

LOCKED UP & LOCKED OUT:
INCARCERATION & CHILDREN'S INTERESTS

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Abstract:

In this thesis I question the justifiability of the current practice of juvenile incarceration. I argue that children have rights borne out of both extrinsic and intrinsic interests. I suggest that the detained child's interests in development allow us to justify incarceration as a means of moral education. However, I conclude that the current practice of juvenile incarceration—as evidenced in Queensland—violates the detained child's rights to carefreeness, connection, and future autonomy. In doing so, the justifiability and permissibility of the practice is undermined.

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I.

In August 2023, Queensland's Parliament passed legislation legalising the long-standing practice of holding young people in police watchhouses.¹ The reform allowed children as young as 10 to be indefinitely detained in facilities designed to temporarily hold adult offenders. Its passage, as well as other changes to youth bail laws and sentencing provisions, constituted a suite of anti-youth crime measures introduced in 2023.² The passage of this suite twice required the suspension of Queensland's own *Human Rights Act*, the first times the statute's operation had been restricted since it was enacted in 2019.³

Queensland's 2023 reforms have been met with strong criticism from child, prison, and human rights advocacy groups – including both the Australian and Queensland Human Rights Commissions.⁴ The prevailing message from such organisations, politicians and the media is that Queensland's treatment of detained young people represents a breach of their human rights. These arguments take a common form with commentators pointing to Australia's international human rights commitments – including the UN Convention on the Rights of the Child and Rules for the Protection of Juveniles Deprived of their Liberty.⁵ Commentators then argue that Queensland's reforms violate such commitments.

However, this seems to be an incomplete response to the potential wrong of juvenile incarceration. Indeed, it is not just the detained child's human rights—as codified in UN instruments—but her natural rights—those possessed in virtue of her status as a child—that are unjustifiably violated. This incomplete response is commonplace in the literature on juvenile justice. Commentators often refer

1. *Child Protection (Offender Reporting and Offender Prohibition Order) and Other Legislation Amendment Act 2023* (QLD).

2. See also, *Strengthening Community Safety Act 2023* (QLD).

3. Andrew Messenger and Eden Gillespie, "'Absolute dog act': Queensland Labor criticised for shock move to override state's Human Rights Act," *The Guardian* 2023, 23 August.

4. Australian Human Rights Commission, "National Children's Commissioner slams 'shocking' new Qld youth justice laws," (News, 2023); Queensland Human Rights Commission, "Statement from Queensland Human Rights Commissioner Scott McDougall regarding the use of adult prisons and police watch houses as youth detention centres," (Statement, 2023).

5. *Convention on the Rights of the Child*, 1989. UN General Assembly; *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, 1990. UN General Assembly.

to the violation of children's rights without properly accounting for what these rights are, how they are motivated and how this motivation interfaces with our aims for juvenile incarceration.⁶

This thesis will attempt to fill this gap in arguments against Queensland's reforms and in the literature on juvenile incarceration more broadly. In it I will argue that the current practice of juvenile incarceration—a practice Queensland's youth justice system is representative of—unjustifiably violates the detained child's rights to carefreeness, connection, and future agency. In doing so, I hope to motivate the commonly held belief that juvenile incarceration imposes a serious—perhaps unjustifiable—burden on detained children.⁷

To this end, this thesis takes the following structure. In the first chapter I will argue for an account of children's rights. Simply, if I am to argue that the current practice of juvenile incarceration is unjustifiable because it frustrates children's rights, I must first suggest that children have rights that warrant certain protections. I begin by exploring two approaches to rights-bearing, the autonomy and interest theories. I conclude that there are significant problems with the autonomy account and Feinberg's modifications to it. I then suggest that we can best capture our intuitions about children's rights and their moral worth with reference to their intrinsic and extrinsic interests. I will conclude this chapter by highlighting three such interests – carefreeness, connection, and future autonomy.

If I am to argue that the current practice is unjustifiable, I must grapple with how one might justify juvenile incarceration. This will be the focus of the second chapter. Specifically, I apply the interest account of rights argued for in the first chapter to traditional justifications of punishment. I will conclude that traditional utilitarian and retributive theories are unhelpful and that the practice of juvenile incarceration is best justified with reference to a moral education theory of punishment.

