires? A fourth problem is worth brief mention here: Mental state accounts of well-being, as I said, can seem too narrow, since we seem to care about more than our own experiences. But unrestricted desire-fulfillment accounts seem too broad. Our desires spread themselves very broadly across the world and through time. Surely all of them do not impinge on our well-being. Parfit gives the example of learning that a stranger I have met on a train has a serious disease. I may have a strong desire that this stranger be cured. Now suppose that years later, unbeknownst to me, the stranger is cured. Has my life just improved? That is hard to believe. The problem is not just that I never know whether the stranger is cured or not. Many people feel that, for example, the life of a woman who never knew that her husband kept a second family would be worse than she thought it was. Nor is the

¹³ However, hedonism can do some justice to the idea that the subject determines his own good, in that it may be held that enjoyment is closely connected to what we want. That is to say that I am unlikely to enjoy something unless I also desire it. The close connection between enjoyment and desire suggests that the practical (as opposed to theoretical) difference between hedonism and desire-fulfillment theories is likely to emerge mainly in peripheral cases.

issue that the lives of others cannot impinge upon my well-being. A parent's life is typically made better or worse by the good or bad fortunes of her children. The problem with the stranger-on-the-train example is that this person is never properly integrated into my life for his fortunes to really affect my well-being on any intuitive conception of what that involves. To fix this problem, some writers suggest that we restrict those desires that impinge on our well-being to those that are "about our own lives" (Parfit 1984: 494). That does not mean that my well-being must be sharply demarcated from the lives of others, and there will be plenty of hard cases where it is difficult to say whether or not a desire is really about one's own life or not. But that vagueness is arguably true to reality: the boundaries of individual well-being are fuzzy and overlap more-or-less with that of others, depending on how closely their lives are integrated in my own.

C) Objective accounts

Some philosophers say (with Aristotle) that it is a mistake to think that something is good for us *because* it is desired; rather, they say that when something is valuable or good, then that gives us a reason to desire it.¹⁴ We should attend, therefore, to what is objectively good (or bad) for people independently of their desires (and independently of what happens to put them in a particular mental state). The simplest objective accounts of well-being are monistic. A monistic theory might hold, for example, that the only good for human beings is submission to God, moral virtue, the perfection of human potential, or self-actualization, etc.¹⁵ More common today are

¹⁴ Aristotle, *Metaphysics*, 1072a: "desire is consequent on opinion rather than opinion on desire." For contemporary views of this sort, see Finnis (1980): 69-73; Raz (1986): 137-145; Scanlon (1998): ch. 1.

¹⁵ The only position familiar to me in the contemporary philosophical literature which comes close to being a monistic objective account of well-being is Hurka (1993). Hurka argues that the human good is the development of human potential. However, he allows that this development may occur across several dimensions. (Although Hurka

pluralistic views. Pluralistic conceptions maintain that a good life involves engagement with several different objective goods, which may vary depending upon the individual's particular constitution. Such goods may include self-determination, achievement, knowledge, friendship, aesthetic appreciation, and so on. Pluralistic conceptions may also include "subjective" elements from our previous two accounts like desire-satisfaction, the absence of pain, happiness, and so on (Parfit 1984: Appendix I). A strongly objective theory holds that people's lives are better as long as they incorporate what is objectively valuable, whether people care about these objective values or not. A more moderate version holds that (perhaps with the exception of biological needs) nothing can benefit a person unless that person endorses it as good. For instance, even if having strong families ties were objectively valuable, it would not be good for someone who did not value them. (I shall have considerably more to say about this in my discussion of the endorsement thesis at 3.2-3).

Objective accounts seem to be committed to a "realist" account of value. But we can get something very much like an objective account of well-being from a "quasi-realist" value theory. It may be held, for example, that value is the property something has when a person desires to desire it in ideal circumstances, e.g., with full imaginative acquaintance, full information, etc. It may further be maintained that, in ideal circumstances, many things would be valued by everyone. These, then, are quasi-objective values.¹⁶ This kind of quasi-objective account rather straddles the distinction between desire-fulfillment and objective accounts of well-being.

claims that his is a theory of the good life, he denies that it is a theory of well-being. For him, perfection of human potential is simply good; it is not good because it is *good for* the individual whose potential is perfected.)

¹⁶ Though there are shades of difference, this is the spirit of Griffin (1986); Railton (1986); and Lewis (1989).

2.3 Two Atypical Arguments

The main strategy of the welfarist approach is to argue that paternalism, though not impermissible in principle, tends to be counterproductive or ineffective in practice, at least with respect to ordinary adults. But before I turn to the typical welfarist arguments, allow me to briefly discuss two atypical arguments against paternalism toward adults, both of which are in the welfarist spirit, but which do not perfectly fit my characterization of the main welfarist strategy. These are what I call the “argument from distrust” and the “social benefit argument.” We find both of these arguments in Mill, but neither is much discussed in the contemporary philosophical literature on paternalism.

A) The argument from distrust

One argument simply casts doubt on the notion that *sincere* paternalism is a very common phenomenon at all outside philosophical discussions, but observes that pure domination and oppression are often cloaked in paternalistic cant. For this reason, it is best to adopt institutions and rules that put each person in control of her own affairs and which rule out paternalism except (perhaps) in narrowly circumscribed cases. Mill is well-known for having argued in *On Liberty* that each person is generally the best judge of his own interests, but it is less often noticed that in the same paragraph he also insists that each individual is generally “the person most interested in his own well-being” (IV.4). And in *The Subjection of Women* he warns us to remember the “gratification of pride there is in power” and the “personal interest in its exercise” (I.8). “It would be tiresome,” he writes in the same work, “to repeat the commonplaces about the unfitness of men in general for power” (II.4). At first, it might seem as if this is a consideration of more importance for politics and law than for personal ethics. But Mill insists that the danger of abuse is not limited to power over strangers: “for everyone who desires power, desires it most

over those who are nearest to him, with whom his life is passed, with whom he has most concerns in common, and in whom any independence of his authority is oftenest likely to interfere with his individual preferences” (SW: I, ¶ 8 / CW, XXI: 268). Attacking paternalistic justifications for the subjection of women to men, he writes,

Whether the institution to be defended is slavery, political absolutism, or the absolutism of the head of a family, we are always expected to judge it from its best instances; and we are presented with pictures of loving exercise of authority on one side, loving submission on the other—superior wisdom ordering all things for the greatest good of the dependents, and surrounded by their smiles and benedictions.... [But] laws and institutions require to be adapted, not to good men, but to bad (SW: II, ¶ 3; CW, XXI: 287).

If children, on the other hand, are to be entrusted to the authority of their parents, it is only because children are almost completely incapable of advancing their own interests and because ordinarily parents have a natural sympathy with the well-being of their children.

The argument from distrust is an instance of what has been called “the liberalism of fear”—the position that maintains that the best defense of liberalism does not rest on particularly deep philosophical foundations, but simply on the historical experience of what happens when power is not limited (Shklar 1989). The argument is not a paradigmatic version of the welfarist approach as I characterized it above, since it does not show that cases of sincere paternalism, taken by themselves, tend to be ineffective or counterproductive. Rather, it maintains that permitting paternalism toward adults is harmful overall because it opens the door to insincere paternalism. It is, thus, a sort of rule-consequentialist argument: it does not say that subjects of sincere paternalism are necessarily worse off for allowing paternalism toward adults, but that subjects of alleged paternalism (sincere and insincere) are worse off as a whole.

Certainly, the argument from distrust cannot be dismissed lightly. No doubt paternalistic justifications are the most common rationalizations of oppressive institutions. What better way to justify depriving another of power or control over her own affairs than to allege that it is for her own good? On the other hand, it is difficult to evaluate the force of this argument in the abstract. First of all, parents can also act insincerely, but we do not condemn parental paternalism for that reason.¹⁷ Moreover, insincerity is a pervasive problem with the exercise of power and not in the least limited to the issue of paternalism. The same argument—that we ought to assume that those who will wield power will have bad intentions—is often leveled against the centralization of state power necessary for alleviating poverty or implementing social justice (cf. Hayek 1944: chs. 7, 10). Finally, the argument is most convincing, not when we are talking about particular paternalistic limitations on freedom of choice, but rather with respect to wholesale subordination and disenfranchisement of groups of people (which is what Mill is specifically arguing against in *The Subjection of Women* and *Representative Government*). It would seem, therefore, that while it would be foolhardy to dismiss the argument from distrust entirely, it would also be rash to accord it too much weight preemptively and in the abstract.

B) The social-benefit argument

Another way to argue for the Liberal Outlook on Paternalism is to appeal to the wider social benefits arising from it. That is, we are all better off for not interfering paternalistically in others' lives, since a free society fosters experiments in living by which new and valuable life-

¹⁷ Indeed, in the *Principles of Political Economy*, Mill writes: “Parental power is as susceptible of abuse as any other power, and is, as a matter of fact, constantly abused. If laws do not succeed in preventing parents from brutally ill-treating, and even from murdering their children, far less ought it to be presumed that the interests of children will never be sacrificed, in more commonplace and revolting ways, to the selfishness or the ignorance of their parents” (V.xi.9 / CW, III: 952).

practices are discovered. Thus, the costs borne by those allowed to harm themselves are outweighed by the benefits to all from having new forms of life continually added to the fund of human experience (Mill, OL: III, esp. ¶ 10ff. / CW, XVIII: 267ff:). However, since children have not yet learned from their predecessors' experiences, their own experiments are less likely to avoid past pitfalls and contribute innovations. By limiting the child's freedom, we preserve for him his liberty as an adult, which is more likely to be used to increase our understanding of the good life.

Although this argument appeals to the well-being of people in society generally, it does not appeal directly to the subject's well-being. It does not maintain that paternalism tends to fail in accomplishing its formal aim, but that even accomplishing it brings in train social costs that outweigh the benefit for the subject. For that reason, the social-benefit argument does not quite fit my characterization of the "welfarist approach" to justifying the Liberal Outlook either. Standing alone, the argument also seems odd since the individual's claim to liberty is traced to the interests of society, rather than to those of the individual. This might seem like the wrong kind of reason, since it fails to account for the sense of personal resentment that people often feel when subjected to what they feel is unwarranted paternalism. The argument might even seem to condone an injustice, in that the individual's well-being is apparently sacrificed for that of the good of the wider community.¹⁸

¹⁸ However, from an historical perspective, it is probably better to look at this argument in a different light. The great task for early liberalism was to show that individual liberty was *not at odds* with the public good, as was commonly assumed. The social benefit argument is therefore aimed at showing that individual liberty is congruent with the public good. By contrast, pure paternalism, which justifies restraints solely in terms of the subject's own good, is really a very individualistic doctrine. Indeed, once you have tried to justify conduct on paternalistic grounds, you are already on the liberal's home turf.

Moreover, while the general proposition that a free society is conducive to social innovation and progress is plausible, it seems like an exaggeration to maintain that this establishes a strong presumption against paternalism toward adults. True, where some activity is largely untried and the outcome uncertain, human experience stands to gain from permissiveness. But what of things which, in Mill's own words, "have been tried and condemned from the beginning of the world until now; things which experience has shown not to be useful or suitable to any person's individuality"? Surely, as Mill anticipates, there "must be some length of time and amount of experience, after which a moral and prudential truth may be regarded as established," and when common human sympathy requires preventing "generation after generation from falling over the same precipice which has been fatal to their predecessors" (OL: IV, ¶ 9 / CW, XVIII: 281). The argument must be allowed to cut both ways, for and against liberty, as experience warrants. Mill's only response is that society benefits from having the bad consequences of unwise conduct always in view to discourage imitation. But whether imitation can better be discouraged through example or interference is an empirical question, and it is hard to see why the former should always cause the least suffering.

2.4 Typical Welfarist Arguments: Looking for Asymmetries

On the typical welfarist approach, paternalism is objectionable insofar as the paternalist fails to accomplish his formal aim of promoting the subject's good (or insofar as acts of that kind will tend to fail as a rule). That there are such cases of failure is hardly surprising, since a person might well fail to promote *his own* well-being as well. Indeed, it is a quite general fact about action that we sometimes fail to achieve our aims. Therefore, if welfarist considerations are to justify the Liberal Outlook on Paternalism, then what we need are reasons to think that, in a wide

range of cases concerning adults, but to a much lesser degree in cases concerning children, there is an *asymmetry* between P's attempts to promote Q's well-being (without Q's consent or cooperation) and Q's own attempts to do so.¹⁹ I shall discuss three kinds of argument for establishing that asymmetry in this chapter and the next. Of course, many writers appeal to more than one argument or make a case that incorporates elements of multiple types.

The most familiar argument tries to locate an *epistemic asymmetry*: each person, it is said, typically knows where his own good lies better than anyone else does (2.5). The second type of argument points not so much to the nature of well-being itself, but rather to one of its central elements, namely to *personal autonomy*. Insofar as autonomy is a central element of well-being, it would seem to be difficult for others to promote a person's well-being by infringing his autonomy (2.6). The remainder of this chapter is devoted to exploring these two arguments.

The third type of argument, which I explore in the next chapter, claims that the very *nature of well-being* makes it difficult for others to benefit adults paternalistically (3.1). I will focus on two versions of this type of argument. On one version, it is assumed that well-being consists in the participation in objectively valuable activities and relationships, but it is maintained that nothing can intrinsically benefit a person without his *endorsement* (3.2-3). The second version is more radical: denying that any activity or relationship is objectively valuable, it maintains that nothing is intrinsically good for someone unless he desires it (3.4). On both versions, the conclusion is the same: a person's well-being is ultimately *up to him*, in that his well-being

¹⁹ Philosophers disagree as to whether people commonly *aim* to promote their well-being. Scanlon (1998): ch. 3 and Raz (2004) think we seldom do, while Crisp (2006) takes the more traditional line that it is a common motive. Whether or not we aim to promote our own well-being, however, we do often aim to do things that have the consequence of actually promoting our well-being (even if that is not description of the consequence that features in our aim).

depends on what he endorses or on what he desires. Others typically cannot promote his well-being without engaging his endorsement or desires, which usually means that they cannot promote his well-being without his consent. And where there is consent, of course, there is no paternalistic interference (see 1.4).

2.5 The Epistemic Argument

We turn now to the first, and the most common, of the typical welfarist arguments for the Liberal Outlook. The claim is that, unlike children, adults can generally be assumed to be the best judges of where their own good lies. This is because adults have greater powers of reason and more experience of the world and of themselves than children do. This is another of the arguments that Mill marshals in *On Liberty*. As he puts it, “with respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by anyone else.” Attempts to improve another person’s well-being—a person “of ripe years”—by ignoring or overriding his will have the tendency to interfere “wrongly and in the wrong place” (OL: IV, ¶¶ 4, 12 / CW, XVIII: 277, 283). But because children lack both these powers of reason and this measure of knowledge, because they have not yet reached “the maturity of their faculties,” they are less competent to judge where their own best interests lie. Thus, children will be better off if we put final authority for the protection and advancement of their interests in the hands of parents and other adults (OL: I, ¶ 10; III, ¶ 3 / CW, XVIII: 224, 262).

The epistemic argument is probably on the strongest ground if you assume a subjective conception of well-being, for then there is nothing to a person’s good beyond her own disposition for enjoyment or her own desires, and the individual *does* seem to have special

epistemic access to these facts about herself. The argument is not without weight, however, on objective conceptions of well-being. At least this is so if we assume both value pluralism and individual diversity: that is, that there are many different valuable activities and that there are ways of life which suit different individuals depending on their own particular personalities, characters, and internal constitutions. In that case, the individual himself might well be presumed to be best placed to know which goods will and won't suit him.²⁰

The usual objection to the epistemic argument is that it would actually permit more paternalistic interference than liberals like Mill suppose.²¹ People can, after all, have false beliefs about themselves. And individuals can certainly have false beliefs about what will make them happy in the future or what they will desire in the future. There is nothing unusual in hearing someone say something like, "I thought wealth and fame would make me happy, but..." And it is even more obvious that people can be wrong about the means most conducive to their ends. I may have the correct belief that making a comfortable living will make me happy, but I may have very mistaken views about how to reach that goal. Perhaps I am invariably drawn in by get-rich-quick schemes and consistently fail to apply myself to a career. H.L.A. Hart (who accepted that a fair amount of "negative paternalism"²² is justifiable) complained that, "Mill carried his protests against paternalism to lengths that may now appear to us fantastic." Mill seems to assume that a person generally "knows what he wants and what gives him satisfaction

²⁰ As Mill puts it, "To give any fair play to the nature of each, it is essential that different persons should be allowed to lead different lives" (OL: III, ¶ 9 / CW, XVIII: 266).

²¹ It must be remembered, however, that a writer like Mill does not present the epistemic argument alone, but as one component of a whole battery of arguments. Criticisms of Mill often fail to take this fact into account.

²² That is, paternalism aimed at preventing non-moralistic harms, especially pain and suffering. The view is closely related to so-called "negative utilitarianism," which does not try to promote pleasure, but only to prevent pain. In the previous chapter, I defined negative paternalism as paternalism aimed at preventing non-moralistic harms (1.3).

or happiness” and that he “pursues these things when he can.” But this, Hart claimed, simply doesn’t correspond to the facts of human psychology as we now see them, and that there has been “a general decline in the belief that individuals know their own interests best” (1963: 32-33).²³ Indeed, much work in behavioral and economic psychology lends support to Hart’s skepticism.²⁴ Nor was Sidgwick so sure that the epistemic argument condemned paternalism toward adults. Reflecting on the restrictions placed on children’s freedom for their own good, he cautiously remarked that “it is, at least, not intuitively certain that the same argument does not apply to the majority of mankind in the present state of their intellectual progress” (1907: 275). The epistemic argument has also been charged with exaggerating how unique and inscrutable each of us really is. “As a matter of fact,” writes Richard Arneson, “it is sometimes the case that persons other than the agent are in a better position to judge the individual’s present as well as future interests.”

[It] is sometimes the case that the young adult’s psychiatrist, his parents, relatives, peer-group friends, even passing acquaintances and back-fence neighbors have more insight into his true interests in the matter than the young adult himself has. If it is a truism that people are very different from one another (and so often unable to judge one another’s interests), it is no less a truism that people are very much alike (and so sometimes able to make strikingly accurate judgments about what is best for another) (Arneson 1980: 486).

²³ Hart’s much quoted (but somewhat unfair) conclusion is: “Mill, in fact, endows [the normal human being] with too much of the psychology of a middle-aged man whose desires are relatively fixed, not liable to be artificially stimulated by external influences; who knows what he wants and what gives him satisfaction or happiness; and who pursues these things when he can” (1963: 33). I think Mill would respond by, first, conceding the individual’s fallibility with regard to his own good, but then emphasizing that the fallibility infects both sides. *As a rule*, he would insist, the individual is still in a *better* position to judge his own interests than others, and he certainly is more likely to have his own interests at heart. (This is why Mill offers the epistemic argument in conjunction with the argument from distrust—see 2.3.A). Just as Hart sees Mill as a naïve optimist about individual rationality, I believe Mill would have regarded Hart as naïve (at least in this passage) about human motives in the exercise of power.

²⁴ The literature on common forms of irrationality and biases is vast, but many seminal articles are collected in Kahneman, Slovic, and Tversky (1982); Kahneman and Tversky (2000); and Gilovich, Griffin, and Kahneman (2002).

In light of these objections, how strong ultimately *is* the epistemic argument for the Liberal Outlook? That is difficult to say in the abstract; it is obviously an empirical question, and I will not pretend to be able to settle the question definitively here. Certainly, one can see the *kind* of story that you would tell within a welfarist framework to justify the Liberal Outlook on epistemic grounds. But you can also see how you could tell a different story within the same framework to arrive at a conclusion incompatible with the Liberal Outlook. This may give the epistemic argument something of the look of a rationalization for a foregone conclusion.²⁵ It is enough for our purposes to observe that if our opposition to paternalism seems more secure and less contingent than this empirical argument, then that suggests that the epistemic argument is not the sole source of that opposition.

2.6 The Direct Contribution of Personal Autonomy to Well-Being

The epistemic argument assumes that some course of action is in a person's best interests, and then argues that the individual adult is in the best position to discern what that course of action actually is in his own case. The next argument I want to discuss posits an "adverbial" connection between freedom and well-being. It contends that the *manner* in which people live their lives is more important than the particular courses of action they pursue. That is, in general, people tend to flourish when they are *self*-determining, or autonomous. As Mill puts it, "If a person possesses any tolerable amount of common sense and experience, his own mode of laying

²⁵ This complaint is similar in spirit to Rawls's "publicity" argument against utilitarian principles of justice: "the vagueness of the idea of average (or total) well-being is troublesome. It is necessary to arrive at some estimate of utility functions for different representative persons and to set up an interpersonal correspondence between them, and so on. The problems of doing this are so great and the approximations are so rough that deeply conflicting opinions may seem equally plausible to different persons. Some may claim that the gains of one group outweigh the losses of another, while others may deny it. No one can say that underlying principles account for these differences or how they can be resolved. It is easier for those with stronger social positions to advance their interests unjustly without being shown to be clearly out of bounds" (TJ: 320-321/282).

out his existence is the best, not because it is the best in itself, but because it is his own mode” (OL: III, ¶ 14 / CW, XVIII: 270). Paternalism is generally objectionable, then, because it interferes with self-determination, which is a central component of well-being.

A) Conceptions of autonomy

It is easy to get turned-around here unless we are careful in disambiguating different senses of autonomy. Joel Feinberg alone lists fifteen senses of the word used in moral and political philosophy (1986: ch. 18). Our word “autonomy” derives from the Greek word for ruling or governing oneself with one’s own laws. It was originally a political notion: a city-state was autonomous if it ruled itself as opposed to being ruled from the outside. That initially political notion was then extended to the individual. In its most immediate sense, then, a person is autonomous when he *in some sense* rules or governs himself, as opposed to being ruled by something that is not his self. Different conceptions of autonomy arise in large part because we take different views on the relevant sense of “the self,” on what it means to *govern* oneself, and on what kinds of agents or things might impede that self-government.

It is tempting to say that autonomy, like the related concept of freedom, is best used in a contextual way. That is, just as we should say that Q is free *from* someone or something *to do* something, we should always say that Q is autonomous *vis-à-vis* someone or something. For instance, Jane is an autonomous woman because she is controlled by no man, or John is autonomous because he thinks for himself rather than uncritically accepting conventional wisdom. While there is something correct about that suggestion, autonomy (like freedom) is not just a descriptive word; it is also an evaluative one. To say that “x is free from y” is almost always to suggest that being without y is a good thing. We speak of being free from oppression, free from fear, free from want—we do not speak of being free from resources, free from security,

or free from any prospect of satisfying our needs (cf. Wood 1990: 40-41). Similarly, we tend to use the word “autonomy” not just to describe an agent’s independence from some foreign control, but further to say that this kind of independence is good, or that this is the kind of independence that really matters. That is why the disagreements about what autonomy *really is* are not wholly confused; people are disagreeing about what kind of autonomy actually matters.

Some conceptions of autonomy belong primarily to moral psychology and the philosophy of action. For instance, for Kant, we are autonomous when our actions are determined, not by our inclinations alone, but by a law that we have imposed on ourselves (G: 4:437-445). For Harry Frankfurt, we are autonomous when we act on those desires that we desire to have, that we identify with, rather than those desires that we do not wish to act upon (1988a). And for some philosophers, we are autonomous when we subject our values and beliefs to critical reflection (G. Dworkin 1988). These conceptions of autonomy are not necessarily irrelevant to the ethics of paternalism or social philosophy generally,²⁶ but they are not primarily conceptions of our autonomy vis-à-vis other persons.

I now want to distinguish between three common ways of thinking about autonomy in political philosophy. No doubt there are others, but these will suffice for our purposes. On one view, autonomy is conceived of primarily as an individual’s right of non-interference against others; it is a zone of *personal sovereignty*, as I shall sometimes call it. As Feinberg puts it, “Philosophers have long had an expression to label the realm of inviolable sanctuary most of us sense in our own beings. That term is *personal autonomy*” (1986: 27). As you would expect, it is this conception of autonomy that is central to what I have called the “sovereignty approach” to

²⁶ As we shall see in Chapter 4.

justifying the Liberal Outlook on Paternalism.²⁷ Mill also has some classic formulations of this idea (although he does not call it “autonomy”). One passage in this vein comes from the *Principles of Political Economy*:

[T]here is a circle around every individual human being, which no government ... ought to be permitted to overstep: there is a part of the life of every person who has come to years of discretion, within which the individuality of that person ought to reign uncontrolled either by any other individual or by the public collectively. That there is, or ought to be, some space in human existence thus entrenched around, and sacred from authoritative intrusion, no one who professes the smallest regard to human freedom or dignity will call in question: the point to be determined is, where the limit should be placed; how large a province of human life this reserved territory should include. I apprehend that it ought to include all that part which concerns only the life, whether inward or outward, of the individual, and does not affect the interests of others, or affects them only through the moral influence of example (V.xi.2 / CW, III: 938).

You might fairly ask what the difference is supposed to be between negative liberty and “autonomy” on this view. Part of the answer, it seems, is just that negative liberty is often taken to refer to particular “instances” of non-interference, while writers employ the label “autonomy” to evoke the notion of the protected personal sphere. Another part of the answer is that a person might autonomously assume certain restrictions on his liberty. For instance, a person who joins the military has less liberty than someone in civil life, but his autonomy has not been infringed.

This last idea of self-imposed restraints leads us to a second important conception of autonomy. Personal sovereignty is both a conception of freedom and of restraint, in that the perimeter of another person’s sovereignty constitutes a limit on my freedom. The classical liberal conception of personal sovereignty does not ask whether these limits are themselves self-imposed. The idea is that each person is free within his personal sphere. Rousseau, however, thought we were not truly free, unless we could view those restraints as created or endorsed by

²⁷ This is one aspect of what Rawls calls the “rational autonomy” of citizens, the liberty to pursue their own conceptions of the good within the limits of justice (1993: 74).

our own wills. Only then could we think of ourselves as truly free men and women, who obey no one but themselves. Only then would we be no less free in civil society than we would have been in a lawless state of nature, although we have now exchanged our natural liberty for *political autonomy*.²⁸ Rawls appeals to a similar idea under the label “full autonomy”: “full autonomy is realized by citizens when they act from principles of justice that specify terms of cooperation they would give to themselves when fairly represented as free and equal persons” (1993: 77). For philosophers like Rousseau and especially Rawls, political autonomy is not substituted for personal sovereignty, but underlies it. Each individual is personally sovereign within his own private sphere, and each is politically autonomous insofar as he wills (or can will) the political order that protects each individual’s personal sovereignty.

The last conception of autonomy I want to distinguish thinks of autonomy, not primarily as a zone of control, nor as a person’s relation to limits on his freedom, but as a characteristic or ideal of a person’s life. According to Joseph Raz, for example, “Autonomy is an ideal of self-creation” (1986: 370):

The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is a (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.... Autonomy is opposed to a life of coerced choices. It contrasts with a life of no choices, or of drifting through life without ever exercising one’s capacity to choose” (369, 371).

Developing the same line of thought, Steven Wall characterizes personal autonomy as

the ideal of people charting their own course through life, fashioning their character by self-consciously choosing projects and taking up commitments from a wide range of eligible alternatives, and making something out of their lives according to their own

²⁸ Cf. Rousseau, SC: I.6. Rousseau however does not use the word *autonomie*, but *liberté*. See also the discussion of Rousseau on autonomy in Neuhausser (2000): ch. 2. For an interpretation of Kant along similar lines, see Ripstein (2008).

understanding of what is valuable and worth doing. Those who realize this ideal take charge of their affairs. They discover, or at least try to discover, what they are cut out for and what will bring them fulfillment and satisfaction. They neither drift through life, aimlessly moving from one object of desire to another, nor adopt projects and pursuits wholesale from others. In short, autonomous people have a strong sense of their own identity and actively participate in the determination of their own lives (1998: 128).

These writers are insistent that, by autonomy, they do not mean (like Feinberg) “a region or domain in which each person has a moral claim to be free to govern him- or herself” (Wall 1998: 128). Autonomy, rather, is a characteristic of a person’s life (or of a period of a person’s life). Someone might fail to live autonomously, in spite of the fact that his private “zone of control” is fully intact. Living autonomously, on this view, is a matter of more-or-less and it may characterize some aspects of a person’s life and not others (e.g., I may see myself as having chosen my religious identity, but not ever having had a real choice about my occupation, or vice versa) (Raz 1986: 391; Wall 1998: 136-137, 183-189). The value of an autonomous life may *justify* recognizing rights to a certain zone of personal sovereignty, but it is not respecting those rights themselves that is ultimately of value. Rights of control or self-government are ultimately of instrumental value in that they help make autonomous living possible (Raz 1986: 407-412; Griffin 1986: ch. XI).

B) Self-creation and well-being

The argument that autonomy is a central element of well-being generally appeals to the third of these conceptions of autonomy: not autonomy as personal sovereignty or political autonomy, but autonomy as an ideal of self-creation.²⁹ But why should an autonomous life in this sense

²⁹ An argument which appeals to personal sovereignty (or perhaps political autonomy) as an intrinsic element of well-being would, once again, be a version of what I called the embedding approach, and therefore not a welfarist argument in my sense (see 2.1).

contribute to well-being? Why should it be that people's lives go better when people see their lives as having been their own creations in significant respects? There are several possible explanations. Perhaps self-creation is something that just about everyone would desire on reflection. Or it may have something to do with what Rawls called the "Aristotelian Principle": that "other things equal, human beings enjoy the exercise of their realized capacities (their innate or trained abilities), and this enjoyment increases the more the capacity is realized, or the greater its complexity" (TJ: 496/374). Mill strikes a similar chord in *On Liberty*:

He who chooses his plan for himself, employs all of his faculties. He must use observation to see, reasoning and judgement to foresee, activity to gather materials for decision, discrimination to decide, and when he has decided, firmness and self-control to hold to his deliberate decision. And these qualities he requires and exercises exactly in proportion as the part of this conduct which he determines according to his own judgment and feelings is a large one. It is possible that he might be guided in some good path, and kept out of harm's way, without any of these things. But what will be his comparative worth as a human being? It really is of importance, not only what men do, but also what manner of men they are that do it (OL: III, ¶ 4 / CW, XVIII: 262-263).

Surprisingly, however, Mill's explanation for the good of exercising our faculties is, at least at on the surface, less utilitarian than Rawls's. In this passage, Mill does not invoke the enjoyableness of exerting our practical capacities, but rather the apparently perfectionistic, objective good of our "comparative worth" as human beings. The suggestion seems to be that there is more dignity in, or something more admirable about, the *self*-directed life, than one directed externally. Or, alternatively, the claim may be that there is something intrinsically good about the *development* of human capacities that the autonomous life requires (cf. Hurka 1993: 148-158). Finally, to consider one last explanation of the contribution autonomy makes to well-being, Steven Wall argues that autonomy is connected to the meaning of life: By pursuing some projects instead of others, we fashion the shape of our lives, and thus, of ourselves as well. In doing so, we impart our own meaning to our lives—a kind of meaning recognizably absent in the life of someone

who had no control over the course of her life, or who never tried to exert any control over it (1998: 147-150).

These considerations regarding the direct contribution of autonomy to well-being suggest at least a general presumption against paternalistic interference with that autonomy. But why shouldn't the same presumption apply to children? One suggestion is that we only develop the capacity to be autonomous with "the maturity of our faculties," as Mill would put it. First, young children lack the basic capacities for self-determination; they have only limited powers to imagine, set, pursue, and remain loyal to ends of their own.³⁰ Furthermore, children *need* parental approval (and appropriate disapproval), and they tend to thrive under the rational authority and guidance of adults. As their rational and volitional faculties mature with age, however, this dynamic gradually changes, and the person begins to value doing more things on her own and for her own reasons.³¹

A second, more interesting argument points to the strongly holistic, "pattern-dependent" character of well-being. On this view, the "atomistic" conception of well-being (characteristic of classical utilitarianism) is misguided in thinking that a good life is just the aggregation, the mere "totting-up," of enjoyable moments. Our well-being depends in large part on the pursuit of valuable and meaningful goals and relationships, and the value and meaning of these goals and relationships depends in large measure on the way they fit into the larger pattern of our lives (Griffin 1986: 34-37; Raz 1986: 288-294; 2004: 276-281). J. David Velleman (2000) makes this point by emphasizing the importance of narrative in explaining how various episodes fit into our

³⁰ The importance of these powers for autonomy is emphasized in Raz (1986): 372-373, 407-408.

³¹ For this argument, see the psychology of "the morality of authority" presented in Rawls, TJ: §70 and Brighouse (2002): 41-42.

lives as whole. Generally, patterns of episodes that make for a better, more satisfying life-story are better for us. He has us imagine, for instance, the lives of two politicians that are virtually alike, except that Mr. A works for years in relative obscurity before coming to power, while Mr. B enjoys meteoric political success early in life, followed by a life in the political wilderness. Mr. A and Mr. B (let us assume) enjoy the same amount of political success and the same amount of toil out of the political limelight. In spite of this apparent symmetry, it is natural to think that Mr. A's life is better than Mr. B's, precisely because the pattern of his life makes for a better story—that is, it is the kind of story we would want to live for ourselves. (Tragedies make good stories for an audience, but are not likely to be stories we want to live through ourselves—though it is perfectly intelligible that a person would prefer a tragic life to an unremarkable one). Likely, our judgment that Mr. A's life is better than Mr. B's rests on the idea that Mr. A's toils were redeemed by his later success, while Mr. B's were not. That redemption imparts meaning to Mr. A's toils that seems to be lacking in Mr. B's. Of course, it is possible that we should prefer the pattern of Mr. B's life to Mr. A's, but again that will likely be because we see something attractive in his life-story—perhaps the rare glory of success in youth and the elegiac cast of a long denouement.

Velleman's point, therefore, is similar to, though more general than, Rawls's remarks in *A Theory of Justice* that it is generally rational to avoid “substantial swings up and down” in life and that “for the most part rising expectations over time are to be preferred” (TJ: 420-421/369). On the narrative theory of well-being, Rawls's remarks are best understood as claims within the “poetics of well-being.” That is, just as Aristotle's *Poetics* explains to us how tragic effect is a function of plot structure which cannot be understood except when we observe how the different parts relate to one another as a whole, we may take Rawls to be explaining the kind of pattern of

life that tends to lead to happiness. It may well be that Rawls's tastes are too conservative for some. Velleman helps make clear that insofar as we do disagree with Rawls, the appropriate mode of reasoning in this quarter is not decision theory (in which we are trying to maximize discrete moments of utility), but something like poetics or aesthetics. Additionally, the narrative theory of well-being can help explain what is right about Rawls's much controverted claim that a good life is one lived according to a plan and one "with a certain unity, a dominant theme" (TJ: 420/369).³² The essential unity is not so much a carefully regimented plan, but a (perhaps loose, sometimes changing) narrative that makes sense of the major events of our lives by putting them into a certain relation to one another, as well as into relation with the future we anticipate.³³

What, then, does this holistic conception of well-being have to do with the relative importance of autonomy for adults and children? This point has not been much explored by previous writers, but it is interesting to draw out the implications. It is quite plausible that the freedom to pursue one's goals and projects makes a greater contribution to well-being in the middle of a life than it does at its beginning. After all, no one has full control over the beginning of his life. So when we speak of autonomy as an ideal of self-creation, we obviously do not mean that one ideally fashions the shape of one's life from birth. We mean, rather, that at a certain point, one was able to take over the reins of one's life and take a hand in directing its course from there, once it is already underway. In this way, the period of restricted freedom in childhood can simply be understood (in narrative fashion) as a prelude or a preparatory stage of

³² For criticisms of Rawls's idea of a life plan, see for instance, Slote (1983): chs. 1-2; Mackie (1984); Raz (1986): 370; Larmore (1999). For a more sympathetic take on Rawls's idea, see Waldron (1993): 161.

³³ We find a similar theme in MacIntyre (1984): ch. 15.

the life of mature activity to come.³⁴ In this sense, the limited freedom of childhood and youth is potentially redeemed by the more expansive freedom of adulthood, whereas similar restrictions of our autonomy in middle age would not be so redeemed.³⁵

C) The compatibility objection

This argument—that autonomy makes a direct contribution to our well-being, but that it matters more in our mature years than it does in youth—seems to me the best single welfarist argument for the Liberal Outlook. The chief objection to it is that the exercise of self-determination is not strictly incompatible with paternalistic restraints. Paternalism and self-determination only seem incompatible if we imagine those restraints dictating precisely what ends someone is to pursue, leaving the person few live options. But paternalism may also simply erect hedges to protect people from certain known pitfalls and yet still leave each person a large field of options from which to choose. Self-determination always proceeds from a range of options, and that range will always have externally opposed limits. The application of Mill's harm principle or Kant's principle of equal freedom themselves reduce the range of options available, but we assume that self-determination is still possible within that range. Why should further marginal reduction in the range of available options make the activity of self-determination suddenly impossible, so long as a person is left an adequate range of choice-worthy options—especially if the options eliminated are less choice-worthy than those that remain or if they undermine future opportunities for self-determination. In these cases,

³⁴ Cf. the somewhat tentative remarks from Joseph Raz, although he is not speaking here about autonomy: “Possibly different stages in people’s life contribute differently to their well-being. A traditional view distinguishes between a preparatory stage in childhood and early youth, a stage of mature activity, and a stage of relative retirement. Possibly people’s years of mature activity count more (minute for minute, as it were) towards their well-being than the early or later stages” (2004: 277).

³⁵ I shall come back to this theme in Chapter 5.

paternalistic restraints seem to enhance, not undermine, the value of self-determination.³⁶ This seems all the more true if, as Raz argues, autonomy has no value when it is exercised in pursuit of the bad.³⁷ Call this line of thought the *compatibility objection*. I shall now consider two responses to the compatibility objection, but I don't think either of them can be wholly successful without leaving behind the spirit of the welfarist approach.

The *first* response is to concede that the present argument cannot easily establish Mill's hard-line, *laissez-faire* anti-paternalism, but then to insist that taking that hard line is not essential to the Liberal Outlook. After all, many liberals are willing to accept a fair amount of "negative paternalism" (which involves the prevention of non-moralistic harms and suffering—see 1.5). The importance of autonomy, thus, gives us an argument for a moderate, but not an extreme, liberal position on paternalism. Call this the *concessive response*.

But the compatibility objection cuts deeper than the concessive response allows. Valuing the exercise of self-determination is also consistent with a moderate form of legal conservatism. Many conservatives would *not* subscribe to what Mill lampoons as the "Calvinist Theory of Life": the theory holding that "All the good of which humanity is capable is comprised in obedience" and that "Human nature being radically corrupt... crushing out any of the human faculties, capacities, and susceptibilities, is no evil" (OL: III, ¶ 7 / CW, XVIII: 265). Morally

³⁶ Cf. the argument in Husak (1981): 35-38 and the concession in Hurka (1993): 152-156.

³⁷ "Autonomy is valuable only if exercised in pursuit of the good. The ideal of autonomy requires only the availability of morally acceptable options" (Raz 1986: 381). Robert George (1993: ch. 6), who follows Raz in this regard, thinks this plank clears the way for the permissibility of coercive moral paternalism, at least once we reject Raz's own arguments against coercive paternalism. I don't want to insist on this idea, however, because I am not convinced that Raz is correct in this respect. In fact, I find it more plausible that autonomy has *some value* even when it is exercised in pursuit of the bad or worthless. Do we not sometimes admire the bold, autonomous wrongdoer (e.g., Machiavelli's portrait of Cesare Borgia in *The Prince*) more than someone who committed similar crimes simply because he lacked the wherewithal to act except as ordered (e.g., Arendt's depiction of Eichmann in *The Banality of Evil*)?

conservative natural law theorists like Robert George and John Finnis, for instance, think that a life cannot be flourishing without “a measure of effective freedom,” which is necessary for realizing the basic good of being able “to bring one’s own intelligence to bear effectively ... on the problems of choosing one’s actions and lifestyle and shaping one’s own character” (Finnis 1980: 198). But this is consistent, on their view, with trying to maintain, promote, and even coercively enforce perfectionist ethical standards. According to George, “a sound perfectionism recognizes both that human flourishing is advanced by having a broad array of morally valuable choices and that a diversity of evil choices contributes nothing of practical value to human beings” (1993: 191). Thus, while a conservative of this stripe values the exercise of autonomy, he also rejects “the liberal idea that there are strict moral norms ... that exclude in principle moral paternalism and the use of coercion to prevent moral harm” (167). To be clear, I am not commending Finnis and George’s conservatism; I am only claiming that their view seems consistent with a recognition of the importance of autonomy for well-being. If that is correct, then we cannot defend the Liberal Outlook solely by appealing to the value of autonomy.³⁸

The *second* response to the compatibility objection is that it ignores how much people tend to chafe under restraints that are put in place for their own good. This tends to make paternalistic restraints more harmful than beneficial. When my liberty is limited to ensure others a like freedom, I recognize this limitation as a necessary consequence of giving equal regard to all. But when I am protected against myself against my own will, I resent it: I feel like I am being

³⁸ Of course, Finnis and George’s conservatism only follows if their substantive value theory really is sound. A liberal might respond by arguing that the things that Finnis and George think are valueless (like homosexuality) really have value. The trouble with this strategy—at least in political philosophy—is that it would seem that a liberal society’s best hope is to aim at some kind of agreement or consensus about higher-order values (like the importance of autonomy or mutual respect) rather than about particular aspects of the good life. Thus, even a writer like Raz, who claims to be a liberal “perfectionist,” has much more to say about the basic value of autonomy than about particular aspects of the good life.

disrespected or shown contempt, and these feelings may in turn damage my sense of self-worth (Raz 1986: 378, 410-411; Wall 1998: 133-135). As a rule, the unhappiness that these subjective sentiments cause to people outweighs any benefits that might follow from paternalistic interference in personal liberty. Call this the *resentment response*.

There are three reasons why I think the resentment response fails to counter the compatibility objection. First, it is quite possible that this resentment depends on the moral rules to which people are accustomed.³⁹ In that case, that paternalism is objectionable in our society at all is simply a matter of convention,⁴⁰ and perhaps a convention we should try to change.

Second, the resentment response at most explains why coercion is objectionable, but not what is wrong with subtler forms of manipulation that the subject does not detect, since these would not cause any harmful subjective experiences. Raz and Wall nonetheless object to such forms of manipulation because, as Raz puts it, this subjects a person to the will of another and “violates his independence and is inconsistent with his autonomy” (378). Call this the “independence criterion.” The independence criterion makes sense if we are talking about manipulation that wholly deprives a person of the capacity to shape his own life. But what if the manipulation is more peripheral in character? Or what if it simply dissuades the person from making certain choices, but leaves him free to choose amongst other options? In this case,

³⁹ A case in point: Presently, according to a recent article in the *New York Times*, “Every Saudi woman, regardless of age or status, must have a male relative who acts as her guardian and has responsibility for and authority over her in a host of legal and personal matters.” Recently, some Saudi women have campaigned for the right to move, act, and make decisions without the permission of a guardian. One woman interviewed described Saudi women as “demanding to be treated as adults.” But this has provoked a backlash amongst some conservative Saudi women. Rowdha Yousef started her own campaign, “My Guardian Knows What’s Best for Me,” which has collected more than 5,400 signatures to a petition “‘rejecting the ignorant requests of those inciting liberty’ and demanding ‘punishments for those who call for equality between men and women...’” According Ms. Yousef, “The image in the West is that we are dominated by men, but they always forget the aspect of love.” Katherine Zoepf, “Talk of Women’s Rights Divides Saudi Arabia,” *The New York Times*, May 31, 2010.

⁴⁰ Though Raz and Wall may well be willing to accept that conclusion.

manipulation doesn't seem wholly incompatible with a person's autonomy—at least, if that is understood as a person being the “(part) author of his own life” (Raz 1986: 369). Again, the independence criterion would make sense if we were thinking about autonomy as a kind of right of personal sovereignty, but (as we have seen) that is not the conception of self-determination that is best understood as making a direct contribution to our well-being (as Raz and Wall rightly observe). If we object to manipulation on the basis of the independence criterion, therefore, we seem to be verging away from the spirit of the welfarist approach and toward the embedding approach, which makes personal sovereignty an ideal component of well-being (see 2.1).

Third, and most importantly, the resentment response simply gets things backwards. If a person *resents* being treated paternalistically, if she is *indignant* about being subjected to the will of another, then it must be because she recognizes some independent norm according which forbids paternalistic meddling. Resentment, unlike mere dislike, is a moral attitude. Like guilt, it assumes the recognition that a moral norm has been violated (Rawls, TJ: §74). It would be more to the point, then, to investigate that norm directly, rather than focusing on the unhappiness that its transgression evokes. If the norm is sound, then we should object to paternalism on the basis of that norm. If it is not sound, then we should try to discourage people from endorsing it.

CHAPTER 3: PATERNALISM AND INTERNALISM ABOUT WELL-BEING

3.1 Arguments from the Nature of Well-Being

We are trying to understand the rationale behind the Liberal Outlook on paternalism: that there should be a strong presumption in practice against paternalism toward adults, but no strong practical presumption against paternalism toward children. In the last chapter, we began exploring arguments for the Liberal Outlook that appeal to the subject's well-being. On the typical welfarist approach, paternalism is objectionable insofar as the paternalist fails to accomplish his formal aim¹ of promoting the subject's good (or will tend to do so as a rule). That we often fail to achieve our formal aims is, of course, a general feature of human action. What we are looking for, then, are arguments that explain why, when dealing with adults, there should be an asymmetry between P's attempts to paternalistically promote Q's well-being and Q's own attempts to do the same (see 2.4).

In this chapter, I consider two kinds of argument which claim that the very *nature of well-being* makes it difficult for others to benefit adults paternalistically. These arguments depend on what we may call "internalist" features of well-being. Let us say that that an account of well-being can be more "internalist" or more "externalist," where an account is more internalist to the extent that what is good for Q depends on one or more of Q's attitudes regarding what is good,

¹ The paternalist's *formal aim* is to promote the subject's well-being or good. His *substantive aim* is a thicker description of the sense in which the subject's well-being or good is to be promoted (see 2.1).

while an account is more externalist to the extent that what is good for Q is independent of Q's attitudes regarding what is good. For our purposes, there are three important kinds of attitudes: enjoying, desiring, and endorsing. (Each of these attitudes should be understood to include its negative correlate as well.) What is meant by enjoying and desiring is clear enough. What it means to endorse something is best understood by contrasting it to desire and enjoyment. St. Augustine found in himself libidinal desires, but (after early adulthood) he did not endorse, or approve, these desires and did not want to satisfy them. When Augustine gave in to his libidinal desires, he may have enjoyed doing so, and yet he disapproved of the enjoyment—perhaps even loathing himself for enjoying what he believed to be base. To endorse something is, therefore, more closely connected to the will than is desire or enjoyment. We can desire and enjoy something in spite of ourselves, but we cannot endorse something in spite of ourselves.

At the extremely internalist end of the spectrum of conceptions of well-being are views that identify Q's well-being with one or more of Q's actual attitudes: with what Q enjoys, desires, or endorses. At the extremely externalist end of the spectrum are views that maintain that Q's well-being is wholly independent of Q's attitudes, actual or idealized. In the middle of the spectrum are views that identify Q's well-being with Q's more-or-less idealized attitudes (e.g., what Q *would* enjoy, desire, or endorse in ideal circumstances) and views that identify Q's well-being with objective values which Q actually endorses.

A wholly externalist view of well-being seems implausible. A person's well-being, as we've said, is what is *good for her*. But for something to be *good for Q*, it seems like the good has to link up with Q's attitudes, or with Q's "subjectivity," in some way or other, at some level. This is not, however, a conceptual truth. There is no contradiction involved in denying that Q's good has anything to do with Q's attitudes. But it is nonetheless hard to swallow. If that is right, then

on any plausible account of well-being, there will be some “attitudinal asymmetry” between the subject and other agents—that is, Q’s well-being depends in a unique way on Q’s attitudes (and not on those of others). But there is also some pressure pushing in the externalist direction, since we do not think that a person’s well-being is always and entirely *up to him*. This is part of what explains why people can make mistakes about what is good for them. And this, of course, is especially clear in the case of children.

Typically, the more internalist the account of well-being, the harder it will be for P to promote Q’s well-being paternalistically. But to what extent does this generalization provide the basis for an argument for the Liberal Outlook on Paternalism? This will depend on the particular theory of well-being. I discuss in detail two different arguments below. The one to which I devote the most space is the subtle idea that, though well-being depends on participation in objectively valuable activities and relationships, nothing can benefit us unless we endorse it (3.2-3). Then, more briefly, I discuss the suggestion that the Liberal Outlook be defended simply in virtue of the logic of a desire-fulfillment account of well-being (3.4). I do not devote a separate discussion to hedonistic accounts of well-being, but I say something about them at the end of the section on desire-satisfaction theories.

3.2 Objective Value and Endorsement

A) The endorsement thesis

Objective accounts of well-being hold that what is good for someone is at least partly independent of what he enjoys, desires, or values (see 2.2). Since such accounts tend toward externalism about well-being, they would seem to offer the broadest prospects for paternalism.

Many objective accounts however also have an important subjective element. One way this could be the case is if enjoyment or desire-satisfaction were simply one part of our well-being, set alongside that part of our well-being that depends on our participating in whatever is of objective value. But it is also possible that our subjective attitudes are partly constitutive of our capacity to benefit from whatever is of objective value. Ronald Dworkin is one philosopher who has defended this constitutive view of the role of subjective attitudes in objective well-being.² On his view, “no component [of the good life] contributes to the value of a life without endorsement” (2000: 217).³ Let us call this the *endorsement thesis*:

No objectively valuable component of a good life can contribute to the value of Q’s life without being endorsed by Q.

The endorsement thesis gives an objective account of well-being an essential internalist aspect, and Dworkin claims that this view of what makes lives go well is the basis of an important argument for (what I call) the Liberal Outlook on paternalism.⁴ Dworkin thinks that the liberal can accept what he calls “volitional paternalism,” which is paternalism that “help[s] people achieve what they already want to achieve.”⁵ For instance, the “state makes people wear

² The view is also explicitly defended by Will Kymlicka (1989; 1990) and (in perhaps a more modest version) by Joseph Raz (1986): 289-294; 1994.

³ The argument originally appeared in Dworkin (1990), which is reprinted in a shortened version as Chapter 6 in Dworkin (2000). I cite the Dworkin (2000) version here.

⁴ Actually, Dworkin says that critical paternalism is inconsistent with what he calls “the challenge model” of the good life, of which the endorsement thesis is one part. The challenge model maintains that the good life, like an athletic performance, consists in performing well in the face of the right challenge, where the right challenge is defined by certain parameters, including principles of justice (2000: 250-254). Because the challenge model requires a conception of justice to fill out the idea of what is a good life for someone, it is really an example of the embedding approach, and so is not a pure version of the welfarist approach. Here, I discuss only the part of Dworkin’s view that deals with the endorsement thesis, since that part *is* consistent with a purely welfarist argument, and since it is a more broadly shared idea than Dworkin’s broader challenge model of the good life (see the references in fn. 2).

⁵ Dworkin leaves at least three crucial issues regarding volitional paternalism unclear. **First**, it is unclear whether it is his position that P has sufficient reason to coerce Q to ϕ if Q already wants to ϕ , or whether it is also necessary that Q wants P (and perhaps has asked P, or would do so if he could) to use coercion to help him achieve his goal of ϕ -ing. Those are two very different things. Many people want (for example) to quit a bad habit, but they don’t

seatbelts in order to keep them from harm that it assumes they already think bad enough to justify such constraints, even if they would not actually fasten their seatbelts if not forced to do so” (2000: 217, 268).⁶ But he maintains that the endorsement thesis is incompatible with most “critical paternalism,” which is to say, paternalism aimed at promoting what is objectively good for the subject regardless of whether or not the subject endorses it as good. This is because the endorsement thesis “rejects the root assumption of critical paternalism: that a person’s life can be improved by forcing him into some act or abstinence he thinks valueless” (269). Dworkin gives a few examples to motivate this idea. One is the activity of religious devotion: even if religious devotion is an essential part of a good life, mere outward observance cannot have any ethical value if it is not endorsed by the practitioner from the inside (269). Another involves personal relationships: “If a misanthrope is much loved but disdains the love as worthless, his life is not much more valuable for the affection of others” (217). (The “much” in that last clause is a bit of a hedge, but let that pass).

As I read it, Dworkin’s argument is strategically “open-textured” in an important respect. Although he claims that some things are of objective value, he does not try to defend liberalism by arguing for and against the value of particular pursuits and relationships. Rather insofar as we agree about the centrality of subjective endorsement to well-being, it would seem that we don’t

necessarily want others to force them to do so. **Second**, it is unclear whether it is a further necessary condition that what Q already wants is objectively valuable—or at least not objectively bad for Q. (Presumably it is.) **Third**, it is unclear just *what* the subject has to “already want” in order to justify paternalism. Is it necessary that Q already wants to do the very thing that P paternalistically requires him to do, or is it enough that Q values some end which P’s paternalism promotes. For instance, is paternalistic seatbelt legislation justified only if motorists generally want to wear seatbelts but find themselves irrationally not doing so, or is it sufficient that motorists value health and long-life, which are ends that wearing a seatbelt happens to promote. Ultimately, I don’t think Dworkin really has a worked-out theory of volitional paternalism. He is best read as giving us an argument against critical paternalism however we ultimately resolve these questions regarding volitional paternalism.

⁶ Dworkin focuses for the most part on *legal* paternalism, though the logic of his argument should apply quite generally.

have to come to public agreement about those particular values, since trying to impose those values paternalistically would be ineffective or counterproductive. In fact, although Dworkin does not do so, he might have made his argument even more ecumenical by couching the endorsement argument conditionally: *If there are such things as objectively valuable relationships and pursuits*, then it is nonetheless true that nothing can improve a person's life unless he endorses it. This would have made the argument neutral between subjective and objective accounts of well-being. This is the spirit in which I shall examine the endorsement thesis. You may think that a strongly objective account of well-being is implausible. But certainly some people believe that well-being has this pronounced externalist dimension. Therefore, it is at least of interest to know what arguments may be made to such people in favor of the Liberal Outlook.

One disclaimer: You might understandably be impatient in what follows with the seeming assumption on the part of the critical paternalist that he has some kind of personal access to true ethical standards that others apparently lack or willfully ignore. I believe the reason the debate has this character may be explained as follows. Liberal philosophers have been sensitive in recent years to the suggestion that their political philosophy depends on some form of skepticism about religion or the good life. There are at least three sources of this sensitivity. First, many liberal philosophers want to devise arguments that can be reasonably accepted by as many people as possible, including those who *do* claim to be certain about religious matters or as to what constitutes the good life. Thus, it has seemed desirable to construct arguments for liberal positions that do not depend on a skepticism about personal life, which many people do not entertain. Second, some philosophers—notably Dworkin—have been sensitive to the charge made from many quarters that liberalism only appeals to “people who do not know how to live”

(Dworkin 2000: 237). Therefore, philosophers like Dworkin have sought to show how liberal justice is actually a part of living well (cf. also Dworkin 2011). Third, many philosophers have wanted to distance themselves from any kind of evaluative skepticism. Virtually every philosopher wants to reject the popular but fallacious idea that *global* evaluative skepticism is a reason for embracing live-and-let-live mores (cf. Waldron 1993: 157-158). Some philosophers *have* argued that standards of the right are inherently more knowable than standards of the good life—that somehow reasonable people can agree about what is just, but may differ on what is good. This then is offered as an explanation as to why coercion is appropriate to enforce principles of justice, but not the standards of the good life.⁷ But establishing this epistemic asymmetry is not easy to do. Therefore, it has seemed that the only alternative to skepticism is to accept that individuals can have access to true standards of the good life.

This may, in fact, be a false dichotomy. Instead of skepticism about the good, on the one hand, and individual self-certainty, on the other, perhaps we ought to explore the idea that access to objectively valid ethical standards can only be attained only by way of thinking together with other moral subjects. That is, instead of relying solely on my own intuitions in reasoning about the good, I ought to give equal, or at least considerable, regard to the consciences of other subjects. This is an idea we find in Hegel, Dewey, and more recently, in Habermas. This third way seems to have made relatively little theoretical headway in contemporary Anglo-American

⁷ There is a wide literature on this topic. The clearest statement of the asymmetrically skeptical view is Barry (1995): ch. 7. See also Rawls (1993): esp. ch. 2; Nagel (1987); and Larmore (1987): ch. 3

political philosophy, but it is worthy of further exploration.⁸ I do not, however, attempt that exploration here.

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Now, to what extent does the endorsement thesis really justify the Liberal Outlook on paternalism? The first thing to do in evaluating the argument is to get a clearer view as to why subjective endorsement should be so important to well-being. Here it is useful to return to the paradigmatic example of religious devotion, since this makes evident how similar the endorsement argument is to one of Locke's arguments for religious toleration. In the *Letter Concerning Toleration*, Locke argued that people *should not* be compelled to embrace any religion, because such compulsion *could not* possibly achieve its object:

For no man can, if he would, conform his faith to the dictates of another. All the life and power of true religion consists in the inward and full persuasion of the mind; and faith is not faith without believing. Whatever profession we make, to whatever outward worship we conform, if we are not fully satisfied in our own mind that the one is true, and the other well pleasing unto God, such profession and such practice, far from being any furtherance, are indeed great obstacles to our salvation (Locke 1823, VI: 10-11).

Religious observance, Locke argues, only has value for the individual if he is inwardly persuaded of its truth. And since inward persuasion cannot be produced by external force, any attempt to use force to convert people will fail to accomplish its aim. Dworkin's argument is that virtually all valuable activities and relationships are like this. They benefit you only if you perform them in the right spirit—in particular, only if you are inwardly convinced of the value of what you are doing. Just as worship in the true religion is only valuable if it flows from inward faith, so too participation in objectively valuable activities and relationships only benefits a person if it flows

⁸ For some forays into this subject in the company of Hegel and Rousseau, see Neuhauser (2000): 248-255 and (2008): 201-217.

from his own convictions as to their value. You cannot force someone to benefit from great art, or from valuable relationships, or from play and relaxation, if the person simply fails to see the purpose of any of these things.

Notably, Kant made a rather similar argument in the *Doctrine of Virtue*. He argued that ethical virtue, as opposed to the rules of right, cannot be externally imposed, since our ethical duties consist in acting for the right end, and “I can never be constrained by others *to have an end*; only I myself can *make* something my end” (MM: 6:381). In particular, we cannot be externally impelled to perform our central duty to ourselves as rational beings: to perfect ourselves. This, as Kant explains, is because “the *perfection* of another human being, as a person, consists just in this: that he *himself* is able to set his end in accordance with his own concepts of duty; and it is self-contradictory to require that I do (or make it my duty to do) something that only the other himself can do” (6:386).⁹

In explaining why subjective endorsement has any importance at all, the reasoning above is convincing as far as it goes. There certainly are many things that seem to be generally valuable but which cannot benefit a person absent the right subjective relation between a person and his activities. For that matter, we may go further still. In many cases, you cannot really even engage in an activity at all without performing it in the right spirit. For instance, it is not just that you cannot benefit from friendship without endorsing it; you cannot even have a real friendship without some internal “endorsement” of its value. But thinking about why subjective endorsement is important also suggests two ways that the endorsement argument against critical

⁹ There is this difference, however: Kant’s argument is not as open-textured as Dworkin’s; more of Kant’s own substantive theory of the good seems to be assumed in his argument. Also it is worth remembering that, even if this argument from the nature of a person’s good were less telling than Kant assumes, he could still appeal to his primary argument concerning our innate right to be our own masters to oppose most forms of paternalism.

paternalism is vulnerable to criticism, which I will take up in turn. First, even if the endorsement thesis were true, paternalism might *produce* the requisite endorsement subsequently (3.2.B). Second, and more fundamentally, the range of cases in which subjective endorsement is crucial to well-being may be narrower than it first appears (3.3).

B) Paternalism and subsequent endorsement

Suppose we accept the endorsement thesis: No activity or relationship can contribute to the value of a particular person's life without that person's endorsement. At first, it might seem as if this means that it will always be counterproductive to force people to do things that they do not *already* endorse for their own good. But what if they came to *subsequently* endorse the activity after having been exposed to it paternalistically? It is especially easy to think of examples of this from childhood. Parents and educators often require children to participate in activities that they do not already endorse, with the aim that the children will come to recognize and endorse the value of the activity with time and experience. I shall discuss this complex issue under two headings. First, I examine the idea of subsequent endorsement itself; then I turn to the argument that some ways of bringing about subsequent endorsement in fact undermine the validity or genuineness of that endorsement.

Subsequent endorsement: It is important to recognize that endorsement is not the same as consent. There are several things you may not do, morally speaking, without another's consent. In ordinary circumstances, if Q's consent is necessary to legitimate P's action, then that consent must precede P's act.¹⁰ It is not acceptable for P to go ahead and act without Q's consent simply because, with time and experience, Q will come to consent to this kind of thing or even to this

¹⁰ I also discuss subsequent consent below at 7.5.B.

very act. (This is assuming, of course, that Q is competent to give consent at the time.) Suppose there is a sulky adolescent who does not particularly like going on camping trips with his father. Before the next trip, the adolescent says, "Dad, I don't consent to being brought along on the next trip. Therefore, if you force me to go, you will have wronged me." Assuming that his father thinks that his son is competent to give and withhold consent to this kind of thing, he would be confused if he responded, "I know you don't consent *now*, but that's okay because you will someday." If the adolescent's consent matters, and if he is competent to give or withhold it, then all that matters is whether he consents now; what happens later is irrelevant.

But endorsement's contribution to well-being is not like consent's contribution to permissibility. Suppose the adolescent says, "I do not endorse these trips, Dad, so they cannot possibly benefit me." It would not be confused if his father now responded, "I know you don't endorse them *now*, but that's okay because one day you will." There are two ways that the father's response might be apropos. First, in virtue of participating in these camping trips which he does not presently endorse, the adolescent may come to recognize the value of such trips when he is older. In that case, the earlier unendorsed trips contribute to the boy's well-being indirectly by preparing him to appreciate later the value of similar camping trips. The second, more interesting possibility is that the earlier camping trips, unendorsed at the time, will be endorsed later and will therefore retrospectively make a direct contribution to the son's well-being. One way this could be true is that, years later, the son is able to see things in those experiences that he could not see at the time. For instance, at the time, the adolescent may have valued spending weekends watching television or playing computer games more than spending time with his father. Years later, however, (perhaps after the father has passed away) the son prizes those weekend camping trips that he had spent with his father, in spite of his sulkiness at

the time, and he is glad that he had not been permitted to fritter away his time at home merely entertaining himself.¹¹

Dworkin is not unaware of the possibility of subsequent endorsement. Thus, he concedes that the endorsement thesis does not literally rule out *all* critical paternalism, since

the defect ... in paternalism can be cured by endorsement, provided that the paternalism is sufficiently short-term and limited so that it does [not]¹² significantly constrict choice if the endorsement never comes. We know that a child who is forced to practice music is very likely later to endorse the coercion¹³ by agreeing that it did, in fact, make his life better; if he did not, he has lost little ground in a life that makes no use of his training (2000: 269).

What is surprising is that Dworkin does not realize that, in principle, this opens up a considerable gap in his argument against “critical paternalism.” Do we really accept that adults may be forced, like children, to participate in intrinsically valuable activities with the hope that they will come to endorse these on their own after a short while? Are the only moral constraints on

¹¹ This is similar to the idea about the relation between narrative and well-being defended in Velleman (2000) which I discussed in 2.6.

¹² The insertion of “not” seems necessary to capture the sense of Dworkin’s point.

¹³ Let me register one quibble here: Dworkin says that the child may later come to *endorse the coercion* employed to get him to practice piano. But whether the child ever comes to endorse the coercion seems beside the point given Dworkin’s argument. That might be what matters on a consent-based theory of paternalism. But what should matter on Dworkin’s welfarist argument is whether the child comes to *endorse playing the piano* when he is older. Although I admit it is likely that a person who later came to endorse playing the piano would also endorse having been forced to practice it, the latter is not necessary. As an adult, the individual may come to endorse the value of playing piano, and yet still believe that his parents were wrong to force him to practice, when that is not what he cared about at the time.

Consider this analogy: One day my house is burglarized and my television is stolen. At first, I am devastated, because there is nothing I enjoy more than watching television. But then after a couple of weeks not having a television, I discover how much more time I have to engage in more valuable and rewarding activities. A year later, I say that having lost my television was one of the best things that ever happened to me. But that doesn’t mean that I subsequently condone or endorse the burglary. I can still regard that act as unwarranted. I would not say: “Actually, the burglar was right to steal my television, because that ended up making me happier in the long-run.”

Would it change my attitude if I found out that this was a paternalistic burglar whose sole motive was to promote my long-term well-being? That might mitigate my judgment, but I wouldn’t be compelled to endorse the theft just because I ended up endorsing the consequences. I may seem to be fussing excessively over a minor careless slip on Dworkin’s part, but if I am right, this is a part of Dworkin’s general tendency to make the endorsement argument look stronger than it is by conflating endorsement with the different idea of consent.

paternalism that the coercion not last *too long* and not be *too disruptive* to the rest of the person's life?

This point is not lost on Robert George, a critic of philosophical liberalism and a proponent of moral paternalism. He observes that "Dworkin's basic concept of (subsequently) 'endorsed consent' would seem to have considerable potential as a warrant for a variety of paternalistic laws rooted in a judgment that the proscribed activity is morally wrong" (1993: 107). Indeed, it is worth noting just what kind of constraints Dworkin is proposing. He is saying that, while future endorsement is necessary for something to *contribute* to the subject's well-being, future endorsement is not necessary to *justify* the paternalistic intervention: what matters is that if the endorsement never comes, the intervention was not too long or too disruptive. Is it necessary that (as the passage suggests) the paternalist has good reason to believe that the subject will one day endorse the intervention? It is not clear why there should even be that requirement. Why shouldn't a paternalist force the subject to participate in some activity (as long as the intervention were neither too long nor too disruptive), knowing full well that the prospects for future endorsement are small, so long as the potential good that *could* come with endorsement would be very great? And by the same token, if the likelihood of future endorsement were extremely high, and the potential contribution to well-being were great, then why shouldn't that justify paternalistic interference of comparably longer duration and greater disruptiveness (cf. George 1993: 108). Please note that *I* do not say that such paternalism would really be a good idea all things considered. I am simply pointing out that it isn't the endorsement thesis that rules it out. The endorsement thesis, by itself, would permit far more paternalism than liberals are typically comfortable with.

Perhaps it will be insisted that there are important differences in the psychology of children and adults which explain why the strategy of seeking subsequent endorsement is more likely to work in the former case than in the latter. We find Thomas Hurka arguing along just these lines:

Habituation often works with children and is therefore desirable for them. Our schools force children to experience music, literature, and athletics in the often justified hope that they will later come to choose these pursuits for themselves. The same tactic is less effective with adults, who usually have fixed values and interests and are therefore harder to lead to new ones. What is more, they tend to resent directives about their private lives and to obey them at best grudgingly: Their attitude at the start of habituation is precisely not ripe for developing intrinsic choosing (1993: 155).

There are two points to be extracted from Hurka's remarks. First, he suggests that, because the values and interests of adults are *more fixed*, they are harder to change by habituation than the more malleable values and interests of children. We can accept this claim as true in large part. However, because it is only a generalization, it has a peculiar implication. There *are* some impressionable adults after all. May these people be treated like children? You might try to block that conclusion by resorting to a form of rule-consequentialism. Because human morality must be governed by easy-to-apply rules, it is sensible to treat all adults *as if* they have fixed values and interests that would make methods of paternalistic habituation ineffective or counterproductive. This might explain why we have a *duty* to generally refrain from treating adults paternalistically with the aim of securing their subsequent endorsement, but (at least absent further argument) it does not readily explain why the particular impressionable adult, for whom paternalism *could* secure subsequent endorsement, has been personally wronged or has a personal complaint against the paternalist. Is his grievance that, though paternalism was not counterproductive or ineffective in his case, *we should have assumed that it would be?*

This is connected to the second point. Hurka says that adults, in any case, tend to *resent* interference in their private lives, and that this resentment makes it unlikely that adults will be

malleable enough for paternalistic habituation to work on them. But resentment is a moral attitude. Unlike mere frustration or anger, resentment is a response to a perceived wrong. If adults resent interference with their liberty or private lives, that must be because they perceive that some wrong has been done to them. We would do better, then, to attend directly to the norm that explains their resentment, rather than to the psychological consequences of their resentment (see 2.6.C).¹⁴

Genuine endorsement: Dworkin tries to control the damage that subsequent endorsement can do to his argument against critical paternalism by insisting that there are constraints on the ways that “genuine endorsement” can be brought about. Immediately following the piano example, Dworkin writes:

In any case ... endorsement must be genuine, and it is not genuine when someone is hypnotized or brainwashed or frightened into conversion. Endorsement is genuine only when it is itself the agent’s performance, not the result of another person’s thoughts being piped into his brain (269).

And in another place he makes much the same point at more length:

We must distinguish acceptable from unacceptable circumstances of endorsement. The distinction, as we know from the history of liberal theories of education, is a difficult one to draw, but any adequate account of acceptable circumstances would, I believe, include the following proposition. We would not improve someone’s life, even though he endorsed the change we brought about, if the mechanisms we used to secure the change lessened his ability to consider the critical merits of the change in a reflective way. Threats of criminal punishment corrupt rather than enhance critical judgment, and *even if*

¹⁴ To this line of argument, one might reply that we should not place much trust in moral attitudes like resentment. After all, people can resent things that they shouldn’t. A controlling husband may resent his wife’s attempt to get a job, for example. But there are two responses to that reply. First, though we should not accept the norms people recognize uncritically, we should examine them. Second, and more to the point, if the norm doesn’t deserve our endorsement, then we should generally ignore a person’s misguided resentment based on that norm. If, for example, the controlling husband is wrong to resent his wife’s decision to look for employment, then we shouldn’t be much concerned with the unpleasant subjective experience that his resentment causes him. Similarly, if people are completely misguided to resent our paternalistic interference, then perhaps we shouldn’t pay much heed to the unpleasantness of their resentment. (If you resist my claim in the last sentence, I would suggest it is probably because we have a hard time imagining away the idea that the adult’s resentment of paternalistic treatment is justified).

the conversions they induce are sincere, these conversions cannot be counted as genuine in deciding whether the threats have improved someone's life (218).

There is one strand of thought in these passages that I think we can readily assent to. That is, we can agree that endorsement is not genuine if it is not really internalized and sincere. If a person is simply acting as if he endorses something, in order to fool others or even himself, then he will not be able to engage in the activity or relationship in the proper spirit, which is necessary in order to integrate that component into his life in a valuable way.¹⁵

But in the second passage Dworkin also suggests a stronger idea: that even "sincere" endorsement might fail to be genuine if it came about in the wrong way. This is harder to understand—partly because Dworkin does not explain just what sincere endorsement entails. Suppose it means that the person is indeed now whole-hearted in his endorsement of the activity or relationship, in spite of the heavy-handed way in which he was induced to acquire that attitude. We can imagine that someone's *consent* that was acquired in this heavy-handed way might be invalid. But, remember, endorsement does not play the same role as consent. Endorsement's primary role is in integrating something into a person's "conception of the good"; its primary purpose is not to *grant* permission.

One possibility is that Q's questionably induced but sincere endorsement of *x* will not benefit Q, if *x* is objectively valueless or bad. But we do not need to appeal to endorsement at all (genuine or otherwise) to make that point. Therefore, Dworkin presumably has in mind a case in which, *ex hypothesi*, *x* is objectively valuable, Q sincerely endorses *x*, *and yet* because Q's endorsement is not genuine in some respect, *x* does not actually promote Q's well-being.

¹⁵ Steven Wall is therefore mistaken in contending that Dworkin's endorsement argument does not rule out hypnotically induced endorsement and in fact rules out nothing but coercion (1998: 189-191).

In the second passage, Dworkin seems to be relying on the following argument:

1. A change in a person's life, even if sincerely endorsed, cannot be for the better *if the change lessens his ability to consider the critical merits of the change in a reflective way*.
 2. Coercive methods (especially criminal punishments) corrupt rather than enhance critical judgment.
- ∴ 3. Coercive (or at least criminal) paternalism cannot make a person's life better.

I don't think that this argument is without significant exceptions. Let's consider objections to premise (1) first, and then consider the limits of premise (2).

You might accept premise (1) for three reasons. **(a)** First, you might think that critical reflection is simply *independently valuable*, and that, other things equal, we are always worse off if our capacity for it is impaired. Dworkin, however, has given us no argument for the independent value of critical reflection. More to the point, other things aren't always equal. If the value of critical reflection is independent of the beneficial change it induces, then why couldn't it ever be the case that the change was in fact beneficial enough to outweigh the loss in capacity for critical reflection.

(b) A more attractive, second suggestion for accepting premise (1) is that critical reflection is somehow partly *constitutive* of genuine endorsement. That is, we might make the following claim about critical reflection:

(CR) For x to benefit Q (where x is an objectively valuable activity or relationship):

- (i) It is necessary that Q endorses x ,
- (ii) but *also* necessary that Q endorses x for good reasons;
- (iii) however, we can only endorse x for good reasons by critically reflecting on the reasons why we came to embrace x .

We are assuming for now that condition (i) is indeed necessary. If (i) is necessary, then arguably condition (ii) is necessary as well. If I endorse a friendship for the wrong reasons (e.g., to gain

social status), then it is plausible to think that I cannot benefit from the intrinsic good characteristic of friendship, until I endorse it for the right reasons. The connection between (ii) and (iii), however, seems harder to establish. We might say that x cannot really be good for me, unless it *could* stand up to my critical reflection. But that is virtually the same as saying that x must really be objectively good, which we assumed at the outset. If I am to benefit from x , is it necessary that I am *actually capable* of, or in fact *actually carry out*, this critical reflection? Both suggestions are implausible, since it appears that people can benefit from things that they never critically reflect on.¹⁶ To take an uncontroversial example, loving parental relationships are central to the well-being of children, and though these could stand up to critical reflection, the child herself is incapable of engaging in this critical reflection.

(c) This leaves a third reason for subscribing to premise (1): the possibility that, while critical reflection is not necessary for genuine endorsement, genuine endorsement is not possible if endorsement comes about as a change which leaves a person *less capable* of critically reflecting on the change than he had been before. However, I suspect that the development of strong attachments and commitments to people, organizations, activities, or projects is a common counterexample to that hypothesis. Critical reflection seems to require taking up a somewhat detached point-of-view. No doubt this reflective detachment is a matter of more-or-less, not all-or-nothing. But when we are emotionally attached or committed to something, it is harder to achieve as much critical distance as we would be capable of otherwise or prior to forming the attachment or commitment. Someone who has devoted the last twenty years of his life to a

¹⁶ For a more sophisticated examination of this theme, one may refer to the discussion of Hegel's views on critical reflection in the modern social order in Neuhauser (2000): 245-248.

political party might find it harder to honestly take up a detached evaluative point of view on that party than he would have had prior to that commitment.

∴

If the preceding criticisms are sound, then premise (1) of CR looks shaky as a general proposition. But premise (2)—*that coercive methods corrupt rather than enhances critical judgment*—is not without exceptions either. In the kind of case that I think Dworkin has in mind, someone has held certain considered religious or ethical convictions, and then these convictions have changed out of fear or social pressure—not on the basis of good reasons. We can agree that, in those cases, the threat of sanction has reduced the person’s capacity for rational reflection. But Dworkin’s piano example seems to show that, at least in the case of children, mild coercion can also induce habits that, over time, make the person more appreciative of valuable activities, and in a more reflective way. Similarly, if there is anything right about the “classical” view, bad habits can corrupt a person’s critical judgment too, such that coercion which preempts the formation of, or breaks, those bad habits, could have the total effect of preserving or improving someone’s judgment.¹⁷ Again, this kind of paternalism seems common with respect to children. The extent to which this kind of paternalism is possible toward adults is, ultimately, an empirical question, which I won’t try to settle definitively. This question of judgment is likely to divide liberals and conservatives, but it at least suggests that the

¹⁷ This is Robert George’s position: “If the suasion of a paternalistic law could serve as a strong disincentive to engage in [an] activity [“that is sufficiently seductive and habituating to corrupt a practitioner’s ability to guide himself with practical reasonableness”], and if a period of abstinence from the activity served to weaken powerful habits, emotional pulls, and the like, which contribute to an individual’s indulgence in the activity, the law would seem to serve a valuable purpose. It ultimately would help the individual to make self-constituting choices against the immoral conduct, even if initially his abstinence was motivated solely by respect for the law or fear of its sanctions” (1993: 107).

endorsement thesis does not, by itself, lead to the Liberal Outlook on paternalism; one has to add several further empirical theses.

3.3 Endorsement and Well-Being

A) Is endorsement always necessary?

If the endorsement thesis is sound, it does rule out some kinds of paternalism. As I've said, the prospects look dim for attempts to force someone against his will to benefit from great art, valuable relationships, or play and relaxation. But, as I argued in the last section, given the possibility of subsequent endorsement, the endorsement thesis still permits more paternalistic interference with a person's autonomy than the Liberal Outlook would seem to allow.

Now I turn to the more fundamental question: whether the endorsement thesis is truly sound. We can readily grant the plausibility of a weak version of that thesis: that there are *some* components of the good life which cannot benefit a person unless she endorses them. The example of religious devotion seems paradigmatic in this respect. Most of us revolt at the idea that a person could be benefited by being forced to engage in religious practices (even assuming they are intrinsically good) that the person does not, and in fact will never, endorse. But we have to ask whether it is safe to generalize from that case. Are all "components" of the good life like religious worship in this respect?

First of all, acts that contribute to our *physical well-being* do not seem to require endorsement. One need not endorse exercise, a healthy diet, or the kicking of a bad habit (like smoking) to benefit from them. People who cannot afford to pay the "sin taxes" on tobacco and quit simply because of its exorbitant price need not endorse quitting smoking to benefit from it. Similarly, an unendorsed activity may benefit me via *causal connections that are hidden from*

my view. Plato and Aristotle thought that musical training was important, not primarily for its own sake, but because of the way it shaped and elevated a person's character.¹⁸ To gain that benefit, it would presumably not be necessary to value that musical training itself, nor even to recognize its educational contribution. It may be replied to these suggestions that the endorsement thesis only applies to intrinsic goods, things desirable for their own sake, like health and good character, not to those goods and activities that are instrumental in procuring what is valuable for its own sake. Therefore, the latter forms of paternalism should really be classified as "volitional," not "critical," paternalism, because they help people accomplish ends they already endorse (or will endorse later). We may concede that reply,¹⁹ but notice that this shows that the category of volitional paternalism is extremely broad. Paternalism is permissible on this principle, not only to force me to do some particular *thing* that I already want to do anyway (e.g., I want to save for retirement, but fail to do so on account of hyperbolic discounting), but also to force me to do something that I don't want to do simply because it promotes some value or aim that I happen to endorse (e.g., I may care about my life *and yet* not want to quit smoking). It is easy to miss the difference between these two ideas at first, but the second permits far more paternalistic interference than the first.²⁰

It would also seem that it is not necessary to endorse *avoiding or abstaining from what is bad* for that abstention to benefit you. (From the foregoing, it is obvious that abstaining from

¹⁸ Plato, *Republic*, Bk. III; Aristotle, *Politics*, Bk. VII. A similar line of criticism of the endorsement thesis, which I have benefited from, is developed by Wall (1998): 189-197.

¹⁹ Though some would insist that our physical and mental health is good for us even if we do not value or endorse it. For this view, see Finnis (1980): 86-87; Raz (1986): 290; George (1993): 106.

²⁰ If it is true, as some have held, that human beings do not differ much in the particular intrinsic and instrumental values they hold, but primarily in the way that they organize these values into particular hierarchies and priorities, then unrestricted "volitional" paternalism would justify just about any kind of paternalism, except perhaps that which required people follow a particular religious creed. On the extent to which we share most values, but differ in the way we rank and organize them, see Rokeach (1973).

something is not necessary to benefit you instrumentally; we are now concerned with the question as to whether the abstention must be endorsed for it to benefit you intrinsically). It turns out that this is a complex issue and the rest of section 3.4 is devoted to working through it. I shall first state the *prima facie* argument for thinking that abstentions need not be endorsed to be intrinsically beneficial; then I will consider two ways of responding to that argument (section B). My rejoinder to the second of these replies leads to our consideration of a further argument, the “substitution argument,” which I take up in section C. And that, in turn, leads to yet another argument, “the argument from ethical integrity,” addressed in section D.

Throughout it is important to remember that we are assuming for the sake of argument that doing certain things can be objectively good or bad for a person independently of that person’s own judgments about them. If this seems implausible to you, recall that it is at least of some interest to know what arguments can be made to someone who does hold that view.

B) The argument from abstention

First, then, the argument for thinking that an agent’s abstaining from what is bad need not be endorsed to be beneficial to him. The endorsement thesis gives us a necessary condition for something’s contributing to a person’s well-being: *If Q is to (intrinsically) benefit from participating in the objectively valuable activity or relationship, x, then it must also be the case that Q endorses x.* The endorsement thesis does not give us a sufficient condition; it does not say that *x* is good for Q, just as long as Q endorses *x*. On Dworkin’s view, objective value and a person’s subjective attitudes work together in the constitution of what is good for the person. Now suppose that *x* is not objectively valuable; it is bad or worthless. Whether or not Q endorses *x*, then, *x* cannot make Q’s life better. Therefore, Q is probably better off not engaging in *x*, whether Q endorses *x* or not. If that is right, then it would seem that paternalism that

prevents Q from engaging in *x could* benefit Q. Putting the argument that way, we have not so much denied the endorsement thesis, as we have shown that paternalistically requiring someone to avoid or abstain from what is bad is consistent with that thesis. In other words, the endorsement thesis generally speaks against forcing people to engage in what is valuable, but it does generally speak against forcing people to avoid what is bad. If that is correct, then once again the endorsement thesis would permit considerably more paternalism than it at first appears to, and (if unsupplemented with other arguments) probably more than is consistent with the Liberal Outlook. Call this the *argument from abstention*.

First reply: One way to reply to the argument from abstention is to reject one of its assumptions about the nature of value. There are at least two ways of thinking about activities and relationships that are not objectively valuable and participation in which cannot *benefit* a person. On the first view, such activities and relationships are worthless, but they are not positively bad in an intrinsic way—though of course they may exact significant opportunity costs. That is to say, participation in what is worthless does not actually make a person's life go worse, except insofar as he is wasting his time. On a second, more traditional view, participating in what is bad can actually be intrinsically detrimental to a person's well-being. To see the difference, consider two common negative views about loveless sex (which is not to deny that there are positive views as well). On one view, loveless sex is typically worthless, but not harmful to people. On the second view, loveless sex is not only worthless, it is positively detrimental to people's well-being; their lives go worse for engaging in it.²¹ The argument in the previous paragraph seems to assume the second view: that there are some things that are

²¹ See, for example, Finnis (1994) and George (2004).

intrinsically bad for people to engage in. But this assumption could be resisted. It may be held that nothing is intrinsically bad in this positive way; some things are just worthless compared to others. (Of course, it is important not to restrict our attention to the example about loveless sex here.)

If the first view is right, if nothing is positively bad for us to participate in, then the argument that we could be benefited by being required to abstain from what is bad loses much of its force. Looked at in this way, the disagreement comes down to a substantive debate about the nature of the good and the bad. Taking the first of these two views allows one to resist some kinds of paternalism on welfarist grounds, but that substantive position about value does not follow from the endorsement thesis. It requires further premises drawn from value theory. This is important because it shows that the strategic open texture of the endorsement argument (that is, its remaining agnostic about the nature of particular values) cannot deliver strong liberal conclusions. Unsupplemented, the endorsement thesis seems to be consistent with paternalism aimed at preventing people from exposing themselves to “moral harms.”²²

Second reply: There is second way of trying to reject the argument from abstention, which is the one that Dworkin appears to prefer. Dworkin grants, at least for the sake of argument, that there are activities and relationships that are positively and intrinsically detrimental to people’s well-being.²³ However, when he says that Q must endorse a “component” of the good life for it to benefit Q, he understands “components” to cover both valuable activities and relationships *as well as* abstentions from what is bad or worthless. This is why he claims that the endorsement

²² On moral harms, see Feinberg (1990): esp. chs. 28 and 30.

²³ For instance, for the sake of argument, Dworkin grants the social conservative the premise that “an active homosexual blights his life by a failure to understand the point of sexual love” (2000): 269.

thesis “rejects the root assumption of critical paternalism: that a person’s life can be improved by forcing him into some act *or abstinence* he thinks valueless” (217, emphasis added). In brief, the issue comes down to this. The argument from abstention posits an asymmetry between engaging in what is valuable and abstaining from what is worthless or bad: while endorsement is necessary to benefit from engaging in a valuable activity, endorsement is not necessary to benefit from avoiding a harmful activity. Call that the *engagement/abstention asymmetry*. If this asymmetry exists, then the endorsement thesis has virtually no application to harm-preventing paternalism, but is restricted to limiting benefit-conferring paternalism (see 1.3). The present response, which someone like Dworkin might avail himself of, is to deny that this asymmetry exists and to maintain that abstaining from what is bad can no more benefit you without your endorsement than can engaging in what is good. I shall now mention three reasons to think, *pace* Dworkin, that there is, in fact, an engagement/abstention asymmetry.²⁴

(i) First, you might think that it is bad to live unjustly, whether or not one endorses avoiding injustice the unjust aspects of one’s life. Therefore, one would be better off being forced to abstain from injustice and to live within the bounds set by justice, even if one did not endorse that abstention. Call this the *moralistic thesis*. It depends on a particular way of thinking about the relation between justice and well-being, which will not be accepted by everyone, but which happens to be defended by Dworkin himself. The moralistic thesis would be denied by two positions. One of these holds that a person’s good is entirely independent of his acting justly (a

²⁴ “Abstention” and “abstinence” are Dworkin’s words. Sometimes these words connote a kind of intentional and deliberate avoidance, as when we say that someone is “practicing abstinence” toward alcohol or sex. (We might not say that a person unable to afford a drink is abstaining from alcohol.) I intend to use these words in a more neutral way, however, in which abstinence from *x* just means not doing or not engaging with *x*, intentionally or otherwise. If you think that abstention necessarily implies that one avoids something voluntarily, then substitute the word “avoidance” for “abstention.”

view held by many utilitarians, for example). The second of these holds that acting justly *is* a part of a person's good, but that for this to be so, one must act out of good will and for the right reasons.

But there is a third position available: Dworkin denies that justice imposes external limits on the good life. If justice did impose such limits, then my life might have been better if I didn't have to be just. For instance, if I didn't have to respect the demands of justice, which require that everyone gets their fair share, I might be able (were I favorably situated) to do more of the things that I want to do and have more of the things I want to have. On Dworkin's view, justice instead sets the normative *parameters* on a good life. The idea of normative parameters is familiar from athletic competitions. A great defensive team is one that prevents the other team from scoring within the parameters set by the rules of the game. These rules do not *limit* the permissible bounds of a good defensive performance; they help define what playing defense is. (It would be confused for a coach to complain, "These pesky rules really tie our hands: we could be a great defensive team if only we were allowed to poison the other team's water.") Interestingly, an athlete's performance can be tarnished by running afoul of the parameters of the game even if the transgression is unintentional. (An athlete's record-breaking performance would be tainted, if accomplished under the influence of steroids administered by a misguided trainer, even without the athlete's knowledge of the offense.) Dworkin thinks that we should take a similar view about the relationship between justice and the good life. A good life is one that responds in the right way to the right challenge, and that challenge is partly defined by the demands of justice. Hence, our lives go worse if we have either more or less than our fair share

of resources, even when we are not individually to blame for the injustice of our society.²⁵ By the same token, then, someone who fortuitously lives out her life in a just society, *even if she would prefer to be a privileged person in an unjust society*, nonetheless leads a better life in that respect, since she faces the right challenge.²⁶ She might be better off still if she endorsed living justly, but in this case, her endorsement really does seem to have merely additive, not constitutive, value. If Dworkin is right about justice as a parameter on the good life, then, this is one thing that doesn't have to be endorsed for it to make someone's life go better. Dworkin might object that *parameters* on the good life are not the same thing as *components* of the good life. Call them what you like, abstaining from injustice makes your life go better on Dworkin's view even without your endorsement of that abstention.²⁷

But let us allow that the moral parameters on a good life are a special case and not *strictly speaking* an objection to the endorsement thesis. In any case, the contribution of justice to the good life is peripheral to the subject of paternalism, since restricting a person's freedom to implement justice is not usually paternalistic in intent. (Though it might be if the paternalist happened to care much more about the well-being of the unjust person than that of the people he might wrong.) So let us turn, now, to the second reason to think that there is an engagement/abstention asymmetry.

²⁵ "If living well means responding in the right way to the right challenge, then someone's life goes worse when he cheats others for his own unfair advantage. It also goes worse when, even through no fault of his own, he lives in an unjust society, because then he cannot face the right challenge whether he is rich, with more that justice allows him to have, or poor, with less. That explains why, on the challenge model, injustice, just on its own, is bad for people" (Dworkin 2000: 265). (The "challenge model" is Dworkin's name for his account of the good life).

²⁶ Dworkin does not explicitly say this, but I do not see how he could possibly deny it, given his avowal of the claim in the previous sentence.

²⁷ In his most recent work, Dworkin seems to have distanced himself from the moralistic thesis: "We might be able to construct a conception of the good life such that an immoral or base act would always, or almost always, make the agent's life finally a worse life to lead. But I now suspect that any such attempt would fail....Though I was once tempted" (2011: 195, 457 n.5).

(ii) This argument works by, first, identifying a possible rationale for thinking that engagement and abstention are in fact symmetrical with respect to the importance of endorsement and then trying to undermine that rationale. Here then is the possible rationale: You might think that endorsement is necessary for either engagement or abstention to be valuable, if you thought that the only thing that matters (or, at least, what is a precondition for anything else mattering) from a moral or ethical point of view is a person's intentions and convictions—not primarily his actions. Thus, if a person abstains from doing what is wrong, but does so against his convictions and only because doing what is wrong has been made impossible, then from a moral or ethical point of view, his abstention has no moral or ethical worth, and therefore, cannot make his life go better. Let us call this the *good-will thesis*. (There is some tension, of course, between the good-will thesis and the moralistic thesis discussed just above, but someone might consistently maintain that the moralistic thesis applies only to parameters of the good life, while the good-will thesis applies only to components of the good life.)

Now, to argue for the engagement/abstinence asymmetry we need to find reasons to cast doubt on the good-will thesis. But, note, to do that I do not need to deny that there are some cases in which abstentions do need to be endorsed for them to be intrinsically valuable for a person. One obvious example of an abstention where endorsement is crucial is a religious fast. It is a part of the concept of fasting that it is done voluntarily and in a certain spirit. Similarly, it seems perverse to us to force a person to refrain from practicing his religion for his own good. We tend to think that what matters is a person's religious convictions, not the actions he performs, and we think (perhaps a little optimistically) that a person's genuine convictions are generally immune to coercion. So we can grant that there are kinds of abstentions that are

meaningless if they are not endorsed. The question is the extent to which we may safely generalize from those cases.

Here is my primary response to the good-will thesis: Even if it is true that *moral worth* depends wholly on a person's intentions, it does not seem as if the "ethical value" constitutive of a good life has the same nature. That is, even if my act of abstaining from what is bad is not morally creditable to me, that abstention may nonetheless be good for me. Suppose that I have a base longing to watch real gladiatorial games just like the Romans used to do. Regretfully, from my point of view, the law does not allow the staging of gladiatorial games. We can agree that my abstention from watching such games therefore has no *moral worth*, but my life may still go better if I do not actually indulge my bloodlust. There is a considerable difference in the quality of a life in which I occasionally regret that I cannot be a gladiatorial spectator and one actually spent enthusiastically watching men fight one another to the death. It is hard to believe that my character wouldn't be more coarsened and debased in the latter case.

Certainly parents assume that this is true of children. Suppose a boy tells his mother that he would like to watch a grisly horror film. His mother refuses on the grounds that such movies are base and that decent people should not entertain themselves by watching even simulated sadistic slaughter. She will not, I suspect, be convinced by the boy's plea, "But, Mother, any harm the movie could do to me has already been done simply by my earnest desire to watch the film in the first place! So it is *pointless* to prevent me from watching it for my own good." While it is true that in this case no moral worth accrues to the boy for his not seeing the horror film, it is still quite possible that the abstention benefits him. What other reason could there be for preventing him from doing what he wants. Children are no doubt more impressionable than adults, but I see

no reason why the same logic shouldn't apply to adults as well: abstaining from what is bad, can make our lives go better, even if we would do what is bad if we had our druthers.

(iii) My response to the good-will thesis once again relies on the idea that there could be activities or relationships that are not only valueless, but actually positively detrimental to our well-being in an intrinsic way. One could therefore resist my response, as before, by rejecting that conception of value. But to do so requires, also as before, invoking a substantive theory of value which does not follow from the endorsement thesis. The third argument for the engagement/abstinence asymmetry, however, is independent of any particular substantive theory of value (though of course it relies, as the endorsement argument itself does, on the existence of objective value). This argument simply points to the opportunity costs involved in engaging in what is worthless. Even if spending my time in worthless activities is not positively harming me in a direct way, I might still be better off if those worthless options were not available to me, since even if I do not endorse their unavailability, I might nonetheless spend my time doing something that is more worthwhile. Call this the *substitution argument*. Let us now turn a more careful examination of this argument.

C) *The substitution argument*

It may be useful at this point to remind ourselves of where we are in the train of argument. We are examining Dworkin's endorsement thesis—that *no objectively valuable component of a good life can contribute to the value of Q's life without being endorsed by Q*. While this may rule out forcing people to do things that are objectively valuable, it appears not to rule out forcing people to refrain from things that are objectively bad. I called this the "abstention argument." Dworkin denies this. He says that abstaining from what is bad cannot benefit a person unless he endorses that abstention. We considered three reasons to doubt that claim. The

third of these is the “substitution argument”: by preventing someone from doing something that is bad or worthless, we free him up to pursue something else he does endorse, even though he would prefer to do the thing forbidden. Since endorsement cannot make an objectively bad or worthless thing valuable, then the subject is presumably better off being forced to do something else he endorses which is valuable.

To his credit, Dworkin considers this possibility. He has us imagine that the monastic life of religious devotion is a wasted one, and that for this reason we abolish religious orders.

Citizens who might have spent their lives in orders will then lead other lives with other experiences and achievements they find valuable, even though ... they will think these lives worse than the life they were denied. Someone who would have spent his life in monastic orders might, for example, take up a life in politics that is eminently successful and valuable to others in ways that he agrees make his life a better one (270).²⁸

Now the question is whether this politician (let’s call him Quinsby) has benefited by our forcing him to abstain from a worthless life of religious devotion. Of course, Dworkin stacks the deck against his opponent by testing our intuitions on so implausible and draconian an example. Even if we are skeptical of traditional religion, most of us think that valuable lives are possible within those worldviews—indeed, religious faith probably makes possible forms of life unavailable in a secular context. But let all of that pass and consider the issue on the possibly artificial hypothesis that the religious life, as such, really is worthless.

²⁸ Better than what? Dworkin doesn’t make that clear. In fact, Dworkin does not say that the life of religious devotion is worthless, but (somewhat ominously) that “people in power think that a life of religious devotion is wasted” (269). But this confuses issues. If we are trying to decide whether a person benefits from abstaining from the religious life, then it is irrelevant what people in power think. On the assumption that some things really are objectively valuable, what matters is whether the religious life really has value or not. As Raz observes, “the fact that the state *considers* anything to be valuable or valueless is no reason for anything. Only its being valuable or valueless is a reason” (1986: 412). The fact that the people in power believe that the religious life is worthless would only be relevant if we were arguing with *them*.

First, we have to distinguish two cases. In one case **(i)**, in the world in which Quinsby became a politician, he never actually formed the desire or aim of leading a religious life, though counterfactually he would have formed that aim, had religious orders been in existence. It seems that Quinsby really *would* be better off in this kind of case where he never formed the intention to do what is worthless. This suggests that the endorsement thesis is not inconsistent with attempts to shape the “moral environment” to influence the formation of people’s preferences in the first place.²⁹ But Dworkin has in mind the other kind of case: **(ii)** one in which Quinsby actually has formed the intention to join a religious order, but has now been prevented from doing so by the abolition of religious orders. Dworkin suggests that it is hard to believe that Quinsby has really been benefited by our preventing him from wasting his life: “how can the life he led be better when he goes to his grave thinking it has been worse? In what sense was a life more successful that left its owner bitter, believing that he was leading a false, distorted life, at war with his own ethical sense?” (270)

Let’s try to separate out the argument from the rhetoric here. The second sentence might lead you to believe that we are to imagine that Quinsby never endorsed the substitute life even as a second-best. So we should distinguish between two further cases. In one, **(iia)** Quinsby

²⁹ In fact, Dworkin *does object* to this kind of “cultural paternalism” (as he calls it), which would deliberately restrict people’s options in life, but his objection does not rely on the endorsement thesis.

Dworkin contends that an initial equality of resources is the best interpretation of what it means to treat all citizens with equal concern and respect, since this makes the actual distribution of wealth depend equally on the economic decisions of each person. In this way, the “true costs” of each person’s ambitions and projects are revealed by the market (2000: ch. 2). But for the costs to truly reflect the ambitions of each person, it is necessary that liberty only be restricted to secure the conditions of equal initial market power. This means that state paternalism aimed at eliminating or manipulating the costs of some options would interfere with the equal influence that each individual should have in shaping the opportunities available in civil society (ch. 3). Living well, then, is to be understood as a skillful performance within these parameters (ch. 6).

However, because paternalism is ruled out by a principle of equal liberty, and because the good life is understood as a skillful performance within parameters set by that principle, this is not really a welfarist argument at all; it is essentially an example of what I have called the “embedding strategy” (see 2.1).

endorses his life as a politician, believes it is valuable, but doesn't believe it was the *best* life for him. In the second, **(iib)** Quinsby never endorses his life at all and thinks it worthless. Assuming that the religious life would not have been positively, intrinsically detrimental to Quinsby, and was only worthless in the neutral sense, we can grant that in case (iib), Quinsby has not benefited from the substitute life. But that is not the interesting question, since we are not presently claiming that a person's central life projects can benefit him without his endorsement. We want to know whether Quinsby can benefit from having avoided the wasteful life, even if he did not endorse having avoided it. So the interesting case is the first one: where Quinsby *does* endorse his life as a politician, but goes to his grave thinking that it was not the best life for him and that the life that was objectively valueless—the life in a monastery—would have been better for him.

Now, to further examine case (iib), let's distinguish three different possible worlds. In the actual world, *W*, Quinsby spends his life in politics, thinks it was a valuable life, and yet goes to his grave thinking that the life of religious devotion would have been better for him. Now there are two possible but non-actual worlds in which Quinsby spends his life in religious orders. In one such world, *Z*₁, in spite of the fact that *ex hypothesi* the religious life is worthless, he never comes to appreciate this fact. In the second world, *Z*₂, after spending much of his life in religious orders, he comes to recognize that his life was wasted, and that he would have been better off spending his life in politics. Now suppose that *had we not* prevented Quinsby from entering religious orders, this would have set Quinsby down the path to world *Z*₂. I think it is obvious that Quinsby is better off in *W* than in *Z*₂. In both worlds he is going to go to his grave thinking he has not lived the life that was best for him, but only in *W* will he nonetheless have

believed that his life had some value in it. So whether or not Quinsby goes to his grave in world W thinking that the religious life would have been better for him is really a red herring.

The more interesting question is whether Quinsby would have been better off in world W had the counterfactual world been Z_1 . That is, would Quinsby be better off living the second-best life of a politician, in spite of going to his grave thinking the religious life would have been better for him (W), or would he be better off living the life he believes to be the most valuable, but which in fact is not valuable at all (Z_1)? We might think that Quinsby is better off in Z_1 than he is in W, if we accept the view that a person's good is simply a pleasant or contented state of mind. That, however, is out of tenor with the externalist aspect of the objective conception of well-being that the endorsement argument relies on. I see no way to maintain both that the religious life is worthless (which is the hypothesis we are working with) and that Quinsby is better off leading the religious life than he would be leading a life that is truly valuable and which Quinsby regards as second-best.

Presumably Quinsby himself in world Z_1 would agree with the conditional proposition that the religious life is not the best life for him *if* the religious life really is *objectively valueless*. How could he do otherwise? He would agree with Paul in *First Corinthians*, “[I]f Christ has not been raised [from the dead], then our preaching is in vain and your faith is in vain ... If for this life only we have hoped in Christ, we are of all men most to be pitied” (1 Cor. 15:14, 18 RSV). True, Quinsby in Z_1 denies that the antecedent of that conditional actually holds. But, again, he presumably believes that it is the actual truth of the antecedent that would make his life objectively valueless, not his belief that it is true.

D) The argument from ethical integrity

To block a conclusion of this sort, Dworkin appeals to a further notion he calls “the priority of ethical integrity” (PEI), the idea that no life can be better for a person than the life which fits his own convictions of the best life for him:

Someone has achieved ethical integrity, we may say, when he lives out of the conviction that his life, in its central features, is an appropriate one, that no other life he might live would be a plainly better response to the parameters of his ethical situation rightly judged....If we give priority to ethical integrity, we make the merger of life and conviction a parameter of ethical success, and we stipulate that a life that never achieves that kind of integrity cannot be critically better for someone to lead than a life that does. (270)

PEI is a much stronger claim than the endorsement thesis.³⁰ The endorsement thesis only says that our endorsement of an activity is necessary for it to be good for us. Suppose Q endorses both of the mutually exclusive options A and B, though he values A more than B. Suppose, however, that A is objectively worthless, while B is objectively quite valuable. It is consistent with the endorsement thesis that Q’s life would go better engaging in option B than A (since B meets both conditions of objective value and endorsement, while A fails the first condition). But presumably this is not consistent with PEI, insofar as Q continues to believe that A is more valuable than B. It might seem as if PEI completely undermines the objective aspect of well-being that the endorsement argument assumed, because the life that PEI says is best for Q is just whatever life Q is convinced is the best life for him. But this is not quite correct. This is because Q would still have been better off valuing B more than A.

³⁰ In other writings, Dworkin refers to a similar idea under the name of “moral independence” (1986: ch. 17). In his most recent work, ethical independence or integrity seems to have assumed a central place, and there is little reliance on the endorsement thesis (2011: esp. 211-213). There is a trade-off here. Dworkin’s more recent arguments are less vulnerable to the criticisms I have been making, but they are also less ambitious, in that their premises about value are not as modest.

Let me spell that out: Assume that Q endorses both A *and* B in both of the possible worlds Z_1 and Z_2 , but that in Z_1 Q values A more than B, while the opposite relation obtains in Z_2 . Assuming that A is worthless and that B is valuable, PEI says that Q is better off pursuing A in Z_1 and pursuing B in Z_2 . *But* PEI is consistent with Q being better off in Z_2 than he is in Z_1 . Objective value, therefore, can still play a role in Q's deliberations about which pursuit will lead to a better life for him, although no one else can make Q better off by preventing him from leading the life that he thinks best.

The priority of ethical integrity is most convincing when interpreted narrowly such that it only applies to a person's deep convictions about the central features of his life. But then that leaves aside the peripheral features of a person's life and those that he lacks deep convictions about. Robert George, for instance, thinks that PEI, while perhaps true, "has little application to most kinds of conduct that sensible moral paternalists seek to discourage." The relevant question is "whether one can fundamentally benefit a person or improve his life by 'compel[ling] him to live in ways contrary to ambivalent or unreflective opinions, or to powerful passions,'"³¹ to which George thinks the answer is clearly 'yes.' So, even if we grant the priority of ethical integrity, this does not seem to rule out controversial cases of critical paternalism as such.³²

The deeper question is whether PEI is even true when we are dealing with a person's convictions about the central features of his life. Again, it is easy to grant that "ethical integrity" (in Dworkin's sense) has considerable value. Suppose the religious life has objectively valuable aspects, even though (because of false metaphysical beliefs) it is considerably less valuable than

³¹ George (1993): 107, quoting Christopher J. Wolfe.

³² I discussed an issue nearly identical to this one in more depth in 2.6.C under the heading of "the compatibility objection."

the political life. It is quite plausible to me that Quinsby could still be better off living the religious life than the political life, if he was convinced that the religious life was the more valuable. But should we accord it the apparently absolute priority that Dworkin recommends. I, for one, don't see the appeal of the doctrine in so strong a form. That is, if we are stipulating that the political life is highly valuable and that the religious life is *wholly worthless*, and if we are assuming that Quinsby thinks both of them valuable, although he (mistakenly) values the religious life more than the political life, I just cannot see how the religious life really would really be better for Quinsby than the political life. Insofar as we think that the less valuable life is the better one for the person, I think we must be assuming that the less valuable life is not wholly worthless or (what would be worse) positively bad. Then it is easier to understand how the importance of ethical integrity can tip the scales in the other direction and make the objectively less valuable life the better one for a particular person to lead.

E) Summary

Let me sum up this complex discussion of the endorsement argument. We have been considering the idea prominent in many liberal writers that, even if some things are objectively better for people than others, and even if people are not always the best judges of their own good, it is nonetheless the case that nothing can make a person's life go better, unless he endorses that thing. This idea is often offered as the basis for the liberal's opposition to paternalism toward adults. A careful examination, however, shows that the endorsement argument is considerably weaker than it is generally represented as being. First, even if it is true that nothing can benefit a person without her eventual endorsement, that does not rule out using paternalistic means to cause the person to sincerely endorse that thing (as in Dworkin's piano practice example). Although most liberals would allow that this is often appropriate in the case of children, most

would shy away from such tactics in the case of adults. But the endorsement argument itself does not explain that asymmetry. Second, the endorsement thesis only applies, at most, to intrinsic goods; things can benefit people in instrumental ways without their endorsement. That leaves open a very wide berth for paternalistic interference. Third, while it is plausible that people can only intrinsically benefit from engaging in certain activities if they endorse them, it is much less plausible that people can only benefit from avoiding certain activities if they endorse avoiding them. My discussion does not show that the importance of endorsement to well-being has no implications for the Liberal Outlook on Paternalism. In general, I agree that the significance of endorsement does tend to support the Liberal Outlook; I simply deny that it can fully account for the Liberal Outlook's general opposition to paternalism toward adults.

3.4 Paternalism and the Satisfaction of Desire

You might think that liberal anti-paternalism would be on the firmest ground if we refused to even crack the door to objective value and insisted that the only source of well-being is the individual's own desires. As Griffin observes, this has been one important part of the appeal of the desire-based approach to well-being: "both philosophers and social scientists have been powerfully drawn to it because it leaves no room for paternalism; if actual desires determine distributions, consumers are sovereign and agents autonomous" (Griffin 1986: 10).³³ On reflection, however, the logic of any reasonable desire-fulfillment theory can provide, in itself, very little support for the Liberal Outlook.

³³ Griffin himself does not endorse this rationale: "it just confuses two quite different ideas to adopt the actual-desire account of well-being just because it makes autonomy prominent" (1986: 11).

The simplest desire-fulfillment account says that a person's well-being consists in the satisfaction of his actual present desires. Prima facie, at least, this view *does* seem to rule out most opportunities for paternalism. If your well-being consists in getting what you presently want, then how can I benefit you by restricting your freedom and therefore by preventing you from getting what you want. An initial fissure opens up, however, from the fact that we often want conflicting things. Someone wants both to smoke and to quit smoking. Where does this person's real well-being lie? One answer is that a person most wants to do whatever he has the strongest inclination to do, and that a person always acts on his strongest inclinations. This would indeed successfully block virtually all opportunities for paternalism, but the cost is a completely implausible conception of well-being, for this makes it impossible for a person to ever act contrary to his own true interests. Furthermore, this view, while technically preserving the anti-paternalism of the Liberal Outlook, fails to explain the other half of the Liberal Outlook: why paternalism toward children is permissible. We may take it as a desideratum of any plausible theory that it can explain how it is possible that paternalism toward children can at least sometimes benefit them.

If we wish to preserve the idea that well-being consists in desire-fulfillment, then it is unavoidable that the desires be restricted in various ways. First, we are going to have to do away with the idea that a person's good is determined by his most intense desires at the moment. How, then, are we to handle conflicting present desires? The most plausible suggestion is that we should attend to the hierarchical structure and nature of our desires. I not only desire to do particular things, I desire to have particular desires. A person may both desire to smoke and desire to quit smoking, but he may desire to have only the latter desire. That is the desire he

“identifies” with. In that case, satisfying the desire to smoke will not really contribute to that person’s well-being at all (Griffin 1986: 14-15, 34-37; Parfit 1984: 496-499).

Our desires reveal a second kind of structure as well: that of means and ends. Many of the things we desire are not desired for their own sake, but for the sake of something else. Suppose Q desires x and y , but desires x for the sake of y . If obtaining x won’t actually bring Q his object, y —or worse, actually makes it impossible to obtain y —then naturally we should say that x won’t actually contribute to Q’s well-being. Moreover, many desires that are not strictly instrumental are nonetheless conditional, and we can be wrong about whether or not these conditions hold. Romeo wanted to die, not in order to accomplish something else, but because he thought that the following condition held: Juliet is dead. But that condition did not really hold: Juliet was not dead. Therefore, Romeo would have been better off not fulfilling his desire to die. Nevertheless, unless I only have one global, intrinsic desire, the structure of desires will not arbitrate between all conflicting desires. At some point, the brute strength of these fundamental desires “in a cool hour” will have to resurface to determine which of these most contributes to my well-being.

Attending to the structure and nature of a person’s present desires helps to explain some of the ways that a person may fail to act in his best interests. From weakness of will, a person may give in to a particularly intense local desire which is inconsistent with his more global or second-order desires. Or a person may fail to grasp the best means to his end. A person may also fail to comprehend how a particular action will impact his other desires. For instance, a person may have the correct belief that another drink will make him feel better now (which is one thing that he wants), but fail to recognize how that drink will make him feel hung-over at work the next day (though he has a strong desire not to feel that way). These points help explain how paternalism can get a foothold in desire-fulfillment accounts. Children in particular are likely to

have poor impulse control and inaccurate knowledge about the best means to their ends, and these facts will often give rise to instances in which adults can benefit children by restricting children's freedom to act as they would. But, of course, adults too may fail to grasp the best means to their ends or fail to act on their second-order desires. The logic of the desire-fulfillment gives us no particular reason not to interfere with adults in these cases. It might be said that adults are likely to have a global desire not to be interfered with in most circumstances, but that is true of some children as well—especially of adolescents—and we often override such desires when they are held by minors. One also might be tempted to say, further, that insofar as children do not have the capacity to reflect on their first-order desires and form second-order volitions, they lack a basic requisite for autonomy (Frankfurt 1988a), and that this explains why paternalism toward children is permissible. Though this is a promising line of argument (to which we will pay more attention in the next chapter), it does not really seem to be an argument rooted in considerations of well-being. If my well-being just consists in the fulfillment of my desires, then why should I need second-order desires at all. True, if I happen to have second-order desires, then these will be more central to my well-being than my first-order desires. But if I don't have any second-order desires, then it would seem that (on the present account) my well-being just consists in the satisfaction of my first-order desires.

Much paternalism toward children is motivated by a still further consideration, however, which is that we know that a child's desires will change over time. What Parfit dubs the "present aim theory," which says that a person's good is to be identified with the satisfaction of the desires he happens to hold at that moment, is (as Parfit argues) completely incredible (1984: §45). Any plausible desire-fulfillment account of well-being will have to take into account, then,

not just a person's present desires, but his future desires as well.³⁴ Little Oliver may not care much about his inheritance now, but that doesn't mean that it won't matter to him very much when he is older. Similarly, many things the child does, or doesn't do today, will have a great influence on the chances of fulfilling his future desires. Responsible parents, therefore, often deny children's present freedom to do as they please in order to ensure that children can lead satisfying lives as adults. Children also often fail to accurately imagine the satisfaction they will really get in the future from the fulfillment of some desire. As Sidgwick observes, what appears good to us now, "may turn out a 'Dead Sea apple,' mere dust and ashes in the eating" (1907: 110). Finally, as we have observed in the context of the endorsement argument, the desires a child will have later, or as an adult, are partly under the control of parents. The child may not have any desire to play piano now, but he may well develop that desire as he gets older if he is made to practice piano as a child. These facts about the way that desires change over time help to make sense of how, even on a desire-fulfillment account, it is possible to benefit children paternalistically.

But, once again, these same facts also make room for the possibility of successful paternalism toward adults. We needn't exaggerate the point, of course. The desires of adults will generally change less drastically and less predictably than those of children, and they are harder to manipulate. And yet, this is a matter of degree, and the desires of some adults are considerably less stable and more vulnerable to manipulation than those of others. Does that variance in disposition correspond to how permissible it is to treat different adults

³⁴ I shall leave aside here the puzzle as to whether a person's well-being depends on his past desires. Brandt (1979) gives the example of "a convinced sceptic who has rebelled against a religious background wants, most of his life, no priest to be called when he is about to die. But he weakens on his deathbed, and asks for a priest. Do we maximize his welfare by summoning a priest?" (250). See also Parfit (1984): 152.

paternalistically? It may also be insisted that, unlike children in many cases, adults often *are* in a better position to know their future desires and what will really satisfy them than anyone else. But this simply leads us back to the epistemic argument again: the logic of a desire-fulfillment account itself does very little to rule out paternalism.

I will not devote a separate discussion to the argument that hedonism about well-being makes paternalism practically impossible, since many of the points made about desire-satisfaction accounts apply *mutatis mutandis* to those accounts as well. The central point is that people can obviously be wrong about what will give them pleasure in the future. More interestingly, people may even be wrong about the amount of enjoyment they are getting from something at the moment. A person may try to deceive herself, for example, as to how much she enjoys her job, her marriage, or raising her children.

CHAPTER 4: RESPECT FOR AUTONOMY

4.1 Introduction

We are looking for a justification of the Liberal Outlook on paternalism, which supposes that, at least in practice, there is a strong presumption against treating adults paternalistically, but no such strong presumption against treating children that way (see 1.5). In the previous two chapters, I have been examining what I have called the “welfarist approach,” which argues that paternalism wrongs the subject only when the paternalist fails (or will tend to fail) to accomplish his formal aim of promoting the subject’s good, or well-being (see 2.1). The suggestion, then, is that paternalism toward children is much more likely to accomplish its formal aim than is paternalism toward adults.

I begin this chapter, in section 4.2, with a discussion of the idea that seems to be missing from the welfarist approach: *respect for autonomy*. This idea is at the heart of what I have called the “sovereignty approach” (see 2.1). In section 4.3, I examine the central challenge facing the sovereignty approach in the company of Sidgwick. In section 4.4, I broach the leading interpretation of respect for autonomy, which I call “respect for agency” or “the agency approach,” and consider its strategy for dealing with “Sidgwick’s Challenge.” Then, in sections 4.5 and 4.6, I explore two families of arguments for the Liberal Outlook that belong to the agency approach. Finally, in section 4.7, I explain why I think the agency approach cannot be the whole explanation of the Liberal Outlook. This prepares the way for my own interpretation of respect for autonomy in Chapter 5.

4.2 Benevolence and Respect

A) The idea of respect for persons

One recurring objection that I have leveled against the welfarist arguments in the previous two chapters is that they permit more paternalism toward adults than seems consistent with the Liberal Outlook. This is essentially an argument from “reflective equilibrium.” The suggestion is not the methodologically unsound one that the welfarist accounts *must* be wrong, since they have implications we are hesitant to accept, but rather the more modest idea that, insofar as these arguments do have counter-intuitive implications, we have good reason to press further in our search for plausible arguments that might underlie our everyday moral views. Of course, our everyday views could be misguided, but it is hard to see where else we can begin.

I now wish to register a second objection to the welfarist approach, which is that (by itself) it gets the phenomenology of our practical reasoning wrong. Even if purely welfarist accounts could be sufficiently massaged in order to squeeze out a plausible justification for the Liberal Outlook on paternalism, these arguments would still tend to distort the nature of the considerations we actually appeal to when we reason about treating people paternalistically. Welfarist arguments suggest that, when we are torn about whether or not it is right to treat someone paternalistically, we are essentially facing a difficult technical question: we know that we want to do whatever will make the person “happiest” in the long run—or best promote his well-being—but we are simply unsure as to which course of action is the best means to that end. *Will the person be better off in the long run if I interfere with his choice (perhaps without his knowledge)—or if I leave him to make his own decision?* Perhaps this is how we think when we are dealing with a child or even an adolescent, but I don’t believe it really captures the whole of our reasoning when the person in question is an adult. Rather, it seems as if the conscientious

paternalist is torn between two different kinds of duties which arise from very different moral attitudes. On the one hand, he *cares* for the other's happiness or well-being. But, on the other hand, he *respects* the other's autonomy, his authority over his own life—an authority which is not forfeited simply because the paternalist could make the subject better off by constraining his freedom of choice. Even where a person is not the *best* judge of his own interests, we typically think that he is nonetheless the *final* judge—at least within a large range of cases. It is the bypassing of that authority that constitutes the most direct objection to paternalism. Call this idea *respect for autonomy*. I maintain that it is at least a *prima facie* objection to the welfarist approach that it doesn't recognize respect for autonomy as an independent moral consideration. On the other hand, this is precisely the attraction of the sovereignty approach: it seems to do justice to our sense that respect for autonomy is significant beyond its contribution to well-being.

Perhaps this intuitive appeal to the place of respect for autonomy in our practical reasoning is persuasive by itself. But someone might object that we shouldn't put much trust in brute appeals to intuition. We need to explain *why* respect for autonomy has the significance we intuitively feel it to have. It is hard to know whether this challenge can be met. After all, how would we explain *why* well-being matters? However, I want to at least try to meet the challenge by explaining how respect for autonomy is a part of the more fundamental idea of respect for persons. This will not be a deductive argument. Instead, the aim is to show how respect for autonomy fits into a larger picture of morality in an attractive way. The argument will bear obvious resemblance to those familiar from the works of Kant and other social contract writers, but I will expound it without trying to attribute it in detail to anyone in particular. Part of the reason for this is that, though familiar in basic outline, I will later interpret the argument in a

somewhat novel way, and so I don't want the discussion here tied too closely to the interpretation other writers give to it.

Although I believe that it is correct to think that showing respect for autonomy is a part of respect for persons, we have to be careful not to fall into making bad arguments. We should be particularly wary of moving too quickly from *respect* for a person's autonomy to *respect* for that person. We often use the word "respect" simply to mean the act of observing some right or claim. Thus, to *respect* Mr. Calhoun's right to own these slaves is simply to recognize that Mr. Calhoun is entitled to a bundle of legal prerogatives, powers, protections, etc. regarding his control over these other human beings. But it should be obvious that, if we refuse to respect Mr. Calhoun's right to own slaves (along with that of every other would-be slaveholder), then we are not being disrespectful to Mr. Calhoun in any important moral sense. Evidently, then, using "respect for x " language does nothing to show that respecting x is a part of respect for persons. We need to say more about what respect for persons consists in, if we are to make any headway in showing the connection to respect for autonomy.

Sometimes respect for persons is understood to signify the recognition that certain characteristics of others make moral demands on our actions, and thus that we cannot simply treat them however we like. This notion sometimes travels under the name "recognition respect,"¹ and it is one way of interpreting the Kantian notion that we are always to treat others as ends and never merely as means (Darwall 1977). In this spirit, we might say that treating someone with respect means never *using* someone "like a piece of furniture or a tool"

¹ Recognition respect is contrasted with *appraisal* respect, which consists in the assessment of the quality of character traits or, more broadly, esteem of someone or something in general. Thus, it is supposed that we are to morally respect someone as a person (recognition respect) even if we think that they are not a very good person (appraisal respect). See Darwall (1977) and (2006): ch. 6.

(Korsgaard 1996c: 297). And, indeed, Kant glosses respect in this way in *The Doctrine of Virtue*: “The duty of respect for my neighbor is contained in the maxim not to degrade any other to a mere means to my ends (not to demand that another throw himself away in order to slave for my end)” (MM: 6:450). Therefore, we might want to say that respect involves recognizing that others are of non-instrumental, unconditional value.

Some Kantians suggest that paternalism fails to show respect in just this sense. Onora O’Neill, for instance, suggests that coercion or deception of competent adults, even for their own good, generally involves treating them “as mere props or tools in our own projects” (1985: 259). But in cases of paternalism, this seems to stretch the idea of *using a person like a tool* beyond all commonsense recognition. To treat someone paternalistically consists in restricting her freedom, or bypassing her autonomy, for her own good and *for her own sake*. But we don’t typically care for a tool for its own sake. (When we do care for them, it is generally because we want them to last for our own sake). Think about it this way: When you force a child to go to school, you plainly treat the child paternalistically, but it seems wrong to say that you are treating the child like “a mere prop or tool” or “a piece of furniture” in your own project—much less that you are demanding that the child throw himself away in order to slave for your end.² Similarly, then, while treating competent adults like children may be wrong, it can’t be the same as treating them like things. Perhaps someone will suggest that we use the term “treating someone as a thing” as a pure term of art, which means nothing more than treating someone in a way inconsistent with the requirements of morality. But in that case we would have to surrender the rhetorical force

² Of course, the child’s good is *your end* in a sense. But likewise, when I use coercion to prevent A from harming B, B’s good is my end. It would be just as misleading in this latter case to say that I have used A as a mere tool or slave to accomplish my end or project.

contained in the ordinary idea of not using or treating others as things. I don't think we should do that.³

Rather than say that paternalism is morally objectionable because it involves treating others as mere tools or things, which seems false, perhaps we should say that it is objectionable because it is inherently contemptuous. That seems to bring us closer to the intuitive idea of what is objectionable about treating an adult like a child. The objection is that paternalism is somehow incompatible with the basic equality of individuals. I think that this, too, is on the right track, but I don't think it is possible to maintain that paternalism toward adults is necessarily *expressive* of contempt, or of any other attitude except benevolence (which on my account is true by definition, see 1.2-3). The difficulty is that all kinds of actions can be expressed with or without contempt, and it is very hard to pick out particular kinds of treatment that are inherently expressive of the actor's contempt. No doubt it is possible for paternalism to be expressive of contempt. But we might also express contempt for others, not by interfering with them for their own sake, but by leaving them alone and remaining aloof from them, as if their well-being did not really matter as much as our own. By the same token, paternalism—and particularly moralistic paternalism—can be understood as taking the equal moral worth of others seriously, and thus, as expressive of the profoundest respect (cf. Finnis 1987; George 1993: ch. 3). It is hard to argue that such professions must be in bad faith.

Instead of looking for what is objectionable about paternalism merely in the subjective attitude of the paternalist, we would do better, I think, to pay closer attention to the characteristics of persons that make respect for autonomy a moral requirement. In other words,

³ I treat a similar theme at more length at 6.5.C. in discussing the difference between persons and property.

why does recognition respect give rise to respect for autonomy? One popular answer is that what is definitive of being a person is having the capacity to freely set ends and prescribe rational rules of conduct for oneself.⁴ Therefore, we cannot respect persons without showing respect for their capacity for self-determination, or in other words, respect for their autonomy. This suggestion gets us part of the way toward where we want to go. I believe it is correct to say that any plausible moral theory is going to have to show due regard for our capacity for independent practical reasoning. But this doesn't quite get us to the stronger sense of "respect for autonomy" that constitutes a standing (even if sometimes defeasible) objection to paternalism. This is because what deserves respect in the highest degree may not be just any arbitrary outcome of a person's practical reasoning, but only those outcomes that are themselves rational or reasonable. Only rational and reasonable deliberation, it may be maintained, is really expressive of the dignity of humanity. Therefore, a part of respecting others as persons is to help them deliberate in a distinctively human way—rationally and reasonably—even if this means paternalistically overriding some of their irrational or unreasonable choices. This, if you will, is the Aristotelian or Thomist way of filling out the notion of respect for persons. It is best articulated by Robert George:

To treat *persons* with equal respect, I suggest, is to act from an *appreciation* of their value *as persons*, as unique loci of human goods, possessing the rational capacity for self-determination by free choice, but subject to being deflected from full reasonableness in choosing not only by mistakes in judgment, but also by habits, weakness of will, and unintegrated feelings, desires, and other emotional factors. Governments are obliged to show equal respect to persons *qua* persons, not to all of the persons' acts and choices. Viewed in this way, respect is neither the equivalent of concern nor the equivalent of non-interference. And treating people with equal respect is neither merely caring about their well-being (in any sense less than their full integrated human flourishing) nor

⁴ Because Kant thought this capacity central to being a person, he called it our "humanity." See Kant, G: 4:437 and MM: 6:380n; and, for discussion, see Hill (1980) and Korsgaard (1996b).

simply refraining from interfering with all of their self-regarding acts and choices (1993: 102).

B) Equal practical authority

If we want to flesh out a rival conception of respect for persons—one in which respect for autonomy (as I have described it above) is more central—I think we do best to emphasize the place of *equality* in respect. In a broad sense, to show (recognition) respect is, as we have seen, to show due regard for something and to act in a way fitting to the thing. In this sense, we can respect animals in that we can recognize (say) how their capacity for pleasure and pain should guide our humane treatment of them. But, as persons, to show respect for other persons seems to involve something more: it seems to involve a recognition of our fundamental equality. This fundamental equality, I would argue, consists in more than our *equal moral worth*: that what happens to one person matters from a moral point of view just as much as what happens to any other person. It even consists in more than the very important recognition that practical reasoning and self-determination are central to personhood. Also central to our fundamental equality is our *equal practical authority*. The idea I have in mind is prevalent in the social contract tradition, but it is perhaps best captured by Locke, when he describes our natural state of equality as one “wherein all power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident, than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection” (2T: II.4). By invoking the notion of a person’s authority, what I mean is that, within a certain domain or “jurisdiction,” what confers a special status on the outcome of a person’s deliberation is its source in the will of an equal being, not its content.

Compare the legal authority of a government: within a certain jurisdiction (and perhaps within certain bounds of reasonableness), what makes something a law is not whether the law is rational or reasonable, but whether it was issued through the proper channels by the legitimate government.⁵ My claim, then, is that the practical activity of others deserves our respect, not in virtue of its rationality or reasonableness, but just in virtue of its having its source in a moral equal. To limit the other's exercise of autonomy, even if for his own good and with the best and purest of intentions, is nonetheless a failure to respect this fundamental equality, in that it oversteps the equally parsed jurisdictional boundaries that separate his authoritative zone of control from my own.⁶ I submit that recognition of this equal practical authority is integral to the best interpretation of what it means to respect others as free and equal persons.⁷ Of course, where interests are shared or conflict, we have to work out forms of "shared jurisdiction." Because my subject is paternalism, I have said nothing about how this shared jurisdiction is to be conceptualized. But a natural way of thinking about the moral root of democracy is that it is a way of sharing our equal authority over matters that are of mutual interest and over which no one has exclusive personal sovereignty. Thus, to deny a person a voice in the government of his

⁵ Of course, philosophical questions about the nature of law are far more complicated than that description lets on, but the point is clear enough, I think, for my analogy to be understood.

⁶ See also Kant, MM: 6:229-233. On the analogy between paternalism and political usurpation, see Korsgaard (2008b).

⁷ It might be objected that there is a gap in my argument. For even if respect for the equal practical authority of others is a part of respect for persons, it does not follow that each person has jurisdiction or authority *over himself*. Perhaps everyone has an equal authority over everything and over everyone else. This idea might take two forms. First, everyone might have the license to act however he likes, without any duty to respect the equal license of others (roughly, as in the Hobbesian state of nature). Or, second, everyone's equal authority might range over everything and everyone, but only be capable of being exercised jointly. Thus, everyone would have a duty to obey the will of all in all things. Although each of these views is consistent with everyone having equal practical authority, neither is attractive as a moral conception. The first seems wholly implausible as an interpretation of respect for persons, since it lacks any distinctively moral content; it is rather the denial that there are any moral requirements on anyone. The second, though a coherent moral conception, is unattractive because it fails to do justice to the facts that human agency comes bundled in separate, independent, person-sized units, and that human beings seem to have a special (though not necessarily overriding) concern for themselves.

basic interests is wrong because it fails to recognize that his practical authority is equal to that of everyone else. Even if his interests would be better protected without his having a say, it is nonetheless his right as an equal to have that say. In this way, we see that the non-instrumental justification of democracy is the same principle as that underlying the non-welfarist objection to paternalism.

What emerges from this is a picture of morality that is at least dualistic in its foundations.⁸ One pillar of morality is grounded in the attitude of benevolence or care, which is a moral attitude oriented toward the good or well-being of others. But trying to reduce all of morality to considerations of benevolence, even if only at a fundamental level, is in my view a mistake. We also recognize the unconditional value of others as free and equal persons by respecting their autonomy and their equal authority as independent human beings. Because there are (at least) these two different ways of recognizing and appropriately responding to a person's unconditional value, it is possible to fail to treat a person as morality requires out of a sincere but one-sided concern for the other person as an end in herself.⁹

Of course, it bears reminding that it is possible to bring this notion of respect for autonomy within an expansive objective account of benevolence and well-being. We might, for instance, simply stipulate that our respect for Q's right to control his affairs is itself one ideal constituent of Q's good, regardless of whether that control tends to promote Q's subjective satisfaction, and regardless of how that control tends to impact the rest of Q's life. And we could further stipulate

⁸ If not more fragmented than that. See Nagel (1979).

⁹ Although I will not try to draw the connections and distinctions, my views here have been particularly influenced by the discussions of love (or care, or benevolence) and respect in O'Neill (1985); Darwall (2002; 2006); and Velleman (2006; 2008a). The opposition of duties of care (or love) and respect is broadly inspired by Kant, MM: 6:448-474, 488.

that the good of controlling one's own affairs always, or almost always, outweighs the promotion of other elements of well-being. It should come as no surprise that there are different ways of carving up in theory what are essentially the same kinds of practical relations; nor should we get too hung-up on what are really little more than stylistic variants of the same philosophical outlook. It seems to me more useful and perspicuous to separate out respect for the autonomy others from care for their well-being, and it is notable that the more influential authors who do ground the moral importance of autonomy in well-being deny that it is respect for the *right of control* that is intrinsically valuable.¹⁰ However, I am willing to concede that the notion of well-being is fluid enough (especially when detached from subjective satisfaction) to accommodate my conception of respect for autonomy. Such a view is what I have called above the "embedding approach" (2.1).

C) The case against the welfarist approach

In sum, I have offered two kinds of argument against the welfarist approach to justifying the Liberal Outlook on paternalism. The first kind of argument, which occupied the last two chapters, was essentially an argument from reflective equilibrium. I claimed that the best welfarist arguments, standing on their own, seem to permit more paternalism than liberal commonsense would allow. To be sure, that does not mean that such intuitive notions are right and that the welfarist arguments are wrong. But a mismatch between our initial intuitions and the implications of our arguments gives us cause to look further for a different justification of our intuitions. The second kind of argument maintains that the welfarist approach fails to do justice to the ways we actually reason about whether or not to treat people paternalistically. That is,

¹⁰ This is very clear in Griffin (1986). I believe that the same is true of Raz (1986) and of the elaboration of the Razian view in Wall (1998). For further discussion, see 2.6.

even if we are confident that we can benefit someone by treating him paternalistically, we still seem to think that there are important considerations against doing so. Respect for autonomy seems to be morally important beyond autonomy's contribution to well-being. Finally, I have tried to say something about *why* respect for autonomy is morally important. I have argued that respect for autonomy is a part of respecting others as free persons, who are not only of equal moral importance to one another, but who also have equal practical authority as one another. It is overstepping this equal practical authority, then, that makes it illegitimate to bypass another's autonomy, even when doing so would be beneficial to him.

4.3 Sidgwick's Challenge

The alternative to the welfarist approach, the "sovereignty approach," does take the idea of respect for autonomy seriously. As I suggested at the beginning of Chapter 2, the challenge for the sovereignty approach is to explain why, given the duty of respect for autonomy, paternalism is *ever* permissible, as commonsense suggests that it is. And in particular, the sovereignty approach must account for why paternalism toward children should be generally more appropriate than paternalism toward adults. This challenge was essentially the argument that Sidgwick gave for rejecting what he called an absolute "Right to Freedom," which is to say, one not grounded in utility. While Sidgwick allowed that the principle that "no one should be coerced for his own good ... commends itself much to my mind," he believed that, on reflection, only the principle of utility could explain the reasonable limitations we place on the right to freedom, since "no one would gravely argue that this ought to be applied to the case of children, or of idiots, or of insane persons." This, for Sidgwick, is the thin end of the wedge. If we ask ourselves why we do not recognize a fundamental right to freedom in the case of children,

“idiots,” and the insane, we must find that the principle of freedom only applies when “human beings are sufficiently intelligent to provide for themselves better than others would provide for them” (this is the “epistemic argument” we explored in 2.5). And, if that is right, then the principle of freedom “would present itself not as absolute, but merely a subordinate application of the wider principle aiming at the general happiness or well-being of mankind” (1907: 274-275). Although the welfarist approach is vulnerable to the criticisms just rehearsed above, it does at least have an account for distinguishing cases of permissible and impermissible paternalism. If the sovereignty approach cannot explain why paternalism should ever be permissible—especially paternalism toward children—then, on balance, the welfarist approach will probably look far more plausible.

An initial move that a proponent of the sovereignty approach might want to make is to distinguish between a *fundamental* and an *absolute* duty to respect autonomy. A duty (or right) is fundamental if it is not derived from another principle. A duty (or right) is absolute if it is indefeasible. These two characteristics might, but need not, go hand-in-hand. In classical utilitarianism, they tend to go together: there is only one fundamental (non-derived) and absolute (exceptionless) moral duty: “promote the general happiness.” Other moral principles, like “tell the truth,” “do not steal,” and “show gratitude” are neither absolute nor fundamental. They are not fundamental because their ultimate rationale is that observing these principles will tend to promote the general happiness. And the derived status of these subordinate principles explains why they are not absolute (or exceptionless): if the rationale for generally telling the truth is that this tends to promote general happiness, then there seems to be no good reason for telling the truth where it is plain that doing so will actually cause net unhappiness.

Perhaps it is for this reason that Sidgwick makes the error of thinking that he can show that a duty is not fundamental if he can show that it is not absolute. He argues that since there are exceptions to the principle of freedom—cases where considerations of utility limit the application of the principle of freedom—that shows that the principle of freedom is ultimately subordinate to the principle of utility. But that does not follow. To give one instance, I can consistently maintain that keeping promises is a fundamental but non-absolute duty. I may think I should keep my promises, even when doing so will lead to somewhat less happiness all around (even taking into account remote effects). That shows that I do not think that the duty to keep promises is simply derived from the duty to promote happiness. But, on the other hand, accepting that the duty to keep promises is fundamental does not mean that I am committed to keeping my promises come hell or high water (cf. Williams 1973: 90-91). There will be cases where the costs of keeping a promise seem unreasonable. Although I have promised to be home for the holidays, I might think it is reasonable to break that promise to care for a very sick friend.

Here is one way to think about non-absolute, fundamental duties. For something to be a duty is *inter alia* for it to exclude certain other grounds for consideration (Raz 1975). When I have a duty to keep a promise, I am not to decide on the basis of what will make me happiest or even what will lead to the most overall happiness. These grounds are excluded. But this exclusion may only operate across a certain range of cases. The duty to keep promises is not overridden whenever breaking the promise would lead to more happiness, but there may be certain exceptional cases beyond the normal range where considerations of utility do override the non-utilitarian principle to keep promises (cf. Fried 1978: 13-17 and Kamm 2007: 30-31).

Allowing that the duty to respect autonomy is not absolute helps deal with Sidgwick's challenge. To say that there is something *prima facie* wrong with inhibiting, overriding, or

bypassing a person's freedom does not mean that it is always wrong no matter the consequences. Someone might consistently hold that generally autonomy should not be overridden to protect or promote a person's well-being, but that in catastrophic cases—in order to prevent a person from killing or crippling himself, for example—paternalistic restraints are warranted. Indeed an even subtler account is possible. In Chapter 1 we considered different forms of paternalism: legal restraint, coercion, manipulation, deception, etc. Perhaps each of these modes sets different thresholds for permissibly overriding autonomy. It may be that legal restraint or coercion are only justified in truly catastrophic cases, whereas the threshold for permissible manipulative or deceptive paternalism is much lower.

To what extent does rendering the duty to respect autonomy non-absolute help with our central concern: the justification of paternalism toward children? Certainly there are cases where abstaining from paternalistic intervention with children seems catastrophic enough to outweigh a concern with autonomy, as in cases where the child's action endangers life or limb. But this would not account for the pervasiveness of the paternalism that we practice toward children. For instance, making rules concerning the child's diet, bedtime, and everyday activities, while perhaps good for children, do not seem to be plausibly construed as catastrophic, exceptional cases. Therefore, it is not just that children stand to benefit more from paternalism than adults; it seems that the threshold for paternalistic intervention is considerably lower in the case of children. Whatever is wrong with paternalism in general, just doesn't seem to be as wrong with respect to children. That is not something that the distinction between absolute and fundamental duties helps us to explain.

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Instead of arguing that respect for autonomy is limited by external considerations, like catastrophic harm, a different approach is to show that respect for autonomy can somehow limit itself. There is a large family of arguments which proceeds roughly in this spirit. To respect a person's autonomy, it is supposed, is to respect another's free choices. As one author puts it, "This means that in every action, we are to respect others as choosers even if we disapprove of the choices they make. As such, there is no general permission to make other people's choices for them simply because they are not likely to choose well on their own" (Schapiro 1999: 719). But the standing obligation to respect a person's choices does not apply when the "choice" cannot be attributed to an accountable agent. This might be for two kinds of reasons. First, sometimes a person does not realize what he is really about to do, and would not want to so act if he did realize it. Preventing someone from doing what they don't really want to do does not seem to really violate a person's self-direction. In these cases, we might say that the action is not really the agent's genuine choice. I shall call these "arguments from involuntariness." The second group of reasons is this: some human beings—like young children—seem to lack the basic rational capacities constitutive of agency. Therefore, here we do not even have an accountable agent, and so we cannot have a duty to respect the subject's agency. I shall call these "constitutive arguments."

Because both kinds of argument turn on questions about agency—whether a choice is expressive of agency or whether the actor is a full agent at all—I call this whole family of views "respect for agency." In the next two sections (4.4 and 4.5), I will explore both sorts of argument. In doing so, I will draw on a number of authors to offer composite accounts that present what seem to me the strongest versions of these arguments. Then, in the following section (4.6), I explain why, in spite of its strengths, the agency approach does not fully account

of the Liberal Outlook either. This sets the table for me to argue in Chapter 5 that respect for agency is not the only possible interpretation of the broader ideal of respect for autonomy, and that a different interpretation is better suited to explaining some aspects of paternalism toward minors.

4.4 Arguments from Involuntariness

Arguments from involuntariness maintain that the duty of respect for agency does not require us to respect the apparent “choices” of a person who is about to do something he does not really intend to do. For example, Mill argues that we do not really infringe a person’s liberty when we prevent him from walking onto a bridge that, unbeknownst to him, is about to give way, “for liberty consists in doing what one desires, and he does not desire to fall into the river” (OL: V, ¶ 5 / CW, XVIII: 294). Joel Feinberg explains the rationale of the position this way: just as the liberal harm principle permits us to protect a person from the harmful choices of others, the same rationale licenses us to protect a person from his own “‘nonvoluntary choices,’ which being the genuine choices of no one at all, are no less foreign to him” (1986: 12). Feinberg suggests that there are ultimately two grounds for regarding someone’s act or assent to something as insufficiently voluntary for it to be truly his own: (a) He didn’t really know (or understand) what he was doing,” and (b) “He couldn’t help it” (316). I shall consider these cognitive and volitional failures in turn in sections (A) and (B), and then, in section (C), briefly discuss some of the different causes of these failures.

A) Cognitive failure

The most straight-forward cases in which a person’s action is foreign to his genuine will involve “cognitive failure,” that is to say, cases of ignorance and defective belief. Mill’s bridge

example, once again, is paradigmatic. If a man is about to walk across a bridge that he doesn't know to be dangerously unsound, and if there is no time to warn him of the danger, then does respect for the man's agency require that I let him continue on his way toward his own peril? That seems perverse. Surely it is perfectly compatible with respecting the man's agency to forcibly restrain him from stepping onto the bridge until I can make the danger known to him. In fact, restraining him seems to be a part of respecting his agency. If he doesn't really know what he is about to do, then the action isn't really *his choice* at all. Only after he knows the condition of the bridge does it seem that he is really in a position to make his own choice about whether to take the risk or not. Once he has made a choice with his "eyes wide open," then respect for his agency requires that I let him go his own way, even if the choice seems unwise. If the person is temporarily in a state that makes it impossible for him to understand what he is doing (maybe he is intoxicated), then I might have to restrain him until he really can understand the consequences.

Although restraining the man appears consistent with respect for agency, it is (in spite of Mill's description of the case) still an interference with the man's liberty in a sense. That is because the action of crossing the bridge isn't fully involuntary either, as it might be if he were being blown across it by a powerful gale. That would be so involuntary a movement as not even to be an action; if we restrained him then, we wouldn't be interfering with his liberty at all. In the original version of the bridge example, however, the man is acting voluntarily under one description (stepping onto the bridge) and involuntarily under another description (about to risk drowning). That means that if we restrain him, there really is a sense in which we are preventing him from doing something for his own good. In that regard, our restraint is paternalistic. But at the same time, we are preventing the man from risking a harm he doesn't really intend to take. In that regard, our paternalism seems compatible with respect for his agency.

But this seems puzzling: Every action has innumerable act descriptions, and no one ever consciously intends to perform all of them. So paternalism cannot be warranted whenever I am about to act involuntarily under *some* description. Part of the solution to the mystery is this: it is a necessary condition for warranted interference that there must be good reason to believe that the new information would change the person's mind about the action he is about to perform. Thus, I should not restrain a man about to unwittingly walk across a bridge that happens to be the second-oldest in Calaverous County (but perfectly safe for all that), since there is no reason to think this would change his mind about crossing the bridge.

On this principle, another constraint on permissible paternalism, naturally enough, is that interference is generally only justified when it is the least restrictive or intrusive option. The bystander cannot indulgently tackle and restrain the pedestrian when a simple word of warning would do. Furthermore, we must keep in mind that very often the restraint is more undesirable than the unintended consequences. If I see a stranger at a concession stand about to put mayonnaise on his hotdog, I have good reason to think this is a mistake, since it is an unusual condiment for hotdogs. But I wouldn't be warranted in knocking the mayonnaise packet out of his hand even if there were no time to warn him of the impending danger. When the "danger" is slight enough, people would usually prefer to suffer the consequences of their mistakes than be interfered with. In order for interference to be justified, then, one needs to have good reason to believe that a person would welcome the interference. One way to think about this is to consider whether we think the person would "subsequently consent" to our interference. This, however,

is just a way of thinking about what a person would want for himself, if only he knew what we know now. We should not think that it is just like ordinary consent, only somehow retroactive.¹¹

Of course, most of the time, no one knows for sure how particular actions will turn out. In these cases, the leading question is whether the subject understands the risks he is taking, and whether we know what they are any better than he does. If we don't have any knowledge that he lacks, then generally paternalism is unwarranted on the present view. In some cases, a person may have a very good understanding of the *general* risks involved in his action, but for some reason we have additional knowledge about this particular case. This additional knowledge could warrant paternalistic interference. The question is not whether the subject has taken due care, but whether he would act as he now intends if he knew what we know.

From the foregoing, then, we arrive at the view that paternalistic interference is generally consistent with respect for agency when we have good reason to believe: (i) that a person is about to do something out of ignorance; (ii) which he wouldn't do if fully informed of the relevant facts; (iii) that there is no less restrictive way of informing of the relevant facts; and (iv) that the person, if fully informed, would prefer the interference to the consequences of his mistake. Of course, knowing what someone else knows and would prefer can be difficult, so we are simply forced to act on the best evidence that is available to us. With close acquaintances, we often have a rough idea of what they would and wouldn't do voluntarily and when they would and wouldn't welcome interference. With strangers, we have to rely on assumptions about what the average person would believe and prefer. For this reason, we often appeal to the

¹¹ I say a little more about subsequent consent in 7.5.D.

standard of what the reasonable “man on the street” would want or prefer. But this is only a heuristic, not a normative standard.

To mitigate the difficulties and dangers this potential interference causes, we create institutions and abide by conventions that make these assumptions public knowledge. People are assumed to know what they are doing when they buy stock, but doctors are not to assume that patients understand a treatment without being explicitly briefed. Sometimes we also delegate the responsibility for oversight over a particular domain to special parties (e.g., we expect our physicians to oversee our health, not our neighbors). These measures not only make justified paternalism more effective, but reduce the risks of unwarranted interference, abuse, and the compromise of privacy. Sometimes pragmatic considerations make policies and laws less flexible than would be warranted in principle. For example, in principle (on this view) we should only make sure that prospective swimmers *fully understand* the risks of a dangerous riptide before allowing them in the water. Nevertheless, a flat prohibition on swimming might be justified, since failing to warn an unwitting swimmer would be far worse than the inconvenience to the few willing to take the enormous risk.

Let me now make a few further remarks fleshing out the ways that cognitive failure does (and does not) justify paternalism on the present view. Sometimes ignorance and defective beliefs absolve a person of responsibility for the consequences of his actions, whereas when a person *should have known better* but acts negligently, his ignorance does not absolve him of responsibility, or at least does not do so entirely. When we want to know whether someone is accountable for the consequences of his action, it is not enough to ask whether he actually foresaw the consequences, because we think a person can be negligent when he unintentionally brings about consequences that were reasonably *foreseeable*. Some writers have suggested that

paternalistic interference is, likewise, only justifiable when a person is ignorant of *unforeseeable* consequences. On this view, respect for autonomy and accountability are essentially flip-sides of the same coin (cf. Arneson 1980). This does not seem to me to be an attractive position. For instance, we typically think a person's accountability for an accident is not fully absolved when he acts under intoxication. And yet, it might still be appropriate to paternalistically interfere with the intoxicated person to prevent him from causing a serious accident to himself, even if absent our interference he would have had no one to blame but himself.¹² So it seems better to say that paternalism can be justified, even when the person would have been responsible or accountable for the consequences of his action.

One might ask how this argument from ignorance differs from the welfarist "epistemic argument" considered previously in section 2.5. Certainly, the two arguments are similar. One difference is that they assume different burdens of proof. The epistemic argument assumes that it is generally right to promote another's well-being. However, since people are usually the best judges of their own good, it is typically best not to intervene against their will. The argument from ignorance, on the other hand, assumes that interference with another's choices is generally wrong. However, interference may be justified if a person's ignorance causes him to do something he does not really intend to do. The more fundamental difference, though, is that the epistemic argument appeals to the concept of a person's good, while the argument from ignorance appeals to the non-voluntary character of his action. Therefore, whether the two

¹² Feinberg (1986) puts this point well: "If we are investigating a person's possible criminal liability for unreasonable risks he caused to others, for example, it will not defeat the voluntariness required for liability to show that 'he didn't know the gun was loaded,' since that kind of ignorance is always presumed to be negligent. ('He should have known,' we reply). But if a person playfully illustrates the game of Russian roulette with a fully loaded six-shooter, it utterly vitiates the voluntariness of his actions to show that he doesn't know the gun is loaded, and any better-informed spectator owes it to him to intervene forcibly for his sake" (159).

arguments are flip sides of the same coin depends on the relationship between a person's good and voluntary action. If, like Socrates, you think no one does what is bad for himself voluntarily, then the two arguments *would* come to the same thing.

Another point to make is this: If the argument from ignorance is going to ground a *liberal* theory of paternalism, then it seems that we are going to have to assume a rough fact/value distinction. Thus, it is ignorance of facts about the empirical world that threatens to undermine the voluntariness of an action, not ignorance of values. Suppose a daredevil attempts to ride his unicycle blindfolded across what everyone knows to be a dangerous bridge. We could not defend our interference with him on the grounds that, owing to his ignorance of the value of his life and the worthlessness of such sophomoric feats, his choice is alien to his "true self" or genuine will. We would then presumably be guilty of what Isaiah Berlin warned us of: of bullying people in the name of respect for their "real selves" (1967: 157).

Furthermore, some departures from rationality may in fact be best understood as rooted in a person's values. The gambler or romantic is not just a person prone to making mistakes; rather his central values are inconsistent with an overly precise calculation of risks, inconsistent with the *actuarial Lebensphilosophie*. In this vein, Richard Arneson insists that "rationality, in the sense of economic prudence, the efficient adaptation of means to ends, is a *value* which we have no more reason to impose on an adult against his will for his own good than we have reason to impose any other value on paternalistic grounds" (1980: 474). A good respect-for-agency account requires, then, something like the distinction between global and local preferences invoked in some desire-fulfillment theories of well-being.¹³ That is, it is not always enough to

¹³ See for instance Parfit (1984): Appendix I. I say more about local and global preferences in section 3.4.

ask whether this local decision was well-enough-informed to be voluntary. We also have to ask how this local decision is related to a person's general values and overall character. For a person who seldom takes risks, an apparently careless decision may invite paternalistic interference, while such interference may be inappropriate if the same decision were made by a well-known rake.¹⁴

Though it is ignorance of empirical facts, not of values, that justifies paternalistic interference on the present view, it may be appropriate, as Feinberg suggests, to say that voluntariness can be undermined, not only by a lack of mere "cognitive awareness" of the consequences or risks of a particular course of action, but also by the lack of a sufficiently visceral or emotional appreciation of them (Feinberg 1986: 121, 135). Thus, if people are to make a truly voluntary decision to smoke, it may not be enough that they are told in a cool intellectual way about the risks; it may also be necessary that they are exposed to gruesome pictures and testimonials of people suffering from tobacco-related illnesses. While there is surely something right about this idea, it is also puzzling in a number of ways. First, insisting on this requirement may somewhat narrow the fact/value distinction, especially if you think that full imaginative acquaintance is one way we recognize values (cf. Lewis 1989). Presumably it would be necessary to allow that there are a number of reasonable ways of appreciating the same facts. For instance, it may be fitting to ensure that would-be mountain-climbers really comprehend what they are getting themselves into, but it seems illiberal to assume that no reasonable person could think the hardships and dangers involved are worthwhile. Second, it is not clear that full visceral appreciation of the possible consequences always makes one's action more voluntary.

¹⁴ Again, there is a good discussion of this issue in Feinberg (1986): 106-113.

To travel by air with one's "eyes wide open," it seems sufficient that one has a cool understanding of the extreme statistical unlikelihood that one's plane will crash; we don't think that it is also crucial for people to be shown grisly photographs of the human remains of air disasters.¹⁵ I won't try to solve these puzzles here; it is enough to have pointed out that this is one part of the account that still has some rough edges.

All of these considerations seem to make clearer why we treat children more paternalistically than adults. For the most part, adults are presumed to know what they are doing and to prefer interference only in exceptional circumstances. Children's ignorance of the world and of themselves is much more pervasive, and thus, they are more likely to act in ways that don't reflect their true intentions. Sometimes, like adults, they simply lack relevant information, and this defect can be easily remedied. But in other cases their lack of understanding is far more profound and is impossible to remedy immediately. Young children lack the capacity to reason abstractly and to imagine the future, so they cannot understand risk or long-term consequences. Although children may not acquire any qualitatively new reasoning capacities after the age of about twelve, they may still lack sufficient comprehension for their actions to reflect genuine agency. For one thing, children simply haven't been around long enough to know very much about the world and what opportunities there are to choose from. And even when children are capable of a purely intellectual understanding of the consequences of their actions, they may lack the imaginative visceral comprehension we discussed above. Nor have they had time to get to know themselves yet, and children who are still in the process of rapid physiological development have very little ability to understand what they will value and desire in just a couple

¹⁵ Similar criticisms of full-information accounts of a person's good are made by Gibbard (1990):18-22 and Sobel (1994).

of years. These considerations seem to justify treating a child somewhat as we would a normally competent person with temporarily compromised capacities, in that we should often prevent them from making weighty decisions until they are really in a position to understand the choice (cf. Lipson and Vallentyne 1991). When a decision must be made, it seems best to decide in a way that keeps the child's future options substantially open, so that he can exercise his own agency when he is able.¹⁶

B) Compulsion and volitional failure

Acting out of ignorance is not the only way that our actions fail to reflect our genuine agency. Sometimes when we feel compelled to act, we don't feel like the action was really our own to make. In such circumstances, we say "I had no choice." The most direct cases are those involving coercion and other forms of external pressure. Cases of direct coercion raise questions for paternalism insofar as we must decide when a person's consent to a transaction or to another's act should be considered valid. Often our judgment about these cases turns on whether the allegedly coercive threat was wrongful. If so, then consent usually isn't binding; otherwise, it is. Harder cases are those where party *A* takes advantage of party *B*'s difficult circumstances. As an egregious example, *A* offers to help *B* out of her difficult financial situation if *B* agrees to donate a kidney. In these cases, we ask whether *A* seems to be taking "unconscionably" unfair advantage of *B*, and whether *B* is forced to do something that we feel no one ever ought to be forced to do (like sell her sex or her organs). Working out particular cases is intricate, and much

¹⁶ Cf. Feinberg (1986): "In almost all the important cases, when the options have serious ramifications for the child's subsequent life, the correct policy is to avoid making any decision at all. In that way the guardian keeps the child's central options open until the child reaches an age of adequate capacity and can make the choices himself. When 'no decision' itself will have the effect of closing the child's future options, then the guardians proxy decision should be for the course that keeps as many life-options as possible open for the adult the child will one day become" (326). See also Feinberg (1980).

depends on background views about distributive justice, what sorts of power people are entitled to wield in coming to agreements, what choices are so personal as to be protected from being made under pressure, and so on. Because of the child's vulnerable condition—physically, emotionally, and economically—we tend to be less tolerant of their choices being made under coercive pressure and duress than we are in the case of adults. One way of handling this is to withhold powers of contract and consent from minors and to appoint guardians to oversee their interests and exercise those powers in the minor's name (see 1.4.C).

More elusive is the category of *inner compulsion*. We often say that a person suffering from a chemical addiction or strong neurotic compulsion “couldn't help himself,” or that a person was “overcome” by a strong passion. These cases of volitional failure are puzzling because the person seems to know what he is doing in the most immediate sense and yet he still acts in ways that seem foreign to him (at the moment or perhaps later). Broadly, there seem to be two kinds of inner compulsion. In cases akin to a frenzy, the person is “out of his right mind” and his “true self” (that is, his settled dispositions) seems temporarily absent. These cases closely resemble those of ignorance and can be treated in the same way. For instance, suppose there is a frustrated writer who has worked himself into a fury and is about to throw the only copy of his manuscript into the roaring fireplace. We would probably say that his friend is warranted in seizing the manuscript and running off until the writer's frenzy has subsided, since this is what we expect the writer in a calm state would want. Although we would surely restrain a child in a tantrum if he was about harm himself, cases of frenzy seem to shed little light on the *special* status of children, especially older ones.

The other category encompasses cases of weakness of will including addiction and neurotic compulsion. In these cases, the person's true self still seems to be present, but impotent to overpower the alien desire (cf. Loewenstein 1996). Severe cases of weakness of will sometimes mitigate responsibility and can vitiate the validity of consent. However, it seems to rarely warrant actively restraining a person's liberty without prior consent. This is because, since the true self is still present, we assume it is still in the person's power to authorize us to "bind him to the mast" (like Odysseus amongst the sirens) if that is his true will (Elster 1984; 2000). Young children have weak impulse control and little ability to defer instant gratification. This is commonly said to be one factor that justifies paternalistic restraint (G. Dworkin 1972: 76; Archard 2000: ch. 4). This is not unreasonable, but one might wonder why we don't first require the child's prior consent. Perhaps it is because weakness of will is combined with other agency-reducing factors, like an inability to understand the consequences of giving into temptation.

C) Forms of cognitive and volitional failures

Some cognitive and internal volitional failures are "one-off" events. A simple mistake or isolated episode of frenzy or weakness of will are examples. Others are due to incapacities. An incapacity, in this sense, is a relatively stable defect or imperfection in a person's reason or will that impedes normal adult functioning. The notion of an incapacity is teleological. Neither a blind person nor a jellyfish can see, but only the blind person suffers from an incapacity, since not-seeing is an imperfection in human beings, but not in jellyfish. Senility, retardation, immaturity, and some mental illnesses can be classified as cognitive incapacities. A serious chemical addiction or a powerful neurotic compulsion may be instances of volitional incapacities.

Some incapacities are sufficiently temporary that it is worth giving them the special label of “impairments.” These are not just defects judged from the species-standard of normal functioning, but are deviations from the individual’s own normal state. “Normal,” here, also denotes a teleological notion; it is not to be understood statistically. A drunkard may spend more time intoxicated than sober, but his “normal” state in the present sense is nonetheless his sober state. As in that example, the most familiar impairments are drugged states, but that is just one form of an altered mental state, which can have other causes (like a high fever). More expansively, Feinberg also includes as temporary impairments “the moods, emotions, passions, and pains whose demands on our attention can be so peremptory in their several ways that we are, while under their influence, utterly distracted from whatever business may be at hand” (1986: 321). In addition to simple temporary impairments, there are also dispositions which make us prone to impairments that regularly come and go. I’ll call these “chronically alternating impairments.” Probably the best examples are bouts of mental illness (like severe depression or schizophrenia) that go through cycles of dormancy and acuteness.

Inexperience, gross ignorance, and naiveté perhaps deserve a special category of their own that we can call “broad-based content deficits.”¹⁷ Broad-based content deficits are unlike incapacities and impairments because they are concerned with content rather than functioning. However, like impairments and incapacities, and unlike simple isolated mistakes, broad-based content deficits dispose an agent to cognitive failures across a wide range of cases. For instance, a person who has very little knowledge of the world outside her nursery is likely to often act without fully understanding what she is doing. Of course, there is no sharp distinction between

¹⁷ Although Feinberg (1986) discusses both temporary impairments and incapacities, the category of “broad-based content-deficits” is of my own invention.

an isolated content-deficit (as in the bridge example) and a broad-based content deficit, but in practice it is nonetheless an important distinction, since the latter, but not the former, might seem to justify taking a generally paternalistic attitude toward a person.

As the bridge example makes clear, arguments from involuntariness are not formulated solely in order to justify paternalism toward children. They aim to provide a general theory of permissible paternalism, which can (hopefully) deal with children as one instance.¹⁸ In one sense, therefore, the present argument for treating children more paternalistically than adults does not appeal to any special kind of justification. The reasons for treating children paternalistically are ultimately the same in form as those for treating adults paternalistically: paternalistic interference is appropriate when children are about to act in some way they don't really intend because they don't really know what they are doing or because they can't help themselves. This might, at first, seem to suggest that the argument from involuntariness cannot really explain the status-distinction between children and adults. It suggests that the difference between adults and children is simply one of degree, and that seems to miss some important qualitative difference.¹⁹ On the present argument, however, there is a qualitative difference in what tends to cause adults and children to act involuntarily. In adults, these causes tend to be occasional (e.g., occasional mistakes or fits of passion). Consequently, paternalistic interference should usually have a narrow, "surgical" character, pinpointing the particular cognitive and

¹⁸ Feinberg (1986), for example, only turns his focus to children on page 325 of a 374-page text on paternalism and even then only for about eight pages. (Admittedly, children do receive some peripheral treatment prior to that point.)

¹⁹ Cf. Schapiro (1999): "It is tempting to conceive of the adult-child distinction purely as a matter of degree because this picture supports the intuition that there is a continuous path from childhood to adulthood. And there is an obvious sense in which such a path exists.... But if the task is to illuminate the content of these concepts as status concepts, the idea of greater and lesser degrees of cultivation cannot be the whole story.... To attribute a status concept is to draw something like a distinction in kind, and our question is about the meaning of concepts as they figure into that sort of attribution" (725).

volitional failures. The causes of involuntary action in children, however, lying as they do in general incapacities and broad-based content deficits, tend to dispose children to acting in substantially involuntary ways across a wide variety of situations. Consequently, paternalistic treatment of children is not just narrowly targeted at particular involuntary acts (like preventing the child about to drink the detergent under the sink), but takes the much more general form of controlling and structuring the child's environment and filtering the kinds of choices that they will face.

4.5 Constitutive Arguments

The arguments from involuntariness hold that paternalism may be permissible when an agent does not really know what he is doing, or when he is subject to some form of compulsion. The second group of arguments cut deeper. These maintain that an actor may lack certain capacities that are constitutive of full human agency. Not being a full agent in the first place, we have no duty to that actor to respect his agency. I will discuss two versions of this argument. One appeals to a subject's lack of moral agency. The other appeals to a lack of agency in a broader sense.

A) Moral agency

One venerable argument for restricting the child's liberty is that the child is not to be entrusted with full freedom until he is capable of recognizing in reciprocal fashion the rights of others and his duties to them. Until then, the child is not a full member of the moral community and lacks the rights attending to that status. This is what Locke meant in saying that children are under the authority of their parents until the age of reason: "The *freedom* ... of man, and liberty of acting according to his own will, is *grounded on* his having *reason*, which is able to instruct

him in that law he is to govern himself by, and make him know how far he left to the freedom of his own will” (2T: II.63). One of the duties of parents therefore is to raise children so that they develop the capacity to know and abide by this law.

In the *Second Treatise*, Locke makes this sound like a very intellectual process: like teaching someone the axioms of geometry. But Locke’s considered view is much more realistic than that. In the *Essay Concerning Human Understanding*, he holds that knowledge of practical principles must “produce conformity to action, not barely speculative assent to their truth” (ECHU: 1.3.3). Someone who “knows” in a theoretical way that the proposition “Lying is wrong” is true, but who doesn’t feel bound by the rule, doesn’t really *know it* in the practical or moral sense. Therefore, making children reasonable involves helping them to internalize moral principles in habits of virtue, especially the fortitude to master their inclinations. Thus, not unlike Kant, Locke tells us that “the foundation of all virtue and worth is placed in this, that a man is able to deny himself his own desires, cross his own inclinations, and purely follow what reason directs as best, though the appetite lean the other way” (STCE: 33). The goal of moral education, then, is to instill in children “Habits woven into the very principles of his nature; and not a counterfeit carriage, and dissembled outside, put on by fear” (STCE: 42). Only someone “used to submit his will to the reason of others, when he is young” will learn how to “submit to his own reason, when he is of an age to make use of it (STCE: 36). Similar stories can be told with slight differences in a variety of philosophical idioms: for instance, as the process of instilling moral principles, or shaping a superego, or awakening in the child a conscience, a moral sense, or sense of justice.²⁰

²⁰ For example, see Rousseau, *Emile*, esp. Bk. II, pp. 97-102; Kant, MM: 6:447ff; Hegel, PR: 175A; Freud (1961).

It might seem that this argument is not genuinely paternalistic, inasmuch as the aim is to ensure the recognition of the moral interests of others, and not those of the child. Insofar as the parent must prevent the child from harming or wronging others before he is governed by his own conscience, the objection is sound. But it is in the child's interests to *become* a moral being. This, anyway, is the way Locke looked at it. He argued that "To turn [the child] loose to an unrestrained liberty, before he has reason to guide him, is not the allowing him the privilege of his nature to be free; but to thrust him out amongst brutes, and to abandon him to a state as wretched, and as much beneath that of a man, as theirs" (2T: II.63). This passage could be interpreted to mean that it is in the interests of people to be able to govern themselves in society so that they do not have to be suppressed by others like wild animals. Or (not incompatibly) it could be understood to mean that a prerequisite for a distinctively human life is the capacity to live in community and relationships structured by law and reciprocity. This, however, means that such restraint is only paternalistic insofar as it is educative. Thus, preventing the child from harming his sibling is paternalistic insofar as it teaches the child the proper way to act, but it is not paternalistic insofar as it simply protects the sibling.

Modern versions of the argument appealing to moral agency sometimes subscribe to the stage theories of moral development articulated by writers like Piaget (1932), Kohlberg (1969; Colby and Kohlberg 1987), and Rawls (TJ: ch. VIII). We cannot go into the differences between these theories here, but since Kohlberg's is the most empirically studied, it can serve as an exemplar. In the roughest outline, Kohlberg posits a progressive developmental trajectory in moral thinking that is characterized by three successive perspectives that the self takes toward the moral expectations of society. At the *pre-conventional* level, moral rules are external to the self, and the person is motivated to act to avoid punishment or bad consequences. At the

conventional level, the person has internalized social expectations and wants to see himself and to be seen by others as conforming to these expectations. And at the *post-conventional* level, the person recognizes the possibility of questioning and evaluating the validity of conventional social expectations in light of mutually acceptable general principles and is motivated to act on those principles.²¹ Kohlberg understood these levels to be increasingly sophisticated and mature forms of moral reasoning and thought of moral education as properly aimed at furthering this process of development (cf. Power et al. 1989).

B) Reflective agency

According to a second kind of constitutive argument, what children lack is not just a moral conscience, but more generally any reflective and relatively stable evaluative framework. Such an evaluative framework is central to two fundamental aspects of the reflective agency typical of personhood: our sense of having the freedom to choose on the basis of reasons which of our inclinations to will and act upon; and our sense of having a distinctive character with aims and principles that endure the changes in our momentary feelings and desires. I will enter into this subject by considering the ideas of reflection and free will, and then explain how these are connected to valuing, character, and temporally extended agency. I shall then explain how the lack of this reflective and temporally extended agency will might justify paternalism toward children.

²¹ Kohlberg further divided each level into two stages, the latter incorporating a more de-centered or generalized perspective than the former. At the pre-conventional level, a person initially gives no regard to individual perspectives and conceives of moral rules as imposed by powerful authorities (Stage 1), but later recognizes the relativity of different perspectives and conceives of moral rules as pragmatic arrangements for pursuing his own interests (Stage 2). At the conventional level, a person thinks of moral rules as rooted in the roles and expectations of small, interpersonal associations (Stage 3), but later considers these roles from the point of view of society as a whole (Stage 4). At the post-conventional level, a person critically evaluates personal norms in the light of general moral principles (Stage 5), but later assesses the validity of these principles themselves insofar as they could be reasonably agreed to by all (Stage 6). See Kohlberg (1967) and Colby and Kohlberg (1987).

(i) Reflection and free will: On the simplest model of action, we always act on our strongest desires. But this model does not conform to our experience. Although we do often find ourselves with conflicting desires of varying intensities, we feel ourselves to be capable of reflecting on and standing back from these desires, and in the normal case, we have the power to endorse one or the other (independently of their visceral intensities) as our true will. In this sense, our practical reason seems to rule over our desires (as Plato, for one, thought) (cf. Korsgaard 2008a). One way to put this is to say that fundamental to mature human agency is having the capacity to form effective “second-order volitions,” in which we will to act on a particular “first-order desire.” This is something we assume that (at least most) nonhuman animals lack. A being who doesn’t care about which first-order desire he acts on (perhaps because he can’t reflect on them) is what Frankfurt calls a “wanton,” and he suggests that, like animals, very young children are wantons (1988a: 16). As such, the “will” of the wanton lacks the hierarchical structure that the will of a “person” possesses. It is this structure of the will that is central to our experience of ourselves as free agents, whose actions are not merely determined by drives or instincts.²² Of course, we are also familiar with cases where our first-order volitions *are* too strong for us to resist them. These are the cases of inner compulsion reviewed in the last section, which (again as Plato thought) we tend to experience as a lack of true freedom. But even being capable of weakness of the will requires a kind of reflective distance on, and at least partial freedom from, our various inclinations.

²² Cf. Rousseau’s remarks in the *Discourse on the Origin of Inequality*: “It is, then, not so much the understanding that constitutes the specific difference between man and the other animals, as it is his property of being a free agent. Nature commands every animal, and the Beast obeys. Man experiences the same impression, but he recognizes himself free to acquiesce or to resist” (Rousseau 1997a: 141). Cf. also Kant’s parallel remarks in “Conjectural Beginning of Human History,” 8:111-112.

(ii) Valuing: This reflective and hierarchical structure of the will seems to be essential to our ability to value and endorse things—or as I shall sometimes say, make “strong evaluations” (Taylor 1985). Mere preferences or first-order desires can be brute, in the sense that there is no accounting for them. For example, someone might have sudden cravings to bite something, like a broom handle. Though there may have been some *explanation* for why he has these cravings, the cravings themselves seem to neither have, nor need, any particular *rationale*. One need not crave something for a good reason. Valuing something, however, is a reflective endorsement of a desire for something. Because valuing depends on reflection, valuing always has a rational or intelligible aspect that mere preferences or desires may lack (cf. Raz 1999). If our friend said that he valued the biting of broomsticks, then we would be puzzled, because we would have a hard time seeing *why* that was something worth doing. But if our friend then explained, “I just have a craving to bite broomsticks, and I think that it is good to satisfy my cravings,” then we would understand that what he really valued was not biting broomsticks *per se*, but satisfying whatever cravings he happened to have. At least some endorsements, it is worth pointing out, will be *principle-dependent* in that they refer to desires the objects of which cannot be described without referring to a principle. For instance, someone might desire not just to help his friend, but to do that which will satisfy the principle of promoting the greater good (cf. Rawls 1993: 82-83).

(iii) Identity and character: Valuing and endorsement seem to be closely bound up with the self-conception of an adult. When I value something, I often “identify” with what I reflectively endorse. This is especially true of those central values and goals, or “ground projects,” that structure our lives and give them meaning, and which form a part of what Rawls

and others call “a conception of the good.”²³ The sculptor, for example, does not just *like* his craft; he does not simply prefer it to other activities. His valuing of this activity is a large part of what makes him who he is. He finds it difficult to say something about himself without reference to his engagement with this value. To capture this, Frankfurt says that in identifying with some volitions rather than others, a person “constitutes himself,” in the sense that he decides what is central to his conception of his self and what is cut off as accidental, or even as external and alien.²⁴ Indeed, a person may understand those desires incompatible with his values as entirely separate from his true self; such a desire is “not merely assigned a relatively less favored position but entirely extruded as an outlaw” (Frankfurt 1988d: 170). St. Paul expresses this idea vividly in his *Epistle to the Romans*, when he writes, “I delight in the law of God, in my inmost self, but I see in my members another law at war with the law of my mind and making me captive to the law of sin which dwells in my members” (*Rom.*, 7.22-23, RSV). In this passage, Paul understands his endorsement of God’s law as central to his true self, while those desires that are in conflict with the law seem external or alien to who he really is. Insofar as he fails to act in accordance with the values and endorsements that he understands to be central to who he really is, Paul thinks of himself as enslaved to his desires and untrue in his actions to himself.

Christine Korsgaard (drawing on a different passage from *Romans*) makes a similar point:

When you deliberate, it is as if there is something over and above all of your desires, something which is *you*, and which *chooses* which desire to act on. This means that the principle or law by which you determine your actions is one that you regard as being expressive of *yourself*. To identify with such a principle or way of choosing is to be, in St Paul’s famous phrase, a law to yourself (1996g: 100).

²³ Rawls (1993): 19. The term “ground projects” is from Williams (1981).

²⁴ There is some danger in this kind of account of imagining that the self is more unified, more transparent, and more “wholehearted” in its valuing than it really is. A fuller discussion would have to take into more careful consideration the issues of ambiguity, ambivalence, and volitional opaqueness than I do here. For some insightful reservations about Frankfurt’s notion of “identification,” see Velleman (2006c).

Korsgaard has called this idea of an identity rooted in values and principles a “practical identity,” and I will adopt this terminology as well. Korsgaard understands a person’s practical identity as drawing on both her conception of what is valuable in life as well as her sense of what is right. Thus, a person’s conscience is typically a part, though not the whole, of her practical identity. Moreover, a person’s practical identity may be quite complex and even conflicted. As Korsgaard puts it, “You are a human being, a woman or a man, an adherent of a certain religion, a member of a certain profession, someone’s lover or friend, and so on” (101). Kwame Anthony Appiah (2006) is especially insightful on this point. He stresses the way that practical identities, particularly in the modern world, are often partially overlapping, partially integrated, but also partially conflicting. Much of the drama of ordinary modern life consists in the ways that we try to negotiate these partial identities, say, as a does the person who thinks of himself at once as Christian, an intellectual, a gay man, an African-American, and a cosmopolitan.

In children, however, practical identities seem to play little or no role in their self-conceptions. A textbook on child psychology draws the following useful picture, emphasizing the link between reflective agency and the nature of the child’s self-definition:

Preschool children tend to define themselves mainly in terms of physical attributes, possessions, overt behavior, or preferred activities (I have a cat named Twinkie. I like to swim). At around 7 or 8 children are more aware of their private selves, of their unique emotions and thoughts, and begin to shift to more abstract self-descriptions. In addition, this is a period when social comparison and concern with competencies are rising (I’m the fastest runner in my gym class). Adolescents present a more organized, complex, and abstract view of themselves. It is as if they are trying to build an integrated personality theory to describe their motives, feelings, and thoughts. In this period there is also an emphasis on self-control and self-direction, in making choices, having intentions, and striving toward long-term goals and on controlling behavior, thoughts, and actions. (Hetherington and Parke 1986: 374-375)

It would seem that the child who conceives of herself in terms of her physical attributes and favorite activities is going to have relatively little in the way of material for forming second-order volitions. As a consequence, it will be difficult for her to stand back from or resist her immediate desires. However, even a slightly older child who conceives of herself as “polite” or “a good helper” *will* probably have sufficient standards to decide what she wants to desire in at least certain domains. At first, this normative self-conception is probably in large part a result of instruction, imitation, and feedback from parents and others. The six-year-old thinks of herself as “a good helper” because that self-conception has been encouraged and reinforced by her parents. Later on, her self-conception becomes more an artifact of her own constitution and validation and, therefore, more genuinely her own (although, no doubt, still also partly a product of the opinions and recognition of others).

(iv) Temporally-extended agency: Because strong evaluations are reflective and are endorsed on the basis of reasons, and not on mere caprice, they have a kind of stability and endurance that simple desires and cravings often lack. This is why it is possible for our practical identities to play such a large role in constituting the apparently enduring “substance” of the self. And this is part of why adults have more stable preference structures than children. This stability, and my recognition of that stability, is a part of what helps me identify with my future self. Again, the hierarchical nature of the will helps me think of myself as an enduring entity, self-identical across time (cf. Noggle 2002). Both of these aspects of agency, the dimensionality of strong evaluations and temporal extension, make possible the formation of long-range intentions, plans, and projects. I do not simply value the same things this week as I did last week. I also commit myself to projects that themselves extend through time, and in doing so, I tend to identify myself with my more central life projects—things like raising a family,

maintaining a marriage or partnership, pursuing a career, developing a skill, or promoting a cause (cf. Bratman 1987). And insofar as I identify myself with a goal-directed project, I necessarily think of myself as projecting into the future, and this further reinforces my identification with my future self.

But the relationship between temporally extended agency and reflective evaluation is a two-way street. It is partly by experiencing and remembering the changes in her passing desires that a person comes to see herself as an entity that underlies and endures these changes.²⁵ And this, in turn, is part of what makes possible the standpoint of reflective distance on my particular desires. I recognize that I may not desire later what I desire now; but I will still be myself; thus, I am different than my passing desires. And this distancing seems necessary if I am to be capable of second-order evaluations of my first-order desires.²⁶

(v) Reflective agency and paternalism: It seems correct to say that there is a qualitative difference between the types of agency characteristic of young children and adults. But how does this difference explain why paternalism toward children is so much less objectionable than paternalism toward adults? One strategy is to invoke the child's less extended time horizons. Children lack the prudence to look after, or even care about, their future selves. Thus, adults can provide a kind of "surrogate prudence" for the child. According to Robert Noggle, this is "the source of a kind of *prudential* authority of parents: the child ought to obey the (competent)

²⁵ Cf. Noggle (2002): "The experience of living through the radical changes that characterize childhood allows her to appreciate the fact that her present desires are not absolutely fixed, and that her future interests will be just as much as her own as her present ones. The experience of not wanting now what she desperately wanted before affords the adult some 'reflective distance' on her own current desires. This in turn allows her to appreciate the wisdom of at least some preference-neutral prudential planning, like keeping one's options open, developing a wide variety of skills and capacities, and storing up goods that will be useful for a wide variety of purposes" (103).

²⁶ If either of these aspects of the will is primary—dimensionality or temporal extension—then perhaps it is really the initial temporal extension made possible by memory that is prior. But once the two aspects of agency are "off the ground," they seem to complement and mutually encourage one another's further, more complete, development.

parent simply because it is in her interest to obey the directives of a person who is manifesting prudence on her behalf if she cannot do so herself” (2002: 103). This way of putting it makes it sound as if we are dealing with a cognitive failure that leads the child to act in ignorance of her future good. In that case, this seems to be another version of the argument from involuntariness (see 4.4.A).

Tamar Schapiro suggests a different explanation.²⁷ She likens childhood at one point to mental illness. She reasons that we may be justified in paternalistically interfering with a friend who is about to do something in a very depressed state, which we do not think is expressive of her genuine will. The depression is “an alien force [that] has taken over her deliberative capacities, undermining their representative function, so that they no longer speak for her.” “By the same token,” she argues, “the only justification of paternalism towards children ... is one that characterizes childhood as something like an alienating condition” (2003: 585). Therefore, insofar as children have not yet developed a stable deliberative framework, they are “not yet in a position to govern themselves, [and] they need to be protected from their own ... wantonness. In so protecting them, we protect them not only from themselves but from the workings of their animal nature, which in the early stages of life tends to have the upper hand...” (590). Or, as she puts it in another essay, “Paternalism is prima facie wrong because it involves bypassing the will of another person....But if the being whose will is bypassed does not really ‘have’ a will yet, if she is still internally dependent upon alien forces to determine what she does and says, then the objection to paternalism loses its force” (1999: 730-731). This makes it sound as if the justification for treating children paternalistically is similar to that which justifies our preventing

²⁷ Although, as we shall see, I think there are several distinct strands in her argument.

the frenzied writer from throwing his manuscript in the fire (see 4.4.C). But I think this is a misleading characterization. Because the writer (or the depressed friend) already has a practical identity in place, it does make sense to describe some of his desires as “alien” to his true self. But if the child does not yet have a practical identity, then none of his desires can be alien to him. Unlike an adult suffering from volitional failure, the child will be “at home” in his wantonness.

Perhaps Schapiro’s point is that wantonness is alien, not to the child’s present self, but to the child’s *true nature* as a rational being; the child is not yet what he ought to be, or is not yet the higher kind of agent that he can become. Moreover, human beings cannot flourish except as reflective agents. Given the way we have evolved, living well as non-rational animals is simply not a possibility for us. But neither do we arrive by instinct at what we are destined to become. Rather it is only by discipline and example that parents awaken in children a sense of their nascent capacity to stand back from, to resist, and to choose on the basis of reasons amongst their immediate motivations (cf. Hegel PR: 174A). In that case, the purpose of parental paternalism is not just to protect the child from his “alien desires,” but to help the “child pull herself together as an agent” by establishing a stable practical identity (cf. Schapiro 1999).²⁸

While this would explain why paternalism toward children is vitally important for the child’s future well-being as a human agent, it does not really explain why such paternalism is consistent with respecting the child’s agency. After all, even if the child lacks the reflective agency distinctive of mature human beings, she does presumably possess the simple agency necessary for acting intentionally and engaging in short-term instrumental reasoning. Why is it only, or

²⁸ In my view, Schapiro has neglected to sufficiently distinguish the protective and educative aspects of paternalism toward children. They are both important, but illuminating the educative aspect is Schapiro’s more distinctive contribution.

especially, reflective agency that warrants respect? The best explanation, I think, will invoke the connection between reflective agency and identity. Beings incapable of reflective agency can still find restraint frustrating, as is evident in the case of non-human animals and infants. However, because these beings do not have a conception of self from which their actions flow (or their more important ones anyway), they do not experience an affront to their dignity and equality when their judgment or agency is overruled or bypassed for their own good. This gives paternalism toward children a wholly different character than paternalism toward adults.

4.6 The Limits of the Agency Approach and the Competence Problem

I believe that both versions of the agency approach—the arguments from involuntariness and the constitutive arguments—shed light on why the choices of young children have a different moral status than that of adults. The question is whether they provide the whole justification of the Liberal Outlook. In particular, we should ask whether they can justify paternalism toward older children and adolescents, who are certainly capable of forms of deliberation and self-government absent in young children. “Childhood, of course, is not all of a piece,” as Feinberg observes, and reasonably enough, most agency theorists suppose that adolescents should be treated less paternalistically than young children. For instance, Feinberg tells us that “as the child gradually acquires all the relevant capacities, he should ideally come into possession, as he goes along, of all the corresponding ... liberties, rights, powers, and liabilities” (1986: 326). Or again, Onora O’Neill instructs parents to adapt their treatment of their children “to a constantly altering set of capacities for autonomous action,” to be aware that “choices which cannot be made at one stage can at another,” and that “autonomy develops in one area of life and lags in another” (1984: 178). In the same spirit, Schapiro allows that children do not constitute

themselves as agents all at once. In play, children “try on” different identities and experiment with being different kinds of person. Similarly, Schapiro argues that adolescents, who we think of as “characteristically ‘in search of themselves,’” are engaged in a more earnest kind of play inasmuch as they tend to identify themselves “in a rather intense but provisional way with peer groups, celebrities, political movements, athletic activities, lovers, and the like” (1999: 733).

Now it is certainly true that conceptions of agency can be formulated in more and less demanding ways, and it is probably possible to devise standards of agency to which most adolescents do not measure up. For instance, it may be argued that a person cannot act in a truly voluntary way insofar as he miscalculates risk, acts impetuously, or without an emotional appreciation for the consequences. Or one might claim that full membership in the moral community requires achieving the sort of moral autonomy associated with a post-conventional “morality of principles.” Or finally, it might be said that to have a fully developed will, one must have a strong sense of one’s own identity and commitments.

One difficulty with any such argument is that the observed differences between adolescents and adults may actually be caused by our current social practices. For example, some argue that youths tend to be less responsible than adults primarily because they are given, and are expected to take on, less responsibility. This, notice, is similar to the argument that early feminist writers made about the alleged inequality of women’s capacities. In *The Subjection of Women*, Mill wrote: “I deny that any one knows, or can know, the nature of the two sexes, as long as they have only been seen in their present relation to one another....What is now called the nature of women is an eminently artificial thing...” (SW: I, ¶ 18 / CW, XXI: 276). Striking the same tone, Richard Farson claimed that “[A]s long as we deprive the child of his right to self-determination we cannot even assess his potentialities” (1974: 32).

But a more fundamental objection is that many adults who now enjoy full autonomy would not measure up to these demanding standards either. Adults, too, take irrational risks, act on their passions, and fail to fully appreciate the consequences of their actions.²⁹ Likewise, some adults lack firm commitments or a strong sense of their own identities, or are still “in search of themselves.”³⁰ And yet you seldom hear it argued that the liberty of adults should be restricted insofar as they lack a strong and stable sense of who they are or what they stand for. Finally, one of the most consistent findings of the Kohlbergian research program is that post-conventional moral reasoning is actually uncommonly attained or employed by adults. Kohlberg himself found in his twenty-year longitudinal study that “Subjects scored as postconventional ... represent about one-sixth to one-eighth of the sample from the mid-twenties on” (Colby, Kohlberg, et al. 1983: 47).³¹

So we must draw the conclusion that if rational or agential capacities are to ground the basic freedom and equality of adults as members of an inclusive liberal society, then the threshold of attainment had better be “not at all stringent” (TJ: 506/443). Or, as Kohlberg and coauthors put it, “As long as we are willing to treat those age eighteen and older equally, we must be willing to

²⁹ Millstein and Halpern-Felsher (2002) offer evidence that, contrary to conventional wisdom, adolescents are on average *more* risk averse than young adults. On the passions, or “visceral factors,” see Loewenstein (1996). On the difficulties that ordinary adults have in forecasting their future affective states, see Wilson and Gilbert (2003).

³⁰ Erikson’s theory of identity is the inspiration for most empirical research of identity formation (see his 1968). The most influential way of operationalizing Erikson’s approach is the framework proposed by James Marcia (1966; 1980), consisting in four possible identity statuses: identity-foreclosed (unquestioned commitments), identity-diffuse (lack of strong commitments), identity-moratorium (searching for commitments), and identity-achieved (autonomously embraced commitments). On identity-formation, see Côté and Levine (2002); Alsaker and Kroger (2006); Côté (2006). For further discussion of empirical research on post-conventional reasoning, see Lapsley (1996): 77-82.

³¹ The empirical rarity of post-conventional thinking is considered by some to be a serious problem for Kohlberg’s theory. If Kohlberg’s strict definition of post-conventional thinking is relaxed, it may be more common (cf. Rest et al. 1999 and Gibbs 2003), but still far from universal in the adult population (Thoma 2006): 79. Some moral psychologists outside the Kohlbergian tradition are even more pessimistic about genuine moral reasoning in all age groups; see, for instance, Haidt and Bjorklund (2006).

adopt a minimalistic definition of the competence necessary for moral personhood” (Power et al. 1989: 29). And if the capacity for agency is to justify treating adolescents differently than adults, then naturally we have to hold adolescents and adults to the same standard. Given the logic of the agency approach, “it seems discriminatory to deny to ‘children’ ... rights which they would have if they were over that age and in possession of the capacities they already possess” (Campbell 1992: 18).

Could we nonetheless find a threshold that would reliably distinguish adults from middle and late adolescents (ages 14-18)? The relevant evidence from psychology seems to suggest not. In his general review of the literature in *Adolescent Psychological Development*, David Moshman concludes:

I am not aware ... of any form or level of knowledge that is routine among adults but rarely seen in adolescents. On the contrary, there is enormous cognitive variability among individuals beyond age 12, and it appears that age accounts for surprisingly little of this variability ... Research simply does not support categorical distinctions between adolescents and adults in rationality, morality, or identity ... The distinction between adolescence and adulthood is more a matter of cultural expectations and restrictions than of intrinsic psychological characteristics. With the understanding that development is not limited to childhood, adolescence may best be conceived of as the first phase of adulthood. (2005: 143).

Nor is Moshman the only researcher to come to this conclusion. According to Daniel Keating, “By middle adolescence (14 to 15 years) most individuals make decisions in ways similar to adults—although it should be noted that adults’ decision making also suffers from a host of well-studied biases and distortions” (1990: 73; cf. Kuhn 2009). Regarding identity-formation, Alsaker and Kroger observe that “large percentages of individuals are seemingly entering adult life without exploration of and commitment to identity-defining roles and values on their own terms” (2006: 106; cf. Côté and Levine 2002). And Kohlberg and his co-authors report that “according to cognitive development research, few, if any [eighteen-year-olds] have attained

stages of autonomous judgment in terms of their reasoning about justice and the good life. Most are scored at the midpoint of these developmental scales.” They conclude that conventional adherence to interpersonal social norms mediated by the “Golden Rule” (or stage 3) should be taken as the minimal baseline for mature moral thinking. “[And since] some children reason at stage 3 as early as age ten and most are at least in transition to stage 3 by junior high school, we would be hard put from a purely cognitive standpoint to regard high school students as ethically incompetent” (Power et al. 1989: 29; cf. Lapsley 1996: ch. 4).

This research suggests that the problem is not the oft-cited but relatively manageable one that the capacities constitutive of agency are a matter of degree and that there is no reason to draw a line just here or just there. That would not be a serious difficulty, since we know it is often necessary to make pragmatic decisions about how to carve up vague boundaries (cf. Korsgaard 1996d). The problem is that the extent of variability in the two populations prevents us from saying that adults as a rule possess capacities for agency *to any degree* that adolescents as a rule lack.

The agency theorist might reply that even if age is only imperfectly correlated with the capacity for agency, it is nonetheless the best criterion available, given that institutions need easy-to-apply standards and that individualistic testing of capacity would be cumbersome, unreliable, and ripe for abuse (Feinberg 1986: 326; Archard 2004: 85-91). But this reply would be more convincing if there were only statistical outliers in both populations, rather than the absence of a strong correlation of age and agential capacities past early adolescence. In other contexts, liberals would never tolerate using proxies (like race, sex, or class) to restrict liberty on the basis of weak correlations. Moreover, this argument implies that some adults we *treat* as

autonomous do not really have a claim to that status in their own right, but are only afforded it out of convenience.

Another reply is that our practice is conscientiously conservative: we time the beginning of adulthood to coincide with the development of the minimal capacities in those who are the slowest to develop within the normal range. That way it is safe to assume that almost everyone has developed the necessary capacities with the onset of majority. And what's three or four years for those who develop more quickly? Notice, first, that this response (like the previous one) could only justify the policy of large, unwieldy institutions; parents generally *can* tailor their conduct to their children's individual capacities. Second, even as an institutional policy, this response is hard to square with the liberal's usual assumptions about the burden of proof in justifying paternalism. Rawls, for example, says that "paternalistic intervention must be justified by evident failure or absence of reason and will" (TJ: 250/ 218), and Gerald Dworkin claims that it would be "better 10 men ruin themselves than one man be unjustly deprived of liberty" (1972: 84). If these views are sound, then what explains why we place the burden of proof on the other side when we are dealing with adolescents?

Some argue that paternalism toward adolescents can be justified because it protects and promotes their *future* autonomy or "open future."³² I am sympathetic to this argument, but the *agency theorist* cannot make independent appeal to it. If the subject is judged to lack the capacities for agency now, *then* the agency theorist may argue that paternalistic authority should be exercised to maximally preserve and enhance the person's future choices. But if the subject is

³² See, for example, Power et al. (1989): 30 and Freeman (1983; 1997). A general freedom-promotion justification for paternalism (i.e., one not limited to minors) is made in G. Dworkin (1972) and Regan (1974). The latter arguments are criticized in Feinberg (1986): 68-70 and Kleinig (1983): 53-55.

already capable of making his own choices, then the logic of the agency approach would rule out this essentially consequentialist argument. As Feinberg puts the position, “When a mature adult has a conflict between getting what he wants now and having his options left open in the future, we are bound by our respect for his autonomy not to force his present choice in order to protect his future ‘liberty’” (1980: 127). Now I have just been assuming that the freedom-promotion argument refers to *future opportunities*, but there is a second version which argues that paternalism is justified when people are at risk of undermining their *future capacity for agency*. A typical example involves a person abusing a dangerous drug. Agency theorists will disagree about whether this is a valid justification for paternalism (cf. Korsgaard 2008b). But even if this second version of the argument is accepted, it will not justify most paternalism toward adolescents, which plainly seems oriented toward preserving their future opportunities, not merely toward the preservation of their future minimal capacity for agency.

A final possibility is to follow the agency arguments where they lead and accept a revisionist conclusion: perhaps adolescents become adults morally speaking at an earlier age than we thought and cannot legitimately be treated differently (cf. H. Cohen 1980). But this is not an attractive option. Even if adolescents are capable of making their own choices, that doesn’t mean that they are always best off doing so. After all, there is a lot more to the agential capacities of rationality, self-control, self-understanding, and moral reasoning than the minimal thresholds necessary for independence as an adult in a liberal society. Surely the aims of parenting and education are more ambitious than raising minimally competent individuals.³³ A

³³ Cf. Ackerman (1980), who suggests that paternalistic authority over children is only justified insofar as it is necessary to keep them out of prison later in life: “The task, in short, is to design a set of behavioral limitations *over a citizen’s entire lifetime* which promise to minimize the overall weight of special restrictions imposed upon him” (148). A very minimal educational ideal indeed.

more attractive view is that a good start in life fosters *abundant* capacities for self-government and prepares a person to live *well*. But the agency approach suggests that parents and institutions should give up all authority over adolescents as soon as they have attained the minimal capacities for adult life. Agency theorists typically only evade these odd conclusions by implicitly holding adolescents to higher standards than adults are held to, which seems—on their own assumptions—unfair.

This leads us to what I believe is a fundamental tension in liberal thought. When we articulate the grounds for a person's free and equal status in a liberal society, we latch onto *minimal* standards of rationality that are as inclusive as possible. But our educational ideals have a perfectionist cast: to raise the young so that they develop as fully possible their potential for human personality and responsible citizenship.³⁴ These two parts of the Liberal Outlook inevitably clash in raising adolescents, since people naturally reach the threshold for minimal competence long before our more ambitious educational ideals can be realized. Call this the *Competence Problem*.

Can we resolve the Competence Problem without giving up on respect for autonomy? I will argue in the next chapter that we can, if we recognize the moral significance of age, or stage of life. The basic idea is that if age itself is a morally relevant characteristic, then we can explain why we subject adolescents and adults to different standards. In order to make that argument,

³⁴ Article 26 of the *Universal Declaration of Human Rights* is exemplary of the kind of educational perfectionism I have in mind: "Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms." I assume that some of these perfectionist aims may be pursued by the state, while others (especially those connected to religious conceptions) should be left to parents and private associations. Hence, the educational perfectionism I have in mind need not be inconsistent with the liberal constitutional neutrality advocated by philosophers like Rawls (1993) and Barry (1995).

however, I shall have to offer a different interpretation of respect for autonomy, which I call “respect for life-authorship.”

CHAPTER 5: ON BECOMING AN ADULT

The Moral Significance of Stages of Life

5.1 A Summary of the Foregoing

Central to the liberal social outlook is the value of personal autonomy: the right of each person to pursue his own good in his own way on fair terms with others. This makes the liberal wary of restricting a person's freedom for his own good. Our very word for this—"paternalism"¹—suggests that, while characteristic of the way fathers treat children, it is not a fitting way of treating other adults. But what justifies this apparent "double standard" of the Liberal Outlook?² What is it about becoming an adult that justifies bestowing the status of autonomy and moral independence on a person? Or, to borrow Tamar Schapiro's pithy formulation, "What is a child, such that it could be appropriate to treat a person like one?" (1999: 715).

This is the question we have been exploring over the previous four chapters. In order to make this chapter capable of standing alone, I summarize in this introductory section the main points made in the foregoing, before offering my own account. Beginning in section 5.2, we

¹ I shall say that "P acts *paternalistically* toward Q if and only if P intentionally restricts Q's freedom of choice in order to promote (what P believes to be) Q's good, or well-being." P's perception of Q's good may include Q's "moral well-being." Paternalism here is not to be understood as limited to legal paternalism; after all, most paternalism toward children is of an informal character. Moreover, not all paternalism is "coercive" in a narrow sense. P may treat Q paternalistically by restricting and filtering Q's opportunities and choices, by issuing to Q authoritative commands, by withholding from Q certain legal or normative powers (like that of contract), and by manipulating or deceiving Q in a way that undermines Q's capacity to make her own choices or form her own judgments. See Chapter 1, esp. the very end of 1.4.D.

² I discuss the "Liberal Outlook on Paternalism" in more detail at 1.5.

pick up the argument from where we left it at the end of the previous chapter. (Readers who feel they need no summary may skip to that point).

A) The welfarist and sovereignty approaches

A good place to begin is simply by asking what it is that *ever* makes paternalism objectionable. After all what could be wrong with promoting another person's good? On one view, which I call the "welfarist approach," paternalism is objectionable, not in principle, but when it is counterproductive at really promoting a person's well-being.³ On the most common welfarist argument, it is argued that we usually cannot benefit adults paternalistically, because people "of mature faculties" tend to be the best judges of their own good.⁴ As Mill puts it, "[W]ith respect to his own feelings and circumstances, the most ordinary man or woman has means of knowledge immeasurably surpassing those that can be possessed by anyone else." Paternalism, therefore, is likelier than not to interfere "wrongly and in the wrong place" (OL: IV, ¶¶ 4, 12 / CW, XVIII: 277, 283). Or, more subtly, we may say that even where a person is not the *best* judge of his own interests, his judgment is nonetheless usually proficient enough that the harms to come from interference will likely outweigh any benefits. And this suggests a natural justification of paternalism toward children. That is, because of children's imperfect powers of reasoning, and because of their lack of experience of the world and of themselves, children are not very good judges of their own well-being, and they often do stand to benefit from paternalism.

³ I assume that, on the welfarist approach, a person's good, or well-being, is defined without reference to "the right." Having autonomy rights may instrumentally promote well-being on this view, but cannot directly constitute well-being. See 2.1.

⁴ I discuss other welfarist arguments in Chapters 2 and 3.

One familiar objection to this line of argument is that it only leads to liberal conclusions on unrealistically optimistic assumptions about how wise and prudent “the most ordinary man or woman” tends to be. Accepting that it is justifiable to restrict children’s freedom for their own good, Sidgwick cautiously remarked that “it is, at least, not intuitively certain that the same argument does not apply to the majority of mankind in the present state of their intellectual progress” (1907: 275). Even if we grant that adults are generally the best judges of their final ends, much work in behavioral and economic psychology suggests that irrationality in instrumental reasoning in adults is not only common, but predictable in many ways, and that suggests that intelligent paternalism need not always be self-defeating (see Chapter 2).

The more important objection is that the welfarist approach mischaracterizes the intuitive moral significance of autonomy. When you are trying to decide whether to treat someone else paternalistically, you feel torn between *two different kinds of duties*. You not only *care* for the other’s well-being, but you *respect* the other as an equal. To respect another as an equal is more than just appreciating that the person’s well-being is as important as that of anyone else; it also involves recognizing (what I call) his *equal practical authority*. This means respecting his “jurisdiction” or “sovereignty” over his own person and what regards chiefly himself.⁵ Practical authority, unlike prudence or wisdom, is a “content-independent” notion. Roughly speaking, what makes something a law within a certain jurisdiction is not the wisdom or reasonableness of the law (at least within certain limits), but that it was a genuine act of the legitimate governing authority. Likewise, then, another person’s self-determination commands our respect, not

⁵ Of course, each person’s authority over himself is limited by the equal authority of others over themselves. This raises questions regarding how to demarcate a sphere of self-regarding authority and how to work out principles of shared authority when the interests of several parties are at stake. I sidestep both of these issues here, since I am concerned here with paternalistic arguments where only the interests of one party are in play.

because the person is conducting himself reasonably or prudently, but because the other person has a certain authority as our moral equal. Even when the person is not the best judge of his own interests, we nonetheless recognize him as the *final judge*, at least across a wide range of cases. Interference with his legitimate domain of control is, therefore, a kind of usurpation, an overstepping of our own legitimate equal authority. This *Respect for Autonomy* may be understood either as an *absolute* constraint on promoting or protecting another person's well-being or as a "threshold-constraint," one that outweighs welfarist considerations across a certain range, and does not itself derive from welfarist considerations, but which can give way in extreme cases. Positions that recognize the intrinsic moral significance of respect for autonomy belong to what I call the *sovereignty approach* (see 4.2).

B) Respect for agency

But the sovereignty approach looks too strong at first. We don't think paternalism is always wrong—especially with respect to children. We need to explain why some cases of paternalism are consistent with respect for autonomy. The most common way of doing this is what I call the "agency approach" (this being one version of the sovereignty approach). The agency approach interprets respect for autonomy as the duty to show "respect for agency," which is to say, as the duty to respect the choices of other agents. As Schapiro puts it, "This means that in every action, we are to respect others as choosers even if we disapprove of the choices they make. As such, there is no general permission to make other people's choices for them simply because they are not likely to choose well on their own" (1999: 719). The challenge, then, is to explain how apparently reasonable cases of paternalism can ever be permissible, if we are not to appeal to the imprudent or unwise *content* of those choices. The general strategy of the agency approach is to

argue that the prima facie obligation to respect a person's choices does not apply when the "choice" cannot be attributed to an accountable agent.

This might be for two kinds of reasons. First, sometimes a person does not realize what he is really about to do, and would not want to so act if he did realize it. Preventing someone from doing what he doesn't really want to does not seem to really violate a person's self-direction. In these cases, we might say that the action is not really the agent's genuine choice. I shall call these "arguments from involuntariness." The second group of reasons is this: some human beings—like young children—seem to lack the basic rational capacities constitutive of agency. Therefore, here we do not even have an accountable agent, and so we cannot have a duty to respect the subject's agency. I shall call these "constitutive arguments." Let me briefly describe both kinds of argument in a little more detail.

Arguments from involuntariness: Arguments from involuntariness say that respect for autonomy does not require us to respect the "choices" of a person who is about to do something he does not really intend to do—typically out of ignorance or some "blinding" passion. For example, respect for a man's autonomy should not prevent us from restraining him from walking onto a bridge that unbeknownst to him is about to give way (OL: V, ¶ 5 / CW, XVIII: 294). Just as the liberal harm principle permits us to protect a person from the harmful choices of others, the same rationale licenses us to protect a person from his own "nonvoluntary choices," which being the genuine choices of no one at all, are no less foreign to him" (Feinberg 1986: 12). Although this is a general argument for paternalism, it is often invoked to justify the special status of children, since their undeveloped powers of reason and general inexperience of the world and of themselves make them especially prone to acting in ways that they do not understand and thus do not really intend. However, unlike the man about to cross the dangerous

bridge unawares whose simple, isolated mistake can be readily revealed to him, the incapacities typical of childhood affect voluntary choice quite generally and cannot easily be remedied except by letting the child grow up. This is supposed to explain why paternalism toward children has a special character (see 4.4).

Constitutive arguments: Constitutive arguments claim that we simply have no duty to respect the “autonomy” of people who lack the basic rational faculties constitutive of autonomy, or agency. One venerable argument focuses on the child’s lack of conscience, or *moral agency*. The child is not to be entrusted with full freedom until he is capable of recognizing in reciprocal fashion the rights of others and his duties to them. Until then, the child is not a full member of the moral community and lacks the rights attending to that status. This is what Locke meant in saying that children are under the authority of their parents until the age of reason: “The *freedom* ... of man, and liberty of acting according to his own will, is *grounded on* his having *reason*, which is able to instruct him in that law he is to govern himself by, and make him know how far he left to the freedom of his own will” (2T: II.63). One of the duties of parents therefore is to raise children so that they develop the capacity to know and abide by this law.⁶

Modern versions of this moral agency argument sometimes appeal to the stage theories of moral development articulated by writers like Piaget (1932), Kohlberg (1969, Colby and Kohlberg 1987), and Rawls (TJ). Since Kohlberg’s is the most empirically studied, let us focus

⁶ It might seem that the moral agency argument is not genuinely paternalistic, inasmuch as the aim is to ensure the recognition of the moral interests of others, and not those of the child. However, this is not the way Locke looked at it. He argued that “To turn [the child] loose to an unrestrained liberty, before he has reason to guide him, is not the allowing him the privilege of his nature to be free; but to thrust him out amongst brutes, and to abandon him to a state as wretched, and as much beneath that of a man, as theirs” (2T: II.63). This passage could be interpreted to mean that it is in the interests of people to be able to govern themselves in society so that they do not have to be suppressed by others like wild animals. Or (not incompatibly) it could be understood to mean that a prerequisite for a distinctively human life is the capacity to live in community and relationships structured by law and reciprocity.

on it. Kohlberg posits a progressive developmental trajectory in moral thinking that is characterized by three successive perspectives that the self takes toward the moral expectations of society. At the *pre-conventional* level, moral rules are external to the self, and the person is motivated to act to avoid punishment or bad consequences. At the *conventional* level, the person has internalized social expectations and wants to see himself, and be seen by others, as conforming to these expectations. And at the *post-conventional* level, the person recognizes the possibility of questioning and evaluating the validity of conventional social expectations in light of mutually acceptable general principles and is motivated to act on those principles. Kohlberg understood these levels to be increasingly sophisticated and mature forms of moral reasoning and thought of moral education as properly aimed at furthering this process of development (see 4.5.A).

A second version of the constitutive argument claims that children do not have a will in the sense of possessing a reflective and relatively stable evaluative framework. Such a framework seems to be central to two fundamental aspects of personhood: our sense of having the freedom to choose on the basis of reasons which of our motivations to will and act upon; and our sense of having a distinctive character with aims and principles that endure the changes in our momentary feelings and desires. Since one way of putting this is to say that children lack a mature “practical identity,” call this the *practical identity argument*.⁷ Tamar Schapiro, for example, argues that to have a will is to have a character structured by central practical principles. It is possession of

⁷ On “practical identities,” see Korsgaard (1996g). Also relevant here are Korsgaard’s essays on paternalism (1996b) and self-constitution (2008a). The present argument can be worked out in slightly different ways in a variety of philosophical idioms, invoking the notions of a “capacity for a conception of the good” (Rawls, TJ; 1993), the capacity for second order desires and volitions (Frankfurt 1988a), or the capacity for character-forming “ground projects” (Williams 1981). Noggle (2002) draws on all three ideas in explaining the difference between children and mature agents.

this normative framework which allows a person to act, not at the whim of her strongest inclinations, but in a deliberate and authoritative way by deciding which of her first-order motivations to endorse or reject as truly her own (1999, 2003). “Conscience” in the moral sense is typically one part of this framework. Only by establishing this authority over our inclinations do we constitute ourselves as rational agents and establish our authority vis-à-vis others. As Schapiro puts it, “Paternalism is prima facie wrong because it involves bypassing the will of another person...But if the being does not really ‘have’ a will yet, if she is still internally dependent upon alien forces to determine what she does and says, then the objection to paternalism loses its force” (1999: 730-731). Naturally, children do not come into the world with this normative perspective already in place. Through discipline and example, parents awaken in children a sense of their nascent capacity to stand back from, to resist, and to choose on the basis of reasons amongst their immediate motivations. But children cannot constitute themselves as agents all at once. In play, children “try on” different identities and experiment with being different kinds of person. Similarly, Schapiro argues that adolescents, who we think of as “characteristically ‘in search of themselves,’” are engaged in a more earnest kind of play inasmuch as they tend to identify themselves “in a rather intense but provisional way with peer groups, celebrities, political movements, athletic activities, lovers, and the like” (1999: 733). (For a more complete discussion, see 4.5.B).

C) The Competence Problem

Both versions of the agency approach shed light on why the choices of children have a different status than those of adults. The question is whether they provide the whole justification of the liberal outlook. In particular, we should ask whether they can justify paternalism toward adolescents, who are certainly capable of forms of deliberation and self-government absent in

children. Now conceptions of agency can be formulated in more and less demanding ways, and it is probably possible to devise standards of agency to which most adolescents do not measure up. For instance, it may be argued that a person cannot act in a truly voluntary way insofar as he miscalculates risk, acts impetuously, or without an emotional appreciation for the consequences. Or it might be said that to have a fully developed will, one must have a strong sense of one's own identity and commitments. Or, finally, one might claim that full membership in the moral community requires achieving the sort of moral autonomy associated with a post-conventional "morality of principles."

But many adults who now enjoy full autonomy would not measure up to these standards either. So we must draw the conclusion that if rational or agential capacities are to ground the basic freedom and equality of adults as members of an inclusive liberal society, then the threshold of attainment had better be "not at all stringent" (Rawls TJ: 506/443). And if the capacity for agency is to justify treating adolescents differently than adults, then naturally we have to hold adolescents and adults to the same standard. Could we nevertheless find a threshold that would reliably distinguish adults from middle and late adolescents (ages 14-18)? The relevant evidence from psychology seems to suggest not. For example, in his general review of the literature in *Adolescent Psychological Development*, David Moshman concludes:

I am not aware ... of any form or level of knowledge that is routine among adults but rarely seen in adolescents. On the contrary, there is enormous cognitive variability among individuals beyond age 12, and it appears that age accounts for surprisingly little of this variability ... Research simply does not support categorical distinctions between adolescents and adults in rationality, morality, or identity ... The distinction between adolescence and adulthood is more a matter of cultural expectations and restrictions than of intrinsic psychological characteristics. With the understanding that development is not limited to childhood, adolescence may best be conceived of as the first phase of adulthood. (2005: 143).

Perhaps, then, we should accept a revisionist conclusion: that adolescents become adults morally speaking at an earlier age than we thought and cannot legitimately be treated differently. But this is not an attractive option. Even if adolescents can make their own choices, that doesn't mean they are typically better off doing so. After all, there is a lot more to the agential capacities of rationality, self-control, self-understanding, and moral reasoning than the minimal thresholds necessary for independence as an adult in a liberal society. Surely the aims of parenting and education are more ambitious than raising minimally competent individuals. A more attractive view is that a good start in life fosters *abundant* capacities for self-government and prepares a person to live *well*. But the agency approach suggests that parents and institutions should give up all authority over adolescents as soon as they have attained the minimal capacities for adult life. Agency theorists typically only evade these odd conclusions by implicitly holding adolescents to higher standards than adults are held to, which seems unfair.

This leads us to a fundamental tension in liberal thought. When we articulate the grounds for a person's free and equal status in a liberal society, we latch onto *minimal* standards of rationality that are as inclusive as possible. But our educational ideals have a perfectionist cast: to raise the young so that they develop as fully possible their potential for human personality and responsible citizenship. These two parts of the Liberal Outlook inevitably clash in raising adolescents, since people naturally reach the threshold for minimal competence long before our more ambitious educational ideals can be realized. Call this the *Competence Problem* (see 4.6).

5.2 Age and Reason

Can we resolve the Competence Problem without giving up on the ideal of respect for autonomy? I will argue that we can, if we recognize the moral significance of age. Most

versions of the welfarist and agency approaches concur in holding that the fact that children are younger than adults, or at an earlier stage of life, is *in itself* a morally irrelevant difference. The real justification for treating children more paternalistically than adults is simply that children lack *the full capacities for, or facility in, mature practical reasoning* (which I will refer to collectively as “Reason”).⁸ The most common versions of the welfarist approach argue that children lack the facility in practical reasoning to adequately promote their own well-being, while those of the agency approach argue that children lack the practical capacities necessary for exercising the fully mature agency which commands our respect. On both views, ideally, individuals should be treated as adults when they attain the necessary facility in reasoning or rational capacities. Age only matters secondarily insofar as it is correlated with this acquisition of Reason. Locke states this “Standard View” succinctly: “[W]e are *born free*, as we are born rational: not that we have actually the exercise of either: age that brings one, brings with it the other too” (2T: II.61). David Archard articulates the same basic idea at greater length:

[A] distribution of rights on the basis of age *alone* would be unfair. It would be morally arbitrary and unjust to deny children rights merely because they were younger than adults. It would be as arbitrary and as wrong as denying rights to humans who were shorter than average, had fewer hairs or lower pitch of voice than others ... [But] the denial of rights to children is not based solely on age. It is done on the basis of an alleged correlation between age and some relevant competence. The young are denied rights because, being young, they are presumed to lack some of the capacities necessary for the possession of rights. (2004: 85).⁹

⁸ My use of “Reason” is intentionally vague and expansive, so as to preserve the ambiguity between more classical conceptions of reason, which broadly encompass understanding, insight, good deliberation, and self-control, and more contemporary conceptions of reason, which emphasize formal capacities for deduction, inference, the discovery of the best means to a given end, etc. Different versions of the Standard View appeal to different conceptions of Reason.

⁹ Cf. Houlgate (1979): “It is true that age is not a morally relevant difference justifying differences in treatment under the law. But the capacity for rational choice is” (274); Henley (1979): “[O]nce the child is capable of rational deliberation, and once he has internalized the prohibition against violence, there is no legitimate authority to educate him further against his will” (259); Schapiro (2003): “What, then, is the idea of majority supposed to pick out, such

Nor is the Standard View confined to academic discussions. To take the most prominent example, in the landmark House of Lords case *Gillick v. West Norfolk*, Lord Scarman interpreted an “underlying principle” of the common law to be that “parental right yields to the child’s right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision.” He concluded that this makes legal age limits unfair if determination of individual capacity is feasible.¹⁰

Contrary to this Standard View, I will argue that *age, in itself, can be a morally relevant consideration in the justification of paternalism*. Or, more precisely, since I will claim that the moral relevance of age is “coarse-grained,” that a person’s *stage of life* can be morally relevant. Of course, a person’s stage of life is not the *only* thing that matters. My claim is simply that two people can have all of the same *general psychological attributes*—the same practical capacities and competencies, the same share of rationality, prudence, knowledge, and commonsense—and yet the mere fact that one person is at the beginning of a life and another in the middle of one can sometimes justify treating the younger person more paternalistically than the older one. Furthermore, I will argue that it is only by recognizing the *moral relevance of age*¹¹ that we can

that it could be the basis for dividing the human community into two unequal classes of person? The philosophical tradition offers a standard answer to this question. The answer is that children, unlike adults, are as yet lacking in reason and are therefore unfit to govern themselves until they reach the age of reason” (578). See also Schrag (1977); Wringer (1981): 104; Freeman (1997): 34-35; and Brighouse (2002).

¹⁰ *Gillick v. West Norfolk & Wisbech Area Health Authority* (1986) AC 112. The case dealt with providing contraceptives to minors against the express wishes of parents. Cf. Eekelaar (1986): “The significance of Lord Scarman’s opinion with respect to children’s autonomy interests cannot be over-rated. It follows from his reasoning that, where a child has reached capacity, there is no room for a parent to impose a contrary view, *even if this is more in accord with the child’s best interests*” (181).

¹¹ By “moral relevance of age,” I shall always mean its intrinsic moral relevance for thinking about autonomy and paternalism. I have never seen this thesis defended, although some defend the moral relevance of age in distributive contexts (for critical discussion, see McKerlie 1989), especially in the distribution of scarce medical resources (cf. Veatch 1979; Rakowski 1991: ch. 13).

do justice to both the moral ideal of respect for autonomy and our perfectionist educational ideals and resolve the Competence Problem.

5.3 Autonomy as Life-Authorship

Whether an action is really the *choice* of an accountable agent does seem to have a direct bearing on whether the action commands our respect, and this makes “respect for agency” an appealing way of interpreting the ideal of respect for autonomy. On the other hand, it is not clear, at first, how a person’s age could have any significance for our duty to respect autonomy. As long as we take an abstract and atomistic view of autonomy—as the freedom to make individual choices at particular moments in time—then age is bound to seem arbitrary. The relevance of age only comes into focus when we take a more concrete and holistic view. In particular, we should think of one important aspect of autonomy as the self-determination which consists in *a person’s authority over the kind of life she makes for herself*. A person exercises this authority by making choices concerning the temporally extended projects and roles that structure and give character to her life. This may be characterized metaphorically as having “authorial control” over the course of one’s life.¹² Paradigmatically, *life authorship* refers to the kind of self-determination that lies behind the question, “What am I doing with my life?”. In this frame of mind, a person asks herself questions like: “Is this really the person I want to build a life with?”; “Do I want to start a family?”; or “Should I keep trying to make a go of it in this career?”

¹² I am borrowing this metaphor from Raz (1986), where personal autonomy is described as the ideal that people “should make their own lives,” and the autonomous person the “(part) author of his own life” (369). My conception of life authorship however differs somewhat from Raz’s conception of autonomy, as I will explain below. See esp. fn. 21.

Why does this global perspective on self-determination deserve special emphasis? After all, we seem to frame goals for different lengths of time. Perhaps some people want to plan out their whole lives, but others may have shorter temporal horizons and prefer projects of shorter duration (cf. Calhoun 2009). One response is that settling on a direction in life is important, since it is only by committing to a few life projects that we make our lives meaningfully “about something.” But whether that is true or not, the more fundamental response is that the question of “what to do in life” is forced on us in the modern world by the fact that we have choices about many of the major social roles we perform.¹³ In particular, we have choices about the careers and occupations to pursue, whether to enter into a committed relationship like marriage, whether to become a parent, and the extent to which we concentrate on some of our roles over others. For a great many people, at least some of these roles do last the better part of a lifetime and are the most meaningful pursuits in their lives. But even for those seeking fulfillment elsewhere, their social roles usually play a critical part in structuring and conditioning the kinds of lives they lead. To fill out the life-authorship conception of autonomy, let’s consider more closely just how social roles shape the character of a life. To do so, it will be profitable to draw on some of Hegel’s insights into how the institutionalized social world is related to the lives and identities of individuals.

A) Social roles and the character of a life

The idea of a “social role” is hard to pin down precisely, but we have a grasp on the notion of one’s occupation or job, or one’s status as a parent or spouse, as roles or institutionalized social

¹³ Cf. Giddens: “In a world of alternative lifestyle options, strategic *life-planning* becomes of special importance. [L]ife plans of one kind or another are something of an inevitable concomitant of post-traditional social forms” (1991: 85).

niches, that we do not simply create, but which we occupy and participate in. The basic idea of a role in this institutional sense, as Hegel suggests, is that of playing a distinct part in a larger organized whole (PR: 145). Sometimes we think of a person's role in terms of the specifically defined tasks, rights, and responsibilities he has within a particular association or organization. But we also think about roles in terms of conventionalized functional contributions a person makes to society. Being a carpenter, for example, is a role in the second sense, even if not in the first. Similarly, one continues to fill the role of "teacher" in the second sense even as one moves from position to position.¹⁴

Our social roles affect the kinds of lives we lead both by shaping the *patterns of our lives* and *the kinds of people* we become. The first way our roles shape the pattern of our lives is by structuring our routine activity. We don't wake up each morning having to decide afresh what to do; our roles serve as practical frameworks that define more or less precisely our routine tasks and responsibilities. These frameworks guide us in different ways: some provide external incentives, some are enforced by the expectations of others, and some are internalized as intrinsically reason-giving. Moreover, our roles create various constraints on what else we can do, whether by simply taking up our time, by determining our income or using up our resources, or by creating special obligations to avoid conduct incompatible with our roles.¹⁵

¹⁴ Hegel tends to think of familial and civic roles in the first sense (PR: 158, 258 + R), and occupational roles in the second (PR: 187, 189, 201), but both senses seem to have broader application. On Hegel's idea of the institutionalized social world (or *Sittlichkeit*) as a rational system or organized whole, see Wood (1990: 195-200) and Neuhauser (2000: ch. 4).

¹⁵ It is a significant virtue of Hegel's social thought that he recognized the importance of these quite different forms of motivation: see, for instance, PR: 187, 199 on external incentives; PR: 164A, 207, 244-245 on social expectations; and PR: 148, 162-166, 173, 257, 258 + R, 324 on internalized norms. On conduct incompatible with particular roles, see PR: 163, 167-168 discussing divorce and the norms of monogamy and exogamy.

Because we tend to perform our major social roles for significant portions of our lives, and because our present station affects our future opportunities, our roles also shape the pattern of our lives *as a whole*. That our roles have this character is not just a contingent fact, but arises from the nature of their social functions. For instance, although we can socialize some aspects of childrearing, there is every indication that children need stable relationships with a few devoted adults. Similarly, the nature of work encourages long-term commitment, since all but the lowest paid work demands specialization, rewards experience, or requires other significant investments. Although we may move from job to job, we tend to settle into occupational tracks, since there are significant costs associated with switching tracks, and since those who do not specialize usually have their options limited for them. These aspects of parenting and work in turn encourage relationships to aspire to permanence. First, because planned parenting is usually undertaken as a long-term joint venture between partners, would-be parents typically intend their partnerships to last indefinitely. Second, if people are going to allow a relationship to affect their decisions about career or finances, they often want some assurance of its stability. In addition, most people simply need the trust and recognition that comes from another person who is committed *to them*—who will “always be there.” But to truly accept this commitment obliges us to reciprocate it. Of course, marriage is not the only form such reciprocal commitments can take, but it is a dominant model for them in our culture.¹⁶

¹⁶ The relation between commitment and freedom is one of the central themes in the *Philosophy of Right*. Hegel persistently critiques the negative “freedom of the void” which thinks of freedom as the absence of all limitations (see esp. PR: 5-15, 149). For Hegel, a person’s freedom is only actual when is freely committed to particular valuable ends (PR: 7A, 12), such as to particular friends and family members (PR: 7A, 158+A, 162, 175+A), to a particular line of work (PR: 207A), and to a particular community (PR: 268). But at the same time, Hegel does not lose sight of the way that our roles are shaped by the socially necessary functions to which they are oriented.

Besides shaping the pattern of our lives, our social roles also *shape us as persons*. Since our roles do so much to determine our everyday activity, they tend to develop some of our traits and potentialities over others. Nor is this limited to the development of “occupational skills,” since the traits, capabilities, even ethical qualities that we develop in our work and relationships (for better or worse) tend to affect our whole personality to some degree. Moreover, the amount of leisure our roles allow us determines how much opportunity we have to develop ourselves in other directions.¹⁷

A second sense in which our roles shape us as persons is by informing our identities or self-conceptions. As Hegel saw, one way our social roles are formative is that they provide us with final ends or obligations that bind us *from the inside*: that is, they furnish us with ends and obligations that, far from being externally imposed, give our lives meaning and substance. In this regard, a role may furnish a person with one part of her practical identity.¹⁸ Familial roles are paradigmatic of this, as are occupational roles invested with the ethical content of a vocation or calling. But many people take more instrumental attitudes toward their particular line of work than talk of practical identities suggests. Nevertheless, these occupational roles almost always shape a person’s “social identity,” his standing in society, or “public face.”¹⁹ Perhaps the most obvious way they do so is by assigning a person (and his or her household) to a position of greater or lesser prestige in the class structure. But Hegel correctly realized that social identities

¹⁷ These are important themes in Adam Smith’s *Wealth of Nations*. The influence of habit on character is stressed at Bk. I, ch. XIV, pp. 16-17, a thesis then applied to the characters of the major economic orders (Bk. I, ch. XI, Pt. iii, conclusion, pp. 284-288) and to the effects of manual labor (Bk. V, ch. I, pt. iii, pp. 839-842). Hegel draws on Smith’s discussion of social orders at PR: 203-205 and emphasizes the formative role of work at PR: 187, 197.

¹⁸ Cf. Hegel, PR: esp. 147, 154, 158, 162, 166; PH: 23-24; EM: 514. I have benefited from the discussion of these matters in Neuhausser (2000): 97-98. See also Wood (1990): 196-198 and Hardimon (1994).

¹⁹ Although Hegel recognized the importance of practical and social identities, he was not scrupulous in distinguishing the two. Also, to be clear, I do not suggest that our social roles *exhaust* the content of our identities, nor that we cannot reflectively stand back from them (theses sometimes attributed to Hegel).

are not purely hierarchical. Different occupational roles also have qualitatively different characters and usually offer the occupant “*recognition* in his own eyes and in the eyes of others” for different kinds of accomplishment and contributions (PR: 207, 253). Thus, a person may identify with the special character of his occupation (e.g., as a tough miner or as a trustworthy clerk) and win self-esteem for doing his job well, without the particular ends of his work having much ethical significance for him. Finally, Hegel located a more fundamental kind of status that occupational roles confer on their occupants, which is the basic dignity of being a contributing member of society—someone who is “pulling his own weight.” The importance of having the dignity of a viable social identity is most evident in cases where it is threatened or undermined, as by long-term unemployment or homelessness (PR: 244-245). Maintaining this viable social identity as a productive member of society typically *is* a part of a person’s practical identity, even when his particular occupational role is not.²⁰

B) Respect for life authorship

Having observed how social roles define the character of a life, let’s return to our discussion of autonomy. The lives of the overwhelming majority of people in every society are shaped by their social roles. The modern liberal idea of life authorship is that people should be able to exercise control over the kinds of lives they lead by having choices about the main occupational and familial roles they perform. This is a holistic notion in that it begins with the character of a life as a whole, not with the character of individual choices. It does not assume that a person’s

²⁰ The traditional women’s roles of wife and mother (especially in societies where the household is not the main site of production) have historically been analogous to male occupational roles insofar as they have given women a viable social standing and esteem for their contributions. However, these roles usually required a degree of ethical internalization uncharacteristic of many male occupational roles. Hegel, like many of his contemporaries, accepted the separate, complementary (albeit unequal) spheres of men and women as natural and rational (cf. PR: 165-166). I discuss this issue in more detail in 10.3.C.

control over her life is complete—that other people’s choices or chance events do not leave their indelible marks as well. Neither does it suggest that we decide the extent to which we succeed in all of our undertakings. Nor still does it imply that there are no roles that we are simply born into. Naturally, we are born into our first families as sons and daughters, brothers and sisters. And these roles do not necessarily completely dissolve when we become adults; we may understand ourselves as having special duties throughout life that arise from these roles. All the same, it is characteristic of the modern family that the claims of our first family weaken with maturity and do not strictly govern the kinds of lives we make for ourselves as adults.

There is more to life authorship than performing social roles, as other projects may define our lives as well. But since our roles typically constrain our other activities (if in no other way than by limiting our time and resources), it is in no small part by having control over our roles that we have the freedom for project-pursuit generally. Moreover, it is chiefly the existence and prominence of social roles that forces us to take up the perspective of what we want for our lives as a whole. If the only choices were short-term engagements, easily entered and exited, then we wouldn’t need to think about what to do with life. The horizon we worried about would be roughly equal to the time necessary for participating in the options available. It is because some of our options, like careers and family, require so much of a lifetime to pursue, that we are forced to think about life as a whole. This in turn affects the character of all the choices available to us. To pursue many short-term activities and relationships in the middle of life can carry the cost of making it more difficult to ever participate in those roles that require most of a lifetime.