6. See, for eg, a series of articles published in the UK *Youth Justice* journal: Ursula Kilkelly and Stefaan Pleysier, "Rights of the Child in the Child Justice System," *Youth justice* 23, no. 2 (2023); Thomas Hammarberg, "A Juvenile Justice Approach Built on Human Rights Principles," *Youth justice* 8, no. 3 (2008); Nessa Lynch, "Youth Justice in New Zealand: A Children's Rights Perspective," *Youth justice* 8, no. 3 (2008). See also: Ursula Kilkelly, "Child First and Children's Rights: An Opportunity to Advance Rights-Based Youth Justice," in *Child First*, ed. Stephen Case and Neal Hazel (Switzerland: Springer International Publishing AG, 2023).

7. The fact that beliefs against juvenile incarceration are so commonly held but so rarely motivated philosophically gives us strong reasons to investigate the issue.

Finally, I will apply the positions argued for in the first two chapters to suggest that the current practice of juvenile incarceration is unjustifiable and *prima facie* impermissible. Sourcing examples from Queensland's youth justice system, I argue that incarceration frustrates the detained child's interests in carefreeness, connection and future autonomy in ways that are not only *prima facie* impermissible but also necessarily undermine the justification for juvenile incarceration entirely.

II. Children as Rights-Bearers

We have strong intuitions that children have rights that are different in kind to rights held by most adults. This difference is explicit in what we see children as having a right to do. For example, one could claim that children have a right to imaginative play but deny that they have a right to drink alcohol. Put another way, it would be wrong to deny a child imaginative play by forcing them to work, but it wouldn't be wrong to deny that same child an alcoholic drink. In fact, most would argue that it would be wrong to let the child imbibe.⁸

Two differences from generally held adult rights are captured in this example. First, that children have weaker claims (or even no claim at all) to goods that most adults have a right to. For example, the right to vote, the right to gamble, the right to marry. While it is not wrong to deny children these goods, it would be wrong to deny adults such rights, most would argue. I shall call this the paternalism intuition – that children have *less* rights than most adults. Second, that children have stronger claims to certain goods than most adults do. For example, to imagination, play, education, and parental affectionate care. While it might make sense to speak of a child's right to parental care it makes less sense to speak of an adult's right to such a good. I shall call this the protection intuition – that in narrow circumstances children have *more* rights than most adults. We want an account of children's rights to match both of these intuitions.

8. We can think of many similar rights here. For example, the right to work or right to marry.

We can frame these two differences by appeal to either an autonomy or interest-based account of rights. Indeed, I argue that both accounts of the project of rights—either as protections of choice or satisfiers of fundamental needs—can explain the paternalism and protectionism intuitions about children rights.⁹ In the chapter that follows I will sketch out both accounts and how they attempt to capture our intuitions about children's rights. I will begin by discussing the autonomy-account, focusing on Feinberg's approach. Next, I explain how the interest-based account is better equipped to capture our intuitions about the claims children do and don't have while recognising their moral worth. In doing so I will establish the interest-account as the foundation of the rest of this thesis.

A. Children and Autonomy

Proponents of the autonomy account cast rights as protections of independently made decisions. On such an account, rights are 'protected liberties of choice' that promote one's decisions about their wellbeing and preserve their outcome.¹⁰ Simply, 'to have a right is to have a choice'.¹¹ Access to basic needs are also protected by an appeal to autonomy. Indeed, one cannot function autonomously if they lack certain basic goods such as bodily integrity, shelter, or nutrition. Without such goods one is unable to make truly autonomous decisions and more importantly 'follow through' with 'one's chosen course'.¹²

Autonomy is to be protected because self-government tends to make our lives go better. This sentiment is central to Mill's justification of liberty.¹³ Indeed, we are better placed than others to not

9. It is important to note that both accounts of rights can function simultaneously, with both maintaining that rights protect what is necessary for a person's life to go well.

10. Joel Feinberg, "The Child's Right to an Open Future (1980)," in *Freedom and Fulfillment* (Princeton: Princeton University Press, 1992), 90.