The idea of life authorship could inform our moral outlook in two ways. We might say that people lead better lives when they actively take charge of their affairs and shape the kinds of lives they lead by choosing their roles and projects in a deliberate, independent-minded way. On

this view, life authorship is a central component in a theory of well-being.²¹ On the other hand, we could think of *respect for life authorship* as one aspect of the more general idea of respect for autonomy. I will pursue this second tack. Recall that respect for autonomy is the duty to recognize the equal practical authority of others and their special “jurisdiction” or “sovereignty” over themselves—their right to be the final judges over their own affairs, even if they are not the best judges. *Respect for life authorship, in turn, is the duty to recognize in others the authority to make their own choices about the kind of life to lead, especially with respect to the major social roles they undertake, whether or not their choices are actually conducive to their well-being.* In short, respect for life authorship requires that we recognize a kind of ownership in each person over the course of her own life. This requires more than negative duties of non-interference, since as a society we cannot respect a person’s authority over her own life if we haven’t enabled her to make real choices concerning it. Thus it is necessary to foster the capacities in youth that will enable them to make life choices as adults, and to maintain the social conditions—like access to education, good jobs, and birth control—that ensure an adequate range of options for exercising life authorship. Nevertheless, respect for life authorship *does* have a strongly negative character in that it is not concerned that people actually do take charge of their lives, but only that people have the social space and capabilities to do so.²² Providing this opportunity is important, furthermore, not because the self-determined life is the good life

²¹ This is the way that autonomy fits into the liberal perfectionism of Raz (1986), Hurka (1993), and Wall (1998). Wall is particularly clear: “[Personal autonomy] is the ideal of people charting their own course through life, fashioning their character by self-consciously choosing projects and taking up commitments from a wide range of eligible alternatives.... Those who realize this ideal take charge of their affairs.... They neither drift through life ... nor adopt projects and pursuits wholesale from others.... For most people [autonomy] is ... a central component of a fully good life. However well their lives may go, if they do not realize this ideal to some substantial degree, they will fail to live a fully good life” (1998: 128, 130).

²² On capabilities versus actual levels of functioning, see Sen (1992) and Nussbaum (2000).

(although that may be so), but because in an affluent society where life authorship is generally possible, such provision is a part of respecting the equal practical authority of others.

Because I have characterized both respect for agency and respect for life authorship as conceptions of the more general concept of respect for autonomy, the question arises as to the relationship between the two conceptions. Do they compete with one another or are they complementary? This is an important question, but I will defer discussing it until the end of the next section.

5.4 The Moral Significance of Age

A) 'Having your life ahead of you'

Having articulated the idea of respect for life authorship, we are in position to see the moral significance of age. Everyone will agree that a person's chronological age, in and of itself, has no direct bearing on her ability to make individual choices. Therefore, if we interpret the duty to respect autonomy along the lines of respect for agency—as respecting a person's ability to make individual choices—then age will certainly seem irrelevant. But suppose we interpret Respect for Autonomy as respect for life authorship: Since people of different ages stand in different relations to their lives as a whole, a person's age *can* affect how essential liberty presently is for making her life as a whole her own. To put it roughly at first, temporary restrictions on a person's freedom in the first years of life (including adolescence) do not undermine that person's ability to make a life on her own terms, since “her whole life lies ahead of her”; there is plenty of time to take on life-defining roles and projects in the future. Similar restrictions in the middle of a life, however, *would* interfere with life authorship, since if a middle-aged person is ever going to lead a life on her own terms, it has to be now.

Before elaborating on that argument, let me say something about age and stages of life. The moral significance of age depends on its relation to the normal lifespan. Therefore, if the normal lifespan doubles in the future, the moral status of (say) twenty-five might be different than it is now, since that age would occupy a different relative position in a complete life. A second point is that, although age lies along a continuum, its moral significance may be coarse-grained. That is, we might distinguish between the moral significance of broad stages of life—like the beginning, middle, and end of life—but not between the ages that fall within those stages. In fact, the only claim that I shall make here is that there is a morally significant difference between “the beginning of a life” and “the middle of a life.” Whether there are other stages of life that have special moral significance, like the end of life, I shall not attempt to determine. That a continuous property may have coarse-grained moral significance should come as no surprise. Those who think that moral status is grounded in rational capacities or competencies for agency, after all, hold the same, since they think that greater or lesser facility in reasoning is morally irrelevant past some minimal threshold. Similarly, I am arguing that stages of life, like capacities or competencies, can be understood as “range properties,” properties that apply in equal measure to all to whom they apply (like a point’s property of being interior to a circle) (Rawls, TJ: 508/444). Thus, a 30 year-old and a 40 year-old may equally be in the middle stage of life. To understand *why* the beginning and middle of a life should be range properties in this sense, we have to return to the argument for their moral significance.

Consider first the person in the middle of a life. For her, there is no time like the present. She needs independence and control over her affairs now if she is going to have the ability to make her life her own. She requires the freedom to decide which roles to participate in, how to carry out those roles, when to abandon one role for another, and which other projects and

pursuits to engage in. Furthermore, since carrying out many roles and projects requires continuous attention, it is important that her control and independence itself be continuous; even relatively short interruptions of control can greatly disrupt a person's ability to lead her life on her own terms. Consequently, denying a person liberty in the middle of a life is generally inconsistent with respecting her autonomy. (Admittedly, minor paternalistic restrictions aimed at preventing harm, like the requirement to wear a seatbelt, may not interfere with a person's ability to lead her own life. But we are concerned here chiefly with the restrictions typical of adolescence, which are much more intrusive, pervasive, demanding, and moralistic, and which, thus, *would* be burdensome in the middle of a life.)

But things are very different at the beginning of a life. Then someone can still look forward to making his life his own in the future. Although it is in adolescence that most people first acquire the minimal practical capacities sufficient for leading adult lives, they do not yet have those lives in place. And instead of granting adolescents the liberty of immediately integrating themselves into adult roles as soon as they are minimally capable of doing so, it is possible to treat adolescence as a sort of officially enforced "moratorium" on taking up adult commitments.²³ During this moratorium, adolescents are required to remain integrated in the paternalistic formative institutions of the family and the school which they inhabited as children in order to better prepare them for taking on adult roles later. In denying the adolescent the liberty to make certain kinds of choices that adults can make, and in requiring him to remain in the formative institutions of youth instead of immediately assuming an independent status, we are plainly limiting the adolescent's liberty for what we believe to be his own good. What makes

²³ On adolescence as a moratorium on adult commitments, see Erikson (1968): 155-58. I say "officially enforced" moratorium, because many people continue to delay making major life choices in young adulthood, and are even encouraged to do so, although they are free to do otherwise.

this paternalistic moratorium consistent with the duty to respect autonomy is that it *comes at the beginning of a life*—before a person has integrated himself into the roles that define adult life, and with the understanding that he will acquire full independence and control over doing so in a few years. For this reason, it does not usurp his equal practical authority to lead a life of his own making. Turning that full control over to the adolescent now or in a few years will not make him less the author of his life as a whole.

It might be objected that it just obfuscates things to say that the paternalistic moratorium does not really interfere with the adolescent's "autonomy over a complete life." Wouldn't it be more accurate to say that we respect a person's autonomy to make major life decisions during some periods of life and not during others? This is a serious objection, since my argument claims that paternalistic restraints at the beginning of a life do not really interfere with a person's self-determination (properly understood). I contend, however, that we distort the moral significance of paternalism at different stages of life if we don't look at it in the context of a complete life. This is because the meaning or significance that a particular episode has for a person depends, not just on its "intrinsic" characteristics, but also on how the person understands that episode to fit into the narrative arc of her whole life. My claim, then, is that *a period of limited but growing freedom at the beginning of life, which is oriented toward preparing a person for the independence of adulthood, is readily interpreted as one integral part of a life whose overall character is marked by a self-directed trajectory.* In other words, the meaning of the part, the

paternalistic moratorium at the beginning of a life, is significantly shaped by the meaning of the whole, the complete autonomous life.²⁴

Moreover, this is not simply one possible interpretation of the paternalistic moratorium. It is a part of the “cultural script” of becoming an adult in our culture. When we construct narratives about our lives, we draw on cultural scripts that define the conventional phases, events, and transitions of life. Certain aspects of these scripts may be more or less specific to different genders, ethnic groups, classes, religious groups, sexual orientations, and so on.²⁵ But the paternalistic moratorium of adolescence is one widely shared part of the life script in our culture. It is commonly understood that it is simply a normal part of life that one is not permitted to fully integrate into the adult world or make certain major life choices until reaching a conventional age like eighteen or twenty-one.²⁶ But there is never any doubt that the adolescent’s life, looking forward, is his own to lead. Because adolescence is publicly recognized as a normal stage of life, adolescents do not typically understand paternalistic restraints to be a form of disrespect for their status as free and equal persons, although many may well chafe under those restraints and be impatient for their independence. The paternalistic moratorium of adolescence, therefore, has a very different character than paternalism that restricts a person’s freedom to make choices about her roles and projects in the middle of a life—the stage of life when such choices need to be

²⁴ Cf. Raz (2004): “The significance of each episode, if any, depends on its relations to others, in light of the direction the person whose life it is gave to his or her life. The relevance and meaning of other episodes is determined by reference to that pattern” (278).

²⁵ Habermas and Bluck (2000): 750-751; Appiah (2005): 21-23.

²⁶ Although that particular script for adolescence may understandably have less salience where adult prospects are bleak, for then it might seem as if there is little to be gained by observing the moratorium. This suggests that the justification of paternalism for adolescents is not entirely separate from questions of social justice. I discuss equality of opportunity in more detail in Part III.

made, if they are to be made at all. But this moral difference lies merely in the temporal position of these stages of life, not in any difference in the subject's capacity for Reason.

B) Objections and replies

Let me try to clarify my view by anticipating some objections and clearing away some misunderstandings. First, someone might object that I am exaggerating the difference between my account and the Standard View, for what I am doing is really offering a more expansive conception of Reason.²⁷ That is, according to this objection, what I have done is to insist that we think about a person's ability to pursue complex projects over a complete life, instead of just confining our attention to a person's ability to make isolated choices. My argument seems to be that while adolescents are as capable of making isolated choices as adults, they are not as capable as adults of planning and pursuing long-term projects and commitments. I do think this is important, and I agree that this is only a version of the Standard View; but it is not my argument. After all, there is a great diversity in the capacity of adults to make and abide by long-term plans as well. My claim is that so long as adults have a minimal capacity to make their own choices, they must be allowed substantial autonomy to do so. But we do not have to employ the same minimalist standard with respect to minors. We can appropriately hold them to more demanding standards than we expect all adults to meet. This makes my view very different than the Standard View, which offers a single standard of reasoning capacity for explaining the differences in the ways we treat adults and minors. I claim that the differences in stage of life justifies applying different standards.

²⁷ In fact, this objection has been raised by many people. I thank Taylor Carman in particular for convincing me that I needed to make clearer how my view differs from the Standard View.

I will be asked whether we may permissibly treat an adolescent paternalistically who is fully capable of making very responsible choices about her complete life. That is, this adolescent is not just as responsible as the least responsible of adults, but as responsible as the most responsible of adults. The first thing to consider is whether we could really benefit this adolescent by denying her full autonomy. If we could not, then there is not even a paternalistic reason to restrict her freedom. Since exercising our capacity for self-direction *is* a component of our good (see 2.6), I think that—other things equal—an extremely responsible adolescent ought to have the same freedom as adults have. (The only *paternalistic* reasons for restricting her freedom that could hope to be legitimate would have to appeal to the sorts of pragmatic institutional and epistemic considerations discussed above.) This, however, does not mean that age is not morally relevant after all, for when we are dealing with less than fully responsible individuals, and when we expect paternalism could be beneficial, we weigh the importance of Respect for Autonomy differently depending on the person's stage in life.²⁸

Finally, since I have said that the moral relevance of age depends on the normal life-span, I will be asked how my argument applies to minors who are terminally ill or otherwise have very short life expectancies. First, to repeat, paternalistic restrictions on freedom are only justified in principle when we think that they will really be beneficial for the subject. That's a conceptual

²⁸ Perhaps this analogy will be helpful. There are three men, Tom, Dick, and Harry. Tom and Dick are Black, Harry is white. Tom and Harry are accused of the same crime in virtually identical circumstances. Dick (Tom's brother) is accused of no crime. The jury sentences Tom, the Black man, to prison and Harry, the white man, only to probation. Tom complains that he has been treated unequally because of his race. The verdict is defended on the grounds that Dick is Black too and we have not sentenced *him* to prison; therefore, race played no role in our decision. Plainly, the logic is fallacious. Age is playing a similar role in my argument as race plays in the deliberation of the jury—except of course I do not think that “age” in this context constitutes invidious discrimination. True, age itself does always completely settle the question as to how we ought to treat a person. But when paternalism might really be beneficial, a person's age is a fundamental moral consideration.

truth that follows from the definition of paternalism (see 1.2). For example, if we thought that the *only* good reason to make children study rather than let them play was due to the good it would do them as adults, and we had a child who we knew would never live to adulthood, then it would be perverse to make her study nonetheless. Since whatever form of a good life a terminally ill child is capable of will likely differ from that possible for people with normal life-spans, we will have good reasons to treat her case differently. Now suppose we are dealing with a terminally ill adolescent, who has reached the minimal threshold of reasonableness to which we hold adults, but who wants to make a decision that we think is not best for her. What does my account recommend? In one sense, my view is hard to apply to cases of this sort, since they concern people who have little chance to pursue the sorts of extended projects central to my conception of life-authorship. But suppose we think the adolescent has one or two years left to live and she wants a chance to make what she can of that time. It seems like a virtue of my account that it recommends that she ought to be given the autonomy of an adult, not because she is more reasonable than her peers, but because of where she stands in the context of *her* complete life. Cases where we expect someone who is now an adolescent to die in mid-adulthood from a genetic disease are harder cases to decide in practice, but that is just because they are boundary cases, not because they raise any special conceptual problems for my account. I think that the life-authorship view provides an attractive framework for thinking about such hard case in that it highlights the importance of life-span, instead of focusing solely on decision-making capacity.

Of course, some children unfortunately have their lives cut short unexpectedly. They shall have no doubt sacrificed some present pleasures for future rewards never to be reaped. But this is a risk endemic to all human existence. I would not spend my time writing if I knew this was my last day alive, but if I lived every day as if it were my last, then I would not accomplish the

things I want to accomplish, and my life would likely be the worse for it. We take the same reasonable risks with children. This should remind us, however, not to think of childhood *solely* as a period of preparation for adulthood. Children have a right to have good lives as children—their childhoods should not be sacrificed to adulthood.²⁹

C) The virtues of the life-authorship account

In recognizing the moral significance of age, we can capture some of the insights of the welfarist and agency approaches, while avoiding their shortcomings. One appeal of the agency approach is its recognition of the importance of Respect for Autonomy. But it is implausible to think that *all* we care about is that children grow up to be accountable agents. We also want young people to learn how to make choices that will lead to happy and fulfilling lives—and this is the appeal of the welfarist approach. At most the agency approach can allow such welfarist-oriented paternalism only as long as the child is unaccountable for her choices. It therefore rests on the unlikely premise that young people attain the capacities for agency and an acceptable measure of practical wisdom and understanding at the same time. This problem is often obscured because agency accounts tend to elide the difference between ideal and minimal agential capacities. But this is a crucial distinction. Since the capacities constitutive of agency admit of degree, and since normal adults show considerable variability across these dimensions, we have to employ very modest standards if we want the possession of agency to ground the normal adult's status as a full free and equal member of society. And yet we want to foster more

²⁹ Cf. Rousseau's *Emile*: "Be humane with every station, every age, everything which is not alien to man... Love childhood; promote its games, its pleasures, its amiable instinct....Fathers, do you know the moment when death awaits your children? Do not prepare regrets for yourself in depriving them of the few instants nature gives them. As soon as they can sense the pleasure of being, arrange it so that they can enjoy it, arrange it so that at whatever hour God summons them they do not die without having tasted life" (Bk. II, p. 79). I have seen a number of philosophers make a similar point recently. For example, see Macleod (2002).

than minimal agential capacities in the young—we want children to grow up to be highly competent at navigating the many choices the modern world throws their way, to have a strong sense of who they really are and what they care about, and to be well-equipped to reason morally in a pluralistic world bounded by no single set of traditions.

The deep problem bubbling up here—the Competence Problem—is that our perfectionist educational aims are in conflict with the minimalist standards that are supposed to ground equal social status. Liberals find themselves in a bind, because they neither want to embrace the “tutelary state” of Plato that values virtue above liberty (Macedo 1990: 98), nor give up on the ambitious and progressive educational goals that have long been a part of the liberal social vision (cf. Dewey 1916). It is easy to overlook this tension when we focus on young children, since they clearly do lack the minimal competence for independence. But adolescents naturally reach the threshold for minimal competence considerably before our more ambitious educational ideals can be realized. The solution to the Competence Problem is to recognize that our educational perfectionism is properly bounded, not by some particular developmental outcome—as almost everyone has assumed—but by *a set period of time*. Thus we may permissibly use paternalistic means to promote our perfectionist aims up until a person reaches a certain age, like eighteen. The idea is to prepare the young person as well as possible for adult life. After the person reaches that age, however, she attains the full status of adulthood, as long as she has the necessary *minimal* competence. In this way, we prevent our perfectionism from posing a danger to the liberty of adults, while at the same time preventing our liberalism from deflating our educational perfectionism.

The life-authorship account also explains what is right about the “open future” argument. We can agree with the agency theorist that it is not generally permissible to restrict the liberty of

adults to preserve their future freedom, and yet maintain that the situation of adolescents is special in that they have “not yet reached the time in their life cycle when they are expected to make crucial choices that will define their identities” (Power et al. 1989: 30).³⁰ Furthermore, since it is probable that no society—and especially no democratic society—could function if adolescents were generally cut loose from adult authority as soon as they attained the minimal competence necessary for adulthood, the life-authorship account helps us reconcile the socialization needs of the community with the liberty rights of the individual by confining coercive socialization to the beginning of life.

At just what age does someone become an adult? One suggestion is that we become adults when we reach maturity and come to the natural end of development (cf. Burt 2003). Indeed, this is one way to understand what Mill might have meant by the “maturity of faculties” (OL: III, ¶ 3 / CW, XVIII: 262). But development by most measures lasts well into what we now consider adulthood. For instance, there has been much focus in recent years on the fact that the brain continues to develop into the mid-twenties, though there is as yet little real understanding as to how these neurological changes relate to behavior (Johnson et al. 2009; Kuhn 2009). And study of moral reasoning and identity-formation suggests that, given the right environments, advances in these domains can continue well into the third and even fourth decades of life, if not later.³¹ Even if we could settle on a satisfactory definition of maturity, there is no reason to assume *a*

³⁰ Though Power et al. (1989) articulate the life-authorship position perfectly in this single phrase, they do not follow through with the idea, but instead appeal the general idea of promoting future autonomy.

³¹ Discussing moral cognition, Colby et al. (1983) reported that subjects “show substantial development occurring into young adulthood—between 29 and 33” (49). On identity-formation in adulthood, see Côté and Levine (2002), Côté (2006), and Tanner (2006). Erikson (1968) thought that development must be understood as continuing throughout the “life cycle” and in fact as defining its contours. Of course, some of this depends on how we define “development” versus “psychological growth” or “learning.” Development is often understood as a universal and invariable sequence of changes, where no stage can be skipped if further development is to take place. But from a moral point of view, it is hard to see why the distinction between development and learning or growth should matter.

priori that people should not be treated like adults until they reach the end of development. That the brain continues to develop into the mid-twenties is not by itself even a *prima facie* argument for delaying the age of majority. Indeed, there is a case for thinking that people ought to attain their full autonomy rights *before* development ends, since autonomy might be conducive to healthy development.

On the life-authorship account, we can allow that *when* young people are admitted as full members of the community is largely conventional. The age of majority may permissibly be set higher or lower, or in a staggered fashion, according to what suits the healthy and autonomous integration into the adult world. For instance, because people are now taking longer to marry, start families, and become financially independent from parents, some social scientists have argued for recognizing “emerging adulthood” (ages 18-25) as a new stage in the normal life cycle (Arnett and Tanner 2006). If this trend were to continue, we can imagine society coming to treat this age group more paternalistically than full adults. On the life-authorship account, this would not necessarily be objectionable, since it would only lengthen the preparatory period at the beginning of a life. The primary question would be whether the change would generally promote better lives.

One virtue of this moderate conventionalism is that, unlike most versions of the agency approach, the life-authorship account is not embarrassed by the fact that the child’s developing capacities are shaped by the existing social world. The agency approach tends to treat the child’s developing capacities for agency as an independent variable, to which our social practices should be adapted. This is of course an unrealistic picture. But when the agency theorist does acknowledge that different social environments can differently affect the child’s rate of development, there is a tendency to think that we ought to adopt those practices that foster

children's capacities for agency as rapidly as possible. And yet there is no good reason to assume that growing up as quickly as possible is the best kind of childhood: indeed, commonsense suggests that ideal development proceeds at a more leisurely pace.

Also, although paternalism is typically understood as a restriction of liberty, observe that there is a sense in which paternalism toward minors affords them a kind of freedom not enjoyed by adults: the freedom from having to make commitments and decisions with serious, long-term consequences. Of course, this freedom is not absolute, but it is nonetheless important for thinking about adolescence. Some hold that, because the adolescent is "in search of herself," her freedom to make irreversible decisions should be limited. While there is some truth to that, we might also reverse that proposition. The phase of self-exploration we associate with adolescence is not a wholly natural phenomenon, independent of supporting social institutions. One reason why adolescents do not have a more definite sense of who they are is *because* they are not yet integrated into any particular adult social roles which are so crucial to shaping our practical and social identities. As the social psychologist Jennifer Tanner observes, "[I]t is at the end of the era of possibilities and exploration that the self consolidates around a set of roles and beliefs that define a relatively stable adult personality. The life events research suggest that this consolidation into an adult self is reflected in the significance of establishing careers, getting married, and becoming parents during these first years of adulthood" (2006: 24). By setting aside a period of life after the basic adult capacities have developed, but before a person is permitted to take on adult roles and responsibilities, we actually create the social space necessary for adolescents to imagine different futures for themselves and the opportunity to explore various provisional courses in life. In this way, the paternalistic moratorium of adolescence can make

possible forms of self-exploration and autonomous identity-formation that would otherwise be much rarer.

D) Life authorship and agency

Let me now turn to an issue I have skirted so far. I said that respect for life authorship is “one aspect” of the more general ideal of Respect for Autonomy. But what precisely does that mean? Is respect for life authorship supposed to replace the more common interpretation of Respect for Autonomy, respect for agency? That would be surprising, since it seems like people should have authority over relatively trivial personal matters as well as over major life choices. But if respect for life authorship does *not* replace respect for agency, then it is not clear that the above argument really can justify paternalism toward adolescents, for even if such paternalism does not interfere with their life authorship, it still does interfere with their exercise of agency.

The solution to this puzzle is to see that, while respect for life authorship does not replace respect for agency, the former duty conditions the strength of the latter in different ways at different stages of life. That one duty can condition the strength of another is familiar in other contexts. For instance, on a common view, one aspect of special relationships, like family ties or friendships, is that they intensify the stringency of our ordinary moral duties: it is wrong to insult anyone, but it is particularly wrong to insult your parents; it is generally wrong to break your word, but it is particularly wrong to break your word to a sibling or best friend. There is a similar relationship at work between life authorship and agency.

Upon attaining the status of adulthood, not only does one acquire the authority to make choices about adult roles, but one’s choices in general also acquire a new, more robust moral standing in the community as commanding full respect. In other words, when a person’s choices

come to possess full moral standing does not depend solely on intrinsic psychological facts concerning the individual, but on his relationship to the community, i.e., whether he has been inducted as a full member.³² But this conventionalism is limited by the fact that the individual does have a natural right, in virtue of his personhood, to become a full member of the community sooner or later.

What kind of standing, then, do the choices of adolescents have, assuming they are minimally competent? This is best approached by comparing adolescents with children. There are two main reasons for deferring to the choices of children. First, it is often best for their present well-being. Even young children can have insights into their good not available to others, and having one's will actively frustrated is almost always disagreeable. Second, part of fostering agency lies in giving the child opportunities to make choices for herself and in treating the child in some contexts *as if* she were already an accountable agent. Is there any *further* reason to defer to the choices of adolescents? Yes: that an adolescent wills something is itself *a* reason for deferring to that choice—even setting aside the choice's effect on his well-being or future autonomy. So the duty to respect agency is not without weight in connection to adolescents. But, until the young person reaches the age of majority, the duty of adults to respect his choices is typically outweighed by the duty to prepare him for a good life. This is what justifies retaining the adolescent in the paternalistic formative institutions of the family and the school and trying to prevent him from unnecessarily narrowing his future opportunities.

³² This has some resemblance to an argument in Korsgaard (1996b) to the effect that an agent's accountability need not be understood solely in terms of facts about that agent; it may also depend on our reciprocal relations with the agent.

5.5 Applications

A) Youth and disability

One important implication of the life-authorship account is that it makes clear the significant moral difference between adults with mental disabilities and minors. The Standard View would lead you to believe that, for example, a normal thirteen-year-old and an adult with the same capacity for Reason ought to enjoy the same liberties, and that any paternalistic restraints that can be justified with respect to one, can likewise be justified with respect to the other.³³ I believe this assimilation is misguided.

Some of those who also reject that assimilation argue that the crucial difference between disabled adults and children is that the children are still developing and “have not yet reached their physical and mental maturity and should be partially defined by the fact that their development toward adulthood is still in progress” (Burt 2003: 255; cf. also Purdy 1992). As a consequence, disabled adults and children have different needs. There is some truth to this, but as I argued above, it is not clear just when “development” ends, and it certainly isn’t at the currently recognized ages of majority of eighteen or twenty-one. But, more importantly, this argument suggests that the only reason why we should treat children differently than mentally disabled adults is because children can benefit from more paternalism than adults can. But this is essentially to return to the welfarist argument discussed in Section II, which is empirically questionable and fails to recognize the intrinsic moral importance of Respect for Autonomy.

³³ Cf. Vallentyne (2000): “[F]or moral purposes, it is *mental* childhood that matters, and ... such childhood should be understood as *non-agenthood*, that is the non-possession of a robust capacity for reflection upon, and modification of, beliefs, desires, and intentions. Hence, I shall include non-agent chronological adults (for example, seriously mentally retarded adults) in the category of children” (196).

Because it is important that people have the autonomy to lead their own lives, we *should* be reluctant to treat adults paternalistically, and when it is necessary to do so we *should* generally employ the least restrictive feasible alternative. Furthermore, in assessing the competence of disabled adults, it is not sufficient to determine how they would fare on their own under *current* social arrangements. Just as concern for autonomy makes it necessary to ask how we can make public spaces and media more accessible for adults with physical disabilities, so too we must ask how we can make the social world more navigable for people with mental disabilities. For instance, instead of simply concluding that a person lacks the capacities for making competent autonomous decisions, we should ask whether it is possible for the person to make her own decisions by “lending” the person the capacities of others. One way to do this would be to assign to the disabled person state-funded assistants trained to help their principals understand the choices facing them. Then we could enable the at least some of the disabled to assume the authority to make their own choices in life, even when others are convinced that they were not making the best possible decisions (Nussbaum 2006: 195-199; cf. also Wikler 1979).

But it is not necessary to take the same attitude toward minors. The life-authorship account emphasizes that to be a minor is not just to be an imperfect Reasoner; it is to be at the threshold of life. Because the first years of life can be understood as a preparation for, and one normal part of, a complete self-directed life, it is not necessary to always seek the least restrictive alternative, nor to always apply the same standards or burdens of proof that we would apply to adults with comparable capacities. Instead, it is appropriate that the minor’s freedom, both in law and in the family, for the most part be tailored with an eye to what lies in the young person’s long-term interests.

Of course, this does not mean ignoring the actual capacities that young people possess, since the kinds of liberties and environments that will be beneficial depends crucially on the actual abilities that young people have. Nor does it imply that adolescents should not enjoy broad freedoms, in the family, in the schools, and in law. Indeed, it is hard to deny that the transition to the full autonomy of adult life is best handled in a gradual fashion. What the life authorship account tells us is that the schedule for emancipation should be timed primarily with reference to considerations of the young people's best interests. This is not incompatible with recognizing the adolescent's "right to be wrong" in particular cases. The point is that the justification of adolescent rights—at the level of rules, not individual cases—appeals primarily to the tendency of those rights to promote adolescents' well-being in general, even though we also give great weight to non-consequentialist arguments in the justification of the autonomy rights of adults. If an adolescent cannot really benefit from a certain form of paternalism, then it is obvious that such paternalism is unjustified in her case. In that sense, the young person's age is not, by itself, a sufficient reason for restricting her freedom, but this simply follows from the inner rationale of a paternalistic justification. The life-authorship account tells us that, *given* the paternalistic treatment in question would not be self-defeating, a difference in age is then a sufficient reason for treating a young person more paternalistically than someone who is at a later stage of life. Furthermore, observe that we are focusing here on the authority of adults over children and are leaving aside questions about the division of authority between parents and the state. Obviously, the welfare interests of children confer on them certain rights against their parents which warrant limiting parental discretion. For example, parents do not have a right to beat their children, or deny them necessary medical treatment, even if they sincerely believe it is good for them in the

long run. On the same grounds, parents may not have the right to attempt to coercively “cure” their children of homosexuality or to interfere with their freedom of expression.³⁴

To illustrate the reasoning recommended by the life-authorship account, consider the question as to how large a part high-school students should have in making decisions about curriculum, school governance, and discipline. Some favor democratic or participatory education because they think it pedagogically superior or crucial for cultivating democratic virtues (Gutmann 1987: 88-94). Others, however, argue that since adolescents are typically at least minimally competent, these consequentialist or perfectionist considerations are really secondary. Just as justice and respect require democratic forms of government, so too do they require democratically organized education (Power et al. 1989; Coleman 2002).³⁵ On the life authorship account, we can concede that considerations of respect offer *some* reason for favoring participatory education in high schools, but we need not treat this as conclusive or of paramount importance, as we would if we were talking about how to govern people over the course of their entire lives. Instead, because we are dealing with a limited period of time at the beginning of a life, we can reasonably attribute the greatest weight to considerations about what on the whole promotes students’ future good.

B) Forced, momentous decisions

Finally, let me consider an apparent problem in applying the life-authorship account. The argument I have defended is that paternalistic restrictions at the beginning of a life, which delay the ability of a rationally competent young person to integrate into the adult world, do not

³⁴ The rights of parents vis-à-vis other adults are addressed in Chapter 10.

³⁵ Though it is hard to see why the proper conclusion is not that all compulsory education for adolescents (democratic or otherwise) is unjust.

undermine that person's authority over her life as a whole. Considered from the perspective of a complete life, a person who is independent by thirteen or fourteen will not typically be more the author of her life than someone who becomes independent at eighteen or twenty-one. But this argument might seem to depend on it being the case that all of the choices that a minor might make *can* be delayed until adulthood.

What, then, are we to say about “forced, momentous” choices—choices which cannot be delayed and which will have dramatic implications for the young person's future life?³⁶ For instance, we cannot simply put off the decision about what to do about a teenager's pregnancy. Likewise, certain kinds of life, like that of an Olympic gymnast or classical musician, must typically be begun well before adulthood. In these cases, it seems inadequate to say that, by denying the young person full authority to make her own decisions, we are simply *delaying* her freedom to assume authorship over her life, since the decision that has to be made now will do so much to determine the contours of that life. Does respect for life-authorship, then, require us to defer to the minimally competent adolescent's decision in such cases as if she were an adult? Practically speaking, of course, it will often be the case that deferring to the minor's considered decision *is* the best thing for her, even when her decision seems unwise in substance, given that in many cases the bad consequences to come from a young person's decision will be less serious than those that will come from frustrating her resolution. But we are interested here in the question of principle.

It is initially tempting to admit that it follows from the logic of the life-authorship account that a forced, momentous decision does generally constitute an exception to the legitimacy of the

³⁶ The terminology is borrowed from “The Will to Believe,” by William James (1897).

paternalistic moratorium of adolescence. In these cases, it seems that respect for life-authorship does require us to defer to the adolescent's decision, whether we think it good or bad. But if we consider the issue more carefully, we will recognize that so wide an exception is in danger of swallowing up the distinctive character of the life-authorship account. If any decision that will potentially affect the minor's future in a significant way counts as a momentous decision, then virtually all important decisions concerning the minor will count as momentous. Recall that one of the driving intuitions behind the life-authorship account was that we want a child's upbringing to make a positive contribution to her prospects for a good life. If we say that a minimally competent adolescent must have the authority to make all decisions that will significantly shape her future life, then we will have drained the life-authorship account of most of its force.

To deal with this problem, I propose that we make a distinction between two classes of forced, momentous decisions: (a) those that simply close off particular opportunities (while still leaving many open ones), and (b) those that positively and narrowly determine some important aspect of the young person's life or that so restrict the young person's future opportunities such that she will lack an adequate range of options for a genuinely self-directed life. A paradigmatic example of class (a) is the adolescent who wants to train for Olympic gymnastics. There is no reason to deny that this is genuinely a forced, momentous decision. But if the adolescent is denied this opportunity, although she will have lost one life option, she will retain a large range of such options to choose from. Class (a) cases, I suggest, should not be regarded as exceptions to our general rule that the freedoms of competent adolescents may be tailored to their best interests. Class (b) cases, on the other hand, should be regarded as exceptions, since in these cases a person's prospects for a self-directed life directly threatened. In these cases, a

competent adolescent's decisions deserve the same respect as those of adults. Paradigmatic of class (b) are decisions like whether to carry a pregnancy to term.³⁷

What is the rationale for this distinction? All childhoods open up some opportunities and close off (or place obstacles before) others. In this sense, then, every childhood has momentous consequences. A theory of autonomy that held that a person's future may not be prejudiced by her origins would be completely untenable. We therefore need a more modest view of what it means to have authority over the course of one's life. Let us say therefore that life authorship is not inconsistent with the absence of particular opportunities which others may have (something that seems inevitable), but that it does require that each person have an *adequate range of options* upon reaching the "point of departure" of adulthood, such that the person can accurately see herself as capable of shaping her life through her choices about which roles and projects to pursue. The larger significance of this distinction is that we can allow the propriety of recent legal trends in recognizing the rights of competent adolescents over certain forced, momentous decisions (like whether to carry a pregnancy to term), without thereby undermining the more general justification for paternalism toward adolescents.³⁸

This of course raises the crucial question as to what counts as an *adequate* range of options. I cannot fully address this question here. It would, after all, lead us far afield from the argument that stage of life can be a morally relevant reason for paternalistic treatment. But making a few

³⁷ These are important practical questions, and both have come before the U.S. Supreme Court. There is a series of cases addressing the question as to whether minors have a constitutional right to an abortion without parental consent or notification. See, e.g., *Planned Parenthood v. Casey* 505 U.S. 833 (1992). In *Wisconsin v. Yoder* 406 U.S. 205 (1972), the Supreme Court granted Amish parents the right (on first-amendment grounds) to take their children out of formal education at age fourteen in opposition to the compulsory school-attendance law which required attendance until age sixteen. The question of the child's right to resist parental wishes in this regard was ignored by the Court's opinion, but broached by J. Douglas in his dissent.

³⁸ As Lord Scarman's opinion in *Gillick v. West Norfolk* threatened to do.

remarks about the kind of answer to be more fully developed in later chapters will help us see how to deal with the problem of forced, momentous decisions.³⁹ First, an account of an adequate range of options cannot be purely quantitative: some options are more valuable to have than others (e.g., occupational choice versus brand choice), and a variety of different kinds of options is more valuable than many options of the same sort. We therefore need to rely on at least a “thin” theory of human flourishing to judge what kind of mix of options it worth having. This, notice, is not equivalent to the welfarist claim that autonomy itself is only valuable insofar as it promotes well-being. Consider the analogy: A theory of justice needs at least a thin theory of the good to know what is worth having, but that does not imply that justice itself is only valuable because it promotes well-being.

On the view I endorse, an adequate range of options will offer opportunities that enable people to develop to varying degrees their valuable, basic human capacities.⁴⁰ The basic human capacities I have in mind include capacities for knowledge and understanding; for aesthetic appreciation (including contact with nature) and artistic production; for religious/spiritual activity; for participation in intimate relationships, community, and the wider culture; for raising children; for productive work; and for play.⁴¹ This kind of account cannot be generated from an evaluatively neutral conception of human nature: discerning which human potentialities are relatively trivial (like the ability to make funny noises) and which make no claim on us for moral

³⁹ I take up the question of adequacy again in Chapters 10 and 14.

⁴⁰ This is the position defended by Raz (1986): 373-377 and Wall (1998): 141-144.

⁴¹ The precise content of that inventory is debatable, of course. Accounts of this general sort are developed by Finnis (1980), Nussbaum (2000), and (with somewhat different meta-ethical foundations) by Griffin (1986).

reasons (like the potential for cruelty) requires making evaluative claims.⁴² Though the account of the human good cannot be value-neutral, a “thin” theory of the good does strive to be culturally ecumenical. The working assumption is that it is possible to identify a wide range of cross-cultural human goods, and that cultures will differ from one another chiefly in the particular ways they realize these goods and in the way they integrate and order them. An adequate range of options, then, need not provide opportunities for every instantiation of developing our basic human capacities, but it will provide options that permit the realization of every capacity in one way or another. For example, adequacy does not require the opportunity for learning the piano, but it should include the opportunity for developing musical talents of some kind.⁴³

5.6 Conclusion: ‘Our Common Humanity’

The prevailing idea that a person’s age cannot be a morally relevant characteristic can be traced to a very deep idea in the liberal tradition: that our moral status and fundamental rights are owed to us, not on the basis of conventional, superficial, or “contingent” characteristics (like class, race, or sex), but rather on the basis of *our common humanity*. One great task of liberal thought therefore has been to explain what this common humanity could consist in given the apparent diversity of human beings. Here there are two great traditions. The utilitarian tradition conceived of our common humanity as consisting in a distinctively human capacity for happiness

⁴² Hurka (1993) attempts to develop an account of human flourishing from an ethically neutral conception of human nature, but to my mind it is effectively critiqued in Kitcher (1999). I essentially agree with Nussbaum’s views in this respect; see her (2000): 83.

⁴³ I borrow this point from Wall (1998): 142. There will no doubt be difficulty in deciding how to carve up these basic capacities. For instance, is it sufficient to have opportunity to develop some artistic abilities, or must one have opportunities for developing capacities for music *and* for the visual arts?

and suffering. The social contract tradition located our common humanity directly in our capacity for reason, morality, and self-direction. Both of these traditions have been pivotal in shaping the modern, secular understanding of human beings as moral equals and in breaking down conventional status distinctions. But the status distinction between children and adults seems to call for explanation rather than dissolution. In their attempts to offer this explanation, liberals naturally turn back to their respective accounts of our common humanity. Thus, the subjection of children to adults is understood either as based on the child's lack of prudence or lack of rational agency. One theme of this essay is that both traditions have taken an overly abstract and timeless view of what our common humanity consists in. We should recognize that an essential part of our common humanity is the temporal structure of a life. While liberalism is properly committed to equal respect for persons, this need not mean that people have to be treated in the same way during each stage of their lives. What matters is being treated as a free and equal member of society over a complete life.

PART II: THE MORAL BASIS OF PARENTAL RIGHTS

Introduction and Overview

In virtually all societies, parents are recognized as holding certain special legal and moral rights regarding the upbringing of their children. But we disagree about the strength and content of parental rights, and sometimes even about who ought to have parental rights. In part, such controversy is endemic to any attempt to mark out rights and prerogatives. If we can manage to disagree about how much authority individuals ought have *over themselves* (the problem of Part I), then we are bound to disagree about how much authority parents ought to have over their children. But controversy about parental rights is also a function of historical social change. Problems of political and social theory are usually most acute in periods of transition, and in Western democracies over the last fifty years, the institution of the family has changed far more than have, for example, the major branches of government. It is often said that since approximately the mid-nineteenth century, we have been moving from a paradigm of the family that is so deferential to parental authority that children are treated almost like a form of property to one that is child-centered and is highly solicitous of children's independent interests and rights against their parents. Indeed, it is now widely accepted that children have a right to be protected by the state from parental abuse, exploitation, and neglect. States perform this role of *parens patriae* through a variety of means which include making education and medical care compulsory, regulating child labor, using public schools and social workers to monitor children's well-being, and—in extreme cases—by removing children from their parents. But just how

much discretion parents ought to have over the upbringing of their children—and what exactly constitutes abuse, exploitation, and neglect—are matters that are bound to generate controversy, especially in societies marked by cultural and ideological diversity.

As I have suggested, we disagree not only about the content of parental rights, but also about how they ought to be assigned. This question arises, in part, in connection to the conditions under which children may be removed from their parents. Is it sufficient to show that the children would fare better if separated from their parents, or is it necessary to show that permitting the parents to keep their children would result in grave harm to their children? The assignment of parental authority is also complicated by changing forms of the family and by new reproductive technologies (like gamete donorship and surrogate pregnancy), which complicate the very idea of a natural or biological parent. Still another impetus behind the question about the assignment of parental rights is the decline of the patriarchal family and other strictly gendered conceptions of parenthood. We no longer subscribe to the view that, in case of divorce or separation, the father always retains custody over his legitimate issue, nor to the view that the mother is the natural caretaker of children in their “tender years.” To settle custody disputes, we now typically appeal to the child’s best interests. But what kind of principle is the child’s best interests? Is it merely a tie-breaker we use when two parents have equally good prior claims to custody? Or is it a more radical, general principle for deciding who should have custody? If grandparents could show that a child would fare better in their care than in that of her parents, then is that a sufficient reason to award custody to them? What if the neighbors made a similar claim? Or people in a more prosperous country? (Think about cases where people from the developed world try to adopt orphans from disaster-stricken third-world countries, even though members of the child’s extended family might still be living).

Similarly, we can ask about the role of the child's-best-interests standard in determining the relative authority over children of parental guardians versus other adults who have contact with children, like teachers. On a traditional understanding, the authority over children of other adults is a power *delegated by parents*; such an individual stands, as Blackstone explains, "*in loco parentis* and has such portion of power of the parent committed to his charge ... as may be necessary to answer the purposes for which he is employed" (CLE: I.xvi.2). On this view—at least within certain limits—parents are like small-scale sovereigns, who appoint other adults as ministers to carry out their will, and, as such, these "ministers" are without any independent authority. But today some philosophers prefer to think about the relation between parents and other care-givers on the model of coordinate separated powers, none of which is strictly sovereign over the others. The specifics of the separation of powers is to be determined in an instrumental fashion (primarily) by considering what best serves the interests of children. On this view, we might even want to revise our concept of a *parent*, so that it includes "any adult who has a continuing obligation to direct some important aspect (or aspects) of a child's development, [such that] a child can have several such parents, including those who actually produced the child, relatives, tutors, day-care workers, and schoolteachers" (Blustein 1982: 140).

When we have disagreements about the content or assignment of moral rights—or about the legal rights that people *ought* to have—we are forced to turn to an account of the moral rationale of those rights. For instance, when Europeans of the seventeenth-century disagreed about the rights possessed by kings, they debated whether royal authority was like a personal possession that the monarch inherited from his ancestors and which was ultimately conferred by God, or whether it was a power conferred by the people, entrusted to the monarch to promote the good of the governed. Similarly, if we want to gain philosophical insight into disagreements about

parental rights, we need to explore the possible justifications those rights might have. Are parental rights akin to property rights? After all, we speak of *my* house and *my* child. Or are parental rights like the rights exercised by a mayor, which have been entrusted to him by the community to protect the interests of the governed?

In Chapters 6 through 8, I shall explore some of the possible philosophical foundations of parental authority—particularly in the company of John Locke and some of his immediate predecessors, like Grotius, Hobbes, and Pufendorf. As any survey of the contemporary literature will attest, the influence of Locke’s account of parental authority is quite unique. Many contemporary philosophers take Locke’s account as their starting point or inspiration,¹ while others have borrowed Lockean ideas (like self-ownership or the rights of producers over their products) to develop their own accounts on the origin or nature of parental rights.² However, no discussion of Locke in the literature on parental rights, considers his position as a contribution to the sophisticated debate about parental authority throughout the seventeenth century. But I believe that this is to miss much of what makes Locke’s own position most interesting. Because philosophers in this period were seriously concerned with the relation between political and paternal power, the nature of parental authority received an unparalleled scrutiny by some of the best minds of the century. Every major natural law theorist felt obliged to devote a chapter to the subject.

As I see it, this was a conversation that began with Grotius’s simple claim that “*generatione jus acquiritur parentibus in liberos*”—that is, that “it is by generation that parents acquire rights over their children.” Grotius, as we shall see, does relatively little to explain this thought, but it

¹ For example, Blustein (1982); Arneson and Shapiro (1996); Brennan and Noggle (1997); Archard (2004).

² For example, Lomasky (1986); Narveson (1988); Steiner (1993); Hall (1999).

did much to exercise later philosophers. Some, like Filmer, took this to mean that men cannot be born free, because we are subject to those who have begotten us. Others, like Hobbes, thought the claim made no sense: “as if it were self-evident,” he complained, “that what I have *generated* is mine.” Still others, like Pufendorf and Locke, tried to explain how Grotius’s claim was partly true, but far from the whole picture.

In Chapters 9 and 10, I turn to more modern conceptions of parenthood, especially those that emphasize the value love and intimacy. Hegel was the first major philosopher to give these values a central place in his conception of the family. However, quite in contrast to Locke, Hegel has been almost entirely neglected by the contemporary literature. Since I believe Hegel has much to contribute to the contemporary conversation, I turn first, in Chapter 9, to the contemporary intimacy-based accounts of parental rights. Then, in Chapter 10—the most important chapter of Part II—I turn to an extended exploration of Hegel’s conceptions of the family and parenthood.

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Although Chapter 10 makes many references back to previous chapters of Part II, it may be read by itself. A reader looking for the most important parts in Chapters 6 through 9 is directed to: 6.5.C and 6.5.D (on the relation between parental rights and property rights); 8.4 and 8.6 (on the Lockean fiduciary account of parental authority and its limits); and 9.3 and 9.4 (on the intimacy-based account of parental rights recently developed by Harry Brighouse and Adam Swift).

CHAPTER 6: GENERATION, CREATION, AND PROPERTY

6.1 Grotius on Generation

A) 'generatione jus acquiritur parentibus in liberos'

We use the terms “parent,” “mother,” and “father,” to name both biological relations and social or moral ones. When we speak of parental *rights*, we are plainly speaking, in the first place, of the social or moral relationship. That the biological relationship, as such, does not logically imply parental rights is evident from the fact that no one would attribute parental rights to flies or spiders or to any creature that does not at least actively raise its young—and typically not to any non-human animal at all. But, all the same, one might think that there is a good reason why we have just one word for the two relationships. Perhaps parental rights amongst humans beings are somehow grounded in the procreative act. This has often been understood to have been the view of Hugo Grotius in *On the Rights of War and Peace* (1625).¹ Although Grotius in fact says very little about how generation gives rise to parental rights, it is worth examining how his suggestion fits in with his general account of what belongs exclusively to each person by natural right.

¹ Grotius is sometimes regarded as the first “modern” moral philosopher because he sought to detach natural law theory from medieval scholasticism. His most famous remark in this connection is his contention that natural right exists by the nature of things, particularly human nature, and that what is right and wrong would be no different “though we should even grant, what without the greatest wickedness cannot be granted, that there is no God, or that he takes no care of human affairs” (RWP: Preliminary Discourse, X-XI).

Grotius maintains that God originally gave the earth and its resources to mankind in common. In this original state, each person had a right to his own person and to what was immediately in his physical possession, but could not claim property in something he did not immediately hold. That is, he could not have true *ownership*, or what Kant would later call “intelligible possession” (MM: 6:245-2549). Grotius illustrates this point with an example from Cicero: “Though the theatre is common for anybody that comes, yet the place that everyone sits in is properly his own” (RWP: II.ii.2). Or to give another example, you would wrong me if you tried to take out of my hands a fish I had caught, but I could not claim as my own a fish still swimming in the lake, since it is not actually in my physical possession. This state of affairs persisted so long as men lived in a primitive state in which they could satisfy their needs by living off the land without cultivation. With the introduction of arts like agriculture, however, men came to have an interest in excluding others from land they had cultivated, which they could not always physically possess. Unlike Locke, Grotius does not imagine that such title could be established merely by mixing one’s labor with what was originally unowned. After all, since the chief consequence of possession is exclusion of others, acquisition of property generally prejudices the interests of others. Private ownership, therefore, cannot come about through unilateral action, but only by consent of those affected. More particularly, Grotius maintains that men gave tacit consent to the convention that first seizure establishes title (RWP: II.ii).

Now we turn ahead a couple of chapters and Grotius proposes to tell us that it is possible to have a right, “not only over things, but over persons too.” Many of these rights also come about by consent—in particular, by the consent of the person over whom the rights are exercised. It is in this way that husbands acquire rights over their wives, promisees over promisors, sovereigns over their subjects, and (typically) masters over servants or slaves. Some rights over persons are

acquired, not by consent, but through forfeit. Thus, a person (or even a whole people) can forfeit his liberty and become a slave by some criminal act.² These forfeit cases are not far removed from those involving consent, however, since here too the right is created by a voluntary act of the person over whom the right is held. With the exception of a person's rights over himself, therefore, virtually all rights according to Grotius come about by consent or by some other voluntary act. Against this background, then, Grotius's contention that it is "by generation" that parents acquire rights over their children is somewhat remarkable. Here alone something external to the person is acquired by a unilateral act. Indeed, insofar as procreation need not even be undertaken intentionally, we might hesitate to call this biological process an "act" at all.³

As we shall see shortly, many later writers understood Grotius to be offering an account as to how parents acquire rights of authority vis-à-vis their children. But it may well be that Grotius only meant to be explaining why rights over children vest in the biological parents, instead of in other adults. In any case, even if he only intended to explain the *assignment* of parental rights in terms of generation, he says very little to explain the connection. He only says that "none but parents [i.e., the biological parents] are naturally entrusted with this charge," and that "paternal authority be so personal⁴ and annexed to the relation of the father, that it can never be taken from

² Who *acquires* the right over the criminal? Grotius is not specific, but presumably it is the person or state that is wronged.

³ Cf. Locke: "What father of a thousand, when he begets a child, thinks farther than the satisfying of his present appetite? God in his infinite wisdom has put strong desires of copulation into the constitution of men, thereby to continue the race of mankind, which he doth most commonly without the intention, and often against the consent and will of the better" (2T: I.54). See also a similar passage in Pufendorf, LNN: VI.ii.4.

⁴ By "personal," of course, Grotius does not mean "intimate," but "pertaining to a particular person," in the way that a "personal crime" is a crime committed by an individual in his own capacity, rather than as a public office-holder or member of an army. Likewise, then, paternal authority is attendant to the relation of being a biological father to a particular child. (In fact, this "paternal" authority is actually more properly designated "parental" authority, since Grotius grants that it is held by both the mother and the father; it is only when their commands come in conflict that the father's authority is preeminent due to the "greater dignity of his sex").

him and transferred to another” (RWP: II.ii.5). He may have simply been following the precedent of Roman law, as his treatise is generally modeled on the ancient legal “textbook”, the *Institutes of Roman Law*. In that treatise, Gaius writes that “a man has power over his own children *begotten* in civil wedlock” (§55). Grotius may also have simply been following what seemed like commonsense. After all, we do seem to treat the act of procreation as a title over children. In any case, Grotius was unconcerned to offer any explicit explanation of how the act of generation could confer rights.

B) The seasons of life

What Grotius is more interested in explaining is the content and duration of parental rights over children—as well, perhaps, as their fundamental justification. In this connection, he influentially distinguishes between three stages or “seasons” of life:⁵ that in which the child lacks the use of his reason; that in which the child has attained his use of reason, but is not yet economically independent and still forms a part of the parental household; and that in which the child is capable of supporting himself and leaves the household. Parental authority has a different character in each of these stages. In the first stage, children “being like the brutes, need to be educated and conducted by the reason of another.” In a note, Grotius observes that Maimonides had held that “at that age children belong to their parents, in the same manner as their other possessions.” As Grotius does not register any objection to this characterization, but rather cites it in support of his own view, we may presume that he essentially concurs with it. However, he clearly rejects the view of the Roman law that children cannot own property in their

⁵ Grotius’s three seasons can be found, for example, in Pufendorf, LNN: VI.ii.vii-xi and WDM: II.iii.5-6 and Tyrrell PNM: I, 18-20. Locke seems to allude to Grotius’s framework when he says that paternal power “terminates at a certain season” (2T: II.69).

own name and that parents may destroy their children or sell them at will. In passing, it is worth noting that we find a very similar view in Thomas Aquinas. Aquinas is considering whether it is just to remove a child from unbelievers and baptize him into the Christian faith, since that would seem to be like saving the child's life—only in this case from the eternal death of damnation.

Aquinas, however, answers that this would be unjust:

So long as man has not the use of reason, he differs not from an irrational animal; so that even as an ox or a horse belongs to someone who, according to the civil law, can use them when he likes, as his own instrument, so, according to the natural law, a son, before coming to the use of reason, is under his father's care. Hence it would be contrary to natural justice, if a child, before coming to the use of reason, were to be taken away from its parents' custody, or anything done to it against its parents' wish (ST: II-II, Q. 10, a.12).

In the second stage, according to Grotius, although children are as capable as their parents of acting as moral agents, they continue to owe obedience to their parents so long as they live in the parental household, but this only concerns actions that “concern the state of the Father’s and Mother’s family,” and “only because it is but just, that what makes a part of the whole, should conform itself to the interest of the whole.” This is arguably the most interesting part of Grotius’s account of parental right. Many philosophers simply distinguish between two stages of life: that of a person’s minority, when due to his lack of reason, the child is not yet his own master, and that of the person’s majority, in which having the full capacity of reason, he is his own master.⁶ Grotius, however, thinks of the household in a more holistic and Aristotelian way as a kind of association held together by common interests (cf. NE: VIII.12; *Politics*: I.2). Therefore, as long as children continue to rely on the family, they owe the *family*, as directed by the heads of household, their obedience.

⁶ Cf. for example, Aquinas, ST: II-II, q. 10, a. 10 and Locke, 2T: II.55, 58. This is also the view of most philosophers today.

Kant seems to have held a somewhat similar view, although he does not explain the rationale as well as Grotius does. According to Kant, if children have reached their majority but remain within the household, then they are subject to the authority of their parents, not as parents, but as heads of household (MM: 6:282). Philosophers today often find the importance that Kant places on economic independence unattractive (cf. Schapiro 1999), but I think it may in fact be enlightening to see a significant part of the authority that parents have over older adolescents and “emerging adults” (i.e., ages 18-25) still living at home, not as essentially paternalistic, but as the right of the heads of household to require everyone to do their parts for the common good of the household.⁷

So, in these first two seasons of life parental authority is made to depend on the child’s lack of moral and economic independence. In the third stage, once the child has moved out of the parents’ household, he is “at his own disposal.” Out of natural affection, respect, and gratitude, the grown child continues to owe his parents honor and deference, but no longer obedience (RWP: II.ii.1-6). This was an important move, and one that Pufendorf and Locke would follow. Some writers had understood the Biblical injunction to “honor thy father and thy mother” to command a certain amount of obedience throughout life.⁸ After all, adult children evidently continued to obey their fathers in the period of the Biblical patriarchs and a similar practice was followed in ancient Rome. Moreover, many political theorists had understood this commandment to enjoin obedience to the sovereign, who was, literally or figuratively, a father to

⁷ To put it in colloquial terms, this is roughly the argument that “As long as you’re living in my house, you’ll obey my rules!” To be clear, I am not saying that parents retain no paternalistic authority over older adolescents. That would be inconsistent with what I maintained in Chapter 5 of this dissertation. I only say that it is a mistake to assume that all parental authority is paternalistic in nature

⁸ *Exodus* 20:12. Cf. *Deuteronomy* 5:16, *Ephesians* 6:1-2, *Colossians* 3:20.

his country.⁹ And Christian authors could not very well argue that the commandment to honor thy mother and father applied only to children, and that hence grown children were freed of all obligation to their parents, for Christ had explicitly denied this in the Gospels.¹⁰ So, instead, Grotius argued that there was a difference in what minor and grown children owed to their parents. As minors, children owed their parents a perfect duty of obedience, while grown children owed their parents only the imperfect duty of deference—but a duty nonetheless. Because the deference is owed out of gratitude, kindness toward parents is not merely an undeserved gift. But, as Locke would later explain, it is also unlike the duty of obedience, because it cannot be exacted by compulsion; it “puts no scepter into the father’s hand, no sovereign power of commanding” (2T: II.69, cf. II.66; cf. Pufendorf LNN: VI.ii.12).

From the preceding, we can see that the original acquisition of parental right has a curious place in Grotius’s philosophy in two respects. First, his suggestion that “parents acquire rights over their children by generation,” besides being woefully underdeveloped, seems to swing freely of his quite plausible account of the content and duration of parental authority. And second, parental right is the only right over an external thing (inclusive of rights over other persons) that does not come about by means of the consent or some other voluntary act of those whose liberty is directly prejudiced by the existence of the right. Later seventeenth-century philosophers—like Hobbes, Pufendorf, and Locke—would be dissatisfied with Grotius’s

⁹ Cf. Filmer, *Patriarcha*; James I, *Trew Law of Free Monarchies* in Wooton (1986); and the discussion in Schochet (1975).

¹⁰ Cf. *Mark* 7:8-13 (KJV): “For laying aside the commandment of God, ye hold the tradition of men, as the washing of pots and cups: and many other such like things ye do. And he said unto them, Full well ye reject the commandment of God, that ye may keep your own tradition. For Moses said, Honour thy father and thy mother; and, Whoso curseth father or mother, let him die the death: But ye say, If a man shall say to his father or mother, It is Corban, that is to say, a gift, by whatsoever thou mightest be profited by me; he shall be free. And ye suffer him no more to do ought for his father or his mother; Making the word of God of none effect through your tradition, which ye have delivered: and many such like things do ye.” See also the parallel passage in *Matthew* 15:4-9.

argument from generation. In *De Cive* (1642), for instance, Hobbes complained that “Those who have attempted in the past to assert the dominion of a *father* over his *children* have only come up with the argument of *generation*, as if it were self-evident that what I have *generated* is mine” (DC: IX.1).

Their discomfort may have arisen in part from a growing appreciation of the gap between *is* and *ought*, between facts and norms. It was just not altogether clear how a brute physical fact like generation *could* confer moral rights. Philosophers of the seventeenth century naturally differed as to how wide this gap was,¹¹ but the general problem was probably best articulated by Pufendorf. “Moral entities,” he explains, can neither simply be identified with “natural entities,” nor can they be understood as proceeding from the principles of natural substances; in other words, contrary to the view of the Aristotelians, ends are not imminent in the natures of things. On the contrary, moral entities –paradigmatically laws—are *imposed* by the will of intelligent creatures, human or divine (LNN: I.i.4). Thus, when Pufendorf turns to the question of property, he whole-heartedly agrees with Grotius that first seizure *alone* cannot account for the origin of property rights: “Upon supposition that all men had originally an equal power over things, we cannot apprehend how a bare corporeal act, such as seizure is, should be able to prejudice the right and power of others, unless their consent be added to confirm it” (LNN: II.iv.5). But of course much the same objection applies to the suggestion that the *bare corporeal act of generation* could bestow parental “dominion.”

In this chapter and the next two, I will look at three kinds of responses to Grotius. In the remainder of this chapter, we consider an attempt to make sense of the argument from generation

¹¹ For instance, as we shall see, I think Locke is torn on this issue, and in some passages, especially when he relies on Hooker, is much closer to the scholastic tradition than Hobbes or Pufendorf.

on analogy with God’s authority over his creation and with a laborer’s right over his product. The approaches in the next two chapters involve rejecting, downgrading, or reinterpreting the moral significance of generation. In the Chapter 7, we look at the attempt—particularly in Hobbes—to assimilate parental rights to the presumably less problematic voluntarist paradigm of contractual rights. In Chapter 8, we consider Locke’s strategy of deriving parental rights from the interests of children.

6.2 The Argument from Creation

When Pufendorf addressed the subject of paternal power in his major treatise, *Of the Law of Nature and Nations* (1672), he dutifully began with consideration of Grotius’s account. But arguably he added something of a twist in the interpretation: “The origin of this power, Grotius and most writers refer to the act of generation, *by which the parents do, in some measure, resemble the divine Creator, whilst they make a person really exist, who before had no being*” (LNN: IV.ii.1, emphasis added). Grotius had not explicitly offered that rationale for thinking that generation conferred rights on the natural parents,¹² but we have seen why Pufendorf thought that Grotius *needed* more of an argument to explain how generation could be as normatively significant as Grotius had alleged. Note that by comparing parental authority to that of God over his creation, Pufendorf seems to be interpreting Grotius as offering a theory for the ultimate justification of parental authority—not just an argument for its assignment to some individuals rather than others. Pufendorf’s fundamental objection to this comparison is that it

¹² Unless we count this remark in the Preliminary Discourse: “Amongst men, parents are as so many gods in regard to their children. Therefore the latter owe them an obedience, not indeed unlimited, but as extensive as that relation requires, and as great as the dependence of both upon a common superior permits” (XV). This *is* the sense that Jean Barbeyrac gives to this sentence in the notes to his edition of *De jure belli ac pacis*, but he could have borrowed this interpretation from Pufendorf.

betrays “very low and unworthy thoughts of the infinite majesty of heaven, to conceive that the same species of sovereignty is enjoyed by God and man” (LNN: IV.ii.1).

In the *Two Treatises of Government* (1690) Locke essentially agrees with Pufendorf, but Locke’s discussion of this issue has attracted a great deal more attention in our day. Of course, this is mainly because Locke is now a much more canonical philosopher than Pufendorf. But Locke’s treatment of this question is genuinely more interesting than Pufendorf’s for two reasons. First, the question about the nature of paternal authority had become more pressing in the wake of Sir Robert Filmer’s *Patriarcha* (1680), which had been received as the official exposition of the crown’s own view of royal power (Laslett 1960: 32). And second, and more importantly for us, given Locke’s other philosophical commitments, it might seem as if he would have a hard time *denying* that parents have rights over what they have created.

It is in the course of his critique of Filmer that Locke directly addresses the argument from creation. According to Filmer, there are two opinions about the origin of government. On one view, held by writers like Grotius, “Mankind is naturally endowed and born with freedom from all subjection, and at liberty to choose what form of government it please” (Filmer 1949: 53).¹³ “The other opinion denies any such general freedom of our forefathers, but derives the power of kings from the original dominion of Adam” (71). But the first view, Filmer thinks, is absurd, for “Every man that is born, is so far from being free-born, that by his very birth he becomes a subject of him that begets him” (232). In fact, Filmer argues that the “natural dominion of Adam may be proved out of Grotius himself, who teacheth that ‘*generationae jus acquiritur parentibus*

¹³ The writings quoted include *Patriarcha* and *Observations Concerning the Originall of Government*, and *Observations Upon Aristotle’s Politiques*. I have cited them in Laslett’s 1949 edition, as these page numbers are also given in the cross-references in Laslett’s edition of the *Two Treatises*.

in liberos” (71).¹⁴ Again, Filmer is plainly reading Grotius as offering a full justification for parental authority—not just for the assignment of parental authority to the procreators. As Filmer sees it, Grotius was on the right track; he just failed to grasp that this paternal authority is absolute, extending even to life and death, and does not naturally give way as the child matures. In other words, according to Filmer, paternal power was originally absolute sovereignty: “a son, a subject, and a servant or a slave, were one and the same thing at first” (188). And this patriarchal sovereignty over children, he alleges, to be the “fountain of all regal authority,” for Adam’s authority has been passed down through the generations from the days of Adam and Noah to the kings of the seventeenth century (57).

Now Locke asks, reasonably enough, why we ought to believe Filmer’s assertion that begetting a child gives the father absolute power over the child. Observing that Filmer has little to say on this point, Locke entertains the following argument: perhaps “fathers have a power over the lives of their children, *because they give them life and being.*” One way to understand this argument is that, as Sidgwick would later put it, “persons who would have no life at all but for me cannot fairly complain that they are not allowed more than a certain quantity” (1907: 326). In a limited respect, this is not an implausible argument. Suppose I have inherited a congenital disease, which my father also suffered from, and which will lead to my death around the age of forty. It may well be that in this circumstance I have no legitimate complaint against the lifespan I have been given, since I was owed nothing.¹⁵ Moreover, if my genetic code is essential to who I am, as many philosophers think, then any child of my parents that lacked my

¹⁴ “It is by generation that parents acquire rights over children” (RWP II.v.1). The passage from Filmer is quoted by Locke at (2T: I.50).

¹⁵ This, of course, is related to the “non-identity problem.” See Parfit (1984): ch. 16. See also the interesting discussion in Heyd (1992).

genetic disease would not have been me. But this is rather different than, first, having been given life by my parents, and then, in a second act, having had that life taken away by them. Locke sees this and makes a fitting reply: “I answer, that everyone who gives another anything, has not always thereby a right to take it away again” (2T: I.52). In fact, we might be tempted to put that point even more strongly: there is a powerful presumption *against* the donor having any right to take away again a gift from the recipient.

But Locke is unwilling to rest content with that reply, for he does seem to want to locate *God’s* authority over us in the fact that we are his “workmanship.” As he puts it in *First Treatise*, “he is *King* because he is indeed Maker of us all” (2T: I.53). Making this point in his early *Essays on the Law of Nature* (1664), Locke suggests that it is as evident that “all things are justly subject to that by which they have first been made,” as that a person can submit himself to another’s will by contract (ELN: VI, 117-118).¹⁶ He invokes the same idea at the beginning of the *Second Treatise*, adding that being God’s workmanship makes us his property: “Men being all the workmanship of one omnipotent, and infinitely wise Maker; all the servants of one Sovereign Master, sent into the world by his order and about his business, they are his property, whose workmanship they are, made to last during his, not one another’s pleasure” (2T: II.6).¹⁷ Since Locke holds that property is “for the benefit and sole advantage of the proprietor,” and that in its use, an owner “may even destroy the thing that he has property in,” it seems to follow that

¹⁶ These early essays contain what is by far Locke’s most systematic account of the natural law. In using them to interpret Locke’s later writings, they must be treated with some care, of course. In spite of the promptings of friends, he refused later on to publish them. Von Leyden (1991) speculates that this is because Locke worried that certain ideas in the *Essays on the Law of Nature* were incompatible with the mature theoretical philosophy set out in the *Essay Concerning Human Understanding* (1690).

¹⁷ Cf. also the *Essay Concerning Human Understanding*, where Locke suggests that morality might be placed “amongst the sciences capable of demonstration” if erected on the foundation of the “idea of a supreme being, infinite in power, goodness, and wisdom, *whose workmanship we are*, and on whom we depend” (IV.iii.18).

God's ownership in us gives him the right of life and death over us (2T: I.92). Indeed, in the *Essays on the Law of Nature*, Locke asks "who will deny that the clay is subject to the potter's will, and that a piece of pottery can be shattered by the same hand by which it has been formed" (ELN: IV, 105).¹⁸ Locke makes a similar remark in the present context, allowing that someone who has given life to that which as yet has no being, "might indeed have some pretense to destroy his own workmanship" (2T: I.53). So if children can be regarded as the workmanship of their parents, perhaps Locke *really is* committed to the view that parents hold absolute power over their creation.

Many have thought that Locke's labor theory of property acquisition is also implicated here. If children are the fruit of their parents' labor, then why aren't they the property of their parents? Robert Nozick, for instance, suggests that Locke has this problem:

Locke must discuss Filmer in detail, not merely to clear the field of some alternative curious view, but to show why that view doesn't follow from elements of his own view, *as one might suppose it did*. That is why the author of the *Second Treatise* goes on to compose the *First*... Ownership rights in what one has made would seem to follow from Locke's theory of property.... [So] Locke must explain why parents don't own their children (1974: 287-288).

With respect to property, Locke holds that "Justice gives every man a title to the product of his honest industry," so long as the producer has not alienated that title by contract, used raw materials that belonged to someone else, or worsened the situation of others in the appropriation of originally unowned materials (2T: I.42; II.27-34). Locke's idea seems to be this: Since "every man has a *property* in his own *person*," it follows that "the *labor* of his body, and the *work* of his hands ... are properly his." When a person labors on a physical thing, he joins his

¹⁸ An allusion to *Romans* 9:20-24.

labor to that thing. It follows then that anyone who takes a thing that has been mixed with my labor takes something that is mine (II.27-29). But if creators and producers *generally* have rights over their creations and products, then why shouldn't biological parents, as *re-producers*, likewise have rights over their offspring? After all, most of the difficulties concerning Locke's theory of appropriation involve the question as to when appropriators worsen the situation of others.¹⁹ But, as Susan Moller Okin observes, supplied with sperm, "a fertile woman can make a baby with no other resources than her own body and its nourishment":

This example of production, in fact, is unique in *not* involving the complications of most other cases. A human infant originates from a minute quantity of abundantly available and otherwise useless resources. Thus, there can be little dispute over how much of the product comes from the added value of the labor and how much from the original resources (Okin 1989: 83).²⁰

How, then, *does* Locke explain why parents do not own their children as something they have made and given life to? Locke appears to argue that, although parents might claim absolute power over their children *if* they were truly the parents' workmanship, parents have not, as a matter of fact, really created children in the requisite way:

How can he be thought to give life of another, that knows not wherein his own life consists?.... Can any man say, he formed the parts that are necessary to the life of his child? Or can he suppose himself to give the life, and yet not know what subject is fit to receive it, nor what actions or organs are necessary for its reception or preservation? (2T: I.52)

According to Nozick, Locke's "argument seems to depend upon the view that one owns something one makes only if one understands all parts of the process of making it." However, Nozick complains that this is very unsatisfactory: "By this criterion, people who plant seeds on

¹⁹ Cf. Nozick (1974): 178-182 and G.A. Cohen (1995): ch.3. Some, however, like Waldron (1988): ch. 6, object that Locke's argument is not even coherent.

²⁰ I should be clear, Okin does not accept this proprietary conception of parental rights. Her remarks are made in the context of a *reductio ad absurdum* argument against Nozick's Lockean libertarianism.

their land and water them would not own the trees that then grow.” But Locke surely *would* want to say that people owned the trees they planted, even if they didn’t understand all the natural processes involved in their growth. Indeed, cultivation is the paradigmatic form of mixing one’s labor with the earth. So Locke is faced with a dilemma: either we can own almost nothing, or else he has not given us any reason why parents do not own their children. Other interpreters—for example, Lawrence Becker—have come to a similar conclusion: “It seems unlikely that anything will be found in the nature of the *labor* involved in conception, gestation, birth, and nurturing which will distinguish it sufficiently from the labor involved in cultivating a garden to justify using the latter in a Lockean argument but forbidding the use of the former” (1976: 657).

Nozick also considers two other arguments Locke might make to explain why parents don’t own their children as property and finds each wanting. Locke cannot argue that human beings are not the sorts of things that can be owned, since (as we’ve seen) he explicitly says that human beings *are owned*—by God. Nor can he argue that God’s prior ownership in human beings excludes our ability to own them, since God owns everything and that argument would make human ownership of any part of Creation impossible (Nozick 1974: 288-289). What *should* someone who is of a “Lockean persuasion” regarding a person’s entitlement to the product of his labor—like Nozick himself²¹—say about this problem? Nozick can’t say that people cannot be owned as property, since he (unlike Locke) expressly allows a person to sell himself into slavery (1974: 331). Presumably, what Nozick would say is that parents cannot *initially* own their

²¹ For instance, Nozick maintains that “Whoever makes something, having bought or contracted for all other held resources used in the process ... is entitled to it” (1974): 160.

children, even though they made them, since children own themselves, in virtue of their (potential) personhood.²²

6.3 Locke on the Nature of Creation

Nozick, however, has misunderstood Locke on this point—as, indeed, have most of his readers in our day. Nozick assumes that, for Locke, the rights of a creator are similar to the property rights of ordinary producers. On this reading, God’s property in human beings is simply a special application of the rights of producers to the fruit of their labor. But, if I am right, this is far from Locke’s view. Locke assumes, though does little to explain, a theological conception of creation that was firmly established in the older natural law tradition, especially as worked out by Thomas Aquinas.²³ God’s creation, as we shall see, *grounds* the natural law. To speak of God’s “property rights” over creation is really a way of referring to God’s status as law-giver, the source and determinant of the natural law. Locke’s labor theory of original property acquisition, on the other hand, is part of the content of the natural law. Its status as a law depends on understanding God’s purposes in creation. Therefore, God’s creation and ordinary human labor exist on totally different planes in Locke’s thought. Someone who genuinely creates is the one who determines the purposes which govern the created thing’s existence. As a lawgiver, the creator is bound by no higher law. In sections 53-54 of the *First Treatise*, Locke is

²² For an interpretation of Nozick along these lines, see J. Cohen (1992). On the concept of “self-ownership” in Nozick, see G.A. Cohen (1995).

²³ The following interpretation was suggested to me by Sparks (1991). Sparks argues that “the central doctrines of Locke’s politics have a theological basis, a doctrine of Creation similar to the Thomist one,” but he does not actually connect Locke’s position to particular arguments in Aquinas. Although it is probably an exaggeration, there is some truth to Sparks’s remark that “Locke has a strong claim to be considered a major figure of scholasticism in its period of decay”—at least if we limit our attention to his natural law theory. Sparks’s main mistake is to assimilate the labor theory of appropriation to the doctrine of creation. I maintain, once again, that these operate at wholly different levels of Locke’s thought.

not engaged in a futile attempt to distinguish between kinds of making that do and do not ground property rights. Rather, Locke is arguing that, since parents are not the *creators* of their children, they must respect the purposes that our true Creator has for human beings.

The best evidence for this reading comes from Locke's explanation of what it would mean for someone to "give Life and Being" to a child:

To give Life to that which has yet no being, is to frame and make a living creature, fashion the parts, and mold and suit them to their uses, and having proportioned and fitted them together, to put into them a living soul. He that could do this, might indeed have some pretense to destroy his own workmanship. But is there any one so bold, that dares thus far arrogate to himself the incomprehensible works of the Almighty? Who alone did at first, and continues still to make a living soul, he alone can breathe in the breath of life. If anyone thinks himself an artist as this, let him number up the parts of his child's body which he hath made, tell me their uses and operations, and when the living and rational soul began to inhabit this curious structure, when sense began, and how this engine which he has framed thinks and reasons (2T: I.53).

There are three themes in this key passage—especially in the first sentence—that I wish to highlight. First, there is the idea of creating something which had previously had no being. Second, there is the emphasis on the purposes and uses of the parts of the body. And third, there is the reiterated importance placed on "the living soul."

Let us begin with the idea of giving life and being "to that which has yet no being."²⁴ Locke refers not to the act of merely giving new form to matter that already exists, but to creation *ex nihilo*. To see this fully, it helps to turn to the more complete discussion in Aquinas, the rough

²⁴ Pufendorf, recall, had used the very same language in describing what he took to be Grotius's view: "The origin of this power, Grotius and most writers refer to the act of generation, by which the parents do, in some measure, resemble the divine Creator, *whilst they make a person really exist, who before had no being*" (LNN: IV.ii.1, emphasis added).

outlines of which I believe Locke accepts.²⁵ “To produce being absolutely,” Aquinas explains, “not as this or that being, belongs to creation.” But if that is what creation is, then “it is absurd to suppose that a body can create, for nobody acts except by touching or moving; and thus it requires in its action some pre-existing thing, which can be touched or moved, which is contrary to the very idea of creation.” Given that there must be a first cause, Aquinas concludes “it is manifest that creation is the proper act of God alone” (ST: I, Q. 45, a. 5). Locke is making a similar point here: Mere mortals do not have the power to *impart being*. It is only this theological conception of creation that makes sense of Locke’s insistence that God not only created us “at first,” but “*continues still* to make a living soul.” Locke here refers to the metaphysical doctrine that creatures cannot endure by their own power, but need to be kept in existence by God’s creative power.²⁶ Ordinary artifacts, on the other hand, bear no comparable relation to their producers.²⁷

That we do not create *ex nihilo* in ordinary production seems straightforward enough. As Aquinas puts it, “when anyone makes one thing from another, this latter thing from which he makes is presupposed to his action, and is not produced by his action; thus the craftsman works from natural things, as wood or brass, which are caused not by the action of art, but by the action of nature” (ST: I, Q. 45, a. 2). But someone who believed in an immaterial soul might think

²⁵ Locke cites Aquinas on the eternal law in the first of the *Essays on the Law of Nature*. Both in the *Essays* and in the *Two Treatises*, Locke draws on Book I of Hooker’s *Of the Laws of Ecclesiastical Polity*, which is steeped in scholastic natural law.

²⁶ Cf. Aquinas, ST: I, Q. 104, a.1.

²⁷ Locke may be alluding to this idea in the *Second Treatise* when he observes that we are “made to last during [God’s], not one another’s pleasure.” He certainly invokes it in his *Essays on the Law of Nature* in an argument which echoes Descartes’s Meditation III:

“If man were the maker of himself, able to give himself being, then he who could bring himself forth into the world of nature would also give himself an existence of everlasting duration.... After the case has been put thus it necessarily follows that above ourselves there exists another more powerful and wiser agent *who at his will can bring us into the world, maintain us, and take us away*” (ELN: IV, 103, emphasis added).

procreation is rather different, for by begetting a child, a new soul seems to come into existence. In a way, Locke accepts that claim. But he insists that the power that creates the child's soul belongs to God alone. God uses parents as his instruments in perpetuating the human race (2T: II.66); in begetting children, parents are not the causes, "but the *occasions* of their being" (2T: I.54, emphasis added).²⁸ Making the same argument, Locke's friend James Tyrrell described parents as the "subordinate causes" of their children's production (PNM: I, 16). In taking this line, Locke and Tyrrell are following a long tradition which includes Pufendorf, who held that "He that begets a Son, hath no power to make him be conceived, to make him be born, to make him live: Whence it appears, that he is not so properly the author of his son's being, as the instrument" (VI.ii.4).²⁹ It may be that Locke emphasizes the creation of the soul in particular because it seems so evident that it is beyond the power of corporeal beings to fashion something immaterial.³⁰ A hundred years later Kant would appeal to a similar argument in the *Metaphysics of Morals* (1790), though stressing now the child's nature as a free being: parents "cannot destroy their child as if he were something they had *made* [since]...it is impossible to form a concept of the production of a being endowed with freedom through a physical operation" (MM: 6:280).³¹

²⁸ Cf. also Aquinas: "the secondary instrumental cause does not participate the action of the superior cause" (ST: I, Q. 45, a. 5).

²⁹ Quoting the early church father, Lactantius, *Divine Institutes* V.18. William Ruddick puts this idea very nicely: "Traditionally, conception has been counted as *procreation*. Procreators, like proconsuls, are deputies for a higher authority and therefore do not enjoy a creator's control" (1979: 126). The point is valid, in spite of the fact that the *Oxford English Dictionary* does not confirm that etymology for procreation.

³⁰ In a similar argument, Pufendorf refers us to Christ's admonition, "Do not fear those who kill the body but cannot kill the soul; rather fear him who can destroy both soul and body in hell" (*Matthew* 10:28; LNN IV.2.4. fn. a). What is insinuated, I take it, is that the soul is beyond the reach of human beings either to destroy or create.

³¹ Locke and Kant differ, of course, in their understandings of lower nature. For Kant's person-centered moral philosophy, there are parts of nature that lack any intrinsic moral status. For Locke's theological ethics, no part of creation stands outside the natural law.

Now, given that creation is different in kind than mere artifact production, what is the moral significance of that difference? On the Thomistic view, to create a thing—to give it being—is to impart to it a nature, form, or essence. This nature is understood teleologically in terms of the thing’s proper ends or characteristic activity. These ends or functions, in turn, are understood to lay down the laws governing a things activity and its proper place in creation. In living things, of course, a thing’s nature, or form, is its soul.³² Locke explicitly invokes this Thomistic conception of the eternal law governing creation in his early *Essays on the Law of Nature*:

All things observe a fixed law of their operations and a manner of existence appropriate to their nature. For that which prescribes to everything the form and manner and measure of working is just what law is. Aquinas says that all that happens in things created is the subject-matter of the eternal law, and, following Hippocrates, ‘each thing both in small and in great fulfilleth the task which destiny hath set down’, that is to say nothing deviates even an inch from the law prescribed to it (ELN: I, 87).

Just how well these Aristotelian ideas fit together with Locke’s mature theoretical philosophy is difficult to say.³³ Apparently he thinks Aristotelian forms are of no use in *natural* philosophy.³⁴ But I believe it is undeniable that some version of the doctrine of Aristotelian forms (perhaps never fully worked out) continued to inform his moral philosophy in the *Two Treatises*.³⁵

³² Aquinas, ST: I, Q. 76, a.1; Q. 103, a. 5; I-II, Q. 91, a. 6; Q. 93, a.1. This basic picture is also laid out clearly in a text that Locke knew well, Richard Hooker’s *Of the Laws of Ecclesiastical Polity* (1594):

“[T]hings natural which are not in the number of voluntary agents ... do so necessarily observe their certain laws, that *as long as they keep those forms which give them their being*, they cannot possibly be apt or inclinable to do otherwise than they do; *seeing the kinds of their operations are both constantly and exactly framed according to the several ends for which they serve*, they themselves in the meanwhile, though doing that which is fit, yet knowing neither what they do, nor why: it followeth that all which they do in this sort proceedeth originally from some such agent [i.e., God], as *knoweth, appointeth, holdeth up, and even actually frameth the same*” (I.iii.4, emphases added).

³³ For example, see ECHU: III.iv. See also the discussion in Waldron (2000: ch. 3).

³⁴ The first chapter of Locke’s *Elements of Natural Philosophy* is entitled “Matter and Motion,” and in his chapters on plants and animals no reference at all is made to forms, souls, or even natures (1823, III: 303 ff.).

³⁵ Cf. von Leyden (1991): “In my view, Locke tended in his later years to regard the notion of a law of nature as a mere premise of his thought, as something he believed in but barely investigated. The reason for this attitude, I

Recognizing this Aristotelian heritage sheds further light on why Locke places such emphasis on the form and purposes of the human being in our key passage from the *First Treatise*. God's purposes in creation constitute the foundation of the natural law, the moral law by which rational beings are to govern themselves. And we can discover these purposes by investigating nature. Locke makes this argument most clearly in the *Essays on the Law of Nature*:

What is to be done by us can be partly gathered from the end in view for all things. For since these derive their origin from a gracious divine purpose and are the work of a most perfect and wise maker, they appear to be intended by him for no other end than his own glory, and to this all things must be related. Partly also we can infer the principle and definite rule of our duty from man's own constitution and the faculties with which he is equipped. For since man is neither made without design nor endowed with no purpose with these faculties which both can and must be employed, his function appears to be that which nature has prepared him to perform (ELN: IV, 105).

Because we human beings do not truly *create* anything—including the children we beget—we are obliged to seek out and respect the Creator's purposes regarding *all creation*. From this follows the natural law governing persons and personal property. It is because the proper purposes of all things are determined by God that all creation is spoken of (metaphorically, I would argue)³⁶ as his “property.”

6.4 Locke on Persons and Property

How do we know the content of the natural law regarding persons and property? Locke follows Aquinas in thinking that, because our Creator is good and his creation good, “those things to which man has a natural inclination, are naturally apprehended by reason as being

think, is to be found in difficulties he had in reconciling the notion of this law with some of his mature doctrines. For instance, the development of his hedonistic views and his philosophy of language in the *Essay* had made it difficult for him to attempt a full exposition of natural law or even to believe in it wholeheartedly” (6).

³⁶ *Metaphorically* because human property is itself a moral relation established by the natural law.

good” (ST: I-II, Q.94, a.2).³⁷ Locke tells us that “The first and strongest desire God planted in men, and wrought into the very principles of their nature being that of self-preservation” (2T: I.88). This inclination is described as a “principle of action” implanted by God. “Reason, *which was the Voice of God in him*, could not but teach and assure him, that pursuing that natural inclination he had to preserve his being, he followed the will of his Maker” (I.86).³⁸ It follows then that each person is morally “*bound to preserve himself*, and not to quit his station willfully”

³⁷ Locke’s acceptance of this tenet is clear from both the previously quoted passage from the *Essays on the Law of Nature* and numerous passages to be discussed below from the *Two Treatises*. Of course, neither Aquinas nor Locke believe that whatever happens to *appear* good to us at any time is actually to be pursued. What appears to be good is not always actually good. What Aquinas and Locke mean is that our inclinations are not fundamentally perverse in their nature or objects.

³⁸ This might sound as if Locke is saying that there are innate practical principles—a doctrine explicitly denied in both the *Essays on the Law of Nature* and the *Essay Concerning Human Understanding*. But it is possible to read Locke charitably here, such that his natural law theory is not in direct conflict with his epistemology on this point. Locke allows in the *Essay* that there are “natural tendencies imprinted on the minds of men; and that from the very first instances of sense and perception, there are some things, ... that they incline to and others that they fly” (ECHU: I.iii.3). What Locke denies is that there is innate *knowledge of moral principles*—that justice must be done, that promises are to be kept, and so on. Moral principles always “require reasoning and discourse, and some exercise of the mind, to discover the certainty of their truth” (ECHU: I.iii.1). And in the above passage from the *First Treatise* (I.86), Locke does not say that our inclination directly teaches us our duty, but that *by reasoning* we recognize, as God’s workmanship, that it must have been God’s will that we pursue this strong natural inclination to self-preservation, which *was* implanted in us by our Creator.

Locke occasionally *appears* to appeal to innate practical principles when he speaks of moral laws—such as the natural right to punish criminals—as “writ in the hearts of all mankind” (2T: II.11). Laslett accuses Locke of inconsistency on this score—cf. his note to II.11. But this language must be placed in the proper context. Locke is simply positioning himself in the tradition of Christian natural law by appealing to the famous passage from *Romans* (esp. 2:15) in which Paul appeals to a moral law that can be known without direct revelation. Although *Paul* may sound like an innatist, Locke thinks that only the faculty of reason is innate. To speak of the law written on our hearts *in this sense* is only a way of referring to conscience. In this respect, Locke’s position is at one with Pufendorf’s:

“The Law of Nature is to be drawn from man's reason flowing from the true current of that faculty, when unperverted. On which account the holy Scriptures declare it to be written in the hearts of men, Rom. ii. 15.... Yet here we by no means think it necessary to maintain that the general laws of nature are *innate*, or imprinted, as it were, upon men’s minds, from their very birth, in the manner of distinct and actual propositions....Although we reject the notion of those innate propositions, yet the knowledge of the Law of nature is truly and really imprinted on human minds by God, as he is the first mover and director of them...That phrase in *Romans* ii.15 which is urged so hardly by some authors, is certainly figurative...” (LNN: I.iii.13).

Admittedly, Locke invites confusion on this score, because he sometimes speaks of laws as written or inscribed on the hearts of men to refer specifically to the innatist doctrine which he rejects (ELN: II, 88-95; ECHU: I.iii.8). But Locke does not think that Scripture contains a false theory of moral epistemology. It is only a case in which Scripture must be interpreted in the light of natural reason (cf. ECHU: IV.xviii).

by destroying himself (II.6). But of course we cannot preserve ourselves without means of subsistence. Therefore, Locke concludes that, if it is the will of God that man preserve himself, it must also be the will of God that man has

a right to make use of those creatures, which by his reason and senses he could discover were serviceable thereunto. And thus man's *property* in the creatures, was founded upon the right he had, to make use of those things, that were necessary or useful to his being (2T: I.86; cf. II.25-26).

When Locke says that we have a right to make use of those creatures which *reason and sense discover to be serviceable to us*, his meaning is not limited to the obvious fact that these faculties teach us the ways in which different parts of creation may be useful to us. Reason also teaches us that man's right over creation extends only so far as it is really serviceable to him; that is, it teaches that "Nothing was made by God for man to spoil or destroy" wantonly (2T: II.31). What follows, then, is that man is not to destroy "any creature in his possession, but where some nobler use, than its bare preservation calls for it" (II.6).

But how do we know when destroying another creature really is for a nobler use? After all, other living things have just as strong an inclination for self-preservation as ourselves.³⁹ Locke's explanation goes like this. Creation assumes the form of a great chain of being, reaching from the baser and less perfect up "by easy steps and a continued series" to the nobler and more perfect (ECHU: III.vi.12).⁴⁰ At the apex of the chain of being is the most perfect being of all,

³⁹ Cf. Aquinas: "every substance seeks the preservation of its own being, according to its nature" (ST: I-II, Q. 94, a. 2).

⁴⁰ Cf. "[W]hen we consider the infinite power and wisdom of the Maker, we have reason to think, that it is suitable to the magnificent harmony of the universe, and the great design and infinite goodness of the architect, that the species of creatures should also, by gentle degrees, ascend upward from us toward his infinite perfection, as we see they gradually descend from us downwards: which if it be probable, we have reason then to be persuaded, that there are far more species of creatures above us, than there are beneath; we being in degrees of perfection, much more remote from the infinite being of God, than we are from the lowest state of being, and that which approaches nearest to nothing" (ECHU: III.iv.12).

God; but man occupies the highest rung in the corporeal world, and “it is the *understanding* that sets man above the rest of sensible beings, and gives him all the advantage and dominion, which he has over them” (ECHU: I.i.1). Therefore, when rational beings use non-rational creatures for their benefit, they are putting them to a nobler use than their bare preservation admits of. But to torment creatures inferior to us out of malice or for no reason at all, as children sometimes do, is to destroy God’s creation to no good purpose (cf. STCE: 116). Therefore, although we have permission to use and even destroy parts of lower creation for our benefit, our authority over property is not absolute. Even with respect to the inferior orders of creation, our prerogative is constrained by God’s will.

Now Locke, as is well-known, uses the word “property” in both a narrower and a wider sense in the *Two Treatises*. In its narrower sense, “property” signifies solely property in “external things” (as Kant would put it)—what Locke calls “estates”—or simply property in the colloquial sense.⁴¹ In the wider sense, property is inclusive of life, liberty, and estates (2T: II.123). Locke calls life, liberty, and estates property because, as he sees it, they all share in the essential nature of property, which is that which “*without a Man’s consent ... cannot be taken from him*” (II.194). In the above block quotation (I.86), however, Locke means property in the narrow sense. In fact, this passage is the key to understanding the philosophical difference between property in the narrow and wide senses. Since it is dominion over things inferior to man and his ends, property in the narrow sense can be destroyed for the proprietor’s comfort and benefit (though not for no reason at all). But a person is not authorized to destroy himself, or to totally

⁴¹ For Locke, “estates” are not limited to land. For example, in *Some Considerations of the Consequences of the Lowering of Interest, and Raising the Value of Money* (1691), Locke speaks of “widows, orphans, and all those who have their estates in money” (1823, IV: 11). Similarly, in the *Second Treatise*, Locke says that, though a sergeant may issue an order that is certain death to a soldier, he may not “dispose of one farthing of that soldier’s estate” (2T: II.139).

alienate his freedom. He is, rather, “bound to preserve himself, and is not to quit his station willfully” (II.6). And, since he has no absolute power over himself, he may not deliver himself into the absolute power of another either (II.23). Therefore, although a person has property in his person and liberty, in that he has dominion over these things and in that no one may take these things from him without his consent, he does not hold them as mere things, which can be destroyed for his own capricious ends.

If we have dominion over the inferior creatures because the faculty of our understanding makes us nobler and more perfect than them, then we must also recognize our fundamental equality with other human beings, “there being nothing more evident, than that creatures of the same species and rank promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst the other without subordination or subjection” (2T: II.4). That is, discovering that we have been furnished by our Creator with the same faculties, we cannot assume that God has intended or authorized any of us “to destroy one another, as if we were made for one another’s uses, as the inferior ranks of creatures are for ours” (II.6). This, then, is a further respect in which sense and reason reveal certain things to be serviceable to us. We are taught which creatures are equal to us in worth or nobility and therefore are not intended to be serviceable to us. From this, it follows that we are not only to preserve ourselves, but when it does not conflict with our duty of self-preservation, we are to “*preserve the rest of Mankind.*”

As Kant would later stress, property is not a relation between persons and things, but between persons regarding things (MM: 6:260-261). The very concept of personal property in external things, then, presupposes the moral status of other persons. (That is why there is no property in the Hobbesian state of nature—no one has any effective claims on one another.) The

purpose of property, then, is to enable persons to use things for their own benefit while respecting one another as moral equals who have claims against one another. Hence, for Locke, there can be no question of one person of belonging to another as his property.⁴² It is in *this context* that we must understand Locke's labor theory of original appropriation. God has given the Earth to "Mankind in common," and yet ultimately we only benefit from the earth by using it individually (especially in consumption). So we are faced with the question: How is it possible to take things out of the common stock while respecting the rights of our moral equals? Whether satisfactory or not, *that* is the sole question that Locke's labor theory of property acquisition is supposed to answer. Since children are persons for Locke and not a part of that original common stock that can be individually appropriated, the "making" of children is entirely orthogonal to the whole purpose of Locke's theory of property in external things. Therefore, contrary to the opinion of many of Locke's interpreters, we can see that Locke can consistently deny that "making" children gives parents property rights in them, while also holding that we are the "property" of our Maker and that we can acquire originally unowned things by mixing our labor with them.

6.5 General Remarks on the Rights of Parents, Property-holders, and Children

A) The ownership of persons

To summarize our discussion of Locke: Creation imparts to a thing its nature and being, and therefore, its purpose as well. Because we human beings are not creators in that sense, we must

⁴² Locke allows that a lawful conqueror may treat captives as slaves, but this is only the continuation of the state of war. Thus, the captive is not morally bound by the condition of slavery. If any agreement between the conqueror and the captive is made, the state of war ceases, and so must the state of slavery, "since no man can, by agreement, pass over to another that which he hath not in himself, a power over his own life" (2T: II.24).

respect the purposes of the true Creator with respect to all of creation. The purpose of property in external things is to permit rational beings to benefit from the use of the lower orders of creation while respecting the moral equality of one another. Children cannot possibly be the property of their parents, because, being endowed with the same natures as their parents, it is evident that children and parents are moral equals and that the Creator did not intend the good of one to be subordinate to the good of the other. Ultimately, then, Locke's explanation as to why parents do not own their children is not so different than the one I attributed to Nozick. Simply put, human beings may not *use* one another as mere means. True, Locke embeds this in a larger theological picture, but otherwise the basic moral outlook is much the same.

However, in at least one important way, Locke's view is more complex than Nozick's. For Nozick, I am my own master in the same way that I am master over my possessions. I own myself just as I own my shoes. Therefore, just as I can transfer to you my ownership rights over my shoes, I can transfer to you my ownership rights over myself as well (1974: 331). But since Locke distinguishes between the kind of property that I can hold in "inferior nature" and the kind of "property" that I hold in myself, talk of "self-ownership" is misleading. The distinction between these two kinds of mastery, or dominion, is nicely drawn by Kant, who holds a view quite similar to Locke's:

An external object which in terms of its substance belongs to someone is his *property* (*dominium*), in which the owner (*dominus*) can, accordingly, dispose of as he pleases (*ius disponendi de re sua*). But from this it follows that an object of this sort can be only a corporeal thing (to which one has no obligation). So someone can be his own master (*sui iuris*) but cannot be the owner of himself (*sui dominus*) (cannot dispose of himself as he pleases) – still less can he dispose of others as he pleases – since he is accountable to the humanity in his own person (MM: 6:270).

This explanation, common to Locke and Kant, as to why children cannot belong to their parents as their property is much more satisfying than the one more recently proposed by the left-

wing libertarian Hillel Steiner. Steiner seems to face a problem similar to Locke's. Since Steiner thinks we own ourselves (in Nozick's sense), he also thinks that we own the fruits of our labor if we own all of the factors of production. Unlike Locke, however, he does not think that we can appropriate something originally unowned simply by mixing our labor with it, as that (in his view) would not leave others with as much and as good as they had before. Since it looks as if parents own all of the "factors of production" that go into making a child, Steiner worries that this means that parents own their children. And this threatens to undermine his initial premise that we own ourselves.

Fortunately, Steiner discovers that parents do not own all of the factors involved in reproduction. "Suppose ... I steal a drawing you've made of Boadicea revolting against the Romans and, before returning it, I replicate it with my photocopier. Would we say that the fact that photo-copier, copy-paper and labour used are all mine gives me an unencumbered title to that photocopy? ... I think the answer must be 'no'" (1993: 247). We do not have full ownership over the copy unless we also own the original. Now living organisms are also the product of a process of replication. Therefore, parents only own their children if they already own the DNA from which their children's DNA is replicated. Where did they get that DNA? From their parents of course. And where did they get it? From their parents, and so on and so on. If we go back far enough, then we eventually find that this genetic material came from creatures that were not persons at all. Not being persons, they could not own anything. Therefore, our genetic material is replicated from something that originally had no owner—it was a natural resource. But since merely copying something does not make one its owner, we cannot claim full ownership over our own genetic material. Therefore, we do not own all the factors of production that went into making our children. It follows, then, that until children are their own masters, the

whole community has some claim to them. Hence, the community is not prohibited from placing limitations on the ways that parents dispose of their children.

In a sense, Steiner defends a view not altogether different than the one Nozick imputes to Locke. True, Steiner does not claim that parents do not really *make* their children, but he does argue that there is something about *the way that children are made* that prevents parents from owning them. I doubt that Steiner has had many converts to his view, but it is instructive to see some of the reasons why this kind of argument is bound to fail. First, the argument does not tell us that the community must place limitations on the ways that parents can manage their children—only that it is permissible to do so. But intuitively, we have an obligation to protect children, not just a liberty to do so. Another implausible implication of Steiner's view appears to be that, until relatively recent discoveries in evolutionary and molecular biology, we could not have known that parents did not own their children. It also has the unsettling science-fiction consequence that if brilliant genetic engineers or computer programmers one day managed to create intelligent life without copying existing genetic material, then they *would* own that being. But surely, when we watch science fiction films, we intuitively feel that the ownership of intelligent androids is a form of unjust slavery. Closer to present-day reality, Steiner's view implies that people have no greater moral right to destroy their own frozen embryos—*or even gametes*—than they do to destroy their ten-year-old child.⁴³ Few bioethicists would be willing to bite that bullet.

It is also doubtful whether Steiner's argument even works. The reason I do not own a photocopy of the sketch you have drawn is because we think that property in ideas and artwork

⁴³ My hunch is that people *should* own their genetic material, but only until that material gives rise to a being with moral status.

extends to the type, not just the token. It would not be worth much for the music composer to have property in his personal score, but not over copies of it. (As composers before copyright laws unfortunately discovered.) But it is not at all evident that, when something is copied *from nature*, the copy does not belong to the person who made the copy. Would Steiner say that Monet did not originally own his paintings of water lilies, since he did not own the pond in which they floated? Or that Ansel Adams did not own his photographs of the Rocky Mountains because he failed to secure ownership over the originals first? Finally, why couldn't a similar argument be used to explain why we do not even own our own bodies, given that their substance comes from originally unowned natural resources? If I eat a fish out of the sea, which surely no one owned, have I forfeited some of my self-ownership rights, insofar as that unowned thing has been incorporated into my body? If I have not, then why can't genetic material become a part *of me* just as other kinds of matter can?

B) Equality and potentiality

What significance does Locke's view have for a philosopher today who does not want to take on board Locke's theological or metaphysical premises? If we jettison the theological conception of creation, first of all, then the whole idea that a creator has absolute authority over the thing he creates loses most of its rationale. Of course, by the same stroke we undermine the very philosophical basis for human equality, and even for morality itself, on Locke's view (cf. Waldron 2000: chs. 3-4, 8). But presumably there are other ways of thinking about the metaphysics of morals and the basis of human equality. If not, then all of secular moral and political philosophy rests on a mistake.

It is worth noting, however, that even if there are alternative ways of grounding human equality, Locke's theory has an easier time accounting for the basic moral equality of infants and

young children with adults than do contemporary philosophers who assume a naturalistic worldview. To illustrate, consider the case of Rawls. Like Locke, Rawls thinks that human beings are morally equal in virtue of their common capacities to act rationally and reasonably, which is to say their capacities to pursue their own good and to act in accordance with moral principle. But “capacity” is ambiguous between the actual possession of some “faculty” and the *potential* for developing that faculty. Rawls wants to say that either sense of rational capacity is sufficient for establishing our fundamental moral equality:

A being that has this capacity, whether or not it is developed, is to receive the full protection of the principles of justice. Since infants and children are thought to have basic rights (normally exercised on their behalf by parents and guardians), this interpretation of the requisite conditions seems necessary to match our considered judgments. Moreover, regarding the potentiality as sufficient accords with the hypothetical nature of the original position, and with the idea that as far as possible the choice of principles should not be influenced by arbitrary contingencies. Therefore it is reasonable to say that those who could take part in the initial agreement, were it not for fortuitous circumstances, are assured equal justice (TJ: 509/445-446).

Locke, of course, would agree with Rawls’s conclusion: children have the same basic moral status as their parents because they too are born with a rational nature. But Locke has a good story to tell about why the potential for rationality is sufficient to ground that basic moral equality: that children are born capable of becoming rational reveals that it is *God’s intention and will* that this development should actually take place. Obviously, Rawls will want to tell a different story, but does he have one?

That treating the child’s potential for rationality as sufficient for moral equality better conforms to our considered judgments seems a weak argument. If we had an argument that independently established the conclusion that conformed to our considered judgments, then that conformity would lend further credence to that argument. But conformity to the opinions we

already happen to hold isn't enough to explain the moral significance of the disjunctive property *rational-or-potentially-rational*. To see this, take the racist who finds that the property of having white skin pretty well conforms to his considered judgment about who has moral worth. Even he will feel pressure on reflection to explain *why* this property is morally significant—e.g., that white people are more intelligent, more civilized, more sensitive, etc. (cf. Williams: 1976).

What does Rawls mean when he says that regarding potentiality as sufficient for equality accords with the idea that as far as possible the principles of justice should not be influenced by “arbitrary contingencies” or “fortuitous circumstances”? He might mean this. Rational beings are moral equals and the point in time at which they develop these rational capacities is morally arbitrary. Therefore, the child's future interests should be given the same protection as the current interests of adults. Otherwise we would be privileging those born sooner over those born later. This is akin to Rawls's argument concerning justice to future generations. And, indeed, it is a good argument for showing that children who will actually develop rational capacities have the same moral status as those with already-developed capacities. But a child may not develop these capacities. He might not be allowed to live that long, or he may be sufficiently injured that he cannot develop these capacities. Nothing that Rawls says explains why children have equal moral status when their very opportunity for developing their rational capacities is put into question.

One conclusion that you might draw from this is that our current attitude toward the moral status of infants and young children is really just the vestige of the older theological picture, the foundations for which are cut away by a fully secular outlook. A few philosophers have been willing to accept this. Notably, Fichte, though denying that children were the property of their parents, argued that children had no enforceable rights against their parents. (The state, however,

might still choose to prohibit infanticide for public policy reasons.)⁴⁴ More recently, Jan Narveson has defended a similar view, except that he goes further in allowing that children *are* the property of their parents (1988: 272). And, of course, there is the well-known difficulty for liberals in explaining the moral distinction between abortion and infanticide (Tooley 1972). I do not want to even try to tackle this problem here. Hopefully, a secular account can be constructed to explain the moral status of children in an intuitively satisfactory way. Perhaps the mistake lies in seeking to ground moral status in our capacity for rationality in the first place (cf. Nussbaum 2006). After all, that also raises problems with respect to adults with severe cognitive disabilities. My modest aim here is to show how Locke's understanding of creation connects to his understanding of the moral significance of the potential for rationality.

C) Persons and property as organizing ideas

If we do subscribe to a thesis of basic human equality, then we can avail ourselves of a view about the relationship between persons and property not unlike Locke's. And if we also accept the equal moral status of adults and children, then a Lockean account can help clarify what is at stake in denying that children are the property of their parents. Let me explain.

The idea that children might be owned by their parents has a curious place in the philosophical literature. Most philosophers are quick to concur with the commonsense view that parental rights are not a species of property right.⁴⁵ But, even though many philosophers express

⁴⁴ Fichte, *Foundations of Natural Right*, "Outline of Family Right," §§48-53.

⁴⁵ Amy Gutmann opens one paper with this sentence: "If children are not the property of their parents, why—and to what extent—should parents have power over them?" (1980: 338).

concern that proprietarian conceptions of parenthood continue to haunt our thinking,⁴⁶ few are very explicit as to what it would mean if children *could* be owned. Usually the suggestion seems to be that, if children were a form of property, then there could be no limits on parental authority. But property rights often have limitations placed on them too, so the existence of limitations cannot settle the question. Edgar Page presses this point effectively:

Can we be ... confident that presently acknowledged parental rights are not property rights? ... Such rights still give parents a fundamental control over their children. It is not *absolute* control, but the so-called absolute control traditionally associated with property rights was never quite absolute.... For example, cruelty to animals is forbidden, even if the animals are one's own property, and a prohibition on killing them would be possible without it affecting their status as property. There are restrictions on uses of land, bans on exporting or destroying works of art, and limits on the number of people who may live in a house of a given size, and so on. So even though parents may not now use, sell or dispose of their children as they wish, and therefore have less than absolute control over them, that alone will not show parental rights are not property rights. The rights they have give them considerable control and arguably as much as owners have over some other forms of property (Page 1984: 192-193).

Part of the difficulty cropping up here is that our concept of property is no longer as determinate as it once was, so it is hard to decide which forms of control constitute ownership. Wesley Hohfeld (1919) argued that modern legal interests—like trusts, options, escrows, futures, and corporate interests—could not be adequately described with a term so blunt as “rights” to property. Instead, he showed how such interests could be analytically decomposed into more basic legal relations, like claims, duties, privileges, powers, liabilities, and immunities. Soon jurists began to look at property, not as a single right, but as a whole bundle of legal incidents, which could be taken apart and put back together in any number of ways. In the most influential such analysis, A.M. Honoré (1961) decomposed the traditional concept of liberal ownership into

⁴⁶ “[M]any of the convictions to which people find themselves drawn in thinking about the authority of parents over children reflect the archaic idea that the child is the chattel of the parent” (Arneson and Shapiro 1996: 366).

eleven separable legal incidents: (1) the right to exclude others, (2) the liberty to use, (3) the right to manage (e.g., grant access or use to others), (4) the right to the income of the thing, (5) the right to any capital generated, (6) immunity from undue expropriation, (7) liability to expropriation to cover debts, (8) rights of transmission (e.g., sale, gift, rent, etc.), (9) absence of term (i.e., title does not lapse as in a lease), (10) prohibitions against use harmful to others, (11) the owner is the ultimate residuary of terminated lesser interests (e.g., when a lease terminates, the rights enjoyed by the lessee revert to the owner). Whether the details of Honoré's analysis are satisfactory is not our concern here. The point is that any such analysis problematizes the notion that there is a definite essence of property rights or that any one incident implies the other. While these are the "standard incidents" of ownership, Honoré emphasizes that none of them are individually necessary for someone to be designated as the owner of a particular thing. Thus, someone may "own" a house, and yet because it is on the historic register, lack the right make an addition to it. Or again, someone may acquire the rights to profit from the exploitation of certain natural resources (like oil fields), but risk being expropriated by the government, if the "owner" delays in bringing the resources to market. Given this "reductionist" view of property, perhaps there is no reason not to think of parental rights as a highly regulated form of property ownership. After all, a few of the incidents of property seem to apply to parental rights as well. On this view, parents would exercise property rights over their children, except as constrained by the rights or interests of their children.⁴⁷

But if we did think of parental rights as a circumscribed form of ownership, then we would be letting our technical sophistication obscure the basic *organizing ideas* of property and

⁴⁷ This is roughly Steiner's (1993) view, although given his choice-conception of rights, he does not think that children have rights, but only interests.

persons, which philosophers like Locke bring to our attention.⁴⁸ These organizing ideas do not, by themselves, establish all of the detailed moral rules concerning particular kinds of property or particular stations persons may occupy, but they do provide us with a rough, easy-to-understand template of the kind of behavior that is appropriate with respect to each category of entity. It is only in virtue of these basic organizing ideas that ordinary people can navigate the world without constant consultation of lawyers or moral philosophers. Further, these organizing ideas are not merely heuristics, like the rule that poisonous snakes usually have triangular heads. These organizing ideas do their work by tapping into the basic moral relationship between persons and property. That is, once again, that the *purpose* of property is to permit rational beings to use external things while respecting one another as moral equals. And for this reason, it is a sort of moral category error to treat persons—including children—as property. I do not say it is a conceptual error. There is no logical contradiction in the notion of human slavery.⁴⁹ I am only saying that the proper understanding of the moral basis of property morally excludes persons from the category of things that can be owned.

D) How parental rights are like property rights

There is one important way in which parental rights *are* rather like property rights, which was probably best appreciated by Kant. Traditional jurisprudence had distinguished between rights *in rem* and rights *in personam*. But these terms were ambiguous. Blackstone, for example, tells us that *jura personarum* are “those which concern and are annexed to the persons of men” while *jura rerum* are “such as a man may acquire over external objects, or things

⁴⁸ I am indebted here to Jeremy Waldron’s discussion of the basic organizing idea of private property (1988: 42-43). Waldron’s focus is not so much on the relations between persons and property, but on the basic distinction between mine and thine.

⁴⁹ See the discussion of self-ownership in Cohen (1995): esp. ch. 9.

unconnected with his person.” And Blackstone proceeds to structure the first two parts of his *Commentaries* accordingly. The first part concerns such subjects as the rights of subjects, the rights of King and Parliament, the rights of husbands and wives, the rights of parents, and the rights of masters over servants. The second part addresses property rights.

But more often rights *in rem* are understood to be rights that hold against the world generally, while rights *in personam* are rights that hold exclusively against particular individuals.⁵⁰ (Henceforth, I will always speak of rights *in rem* and *in personam* in this second sense.) Most rights over things, especially property rights, are rights against the world. If I have a right to this book, then no one may take it from me. And indeed, many rights “over” other persons, like rights conferred by contracts and torts, are held only against particular individuals. My right that you perform your end of our bargain confers a duty on you, but no duty on a third party to enable you to follow through on that obligation. Quinsby’s right that Perkins compensate him for a car accident in which Perkins was at fault does not impose a duty on Roxy, a bystander. However, some rights over persons *do* seem to be held against the world. One example is my right to personal security, which is a right I hold over my own person, but which is held against the world. Another example is a parent’s right to protect her child against the interference of others.

Kant organized his *Doctrine of Right* so as to sort out this confusion. Everyone has an innate right to be his own master (at least, upon reaching the age of reason), and from this follows not only rights to liberty, but also rights to personal security. This innate right is a right *in rem*, but not a right over anything external to myself. As we have seen, some philosophers do assimilate my authority over my own person to self-ownership. But we have also had occasion to observe

⁵⁰ Cf. John Austin, *Lectures on Jurisprudence*, Lectures XIV-XV.

that, because Kant holds that each person is accountable to the humanity in his own person, he denies that being one's own master (*sui iuris*) is the same as owning oneself (*sui dominus*).

All other private rights (as distinct from the rights of the political community as a whole and its officers and representatives) are rights over something external, of which there are three categories, according to Kant:

1. **Rights to things** (*Sachenrecht*) or *ius reale*
2. **Rights against a person** (*personliches Recht*) or *ius personale*
3. **Rights to a person akin to rights to a thing** (*dinglich-persönliches Recht*) or *ius realiter personale*

The first two are just the traditional categories of property rights and contract rights. Kant's innovation is the third category—the rights to a person akin to rights to thing, or as I shall call them, “rights *in rem* over (other) persons.” In this category, Kant places the traditional status-based rights of married persons, of parents, and of masters over their servants. The rights of spouses, parents, and masters, on Kant's view, both resemble and differ from property rights.

Rights *in rem* over persons resemble property rights in that they are rights over something external, which are held against the world. The aspect of this that Kant most often emphasizes is the fact that if a spouse, or child, or servant runs away, then the right-holder is justified in demanding that others bring that person back under his control. But this is only an example; in various legal codes there may be other rights *rem* over persons as well. For instance, Blackstone describes common-law actions by which a husband can collect damages from another man if the latter committed adultery with his wife; by which a father may collect damages from someone who has married his child as a minor and without his consent; and by which a master may collect damages from someone who has injured his servant or hired him away before the termination of

his contract (CLE: III.viii). In this way, the rights conferred by the law of status are analogous to property rights over things. If someone takes something that belongs to me, then I can demand it be returned. And if something of mine is used without my permission or damaged, then I may be able to collect damages.

One possibility, then, is to regard human beings as “things” that can be owned, at least for some legal purposes. This seems to have been the bent of Roman law. But, like Locke, Kant wants to distinguish sharply between the categories of persons and property. For Kant, we are accountable to persons, while we can dispose of property more or less as we please.⁵¹ This leads to at least two fundamental differences between rights *in rem* over persons and property rights. The first difference is that, unlike typical property rights, these status rights are not alienable at will. You cannot sell or give away your spouse, child, or servant. Nor can you abandon your spouse or child; even a servant cannot simply be discarded like a thing, but rather must be given notice before dismissal. The second difference is that, while all of these relationships involve some kind of “use” of the other person—and in that sense resemble property rights—the permissible “uses” are highly circumscribed, so as to be consistent with the person’s status as an end. Thus, we can only use another’s sexual attributes for our pleasure, if we have at the same time given the use of ourselves to the other. While parents may *manage* their children—and thus, amongst other things, grant to other adults access to their children (like teachers or doctors)—this must be directed to the child’s education and development. And while masters may employ the services of their servants, they may not “use them up,” as if they were mere things.

⁵¹ Cf. Hegel: “What is immediately different from the free spirit is, for the latter and in itself, the external in general – a *thing*, something unfree, impersonal, and without rights” (PR: 42).

Ultimately, Kant's category of rights over persons akin to rights to things never really caught on in jurisprudence. Part of the reason for this may be the general decline of importance of domestic status relationships and the ascendancy of contract. As Sir Henry Maine famously observed, the modern world has witnessed "the gradual dissolution of family dependency and the growth of individual obligation in its place. The individual is steadily substituted for the Family, as the unit of which civil laws take account." In this regard, modernity has been characterized by "a movement from *Status to Contract*" (1864: 163, 165). The status of servant, for instance, has been entirely assimilated to a contractual relationship, and therefore, typically confers only rights *in personam*, not rights *in rem*. An employee may be sued for breach of contract, but typically you cannot sue the party that hired him away, as if he had stolen something from you. The marriage relationship, it is true, has not *completely* lost its character as a relation of status, but it as well has moved significantly in the direction of a contractual relationship. Most rights now associated with marriage are rights that spouses hold against one another (e.g., in case of divorce), not against third parties. One reflection of this is that many people today find very offensive the notion that a husband might sue another man for damages incurred from the latter's adulterous affair with the former's wife—as if a husband literally owned the wife and her sexuality.⁵² But in spite of the advances of the contract paradigm, the parent-child relationship continues to be one which is conceived of as a form of status. Parents, as we have seen, continue to hold rights, not only against their children, but against third parties. And *in that sense*—as

⁵² In what now appears a somewhat amusing passage that highlights the property-like character of marriage, Blackstone records that "the husband is also entitled to recover damages in an action on the case against such as persuade and entice the wife to live separate from him without a sufficient cause. The old law was so strict in this point, that if one's wife missed her way upon the road, it was not lawful for another man to take her into his house, unless she was benighted and in danger of being lost or drowned; but a stranger might carry her behind him on horseback to market to a justice of the peace for a warrant against her husband, or to the spiritual court to sue for a divorce" (CLE III.viii).

rights *in rem* over something external—parental rights do resemble property rights more than most other rights with which we are now familiar.

6.6 Conclusion

This chapter began with Grotius's claim that it is "by generation that parents acquire rights over their children" and the puzzle as to how the bare act of begetting can confer rights over one's issue. This claim, I said, is ambiguous between two meanings. It might mean that children are not free *because* they owe obedience to those who have begotten them. Or it might mean that, since children need caretakers, those who gave birth to them have a right to be those caretakers. Most philosophers have read Grotius as making the first claim: presumably on the view that parental rights are either akin to the rights of creators or producers. But neither of these views seems compatible with Grotius's more compelling idea that children are the moral equals of their parents and attain their liberty as a matter of course with maturity. This, however, is not obviously an objection to the second interpretation: that generation only grounds the assignment of parental rights to particular persons. As we shall see in Chapter 8, this is a position that Locke arguably holds. But before we explore Locke's position in greater depth, we turn in the next chapter to the voluntarist approach to parental authority.

CHAPTER 7: CONSENT AND CONTRACT

7.1 Introduction

In the previous chapter, we examined the idea, apparently held by Grotius, that the act of begetting a child is the source or basis of parental authority in the same sense that an agreement is the source or basis of a contractual right (6.1). We noted that this doctrine seems incongruous with the rest of Grotius's thought in two ways. First, the alleged basis of parental authority in generation seems oddly unrelated to Grotius's account of the content and duration of parental authority, which is for the most part based on the child's needs prior to attaining moral and economic independence. The second incongruity concerns the way that parental right contrasts with other forms of acquired rights relating to other persons and external things—e.g., property rights, rights of husbands over wives, rights of masters over servants and slaves. In all of these other cases, rights are acquired by means of the consent, or by some other voluntary act, of those whose liberty is directly prejudiced by the existence of the right. Even property rights, according to Grotius, originally came about by consent—not (in the first place) by first seizure or by mixing one's labor with a thing. Pufendorf, who followed Grotius in this respect, expresses this view quite well: "Upon supposition that all men had originally an equal power over things, we cannot apprehend how a bare corporeal act, such as seizure is, should be able to prejudice the right and power of others, unless their consent be added to confirm it" (LNN: II.iv.5). But it would seem that a similar objection could be leveled against the idea that "the bare *act of begetting*" could give parents authority over their children and against third parties who might

claim a like authority (Locke 2T: II.65.). Hobbes, too, found this notion utterly mysterious: “Those who have attempted in the past to assert the Dominion of a *father* over his *children* have only come up with the argument of *generation*, as if it were self-evident that what I have *generated* is mine” (DC: IX.1).

In the previous chapter, we considered the possibility that these incongruities might be dispelled if generation were likened to God’s creation or to the act of production in a Lockean theory of property acquisition. In this chapter, we look at the attempt to assimilate parental rights to the presumably less problematic voluntarist paradigm of contractual rights. This at least appears to have the advantage of treating children as persons rather than mere inanimate things. Moreover, it is of some philosophical interest because it represents an attempt to carry the historical “movement from *status to contract*” observed by Sir Henry Maine to its logical extremity. There are roughly two ways that philosophers have attempted this assimilation. The more brazen route, apparently defended by Hobbes, is to simply maintain that the source of parental authority comes from the child’s actual, albeit perhaps tacit, consent. The obvious objection to that argument is that children seem incapable of giving consent. The second route, then, one version of which can be attributed to Pufendorf, is to explain parental authority in terms of the child’s hypothetical or future consent.

7.2 Hobbes on Parental Authority

One way to respond to the apparent incongruities of Grotius’s account is to attempt to bring the account of parental right into conformity with other kinds of acquired right by basing it on voluntary consent. Hobbes, who maintained that “all obligation derives from contract,” pursued this strategy (DC: VIII.3). Paternal dominion, Hobbes explains, “is not so derived from

generation, as if therefore the parent had dominion over his child because he begat him; but from the child's consent" (Lev: XX.4). This argument, which is adumbrated in chapter XX of *Leviathan*, and given at greater length in chapter IX of *De Cive*, goes like this. In the state of nature, everyone has a right to use everything which in his judgment may be useful in preserving his life. Unlike most other natural law thinkers, Hobbes understands this natural right to extend "even to one another's body" (Lev: XIV.4). And because adults are roughly equal in their capacity to kill one another, everyone has cause to fear everyone else. Each person must therefore regard every other "whom he neither obeys nor commands" as an enemy (DC: I, IX.3; Lev: XIII). Moreover, such obedience must be absolute; for if the subject retains any right to resist the authority's command, then the two remain in a (perhaps latent) state of war, and thus, they remain enemies. The chief objection to this absolute power is that the subject cannot be obliged to do what would be destructive of his life, since that would defeat the purpose of escaping from the state of war in the first place. Hobbes believes it follows that whenever it happens that one person gets another in his power, we may presume that the stronger will compel the weaker, "as a man in health may one that is sick, or he that is of riper years a child," to pledge absolute obedience in exchange for life:

For since the right of protecting ourselves according to our own wills, proceeded from our danger, and our danger from our equality, it is more consonant to reason, and more certain for our conservation, using the present advantage to secure ourselves by taking caution, than when they shall be full grown and strong, and got out of our power, to endeavor to recover that power again by doubtful fight (DC: I.14).

The case of children, then, is the same as that of anyone else in another's power: "the dominion over the infant first belongs to him who first hath him in his power." Since, in the state of nature, the mother may either nourish and bring up her child or abandon him and "adventure him to fortune," Hobbes maintains that "it is manifest that he who is newly born is in

the *mother's* power before any others.” If she does in fact bring the child up, “she is supposed to bring him up on this condition; that being grown to full age he become not her enemy; which is, that he obey her.” It is because the child is first in the power of the woman who bore him that generation *seems* to be the basis of parental authority; in that sense, parental authority “follows the belly” (DC: IX.2-4).

By pledging to obey his mother, Hobbes thinks that the child must be understood to authorize her actions as his own and to give up all right to resist her will. For this reason, all of her actions must be presumed to be his as well, and since no one can injure (i.e., do an injustice to) himself, a child cannot be injured by his mother in the state of nature (DC: IX.7; Lev: XVIII).¹ In short, in the state of nature, Hobbes understands the child’s relationship to his mother to be precisely the same as that of the subject with respect to a sovereign power. Indeed, the child’s mother *is* his sovereign, for Hobbes holds that there is no difference, except for its size, between a family in the state of nature and a sovereign kingdom. “[I]n the state of nature, every woman that bears children, becomes both a *mother* and a *lord*” (DC: IX.3; cf. DC: VIII and Lev: XX).²

If the mother does *not* bring up the child, then the child has no obligations to his mother; if she abandons him before he is full grown, then any obligations he had to her are annulled. Instead, anyone who brings up the child comes to partake in the same dominion over the child, and on the same terms, as the mother initially had (DC: IX.4). Notably, Hobbes’s assimilation of parental authority in the state of nature to a kind of dominion is the basis for one of his

¹ Of course, even if the child had not submitted and so authorized his mother, she could not *injure* him in the state of nature, since all injustice is only “the not performance of covenant” (Lev: XV.2). The most important consequence of the child’s submission to his mother is that he loses his natural right to resist her will.

² Strictly speaking, once the child has submitted himself to his mother, they are no longer in the state of nature with respect to one another. After all, a family is but a small kingdom. But I shall follow Hobbes in speaking of this kind of relationship as still existing in the state of nature, since they do not live under the laws of a larger commonwealth.

arguments against basing that authority on generation:³ Sovereign dominion must be indivisible, because no one can serve two masters. But “two persons, male and female, must concur in the act of generation.” Therefore, generation cannot be the source of paternal dominion (Lev: XX.4; DC: VIII.1).⁴

The child’s obligation to obey his parent does not bind third parties in the state of nature. That is to say, in acquiring rights over her child, the mother does not thereby acquire rights *in rem*, rights against the interference of others, only a right *in personam* against her child. If someone judged that it would be beneficial to his prospects for survival to take possession of someone else’s offspring, he is entitled to do so by the right of nature. This point bears emphasis. Someone who assimilates parental authority to property rights, even partially, is largely interested in the rights *in rem* that parents hold against third parties.⁵ Hobbes is not just providing alternative theoretical foundations to the same rights. He is interested in explaining a different kind of right: the right of parents to demand obedience from their children.

Does Hobbes have any account of parental rights against third parties in the state of nature. In short, no, because there is no mine and thine in the state of nature. But this may deserve a qualification, although admittedly I do not find Hobbes making this qualification explicitly. The

³ The other argument being the one already mentioned: that it is not self-evident that “what is begotten by me is mine.”

⁴ Locke reversed this line of reasoning in an *ad hominem* argument against Filmer: Filmer holds that those who beget a child have absolute authority over that child. But mother and father beget a child together. Since absolute power cannot be divided between two persons, the authority that comes from generation cannot, therefore, be absolute (2T: II.53).

⁵ Recall the passage from Aquinas quoted in the previous chapter: “So long as man has not the use of reason, he differs not from an irrational animal; so that even as an ox or a horse belongs to someone who, according to the civil law, can use them when he likes, as his own instrument, so, according to the natural law, a son, before coming to the use of reason, is under his father's care. Hence it would be contrary to natural justice, if a child, before coming to the use of reason, were to be taken away from its parents' custody, or anything done to it against its parents' wish” (ST: II-II, Q. 10, a.12).

fundamental law of nature is “that peace is to be sought after, where it may be found; and where not, there to provide ourselves the helps of war” (DC: I.7-8; Lev: XIV.1). Now one way to keep the peace is to permit the first possessor of a thing to enjoy its use; this is the fourteenth law of nature (DC: III.18; Lev: XV.28). Because this is not the outcome of a covenant, respecting the right of first seizure is not strictly an obligation to another person in the state of nature; but it *is* a rule of right reason, binding in conscience, and perhaps a “moral duty” owed to God (DC: III.27-33; Lev: XV.36-41). Since mothers have first possession of their children, a third party in the state of nature may have good reasons to respect a parent’s possession of her offspring, so long as doing so does not endanger the life of that third party.

For Grotius, recall, parental authority loosened naturally as the child acquired reason and economic self-sufficiency—although we have seen that Grotius never tried to explain how this was connected to the origins of parental rights in generation. Hobbes, as you would expect, does offer a unified account, and it entails denying that parental authority ceases of itself. That is, because the child pledges complete submission to his mother (or foster parent), release from parental authority can only come from the parent’s voluntary manumission of the child (DC: IX.7), and this explains why grown children continue to owe their parents duties of honor, for a rational person would only emancipate her children on the understanding that she is to continue to be honored and aided by her adult children (DC: IX.8; cf. Lev: XXX.11).

To this bald statement, however, three provisos must be added. First, the child has no obligation to a parent who is unable or unwilling to preserve his life. It follows then that if the child falls into the hands of some other adult, then he must be understood to owe obedience to that person (cf. Lev: XXI. 21-22). Second, although Hobbes does not announce this expressly, it undoubtedly follows from the fact that masters can sell their servants, and sovereigns their titles,

that parents can sell (or give away) their children in the state of nature, in which case the child owes obedience to the buyer or recipient (cf. DC: VIII.6, 13). Third, because a person who submits himself to another also submits to this person all he has, it follows that a mother or foster parent who submits to the authority of another (like a husband), also transfers parental authority to this new master.

By the same token, when any person submits to the authority of a commonwealth, the dominion over her children is transferred to the new sovereign. Thus, in civil society, parental rights are conferred and determined by the sovereign's positive law. These rights are typically of a more limited nature than they were in the state of nature, for the state reserves to itself the power of life and death (Lev: XXX: 11). But because good laws follow the laws of nature, they will generally recognize the right of biological parents as the first possessors of their children, since not respecting this right will generally be productive of unnecessary strife.⁶ All the same, bad laws that depart from the particular guidance of the law of nature are no less valid and binding for that (Lev: XXX.20; DC: XIV.10). Thus, parents have no natural right to their children in opposition to a law that says otherwise. Hobbes adds that it is because commonwealths are typically the creations of men that ultimate parental power is usually placed in the hands of fathers, not mothers (DC: IX.5-6; Lev: XX.4).⁷

We have already observed that Grotius based a great deal of natural right on acts of will, and particularly on consent. From Hobbes's perspective, then, Grotius was on the right track in this respect, but failed to carry this principle to its logical conclusion when it came to parental right.

⁶ I have not seen this observation made by previous commentators on Hobbes.

⁷ Pateman (1988) appreciates this, from a feminist perspective, as a welcome bit of realism, in contrast to the Aristotelian tradition of explaining the authority of men over women in terms of some difference in rational capacity (ch. 3).

In remedying this, Hobbes would have understood himself to have accomplished several further objects. First, he explained why the patriarchal absolutists were correct to think that paternal power is originally the same as political power, but he was able to do this without relying on obscure brute facts about generation and without relying on a shaky interpretation of Biblical authority. In addition, he was able to explain why the patriarchalists were right in holding that both political power, and paternal power in the state of nature, were absolute, while at the same time anticipating and answering the objection that we almost never find parental authority treated as absolute in any existing society. Finally, if the interpretation offered here is correct, then the doctrine of first seizure could explain the respect in which parental rights against third parties resemble property rights as rights *in rem* over persons.

7.3 Hobbes on Parental Duties

Do parents have any *duties* regarding their children in the state of nature? (There is no question that there are usually parental duties in civil society; the existence of positive laws to that effect settles the question.) At first, it might seem as if there cannot be any parental duties, and that Hobbes treats children as if they were nothing but the servants or slaves of their parents. And this is partly true. First, Hobbes does think that, in the state of nature, the rights of parents and the rights of masters over servants are the very same and that these are absolute (Lev: XX.14; DC: VIII-IX). To this extent, Hobbes would have agreed with Filmer that “a son, a subject, and a servant or a slave, were one and the same thing at first” (Filmer 1949: 188). It follows, then, that children cannot accuse their parents of any injustice, and that parents cannot

be punished for anything they do to their children (Lev: XVIII: 4).⁸ Further, Hobbes sometimes describes a servant in the state of nature as a kind of property, for the master “may say of his servant no less than of another thing, whether animate or inanimate, *this is mine*” (DC: VIII.5; cf. Lev: XX13).

One might think that Hobbes would have to allow that parents can act unjustly toward their children, since they have entered into an agreement whereby they will preserve their children in return for obedience. If their children have rendered their side of the bargain, then the parents are surely obliged to keep faith with their word. But this is mistaken. Parents, after all, are sovereigns in the state of nature, and Hobbes is very clear that sovereigns cannot injure their subjects. This is because sovereigns do not make an agreement with their subjects at all. They only declare their intention not to destroy their subjects on the condition that they submit to the sovereign’s authority. Therefore, while subjects and children do have obligations, sovereigns and parents are free of them (cf. Lev: XX.12).

However, that parents in the state of nature lack obligations to their children does not imply that they have no purely *moral* duties toward them. After all, Hobbes holds that sovereign rulers do have moral duties with respect to their subjects by the law of nature. These duties are the precepts of right reason. They are rationally binding, bind in conscience, and are perhaps owed to God, but they are not owed to other men, unless they are the outcome of an enforceable covenant (Lev: XV.36, 41; DC: III.27-33). The moral duties of rulers, we are told, are “contained in this one sentence, *the safety of the people is the supreme law,*” by which is meant, Hobbes explains, not the bare preservation of the people, but all that makes life happy (DC: XIII.

⁸ Punishment being an evil inflicted by a superior authority (Lev: XXVII.1).

2-4; cf. Lev: XXX.1). So, if parents are sovereign lords to their children in the state of nature, then it would seem that they must have the same moral duty regarding their children: to secure their safety and flourishing.

There are a couple of difficulties with that interpretation. First, it not obvious that this could be a moral duty for *procreators* as such; it would only be a duty for those who take the trouble to preserve their child's life in the first place, which is the basis upon which the child is presumed to consent to parental authority, and the act by which parents become small-scale sovereigns. True, procreators might have a moral duty not to wantonly kill an infant, assuming this would in no way help preserve the parent's life; but it is hard to see why procreators in the state of nature have a moral duty to refrain from abandoning their offspring to certain death.⁹ And, indeed, Hobbes says that a mother "may rightly, at her own will, either breed [her child up] or adventure him to fortune" (DC: IX.2).

Second, we should ask *why* the safety of the people is the supreme duty of rulers, in order to see if the same rationale applies to parents. A law of nature, recall, is a "a precept, or general rule, found out by reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it may be best preserved" (Lev: XIV.3). So why does preserving the safety of the people tend to preserve the life of the sovereign? As I read him, Hobbes's answer is that there is an identity of interests between the people and the ruler. Rulers benefit from the safety and flourishing of their subjects because, in peace, they are a source of wealth and power, and because without peace,

⁹ It seems significant in this connection that Hobbes always describes the epitome of the law of nature in negative terms as, "Do not that to another, which thou wouldest not have done to thyself," (Lev: XV.35, DC: III.26), and not in the positive terms of the Gospel, "All things whatsoever ye would that men should do to you, do ye even so to them" (Matt. 7:12, KJV).

they are a threat to the ruler's personal security. That is, of course, a very optimistic view, but set aside that objection. The question we want to ask is whether a similar story could be told about the identity of interests of parents and children in the state of nature. If we cannot, then we lack an account as to why parents would have even moral duties in the state of nature to preserve the lives of their children. But children—at least young children—are neither sources of wealth nor immediate threats. So why should right reason direct parents to look to their safety? Perhaps it will be urged that we should look to the future benefits children provide parents, for when the children are older, they can work for, and later support their parents in old age. This, so the argument would go, is a benefit that exceeds the costs of preserving the life of the infant, and so right reason commends preserving the lives of infants in order to reap these future benefits. Perhaps this argument could even explain why right reason directs procreators to preserve their children. However, this argument could only justify preserving *all* of one's children, if (as seems unlikely) the future benefits accruing to the parent of each additional child never dropped below the costs of raising an additional child.¹⁰

Whether or not that is a convincing solution, it is worth observing that these interpretative difficulties are symptomatic of a deeper tension in Hobbes's account. For parental authority in the state of nature is assimilated both to the authority of masters over servants and to that of rulers over subjects. But these two forms of authority seem quite different in their natures.¹¹

¹⁰ Thus, I somewhat disagree with Blustein's interpretation, on which "parents in the natural state do have a duty to preserve their children, but it is a duty from which the right of self-preservation can exempt them" (1982: 107)—at least, I disagree if Blustein means to identify parents with procreators. First, as I've said, it is important to emphasize that this is only a precept of right reason, not an obligation to the child. Second, I would stress that procreators do not have a defeasible duty to raise their children unless this would compromise their ability to preserve their own lives; rather, they have, at most, a duty that is conditional on the probability that raising the child would positively benefit the parent. Blustein places the burden of proof on the wrong side.

¹¹ As Aristotle pointed out. See *Politics*, I.1.

Whereas the purpose of the servant is simply to serve the interests of the master, the purpose of rulers (as even Hobbes allows) is to serve the interests of his subjects. As Hobbes puts it in *De Cive*, “the city [including the sovereign] was not instituted for its own, but for the subjects’ sake” (DC: XIII.3). It would be absurd, though, to say that the household was instituted for the sake of the servants. As we shall see in the next chapter, Locke was quite alive to these differences and they play an important part in his account of parental authority.

7.4 Two Objections

It is probably an understatement to say that there are some serious objections to Hobbes’s account of parental authority. I will mention only two. The first is one that applies equally to his general political philosophy, which is that it relies on the dubious idea that contracts are binding no matter the circumstances in which they are made. Locke makes a plausible argument against the validity of extorted promises. If another had taken my horse from me by force, then I retain my right to the horse. The horse ought to be given back to me, and I retain the right of retaking the horse. But “by the same reason, he that *forced a promise* from me, ought presently to restore it, *i.e.* quit me of the obligation of it; or I may resume it myself, *i.e.* choose whether I will perform it” (2T: II.186). Since the child’s “promise” to obey is extorted under threat of death, it cannot be binding either.

Now Hobbes would agree with Locke that *under civil law* certain kinds of promises and agreements are considered invalid, but he would deny that this rule is already in effect in the state of nature *as he understands it* (which is to say, a state of war). In a Hobbesian state of nature the horse-thief has no duty to give Locke back his horse, and so likewise, the extortionist has no duty to “restore” Locke his promise or release him from it. This only underlines the fact

that the plausibility of Hobbes's account of parental rights depends in part on his conception of the state of nature as one where "there be no propriety, no dominion, no *mine* and *thine* distinct; but only that to be every man's, that he can get; and for so long, as he can keep it" (Lev: XIII.13).¹²

The second objection comes from none other than Hobbes himself. Given that Hobbes says that it is impossible "to make covenants with brute beasts," who lack the reason to understand an agreement (Lev: XIV.22), it is odd that Hobbes could be so untroubled by the idea that covenants could be made with children, since they too seem to lack reason. Hobbes even seems to admit all of this in one passage in *Leviathan*:

Over natural fools, children, or madmen there is no law, no more than over brute beasts; nor are they capable of the title just, or unjust; because they had never power to make any covenant, or to understand the consequences thereof; and consequently never took upon them to authorize the actions of any sovereign, as they must do that make themselves a commonwealth (Lev: XVI.12).

How can this admission fail to undermine his proffered justification of parental authority? Hobbes never squarely confronts this rather obvious objection.¹³ The problem is examined, however, by Pufendorf and his eighteenth-century commentator Jean Barbeyrac, so it is useful to turn to their discussions of the problem at this point.

¹² Locke might reply that, even granting that the state of nature is a state of war, he has a right to retake the horse that was stolen from him. So why shouldn't he also be able to "retake" a promise extorted from him by renegeing on it? Hobbes could respond as follows. First, we need to distinguish two ways that Locke might have had his horse taken from him: (A) The horse might have literally been taken from him, Locke having been overpowered or having remained wholly passive, or (B) Locke might have been extorted into giving the horse to the horse-thief. In case (A), Locke may justly retake the horse, but his having been overpowered or remained passive is very different than having undertaken the speech act of making a covenant, the very possibility of which presupposes that the actor can "bind" himself. In case (B), the two acts of extortion are on a par. Either Locke cannot retake his horse or renege on his promise, or he can only do so because he lacks assurance that the other party will fulfill his side of the bargain.

¹³ Perhaps Hobbes was not overly concerned about the details of his account of parental authority. After all, unlike most of his contemporaries, he did not think of his account of natural parental rights had much practical import, since in all civilized lands parental rights were wholly conventional and determined by positive law and custom.

7.5 Tacit and Presumed Consent

A) Pufendorf and Barbeyrac

Pufendorf, after reviewing the positions of Grotius and Hobbes on paternal power, argues that there are, in fact, two grounds of parental authority. One is the “Duty which Nature (in enjoining man to be a sociable creature) lays on [parents] to take care of their offspring” (LNN: VI.ii.4). This is essentially Locke’s view as well, and we will examine such arguments more carefully in the next chapter. Pufendorf’s second argument, which is our present concern, is that there is a kind of agreement between parents and children. Unlike Hobbes, however, Pufendorf understands this agreement to be mutual. The parent “by the very act of breeding up the infant, doth declare himself ready to fulfill the obligation of Nature, so far as in him lies, the well educating of his charge.” And “though on account of imperfect force of reason, [the child] cannot expressly promise those reciprocal duties, which answer to the parent’s obligation,” we may yet infer his “presumed consent,” “by virtue of this care, employed by the parents about him.” In this way, the child “contracts as firm an engagement toward [his parents], as if he gave his full and express consent,” and parents and children can be understood to be parties to a “tacit pact” (LNN: VI.ii.4).¹⁴ Hobbes might have had similar arguments in mind. In *De Cive*, he claims that, if the mother is going to raise her child, “she is *supposed* to bring him up on this condition; that being grown to full age he become not her enemy; which is, that he obey her” (DC: VIII.3, emphasis added). And in *Leviathan*, he says that paternal dominion is based on “the child’s consent, either express, *or by other sufficient arguments declared*” (Lev: XX.4, emphasis added). For Pufendorf, however, this tacit pact confers not only rights *in personam* against the

¹⁴ One may also compare Pufendorf, LNN: III.vi.3, 5, where the incapacity of infants to make contracts is discussed.

child, but rights *in rem* against third parties. This is because, unlike Hobbes, Pufendorf thinks that everyone has natural rights to his own person which are held against the world. (That is, for Pufendorf, rights are not bare liberties; they *protect* a sphere of liberty.) In making this tacit pact, children have entrusted the exercise and protection of these rights to their parents during the period of their minority.

Barbeyrac levels a couple of perceptive objections at Pufendorf on this point. First, Barbeyrac justifiably accuses Pufendorf of failing to distinguish between tacit and presumed consent. (Hobbes, I believe, is often guilty of the same confusion.) Properly understood, tacit consent differs from express consent only in that it is not declared by express signs like saying “I agree to that,” the shaking of hands, or the signing of a contract, but is instead inferred from certain actions or inactions, given the nature of the situation or business at hand. For example, at dinner a man says to his fellows, “Unless anyone objects, I think I’ll take the last roll.” Silence in this circumstance is a kind of tacit consent to his proposal. Tacit consent, therefore, is still a form of *actual consent*. Barbeyrac rightly points out that there is a second notion, more properly called “presumed” or “supposed consent,” (often called “hypothetical consent” now) which is easily confused with tacit consent. In cases of presumed consent, “though a person be absolutely ignorant of what passes, and consequently could neither indirectly nor directly agree to it, yet we suppose he acquiesces in it, because we believe, [i] That if he knew it, he would freely consent, or [ii] at least that he ought so to do by the maxims of Natural Equity” (LNN: III.vi.2 n.3).

We can sharpen Barbeyrac’s point if we more explicitly distinguish between the two kinds of “presumed consent” alluded to here (which I have marked as [i] and [ii]). Let “dispositional consent” refer to what an actual person would be disposed to consent to, given his actual

preferences and values, were he only situated to do so. Pufendorf gives a very good example of this kind of presumed consent, although he confusedly calls it a “tacit pact”:

A Man is abroad at a distance from his family and his concerns, in the meantime a neighbor without particular orders, transacts some business for him; here again we must suppose a *tacit* pact, by virtue of which the one having lent his free assistance, the other is bound to requite the pains, and to refund the charge. In as much as it may be fairly presumed, that had the absent party known how affairs stood, he would readily have consented to the whole management (LNN: III.vi.2).

Dispositional consent is not a form of actual consent. But when we are forced to make a decision regarding someone’s interests, and that person is either absent or unable to presently give consent (e.g., because they are unconscious, intoxicated, or temporarily insane), then thinking about what a person would be disposed to consent to often has to serve as a “second best.” When actual consent is impossible, relying on dispositional consent can be understood as imperfectly deferring to the same value of not acting contrary to the person’s will. Let “hypothetical rational consent,” on the other hand, refer to what an ideally rational or reasonable person would consent to in the circumstances.¹⁵ Barbeyrac hints at one version this idea, when he speaks of what a person “ought to [consent to] by the maxims of Natural Equity.” Different conceptions of hypothetical rational consent may vary in their particular idealization conditions. For instance, we might ask what a perfectly prudent agent would consent to, what a “reasonable” agent would consent to (i.e., someone “willing to meet others half-way”), or what the average “man on the street” would consent to. Plainly, this is not a form of actual consent either.

With these distinctions in hand, we can return to Barbeyrac’s objection. If children are unable to give express consent, then they are equally incapable of giving tacit consent. Indeed,

¹⁵ This distinction may be found in Feinberg (1986): ch. 22.

you might argue that the capacity to give tacit consent is *more demanding* than the capacity to give express consent, since tacit consent requires a deeper understanding of the situation and familiarity with subtle conventions. So Pufendorf has to be understood to mean that infants give presumed consent to the authority of their parents. And indeed Pufendorf explicitly compares the child's "supposed" consent to that of the man abroad who is supposed to consent to his neighbor looking after his business for him in his absence. Barbeyrac says that this argument is "ill grounded and superfluous," but if we distinguish between dispositional and hypothetical rational consent, then we can reconstruct Barbeyrac's objection as a dilemma on which Pufendorf's argument is *either* ill-grounded or superfluous. It is *ill-grounded* if the child's presumed consent is interpreted as dispositional consent, because unlike the man abroad who would be able to give or withhold consent regarding his business affairs were he only present, the infant entirely lacks the capacities to give or withhold consent. It is *superfluous* if the child's presumed consent is interpreted as hypothetical rational consent because, if we argue that a person would have consented to something were he only reasonable, then we might as well appeal directly to the reasonableness of our action. According to Barbeyrac, that children have "an absolute need to be helped and directed by others" makes parental authority reasonable by itself; appealing to that what the child would reasonably consent to adds nothing (LNN: III.vi.2 n.3; VI.ii.4 n.2).¹⁶

¹⁶ One may plainly see Pufendorf sliding alternately between tacit, dispositional, and hypothetical rational consent in the following passage: "It [is] fairly presumed, that had [the child], at his coming into the world, been furnished with the use of reason, and made capable of understanding that his life could not be preserved, without the kind provision of his parents, joined with their command over him, he would gladly have yielded obedience on so commodious terms. Which consent of his, being rationally supposed, hath the same validity as if it had been openly declared. In the same manner as a person, who hath had any business performed for him by another, in his absence and without his knowledge, is supposed by a kind of silent covenant to contract an obligation of refunding the charges" (LNN: VI.ii.4).

Do Barbeyrac's objections hit their mark? He is certainly correct in insisting that presumed consent cannot confer authorization in the same way as can express or tacit consent. He is also correct to point out that the presumed consent of an infant is not really comparable to the presumed consent of the man abroad, since in the case of the latter, but not the former, we can appeal to known preferences and settled dispositions. But hypothetical rational consent may not be superfluous if it is understood, not as an alternative to what is reasonable in itself, but as a way of identifying what actually is reasonable. Pufendorf held the common view that the most usual cause of wrong-doing is "when a man, without any reason, or, without sufficient reason, prefers himself to others," as if others were "unworthy of his consideration or regard" (LNN: III.ii.6). This failure to recognize the moral equality of others, and the equal importance of their claims, is what Pufendorf calls "pride."¹⁷ To overcome this bias for ourselves, reason tells us to put ourselves in the other's place and try to see things from his point of view: "*When a man doubts whether what he is going to do to another be agreeable to the Law of Nature, let him suppose himself in the other's room. For by this means, ... self-love and the other passions, which weighed down one scale, are taken thence and put into the contrary scale*" (LNN: II.iii.13).¹⁸ In our day, Rawls has made a similar point: "to respect another as a moral person is to try to understand his aims and interests from his standpoint" (TJ: 338/297).¹⁹ But we know that role-reversal arguments have to be handled with care. Should a judge release a guilty criminal, if that is what he would want were he in the criminal's place? Should we let an

¹⁷ Cf. Hobbes, Lev: XV.21; DC: III.13. This is essentially identical to what Kant would later call "self-conceit": thinking one's own claims are more worthy of respect than those of others (*Critique of Practical Reason* 5:73-75 and MM: 6:462).

¹⁸ Pufendorf is explicitly following Hobbes here. Cf. Lev: XV.35.; DC: III.13.27.

¹⁹ Other important representatives of this tradition in contemporary moral and political philosophy include Nagel (1991), Barry (1995), and Scanlon (1998).

intoxicated person embarrass himself, if we think we would act the same way were we just as intoxicated? The idealizations of hypothetical consent and hypothetical contract theories are elaborated in order to make clearer which perspectives ought to be given moral weight in different kinds of circumstances, if we are to treat others as moral equals. Thinking about what sort of parental control a child would consent to if he were reasonable is no different: the child's idealized perspective is the way we think about what treating the child as a moral equal actually consists in. So, if we understand the child's hypothetical consent as a way of identifying what is just, there is nothing objectionable about invoking it. All the same, Barbeyrac is correct to criticize Pufendorf's attempt to make the child's needs and the child's presumed consent two different arguments for parental authority. The child's hypothetical consent is simply our way of appropriately gauging the child's needs and interests by thinking about things from his (idealized) point of view.

What about interpreting *Hobbes* as invoking the child's hypothetical consent? This seems distinctly unpromising. Hobbes wants the child's consent to actually authorize his parent as sovereign, but hypothetical consent, as we have said, is not a form of actual consent at all.²⁰ The idealizations of hypothetical consent, on the other hand, can only be justified on moral grounds. But if we idealize the child's capacity to give consent, why shouldn't we also make further idealizations? In particular, it seems that we should idealize away the parent's power advantage over the child.²¹ But this would undermine Hobbes's whole argument, for it turns crucially on the parent's ability to threaten her child with death. Therefore, it seems that Hobbes cannot help himself to the child's hypothetical or presumed consent. On the other hand, I do think that the

²⁰ Cf. R. Dworkin (1977): 151.

²¹ As Rawls put it, "to each according to his threat advantage is not a theory of justice" (TJ: 134/116).

prospects of appealing to tacit consent are more promising for Hobbes than they are for Pufendorf. But before I explain why, let me briefly consider one further interpretation of consent that is sometimes invoked in this context.

B) Future consent

Some have suggested that parental authority might be justified by the child's *future consent* as an adult. Jeffrey Blustein, for example, says that we might make sense of Hobbes in this way: "Though children, as children, do not actually consent, eventually they will come to see that obedience was a small price to pay for protection and that in obeying they only did what they would have wanted to do if they were fully rational. This future-oriented consent obligates even very young children" (1982: 71).²² Similar ideas have occasionally been invoked in the contemporary philosophical literature on paternalism toward children. Gerald Dworkin once argued that "Parental paternalism may be thought of as a wager by the parent on the child's subsequent recognition of the wisdom of the restrictions." On this view, "there is an emphasis on what could be called future-oriented consent—on what the child will come to welcome, rather than on what he does welcome" (1972: 76-77). Similarly, Samantha Brennan and Robert Noggle have claimed that "Most of us would give a sort of 'retroactive consent' to having had various sorts of restrictions placed on us when we were children—even if we did not agree with them at the time" (1997: 4).²³

²² Blustein attributes this interpretation of Hobbes to Schochet (1975): 232, but I think Schochet's view is closer to the one that I offer at the end of this section.

²³ Other defenses of what is variously called "future-oriented," "subsequent," or "retroactive" consent can be found in Carter (1977) and Freeman (1997): 88. Carter's essay is the only sustained attempt to make sense of the notion with which I am familiar.

Future-oriented consent can be understood in two ways. On one interpretation, it is just a version of hypothetical consent. We imagine that, as adults, we travel back in time to our infancy. We then imagine ourselves being asked whether we consent to the authority that our parents intend to exercise over us as children. If we judge that it is reasonable for such time-travellers to give their consent, then parental authority is actually justified. On this interpretation, the fiction of future consent is just a heuristic—not wholly unlike Rawls’s original position—for helping us think about how to treat children like moral equals. On a second interpretation, however, future consent is understood to be a kind of actual consent, much like the more familiar prior consent (e.g., a living will), only instead of being prospective, it is retroactive. For example, one contemporary philosopher gives the following example of retroactive consent: “Bill interferes with Jim’s freedom of action by preventing him from committing suicide. Subsequently, Jim explicitly consents to the intervention by expressing his appreciation for Bill’s action. He thus, after the event, alienates his right to non-interference for that particular act” (Carter 1977: 135). This understanding of future consent has come in for a good deal of criticism. Some complain that it is “surpassingly mysterious” how subsequent consent could retroactively authorize a prior act without dubiously invoking “backward causation in time” (Van De Veer 1979: 638). Others object that it is unfair to make the moral status of parental control depend on some future event that they have no way of presently discerning (Feinberg 1986: 182). If “ought implies can”—so this argument goes—then the justification of an action cannot depend on some event that is impossible for the agent to know at the time of action. While these objections may not be absolutely watertight, they make daunting the prospect of defending future consent as a form of actual consent. However, as an interpretation of hypothetical consent, future-oriented consent seems reasonable enough.

C) *Hobbes and tacit consent*

Although Barbeyrac is correct in thinking that Pufendorf cannot appeal to the child's tacit consent to justify parental authority, that notion may nonetheless be serviceable for Hobbes. This is because there is an important difference between what Pufendorf and Hobbes are trying to justify. Pufendorf needs his argument for parental authority to justify the exercise of discipline—something which private individuals ordinarily lack the authority to inflict upon one another absent a special consensual relationship (like that between a husband and a wife or a master and a servant). Therefore, it is important for Pufendorf that parental authority can be justified from birth. But Hobbes does not need to justify the exercise of discipline; force is not prohibited in a Hobbesian state of nature. All that Hobbes needs is an argument for filial obligation—an argument, that is, to explain why the child has a categorical reason to obey his parents and why he acts unjustly otherwise. Strictly speaking, of course, parents cannot *punish* their children until the children are under a filial obligation, since Hobbes defines punishment as an evil inflicted by a superior authority (Lev: XXVII.1). But parents can “inflict evils” *as if* they were punishments until their children confer them with authority.

This suggests that Hobbes could tell the following story about the child's tacit consent. Infants are indeed like brute beasts in that they lack the rationality to engage obligations, but parents can nonetheless discipline them in the same way that they might discipline a dog. As with dogs, disciplining children will reliably condition sub-rational habits of obedience. Until children have attained some modicum of rationality, children will obey their parents without having any true obligation to obey. As children gradually develop the rational capacities

necessary for engaging obligations,²⁴ they typically continue to obey their parents out of ingrained habit. But in doing so, they give their tacit consent to the existing arrangement, and parental strength is thereby transformed into parental authority, which the children now have an obligation to obey. Moreover, it should come as no surprise if children could consent to parental authority before they can consent to political authority, since the first is so much more familiar to them and so much more easily understood. That is why this story does not conflict with Hobbes's claim that "over natural fools, children, or madmen there is no law." When children are born to a parent living in civil society, their authorization of their parent indirectly authorizes the state.

I believe this story pretty effectively disposes of the objection to Hobbes's account that children lack the rationality necessary to give consent. Unlike Pufendorf, Hobbes doesn't need the child to give his consent until the child is able to give it. If that is correct, then the most serious objection to Hobbes will appeal to the unfair conditions under which children are said to give their consent and the moral implausibility of the Hobbesian state of nature lying in the background.

7.6 Conclusion

The idea that the parent-child relation might be understood as a sort of contract has seemed absurd to many—a kind of bourgeois individualism run amok. But it is at least understandable as an attempt to explain how parental authority is compatible with the idea that we are born free

²⁴ Therefore, when Hobbes says that the mother is supposed to have raised her child on the condition that "being grown to full age he becomes not her enemy; which is, that he obey her," I interpret "full age" to mean, not adulthood, but the age where the child has the minimal understanding to make simple agreements and to respect his mother's authority (DC: IX.3).

and equal, without appealing to the idea that, somehow, what I have begotten is mine. Ultimately, Hobbes's view is not very attractive, but that is more due to its assumptions about the state of nature than due to any problem with his argument. Pufendorf's appeal to the child's presumed, or hypothetical, consent is more appealing, but we must keep in mind that hypothetical consent is not really a kind of consent, but only a way of bringing to our minds in a clear and vivid way the perspective or interests of others. Barbeyrac was correct to criticize Pufendorf for suggesting that the child's needs and the child's presumed consent were two different arguments. We must have a substantive account of the child's needs before we can know what it would be reasonable for the child to consent to in the first place. This is the subject-matter of the next chapter.

CHAPTER 8: LOCKE AND THE FIDUCIARY MODEL

8.1 Introduction

In the previous two chapters, we considered two approaches to the moral basis of parental rights: that they might be grounded in the parents' creation of the child, and that they might be grounded in the child's consent to the parent's authority. A third approach—the one favored by Locke and the subject of this chapter—is to start with the child's undeveloped capacities for reason and independence. Locke's rather elegant strategy is to argue that the child's *undeveloped potential for reason* is at once the basis of the child's moral equality with his parents and the basis for his temporary subjection to their authority. As Locke puts it, "we are born free, as we are born rational; not that we have actually the exercise of either: age, that brings one, brings with it the other too. And thus we see how *natural freedom and subjection to parents* may consist together, and are both founded on the same principle" (2T: II.61). By founding parental authority in consideration of the basic moral equality of children and parents, Locke's account has secured an enduring appeal, and many philosophers today see their own accounts of parental rights as essentially Lockean in spirit.¹ However, I believe that Locke's account of parental authority is much richer than most contemporary philosophers have realized. This is particularly so if we read Locke's account of parental authority in the light of his views about the nature of government, property, and education, and then draw out some of the implications that Locke himself neglected.

¹ See particularly, Blustein (1982); Arneson and Shapiro (1996); Brennan and Noggle (1997); Dwyer (1998); and Archard (2002).

I shall proceed in this chapter as follows. After presenting the basics of Locke's account in the next section (8.2), I use Locke's distinction between government and property (8.3) to refine a Lockean theory of parental authority (8.4), as well as abuse of that authority (8.5). I then consider two objections to a purely fiduciary model of parental rights, as well as replies to those objections which retain the child-centered focus of the fiduciary model (8.6).

8.2 Equality and the Subjection of Children

If we are "born free and equal," then the subjection of children to parental authority seems to call out for some explanation. Philosophers today typically ground human equality either in our basic rational and moral faculties, or in our qualitatively similar capacities for flourishing and suffering (cf. Williams 1976). As we observed in Chapter 6, Locke's own view is of the first sort, although it is ultimately rooted in his theology. Because reason teaches us that we are all the workmanship of an infinitely wise and powerful Creator, we know that we must seek our proper ends in God's intentions. If God has deigned to create something, then we must presume that it is not to be destroyed, except insofar as he would so intend, which is to say, insofar as it is put to some nobler purpose (2T: II.6). Since human beings need food, drink, and other things to subsist, we can infer that God must have intended human beings to use at least some parts of creation for their own benefit (I.86, II.25-26). And yet, there is "nothing more evident, than that creatures of the same species and rank promiscuously born to all the same advantages of Nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection" (II.4). Therefore, while human beings are authorized by God to use inferior, non-rational creation for their own pleasure, they are not so authorized to use one another. Rather, this natural equality obligates every person by the fundamental law of nature

“to preserve the rest of mankind” and forbids him to “take away, or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another” (II.7, 16).

Like other natural law thinkers, Locke distinguishes between perfect duties of justice and imperfect duties of humanity and charity.² Perfect duties are those which may be exacted by force (in the state of nature) or by legal proceeding (in civil society), and which, if not performed, do injury or damage to the party to whom the duty is owed. Imperfect duties, on the other hand, are those which promote the good of others, and which we ought to do out of love for our fellow creatures if at all convenient, but which it would be wrong to exact by force or law, and which if not performed, do no injury or damage to the would-be beneficiary.³ Since each person is charged with preserving himself through his own industry, Locke thinks that, in what we might call “ideal circumstances,” we can generally fulfill our perfect duties to others by respecting their liberty and independence, and by performing whatever special obligations we have assumed by agreement (II.34, I.42). But Locke allows that non-ideal circumstances may arise where a person lacks the means to preserve himself. In such cases, the duty to preserve mankind gives rise to a *perfect duty of charity*. As Locke puts it in the *First Treatise*, “Charity gives every man a title to so much out of another’s plenty, as will keep him from extreme want” (I.44).

² Cf. *Letter Concerning Toleration*: “We must not content ourselves with the narrow measures of bare justice: charity, bounty, and liberality must be added to it” (Locke 1823, VI: 17) *A Third Letter Concerning Toleration*: “that charity which our great Master so earnestly recommends and so strictly requires of all his disciples ... obliges all men to seek and promote the good of others, as well as their own ... by such means as their several places and relations enable them to use” (1823, VI: 149-150).

³ Locke would have been familiar with the extensive discussion of this distinction in Pufendorf, LNN: I.vii.11, III.i, III.iii.

Locke's precise language is significant here. He is not saying that it would merely be commendable (an imperfect duty) for those with plenty to give away some of their surplus to the needy. He says that those in extreme want *have title* – a natural right – to that surplus. It is worth noting that Locke is not innovating here; the “right of necessity” was a traditional natural law doctrine, which we already find in writers like Grotius and Pufendorf.⁴ The most familiar right of necessity is the right to kill, or cause the death of, another person in self-defense. But, in the present case, the right to necessity has other implications. Jean Barbeyrac, the influential editor of Grotius and Pufendorf, sums up the doctrine well: “In case of extreme necessity, the *imperfect right* that others have to ... duties of charity from us, becomes a *perfect right*; so that men may by force be obliged to the performance of these duties at such a time, though on all other occasions the performance of them must be left to every man's conscience and honor” (WDM: I.ii.14 n).⁵ Because extreme necessity confers a perfect right on the person in want to another's surplus, the person with plenty cannot exact concessions out of the person in want in exchange for what will preserve his life—for example, by forcing “him to become [a] vassal,” by threatening to withhold relief otherwise. According to Locke, that kind of coercive offer is no different than putting “a dagger at his throat” and offering him slavery or death.⁶ Ideally, the goal of charity is to enable the person in want to become independent again, thereby reestablishing what I've called ideal circumstances.

⁴ A doctrine, I might add, that deserves more attention by contemporary philosophers, who have tended to work with only the cruder distinction between doing harm and allowing harm. See, for example, the puzzles raised in Nozick (1969).

⁵ Cf. Pufendorf: “Those things which *Nature* enjoins one Man to pay another, without any antecedent *Pact*, as are the Offices of Charity and Humanity, we cannot challenge any otherwise, than by gentle and easy Methods; as by persuading, admonishing, desiring, or entreating. But we must not apply *Force* to the most obstinate refuser; unless in the Case of extreme Necessity” (LNN: III.vi.6). See also LNN I.vii.7, II.vi *passim* and Grotius, RWP: II.ii.6.

⁶ I borrow the term “coercive offers” from Feinberg (1986): ch. 24.

Now the child, too, can be understood as a person in non-ideal circumstances on account of his lack of independence.⁷ Since infants are born without the strength and reason to preserve their own lives, they come into the world in a similar state of extreme want, except that giving them the bare *means* of subsistence is not enough. If the lives of young children are to be preserved—which the fundamental law of nature demands—they must receive the active *care* of adults⁸ who will help them during the “weakness and imperfection of their nonage” until they “are able to shift and provide for themselves” (2T: II.66, 79). But even should the child grow into a self-sufficient adult, he could *still* not be entrusted with his liberty, unless he could (and were disposed to) govern himself by reason and thereby know and respect the rights of others (II.56, 6). So, the child must also be instructed in the law by which he is to govern himself (II.63). Until he reaches this age of discretion, his actions must be governed by those who do have an understanding of right and wrong (II.61). But when the child attains the age of discretion, he is (*pace* Hobbes) naturally free from the temporary rule of his parents: “The bonds of [their] subjection are like the swaddling clothes they are wrapt up in, and supported by, in the weakness of their infancy: age and reason, as they grow up, loosen them, till at length they drop quite off, and leave a man at his own free disposal. (II.55, cf. II.59, 65). Only those who are “by a natural defect” precluded from ever developing their powers of reason are subject to the perpetual government of their parents (II.60). In this respect—in holding that the duration of parental authority is connected to the child’s attainment of reason—Locke is essentially following Grotius (see 6.1).

⁷ Schapiro (1999) makes this claim about childhood in Kant’s moral philosophy. Her idea of ideal and non-ideal circumstances is due to Korsgaard (1996d), which is in turn indebted to Rawls (TJ: esp. §39).

⁸ Locke actually says “parents,” not “adults.” I address the special duties of parents over and above other adults below.

Someone of a perverse bent might ask whether a parent may entirely neglect his child's education, if he intends to always care for and govern the child just as if she were naturally disabled.⁹ After all, the parent would still be preserving the life of his child, and he would not be exercising control over anyone who is *actually* able to govern himself. Locke does not anticipate this question—but, happily, Barbeyrac does and the answer he gives would be available to Locke. Barbeyrac rejects the premise on which the question is founded, viz. that by neglecting the child's education we are not actually *doing harm*, but only withholding a benefit. Because the child is in a state of “absolute need to be helped and directed by others,” the right of necessity kicks in (LNN: VI.ii.4 n.2). Thus, our duty to help the child becomes a perfect duty, and “a damage or hurt may be done to the soul by neglecting to inform the mind, or regulate the passions of such as we are obliged to instruct or reform” (LNN: III.i.2 n. 2). Locke would almost certainly agree. But the questioner might press the issue as follows. Why think that the child *needs* to become a rational being? Why not think that the child just has two possible destinies: either to become a rational creature, or to remain in an animal state? Locke, I think, has an answer to that question. That a child has the potential to become a rational being reveals that it is God's will that these rational faculties actually be developed. Therefore, to intentionally hinder a child's development by neglecting the cultivation of her mind is a kind of waste and spoilage, which the natural law expressly forbids (II.6, 31). But, on this reconstruction, Locke's answer ultimately depends on his providential worldview. And that raises the question how *we* would

⁹ A similar problem is raised in Ackerman (1980): 144-145.

respond to this problem.¹⁰ Having flagged that difficult question, let us table it and continue with our exegesis of Locke.

Children, for Locke, while not born *in* a state of full equality, are born *to* it (II.55).¹¹ That is, while they are not presently in a position to enjoy their natural freedom from the subjection to the will or authority of any other person, it is their birthright as a human being to attain this state. Special authority over children, then, is conferred on certain adults so that they can fulfill their charge to “preserve, nourish, and educate” children who are in a state of extreme want (II.56). Pufendorf put the same point more concisely: “that this care [of children] may be rightly managed, it is requisite that [parents] have a power of ordering the actions of their children for their good” (WDM: II.iii).¹² Locke, then, is simply following Pufendorf when he says that “The *power... that parents have* over their children, arises from that duty which is incumbent on them, to take care of their offspring, during the imperfect state of childhood” (2T: II.67). Parental rights, in other words, are instruments for fulfilling our duties to children. For this reason, Locke describes parental authority as a kind of temporary, limited government: “*Parental power* is nothing but that, which parents have over their children, *to govern them* for the children’s good,

¹⁰ Ackerman’s own solution to this problem seems to me unsatisfying. Ackerman believes that all “power relations” between rational beings have to be justified to one another dialogically on terms that all parties can reasonably accept. (That is, his view is somewhat like that in Scanlon [1998] or Habermas [1990]). When Ackerman considers whether a parent might raise a child so that the child never develops the necessary rational capacities to engage in dialogue, he explains that this would be impermissible because “all power relations that *can* possibly be mediated through dialogue *are in fact* legitimated” in this way (1980: 145). But it is unclear why that follows from any of Ackerman’s initial premises. Unfortunately, I don’t know how to press this point, except through a science-fiction example. Suppose we were able to perform a surgical operation on parrots that made them to be capable of rationality and of engaging in justificatory dialogue with us. Would that make the omission of the operation impermissible? If we say ‘no,’ then that seems to be because we have some residual idea about the natural teleology of development, which differs from surgical *interventions*. But how can we explain the normative significance of that difference without a providential or teleological worldview?

¹¹ Similarly, Pufendorf writes that children “become persons like ourselves, and our equals, as to all those rights which naturally accrue to men” (LNN: VI.ii.4).

¹² Cf. also the longer parallel passage at Pufendorf, LNN: IV.ii.4.

till they come to the use of reason.”¹³ In similar terms, Pufendorf had described parenthood as the “most sacred kind of government” (LNN: IV.ii.1).

8.3. Government and Property

A) The nature of government

That parental authority is described as a form of *government* is important, since Locke draws a crucial distinction between the nature of government and of property-ownership in the *First Treatise*:

Property, whose original is from the right a man has to use any of the inferior creatures, for the subsistence and comfort of his life, is for the benefit and sole advantage of the proprietor, so that he may even destroy the thing, that he has property in by his use of it, where need requires: but government being for the preservation of every man’s right and property, by preserving him from the violence or injury of others, is for the good of the governed....not for the sole advantage of the governors (but only for theirs with the rest, as they make a part of that politic body) (2T: I.92, 93).

Locke is telling us here that, properly understood, property-ownership and government are diametrically opposed to one another in their natures. Property-ownership is a kind of private right which gives the proprietor the prerogative to exploit his possessions for his own benefit and for more-or-less whatever ends he prefers.¹⁴ Government, on the contrary, is not a private right, but a *fiduciary trust* (II.149, 156): It is a “right of office,” conferred on governors by the consent of the governed for certain limited ends.¹⁵ The chief end of *government* is to benefit the

¹³ 2T: II.270, emphasis added; cf. also II.55-58.

¹⁴ The main limitation is that one may not, of course, use one’s property in a way that violates the rights of others. Similarly, while the property-owner is entitled to use his property to whatever benefit he likes, he may not waste his possessions by letting them spoil or destroying them to no purpose (2T: II.6, 31).

¹⁵ Locke speaks of someone *having a right* when that person is entitled to something: either entitled *to do something*, usually without interference (like the right to exercise his liberty and dispose of his possessions [e.g., I.4-6]); *to exercise a legal or normative power* (like giving consent, making a contract, or law-making [e.g., II.14-15,

governed by preserving “every man’s right and property,” that is, to protect every person’s private rights (or *property in the wide sense*, which includes not only ownership of things, but also the rights to life and liberty) (II.64). The governor is to use his official powers to benefit himself only as one of the governed. To attempt to exercise such official powers “not for the good of those, who are under it, but of his own private separate advantage” is *tyranny*. Hence, the governor’s official powers are not a part of his property,¹⁶ and the people are not “to be looked on as an herd of inferior creatures, under the dominion of a master, who keeps them, and works them for his own pleasure or profit” (II.163). In contrast to the more ambiguous picture presented by Hobbes, then, Locke very sharply distinguishes the natures of public and private dominion (see 7.3).

B) Slaves and servants

Not only are public and private dominion distinguished, Locke denies that human beings may generally be held as property at all. Although this point was already discussed in Chapter 6, it nonetheless deserves emphasis. Hobbes had said that a lord “may say of his servant no less than of another thing, whether animate or inanimate, *this is mine*” (DC: VIII.5). And this view found support in Roman law, where a human being was either in his own power or jurisdiction (*sui juris*) or in the power or jurisdiction of another (*alieni juris*). Those who were *sui juris* were free men; everyone else was, legally, a slave—not a *person* with rights, but a *thing* belonging to

127]); or *to have some positive service rendered to him* (like the child’s right to be nourished and maintained by his parents [e.g., II.78]). Locke also speaks of both “rights of office,” which typically consist in the conferred authorization to act in some public capacity for the public good, and private or personal rights, like the rights to life, liberty, and estates, which pertain to the separate and distinct interest of the individual (cf. II.6, 31). On “rights of office,” see II.164. On what I am calling “private rights,” see II.123. Locke denies that princes have a legitimate “distinct and separate Interest from the good of the community” at II.163.

¹⁶ In either the wide sense of “life, liberty, and estates” or the narrow sense of estates alone.

another person, which could be used, sold, or destroyed at the owner's discretion (Cf. Gaius, *Institutes* I.ix). Now the importance of the Roman law can hardly be exaggerated for the natural law tradition. The most systematic exposition of Roman law, the *Institutes* of Gaius, provided the basic plan of organization for treatises on natural right by philosophers such as Grotius, Pufendorf, and Kant. It is partly for this reason that virtually all natural law theorists up through Kant devote sections to the three basic forms of domestic status: marriage, children, and servants.¹⁷

Locke follows Grotius and Pufendorf in rejecting the Roman concept of servitude. For these moderns, no human being was ever entirely without rights—except perhaps one guilty of a capital crime who had thereby renounced his fellowship with the rest of humanity (cf. 2T: II.11). And this meant that no one ever has the right to kill another human being, except in self-defense or as just punishment (RWP: II.v.28; LNN: VI.ii.6). According to Pufendorf, for example, “the Law of Humanity doth by no means allow us to extinguish all marks of primitive equality in a slave, who, whatever he may have formerly designed, is now in a condition of peace and kindness with us, so as to use him in the same manner as a beast or inanimate creatures, towards which we cannot stand under any engagement [i.e., hold duties toward]” (LNN: VI.iii.7). With respect to Hobbes's above remark, Pufendorf insists that to say “this is mine” of another human being means something entirely different than to say than “this is mine” of a thing:

For by the former expression I mean no more, than that I, and none else, have the right of governing such a person; yet so as to be myself under some kind of obligation to him, and not empowered to exercise that right upon him, in an unlimited absolute manner. But, on the other side, the property I claim over a thing, implies a right of using, spoiling, and

¹⁷ Hegel's *Philosophy of Right* is particularly modern in having separated his discussion of “abstract right” from that of the family and economic relationships. Furthermore, Hegel has no special discussion of servants at all: slavery is rejected as inconsistent with natural right, and everyone else is simply a participant in the exchange economy.

consuming it, to procure my advantage, or to satisfy my pleasure; so that, what way soever I dispose of it, to say it was my own, shall be a sufficient excuse (ibid).

Grotius and Pufendorf both allow that a person may consent to enter into servitude, either temporarily or permanently, in return for the necessities of life. But this does not confer on the master any right to abuse, much less kill, the servant or slave.¹⁸ Pufendorf further argues that masters may not sell or give away servants “as we do our ... goods and commodities,” for “men usually [have] peculiar reasons why they choose to submit to this person rather than any besides” (ibid. and WDM: II.iv.5). Locke’s view is largely the same. Being the property of God, we do not have the right to destroy ourselves, and so we cannot give anyone else a power we lack ourselves. We can sell ourselves as servants into “drudgery,” but not chattel slavery. Locke, however, goes somewhat further than Pufendorf in allowing only *temporary* contracts of service in exchange for wages (2T: II.24, 85). Locke does not explain *why* temporary servitude is permissible, but not permanent servitude. Perhaps he would agree with Kant’s explanation: that to alienate one’s liberty for life is to give the owner the right to “use up,” or consume, the servant, which is inconsistent with the servant’s humanity (MM: 6:283). In any case, at this point, one can see that the status of the servant is close to collapsing into that of the free man, and one suspects that Locke ought to have entirely gotten rid of it and replaced it with a contractual relationship between equals (as Hegel would later do); for as long as this form of authority is retained, it remains ambiguous between a form of government over persons (which is for the good of the governed) and a form of property (which is for the sole advantage of the owner).

¹⁸ There is but one word, *servus*, in Latin.

C) Lawful government

A corollary of the principle that government is instituted for the good governed is that “the ruling power ought to govern by *declared* and *received laws*, and not by extemporary dictates and undetermined resolutions” issued arbitrarily at the ruler’s pleasure. First, one of the reasons for establishing government in the first place is to establish an impartial umpire, who can settle disputes rationally and disinterestedly. For when people are judges in their own case, “passion and revenge are very apt to carry them too far, and with too much heat” for justice to be done (2T: II.125, cf. II.8). But it is hardly an improvement on the state of nature, if the governor himself is to rule by personal inclination and whim, rather than in accordance with impartial rules. No less important, it is only under settled, promulgated law may “the people ... know their duty, and be safe and secure within the limits of the law, and the rulers too kept within their due bounds, and not to be tempted, by the power they have in their hands” to use it for purposes other than those for which it was entrusted to them (II.137, cf. II.124). Because Locke distinguishes between lawful liberty and unlawful license—in contrast to Hobbes or Bentham, for example—Locke understands law, not as a constraint on true liberty, but as constitutive of it.¹⁹ Where there is no law, there can be no liberty. I am at liberty only when I may dispose freely of what is *my own*, but I own nothing without law which sets limits to the rightful action of others—including the action of the government (II.138). This does not mean that issuing laws is the only legitimate function of the government. The executive must have the freedom to act according to its own discretion within the law for the good of the people. And, in some cases, “where a strict and rigid observation of the laws may do harm,” the executive may even, at his

¹⁹ Cf. Hobbes, Lev: XX; Bentham, *Of Laws in General*, VI.3.

own prerogative, depart from the letter of the law where that is necessary to fulfill the government's fundamental purpose of promoting the public good (II.159 and ch. XIV *passim*).

Finally, a few comments are in order on the idea that government is for the good of the governed. First of all, Locke does not imply of course that the governor loses his own private rights upon taking office. As Locke puts it in the *Letter Concerning Toleration*, becoming a magistrate does not oblige a man to disavow his humanity (1823, VI: 11). For example, although a governor may not use official powers to enforce a particular religion, he may, in common with all private persons, make use of argument and persuasion in order to convert others to his own faith. And, since government is founded to protect property, it almost goes without saying that Locke never imagined that officials in government should be unable to hold and look after their own private property.

It is also important that we avoid interpreting the "good of the governed" too narrowly. First, Locke does not understand this in a welfarist or utilitarian sense; the "good of the governed" refers primarily to the preservation of the *rights* of the governed.²⁰ There can be no question, therefore, of sacrificing the rights of a few to make many others happy. Second, Locke does not believe that governors have either the duty or the right to sacrifice the rights of peoples in other nations for the benefit of his own people (cf. 2T: II, ch. xvi). It is best, then, to understand Locke as holding a version of what Joseph Raz has called the "service conception" of authority. This, according to Raz, is the idea that the role of authorities is to help the governed conform to the

²⁰ Cf. Kant: "The well-being of a state must not be understood as the *welfare* of its citizens and their *happiness*. . . . By the well-being of a state is understood, instead, that condition in which its constitution conforms most fully to principles of right" (MM: 6:318). Locke's view, however, is probably not quite so austere as Kant's. In the *Letter Concerning Toleration*, for example, Locke says that the power of civil government is to be directed to the "temporal goods and outward prosperity of the society" (1823, VI: 43).

reasons that already apply to them (1986: 55-56). On Locke's version of that idea, the people are bound by the law of nature to respect the rights of human beings, not only within the boundaries of their country, but in other countries as well; it is the role of governors to help the people conform to that law—with their consent, of course.²¹

8.4 Parental Government

A) The inviolability of the child

Because of his immediate polemical aims in undermining patriarchalism, Locke often stresses the differences between paternal and political power (II.1-3, 71, 86), but there is also much to learn from the similarities between these two forms of government. On Locke's view, parental rights are not a kind of proprietary right, acquired by generation, which parents can exercise for their own capricious ends, but are instead fiduciary rights, held in trust by parental "governors," which are to be exercised for serving the interests of children. In fact, Locke insists that, "to speak properly," the rights of parents over minor children are "rather the privilege of children, and the duty of parents, than any prerogative of paternal power" (II.67). Unlike things held as property, children have rights against their parents.²² Like anyone else, children hold

²¹ Locke would not agree that the government helps people, in principle, to conform to *all the reasons* that already apply to them. For that fails to distinguish between perfect and imperfect duties and fails to circumscribe the jurisdiction of government to civil interests.

²² Brennan and Noggle (1997) seem to misinterpret Locke on this point when they write: "While we share with Locke the belief that the basis of parental rights is the parents' responsibility for the welfare of children ..., we also believe that children's rights also impose limits on the rights of parents" (11). In the note accompanying this sentence, they explain that "While [Locke] is clearly an important early spokesperson for the view that parents do not have absolute authority over their children, it is also the case that the limits on parental power he proposes are not generated by a belief in children's rights" (24n.13). The passage I quote above (2T: I.89) shows that this supposition is false (cf. also II.84, 190). True, Locke claims that the ultimate ground of parental duties is respect for the workmanship of God (II.56; cf. I.52-53), but that is true of all moral duties for Locke (II.6). Perhaps Brennan and Noggle only mean that Locke sees no role for the state to intervene in the family to protect children's rights. It is true that Locke (like most writers until relatively recently) imagines little role for the state in regulating the

general rights to life, limbs, and property *against the world*—and that of course includes their parents (II.65). Therefore, parents may not kill or mutilate (e.g., castrate) their children, nor sell them as if they were mere things (I.56-57). But instead of a right to their present liberty, the weakness of children gives them, until they reach maturity, “a right to be nourished and maintained by their parents,” as well as a right to education for the cultivation of their capacities, so that they will be suited as adults for the lawful liberty befitting rational beings (I.89, II.56; cf. II.78).

In offering this basic picture of children as persons with rights, and not as the property of their parents, Locke is in general agreement with Grotius and Pufendorf. Again, the essential point of reference is Roman law, in which the child was in the power of, and thus the slave of, his father (unless the father were still under his own father’s power, in which case the child was legally in the power of his grandfather). Just as a man exercised the power of life and death over his slaves, and could sell them, so too could he sell his children and, in legal theory at least, kill them with impunity.²³ This was the infamous paternal power, the *patria potestas*, of Rome. It was relatively easy for natural law philosophers to dismiss any suggestion that this absolute paternal power was a part of the natural law. First, even the *Institutes* recognized that “there is scarcely any other nation where fathers are invested with such power over their children as at Rome.”²⁴ Second, most natural law thinkers rejected, as we have just seen, the idea that any

internal life of the family, but it is false to say that Locke recognizes no enforceable legal rights between family members. Locke expressly recognizes that families are subordinate to the civil authority, and that the authority of parents “reaches not their life or property” (II.65). But the rights to life and property are paradigmatic of legally enforceable rights.

²³ Gaius, *Institutes* I.iii, iv; *Digest of Justinian* I.v.

²⁴ Gaius, *Institutes* I.iv. This is expressly pointed out by Grotius, RWP: II.v.7 and in Barbeyrac’s accompanying note.

person could exercise absolute power over another. Third, they held that a person could only become a servant only by his own consent or crime, and neither could be imputed to children.

B) The inalienability of children

Obviously, then, parents can have no right to harm, much less to kill, their children. Nor can they be treated as possessions that may be given away or sold to another for any reason at all. According to Grotius, where positive law does not forbid it, natural right *does permit* a parent to “pawn his child, and sell him too,” but only “if there be a necessity for it, and no other way of maintaining him.” What he seems to have in mind is putting the child into servitude in exchange for his upkeep. Grotius reasons that the child cannot be wronged in this way, if this is the only means available to meet his basic right to live (RWP II.v.5). This, then, is just another application of the right of necessity, which can make actions permissible that are otherwise forbidden. However, even in this case, the parent does not entirely alienate his parental rights and duties, for, as Grotius goes on to tell us, “Nature does not permit this; all he can do is trust his son to another, who undertakes to maintain him, and whom he substitutes in his own stead for that purpose” (RWP: II.v.26). Pufendorf, on the other hand, does seem to permit children to be fully adopted by others while the original parents live, but only “when ‘tis likely to prove to the child’s advantage,” not at the mere convenience of the original parents. Otherwise, he agrees with Grotius that selling a child into servitude is better than allowing him to perish from hunger, and permissible in that case alone. But he suggests that it would be better if such transactions proceeded under the supervision of the magistrate, rather than carried out as purely private exchanges (LNN: VI.ii.9).

Although Grotius and Pufendorf clearly maintain that a child is not simply held as property, Locke’s position on transferring parental authority is still considerably stricter. Locke condemns

selling a child and exposing it in one breath, and he never makes the exception that parents might sell their children into servitude in order to preserve the child's life (2T: I.56). Locke's reasons for this position are not hard to understand. First, lacking any rights themselves over the child's liberty as an adult, the parents cannot transfer any such rights to another (II.189). Second, by the right of necessity, anyone in absolute need is entitled to the resources held by others necessary to preserve his life, and no one may use a person's extreme want to turn him into a vassal (I.42). Further, Locke seems to agree with Grotius in that parental rights and duties are not alienable at will. "The nourishment and education of their children, is a charge so incumbent on parents for their children's good," he explains, "that nothing can absolve them from taking care of it" (II.67). He is even more adamant about this in a passage from the *First Treatise*: "a father cannot alien the power he has over his child, [and though] he may perhaps to some degrees forfeit it, ... he cannot transfer it" (I.100).

What Locke *does* permit is for parents to temporarily delegate some of their power to others, particularly to schoolmasters, tutors, or masters of apprentices (II.69).²⁵ But, like subordinate ministers of a government, these people remain accountable to the parents (cf. II.152). Explaining the same idea, Blackstone says that such a person acts "*in loco parentis*, and has such a portion of the power of the parent committed to his charge ... as may be necessary to answer the purposes for which he is employed" (CLE: I.xvi.2). But in this, parents have not quitted their ultimate responsibility for the child's well-being. Thus, a parent who has negligently entrusted

²⁵ Cf. also this passage from Locke's *Third Letter Concerning Toleration*: "What is it that warrants and authorizes schoolmasters, tutors, and masters to use force upon their scholars or apprentices? I answer, a commission from the father or mother, or those who supply their places; for without that no indirect or at a distance usefulness, or supposed necessity, could authorize them" (1823, VI: 209).

his child to an unfit guardian is partly responsible, at least morally speaking, for any harm that comes to the child.

Although a parent cannot entirely alienate his parental authority at will, he can *forfeit* it if he fails in his duties to nourish and educate his child. (Similarly, for Locke, one cannot alienate one's right to life by contract, although one can forfeit it through crime). Since Grotius, philosophers had debated whether the true foundation of parental authority and honor is generation or upbringing.²⁶ For the most part, Locke is in the latter camp, and this leads him to partly disagree with Grotius's contention that "paternal authority be so personal and annexed to the relation of the father, that it can never be taken from him and transferred to another."²⁷ On the contrary, Locke argues:

[T]his *power* so little belongs to the *father* by any particular right of nature, but only as he is guardian of his children, that when he quits his care of them, he loses his power over them, which goes along with their nourishment and education, to which it is inseparably annexed, and it belongs as much to the *foster-father* of an exposed child, as to the natural father of another; So little power does the bare *act of begetting* give a man over his issue; if all his care ends there, and this be all the title he hath to the name and authority of a father" (II.65).

For Locke, then, parental rights are "annexed," not to procreators *as such*, but to the role of governing and educating children, whether that role be performed by a the biological parent or a foster-parent. In this limited respect at least, Locke's view resembles that of Hobbes. Moreover, if a parent were to try to sell her child, all that she would really do is abandon her child; whoever then took responsibility for the child's care would, by that act, acquire parental authority—whether that be the person with whom money was exchanged, or someone else (I.100).

²⁶ Cf. Pufendorf on the duty to honor one's parents: "Whether this perpetual duty and obligation of children, remaining after their father's power is expired, arise from the act of generation, or from the faithful care and labor of breeding them up, is a controversy that hath divided learned men" (LNN: VI.ii.12).

²⁷ There is a sense in which Locke agrees with Grotius here, but I will come to that qualification below.

C) The good of the governed

Locke, then, is extremely scrupulous in eliminating any vestige of the idea that parental power is a kind of property right. Let us now consider in more detail the idea of parental government. In this connection, much of what it means for a political magistrate to exercise his rule for “the good of the governed” can be imported to the case of parental governors. First, a person on becoming a parent does not forfeit his humanity or his own private rights and interests. True, Locke does believe that the instinct of parents to care for their offspring is so strong that parents “sometimes neglect their own private good for it” (I.57). But it is plain that he does not think that parents have a standing duty to always put their children’s good before their own, since he tells us that a parent “may dispose of his own possessions as he pleases, when his children are out of danger of perishing for want” (II.65). Pufendorf makes a similar point, only more explicitly. He says that parents have a duty to enable their children “to become honest and useful members of society,” but that the law of nature “doth not command parents to pinch and defraud their own inclinations, and to make themselves miserable for the sake of their issue” (LNN: IV.xi.5).²⁸

Second, as before, the good of the governed is not to be understood narrowly as exclusive of the good of others. Parents are to instruct their children in their duties and in the limits of their rightful liberty.²⁹ And Locke holds that learning how to govern oneself as a rational and moral

²⁸ Cf. also Locke’s friend, James Tyrrell: “[I]n his children [a parent] is chiefly to design their good and advantage, as far as lies in his power, *without ruining himself*” (PNM: I, 17, emphasis added).

²⁹ Arneson and Shapiro (1996) nicely sum up Locke’s view, to which they largely subscribe: “On Locke’s view, biological parents have fiduciary obligations to care for their children. Since children are incapable of controlling their own conduct by their reason in a steady way that adequately caters to their prudential long-term interests and the interests of others affected by their conduct, parental obligations include the duty to govern their children. These obligations are oriented to the interests of children and of humanity at large, and the concomitant rights that devolve on parents so that they may fulfill their obligations are rights to act for the good of their children (subject to moral constraints), not rights to use their children as they might wish for the parents’ own benefit” (380).

being is one part of the child's true interests. "*Law*, in its true notion," he claims, "is not so much the limitation as *the direction of a free and intelligent agent* to his proper interest" (2T: II.57). Therefore, "To turn [the child] loose to an unrestrained liberty, before he has reason to guide him, is not the allowing him the privilege of his nature to be free; but to thrust him out amongst brutes, and to abandon him to a state as wretched, and as much beneath that of a man, as theirs" (II.63). As I have already noted in a previous chapter, this last quotation could be interpreted to mean that it is in the interests of people to be able to govern themselves in society so that they do not have to be suppressed by others like wild animals. Or (not incompatibly) it could be understood to mean that a prerequisite for a distinctively human life is the capacity to live sociably in community and in relationships structured by law and reciprocity.³⁰

Philosophers today often ask whether, in fulfilling their duties to maintain and educate their children, parents have a duty to promote their child's "best interests" or only their "basic interests."³¹ Most who raise the question in this way take the latter view, since promoting the child's *best* interests seems like too demanding a standard. A casual reading might suggest that Locke endorses a "basic interests" account, since he speaks of parents as having the duty to preserve the lives of their children and to make them capable of looking after themselves as adults (cf. II.64, 79). But in fact he takes a third view, less often recognized in the contemporary literature. Children have a right, he explains, "not only to bare subsistence, but to the conveniences and comforts of life, *as far as the conditions of their parents can afford it*" (II.89,

³⁰ The latter interpretation is, of course, the more classical picture, which natural law writers had inherited from Cicero in particular (see *On Duties*, Bk I.) In this spirit, Locke writes that "God having made man such a creature, that, in his own judgment, it was not good for him to be alone, put him under strong obligations of necessity, convenience, and inclination to drive him into *society*, as well as fitted him with understanding and language to continue and enjoy it" (II.77). See also ELN: IV.

³¹ Cf. Arneson and Shapiro (1996): 387 and Brennan and Noggle (1997): 18ff.

emphasis added). Pufendorf defends a similar position.³² The gloss I would put on this is that, beyond having their basic interests met, children have a further right to enjoy roughly the same standard of living as do their parents. Of course, parents are not under a duty to spoil their children, and they may deprive them of anything that they think would be injurious to the formation of their characters. But, that qualification in place, I believe that the Lockean view is that parents who deprive their children of the same level of comfort that they provide themselves are failing to treat their children like persons of equal moral concern.

D) The consent of the governed

Although Locke treats the parent as a kind of governor, he does not of course believe that political and parental government have the same origin. In contrast to Hobbes, Locke does not try to erect parental authority on the consent of the governed. This, of course, is because children, lacking reason, are incapable of giving their consent.³³ Now Pufendorf had held that a child could not give consent because he was not the “master of his reason” in the sense that he could not “understand the business at hand, ... know whether it be convenient for him, and whether he have the strength and ability to perform” his side of the agreement (LNN: III.vi.3). Locke would surely agree with all of this this, but it is not the point he stresses. For Locke, what is essential for a man to be the master of his reason is his ability to know “that law he is to govern himself by, and make him know how far he is left to the freedom of his own will” (2T:

³² “As for the measure of what ought to be spent on education, in training up children for a civil life, it is to be stated according to the fortunes of the parents, and the genius and capacity of the children. Thus, much at least is required, “That they be enabled to become honest and useful members of human society. But this is a general rule in the whole affair: “That as nature doth not command parents to pinch and defraud their own Inclinations, and to make themselves miserable for the sake of their, Issue ; so a parent placed in a high and wealthy condition is, no doubt, in fault, if he do not take care that his children be brought up after the most exact and accomplished manner of institution” (LNN: IV.xi.5).

³³ Like Pufendorf, and unlike Hobbes, Locke needs to justify parental discipline of children—not just the obedience that children owe to their parents.

II.63). For Locke, then, to be rational is not only to be capable of sound instrumental reasoning; it is to know the true worth and proper purposes of things. The child must learn, for example, that human beings may not arbitrarily destroy themselves, and therefore cannot subject themselves as slaves to the absolute and arbitrary authority of another (II.23). Indeed, in a central passage from *Some Thoughts Concerning Education*, Locke makes it clear that imparting this sort of understanding is the fundamental task of education: “to set the mind right,” he explains, means that “on all occasions it may be disposed to consent to nothing, but what may be suitable to the dignity and excellency of a rational creature” (STCE: 31).³⁴

So, Locke does not appeal to the child’s consent to justify parental authority, because it is the task of parents to make their children capable of giving rational, lawful consent. Also, in contrast to Pufendorf, Locke avoids appealing to the child’s presumed or hypothetical consent. Like Barbeyrac, Locke thinks that the child’s “absolute need to be helped and directed by others” is a sufficient justification for the child’s subjection to parental authority. That said, I see no reason why Locke’s argument could not be rephrased in terms of the child’s hypothetical consent—for instance, that, given every child’s absolute need, no rational person could reasonably reject the authority of adult guardians over her in childhood. Indeed, this may be an attractive style of argument for philosophers who want to avoid Locke’s appeals to natural law or to the Creator’s intentions.

³⁴ I take it that “consent” in this passage has a broader meaning than it does in political theory. In this context, Locke means (like Kant) that a rational being does not “consent” to the invitation of his inclinations except when it is suitable for a rational creature to do so. In this sense, all intentional action involves consent. But since consent in the narrower sense of an agreement is a kind of intentional action, it is included in this broader sense.

8.5 Prerogative, Tyranny, and Exploitation

A) Domestic lawfulness

Because the parent is a species of governor, it is important that she always exercise her power in a lawful and rational way for the good of the child—never arbitrarily, nor in the heat of passion, nor in an exploitative way. Of course, unlike well-ordered states, families usually do not have written laws or constitutions which precisely delimit the rights and duties of each family member. And because so much of parental government requires judgment and decision of particular cases, parental authority is in large part *prerogative*.³⁵ But, as we have seen, prerogative for Locke is not a license for caprice, but only the authorization to promote the good of the governed without a specific, determinate rule (II.166). Therefore in a broader sense, prerogative is lawful in spirit. And it is in a lawful spirit that parents ought to exercise their authority over their children.

For example, parents must not allow themselves to punish children when they are angry, “lest passion mingle with it, and so ... exceed the just proportion” (STCE: 83). This is important, not only so that justice may be done, but so that children are raised as rational creatures, who learn to respect the proper bounds of their liberty, and not to act only out of fear of those who are stronger than they (SCTE: 50-51). For this reason, Locke insists that parents always treat their children as “rational creatures.” Of course, this does not mean treating children as if their reason were already fully developed, for then there would be no need of parental authority in the first

³⁵ Cf.: “It is easy to conceive, that in the infancy of governments, when commonwealths differed little from families in number of people, they differed from them too but little in number of laws: and the governors, being as the fathers of them, watching over them for their good, the government was almost all *prerogative*. A few established laws served the turn, and the discretion and care of the ruler supplied the rest” (2T: II.162).

place.³⁶ But Locke does believe that children can begin to appreciate the force of reasons, at least at an elementary level, almost as soon as they are capable of language. In particular, he thinks that children can soon detect the difference between reasonable punishment, which evokes shame, and mere “peevishness and arbitrary imperiousness” in their parents, which evokes only fear and resentment (SCTE: 71, 78, 81). Moreover, children must be made aware that—allowing for relevant differences due to age and station—their parents are subject to the same moral rules as they are themselves (SCTE: 71). Only in this way can parents impress upon children that the household is one made up of moral equals.

On analogy with political rulers, parents who regularly exercise their power over children in an arbitrary way, or who use that power for their own “private separate advantage,” instead of for the purpose of promoting their children’s good, can be justly called, on Lockean grounds, petty *tyrants* (cf. II.199). Such parents treat their children like inferior creatures that they own, to be enjoyed or worked for the parents’ own pleasure and profit (II.163). Locke never expressly uses the language of tyranny to describe unjust parents, but his friend and occasional collaborator James Tyrrell did.³⁷ In *Patriarcha non Monarcha*, we find a passage that captures the Lockean view I am describing perfectly:

³⁶ Rousseau raises this objection to Locke in *Emile*, Bk. II, p. 91. As to the advisability of reasoning with children, I would speculate that, to the extent that Rousseau does not simply caricature Locke, Locke is closer to the truth than Rousseau.

³⁷ Locke refers to “the ingenious and learned author of *Patriarcha non Monarcha*” at 2T: I.24. Tyrrell’s book, which like Locke’s *First Treatise* is a refutation of Filmer’s *Patriarcha*, was published in 1681; Locke’s *Two Treatises* was published in 1689. According to Peter Laslett, Locke spent much of his time in the years from 1680-1683 in Tyrrell’s house, and during that time they collaborated on a critical commentary of Stillingfleet’s *Unreasonableness of Separation*. With respect to their separate projects, Laslett has this to say:

“Locke and Tyrrell, then, were in close communication when, as I am prepared to believe, both were engaged in refuting Filmer, and their writing plans followed a remarkably similar pattern. So close were they, indeed, that some sort of collaboration would seem possible, or even likely. But the remarkable thing is that the evidence we have goes to show that Locke most certainly did not let Tyrrell see his manuscript, or even know of its existence, and that Tyrrell seems to have been almost as guarded about his too. This is

God hath not delivered one man into the power of another, merely to be tyrannized over at his pleasure; but that the person who hath this authority, may use it for the good of those he governs. And herein lies the difference between the interest which a father hath in his children, and that property which he hath in his horses or slaves; since his right to the former extends only to those things that conduce to their good and benefit; but in the other he hath no other consideration, but the profit he may reap from their labor and service, being under no other obligation but that of Humanity, and of using them as becomes a good-natured and merciful man; yet still considering and intending his own advantage, as the principal end of his keeping of them (PNM: I, 17).

But this picture of parental tyranny, reasonable as it is, also raises some difficult questions: If children are not the property of their parents, then is it ever appropriate for parents to profit from their children? And if so, at what point does it become exploitative?

B) The exploitation of children

Pufendorf usefully suggests that we distinguish between, on the one hand, property that children have inherited or been given, and on the other hand, children's rights to their labor and the fruits of their labor (LNN: VI.ii.8). With respect to property that children receive "by another's bounty," Pufendorf and Locke agree (as does Grotius) that parents cannot appropriate this for themselves, although it is appropriate for them to manage it during the child's minority (for instance, the property may be revenue-generating land). The harder question has to do with the extent to which children can be forced to work for the family, or to hand over wages from employment to the parents. It is plain that a parent can compel her children to work and toil for their own good—for example, so that, as Tyrrell puts it, "being bred up in a constant course of industry, [the children] may be the better able either to get their own living [as adults], or else to

of some interest, since so many of Tyrrell's positions against Filmer were also those of Locke..." (1960: 60).

In his note to 2T: I.24, Laslett points out that, in a letter to Locke of 1690, Tyrrell observes that the author of *Two Treatises* "agreed perfectly with my conceptions in *Patriarcha non Monarcha*."

spend their time as they ought to do, without falling into the vices of idleness or debauchery” (PNM: I, 18). But can parents require children to labor for the parents’ own benefit? On the one hand, it might seem as if children should have as much right to their labor and the fruits of their honest industry as anyone else, and that parents have no right to benefit from their children’s pains (cf. 2T: I.42, II.34). On the other hand, it might seem as if it were only fair for children to contribute something to the support of their family.

Pufendorf took the view that parents were entitled to “any advantage or profit that can be made by the labor of a [child],”³⁸ in order to go some way in recompensing them for the costs of maintaining and educating the child (WDM: II.iii.5; LNN: VI.ii.8).³⁹ For the same reason, Pufendorf argues that parents can keep the profits earned while managing their children’s property. One might object that parents are owed no such compensation, since (as both Pufendorf and Locke hold) they are under a duty to support and maintain their children out of their own property. Anticipating that objection, Pufendorf replies thus:

Though he were obliged indeed, by the Law of Nature, to support and maintain his offspring, yet he was not in the least prohibited to make what fruit or advantages he could of his labor. One might as well say that parents are forbidden to take any delight or comfort in their children; a satisfaction so very great, that most, who are so happy as to enjoy it, esteem it invaluable, and beyond all compensation or equivalent. For the same reason, it would be a high degree of impudence, for a son, in his state of minority, to require a reward for the service he does his father (LNN: VI.ii.8).

This reasoning is unconvincing. There is no reason an employer should not delight in his employees either, but that does not show that he owes them no reward for their work.

³⁸ Pufendorf has “son” instead of “child,” but I take it that the same point would apply to daughters as well.

³⁹ Tyrrell follows Pufendorf almost verbatim here: “the Father hath a power to set his children to work, as well to enable them to get their own Living, as to recompense himself for the pains and care he hath taken, and the charge he may have been at in their education. For though he were obliged by the Law of Nature to breed up his children, yet there is no reason but he may make use of their labor, as a natural recompense for his trouble” (PNM: I, 19).

Furthermore, you might think that the fact that parents take such delight in their children's company—esteeming it beyond all compensation—only goes to show that they are not entitled to any further compensation for their pains.

Locke seems to be more wary than Pufendorf of children being exploited by their parents. He never suggests that parents are owed any recompense except gratitude, and he certainly never says that parents are entitled to “any advantage or profit” that they can get from their labor of their children. The duty of gratitude, it is true, does lay on adult children a duty to care for, and when necessary, to support their parents, but this is an imperfect duty, which parents have no power to exact from them, as though it were an ordinary debt. Moreover, just as parents have no right to a bequest conferred on the child, they have no right to any income that children earn from their own labor. Of course, parents may apprentice their children so that they learn a trade, but children can only be forced to work for the express purpose of providing for their own subsistence, where this is absolutely necessary—apparently another application of the right of necessity (II.64-69). Although Locke does not speak to the issue, I can imagine a Lockean denying that parents have a right to *all* of the profits earned from their children's property; perhaps it would be more appropriate if they paid themselves a manager's wage or commission. What about services like household tasks? One might imagine a Lockean—at least of a modern stripe—arguing that children should always be given a certain wage or allowance for any labor they do, so that they may profit from their honest industry. In his educational treatise, however, Locke hints that children might be required to perform certain “little tasks” without any material reward. Indeed, he even suggests that rewarding children for what they ought to do anyway is harmful, insofar as it excites their appetites, instead of encouraging virtue. It is much better, he says, to motivate children by praising their good deeds, and making them ashamed of their bad

(STCE: 52-58, esp. 52). This suggests that children do have duties to contribute certain services to the family, but it does not shed much light on the proper measure of these.

In his discussion of marriage, Locke says that this should not be understood *only* a “right to one another’s bodies,” but also as a relationship of mutual support, assistance, and communion of interest (II.78). If those latter characteristics can be extended to the whole family, then this might serve as an attractive basis for the parents’ right to the services of their children. We find a position of this sort in Hegel. I discuss Hegel’s conception of the family at greater length in Chapter 10, but it is fitting to consider the Hegelian view on the labor of children here. Hegel agrees that parents have a duty to maintain and educate their children, and he is eager to distinguish the status of children from that of chattel slaves (PR: 143R, 174A). But he argues that “the right of the parents to their children’s *services*, as services, is based on and limited to the common concern of caring for the family in general” (174). When Hegel speaks of the parents’ right to their children’s services, *as services*, he means to set aside the sorts of cases where the purpose of the child’s work is purely educational or otherwise exclusively in the child’s interests; he is explaining here when services can be required of children for other than paternalistic reasons. What is important about Hegel’s account is that he eschews any story about an individual claim for compensation for expenses outlaid. The parents, as individuals, are *not* entitled to the child’s services. Although parents’ labors may deserve the child’s gratitude, they are not entitled to *compensation* from the child, as if the child had injured or wronged them. If anyone is responsible for the existence of the child’s needs, it is the parents themselves, not the child. Since the child does not owe his parents compensation, giving the parents, as individuals, the right to use their children as workers for their own personal benefit *would* be akin to

slavery.⁴⁰ On Hegel's view, then, it is the family as a whole that is entitled to the child's services. It is in only their capacity as family members that parents are entitled to the services of their children. But what precisely does this mean?

Here is my interpretation: The family promotes each individual's well-being when the members renounce their strictly separate individuality, and instead, cooperate as parts of a whole. This is in two respects. First, from a spiritual or ethical perspective, each member attains a sense of his or her self-worth from the love, trust, and appreciation of the other family members (PR: 158+A). Second, each member is *economically* supported by the household's common property (PR: 170-171). "Economically" here should be understood in the broad sense, as suggested by its etymology:⁴¹ economic support includes not only monetary income, but also the value of a well-kept and comfortable home. Both the earning of income and household management are essential material preconditions for the internal, spiritual life of the family to develop, because the family needs a secure and stable *place* to come together (PR: 170). Only then do family members have a reasonable opportunity to experience what Hegel calls the "peaceful intuition of [the family's] unity" (PR: 166).

The services that parents can demand of children are essentially those which help maintain the material basis of the family. In modern conditions, this often takes the form of having children help with household chores. But it may also take the form of children helping with the parents' primary productive activities, especially on farms or in small businesses. In performing these services, children do not contribute only to the parents' good; they contribute to the well-

⁴⁰ In the addition to §174, the text says that, in requiring their children's services, parents must not claim to be justified "in their own right, for the most unethical of all relationships is that in which children are slaves."

⁴¹ *oikos*, Greek for "home." Classical Greek writers equated "economics" with the art of household management.

being of the whole family, of which they partake. Moreover, while these services do not have the child's benefit as their *primary* justification, they are not harmful to the child either. For by performing tasks for the sake of the family as a whole, the child wins appreciation for his contributions from the other family members, and this is an important part of his growing sense of self-worth. In this way, it is only by contributing to the family as a whole that can the child fully benefit from what the family has to offer.

The services that can be required of children, as endorsed in the above Hegelian picture, should not of course be confused with modern "child labor." As Marx recognized, modern industry entirely transformed the nature of the child's place in the division of labor, from one governed by customary limits and supervised by ordinarily benevolent parents, to one of ruthless exploitation by employers (*Capital*, I.X.3). Marx was correct, therefore, to ridicule the idea of defending child labor by invoking the natural authority of parents, when in fact the practice was rending the family apart, by turning children into commodities and keeping them employed for long hours outside the home.⁴² Even if a child's work need not always be purely educational, it should not be allowed to positively hinder his education, and obviously it should not endanger his health or safety. Of course, if a family cannot subsist in any other way, then one can hardly blame *the parents* for sending their children out for work. In this sense, the right of necessity seems to apply. But, for the same reason, we can say that no social system ought to exist which permits such extreme necessity, and that if such a society does exist, then individuals who can afford to hire children ought to be supporting them out of charity, instead of exploiting their want.

⁴² *The Communist Manifesto*, *The Marx-Engels Reader*, 476, 487-488 / *Collected Works*, VI. 487, 501-502.

I do not want to attribute this Hegelian view to Locke. That would be to underappreciate Hegel's originality. If it could be imputed to any natural law thinker, it would be Grotius (and perhaps his scholastic predecessors), for he had a sufficiently Aristotelian conception of the family to say, in connection with the duties of older children, that "it is but just, that what makes a part of the whole, should conform itself to the interest of the whole" (RWP: II.v.3). My primary point, however, is to suggest that this Hegelian account may be available to someone otherwise endorsing a Lockean picture of parental rights, and that it is more attractive than Pufendorf's story about compensating parents for their pains.

8.6 Two Objections to the Fiduciary Model

A) The assignment of parental duties

Although there is much that is attractive in a picture of parental authority that depicts it as a kind of small-scale government, or fiduciary trust, instituted for the good of the child, there are two respects in which one might think that the fiduciary model cannot be the whole story. First, it is not clear how the needs of children alone can establish that particular adults—like the biological parents—have *special duties* to particular children (and, therefore, also special rights). Clearly Locke *does* assume that the biological parents have these special duties, but how can that be accounted for? Why do not children's needs merely establish that adults in general have duties and rights with respect to children in general—just as the extreme want of the very poor creates duties of charity for everyone with surplus.⁴³ Whatever their weaknesses, at least

⁴³ Cf. O'Neill (1979): "an attempt to ground obligations [to children] only in needs or interests will not, by itself, tell us who has an obligation to meet those needs and interests. By considering children's needs and interests, we might reach a more detailed understanding of the content and limits of parental obligations; but it would remain unclear, in

accounts of parental authority that appeal to generation or to the child's consent have a way of forging the special normative connection between parent and child. Barbeyrac saw this problem very clearly. Although he dismissed the idea that generation was the sole basis of parental authority, he also realized that generation at least explained the assignment of parental duties:

It is certain that ... education is the immediate foundation of paternal power, and the mutual duties of father and child. But we must not exclude generation, which, to speak the truth, is the first foundation of all engagements to a father, and consequently of his power. Indeed, how comes it to pass, that a father and mother are obliged above all others to bring up the child that is born to them? (LNN: IV.ii.4, n.1).

B) Fundamental parental rights

The second objection is that the fiduciary account fails to do justice to the notion that parents have fundamental individual rights—rights in their own name, not just rights of office—to raise their children. Before I elaborate on this objection, let me say something about the nature of rights.

Theories of Rights: Contemporary philosophers disagree about what we mean—or ought to mean—when we say that someone has a right. On one prominent view, the function of rights is to carve up domains of freedom and control, so that, when there is a conflict of wills, it is known whose will has “right of way” (cf. Hart 1955, 1984; Wellman 1985: esp. chs. 4, 7). This is known as the Choice or Will Theory. The Will Theory works well for capturing the sense of the old legal nostrum *ubi jus ibi remedium*—where there is a right, there must be a remedy. Kelsen gives this illustration: “One contracting party has a legal right against the other party because the legal order makes the execution of the sanction dependent ... upon the [first] party's expressing a will that the sanction be executed against the delinquent.” It is only when “the law is at the

most cases, on whom particular children have legitimate claims for satisfying which of their needs or interests” (26-27). See also Shiffrin (1999): 140 fn. 42.

disposal of an individual” in this way that it can be considered “ ‘his’ law,” and thus, his right (Kelsen 1949: 82). But the Will Theory appears to be at variance with common usage in some ways. For example, it seems to imply that there can be no inalienable rights, since such rights cannot be exercised or waived at the individual’s discretion. That suggests that, where education is compulsory, children do not (strictly speaking) have a right to be educated. More fundamentally, young children appear not to have any rights at all on this account, since they are incapable of exercising their rights (cf. MacCormick 1977, 1982). Parents may have *duties regarding* their children, but children cannot have rights unless they can exercise control over those duties.⁴⁴

Amongst moral and political philosophers, the more influential view is to say that the function of rights is to protect important interests. The Interest Theory has been most influentially articulated in recent years by Joseph Raz. He claims that “ ‘X has a right’ if and only if ... some aspect of X’s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty” (1986: 166). On this view, one need not necessarily have the power to *exercise* one’s rights (e.g., by having the power to demand or waive the performance of another’s duty) in order to have a right. As Neil MacCormick puts it, “powers of waiver and enforcement are essentially ancillary to, not constitutive of, rights” (1982: 164). One virtue of the Interest Theory, especially from our point of view, is that it has no difficulty in accounting

⁴⁴ Cf. Hart (1955): “These considerations incline us not to extend to animals and babies whom it is wrong to ill-treat the notion of a right to proper treatment, for the moral situation can simply and adequately be described here by saying that it is wrong or that we ought not to ill-treat them or, in the philosopher’s generalized sense of ‘duty’, that we have a duty not to ill-treat them. If common usage sanctions talk of the rights of animals or babies it makes an idle use of the expression ‘a right’, which will confuse the situation with other different moral situations where the expression has specific force and cannot be replaced by the other moral expressions which I have mentioned” (181)

for the rights of children. Because children have a strong interest in receiving care and education, they have right against their parents and the state to have this provided for them.

One question we will have about the Interest Theory is the extent to which it is committed to a welfarist theory of morality. Some philosophers—notably the utilitarians—hold that all moral rights and duties ultimately appeal to well-being for their justification, while others, like Kant, hold that there is a fundamental right to be one’s own master, which is irreducible to its contribution to the person’s well-being (MM: 6:236-237 and 2.1 above). Could such a right to freedom be recognized by Raz’s Interest Theory?⁴⁵ Admittedly, Raz’s definition seems prejudiced in favor of welfarist theories of morality, and Raz’s own moral philosophy inclines in that direction,⁴⁶ but I do not think his theory of rights needs to take a stand on this issue. All that we need to say is that, if X has a right, then someone else’s duty is grounded in something that is “good” for X in the broadest sense; in other words, the duty exists for the sake of X. This extremely thin sense of a person’s “good” can encompass both well-being as well as freedom or autonomy. Indeed, it is the same sense of “good” that is implied when we say that government exists for the good of the governed. That phrase, as I have argued, can be understood to include the protection of the rights of the governed, not just the promotion of the general welfare. The reason why we have to be able to say that the duty exists for the sake of the right-holder is brought out well by Matthew Kramer:

⁴⁵ Cf. Wenar (2005): “Will theorists and interest theorists have erred in adopting analyses framed to favor their commitments in normative theory. This has turned the debate between them into a proxy for the debate between Kantianism and welfarism. Yet that normative dispute cannot be resolved through a conceptual analysis of rights” (224).

⁴⁶ See Raz (1986): ch. 12; (1994a); and (1994b). The position is slightly hedged in his (2004), but not in a way that concerns us. For my discussion of Raz and the contribution of autonomy to well-being, see 2.6.

Suppose first that, as a result of a statute or a judicial ruling or some other mandate, *X* has a duty to provide his parents with a certain level of financial support after they reach the age of sixty-five. Suppose next that, as a result of some mandate, *X* has a duty to inform on his parents whenever they utter seditious sentiments. Now, in each of these situations, *X* bears a duty with a content that pertains to his parents... Why do we ascribe to the parents a right-to-be-furnished-with-financial-support in the first setting, and deny that they have a right-to-be-informed-upon in the second setting? (1998: 91).

The explanation is simply that the first duty exists for the good of, or for sake of, the parents, while the second does not.

Understood in this broad way, I believe that the Interest Theory is a good theory of *moral* rights. It also works fine when we think about legally protected moral rights. However, the Interest Theory runs into trouble when we come to rights of office, fiduciary rights, and other morally derivative rights. The President, for example, has certain special rights and powers that attach to the office of the presidency, but the justification of these rights do not appeal to the good of the President. They do not exist for his sake. Rather, we say that the holder of that office needs a certain domain of freedom and authority in order to promote the good of the people. With respect to these morally derivative rights of office, the Will Theory seems like a more natural fit. What it means to say that the President has a right to keep certain information confidential is that, if the President and some other party disagree about whether to disclose the said information, the President's will has "right of way."

Raz's attempt to handle rights of office within the Interest Theory seems to me quite unsatisfying. He says that rights of office *do* protect the interests of the right-holders, but that these interests need not be intrinsically valuable. Instead, those interests are only worthy of consideration insofar as they are instrumental in protecting the interests of others (1986: 178-179; 1994c: 274-275). Thus, the President's right to keep certain information confidential *is* a

way of protecting his interests; it is just that the only reason to protect his interests is that, on the whole, it is instrumental to protecting the morally important interests of the people. This is an unnecessary epicycle. The Will Theory provides a much more straightforward explanation: the rights attaching to the office of the President define the President's domain of freedom and authority. We can know what those rights are, in an operational sense, without knowing their justification at all. For instance, we may agree about the powers of the monarch, but disagree as to whether they are rights of office, or personal rights, akin to property rights.

I see no reason why we ought to think that our ordinary talk about "rights" should always conform to one theory of rights or another. The reason why both the Will and Interest theories have had such long lives in the philosophical literature is because they both have a foothold in ordinary thinking. It would be a misunderstanding of the nature of concepts to think that they must either be univocal in their content or else hopelessly confused. Political philosophers tend to be partial toward the Interest Theory for the good reason that it is more useful for talking about what they are interested in, namely, the justification of duties. But many legal philosophers are more inclined toward the Will Theory, because it is more useful for thinking about whose will should prevail in law where parties are in conflict. Henceforth, I shall refer to "operational rights" when referring protected spheres of freedom and control, and "fundamental rights" when referring to protected interests. Operational rights, therefore, may or may not be fundamental rights.

Are parental rights fundamental rights?: Parental guardians clearly have operational rights. But do parents have a fundamental right to exercise those operational rights? If parental rights are just rights of office, then it would seem that the answer is 'no.' Consider a standard case of rights of office: Barack Obama has operational powers that accompany the office of the

Presidency. But Obama does not have a fundamental right to *be* President. He is not personally wronged or injured if the electorate does not select him for that office—even if he would have been the better candidate for the position. Or take another example: Some people think that the Supreme Court erred when it settled the disputed election in *Bush v. Gore* in favor of George W. Bush; they think that Al Gore really won the election. Suppose that is true. While the electorate would have been wronged in that case, I do not think we would say that Gore had been personally wronged. After all, no one thinks that Gore should have been personally compensated for his misfortune.

Some philosophers who endorse a Lockean account of parental rights accept the implication that parents have no fundamental right to rear their children. James Dwyer argues that, properly understood, parents would have only legal privileges to rear their children and direct their upbringing. On this view, adults would not have “any legal claims of their own against state efforts to restrict their child-rearing practices or choices that would not, on the whole, improve the children’s well-being,” and no personal “entitlement to direct a child’s life.” The role of parent would be understood “as a benefit enjoyed contingent upon fulfillment of attendant responsibilities, like other fiduciary positions such as a trustee or attorney” (1997: 64).

Dwyer does not offer a theory as to how these privileges are initially assigned; he is mainly interested in arguing that parents have no fundamental right to direct their children’s education. Peter Vallentyne (2003), however, argues that the operational rights of parental guardians ought to be assigned to whomever it is in the child’s best interests to possess those rights. This is not only a rule for the initial distribution of parental rights; if, after the child has grown older, it becomes apparent that he would be better off in the care of some other adult, then custodial rights ought to be transferred (the child need *not* be suffering from abuse or neglect). Of course,

as a rule (Vallentyne claims) it can be presumed that biological parents will be the best caretakers for their children, and that transferring custody would not be in the child's best interests. David Archard seems to agree: "it may be reasonable to presume that biological parents should act as the child's caretakers, especially if the feasible alternatives can be shown to be unacceptably poorer.... What the state should not do is presume that natural parents have a right to rear which derives simply from biological parenthood" (2004: 152). Just how strong the presumption in favor of biological parents should be depends on how important blood ties are *to children*. J. David Velleman, for example, has argued that children have a strong interest in being raised by their biological parents, on the premise that knowing our parents is an important part of getting to know ourselves (2005, 2008b).

But most people think that parents (not just their children) are *personally* wronged if they are deprived of their authority to raise their children as they think best—at least so long as they would be adequate parents.⁴⁷ For example, in some Australian states from the 1930s to the 1970s single mothers had their newborns taken away from them in order to give the children a "better life" with an adoptive married couple (Richards 2010: 11). Whether or not this wronged the child, we probably feel that it certainly wronged the mother. William Galston urges us to recognize this point when he insists that "As a parent, I am more than the child's caretaker or teacher, and I am not simply the representative of the state delegated to prepare the child for citizenship" (2002: 103). Instead, he insists that raising one's children, and raising them in a particular way, is a part of most parents' conception of the good life. But conceiving of parental rights on a purely fiduciary relationship fails to capture that aspect of parenthood.

⁴⁷ Cf. Page (1984), who insists on accommodating "the powerful intuitive idea that parents, rather than children, are wronged when parental rights are invaded. No account would be satisfactory unless it could do justice to this idea" (191).

C) Locke's position

Interestingly enough, Locke has relatively good answers to both of these objections, but they depend on his larger theological picture. In the *Essays on the Law of Nature*, Locke argues that, just as we know that there is a wise Creator from the fact that “this visible world is constructed with wonderful art and regularity,” so too can we “infer the principle and definite rule of our duty from man’s own constitution and the faculties with which he is equipped.” “For since man is neither made without design nor endowed to no purposes with these faculties which both can and must be employed, his function appears to be that which nature has prepared him to perform” (ELN IV, 103-105).

And as Locke sees it, there is abundant empirical evidence that God intended a child’s biological parents to be his natural caretakers. First, there is the utter helplessness of children. If they are to survive, *someone* has to take care of them. Second, there is the fact that mothers naturally produce the milk that infants need for nourishment upon giving birth. Third, there is the strong natural affection that mothers tend to have for their infants. Fourth, we find that mothers naturally nurture and raise their young in many other animal species, particularly the mammals and birds. Fifth, we find that, in those animal species where caring for the young makes the female less able to provide for herself, the bond between mating pairs last longer, so that the male can help provide for, and help raise, the female and the young. Sixth, in human beings, we find strong bonds of love between mating males and females, which lasts for many years, if not for a lifetime. Finally, we find that human fathers, as well as mothers, tend to develop a natural attachment for their offspring (2T: II.78-81).

Therefore, just as the eye seems to have been fashioned by a wise Creator as an instrument for seeing and navigating the world, parents seem to have been fashioned as instruments for

maintaining and raising their children for the purpose of continuing the human race. The natural need of children and the natural faculties and affections of parents appear to fit together like hand and glove. Because God has so wisely ordered nature so that there is an instrument available to provide for child's need, we must infer that it is indeed God's intention and will that parents raise their young. Furthermore, by appealing to parents' natural inclination to preserve their own children, Locke puts parental duty on a footing comparable to the basic duty to preserve one's own life:

[God] has in all the parts of the Creation taken a peculiar care to propagate and continue the Several Species of Creatures, and makes the Individuals act so strongly to this end, that they sometimes neglect their own private good for it, and seem to forget that general Rule which Nature teaches all things of self-preservation, and the Preservation of their Young, as the strongest Principle in them over rules the Constitution of their particular Natures (I.56).

So, although Locke denies that the content or duration of the authority that parents have over their offspring derives from the "bare act of begetting," he does think that the assignment of parental rights and responsibilities to particular men and women rests on the relationship of generation. To that extent, Locke could agree with Grotius that it is "by generation that parents acquire rights over children." Even then, however, Locke would insist that it is not the *bare act* of begetting that confers those rights, but rather God's evident intent in having made the biological parents his instruments in continuing the race. In one sense, therefore, Locke's account of the special duties of parents is essentially *forward-looking*. All human beings have a duty to preserve mankind where it is possible to do so, but because parents are especially fitted by nature to preserve the lives of their offspring, they are singled out with the special responsibility of doing so. But, for Locke, the forward-looking argument could not be sufficient

by itself to create a genuine *obligation* with the “force of morality,” for which a law issued and enforced by a superior is wanting.⁴⁸

Given Locke’s belief in a providential Creator, I believe his argument for the special duty of parents toward their own offspring is at least as good as his arguments for the other parts of the natural law. In fact, I would venture that it is considerably stronger. If we suppose that human nature has been created by God for particular purposes, it seems more straightforward to argue that God intended parents to raise their own young than that, say, he intended labor to be a title to property or for all men be free and equal. Does this argument also enable Locke to argue that parents’ have fundamental rights to rear their children? For all human purposes, it does. Of course, Locke does not think that this right, or any other, holds against God. But the relevant point from Locke’s perspective is that parental rights have the same basis as rights to one’s own person: not mere human convention, but God’s will, which is reason (II.6).

Contemporary philosophers, who wish to detach Locke’s theory of parental authority from his theological picture, have not sufficiently taken notice of the fact that they are thereby deprived of Locke’s own answers to these objections. Can such answers nonetheless be supplied from within a secular fiduciary account? I believe that a reasonable answer is available for the first objection, but not for the second.

⁴⁸ Cf. ECHU: II.xxviii.5-8. But the point is made even more clearly in a draft manuscript for the *Essay*: “show no law of a superior that prescribes temperance, to the observation of breach of which law there are rewards and punishments annexed, the force of morality is lost, and evaporates only into words and disputes and niceties” (Locke 1996: 302).

D) Parental liability

The most plausible argument for establishing the special *duties* of biological parents appeals to the parent's responsibility for the child's present state of neediness. Were the parent not to care for the child, so the argument goes, the parent would be harming the child. The argument has occurred to many writers, but we find a particularly clear articulation of it in Blackstone's *Commentaries*:

The duty of parents to provide for the *maintenance* of their children is a principle of natural law; an obligation ... laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave their children life that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation to endeavour, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have the perfect *right* of receiving maintenance from their parents (CLE: I.xvi.1).⁴⁹

Many contemporary philosophers have made the same argument. Velleman puts it straightforwardly enough:

Consider the hackneyed example of a child who is drowning at the deep end of a swimming pool. People lounging around the pool obviously have an obligation to rescue the child. But the obligation doesn't fall on the bystanders equally if one of them pushed the child in. The one responsible for the child's predicament is not just a bystander like the others, and he bears the principal obligation (Velleman 2008b: 251).

If there is anything right about the concept of liability, then this argument is hard to quarrel with in the abstract. However, it does raise some difficult questions, which I will simply flag without trying to resolve. First, it is not clear just what the parents are liable for. The traditional view is that the parents are liable for the entire cost of maintaining and educating the child until the child reaches adulthood, and that view still finds support amongst some philosophers. But in

⁴⁹ Blackstone takes the argument from Pufendorf, LNN: IV.ix.4; but Blackstone is more quotable in this case.

all modern societies, much of the cost of raising children is now socialized (e.g., through public schools, public health-care, or in some countries, public day-care). Are these cases of some people being unjustly forced to subsidize the choices of others? Interestingly, Velleman (2008b) suggests that parents are mainly responsible just for personally rearing their own children; he does not explicitly draw any economic consequences from the liability argument at all.

The second hard question concerns the circumstances under which one becomes responsible for a child's existence? The most obvious way of incurring such responsibility is to intentionally procreate. Similarly, it would seem that one is responsible for a child's existence when one intentionally induces someone else to procreate for you.⁵⁰ And surely we will want to say that parents can incur liability for children that they did not intend to create as well. The traditional view is that by voluntarily having sexual intercourse, individuals assume responsibility for any offspring that may result. The existence of birth control and abortion have somewhat complicated this. If my partner assures me that she is using birth control, but has deceived me, then am I still responsible for supporting the child that results? What if the man wishes his partner to have an abortion, but she refuses. Is he still liable to support the child. In other words, if women have the right to choose whether or not to be mothers, ought men have the same right (cf. Brake 2005)?

But let's set aside these questions. I shall assume that they concern the periphery of the liability account, not its core. So let us agree that there is a good secular explanation as to why

⁵⁰ Suppose that Mr. A and Ms. B want a child, but they discover that Mr. A is infertile. In consequence, Mr. A and Ms. B contract with a sperm donor, Mr. C, so that Ms. B can get pregnant. This results in the birth of D. Even though Mr. A has not made a genetic contribution to the creation of D, it seems that Mr. A is just as morally responsible for D's existence as an ordinary biological father would be (or at least very nearly so). Does Mr. C have any obligations to D? The conventional view is that he does not, but some writers dissent (cf. Shiffrin 1999 and Velleman 2008b).

some adults have greater responsibility for meeting children's needs than other adults. Can this argument, like Locke's, also be used to show that parents have a fundamental right to raise their own children? The suggestion would be that insofar as my life goes better for me when I live up to my obligations, I have a strong personal interest in having the freedom to do so. There is something to be said for this argument, insofar as no one else will fulfill my obligation for me. To return to Velleman's example, suppose, as a joke, I push a child into the swimming pool, not realizing that he does not know how to swim. As it turns out, I am the only person on site strong enough to pull the child up from the bottom of the pool. In that case, it makes some sense to say that someone who prevented me from saving the child would wrong both the child and (to a lesser extent) me. But suppose now that I am *not* the only one capable of rescuing the child. Someone else jumps into the pool first and saves the child. Even though this person had less of an obligation than me to save the life of the child, it does not seem as if he has wronged me by performing my obligation for me. These points seem to carry over the case of biological parents. It is reasonable to think that parents have a right to fulfill their obligations to their children, if no one else would do so for them. But it does not seem as if parents have a right to be the persons who meet their children's needs, if someone else might do as well or even better than they could. If that argument is sound, then we shall either have to accept that biological parents do not after all have a fundamental right to rear their own children, or that the modern fiduciary account of parental authority is only part of the whole picture.