11. Robert Noggle, "Children's rights," in *The Routledge Handbook of the Philosophy of Childhood and Children*, ed. Anca Gheaus, Gideon Calder, and Jurgen De Wispelaere (Routledge, 2019), 102.

12. James Griffin, "Do Children Have Rights?," in *The Moral and Political Status of Children*, ed. David Archard and Colin M. Macleod (Oxford University Press, 2002), 21.

13. See, for eg, John Stuart Mill et al., *On liberty*, Rethinking the Western tradition, (New Haven: Yale University Press, 2003), 164.

only determine our own good but decide which actions and projects will bring us closer to it.¹⁴ Autonomy—including the ability to forgo certain other sources of wellbeing—is vital in conceiving of and pursuing one's good. For example, deciding on a career and making sacrifices to land a dream position. Such instrumental importance allows us to claim that autonomy is a 'causally necessary condition' for wellbeing.¹⁵

However, one may see autonomy as also intrinsically good. Simply, we value authority and ownership over our own actions. This source of wellbeing is important even if one's actions ineffectively contribute to their pursuit of the good. Such an effect means that 'agency is central to welfare' regardless of its instrumental success.¹⁶ On either view, however, rights protect autonomy because of its value—its importance for one's wellbeing and one's good.

If the project of rights is to protect autonomy it would seem that only those with the capacity for autonomy have their 'liberties of choice' protected. In this way, a capacity for autonomy is a precondition of bearing rights. It is long been argued that children—especially the young—lack the capacity for autonomy. Indeed, Feinberg writes that a 'child cannot very well exercise... free choice'.¹⁷ Some autonomy theorists take this to mean that children cannot act autonomously – they are unable to make independent decisions and be self-governing. Schapiro argues that young children have not yet 'establish[ed] a deliberative perspective which speaks for them'.¹⁸ As such they are incapable of independence and are creatures whose actions, desires and beliefs cannot be attributed to them.¹⁹ Rather, their actions represent mere primary instincts.

14. Feinberg, "Right to an Open Future," 91-2. See also, Laurence D. Houlgate, "Children, Paternalism, and Rights to Liberty," in *Having children : philosophical and legal reflections on parenthood : essays*, ed. Onora O'Neill and William Ruddick (New York: Oxford University Press, 1979), 271.

15. Feinberg, "Right to an Open Future," 91.

16. Harry Brighouse, "What Rights (If Any) Do Children Have?," in *The Moral and Political Status of Children*, ed. David Archard and Colin M. Macleod (Oxford University Press, 2002), 39.

17. Feinberg, "Right to an Open Future," 125.

18. Tamar Schapiro, "Childhood and Personhood," *Arizona Law Review* 45 (2003): 589.

19. Schapiro, "Childhood and Personhood," 588.

However, others argue that this lack of autonomy must mean that children lack the capacity to act autonomously in a *proficient* way. In other words, children tend to ‘make bad choices’.²⁰ Bad, here, could mean two things. First, that children lack the knowledge, experience, and ability to choose well.²¹ For example, we could think of children as being bad at practical reasoning – the ability to understand ‘normative information’,²² adopt it, and apply it consistently.²³ Second, that children's decisions aren't helpful in their pursuit of the good or are in fact harmful to this pursuit. These are all controversial empirical claims, but it seems reasonable to claim that at least small children can't make rational and reflective decisions which contribute to their good - an important facet of autonomy. As such, children lack the necessary precondition for rights bearing.²⁴

In turn, children don't have a claim to autonomy - they don't have protected liberties of choice. This seems to align with our intuitions. Simply, children don't have the same rights as most adults because they lack the necessary precondition for most rights - they lack the capacity to effectively self-govern. Such a claim captures the paternalism intuition.

This view leaves children without the moral protection of rights. Some have argued that this doesn't matter and that we can easily frame our duties to children without recourse to rights language.²⁵ However, this is at odds with our protectionism intuition—that children have rights to certain goods that adults do not. Beyond this, there are good reasons to think about our obligations to children as rights. Noggle explains that rights indicate their holders ‘special, morally significant status’ and ensure that one’s claims are treated as ‘especially stringent’.²⁶ In turn, to speak of children's rights is to speak of what we owe to humans of equal moral importance to adults. It is also to respect claims that are of equal moral weight to our own. Practically, to talk of children's rights is to emphasise children's interests

20. Samantha Brennan, "Children's Choices or Children's Interests: Which Do Their Rights Protect?," in *The Moral and Political Status of Children* (Oxford University Press, 2002), 60.