CHAPTER 9: THE VALUE OF INTIMACY

9.1 Introduction

Over the last three chapters, we have explored three paradigms for parental rights: property, contract, and government. The property paradigm, while no longer very popular, has appealed to some philosophers for three respectable reasons. First, enforceable parental rights *are*, at least in large part, rights held against third parties with respect to the management of children, and property rights are paradigmatic of such rights *in rem* over external things. Perhaps for this reason Aquinas compared a young child to an ox or a horse in the way each belongs exclusively to some and not others (ST: II-II, Q. 10, a.12). Second, if parental rights were akin to property rights, then that would explain why undue interference personally wrongs the parent. In other words, that would explain the sense in which parental rights are fundamental rights—not just rights of office. Third, if we think that we generally have property over what we create, or over what we are the first to seize, then perhaps children belong, at least in the first place, to their procreators, or to those into whose hands they first fall.

But although there may be some commonalities between property rights and parental rights, the fundamental difference is, of course, far more striking. For us, the organizing idea of property is that which I can dispose of for my own advantage, while the organizing idea of a person is that of a being who has rights and cannot be used merely as a means. Therefore, it seems like a moral category error to say that persons can be held as property. This led us to our second paradigm. We do imagine that it is possible to acquire rights “over” other persons

through contract. Perhaps parental rights can be likened to contract rights. We considered two versions of this idea. First, that children actually make a pact with their parents which recognizes the parent's authority in return for parent's care, and second, that parental rights can be justified in terms of the child's hypothetical consent. The first view either founders on the fact that children are incapable of consent, or else it requires us to accept a Hobbesian conception of the state of nature. The idea that parental rights might be justified by the child's hypothetical consent is not wholly implausible, but as Ronald Dworkin has rightly said, "a hypothetical contract is not simply a pale form of an actual contract; it is no contract at all" (1977: 151). Rather, it is a heuristic for thinking about people's interests, aims, or rights from an impartial point of view that accords everyone equal consideration.

This led us to our third idea. Perhaps parental authority is best conceived, not as a form of private dominion, but as a form of government, which exists in order to protect the interests of the governed. On this view, the child's *undeveloped potential for reason* is at once the basis of the child's moral equality with his parents and the basis for his temporary subjection to their authority. While children are not presently in a position to exercise their natural freedom, it is their birthright as human beings to attain this state. Special authority over children, then, is conferred on certain adults so that they can preserve, nourish, and educate children during their minority. Thus, as Locke puts it, "*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" (2T: II.270). This has been an extremely attractive view for contemporary philosophers, because it makes the rights of children primary in the order of justification. I believe that the fiduciary model will at least be an element of any satisfactory account of parental rights. But there is an important objection to the fiduciary model. We ordinarily do not think of people as having a

right to assume any particular fiduciary role, even if they are the well-qualified for it. Therefore, by itself, the fiduciary account suggests that no one has a fundamental right to assume the office of guardian over their own biological children—and that seems counterintuitive.

A natural thought at this point is that the fiduciary account of parents as governors is missing something important, namely, a recognition of the personal stake that parents possess in having an intimate relationship with their children. The nature of that relationship, it will be argued, is very different from the sort of relationship a public office-holder has with the public, and it constitutes so fundamental an interest that it *does* make sense to say that parents have an individual right to rear their children. The special interest of parents in having an intimate relationship with their children is one idea that was left relatively unexplored by the seventeenth-century natural law theorists. Hegel was perhaps the first major philosopher to think about the parental role in this way. But Hegel (in stark contrast to Locke) has been almost entirely neglected in the contemporary literature on the topic. In this chapter, I shall look at two contemporary intimacy-based accounts of parental rights. Then, in the next chapter, we shall look at Hegel's view in more detail and see what contributions he can make to the contemporary conversation.

9.2 The Value of Intimate Relationships

A) The value of intimate relationships

As I have just recounted, contemporary appeals to the value of intimacy in the literature on parental rights are typically motivated by a sense that fiduciary accounts, which focus on the rights and interests of children, are too one-sided and have wrongly left the interests of parents out of the picture. If the fiduciary account were the whole story, then why should the power of

guardianship should be vested in biological parents who may not be the most competent to exercise them (cf. Fried 1978: 153)? Harry Brighouse and Adam Swift put the question this way:

If all that matters is ensuring that children's interests are met as well as possible, then, children should be distributed to those people judged most likely to raise them best. If parents' interests play no justificatory role, what would there be to impugn a well-intentioned and efficient government agency that distributed children, who under a laissez-faire system would be reasonably well-raised, to adults who would be better parents, thus leaving some adequately good parents childless? (2006b: 86)

Some philosophers accept that view: parental rights over a given child, they maintain, ought to belong to those for whom possession is in the child's best interests (Valentyne 2003). They just argue that, typically, biological parents can be presumed to be the best caretakers for their own children, and that moreover various pragmatic considerations rule out "redistributing" children in all but the most egregious cases of parental incompetence. Thus, David Archard cautiously remarks, "it may be reasonable to presume that biological parents should act as the child's caretakers, especially if the feasible alternatives can be shown to be unacceptably poorer.... What the state should not do is presume that natural parents have a right to rear which derives simply from biological parenthood" (2004: 152). But many philosophers think that that kind of view is inadequate; instead, they "want a conception that will do justice to the hopes that parents have and the sacrifices they make in rearing their children" (Callan 1997: 245).

Ferdinand Schoeman offers an account of this kind. He argues that parents have a strong interest in having and maintaining an intimate relationship with their children, and that this interest is sufficiently important to ground the fundamental right of "biological parents ... to keep their children under their care in the setting of privacy, autonomy, and responsibility which is usually accorded the family," at least so long as they do not put their children in grave danger.

That means that even if children might be better off being raised differently or by someone else, third parties (including the government) may not intervene in any way, except to protect the child from serious and irreparable harm. This argument essentially has two parts. First, Schoeman offers a characterization of intimate relationships and of the social conditions they need to thrive. Second, he applies this account to the relationship between parents and children, and draws conclusions about parental rights.

Schoeman describes an intimate relationships as one in which the parties share their selves with one another to such a degree that the ordinary boundaries that “give shape to the self” become “transparent.” As a consequence, each individual comes to think of her personal well-being as inextricably entangled with that of the other (1980: 8). Such relationships, he maintains, are typically foundational to a meaningful and complete human life. For most people, “human existence would have little or no meaning if cut off from all possibility of maintaining and reestablishing such relationships”; “they constitute one’s roots in life or attachments to living” (14).

Because intimate relationships are so fundamental to our well-being, Schoeman argues that we ought to recognize that people have a general right to form and maintain these relationships without interference. This leads him to an account of the conditions under which intimate relationships thrive. Intimate sharing, he argues “presupposes limited sovereignty on the part of those reaching out to and sharing with others to determine the conditions of the relationship” (14). This limited sovereignty has two aspects. First the parties to the relationship need to have the *autonomy* to order and conduct their relationship as they see fit. Without this autonomy, the relationship does not permit the individuals to interact with one another in an immediate and spontaneous way as particular individuals, but rather forces them to play parts that are imposed

from the outside. A second aspect to sovereignty is *privacy*. When we feel that we're being watched, it is often difficult to act with sincerity, and without self-conscious artifice, since we tend to conform our actions to the standards we attribute to those watching us. Moreover, certain kinds of sharing—sex and frank conversation being two examples—are intimate precisely because we don't mean to share them with anyone and everyone.

It we have a general right to form and maintain intimate relationships, and privacy and autonomy are essential conditions for those relationships to flourish, then it appears to follow that we also have a right that our intimate relationships be accorded significant privacy and autonomy. Schoeman is particularly concerned that the state refrain from interfering in such relationships, since he thinks that the intervention of the state, or even the threat thereof, tends to change the character of the relationship from one of shared commitment and spontaneity to one in which individual rights and duties are clearly marked out. The consequence of this transformation is that people cease “see[ing] their interests fused with those of another” (14). “The very act of precisely sorting things out in conformity with the legalistic paradigm tends to wring out aspects of inner commitment” (15).

Now the parent-child relationship is one particularly common and important intimate relationship. Many adults, at least in our culture, choose to have children for the very purpose of establishing such intimate relationships with their children (8). From this, Schoeman draws two conclusions. First, even if it were possible to improve the prospects and well-being of children by taking them from their biological parents and transferring custody to other guardians, we would, in doing so, be interfering with the intimate relationship of the parent with her child – a relationship which she has a fundamental interest in maintaining and, consequently, a right to maintain. Second, since interference that comes short of depriving the parent of custody can also

disrupt the *intimate character* of the relationship, parents must also be accorded broad rights of privacy and autonomy in raising their children as they think fit (10). Of course, this does not mean that children do not have protected interests as well; parental rights are not absolute. And yet, if every moral duty that parents had to their children were legally enforceable, then parents would lack the autonomy and privacy that is necessary for intimacy in the first place. As Schoeman sees it, the reasonable middle ground is to say that the state may only intervene where the failure of parents to fulfill their duties places children in clear and present danger of grave harm.

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There are at least two important criticisms to make of Schoeman's argument. First, even if he has established that parents have a fundamental interest in the intimate character of the parent-child relationship, it is not clear how extensive this right to rear is. It is a shortcoming of Schoeman's argument that it is couched in such general terms. We can allow that parents have an important interest in having an intimate relationship with their children and yet still not know how much authority parents have over the content of their children's education (cf. Brighouse 2000: 17 and Brighouse and Swift 2006b). While I believe that consideration of far-fetched policy ideas—like the redistribution of children *en masse*—can be useful for reflecting on our moral beliefs, the usefulness will ultimately turn on the implications our beliefs have for more realistic problems and policies. For instance, does Schoeman's argument tell us whether parents can shelter their children from learning about Darwinian evolution or forms of safe-sex, if they believe those ideas are inconsistent with their religion?

The second objection is that, as Brighouse and Swift (2006b) point out, there is a gap in Schoeman's argument. Assume that Schoeman has made the case for thinking that it would be

unjust for the state to disrupt our already existing intimate relationships or prevent us from establishing them. It is less clear that Schoeman has made the case for thinking that adults have a right *to establish* an intimate relationship with children in the first place. As Schoeman himself observes, “adults can establish intimate relationships with other consenting adults” (1980: 16). From the fact that my life cannot go well without some intimate relationships, it does not logically follow that I have a right to establish any intimate relationship whatsoever. Therefore, Schoeman’s argument establishes that adults have a right to have some intimate relationships protected from interference, but not that they have a right to intimate relationships with children.

Schoeman tries to parry this objection by claiming that, in order for intimacy to take root, it is important that *the parties* be free to set the terms of their relationship. But Brighouse and Swift are right to answer that, when it comes to the relationship between adults and young children, it is artificial to speak of *the parties* setting the terms; rather it is chiefly the adults that set the terms, and the children who must live with them. With regard to relationships between adults, it is reasonable to give parties wide latitude to set the terms of their own relationships, since we assume that someone unhappy with the terms of that relationship can either renegotiate them or exit the relationship. But since children lack power to affect the structure and character of their relationships themselves, it is reasonable for the state to be more solicitous of children’s interests than those of adults. Therefore, it is arguable that the state is perfectly justified in making sure that both the pairings between particular adults and children, and the general structure of the parent-child relationship, are such that the not-yet-autonomous child could reasonably choose these for himself if he were capable of doing so.

9.3 The Distinctive Intimacy of the Parent-Child Relationship

Brighthouse and Swift want to remedy Schoeman's argument so that it avoids the two criticisms we have just considered. The approach they take is to argue that while the parent-child relationship is indeed just one form of intimate relationship, it has several unique features that make it non-interchangeable with other intimate relationships. This move is supposed to block the objection that adults do not have a powerful interest in establishing an intimate relationship with children at all, since they can just as well have intimate relationships with other adults. Because parent-child relationships are so different in kind from intimate relationships between adults, Brighthouse and Swift think that they can establish that adults *do* have protected interests in having intimate relationships with both adults and children. But they also argue that, although this grounds a fundamental parental right to rear children, it does not necessarily ground *extensive* parental rights of control. "Insofar as the purpose of parental rights is to protect the parental interests in having and maintaining a relationship of that kind, parental rights are justified only insofar as they are required for protecting that relationship" (2006b: 102).

Brighthouse and Swift pick out four features of the parent-child relationship that make it distinctive from other intimate relationships. *First*, children, particularly young children, are far more vulnerable to their parents, physically and psychologically, than their parents are to the child. In intimate relationships between adults, the parties are typically in *more* symmetrical positions with regard to their vulnerability to one another. *Second*, a child generally does not have either the *de facto* or *de jure* power to exit from a relationship with her parent, whereas the parent typically has both powers. In adult intimate relationships, both parties ordinarily possess the *de jure* power to exit, and even if their *de facto* power is unequal, that power is usually considerably greater than that possessed by the young child. Third, the kind of intimacy that

exists between parent and child is also very different than that which exists between two adults: “The love one receives from one’s children, again especially in the early years, is spontaneous and unconditional and, in particular, outside the rational control of the child.” In this way, children are capable of giving something to parents that no adult can give. Finally, the role of parent comes with a responsibility for fostering the healthy development and well-being of the child. Unlike many intimate relationships, then, the role of parent is, at least in large part, a fiduciary role (2006b: 92-95).

When we concentrate on the fiduciary role of the parent, we usually end up focusing on the child’s interests, since that is what the parent is charged with looking after. This can make it appear as if the rights of parents are wholly derived from the duty to look after the child’s interests. Brighthouse and Swift want us to recognize, however, that parents have “a nonfiduciary interest in playing this fiduciary role.” True, to play the role of parent is, first and foremost, to care for a child’s interests, but the reasons for the adult to play that role are not entirely reducible to the child’s interests. Rather, it is a valuable thing for one’s own life to “meet this distinctive moral burden.” This is not only because the love and trust of a child is qualitatively different from that of which adults are capable; it is also because being a parent requires the development and exercise of capacities that are not called for by any other pursuit and which open up possibilities of self-discovery that are unavailable in any other relationship. Brighthouse and Swift argue that this analysis of the parent-child relationship shows that the intimacy involved is quite different from that possible between adults and contributes to the well-being of adults in a different and non-interchangeable way. They conclude, therefore, that the “challenge of parenting is something adults have an interest in facing, and it is that interest that grounds fundamental parental rights over their children” (95-96).

Moreover, the fundamental interest that parents have in intimacy with their children helps us think about the content and extent of parental rights. Now many of the operational rights and powers that parents have over their children and against third parties are ultimately grounded in the interests of their children. For example, the right of parents to shield their children from strangers exists in order to protect children from people who might harm them. These operational rights of control are not grounded in the parent's own fundamental rights. The operational rights that are grounded in fundamental rights of parents are primarily what Brighouse and Swift call "associational rights." These are rights that parents need in order to protect their ability to share a life with their children. For instance, not only do parents have a right to live with their children and spend substantial time with them, but they also have "the right to share their enthusiasms with their children, including, for example, their enthusiasms regarding their own particular cultural heritage" (2006b: 102). Thus, "parents should be free to have their children accompany them to religious ceremonies and to enroll them in associations in which they will participate in the communities of value of which the parents approve (Hebrew School, the Ukrainian Youth League, cricket clubs, and so on)" (2009: 57). This is important since shared interests and values facilitate intimate relationships.

This right to expose children to our values and enthusiasms is limited, however, by the parent's duty to meet children's basic interests. The present argument would be compatible with various ways of filling in the content of those basic interests. Brighouse and Swift hold that one of the most important of them for liberal theory is that of acquiring the basic capabilities for exercising autonomy as an adult. They do not expand much on what this entails, other than that it prohibits parents from "indoctrinating" their children, forcing them into a particular career, or "manipulating an exclusive enthusiasm for cricket or folk music" (Brighouse and Swift 2006b:

104-105). Elsewhere, Brighouse has explained his conception of autonomy as follows. Negatively, to be autonomous is to be free from manipulation, adaptive preferences, and illegitimate coercion. Positively, it is to have the capabilities for reflecting critically on one's beliefs and values, subjecting moral principles to scrutiny, and disciplining one's own behavior in light of those values and principles (2002: 42; 2000: ch. 4; 1998). *Why* is this prospective autonomy a basic interest? Living well, he argues, has two aspects: the way of life must be good and the person living that life must endorse it "from the inside."¹ But because people have different characters, personalities, and constitutions, some generally good ways of life may not be suitable to some people. Thus, some people will find that the culture in which they were raised, while perhaps valuable for others, cannot make them happy (2000: 61-73). "For some of us it is vital for our long-term well-being that we be able to throw off some parts of the unchosen parts of our identities." This, he argues, is especially true for women or homosexuals who grow up in cultures that are sexist or intolerant of homosexuality (2002: 50). Therefore, if people are going to be assured a fair opportunity of living well, they need to "possess epistemically reliable ways of evaluating different ways of life" (Brighouse 2000: 63-71).

Brighouse and Swift maintain that as long as parents ensure that the child's interests are sufficiently served, "parents are not under an obligation to be considering the child's best interests as they exercise these [associational] rights" (Brighouse and Swift 2006b: 102). This appears to mean that, for example, when deciding whether it would be best to enroll my son in the Boy Scouts, I may appeal to my interest in sharing my enthusiasm for the outdoors with him,

¹ This is the picture of well-being that I examined at length in 3.2-3.3. Although I criticized the idea that this conception of well-being provided a strong argument against paternalism, I did make no objections to it as an account of well-being. The main question seems to be how objective one wants to make one's claims about ways of life that are valuable in themselves.

even if I think he might be *better served* by doing something else with his time. The reverse side of this argument, however, is that parents cannot object to sharing authority over their children with some other agency—like public schools—if that is in the child’s best interests, “as long as this division does not infringe the fundamental rights of parents to intimate relations with their children” (103).

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In at least three ways, the Brighthouse-Swift argument is a significant improvement upon Schoeman’s. First, it tries to explain what is distinctively valuable about the parent-child relationship as compared with other intimate relationships. Second, it gives us some guidance in thinking about the content of parental rights. And third, in arguing that parents have a nonfiduciary interest in fulfilling the fiduciary responsibilities of parenthood, it incorporates the attractive parts of the fiduciary account within a larger and more complete theory of the family.

I have four critical comments. The first is a relatively minor point. It seems to me that it would be possible to give a better and fuller account of the interest that people have in becoming parents. It seems right that a person has distinctive interests in being the recipient of a child’s spontaneous affections and in taking on the responsibility for a child’s education and daily needs. And while the child’s vulnerability and inability to exit from the family do seem to condition the kinds of responsibility parents undertake, I would hesitate to say that we have a comparably weighty interest in forming relationships with people who are especially vulnerable to us and who cannot leave us. Indeed, parents who value their children’s dependence too much may resent their children’s attempts to establish their independence as young adults. We shall

consider ways of improving this account later on (esp. 10.4); it suffices at present to have flagged the need to do so.

The second objection is this: the argument says that parents only have a fundamental right to those interactions with their children that are *necessary* for maintaining an intimate relationship. This is an important part of the account, because it “immediately supports only the right [of parents] to live with, and associate intimately with the children, not the right to control their education” (Brighouse 2000: 17). But if we restrict ourselves to what is *necessary* for maintaining an intimate relationship with one’s children, then adults can actually claim surprisingly little parental autonomy in their own name (as opposed to arguing that more parental autonomy is in their child’s best interests). To see this, consider a divorced couple that lives in the same city and which shares joint custody over the children. The children spend half of the their time with their mother, and half with their father. It seems that each of the parents under this arrangement has an opportunity to maintain an intimate relationship with the children, even though they must share divided authority with the other parent. But that suggests that, for an intact family, a similar kind of divided authority might be arranged with the state, without infringing the parents’ fundamental rights to maintain an intimate relationship with their children. That is, the child might live with their parents half the time, and with a state-appointed mentor the other half of the time.

Third, the way that Brighouse and Swift characterize the associational rights of parents does not seem quite right. Suppose I am an extremely assiduous social worker looking in on a parent-child relationship. The father has enrolled his child in the Boy Scouts, even though I think it would be better for the child to focus on learning how to play a musical instrument. Perhaps I ought reason that, though Boy Scouts may not be the best activity for the child, the father’s

decision ought to be respected, since it will provide opportunities for the parent to realize his interest in bonding with his child. But this seems like an odd way for the father himself to reason. We are supposed to imagine him granting that, although participating in the Boy Scouts is certainly not in his son's best interests, he is justified in enrolling his son in that activity anyway, since it is important *to him* and doesn't significantly harm his son? That doesn't sound right. I don't mean to suggest that parents always have a duty to pursue their children's interests at the expense of their own. (And I certainly don't mean that parents must always defer to their children's *judgments* about their own best interests.) But it seems strange to say that parents might legitimately seek bonding activities with their children *for themselves*—even when that is not what is best for their children.²

I have reserved my most serious criticism for last. Recall that one thing that Schoeman wanted to explain was whether the state would wrong parents if it redistributed at birth their children to other guardians who were more capable of promoting their best interests. We have reviewed the difficulty that Schoeman has in actually demonstrating that such a redistribution would wrong parents, since he does not explain why adults need to establish intimate relationships with children. Brighthouse and Swift think that their account bridges the gap in Schoeman's argument and shows why the redistribution scheme would wrong parents, namely, because parents have a strong nonfiduciary interest to play the fiduciary role of parent, and this interest is grounded in the fact that the kind of intimate relationship involved in this role is an important part of a fully flourishing life for many, if not most, adults. This interest is important enough, they argue, that it warrants protection with rights. But there is at least one important

² I briefly touch on this point again at 10.4.C.

part of the conclusion that Schoeman wanted to reach that Brighthouse and Swift acknowledge their argument does not establish:

We have shown why no one who will do an adequately good job of raising a child should be prevented from being a parent. But we have not shown that the child they should be allowed to raise should be their own biological child. This is not because we believe that there is no weighty interest in raising one's own biological child but because we do not have an argument establishing that there is such an interest. In this we are not alone. Such an interest is frequently asserted, but we are not aware of any convincing arguments for it.³

It is not altogether clear to me what Brighthouse and Swift are claiming that their argument *does* and *does not* establish. The most natural interpretation is that while parents have no positive claim to raise their own biological children, they do have a claim against having children redistributed away from them at birth, so long as they are adequately good parents. Technically, this would still permit the state (as far as parent-centered arguments go) to send new parents home from the hospital with children that are not biologically their own, but it is hard to imagine what the rationale behind this exercise would be, unless perhaps there were some way to predict which parents would be best at raising which "kinds" of children. If this is the only scenario under which parents would be deprived of their biological children, then the lack of an argument to establish the positive right of parents to raise their biological children is not very alarming. I get the sense that this is the interpretation that Brighthouse and Swift have in mind, for they say, a little later:

[A]bsent an argument that the interest in having a biological connection to the child one raises is very powerful indeed, we do not claim that the interest in being a parent impugns

³ Ibid., p. 97-98. And later on, they state, "We have an argument against the forcible redistribution of children from adequately good parents to others (or to state institutions) that might do better by them" (106).

redistribution at birth. What we do claim is that it impugns redistribution away from people who would be adequately good parents (though not as good as others) (98).

But this last sentence is not a conclusion that their argument entitles them to.

Since the interest in parenting is just as strong for unwillingly childless people as it is for procreators, the former have the same rights as the latter to be parents. Consequently, the conclusion that Brighthouse and Swift's argument really establishes is that whenever parents have their second child, then that child should *always* be redistributed away from the biological parents to unwillingly childless (but adequate) would-be parents, until all adequate would-be parents have at least one child.⁴ In fact, the conclusion that Brighthouse and Swift actually establish is even stronger and stranger: So long as the unwillingly childless people would make adequate parents, we should always redistribute children to them and away from their biological parents, even when it is known with certainty that *the biological parents would be substantially better* at promoting the child's interests than the initially childless would-be parents. Only then would we be respecting the rights of all parties. The *only* kind of reason that could possibly defeat the presumption of redistributing children to unwillingly childless persons is the same kind of reason that could justify denying custody to biological parents of their first child, namely, that they cannot meet children's basic needs. Now if *that* is the conclusion that Brighthouse and Swift intended to convey, they certainly don't drive the point home. The only way that I can imagine avoiding this truly weird conclusion, given their argument, is to insist that the right to parent establishes only a negative duty on the part of the state to refrain from redistributing children *away* from adequate parents but no positive duty to redistribute children to adequate

⁴ After every willing and adequate parent has at least one child, Brighthouse and Swift's argument gives us no further guidance as to the distribution of children. This is because their argument establishes a right to parent, not a right to parent an equal number of children as everyone else.

parents. But I don't know what argument Brighthouse and Swift could possibly avail themselves of to establish this asymmetry.

It may help to see my point here to observe that the argument that Brighthouse and Swift offer has precisely the same structure as an argument which grounds the right to private property in the contribution that individual property-ownership makes to the property-holder's well-being or freedom.⁵ In contrast to Lockean arguments which ground property rights to particular things in some special transaction or relationship of the right-holder, an argument that appeals to a general interest in having property—for example, because it fosters the development of personal responsibility and independence—naturally leads to the conclusion that “everyone ought to have property” (cf. Hegel PR: 49A). But that conclusion, far from establishing that all redistribution of private property is illegitimate (as a Lockean argument might), really establishes that, if anyone is without property, then some redistribution from the haves to the have-nots is mandatory.⁶ The Brighthouse-Swift argument, as it stands, is no different. If it is true that the “challenge of parenting is something that adults have an interest in facing,” then it would appear to follow that we ought to redistribute children at birth from the haves to the have-nots, until everyone able and desiring to take on this role has the opportunity.⁷

9.4 Intimacy and Natural Affection

Conspicuous in its absence in these contemporary discussions is any invocation of the natural affection that parents, and especially mothers, are often thought to have for their offspring. After

⁵ For example, the argument in Hegel, PR: 41 + A, 45 + R, 46, 49A. See the interpretation in Waldron (1988): ch. 10.

⁶ Thus, Hegel, PR: 229A, 230, 238 + A, 239 + A. Again, see Waldron (1988): ch. 10.

⁷ I offer my solution to this problem at 10.3.B.

all, you might have thought that this was the most obvious respect in which a parent has a personal interest in raising her own child. It seems particularly odd that there is no mention of the possibility that a mother might develop a strong attachment to her child in the womb. But, in fact, Brighthouse and Swift scrupulously avoid any such argument. Schoeman, for his part, maintains that the significance of the biological tie is only conventional, but that it does deserve respect since people in our culture do happen to value it (1980: 18). Arneson and Shapiro also seek to minimize the biological in their Lockean account of parental rights:

Locke may perhaps make too much of biological parenthood, but the rest of the story he tells remains credible. Society assigns major responsibility to particular persons to be primary guardians of particular children; in our society, biological parenthood is one way, perhaps a generally acceptable way, to assign these bundles of rights and responsibilities that are conventionally identified with parenthood (1996: 381).

Neil Levy and Mianna Lotz (2005) go further still. They agree that the significance of blood ties is only conventional, but that it is a convention that we ought to try to change, since it tends to marginalize blended and adoptive families. All of this differs sharply, of course, from the view that has predominated in Western thought. To select but one representative, we find Montaigne—who lost all but one of his children in infancy—reflecting that:

If there is truly a Law of Nature – that is to say, an instinct which can be seen to be universally and permanently stamped on the beasts and on ourselves (which is not beyond dispute) – I would say that, in my opinion, following hard on the concern for self-preservation and the avoidance of whatever is harmful, there would come second, the love which the begetter feels for the begotten (*Essays*, II.8, p. 434).

How are we to account for this sea-change? Part of the explanation, as I have already intimated, arises from a desire to hold an inclusive conception of the family that encompasses not just the traditional “biological” family, but also families where children are not genetically related to one or both of their social parents. We have also become more sophisticated about distinguishing the natural from “what feels natural,” and more sensitive to the ways that nature is

used to make power relations seem inevitable. In part, this is due to anthropological researches. In part, it is due to feminist challenges to masculine idealizations of maternity. Simone de Beauvoir assures us that closer attention to women's voices will reveal that "no maternal 'instinct' exists: the word hardly applies, in any case, to the human species. The mother's attitude depends on her total situation and her reaction to it [and] this is highly variable" (1952: 511). But even if there were natural feelings that parents felt for their biological children, we have become skeptical that they would have any normative significance. As we observed in a previous chapter, natural law thinkers held, as Aquinas puts it, that "those things to which man has a natural inclination, are naturally apprehended by reason as being good" (ST: I-II, Q.94, a.2). But most modern philosophers are more likely to endorse Mill's view that there are bad instincts, as well as good, and that "Conformity to nature has no connection whatever with right and wrong," and the conviction that it does has led to "false taste, false philosophy, false morality, and even bad law" ("Nature," CW, X: 400, 373).

In the next chapter, I turn to Hegel's account of the family, which, as we shall see, has much in common with the intimacy-based approaches we have just considered. But it also has much to contribute, not least in shedding light on the connection between biological and moral parenthood (see 10.3.B).

Chapter 10: The Affective Family in Modern Society

10.1 Introduction: The Relevance of Hegel

In this chapter, I discuss Hegel's conception of the family, its role in shaping future members of modern society, and the ways that the parental role can be a fulfilling part of a complete life. The chapter's premise is that a Hegelian account of the family is well suited to capture and integrate the more attractive ideas about the moral basis of parenthood that we have come across in the last four chapters. Before I delve into the details of this interpretation, let me offer an overview as to the general shape Hegel's integration of these ideas will take.

Like Locke, Hegel resists any temptation to assimilate parental rights to property (see Chapters 6 and 8). But whereas Locke (especially in the *Second Treatise*) tends to speak of the goal of moral education as the task of instructing the child *in the law* by which he is to govern his actions, Hegel provides a much more nuanced account of different aspects of rightful action: of abstract legal right, of inward morality, and of our associated lives in modern institutions. It is not that Locke had *no* notion of these subtleties, as his educational treatise makes evident. But it is Hegel's contribution to have provided a useful framework for organizing these ideas. Hegel also has a more modern view of the relationship between parents and other agencies, like schools, in raising children. For Locke, educators are merely the hired agents of parents, and understandably he foresaw no role for the government in this sphere. But Hegel insists that the state has the duty to supervise the education of children and to overrule the authority of parents

in some cases. In this way, the state takes on some of the characteristics of a “universal family” (PR: 239).

Although Hegel does not think of parental rights on a contractual model as, for instance, Hobbes did (see Chapter 7), Hegel does help us better understand why modern philosophers have sometimes been attracted to that position; namely, because we are resistant to the idea that we should be governed by some power alien to our will. The animating principle of the modern world, as Hegel sees it, is that we ought to be governed by law and yet obey only our own will (cf. Rousseau, SC: I.6). While contract is *one* way to obey a law that is not alien to our will, it is not the *only* way. We may also *identify* with the law to which we are subject. Thus, the love and trust that the child has for his parents play an essential role in making it possible for the child to internalize their rules and expectations and eventually make them his own. Moreover, if these rules are rational, then as an adult, the individual will be able to look back at his childhood and endorse his parents’ rules—at least on the whole—as consistent with his will as an adult. Therefore, there is something to the intuitions of the contract model; it is just that it fails to see that the origins of personal freedom lie in the intimate, solidary relationship of the family—not in a contractual relationship between independent individuals.

Hegel is indeed our contemporary insofar as he both makes affective relationships central to his account of the family and emphasizes not just the *duties* of parents, but the contributions that parental roles can make to the lives of adults. This contrasts sharply with the tenor of seventeenth-century philosophers—even in the case of Locke, who was in many ways ahead of his time in his thinking about the family. But Hegel’s account also has virtues that are missing from recent intimacy-based theories, which we explored in Chapter 9. First, his account of recognition provides deeper insight into the nature of some of the interests that parents have in

raising children. Second, the richer account of the formative tasks of the family reveals some of the different aspects in which parenthood can be a rewarding role for people. Third, because Hegel approaches the parent-child relation through the romantic love of the parents, he helps us understand the relationship between the different kinds of intimate relationship in the family. Fourth, Hegel suggests why the blood relation may contribute to the intimacy of the family as well as provide a model on which non-biological parent-child relations may be patterned. Rather than either taking biological facts as inherently normative, or treating them as mere brute facts, Hegel, I shall claim, seeks to “spiritualize,” or humanize, our biological nature and raise it to ethical significance. In this way, Hegel seeks to reconcile our natures as natural and moral beings. If Hegel is right, then, there is a sense in which Grotius was on to something when he sought to found the moral authority of parents on generation (see Chapter 6)

The primary respect in which Hegel’s account of the family will be unsatisfactory to us today concerns the rigid gender roles he assigns mothers and fathers. Even, here, however, Hegel’s theory is of interest, in that it at least helps us single out different ways in which the family can contribute to a rewarding life. We may want to think that both men and women can participate in “motherhood” and “fatherhood,” as Hegel understood those roles. And yet, at the same time, Hegel does force us to ask ourselves whether we can really pull off that amalgamation of roles without endangering the interdependent solidarity of the family unit.

Ultimately, this chapter is more in the spirit of a rational reconstruction of a compelling Hegelian account than that of pure historical exegesis. Like many sympathetic interpreters of Hegel’s social thought, my reading deemphasizes Hegel’s systematic metaphysical ambitions, and tries to find various ways of democratizing and naturalizing his views. And throughout, I seek to present Hegel’s position in the best possible light from our current vantage point, rather

than seeking the more dispassionate reading of the serious historian. Nevertheless, I have endeavored to be mindful of the difference between Hegel and a compelling Hegelian account, and to this end I have sought to make it apparent in those places where I am going beyond, or contrary to, Hegel's texts.

∴

Because Hegel approaches the parent-child relation through the romantic and conjugal love that parents have for one another, I begin with a discussion of Hegel's views on the nature of modern marriage (10.2). This may seem like an unnecessary digression from our main subject, but I shall be arguing (especially in 10.3.B) that Hegel correctly recognizes a close connection between the "inwardness" of companionate marriage based on romantic love and the ethical character of the modern parent-child bond. In order to bring the originality of Hegel's picture of marriage and the family into relief, I shall draw liberally on other writers, especially Locke, Montaigne, Kant, Aristotle, and Simone de Beauvoir. After an initial discussion of the relation between parents and children, as well as that between husbands and wives (10.3), I turn to a discussion of the formative tasks of the family in the upbringing of children (10.4). This, as I've already intimated, serves two purposes. In part, it enriches the Lockean account by providing a more nuanced view of the educational goals of the family. But it also brings into focus some of the different ways that parenting can be a fulfilling role for adults. Finally, in the last section, I discuss the Hegelian view as to the relation between the family and the state (10.5).

10.2 Nature, Contract, and Love

A) The marriage contract

To appreciate Hegel's conception of marriage, and how it influences his conception of the parent-child relation, it is useful to contrast Hegel's view with that of the older natural law tradition. For a philosopher like Locke, marriage was understood primarily in natural, instrumental, and contractual terms. First, man and woman come together out of natural sexual impulse. The typical result is procreation, but this is not ordinarily the intention of the mother and father. The propagation of the race is the design of Nature, or God, and we human beings participate in it simply by pursuing our own appetites. As Locke puts it:

What father of a thousand, when he begets a child, thinks farther than the satisfying his present appetite? God in his infinite wisdom has put strong desires of copulation into the constitution of men, thereby to continue the race of mankind, which he doth most commonly without the intention, and often against the consent and will of the begetter (2T: I.54).

Now all mammals come into the world needing the care of their mothers, who are naturally attached to their young. In grazing species, mothers can typically provide this care without any special contributions of the male, because she can find food for herself while nursing. But in animals that must hunt and gather their food, like many species of birds and carnivores, the mother often needs the help of her mate. Nature provides for this as well by implanting in these animals a certain attachment between mating pairs which lasts as long as necessary in order to raise the young (2T: II.79). Since human beings come into the world extremely helpless and have a very long childhood, man and woman must stay together even longer than mating pairs in most other mammal species. And as we would expect, we find in our natures not only the sexual

passion, but a tendency to form a more enduring affectionate attachment to our mates.¹ So Locke recognizes the existence of conjugal love, but it is instrumentally subordinated to the purpose of rearing children.

In the lower animals, natural impulses and attachments ordinarily suffice to keep male and female for as long as is necessary (II.80). But because human beings have freedom of the will, and do not act from instinct alone, we must be guided by law (II.57). Therefore, man and woman do not rely on affection alone, but make conjugal agreements in order care for their mutual offspring. The whole position is summed up most concisely in the following passage:

Conjugal society is made by a voluntary compact between man and woman: and though it consist chiefly in such a communion and right in one another's bodies, as is necessary to its chief end, procreation; yet it draws with it mutual support, and assistance, and a communion of interest too, as necessary not only to unite their care, and affection, but also necessary to their common offspring, who have a right to be nourished and maintained by them, till they are able to provide for themselves (2T: II.78).

Because the chief end of marriage is procreation and education of the young, there is no reason why matrimonial contracts “may not be made determinable,² either by consent, or at a certain time, or upon certain conditions, *as well as any other voluntary compacts,*” so long as the interests of any children are secured.

∴

¹ There is a long and mostly unconvincing criticism of this part of Locke in note 12 of Rousseau's *Discourse on the Origin of Inequality*. Rousseau wants to argue that, in the state of nature, man and woman would not have formed any lasting attachments and would have separated immediately after copulation. While Rousseau rightly insists on the distinction between moral love and physical desire, he fails to appreciate (at least in this instance) that there is also a difference between loving attachment and romantic love. Part of the problem (as Rousseau half recognizes) is that the very idea of human beings in a historical state of nature is incoherent, since it is natural for human beings to live in groups mediated by convention.

² That is, “terminable.”

Characteristically, Hegel thinks this picture is not so much wrong as one-sided—particularly for his own time. Of course, there are natural, instrumental, and contractual aspects to the formation of families, but these for Hegel must be understood in their connection to the spiritual, non-instrumental, and institutional aspects.

Hegel would agree with Locke that biological drives and the developmental needs of children form the natural foundation of the family. Basic to Hegel's picture is a natural drive for the feeling of unity with another, which underlies the human sentiment of love (EN: 369; PR: 158A). In its most basic, biological form, this desire for unity underlies the sex drive, which exists in all animals (EN: 368). In mammals and birds, mothers (and in some species, fathers) also have this feeling of unity with their young offspring (EN: 370A, pp. 425-426).³ Now, from our perspective, most of Hegel's philosophy of nature is admittedly overly metaphysical and rationalistic: He wants to account for why nature necessarily had to be the way that it in fact is, and he is unwilling to accept anything as a brute fact.⁴ For this reason, Hegel's attempt to explain *why* the sex drive and maternal affection exist is unlikely to be of much interest to us except from a historical perspective.⁵ But that notwithstanding, there is, I think, little objectionable in his basic understanding of the drives to which we are subject as animals.

³ Although I do not find Hegel expressly saying so, he at least *ought* to agree with Locke that the tie between fathers and their offspring, where such exists, is at least originally mediated through the father's enduring attachment to the female, since otherwise the father would not be around for the birth of his offspring. (Indeed, this helps account for why, even amongst human beings, there is considerably more cultural variation in fatherhood than in motherhood.)

⁴ Thus: "thought will be satisfied with nothing short of showing the *necessity* of its facts" (EL: 1).

⁵ In order to explain the sex drive, he writes, "the individual as a *singular* does not accord with the genus immanent in it, and yet at the same time is the identical self-relation of the genus in *one unity*; it thus has the *feeling* of this defect. The genus is therefore present in the individual as a straining against the inadequacy of its single actuality, as the urge to obtain its self-feeling in the other of its genus, to integrate itself through union with it and through this mediation to close the genus with itself and bring it into existence" (EN: 368).

Hegel would also agree with Locke that, as rational creatures, mature human beings do not act upon instinct or impulse alone. Because we are able to represent our impulses to ourselves, we are able to stand back from them and resolve ourselves against acting as we are immediately inclined (EM: 473-478; PR: 4 *ff.*). And because we are capable of communicating our representations to one another through language (EM: 459), we are capable of making practical intelligence external and collective, in that we can coordinate our activity with one another by means of laws and agreements (EM: 485-486).

But Hegel would say that Locke jumps too quickly from the idea that the human family is always structured by rules and agreements to the historically contingent idea of marriage based on a free contract between the parties. This is indeed typical of the spirit of the modern age, but Hegel recognizes that in other times and places, kinship laws have been arranged differently and yoked to various other ends. In some societies, for instance, parents might arrange their children's marriages for their own social, economic, or political ends, without consulting the individuals concerned (PR: 162A). Or a man's wife and children may be regarded as his property, which may even be purchased or sold to others (PH: 286-287; PR: 43R, 175R). But in the modern world, we recognize "the right of the subject's *particularity* to find satisfaction" or "the right of *subjective freedom*" (PR: 124; cf. 261A). This means that there is a general demand that the institutions under which we live as men and women be, in some sense, expressions of our individual wills—not alien impositions. Social contract theory is one manifestation of this modern spirit: that we be subject only to a government to which we consent (PR: 258). Marriage as a voluntary contract between the parties is another.

Hegel breaks from Locke in a more significant way when he insists that marriage, at least in nineteenth-century Europe, is *not* just like an ordinary contract. In an ordinary business contract,

I might enter into a bargain for any number of motives, and I am typically more interested in simply finding someone who will hold up his side of the bargain than in my partner's particular personality. And there have been times and places where marriage has been like that as well. Marriages might be made for all kinds of reasons: for political connections, for social advancement, to engage in sex without sin, to avoid becoming an old maid, to acquire a helpmate in running the farm, to acquire children or heirs, and so on (PR: 162A). And all of these motives would be free of any social disapproval, so long as one followed through on one's duties as a husband or wife. For Montaigne, writing in late sixteenth-century France, this is one reason why friendship of the highest sort is almost impossible in marriage: although marriage is freely contracted, "it is a bargain struck for other purposes; within it you soon have to unsnarl hundreds of extraneous tangled ends, which are enough to break the thread of a living passion and to trouble its course, whereas in friendship there is no traffic or commerce but with itself" (*Essays*, I.28, p. 209). This is not to say that, in such periods, husbands and wives did not feel tenderness and affection for one another. It is only that romantic love was not understood to be either essential to marriage or a moral precondition for entering into it.

Hegel thinks that we moderns take a much more puritanical attitude toward marriage. At first, this is surprising. You might have thought that the spirit of subjective freedom would have led us to believe that everyone should feel free to marry for whatever reasons they like. But, instead, we insist that marriage has to be entered into with the right motive—that of true love. As Hegel puts it, "In modern times ... the subjective origin of marriage, the *state of being in love*, is regarded as the only important factor. Here, it is imagined that each must wait until his hour has struck, and that one can give one's love only to a specific individual" (PR: 162A). This is why we, like Hegel, wince when a philosopher like Locke says that the marriage contract

consists “chiefly in a ... right in one another’s bodies, as is necessary to its chief end, procreation.”⁶ To us, this seems crude. We are more likely to agree with Hegel’s view that sex is, at its best, but an external expression of the love that spouses have for one another. From a truly human, or spiritual, perspective, marriage in the modern world is supposed to have no end beyond the love that two individuals have for one another. Children may be the culmination of a marriage, but marriage is not *for* procreation (164 + R).⁷

This is an important part of the explanation as to why Hegel does not follow Kant in treating of marriage and family alongside property and contract. Kant was innovative in sharply separating his discussions of law and rights from that of morality in the *Metaphysics of Morals*. As he saw it, although one can act within one’s rights regardless of motive, one’s action has genuine *moral worth* only if it is performed from the motive to do one’s duty for its own sake. Hegel follows Kant in distinguishing between external or “Abstract Right” and the realm of conscience or “Morality.” But Hegel thinks that, unlike property and contract, which are concepts of abstract or external right, the family cannot be understood without bringing to bear some of the “internal” concepts of morality, like intention and happiness. For Hegel, then, marriage and family are partially akin to Kantian morality, in that these are relationships that

⁶ This *sounds* like Kant’s view—viz., that “sexual union in accordance with law is *marriage* ..., that is, the union of two persons of different sexes for lifelong possessing of each other’s sexual attributes” (MM: 6:277)—but in fact it is very different. For Locke, marriage exists for the sake of children. Kant, on the other hand, is closer to holding St. Paul’s view: “that it is better to marry than to burn.” (1 Cor. 7:10). For Kant, marriage exists in order to make sex, which is morally problematic, permissible. Procreation may be “an end of nature,” Kant says, but it is not essential to marriage. Ultimately, then, Hegel’s view is more akin to Kant’s than Locke’s, in that it is concerned with the ethics of sex. However, instead of dwelling on the idea that sex is immoral outside of marriage, Hegel argues that the ethical significance of sex can only be fully realized in marriage. For Kant, sex within marriage is not wrong; for Hegel, it is good.

⁷ Thus, Hegel’s conception of marriage is well-suited to the expansion of the institution to include same-sex couples. This is in contrast to modern natural law theorists who continue to stress the centrality of procreation—cf. Finnis (1994) and George (2004).

must be undertaken with the right motives, and for no end beyond themselves.⁸ By attempting to handle marriage as a part of external right, which may be performed for any motive, Hegel thinks that, like Locke, Kant “debased” the institution and reduced it to a mere “contract entitling the parties concerned to use one another” (PR: 161A). This does not mean marriage and family are *merely* moral categories for Hegel. As we shall see later on, they have a social, external character that cannot be fully captured by the individualistic categories of morality either.

B) Love and recognition

But why does Hegel think that romantic love *has* become central to the modern family? And how has that affected the relationship between parents and children? To understand this, we need to say more about Hegel’s understanding of the nature of love. We have already seen that, in its more primitive forms, animals too experience a drive for unity. But Hegel thinks that, in human or spiritual terms, this drive for unity has a different and deeper significance—namely, that it satisfies our need for recognition.

Hegel’s central discussion of recognition is, of course, the “struggle for recognition” dialectic in the *Phenomenology of Spirit* (166-196). But it would be out of place here to enter into an extended discussion of that complex passage and its implications for our subject matter—indeed, this is a task made particularly difficult given that Hegel denies that the struggle for recognition exists in its pure form outside the state of nature (EM: 432A). Instead, I want to simply describe, in a somewhat breezy manner, the nature of the desire for recognition in ordinary life.

⁸ Fichte makes the same point even more clearly: “Philosophers have felt obliged to explain what the end of marriage is and have answered the question in very different ways. But marriage has no end other than itself; it is its own end,” *Foundations of Natural Right*, “Outline of Family Right,” §8.

Unlike most animals, human beings have a highly developed capacity to imagine how things look to others, and how something would look to ourselves, differently situated. This ability to distance ourselves from our own immediate perspectives is what allows us to make the distinction between reality and appearance. Within practical cognition, this perspective-taking permits us to make the distinction between what is desired and what is desirable, which is to say, between what merely seems good and what is really good. Hegel believes that once a subject has made that distinction, he cannot but want what is really good, what there is reason to want. I may want my own arbitrary will to be an authoritative reason for me, but that is not the same as not caring about what there is reason to do. This is the basis of our capacity to value things as opposed to merely desiring them.

Now the perspective of other subjects is potentially disturbing, because their ideas about what is true and good may conflict with my own, and in this way, challenge the objective authority of my perspective. Moreover, to know that I and my perspective objectively matter at all, I am bound to think about how I appear in the viewpoint of others. This is why I seek the recognition of my reality and worth in the eyes of others. The need for recognition can be glimpsed in its most primitive form in children, who immediately seek the recognition of their parents for any small achievement. Without that recognition, the child cannot take satisfaction in his accomplishment, as it isn't yet real for him. Although the recognition we need as adults is typically not so direct or immediate, the basic need does not go away. As Hegel sees it, we are only real and valuable to ourselves insofar as we exist for another (PS: 178). Alone we feel deficient and incomplete (PR: 158A).

But this need for the recognition of others appears to come at a great cost, for it seems to imply that we cannot truly be free, or self-determining.⁹ Instead, we appear to be condemned to exist for ourselves only by existing for others. As Rousseau puts it in the *Discourse on the Origins of Inequality*, in such a state, the individual is “always outside himself and knows how to live only in the opinion of others”; it is “from their judgment alone that he draws the sentiment of his own existence” (1997: 187). But this need for the recognition of the other puts us in the power of another, for now I depend on his approval. And this suggests that, in a very deep way, the modern demand for individual freedom in society is impossible to satisfy. As Rousseau seemed to suggest pessimistically in the *Discourse on Inequality*, freedom appears possible only in the personal independence and isolation of the state of nature. The solution to this problem, according to Hegel, is to identify with the other who recognizes me. To identify with another, in this sense, is to conceive of the other as a part of myself. And love is the most immediate and intense form of such identification—although, as we shall see, it is not the only form. In Hegel’s words, “The first moment in love is that I do not wish to be an independent person in my own right” (158A).

Now the idea of identifying with another through love or affection is familiar enough. Aristotle, for instance, says that a person relates to his true friend as he relates to himself; a friend is another self. And so, my desire that my friend fares well is not like my goodwill toward perfect strangers, but more like my desire for my own well-being.¹⁰ There is a particularly moving portrait of such identification in Montaigne’s essay “On Friendship”:

⁹ Freedom, in its broadest sense, is “the absence of dependence on an Other,” or—to say the same thing—to be limited and determined by nothing external to oneself, to be self-determined (EM: 382+A; PR: 7, 23).

¹⁰ NE: IX.4, 1166a30-34; IX.9, 1169b6-9.

What we normally call friends and friendships are no more than acquaintances and familiar relationships bound by some chance or some suitability, by means of which our souls support one each other. In the friendship which I am talking about, souls are mingled and confounded in so universal a blending that they efface the seam which joins them together so that it cannot be found. If you press me to say why I loved [my friend], I feel that it cannot be expressed except by replying: ‘Because it was him: because it was me’ (*Essays* I.28, pp. 211-212).

Or, again, Freud observes that “At the height of being in love the boundary between ego and object threatens to melt away. Against all the evidence of his senses, a man who is in love declares that ‘I’ and ‘you’ are one, and is prepared to behave as if it were a fact” (1961: 13).

The gloss that Hegel would put on this last idea—that of being prepared to behave as if I and my beloved were one—is twofold. First, as Aristotle suggests, the well-being of the beloved becomes a part of my well-being (PR: 125). Second, another part of my well-being now becomes the well-being of my relationship with the beloved. That is, it becomes important to me, not only that I and my beloved fare well, but that we fare well together. In this way, the relationship is not just a casual relation, like that of the parties in a mutually advantageous business contract; the relationship has its own life and substance, of which I experience myself as a part (PR: 159). Being in the grip of this love, I do not want to become the person who could be happy without my relationship with the beloved. Someone might say, “But we are assuming you *would be just as happy* separated as you are now. What, then, could be bad about that?” The lover replies, “If *I* were happy separate from my beloved, then that would not be *me*.”¹¹

¹¹ There is some difficulty in understanding the proper sense in which I would no longer be me if I ceased to care about what I now care about. Does the lover really believe that in such a case there would be no continuity of his personal identity? That seems like an exaggeration. A better way of understanding this language is as talk about my practical identity. If I ceased to care about what I now care about, then my life would be organized according to different principles, and I would be a different person in the way that Paul was a different man than Saul had been. But Paul obviously recalled the days in which *he* was a different person.

Now, as Hegel sees it, by seeking recognition in someone with whom I identify in this way, I put myself in the power of another who is not alien to myself. “Just as Adam says to Eve: ‘You are flesh of my flesh and bone of my bone, so does spirit say: ‘This is spirit of my spirit, and its alien character has disappeared’” (PR: 4A).¹² Therefore, I get to have it both ways. My worth as an individual is affirmed through the *recognition* of another, and yet, in virtue of my *identification* with the other, I remain wholly “with myself.” Therefore, being dependent on nothing that is alien to myself, I become self-determining—or free. This *being with oneself in another* is the “concrete concept of freedom” which we feel immediately “in friendship and love” (PR: 7A).

However, to really have it both ways, it is necessary that my individual identity is not wholly lost in the union; my individuality is preserved and transformed in the union. As Hegel put it in an early writing, “the separate still remains” in love, but now “as something united.”¹³ In love, my individuality is preserved in that the other loves me as a particular, concrete person, who in turn needs me, and needs my love and recognition (PR: 162A). Thus, “The *second* moment of love is that I find myself in another person, that I gain recognition in this person, who in turn gains recognition in me” (PR: 158A). Because my individuality is not wholly effaced in love, Hegel might be a little wary of some of Montaigne’s talk of a total blending of souls. After all, if identification led to a perfect unity, then *we* would no longer be a “we” at all—but only an I. Then presumably we would be back to where we started and in need of external recognition and

¹² Although this quotation captures the present idea perfectly, I have taken it slightly out of context. Hegel is actually describing the way in which mind’s rational comprehension of something (e.g., a part of nature or society) removes its alien character: “it is only when I think that I am with myself, and it is only by comprehending it that I can penetrate an object; it then no longer stands opposed to me.”

¹³ “Love” in Hegel (1948): 305.

validation all over again. In a genuine “we,” there is a unified plurality—not a perfect unity. This is essentially an Aristotelian idea. In the *Politics*, Aristotle disapproves of the notion he attributes to Aristophanes, according to which “lovers, because of their excessive friendship, want to grow together and become one instead of two.” The result of that, Aristotle maintains, would be that “one or both [of the lovers] has necessarily perished” (*Politics* II.4, 1262b10-15). This is as if, recognizing that a harmony or rhythm were a kind of unity, one were to then conclude that the most beautiful harmony is a single note, or the most engaging rhythm a single beat (*Politics* II.5, 1263b33—35).

C) *Amitié and amour*

But the kind of “love” implicated in the desire for recognition does not, at first blush, seem to have much to do with romantic or sexual love—Montaigne’s *amour*. For Aristotle and Montaigne, the highest kind of affection is “friendship-love,”—*amitié* in Montaigne’s vocabulary. Such friendships *may* exist in marriage, these philosophers allow, but they are usually not friendships of the most perfect kind. The highest friendship, because it is a form of identification, is between equals, but man and woman are naturally unequal (NE: VIII.5, 7, 12; *Essays* I.28, p. 210). For Montaigne, *amour* is not even a kind of *amitié*:

You cannot compare with friendship the passion men feel for women, ... nor can you put them in the same category. I must admit that the flames of passion ... are more active, sharp and keen. But that fire is a rash one, fickle, fluctuating and variable; it is a feverish fire, subject to attacks and relapses, which only gets hold of a corner of us. The love of friends is a general universal warmth, temperate moreover and smooth, a warmth which is constant and at rest, all gentleness and evenness, having nothing sharp or keen. What is more, sexual love is but a mad craving for something which escapes us.... As soon as it enters the territory of friendship (where wills work together that is) it languishes and grows faint (*Essays* I.28, pp. 208-209).

And yet Hegel takes romantic and conjugal love to be the paradigmatic form of “recognitive” love (cf. PS: 456). Why? There are, I believe, two parts of the explanation.

One reason why *amour* is the highest form of love for Hegel can best be brought out by further contrast with Montaigne. Montaigne, as we have seen, doubts that there can be true friendship between husband and wife. In part, this is because, in Montaigne’s world, marriage is seldom entered into for the sake of the other person; it is “bargain struck for other purposes.” “In marriage, alliances and money rightly weigh at least as much as attractiveness and beauty. No matter what people say, a man does not get married for his own sake: he does so at least as much (or more) for his descendants, for his family. The customary benefits of marriage ... concern our lineage” (*Essays* III.5, p. 959). Montaigne is also skeptical that women are capable of the same depth of friendship as men.¹⁴ And yet, because the “perfect friendship” is one in which “everything is common,” one in which each friend “grieves that he does not have several souls, several wills, so that he could give them all to the one he loves,” it seems to Montaigne like a blunder of creation that the union of souls should always be separated from the union of the flesh:

If it were possible to fashion such a relationship, willing and free, in which not only the souls had this full enjoyment but in which the bodies too shared in the union – *where the whole human being was involved* – it is certain that the loving friendship would be more full and more abundant (*Essays* I.28, p. 210, emphasis added).

Hegel starts from a similar premise: “love is indignant if part of the individual is severed and held back as a private property.”¹⁵ But for Hegel, romantic love makes possible this complete

¹⁴ “Women are, in truth, not normally capable of responding to such familiarity and mutual confidence as sustain that holy bond of friendship, nor do their souls seem firm enough to withstand the clasp of a knot so lasting and so tightly drawn” (*Essays* I.28, p. 210).

¹⁵ “Love” in Hegel (1948): 306.

union of body and soul—a companionship in which nothing is held back. This is a form of friendship that was unavailable to Montaigne.

For this reason, Hegel would also disagree with Kant’s contention that sexual “ardor has nothing in common with moral love properly speaking, though it can enter into close union with it under the limiting conditions of practical reason” (MM: 6:426). Where Kant sees animal, sexual passion and spiritual, moral love as two distinct affections, which may be *combined*, and whereby moral love governs and limits sexual passion, Hegel understands moral love to be the “truth” of sexual passion, the implicit end after which sexual passion strives, and in which sexuality is completed (PR: 163-164; EM: 397). That is, in pleasure, I make myself aware of myself and as existing for myself; I feel myself to be alive (cf. PS: 360 *ff.*). In sex, I seek this pleasure through physical contact with another sensual being that feels me. This is already a sort of incipient recognition. I feel myself to be alive as I am felt to be alive by another. But this is only a “recognition” (if it can be called such) of me as a living thing, and yet I also desire to be recognized as a person or subject. And this is precisely what love is, the emotional mutual recognition of two subjects.¹⁶ This, I believe, is an important aspect of Hegel’s thought to which we will return in the parent-child relation. Hegel neither wants to treat conjugal union as a purely natural relationship, nor as a purely spiritual one. He wants to show how the spiritual relationship is founded on and transforms the natural relationship (PR: 161+A). In this way, Hegel rejects Kant’s pronounced dualism between our animality and humanity (cf. MM: 6:387);

¹⁶ Kant, perhaps, came closest to holding a similar view when he described, in another context, the physical beauty of nature as a visible symbol of morality. See *Critique of the Power of Judgment*, 5: 351 *ff.* Montaigne comes closest to Hegel’s view when he quotes Cicero on love: “Love is the striving to establish friendship on the external signs of beauty” (*Essays*, I.28, p. 211, quoting *Tusculan Disputations* IV.xxxiv).

instead, Hegel seeks to reconcile our animal and spiritual natures, by showing how spirit transforms and yet preserves our animality.

The second reason why *amour* is the highest form of love for Hegel is due to its intense exclusivity. Ordinarily we are tolerant of our friends having friends other than ourselves. True, we can feel jealousy for a friend's attention, especially when we feel that our affection for him is greater than that we receive in turn. But too much of that kind of jealousy we regard as pathological.¹⁷ And it is not unusual for close friendships to exist between three or four people who usually associate with one another as a group. But jealousy seems much more inherent in romantic love. *Amour*, as opposed to lust, seems prone to fix on the particularity of a single person, and then to elevate the worth of that person, perhaps unrealistically, in comparison to all others. And, as Rousseau observes, "one wants to obtain the preference that one grants": we want our own virtues to be compared with and valued above those of all others in the eyes of the beloved (*Emile*, Bk. IV, p. 224).¹⁸ Surprisingly (given the nature of her relationship with Sartre), Beauvoir makes a similar argument: "No doubt fidelity is necessary for sexual love, because the desire felt by two people in love concerns them *as individuals*; they are unwilling for this to be contradicted by experiences with outsiders; they want each one to be irreplaceable for the other" (1952: 445-446, emphasis added). We might think of romantic love, then, as the cult in which the individual is worshipped—indeed, where the individual seeks his own worship. But paradoxically the lover does so by seeking to renounce his individuality in union with the

¹⁷ This is why, I think, Montaigne's description of his friendship with Etienne de La Boëtie strikes us as bordering on the erotic: "The perfect friendship which I am talking about is indivisible: each gives himself so entirely to his friend that he has nothing left to share with another" (*Essays* I.28, p. 215).

¹⁸ For a deeper discussion of Rousseau in this connection, see Neuhouser (2008): esp. 142-143, 170-171.

beloved (158A).¹⁹ The argument, therefore, is that *amour* becomes the highest form of love for moderns like Hegel, because it is the kind of affection that most fully recognizes “the right of the subject’s *particularity* to find satisfaction” (PR: 124), the right of the individual to be first and to be exalted above others—or, to put it in Rousseau’s vocabulary, the right of comparative self-esteem, of *amour propre*.²⁰

10.3 The Affective Family

A) Companionate marriage

And yet, how can it be reasonable to found a family on *amour*, if *amour*, as so many philosophers attest, cannot last long between two people. “I know of no marriages which fail and come to grief more quickly,” Montaigne asserts, “than those which are set forth on foot by beauty and amorous desire. Marriage requires foundations which are solid and durable... The boiling rapture is no good at all.” And later he adds: “it is against the nature of *amour* not to be impetuous, and it is against the nature of what is impetuous to remain constant” (*Essays* III.5, pp. 959, 1001). I believe that part of Hegel’s position has to be a reconceptualization of what *amour* is. Hegel, admittedly, does not have that much to say on this head, so it would be a little

¹⁹ Narcissism appears to be a pathological deviation from romantic love, in which, roughly, the subject seeks to recognize herself through the eyes of the lover, but is little interested in recognizing the other as a subject in his own right. If this is correct, then we would expect narcissism to become more prominent in cultures more devoted to the cult of romantic love.

²⁰ I find Lawrence Stone (1977) to offer an excellent description of modern individualism in the sense that is integral to *amour*:

Individualism is a very slippery concept to handle. Here what is meant is two rather distinct things: firstly, a growing introspection and interest in individual personality; and secondly, a demand for personal autonomy and a corresponding respect for the individual’s right to privacy, to self-expression, and to the free exercise of his will within limits set by the need for social cohesion... Because these are now such familiar tenets of Western society, they should not be taken for granted. They are culturally determined values, which most societies in the world have despised or deplored, and which most still do. Normally, individualism is equated with narcissism and egocentricity, a selfish desire to put one’s personal convenience above the needs of society as a whole... (223-224).

presumptuous to say that I am merely articulating Hegel's view. Rather, I shall describe the sort of reconceptualization that I think is necessary if one is to hold, with Hegel, that the modern family should be based on romantic love.

For Montaigne, *amour* is essentially sexual infatuation: it is a "feverish fire": "rash, fickle, fluctuating, and variable" (*Essays* I.28, p. 209). It is not, however, merely lust or sexual arousal. Mere sexual arousal (especially for men, it seems) is not that particular in its object; it can be quite casual. A man may be sexually aroused by one woman, and satisfy his desire with another. Sexual infatuation, on the other hand, like friendship, is focused on a particular person and is not so easily transferred at will.²¹ It seems difficult to deny that sexual infatuation is, indeed, like a short-lived fever. Therefore, there is something to Montaigne's view that a marriage based on sexual infatuation is bound to be in trouble, unless it is soon replaced with the much cooler relationship of friendship—albeit, a friendship that is unlikely to be of the highest kind.²² Hegel—and I think *we*—carve up our emotional lives in a different way. We think of sexual infatuation as, at its best, the opening act of romantic love. The less feverish, but possibly much deeper, loving-companionship that comes later comprises its later acts.

²¹ Thus:

"As for me, I no more know Venus without Cupid than motherhood without children: they are such things whose essences are interdependent and necessary to each other. So such cheating splashes back on the man who does it. The *affaire* costs him hardly anything, but he gets nothing worthwhile out of it either....I rarely lent myself to venal commerce with prostitutes...because I despised it. I wanted to sharpen the pleasure by difficulties, by yearning and by a kind of glory." And elsewhere: "A good marriage (if there be such a thing) rejects the company and conditions of Cupid: it strives to reproduce those of loving-friendship." (Montaigne, *Essays* III.3, pp. 930-931; III.5, p. 961).

²² Cf. Mary Wollstonecraft:

"Friendship is a serious affection; the most sublime of all affections, because it is founded on principle, and cemented by time. The very reverse may be said of love. In a great degree, love and friendship cannot subsist in the same bosom; even when inspired by different objects they weaken or destroy each other, and for the same object can only be felt in succession. The vain fears and fond jealousies, the winds which fan the flame of love, when judiciously or artfully tempered, are both incompatible with the tender confidence and sincere respect" (*Vindication of the Rights of Woman*: ch. IV, ¶ 73 / 1995: 151).

But now, you will wonder whether we and Montaigne are simply talking past one another. If that is indeed what we are doing, then Montaigne would seem to have the better view, since it seems to have a stronger claim to having carved nature at its joints. What, other than a will to self-deception, could justify calling these apparently different feelings by the same name? As Montaigne puts the accusation:

Those who think to honor marriage by associating passion with it are like those (it seems to me) who to promote virtue hold rank to be none other than a virtue: there is some cousinship between rank and virtue but great differences as well; there is no gain in confusing their names and title-deeds: we wrong them both by confounding them in that way” (*Essays* III.5, p. 959).

To parry this charge, Hegel will have to maintain that the loving companionship of enduring romantic love does not simply replace the more intense and transitory feeling of sexual love, but that the two are somehow of a piece. It must be argued that true romantic companionship cannot develop except from the germ of sexual ardor, and perhaps as well, that something of sexual love is preserved in the later acts of the romantic relationship. Such an argument might go something as follows.

First, romantic infatuation forms in the lover’s mind the idea that he cannot be happy without this particular individual, the beloved. Further, this infatuation leads the lover to seek out the particular virtues of the beloved and to compare them favorably to others. In this way, romantic infatuation fixes in our minds the special particularity of this one individual, and, when all goes well, this forms the basis of the attitude of cherishing the person of the beloved—an attitude that is more durable than the first fever of infatuation. This attitude in turn inspires in us ethical ideals—like loyalty, support, benevolence, and respect—which infatuation is itself incapable of

realizing or sustaining.²³ A romantic infatuation that understands itself to be merely provisional seems incomplete or half-hearted. But the insufficiency of infatuation is not merely because it is fleeting; it also has a tendency to be superficial. Sidgwick, for instance, has a useful distinction between the more unreflective forms of love and rational benevolence:

Love is not merely a desire to do good to the object beloved, although it always involves such a desire. It is primarily a pleasurable emotion, which seems to depend upon a certain sense of union with another person, and includes, besides the benevolent impulse, a desire of the society of the beloved: and this element may predominate over the former, and even conflict with it, so that the true interests of the beloved may be sacrificed (1907: 244).

Because infatuation inspires in us ideals of benevolence, respect, and so forth, it leads us on to a deeper, if less passionate, relationship that is adequate to the task. Therefore, just as the natural sex impulse draws us upward to the spiritual feeling of romantic love, so too does the feeling of romantic love draw us upward to a committed relationship that binds us with ties that are stronger than transitory feelings. And, therefore, as sex is incorporated in but subordinated to romantic infatuation, romantic infatuation is incorporated in but subordinated to the committed ethical relationship of matrimonial companionship (PR: 163+A).

Of course, marriage is not *merely* romantic love—whether infatuation or loving-companionship. Love is a feeling, whereas marriage is a commitment, the general contours of which are shaped by prevailing custom and law. The claim, then, must be that the loving-companionship of the later acts of romantic love cannot exist without commitment. The ethical ideals of loyalty, trust, and respect require commitment to flourish. If we did not commit ourselves to those we love, then we would be holding something back from them; indeed, we

²³ As Rousseau puts it, “A heart full of an overflowing sentiment likes to open itself. From the need of a mistress is soon born the need of a friend” (*Emile*, Bk. IV, pp. 214-215).

would be holding back our humanity, our capacity to resolve our will and rise above mere inclination. But we do not create the terms of this commitment from nothing: to a greater or lesser extent, we use existing social forms as models (cf. Raz 1986: 308-33, 391-395).²⁴ This accounts for the institutional character of marriage.²⁵ One effect of this institutionalization is to supply external social incentives and sanctions for remaining true to our commitments—although, sometimes to a degree that is undesirable (cf. Neuhaus 2008: 170-171).

Because marriage is fundamentally a loving *commitment*, Hegel says that it “should be regarded as indissoluble *in itself*” (163A). This does not mean that the commitment of modern marriage must endure a genuine change of heart. If we were unconflicted creatures, whose feelings and desires always led in one direction or another, then commitments of any sort might be unnecessary. But that, of course, is not our nature. If we are to satisfy some of our wants, then we have to resolve ourselves not to act on wants that are incompatible with them. Marital commitments are resolutions of this sort: an identification with some of our wants and feelings, and a decision to cut others off from us as outlaws (cf. Frankfurt 1988a). This also involves a certain amount of character planning: a resolution to attend to and foster those feelings and

²⁴ This is why social conservatives are not completely irrational in thinking they have something at stake in the public recognition of same-sex marriage. As Gallagher (2004) observes, since “social meanings are encoded in [the] law... [e]ither the legal incidents of marriage will be designed around opposite-sex sexual reality, or they will be designed around the allegedly more generic ‘gender neutral’ same-sex sexual reality. In either the case, one of the two groups is going to find the ‘fit’ between legal form and the relationship being regulated is not as good” (58). Gallagher’s remark is only inaccurate in drawing the line between same-sex and opposite-sex couples; the real division is between couples committed to strongly gendered conceptions of marriage, and those committed to a more gender-neutral social form.

²⁵ Many philosophers and legal theorists have held that marriage and family are “creations” or “products” of legal enactment. Cf. Russell (1929): 204; Olson (1983); Okin (1989): 130-131; Nussbaum (2000): 252-264. While there is some truth to that view, it is ultimately one-sided and misleading. Mill is closer to the truth when he remarks that “Laws and systems of polity always begin by recognizing the relations they find already existing between individuals” (SW: I, ¶ 5 / CW, XXI: 264). Laws do have a certain conservative force in giving official public recognition to certain existing social forms, but the law rarely *creates* those social forms whole-cloth. Although I do not agree with the substance of her argument, Gallagher (2004) is correct when she says that “Marriage law helps sustain the core public (as opposed to private or sectarian) understandings of what marriage is and what purposes it serves” (51).

desires that we identify with, and to avoid situations that would inflame the outlaw desires. But, whatever it once meant, there is no reason to think that modern marriage must be a commitment to remain together where the spouses are permanently estranged from one another in their affections (PR: 176). This is similar to our modern attitude toward religious commitment. We think it reasonable for a believer to make a commitment to attend church every week, whether he feels like going or not, but generally unreasonable to make a commitment to attend even if he should one day cease to believe. Unlike medieval theologians such as Thomas Aquinas, we do not think that apostates should be compelled to return to the church for “backsliding” on their commitment to God (ST: II-II, Q. 10, a.8).

B) Love of children

In contrast to most previous philosophers, Hegel explicitly approaches the relationship of parent and child through the romantic relationship of the man and the woman. Whereas Locke sees the love between man and woman as instrumental for the purposes of the care and upbringing of children, Hegel sees children as an expression or culmination of the love that the man and woman have for one another; in his words, as “the objective and concrete form of their union” (PR: 175A).

This should be understood as a part of a larger trope of “externalization” in Hegel’s philosophy, whereby “inner” aspects of personality are only first or fully recognized by the subject in external “objects” that somehow bear the stamp of that personality. For example, in the famous dialectic of Lord and Bondsman from the *Phenomenology of Spirit*, the bondsman becomes conscious of what he truly is—the master of his own desires, and thus, a being with a mind and will of his own—through his disciplined work on an external object. Thus, the bondsman first becomes conscious of his own true nature in an external object that bears the

stamp of his own activity (PS: 194-196). For similar reasons, in his discussion of property in *The Philosophy of Right*, Hegel argues that persons need private property, an external sphere of freedom, in order to take the first steps toward becoming reasonable, responsible beings (PR: 41+A). Just as individuals seek a sense of themselves in their work, the couple seeks a sense of their union in external things. Hegel notices that this phenomenon is already at work in the couple's attitude toward common property, especially in the couple's home.²⁶ But in the child, the couple sees their union in a "spiritual form," in another human being, who they "love as their love" and who can return that love. "In the child, the mother loves her husband and he his wife; in it, they see their love before them" (PR: 173+A). The child, then, is at least one way that the man and woman preserve something of their sexual intimacy with one another in the companionship of marriage.

At first, this might seem like the wrong attitude for parents to take up toward their child. Beauvoir, for example, criticizes parents who narcissistically look upon their children as if they were their doubles or alter egos, and try to project their personalities wholly upon them, when in fact each child is an independent subject, not a tool for the fulfillment of parental needs (1952: 512, 522). It would seem the case stands no differently when a *couple* projects the image of their union upon the child. But there is a more charitable way of looking at this. What the parents are, in effect, doing is extending the individualistic affection of romantic love to the child. Just as modern marriage is based on the love that two "infinitely unique" individuals have for one another's particularity, so the modern family extends that recognition of individuality to the child by including the child in the couple's love story. This is not just *some child*; this is *the child* that

²⁶ Beauvoir observes that "The ideal of happiness has always taken material form in the house, whether cottage or castle; it stands for permanence and separation from the world. Within its walls the family is established as a discrete cell or a unit group" (1952: 448).

you and I have brought into the world together.²⁷ Cultures which base matrimony on different concerns tend to also take different attitudes toward the child. Where marriage was primarily a pragmatic partnership for running a household or farm, children were often regarded as an additional source of labor. Where lineage was of the highest importance, the child (especially the son) was an heir and a continuation of the family name. Where marriage was understood to exist to control the sinful passion of sex, the fruit of that union is likely understood to be born in original sin, whose will must be broken by stern and unrelenting discipline.²⁸ The cult of the individual nourished by romantic love, on the other hand, now embraced the child as possessing his or her own particular character that is infinitely unique and worthy of being cherished and developed for its own sake.²⁹

There is another, albeit closely related, connection to draw between romantic love and the intimacy of the parent-child bond. I characterized Hegel's view of romantic love as a form of

²⁷ Stone (1977) illustrates one aspect of the modern recognition of the child's individuality in changes in certain naming practices in modern England. Prior to the later eighteenth-century, a child might be given the name of a deceased sibling, or a younger son might be given the same name as the eldest living son, in case he should die. For example, "Edward Gibbon records that after his birth in 1737, 'so feeble was my constitution, so precarious my life, that in the baptism of my brothers, my father's prudence successively repeated my Christian name of Edward, that, in case of the departure of the eldest son, this patronymic appellation might still be perpetuated in the family.'" But this practice died out during the same period as the ascendancy of romantic love, "indicating a recognition that names were highly personal and could not be readily transferred from child to child" (409).

²⁸ Cf. Stone (1977): "Because of this [sixteenth-and-seventeenth-century] conviction of the innate sinfulness of the child, the only solution seemed to be to crush his will. For the child was both the hope of the future – the embodiment of parental ambitions to create a generation of virtue and godliness that would presage the Second Coming – and, at the same time, the negation of all such aspirations, the incarnation of Original Sin, the victim from birth of the manifold and endless temptations of the Devil. Puritans in particular, therefore, were profoundly concerned about their children, loved them, cherished them, prayed over them and subjected them to endless moral pressure. At the same time they feared and even hated them as agents of sin within the household, and therefore beat them mercilessly" (175).

²⁹ Perhaps in reaction to the permissiveness of Rousseau's *Emile*, Hegel himself often stresses the importance of discipline and obedience. For example: "One of the chief moments in a child's upbringing is discipline, the purpose of which is to break the child's self-will in order to eradicate the merely sensuous and natural" (PR: 174+A; cf. EM: 396A). But this must be read alongside the passages in which Hegel stresses the importance of the family circle embodying love, care, and trust. In any case, it would not be surprising if the new spirit of the sentimental family that Hegel identified had the germ of less authoritarian forms of parenting than even Hegel himself anticipated.

friendship in which the whole human being—body and soul—is involved in the union. This has a dual significance. On the one hand, the ethical relationship of marriage is a spiritualization of the sex drive and a culmination of the aspirations it inspires in us. On the other hand, sexual union is a kind of visible symbol or manifestation of the loving friendship. Something similar is at work in the parent-child bond. As mammals, we have a natural tendency for affection toward our biological offspring. This natural affection has been spiritualized—raised to a higher ethical level—in the modern attitude of cherishing the individuality of this particular child. And yet, the physical relation between parent and child—the ability to see oneself, as well as one’s partner, in the features and traits of the child—is retained as a symbol and external manifestation of the ethical unity of the family. (Although Hegel thinks that, in the ideal case, the blood tie binds the mother, father, and child, there is no reason to think that a similar tie cannot exist between just one parent and the child—at least, once the culture has come to recognize the great value of the parent-child relation.)

This picture has important implications for thinking about the fundamental interest of parents to raise their biological children.³⁰ Throughout the chapters of Part II, we have been wrestling with the question as to what ethical significance, if any, generation might have. Grotius, recall, held that parents acquire their rights over children by generation, while Hobbes scoffed that it was far from obvious what I have begotten is mine. Various philosophers have wondered whether parental rights might be akin to the rights of producers, or even analogous to the rights of God over his Creation (see Chapter 6). But many contemporary philosophers have downplayed the importance of biological relations compared with social and moral ones. For

³⁰ It is a fundamental right in that it is a right the parent holds in her own name (see 8.6.B). It is a prima facie right in that it is defeasible if the parent is unfit to adequately raise the child.

example, as we observed in Chapter 9, Harry Brighouse and Adam Swift (2006b) argue that adults have an interest in assuming the role of parent, because it is a fulfilling form of relationship which is quite unlike intimate relationships with adults. But they say they know of no good argument for thinking that adults have an interest in raising their own biological children; apparently raising any child would do just as well.³¹

My argument is that when we look at the modern parent-child relation as the spiritualization of the natural affection that mammals have for their offspring, this stark separation between biological and social parenthood loses much of its appeal. One sign of this is that there are individuals who have little interest in being a parent in the abstract (the child may be an “accident”) but, given that they actually have a biological child, have a strong desire to raise and have a relationship with *that* child. Given that there is already someone out there who is physically a part of himself, the biological parent has a strong desire to form a human relationship with this child. Otherwise, he will feel as if he has lost a part of himself.

Some philosophers deny that there can be any special ethical significance in raising one’s biological children, since all of the ethical values of biological parent-child relationships can also exist in the adoptive variety (Levy and Lotz 2005). One reply to this is that this is because adoptive relationships are consciously modeled on natural families (Page 1984). It is hard to imagine what families would be like if we did not rely on natural affection as the basis for the larger social institution. For instance, Levy and Lotz argue that “there is no reason why an adopted child cannot be considered the physical expression of a couple’s love for one another, in a sense that is just as real as [a biological child]” (2005: 245-246). That may be so, but it is hard

³¹ They do not expressly deny that biological parents have an interest in raising their offspring; only that they can find no argument for the position.

to believe that this idea would be available for adoptive parents to appropriate were there no families based on natural ties. Moreover, if there were nothing valuable about raising one's own child, then one would be indifferent as to whether one left the hospital with one's own newborn or that belonging to another couple. This seems to express an indifferent attitude toward the child's individuality, which is wholly antithetical to the spirit of the modern family.³²

The fundamental claim, then, is that if adults have interest in having an intimate relationship with children, then they surely also have an interest in having an intimate relationship with their own biological children. Not only is the modern parent-child relationship a spiritualization of the natural affection of parents for their offspring, but it is a valuable basis for and expression of that intimacy. But let me be clear: there is no reason to think that valuing the special form of intimacy that is possible between biological parents and children denigrates the value of adoptive relationships. After all, to say that there is a valuable form of sharing and mutual giving in modern marriage that was absent in the friendship between Montaigne and La Boëtie is not to denigrate *that* relationship either.

C) Mothers and fathers

To this point, I have for the most part been speaking generically of "parents." But for Hegel there are important differences in the way that motherhood and fatherhood fit into a complete life. We want to understand why Hegel thinks parenthood is gendered and how integral that is to

³² It is sometimes pointed out that there have been other cultures, like the Romans, who placed relatively little importance on the blood tie. But, at least in the case of the Romans, this was symptomatic of the fact that what was important was not the individual child, but carrying on the family name. Cf. Veyne (1987): "The 'voice of blood' spoke very little in Rome. What mattered more was the family name. Bastards [were] forgotten by their fathers.... Adoption could prevent a family line from dying out....Children who were moved about like pawns on the chessboard of wealth and power were hardly cherished and coddled. Such matters were left to the servants" (10, 17-18).

his larger view. The place to begin, I think, is with the relation between the family and the larger social order. In modern society, the family exists alongside the economic sphere (i.e., civil society), and the state. Therefore, an important part of Hegel's task is to show two things: (i) that all three major institutions can respect the individual's right to subjective freedom—that is, the individual's right to be subject only to institutions that are expressions of his will; and (ii) that these institutions can exist in harmony with one another, without irreconcilable conflict.

The general nature of institutional conflict is perhaps best exemplified in Hegel's reading of *Antigone*. After the death of Oedipus, one of his sons, Eteocles, assumes the throne of Thebes, but his brother Polyneices believes that the throne should be his instead. Polyneices attacks the city and both brothers are killed in the combat. Their uncle, Creon assumes power and orders that Eteocles is to be given a proper burial, while the traitor Polyneices is to be denied burial rites. But Antigone, the sister of Eteocles and Polyneices, feels bound by familial piety to oppose Creon and to ensure that both brothers receive a proper burial. When she is caught, Creon sentences Antigone to death. For Hegel, the tragic character of this story consists in the fact that both Antigone and Creon are acting in accordance with the duties they most identify with. Antigone identifies with the divine law that holds the family unit together through the reverence of the dead, while Creon identifies with the human law that holds the larger community together (PS: 444-476). Hegel understands this, as Terry Pinkard puts it, to be a “discord within Greek culture itself, between the two ethical powers that the Greek form of life recognizes as essential to itself: the divine law and the human law, embodied in the different individualities of men and women” (1994: 144). This irreconcilable conflict demonstrates to

Hegel that the Greek culture was not rational on its own terms.³³ The question is whether modern society is any more rational, or whether it also contains deep internal contradictions. Indeed, the potential for contradiction seems particularly great, given the increased complexity of modern society; for now civil society has emerged as a distinct sphere of activity separate from the family and the state. In particular, many have worried that the individualistic character of the market economy is corrosive to the solidary relations constitutive of both the family and political community.

The heart of Hegel's attempt to reconcile these three spheres of human activity is to show that participation in all three spheres of life is essential to the full development of modern personality (cf. Neuhauser 2000: 140). By participating in productive activity in the economy, I develop skills that are useful to and appreciated by others. I thereby simultaneously manage to earn an income to satisfy my personal desires and to "become somebody" in the eyes of the world. And by earning esteem and recognition for my contributions and achievements, I become somebody *in my own eyes* as well (PR: 207, A). I also earn recognition for being a loyal and dutiful citizen. The general form of these duties is that of sacrificing my particular well-being for the good of the country. In the extremity, this means risking, or giving, my life for my country in war (PR: 325-327). But in more everyday circumstances, it might involve the willingness to pay taxes and the willingness to meet other reasonable citizens halfway when our particular interests conflict for the good of the community (PR: 324, 309). By identifying with the country, I can perform these duties with the same kind of unalienated satisfaction that I take in take in doing my duties in my family and in my work (149, 261,R).

³³ I have benefited much from Pinkard's whole discussion of this passage from the *Phenomenology*. See especially his (1994): 137-146.

The three primary sources of recognition in the modern world—love as a family member, esteem as a contributing member of society, and respect as an equal member of the larger community—are complementary and not interchangeable with one another. Someone without intimate relationships is likely to lack a sense of his intrinsic worth as an individual. For that reason, he may lack the motivation to seek esteem, or alternatively, pursue that esteem to unhealthy excess. Someone who does not make himself useful to others through work is likely to lack a sense of having made anything out of himself, of having accomplished something of value to others. And someone without any attachment in his larger political community lacks a stake in something larger and more enduring than himself and his narrow circle of concerns. Hegel's claim is that the modern social order is rational insofar as these forms of recognition are complementary parts of an integrated modern selfhood.³⁴

Given this picture of the modern self, it is somewhat surprising that Hegel denies that women have a direct role to play in civil society or the state. The woman has her sole vocation in the family; instead of seeking to prove herself as an individual through struggle with the external world, her ethical disposition consists in a feeling of unity with her family. Her work consists largely in ensuring that this feeling of intimate unity is available to the other family members as well (PR: 164A, 166). One may ask how, on Hegel's premises, women were supposed to find satisfaction for her own particularity in such a world. Of course, this was essentially the social world that existed in Hegel's time. Philosophically, then, he was faced with a choice. He could argue that the gendered family was inconsistent with the modern spirit of subjective freedom and must eventually give way—that, as Mill will later put it, “the social subordination of women ...

³⁴ Here, I have benefited and drawn much from Neuhauser (2000): 143-144 and (2008): ch. 3.

stands out as an isolated fact in modern social institutions; a solitary breach of what has become their fundamental law; a single relic of an old world of thought and practice exploded in everything else” (SW: I, 16; CW, XXI: 275). Or he could argue that, despite superficial appearances, the gendered family was indeed rational. Hegel opted for the second course.

As for the exclusion of women from civil society (and public office), Hegel undoubtedly understood this as a part of the division of labor. As production is carried out on a larger scale, the primary site of production moves outside of the household. Household work and childcare, on the one hand, and primary production, on the other, are both time-consuming occupations, so it is rational for a man and woman to divide these tasks amongst one another (cf. PR: 198). Setting aside woman’s alleged natural unsuitability for work outside the home, it does seem almost inevitable that, under such conditions, women should take on the domestic role, since it is women who undergo pregnancy, give birth, nurse, and are perhaps more naturally suited to care for young children.³⁵ Even more egalitarian thinkers, like Wollstonecraft and Mill, who thought that women ought to be allowed to pursue professions or public office, nonetheless understood that this would usually be an alternative to marriage and motherhood—a choice men were not forced to make.³⁶ Hegel may have even understood the separate spheres of man and woman to be a sign of their fundamental equality. Where man and woman share the same sphere, as was the case when the home was still the primary site of production, then (so the reasoning goes) one spouse must inevitably be subject to the other. Only by giving woman her own sphere can she

³⁵ At least as Hegel undoubtedly assumed. See PR: 175A.

³⁶ Wollstonecraft, *A Vindication of the Rights of Woman*, ch. IX, ¶¶ 21-30 / 1995: 237-240; Mill, SW: IV, ¶ 21 / CW, XXI: 338-340.

acquire a sphere of autonomy. Tocqueville, Hegel's contemporary, attributed this outlook to Jacksonian America:

America is the one country where the most consistent care has been taken to trace clearly distinct spheres of action for the two sexes and where both are required to walk at an equal pace but along paths that are never the same.... Thus Americans do not believe that man and woman have the duty or the right to perform the same things but they show the same regard for the role played by both and they consider them as equal in worth although their lot in life is different (DA: II.2.xii, pp. 697, 699).

Why, on Hegel's view, women should be excluded from ordinary political participation (as opposed to pursuing a political vocation) is harder to understand—that is, until it is recalled that Hegel imagines that political representation is mediated by one's membership in one of the estates of civil society. Additionally, Hegel probably assumed, like James Mill, that wives have the same political interests as their husbands, and that they were already virtually represented.³⁷ Hegel would presumably say that women do gain a kind of recognition in civil society and in the state as the wives of men who directly participate in those spheres. Finally, even if Hegel hadn't thought that women were naturally unsuited to the affairs of state, he might have thought that activity in civil society was a necessary formative experience to be prepared for political activity. Because the domestic vocation of women encouraged them to rely on their emotion and intuition, they might be unsuited to thinking rationally and critically about political issues (PR: 166A; PS: 475)³⁸

Allen Wood suggests that Hegel might have understood the separate spheres of man and woman to have a still deeper significance. The problem is that if women took on the same

³⁷ James Mill, "On Government," ch. 8, p. 27.

³⁸ J.S. Mill makes an argument for woman's suffrage that, as we shall see shortly, should be congenial to Hegel, and which grants the present premise: that is, even if the ethical disposition of women is prejudiced in some ways, that one-sidedness may help balance out the equal and opposite one-sidedness of the ordinary ethical disposition of men (SW: III, ¶¶ 9, 25 / CW, XXI: 306, 321-322).

individualistic ethical disposition as men, then the solidarity of the family would suffer (1990: 244-246). At the end of his monumental *The Family, Sex, and Marriage in England 1500-1800*, Lawrence Stone permits himself some remarks on the twentieth-century family that illustrate this sentiment well:

Group life, as in a nuclear family, ... involves a trade-off between the demands of collective affect [and] intimacy..., and those of personal privacy and autonomy for its individual members.... Since [today] self-fulfillment is the chief goal to which all else has to be sacrificed, couples with marital problems now divorce without giving much thought to the consequences on the psychological stability not only of themselves and their spouses but also of their young children. Similarly, mothers of very young children put their jobs before their duties as wives and mothers, sometimes with equally damaging consequences to their marriage and their children (1977: 685).

As an interpretation of Hegel, this reading gains credibility given that Hegel also supposes that in a rational social order, the different estates of civil society will have specialized ethical dispositions. That is, while the ethical disposition of the agricultural estate is based on the interdependence of family life, the civil service identifies with the universal interest of the state, and the estate of trade and industry identifies most with the individualistic and self-reliant spirit of civil society (PR: 203-205). Presumably the idea here too is that the stability of the social order requires that each of the three spheres of society needs its partisans—particularly in the Estates General (cf. PR: 301-302). On this analysis, the same is true of the family. Out of necessity, the family must be integrated into the larger economy, but if it is to retain its substantial character against the centrifugal forces of civil society, then that solidarity needs one of the spouses to be its special champion.

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Of course, Hegel's vision of the relation between husband and wife is one that is no longer available to us as a society—although it may live on in certain subcultures. In retrospect, at

least, it seems inevitable that women would seek the same opportunities for self-realization and recognition as modern society afforded to men. The Hegelian case against Hegel's conception of woman's social role was put most forcefully by Beauvoir in *The Second Sex*, from which it is worth quoting at some length:

[W]oman's work within the home gives her no autonomy; it is not directly useful to society, it does not open out on the future, it produces nothing. It takes on meaning and dignity only as it is linked with existent beings who reach out beyond themselves, transcend themselves, toward society in production and action. That is, far from freeing the matron, her occupation makes her dependent on husband and children; she is justified through them; but in their lives she is only an inessential intermediary.... Woman is not allowed to *do* something positive in her work and in consequence win recognition as a complete person. However respected she may be, she is subordinate, secondary, parasitic. The heavy curse that weighs upon her consists in this: the very meaning of her life is not in her hands. That is why the successes and the failures of her conjugal life are much more gravely important for her than for her husband; he is first a citizen, a producer, secondly a husband; she is before all, and often exclusively, a wife (1952: 456).³⁹

From a more practical point of view, insofar as the woman is economically dependent on her husband, she finds it difficult to exit a bad or abusive marriage, and her power within the family reflects this dependence (Okin 1989: ch. 7; Mill, SW: II, ¶ 9 / CW, XXI: 291-292). This considerably vitiates the ideal of the separate but equal spheres of man and woman.

Even more damning, Beauvoir argues that, insofar as women are denied the opportunities for transcendence and recognition available to men, they are not particularly good at their assigned roles of mother and wife. "The great danger which threatens the infant in our culture, lies in the fact that the mother to whom it is confided in all its helplessness is almost always a discontented

³⁹ Cf. Mill: "All women are brought up from the very earliest years in the belief that their ideal of character is the very opposite of men; not self-will, and government by self-control, but submission, and yielding the control of others. All the moralities tell them that it is the duty of women, and all current sentimentalities that it is their nature, to live for others; to make complete abnegation of themselves, and to have no life but in their affections" (SW: I, ¶ 11 / CW, XXI: 272-272).

woman.” She feels herself socially inferior and “has no independent grasp on the world or on the future.” As a consequence, “She will seek to compensate for all these frustrations through her child” (1952: 513). This can lead to a variety of pathologies, but the one that is particularly damaging to Hegel’s view is the maternal refusal to let her child grow up. Having felt needed, respected, justified, and authoritative only as a mother, the woman encourages the child’s dependency and obstructs the child’s attempt to depart from the family as a self-sufficient individual (519). Having been taught to value nothing but the substantial unity of the family, it is unsurprising if she cannot appreciate the importance of children striking out on their own. Likewise, because woman does not experience herself as a subject in her own right, because she is asymmetrically dependent on her husband, she cannot provide that reciprocal recognition that Hegel attributes to conjugal love (247). The drive for recognition may lead a man to marry and raise a family, but it is largely the approval of other men he is seeking (426). As Beauvoir sees it, only when woman concretely affirms her status as subject through own activities and projects can she become the companion for man that Hegel wanted her to be:

Genuine love ought to be founded on the mutual recognition of two liberties; the lovers would then experience themselves both as self and as other: neither would give up transcendence, neither would be mutilated; together they would manifest values and aims in the world. For the one and the other, love would be revelation of self by the gift of self and enrichment of the world (667).

Mill had made a similar argument: “Intimate society between people radically dissimilar to one another, is an idle dream. Unlikeness may attract, but it is likeness which retains; and in proportion to the likeness is the suitability of the individuals to give each other a happy life” (SW: IV, ¶ 15 / CW, XXI: 333).

Finally, and most ironically, it is not even clear that Hegel’s conception of the family overcomes the original contradiction posed by *Antigone*. By excluding woman from political

society, a society only encourages woman's identification with the family and alienation from the state and its larger goals. In the *Phenomenology*, Hegel describes womankind as "the everlasting irony [in the life] of the community," who "changes by intrigue the universal end of the government into a private end, transforms its universal activity into a work of some particular individual, and perverts the universal property of the state into a possession and ornament for the Family" (PS: 475). Setting aside questions about the historical accuracy of that claim, one may ask how political loyalties can but seem unreal compared to those of the family for a person confined to the domestic sphere. The reflective woman in such a condition may well deny any allegiance to a state built by men and for men; she may conclude, with Virginia Woolf, that "as a woman, I have no country. As a woman I want no county" (1938: 109, cf. 78).

Beauvoir's indictment of the historical station of women can, at times, come across as unreceptive to what was good in the world we have lost. Or it may seem unbalanced, deprecating all that has traditionally been feminine while glorifying the masculine world in spite of "its possessiveness, its jealousy, its pugnacity, its greed" (Woolf 1938: 74).⁴⁰ Indeed, one occupational hazard of social criticism is the failure to appreciate the ways that meaningful lives can be lived within worlds that seem to the critic oppressive, unenlightened, or unjust. In doing so, the critic appears to assert that any happiness in that world was but false consciousness, and to invalidate the lives of those who learned to feel at home and to thrive in the social environment that it was their lot to inhabit. We should beware of this pitfall, as it bespeaks a

⁴⁰ This led Virginia Woolf to a deep ambivalence about the situation of women: "We ... are between the devil and the deep sea. Behind us lies the patriarchal system; the private house, with its nullity, its immorality, its hypocrisy, its servility. Before us lies the public world, the professional system, with its possessiveness, its immorality, its pugnacity, its greed. The one shuts us up like slaves in a harem; the other forces us to circle, like caterpillars head to tail, round and round the mulberry tree, the sacred tree, of property. It is a choice of evils. Each is bad. Had we not better plunge off the bridge into the river; give up the game; declare that the whole of human life is a mistake, and so end it" (1938: 74).

certain shallowness of insight into the human condition. Almost all societies have their charms as well as their pathologies. What is called for, then, is a certain balance of perspective—but we must not forget that social criticism is an essential part of that balance.

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Of course, more than social criticism was necessary to effect the emancipation of women. Birth control and legalized abortion has made it possible a woman to make pregnancy voluntary, to reduce the size of her family, and to make motherhood a “rationally integral part of her life” (Beauvoir 1952: 121). Public education has socialized the rearing of children to a large degree. Household machines, cheap clothing, ready-made meals, and the microwave oven have greatly reduced the time required to feed, clothe, and clean up after the family. These material and technological advances have made it increasingly possible for husbands and wives to share the tasks of family and civil society, in a way that was nearly impossible in the nineteenth century.

And this has had the consequence not only of transforming the role of women in the public sphere, but of narrowing the differences between motherhood and fatherhood in the private. The ideal father can no longer confine himself to the role of bread-winner. He must increasingly take over a significant (if not yet equal) portion of the duties of child-care. And, indeed, we find philosophers today arguing that fathers who fail to develop familiar and intimate relationships with their children have not only “failed to deliver on their obligations” as parents, but have also missed out on “fully flourishing lives” (Brighouse and Swift 2006b).⁴¹ Moreover, it seems reasonable to think that if women are to develop an ethical disposition that is partly directed

⁴¹ Brighouse and Swift take a rather absolutist line here: they do not confine their verdict to contemporary society, but extend it to all human societies.

toward individual self-fulfillment, then the solidarity of the family depends on husbands and fathers also developing an ethical disposition that incorporates the emotional feeling of familial unity that Hegel had attributed to women alone. If part of the good life for women today is to include historically male activities and attitudes, then part of the good life men is going to have to include activities and attitudes that were historically female. (Further, if men and women can both take on aspects of traditional motherhood and fatherhood, then there would seem to be no barrier to same-sex couples raising children—as of course many already do).

Just how far this transformation of gender roles will go in the future is difficult to know. On the one hand, Susan Moller Okin looks forward to a possible moral regeneration of society:

Only when men participate equally in what has been principally women's realms of meeting the daily material and psychological needs of those close to them, and when women's participation equally in what have been principally men's realms of larger scale production, government, and intellectual and artistic life, will members of both sexes be able to develop a more complete *human* personality than has hitherto been possible (Okin 1989: 107).

On the other hand, giving Hegel a sympathetic hearing, Wood observes that:

[I]t is easy to agree with the platitudes that men should be more sensitive, women more self-confident. But we have never really seen what human personalities would be like if they were not socialized through the traditional system of gender stereotypes. We do not know what role gender differences might play in personalities balancing the substantial principle with the reflective (1990: 246).

It would be unduly pessimistic, and anthropologically naïve, to think that the dichotomous gender stereotypes of nineteenth-century Western culture are immutable. Many of us have witnessed in our own families how the character of father-child interactions have changed from one generation to the next. Whether this will lead, as Okin hopes, to a future “without gender,” where “one's sex would have no more relevance [in social practices] than one's eye color or the length of one's toes,” where the words mother and father are completely replaced by the word

“parent,” is more doubtful (Okin 1989: 171). At least, that is my suspicion, if sexuality and reproduction are as fundamental parts of human psychology as they are in other mammal species. But perhaps we are already entering a society in which gendered personality types are more loosely defined, permit greater individual interpretation, and tolerate more nonconformity. In that case, we would not be looking forward to a society in which each person might become a “complete exemplar of community,” but instead, a world where individuals are less one-sided than they once were and have more choices about the particular virtues they will contribute to their families and communities (cf. Rawls, TJ: §79; Hegel, PR: 207 + A).

10.4 The Formative Tasks of the Modern Family

A) Origins and departures

We now turn to Hegel’s account of the formative tasks of the family with respect to preparing children for modern life. Hegel’s perspective in this respect is not wholly inconsistent with Locke’s, but he does have two contributions to make. First, he has the resources for a more nuanced account of moral and social development, which is better attuned to the modern world. Second, whereas parenting for Locke is primarily conceived of as a duty, for Hegel, as a part of “ethical life” (or *Sittlichkeit*), parenting is at once a duty (that is, for those who have children) and an activity in which individuals find personal fulfillment (PR: 147-149). This is a much more modern perspective, especially now with the advent of effective birth control. Once becoming a parent was a natural and expected part of marriage. Now it has become (at least potentially) a choice for couples to make. In this way, Hegel’s perspective has much in common with recent intimacy-based accounts of the parental role (e.g., Brighouse and Swift 2006b). But

Hegel's complex account of the cultivation of modern personality, of *Bildung*, also provides Hegel with the resources for a richer account of the intrinsically rewarding aspects of parenting.

Much like Locke, Hegel insists that "children are free *in themselves*," though, on account of their immaturity, they are not yet prepared to actually exercise that freedom *for themselves*. Because they are "born free" (as Locke would put it), children cannot be regarded as things that owned and used by their parents (PR: 175+R, 43R). And for the same reason, the child does not remain under the authority of her parents after coming of age: the family to which the child is born is merely her "original basis and point of departure" (PR: 177).⁴² This means that parents have a duty to prepare the child to leave the family as a free personality and enabled to become full member of society (PR: 175, 239). In the *Second Treatise*, Locke explains this as the process of children coming to know the natural and customary law by which a person is to govern his actions (2T: II.6). Hegel offers us, as I've said, a much more nuanced framework. On the Hegelian view, parents have a duty to see that their children are enabled to act as free agents with respect to each of the different moments in the "concept of right." That is, children are to be instructed to act in accordance with their external rights as persons (Abstract Right); their reflective capacities for conscience and value are to be fostered (Morality); and they are to be enabled to participate in the major institutions of the modern social order: as members of valuable intimate relationships, as productive and self-respecting contributors to the economy, and as dutiful citizens of a good state (Ethical Life). These parental duties have a positive and negative aspect. Positively, the parents have the task of making the child feel secure, loved, and valued. Negatively, the parents have the task of raising the child out of her "natural immediacy"

⁴² Although Hegel might allow the law to require grown children to support their parents, if they become unable to support themselves, although this function could also be taken over by the state. Cf. PR: 238.

by helping her to recognize her ability to stand above and judge amongst her inclinations and to be receptive to reasons (PR: 175). Let us examine these in more detail.⁴³

B) 'A circle of love and trust'

The first and fundamental responsibility of parents is to raise the child from infancy within “a circle of love and trust” (PR: 175A).⁴⁴ First, this is essential for a person to develop a basic sense of security in the world, since otherwise a person may be subject to chronic feelings of anxiety and fear as adults (cf. EM: 396A, p. 57). Second, this permits the child to develop a sense of unity with others. Without this, we will have great difficulty as adults experiencing intimacy with friends, lovers, or our own children. Moreover, by forming affective bonds with other family members, we develop the capacity to empathize with others, which is essential to morality, and even to consider their welfare as a part of our own (cf. PR: 125). The basic form of trust we develop in the family is also the basis for more impersonal forms of trust and reciprocity, such as that which underlies a sense of belonging to the political community (cf. PR: 268).⁴⁵ Burke was perceptive when he said that we begin by loving and trusting the “little platoon we belong to in society,” and that “this is the first link in the series by which we

⁴³ Throughout sections A) and B), I have benefited from the discussion of Hegel’s view on the formative tasks of the family in Neuhausser (2000): 148-157.

⁴⁴ Can there be a *duty* to love someone? Kant held that insofar as love is a feeling (as opposed to the practical attitude of benevolence), one cannot love at will. And because “ought implies can,” there can be no duty to love (MM: 6:401; G: 4:439). But even if we cannot *instantaneously* produce in ourselves a feeling of love for someone, it seems that we usually can take measures to foster that feeling over time. Parents who do everything in their power to foster the feeling of love for their children, but find that they cannot, do not act *wrongly*. In this sense, we can agree with Kant. But all the same, they do not fulfill one of the fundamental role-obligations of parenthood. Because such individuals are not capable of fulfilling the parental role for their children, they are obliged to ensure that someone else can. On duties to love, see Liao (2006) and Richards (2010): ch. 9. Richards also has a discussion of the consequences of people who lack the capabilities to parent their children in Chapter 2.

⁴⁵ Although she never refers to Hegel, Morse (1999) has some insightful, albeit probably uncontroversial, things to say about the importance of familial love and attachment in early childhood for fostering the trust necessary for a functional market and state.

proceed” to more public affections and loyalties, such as those for country and mankind (*Reflections* ¶ 75, 1987: 41). The military allusion is appropriate: armies have long recognized that the best way to make soldiers loyal to the army is to first make them loyal to a small “band of brothers.”

The unconditional love we receive from our parents is also crucial to developing a basic sense of self-respect or self-worth. The child learns that he is valued for who he is by his family—for his “immediate individuality”—and that there is no danger of forfeiting that love (EM: 396A, p. 61). This sense of self-worth is what enables us to appreciate that certain actions are unworthy of us and that we owe it to ourselves to make something of ourselves. It also motivates us to seek the esteem of others in a healthy and measured way. That is, when we enter school, and later begin work, we find that we are not loved merely for who we are, as we were in the family, but are now valued according to our achievements and contributions. If I have a healthy conception of self-worth, Hegel suggests that I will feel as if the world does not yet recognize my true value, and I will be motivated to prove myself (EM: 396A pp. 61-62). Of course, as the child begins school and takes his first steps into civil society, the family continues to provide support: for instance, by providing him a refuge of love and acceptance, when he comes home from school, and by encouraging the child to achieve in accordance with his abilities. In these ways, the immediate love and trust we experience as children is the basis of participation in all of the major institutions of ethical life: of the family, civil society, and of the state (PR: 125).

What Hegel leaves out of his description of the familial circle is as important as what he includes. A certain measure of parental love and attachment for children is surely a cultural universal. What is distinctive about Hegel’s account is the *preeminent* importance he gives to

the feelings of intimacy, love, and trust. Other periods and cultures have attributed more importance to the fear and reverence that a child should have for his parents. For example, in contrast to the intimate, even saccharine, terms of endearment between parents and children (especially fathers and daughters) with which we are familiar from Victorian novels,⁴⁶ Stone offers us the following excerpts from an early eighteenth-century book of etiquette, which admonishes children on the proper ways to show deference to their parents:

3. Never sit in the presence of thy parents without bidding, tho' no stranger be present.
- ...
6. Never speak to thy parents without some title of respect, viz.: Sir, Madam, etc.
7. Approach near thy parents at no time without a bow.

Another of the most effective methods of socialization of the period, Stone continues, was to teach children “at a very early age, to be afraid of death and eternal damnation.” “It was standard advice in the sixteenth and seventeenth centuries,” he explains, “to tell [children] to think much about death.” For example, in 1694, a certain John Norris instructed children as follows:

Be ... much ... in the contemplation of the four last things, Heaven, Hell, Death, and Judgment. Place yourselves frequently upon your deathbeds, in your coffins, and in your graves. Act over frequently in your minds the solemnity of your own funerals; and entertain your imaginations with all the lively scenes of mortality. Meditate much upon the places, and upon the days of darkness, and upon the fewness of those that shall be saved; and be always with your hourglass in your hands, measuring out your own little span and comparing it with the endless circle of eternity (Stone 1977: 172-173).

Continuous with this preoccupation with eternal punishment, whipping and flogging were the routine forms of discipline in sixteenth- and seventeenth-century English homes (ibid, 176). Against this background, Locke is a very profoundly progressive educationalist, discouraging

⁴⁶ *A Tale of Two Cities* by Dickens comes to mind in particular.

frequent beatings as well as any attempt to frighten children with superstition or religion (STCE: 47ff, 138). But even he hardly ever mentions familial love without insisting that it be balanced and even *preceded* by filial awe:

I imagine everyone will judge it reasonable, that their children, when little, should look upon their parents as their lords, their absolute governors; and, as such, stand in awe of them: and that, when they come to riper years, they should look on them as their best, as their only sure friends: and, as such, love and reverence them.... Fear and awe ought to give you the first power over their minds, and love and friendship in riper years to hold it (STCE: 41, 42; cf. 40-44 *passim*, 78-80, 95, 99, 107, 167 and 2T: II.67).

The point is not that Hegel—nor *we* for that matter—think respect for parental authority unimportant. Cultural patterns do not differ from one another in being completely unlike nearly so much as in which values and attitudes are given pride of place.

Providing this circle of love and trust to children is, of course, not *merely* a duty; in performing this role, parents too realize a great good. In much of life, for most of us, we know the world could very well get along without us. Were we to disappear from the face of the earth, our positions would quickly be refilled, and our fellow citizens would never miss us. But in caring for a child, the parent feels necessary. Perhaps many parents never feel their existence so justified as when their child ceases to cry when put into their arms. The sentiment may have a special quality in the case of one's biological children—and for at least two reasons. First, by valuing the child, I am able to value my own existence, since the child could not have come into the world without me. Second, as the child's biological parent, I am irreplaceable in a unique way. Were I to vanish, the child might be fortunate enough to acquire a step-mother or step-father, but she will never have another natural mother or father. Perhaps this experience is best exemplified in the mother's nursing of the child, for here the child literally draws its life and substance from the mother's body. Although we have just now been emphasizing the parent's

relation to the infant, we may also observe that, as the child grows older, the parent enjoys the privilege of the child's spontaneous and unconditional love and trust for her. This is a kind of love and trust that is seldom possible between adults, even in committed relationships like those spouses and partners.⁴⁷ Indeed, part of what is wonderful about the child's love is that it is so strong that commitment on his part is not only impossible, but quite unnecessary.

Much of this intimacy, especially with young children, has traditionally been associated with the role of mothers.⁴⁸ There are also rewarding aspects of attachment to the child that have been more traditionally associated with fatherhood. Men have often found greater meaning in their work, insofar as they know they are supporting their children.⁴⁹ They have also often been inspired to take a more altruistic and selfless view regarding the future of their country—a phenomenon that is visible today in political discourse about both the environment and the national debt. In these ways, attachment to one's children actually deepens a person's commitment to his other roles as worker and citizen. As we have already observed, in our time the various forms of personal fulfillment traditionally associated with motherhood and fatherhood are increasingly available to both men and women.

⁴⁷ This last theme is well captured by Brighthouse and Swift (2006b): 93.

⁴⁸ Cf. Hegel: "In the period of infancy, the mother's role in the child's upbringing is of primary importance..." (PR: 175A).

And Montaigne: "I am incapable of finding a place for that emotion which leads people to cuddle new-born infants while they are still without movements of soul or recognizable features of body to make themselves lovable. And I have never willingly allowed them to be nursed in my presence. A true and well-regulated affection should be born, and then increase, as children enable us to get to know them; if they show they deserve it, we should cherish them with a truly fatherly love, since our natural propensity is then progressing side by side with reason; if they turn out differently, the same applies, *mutatis mutandis*: we should, despite the force of Nature, always yield to reason" (*Essays* II.8, p. 435).

⁴⁹ To choose an example almost at random, one may think of the dock-worker in *On the Waterfront*, who has found meaning in his grueling work knowing that he has been supporting his daughter and putting money away for her education.

C) Bringing the rational to self-consciousness

Free will and conscience: The negative task of parents is to raise children out of their natural immediacy to consciousness of their wills and rational natures (PR: 174-175). That is, the child must be enabled to stand back from his immediate inclinations, recognize his power to determine his will one way or another, to do so on the basis of reasons, and eventually on the basis of reasons that he himself reflectively endorses.⁵⁰ In this way, the child's will becomes more genuinely his own, and thus, freer and more distinctly human (PR: 10A).⁵¹ Parents pursue this task, at least initially, primarily through discipline and example. The first effect of discipline is to give the child the sense of resisting his own inclinations in order to avoid punishment or disapproval. By giving the child conflicting motives—e.g., “I want to write on the wall; I don't want to get in trouble”—the parent helps the child gradually distinguish between his immediate wants and his capacity for choice. The second effect is that consistently applied discipline leads the child to develop habits of good conduct. In this way, the child comes to feel at home in what originally seemed like alien constraints, and his unruly desires lose some of their originally sharp and precipitate character (EM: 409-410). Third, if the child loves and trusts his parents, then he recognizes their power and will as authoritative for him. (In this way, establishing the bond of love and trust between parent and child—rather instilling awe and fear in the child—is, once more, fundamental).⁵² In recognizing the authority of his parents, the child comes to share his

⁵⁰ See the discussion of the will in the Introduction of the *Philosophy of Right*, as well as §129ff.

⁵¹ Schapiro (1999) develops a similar account within a Kantian framework. See my 4.5.A for more discussion of this topic.

⁵² Presumably, in a home where love and trust is lacking, a child might develop a sense of the power of his will over his immediate inclinations, without recognizing the authority of his parents and thereby without developing a sense of moral principles. That, anyway, is one lesson one might draw from the dialectic of Lord and Bondsman in the *Phenomenology of Spirit*.

parents' attitude toward his own conduct, and eventually identifies with their norms as rational.⁵³ Similarly, insofar as the loving care of his parents inspires the child is to look up to them as superior beings, the child will emulate them, and thereby come to knowledge of rational ideals and virtues in the concrete character of their persons.⁵⁴ In these ways, the child learns not only to resist his immediate natural self, but moral principles are implanted in his nature, such that “the rational [appears to the child] as his own most personal subjectivity” (PR: 175A).

In the *Doctrine of Virtue*, Kant says that there are four forms of moral “receptivity” which are preconditions for moral subjectivity: **respect for oneself**, **love of other human beings**, **conscience** (i.e., practical reason), and **moral feeling** (i.e., the susceptibility to feel pleasure or displeasure from being aware of the consistency, or inconsistency, of our actions with our duty) (MM: 6:399-403). It is impossible to be under a duty to acquire these forms of receptivity, as they are necessary for moral agency in the first place. Kant speaks of these forms of receptivity as if they were innate and need not be acquired.⁵⁵ This is difficult to accept. No doubt we are sufficiently “good-natured” as to be disposed to acquire these forms of moral receptivity, but it

⁵³ Cf. Rawls: “[The child] may see no reason why he should comply with [parental norms]; they are in themselves arbitrary prohibitions and he has no original tendency to do the things he is told to do. Yet if he does love and trust his parents, then, once he has given in to temptation, he is disposed to share their attitude toward his misdemeanors” (TJ: 465/407). Velleman (2006b) makes the interesting suggestion that children accept their parents’ power as authoritative insofar as the child implicitly recognizes that his parents treat him as end in himself.

⁵⁴ “Since the boy is still at the age of immediacy, the higher to which he is to raise himself appears to him, not in the form of universality or of the matter in hand, but in the shape of something given, of an individual, an authority. It is this or that man who forms the ideal which the boy strives to know and to imitate; only in this concrete manner does the child at this stage perceive his own essential nature” (EM: 396A, p. 54).

⁵⁵ “There can be no duty to have moral feeling or to acquire it; instead every human being (as a moral being) has it in him originally”; “So too conscience is not something that can be acquired, and we have no duty to provide ourselves with one; rather, every human being, as a moral being, *has* a conscience within him originally”; “it is not correct to say that a human being has a *duty of self-esteem*; it must rather be said that the law within him unavoidably forces from him *respect* for his own being.” If any of the forms of receptivity can be acquired, it would seem to be love of human beings—at least, it can be acquired toward particular persons: “*Beneficence* is a duty. If someone practices it often and succeeds in realizing his beneficent intention, he eventually comes actually to love the person he has helped.”

seems misguided to think that they are, in a developed form, innate in the infant. One way to understand Hegel's project as we have canvassed it thus far, then, is as providing a genetic account of how children acquire these four forms of moral receptivity.

Justice: Although Hegel does not much remark on it, the family must also play a crucial role in opening the child's eyes to the basic principles of property and justice (i.e., Abstract Right). This might seem surprising, since Hegel says that "no member of the family has particular property" (PR: 171). One might instead suppose that the family would be a school for communism, insofar as both are based on the principle "from each according to his ability, to each according to his needs."⁵⁶ But the family fosters a conception of mine and thine in at least two ways.

First, although much is held in common within the family, the child soon recognizes that other families have their own communal possessions, which are not held in common with his family. Thus, we find distrust of the family in Plato's *Republic* because it encourages people to think in terms of what belongs to me and mine and sets citizens against one another (*Republic*, Book V, 464ff). Hegel essentially agrees with Plato about the connection of the family with "subjective particularity," only he thinks that communal solidarity can be made to coexist with that more subjective ethical disposition (PR: 185R).

Second, it would probably be a mistake to take too literally Hegel's claim that all property in the family is held in common (PR: 171). True, it is important for the child's sense of security that he does not feel like a lodger in his parents' house; that instead, he feels it is his home as well. However, if the child is to develop a sense of his own freedom and responsibility, as well

⁵⁶ Marx, "Critique of the Gotha Program," *The Marx-Engels Reader*, 531 / *Collected Works*, XXIV: 87.

as the rightful limits of that freedom, then it is important that certain things belong to him, while other things belong to other family members (cf. PR: 41). Rousseau can help fill out our picture here. To develop his pupil's sense of justice, Rousseau has Emile plant his own garden: "I make him feel that he has put his time, his labor, his effort, finally his person there; that there is in this earth something of himself that he can claim against anyone whomsoever, just as he could withdraw his arm from the hand of another man who wanted to hold on to it in spite of him" (*Emile*, Bk. II, p. 98). Later, when Emile and the gardener get into a disagreement over who has a right to plant in the garden, Emile receives an object lesson in negotiating competing claims of mine and thine.

Justice and the gendered family: A number of philosophers have worried that the patriarchal or traditional gendered family is not, in fact, a good school for justice and the moral sentiments, but is rather a school for despotism, on the one hand, and servility on the other. Mill puts the point forcefully in the *Subjection of Women*:

Think what it is to be a boy, to grow to manhood in the belief that without any merit or any exertion of his own, though he may be the most frivolous and empty or the most ignorant and stolid of mankind, by the mere fact of being born a male he is by right the superior of all and every one of an entire half of the human race.... Is it to be imagined that all this does not pervert the whole manner of existence of the man, both as an individual and as a social being? (SW: IV, ¶ 4 / CW, XXI: 324-325)

The moral training of mankind will never be adapted to the conditions of the life for which all other human progress is a preparation, until they practice in the family the same moral rule which is adapted to the normal constitution of society (SW: II, ¶ 12 / CW, XXI: 293-294).

More recently, Okin has developed a similar line of argument. Taking Rawls's picture of moral development in the family as her point of departure, she argued that a society of just citizens required just, egalitarian families:

If gendered families are *not* just, but are, rather, a relic of caste or feudal societies in which roles, responsibilities, and resources are distributed not in accordance with the two principles of justice but in accordance with innate differences that are imbued with enormous social significance, then Rawls's whole structure of moral development would seem to be built on shaky ground. Unless the households in which children are first nurtured, and see their first examples of human interaction, are based on inequality and reciprocity rather than on dependence and domination ... how can whatever love their receive from their parents make up the injustice they see before them in the relationship between these same parents? (1989: 99-100).

This is an important issue, and it goes to the heart of the question about the theoretical stability of Hegel's gendered conception of the family. Unfortunately, most discussions of this question in contemporary political philosophy have remained relatively superficial.

A sense of fairness or justice is not primarily a set of doctrines that the child learns when young. It consists most fundamentally in the capacity to empathize with others and look at things from their points of view. When developed, this capacity can lead the subject to criticize the unfairness or injustice of some of the institutions and practices which she might have taken for granted in childhood. For example: Emile, after having reflected on the sense of possession we feel toward the products of our labor, and after having learned to look at things from the perspective of others (like the gardener), may one day begin to wonder why his father should own the products of the gardener's labor. Of course, having an effective sense of justice does not guarantee that one will not make mistakes in moral judgment. Nor is this meant to deny that growing up under just or egalitarian institutions is conducive to the development of the sense of justice. The more just the ethical institutions which comprise the initially unquestioned background of our lives, the more individual injustices will stand out as incongruous. This, after all, was an important part of Mill's indictment of the subordination of women: it "stands out as an isolated fact in modern social institutions... a single relic of an old world of thought and practice exploded in everything else" (SW: I, ¶ 16 / CW XXI: 275).

But if there was anything right in the mid-century psychological research on the authoritarian personality undertaken by Theodor Adorno and his collaborators, then it seems that what is *most important* for the development of a (democratic) sense of justice and fairness is an “internalized and individualized approach to the child” on the part of the parents. This is what fosters empathy and perspective-reversal. What is most likely to lead to an intolerant or authoritarian personality is a parenting style that is distant, stern, or arbitrary (Adorno et al. 1950: 384-389). This suggests that it is not traditional gender roles *per se* that most inhibits the sense of justice, but authoritarian families based on relations of overt domination and submission which deprive the child of a “a circle of love and trust.”

A conception of happiness and value: Philosophers now often follow Rawls in speaking of two “moral powers”: a sense of justice (or conscience and moral feeling more generally), and a capacity for a conception of the good, or happiness, or the good life (TJ: §§63, 77). A conception of the good may be understood in the most general sense as those ends, relationships, and activities that we endorse as valuable components of our lives. It seems that adult human beings cannot lead happy or fulfilling lives without having something like a conception of the good.⁵⁷ As Kant once suggested, human “happiness is not something [merely] sensed but something thought.”⁵⁸ We do not find out whether we are happy merely by attending to our feelings. We consider whether our lives are living up to our ideas about what is worthwhile in life. Therefore, Rawls seems to get it about right when he says that “we can think of a person as being happy when he is in the way of a successful execution (more or less) of a rational plan of

⁵⁷ We might distinguish between a happy life and a fulfilling life, in that a person might find fulfillment in pursuing ends that are self-denying.

⁵⁸ Kant, *Lose Blätter aus Kants Nachlass*, Rudolph Reicke (Königsberg: Ferd. Beyer, 1889): 1:11-12. Quoted from Wood (1990): 61.

life drawn up under (more or less) favorable conditions, and he is reasonably confident that his plan can be carried through (TJ: 359).⁵⁹

Because human happiness or fulfillment is something thought, not merely sensed, it is something we must learn how to pursue. This aspect of education is not a theme that Hegel devotes a lot of attention to, but he has the resources for a rich account. One part of an education for happiness consists in learning to recognize that our various desires may conflict and change over time (PR: 17; see also my 4.5.B). As a consequence, we must learn to “purify” our desires, by organizing them in such a manner as they can be consistently pursued without undermining one another (PR: 19). But in order to do this, a person must learn to stand back from and evaluate his own desires. Hegel believes that there is no single yardstick—like quantity of pleasure—by which we can measure some desires as more worthwhile of fulfillment than others (PR: 17 + A). Instead, we simply have to reflect on our desires and determine which ones mean more to us than others. We typically do so by reflecting on the conception of the good that best expresses the kind of person we want to be. This is why most of us do not decide to cultivate a single easily satisfied desire as the whole of our conception of happiness: that would, as Hegel says, be “a destructive limitation,” a cramped conception of what a good human life consists in (PR: 17A).⁶⁰ Therefore, not only do parents have a role in helping the child stand back from his immediate desires (as we have seen), but they also serve as the child’s first role-models of what an integrated human life can look like. Whereas the child, at first, simply wants to do whatever

⁵⁹ This more measured formulation in the revised edition is an improvement on the original version: “Someone is happy when his plans are going well, his more important aspirations being fulfilled, and he feels sure that his good fortune will endure” (TJ 1971: 409).

⁶⁰ I have benefited much from the discussion of Hegel’s view on happiness in Wood (1990): esp. 69-71. Wood puts Hegel’s view most concisely as follows: “We form the idea of happiness not so much in order to get the satisfactions that constitute it as in order to bring it about that our desires are adequate expressions of our universal self” (69).

he feels like at the moment, he observes how his father balances work with time devoted to the family and how he takes delight in the outdoors, baseball, and American history.

Children also need to be introduced to rewarding activities. Because the capacities of children are expanding, they are constantly outgrowing the activities that they used to delight in. Young children may delight in very simple activities, like spinning tops, but this entertains few adults, or even older children. Therefore, another formative task that falls to parents is to introduce their children to the sorts of activities which are rewarding for adults. Locke provides an example of this when he advises parents and tutors to instruct even young gentlemen in trades and crafts, not as a career, but as rewarding diversion (STCE: 201-205).⁶¹ Now one way to do this is to simply introduce children to many different activities—horseback-riding, piano, baseball, chess, etc.—and find out which ones the child most prefers. But the more common and natural approach is to initiate the child into the activities that the parents themselves find rewarding. This has the additional advantage of providing the parent and child the opportunity to do something together and therefore strengthen their friendship: as Aristotle says, friends cannot easily spend time together unless they enjoy doing some of the same things (NE: VIII.6, 1157b24). In these cases, parents do not, properly, pursue their own interests in bonding with their children *instead* of their children's own best interests; they pursue both at once.⁶²

⁶¹ In this instance, Rousseau is much more utilitarian than Locke. When Rousseau comes to the same subject, he follows Locke in recommending carpentry to his pupil, but Rousseau wants Emile to learn such a trade, not so much for its own sake, but so that he will be independent (*Emile*, Bk. III, pp. 195ff).

⁶² According to Brighouse and Swift (2006b), parents are not obliged to pursue their children's best interests when enrolling their children in activities that the parent can share with the child, so long as the child's interests are "well-enough served" (102). (See 9.3.) I agree that parents have a legal right to act this way, but this does not sound to me like healthy advice for the parent-child relationship. I would think that the parent would want to pursue bonding activities with children that were a part of the child's good, as well as their own. Perhaps the problem is an implicit assumption that, given any two activities, one is always better for a person than another. But it is more plausible to think that most valuable activities are incommensurate in the contributions they make to a person's life (cf. Raz 1986: ch. 13).

Moreover, the purpose of this education for living is not mainly to give *final form* to the child's mature conception of the good. As Frederick Neuhouser puts it, the task is to give the child "the raw material ... that makes up the indispensable (and inescapable) basis of the particular being" that he or she ultimately becomes. We expect that, as our children mature, they will refashion this material to a greater or lesser extent to suit their own particular bent (2000: 153).

Although a conception of the good life should not be a cramped or "destructive limitation" of human potential (PR: 17A), limitation is nonetheless necessary. "Initially – i.e. especially in youth – the individual balks at the notion of committing himself" to any particular path in life, as Hegel explains. The youth regards this "as a limitation imposed on his universal determination and as a purely *external* necessity" (PR: 207R). But to become anything actual, we must learn to limit ourselves (PR: 13A). This is particularly true with respect to finding an occupation and niche in life. The wide range of opportunities regarding career-choice in modern life can be a stumbling block to young people, if they lack the will to apply themselves in any one direction. This particular challenge of modernity is a common theme in Victorian literature: characters like Richard Carstone from Dickens's *Bleak House* just cannot manage to settle on any one career, but instead flit from one vocation to another, causing parents or guardians great anxiety that they will never make anything out of themselves at all. Thus, another responsibility of parents is to help their children find a viable role which is well-suited to their temperament and abilities and to help summon the young person's resolution to follow through on their decisions.

Religion and the absolute: Societies that tolerate religious pluralism have typically accepted the propriety of parents bringing their children up in their own religious or philosophical worldviews. Observing the advance of state control over many of the traditional

domains of the family, especially in the lower classes, Bertrand Russell wryly noted that “One of the few rights remaining to parents in the wage-earning class is that of having their children taught any brand of superstition that may be shared by large number of parents in the same neighborhood.” “And even this right,” he continued, “has been taken away from parents in some countries” (1929: 206).

In fact, the role of the family in religious education can be made to look peculiar from two directions. In most historical societies, political rulers have sought ideological support from religion or some other comprehensive worldview (like historical materialism). In such societies, permitting parents to teach their children heterodox opinions may seem politically destabilizing. On the other hand, there is the liberal view according to which “the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”⁶³ On this picture, the state must not use its coercive powers to indoctrinate individuals. But then, if we think of the parent as a kind of governor, why shouldn’t the child have analogous rights against his parents? Or to put the point a little differently, it may seem almost as wrong to indoctrinate children in one particular religious faith or comprehensive worldview as it would be to select for young children their future occupation or spouse.⁶⁴ Instead, so the argument goes, parents ought to raise their children so that all of these matters are as open as possible when the child reaches an age in which she can exercise her own autonomy.

To understand Hegel’s view on this question, we have to understand his conception of religion. Hegel thinks of religion as one way of relating to what we take to be “absolute truth,” and that, as such, “it contains the requirement that everything else should be seen in relation to

⁶³ *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1991).

⁶⁴ Arguments of this sort are pressed in Clayton (2006): ch. 3.

this and should receive confirmation, justification, and the assurance of certainty from this source.” But religion is not the only way of relating to the absolute: “religion is the relation to the absolute *in the form of feeling, representational thought, and faith.*” Philosophy and science are also ways of relating to the absolute: they however take the form, not of inward feeling, but of cognition disciplined by the study of what actually or necessarily exists. Because philosophical/scientific cognition and religion may both make claims about the absolute, they can come into conflict. On the other hand, most religions accept the authority of scientific cognition to a greater or lesser extent, but preserve for themselves an authority regarding “higher things” that are not accessible by science, and which are “the unlimited foundation and cause on which everything depends” (PR: 270R).

Hegel agrees with the liberal that the modern individual has an interest in being free to relate to the absolute on his own terms. This is a necessary part of the right of subjective freedom. I must be free to interpret how things ultimately hang together in a way that seems valid to me. To use a phrase with much currency in contemporary philosophy, the modern individual demands the right to endorse his comprehensive worldview *from the inside*. Thus, the state has reason not to meddle with religion. As Hegel puts it, the “sphere of inwardness is not, as such, the province of the state.” But, all the same, the state cannot be indifferent to religion, for it has its own ethical doctrines, which may come into conflict with certain religious beliefs. For example, the just state cannot be indifferent between religions that accept the civic equality of the sexes and those that deny it. Hegel’s solution to this problem is not altogether different from that of Rawls. The modern state should strive to stand above differences between (what we might call) “reasonable” religious doctrines—that is, those that embrace the authority of the state and the ethical principles at its base (cf. Rawls 1993: 48-50). Furthermore, when the state is strong, it

should also tolerate religious groups that are less reasonable in this sense, but which do not directly endanger others or the stability of the state (PR: 270R).

Should parents follow a similar policy of toleration? I think Hegel would say that education is impossible without giving children some sense of “absolute truth,” of the ultimate grounds of validity for facts and norms.⁶⁵ This is especially the case if we expect children to have any way of judging matters by their own lights. And, in good conscience, parents cannot perform this duty except in accordance with their own understanding of the absolute. Matthew Clayton has recently argued that parents ought to instruct their children only in those beliefs and norms which everyone could reasonably accept, such as empirically verifiable facts and principles of mutual respect. They should not “enroll” their children in any particular religious or comprehensive doctrine—though of course they may introduce their children to their own personal faith or philosophy. In short, children should not be brought up as Catholics, Muslims, or Marxists, but should only voluntarily join such groups upon reaching the age of maturity (Clayton 2006: 119-123).

I believe that Clayton makes the mistake of thinking that what makes something a “comprehensive doctrine” is the fact that it has propositional content that is controversial amongst reasonable people. Thus, on this view, the resurrection of Christ is a part of a comprehensive doctrine, because many people who accept the duties of mutual respect do not believe in it. But the more important question has to do, not with the content of the doctrine as such, but with the source of validity for that content. A religious believer may subscribe to the same norms of mutual respect as the secular philosopher, and yet whereas the philosopher

⁶⁵ This absolute truth need not be a form of “foundationalism” in the ordinary sense. Absolute truth for a pragmatist might be a method of inquiry.

regards these norms as valid in themselves, the religious believer may think that they ultimately derive their validity from God's will. If we think about "comprehensive doctrines" in terms of the ultimate source of validity, then it hardly seems possible to raise a child without a comprehensive doctrine. The philosopher may raise his child to respect the rights of other persons, and yet keep an open mind about the existence of God. But in doing so, he is raising the child to regard the source of validity for morality as independent of the truth of any traditional religious worldview; for this child, respect for persons is a part of absolute truth.

To the extent that it would be possible to raise a child without any relation to absolute truth, the child would grow up without any real convictions at all. This is why Hegel thinks that it is in the interest of the state that every citizen should belong to *some* religious community (PR: 270R). We may reinterpret this to mean that the state has an interest in all children being brought up with some reasonable conception of absolute truth—which may include certain philosophical outlooks not ordinarily regarded as religions.

Still, someone might ask, why *parents* ought to have the task of initiating children into a particular relation to absolute truth. Why shouldn't government schools take on this task, as they have in some societies? The schools might then instruct children in the "absolute truth" of basic liberal moral principles and of scientific inquiry (though not of particular scientific theories, which are revisable). Questions about religion and personal ethics, in turn, would be taught as matters about which reasonable people disagree, and on which everyone must eventually come to his own conclusions. The objections to this proposal are probably legion, but I will confine myself to two of the more interesting.

First, such a society would endanger the very intellectual autonomy it seeks to protect. In such a society, there would be one orthodox relation to the core of absolute truth. Individual

reflection on that essential core would be regarded as either unnecessary or even dangerous. Religion and personal ethics, on the other hand—matters on which people were free to differ—may increasingly be regarded as inessential accretions to the core of orthodox absolute truth.⁶⁶ In that case, the individual would regard himself as responsible for his relation to absolute truth only at the inessential peripheries. By assigning the ultimate responsibility for religious and philosophical education to individual families, we sustain the ideological pluralism that makes intellectual autonomy meaningful.

The second point is perhaps more important for present purposes. For the young child, the absolute first resides in the persons of his parents (EM: 396A, pp. 59-60). It is in them that the child puts his trust, and it is they who are the ultimate arbiters of good and bad, true and false. This is the truth implicit in the now-antiquated saying that a father is like a god to his children. One task of parents, therefore, is to help their children transfer this absolute trust from themselves to independent standards of the good and the true. If this is accurate, then no one is in nearly so good a position as the parents to carry out such an education.

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As before, the educational responsibilities of parents are not only duties for Hegel; they are also opportunities for personal self-fulfillment. Of course, I cannot hope to canvas all of the different ways that people find child-rearing personally rewarding. But we may mention a few of those that are especially interesting from a philosophical point of view—most of which Hegel does not specifically mention. First and most fundamentally, there is simply the fact of doing

⁶⁶ Perhaps this is, to some degree, already taking place in liberal societies.

something momentous.⁶⁷ Loren Lomasky captures part of this quite well when he observes that, though “few people can expect to produce a literary or artistic monument, redirect the life of a nation, garner honor and glory that lives after them[,]... it is open to almost everyone to stake a claim to long-term significance through having and raising a child” (1987: 167).

Second, there is the opportunity to be respected as a role model and authority. At its best, this not only feeds the parent’s *amour propre*, or self-esteem, but inspires her to deserve that respect—and this too a person can take satisfaction in. Earlier I mentioned that having a child can add meaning to our other social roles. A similar phenomenon is at work here in the way that parenting can enhance a person’s interest in being a good person. That is, since being a good person is a part of the role of being a parent, those who identify with the role of parent as a part of their practical identity may develop a stronger identification with the associated moral principles and ideals.

Then there are myriad ways it is rewarding to introduce others to those activities and traditions that we ourselves value or delight in. In part, this may be because we think these activities or traditions *deserve* to be passed on, and we take satisfaction in doing justice to the art, or sport, or faith. Moreover, insofar as we identify with what we teach and share, we may also feel that a certain part of ourselves is passed on to be preserved in another. Perhaps we also find that, in the act of introducing someone to something we value, we experience that thing again afresh.

Finally, we should return to Hegel’s point that the parents attain their unity in their children (173+A). This should not be understood to mean merely that parents see in the child an

⁶⁷ Or, as Nozick (1989) says, “Having children and raising them gives one’s life substance. To have done so is at least to have done that” (28).

amalgam of their biological traits. The child's upbringing is also the spouse's mutual project that typically becomes the focus of their own friendship. As Bertrand Russell observes, "cooperation in the serious business of rearing children, and companionship through the long years involved, bring about a relation more important and more enriching to both parties" than typically arises from "mere sex relations" (1929: 199).

10.5 The Family, Civil Society, and the State

A) Initiation into civil and political society

Of course, parents need not, by themselves, confer all of the education that their children will need for life in the modern world. Indeed, generally speaking, parents are not equipped to do so; instead they typically cooperate with other agencies, especially the schools, in the task of socializing children (PR: 239). There are four respects in particular where the family is not especially well-suited to carry out the education of children. The first and most obvious is in providing children a formal education, especially at higher levels. Modern schools take advantage of the benefits of specialization and the division of labor in teaching children diverse subjects like mathematics, the natural sciences, social studies, literature, and arts and crafts. Parents, in contrast, seldom have the time or training to provide their children with a comparable preparation for future careers or higher education. A second important function of schools is to introduce children to the larger and more impersonal social world. In the school, the child is no longer doted upon as he might be in the home; he learns to look upon himself as just one individual amongst others (EM: 396A, p. 61).

Third, at least where schools have some cultural and economic diversity, children learn to get along with others who are different from themselves. This is an important part of our education

for citizenship in a pluralistic society—especially democratic citizenship (see Chapters 11 and 14). Hegel does not emphasize this theme, as he tends to think of political will-formation taking place first and foremost in the legislature (PR: 301+R, 316-319). But insofar as we think ordinary citizens have an important role in deliberating on the content of the general will, it is important that we learn how to see things from the perspectives of people who have backgrounds different than our own (see 14.3-14.5 below).

Fourth, encounters with other children, with teachers, and with ideas foreign to the culture of the child's family all help foster higher forms of reflection on morality, ethics, and worldview.⁶⁸ Only in such encounters does the young person typically begin to appreciate that he might have been brought up differently than he was. By confronting the contingency of his own beliefs and values, the youth is forced to find reasons for believing and valuing some things rather than others. Again, this is not a theme much emphasized by Hegel, but we do find it in both Locke and Rousseau. They don't think of *schools* having this function; indeed, they are both suspicious of the bad influence that schools have may have on children. But they do see this broadening of intellectual horizons as the great value to be gained from travel. Locke, for instance, says that we improve in wisdom and prudence "by seeing men, and conversing with people of tempers, customs, and ways of living, different from one another, and especially from those of his parish and neighborhood" (SCTE: 212). Similarly, Rousseau declares that "whoever has seen only one people does not know men; he knows only the people with whom he has lived" (*Emile*, Bk. V, p. 451).

⁶⁸ This role of the school is emphasized by Ackerman (1980): ch. 5 and Callan (1997): ch. 6.

B) The state as parens patriae

In all modern societies, the state has assumed a large role in the provision of formal education. We shall explore the *responsibility* of the state in education in Part III. Here we ask a different question: What *authority* does the state have over the education of children? Does the state, for example, have the right to require parents to send their children to public, or publicly accredited, schools? From a Hegelian perspective, we are initially drawn in two directions. On the one hand, the feeling of familial love leads family members to identify with one another and to think of themselves as members of a single whole (PR: 158-159, 173). Besides governing the internal life of the family, this unity is also the basis of the family's relation to the rest of society, in that the family is typically considered to be one legal person (PR: 171). This accounts for what Kant identified as the "property-like" character of parental rights (see 6.5.D). For Hegel, the legal rights of the parent over her children resemble the legal rights of the individual, not over her external property, but over herself (PR: 57, 70).⁶⁹ This might lead us to think that the state will have relatively little authority over the child's education, that education is a part of the personal prerogative of parents. On the other hand, "children are free in themselves": they may not be used by parents for their own ends, but rather must be brought up to depart from their original family unit, to assume a life of independence and freedom of personality (PR: 175). This might lead you to think that the state has an important role in ensuring that parents follow through on this responsibility. And if there are aspects of the child's education that the family is not well-suited to provide, then presumably the state may require children to attend school—or even its own schools.

⁶⁹ Hegel's own way of thinking about this is, of course, for the husband to represent the family to the external world. Our view today allows both spouses equal representation. Irresolvable disagreements between the parents may have to be settled by the courts.

For Hegel, as you would expect, there is some truth in both of these perspectives. The key is to integrate them in the right way. Because the ethical unity of the family is of great importance to both children and parents, the state will generally have reason to respect the autonomy and privacy of the family. The interests of the individual in opposition to other family members become salient for the state chiefly in connection to the dissolution of the family (PR: 159). This should be understood to have two aspects in the case of children, which correspond to the positive and negative educational tasks of parents (see 10.4). First, the child's interests attain legal relevance insofar as the bonds of love and trust which make the family into an ethical unity in the first place are threatened or broken by acts of abuse, exploitation, or neglect.⁷⁰ In such cases, the state may intervene: first, in an attempt to reestablish the proper relationship; and if that fails, then to remove the child, if possible, to another family where she may live in an atmosphere of love and trust.

The second way the child's interests have legal salience is with respect to the ethical dissolution of the family which (as far as the child is concerned) occurs as a matter of course when the child reaches maturity (PR: 177). That is, parents have a duty, as we have said, to prepare their children to leave the family as free agents with respect to each of the different moments in the "concept of right": (i) as legal persons, (ii) as subjects capable of morality and a conception of happiness, and (ii) as participants in the primary institutions of modern ethical life (i.e., as members of a family or intimate association; as participants in the economic sphere; and as citizens of the state). Insofar as parents are failing in any of these responsibilities, the state

⁷⁰ Hegel says that the unity of the family cannot assert itself against feeling (PR: 159A). What Hegel has in mind, I take it, is that one spouse may not compel another to remain in the family if they are emotionally estranged from one another (cf. 163A, 176A). But we may expand the point to cover the parent-child relation. Parents who do not love their children, or who are incapable of consistently acting on that love, have no right to maintain the integrity of the family.

has a right in its role as *parens patriae* to intervene.⁷¹ As Hegel puts it, the state,⁷² in its character as a “universal family ... has the duty and right, in the face of *arbitrariness* and contingency on the part of *the parents*, to supervise and influence the *education* of children in so far as this has a bearing on their capacity to become members of society” (PR: 239).

Hegel’s expansion on this topic (from the appended lecture notes) is somewhat ambiguous, but worth quoting at length:

It is difficult to draw a boundary here between the rights of parents and those of [the state].⁷³ As far as education is concerned, parents usually consider that they have complete freedom and can do whatever they please. With all public education, the main opposition usually comes from the parents, and it is they who protest and speak out about teachers and institutions because their own preference goes against them. Nevertheless, society has a right to follow its own tested views on such matters, and to compel parents to send their children to school, to have them vaccinated, etc. The controversies which have arisen in France between the demands for freedom of instruction (i.e., for parental choice) and for state supervision are relevant in this context (PR: 239A).

Perhaps there *is* no bright line to draw between the authority of parents and that of the state, but I think we can sharpen the Hegelian position in several ways.

First, not only is it clear that parents have no right to act however they please toward their children, Hegel would not accept that they have an absolute right to follow their own conscience in education. Of course, he does recognize the interest that individuals have in acting in accordance with their own views and their own conscience; this is a part of the right of subjective freedom. But Hegel also thinks it is absurd to give absolute deference to people’s

⁷¹ The classical statement of *parens patriae* principle in American law comes from the Supreme Court decision, *Prince v. Massachusetts* 341 U.S. 158, 166 (1943): “Acting to guard the general interest in youth’s well being, the state as *parens patriae* may restrict the parents control by requiring school attendance, regulating or prohibiting the child’s labor, and in many other ways.”

⁷² Hegel says “civil society,” rather than state, but that is because he thinks of the state’s police powers as a part of civil society, inasmuch as they protect the interests of individuals.

⁷³ See previous note.

inner feeling of conviction, no matter how uneducated or perverse (PR: 124R, 261A, 270R). So the state need not defer to a parent's benighted views about beating children with a rod, just because the parent can sincerely claim that he finds this instruction in his religion (namely, at *Proverbs* 13:24). If the state has good reason to believe that this kind of discipline is harmful to children, then this is a case where the state is within its rights to rely on its own tested views.

Second, it is clear that Hegel believes that the state has a right to set up public schools, which teach students the moral and constitutional principles on which the state is based (PR: 270R). In this way, Hegel is closer to contemporary liberals who stress the importance of civic education in public education than he is to classical liberals like Mill who fear that government schools will inevitably lead to state indoctrination (cf. Callan 1997 and Macedo 2000; Mill, OL: V, ¶¶ 13-14 / CW, XVIII: 302-303). In this connection, there has been a debate in contemporary philosophy as to the extent to which schools ought to inculcate liberal sentiments by "rhetorical" rather than "rational" teaching. For instance, according to William Galston,

[F]ew individuals will come to embrace the core commitments of liberal society through a process of rational inquiry. If children are to be brought to accept these commitments as valid and binding, the method must be a pedagogy far more rhetorical than rational....Civic education ... requires a noble, moralizing history: a pantheon of heroes who confer legitimacy on central institutions and are worthy of emulation (1991: 243-244).

I think Hegel would look upon this as obscurantism, not wholly unlike attempting to use religion or superstition to prop up the legitimacy of the state. For Hegel, the state must instead "champion the rights of reason and self-consciousness" (PR: 270R).

The harder question has to do with whether Hegel would agree with the *Universal Declaration of Human Rights*, which holds that "Parents have a prior right to choose the kind of education that shall be given to their children" (Art. 26). Certainly, Hegel would deny that

parents have such a right where its exercise would endanger the state (PR: 270R). For instance, in countries like France under the Third Republic, republican institutions were often thought to be threatened by reactionary Catholic schools. Or again, as a young state, Turkey sought to close down schools run by European colonial powers. In such cases, Hegel would undoubtedly defend the broad authority of the state over the content of education. He is aware that this sort of justification is prone to abuse, but he doesn't seem to think philosophy can do much about that (234A). On the other hand, when the state is strong, then presumably parents should be permitted to enjoy much broader freedom of educational choice. And though this is not Hegel's view, I would add that when the state is strong, its ability to interfere in educational choice for *political* purposes ought to be institutionally restrained.

However, there remains the state's *paternalistic* concern for the interests of children to consider. I do not see how such considerations could justify requiring children to attend government-run schools, although it certainly would justify requiring parents to send their children to publicly accredited schools. Does that mean that parents ought not be permitted to home-school their children? Hegel's text appears to incline in that direction. It seems to me that the liberal Hegelian might appropriately discourage home-schooling as suboptimal for socialization, especially for older children, and yet permit it, so long as there were sufficient oversight to ensure that parents were indeed providing their children with an adequate education (on adequacy in education, see Chapters 14 and 15).

Finally, to consider a question of much interest to contemporary philosophers, to what extent does the state have an interest in encouraging children or adolescents to engage in "critical reflection" on received beliefs and values? Like many contemporary liberals, Hegel believes that "religion can take on a form which leads to the harshest servitude within the fetters of

superstition” (PR: 270R). Does this mean that the state should require that children receive an education that encourages such reflection? This is a large topic, and I shall not be able to do it full justice here. But I do want to draw one contrast.

My sense is that Hegel’s concern is somewhat different than that of most contemporary liberals. Contemporary liberals do not seem nearly so concerned with whether a person’s faith or worldview is true or rational, as with whether or not a person has embraced it in an authentic way, for reasons of her own. Hegel’s view, on the other hand, is more objective. He wants people to act in accordance with institutions that are rational, and if possible, to comprehend their rationality. He is less concerned with subjective authenticity. This approach may have its virtues, in being less psychologically intrusive and less likely to cause antagonism with parents. In its role as overseer of children’s education, the state might best focus on ensuring that children have access to reliable information about their world, and let reflection take its own course in the young without much conscious direction by educational authorities.

10.6 Conclusion

The premise of this chapter has been that a Hegelian account of the family—especially when naturalized, democratized, and extended beyond some of Hegel’s own immediate concerns—is well suited to capture and integrate many of the more attractive ideas about the moral bases of parental authority and responsibility that we have explored throughout Part II. A brief summary of our main conclusions may be useful.

I argued in Chapter 8 that any satisfying account of parental rights will at least have to include as one important element the Lockean idea of the parental role as a fiduciary trust exercised in the interests of children. While Hegel can indeed incorporate this fiduciary element,

he also goes beyond Locke in several respects. First of all, given his nuanced picture of the various stages or aspects of the concept of right (i.e., Abstract Right, Morality, and Ethical Life), Hegel provides us with a richer framework for thinking about the cultivation of a free rational and moral personality. Relatedly, Hegel's attention to the importance of subjective freedom in modern life leads him to emphasize the ways in which parenthood is not just a duty imposed by Nature or God, but a rational part of a fulfilling life, something worth pursuing for its own sake. Then, insofar as we democratize Hegel and reject his strong assumptions about gender roles, we can also explain some of the ways that men and women in contemporary society are free to enjoy various valuable aspects of parenting traditionally associated exclusively with either motherhood or fatherhood. Finally, Hegel's more modern understanding of the state, especially with respect to its role in education, offers us resources for thinking about conflicts between parents and the state.

Hegel also shares much with contemporary authors who stress the importance of love and intimacy in family life. But Hegel can make contributions here as well. First, Hegel's theory of recognition can deepen our understanding of *how* and *why* love and intimacy are as important to us as they are—as well as how they are related to modern individualism. Second, the complex account of ethical cultivation, or *Bildung*, suggests manifold ways in which the parental role can be fulfilling. Third, I have interpreted Hegel as providing an account for how “blood relations” may contribute to the intimacy of the family insofar as we spiritualize, or humanize, these natural relations and raise them to a higher ethical significance. In this way, I argued, Hegel seeks to reconcile our animal and spiritual natures, instead of seeing them as either antagonistic or irrelevant to one another. Thus, by drawing on Hegel, we have been able to show—what others

have been unable to do—how generation can be ethically significant without attributing any mysterious normative power to a brute biological relation.

PART III: EQUALITY OF OPPORTUNITY AND EDUCATION

Introduction and Overview

In 1953 the U.S. Supreme Court ruled unanimously that schools legally segregated by race violate a state's responsibility to treat its citizens equally. "In these days," wrote Justice Warren in the Court's opinion, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."¹ While almost no one would disagree with that pronouncement today, there remains the crucial question as to how we ought to understand the idea of making educational opportunity accessible to all "on equal terms." Does it require that the state spend roughly the same amount on educating every child? Or does it require that the state attempt to compensate children who have fewer educational advantages in the home? Is it unfair if different local governments devote different amounts of resources to education? Should we be trying to achieve a rough equality of educational outcomes—or at least to eliminate any achievement gap between different sectors of society? Or should equality be understood in a more modest way: an equal opportunity, not for success in life, but for a decent or adequate education. But, then, adequate for what—decent in what respect?

¹ *Brown v. Board of Education of Topeka* 347 U.S., 483, 493 (1953).

I explore these questions over the next five chapters. Chapter 11 sketches the institutional history of public-school finance in the United States, which has done so much to frame the debate in this country about educational opportunity. The first part of that chapter examines the ideological origins of the common schools and their public support (11.2). The second part examines the legal history of challenges to school-finance systems from the 1970s to the present (11.3). Chapter 12 sorts out conceptual issues for talking about distributive justice in education. The problem, here, is that there are at least two literatures relevant to thinking about conceptions of distributive justice in education: the field of school finance in law and public economics, and the field of distributive justice in political philosophy. Both literatures provide useful conceptual tools for thinking about fairness in the distribution of education, but unfortunately they remain largely uninformed by one another. Therefore, the aim of Chapter 12 is to provide a conceptual framework that integrates some of the conceptual apparatus of each of these two disciplines, particularly with a view to facilitating discussion amongst political philosophers about justice in the domain of education. I then draw on this framework in the three following chapters.

The more substantive philosophical discussions of Part III are to be found in Chapters 13 through 15. Chapter 13 examines conceptions of equal treatment and equal chances in education. Most of the chapter is devoted to a critical discussion of Rawlsian “Fair Equality of Opportunity.” Many people are attracted to the notion that, ideally, people from different sectors of society ought to have equal prospects of success in life. However, it turns out that it is very hard to find a good argument for that position. In Chapter 14, I turn to the adequacy approach to thinking about justice in education. On this view, justice has been done when every child receives a “good enough” education—not necessarily an equal education. But how can we provide a philosophically principled account of what a “good enough” education consists in?

The prevailing approach is, as Debra Satz puts it, to try to “derive ... the nature and content of educational adequacy from the requirements for full membership and inclusion in a democratic society of equal citizens” (2007: 636). Chapter 14 therefore considers several different views as to what that might consist in, most notably in the company of Amy Gutmann and Elizabeth Anderson. In Chapter 15, I defend an account of justice in education that incorporates both elements from the adequacy approach and the norm of equal treatment. Chapter 15 is the most constructive chapter of Part III, but it is best read along with, at least, 13.4.E (on equal treatment and the “Emergent Inequalities Thesis”) and Chapter 14.

CHAPTER 11: ORIGINS, DEVELOPMENT, AND TRENDS IN THE PUBLIC SUPPORT OF COMMON SCHOOLS

11.1 Introduction

Although we shall pursue questions about equal opportunity in education as philosophical—not legal—questions, they are ultimately questions that have arisen from the problems and tensions in real institutions. If we take the time to acquaint ourselves with some of the history of these institutions, I think we may achieve deeper insight into the nature and import of our philosophical questions. In this chapter, then, I sketch the institutional history of public support for schools in the United States.

This historical sketch unfolds in two main parts. The first part concerns the emergence of common schools in the first half of the nineteenth century. Studying this period sheds light on the historical arguments in favor of public schooling, how states and local communities came to share the costs of supporting schools, and how this system led to significant inequalities between localities in the twentieth century. The second half of our historical outline focuses on the court cases from the late 1960s to the present which have challenged the inequalities and inadequacies of state school systems. It is largely from this legal history that contemporary political battle-lines over school-finance have been drawn.

11.2 The Origins of Common Schools and Public Support

A) The rise of the common schools

At the beginning of the nineteenth century, the American “school system” was a diverse patchwork composed of private schools, charity schools, town-sponsored schools, church-run schools, and informal frontier schools, and it varied considerably by region. Most Americans did not conceive education to be primarily a public function. Education is nowhere mentioned in the U.S. Constitution, and although this made education a power reserved for the states under the Tenth Amendment, only seven of the sixteen states had asserted this power in their constitutions by 1800. Often schools were associated with churches, and most believed it to be the right and responsibility of parents to make decisions about their own children’s schooling, just as it was appropriate for them to guide their children’s religious instruction. In the religiously diverse Mid-Atlantic states, many parents sent their children to schools run by their own denomination or religion. As in England, the well-to-do would often send their children to more expensive private schools, where they were prepared for a classical education at the universities. Rounding out the system, philanthropists in the larger cities founded and supported free charity schools for the children of the poor. Some of these—“Sunday schools”—met only once a week, so that working children could attend; others—the monitorial schools—employed only a very few teachers and relied on older students to teach the younger ones. The most common role for state governments in education during this period was to give private schools financial assistance from a permanent educational endowment—a practice somewhat resembling modern voucher schemes.¹ These endowments were funded in various ways, including Federal land grants and

¹ The comparison is made by Stephen Macedo (2000): 51.

various fines, fees, or excise taxes. But typically they were not funded by direct taxes. In the South, the rural and aristocratic character of plantation society made schools difficult to maintain and unattractive to the wealthy. Therefore, while the children of the upper-class would be educated by private tutors, most children, white and Black, received no formal education at all (Cremin 1970).

It was only in New England that there was a long tradition reaching back to colonial times of treating education as a public function. Land holdings in most of New England were much smaller than in the South and towns were more common. As a result, there were fewer practical barriers to schools than existed in the South. And unlike the Mid-Atlantic colonies, where religious pluralism encouraged the separation between church and state, there was initially no sharp distinction between civil and religious functions in the Puritan colonies of New England. For example, it was typical for all inhabitants of a seventeenth-century Massachusetts town to be required to support the town's church and minister, whether they were personally church-members or not. The church was understood to be the whole town's church. Hence, it is not surprising that the school should likewise be understood to be the town's *common school*. As early as 1647, the colony of Massachusetts passed a law requiring all towns of over fifty households to maintain a teacher, and all towns of over one-hundred households to maintain a grammar school. The impetus for founding schools at that time was primarily religious. Their purpose, as the 1647 law made clear, was to foil the "Chief project of ye old deluder, Satan" of keeping men illiterate and ignorant of the Scriptures. The law provided that teachers and schools were to be supported "either by the parents or masters of such children, or by the inhabitants in general" (Gross and Chandler 1964: 6). When Massachusetts became a state under the 1789

Federal Constitution, it enacted the first general state school law, essentially reauthorizing the 1647 law (Cremin 1951: 86-87; 1970: 181-182).

Enthusiasm for schools grew markedly in the country under the influence of republican thinking during the revolutionary and early national periods. Steeped in Enlightenment ideas about the perfectibility of man and society through knowledge, republicans held, in the words of one writer, “that the mode of government in any nation will always be moulded by the state of education,” that “the throne of tyranny is founded on ignorance,” and that “literature and liberty go hand in hand.”² This republican faith in knowledge led a number of prominent statesmen and intellectuals to devote considerable energy to drafting plans for public school systems. Thomas Jefferson, who was familiar with similar proposals from his stay in Revolutionary France, worked out the most detailed program of the period in his “Bill for the General Diffusion of Knowledge” for the state of Virginia. The bill reflected Jefferson’s conviction that, though “the people are the only safe depositories of their own liberty,” even the people “are not safe unless enlightened to a certain degree.” This idea, that a self-governing people must be enlightened, was the basis for Jefferson’s belief in the necessity of universal public education, which would impart to every member of society sufficient learning, as he put it, “as will enable him to read & to vote understandingly on what is passing.”³ But Jefferson also recognized that every society must have its leaders, and these men would need more education than the average citizen. Jefferson thought that these leaders should be drawn from the country’s “natural aristocracy” of talent of virtue—not just from the “artificial aristocracy” of wealth and birth.⁴ Therefore, he

² Simeon Doggett, *A Discourse on Education* (1797), quoted in G. Wood (2009): 471.

³ Letter to Littleton Waller Tazewell (Jan. 5, 1805) in Jefferson (1984): 1149-1150.

⁴ Letter to John Adams (Oct. 28, 1813) in Jefferson (1984): 1305-1306.

proposed that there be a selection system at each stage of schooling that would send the “best geniuses” of modest means to further education at public expense. Jefferson’s concern was not with “equal opportunity” as we would think of it. Typical of republicanism, his aim was oriented toward the public good: “we hope to avail the state of those talents which nature has sown as liberally among the poor as the rich, but which perish without use, if not sought for and cultivated.”⁵

Republican educational ideals found fertile ground in New England. As one historian observes, “It is not difficult to perceive the close relationship between the desirability of all children being able to read and interpret the Bible for themselves, the essence of the older Protestant tradition, and the desirability of all children being able to read in order to participate in the affairs of government” (Cremin 1951: 93). In 1800 Massachusetts took the important step of being the first state to permit local school districts to levy property taxes in support of their common schools, thereby setting in place what would become the central feature of the American school-finance system, even as it exists in our day. Tax support for the schools did not immediately lead to free schools, however. Many schools employed the rate-bill system, on which pupils would be charged a tuition based on ability to pay. This, unfortunately, had the effect of discouraging some poor families from sending their children to school at all, since they regarded the receipt of charity to be stigmatizing. In 1827 the Massachusetts common schools became the first in the country to do away with all private tuition and to be entirely supported by public taxes. Writing in 1843 as the first secretary of the Massachusetts Board of Education, Horace Mann could boast that:

⁵ *Notes on the State of Virginia*, Query XIV in Jefferson (1984): 274.

Our schools are perfectly free. A child would be as much astonished at being asked to pay any sum, however small, for attending our Common Schools, as he would be if payment were demanded of him for walking the public streets, for breathing the common air, or enjoying the warmth of the unappropriable sun (quoted in Cremin 1951: 91-94).

But outside of New England, the individualistic and philanthropic traditions of education had a firmer grip on the minds of Americans. Many considered taxation for general public education an unjust burden and an intrusion of government into the proper domain of the family. When Henry Barnard called for a state-wide tax to support common schools in Rhode Island, citizens allegedly complained that “he might as well take a man’s ox to plough his neighbor’s fields as to take a man’s money to educate his neighbor’s children.”⁶ Although many Americans accepted the ideal of universal education, they also understood it to be satisfied so long as there were adequate charity schools available for those whose family could not afford to pay for it. When the Free School Society of New York City—the forerunner of the public school system—wanted to expand beyond its traditional role as a charitable institution and attract the children of middle-class citizens in the 1820s, they found that many parents were too proud to send their children to free schools. The Society only succeeded in its aim of attracting these students by implementing a rate-bill system and asking families to pay for what the Society was prepared to offer for free (Ravitch 1974: 22). In 1822, Daniel Webster could still praise New England for its peculiar insight into what he took to be the proper role of government in education:

[New England] early adopted and has constantly maintained the principle, that it is the undoubted right, and the bounden duty of government, to provide for the instruction of all youth. That which is elsewhere left to chance, or to charity, we secure by law. For the purpose of public instruction, we hold every man subject to taxation in proportion to his property, and we look not to the question, whether he himself have, or have not, children to be benefited by the education for which he pays (Cremin 1951: 92).

⁶ Address of Jas. L. Hughes at the eighty-seventh birthday of Henry Barnard (1897), quoted in Cubberley (1905): 71-72.

During the period from 1820 to 1850, at least two further arguments for tax-supported common schools assumed prominence and helped convince many Americans that education was a legitimate public function after all. Both of these arguments emphasized the importance of children from diverse backgrounds being educated together. First, in the era of Jacksonian democracy, those concerned to establish and preserve social equality saw the common schools as the great social leveling device (Cremin 1951: 33-44). Arguing for tax-supported common schools in the Pennsylvania legislature in 1835, the New England native Thaddeus Stevens invoked what he took to be the good example of ancient republics: “There all were instructed at the same school; all were laced on perfect equality, the rich and the poor man’s sons, for all were deemed children of the same common parent—of their commonwealth.” Meeting the individualist objection that the tax law would force responsible parents to support the children of the profligate, Stevens countered:

It ought to be remembered, that the benefit is bestowed, not upon the erring parents, but the innocent children. Carry out this objection and you punish children for the crimes and grades founded on no merit of the particular generation, but on the demerits of their ancestors; An aristocracy of the most odious and insolent kind—the aristocracy of wealth and pride.⁷

For Stevens, public education was not only a means of sifting out the diamonds in the rough for public benefit. It was also a means for attacking the causes of poverty:

I know how large a portion of the community can scarcely feel any sympathy with, or understand the necessities of the poor; or appreciate the exquisite feelings which they enjoy when they see their children receiving the boon of education, and rising in intellectual superiority, above the clogs which hereditary poverty had cast upon them. It is not wonderful that he whose fat acres have descended to him from father to son in

⁷ Thaddeus Stevens, “An Appeal for Tax-Supported Schools,” (1835) in Gross and Chandler (1964): 112, 114.

unbroken succession, should never have become familiar with misery, and therefore should never have sought for the surest means of alleviating it.⁸

The other argument typical of the period was nationalistic. With new influxes of immigration from the 1820s onward, most notably that of the Irish Catholics, many Americans began to worry that differences in language, religion, and culture would undermine the cohesiveness of American identity and the commitment to free self-government. If all children were educated together in common schools, then perhaps they “would form similar associations, cultivate kindred political and social feelings, and in their manners and customs become peculiarly American.”⁹ For instance, in an 1849 speech by Benjamin Labaree, President of Middlebury College, we find these newer nationalistic themes overlaid onto the older republican motif of education for civic virtue:

The multitude of emigrants from the old world, interfused among our population, is rapidly changing the identity of American character. These strangers come among us, ignorant of our institutions, and unacquainted with the modes of thought and habits of life peculiar to a free people. Accustomed to be restrained by the strong arm of power, and to look upon themselves as belonging to an inferior class of the human race, they suddenly emerge from the darkness of oppression into the light and liberty of freemen.... Shall these adopted citizens become a part of the body politic, and firm supporters of liberal institutions, or will they prove to our republic what the Goths and Huns were to the Roman Empire? The answer to this question depends in a great degree upon the wisdom and fidelity of our teachers...¹⁰

In the same period, W.S. Dutton, a Congregationalist minister, urged Americans to set aside religious differences in schooling for the sake of national harmony:

⁸ Ibid., p. 115.

⁹ *Albany State Register*, September 12, 1855, quoted in Macedo (2000): 63, 295 n.61.

¹⁰ Benjamin Labaree, “The Education Demanded by the Peculiar Character of Our Civil Institutions,” in *The Lectures Delivered Before the American Institute of Instruction, at Montpelier, Vt. August, 1849* (1850), quoted in Cremin (1951): 45.

The children of this country, of whatever parentage, should, not wholly, but to a certain extent, be *educated together*,—be educated, not as Baptists, or Methodists, or Episcopalians, or Presbyterians; not as Roman Catholics or Protestants, still less as foreigners in language or spirit, but as Americans, as made of one blood and citizens of the same free country—educated to be one harmonious people. This, the common school system, if wisely and liberally conducted, is well fitted, in part at least, to accomplish.¹¹

Although it was a slow and gradual process, the institution of the free common school spread from New England to the rest of the Northern states by about 1850 and then through the South after the Civil War. Later in the nineteenth century, the high school would be added to the common school system. In this way, the common schools largely replaced the older patchwork of private, religious, and philanthropic schools and academies. A notable exception, of course, was the Catholic parochial school system, and this too had important implications for the future contours of the American school system.

It was not that most Protestants had wanted to exclude Catholics from the common schools. Quite the contrary, the leaders of the common school movement earnestly wanted the schools to be American, not sectarian. Part of the problem was that their understanding of what America was—their notion of where the country stood in the march of history—was difficult to disentangle from their essentially Protestant outlook. American republicanism was understood to be the political culmination of the revolt against despotism that Luther had begun. It is really not surprising, then, that Catholics often felt that instruction in the common schools defamed their religion. There was also the problem of conducting moral education. For most Americans in the mid-nineteenth century, the foundation of morality was religion, and they took for granted that schools would not only improve the minds of students, but shape their moral characters.

¹¹ W.S. Dutton, “The Proposed Substitution of Sectarian for Public Schools” (1848), quoted in Macedo (2000): 54.

Protestants of different denominations found that they had enough in common that moral education in the schools could be conducted along nonsectarian lines, at least as far as they were concerned. As they understood it, one part of this nonsectarian moral education was the reading of the Bible without commentary or interpretation by the teachers. But Catholic leaders objected that lay reading of the Bible was a Protestant practice and was forbidden for Catholics. On the other hand, doing away with all reference to religion in the schools, even if that would have been satisfactory to Protestants, was not acceptable to Catholics either; this would be an education fit only for “infidels.”

Not only did the Catholics want to maintain their own school system, they also wanted it to receive state funding. This led to a particularly heated battle in New York City in the 1840s. From the Catholic perspective, just as the state of New York gave financial support to both Catholic and Protestant orphanages, it ought also to support both the Catholic and Protestant schools (which the Protestants called “common schools”). This evenhandedness would have been quite the opposite of establishing a state religion, as the Catholics saw it. And many European and Commonwealth countries did eventually adopt this strategy. But by this time, there was already a strong tradition in New York and other states of not funding sectarian schools, and there was insufficient political will to reverse this policy. The political settlement that finally emerged from this controversy laid the basic pattern that continues to characterize the American educational system: publicly supported “common schools” and a separate, privately supported—but tax-exempt—system of religious schools.¹²

¹² See Ravitch (1974): chs. 1-7 for a history of this controversy. Macedo (2000) has an interesting discussion of the controversy that draws out philosophical themes concerning political liberalism and liberal neutrality (see esp. chs. 2-3).

That dual system was further entrenched in American law in 1925. The state of Oregon had passed a law compelling all children to attend *public* schools, on the republican argument that “the State has an interest in making it certain ... that the citizen is fitted, both in mind and body, to perform [his duties to the State].”¹³ This law would have effectively abolished private schools throughout the state. In *Pierce v. Society of Sisters*, the U.S. Supreme Court held that, since the freedom of parents to raise their own children was a fundamental liberty protected by the Fourteenth Amendment,¹⁴ the state could only abridge that liberty where there was some “reasonable relation to some purpose within the competency of the State.” And the Court denied that the state had “any general power ... to standardize its children by forcing them to accept instruction from public teachers only.”¹⁵ In this manner, the Court recognized in parents a constitutionally protected right to send their children to private schools.

The basic system of financing public schools that emerged in the second half of the nineteenth century had local and state-wide components.¹⁶ First, there were state laws authorizing local school districts to levy property taxes and issue municipal bonds for capital projects.¹⁷ Second, these local funds were supplemented by the state permanent education endowment and possibly by state-wide taxes. (In some states, however, the revenues of state-wide taxes were apportioned to local districts on the basis of taxes paid; hence, there was no

¹³ *Pierce v. Society of Sisters*, 268 U.S. 510, 524 (1924).

¹⁴ As argued in *Meyer v. Nebraska*, 262 U.S. 390 (1922).

¹⁵ *Pierce v. Society of Sisters*, 535.

¹⁶ Today the only state that is purely financed and administered by the state with no local component is Hawaii, but of course it only became a state in 1959.

¹⁷ Why property taxes and not some other form of tax? There are at least two reasons. First, it is often easy to evade local sales taxes; property has the attractive feature that it cannot leave the local community. Second, property values are more stable than consumption or income, and thus property taxes provide a more reliable revenue stream than other kinds of tax. See Odden and Picus (2008): ch. 10 and Stiglitz (1999): ch. 27.

redistribution across districts.) A number of states also discovered by trial and error the principle of matching-funds. When state monies were provided to local communities unconditionally, the local communities often used this revenue in place of taxing themselves. To avoid this, state revenues were made conditional on local communities taxing themselves at a certain rate. In this way, state funds could be used to encourage local initiative (Cremin 1951: 126-128).

With the exception of the land grants which helped fund the state education endowments, very little funding for primary and secondary education came directly from the Federal Government. As late as 1920, the federal government was responsible for only 0.3% of all revenues for primary and secondary education (Odden and Picus 2008: 6). As a part of the Johnson administration's "War on Poverty," the federal government significantly increased its part in financing schools with the 1965 Elementary and Secondary Education Act (ESEA) (known as "No Child Left Behind" since its reauthorization and amendment in 2001). Title I of ESEA instructed the federal government to provide grants to local school districts on the basis of the number of students living in poverty. In the following two years, provisions were added to fund special education programs for disabled and bilingual children. As a consequence of these special and compensatory education programs, the part of the federal government in financing education increased from 4.4% of total public educational expenditures in 1960 to 8% in 1970, which is roughly the percentage that the federal government provides today.¹⁸ Although ESEA was groundbreaking in defining a new role for the federal government in education, it may also

¹⁸ Although the percentage is roughly the same, the actual amount has increased. The federal government spent almost 13 billion in constant 2009 dollars in 1965; in 2009, it is estimated to have spent almost 83 billion. The federal share of revenue also varies by state, as the absolute size of state education budgets and the number of children with special needs both vary between states. In some states, like New Jersey and Connecticut, federal revenues only constitute 4 to 5 per cent of total public expenditure on education, while in other states, like Mississippi or Alaska, federal revenues constitute over 15 per cent of total expenditures. (National Center for Education Statistics, *Digest of Education Statistics* 2009).

be seen as a continuation of the tradition of viewing education as an anti-poverty measure—a tradition which we have seen goes back to the early advocates of common schools and even to the older philanthropic tradition of charity schools. In any case, while ESEA improved special and compensatory education programs, and had the effect of giving the federal government more leverage over educational policy, it did not alter the basic nature of the school-finance system in the United States, which continues to confer primary responsibility on state and local governments.

B) Modernization and inequality

As we have seen, when the state school systems coalesced into their basic modern forms in the mid-1800s, they assumed a decentralized and predominantly local organization under state auspices. In part, this was simply due to the piecemeal history of their development. In part, it was due to the dispersed agricultural character of American society. But the desire of local communities to retain as much control as possible over their children's education, as well as over their taxes, was also an important factor. When the industrialization of the later nineteenth century began to increasingly concentrate wealth regionally, this decentralized system of financing schools led to significant inequalities between districts. This inequality was exasperated because, at the same time, the provision of education was growing more expensive. Teaching was being professionalized, the number of years of schooling extended, and states sought to improve educational standards by imposing higher academic requirements on local schools. One author from the period suggests that the costs of education doubled during the period from 1870 to 1900 (Cubberly 1905: 34). As a consequence of these trends, some communities had difficulties keeping their schools open for as many days as the state required.

In fact, poorer districts often taxed themselves at many times the rate of wealthier districts and yet still received considerably less revenue per pupil.

Initial attempts at the state level in the early twentieth century to ensure that all schools had the minimal funds for providing a basic education took the form of an improved and enhanced system of flat grants. Flat grants are simply lump sum payments apportioned according to some criterion. For example, in 1900 many states apportioned money according to the number of school-age children residing in a district. E.P. Cubberley, who one of the first scholars to devote intense study to school finance, argued that states ought instead to apportion funds to schools on a per-teacher basis, as that would roughly track the number of children actually in school, while also giving local districts an incentive to improve their schools by hiring more faculty. Although larger and more rationally apportioned flat grants did increase the funds available to the poorest schools, they did little to alter the fundamental inequality between rich and poor districts, since the funds were apportioned alike to all schools (Coons et al. 1970: 39-61; Odden and Picus 2008: 276-282).

In the 1920s states began to replace or supplement flat grants with foundation programs, first devised by George D. Strayer and Robert M. Haig. In a typical foundation scheme, the state government guarantees every local school district a certain amount of revenue per pupil, the “foundation level,” on the condition that the district tax itself at least up to some minimal participation rate. If the district does not raise the foundation level at the participation rate, then the state makes up the difference from general state revenues. Central to the idea of a foundation program is that local districts are permitted to tax themselves in excess of the participation rate; these revenues remain in the district and do not count toward the foundation level. In this way, it is possible even for a district that receives foundation aid from the state to raise revenue in

excess of the foundation level. For example, suppose that the state foundation level is \$500 per pupil and the participation property-tax rate is 2%. Now suppose that the district of Flatfield would raise \$400 at the participation rate, but since it chooses to tax itself at 3%, it actually raises \$600 per pupil. Under the foundation program, Flatfield would thus receive state revenues of \$100 per pupil (the foundation level of \$500 minus the amount Flatfield raised at the participation rate, \$400). Adding that \$100 to the \$600 that Flatfield raised through local taxes yields \$700 per pupil.

In theory, if a district raised more than the foundation level at the participation rate, then the state might recapture that “excess revenue” to help fund subsidies to poorer districts. As before, revenues raised at tax rates higher than the participation rate in wealthy districts would remain in the local district. Again, suppose that the foundation level is \$500 per pupil and the participation tax rate is 2%. Now the wealthy district Riverwood raises \$1,000 per pupil at the participation rate, but goes ahead and taxes itself at the higher rate of 3% and raises in all \$1500 per pupil. If the foundation program recaptured excess revenues, then \$500 ($\$1000 - \500) would be redistributed to poorer districts like Flatfield; Riverwood would then keep total revenues of \$1000 per pupil ($\$1500 - \500). But in practice recapturing is typically unpopular politically and is rarely implemented.¹⁹

Unlike flat grants, foundation plans do have the potential to equalize revenues between districts to some extent. Just *how* equalizing a foundation plan is depends on the details of the plan’s design. If the foundation is set at a high level, such that few districts can reach that level at the participation tax-rate, then the plan tends to level out differences between districts. It is

¹⁹ There are good discussions of foundation plans in Coons et al. (1970): ch. 2 and Odden and Picus (2008): 283-293.

even more equalizing if, in addition, there is a high participation rate, such that few districts choose to tax themselves any further. On the other hand, low foundation levels, or low participation rates, will be much less equalizing (Coons et al. 1970: ch. 3-5). As a matter of historical record, foundation levels were not very high in most states until the wave of court challenges beginning in the late 1960s. Moreover, they were often set in a relatively arbitrary way, more sensitive to available state revenues and the balance of political power than to any particular educational purpose (Minorini and Sugarman 1999b).

11.3 Three Waves of Court Challenges to School-Finance Systems

A) The First Wave: Education and Equal Protection

By the 1960s many advocates of school-finance reform despaired of attaining their ends through legislative means, since those who were most disadvantaged by the status quo, the poor, were also those with the least clout in state legislatures. As John Coons and his coauthors put it in 1970, “the testimony of seventy years of frustration of legislative reform strongly confirms the futility of political commotion at the state level.” They depicted the status quo as a political “logjam” of vested interests which only the courts could break. In doing so, the judiciary would liberate democratic processes to consider reasonable alternatives (Coons et al. 1970: 293-294).

The legal strategy was to argue that state school-finance systems which produced large inter-district inequalities by relying substantially on local property-tax revenues violated the right of children in poorer districts to equal protection under the law as guaranteed by the Fourteenth Amendment. Lying in the background, of course, was the precedent of *Brown v. Board of Education*, where the Supreme Court had ruled that legally segregated schools violated the Equal Protection rights of Black students. *Brown* could be looked at in two ways. It might be

understood to have been a case primarily about racial segregation. On that reading, it was at most tangentially related to the school-finance question—although some reformers did see school-finance reform as a continuation of the civil rights struggle, given that Blacks and other minorities disproportionately lived in poorer districts. But one could also understand *Brown* to have been a case about equal educational opportunity. In a famous central passage, *Brown* seemed to define the nature of state and local governments' responsibilities in education:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities even in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity to an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.²⁰

Perhaps it could be argued that decentralized school-finance systems failed to make educational opportunity available to all on equal terms and in that way violated the Equal Protection clause.

When *does* a law violate the Equal Protection clause? The original impetus behind the Equal Protection clause was, of course, to forbid state governments from invidiously denying Blacks the same legal rights accorded to whites; thus, the clause embodies the basic liberal right to equality under the law. But courts quickly discovered that in a complex and heterogeneous society, the law is bound to treat and impact individuals in different ways depending on their circumstances. Therefore, Equal Protection jurisprudence has faced the difficult task of navigating a path between, on the one hand, undue interference with the discretion of

²⁰ *Brown v. Board of Education of Topeka* 347 U.S. 483, 493 (1953).

democratically elected legislatures, and on the other hand, eviscerating the substantive guarantees of the Fourteenth Amendment. The approach American jurisprudence has adopted is to apply two different standards, depending on the characteristics of the case.²¹ In most cases, particularly those involving economic regulation, the Court is deferential to the legislature and only requires that the law employ reasonable means toward accomplishing a rational state policy. Under this “rational basis” test, the state does not have to prove that the law employs the most reasonable means, nor that the purpose of the law is particularly wise or enlightened. But the Supreme Court has also found it appropriate to carve out an inner circle of cases to be given special “strict scrutiny.” These are cases in which a law *either* abridges a constitutionally protected fundamental right, or where it invokes a classification, like race or religion, that is “suspect” because of historical patterns of prejudice. Under the strict scrutiny test, the state must show that the law is in pursuit of an extremely important or “compelling state interest” *and* that there is no less discriminatory or restrictive means of pursuing that interest. Where the rational basis test is employed, laws are seldom declared unconstitutional, whereas they are often overturned under the strict scrutiny test.

The first high-profile case to attack the local financing of schools on equal protection grounds was *McInnis v. Shapiro* in 1968. The plaintiffs argued that, because education was so fundamental an interest, as the *Brown* decision had recognized, the school-finance laws of Illinois should be held to the standard of strict scrutiny. Held to that standard, the plaintiffs argued that the school-finance system must be declared unconstitutional, because the “classifications upon which students ... receive the benefits of a certain level of per pupil

²¹ Arguably a third standard has emerged for dealing with gender discrimination cases, but does not concern our discussion.

educational expenditures are not related to the educational needs of the students and are therefore arbitrary, capricious, and unreasonable.” The federal district court, however, rejected this argument. The court declined to apply the strict scrutiny test, apparently on the ground that “the allocation of public revenues is a basic policy question more appropriately handled by a legislature than a court.” Then the court ruled that the inequalities in the Illinois school finance system were an inevitable part of giving local communities control over education and taxes, and that local control of schools is a rational state policy. Such inequalities were not the result of intentional, invidious discrimination. As the Court observed:

[D]elegation of authority to school districts appears designed to allow individual localities to determine their own tax burden according to the importance which they place upon public schools. Moreover, local citizens must select which municipal services they value most highly. While some communities might place heavy emphasis on schools, others may cherish police protection or improved roads. The state legislature’s decision to allow local choice and experimentation is reasonable, especially since the common school fund assures a minimum of \$40 per student.²²

Additionally, the court held that the plaintiff’s proposed standard of apportioning funds on the basis of educational needs was too vague for courts to determine whether or not the standard had been met. In legal jargon, the need-standard was held to be “nonjusticiable.”

At about the same time as the *McInnis* case was unfolding, the legal scholars John Coons, William Clune, and Stephen Sugarman (1970) were developing a slightly different Equal Protection argument. Like the plaintiffs in *McInnis*, they argued that school-finance cases should be held to the standard of strict scrutiny, in part because education was so fundamental an interest. But the Coons team wanted to be able to accommodate the plausible argument that states had a rational interest in giving local communities significant control over the funding of

²² *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968).

their schools. It was important, therefore, to avoid arguing that the Fourteenth Amendment required some narrowly defined school-finance formula, like equal expenditures per pupil or apportionment on the basis of educational need, which would be incompatible with local control. Moreover, in light of the *McInnis* decision's rejection of the educational needs standard, it was necessary to find a standard that was manageable for a court to apply. The Coons team argued that a state-finance system (including the state laws governing local taxation) may not apportion funds on the basis of any suspect classification and that district wealth should be recognized as a suspect classification. Hence Equal Protection requires that the quality of public education in a district not be a function of that district's wealth. If some schools are better funded than others because of the tax preferences of local voters, that would be acceptable. What is unacceptable is a school-finance system that legally empowered rich districts to raise more revenue per pupil than poor districts at the same level of tax effort. In short, what the Fourteenth Amendment required of state school-finance systems is *fiscal neutrality*.

Fiscal neutrality could be made compatible with local control through what Coons and coauthors called a "power-equalization" scheme. Under such a scheme, the state would use its general revenues to guarantee that every local district can operate as if it had the same tax base per pupil as some key district—ideally, but not necessarily, the wealthiest district. For example, suppose that the per-pupil property assessment of the state's wealthiest district, Riverwood, is \$10,000, and that the per-pupil assessment of Flatfield is \$8000. The residents of Flatfield decide to tax themselves at a rate of 1%, so they locally raise \$800 per pupil. But since the state guarantees every district an effective tax base of \$10,000 per pupil, the state then allocates to

Flatfield an additional \$200 from statewide revenues.²³ It is important to note that the principle of fiscal neutrality does not *require* that a state implement power equalization. Fiscal neutrality would also be satisfied by a centralized state financing system which apportioned revenues on an equal per pupil basis, on the basis of need, etc. Power equalization is only required by the principle of fiscal neutrality where there is significant financing through local taxes. The concept of power equalization is important to the Equal Protection argument, however, for it shows that there is a way of giving local districts significant control over school finance, which does not discriminate on the basis of district wealth. Indeed, the Coons team argued that if states really cared about local control, then power equalization was the only way to give poorer districts real power to improve their schools.

The most innovative part of the Equal Protection case for fiscal neutrality is the claim that district wealth constitutes a suspect classification. The Coons team pointed out that there were two other areas in which the Supreme Court had held that the Constitution protected citizens against differential treatment on the basis of wealth. First, the Supreme Court had held that states could not make the basic rights of criminal defendants conditional on their ability to pay for services. In particular, states could not require indigent defendants to pay for a court transcript, since that effectively denied them the right to appeal the verdict of the case; additionally, states were required to appoint counsel for defendants who could not afford to pay legal fees.²⁴ Second, states could not make voting conditional on the ability of citizens to pay a poll tax.²⁵ The Coons team argued that the child's interest in education was of comparable

²³ There is a fuller discussion of power-equalization in 15.5.A.

²⁴ *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California* 372 U.S. 353 (1963).

²⁵ *Harper v. Virginia Board of Education*, 383 U.S. 663 (1966).

importance to the rights of criminal defendants and voters. Whereas most citizens will never be criminal defendants, every citizen is legally compelled to go to school for the greater part of childhood. And like voting, education is fundamental to democratic society. Echoing the republican arguments articulated by early advocates of public education like Thomas Jefferson, Coons and his co-authors maintained that

All political behavior inevitably must reflect the presence or absence of education. A man's understanding of public issues is a function of those communications which are intelligible to him.... If society's stake in the preservation of the 'voting interest' really is broader than protecting the mechanical act of pulling a lever ... education must be viewed as a crucial interest. The model of the voting citizen, we trust, is not one of passive absorption and Pavlovian reaction; it is the model of *response* and *participation*, a role for which education is the fundamental preparation (1970: 372)

Hence, just as it was discriminatory to make the right to vote conditional on wealth, the Coons team argued that it was discriminatory to make the quality of our preparation for democratic citizenship conditional on wealth.

The fiscal neutrality argument was accepted by the California Supreme Court in 1971. In *Serrano v. Priest*, plaintiffs—who claimed “to represent a class consisting of all public school pupils in California, ‘except children in that school district, the identity of which is presently unknown, which school district affords the greatest educational opportunity of all school districts within California’”—argued that the state’s reliance on local property taxes was in violation of their Equal Protection rights.²⁶ The court observed that the tax bases did vary widely across the state: “in 1969-1970, for example, the assessed valuation per unit of average daily attendance of elementary school children ranged from a low of \$103 to a peak of \$952,156—a ratio of nearly 1

²⁶ *Serrano v. Priest*, 487 P.2d 1241, 1244 (Cal. 1971), quoting the plaintiffs’ brief.

to 10,000.”²⁷ Moreover, these inequalities in tax bases led poorer districts to tax themselves at high rates for comparatively low revenue yields. “For example, Baldwin Park citizens, who paid a school tax of \$5.48 per \$100 of assessed valuation in 1968-1969, were able to spend less than half as much on education as Beverly Hills residents, who were taxed only \$2.38 per \$100.”²⁸ Accepting that education is a fundamental right and that district wealth constituted a suspect class, the court in *Serrano* held that the California school-finance laws should be held to the standard of strict scrutiny. It roundly rejected the argument, accepted in *McInnis*, that the inequalities were a necessary consequence of a policy favoring local control. It held that the pretense of local control is a “cruel illusion”: “Far from being necessary to promote local fiscal choice, the present financing system actually deprives the less wealthy districts of that option.”²⁹ Hence, employing the language of the Coons team, the court in *Serrano* ruled:

We have determined that [the California public school financing system] invidiously discriminates against the poor because it makes the quality of a child’s education a function of the wealth of his parents and neighbors. Recognizing as we must that the right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth, we can discern no compelling purpose necessitating the present method of financing.”³⁰

B) The First Wave Collapses: San Antonio v. Rodriguez

The legal victory for advocates of school-finance reform marked by *Serrano* was short-lived. Only eighteen months after *Serrano* was decided, a similar case from Texas reached the U.S. Supreme Court as *San Antonio v. Rodriguez*. Like Illinois and California, Texas financed its schools through local property taxes and a state-wide foundation program. In a 5-4 decision, the

²⁷ *Serrano v. Priest*, 1246.

²⁸ *Serrano v. Priest*, 1250.

²⁹ *Serrano v. Priest*, 1260.

³⁰ *Serrano v. Priest*, 1241.

majority denied that the inequalities that arose from the system of local financing violated the Equal Protection clause. The Court held that it was not appropriate to hold the school-finance laws of Texas to strict judicial scrutiny, and that, when held to the appropriate rational basis standard, the Texas financing system was reasonably related to the legitimate state interest in promoting local control over schools.

The argument that the strict scrutiny standard was inappropriate had three parts. First, the Court rejected the idea that district wealth counted as a suspect class. Where the Supreme Court had previously recognized the presence of wealth discrimination, these had been cases where indigent individuals were absolutely deprived of some essential benefit like the right to a court transcript, the right to defense counsel, or the right to vote. But the members of the class allegedly being discriminated against in *Rodriguez* had not been shown to be indigent; indeed, they had not even been shown to be *individually* poor at all. The attempt to define a suspect class on the basis of characteristics of a district, rather than characteristics of individuals, marked a significant departure from previous wealth-discrimination cases. Moreover, the majority was disturbed by how large and amorphous the suspect class was. In the Court's opinion, Justice Powell observed with some trepidation that the plaintiffs in *Serrano* claimed to represent every child in the state of California, except those in the unidentified district that had the highest per pupil property assessment. To recognize a group that incorporated the vast majority of the population of schoolchildren potentially marked a dramatic transformation of previous discrimination jurisprudence. The plaintiffs in *Rodriguez* had claimed to act on behalf of a more modestly delimited group—those “schoolchildren throughout the State who are members of minority groups or who are poor and reside in school districts having a low property base.” But the Court was dissatisfied with the vagueness of the class of districts with *low property bases*,

and it denied that all members of minority groups lived in poor districts. Just as important, the plaintiffs had not shown that anyone had been absolutely deprived of an education. At most they received an education of lower quality than children in wealthier districts. The Court argued that “where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.”³¹ Indeed, this seems particularly apt of the law regarding state-appointed defense counsel.

The second argument against invoking strict scrutiny was that the case did not involve a fundamental right. The Court argued that the “fundamental importance” of a child’s interest in education was not the proper test as to whether it should count as a fundamental right for the purposes of Equal Protection; the sole question was whether it was explicitly or implicitly protected by the U.S. Constitution. Since education is nowhere mentioned in the Constitution, the majority ruled that it was not a fundamental right. The plaintiffs had argued that education was a fundamental right, because it is so essential to exercising explicitly mentioned constitutional rights, like the freedom of speech, the ability to benefit from a free press, as well as the right to vote. This argument features prominently in Justice Marshall’s long dissent in *Rodriguez*. He agreed that not all important or fundamental interests are constitutionally protected, and that the fundamental rights protected by the Fourteenth Amendment “should be firmly rooted in the text of the Constitution.” But Marshall argued that

The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of

³¹ *San Antonio v. Rodriguez*, 411 U.S. 1, 24 (1972).

judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.³²

While the majority appears to have been skeptical of this argument, they granted the premise that some “identifiable quantum of education” may be necessary in order to meaningfully exercise these constitutional rights. But the majority denied that the U.S. Constitution could be interpreted to guarantee “the most *effective* speech or the most *informed* electoral choice,” and, once again, they pointed out that the plaintiffs had not established that the basic education that Texas did guarantee to all “fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.”³³

The third argument against applying strict scrutiny to Texas’s school-finance laws was that the case involved, not some straightforward abridgement of individual rights, but complicated policy questions about how a state will raise and disburse tax revenues. Echoing *McInnis*, the Court held that such matters of public policy are better handled, however imperfectly, by legislatures than by the judiciary. Moreover, the Court feared that interfering with the way a state devolved powers on local governments would constitute a serious violation of the principle of federalism, which respects the state’s broad authority to run its own affairs as delimited in the Federal Constitution.

Having disposed, to its satisfaction, of the argument for applying strict scrutiny, the Court asked whether the Texas school-finance system at least had a rational basis in legitimate state interests. In this respect, too, the Court essentially followed *McInnis* in deeming the state’s

³² *San Antonio v. Rodriguez*, 102-103.

³³ *San Antonio v. Rodriguez*, 36-37.

system a reasonable response to the interest in giving local communities power over education. The Court observed that “direct control over decisions vitally affecting the education of one’s children is a need that is strongly felt in our society.”³⁴ And part of local control, Justice Powell urged, means “the freedom to devote more money to the education of one’s children.” But vesting control over education in local communities also offers citizens more freedom to participate in decision-making as to how tax dollars will be spent: “Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence.” In this respect, Justice Powell found an analogy to the U.S. Federal system, in which each state may “serve as a laboratory and try novel social and economic experiments.”³⁵

Finally, the Court rebutted the charge that the inequalities in the Texas school-finance system were arbitrary in a discriminatory or invidious way. Of course, there was a sense in which the inequalities that emerged from decentralized decision-making were arbitrary. “But any scheme of local taxation—indeed the very existence of identifiable local governmental units—requires the establishment of jurisdictional boundaries that are inevitably arbitrary.” This kind of arbitrariness, however, could hardly be said to constitute discrimination against any class. Moreover, the Court worried that a decision for the plaintiffs might endanger the constitutional legitimacy of all local government: “[I]f local taxation for local expenditures were an unconstitutional method of providing for education, then it might be an equally impermissible means of providing other necessary services customarily financed largely from local property

³⁴ *San Antonio v. Rodriguez*, 49, quoting Justice Stewart in *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972).

³⁵ Quoting Justice Brandeis *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280, 311 (1932) (Brandeis, J., dissenting).

taxes, including local police and fire protection, public health and hospitals, and public utility facilities of various kinds.”³⁶ Notably, Justice White dissented from this line of argument. He allowed that local control was a legitimate state aim, but (similar to the court in *Serrano*) he denied that the Texas school-finance system was a means rationally related means to accomplishing that aim, since the ability of local communities to improve their schools was an option only realistically available to the richer districts. Justice Marshall also questioned whether Texas could invoke the interest in local control in good faith, given that “statewide laws regulate ... the most minute details of local public education,” including required courses, approved textbooks, teacher qualifications, and the length of the school day.”³⁷

C) The Second Wave of Court Challenges: Equity and State Constitutions

The Supreme Court’s decision in *Rodriguez* put to rest the legal argument that inequalities in state school-finance laws were in violation of the Fourteenth Amendment and ended the attempt to force school-finance reform throughout the country in a single action. It did not, however, end court challenges to school-finance systems altogether. Now plaintiffs argued that funding inequalities between districts were in violation of state constitutions. They did so on two grounds. First, most state constitutions have their own Equal Protection Clauses, and it was recognized that states might interpret equal protection differently than had the Federal Government. Moreover, unlike the Federal Constitution, education is mentioned in every state constitution, so there should be no difficulty in establishing that education is a fundamental right in the state context. It was on this basis that the California Supreme Court reaffirmed its initial

³⁶ *San Antonio v. Rodriguez*, 53-54.

³⁷ *San Antonio v. Rodriguez*, 126-127.

Serrano v. Priest decision in *Serrano II*.³⁸ Second, the education clauses of some state constitutions might be interpreted independently of the Equal Protection clauses as guaranteeing “some degree of equity in educational funding or opportunity” (Minorini and Sugarman 1999a: 43). Many state constitutions guarantee that the state will provide a “thorough and efficient” or “general and uniform” system of schools. The Constitution of Montana goes so far as to say that “It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state.”³⁹ It was on the sole basis of the education clause that the New Jersey Supreme Court found the state’s school-finance system unconstitutional in *Robinson v. Cahill*. These victories marked the beginning of the second wave of court challenges to school-finance systems, which now appealed to state constitutions instead of the Federal Constitution. In all, plaintiffs were successful about half the time. While some states followed California and New Jersey in finding school-finance systems to be unconstitutional, several others endorsed arguments similar to those invoked by the majority in *Rodriguez* and upheld the school-finance laws.

The fate of the California school-system after *Serrano II* is worthy of note at this juncture, since it is often invoked in debates about the politics of educational equity. At first, the state legislature enacted a power-equalization scheme similar to that proposed by the Coons team. But soon afterwards, California voters passed by referendum the tax-relief measure Proposition 13. This law limited property tax rates to 1 percent of the assessed value; permitted the assessed value of real property to respond to rates of inflation not in excess of 2 percent annually;

³⁸ *Serrano v. Priest* 557 P.2d 929, (Cal. 1976).

³⁹ Montana Constitution, Art. X, Sec. 1.

permitted property to be reassessed only upon sale or improvement; forbade the state legislature from levying a state-wide property tax; and required all further tax increases to pass by a two-thirds super-majority in the legislature. These constraints made it fiscally impossible for the state to implement the power-equalization scheme, so the legislature instead enacted a new plan that replaced most local financing with state-financing. The new system succeeded in substantially equalizing the expenditures between districts, but Proposition 13 has substantially slowed growth in educational spending. As a consequence, California went from being one of the highest spending states on education to becoming one of the lowest. Although the lessons to be drawn from experience of California are hotly debated, it is often cited as an example of how voters will typically respond to attempts to equalize educational spending—namely, by leveling down.⁴⁰

D) The Third Wave of Court Challenges: Adequacy

Equity-based challenges to school-finance system continued through the 1970s and 1980s. At least five factors, however, encouraged plaintiffs at the end of the 1980s to start casting around for a new legal strategy which focused not on fiscal equity but on the adequacy of the state educational system. First, the rate of victories for plaintiffs in equity cases slowed. From 1980 through 1988, only two states invalidated their school-finance systems, while eight upheld them as constitutional (Minorini and Sugarman 1999a: 55). Many courts interpreted the state education clause as guaranteeing, not equal funding, but only an adequate or sound basic education for every district. Second, in 1983 the National Commission on Excellence in Education published an influential report, *A Nation at Risk*, arguing that American

⁴⁰ See the discussion in Minorini and Sugarman (1999a): 48-51. They however contend that the argument that the experience of California might be typical is “oversimplistic and overstated.”

schoolchildren were falling behind their peers in other countries. This led many education experts to emphasize the importance of improving achievement, raising standards, and increasing accountability. Third, in light of the experience of California, many argued that equality in school financing is consistent with equally lousy schools. This suggested that, if the goal was improving education, and not just equalizing the dollars spent per pupil, then a more outcome-oriented principle was needed. Fourth, a related point, some were disenchanted with the openly redistributive emphasis of equity-based arguments. Perhaps it would be better to focus instead on improving the education of all, which would be more in keeping with the political mood since *A Nation at Risk* anyway. Fifth and finally, some believed that power-equalization failed to address the fact that urban districts, even if they received funds comparable to suburban districts, faced higher educational costs due to students with special needs, and had to provide many other services from their property taxes which competed with education.

The new legal strategy, the “adequacy” approach, first crystallized in 1989 when the Kentucky Supreme Court invalidated the state’s school-finance system in *Rose v. Council for Better Education*. The court held that the Kentucky Constitution, which held that the state shall “provide for an efficient system of common schools throughout the state,” required the state to provide equal opportunity to every child for an adequate education, and that the evidence revealed that schools of Kentucky were inadequate as measured by national standards. Providing a uniformly efficient education to all children of the state is consistent, the Court ruled, with local communities supplementing the state system through local taxes, but the final responsibility for guaranteeing that all children receive at least an adequate education must rest with the state. What did an adequate or efficient education consist in? While the court did not instruct the

legislature to adopt any specific measures, it did try to provide general standards by which an adequate educational system could be measured:

An efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably in surrounding states, in academics or in the job market.⁴¹

To its advocates, the adequacy approach has several advantages over the equity approach. With its focus on educational outcomes, rather than fiscal equity, the adequacy approach would seem to prevent a state from, in effect, washing its hands of failing schools, so long as those schools received the same funds that more successful schools received. It also promised to foreclose another California scenario, by which a state remedied fiscal inequality essentially by leveling down. On the adequacy approach, equalizing the funding between districts would have been pointless unless it actually improved the educational outcomes of some children.

To some extent, the adequacy approach resembles the needs-based approach deployed by the plaintiffs in *McInnis*. For example, it would take into account the varying needs of different students and the different circumstances of different districts. The most significant difference between the adequacy and the needs-based approaches is that adequacy does not condemn all

⁴¹ *Rose v. Council for Better Education*, 790 S.W.2d 186, 212 (Ky. 1989).

inequalities between districts which are not based on educational needs; it only insists that basic educational needs be met. In practice, this might be accomplished either by redistributing funds from richer districts to poorer ones, or by increasing overall educational funding—the advantage of the latter option being that no one’s education suffers and is, besides, more politically viable.

Also noteworthy is the claim by its advocates that the adequacy approach may also be more suitable than the fiscal-equity approach for taking into account so-called *intangibles*, like the benefits of having higher-achieving classmates.⁴² This matter of educational intangibles harkens back to a central issue *Brown*. As you would expect, segregated schools were dismally provisioned for most of their history. But this changed just before *Brown*. In the 1940s, the Supreme Court had already declared segregated professional schools in state universities to be unconstitutional, on the grounds that they were not really equal to the facilities provided for whites. Southern states saw the writing on the wall, and in a final effort to prove their good faith in the “separate but equal” standard laid down in *Plessy v. Ferguson*, they began to pump money into schools for Blacks in the early 1950s. Some states even spent more on schools for Blacks than on those for whites. Therefore, by the time that *Brown* reached the Supreme Court, “substantial equality” between Black and white schools had been achieved. As the Court observed in its opinion:

Here, unlike *Sweatt v. Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other ‘tangible’ factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases.⁴³

⁴² For discussion, see Minorini and Sugarman (1999b): 188.

⁴³ *Brown v. Board of Education*, 492.

Therefore, the decision instead turned on the intangible factors inherent in segregation:

To separate [schoolchildren] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.... ‘Segregation with the sanction of law... has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.’⁴⁴

One appeal of the adequacy approach, therefore, is that, by focusing on educational objectives, it can potentially take intangible factors into account as *Brown* did—factors which would be invisible on the fiscal equity approach (cf. Satz 2007). Some advocates even hope that focusing on intangible factors within an adequacy framework could provide a viable legal strategy for attacking de facto racial segregation at the state level, which has proved resistant to the traditional federal Equal Protection challenges modeled on *Brown*.⁴⁵

Since the decision in *Rose*, court challenges to school-finance systems have significantly shifted from the equity to the adequacy approach, and several state high courts have followed Kentucky in invalidating their school-finance systems on adequacy grounds. In other states, however, school finance systems have withstood adequacy challenges. Interestingly, some states have held that the adequacy standard is too vague to be justiciable, thus echoing the decision in *McInnis*.

11.4 Conclusion

The rise of public schools and of compulsory universal education, as well as the end of segregation, may properly be understood as moments in what Talcott Parsons has called the

⁴⁴ *Brown v. Board of Education*, 494, quotation from the decision in the original Kansas case.

⁴⁵ Minorini and Sugarman (1999b): 199; *Milliken v. Bradley* 418 U.S. 717 (1973). I return to this issue in 14.5 and 14.6.

educational revolution: “the first attempt in history to give large populations as a whole a substantial level of formal education.” Thus, the educational revolution may be set aside the related industrial and democratic revolutions as one of the central social transformations of modernity (Parsons 1967: 409). And like the social disturbances of those other revolutions, the disturbances created by the educational revolution have brought in their train difficult questions of social philosophy. Perhaps the most fundamental is: Who has responsibility and authority for the education of children? The great early modern philosophers of education, Locke and Rousseau, never really questioned the premise that responsibility and authority over education vested in parents and their delegates. One of the general tendencies of the educational revolution has been a shift of responsibility and authority from parents, and secondarily from religious associations, to various levels of government. That *some* such shift is appropriate is subject to broad, though not universal, consensus. But how to articulate the principles lying behind the new balance of power is immensely controversial.

This question about authority and responsibility is closely bound up as well with questions about the proper goals of education. When authority over education was held almost entirely by the parents, there was relatively little friction over what children ought to be taught or how much ought to be spent on education. But as authority is dispersed across various agencies, disagreements about the content and extent of education become endemic. The public schools are the frontlines in the culture wars, and not uncommonly a theater for battles over economic inequality.

Let me close by briefly expanding on the problem of inequality, since it is the focus of the following chapters. When education was primarily a function of parental authority, there was relatively little concern about educational equality between families. Naturally, what one family

provided for its children would differ from that of another. The primary question was what minimal education every child ought to receive—if not from his parents, then from the philanthropic members of the community. The answers given were various, but they typically pointed to moral and religious education, as well as training for an occupation or station in life. As literacy and numeracy assumed greater economic and political importance, governments began to take measures to ensure that children from all families had access to at least some formal schooling. Given the conditions and traditions of nineteenth-century America, these measures, as we have seen, were typically decentralized and local in character. One consequence of state intervention was to increase expectations that children would receive equal educations, seeing as they were equal citizens. Not only do government inputs to education become politicized, but educational outcomes do as well. Whereas before, differences in educational outcomes had seemed like a natural phenomenon, the state increasingly seems implicated in their creation.⁴⁶ And at the same time, the decentralized structure of the school system inevitably *produces new inequalities*, just as individual families have always done.

⁴⁶ The picture I am describing has some analogies with what Habermas describes as a legitimation crisis. Government efforts to steer the economy out of crisis politicize relations of production and exchange, which bourgeois ideology had formerly accepted as non-political. In doing so, the legitimacy of the economic order comes under increased scrutiny. Thus, attempts to handle the economic crisis give rise to a legitimation crisis (1975: esp. 36).

CHAPTER 12: THE PHILOSOPHER'S GUIDE TO DISTRIBUTIVE CONCEPTS IN EDUCATION

12.1 Introduction

There are at least two literatures relevant to thinking about conceptions of distributive justice in education: the field of school finance in law and public economics, and the field of distributive justice in political philosophy. Both literatures provide useful conceptual tools for thinking about fairness in the distribution of education, but unfortunately they remain largely uninformed by one another. The aim of this chapter is to provide a conceptual framework that integrates some of the conceptual apparatus of each of these two disciplines, particularly with a view to facilitating discussion amongst political philosophers about justice in the domain of education.

12.2 Three Dimensions of Principles: Metrics, Rules, and Scope

Political philosophers have devoted much attention to the task of distinguishing and articulating various principles of justice, which might be mistaken for one another, or whose deep structural similarities might be overlooked. Three dimensions of a principle can be distinguished. First, there is the question of the **metric**, “currency,” or “distribuendum” of distributive justice. This issue has, as it happens, been most thoroughly explored in debates about egalitarianism. Egalitarians believe in equality, but “equality of what?”: welfare,

resources, Rawlsian primary goods, capabilities, etc.¹ These are examples of the various metrics that a distributive principle might employ. The metric measures individuals' distributive **shares**. Of course, some "shares" (like resources or primary goods) are more literally distributed or redistributed than others, which are really desirable consequences of distributions (like welfare or capabilities). Nonetheless, I will adopt the common, looser way of talking and speak of all shares as being distributed.

The second dimension of a principle is what I will call the **rule**. For any given metric, we might maintain that we ought to maximize aggregate shares, equalize shares, maximize the shares of the smallest holder (what is often called "maximin" or "priority for the worst off"), equalize initial shares, and so on.² By themselves, both metrics and rules are incomplete; when they are combined in a particular way, I will speak of **principles**. Although they are logically independent of one another, some rules and metrics tend to go together in the most common principles. For example, classical utilitarians hold that we ought to maximize welfare; Rawls holds that we ought to maximize the primary goods of the worst-off group; and Dworkin holds that we ought to equalize initial holdings of resources. Although it is useful to distinguish between metrics and rules, more complex principles might be decomposed in different ways. For example, we might describe the principle of "equal opportunity for welfare" as composed of the somewhat recondite metric "opportunity for welfare" and the simple rule "equality," or

¹ The literature is large, but some of the most seminal essays include, Sen (1980); Dworkin (1980a) and (1980b) (reprinted as chs. 1 and 2 in Dworkin [2000]); and G.A. Cohen (1989).

² Again, there is a large literature, but some of the most important works are Parfit (1995) and Temkin (1993).

alternatively, as composed of the simple metric “welfare” and the more sophisticated rule “equal opportunity.”³ Nothing of substance turns on such notational variants.

The third dimension of a principle is its **scope**. Many traditional discussions of social justice assumed that principles of justice apply only within the nation-state.⁴ But over the last thirty years, several writers have argued that the proper scope of distributive justice is global,⁵ while some feminists have argued that principles of justice ought to be applied on a smaller scale to individual families as well (notably Okin 1989). These are debates about a principle’s proper scope.

12.3 Metrics in the Distribution of Education

When we turn to the distribution of education, we can likewise characterize various distributive principles across the dimensions of metric, rule, and scope. I discuss metrics in this section and rules in the next. The dimension of scope does not receive its own section, but is discussed at various points along the way.

Broadly speaking, there are two kinds of metric, or distribuendum, in education: inputs and outcomes. The labels, I trust, are relatively transparent. Inputs are roughly factors that go into a person’s education, while outcomes are results or (as economists sometimes say) “products” of the educational process. Let us now examine these two metrics in more detail.

³ Equal opportunity for welfare is defended by Arneson (1989).

⁴ Most notably Rawls, TJ: §18 and (1999a). Of course, this was never a tenable position for utilitarians.

⁵ For example, Barry (1989): ch. 5; Pogge (1989): ch. 6; Blake (2002); Nussbaum (2006): chs. 4-5.

A) Inputs

The most straightforward **input-metric**, and the one that features most prominently in the history of school finance, is dollar-expenditure-per-pupil. For instance, court challenges to the equity of school-finance systems (like *Serrano v. Priest* and *San Antonio v. Rodriguez*) have often turned on the large inequalities in per-pupil expenditure between districts (see 11.3.A,B). But one might measure inputs in other ways as well. For instance, since resources (e.g., transportation and building costs or teacher salaries) have different costs in different regions and neighborhoods, one might measure inputs, not in monetary terms, but in terms of what money can buy. For instance, in one influential work, “educational resources” are defined as “those services and goods, such as teachers, guidance counselors, textbooks, and libraries, which are used in schools” (Wise 1968: 143 n. 1). Sometimes school-finance writers take into account the different prices of various educational resources by speaking of “price-adjusted costs.”⁶

Although it is rare in the school-finance literature, philosophers sometimes take rather broader views of inputs. For example, the other children in the school might be considered an intangible resource made available to individual students. Thus, Brian Barry argues that “One of the things that makes a school ‘good’ is having middle-class children in it, because of the personal resources they bring to it: middle-class articulacy, middle-class ambitions, and so on” (2005: 64). On this view, then, even if schools were equal in all other tangible factors, different compositions of the student body may deprive some children of crucial educational inputs. Since intangibles are by their very nature difficult to measure as inputs, school-finance economists who

⁶ In the school finance literature, the distinction is sometimes made between capital outlays and annual operating costs. Even if there is equity in annual operating costs, some schools may be disadvantaged by deteriorating buildings. See Odden and Picus (2008): 151-178. Although it is important for accounting purposes, I don’t think this distinction is of much philosophical importance.

want to take them into account tend to shift to more outcome-oriented metrics. Here is a second example of a broad conception of inputs: In order to take into account the special needs of students with disabilities, Harry Brighthouse suggests we think of inputs as “effective educational resources,” where resources are effective for a particular student only if she can actually benefit from them. Thus, a deaf child is not given effective educational resources if she is put in a classroom without a teacher or aid who is trained to communicate with the hearing impaired (2000: 139). The notion of effective educational resources reveals the tight conceptual connection between inputs and outcomes. Inputs produce outcomes. If a resource did not tend to improve educational outcomes in some way, then it generally wouldn’t qualify as an educational input.⁷ In that sense, outcomes seem to be conceptually prior to inputs.

Another conception of resource-inputs that might occur to some philosophers is to treat a person’s native capacities or endowments as “internal resources,” in the way suggested by Ronald Dworkin (1980b; 2000: ch. 2). On this view, true resource equality is inconsistent with devoting the equal bundles of external resources to people with unequal internal resources; instead, those with fewer internal resources ought to be compensated with more external

⁷ One qualification: Some school resources may be desirable simply because they improve the daily quality of life in the school for children and teachers, not because they improve educational outcomes. It would be crude to think that every resource in a school is useless unless it, say, boosts test scores. Jonathan Kozol (2005), for example, relates the following anecdote to illustrate how the accountability culture has absurdly warped elementary education in struggling schools: “A student-teacher at an urban school in California ... wanted to bring a pumpkin to her class on Halloween, but knew it had no ascertainable connection to the California standards. She therefore had developed what she called ‘the MultiModal Pumpkin Unit’ to teach science (seeds), arithmetic (the size and shape of pumpkins, I believe—this detail wasn’t clear), and certain items she adapted out of language arts, in order to position ‘pumpkins’ in a frame of state proficiencies” (79-80).

resources.⁸ Applied to the domain of education, this approach seems to stretch the notion of resource-inputs near, if not beyond, the breaking point, but it is not an incoherent view.

The dimension of scope is particularly important for thinking about input-metrics, since inputs come from different sources. Consider, for example, a system in which states aid local districts by making unconditional flat grants on a per-pupil basis. If one looked at the state grants in isolation, one might say that they are fair, since the state is treating every district equally. But if one instead focused on the *total* local and state expenditure per pupil, one might be led to say that the system is unfair because the system as a whole is disadvantageous to poorer districts.⁹ Since the states have primary legal responsibility for education in the United States, school-finance experts usually restrict their scope to the distribution of total state and local expenditures between districts *within* particular states. However, one might well take a wider perspective by looking at disparities between states, or (conceivably) even between different countries. On the other hand, one could also examine equity in more fine-grained terms. School-finance theorists typically focus on equity between districts, because districts are the basic administrative entities and thus their fiscal information is the most readily available. But one might also look at disparities between schools within a district. This is especially important if some neighborhoods attract teachers with more seniority or if magnet schools with selective admissions policies are better resourced than other schools in the district. Finally, one could examine the inputs devoted to each student. Schools receive more funding for disabled,

⁸ The solution Dworkin proposes is not strict equalization of resources, but to convert brute-luck inequalities into option-luck. This is approximated by imagining a hypothetical insurance scheme: If people did not know what abilities or disabilities they might have, what sorts of premiums would they agree to pay to insure themselves against misfortune?

⁹ See, for example, the discussion in Coons et al. (1970): esp. chs. 1 and 3.

bilingual, or economically disadvantaged children, on the premise that their education is more costly. It is also common for schools and districts to devote more resources to gifted students or to college-prep programs—especially in the form of smaller class sizes.

Since school finance is often treated as a sub-discipline of public economics, inputs are usually understood to be restricted in scope to *public* inputs. In this context, input equity means equity in the public funds devoted to public schools. Political philosophers, however, are likely to be interested in private educational inputs as well. After all, one central argument for the institution of public schools is to counter-balance the privilege of private education that is inaccessible to less wealthy families. I shall refer to **narrow-scope** principles as those that encompass only public inputs and **wide-scope** principles as those that encompass public and private inputs. For convenience, private inputs may be divided into three categories: (i) private inputs to public schools, (ii) private inputs to private schools, and (iii) private inputs to informal education. Let's examine these briefly in turn.

(i) First, public funds often do not exhaust the revenues received by public schools. Public schools may receive supplementary resources from private charities, private companies, or from voluntary parental donations. Many parents also donate their time in volunteering as assistants in the classroom. All of these supplementary inputs can raise questions of fairness. For instance, although Parent Teacher Association groups have traditionally raised extra revenues for schools through events like bake sales, private “boosterism” occasionally takes on much larger proportions. In Greenwich Village, parents wanted to use voluntary contributions to hire an additional teacher in order to reduce class sizes in their school. As it turned out, they were prevented from doing so by the New York City school board (Kozol 2005: 46-49). One could agree with the school board's decision either because one thought this private input inherently

unfair, or because one thought it might set a bad precedent and compromise the public character of the school system, with wealthy parents eventually voting for lower taxes and contributing private money directly to their children's schools.

(ii) Next there are private inputs to private schools in the form of tuitions, donations, or funding from religious organizations. Much of the school-finance literature simply ignores private schools. Egalitarian political philosophers, on the other hand, are likely to be very concerned about significant disparities between public and private schools. R.H. Tawney, for example, held that the English private schools (the so-called "public schools") were one of the two central pillars of social inequality in England (the other being the inheritance of wealth). Of course, the distinction between public and private schools is complicated by the fact that, under some systems, privately administered schools can receive public funds. For example, in many countries, religious schools are publicly funded. In the United States, charter schools are privately administered and partially funded by the state. Additionally, some advocates of school-choice argue that parents ought to be given vouchers which they could spend at the accredited school of their choice (cf. Friedman 1961: ch. VI). This suggests one strategy for equalizing inputs between private and public schools: one might use vouchers to publicly fund privately administered schools, but block all private supplements to them (cf. Brighthouse 2000: 160).

(iii) Finally, there are private inputs to informal education that take place primarily through the family. Private inputs might take the form of the day-to-day vocabulary of parents, the amount of time spent reading with children or helping them with homework, educational extra-curricular activities, parenting-style, and so on. Obviously, these factors are difficult to quantify and compare to public inputs, so economists and legal scholars usually do not treat them as inputs. But political philosophers used to talking about resource equality are more likely to find

this a natural way of thinking. Brighthouse, for example, defends the following input principle: “Children of different classes but the same level of natural talent should receive roughly equal educational resources.” Crucially, however, he argues that we must take into account resource-inputs both in the school and in the home. Thus, “If we assume that children from wealthy families will generally receive greater educational resources outside the school, this supports compensating by expending more in school on similarly talented children from less wealthy backgrounds” (Brighthouse 2000: 138).¹⁰

B) Outcomes

We have been exploring some of the complexities of input-metrics. **Outcome-metrics** can be discussed more briefly. The most influential conceptual framework in the school-finance literature—developed by Robert Berne and Leanna Stiefel—distinguishes between outputs and outcomes. By “outputs,” they mean *educational attainment* as measured by standards such as test-scores, subject mastery, high school graduation or college-entrance rates, and so on. By “outcomes,” they mean *life-time consequences*, such as “income, occupational status, personal satisfaction, ability to compete in the labor market, or status in life” (1984: 12). For the sake of transparency in terminology, I will simply refer to these respectively as “academic, or educational, outcomes” and “lifetime outcomes.” Berne and Stiefel also note that, since measuring and collecting information about lifetime outcomes is very difficult, most economists focus either on inputs or academic outcomes. But philosophers are likely to be interested in academic outcomes only insofar as they have some connection with lifetime outcomes, since it is lifetime outcomes that seem to matter from a moral point of view. We should also observe that

¹⁰ I might note that Brian Barry (2005) misrepresents Brighthouse by quoting the first sentence without putting it in the context of the second sentence (see pp. 114, 292 n.16).

some outcomes are not really individual outcomes at all. For example, in the last chapter, we saw that many republican thinkers emphasized the positive social consequences of universal education, including the formation of virtuous and responsible citizens and leaders. I shall refer to these simply as “social outcomes.” Finally, whereas the dimension of scope is complicated on input-metrics, it is conceptually straightforward on outcome-metrics. That is, one might compare outcomes within various populations: for instance, within an individual school, within a district, within a state, within the country as a whole, or even internationally.

Metrics can always be specified at coarser or finer grains, but this is particularly important for thinking about academic outcomes. Michael Walzer claims that “The goal of the reading teacher is not to provide equal chances but to achieve equal results” (1983: 203), and Brian Barry argues that “we should regard the demands of social justice as being met to the extent that there are equal educational attainments at the age of 18” (2005: 47). At first blush, any sort of equality in educational attainment sounds like an extremely ambitious—perhaps impossible—goal. But much depends on the grain of measurement. Rates of high-school graduation or functional literacy are relatively modest, coarse-grained metrics; grade-point averages or scores on standardized tests, on the other hand, are much more demanding, fine-grained metrics. Walzer, it turns out, has the modest outcome of basic literacy in mind, while Barry means, much more ambitiously, “similar (university entry level) scores” or “graduation from equally well-regarded high schools with equally impressive records.”

Many philosophers—Rawls being only the most notable example—hold that one central goal of an educational system is to provide children from different backgrounds with *equal chances of success in life*, or *equal life prospects* (TJ: 74/64). These are plainly lifetime outcome metrics, but how ought they be understood? There are a number of possibilities, of which I will mention

three. First, one might understand them in welfarist terms. On this view, “success” in life would be cashed out either in terms of lifetime happiness or desire-satisfaction. A person’s life *prospects*, or *chances* of success, then would be understood in terms of his lifetime expected welfare (cf. Arneson 1989). Of course, it is hard to predict future utility, but we can make reasonable estimates that, for instance, people living in poverty and economic insecurity are less likely to be happy or satisfied than those living in secure affluence. Rawls, however, rejects subjective well-being as the appropriate measure of person’s just expectations for several reasons. First, there are the well-known difficulties inherent in making interpersonal welfare comparisons. Second, because preferences are shaped by the existing social system, Rawls thinks that they do not provide an independent basis for judging the merits of different social systems. And third, like Kant, Rawls maintains that happiness or satisfaction only has moral weight when it is consistent with justice; in this respect, the right sets limits on what is truly good. Therefore, Rawls proposes that we measure a person’s relative “success” in life more objectively in terms of her level of social advantage. By this, he means a person’s lifetime share of “primary social goods”—things which a rational person is presumed to want more of rather than less, whatever her more particular values and desires. Assuming that everyone enjoys equal liberty under the law, Rawls claims that the appropriate metric for measuring relative “success” is shares of the variable primary goods, like income and authority. Since Rawls is interested in the basic structure of society, as opposed to the idiosyncratic circumstances of individuals, he supposes that we should go about this by dividing society up into several representative social classes, characterized by their greater and smaller shares of income and power (TJ: §§15-16). A person’s level of “success,” or social advantage, will then be measured in terms of his destination

in the class hierarchy.¹¹ Similarly, a person's life prospects, can be defined as the initial chances that a person with given characteristics will end up in any given class. Finally, some may feel that the welfarist account of success is too subjective and that the Rawlsian account is too materialistic. In this vein, Amy Gutmann suggests that the liberal conception of life chances should not be identified simply with "income, social status, or political power," but instead with "all opportunities to develop and exercise our human capacities" (1987: 129 fn.3).

However we think about life prospects, it is important to specify the point in life at which prospects are to be measured and compared. After all, two people may have equal prospects at ages 1, 12, or 18, and yet have very different prospects at ages 25 or 40. Rawls, for instance, tells us that individuals born into different income classes are to have equal life chances, but he does not tell us at what age those prospects are to be equal. This led James Fishkin to point out that, in theory, we could equalize the life chances of people born to families from different social classes simply by randomly assigning newborns to different families just after birth (1983: 57-64). But, as Fishkin recognizes, this would trivialize the principle of equal life chances. Why not just treat birth as a fair "natural lottery"?

What a principle of life-chances needs, then, is a point in life that can be treated as a morally relevant "starting gate." Prior to the starting gate, the goal is to equalize the advantages that bear on people's future prospects; past the starting gate, individuals' prospects are permitted to diverge from one another, at least when this is due to their own choices. An important question

¹¹ For example, in a Rawlsian spirit, the sociologist John Goldthorpe has developed an influential seven-fold hierarchy of occupational classes measured in terms of basic social advantages like income, job security, opportunity for advancement, and degrees of authority and autonomy. In descending order of advantage, these classes are: I. Large proprietors and higher-grade professionals, administrators, and managers; II. Higher-grade technicians and lower-grade professionals, administrators, and managers; III. Routine non-manual employees; IV. Small proprietors, small farmers, self-employed artisans; V. Lower-grade technicians and supervisors of manual employees; VI. Skilled manual laborers; VII. Unskilled laborers. See Marshall et al. (1997): ch. 3.

for educational policy is whether the purpose of schools is to get individuals up to an equal starting line, or whether school is to be conceived as the first part of the competition for advantage. Some may say that this marks a distinction between primary and secondary (i.e. high school) education. Or perhaps schools can somehow simultaneously perform both roles. In any case, these are questions that have to be faced by principles that prescribe equal life chances.

12.4 Rules in the Distribution of Education

Having discussed the metrics of distribution, we now turn to a classification of distributive rules. I place these in five categories: horizontal equity, vertical equity, maximization, neutrality, and adequacy.

A) Horizontal equity

The simplest rule is horizontal equity. Often, horizontal equity in the distribution of education is understood to mean simply equal public expenditure per pupil. Following Berne and Stiefel, however, I will use the term in a more expansive way to mean *equal distributive shares for all*, where the shares can be filled in in different ways (1984: 13). Thus, horizontal input equity says that every student ought to receive equal educational inputs, while horizontal outcome equity says that inputs ought to be distributed unequally (if necessary) so as to realize equal academic or lifetime outcomes.

Sometimes horizontal equity is described as the principle of “equal treatment for equals.”¹² This is the standard definition in public finance, but I dislike the description for two reasons.

¹² Berne and Stiefel 1984: 13; 1999: 18; Odden and Picus 2008: 66.

First, talk of “equal treatment” connotes an input metric,¹³ whereas on my understanding the rule may be applied to either input- or outcome-metrics. Second and more importantly, it needlessly opens simple horizontal equity up to internal critique. For instance, Berne and Stiefel claim that “The problem with the horizontal-equity criterion in school finance is that in most instances the assumption that children are substantially equal is easily refuted.”¹⁴ But this is question-begging: a principle of horizontal equity need not claim that children are alike in all interesting respects; only that it is appropriate for some reason to distribute shares to all children in the same way. A principle of horizontal equity may be objected to, from an external standpoint, for failing to take into proper account morally salient differences, but it need not be guilty of making an easily refuted assumption.

B) Vertical equity

Instead of distributing shares equally to all, we might distribute shares differently to students with different profiles of relevant attributes. This is the rule of vertical equity. Vertical equity can be either continuous or step-wise. Consider a progressive income tax. It incorporates both continuous and step-like elements. Insofar as one is taxed some percentage of one’s earnings, the tax incorporates continuous vertical equity. At a rate of 10 percent, someone earning \$40,000 pays \$4000 while someone earning \$41,234 pays \$4123.40. But the tax brackets which determine the tax rate one pays incorporate step-wise vertical equity. Step-wise vertical equity can be conceived as “layered” horizontal equity: that is, horizontal equity for similarly situated subgroups, but not between subgroups.

¹³ Cf. Hayek (1960): “From the fact that people are very different it follows that, if we treat them equally, the result must be inequality in their actual position, and that the only way to place them in an equal position would be to treat them differently” (87).

¹⁴ Berne and Stiefel (1984): 13; (1999): 18. And following their lead, Odden and Picus (2008): 66.

As before, I understand vertical equity as a rule that can be applied to either input- or outcome-metrics. An example of a vertical *input* principle is the weighted-pupil system, on which a school receives funds in proportion to its student population, except that students with special needs are given extra weighting. For instance, each disabled student may be weighted as 2.3 pupils and each economically disadvantaged student as 1.2 pupils. An example of a vertical *outcome* principle is Rawls's principle of Fair Equality of Opportunity: that persons of the same native talent and level of motivation ought to have the same life prospects. To be complete, principles of vertical equity need to explain not only the attributes that define who is to receive the same or different distributive shares, but also the range of difference in distributive shares between those who are to be treated differently (Berne and Stiefel 1984: 35). For example, a weighted pupil system tells us both the characteristics of children who are to be given additional resources and the amount of extra resources they are to receive. On the other hand, while Rawls's principle of Fair Equality of Opportunity tells us who is to have similar life prospects, the principle does not, on its own, tell us how much the life prospects between subgroups may differ (as observed in Brighthouse 2000: 128).

In the previous examples, vertical equity is applied at the level of the pupil, but vertical equity can also be applied at the school or district level. A trivial example, I suppose, is apportioning more funds to schools with more students. (But usually this is couched in terms of horizontal equity toward students.) More interesting are systems which take into account special circumstances of some districts like economies or diseconomies of scale or the high-cost of transportation for rural schools (Berne and Stiefel 1984: 15; Odden and Picus 2008: 72-73).

If we define horizontal and vertical equity such that they can apply to either input or outcome metrics, it will generally be possible to describe what is in substance essentially the same

principle in more than one way. For example, we might adopt in practice a principle of *vertical input* equity in order to achieve, or at least approach, the valued goal of *horizontal outcome* equity. In this case, horizontal outcome equity is the morally fundamental notion, as it guides us in determining the details of the principle of vertical input equity. A similar phenomenon can be observed when we play with a principle's scope. Brighthouse, as we have seen, defends a principle of horizontal input equity with a wide scope: that is, it encompasses all educational inputs, public and private. But because some children receive more educational inputs in the private sphere than others do, this means that in the schools, we should distribute educational resources according to a principle of vertical equity, whereby children with fewer resources in the home receive more in the school. Here, then, we have a *wide-scope* principle of *horizontal* input equity which determines the contours of our *narrow-scope* principle of *vertical* input equity in the schools.¹⁵ A final example: Having described Rawls's Fair Equality of Opportunity as a kind of vertical lifetime-outcome equity, and Brighthouse's principle of educational resource equality as a kind of wide horizontal input equity, it may be surprising to discover how similar in substance they are to one another. If we assume that, within a class of people similarly talented and motivated, the only statistically important factor affecting people's life prospects is total educational inputs, then Rawls's Fair Equality of Opportunity would imply something like Brighthouse's educational resource equality.

¹⁵ Just how we would actually make these determinations is another question. If children reach school having received different educational inputs in the home, then how do we compensate the disadvantaged? We can't just give them, in kindergarten, the resources they should have had as toddlers. Presumably they will need much larger inputs now than they would have needed at an earlier developmental stage, if they are to have any hope of catching up with their peers. But how can we calculate the size of compensation without implicitly relying on a principle of outcome equity? Perhaps the idea is that we ask, counter-factually, what level of educational achievement the child is likely to have reached by now had he previously enjoyed the appropriate educational inputs, and allocate whatever resources are necessary now to reach that level of achievement.

C) Maximization

An alternative to equalizing shares is to maximize them in some respect. There are two main alternatives here: one can maximize aggregate distributive shares or selectively maximize the shares of those students with a particular profile.¹⁶ The most important versions of selective maximization array students across some range of attributes (e.g., innate ability, past academic performance) and then maximize the shares of those either at the top end (“maximax”) or bottom end (“maximin”) of that range.

The notion of maximizing educational *inputs*, while logically coherent, is never reasonable. First, it would be pointless to increase inputs beyond the point that they improved outcomes.¹⁷ Second, past some point of diminishing returns, the resources used for education will be more valuable elsewhere. Third, when we are dealing with a fixed pool of resources, maximin is equivalent to equality, while maximax amounts to devoting all resources to those at the top end.

Maximization is only sensible, then, when we are dealing with the metrics of academic or lifetime outcomes. The most common philosophical views focus on lifetime outcomes. For instance, the utilitarian approach is to distribute educational resources so that they maximize aggregate lifetime welfare. Just what this entails in the distribution of educational resources is of course an empirical question. It may justify spending somewhat more on the education of the most promising students, if they have the most potential to promote total social welfare in their professional lives. Alternatively, one might want to distribute educational resources so as to

¹⁶ When population sizes can vary, there is an important difference between average and aggregate maximization. Cf. Parfit (1984): chs. 17, 19. However, because the distinction is at best tangential to the question of educational policy, I ignore it here.

¹⁷ Perhaps one could argue that past the point where they no longer produce better outcomes, they are no longer truly “educational inputs.”

maximize the lifetime outcomes of those with the worst lifetime prospects. Rawls recommends this principle at one point: “[T]he difference principle would allocate resources in education, say, so as to improve the long-term expectation of the least favored. If this end is attained by giving more attention to the better endowed, it is permissible; otherwise not” (TJ: 101/86-87).

Maximization is also the rule implicit in various forms of perfectionism. For instance, one might want to distribute education, as Rawls puts it, in order to “maximize the achievement of human excellence in art, science, and culture” (TJ: 325/285-286). Call this “elitist perfectionism.” Although Rawls rejects elitist perfectionism, Thomas Nagel expresses limited sympathy with it:

Equality of opportunity is fine, but if a school system also tries to iron out distinctions, the waste from failure to exploit talent to the fullest extent is inexcusable.... The position I favor is maximalist. A society should try to foster the creation and preservation of what is best, or as good as it possibly can be, and this is just as important as the widespread dissemination of what is merely good enough. Such an aim can only be pursued by recognizing and exploiting the natural inequalities between persons, encouraging specialization and distinction of levels in education, and accepting the variation in accomplishment which results” (1991: 135; cf. Nagel 1997: ch. 12).

Nagel, reasonably, does not think of elitist perfectionism as a principle of fairness or justice. It is simply another value with distributive implications that sits alongside justice, embodying “respect for what is valuable in itself” (1991: 131). For Nagel, we must either balance these two values against one another in an intuitive way, or else find a conception of justice that is limited enough so as to leave room for promoting perfectionist goals.¹⁸

Another version of perfectionism, one rooted in the idealist tradition, focuses on the full development of each individual’s potential, rather than emphasizing rare achievements. Unlike

¹⁸ Nagel seems to suggest the balancing approach in his (1991) and explores the possibility of limiting the claims of justice in his (1997).

elitist perfectionism, this “democratic perfectionism” often *is* invoked as a principle of justice in education. R.H. Tawney, for one, made such an argument:

What a wise parent would desire for his own children, that a nation, insofar as it is wise, must desire for all children. Educational equality consists in securing it for them. It is to be achieved in school, as it is achieved in the home, by recognizing that there are diversities of gifts, which require for their development diversities of treatment. Its aim will be to do justice to all, by providing facilities which are at once various in type and equal in quality (1931, 1964: 146; cf. 104).

More recently, William Galston has recommended a conception of equality of opportunity on which “[T]he full development of each individual—however great or limited his or her natural capacities—is equal in moral weight to that of every other” (1986; 1991: 202-203). In much the same spirit, John Gardner claims that “Our kind of society demands the maximum development of individual potentialities at *every level of ability*. The goal of the American educational system is to enable every youngster to fulfill his potentialities, regardless of his race, creed, social standing or economic position.”¹⁹ The idea has even found its way into a few state constitutions, like that of Illinois: “A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities.”²⁰

Critics object that this sort of maximizing principle unreasonably demands that we give up everything else we value for the sake devoting all of our resources to education. As Arthur Wise put it, “Educational resources are limited. Therefore, it is impossible to expend resources on every individual until he can no longer profit from them” (1968: 148-149; cf. Gutmann 1987: 129-130). And, indeed, it might be suspected that democratic perfectionism rests on an unrealistic idealist assumption that every individual has some definite inner potential that *can* be

¹⁹ John W. Gardner, *Excellence: Can We Be Equal and Excellent Too?*, pp. 74-75; quoted in Wise (1968): 148.

²⁰ Illinois Constitution, Art. X, Sec. 1.

fully realized. On the other hand, it would be quite contrary to the whole tenor idealist tradition to suppose that individuals *could* fully realize their potential at the end of formal education in adolescence. Humboldt, for example, says that “the highest and most harmonious development of [a person’s] powers to a complete and consistent whole” is “the end of man”—not the end of *childhood*. Moreover, Humboldt says this is the end “towards which every human being must ceaselessly direct his efforts” (Humboldt 1854: 11, 13).²¹ Therefore, perhaps a more charitable interpretation of democratic perfectionism would understand it as enabling the individual to continue the project of self-realization himself. John Dewey, for instance, who had one foot in the idealist tradition, suggests that “The criterion of the value of school education is the extent in which it creates a desire for continued growth and supplies means for making the desire effective in fact” (Dewey 1916: 53). Still, whatever its virtues as an educational philosophy, one may doubt whether this idea will provide much guidance in distributive questions, unless it is employed as a threshold concept for defining an adequate education, in which case it is no longer a maximization concept.

D) Neutrality

Unlike equality and maximization, some rules do not tell us just how shares ought to be distributed, but only rule out certain distributions. I will refer to these rules as “neutral,” in that they insist that distributions not be based upon or biased toward certain factors.²² Perhaps the most familiar neutral rules are non-discrimination input principles. These do not require us to devote the same inputs to every child, but forbid unequal distributions on the basis of certain

²¹ The passage is quoted at the beginning of chapter III (§2) of Mill’s *On Liberty* / CW, XVIII: 261-262.

²² Berne and Stiefel (1984) call this “equality of opportunity,” but this seems too narrow a meaning to associate with so venerable a label.

“suspect categories” like race, sex, or religion. Notice that, when dealing with neutral input rules, it is necessary to distinguish between *ex ante* and *ex post* perspectives (cf. Berne and Stiefel 1999). Suppose that extra educational resources (e.g., smaller class sizes) are distributed to students on the basis of a race-neutral standard, like performance on a special test, but that whites are statistically overrepresented, and Blacks underrepresented, in passing that test. Although the distribution of extra resources would be racially neutral from an *ex ante* perspective, the distribution would not be race-neutral from an *ex post* perspective, as whites turned out to be much more likely to benefit from the system than Blacks.

One of the most important principles in school finance is that of district-wealth neutrality, also referred to as “fiscal neutrality.” As we observed in the previous chapter, in a state school system where districts are financed largely through local property taxes, districts with high property-wealth per pupil are able to raise more revenue per pupil than districts with low property-wealth per pupil with the same, or even smaller, tax effort. A school-finance system that embraced the principle of *ex ante* district-wealth neutrality might permit local districts to decide how much to tax themselves, but would guarantee that all districts received the same per-pupil revenues for a given tax effort. This is called a “guaranteed tax base” (GTB) program. Since local control would be retained under a GTB program, inequalities between districts would be likely to continue to exist, but the inequality of tax power between rich and poor districts would be neutralized. Once again, it is important to keep the *ex ante/ex post* distinction in mind here. In some states where GTB programs have been implemented, poor districts have responded to their increased tax power by voting for tax relief, while rich districts have voted for higher taxes in order to maintain their educational advantage. From an *ex post* perspective, per pupil expenditures in those states remain correlated with district wealth, although the mechanics

of the system are ex ante neutral toward district-wealth (Odden and Picus 2008: 19-24, 56-57). Such cases force us to decide whether it is the mechanics of the distribution that is morally significant or the actual patterns of distribution. The ex ante/ex post distinction should not be confused with the input/outcome distinction. Whether we are looking at district-wealth neutrality from an ex ante or ex post perspective, we are still concerned with the distribution of inputs. But neutrality principles can of course be concerned with outcomes. One example is a principle that says that differences in academic or lifetime outcomes should not be significantly correlated with the socioeconomic class into which one is born.

E) Adequacy

The last distributive rule to discuss is adequacy. In the school-finance literature, the distinction between adequacy and equity concepts is typically drawn by explaining that adequacy is concerned with sufficient and absolute minimum levels of education, while equity is concerned with relational or comparative levels.²³ Educational adequacy is thus a particular instance of what Harry Frankfurt called the doctrine of sufficiency: the view that “what is important from the point of view of morality is not that everyone should have *the same* but that each should have *enough*. If everyone had enough, it would be of no moral importance whether some had more than others” (1988c: 134-135). Hence, as long as children receive the minimally adequate education—and it may be a “high minimum”—adequacy concepts do not condemn educational inequalities above the minimal threshold. But it would be a mistake to say that adequacy is simply a weaker principle than equity, since an equitable system might not meet the

²³ Berne and Stiefel (1999): 22; Reich and Koski (2006): 550; Odden and Picus (2008): 76.

standard of adequacy. As we observed in the last chapter, equality is consistent with equally lousy (Minorini and Sugarman 1999b: 186).

Although adequacy is often contrasted with equity concepts, it is also commonly presented as an interpretation of equal opportunity. For instance, in the landmark adequacy case, *Rose v. Council*, the Kentucky Supreme Court couched the constitutional mandate that the state provide an adequate education for all in the language of equality of opportunity:

Each child, *every child*, in this Commonwealth must be provided with an equal opportunity to have an adequate education. Equality is the key word here. The children of the poor and the children of the rich, the children who live in the poor districts and the children who live in the rich districts must be given the same opportunity and access to an adequate education.²⁴

Some critics, on the other hand, argue that this is just misleading, and that even the weakest plausible conceptions of equal opportunity require more than adequacy. On this view, “Equal educational opportunity demands equality, not adequacy” (Koski and Reich 2006: 608-611).

Unlike equity, maximization, and neutrality, to speak of “adequacy” naturally invites the question, “Adequate *for what?*” It is hard to imagine how that question could be answered without invoking either educational or lifetime outcomes at some level; inputs cannot be adequate in themselves. As a result, adequacy principles always make some reference to educational or lifetime outcomes. In fact, one way to think about adequacy is as a *very* coarse-grained type of outcome equality. Political philosophers who endorse adequacy conceptions typically focus on lifetime outcomes. The dominant strategy is to try to “derive ... the nature and content of educational adequacy from the requirements for full membership and inclusion in a democratic society of equal citizens” (Satz 2007: 636; cf. Gutmann 1987). Adequate

²⁴ *Rose v. Council*, 790 S.W. 2d 186, 211 (Ky. 1989).

educational outcomes are then derived (at least in outline) by working backward from that conception of citizenship. For instance, Debra Satz argues that “citizenship requires a threshold level of knowledge and competence for exercising its associated rights and freedoms—liberty of speech and expression, liberty of conscience, and the right to serve on a jury, vote, and participate in politics and the economy” (2007: 636). In the previous chapter, we observed a similar approach in *Rose v. Council*. In that case, the Kentucky Supreme Court found the state’s entire educational system unconstitutional because it failed to ensure the children of Kentucky an “efficient education,” which was interpreted to mean an education sufficient for developing the skills and competencies essential to modern life and citizenship. The court held that such an education would have to include:

- (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
- (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
- (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
- (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness;
- (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
- (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and
- (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably in surrounding states, in academics or in the job market.²⁵

Since it will presumably cost more to educate students with special needs up to adequate levels, adequacy incorporates a kind of vertical equity. However, this must be qualified in that

²⁵ *Rose v. Council*, 212.

adequacy says nothing about how to distribute shares after the threshold of adequacy is met. Moreover, as Paul Minorini and Stephen Sugarman explain, the relation between inputs and outcomes on adequacy conceptions (at least in the legal and economic literature) is complex:

[A]lthough educational adequacy is more about outputs than inputs, nevertheless, in the minds of many of its supporters, the achievement of adequacy does not appear to be ultimately judged by actual educational outcomes. It is still an opportunity concept, and as such, compliance with the adequacy requirement is ultimately still a matter of inputs, albeit now more broadly conceived. In other words, at the level of the moral claim, educational adequacy seems to be about what fairly ought to be provided, leaving it in the end to the student to take advantage of that offering (1999b: 189).

It would seem that “adequacy” is actually entering the equation at two different places. First, certain educational outcomes deemed adequate are identified. Then a level of spending is identified as adequate to realize those educational outcomes. Both steps involve difficulties.

Adequate outcomes: Academic outcomes can be specified in *norm-referenced* or *criterion-referenced* terms. “All 9-year-olds should read at a 4th-grade level” is an example of a norm-referenced specification. “All 9-year olds should be able to read and comprehend books comparable in difficulty to *The Secret Garden*” is an example of a criterion-referenced specification. As James Guthrie and Richard Rothstein point out, because there is “relatively little consensus ... regarding criterion-referenced adequacy, even in the basic skills of reading and math,” it is much easier to specify adequacy in norm-referenced terms. For example, in spelling out her conception of an education adequate for standing as an equal in society, Elizabeth Anderson suggests that in developed countries, this would probably require “attainment of a high school diploma or its equivalent, representing real twelfth-grade-level achievement” (2007: 620).

But, as Guthrie and Rothstein point out, norm-referenced conceptions of adequacy are logically problematic. A “4th grade reading level” is typically understood as the mean for today’s 4th graders. But there is invariably a distribution around this mean. Therefore resources are by definition already adequate for the *average* 4th grader to read at the 4th grade level,²⁶ and at this resource-level, some 4th graders will naturally read at a 2nd grade level, while others will read at a 6th grade level. Suppose we want virtually *all* 4th graders to read at what we now call the 4th grade level, and we can accomplish this by increasing educational funding and thereby reducing class sizes and increasing the pool of good teachers. Assuming we really do succeed, then the average 4th grader will likely read at what we now call a 6th grade level. But then *that*—what we now call the 6th grade reading level—is what we will *then* call the 4th grade reading level. And, once again, the left tail of the distribution of 4th graders will read at what we will *then* call the 2nd-grade reading level (Guthrie and Rothstein 1999: 252-254). Norm-referenced specifications of adequacy, therefore, must either be understood to involve a program for somehow compressing the range of distribution, or (more likely) to be an elliptical way of referring to non-relative criteria (e.g., those educational attainments now typical of 4th graders).

Adequate spending levels: Suppose we find a way to identify a level of adequate outcomes. How do we move from a conception of adequate outcomes to a conception of adequate resources? Three methods have emerged in the school finance literature. Their details are not all that important for our purposes, but a brief review will help us appreciate roughly how the adequacy approach is understood by economists and students of public policy.

²⁶ While still true, this requires qualification in higher grades, since some youths drop out of school.

On the *professional judgment approach*, a group of professional educators identifies the resources and programs needed to produce adequate outcomes. These inputs are then priced out and a per-pupil dollar expenditure is worked out. This defines an adequate level of resources. Students with special needs can be taken into account by using an index for weighted pupils. Price differences can be taken into account by multiplying the basic per-pupil expenditure level by a regional cost index (Odden and Picus 2008: 77-81; Guthrie and Rothstein 1999).

On the *successful schools* approach, a desired level of academic performance is first defined. For instance, in one model, this involved 18 different performance thresholds, which included a drop-out rate of 3 percent or less, an attendance rate of at least 93 percent, passage rates of 75 percent on the 4th-grade proficiency tests in reading, mathematics, writing, and citizenship, and 60 percent passage rates on comparable 12th-grade tests. After the desired performance level is specified, districts that meet that level are identified. Discarding the statistical outliers of high- and low-spending districts, an average per-pupil expenditure is worked out, which sets the level of resource adequacy. As before, this amount can be adjusted by weighted pupils and regional cost indices. “The underlying assumption,” according to one advocate of this approach, “is that any district should be able to accomplish what some districts do accomplish.”²⁷

The third method is the *cost-function approach*. Once again, a level of adequate performance is first identified. Then regression analysis is used to determine which factors outside the control of the school affect the cost of providing an adequate education—factors like the socioeconomic status of the student body or the local cost-of-living. The results of this regression analysis are

²⁷ J. Augenblick, *Recommendations for a Base Figure and Pupil-Weighted Adjustments to the Base Figure for Use in a New School Finance System in Ohio*. Report presented to the School Funding Task Force, Ohio Department of Education. Quoted in Guthrie and Rothstein (1999): 224.

then used to construct a cost index, which allegedly calculates how much more money is needed by more burdened districts to achieve adequate outcomes (Guthrie and Rothstein 1999; Duncombe and Yinger 1999).

Our purposes do not require us to delve into the various advantages and disadvantages of these three approaches to estimating a level of adequate inputs. The point of this brief review is simply to illustrate the sense in which (at least for many of its advocates), as Minorini and Sugarman suggest, “educational adequacy seems to be about what fairly ought to be provided, leaving it in the end to the student to take advantage of that offering” (1999b: 189).

12.5 Conclusion

We have now completed our framework for organizing ideas regarding the distribution of education. We characterized distributive principles across three dimensions: metric, rule, and scope. In the field of education, we distinguished two families of distributive metrics: inputs and outcomes. Amongst outcomes, we mentioned academic, lifetime, and social outcomes. We distinguished between five families of distributive rule: horizontal equity, vertical equity, maximization, neutrality, and adequacy. The dimension of scope was invoked at several points, but it is most important for distinguishing wide input principles, which take into account public *and* private inputs, and narrow input principles, which focus only on public inputs.

It remains only to underline the fact that these distributive principles may be endorsed in different contexts. For example, the legal literature is naturally concerned with distributive principles concerning education that are plausible interpretations of the law—especially constitutional law. Political philosophers are more likely to be interested in them as candidate moral principles—especially within a theory of distributive justice. Of course, there is some

overlap here, since ideas of justice and fairness seem to be built into certain constitutional ideas, like equal protection. But the distinction is nonetheless important to keep in mind. Few suppose that their preferred theory of distributive justice is already enshrined in constitutional law. One could very well maintain, for example, that the most reasonable interpretation of most state constitutions supports only a right to an adequate education, and yet all the same insist that social justice requires a more thoroughgoing equity. On the other hand, one might suppose that, *in the abstract*, justice only requires us to assure that everyone has an adequate education, but that, because the state constitution promises equality, justice *in our society* in fact requires adequacy and equality.²⁸

Besides candidates for legal constructions and moral ideals, distributive principles may be regarded as reasonable principles for practical public policy. An obvious example is that a utilitarian might endorse a principle for distributing education that makes no reference to maximizing utility. The distributive principle, in that case, is not really a moral principle, but a good rule of regulation.²⁹ A more interesting possibility concerns someone who holds the view that educational inequalities are morally insignificant above a very high threshold of educational attainment. Even if adequacy is the right ultimate moral principle, that very high minimum may only have a realistic chance of being met if the rich and the poor are forced into the same educational boat (cf. Minorini and Sugarman 1999: 206). Therefore, just because adequacy is

²⁸ For instance, the constitution might resemble Montana's: "It is the goal of the people to establish a system of education which will develop the full educational potential of each person. Equality of educational opportunity is guaranteed to each person of the state" (Montana Constitution, Art. X, Sec. 1).

²⁹ The term "rule of regulation" is from G.A. Cohen (2008): 279-292. Cohen thinks that Rawls conflates moral principles and rules of regulation.

the right moral principle regarding the distribution of education, it does not immediately follow that the adequacy approach is the best public policy.

CHAPTER 13: EQUAL TREATMENT AND EQUAL CHANCES

13.1 Introduction

In this chapter, I examine two equity-based views as to what justice in the provision of education requires. I begin with a discussion of the simple idea that justice has been done when public schools treat everyone equally, where that is understood to mean devoting the same public resources to all children. This is a straightforward conception of horizontal equity (13.2). Finding this idea lacking in several ways, the bulk of the chapter is devoted to an examination of the more egalitarian idea that educational resources ought to be distributed so as to provide children of similar abilities and motivation the same chances of success in life. This notion of vertical equity is probably most familiar to philosophers in the guise of John Rawls's principle of "Fair Equality of Opportunity."

After teasing out some of its ambiguities (13.3), I consider what arguments might be given for a principle like Fair Equality of Opportunity (13.4). The fundamental difficulty lies in explaining why we ought to insist on equal chances in life for people from different social backgrounds, but not for people of differing native abilities. What is the rationale for treating social and natural disadvantages differently? The most promising argument, which is the last I consider, is that socially caused inequalities are unfair because they constitute a form of unequal treatment. This, however, appears to bring us back to where we began: that justice is done whenever everyone is treated in the same way. The chapter ends on a skeptical and inconclusive

note. However, at the end of Chapter 14, after having considered the virtues and limitations of the adequacy approach, I return to the question of the implications of the norm of equal treatment in educational justice.

13.2 Equal Treatment and Narrow Equity

Probably the simplest principle of educational justice says that the public schools ought to expend roughly the same resources on educating every child. Because this principle focuses on equality of inputs, and ignores inputs outside the school, it may be characterized as a principle of narrow horizontal input equity.¹ Since that's a mouthful, I'll refer to this simply as "Narrow Equity." Narrow Equity is attractive insofar as it is a straightforward application of the idea that the state is supposed to be fair and impartial in its dealings with its citizens. Sometimes Narrow Equity is objected to on the grounds that it "ignores the fact that students have different needs" (Satz 2007: 628). But if this only means that devoting the same public resources to children's educations neither assures equal educational outcomes nor equal chances in life, then the proponent of Narrow Equity can concede the point without flinching. For a writer like F.A. Hayek, for example, the classical liberal ideal of equality has always merely been that careers should be open to the talents. This means, as Hayek puts it, "that all man-made obstacles to the rise of some should be removed, that all privileges of individuals should be abolished, and *that what the state contributed to the chance of improving one's conditions should be the same for all*" (1960: 92, emphasis added). This is fundamentally a principle of equal treatment. It does not promise to make people materially equal or give them equal chances in life:

¹ As I explain in the previous chapter (12.3.A), *wide* horizontal input equity holds that, because *total* educational inputs (i.e., public and private) ought to be equal, inputs in the school may need to be unequal to compensate for the otherwise disadvantaged. Harry Brighouse (2000) is one writer who defends this position.

That so long as people were different and grew up in different families this [equal treatment] could not assure an equal start was fairly generally accepted [by classical liberals]. It was understood that the duty of government was not to ensure that everybody had the same prospect of reaching a given position but merely to make available to all on equal terms those facilities which in their nature depended on government action. That the results were bound to be different, not only because the individuals were different, but also because only a small part of the relevant circumstances depended on government action, was taken for granted (ibid.).

The present objection, then, is far from fatal. But perhaps it may be recast as a reminder that what is morally fundamental is treating people as subjects of *equal moral concern*, not treating people in identical ways (cf. Dworkin 1978: 227). Thus, a parent shows equal concern for her children, not by mechanically treating them in the same way, but by being equally attentive to their individual needs—“by recognizing,” as R.H. Tawney once put it, “that there are diversities of gifts, which require for their development diversities of treatment” (1931, 1964: 146). Understood this way, the objection at least casts doubt on the rationale for Narrow Equity.

The same point can be pressed in a subtler way. We can ask how we are meant to measure inputs. Are we trying to equalize the amount of money we spend on each child? Since the costs of tangible resources (like teacher salaries, transportation, and building maintenance) differ with local conditions and with economies and diseconomies of scale, equal dollar expenditure per pupil will lead to significant inequalities in the provision of what money can buy. So should we instead be trying to equalize the tangible resources available to each student? If we think it would be petty to require children in rural schools to make do with fewer classroom resources than their suburban peers simply because of the higher transportation costs in their district, then we are already assuming that it is sometimes appropriate to treat children in different circumstances differently. But children’s circumstances differ in more important ways than in the distances between their houses. Children from socially and economically disadvantaged

backgrounds often do not benefit from school as much as children from more privileged homes. If educational equality requires us to take into consideration the special transportation needs of children living in different kinds of communities, might we not also need to take into consideration the special educational needs of children coming from disadvantaged parts of society?

A related but more decisive objection is that Narrow Equity is compatible with having no public school system at all. But it is typically thought that one of the chief reasons for the existence of public education is to provide children from all backgrounds with opportunities that otherwise only the well-to-do could afford. That suggests that there has to be more to justice in education than an evenhanded provision of public benefits. Part of the point of public education is to remove the socio-economic barriers that would exist were education simply treated like a private consumption good. Of course, someone of a libertarian bent *could* deny this and argue that public education is justified (if at all) solely by its instrumental contributions to society as a whole, and that it is not due to individuals as a matter of right. On this view, justice only comes into the picture as a side constraint: since education also has important private benefits, justice requires that, if government provides education at all, it do so in an impartial way. But most people think that the state's duty in education is more substantial than that. Parents have traditionally been recognized as having positive duties to support and educate their children (cf. Chapter 8). The state, in turn, has a duty in its role as *parens patriae* either to ensure that parents are able to fulfill that charge or to find other means of meeting these basic needs. In *Brown v. Board of Education*, the Supreme Court held that, in modern society, children can only be expected to "succeed in life" if they have benefited from a formal education. If that is so, then it

would seem that the state does have an obligation *to children* to ensure that education is accessible to every family, regardless of their financial means.

13.3 The Idea of Equal Chances

We've just observed that one of the traditional arguments for a public school system has been to provide educational opportunities to children from families of modest means so that, like their more privileged counterparts, they too may "succeed in life." A common way to think about this is to suppose that everyone ought to have *equal chances* for success in life, regardless of his or her starting point in society. A central role of the public schools, then, is to help secure those equal chances by "leveling the playing field" for the disadvantaged. This idea is perhaps best known to philosophers in the guise of John Rawls's principle of "Fair Equality of Opportunity." Unlike formal equality of opportunity—the classical liberal ideal that careers should be open to the talents—"Fair Opportunity" (as I shall sometimes refer to it for short) holds that positions must also be open to all in the sense that all have a "fair chance to attain them." That is to say, "those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system" (TJ: 73/63).

Rawls, of course, does not claim that Fair Opportunity is all there is to economic justice. While Fair Equality of Opportunity is concerned with social mobility and access to unequal benefits, the Difference Principle constrains the magnitude of those social inequalities by requiring that the least-advantaged class of society be as well-off as possible. However, at least in *A Theory of Justice*, Rawls did think equality of opportunity to be important enough that he

gave it lexical priority over the Difference Principle.² That means that lower living standards for the least-advantaged class could in principle be justified in order to improve social mobility. (Both Fair Opportunity and the Difference Principle are constrained by the lexically prior first principle of Equal Liberty.)³ Before considering the arguments that might be offered in support of Fair Opportunity, we need to make clearer the content of the principle and its implications for education.

A) Equal prospects of success

What does it mean to say that those with similar talent and motivation should have the *same prospects of success* regardless of their initial place in the social system? Rawls understands a person's "success in life" to signify her lifetime share of "primary social goods"—things like liberty, wealth, and power which a rational person is presumed to want more of rather than less, whatever her more particular values and desires (TJ: §15). In a just society, Rawls assumes that everyone will enjoy the same scheme of basic liberties, but that "the powers and prerogatives of authority," as well as income and wealth, will still vary in their distribution. Inequality of power appears to be inevitable in an organized society where collective action is necessary; inequality of income is necessary to create incentives for work and simply to provide information through the price system as to how much different goods and services are desired. Therefore, assuming the equal enjoyment of basic liberties, Rawls claims that the appropriate metric for measuring relative "success" is a person's shares of the variable primary goods, like income and authority. Since Rawls is interested in evaluating the basic structure of society, he thinks we should go

² Rawls later expressed uncertainty on this point. See his (2001): 163, fn. 44.

³ In *A Theory of Justice*, Rawls defined this as "Each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others" (TJ 1999: 53). The original wording was slightly different (TJ 1971: 60), but the difference does not matter for our purposes.

about this by dividing society up into several representative social classes, characterized by their greater and smaller shares of income and power. A person's level of "success," or social advantage, will then be measured in terms of his destination in the class hierarchy. A person's life chances or prospects, in turn, are defined as the initial chances that a person with given characteristics will end up in any given class (see 12.3.B and 12.4.B).

Now Rawls does not say that *every* person must have equal life prospects, but only that there should be the same chances of success for those who are similarly talented and motivated, "regardless of their initial place in the social system." A group of people have *equal opportunity* when *inequalities in their life prospects* do not depend on their initial places in the social system, but only on differences of talent and motivation. Strictly speaking, one can read Fair Opportunity in at least two different ways at this juncture. Some read it to mean that "any two persons with the same native talent and the same ambition should have the same prospects of success in the competition for positions of advantage" (Arneson 1999: 77). On this *individualistic formulation*, differences in distributive outcomes between two people should in principle be dependent solely on the factors of native talent and ambition. One does not really need to *add* that social background should not affect distributive outcomes, since that is implied. This is a principle of vertical outcome equity: subgroups are defined by the degree of talent and ambition, and while inequalities of life chances are permissible between subgroups, they are not permissible within subgroups.

But others read Rawls to mean that, if we look at a class of persons with the same native talent and ambition, then their social backgrounds should not be predictive of their lifetime incomes or class destinations (Fishkin 1980: 30-35). If there are factors that affect distributive outcomes that vary *within* a sector of society, like fortunate familial circumstances, then these are

not social injustices, despite the fact that they cannot be traced to individual talent or ambition (TJ: 301/265). On this second, *statistical formulation* the goal is to neutralize the differential influence of major structural features of society, not necessarily to eliminate the influence of all factors except effort and native talent. This is not necessarily the same as eliminating all correlation of superior life prospects with social background, since social background could itself be correlated with differences in talent or motivation. However, once talent and motivation have been controlled for, social background should not be predictive of class destination. (If provided with all of the appropriate information, this could be measured by linear regression analysis.) It is in this sense that life prospects should be class-neutral. On this statistical interpretation, one is obliged to be specific as to which characteristics of a person's "social background" ought to be neutralized. In *A Theory of Justice*, Rawls was pretty clearly thinking of a person's "initial place in the social system" solely in terms of socioeconomic or "income classes" (TJ: 73/63). But today many would want to say that other characteristics, like sex or race, should not differentially affect a person's life prospects either (see Okin 1989 and Pogge 1989). And, indeed, in the *Restatement*, Rawls seems to assume that his principle does guarantee men and women of like talents and ambition equal life chances (2001: 162-168). Which is the superior of these two interpretations: the individualistic or the statistical? From an exegetical perspective, there is considerable textual evidence to support the statistical formulation as the better reading of Rawls, but which version of the principle is really better on philosophical grounds depends, naturally, on the balance of arguments.

B) Talent

So far we have been speaking as if it were quite clear what we mean by people who are *similarly talented and motivated*. But there are subtleties and pitfalls lurking here too. First, we

speak of talent in two different ways. Sometimes we refer to a person's *developed talents*, and sometimes we refer to a person's *native ability* to acquire developed talents. For example, when we speak of a firm trying to *retain talent*, we mean that the firm is trying to keep employees with developed abilities that make them good at doing their jobs. On the other hand, when Thomas Jefferson said that the purpose of public schools is to "avail the state of those *talents which nature has sown* as liberally among the poor as the rich, but which perish without use, if not sought for and cultivated,"⁴ he was plainly referring to native, not developed, talents. We would expect people with similar *developed talents* for marketable tasks to have equal chances of getting desirable positions where there is an efficient and non-discriminatory labor market. Rawlsian Fair Equality of Opportunity must therefore be understood as the principle that people ought to have the same chances of cultivating their native abilities into marketable developed talents with comparable levels of effort.

We must also be careful to distinguish innate talent from a person's present capacity to learn. Suppose we observe that, in the third grade, Alice and Ben have about the same degree of developed ability, but that Alice is a much faster learner than Ben. As a consequence, we expect Alice to soon outpace Ben. Does this show that Alice has more innate talent than Ben? Not necessarily. We should expect a person's present capacity to learn to be affected by a wide range of factors, including healthy childhood development (beginning in utero), physical and emotional wellbeing, and past learning (cf. Barry 2005: ch. 5). Perhaps, then, Alice has simply been "better primed" to learn in school than Ben. By the third grade, this advantage may be essentially

⁴ *Notes on the State of Virginia*, Query XIV in Jefferson (1984): 274. Emphasis added. See 11.2.A.

entrenched: prospectively, Alice really does have more potential than Ben. Still, this doesn't mean that Alice's advantage is innate.

If we cannot infer native talent from present learning potential, then how can we detect it? Actually, it's quite obscure. Historically, many people have equated innate intelligence with general intelligence as measured by IQ tests, but there is reason to think that early childhood environment could affect the development of general intelligence to some extent. What if Alice and Ben had grown up in virtually identical environments, and we observed that Alice was still a faster learner than Ben? Surely *that* would show that Alice has more innate talent than Ben. Again, not necessarily. Perhaps Alice was predisposed to benefit more from that environment than Ben, while Ben was predisposed to benefit more than Alice from some other environment. In other words, organisms are born, not so much with definite traits, but with genotypes that react in various ways with environments to produce certain observed phenotypes.

If we replace talk of inherited traits with talk of norms of reaction, how damaging is that to the ideal of equality of opportunity? Brian Barry complains that, although these points have been commonplace in genetics for decades, "I am not aware of a single political philosopher ... who discusses issues involving equal opportunity without assuming that it makes sense to ascribe to each person some measure of 'native ability' or 'native talent', understood as cognitive ability or talent" (2005: 124-125). Suppose we couldn't make any sense of the idea of native ability or talent. We would be left with the view that the only thing that justifies differences in life prospects are differences in people's level of motivation. This, indeed, is roughly Barry's view. However, because he thinks that children cannot be held responsible for their level of motivation, Barry holds that equal educational opportunity collapses into equality of educational attainment.

Can we in fact make any sense of the idea of innate talent? If not, then we can dismiss Rawls’s conception of Fair Opportunity summarily. I want to suggest that in many cases we can make some sense of the idea, although it might bear less justificatory burden than has frequently been supposed. Suppose we find that in “tough” environments, Ben outperforms Alice, while in “abundant” environments, Alice outperforms Ben. However, we also find that both Alice and Ben perform better in “abundant” environments than in “tough” environments. This scenario is represented in Table 1, where the numbers represent academic performance (albeit in an artificially precise and one-dimensional way).

	Alice	Ben
“Tough” Environments	3	5
“Abundant” Environments	8	6

Table 13.1

Even though the average performance of Alice and Ben is the same, it makes sense (suitably qualified) to say that Alice has more native academic talent than Ben, since Alice outperforms Ben in the environments where each performs at his or her best.

Now suppose, instead, that Ben thrives on adversity and actually performs better in tough environments than in abundant ones; and yet, Alice still does better in “abundant” environments than Ben does in “tough” ones. This scenario is represented in Table 2.

	Alice	Ben
“Tough” Environments	3	5
“Abundant” Environments	6	4

Table 13.2

Saying that Alice has more native talent than Ben in this scenario is more likely to mislead, but (again) suitably qualified, it retains some sense.

What if Alice and Ben's norms of reaction are mirror images of one another, as in Table 3?

	Alice	Ben
"Tough" Environments	4	5
"Abundant" Environments	5	4

Table 13.3

In the abstract, it is pretty clear we cannot say that either is more naturally talented than the other. But suppose now that the abundant environment is the one actually in place and that this cannot easily be altered, or that we have good reasons for keeping it in place. Does it make sense to say that, given the parameters of the present environment, Alice is the more naturally talented? It depends, of course, on what work we want talk of "natural talent" to do. But I think it makes at least as much sense as a similar claim does in the following scenario.

Suppose that Ben would have thrived in performing the most prestigious tasks in a hunter-and-gatherer society, but lacks the predispositions to succeed in a highly literate technological society like our own. Alice's predispositions are just the reverse.

	Alice	Ben
Hunter-and-Gatherer Society	3	6
Technological Society	6	3

Table 13.4

Since we actually find ourselves in a technological society, it seems to make sense to say that Alice is more naturally talented than Ben, so long as we implicitly understand this only holds because of the abilities that are actually prized in our society. It seems that we can say

something similar for the case depicted in Table 3. If we actually find ourselves in an abundant environment, then Alice is the more naturally talented, in the sense that she is more *naturally suited to the existing environment*. So we *can* make some sense of the idea of native talent, even though it turns out to be a more complex and contingent matter than most political philosophers have assumed. Whether this sense can bear any moral weight is another question, of course; we will come to that below.

C) *Motivation*

Having explored some of the difficulties in the notion of native talent, let's consider what it means for two people to be similarly motivated? Sometimes philosophers equate motivation with effort or ambition. That is probably harmless enough as long as we are focusing on educational achievement up through high school, but it is potentially misleading when we turn to thinking about occupational status. If Alice and Ben are equally talented, then there are two reasons consistent with Fair Opportunity why Alice might end up "more successful" than Ben. She might have put forward more *effort* and, for that reason, have outperformed Ben in competitions for the same positions. Or she might have been more *ambitious* than Ben, in that she placed greater value on social advantages like income and prestige, and for that reason, the two sought different kinds of positions. Perhaps Ben believed he had a calling as a school teacher, while Alice pursued a career in the law. It would obviously be a mistake in that case to simply equate worldly ambition with effort, since Ben might well work as hard, or harder, than Alice. Therefore, we should understand talk of two people being "similarly motivated" as encompassing these two separable dimensions of effort and ambition.

We must also ask: *At what age* may differences in motivation justify differences in life prospects (Mason 2006: 73 *ff.*)? There are two obvious options: (a) from birth or (b) after

reaching some point of moral maturity and accountability, which may occur in a graduated or step-wise fashion. How we answer this question hinges on the extent to which it is permissible for differences in motivation to affect academic achievement. It is easy to see the appeal of option (b), since we generally don't hold young children accountable for their choices—certainly not for choices that may impact the whole course of their lives. Moreover, it is commonsense that children's aspirations and characters are deeply shaped by their family and social backgrounds. If it is unfair when a person's social background directly limits his options, why shouldn't it also be unfair when his social background indirectly affects his prospects in life by limiting his aspirations? Some philosophers, like Barry, think it is *patently* unfair: "There is something very unrealistic," he observes, "about a model of [children's 'choices'] that abstracts from parental encouragement and discouragement, peer pressure, and the attitude of other children in the school" (2005: 46; cf. Brighthouse 2000: 127). Now, one *could* judge that the social determination of character is so powerful that *even as adults* we cannot be held responsible for our choices. But the concern about the social determination of children's attitudes is pressing even if we insist that self-respecting adults must take responsibility for their characters and values (cf. Dworkin 2011: ch. 10).

Rawls's own position on this matter is difficult to puzzle out. He clearly recognizes the problem. At some points, he seems to agree that it is unfair for a child's motivations to be affected by his social background, but that this just shows that Fair Equality of Opportunity can never be satisfied, and this is one reason why we ought to embrace the Difference Principle *instead* (TJ: 74, 301, 511/64, 265, 447-448). But this does not appear to fit with his own more considered statements that Fair Opportunity has lexical priority over the Difference Principle. At other points, he seems to suggest that, since Fair Opportunity has been explicitly *defined* as equal

chances for those similarly endowed and motivated, the effect of social circumstances on a child's motivation are consistent with that principle (TJ: 301/265). That would successfully clear up the ambiguity, but principles of justice cannot simply be stipulated; there must be some rationale for defining equality of opportunity this way. Finally, sometimes Rawls seems to think that he can dispose of the problem by emphasizing that Fair Opportunity does not require equal chances between individuals, but only between different sectors of society (what I called the statistical interpretation above): "If there are variations among families in the same sector in how they shape the child's aspirations, then while fair equality of opportunity may obtain between sectors, equal chances between individuals will not" (ibid.). But this just sweeps under the rug the fact that the range of variation among families may not be evenly distributed across social sectors. Differences between the average middle-class and working-class family may be a central cause of inequality of opportunity.⁵ And as before, the solutions to these difficulties cannot be stipulated; if the statistical interpretation is to be preferred, it must be given some rationale.

Even if we understood what it means for two people to be similarly talented *and* understood what it means for them to be similarly motivated, we would still have to ask what it means for two people to be similarly talented *and* motivated? Presumably Alice and Ben can be similarly talented and motivated, not just when the two are similarly talented *and* similarly motivated, but also when Alice is a little more talented than Ben, and Ben a little more motivated than Alice. Rawls doesn't expand on this issue, but I think the following is a plausible rough picture. At average levels of effort, people with the same innate talent in the same environments ought to

⁵ As Rawls occasionally recognizes (TJ: 74/64). See, for instance, the sociological study of Lareau (2003).

have comparable levels of achievement and therefore comparable life prospects. Call this “Normal Expectations.” Under Normal Expectations, developed talent ought to roughly track innate talent. It follows, then, that careers ought generally to go to those with the most innate talent. Permissible deviations from Normal Expectations are due to individual departures from average effort. That is, if an individual puts forward more or less than average effort, then that ought to push him up, or knock him down, a few pegs in his life prospects from what his prospects would have been under Normal Expectations.

D) Equal opportunity and the schools

What implications does Fair Equality of Opportunity have for the educational system? Because it focuses on life prospects rather than on educational inputs, the consequences of Fair Opportunity for education are much less straightforward than are those of Narrow Equity. Just what is required will depend on the particular role education plays in determining life prospects. For example, in largely agricultural societies, education may be relatively unimportant, and then Fair Opportunity would have little to say about its distribution. On the other hand, in a society where the *only* barrier to equal life chances was the poor’s lack of access to schools, then Fair Opportunity might require nothing more than Narrow Equity. If exclusive private schools gave one class special advantages in acquiring good jobs, then Fair Opportunity would give us a (defeasible) reason for abolishing or democratizing them.⁶ Inching our way closer to the real world now, if it should turn out to be more expensive to teach children from disadvantaged backgrounds up to the same standards, then Fair Opportunity might require compensatory expenditures in order to narrow the achievement gap as much as possible.

⁶ Tawney (1931, 1964): 145; Brighouse (2000): 160; Swift (2003): ch. 2.

This leads to a second important way that Fair Opportunity differs from Narrow Equity. Narrow Equity is a principle exclusively governing the distribution of educational resources,⁷ whereas Fair Opportunity is a principle that governs all the major social institutions as a single system—the basic structure. The educational system is simply one component of this basic structure. For this reason, Rawls does not assume that an educational system—no matter how well designed—could achieve Fair Opportunity all by itself. For one thing, he thinks it is also necessary to prevent “excessive accumulations of property and wealth” both by means of progressive taxation and limits on inheritance (Rawls, TJ: 73/63 and §43 *passim*). This means that there is always a question as to whether expenditures on compensatory education will be the most effective available means of equalizing life chances. It may turn out, for example, that we could do more to close the achievement gap in education by ensuring that all children have good medical and dental care or by making high-quality day-care accessible to all working parents.⁸ Or, if children living in poverty lag behind their peers educationally, the best policy may be to attack poverty directly—for instance, by raising the minimum wage or by providing generous child allowances. In short, even when there is a close link between educational achievement and distributive outcomes, schools may not be the cause of the achievement gap or the best remedy for closing it.

⁷ Of course, a similar principle of horizontal equity could be applied to other domains as well—for example, to health care. Moreover, the same reasoning may underlie employing the same principle in these different domains. The point in the text is simply that whether or not we employ horizontal equity to other domains, this does not affect the way the principle of Narrow Equity works in education.

⁸ For an anecdotal account of how lack of basic medical and dental care affects educational achievement, see Kozol (1991): 20-21. On importance of day-care, see Barry (2005): “Early, multidimensional high-quality child care sustained over several generations is the only possible route to the real equalization of opportunity. This makes it more of a threat [to middle-class privilege] than any amount of fiddling around with the school system, since it is clear that, by the time children reach school middle-class advantage is already so entrenched under existing conditions that nothing can overcome it later” (60).

E) Equal opportunity and the family

Of course, schools are not the only educational institutions in our society; the family, in particular, plays a critical role in educating children. Indeed, to a very large degree, it is the family that creates the problem of unequal opportunities between children in the first place. Not only do well-to-do families purchase formal educational advantages for their children (expensive houses in good suburban schools, private schools, tutoring, etc.), but the internal life of families has a large influence on a child's educational success. The day-to-day vocabulary of parents, the amount of time spent reading with children or helping them with homework, enriching extra-curricular activities, the values of the family, parenting-style—all of these things confer educational advantages on some children over others thereby leading to unequal life prospects (see 12.3.A). In this connection, Rawls observed that “Even the willingness to make an effort, to try, and so to be deserving in the ordinary sense is itself dependent upon happy family and social circumstances” (TJ: 74/64). In an influential empirical study published about the same time as *A Theory of Justice*, Christopher Jencks and his colleagues estimated that “family background explains nearly half the variation in educational attainment” in America (Jencks 1972: 143). Moreover (as we have already observed) many of the educational advantages that families confer on children are correlated with social class.⁹ “Is the family to be abolished then?” Rawls allowed that “Taken by itself and given a certain primacy, the idea of equal opportunity inclines in this direction.”¹⁰ Perhaps, in place of the family, children could be raised collectively in compulsory boarding schools. We might roughly imitate the ancient Spartans who sent all boys to be educated in the barracks at age seven. If this sounds extravagant, it may be noted that we

⁹ Jencks (1972): ch. 5; Marshall et al. (1997): esp. ch.5; Lareau (2005): esp. ch. 1.

¹⁰ Rawls TJ: 511/448. I have already touched upon Rawls's largely unsatisfactory responses to this problem in the previous section.

have already in large part shifted our care of the elderly from the family to collective institutions (Muñoz-Dardé 1999: 45 fn.10).

Abolishing the family is obviously not a live policy option, but several philosophers interested in equality of opportunity have entertained it as a speculative question.¹¹ Not surprisingly, they have all managed to locate reasons of one kind or another for not abolishing it. Some have offered the child-centered argument that only small family-like units can provide the care and intimacy necessary for fostering the capacities of moral personality in children that are fundamental to any just social order (Blustein 1982: 211-223; Muñoz-Dardé 1999). Others stress the importance of individual families for preserving the cultural pluralism from one generation to the next that is an essential precondition to a meaningful exercise of personal liberty (Russell 1929: ch. XIV). Still others emphasize a parent-centered rationale: that people have a basic right or interest in raising their offspring.¹² Harry Brighouse and Adam Swift, for example, argue that parenthood makes possible a valuable social good—namely, a certain kind of intimate relationship between an adult and a child—which is unique and not possible in other forms of human association (see my Chapters 9 and 10). Consequently, a society with intact families but

¹¹ Schrag (1976); Blustein (1982); Fishkin (1983); Ross and Schmidtz (2005); Muñoz-Dardé (1998; 1999; 2002); Brighouse (2000); Macleod (2002); Brighouse and Swift (2009).

¹² Certainly this right is widely recognized in rights declarations and in law. Article 16 of the *Universal Declaration of Human Rights*, for example, maintains that “men and women of full age ... have the right to marry and to found a family,” and that “the family ... is entitled to protection by society and the State.” And in *Meyer v. Nebraska*, the U.S. Supreme Court held that the rights “to marry” and to “establish a home and bring up children” are fundamental rights protected (implicitly) by the Constitution, which is to say, rights that cannot be legally abridged without the demonstration of a compelling state interest. *Meyer v. Nebraska* 262 U.S. 390, 399 (1922). See also *Skinner v. Oklahoma* 316 U.S. (1941) on the basic right of procreation.

less equality of opportunity would be better than one without families and more equality of opportunity.¹³

However, even though the family is on all accounts sufficiently valuable to warrant protecting it at the cost of significant inequality of opportunity, that does mean that the state should not try to break or minimize the connection between families and the unequal advantages that lead to unequal life prospects. And in this, the school system will surely have a large role to play. Compensatory educational programs (it is hoped) can provide children from disadvantaged homes with skills other children learn in the home. Racially and economically integrated schools (again, hopefully) will permit disadvantaged children to benefit from the aspirations, vocabularies, and cultural capital of their middle-class peers. Brighthouse goes so far as to argue that schools can even be beneficial by insulating advantaged children from their parents: “Compulsory equal state schooling can designate around 15,000 hours of each child’s life in which their parents could not be conferring on them opportunities superior to those which others will enjoy” (2000: 120). Brighthouse and Swift have also argued that equality of opportunity puts certain limits on the kinds of benefits that parents should bestow on their children. For instance, even if exclusive private schools are available, the goal of equal opportunity gives parents a strong reason not to send their children to them, since conferring such advantages is not essential to realizing the value of the family (Swift 2003; Brighthouse and Swift 2009).

F) Equal opportunity within a complete theory of justice

Our discussion of the family reveals that the ultimate implications of Fair Equality of Opportunity for social institutions depend in part on that principle’s role in a complete theory of

¹³ Brighthouse and Swift (2006) and (2009): esp. 50. See also Brighthouse (2000): 13-17, 151-161 and Swift (2003): ch. 5.

justice or political philosophy. For instance, I have already noted that Fair Opportunity gives us a (defeasible) reason to abolish or democratize exclusive private schools. But it might be argued (*pace* some egalitarians) that one part of a parent's prior fundamental right to raise her children is to send them to private schools. For instance, this right appears to be recognized by both the *Universal Declaration of Human Rights*¹⁴ and by U.S. Constitutional law.¹⁵ Or to take another example: By itself, Fair Opportunity is presumably consistent with devoting more educational resources to the gifted than to the mediocre student—or vice versa. But for Rawls, once Fair Opportunity is secured, the Difference Principle kicks in. As Rawls explains, “the difference principle would allocate resources in education ... so as to improve the long-term expectations of the least favored. If this end is attained by giving more attention to the better endowed; it is permissible; otherwise not.” And in this connection Rawls cautions us against assuming that education is only of instrumental importance to people: “Equally if not more important is the role of education in enabling a person to enjoy the culture of his society and to take part in its affairs, and in this way to provide for each individual a secure sense of his own worth” (TJ: 101/87).

13.4 Arguments for Fair Equality of Opportunity

Although many people find Fair Equality of Opportunity an intuitively attractive principle, it is not so easy to find an argument for it. In the remainder of this chapter, I consider in turn five possible arguments.

¹⁴ Article 26: “Parents have a prior right to choose the kind of education that shall be given their children.”

¹⁵ *Pierce v. Society of Sisters* 268 U.S. 310 (1924).

A) The argument from the Original Position

First of all, it is hard to see Fair Equality of Opportunity as an implication of Rawlsian contractualism. I assume the basic outlines of Rawls's argument from the "Original Position" are familiar: Rawls holds that the principles of justice are those that would be chosen by fairly situated rational and reasonable people who are motivated to come to fair terms of cooperation with one another. We can model this fair choice situation, he maintains, by thinking about which principles governing the basic structure of society would be chosen by mutually disinterested persons placed behind a "veil of ignorance," which deprives them of any knowledge of their place in society or their particular values. Now whether Rawls's contractual arguments for the Difference Principle and the Principle of Equal Liberty are successful has been debated at length, but at least Rawls provides arguments on these counts. However, Fair Equality of Opportunity, along with its priority over the Difference Principle, never receives such an argument at all. And it is difficult to see how it could possibly be given one. Giving Fair Equality of Opportunity priority over the Difference Principle amounts to treating inequalities due to social background as worse than inequalities due to differences in native endowment. But why would the parties behind the veil of ignorance make that judgment, given that they are only concerned about their expected share of primary goods and do not know whether they are more likely to be disadvantaged by class or by natural endowment? (Nagel 1997: 311-312; Arneson 1999: 81-83; Pogge 1989: 168-173).

Of course, implementing Fair Equality of Opportunity might turn out to improve the condition of the least advantaged. Thus, if the parties in the Original Position chose to govern themselves by the Difference Principle, Fair Opportunity might be justified derivatively. To some extent, at least, that is plausible. First, it would promote efficiency by elevating talented

individuals to positions where they could be of the most use to others. Second, by removing barriers to entry for the most desirable skilled positions, the whole labor market should become more competitive and income inequality should flatten out somewhat (cf. Tawney 1931, 1964: 150). Third, having roughly equal chances of success in life might be an important basis of self-respect for the least advantaged—although it is also conceivable that having low status in a genuinely meritocratic society would damage a person’s self-respect too, since one could not easily blame factors outside oneself for one’s circumstances. These are important considerations, although they may have limits, since implementing Fair Opportunity could affect total productivity. A school system that really “evened out class barriers” would by all accounts be very expensive and might reduce the social surplus available to benefit the least advantaged (Pogge 1989: 173). These are, of course, empirical questions and cannot be decided a priori. In any case, showing that Fair Opportunity helps satisfy the Difference Principle does not justify erecting it as an independent and lexically prior moral principle, as Rawls does (Barry 1973: 83; Arneson 1999). Instead, it suggests that Fair Opportunity ought to be relegated to the status of a secondary norm, the relative strength of which is determined by the more general principles of justice (cf. Rawls TJ: 60/52).

∴

It may be that, in less careful moments, Rawls occasionally reasoned as follows.¹⁶ In presenting the second principle of justice (TJ: §12), Rawls initially introduces it as the principle that “social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone’s advantage, and (b) attached to positions and offices open to all.”

¹⁶ This interpretation was suggested to me by the discussion of Fair Equality of Opportunity in Freeman (2007): esp. 130-131. Freeman, however, does not see Rawls as making a mistake.

But both “everyone’s advantage” and positions “open to all” are ambiguous expressions, he explains. “Everyone’s advantage” may be interpreted to refer to either an efficient (Pareto-optimal) distribution or to one that is maximally advantageous to the least advantaged (the Difference Principle). “Open to all” may be interpreted to refer to either formally open positions (“careers open to the talents”) or to Fair Equality of Opportunity. Rawls then suggests that these two ambiguities can be crossed to yield four interpretations of the two principles, which are presented in Table 5 below.

“Equally open”	“Everyone’s advantage”	
	Principle of efficiency	Difference Principle
Equality as careers open to talents	System of Natural Liberty	Natural Aristocracy
Equality as equality of fair opportunity	Liberal Equality	Democratic Equality

Table 13.5: From Rawls (TJ: 65/57).

Of the four, Rawls’s position is that of “Democratic Equality.” What is interesting for our purposes is the interpretation that combines formal equal opportunity with the Difference Principle, “Natural Aristocracy.” “On this view,” Rawls explains, “no attempt is made to regulate social contingencies beyond what is required by formal equality of opportunity, but the advantages of persons with greater natural endowments are to be limited to those that further the good of the poorer sectors of society” (TJ: 74/64). But what if the best way to promote the good of the least advantaged is by implementing—at least to some extent—Fair Equality of Opportunity? Might the principle of Natural Aristocracy recommend implementing Fair Equality of Opportunity on derivative grounds in that case? Rawls seems to have ruled this out

in his description of the principle. Instead, it is as if Rawls is imagining that the Difference Principle might be applied in two different kinds of societies: one in which there is Fair Equality of Opportunity and one in which there is not.

Consider Figure 1, which depicts two production curves showing the possible distributions of primary goods between two representative persons X1 and X2 at various levels of output.¹⁷ The production curves illustrate the fact that different arrangements of the basic structure affect not only relative shares of the total social product enjoyed by each representative person, but the size of the total social product as well. The diagonal line drawn from the origin signifies a perfectly equal distribution. The origin marks, not the point where no one has anything, but where the production curves happen to depart from perfect equality. As the two production curves are both Southeast of Perfect Equality, X2 is the less advantaged of the two representative persons.

¹⁷ The graph is modeled on the ones in Rawls, TJ: 76-77/66-67 and (2001): 62. See also Freeman (2007): 110-115.

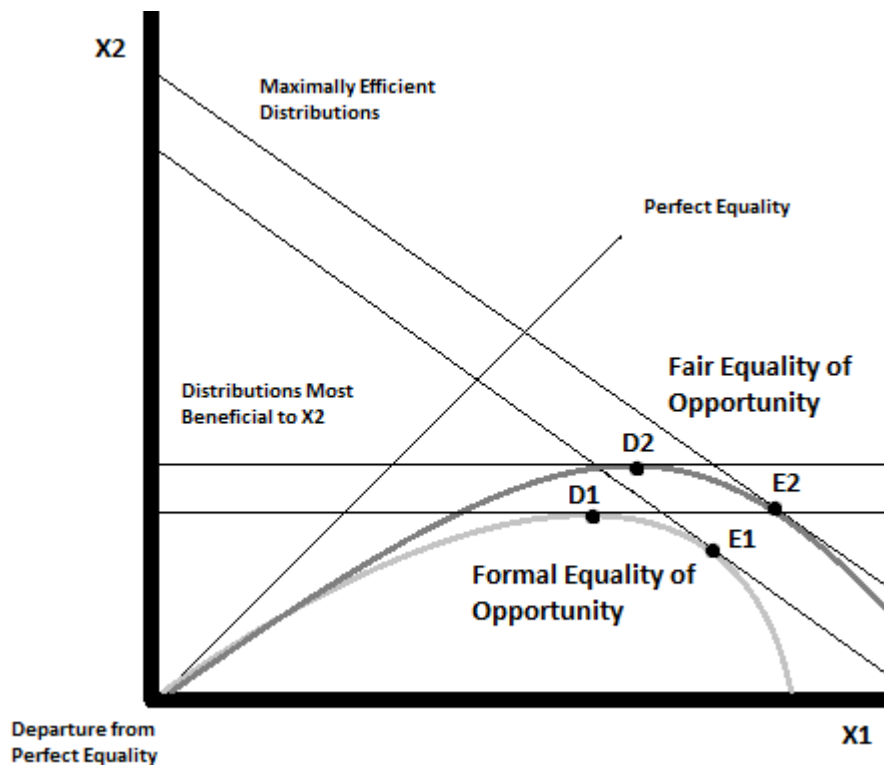


Figure 13.1

The production curve that runs through points D2 and E2 represents the feasible distributions in a society that has implemented Fair Equality of Opportunity, whereas the curve that runs through points D1 and E1 represents the distributions in a society where “no attempt is made to regulate social contingencies beyond what is required by formal equality of opportunity.” Both curves have a point that is the maximally efficient distribution on that curve (E), and a point that is most beneficial to the less advantaged representative person on that curve (D). Let us say that we apply the principle of efficiency¹⁸ and the Difference Principle *narrowly* when we apply it only along a single production curve, not across curves. We apply these principles *broadly* when we

¹⁸ Understood now in a maximizing, aggregative way (i.e., the Kaldor-Hicks point: the point that would be Pareto-optimal if, hypothetically, gainers were to compensate losers). Every point on the curves from D eastward is efficient in the sense of ordinary Pareto-optimality.

apply them across curves. Applied broadly, efficiency picks out E2 as the just distribution, and the Difference Principle picks out D2. I believe that a broad application of the Difference Principle is plainly the best interpretation of Rawls's considered view.¹⁹

Nevertheless, we may conjecture that in passages like section 12 of *Theory of Justice*, which contains Rawls's most detailed discussion of Fair Equality of Opportunity, Rawls is implicitly thinking about the Difference Principle (and the principle of efficiency) as being applied narrowly. One reason for thinking this is that, if Fair Equality of Opportunity really would typically improve the absolute position of the least advantaged (e.g., for the reasons mentioned above), then the principle of Natural Aristocracy (as Rawls has defined it in opposition to Fair Opportunity) is incoherent on a broad application of the Difference Principle.²⁰ On the narrow interpretation, however, it makes some sense to say that one applies one or the other interpretation of equal opportunity *first*—that sets the parameters of the production curves—and *then* one applies either the principle of efficiency or the Difference Principle. Furthermore, on the narrow construal of the Difference Principle (and *only* on that construal), it is possible to say, as Samuel Freeman does, that Fair Equality of Opportunity actually “advances the *absolute position* of the worst-off in ways not provided by the difference principle.”²¹

¹⁹ This is perfectly clear in the *Restatement*: “there are, in general, different [production] curves for different schemes of cooperation; and some schemes are more effectively designed than others. One scheme is more effective than another if its [production] curve always gives a greater return to the less advantaged for any given return to the more advantaged. Other things being equal, the difference principle directs society to aim at the highest point on the [production] curve of the most effectively designed scheme of cooperation” (Rawls 2001: 63).

²⁰ Of course, it is conceivable that these circumstances would not hold and that point D on the Fair Equality of Opportunity production curve would be better for the least advantaged than point D on the Formal Equality of Opportunity production curve.

²¹ “FEO [Fair Equality of Opportunity] advances the *absolute position* of the worst-off in ways not captured by the difference principle: Compare two societies with the difference principle which differ in that the first ‘Democratic Equality’ has FEO whereas the second, ‘Natural Aristocracy,’ has only formal equality of opportunity... Because of FEO, Democratic Equality provides universal education and health benefits not available under Natural Aristocracy.

B) Fair Opportunity and pure procedural justice

At one point, Rawls tells us that “It is evident that the role of the principle of fair opportunity is to insure that the system of cooperation is one of pure procedural justice. Unless it is satisfied, distributive justice could not be left to take care of itself, even within a restricted range” (TJ 1971: 87).²² How should we understand this remark? Is this an independent argument for Fair Equality of Opportunity?

Rawls distinguishes two ways that procedures may be related to just outcomes. In some cases, the justice of outcomes are defined by some criterion independent of the procedure by which we derive the outcome. The procedures in these cases are merely heuristics or ways of approximating the right result. For example, we think that the guilt or innocence of the defendant in a criminal trial is a fact independent of the verdict of the jury; the procedures of the jury trial are our ways of trying to reach the right outcome. In some rare cases procedures can be designed that are sure to reach the independently defined right outcome. These are cases of *perfect procedural justice*. Rawls’s example is the method of slicing up a cake in equal portions by having the person doing the slicing take the last piece. But in most cases, like the criminal trial, the procedure is not sure to reach the right outcome. These are cases of *imperfect procedural justice*. Although perfect and imperfect procedural justice are distinguished by the reliability of the procedure, they are fundamentally alike in that the right or fair outcome is judged by a criterion independent of the procedure. In other cases, outcomes are fair because they are the outcome of a fair procedure. Rawls calls these cases of *pure procedural justice*. An

Not only do these benefits directly benefit members of the worst-off class (who otherwise cannot afford them), but they also allow society to call upon a larger pool of trained skills and abilities, thereby improving *overall productivity and output*. A society of Democratic Equality is then more prosperous in the aggregate than is Natural Aristocracy” (Freeman 2007: 130).

²² The wording of the sentence in the revised edition is trivially different TJ (1999): 76.

example is gambling. When people make bets in a game, the fair distribution of cash at the end of the game is determined solely by the actual results of playing the game (TJ: 85-86/74-75).

Rawls invokes this distinction because he wants to treat “the question of distributive shares as a matter of pure procedural justice” (TJ: 84-85/74). This does not mean that the shape of the basic structure, including the expectations of representative social positions, is one of pure procedural justice. The principles of justice provide us with the criteria to evaluate the basic structure. Rather, the role of pure procedural justice lies in determining the destination of each particular individual in the just social structure. Independent of the actual bargains and exchanges people make within these fair background institutions, no particular individual is entitled to any particular place in the distribution of goods. Rawls means to distinguish his view from utilitarianism (as well as desert-based theories) in this respect. Utilitarian political theory seems to be committed to be a version of imperfect procedural justice. The goal is to design social institutions such that goods are distributed to satisfy as greatly as possible the actual preferences of particular individuals. Rawls insists that, on his view, “no attempt is made to define the just distribution of goods and services on the basis of information about the preferences and claims of particular individuals”; “the distribution that results is a case of background [or pure procedural] justice on the analogy with the outcome of a fair game” (Rawls, TJ: 304/265 and 2001: §14).

In light of this, what are we to make of the claim we began with: that “the role of the principle of fair opportunity is to insure that the system of cooperation is one of pure procedural justice”? Samuel Freeman provides the only attempt to explain this passage that I have ever encountered:

To see [Rawls's] point, suppose that there is in place *an economic system satisfying the difference principle*, ... [and] there are no ... legal constraints on entry into favorable positions, but still opportunities are largely determined by social connections, class membership, and class bias. Hence children of those better off largely monopolize desirable professional positions, ... while all socially less-advantaged children [fall behind] due to a lack of fair educational opportunities and an absence of family and other social networks. [I]n the absence of fair educational opportunities, and because of class discrimination, there will be fewer qualified people to compete for positions, and desirable positions will demand a premium, *aggravating inequality between income groups, and limiting the relative and absolute wealth of the less advantaged* (Freeman 2007: 129, emphases added).²³

If Freeman is correct and this is what Rawls is getting at, then we have another case where Fair Equality of Opportunity is treated as an independent and prior principle when the Difference Principle is applied narrowly. In that case, the argument for Fair Equality appears to be (as Freeman suggests) that it improves the relative and absolute wealth of the less advantaged, and (in my terms) is endorsed by a *broad application* of the Difference Principle. If that's so, then all the points made in the previous section apply here as well.

On this reading, when Rawls says that “unless [Fair Opportunity] is satisfied, distributive justice could not be left to take care of itself, even within a restricted range,” what he means is that the allocation of fair distributive shares could not be left to the free market for the most part, unless the labor market were kept competitive by employing all human resources to their full potential. If the market were perfectly competitive, then wages would be adjusted so that every job is roughly equally attractive, taking into consideration the inherent appeal, burdens, and the necessary prior investments in training, specific to each position; the only exception would be special premiums placed on scarce natural talents. These inequalities due to natural differences

²³ I have substantially shortened this paragraph, but the sense of it has not been altered.

as well as those caused by imperfections that kept the labor market from being perfectly competitive could be mitigated by means of a social minimum.²⁴

C) The argument from self-realization

In the previous section, I mentioned some of the ways that Fair Equality of Opportunity might be thought to improve total productivity and efficiency. But in Rawls's most direct statement on the matter, he insists that efficiency is *not* the primary justification for Fair Opportunity. Instead, he argues that Fair Opportunity is of principal importance, because without those opportunities, even if the situation of everyone can be otherwise improved, some will be "deprived of one of the main forms of the human good," which is "experiencing the realization of self which comes from a skillful and devoted exercise of social duties" (TJ: 84/73). One puzzling aspect of this argument is that self-realization does not seem like a typical Rawlsian primary good—an all-purpose good that people tend to desire more of whatever else they want. Therefore, it is not clear how citizens can appeal to this argument in their public deliberations with one another in the way Rawls thinks they should. Perhaps one could argue that self-realization is one of the "social bases of self-respect." But, from Rawls's point of view, there is some danger of opening the door to full-blown perfectionism with this move. Part of the point of measuring expectations in terms of primary goods in the first place is that it permits the principle of justice to abstract from citizens' various thick conceptions of the good.²⁵ But self-realization looks like a particular thick conception of the good.²⁶ Isn't this precisely the sort of

²⁴ There is some textual support for this interpretation at Rawls, TJ (1971): 87, 307. Although the latter passage is reproduced in the revised version TJ (1999): 270, the former passage has curiously been deleted TJ (1999): 76.

²⁵ Rawls TJ: §§15, 60; (2001): §17.

²⁶ A similar criticism is made in Barry (1973): 83-86. Barry objects that Rawls is illicitly smuggling in substantive moral notions that are not admissible in the Original Position.

value that ought to be excluded by the veil of ignorance. If we permit this kind of appeal to self-realization, might not others just as well argue that an essential part of self-respect is an environment free of “degrading” activities?

Essentially the same point can be made in a different way. In sections 40 and 86 of *A Theory of Justice*, Rawls argues that acting in accordance with the principles of justice chosen in the Original Position expresses our true natures as free and equal rational persons, and that one source of stability for a just society is the fact that people regard a life that expresses their true natures as a part of their good. This mitigates the so-called “dualism of practical reason,” according to which our sense of justice and self-interest can come into conflict with one another.²⁷ Now plainly this “Kantian Interpretation” is, at bottom, a theory of self-realization—albeit one where the “self” that is realized is a universal human Self, not a personal or idiosyncratic one. But in his later work, Rawls retracted this line of argument, on the ground that this theory of stability was incompatible with the spirit of Justice as Fairness, which aimed to abstract from the content of different conceptions of the good and different “comprehensive doctrines” that are held by reasonable citizens of liberal societies (Rawls 1993, 1996: xviii-xix). This suggests that an appeal to self-realization in support of Fair Equality of Opportunity is also incongruent with the “political not metaphysical” spirit of Justice as Fairness.

Although the foregoing objection has some merit, it is not decisive. Here is the way to parry it. The argument is not that Fair Equality of Opportunity is essential to promoting the perfectionist end of self-realization. Rather, the argument is that any account of social justice is

²⁷ The notion of the “Dualism of Practical Reason” is coined and discussed in Sidgwick (1907): 404 fn. 1, 507-509. Part III of *Theory of Justice* and *Political Liberalism* may be read as Rawls’s two attempts to solve Sidgwick’s problem.

going to have to take into account the reasons why people actually value particular kinds of goods. A theory of justice that treated desirable positions and the opportunities to attain them purely as the means to earn income would be psychologically and sociologically deficient. Rawls, therefore, is simply acknowledging the fact that our occupations play an important part in defining our practical and social identities and in shaping the directions in which we develop our abilities,²⁸ and that it is in large part because people care about these identities and their self-development that they value some positions more than others. It is because work so plainly has this formative and self-actualizing aspect, especially in modern society, that it is important that a theory of justice not look at the distribution of positions solely from the perspective of distributing and maximizing material wealth.

Let us allow, then, that “the realization of self that comes from a skillful and devoted exercise of social duties” is a worthy political ideal. The next question is whether this really constitutes an argument for Fair Equality of Opportunity. First of all, the appeal to self-realization in the performance of social duties seems to speak in favor of meaningful work and dignified working conditions in *all* forms of employment. It is odd to think the way to satisfy this ideal is to assure everyone an *equal chance* for meaningful and dignified work (and thus an equal chance of meaningless and undignified work). Increasing competition for important social positions will not evidently increase the number of those positions.

That said, it does make sense to think that an important part of self-realization is having real options with respect to employment. To be sure, having a range of options is not strictly *necessary* for self-realization. There have surely been people who have experienced the kind of

²⁸ Cf. Rawls, TJ: §79, esp. 529/463-464. This is an important theme in Hegel’s *Philosophy of Right*, esp. §§ 166, 187, 207

realization of self at issue—the sense that “this is what I was born to do”—without having had any other viable options in life. But we also know that a life of forced choices can alienate people from the lives they lead. And this seems particularly true in the modern world, where people have come to expect that they should be, in a significant way, the authors of their own lives. This no doubt requires more than formal freedom of occupation. A life of bleak prospects, even absent formal exclusion and overt discrimination, is a formidable barrier to self-realization. Without effective access to education, for example, people will be unable to develop their talents and therefore unable to have much power to choose their own course in life.

But is it the comparative inequality of life prospects that is the barrier, or is the lack of *sufficient* or *adequate* opportunities? It is easier to see how self-realization underlies an argument for sufficient opportunity than equality of opportunity.²⁹ Suppose some people have more options in life than I do. How could the mere act of eliminating some of their options improve my prospects for self-realization?³⁰ More to the point, although it is possible to have more and more opportunities, it is not clear that past a certain point, additional opportunities necessarily make us any more capable of self-realization. However, as Debra Satz observes, this conclusion surely requires one qualification: “Although an adequacy standard does not insist on strictly equal opportunities for the development of children’s potentials, *large inequalities* regarding who has a real opportunity for important goods [may] relegate some members of

²⁹ What we might call “adequacy of opportunity” positions are defended by Raz (1986): 373-377; Anderson (1999); Cavanagh (2002): 27-30; Satz (2007).

³⁰ Actually, this point by itself, although it speaks against equality, is consistent with both sufficiency and priority for the worse-off.

citizens to [what is in effect] second-class citizenship,” and this *would* threaten to undermine the good of self-realization (2007: 637, emphasis added).³¹

D) The argument from merit and moral arbitrariness

Another line of argument for Fair Opportunity appeals directly to its meritocratic character. In contrast to the argument from self-realization, this argument has the virtue of appealing directly to comparative chances in life. Rawls seems to suggest such an argument at one point (TJ: 71-75/62-64), but it had been made previously and at greater length in Tawney's *Equality*.

According to Tawney:

The inequalities of the old régime had been intolerable because they had been arbitrary, the result not of differences of personal capacity, but of social and political favouritism. The inequalities of industrial society were esteemed, for they were the expression of individual achievement or failure to achieve. So it was possible to hate the inequalities most characteristic of the eighteenth century and to applaud those most characteristic of the nineteenth. (1931, 1964: 102)

But the problem with this new liberal view, as Tawney explains, is that it focused exclusively on removing formal disabilities and ignored how individuals acquire the abilities they need to succeed. Even if the market does distribute advantages to the most qualified, social inequalities will still be unfair if the education necessary for acquiring those qualifications is unaffordable for some. After all, parental wealth hardly seems less arbitrary from a moral point of view than noble lineage (cf. Williams 1976). Classical liberalism, so the argument goes, turns out to be philosophically unstable. It prides itself for the rationality of making wealth depend on individual merit, but then it ignores the arbitrary way by which the talents of some are developed, while those of others are left to lay fallow. “In proportion as the capacities of some

³¹ I discuss this issue in further detail in 14.5 and 15.2.

are sterilized or stunted by their social environment, while those of others are favoured or pampered by it,” Tawney concludes, “equality of opportunity becomes a graceful, but attenuated figment” (1931, 1964: 104). Drawing on Tawney’s analysis, Brian Barry reaches a similar verdict:

What we have here is an ideology: it cloaks the status quo with legitimacy through a process of mystification. For it has the effect of building into the limited claim that some appointment was fair the far more grandiose claim that the successful candidate was distinguished from very many others only by pursuing a course of action that it was equally open to any of them to have taken (2005: 40).

Now ideologies typically work because they appeal to genuinely attractive moral ideals. For this reason, an effective way to subvert them is to take those ideals at face value and demand that measures be taken that are actually sufficient to realize them. Fair Equality of Opportunity is often understood in this way: it simply takes meritocratic ideals seriously and carries the logic of classical liberalism to its logical, more egalitarian conclusion. Adam Swift makes the case for equal educational opportunity turn on precisely this point:

People should do well or badly in life on their own merits.... Someone’s chances of getting into a good university, or to a university at all, shouldn’t depend on whether her parents are able and willing to send her to a private school. It should depend on how intelligent she is, and how much effort she’s prepared to make when applying that intelligence. The kind of equality of opportunity we’re talking about here is meritocratic: people with the same level of merit—IQ + effort—should have the same chances of success. Their social background shouldn’t make any difference (Swift 2003: 42, 24).

But one can certainly ask *why* it is important that people do well or badly in life on the basis of their own merits. The most natural suggestion is that otherwise people don’t get what they *deserve*. “The moral basis of equality of opportunity,” Harry Brighouse argues, is “grounded in the concept of desert” (2000: 124). “Where social institutions license social rewards,” he explains, “the competition for them must be designed to ensure that the individuals who benefit

from the rewards *deserve* to in some sense.” A person can only be said to deserve his success in life to the extent that that individual can be held responsible for her level of success. And to the extent someone’s success is “due to their family background circumstances, or their family’s choices, it is unreasonable to hold the competitor responsible” for his or her success to that degree. Now, since being better educated is one important advantage in the competition for positions, a person cannot deserve his success in that competition to the extent that he received a better education than others because of the choices or resources of his family. Thus, educational inequalities due to family background and family choices are unjust (Brighthouse 2000: 117-118).

Of course, the glaring defect in this argument is that native endowment is not deserved either. Hayek thought this a serious weakness in egalitarian thought. “Egalitarians generally regard differently those differences in individual capacities which are inborn and those which are due to the influence of environment.” But they are in the same boat: “Though either may greatly affect the value which an individual has for his fellows, no more credit belongs to him for having been born with desirable qualities than for having grown up under desirable conditions” (Hayek 1960: 89). Rawls recognized this as well: “once we are troubled by the influence of either social contingencies or natural chance on the determination of distributive shares, we are bound, on reflection, to be bothered by the influence of the other. From a moral standpoint the two seem equally arbitrary” (TJ: 74-75/64-65).

Hayek, and later Nozick, concluded from this that it was a mistake to think of material “rewards” as corresponding to moral merit at all. Instead, a person’s income should be understood to signify only how useful a person is judged to be by others. It does not matter that the degree of one’s usefulness is a contingent and largely morally arbitrary matter (Hayek 1960: 93-102; Nozick 1974: 155-160). But one could also take the opposite view. One might decide

that material inequalities are unjust whether they arise from social contingency *or* from the “natural lottery” of innate endowment. When are inequalities *not* morally arbitrary? The intuition, here, is that inequality is not morally arbitrary when it is a consequence of choices for which people can be held responsible (cf. Nagel 1991: 71).

This, of course, is essentially the perspective of that family of positions known as “Luck Egalitarianism,” which can be understood as a particularly radical brand of equality of opportunity (cf. Mason 2001). If educational attainment is highly correlated with social inequality, then Luck Egalitarianism seems committed to equal educational attainment for all, except insofar as inequalities can be attributed to a student’s accountable choices. To the extent that we are skeptical that minors can be held accountable for their choices, we are led to the view that educational equality means equal academic attainment for all. This, as we have seen, is essentially Barry’s conclusion: that “we should regard the demands of social justice as being met to the extent that there are equal educational attainments at the age of 18” (2005: 47).

Some try to salvage the moral relevance of the distinction between inequalities in capacity that are inborn and those that are due to environment by arguing that the difference is not one of principle but of practicality. Even if we can benefit the naturally disadvantaged to some extent by devoting additional resources to their educations, it seems wrong to aim so high as equal educational achievement. As Brighthouse explains, this “would have the consequence that we may completely neglect the education of the extremely talented, devoting all educational resources to the least talented who may never reach the level of achievement that the most talented can reach with very little input.... Even more counter-intuitively, if the least talented are sufficiently untalented, even the averagely and below averagely talented will be neglected educationally” (2000: 131).

But it is an error to think that such pragmatic considerations will support a distinction in the way we treat naturally and socially caused inequalities in capacity. We are tempted to make this mistake, because we think of our environments as changeable, while our genes seem immutable. (I leave aside here the speculative question concerning equal opportunity and genetic enhancement.) But the relative mutability of the initial *causes* tells us nothing about the relative mutability of the *consequences*. A child with an innate cognitive disability may be able to benefit much more from extra help at school than a naturally gifted child who has suffered from poverty-induced educational neglect (Jencks 1988: 523).

The conclusion to which we are driven by the foregoing considerations is that an argument from merit or desert cannot ground Fair Equality of Opportunity. But might Fair Opportunity, like the classical liberal view critiqued by Rawls and Tawney, just be another incomplete follow-through of the core idea that inequalities should not morally arbitrary? Should we, for this reason, accept some version of Luck Egalitarianism?³² I shall suggest three reasons, specific to the domain of education, why I think we should resist that conclusion.³³

First, observe that Luck Egalitarianism is supposed to look attractive compared to simple equality, because it permits inequalities that arise from people's different choices and (on some views) their different characters. In this way, it is less procrustean than simple equality. But if children cannot be held accountable for their choices and characters, then in childhood Luck Egalitarianism is every bit as procrustean as simple equality. Different educational outcomes could only be eliminated, as Amy Gutmann points out, "by eradicating the different intellectual, cultural, and emotional dispositions and attachments of children" (1987: 133). Even though

³² The suggestion is made by Kymlicka (1990): 70. For discussion, see also Scheffler (2003).

³³ For more general critiques of Luck Egalitarianism, see Anderson (1999) and Scheffler (2003).

children are not accountable for this diversity, we are not necessarily wrong to value it. Looking upon this diversity as something that needs to be uprooted in the name of a more competitive society seems very misguided. The second point is the reverse of the first. It seems wrong to think that an adolescent who is morally accountable for his choices should be made to shoulder *full* responsibility for them. We don't treat responsible students unjustly when we give the irresponsible ones second and third chances.³⁴ Third, although compensating people for bad luck has a certain appeal, our intuitions about good luck are not symmetrical. When we discover a musical or mathematical prodigy, for instance, we don't think it is a good idea to deprive him of educational opportunities to ensure that he doesn't end up with life prospects any better than the rest of us. But if we focus on *equality* of fortune, then there is no real difference between good and bad luck. As Matt Cavanaugh puts it, "A stroke of good luck for me *just* is a stroke of bad luck for you, since what it does from your point of view is leave you worse off through no fault of your own" (2002: 97-98). If we intuitively revolt at that conclusion, then that suggests that what we really care about is not equality of fortune, but the mitigation of serious misfortune.

I admit that these are not decisive arguments against Luck Egalitarianism. This is particularly because many Luck Egalitarians are value pluralists and think that justice has to be balanced with other values.³⁵ They would agree that insisting on the just outcome in every case would be cruel and narrow-minded; that, after all, is supposed to be the moral of the *Merchant of Venice*. On their view, while it is appropriate to balance justice with compassion and other

³⁴ This is analogous to the point made by Elizabeth Anderson, to the effect that it is not necessarily just to deprive a person of medical care, just because his injury or illness was due to his own choices. See Anderson (1999): 295-296.

³⁵ Cohen (2008): 271; Temkin (1993): esp. 282.

values, it is mistaken to make such compromises *internal* to the principle of justice.³⁶ We are better off, on their view, with many clearly defined values and principles that can be balanced against one another in particular cases, rather than a couple of murky all-purpose rules into which we've tried to stuff all good things. When I look at the issue in this way, I am tempted to concede to the Luck Egalitarians that they are right about the value of fairness in the most abstract, cosmic sense. But, at the same time, it seems to me a serious mistake to identify this austere conception of fairness with the traditional subject of social justice.³⁷ "Justice," as Nagel has observed, "plays a special role in political argument: to appeal to it is to claim priority over other values. Injustice is not just another cost; it is something that must be avoided, if not at all costs, then at any rate without counting the costs too carefully" (1997: 303). The Luck Egalitarian conception of justice can be vindicated against the previous objections only at the price of depriving it of this priority and transforming it into a potentially weak *pro tanto* consideration.

Finally, before we leave the argument from merit, let me say something about one final response one could make to Hayek's point that innate differences in ability are every bit as undeserved as differences in ability due to social background. One might accept the premise, agree that natural and social advantages are morally on a par, but argue that both Hayek and the Luck Egalitarians draw the wrong conclusion from this. Hayek is wrong in drawing the conclusion that inequalities resulting from these contingencies need no justification, or none except that they are the result of free exchanges between individuals. Rawls's efforts to show

³⁶ Cf. Berlin (1969) for this argument with respect to the concept of liberty. Brighouse makes a similar point about educational equality (2000): 134.

³⁷ For the opposing view, see Cohen (2008): ch. 7.

that the distribution of goods that results from free exchanges in a laissez-faire market are heavily influenced by morally arbitrary factors are best understood as an attempt to undermine any temptation to treat them as self-justifying or morally privileged (cf. Scheffler 2003: 24-31). But the Luck Egalitarians are wrong in drawing the conclusion that such morally arbitrary inequalities should be eliminated. The proper conclusion, on the present view, is that inequalities in natural talents and social circumstances can be justified by being put to *everyone's advantage*. In at least one passage, Rawls argues for this position:

No one deserves his greater natural capacity nor merits a more favorable starting place in society. But it does not follow that one should eliminate these distinctions. There is another way to deal with them. The basic structure can be arranged so that these contingencies work for the good of the least fortunate. Thus we are led to the difference principle if we wish to set up the social system so that no one gains or loses from his arbitrary place in the distribution of natural assets or his initial position in society without giving or receiving compensating advantages in return (TJ: 102/87).

This, however, again raises the question as to why Rawls does not believe that the Difference Principle wholly replaces Fair Equality of Opportunity, at least at the most fundamental level.

E) The argument from equal treatment

A different kind of argument for Fair Equality of Opportunity is this: It is because society is responsible for *causing* social disadvantages, but not for causing natural disadvantages, that it is more important to eliminate socially-caused inequalities than naturally-caused ones. As Nagel points out, there are two diametrically opposed views that one could take on inequalities caused by nature: “as a factor for which *individuals* are not responsible and whose inequities society must therefore correct, or as a factor for which *society* is not responsible and whose unequal results it can therefore accept.” (1997: 305). As we have seen, the argument from desert

naturally leads to the first view; but if we emphasize the importance of society treating individuals equally, then the second view may seem plausible.³⁸

Of course, for this argument to even get off the ground, we have to reject a certain version of the doctrine of negative responsibility: that society is as responsible for the inequalities that it allows as it is for those that it directly causes. Christopher Jencks, for example, denies that society is free from responsibility with respect to inequalities in native endowment, since “we have ‘chosen’ not to limit the fertility of the genetically disadvantaged” (1988: 523).³⁹ But whatever the merits of the doing/allowing distinction in general, it seems to have special appeal when we are thinking about equality. Suppose that there are two groups of farmers living in different regions of the country who do not have any direct economic relations with one another. Suppose further that there are no laws preventing the farmers from relocating from one area to the other, although it would be expensive for them to do so. It seems plausible to say that, if one area is more fertile than the other, and as a result one group of farmers is better-off than the other, then this is an inequality bestowed by nature, even though the government *could* choose to redistribute income equally. On the other hand, in a second scenario, if the two groups of farmers are initially equally well-off, but the government then arbitrarily decides to tax one group much more heavily than the other, then this does seem to be a socially caused inequality. It

³⁸ Elsewhere Nagel defends the first view: “What seems bad is not that people should be unequal in advantages or disadvantages generally, but that they should be unequal in the advantages or disadvantages for which they are not responsible” (1991): 71. In his (1997), however, he writes, “I myself have always been sympathetic to the liberal-egalitarian tendency to expand the scope of social responsibility and correspondingly to diminish the scope both of nature and of individual responsibility in justifying inequality. But I am beginning to have my doubts, and want to investigate the resistance this expansive tendency encounters from a more limited conception of justice—one that centres on equal treatment rather than the avoidance of inequality in the broadest sense” (305-306).

³⁹ Brighouse (2000) agrees: “in, quite properly, allowing the genetically weak to procreate with one another society incurs some responsibility for the resultant genetic disadvantages” (129).

is reasonable to think that the inequality in the second scenario is more unjust than the former because it is caused by *unequal treatment*.

Notice, however, that someone accepting this conclusion is not also committed to the view that we have *no obligations* to aid others unless we are responsible for their circumstances. We presumably also have (at least) the natural duty of mutual aid that requires us (especially as a community) to relieve people from suffering or distress regardless of the cause of their hardship.⁴⁰ The present argument is only that inequality, in itself, is unjust only (or especially) when it is the result of unequal or unfair treatment.⁴¹

One complication for this position is that the important cases for thinking about equality of opportunity are not ones where natural causes create inequalities independently of social institutions. Rather we are dealing with cases where, as Nagel observes, “a natural difference between people interacts with social mechanisms in such a way that it gives rise to differential advantages or disadvantages—even though the mechanisms do not specifically aim to produce any such correlation” (1997: 304). It is not simply a natural phenomenon that people who tend to be better at writing and arithmetic (for example) tend to have a larger share of social goods. It is because these talents are in greater demand given the social systems of production, organization, and consumption that we happen to have in place. If we had a different system in place, different natural attributes might attract a larger share of goods. Nagel argues that, in spite of this, it still makes sense to say that an inequality is *due to nature* when it is produced through an interaction of the natural differences of individuals and social institutions which would be

⁴⁰ See the discussion of the natural duties in Rawls, TJ: §51.

⁴¹ These remarks are made to fend off Brighouse’s suggestion that this sort of view is committed to the idea that all duties arise from cooperation and reciprocity (2000: 129-130). That idea is defended in Gauthier (1986) and is criticized in Buchanan (1990).

difficult to change and which do not aim to produce inequality, but rather have an independent, legitimate purpose. As Nagel sees it, the educational system is a good example of this: “Educating individuals to the limit of their capacity is a legitimate aim, and social inequality generated in the pursuit of a legitimate aim is not unjust if natural differences among the persons involved are its primary cause” (316).

With respect to education, then, the principle of equal treatment implies that society has a duty to provide equal educational opportunities to all students, regardless of family or social background. At first glance, this might seem to return us to where we began: narrow horizontal input equity. But we must remember to take into account those socially caused inequalities that arise in the private sphere. If society provides more educational advantages to some children in the home than others, then society has a duty to try to even out that inequality in the schools through compensatory education. However, if due to variation of native potential children differ in their degree of educational attainment and thus their prospects as adults, then that inequality is not unjust. By the same token, if students with more native potential can benefit from more higher education than those with less, then it is not unjust if society devotes more educational resources to the more naturally talented than to the less naturally talented. Nagel thinks that this deontological norm of equal treatment might explain why the proponent of Fair Equality of Opportunity holds the otherwise mysterious idea that justice in education requires evening out differences in social background, but not differences in native talent: “Once the society provides fair equality of opportunity,” he explains, “it is nature, not society, that is responsible for the unequal capacity of individuals to benefit from it” (316).

Although Brighouse officially defends his conception of equal opportunity on the basis of desert (as we saw in the previous section), there is one passage in particular where he really seems to be appealing to the different norm of equal treatment:

Equal opportunity is desirable as a way of implementing a presumption of the equal moral worth of all persons. This is an individualist criterion: *having society devote less resources to someone's life for arbitrary reasons is not much less of an assault on his moral standing than having society license such discrimination on other bases.* Yet having less devoted to someone's life simply because he had the misfortune to be born to the Glums [a 'poverty-stricken and inattentive' family] rather than to the Lyons [a 'financially successful and attentive' family] seems to be an arbitrary reason. So equal opportunity, properly understood, *is inhibited by the family.*⁴²

This passage, observe, does not appeal to factors that are beyond the control of the individual child (as an argument from desert would), but rather to the way that society *treats* children unequally if it devotes fewer educational resources to some children than to others. One way for society to treat children unequally is for the public school system to devote fewer resources to some children than to others on a discriminatory basis, as in segregated or arbitrarily unequal schools. But hardly less disrespectful, Brighouse argues, is a system in which society devotes fewer educational resources to some than to others *through the private sphere of the family*. If the Lyons devote more resources to their children's education than the Glums devote to that of their children, then society has not treated the Lyon and the Glum children equally. So understood, the principle of equal treatment seems well-suited for deriving Brighouse's own conclusions: that the state ought "to expend more educational resources on the children of the socially disadvantaged children so that they face similar prospects for material and educational success to those of children from wealthier backgrounds," but that with respect to children burdened by natural disadvantages, while some extra educational resources may be justified,

⁴² Brighouse (2000): 152. Emphasis added. The description of the Glum and Lyon families is on p. 151.

“equal prospects for material and educational success do not seem to be the appropriate goal” (2000: 131; see also 138-140).

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The key question is whether it is really appropriate to think of all the inequalities that arise from individual families as cases where “society” has treated individuals unequally. This argument looks more straightforward than it really is, because of our way of talking about “socially caused” inequalities. When we speak of an inequality as having a social—as opposed to natural—cause, we usually simply mean to say that it is the result of human actions. But it requires further argument to show that all inequalities with social causes in this broad sense are cases where individuals have been treated unequally by some entity called “society.”

To see this, let us begin with a trivial example. It is plausible to suppose that parents may make different reasonable judgments about how much television their children may watch per week. Suppose that Perkins has a son and a daughter very close in age. The principle of equal treatment suggests that, absent any special reason to do otherwise, Perkins ought to apply the same household rules to both of his children—in this case, that they are permitted to watch five hours of television per week. If Perkins allowed his daughter to watch seven hours, and his son only five, then absent some special justification (e.g., the daughter is being rewarded for good behavior), the son will have a reasonable grievance against his father. Now suppose that the neighbor, Quinsby, has children the same age as Perkins’s, but that he lets them each watch seven hours of television a week. Even though the stakes in this example are indeed trivial, it is clear that the norm of equal treatment applies *within* each family. But it does not seem to apply *across* families. Perkins’s children cannot legitimately complain that they are being treated

unfairly, in that Quinsby's children are permitted to watch more television than they are. Perkins treats his children equally, and Quinsby treats his children equally. There is no agent that is the union of Perkins and Quinsby whose actions must treat all four children equally. We would not be convinced if the Perkins children mounted the following argument: "The number of hours of television a child is permitted to watch is not a natural fact; it is a socially imposed rule, which could be changed. Because this rule is socially imposed, it is unfair if society treats us differently than the Quinsby kids, if there is no relevant difference between us." While the premise is true—household rules are not the work of nature—the inference that "Society" has treated them unequally, and therefore unfairly, is implausible. It is better simply to say that this is a case where two different legitimate authorities have employed their reasonable discretion differently. Although it is through no fault of their own that the Perkins children get to watch less television than the Quinsby children, and though the Quinsby children in no way deserve to watch more television, the emergent inequality is not a case of unfair treatment.

Although this example deals with a relatively inconsequential matter, the principle can be generalized to more important cases. Many decisions can be made in more than one reasonable way. This is particularly true when we are dealing with quantitative trade-offs—for example, how much of one's resources or energy to devote to one good as opposed to another. Nonetheless, when an authority has to make a decision, there is typically a duty to treat those subject to that authority in a fair and evenhanded way. For example, although it may be true that both the five-hours- and the seven-hours-of-television-per-week rules are reasonable in themselves, it would be unfair if Perkins applied one rule to his son and another rule to his daughter, absent some special justification. Perkins could not excuse his action simply because both rules were reasonable, since he has a duty to be evenhanded as well as reasonable in

applying the household rules. But when authority is decentralized, and authorities use their discretion to make different reasonable choices, the inequalities that emerge across jurisdictions are not necessarily cases of unequal treatment. Call this the *Emergent Inequalities Thesis*.

One implication of the Emergent Inequalities Thesis is that inequalities of opportunity that arise from the different decisions of private families are not necessarily unjust. For example, if Perkins values education more than Quinsby, and therefore spends more of his free-time or disposable income on enriching his children's education than does Quinsby, then that is not *ipso facto* unjust—even though the inequality between the Perkins and Quinsby children does not track any morally relevant difference. Obviously, the difference between the Perkins and Quinsby children is not one of innate potential; the Perkins children enjoy a culturally transmitted advantage that the Quinsby children lack. But this culturally transmitted advantage nonetheless has the same moral character as a naturally transmitted advantage, since it is not the outcome of unequal treatment.

I consider this an attractive implication. Suppose Quinsby, Perkins, and Roxy each have a child in the same grade. Assume that the Quinsby child is more naturally gifted intellectually than the Perkins and Roxy children, who are of ordinary intelligence. Now it turns out that Quinsby and Roxy meet ordinary expectations in how they divide their time between helping their children with their schoolwork and pursuing their own non-parenting projects. As a consequence, Quinsby's child performs better in school than Roxy's. Perkins, on the other hand, sacrifices his own non-parenting projects to devote an extraordinary amount of time helping his child with his school work. As a consequence, the Perkins child performs better in school than the Roxy child, and just as well as the more naturally talented Quinsby child.

Proponents of Fair Equality of Opportunity (especially those who accept an individualistic interpretation—cf. 13.3.A) would say that this is *prima facie* unjust. In fact it is as unjust as if the school had sent home a paid tutor with the Perkins child but not with either the Roxy or Quinsby children. In both scenarios *Society* is devoting more resources to the education of the Perkins child than to that of the Quinsby or Roxy children. Not only does this seem implausible, but it also seems unattractively individualistic. In theory any gift, any beneficence beyond what one is morally required or expected to bestow, and which might have significant implications for someone else's chances in life, is unfair to all those people who weren't benefited and cannot expect a like benefit from someone else.

True, such philosophers would typically allow that what Perkins is doing is, all things considered, morally permissible. But this is not because his extra tutoring does not lead to an injustice or unfairness. Rather, it is because it is permissible for parents to act *partially* toward their own children, and therefore depart from strictly impartial justice. Adam Swift puts it this way:

Most evenings, I read a bedtime story to my kids. I am showing a special, partial interest in my children. I know that reading to them gives them advantages that will help them in the future, advantages not enjoyed by less fortunate others. It is unfair that they don't get what mine do. The playing field is not level; our bedtime stories tilt it in their favour. Even so, few would advocate that they be banned. Bedtime stories are on the right side of the line [of permissible parental partiality] (Swift 2003: 9; cf. Brighouse and Swift 2009).

I agree that Swift's bedtime stories are unfair *in the cosmic sense* latched onto by Luck Egalitarians. But by the same token, it is equally unfair if Professor Swift has transmitted to his children genes that are better than average for getting ahead in the world. But that is not Swift's view. As we saw above (13.4.D), Swift thinks that it is fair for people to get ahead either on account of their efforts or (unearned) native talents. Since such a position cannot appeal to moral

desert (as the Luck Egalitarians can), the only plausible argument is one, like Nagel's, appealing to equal treatment. And the objection that I am making is that it is implausible to regard such emergent inequalities as instances of unequal treatment at all.

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I do not want to pretend that the last word about fair opportunity and the family has been said here. But by way of conclusion, I wish to look at one more apparent implication of the Emergent Inequalities Thesis. That is, it seems that we are unable to say that the inequalities that emerge from decentralized school-finance systems constitute unequal treatment either. We have seen that the Supreme Court appealed to something like this reasoning in *San Antonio v. Rodriguez* (11.3.B). That is, the Court agreed that school-finance systems based on taxes raised in local districts led to an arbitrary pattern of educational provision across the state. But the Court denied that this violated the principle of equal treatment enshrined in the Equal Protection clause, for “any scheme of local taxation—indeed the very existence of identifiable local governmental units—requires the establishment of jurisdictional boundaries that are inevitably arbitrary.”⁴³

Now it really does seem as if we are back to where we began in this chapter: Narrow Horizontal Input Equity. And, of course, the objections leveled against that position in 13.2 have not gone away. So this chapter closes in a sort of Socratic *aporia*. By pursuing the idea of equal educational opportunity, we seem to have traveled in a circle from the principle of equal treatment to that of equal life chances and back again to equal treatment. In the next chapter, we examine the adequacy approach in order to see if it holds better promise for a compelling theory of educational justice. In Chapter 15, I will return to the idea of equal treatment, and argue that

⁴³ *San Antonio v. Rodriguez*, 411 U.S. 1, 53-54 (1972).

it is *one element* in an attractive theory of educational justice, which also incorporates elements of the adequacy approach.

CHAPTER 14: DEMOCRATIC CITIZENSHIP AND EDUCATIONAL ADEQUACY

14.1 The Idea of Adequacy

In the previous chapter, we examined the view that a just educational system is either one that treats children equally or one that assures children equal chances in life in some sense. In this chapter, we turn our attention to the idea that a just educational system is one that provides all children with an *adequate* education. I begin in this section with a general discussion of the adequacy approach. In the following sections, I examine four different attempts to articulate a philosophically principled conception of an adequate education.

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Whereas equity concepts are typically understood to be relative or comparative in nature, adequacy concepts are said to be concerned only with absolute levels.¹ They are, therefore, what philosophers sometimes call “sufficientarian” theories of distributive justice, applied to the domain of education. Harry Frankfurt characterized the “doctrine of sufficiency” as the view that, “With respect to the distribution of economic assets, what *is* important from the point of view of morality is not that everyone should have *the same* but that each should have *enough*. If everyone had enough, it would be of no moral importance whether some had more than others” (1988c: 134-135). Similarly, adequacy conceptions in education maintain that it is imperative

¹ Berne and Stiefel (1999): 22; Minorini and Sugarman (1999b): 189; Reich and Koski (2006): 550; Odden and Picus (2008): 75-76.

that some minimum threshold of education is met for all students, while inequalities beyond that minimum are permissible.

This minimum threshold is usually characterized in terms of what is necessary in the way of educational resources to produce certain outcomes—either in terms of educational attainment or, more broadly, in terms of the basic capabilities and functionings necessary for social life.² Even though adequacy conceptions are often contrasted with conceptions of educational equality, they can also be understood as particular interpretations of equal opportunity—namely, as “an equal opportunity for a sound basic education,” as one court put it,³ or as “an equal opportunity to learn to high performance standards” (Odden and Picus 2008: 75). In this respect as well, the adequacy approach can be compared to many sufficiency theories of social justice, which insist that everyone have access to the resources sufficient for what is variously described as “equality of status,” “equal dignity,” or “democratic equality” (Marshall 1964; Anderson 1999; Nussbaum 2000: 86; 2006: 291-295).

The adequacy approach has many virtues. First, by focusing on educational and social outcomes, it avoids fetishizing the *means* of education and instead concentrates on the ultimate purposes of education.⁴ In this way, the adequacy approach is more closely allied with the philosophy of education than simple input theories are. That is, one cannot know what social justice in education requires without a theory of the social role of education. Arguably, then, the adequacy approach is just the classical approach to education in social philosophy, as we find it

² For more on the adequacy approach in general, see 11.4.E. For more on the role of adequacy in school-finance litigation, see 10.3.D.

³ *Vincent v. Voight* 614 N.W.2d 388, 396 (Wis. 2000).

⁴ Cf. the discussion in Sen (1992) of capabilities versus resources as the metric of distributive, esp. ch.2.

variously developed in the works of Plato, Aristotle, Rousseau, and Dewey. Second, unlike narrow equal input theories, the adequacy approach can explain what would be unfair about abolishing public support of education altogether or of supporting it at miserly levels (Satz 2007: 640). Third, adequacy accounts do not recommend “leveling down” as strict equality-based conceptions do: if one cannot benefit the positively disadvantaged by taking away educational resources from the more advantaged, adequacy accounts typically say that there is nothing objectionable about some children receiving better educations than others. Fourth, unlike horizontal outcome equality, the adequacy approach is not in tension with the diversity of student ability and disposition (Gutmann 1987: 133). It accepts as wholly appropriate that, past a minimal threshold, students will achieve at different levels. Fifth, unlike strict equality approaches, the adequacy approach does not seem to be in much tension with other educational values. Conceptions of equality are what we might call “voracious principles” in that, left unchecked, they exclude any consideration that would disrupt an equal distribution. Of course, we can make trade-offs between equality and other values, but equality does not itself make room for those other values. Adequacy, on the other hand, can make room for other values. For example, so long as an adequate education is guaranteed to all, adequacy approaches would permit devoting extra resources to the best students on grounds of efficiency or perfectionism (Gutmann 1987: 137; Satz 2007: 632, 634). A special case of this is the sixth virtue: unlike outcome equality and broad input equality, the adequacy approach is consistent with recognizing that parents and local communities may have different values and aspirations in education. Beyond the threshold of adequacy, this approach permits families and communities to exercise freedom in pursuing different educational goals and in making different trade-offs with other

public or private pursuits.⁵ Seventh, the adequacy approach may seem to give more sensible and realistic advice about educational goals for students with different abilities and levels of advantage. That is, on the one hand, it is not enough to equalize inputs and then let the chips fall where they may; different inputs may be required to make an adequate education possible for differently situated students. But, on the other hand, we are not obliged to quixotically strive for equal educational outcomes above the minimal threshold. Eighth and finally, even if adequacy is not all there is to justice in education, it may at least be a good theory for thinking about the most indecent injustices which are the most urgent to rectify. In this respect, it may have the advantage of attracting an overlapping consensus amongst people who disagree about the importance of input or outcome equality. If, as seems likely, our educational system falls short even of this standard of minimal decency, then practically speaking, developing an ecumenical account of adequacy would be much more important than working out the details of a more controversial, possibly utopian, egalitarian theory.⁶

Many regard the most serious challenge to the adequacy approach to be that it fails to take into account the positional aspect of education.⁷ As Brighouse and Swift explain, positional goods are “goods with the property that one’s relative place in the distribution of the good affects one’s absolute position with respect to its value” (2006b: 472). Of course, education, like many goods, is not wholly positional: more education may make one more productive and confer the

⁵ Gutmann (1987): 144; Anderson (2007): 615, 618; Satz (2007): 634, 641.

⁶ This is the way that Martha Nussbaum characterizes her capabilities-approach to social justice. See Nussbaum (2000): 75; (2006): 75-76, 274, 291-295. Satz emphasizes that adequacy accounts of education “explain why some inequalities require greater remedial attention than others,” although she also thinks that adequacy suffices for educational justice (2007): 640-641.

⁷ Barry (2005): 176-177; Reich and Koski (2006); Brighouse and Swift (2009); Satz (2007): 641-645.

benefits of culture. But it does seem to have a strong positional aspect. Reich and Koski articulate the positional-good objection to the adequacy approach in a particularly forceful way:

“[T]he value of education to its holder depends in part on how much education other people possess. Education is central to concerns about equality of opportunity, opportunities to gain admission to college and professional schools, and opportunities to compete for high-paying and high-status jobs in the marketplace. Roughly speaking, the more education a person possesses, the greater the positional advantage of that person in the competition for college admission and economic success. If this is true, then the adequacy framework is, to put it bluntly, inadequate because adequacy tolerates wide inequalities above the specified threshold of educational opportunity and proficiency, and inequalities above this threshold will disadvantage those in the bottom end of the distribution” (2006: 550).

It may seem as if the adequacy approach could easily deal with this objection. If one’s relative place in the distribution of education truly affects the absolute value of education, then what counts as an adequate minimal education can simply take that into account. To some extent, as we shall see, this is precisely what several of the most sophisticated philosophical defenses of the adequacy approach do. But critics would insist that this is not how adequacy concepts are actually being deployed in educational policy: they are substantially ignoring the positional character of education. Moreover, if the adequacy approach does take the positional aspect of education into account, there is a real question as to whether it can avoid collapsing, in practice, into an equity-based theory (cf. Brighthouse and Swift 2006b).

The other fundamental challenge to the adequacy approach lies in simply explaining, without excessive vagueness, what an adequate education would look like.⁸ Adequate for *what*? As Frankfurt observes, “Calculating the size of an equal share is plainly much easier than determining how much a person needs in order to have enough” (1988c: 137). In educational

⁸ The problem has puzzled education experts as well as philosophers. Cf. National Resource Council (1999): ch. 4; Odden and Picus (2008): 47.

policy discussions, especially in our era of standards-based reform, the practical focus is often on attaining a certain level of minimum passing grades on state achievement tests (Berne and Stiefel 1999: 22). But this would make no sense unless it were believed that the achievement tests are measuring something of value outside the walls of the school. Hence, at least amongst philosophers, the dominant strategy is, as Debra Satz puts it, to try to “derive ... the nature and content of educational adequacy from the requirements for full membership and inclusion in a democratic society of equal citizens” (2007: 636). Particular theories differ in their understandings of what these requirements are. Let us now examine some of the alternatives.

14.2 The Compliance Principle

How might an adequate provision of education be defined in a more principled way? In the landmark Supreme Court case *San Antonio v. Rodriguez*, the plaintiffs argued that funding public schools substantially through local property taxes violated the Equal Protection clause of the Fourteenth Amendment, in that it discriminated between children on the basis of local property wealth. As a consequence, they claimed, children in poorer districts were less well prepared to effectively exercise their right to vote and First Amendment freedoms. The Supreme Court rejected that argument in a 5-4 decision, in part because the majority denied that the U.S. Constitution could be interpreted to guarantee, as a matter of individual right, “the most *effective* speech or the most *informed* electoral choice.”⁹

Randall Curren (1994) suggests that the principle of equal protection under the law might more convincingly be employed to establish a minimum threshold of educational adequacy.

⁹ *San Antonio v. Rodriguez*, 411 U.S. 1, 36-37 (1972). See 11.3.B for more discussion.

According to his argument, the law does not equally protect all unless all are enabled to comply with it. But people cannot generally be expected to comply with the law unless they have received an education sufficient to prepare them for at least one viable occupation and to foster basic moral development and social integration. Therefore, Curren argues that “a fundamental requirement of justice is that the state not put some citizens more at risk than others of suffering a loss or suspension of fundamental rights [by means of incarceration] through unequal distribution of goods whose distribution it has a duty to oversee.” This is supposed to establish a baseline of education adequate to give all students “a reasonable prospect of complying with the law.” Call this the *Compliance Principle*. Although Curren does not put it this way, his argument can be understood as an extension to the state of the traditional parental duties in natural law theory to enable children to know right from wrong and to provide for themselves as adults.¹⁰

Whatever else one might say about it, one can hardly fault the Compliance Principle for being too ambitious. The interesting question is whether the state has further educational obligations than this.¹¹ Notice that the argument does not even oblige the state to actually ensure “reasonable prospects for complying with the law,” but rather only to ensure that inequalities in the distribution of goods *under the state’s control* not put citizens at risk of losing their liberty. This suggests that (on common assumptions) compensatory funding to poor communities with

¹⁰ Cf. Pufendorf, LNN: IV.xi.4-7, VI.ii; Locke, 2T: II.vi; Kant, MM: 6:280-282. See my Chapter 8. However, most natural law theorists thought that parents had a duty to provide for their children proportional to their means. There is no proportionality component in Curren’s argument.

¹¹ I should be clear, Curren readily grants that justice may demand more than the Compliance Principle. He only claims that meeting the Compliance Principle is particularly urgent and that parts of the American school system presently fall short of it.

greater needs might not be required by this argument.¹² Moreover, the argument would seem to be compatible with an educational system that enabled very little upward social mobility, as long as it prepared everyone for some form of work. Curren might deny that charge on the grounds that “demoralizing stratification” undermines the development of law-abidingness, as is evidenced by its correlation with higher crime rates. But this just shows how much is riding on how we interpret the morally loaded notion of having “reasonable prospects” for complying with the law. The conservative will think that everyone has reasonable prospects to comply with the law so long as neither he nor his family are in abject need, while a radical socialist may think that any state-licensed inequalities are grounds for revolution. If the burden of the argument is going to rest on the reasonably demoralizing effects of inequality in education past a certain threshold, then a proponent of the Compliance Principle is going to have to say more about where that threshold lies. Moreover, if people have good reason to be demoralized by a certain amount of social inequality, then maybe we had better appeal directly to the injustice of that inequality, rather than focusing exclusively on uncertain subjective reactions to it.

14.3 The Democratic Threshold Principle

A) The Democratic Threshold

Amy Gutmann defends what appears to be a more robust conception of adequacy. She argues that inequalities in the distribution of education must be constrained by what she calls the *Democratic Threshold Principle*. This principle requires that “democratic institutions allocate

¹² It is possible that Curren would argue that the state is responsible for putting young people at risk of noncompliance with the law whenever they are, in fact, at risk, and it is in the power of the state to alleviate that risk. This *would* justify compensatory educational spending. However, to speak of an “unequal distribution of goods whose distribution [the state] has a duty to oversee” is to invoke the same language that a classical liberal like Hayek does to wash the state’s hands of responsibility for economic inequality (cf. Hayek 1960: 92).

sufficient resources to education to provide all children with an ability to participate”—or as she sometimes puts it—“participate *effectively* in the democratic process” (1987: 136, emphasis added). Inequalities between schools beyond the democratic threshold would “not be morally suspect” (144). This leaves substantial room for parents and communities to exercise discretion in educational goals past that threshold.¹³ Gutmann’s argument therefore bears some resemblance to the traditional republican brief for public education. In Chapter 11, recall, we found Thomas Jefferson arguing that the state ought to provide three years of free schooling to every child, as that would impart to everyone sufficient learning “as will enable him to read and to vote understandingly on what is passing.”¹⁴ Gutmann’s own idea is that, while democratic communities share broad moral authority with parents to decide what goals to pursue in the education of children, they do not have the authority to deprive children of the skills and knowledge they will need to participate in democratic decision-making themselves as adults.¹⁵ You might think of this as an intergenerational analogue to the principle that a democratic majority does not have the authority to disenfranchise the minority of its right to vote.

¹³ In fact, Gutmann’s concrete policy proposals might lead to considerably more inequality between districts than now exists. Gutmann says that it would be better to fund schools up to the adequacy threshold at the state level, and then to permit local supplementation on top of that. In this way, trade-offs between primary education and other expensive public goods (like highways and universities) would be framed in a more transparent way, whereas now opposing local referenda on increased spending on schools is “the most effective and obvious means by which citizens can register their desire to slow down government spending and taxation” (141). But, although Gutmann calls her proposal a “foundation plan,” it really sounds more like a system of block grants (see my 11.2.B). In traditional foundation programs, the state transfers less money to wealthy districts than to poor districts, and therefore offsets some of the inequality between them. But if local districts are permitted to simply supplement block grants from the state, then none of the inequality between districts is directly offset by state revenue. (Of course, there *may* be some indirect offsetting, if the block grants are funded through progressive taxes that effectively redistribute money from the wealthier districts to the poorer ones.)

¹⁴ Letter to Littleton Waller Tazewell (Jan. 5, 1805) in Jefferson (1984): 1149-1150.

¹⁵ Surprisingly, Gutmann draws very sparingly on the philosopher most interested in the role of education in democracy, John Dewey. You would have thought that Dewey’s *Democracy and Education* would have been an important book for the author of *Democratic Education*, but most of Gutmann’s scattered remarks on Dewey are superficial and critical, and she virtually ignores his theory of democracy. (See the entry on Dewey in the index to Gutmann [1987]).

This is an elegant argument, but it is hard to believe that democratic participation is the *only* activity for which a justly adequate education must prepare children. Surely, a minimally adequate education must also ensure that children learn the skills they will need for work and managing their personal lives.¹⁶ Gutmann's reasons for giving such primacy to democratic participation are ultimately unpersuasive. First, she claims that if people "were educated to exercise their rights and to fulfill the responsibilities of democratic citizenship, these future citizens collectively could decide whether to change the way that social institutions (including schools) structure their life chances" (148). But this is unsatisfactory for two reasons. Once these citizens are adults, they can't determine the ways that schools structured *their* life chances; the democratic solution comes too late for them. Furthermore, the citizens in whose interests it is to change the educational system may neither be in the majority nor be able to win the majority to their view. Are we to assume that this simply could not happen in a genuinely democratic society? Another of Gutmann's arguments for the sufficiency of the Democratic Threshold is that it is a mistake to require that an adequate education prepare students for getting jobs, since jobs might be unavailable for macroeconomic reasons that have nothing to do with the quality of education. The point is well taken, but the same is true of democratic participation: citizens might be deprived of the ability to govern themselves for reasons that have nothing to do with their educations. The right focus for an adequacy approach, therefore, seems to be on whether

¹⁶ Compare the much richer and more imaginative account of an adequate education developed by the Kentucky Supreme Court in *Rose v. Council*, 790 S.W. 2d 186, 211 (Ky. 1989). See the discussion in 11.3.D and 12.4.E.

the school system is successfully conferring the capabilities necessary for work, personal life, *and* democratic participation.¹⁷

B) Justice and legitimacy

Although Gutmann describes her account of “democratic justice” (127, 138-139) as a rival to “standard interpretations of equal opportunity” that focus on socio-economic “distributive goals” (287-288), her theory may be better understood as one concerning the bounds of democratic *legitimacy* in educational policy. On that revisionary reading, her account would operate at a different, more fundamental level than most liberal-egalitarian theories of education. To explain: On most views, justice and legitimacy are distinct notions. Justice is primarily concerned with the protection of rights and the fair distribution of benefits and burdens. Legitimacy, on the other hand, is primarily concerned, not with the content of the best policy, but with *who* has the authority to implement his or her will? Most believe that a political action can be less than perfectly just and yet still be legitimate for all that. A regressive tax law might be unjust, but that alone does not make it illegitimate. Likewise, the justice of a policy, considered in the abstract, is not sufficient to make it legitimate to implement by any means. Abolishing capital punishment may be what justice requires, but that does not give the president the legitimate constitutional authority to abolish it in the states that still practice it. Although justice and legitimacy are distinct notions, they are also connected in complex ways. It is unjust, for example, to usurp legitimate authority, even for the sake of implementing a policy that is, in the abstract, more just. Conversely, legitimacy may depend on the minimally just exercise of

¹⁷ As, for example, the Supreme Court of Wisconsin did when it described a “sound basic education” as one “that will equip students for their roles as citizens and enable them to succeed economically and personally.” *Vincent v. Voight* 614 N.W.2d 388, 396 (Wis. 2000).

authority. A procedurally unimpeachable act of government may be illegitimate if it blatantly disregards the basic rights of some part of its population.¹⁸

With that distinction in mind, I suggest that we interpret Gutmann's Democratic Threshold Principle, not as a complete theory of justice in education, which would be in competition with standard conceptions of equal opportunity, but as the minimal condition of justice that must be satisfied for democratic decisions about education to be legitimate. This would arguably be a better way of justifying the primacy that Gutmann wants to give to education for democratic participation. The idea would be that the legitimacy of democracy depends on everyone having a part in making collective decisions. Just as democracy cannot be true democracy if it disenfranchises one part of the population, it cannot be legitimate if it deprives future citizens of the education they need to participate effectively. Although this reading is admittedly not consistent with everything that Gutmann says, it is faithful to her intention to take seriously the problem of how to decide which educational policies to implement, given that we disagree about their justice (1987: 135-136).

If this reading is plausible, then we need to distinguish much more carefully than Gutmann does between two kinds of legitimate democratic decisions, which, following Ronald Dworkin, we can call "choice-sensitive" and "choice-insensitive" decisions (2000: 204-205). Choice-sensitive decisions are those in which the justice of the decision depends on the preferences of the political community. For example, in the abstract, it seems that it is neither just nor unjust to use public land for development rather than for a park. Which alternative is just depends on the preferences of the community. If more people want the site turned into a park, then (other things

¹⁸ There is a similar discussion of justice and legitimacy in Rawls (1993, 1996): 427.

equal) that is the just thing to do. Suppose I wanted the land used for development, but that the majority wants a park. It makes no sense for me to say that the community's decision was unjust. But often we use democratic procedures to settle disagreements about what is just independently of our opinions—not to determine what is, in fact, just or fair (cf. Waldron 1999: ch. 7). These are choice-insensitive decisions. For instance, we may disagree about the justice of a proposed tax cut. Here the democratic decision reflects the community's judgment as to what is just; it does not settle the question as to what is just. Suppose I am in the minority in opposing the tax cut. After the decision is made in favor of the tax cut, I can still complain that the tax cut was unjust, even while conceding its legitimacy. Gutmann often speaks as if all democratic decisions about education are choice-sensitive, so long as the Democratic Threshold is met (cf. Gutmann 1987: 136-137, 144). But it seems more plausible to say that, past the Democratic Threshold, democracies can legitimately enact unjust educational policies.

C) The determinacy of the Democratic Threshold

The Democratic Threshold Principle cannot, in any case, yield a satisfying account of educational adequacy unless it is determinate enough to generate substantive educational requirements. But whether it can do so is questionable. Moreover, how we interpret the stringency of those requirements may turn on whether we read the Democratic Threshold as a principle of legitimacy or of justice. If it is merely a principle of legitimacy, then the requirements will presumably be much weaker.

It seems that relatively little education is necessary to cast a vote, as is evident from the fact that we have decided that it is unreasonable to require voters to pass literacy tests (though of course these were actually being used in bad faith). Therefore, if the principle is to have any bite, it must turn on what it means to be capable of *effective* democratic participation. At one

point, Gutmann suggests that the threshold may best be determined through democratic procedures (137). But we have to be able to at least *articulate* the threshold independently of democratic outcomes, if that threshold is going to be a check on democratic discretion. Effective participation cannot mean actually producing the political outcomes one desires; where there is political disagreement, that is not a universalizable principle. In his dissent in *San Antonio v. Rodriguez*, Justice Thurgood Marshall pointed out that educational attainment was strongly correlated with voting turnout (see 11.3.B).¹⁹ But voter turnout would not be a good metric for the Democratic Threshold either, since we could sever the connection between education and electoral turnout without changing the educational system—for example, by making voting mandatory (as in Australia) or by giving voters a small honorarium (as we do with jurors).

Another approach would be to define effectiveness as the capacity to know one's true interests. On this view, the central problem of democracy is that citizens are too easily misled by superficial journalism and political spin to recognize where their true interests really lie.²⁰ The solution, it may be supposed, is to give them an education that makes each savvy enough to search for reliable sources of information and to think critically about the issues of their day. The potential pitfall here is striving after the mirage of the "omnicompetent citizen"—the citizen who is expected to have an informed opinion on every major issue of public concern (Lippman

¹⁹ *San Antonio v. Rodriguez*, 114. Justice Marshall invoked this point to make a different argument than Gutmann's. He claimed that, because education had a disparate impact on the exercise of constitutional rights, the local financing of schools in Texas ought to be held to "strict scrutiny" in determining whether it violated the Equal Protection clause. On that standard, the state would have to show that the existing school finance system not only had a "rational basis," but that it was necessary for pursuing a "compelling state interest," and that there was "no less discriminatory" means of achieving that interest.

²⁰ In the 1920s, Dewey could already write, "We seem to be approaching a state of government by hired promoters of opinion called publicity agents" (1927: 169).

1922: 173, 229). This seems unrealistically ambitious given the complexity of modern issues like geopolitics, macroeconomics, and climate change (cf. Curren 1994).

Harry Brighouse suggests that we might interpret Gutmann's effectiveness standard by drawing on an account of political influence developed by Dworkin. Suppose at first that we know nothing about the electorate's views on some issue. Then we discover the view of one individual, P. P is an effective participant "if, having discovered he intends to make efforts to get his view implemented, we should assign a higher probability than before that his view will be adopted."²¹ The greater the increase in our probability estimate, the more effective that person's participation is judged to be. Although this gives us some metric of political effectiveness, it doesn't come close to solving the problem of defining an adequate *threshold* of effective democratic participation. As Dworkin rightly points out, we cannot say that everyone has a right to equal political effectiveness or influence. Although there may be some illegitimate forms of political influence, it is not unjust if (say) the conservative journalist David Brooks happens to be more politically influential than his liberal colleague Mark Shields. Nor is there any obvious minimal level of effectiveness, so understood, that individuals are entitled to, beyond having the right to vote their own minds. In any case, almost everyone who is not a complete social outcast, however uneducated, has *some* influence on the minds of his immediate circle of acquaintances. But that, once again, is surely too weak of a standard.

These critical remarks should not be taken as suggesting that the Democratic Threshold Principle is empty. Gutmann reasonably suggests that citizens must be provided an education sufficient to enable them to read newspapers, have some understanding of the national economy,

²¹ Brighouse (2000): 132-133, quoting Dworkin (1987), which is reproduced with minor changes in Dworkin (2000): ch. 4.

and to think critically about important political choices (147). Moreover, Gutmann argues that the Democratic Threshold is to be understood as having a comparative aspect: “the threshold of an ability to participate effectively in democratic politics is likely to demand more and better education for all citizens as the average level and quality of education in our society increases” (139). In the same vein, Satz argues that to fulfill our duty as jurors, democratic citizens “need not only to comprehend and apply concepts like ‘reasonable doubt,’ ‘negligence,’ and ‘probability,’ and be able to analyze statistical tables and graphs, but also to have the capability of responding to the arguments of other jurors during their deliberations” (2007: 636). While it is true that being the member of a jury is the most intellectually demanding contribution that many individuals will make in their capacity as citizens, it strikes me as odd to argue that children are entitled to an education in elementary probability and fundamental legal concepts *because* they may serve on a jury a couple of times over the course of their lives. That seems like too frail peg to hang the individual’s right to an education.

The present objection, then, is that “effective democratic participation” is an uncomfortably vague standard to ground a conception of what kind of education society owes to every child. When the Supreme Court entertained a similar argument in *San Antonio v. Rodriguez*, the majority accepted the premise that some “identifiable quantum of education” may be necessary in order to *meaningfully* exercise First Amendment rights and the right to vote. But, as I’ve already mentioned, the majority denied that the U.S. Constitution could be interpreted to guarantee “the most *effective* speech or the most *informed* electoral choice,” and further denied that the plaintiffs had established that the basic education that Texas did guarantee “fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the

enjoyment of the rights of speech and of full participation in the political process” (see 11.3.B).²² Since written media is such an important part of political communication in modern countries, I think we may safely say that the legitimacy of modern democracies *is* threatened by a failure to impart functional literacy to virtually all students. On the other hand, you need not agree with the Supreme Court’s decision in *Rodriguez* to appreciate that the vagueness of the “effective democratic participation” standard *beyond* functional literacy makes it extremely difficult to demonstrate that schools are, in fact, failing children.²³

14.4 The Democratic Elite

A) The idea of a Democratic Elite

This vagueness objection to a democratic theory of educational adequacy has been somewhat remedied in a thoughtful way by Elizabeth Anderson. Instead of thinking exclusively about the capabilities that *all* democratic citizens need, Anderson suggests that we must also think about the qualifications of the “democratic *elite*.” By “elites” Anderson means those who “occupy positions of responsibility and leadership in society: managers, consultants, professionals, politicians, policy makers.” In a Rawlsian spirit, she argues that elites in a democratic society must perform their roles in a way such that “the inequalities in power, autonomy, responsibility, and reward they enjoy in virtue of their position redound to the benefit of all, including the least advantaged.” For this, it is important that the elites have the technical knowledge conferred by higher education; but this alone is not sufficient. Collectively, they also need to be aware and responsive to the interests and problems of people from all sectors of society and know how to

²² *San Antonio v. Rodriguez*, 36-37.

²³ See the similar criticism of all adequacy standards in Reich and Koski (2006): 572.

interact respectfully with them (2007: 596). But, unlike merely academic—“third-person”—knowledge, these are not competencies that can be taught in a classroom. Drawing on studies in the psychology of stereotyping and discrimination, Anderson argues that these are forms of knowledge that depend on first-person experiences and second-person interactions with others from different walks of life (607). This means that, if the elite is really to be responsive to and capable of serving all, its ranks must be drawn from all demographic groups, and from people who have experience in face-to-face interaction with individuals from different backgrounds.²⁴

“Working backward from the requirements for a qualified elite,” Anderson argues that “we can derive a standard of fair educational opportunity to which all social groups should be entitled.” Because it is essential that the democratic elite recruits individuals from every sector of society, members of all social groups must have effective access to higher education. Anderson says that “this entails that every student with the underlying potential should be prepared by their primary and middle schools to be able to successfully complete a college preparatory high school curriculum... This yields a high but not unattainable sufficientarian standard for fair educational opportunity.” So long as this sufficientarian threshold is met for all students, further inequalities in education provided by parents and local communities are morally unobjectionable (614-615). However, the ability of socially and economically privileged groups to convert their wealth into educational and social advantage will be limited in two ways. First, because a democratic elite must have experience in diverse settings, people from all sectors of society should be educated together in racially and economically integrated schools. Advantaged communities, therefore, cannot be permitted to segregate themselves in neighborhood schools

²⁴ The importance of integration for fostering the mutual respect that underlies democratic society is also stressed by Gutmann (1987): 160-170.

that effectively exclude members from disadvantaged groups (597-598, 617-619). Second, formal education is only one qualification for membership in the democratic elite; having first-person experience as a member of a disadvantaged group is another of comparable importance. Although meritocracy is often thought to be incompatible with affirmative action (cf. Fishkin 1981), Anderson's argument suggests that integration of educational and social institutions is actually required by a proper understanding of meritocracy. If colleges employ admissions procedures that give weight to the importance of democratic integration, then the disadvantaged have a qualification that the wealthy and privileged cannot buy (Anderson 2007: 616-617). This would help break the dominance that money now has over access to higher education.

By connecting the importance of recruiting members from all social groups into higher education, Anderson is able to give an account of democratic adequacy in primary and secondary education that is more determinate and more demanding than Gutmann's Democratic Threshold Principle.²⁵ Again, there are Jeffersonian echoes here. Jefferson, too, thought that the country's leaders would need more than the common share of education, and that a public school system could help draw the "best geniuses" from every class into that elite (see 11.2.A). However, Anderson's idea of the nature of the leadership potential is quite different than Jefferson's, and therefore so too are her educational ideals. Jefferson seems to have believed that exceptional native capacities for developing talent and virtue were distributed across society, so that it would be a waste not to tap the potential that every class had to offer. Once that potential is discovered, knowledge is imparted to the student in the schools. There is little sign that Jefferson believed

²⁵ I should say, I do not assume that Gutmann would necessarily disagree with Anderson's notion of Democratic Elite. I only mean to emphasize the ways in which Anderson has made contributions that go beyond Gutmann's work.

that children from different sectors of society would bring with them different kinds of first-hand knowledge that would be useful to them in their role as elites.

Anderson's view in this respect seems to owe much more to Dewey, although she does not explicitly draw that connection in this essay. Dewey too thought that technical knowledge is only one part of the knowledge that elites need. Familiarity with the needs and understandings of different sectors of society is just as crucial—probably even more so. And an elite cannot gain this familiarity if they form an exclusive class isolated from the rest of society (Dewey 1927: 206). What is needed, then, is a leadership class that facilitates more effective communication between different parts of society and helps break down “those barriers of class, race, and national territory which keep men from perceiving the full import of their activity”; in particular, the effects—direct and indirect—that their activity has on the interests of other parts of society (Dewey 1916: 87, 344). For this reason, Anderson insists that it is not possible to educate a democratic leadership class by removing them from their communities and putting them into elite institutions. Every school needs to be capable of providing an adequate education to produce its own leaders.

Hegel, it is worth observing, had assigned a somewhat similar leadership role to the representatives of the “Estates” in the legislature. Hegel would have agreed with Dewey that the central political problem lies in “discovering the means by which a scattered ... and manifold public may so recognize itself as to define and express its interests,” and from there, generate a “general will and social consciousness.”²⁶ According to Hegel, “it is extremely important that the masses should be organized, because only then do they constitute a power of force; otherwise

²⁶ Dewey (1927): 146, 153. The ellipsis marks my deletion of the word “mobile,” since that seems to be much more a characteristic of America in the 1920s than of Germany in the 1820s.

they are merely an aggregate, a collection of scattered atoms. Legitimate power is to be found only when the particular spheres are organized” (PR: 290A). In particular, Hegel thought that representatives of the agricultural, business, and civil service sectors could bring to the legislature their first-hand knowledge of their own estate’s “special needs, frustrations, and particular interests.” In this way, the particular, limited perspectives of each estate could be brought to the attention of the whole public. Then, through parliamentary deliberation on public policy with other representatives, the delegates could forge the “universal interest” of the community (PR: 301-302, 311).

Dewey, as well as Anderson, may be read as modernizing and democratizing Hegel in two ways. First, Hegel seems to assume that our political perspectives and interests will be shaped largely by our basic functional role in the horizontal division of labor (i.e., agriculture, trade and industry, or the civil service). Dewey and Anderson believe, not only that social divisions are more complex and varied than that (e.g., it seems like a mistake to assume that landlords and peasants, or capitalists and workers, will have the same interests), but more interestingly, that each of us is shaped by our membership in multiple social groups (Dewey 1927: 147; Anderson 2007: 598-599). (For example, I may identify as a Black, liberal, Christian, professional class, gay man.) Second, whereas Hegel seems to have understood deliberation and political will-formation occurring primarily within the parliament, Dewey and Anderson see communication and deliberation between different social groups occurring at many different levels and in many different quarters by all citizens—*especially* in common schools and universities.

By focusing on the role of a leadership class, Anderson also gives us some guidance as to how education might enhance the intelligence of a democracy without vainly striving to create the “omnicompetent citizen.” In this connection, there are at least two roles leaders might have.

The one that Anderson concentrates on is that leaders will be capable of drawing on detailed personal knowledge of the needs and perspectives of their communities (and will be motivated to do so) in dealing with the members of that community and in representing their concerns in deliberation with other elites. But there is another role which leaders can play: they can help their “constituents” focus, recognize, and articulate their interests (cf. Dewey 1927: 123). For example, Martin Luther King, Jr. did not just transmit knowledge of the interests of the African-Americans to the rest of American public. He helped the African-American community understand what it really wanted, what its demands and expectations as a group would be, and he helped that community act together as a relatively coherent body. In this way, a Democratic Elite is essential to political will-formation at two levels. First, in helping smaller publics recognize themselves, and second, in helping the larger public recognize its constituent parts.

B) Objections and limitations

I have just now been discussing some of the virtues of Anderson’s account of a Democratic Elite, including some of those aspects left undeveloped by Anderson herself. Now I turn to certain objections to and limitations of the position. One way that Anderson’s conception of a democratic leadership class differs from that of many previous thinkers is that it is not limited to public offices. But for this very reason, it may be objected that insufficient attention is paid to two different ways that elites benefit society. Public office-holders benefit society by intentionally trying to serve the public interest and to solve people’s problems. That these elites be sensitive and responsive to the interests of all sectors of society is indeed crucial. But to a considerable extent, the elites in the private sector serve the public interest by looking for profits for themselves and for shareholders. In this way, they provide goods and services that the market rewards with greater efficiency. It is not so clear that the sensitivity and responsiveness

that Anderson focuses on are nearly so important of virtues for the elites of the private sector—excluding at least the service professions, like law and medicine. For example, would energy companies provide better service to minority customers, if the leadership of those companies was more diverse? That seems doubtful.²⁷ (Unless those in the private sector allow animosity toward another group override market motives—for example, by charging Blacks more than whites for the same products and services).

Of course, this contrast between the motives of the public and private sectors can be exaggerated. Some political scientists will emphasize the importance of self-interest in promoting the interests of those in the public sector as well. And the elites in the private sector must at least have enough sensitivity to the preferences of various demographic groups to know which goods and services will be in demand. But, at least in the private sector, this socially distributed knowledge can be gathered through other means, such as focus groups and surveys, that would leave unaffected the demographic composition of the corporate leadership.

Even if it is true that the elite in the private sector does not need to be diverse in order to serve diverse groups of society, that does not diminish Anderson's case for diversity in public offices nor perhaps in the service professions (e.g., law, medicine, teaching). But it does mean

²⁷ To illustrate the way that elites may lack awareness of the needs of the less advantaged, Anderson offers the anecdote of a personnel manager in a private firm who offered a tax-sheltered child-care benefit to the employees, but initially failed to recognize that it would be difficult for the lower-paid staff to benefit from it (pp. 602-603). The anecdote is useful in making Anderson's point that elites without first-hand experience of the financial realities of the working class may unintentionally design policies that neglect working-class needs. (Incidentally though: would growing up as a child in a working class family give one *that* first-hand experience either?) Moreover, it is a good example of the way that tax policy may be biased against less advantaged groups. But is it *also* an example of why it is important for diversity amongst the elite *in the private sector*? I don't think so. The Rawlsian argument that Anderson appeals to is that the advantages of the elite are only justified insofar as they benefit everyone—not insofar as they benefit members of a particular firm. As far as the private firm is concerned, the employee benefit is just an incentive, not a public service; it is just a way of using a government subsidy to pay employees higher effective wages. If it doesn't actually benefit employees, then it won't work as an incentive, and the firm will just have to find other ways of attracting talent.

that fewer members of disadvantaged groups would need to be recruited to the ranks of the elite in order for them to carry out their purpose of benefiting all. That would suggest that (as far as the present argument goes) we could tolerate considerably lower rates of college admission for disadvantaged groups than Anderson claims, and that weakens the “egalitarian implications” of taking seriously the requirements of a democratic elite (596).

There is a deeper question about the kind of argument that Anderson has offered. Consider a rival, conservative theory about the education of the elite. Hayek, for instance, once argued that

[T]here is ... good reason to think that there are some socially valuable qualities which will rarely be acquired in a single generation but which will generally be formed only by the continuous efforts of two or three... Granted this, it would be unreasonable to deny that a society is likely to get a better elite if ascent is not limited to one generation, if individuals are not deliberately made to start from the same level, and if children are not deprived of the chance to benefit from the better education and material environment which their parents may be able to provide (1960: 90).

Now suppose that an egalitarian government came to power and tried to prevent families from passing on educational advantages to their children. A conservative like Hayek would think this foolish no doubt, but he could not claim, on the basis of *this* argument, that the children from privileged families were being treated unfairly. If there is any injustice done, it is an injustice to all those members of society who would have benefited from the education of a more talented elite. Anderson’s argument, though different in the details, has essentially the same structure. Denying educational opportunities to members from disadvantaged groups is not unfair *to them*; if there is an injustice done, it is only an injustice to society as the beneficiary of a more sensitive and responsive democratic elite. Although Anderson’s account of educational adequacy is a part of a theory of distributive justice (i.e., elite positions are justified only insofar as they serve the interests of all), education is regarded from a wholly instrumental perspective—not as a

distribuendum in its own right. Therefore, those denied educational opportunities cannot claim, on the basis of this argument, to have been personally wronged.

Notably, although both Jefferson and Dewey saw public education as having a central role in creating the conditions for a well-functioning republic or democracy, neither seems to have thought of these conditions as a good to which an individual might have a personal right. Rather a well-functioning social order seems to be a collective good, which we all have reason to promote, but to which no one is entitled *as an individual* (cf. Raz 1986: 198-207). Although Anderson has elsewhere expressed dissatisfaction with the current philosophical tendency to reduce all political questions to “the distributive paradigm,”²⁸ one might wonder whether she has not allowed herself to be too influenced by Rawlsian political philosophy in this particular. Perhaps the concepts of “justice” and “fair opportunity” are ultimately too individualistic for outlining a democratic theory education.

Anderson claims that her argument for integrated education and an integrated elite has “demanding egalitarian implications”—and that seems right, but one wants to know whether these egalitarian implications are supposed to be intrinsically valuable, or just interesting byproducts of educating a democratic elite. If they are supposed to be intrinsically valuable, Anderson’s argument doesn’t explain why. Moreover, although Anderson sees herself practicing non-ideal theory, “constructing workable criteria for our currently unjust world” (621), her “two-birds-with-one-stone” strategy carries certain practical risks. Namely, it loses sight of the fact that there are, in fact, *two* birds (cf. Barry 2001: 209). Suppose it proves politically impractical to thoroughly integrate education and the elite ranks of society. Should we nonetheless devote

²⁸ Anderson (1999): 312. The critique was first made in those terms by Young (1990): ch. 1.

extra resources to educating the disadvantaged to help them compete for mid-level (rather than elite) positions? Anderson's argument cannot easily explain why we should. Or, alternatively, suppose it turns out to be possible to produce a sensitive and responsive democratic elite without a more egalitarian and integrated educational system. Perhaps we really *could* create such an elite without thorough social integration, but through mere tokenism of disadvantaged groups, or by encouraging privileged students to volunteer after school in disadvantaged neighborhoods. Anderson may be right in thinking that these measures would not be sufficient (617), but *if they were*, her argument would not be able to explain why we still have a duty to improve the educational opportunities of disadvantaged students.

14.5 The Democratic Citizenship Threshold

A) The idea of Democratic Equality

Even if the argument for a Democratic Elite has more limited implications for fair opportunity in education than Anderson suggests, the larger theory of Democratic Equality that she has developed elsewhere (1999) does seem to have the resources for a promising account of educational adequacy.²⁹ Anderson thinks that contemporary political philosophers—especially those she dubs “Luck Egalitarians”—have exaggerated the importance of an equal distribution of income and wealth in theories of justice at the expense of the more important social relations of equality. In doing so, she attests, they have lost touch with the historical aim of egalitarian movements, like the civil rights movement, the women's movement, the disabilities movement,

²⁹ As Anderson notes in passing in her essay on the Democratic Elite (2007): 620-62.

the gay-and-lesbian movement, and so on.³⁰ For these movements, *inequality* has been understood primarily, not as equality in the distribution of goods, but as a relation “between superior and inferior persons,” where superiors dominate, exploit, marginalize, demean, or inflict violence upon their “inferiors” (1999: 312-113). Democratic Equality seeks to reestablish that connection to what we might call “movement egalitarianism.” Its ideal of equality is a social order expressive of equal respect—a society in which individuals stand together as equal citizens, as opposed to an oppressive, hierarchical one (289, 315).

Anderson understands this equality to have two aspects: negatively, it means freedom from oppression; and positively, it means the ability to function as an equal in society (1999: 312-313, 317-318; 2007: 620). From this basic picture of equality, we can derive the requirements of justice. Generally speaking, what citizens owe to one another as a matter of justice is, neither equality of goods, nor the correction of the cosmic “unfairness” of nature, but equality in the basic social conditions—or capabilities—necessary to enable people to function as equal citizens, free from oppression (1999: 320, 314, 316, 288).³¹ That’s the basic idea. But what precisely does it mean to be free from oppression and to be capable of functioning as an equal citizen?

³⁰ Historically, this is a somewhat odd claim. Anderson seems to be suggesting that the Old Left has lost touch with its New Left forebears.

³¹ The idea of “capabilities” comes from Amartya Sen. The idea is that people need qualitatively and quantitatively different bundles of resources to make them *capable* of achieving certain valued activities, or “functionings.” As a metric of justice, the capabilities approach is supposed to capture the strengths of both resource and welfare metrics. Like resource metrics, it is an objective measure that looks to the social conditions of freedom rather than to the gratification of the subjective preferences of individuals. But like welfare metrics, it is capable of taking into account the differences between individuals that make different resource entitlements appropriate. For further discussion, see Sen (1992) and the more normatively substantive development of the idea in Nussbaum (2000; 2006).

B) Freedom from oppression

That equal citizens do not oppress one another seems reasonable enough. Following the lead of Iris Marion Young (1990), Anderson unpacks the idea of freedom from oppression as follows:

Equals are not subject to arbitrary violence or physical coercion by others. Choice unconstrained by arbitrary physical coercion is one of the fundamental conditions of freedom. Equals are not marginalized by others. They are therefore free to participate in politics and the major institutions of civil society. Equals are not dominated by others; they do not live at the mercy of others' wills. This means that they govern their lives by their own wills, which is freedom. Equals are not exploited by others. This means they are free to secure the fair value of their labor. Equals are not subject to cultural imperialism: they are free to practice their own culture, subject to the constraint of respecting everyone else (1999: 315).

Many of these notions stand in need of more elucidation than Anderson has given them. No one is *for* exploitation, but as the Marxist tradition has discovered, it is not easy to give an account of what the "fair value" of labor really is (cf. Elster 1985: ch. 4). Similarly, no philosopher today is in favor of *domination*, but we disagree about what power relations constitute domination. For instance, must the workplace be organized democratically if employees are not to be dominated by their employees?

Although the theory remains incomplete at present, Anderson's main point seems correct. There has been an overemphasis in recent political philosophy on the idea of "compensating" people for misfortunes—typically with extra income. Anderson insists that inequality takes many specific forms and remedies must be type-specific. Thus, it is wrong-headed to think that we ought to "compensate" the disabled with extra income for their bad luck. What we owe to the disabled is accommodation that enables them to be included as valued members of society. Furthermore, Anderson insists (contra libertarians) that democratic "freedom" cannot be reduced to mere negative liberty. Individuals also need access across a complete life to the means and capabilities that enable them avoid or escape various forms of social oppression and

marginalization. For instance, workers need unemployment support, if they are to have the freedom to leave an oppressive employer and look for another job, without starving or losing their home in the meantime. Or again, women need to have access to economic support for themselves and their dependents, either through work or some sort of child allowance, if they are to be free to leave abusive domestic relationships (cf. Okin 1989: ch. 7). And yet, more than access to external means is necessary to enable people to avoid oppressive relationships. Enduring relations of oppression almost always have a large psychological component: “inferiors” are made “to know their place.” In a society of equals, therefore, individuals need certain qualities of mind and character to resist that psychological domination. For instance, to avoid servile deference to their supposed superiors, individuals need the education, self-confidence, and self-respect to think and judge matters for themselves (1999: 316-318).

Freedom from oppression, once again, is the negative aim of Democratic Equality. Anderson says that there is also the positive goal of enabling individuals to participate as equal citizens in a democratic society. Since Anderson characterizes inequality as rooted in a hierarchical social order, one might think that, so long as citizens are free from arbitrary violence, domination, exploitation, marginalization, and cultural imperialism, then they stand as equals with respect to one another. On this interpretation, the negative and positive aims of Democratic Equality would be just two ways of describing the same basic status of freedom amongst equals. This would make it all the more important to offer a sustained account of what forms of oppression like domination, exploitation, and marginalization actually consist in. But this is evidently not Anderson’s own interpretation of Democratic Equality. She says quite explicitly that “While the negative and positive aims of egalitarianism overlap to a large extent, they are not identical” (317).

Anderson's account of what it means to be an equal citizen in a democratic society, beyond freedom from oppression, is at once rich, suggestive, and difficult to pin down with precision. What is clear is that she is tapping into an expansive conception of "social citizenship," which encompasses not only political participation, but also "full membership" in civil society, and yet which at the same time permits significant inequality in income and wealth (cf. Marshall 1964: 113). Debra Satz has recently defended a similar view: "I define citizenship, following T.H. Marshall, in terms of the political, civil, and economic conditions that are needed to make one a full member of one's society. Citizens are equal in terms of their status as full members, although they may be unequal along other dimensions such as income and wealth" (2007: 636). While attractive in many ways, such a view is bound to be difficult to articulate. Classical liberalism has historically been criticized on the left for erecting a formal realm of legal and political equality that stood over against the enormous inequalities produced by the market economy. The radical solution is to abolish this separation and extend the principle of equality to all spheres of life. Philosophers like Anderson and Satz appear to want an intermediate position: extend the principle of equality beyond the formal equality of classical liberalism, but not so far as to eliminate all substantial inequalities of income and wealth. Such intermediate positions, while perhaps reasonable, are often difficult to defend philosophically, as they can easily appear to be unstable compromises between two principled extremes. But let us examine the ideal of Democratic Equality in more detail by looking, first, at the idea of a democratic civil society, and then that of democratic citizenship in the political arena.

C) Democratic civil society

Anderson tells us that one of the achievements of the civil rights movement was to vindicate a conception of citizenship that extends beyond law and politics. On this picture, a group that is

“excluded or segregated within the institutions of civil society, or subject to discrimination on the basis of ascribed social identities by institutions in civil society, has been relegated to second-class citizenship, even if its members enjoy all of their political rights” (317). Now writers define “civil society” in different ways. Hegel and Marx, for example, used the term to refer roughly to the economic sphere of society (along with its legal substructure and stabilizing mechanisms). This is one part of Anderson’s picture; she says that one aspect of Democratic Equality is “participation as an equal in a system of cooperative production” (321). But her understanding of civil society includes more. She says that by “civil society” she means the sphere of social life “open to the general public and . . . not part of the state bureaucracy”:

Its institutions include public streets and parks, public accommodations such as restaurants, shops, theaters, buses and airlines, communication systems such as broadcasting, telephones, and the Internet, public libraries, hospitals, schools, and so forth. Enterprises engaged in production for the market are also part of civil society, because they sell products to any customer and draw their employees from the general public (317).

For the sake of convenience, let me postpone discussion of what it means to participate as an equal in a system of cooperative production and take up first the question as to what is entailed by equal citizenship in other parts of civil society.

The central idea, here, appears to be that, in a democratic civil society, people are not segregated from one another nor excluded from mainstream society. Of course, the first thing Americans think of in connection with segregation and exclusion is the Jim-Crow South. But that is only one of the most egregious examples of the kind of injustice that Anderson is drawing to our attention. It is obvious to us now that a democratic society cannot tolerate the sorts of legal segregation struck down by *Brown v. Board of Education*. But that is surely not sufficient. I suspect that Anderson would insist that the following measures are also necessary.

First, there must be laws enacted to prevent proprietors from excluding groups on a prejudicial basis from premises that are “open to the public.” Next, there must be vigilance that public authority is not used to practice segregation in less overt ways. For example, care must be taken that zoning laws are not used to enforce residential, and thus, educational segregation (cf. Anderson 2007: 619). Moreover, measures must be taken to actively integrate groups that are involuntarily isolated from mainstream society. Once again, this means that racial isolation in schools must be actively combatted. The point is not, of course, that Black or Hispanic children need to be around white children, because the latter are somehow superior to the former. Rather the idea is that, as one writer has put it “black children [need] access to majority culture, so that they negotiate it more confidently.... It is foolhardy to think black children can be taught, no matter how well, in isolation and then have the skills and confidence as adults to succeed in a white world where they have no experience.”³² This does not mean that minorities—like some Orthodox Jews or the Amish—that *voluntarily* insulate themselves from mainstream culture must be integrated against their will. (However, this does raise a difficult problem that deserves more attention. How can we both allow communities to insulate themselves from external influences, while preventing privileged cultural groups from protecting those privileges by excluding disadvantaged populations?)³³ Finally, I think a view such as Anderson’s is committed to an ideal of civic friendship or civility. For instance, to take an issue of current relevance, gays and lesbians should not experience hostility in public places for being open about their sexual orientations (1999: 320). That does not mean that everyone has to agree about sexual mores; only that in public no one need be afraid for their safety or be exposed to open

³² Kozol (2005): 229. Quoting Richard Rothstein, “When Tried, Real Integration Proves Worthwhile,” *New York Times*, January 30, 2002.

³³ There are important discussions of these problems in Kymlicka (1989; 1995).

contempt. (Of all of these provisions, however, one may fairly ask whether they really go beyond abolishing oppression and marginalization.)

Now, let me turn to the matter of what it means to participate as an equal in a system of cooperative production. One thing that is clear is that Anderson means to rule out workplace discrimination, even amongst the more privileged sectors of the social structure. In fact, this is the main example Anderson gives to explain the respect in which equal citizenship goes beyond freedom from oppression. If all that mattered were having the capabilities necessary to avoid oppression, then Democratic Equality could not object to discrimination amongst the relatively privileged, such as “the glass ceiling for female executives.”³⁴ But, in fact, Democratic Equality also aims at “enabling all citizens to stand as equals to one another in civil society, and this requires that careers be open to talents” (316-317).

In case that sounds too mild, I suspect we can also attribute to Anderson what Cass Sunstein has called the “anticaste principle”: “the anticaste principle forbids social and legal practices from translating highly visible and morally irrelevant differences [like race or sex] into systematic social disadvantage, unless there is a very good reason to do so” (1994: 2411). Anderson would almost certainly agree that people are likely to suffer serious insults to their self-respect when they are members of a group with highly visible characteristics that is systematically subordinate in society—even if the individual herself does not occupy a subordinate position (Sunstein 1994: 2430; cf. Anderson 2007: 598-600). In societies where inequality is significantly correlated with race and sex, a formal nondiscrimination principle

³⁴ Is this really true? Is not gender discrimination, even in high positions, a form of exclusion and marginalization within an otherwise privileged sphere? Again, the lack of any account of oppression makes the question impossible to answer with certainty.

would be an insufficient remedy. It would be necessary to tackle the causes of “caste” stratification more directly, and one can hardly imagine a more important way of doing so than by integrating the schools by class and race.

What else is necessary to be capable of functioning as an equal participant in a system of social production? Anderson says that this requires “effective access to the means of production, access to the education needed to develop one’s talents, freedom of occupational choice, the right to make contracts and enter into cooperative agreements with others, the right to receive the fair value of one’s labor, and recognition by others of one’s productive contributions”³⁵ (1999: 318). I shall beg off exploring all of these here. Some I have already touched upon, some are uncontroversial, and some are simply peripheral to my main subject. It will suffice here to say something about the importance of having an education to develop one’s talents. As a general proposition, no one today disputes this. The whole purpose of this chapter is to ascertain whether philosophers can shed any light on what a *principled* threshold for an adequate education might look like. While I have been arguing that Anderson’s larger picture of Democratic Equality does indeed have important implications for educational policy, I do not think that her remarks on this particular point add much.

Anderson suggests that adequate development of skills implies that everyone should attain “a high school diploma or its equivalent, representing real twelfth-grade-level achievement,”³⁶ and

³⁵ I take it that by “recognition of one’s productive contributions,” Anderson especially has in mind recognition of the productive labor that people—especially women—do outside the cash economy, especially in caring for children, the household, and other dependents (cf. 1999: 323-325). This is an important question for thinking about the relation between the family and the rest of society, but I am unable to take up the question in a satisfactory way here.

³⁶ I shall not repeat here the difficulties inherent in such “norm-referenced” standards that I raised in 12.4.E, though of course they apply.

that, though there need not be *equal* opportunity for higher education, “every student with the underlying potential” should be prepared for going on to college (2007: 620, 615). Satz makes a similar claim: “While my conception of adequacy does not require that everyone have the level of education necessary to gain entry into the top law schools, it does require that everyone with the potential have access to the skills needed for college” (638). But what does it mean to speak of those with the potential for college? Does that mean we abstract from all social influences? If not, then the proposal has limited implications for reform. If so, then I suspect that the children with the “underlying potential” for college—at least, on present standards—is extremely high. At public high schools in wealthy suburbs, nearly everyone goes on to college, and this is not because of their exceptional native talents, but because this is what is expected of them. Sending everyone to college hardly seems the most reasonable solution. While there may be some gains in productivity, it is likely that we would also ratchet up the unproductive educational arms-race yet another level. And that is a race that those from advantaged backgrounds are likely to win. Anderson and Satz have done admirable work in helping us see ways in which education is not merely a private and positional good—that in many ways the education of each can redound to the good of all. But we cannot simply wish away that positional character of education either.

Finally, we come to the difficult question of social status. In discussing how much income inequality is permissible, Anderson says that this would “depend in part on how easy it was to convert income into status inequality” (1999: 326). Satz, working within a similar framework, connects the issue of status directly to educational opportunity and social mobility:

Although an adequacy standard does not insist on *strictly equal opportunities* for the development of children’s potentials, *large inequalities* regarding who has a real opportunity for important goods above citizenship’s threshold relegate some members of society to second-class citizenship, where they are denied effective access to positions of power and privilege in the society.... Care must be taken to ensure that those with fewer

opportunities are not at such a relative disadvantage as to offend their dignity or self-respect, relegate them to second-class citizenship, cut them off from any realistic prospect of upward mobility, or deprive them of the ability to form social relationships with others on a footing of equality (2007: 637-638).

If by status inequality, Anderson and Satz mean the differences in prestige that now exist between social classes, then Democratic Equality might be radically egalitarian—it may require even a classless society. Presumably, Anderson and Satz would say that there is a difference between the basic respect individuals have as citizens, and the inequalities of prestige that individuals have as members of particular social classes. That may be so, but the harder you drive the wedge between respect owed to citizens and class prestige, the less handle you are going to have on economic inequality of any magnitude from this direction.

But the larger difficulty is that perceptions of social status and the social bases of self-respect seem to be quite subjective. There are at least two psychological mechanisms to take into account here. First, where expectations of social mobility are relatively low, people may resign themselves to a certain station in life, and see that station both as natural and as possessing its own form of honor (cf. Rawls, TJ: 547/479). With rising expectations, on the other hand, people begin to compare their situation with that of more privileged groups, and the sense of dignity in one's own humbler station may be undermined. The second mechanism works in the opposite direction: above a certain threshold of social mobility, people may have irrationally high expectations for their own chances of advancement or that of their children (cf. Elster 1983: 139). This may have the effect of enhancing their conception of their own social status. Generally, the more one's theory of justice relies on subjective attitudes, the more the theory is beholden to problems of adaptive preferences and wishful thinking. Ironically, these are precisely the problems that reliance on capabilities as the metric of justice, as opposed to

subjective welfare, is supposed to avoid (cf. Anderson 1999 and Nussbaum 2000: ch. 2). But if you try to define capabilities in terms of what is necessary for people to achieve a certain subjective attitude about their social status, then that theoretical virtue is forfeited.

At this point, a comparison with Rawls may be apropos. Self-respect, of course, plays a central justificatory role in Rawls's theory of justice as well (TJ: §67). However, he claims that, in Justice as Fairness, no one has cause to feel his self-worth affronted by the social structure, because things could not be arranged differently without making the position of the least-advantaged worse off than it is now. Therefore, Rawls gives us an *interpretation* of what a society based on mutual respect might be understood to consist in (TJ: §87). He does not say that we should adjust socio-economic inequalities until no one *feels* like a second-class citizen. True, he does somewhat reluctantly allow that "theoretically we can if necessary include self-respect in the [index of] primary goods ... which defines expectations" (TJ: 546/478). But this is an "unwelcome complication" to be resorted to only in the extremity; it would be a gross misinterpretation to suppose that this direct appeal to ordinary perceptions of self-respect comprised the heart of Rawls's theory.

D) Political participation

We have been discussing the ideal of a democratic civil society. We now turn to the more narrowly political aspect of democratic citizenship. Of course, these are not two entirely separate subjects. A crucial part of political participation is engagement in institutions of civil society, especially those that form part of the deliberative "public sphere," like the media, the internet, schools, and universities. Since we are primarily interested in the educational implications of Democratic Equality, I shall not dwell on the relatively uncontroversial aspects of democratic citizenship such as liberal rights to freedom of speech and press or formal political

rights. Moreover, we have already discussed that part of Anderson's view concerned with the Democratic Elite; here we are interested in whether Anderson has anything to add to Gutmann's related conception of the Democratic Threshold Principle. Anderson's most distinctive claim is that "Democratic equality regards two people as equal when each accepts the obligation to justify their actions by principles acceptable to the other, and in which they take mutual consultation, reciprocity, and recognition for granted" (Anderson 1999: 313).

Here is how I would construe that claim. Many theories of morality hold that we can understand "what we owe to each other" by considering what principles informed and uncoerced, reasonable people would agree to (cf. Barry 1995: 67-72; Scanlon 1998: ch. 5). To take one example, Habermas holds that valid norms are those that would be approved by all participants in an ideal speech situation, where (amongst other things) every subject competent to speak is allowed to raise any issue and be heard by all (1990: 66, 89). As I read Anderson, Democratic Equality is to be understood as implementing the social preconditions that enable citizens to participate in social and political dialogue that approximates an ideal speech situation. In particular, no one is to be silenced because of her race, sex, or class, and "no one need bow and scrape before others or represent themselves as inferior to others as a condition of having their claim heard" (Anderson 1999: 313). To the extent that political dialogue is compromised or distorted by the marginalization or inarticulacy of certain perspectives, then to that extent society has failed to foster the capabilities that Democratic justice requires.

Admittedly, that is not a very precise standard, but perhaps it does as much as we can hope in giving us some guidance for framing our arguments. For example, if the concerns of the American Hispanic community seem underrepresented in mainstream political dialogue, then we need to figure out what the causes of that underrepresentation are, and search for ways to remedy

them. For instance, is the main problem a language barrier? In that case, we need to find ways to help the Spanish-speaking and English-speaking communities communicate with one another. How best to do this is an empirical question. It may require more intense instruction in English in largely Hispanic schools, more thorough integration of Spanish-speaking and English-speaking children in the schools, or any mixture of other strategies.

One interesting implication of this is that effective democratic participation may best be understood as a characteristic of groups, not of individuals. We have seen that it is very difficult to say what—other than literacy and a basic knowledge of government—is adequate to enable an individual to be an *effective* participant in the democratic process (11.3.B. and 14.4.C). But perhaps we ought to be looking at the effective political participation, not of individuals, but of various “micro-publics,” each defined by shared generalizable interests. In that particular micro-publics may be politically marginalized, the issue of effective democratic participation is a matter of social justice. But, because effective voice in the public sphere is not an individual good, it is not the sort of good that is easily handled within liberal theories of *distributive* justice. Rather, it is more akin to the collective interests that a group may have in the survival of its language or culture. Such collective interests may be fit goals of legislation, but they are not the sorts of interests we typically imagine to be protected by the courts.

In any case, Anderson is vulnerable to a serious objection at this point. She presents her theory of Democratic Equality as if it is an alternative to other theories of justice, like that of Rawls or the Luck Egalitarians. But now it seems that her theory (perhaps like Gutmann’s) is really operating at a different level. For once we have established the social conditions necessary for citizens to be able to present their claims to one another on equal terms, there is still the question as to what those legitimate claims are. Maybe we will find, once we try to justify our

social institutions to one another as equal citizens, that it is unjust if anyone suffers from a disadvantage through no fault of their own, or that it is unjust if social institutions could be rearranged so as to improve the expectations of the least advantaged. It seems odd to think that, once we have established the conditions for ideal deliberation as well as we can, we will then have no further claims to present to one another. Suppose that the schools are of sufficient quality that everyone is fully prepared to engage in democratic deliberation and participate in civil society, and yet, because of reliance on local property taxes, some schools are considerably superior to others. As a result some children enjoy competitive and cultural advantages in public schools not available to other public-school children. It seems quite reasonable that someone might argue that this system failed to treat all children as equal citizens, not because it failed to foster the capabilities for equal citizenship, but simply because there were fairer ways of structuring the system of school-finance. Ultimately, then, I believe that while Anderson has a strong argument for having a theory of the most urgent forms of injustice, she cannot possibly have offered a complete theory of justice.

Someone might respond to that objection in the following way. Some democratic theorists have suggested that it is actually undemocratic for the philosopher to attempt to settle substantive political questions from his armchair, since they are properly resolved through democratic deliberation and procedure. This, someone might say, is why Anderson is correct to offer no account of how the claims of equal citizens may properly be settled; that would usurp the

prerogative of democratic decision-making. The philosopher, on this view, can go no further than to propose the conditions necessary for claims to be presented in open dialogue.³⁷

This view seems to me quite mistaken. Philosophers can sensibly offer theories at different levels (see 14.4.B). Democratic theorists are not wrong to be interested in questions about rational political will formation, but they *are wrong* to think that there is nothing else for a philosopher to do. If there can be any real democratic *deliberation*, as opposed to people simply voting their preferences, then there must be reasons that can be given for why one policy is superior to another. The political philosopher is simply making a contribution to that deliberation, albeit at a more abstract and systematic level than is typical of most political discourse. To give an account of what seems to be the most reasonable position is *not* tantamount to saying—as these democratic theorists suggest—that the philosopher ought to rule instead of the people. Rather, it is to take seriously the premise of deliberative democracy, which is that politics ought to be responsive to reasons, not merely to power and rhetoric.

³⁷ For instance, Habermas criticizes Rawls for trying to settle substantive questions of distributive justice rather than leaving these to actual processes of democratic will formation:

“I propose that philosophy limit itself to the clarification of the moral point of view and the procedure of democratic legitimation, to the analysis of the conditions of rational discourses and negotiations. In this more modest role, philosophy need not proceed in a constructive, but only in a *reconstructive* fashion. It leaves substantial questions that must be answered here and now to the more or less enlightened engagement of participants.”

Habermas allows that philosophers may participate as “intellectuals,” but he insists that they may not pose as “experts” (1995: 131). I don’t really understand that distinction in this context. If the attitude of the expert is “Trust me: You don’t have to think about it yourself,” then nothing seems further from true philosophy than posing as an expert.

To give another example, while Gutmann makes the accurate observation that many liberal theories of educational justice have ignored questions about educational authority and legitimate decision-making, she is wrong to think that liberal philosophers are “profoundly undemocratic,” in that they (allegedly) suggest “we need a philosopher-king ... to impose the correct educational policies, which support individual autonomy, on all misguided parents and citizens” (1987: 11).

Indeed, what could be more deliberative and dialogical than the kind of thorough and relatively dispassionate analysis of argument that good philosophers and other scholars engage in?

CHAPTER 15: ELEMENTS OF EDUCATIONAL JUSTICE

15.1 Introduction

In this chapter, I argue that an attractive theory of educational justice will have elements drawn from both the equity and adequacy approaches, which we have been exploring in the previous two chapters. I begin with a summary of my conclusions regarding the adequacy approach from the last chapter. In particular, I endorse the basics of Elizabeth Anderson's theory of "Democratic Equality," although I express some reservations and offer a few constructive remarks. Then, returning to the criticism of Anderson I made at the end of Chapter 14, I argue that the chief shortcoming of the adequacy approach is its failure to pay sufficient attention to the norm of equal treatment. This leads us back to the problem discussed at the end of Chapter 13: when *do* inequalities amount to unequal treatment? Most pressing is the question as to whether inequalities that emerge from decentralized school-finance systems involve unequal treatment.

15.2 Adequacy

I believe that we should accept Elizabeth Anderson's fundamental claim that justice is properly concerned with creating and maintaining the preconditions of a community in which citizens stand in relation to one another as equals—not with ensuring that everyone gets what they deserve in some cosmic sense (14.5.A). And she and others are right to maintain that this can help inform a theory of educational adequacy. All the same, as we saw in the previous chapter, giving an account of what it is necessary—educationally or otherwise—if citizens *are* to

stand as equals is very difficult to do. Indeed, we should be upfront about exactly what kind of task we are setting for ourselves: We are trying to explain *how unequal* individuals can be in socio-economic terms and yet still count as fully *equal citizens* of a democratic society. I am of two minds about the prospects of this project. On the one hand, I am skeptical that any final answer to such a problem can be given. When one generation achieves the “basic equality” that the previous generation aspired to, it seems to be human nature to freight remaining inequalities with the status significance that once attached to the old. On the other hand, I also believe that any political theory that *did not* try to address this problem—how unequal can equals be—would be either utopian or complacent.

I have already had much to say in the previous chapter about different components of a theory of educational adequacy, both constructive and critical. I will not rehash those points here, but only offer my primary negative and positive conclusions.

A) Negative conclusions

First, although justice is committed to a society founded on mutual respect, I believe we do well to appeal as little as possible to subjective perceptions of respect. The proper goal is to develop a theory of justice that is a compelling interpretation of mutual respect; not to cater to current beliefs about what mutual respect involves. Of course, we cannot proceed without some input concerning prevailing understandings of the significance of certain goods.¹ But that is only the first stage of theory construction; not the content of a practical principle.

Next, Anderson and Debra Satz are surely right to believe that the single reform that would do more good in more ways than anything else in American education would be thorough racial

¹ This is an insight of Walzer (1983): ch. 1. See also 13.4.C.

and economic integration of the schools. However, as we saw in Chapter 11, this is not a new idea. In 1835, Thaddeus Stevens was calling for common schools for the “rich and the poor man’s sons,” where all would be educated together in “perfect equality” (11.2.B). Because it has proved so difficult to implement educational integration, it is important to distinguish between means and ends, as the optimal means may be politically infeasible. No feature of education seems more ubiquitous across societies than that those of higher status loathe their children mixing with their social inferiors. Bertrand Russell noted that he had “seen prominent English Socialists foam at the mouth of the suggestion that all children ought to go to [common] elementary schools. ‘What? My children associate with the children of the slums? Never!’” (1929: 207). In trying to gauge how realistic a goal educational integration is for the United States, it is not enough to speculate on the extent to which the racially charged firestorm over busing has sufficiently died down. We must also take into consideration the fact that a large number of politically active middle-class families have paid a premium on their homes in order to get their children in with the “right crowd.” As in the busing controversy, integration would lead those families to feel as if they had been suckered: that “the rules” had been changed in the middle of the game to their disadvantage. I am not saying that political philosophy should be guided by opinion polls, nor that incremental progress in integration is hopeless.² The point is merely that the extreme difficulty of integrating schools makes it all the more important that we understand the goals we hope to achieve, so that they can be pursued by multiple avenues.

The final precaution is that we must avoid assuming that democratic participation is an individual good, which is easily assimilated to a theory of distributive justice. True, we would

² Consider the wise remarks of Gary Orfield as recounted in Kozol (2005): “If you start with the hardest cases in the country you’re not going to come up with the right answers. You don’t *need* to desegregate New York in order to desegregate Des Moines” (235-236).

perpetrate an injustice against an individual by denying her the very basic capabilities—particularly, literacy—necessary to participate in the democratic process. But for the most part, effective democratic participation is a collective good of a public: either that of the whole public, or that some smaller group united by common interests, which I have called a “micro-public” (14.5.D). This has an important practical implication. A strong state can be more tolerant of families that do not cooperate in promoting collective educational goals than it can be of families that do not provide their children with the education they are individually owed as a matter of justice. For instance, because certain religious groups shun politics and want little to do with the rest of society, their members are not ideal democratic citizens; a society made up entirely of such groups could not be democratic. But if such communities nonetheless provide their children with the education justice requires, then we may be able to tolerate the fact that such communities do not impart democratic values to their children, as long as the stability of a just society is not thereby endangered.³ On the other hand, if a cultural group’s educational practices is undermining the effective political voice of a sub-population of that group (like women), then less leniency may be appropriate.

B) Positive conclusions

Turning now to my positive conclusions about adequacy. Anderson provides us with a useful framework from which to start when she suggests we think about the capabilities necessary for three aspects of individual functioning: as a human being capable of forming relationships with others in public and private, as a participant in a system of cooperative production, and as a citizen of a democratic society (1999: 317, 318). This, I believe, fits well

³ In this respect, my view is more accommodationist than, for example, that of Arneson and Shapiro (1996), who deny that any parental right, even in a strong state, to exclude children from an education for democratic citizenship.

with the ideal of respect for life-authorship which I defended in Chapter 5 (5.3.B).⁴ I described that as the social duty to recognize individuals as possessing the authority to make their own choices about the kind of life to lead, especially with respect to the major social roles they undertake. And for this, I argued, more than negative liberty is necessary: we must also foster the capacities in the young that will enable them to make life choices as adults, and we must maintain the social conditions—like access to education, good jobs, and birth control—that ensure an adequate range of options for making meaningful choices about the contours of their lives.

Of course, this leads us back to the vast question of how to define an adequate range of options. I have little to add here to my remarks in Chapter 5: namely, that an adequate range of options will have to be defined by articulating valuable activities that exercise basic human capacities for such things as knowledge and understanding, for artistic production and aesthetic appreciation, for religious and spiritual expression, for participation in intimate groups, in community, and in the wider culture, for raising children, for productive work, and for play (see 5.5.B). Such an account will be laborious to elaborate and will involve philosophical reflection on material drawn from various disciplines in the social sciences and humanities. It is also the sort of project that we can hardly hope to be completed by a single philosopher; the very nature of the subject calls for multiple perspectives. Chapter 10, which examined the ways that committed romantic relationships and parenting can contribute to a fulfilling modern life, is one modest contribution to this research program. The examination in the previous chapter of various thresholds of educational adequacy is another.

⁴ It is also similar to the Hegelian educational philosophy I articulated in Chapter 10 (esp. 10.5.A).

The hardest part of an account of educational adequacy concerns opportunities for attaining desirable positions in the economy. Once again, the adequacy approach is faced with the difficulty of finding a principled middle-ground between classical liberal and standard egalitarian theories of equality of opportunity: that is, between theories that require only formally open positions, and those that require that real opportunities be equal for all (see Chapter 13). Adequacy theorists like Satz are fond of saying that a democratic society cannot tolerate a society composed of “fixed and frozen ranks, where ‘each person is believed to have his allotted station in the natural order of things.’”⁵ But it must be kept in mind that the incidence of upward mobility does not require—and historically has not much depended on—the ability of children from lower classes to compete with the children from the upper or middle classes. If the demand for professional or managerial positions sufficiently grows due to structural changes in the economy, then children from the lower classes are bound to be recruited into it (Marshall et al. 1997: ch. 2). Do we want to say that the upward mobility due to economic growth is sufficient for “adequate opportunity”?

Again, the only way forward on this front that I can see is to think about what range of career offerings might give people a meaningful ability to shape the kinds of lives they will lead, and thereby exercise meaningful life-authorship. This would mean having opportunities to exercise different kinds of capacities, as well as choices regarding trade-offs between income and other goods like leisure, security, autonomy, and meaningful work. The problem is that, where a segment of the population has very different educational opportunities than the rest, the educationally privileged have a corner on the market for the most skilled, and often most

⁵ Satz (2007): 643, quoting Rawls, TJ: 547/479. Actually, the quotation is taken out of context in an ironic way. Rawls is in the midst of saying that there may be very little damage to subjective perceptions of self-respect in a society where individuals assume that their social position is assigned by nature.

intrinsically rewarding, positions. As a result, those positions also command the highest incomes. Meanwhile, the less well-educated face stiffer competition for relatively undesirable positions, and therefore they bid one another down for wages and other benefits. If the least-advantaged positions in the economy are inadequate to sustain what we would regard as a sufficiently good life, then over the long term the solution would seem to be a more competitive and integrated labor market which would compress inequality of compensation, and more importantly, raise that of those on the bottom.⁶ The moral of the story, then, is that we should not be too quick to assume that an adequacy or sufficiency theory of social justice will lead to an adequacy theory of *educational justice*. It may be that the only way to make sure that everyone has “enough” in life, is to provide everyone with nearly equal educational opportunity (see 12.4.C and 13.4.A, B). Naturally, the extent to which this is true is an empirical question, but it is my impression that many philosophers have failed to recognize this possibility.⁷

An easier, but no less important, matter for the idea of educational adequacy is that of giving every student access to our collective cultural and scientific heritage and the opportunity to participate in arts and crafts (cf. Marshall 1964: 78). This was the sort of social exclusion that bothered many Victorian social thinkers and reformers: that the conditions of the working class led to a brutish life cut off from appreciation of beauty and enlightenment—activities which lent grace and spiritual substance to life at very little cost. Unfortunately, (with the notable exception of science) these are precisely the parts of the curricula that have suffered most in struggling

⁶ Cf. Tawney (1931, 1964): “The element of monopoly, which necessarily exists when certain groups have easier access than others to highly paid occupations, would be weakened, and the horizontal stratification, which is so characteristic a feature of English society, would be undermined. While diversities of income, corresponding to varieties of function and capacity, would survive, they would neither be heightened by capricious inequalities of circumstances and opportunity, nor perpetuated from generation to generation by the institution of inheritance” (150).

⁷ A notable exception is Brighouse and Swift (2006a).

schools under the current regime of standardized testing. Part of the cause of this is the notion that such subjects are merely ornamental and quite secondary to serious, more practical studies. But in part it is also due to the fact that such subjects are not easily tested. Jonathan Kozol observes that:

The virtual exclusion of aesthetics from the daily lives of children in these schools is seldom mentioned when officials boast that they have pumped the scores on standardized exams by three or four points by drilling children for as many as five hours in a day... [B]ut the stripping away of cultural integrity and texture from the intellectual experience of children, denial of delight in what is beautiful and stimulating for its own sake and not for its acquisitional equivalents, is a perennial calamity (2005: 119-120).

The result, as Kozol well recognizes, is not only that these children miss out on appreciation of the beautiful. Dewey warned that the desire for “speedy, accurately measurable, correct results” easily leads to a mechanical approach to education that discourages independent thinking, especially about values and their relation to human life and society (1916: 175, 288-290, 316-319).⁸ In the extremity, educators begin to think of themselves as “in the business of developing minds to meet a market demand,” which are either incapable or disinclined to interrogate the conditions prevailing in their society.⁹ In short, a decent theory of educational adequacy would not draw its pedagogy from Mr. Gradgrind. Matthew Arnold is a better guide on the value of a liberal education:

⁸ Cf. Kozol (2005): “ ‘If you do what I tell you to do, how I tell you to do it, when I tell you to do it, you’ll get it right,’ says a South Bronx principal observed by a reporter from the *The New York Times* in laying out a memorizing rule for math to an assembly of her students. ‘If you don’t you’ll get it wrong.’” This is the voice, this is the tone, this is the rhythm and didactic certitude one hears today in inner-city schools that have embraced a pedagogy of direct command and control” (64). “The head of a Chicago school ... who was criticized by some for emphasizing rote instruction which, his critics said, was turning children into ‘robots,’ found no reason to dispute the charge. ‘Did you ever stop to think that these robots will never burglarize your home?’ he asked, and ‘will never snatch your pocket books... These robots are going to be producing taxes’ (97-98). See also Ravitch (2010): esp. ch. 6.

⁹ Kozol (2005): 96, quoting a principal’s speech to corporate executives, reported on in the *Wall Street Journal*, February 9, 1990.

[Culture] does not try to teach down to the inferior classes; it does not try to win them for this or that sect of its own, with ready-made judgments and watchwords. It seeks to do away with classes; to make the best that has been thought and known in the world current everywhere; to make all men live in an atmosphere of sweetness and light, where they may use ideas, as it uses them itself, freely,—nourished and not bound by them (*Culture and Anarchy*, ch. 1, p. 70).

15.3 Equality

A) Equal treatment

In Chapter 14, I endorsed Anderson’s claim that equals accept the obligation to justify their actions and shared institutions to one another (1999: 313). But at the end of that chapter I argued, *pace* Anderson, that there is no reason to think that such justifications will only appeal to equality in the basic capabilities necessary for avoiding oppression and participating as an equal citizen in a democratic society (14.5D; cf. Anderson 1999: 316). In particular, there is surely a presumption that the state will not, without good reason, contribute more to improving the condition of some than to that of others (cf. Hayek 1960: 92). I cannot justify to my daughter devoting fewer resources to her education than to that of my son on the grounds that what I have provided to her is fully adequate. Neither, then, can the state justify lavishing resources on the education of some, while spending only what is adequate on the education of others. In short, equal citizens expect their government to abide by a norm of equal treatment.

What, then, does the norm of equal treatment require? Clearly, it rules out invidious discrimination on the basis of “arbitrary” characteristics like sex and race. And the adequacy theorists, of course, assume this as well. But is that all that the norm of equal treatment requires? At the end of Chapter 13, I argued that “emergent inequalities”—i.e., inequalities that emerge when authorities in separate jurisdictions make different reasonable decisions—do not

necessarily violate a norm of equal treatment. Once again, if I treat my son and daughter differently for no good reason, then that *would* be unfair. But if my neighbor confers more benefits on his children than I confer on my own, then no one is *treated* unequally, and no clear injustice has been done to anyone. I called this the “Emergent Inequalities Thesis.” And I argued that its implications for the family are, for the most part, attractive.

But I also said that we may begin to worry when we discover that a similar argument seems to apply to local school districts. If Riverwood confers more educational advantages on its children than Flatfield, then no one (it seems) is treated unequally, and no injustice has been done. This was essentially the reasoning that the Supreme Court relied on in *San Antonio v. Rodriguez* to argue that, though the pattern of public school funding in Texas was, in a manner, arbitrary, it was not objectionably so, since “any scheme of local taxation—indeed the very existence of identifiable local governmental units—requires the establishment of jurisdictional boundaries that are inevitably arbitrary.”¹⁰

Our acceptance of certain adequacy standards is one way of limiting the inegalitarian implications of the Emergent Inequalities Thesis. That thesis says merely that *relative inequalities arising from decentralized decision-making are not unjust insofar as the norm of equal treatment is concerned*. But the positive duty to ensure that others have access to the social conditions necessary for equal citizenship makes no reference to jurisdictions, and Anderson makes a good case for regarding this as a part of social justice. Suppose Flatfield cannot provide its children with an adequate education. If Riverwood has resources left over after providing its children with an adequate education and meeting other needs, then that district

¹⁰ *San Antonio v. Rodriguez*, 411 U.S. 1, 53-54 (1972). For discussion, see 11.3.B.

has a presumptive moral duty to aid Flatfield. This redistribution is morally required, not because the *relative inequality* between Riverwood and Flatfield is inherently unjust, but because it would be unjust to permit the *absolute deprivation* of Flatfield, were it possible to alleviate it. This helps solve the problem we encountered in Chapter 13: that the norm of equal treatment by itself seems unable to explain why a poorly funded, but equal, educational system—or even no public educational system at all—is unjust (see 13.2; see also 11.3.B on the California school system after Proposition 13).

So, taking the adequacy requirement into account, the Emergent Inequalities Thesis suggests that inequalities between jurisdictions are not unjust, so long as all jurisdictions are enabled to make adequate provision. This, I believe, is essentially where adequacy theories leave us.¹¹ But they fail to take into consideration the fact that the whole school-finance system needs justification. It is not enough to ask whether there has been any unequal treatment, given the system of distribution actually in place. We also have to justify why we shouldn't adopt a different way of funding education that would have different distributive implications.

B) A presumption of horizontal equity

Focusing on the American context, let us begin at the state level, which is the site of the greatest controversy historically. Why shouldn't the states simply disburse equal tax revenues

¹¹ Cf. Gutmann (1987): "The democratic standard of distribution gives local districts the freedom to supplement state funds with their own, as long as state and federal governments guarantee a level of funding for all districts sufficient to bring every child to the democratic threshold. Inequalities above this threshold would not be morally suspect. A well-financed Foundations Program, for example, would leave wealthier districts with a greater capacity than poorer ones to raise money above the threshold. Wealthy districts should not be prevented from surpassing the learning threshold" (144).

Debra Satz (2007) is more hesitant, but ultimately adopts much the same view: "There is a strong *prima facie* case for the equal public provision of education; as *Brown* put it, education must be provided by the state 'on equal terms'... Nevertheless, 'on equal terms' is a complex idea... I have endorsed an understanding of this phrase that links it to the equal status of citizenship. And I have argued that such equal status can be compatible with unequal funding, at least to some degree" (645).

per pupil to every district or school, allowing for departures in order to meet the adequacy threshold and possibly taking into account regional price differences, economies and diseconomies of scale, etc.? Why should the wealthier community of Riverwood receive more tax revenue per pupil—even by means of the local property tax—than the poorer community of Flatfield? It seems as if there should be a *presumption* of “narrow horizontal input equity”¹² (henceforth, just “horizontal equity”). Departures from that presumption may be justifiable—like the necessity of unequal resources to meet the adequacy threshold. But departures do seem to require some justification.

Someone might object to that way of framing the question. This critic would argue that *his community* ought not be obliged to pay taxes for *another community's* schools: “Let Flatfield fund their own schools; Riverwood money should stay in Riverwood!” There is no question that such attitudes often carry the day politically. But, stated so flatly, the argument makes little sense. On the one hand, it appears to accept that citizens within a school district have the responsibility to share the costs of supporting schools, which will make available the same quality of education to every child. Therefore, we have apparently already rejected the argument I alluded to in Chapter 11: that the state “might as well take a man’s ox to plough his neighbor’s fields as to take a man’s money to educate his neighbor’s children.”¹³ But then our critic’s argument insists that this responsibility only extends as far as the local community. This looks, at least at first blush, like an arbitrary and unstable position. After all, school districts are not sovereign entities. They are “quasi corporations ... created as instrumentalities of the states in

¹² “Narrow” because we are restricting our attention to *public* inputs. By “inputs,” I mean roughly resources. See 12.3A and 12.4A.

¹³ Cubberley (1905): 71-72, quoting Address of Jas. L. Hughes at the eighty-seventh birthday of Henry Barnard (1897).

order to facilitate the administration of government.” As such, their powers, including the power to tax, are only such as are prescribed by statute.¹⁴

This potentially sets the problem of intra-state inequalities on a considerably different footing than interstate inequalities. States are not mere administrative entities that were created by Federal statute. While not fully sovereign states, they do have some of the marks of sovereignty. As a result, inequalities between states share something of the character of global inequalities, as well as the attendant philosophical questions. Ultimately, I do not have a worked-out view about educational inequalities between states, *once the adequacy threshold is met*. It may be that all the arguments that apply to interdistrict inequalities apply equally to interstate inequalities—but then they may not. To determine this, one would have to come to grips with the political theory of federalism, and I do not presently have solid views on this. Therefore, I shall have no more to say specifically about interstate inequalities in education.

With respect to state school-finance systems, however, a presumption of horizontal equity seems like a fitting expression of the idea that the state should not play favorites, but should instead adopt policies that take into equal consideration the claims of all citizens. Once again, there will surely be justified departures from that presumption, but the burden of proof lies on those departures. In the next section, I shall consider whether allowing local communities to exercise substantial control over the funding of their schools constitutes a justified departure from the presumption of horizontal equity. More particularly, the argument I want to consider is that justice would be done so long as there were a foundation plan that ensured every school

¹⁴ Wise (1967): 98, quoting Newton Edwards, *The Courts and the Public Schools* (Chicago: University of Chicago Press, 1955): 54.

sufficient resources for meeting the adequacy threshold.¹⁵ Local communities would then be permitted to supplement the foundation level through local tax revenues as they saw fit.

15.4 Arguments for Local Control

A) Public goods and fiscal federalism

First, in support of local control over school finance, someone may insist that there is a general presumption that public goods ought to be paid for by the community that benefits from them. Joseph Stiglitz explains this principle of “fiscal federalism” as follows:

For some kinds of goods there is a strong presumption for federal provision. These are national public goods, whose benefits accrue to everyone in the nation. In contrast, the benefits of local public goods accrue to residents of a particular community. National defense is a national public good; traffic lights and fire protection are local public goods (1999: 733).

Why should there be such a presumption? The chief arguments appeal to efficiency. Economic theory tells us that decentralized markets are typically more efficient than centralized distribution. In a perfectly competitive free market, people will make mutually beneficial exchanges until no further exchanges can be made without making some people worse off. Where distribution is controlled by the government, on the other hand, it is extremely difficult to acquire enough information about individual preferences to produce the right amount of the right kind of goods to meet demand. But not all goods *are* efficiently supplied by the market. Exchange depends on being able to exclude people from benefiting from a good unless they pay for it. And it is in the nature of *public goods* (like national defense) that it is difficult to exclude free-riders. As a result, the market will tend to undersupply non-excludable goods, since there is

¹⁵ The mechanics of foundation plans are discussed in 11.2.B.

little or no return for them. This is inefficient, if people *would* have paid for the good, had it been excludable. Governments can give people more of what they really want by funding public goods through the taxation of the beneficiaries at roughly the level that those beneficiaries hypothetically would have paid for the benefit, were it an excludable good. But public goods may serve larger or smaller populations. The whole country is a beneficiary of national defense, so only the national government can solve the associated market failure. A fire department, however, may only benefit the local community, so that is a market failure that local governments can remedy.

True, we *could* have a national fire brigade, instead of local fire departments. But if people in different localities prefer different baskets of public goods, then local provision can be more responsive to those local preferences than broad uniform provision would be and, thus, more efficient. Moreover, local authorities are likely to have better knowledge of local conditions than more distant central authorities, which also makes them better at satisfying local wants. Finally, local provision may be more efficient, insofar as it is possible for people to move to the communities that provide the basket of public goods most to their liking (the “Tiebout Hypothesis”) (Stiglitz 1999: chs. 4 and 26). Milton Friedman puts the point this way:

If government is to exercise power, better in the county than in the state, better in the state than in Washington. If I do not like what my local community does, be it in sewage disposal, or zoning, or schools, I can move to another local community, and though few may take this step, the mere possibility acts as a check. If I do not like what my state does, I can move to another. If I do not like what Washington imposes, I have few alternatives... (1962: 3).

I have no quarrel with these arguments in the abstract. The main problem lies in trying to apply them to the case of public education. First of all, regarding the Tiebout Hypothesis, it is certainly true that many families move to communities on the basis of their preferences regarding

schools and property taxes. But to the extent that zoning restrictions (like those on the construction of multifamily dwellings) prevent families with low incomes from moving into communities with good schools, the freedom of movement that the Tiebout Hypothesis assumes does not exist. Granted, a libertarian like Friedman might find such zoning laws an objectionable restriction of liberty and of the market, but as long as they do in fact exist, the Tiebout Hypothesis does not provide a strong argument for the local funding of schools.

More fundamentally, in most regions, education is not even a very pure case of a public good (in the economic sense). Colleges and private schools make it abundantly clear that it is quite easy to exclude pupils who do not pay the tuition (Stiglitz 1999: 426; Tooley 1995: chs. 6-7). The most important arguments for public education (as we have seen throughout Part III) appeal, not to market inefficiencies, but to collective goals and considerations of justice.¹⁶ These values do not seem to have any relevance to the principle of fiscal federalism. I grant that not all of the benefits of education accrue directly to the student, and this could, theoretically, lead to underinvestment. However, the mere existence of positive and negative externalities would not demonstrate that the market is operating inefficiently. The crucial question is whether these externalities will be the happy byproducts of private investment in education, or whether their realization requires some kind of public intervention. Because there are such large and relatively immediate private gains to be had from education, it seems unlikely that many parents will intentionally choose to “free-ride” on the rather distant positive externalities that come from the education of other people’s children.

¹⁶ The strongest efficiency-based arguments would concern rural areas, where there may be a natural monopoly, and in undeveloped regions, where there is no existing school system and little demand for one.

But now we can imagine a slightly different argument. The problem is not one of inefficient underinvestment, but of an equitable way of shouldering the costs of collective goods. That is, if education confers positive externalities on the community, then it is only fair if all the members of the community that benefit from those externalities also do their part in contributing to the schools. Now this is not *obviously* a good argument: Must I help shoulder the costs of my neighbor's garden, since it improves the view out my back window? But let us set that objection aside; I suspect that there is something to the argument in at least some contexts. The problem, however, is that, whatever might have been true in the past, it has little relevance to education under contemporary conditions. First, many Americans do not live in the community in which they grew up. This is especially true of those with the most education. Therefore, communities with growing populations of educated people are benefiting from the educational expenses of communities with dwindling populations. Second, we clearly benefit—economically, culturally, and politically—from the education of people who are not our neighbors. The bottom line, then, is that if you begin with the argument that support of schools should be linked to the impact of their externalities, then you are not going to end up with a conclusion for local funding.

B) Social choice and efficiency

Even if education is not a very pure public good (again, in the economist's sense), someone may mount the following social-choice argument. So long as communities do differ in how much they want to spend on education relative to other public services and private consumption, it remains true that local decision-making about funding would be more efficient in the satisfaction of preferences than more centralized control. One concern about this argument is that it attends more to the preferences of adult taxpayers than to the interests of children. Moreover, once we have dismissed the idea that education is a public good, the logical

conclusion of this argument is not local control, but a free market. We could institute a system of vouchers to ensure that all children had access to an adequate education, and then let parents top-up the vouchers as much as they pleased (cf. Friedman 1962: ch. VI). Different schools would then cater to parents with different tastes (and ability to pay) for education. This would be the most effective way of satisfying individual preferences.

Why not follow this argument where it leads and simply endorse a voucher system? There are, I think, at least two reasons. The first is a pragmatic, political argument. The voucher would transparently redistribute money from the wealthier to the poor families. The wealthier families therefore would have a personal interest in the vouchers being worth as little as possible, as that would free up more of their income to spend on their own children's education. And this may make it difficult to sustain the political will to ensure that the vouchers really do make an adequate education available to all. In this way, a voucher system may erode support amongst the most powerful sectors of society for anything but the most meager public provision for education. The second, and I think more powerful, argument is that this kind of voucher system would spell the death of the common school. Even more so than is the case today, children of different means and backgrounds would no longer be educated side-by-side, but instead with children of like-minded parents of similar means. Nothing could more antithetical to the concerns for civic unity that motivated the pioneers of common schools (see 11.2.A). As Stephen Macedo pointedly observes, "The health of our political society requires that we learn how to negotiate cultural boundaries and promote wider sympathies among citizens." And "where," Macedo asks, "will this work be done if not in the common schools?" (2000: 263).¹⁷

¹⁷ See also Walzer (1983): 217-221; Gutmann (1987): ch. 2; and Callan (1997): ch. 7.

If we accept these arguments, then we have at least a provisional case against voucher systems. But perhaps that means that local control over public schools is an attractive way of balancing efficiency with the democratic-communitarian case for common schools. I shall return to this question in 15.5.

C) Local experimentation and participation

I now turn to arguments that appeal to the goods of local experimentation and of local democratic participation. First, it will be argued that local control over schools permits experimentation and innovation, which are conducive to social problem solving. This is the “locality as laboratory” theory, first posed in those terms by Justice Brandeis in defense of the prerogative of state legislatures: “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹⁸ Much the same argument could be made at a more local level.

The second argument appeals to the good of local democratic participation. In part, democratic participation has an educative role. By drawing individuals out of their own private concerns and putting them in dialogue with their neighbors over matters of common concern, democratic participation fosters the mutual respect and public spirit which free institutions depend upon (cf. Tocqueville, DA: I.ii.8, II.i.7). Furthermore, democratic participation might be held to be intrinsically valuable, insofar as it allows people to actively govern themselves (cf. Rousseau SC: II.6). And in fact, local control over schools seems well-suited to giving

¹⁸ 285 U.S. *New State Ice v. Liebmann* 262, 321 (1931), J. Brandeis dissenting.

individuals an opportunity to take part in democratic self-governance over an issue that is of great importance to them (cf. Gutmann 1987: 74, 96).¹⁹

One objection to both of these arguments is that local decision-making over pedagogy and curricula need not be connected to local funding. States might disburse funds and permit local districts to allocate that money as they see fit. But perhaps that is politically naïve: it will be replied that “He who pays the piper calls the tune.” So set that objection aside for now; we will assume that local control over the content of education assumes a significant measure of control over funding.

In itself, the local-experimentation argument is a perfectly good consequentialist argument. In its strongest form, it would assume a Rawlsian character: since we will all be better off,²⁰ including the least-advantaged, if we allow local communities the freedom to experiment with their schools, the resulting inequalities should not be regarded as unjust. On the other hand, it would not be very convincing to argue that local control is justified, even though it only helps those in wealthy districts. Again, the burden of proof here must lie with those who support institutions that involve departures from equality; they have to show that these departures really are good for everyone. Finally, even if some local control over funding is necessary to give districts the autonomy necessary to innovate, this is not an all-or-nothing affair: it is a question of finding how much local funding and control is necessary to permit that amount of innovation that would be beneficial to everyone. Even if some innovation might justify some inequality, a lot of innovation might not justify a lot of inequality. Similar points apply to the argument from

¹⁹ Cf. also Walzer (1983): “Politics is always territorially based; and the neighborhood (or the borough, town, township...) is historically the first, and still the most immediate and obvious, base for democratic politics. People are most likely to be knowledgeable and concerned, active and effective, when they are close to home” (225).

²⁰ Better off, that is, than under any other feasible system. Not just better off than under the status quo.

democratic participation. Insofar as everyone is better off with the opportunity to engage in local democratic decision-making, even if this necessarily leads to some inequality between communities, then such inequalities may be justifiable and not amount to unequal treatment. But this is probably not a matter of all-or-nothing either. Surely most people would be willing to trade some degree of democratic control for large enough increases in the resources available to their schools.

15.5 Equal Treatment and Adequacy: A Combined Approach

A) Power equalization + a foundation plan

The conclusion I draw from the foregoing is that there are reasonable arguments for giving local communities some control over school funding. The strongest of these, in my opinion, is the social choice argument: local control permits communities to make their own judgments as to how much they value education relative to other public services and private consumption. Insofar as local experimentation and local democratic participation really do require control over funding (and those are empirical questions), these arguments supplement the case for local control.

But this case does not support giving local communities access to unequal tax bases. If Riverwood has better schools than Flatfield, because the citizens of Riverwood have chosen to tax themselves at a higher rate than Flatfield, then (other things equal) it does not seem as if the citizens of Flatfield have a legitimate complaint of unequal treatment. The state has simply given local communities discretion in determining what is a reasonable amount of money to spend on education, and then those communities have made different choices. This truly is what I have called an “emergent inequality,” and therefore it is not a case of unequal treatment. But

suppose that Riverwood has better schools than Flatfield, because Riverwood has a higher per-pupil property assessment. Now it seems like Flatfield *can* legitimately object that the state is treating children in poor districts unequally vis-à-vis their peers in wealthier districts. Why? Because state laws authorize wealthy districts to draw on larger revenue sources than poor districts. That *does* seem like a case of unequal treatment, since the rules could be drafted in a different way that made the same tax bases available to all.

This suggests that a fair solution would be to equalize the revenue-generating power of each district. In such a power-equalization scheme, every district would have access to the same revenue per pupil for any given tax rate (cf. Coons et al. 1970). The simplest way for this to work is as follows. First, we find the local district with the highest per-pupil property assessment (or tax base) in the state. This becomes our key district. Suppose this is Riverwood and the tax base is \$100,000 per-pupil. That means that if Riverwood taxes itself at 2%, it will raise \$2000 per pupil. Now the state says that it will use its general revenues to guarantee that every district can operate *as if* it had the same tax base as the key district—in this case, Riverwood. Suppose, then, that Flatfield has a tax base of only \$50,000 per pupil. Without power-equalization, if Flatfield taxed itself at 3%, it would raise \$1500 per pupil. On the other hand, if Flatfield had possessed the same tax base as Riverwood, then it would have raised \$3000 per pupil with the 3% tax. With power-equalization in effect, therefore, the state distributes out of its general revenues ($\$3000 - \$1500 =$) \$1500 to Flatfield.

This might be an expensive program. We could make it more affordable by setting the guaranteed tax base lower and then recapturing “excess revenues” from wealthier districts.²¹ For example, in between Riverwood and Flatfield, there is a community called Middlebury. It has a tax base of \$75,000 per pupil. Now the state picks Middlebury out as the key district: every district will operate as if it had a tax base of \$75,000. Riverwood still taxes itself at 2%. Initially it raises, as before, \$2000 per pupil. But it may only keep ($\$75,000 \times 2\% =$) \$1500. The remaining \$500 is recaptured by the state and used to fund aid to other districts. Meanwhile, Flatfield continues to tax itself at 3%. From its own tax base, it raises, as before, \$1500 per pupil. Had it possessed the tax base of Middlebury, it would have raised ($\$75,000 \times 3\% =$) \$2250 per pupil. Therefore, the state sends to Flatfield ($\$2250 - 1500 =$) \$750 per pupil. If we assume that Flatfield and Riverwood have the same number of pupils, then the state only has to pay Flatfield ($\$750 - \$500 =$) \$250 per pupil; considerably less than the \$1,500 per pupil when we used the wealthiest district as our key district. If we knew more about the districts in our state—their tax bases, populations, and anticipated tax rates—we could, if desirable, design a system over time that would be expected to break even. If poor districts were taxing themselves at excessively high rates, such that the state was having to pay out much more aid than it was bringing in through taxes, then it may be necessary to cap property tax rates—which many states already do anyway.

²¹ The power-equalization (or guaranteed tax base) formula is as follows:

$$G_a = r \times (GTB - LTB)$$

G_a = State GTB aid per pupil **r** = Local property tax rate

GTB = Guaranteed tax base **LTB** = Local tax base

If $GTB - LTB < 0$, then $G_a < 0$. That means that, instead of receiving state aid, this district will have that amount of its per-pupil revenue recaptured by the state to redistribute to poorer districts. (I have adapted this formula from Odden and Picus [2008]: 295).

Because we also want to make sure that all children receive an adequate education, we should combine this power-equalization scheme with a foundation program. (To be sure, for all the reasons explored in this chapter and Chapter 14, adequate revenue is not all there is to an adequate education; but it is a part.) Under the foundation program, the state would set a foundation level of revenue per pupil deemed sufficient to educate the average child up to the level of adequacy. A district that was unable to raise the foundation level at the participation tax rate, would receive state aid to make up the difference.²² Districts that raised *more* than the foundation level at the participation rate would have those revenues recaptured by the state to redistribute to poorer districts. Revenue raised at rates above the participation rate would then be subject to power-equalization, as above.²³ We need not explore all of the technical details of such a program here. The question we are interested in is whether there are any philosophical objections to such a system for funding public schools. Would not such a system satisfy the desiderata of (i) a common school system that (ii) satisfies the norm of equal treatment, (iii) ensures an adequate education for all, and (iv) allows local communities significant autonomy over educational spending?

²² The foundation plan formula is as follows (see 11.2.B for a more informal explanation):

$$Fa = F - (pr \times LTB) \quad \mathbf{Fa} = \text{State foundation aid per pupil} \quad \mathbf{pr} = \text{participation tax rate}$$

$$\mathbf{F} = \text{Foundation level per pupil} \quad \mathbf{LTB} = \text{Local tax base}$$

If $F - (pr \times LTB) < 0$, then $Fa < 0$. That means that the district does not receive aid, but has this amount of its excess revenue recaptured by the state to redistribute to poorer districts. Adapted from Odden and Picus (2008): 289.

²³ The formula for power-equalization of revenues above the participation tax rate is as follows:

$$Ga = (r - pr) \times (GTB - LTB) \quad \mathbf{Ga} = \text{State GTB aid per pupil} \quad \mathbf{r} = \text{Local property tax rate}$$

$$\mathbf{pr} = \text{participation tax rate}$$

$$\mathbf{GTB} = \text{Guaranteed tax base} \quad \mathbf{LTB} = \text{Local tax base}$$

Adapted from Odden and Picus (2008): 305.

B) Objections and replies

My argument throughout this chapter will suffice as my case against the objection that the proposal would permit too much redistribution. In general, the difficulty of any such objection lies in avoiding the unstable position to which I have already alluded. On the one hand, such an objection accepts that, *within the district*, citizens will share, according to ability to pay, the costs of providing an equal public education for all. But on the other hand, it insists that this principle of the public school should go no further than the boundaries of the district. The historical result of this attitude has been to erect what is, in effect, a cloistered private school system in the suburbs, operating under public auspices.²⁴ Simply unmasking this system for what it is, is probably the most effective indictment one can make of it.

It may be objected that I have failed to take into account the fact that some students are more expensive to teach than others (e.g., disabled, bilingual, or economically disadvantaged students). But we can accommodate this through a “weighted pupil” system. For example, a bilingual student might count in our formula as 1.5 pupils. Formally, we can take into account any justified departure from the presumption of horizontal equity either by adjusting pupil weights or by other accounting tricks (like regional cost indexes for dealing with price differences). But note that I have not tried to give a complete theory of all of the justified departures from the presumption of horizontal equity.

Let me briefly expand upon that point. In Chapter 14, I argued that one appealing feature of the adequacy approach is that it is not necessarily in tension with other educational values, and in

²⁴ Here I echo the words of former U.S. Commissioner of Education Francis Keppel: “The nation in effect does not have a truly public school system in a large part of its communities; it has permitted what is in effect a private school system to develop under public auspices.” *The Necessary Revolution in American Education* (New York: Harper, 1966), quoted in Kozol (1991): 80.

this way contrasts favorably with liberal-egalitarian principles of equal opportunity (see 14.1). My combined approach shares this characteristic with the adequacy theories. But my combined approach achieves this in a different way than the adequacy approach. The adequacy approach is compatible with other educational values because it imposes *no* constraints above the adequacy threshold. My combined approach is compatible with other educational values, but only insofar as those values are justifiable departures from horizontal equity.

What other departures from horizontal equity might be justifiable? I do not think we should depart from horizontal input adequacy to try to achieve equal outcomes. Once we have focused our attentions on providing everyone with an adequate education, it seems quite acceptable that, beyond that threshold, children will perform at different levels due to differences in ability and disposition (see 14.1). This is another aspect of the adequacy approach we should incorporate. The most compelling departures from horizontal equity will be those which would benefit everyone in the long run. For instance, perhaps if we devoted more resources to the most promising students, then we will all benefit from their future productivity, leadership, or cultural contributions. More controversial, but not wholly implausible, would be purely perfectionist considerations.²⁵ Perhaps it would be worthwhile to spend extra resources on students who will excel in certain scientific or cultural endeavors, not because it benefits all of us personally, but simply because it is good for such excellence to exist. In any case, even if these departures from horizontal equity were justifiable, neither would be owed to the direct beneficiaries as a matter of justice to them.

²⁵ That is, elitist perfectionism. See 12.4.C on the distinction between elitist and democratic perfectionism.

What does seem a matter of justice is that the school ought to aim to benefit each student. That means that schools might have to take special measures if the most intellectually advanced students are to gain from attending school; this could require departures from horizontal equity.²⁶ I don't mean that advanced or gifted students deserve a superior education, so that they can pull even further ahead of their peers. I only mean that everyone ought to benefit by going to school, and that we should reject the suggestion that Harry Brighthouse makes to the effect that one advantage of "compulsory equal state schooling" is that it "can designate around 15,000 hours of each child's life in which their parents could not be conferring on them opportunities superior to those which others enjoy" (2000: 120). This seems to me a perverse idea of a school: a place where we can prevent children from having their potential developed *too much*.

Now, in closing, let me consider what may be the most serious line of criticism of the combined approach. The classic American school-finance problem has been that communities with high tax bases have been able to tax themselves at low rates and yet bring in more revenue per pupil than communities with low tax bases and high tax rates. That has seemed to many people very unfair. However, in some states where some measure of power-equalization has been enacted, the result has been that poorer communities have given themselves tax relief, while wealthier communities have raised their taxes, in order to retain a competitive edge in education (Odden and Picus 2008: 19-24). Some object that this is unfair to the children in the poorer districts. After all, the children don't have any choice in the matter.

²⁶ But, then, maybe not. Perhaps a more creative technique would be to have the most advanced students teach the less advanced ones, if that could be made beneficial to both. Cf. Michael Walzer (1983) on Japanese schools: "It can't be said that the brighter children are held back by such procedures. Student-teaching is a form of recognition; and it is also a learning experience for the 'teacher' as well as the student, an experience of real value for democratic politics. *Learn, then teach* is the practice of a strong school, capable of enlisting students in its central enterprise" (205).

I have argued here, and more extensively in Chapter 13 (esp. 13.4.D. and 13.4.E.), that such emergent inequalities, while perhaps unfair in a cosmic sense, are not intrinsically unjust. Insofar as we fear that extremely large inequalities will render the education of some children inadequate, then the ideal solution is to raise the foundation level. This would have the effect of redistributing revenues from wealthier districts to poorer ones. True, one might worry that it would be difficult to muster the political will to raise the foundation level: if the wealthier communities have just voted to give themselves a competitive edge, then why would they support having it taken away from them again? Of course, this depends on how much political clout the wealthier communities have. But if local control over school-finance is not compatible with a politics that can sustain the adequate education for everyone which social justice requires, then local control is not in everyone's interests and is not justifiable. For the sake of argument, I shall assume that this pessimistic conclusion is not warranted.

We are, however, forced to ask *why* these poorer communities are choosing to spend less on education than the wealthier communities. There are many possibilities, but let us restrict our attention to two. The first is that they simply have different preferences. Given that the existence of different preferences is central to the argument for local control over funding in the first place, this cannot be very alarming. But it would be surprising if part of the explanation were not that it is a greater sacrifice for the less-well-off to devote more of their income to public services like education than it for the better-off. This is the problem of marginal utility. This does seem problematic, for the system still seems rigged to be more beneficial to the wealthy than to the poor. In part, differences in marginal utility should be offset by the fact that the state matching funds from the power-equalization scheme will make every dollar the less-well-off spend on education go further than it would have, had they spent that dollar on something else.

But that may not entirely offset the problem. Unfortunately, it seems very difficult, if not impossible, to disentangle the effect of marginal utility from simple differences in preferences. I do not have a neat solution to this problem. The standard way to handle marginal utility in the tax context is to make taxes more progressive. Typically, this is a rough-and-ready way of handling the problem (Coons et al. 1970: 220-222). I do not know whether there is any other alternative. So long as school districts are economically segregated and the problem of marginal inequalities cannot be sufficiently offset through various adjustments, that is an argument against local control.

∴

In closing, it will be useful to review how my combined proposal goes beyond the adequacy approach. Once the adequacy threshold is defined, adequacy theories impose no limits on inequalities beyond that threshold. I argued that this cannot be a complete theory of educational justice, because the state surely has an obligation to treat citizens equally (see 14.5.D). This is the norm embodied in the Equal Protection clause of the Fourteenth Amendment (see 11.3). The state cannot intentionally set out to benefit some more than others for no good public reason and then excuse itself by pointing out that no one has “less than enough.” This puts a constraint on inequalities above the adequacy threshold. Every such inequality must be justified to everyone.

But, according to the Emergent Inequalities Thesis, inequalities that arise from multiple jurisdictions making different reasonable decisions do not amount to unequal treatment (13.4.E). It might seem then that there is nothing objectionable about inequalities between school districts. But I argued in this chapter that this simply took the decentralized system of school-finance for granted. That system needs justification. I then suggested that there were reasonable arguments

for significant local control over school-funding, but no good arguments for permitting districts to draw from unequal tax bases. That is how we ended up with our combined approach: first, secure an adequate education for all, and then give districts *equal power* to supplement that baseline. Then the inequalities that result between districts are truly emergent and therefore not unjust.

Finally, I may note that adequacy theorists like Elizabeth Anderson and Amy Gutmann have said that they, too, could endorse power-equalization. But neither Anderson nor Gutmann explains how this follows from anything in their accounts, as opposed to being an expression of their personal reasonableness and good-will.²⁷ What we have sought to do here is give *an argument* for power-equalization above the adequacy threshold. Perhaps this is what Anderson and Gutmann really had in the back of their minds all along. In that case, we can happily admit them to our camp.

²⁷ Gutmann (1987) says that power-equalization may be “applauded” insofar as it “combines a substantial degree of local control over school financing with a redistribution of resources that enables poorer districts to raise students up to the threshold” (141). But a well-funded foundation plan could serve both of those purposes as well. Gutmann does not explain why local spending above the adequacy threshold should be constrained by power-equalization.

Anderson (2007) tells us that “It does not follow [from the fact that different groups should be free to tax themselves according to their different preferences for public goods] that different communities within a state are entitled to draw on vastly unequal tax bases to fund their unequal tastes for education.” Anderson concludes that power-equalization “offers a fair starting point for justly allocating ... tax revenues” after the adequacy threshold has been met (618 fn. 41). Her first sentence is correct, but I do not see how her conclusion follows from any argument she has given us. *Why* is it unfair for different communities to draw on vastly unequal tax bases, after the adequacy threshold for Democratic Equality has been met. It seems to me that this admission would require Anderson to significantly revise her theory of Democratic Equality (see 14.5.D). Perhaps that is why the comment is relegated to a footnote.

EPILOGUE

Problems regarding the education and governing of children in a liberal society may at first seem peripheral to the main concerns of contemporary social and political philosophy. But this is an illusion, perhaps engendered by a tendency to think of the sphere of the political as concerning the relations between heads of households, each of whom governs his own family on his own terms. After all, the subject matter of political philosophy is not the same as that of politics; political philosophy must define what is, and what is not, a proper question for ordinary politics. For example, liberals think that the law has no business prying into what citizens read. In that regard, what each citizen reads does not belong to the domain of the political for the liberal. And yet, the defense of this circle of personal liberty and privacy *is* a central concern of liberal political philosophy. Similarly, even if we thought that childrearing were properly a completely private affair of families, political philosophy would have to defend drawing the boundaries of the public and the private in just that way.

More to the point, this notion that children belong to some private sphere entirely shielded from public scrutiny is hard to reconcile with the basic liberal concern for the separate interests of each individual, as well as with the liberal conviction that no one should be at the mercy of another's absolute, arbitrary power. And, in any case, the very idea that childrearing is not subject to public scrutiny is no longer congruent with contemporary practices and institutions. As writers on family law have observed, while the state in Western societies has progressively

withdrawn from the regulation of sex, marriage, and divorce, it has at the same time taken on a growing role in the supervision of child welfare and the quality of parental care.²⁸

The premise of this dissertation is that we may make a still stronger claim about the importance of childhood for social and political philosophy. *Because we are counted as minors for such a significant portion of our lives, and because this is by far the most formative period of life, any full appreciation of core liberal values like autonomy, equality, responsibility, and opportunity must come to grips with what these mean for the first stages of life.* One thing that soon becomes apparent is that these ideals are, on the whole, more demanding at the beginning of life than they are at the middle of life. It is one thing to permit individuals to pursue their own good in their own way; it is quite another to raise a person in such a way that she is *capable* of effectively forming and pursuing a conception of her own good and has realistic opportunities to do so. Or, again, the idea that all individuals should enjoy equal opportunity sounds very fine, but to what extent should it restrict the freedom of parents to do what they think best for their children?

As these two examples suggest, childhood poses problems for liberals on both the right and the left. Right-wing positions that emphasize negative duties of noninterference seem to assume independent individuals, but this picture is hard to reconcile with the dependence of children. On the other hand, the sharing and giving characteristic of families seems problematic for left-wing positions that conceive of undeserved inequalities *between individuals* as inherently unjust. I have set forth my own views on these issues at length in the preceding chapters, and I will not attempt to rehash them all here. My intention is only to highlight the central importance of

²⁸ See especially Glendon (1976).

questions about the governing of children to liberalism generally. In what follows, I want to take notice of three further sets of questions raised—but not settled—by the arguments of this dissertation.

I

In Part I, I argued that liberty had a different moral significance at the beginning of life than it did in the middle of life. One corollary of this is that adults with cognitive capacities comparable to those of children should not generally be treated *like children*. A natural follow-up question is whether something similar is true of the end of life. For instance, diseases like Alzheimer's make reduced cognitive functioning and personality change very common amongst the elderly. In their ground-breaking book *Deciding for Others*, Allen Buchanan and Dan Brock observe that between 10 and 18 percent of those sixty-five and older, and between 15 and 20 percent of those eighty or older, suffer from some form of dementia (1990: 270). Given the aging demographics of most developed societies, the proper treatment of the elderly with compromised cognitive functioning is fast becoming a social issue of vast proportions. Especially puzzling is the question as to when we ought to defer to an elderly person's current preferences, when these conflict with the wishes she had before the onset of dementia. Ordinarily, we respect a person's right to change her mind. But we also typically privilege those desires a person manifests when lucid and rational. The following sketch of a real case study illustrates the way these considerations can come into conflict. A man, who on religious grounds used to strongly object to suicide or the withholding of life-saving treatment, develops Alzheimer's disease. As a consequence of his dementia, he not only loses his ability to do most of the things he used to enjoy, but his religious beliefs also fade away. When his wife dies, he

begins telling his children that he no longer wants to go on. In deciding whether to provide or withhold life-preserving treatments, should his children defer to his current expressed preferences or to his former religious values—values which he held when he was in full command of his faculties, but which sadly he can no longer understand (Jaworska 1999: 107)?

The importance I have attributed to respect for life-authorship would seem to lead to a view like that defended by Ronald Dworkin: that the heart of autonomy is a competent person's freedom to make judgments in light of her own beliefs and values about the overall shape of the kind of life she wants she wants to lead (1993: 224-226). This suggests that the person's will prior to the onset of dementia ought to be given priority. But it is easy to feel uneasy about that position, especially when a person's former values now seem alien or incomprehensible to him. For reasons such as this, a number of authors have argued that Dworkin's view fails to respect the more limited, but nonetheless valuable, autonomy of those "at the margins of agency."²⁹

II

Turning now to a second set of issues: In Part II, I examined the moral basis of parental rights. However, I left relatively unexplored questions about the extent to which the responsibilities and costs of childrearing ought to fall on parents alone and whether society has any obligation to the parents to help shoulder these burdens. On the one hand, some philosophers (including many feminists) argue that a just society should make substantial provision and accommodation to parents performing the socially necessary labor of reproducing society. This might include measures such as parental leave, subsidized day-care, and reduced

²⁹ The phrase is from Jaworska (1999); see also Shiffrin (2004).

hours.³⁰ On the other hand, some liberal egalitarians think that, so long as people freely choose to have children, it is unfair to make others subsidize the costs of those choices.³¹ And suppose we decided that society *does* have some obligation to the parents to help shoulder the burdens of care. We are left with the question as to how much support is called for. After all, we already have a publicly supported educational system; perhaps that is more than enough.

It may be that this is a place where Hegel's understanding of a rational social order can be useful. For Hegel, a social order is rational when its major social institutions—like the family, the economy, and the state—work together like the parts of an organism to form a coherent, harmonious whole.³² As we have seen (in Chapter 10), the tragedy of *Antigone*, on Hegel's reading, is that allegiance to the family came into contradiction with allegiance to the state. Arguably, the institutions of the family and the economic sphere in our society are now out of harmony with one another in a different way. Ever since women began to take on traditionally male work roles, which were designed on the assumption that someone else would take care of the children, working parents (especially mothers) have faced great difficulties balancing their work and family roles. In that the family performs the necessary social labor of producing and socializing the next generation; in that the opportunity to participate in both work and family roles (and not just one or the other) is integral to our modern conception of social freedom;³³ and in that one of the proper roles of the state is to ensure that the other social institutions work together to make this freedom available to all; we have the beginnings of a Hegelian argument

³⁰ George (1987); Okin (1989); Kittay (1999); Alstott (2004).

³¹ Rakowski (1991); Casal (1999); Casal and Williams (2004).

³² Hegel, PR: 269+A, 270A. For discussion, see Neuhauser (2000): ch. 4, esp. pp. 124 *ff*.

³³ As discussed above at 10.3-4.

for the state's responsibility to enable individuals to reconcile their work and family roles without undue hardship. A more developed form of such an argument would have to answer two further questions. First, what can be said to sharpen the admittedly vague notion of "undue hardship"?³⁴ And, second, to what extent would such a policy be consistent with the environmentalist aim of discouraging overpopulation? After all, just as society has reasons for wanting a next generation, it also has reasons for wanting that generation not to be too large.

III

Another issue that requires further investigation concerns the nature of the child's right to an education. As the philosophical questions involved here are somewhat deeper and require more motivation, I shall be a little more expansive on this issue than I was in discussing the previous two. In Part III, I considered the child's right to an education as a question about distributive justice. This perspective probably encourages thinking about the right to education in quantitative terms: Are children receiving *enough* education? Do they enjoy *equal* opportunities? And so on. But no less important are qualitative questions about the kind of education to which children are entitled. Let me enter into the problem historically. Since the Enlightenment, many philosophers have emphasized that education is not intrinsically liberating, that it can just as well be an instrument of control and oppression. Religious superstition has long been castigated on such grounds. For example, we find the young Hegel arguing that some of the educational methods of churches fetter their pupils' intellects or else frighten them from ever daring to think for themselves. By undermining the individual's ability to make his own

³⁴ One of the only philosophical works of which I am aware to tackle this problem in a rigorous way is Alstott (2004).

choices about religion and other matters, such an education “infringes the child’s natural right to the free development of his faculties and brings him up a slave instead of as a free citizen.”³⁵ In a similar way, the use that authoritarian and totalitarian regimes in the twentieth century made of state-run school systems awoke widespread concern in liberal democracies about the evils of political indoctrination (cf. Gatchel 1972).

More subtly, there are forms of educations that encourage rigorous thinking and critical thought, but only within certain bounds. In a fascinating essay on the Jewish Yeshiva, Moshe and Tova Halbertal explain that while the education in the traditional Yeshiva aims to develop an inquisitive and searching attitude toward the interpretation of the Torah and the Talmud, “there are questions that may not be voiced.” “Questions aimed at the meaning of the practice as a whole, inquiries concerning theological and religious beliefs, historical contextualization and moral critique which might undermine claims for authority, are not a part of the legitimate ongoing conversation” (1998: 464). Roy Mottahedeh relates a similar picture of traditional Shi’ite madrasa education. This education, he says, “is highly speculative about the formal relations of agreed sources of knowledge, but not necessarily about uncertain knowledge.” As a consequence, “the logic studied is deductive; induction, needed for dealing with uncertain matters, is not formally studied” (1998: 456).

These more authoritarian or traditionalist educational regimes raise the question: What sort of education is appropriate for free citizens in a modern society? Perhaps, taking a page from Kant, we could say that such an education would enable people “to make use of [their] own understanding without direction from another,” whether that direction comes from “a book that

³⁵ *The Positivity of Christian Religion*, §24 in Hegel (1948): 115.

understands for me, a spiritual advisor who has a conscience for me, or a doctor who decides upon a regimen for me.” Moreover, this education must give people the courage and resolution to actually make use of their own faculties. This, according to Kant, is the meaning of *Enlightenment*. A person is enlightened when she does not remain “a minor for life” under the intellectual supervision of guardians.³⁶

This is a sketch of one conception of an “education for autonomy.” It faces two important challenges. One is a conceptual question. Just what does it mean to think for oneself? What does that rule out? Does it, for instance, rule out accepting beliefs on religious authority? What about conformity to tradition or to prevailing ideas and mores? Mill, after all, tells us that “He who does anything because it is the custom, makes no choice” (OL: III, ¶ 3 / CW, XVIII: 262). To this, it may be responded that autonomy is concerned, not so much with the content of someone’s ideas, but with one’s manner of accepting them. Even Mill, we will be reminded, distinguished between “an intelligent following of custom” and “a blind and mechanical adhesion to it” (OL: III, ¶ 5 / CW, XVIII: 263). What matters is whether we have critically examined our beliefs, values, and goals and have endorsed them for reasons of our own.

But philosophers have expressed two concerns with this answer. First, it may seem to prize too highly the Socratic ideal of the self-reflective, examined life. But some people’s characters seem to naturally incline more toward action than introspection. And thus, some writers who champion the ideal of autonomy deny that people need to engage in much critical self-reflection to think or make choices for themselves (Raz 1986: 371; Wall 1998: 129). The second concern has to do with authority. Kant makes it sound as if the enlightened person never substitutes

³⁶ *What is Enlightenment?*, 8:35. In Kant (1996).

reliance on authority for the verdicts of his own understanding. But it seems impossible to get along, especially in a complex society, without reliance on authority. In fact, Kant's example of deferring to a doctor's authority seems to highlight this point. Isn't it rational to defer to another's judgment, when I have reason to believe he can judge better than I can? Perhaps the point is that we can autonomously defer to authority only on the basis of good reasons. But is the test whether we actually have good reasons or that we think we have good reasons? If it is suggested that an autonomous deference to authority requires that we have done due diligence in critically examining the reasons we have for not deciding on our own, then we seem to be back to the idea that autonomy requires critical reflection, at least at some level of deliberation. I am not, of course, suggesting that the conceptual challenge is insuperable. I only mean to show where further work remains to be done.

I said that there were two challenges to the broadly Kantian picture of education for autonomy. The second is a normative one. So-called "political liberals," Rawls being the most prominent, have argued that diversity regarding religious and moral outlooks is a natural outcome of a free society, and that liberal institutions need to be defended on grounds that can command the broad assent of different reasonable worldviews, religious and traditional as well as secular and modernist. But ideals like autonomy or individuality, it is said, are too sectarian, too bound up with certain modernist conceptions of the good life, to be the subject of this overlapping consensus. This, according to Rawls, has important implications for a state's educational policy, for the political liberal will "not seek to cultivate the distinctive virtues and values of the liberalisms of autonomy and individuality" (1993: chs. 1-2, pp. 199-200). But to some critics this just takes for granted the legitimacy of the authority of parents over their children's upbringings. Why shouldn't parental power be subject to restrictions comparable to

those that limit political power (cf. Ackerman 1980: ch. 5; Clayton 2006: ch. 3)? Although I have touched upon this question in Chapter 10 (see 10.4.C and 10.5), I do not believe I have yet seen to the bottom of it.

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“Education,” Michael Walzer has observed, “expresses what is, perhaps, our deepest wish: to continue, to go on, to persist in the face of the future.” In education, we attempt to form a type of character in the next generation that is continuous with, if not identical to, our own, but also one which seems appropriate to the kind of society that we believe in. This gives rise to three kinds of problems for liberal theory—problems with which the chapters of this dissertation have wrestled. First, people are likely to disagree about the nature of the society they actually live in, or what it is becoming, or what it should be. And even where there is consensus about the sort of society they want to live in, there may still be disagreement about the sort of character that is most likely to sustain that kind of society and how that type of character might be fostered (Walzer 1983: 197). Therefore, not only must we develop “first-order” theories about the proper aims and methods of education, but we must also work out an account of who has what authority to make decisions about education. However, the liberal cannot easily stop there, as if the child were merely a lump of clay, bound to be formed by one party or another according to its own particular ideals. The liberal must also come to terms with the limits on adult authority, whether exercised by parents or the state, arising from the child’s right to be treated as a person born to a life as a free and equal member of society and distinct human being.

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