21. Michael Tiboris, "Blaming the Kids: Children's Agency and Diminished Responsibility," *Journal of applied philosophy* 31, no. 1 (2014): 85. See also, Laurence D. Houlgate, *The Child & the State: A Normative Theory of Juvenile Rights* (Johns Hopkins University Press, 1980), 66-73.

22. Tiboris, "Blaming the Kids," 85.

23. Rosalind Ekman Ladd, "Paternalism and the Rationality of the Child," *Thinking: The Journal of Philosophy for Children* 6, no. 1 (1985): 19.

24. See, for eg, Feinberg, "Right to an Open Future," 78.

25. See, for eg, Onora O'Neill, "Children's Rights and Children's Lives," *Ethics* 98, no. 3 (1988): 445-6.

26. Noggle, "Children's rights," 102.

and preserve their ‘independent standing’ in political and social decisions.²⁷ For these reasons we should think about our obligations to children as being borne out of rights.

Feinberg attempts to frame our obligations to children as rights *within* the autonomy account.²⁸ In the remainder of this section, I will further explore the autonomy account through Feinberg’s rights-in-trust theory. I will explain Feinberg’s theory and its attempt to capture the protectionism and paternalism intuitions. I then will defend it against common objections. Finally, I will argue for what I believe are two fatal objections to the theory. These critiques—as they apply to the autonomy account more generally—mean that we should turn to an interest-based account. This will be the focus of the next section.

B. Feinberg: Potential Autonomy, Protectionism and Paternalism

Feinberg places his theory within an autonomy account of rights. Indeed, he believes that an important category of rights are ‘liberties of choice’.²⁹ He writes that the purpose of these rights is to protect self-determination, defined as autonomous decision making and the ‘capacity to... direct one's own life’.³⁰ He deems the enjoyment of this capacity as necessary for the realisation of one’s good. Indeed, autonomy so defined is ‘casually necessary for the achievement of self-fulfilment’.³¹ This is because we're best placed to order our lives to achieve what we conceive to be good.

Such an interaction between autonomy and the good means that ‘autonomy takes precedence’ over other sources of wellbeing.³² Indeed, the instrumental and intrinsic importance of autonomy for Feinberg means that one’s decisions demand respect even if they risk one’s own ‘probable future good’.³³ This interaction also means that possessing protected liberties of choice is dependent on

27. Brighouse, "What Rights (If Any) Do Children Have?," 36.

28. Feinberg, "Right to an Open Future."

29. Feinberg, "Right to an Open Future," 90.

30. Feinberg, "Right to an Open Future," 90.

31. Feinberg, "Right to an Open Future," 91.

32. Feinberg, "Right to an Open Future," 78.

33. Feinberg, "Right to an Open Future," 78.

possessing autonomous capacities – the ability to ‘support oneself’ and ‘direct one's own life’.³⁴ As such, for Feinberg rights bearers are autonomous agents.

Feinberg argues that children aren't autonomous agents and that as such autonomy rights ‘could hardly apply to small children’.³⁵ It appears that Feinberg is talking about what Schapiro deems the ‘proficiency difference’—that children aren't able to effectively make decisions that contribute to their self-fulfilment in an instrumentally valuable.³⁶

i. Rights-in-trust

Importantly, however, Feinberg acknowledges that children possess some rights grounded in autonomy despite these deficiencies.³⁷ Indeed, he conceives of a subclass of rights that protect a child's future autonomy rights or ‘A-rights’. Feinberg calls these ‘rights-in-trust’.³⁸ In doing so he recognises the instrumental importance of childhood as a precursor to adulthood – or rather, to full rights-bearing. Decisions made in childhood—by a child or their guardian—continue to impact one's life into adulthood. Crucially, one such impact could be an inability to enjoy A-rights. For example, sterilising a child would mean that as an adult they couldn't enjoy their right to procreation.³⁹

In turn, each A-right is held in trust for the adult the child is to become. We can think of rights-in-trust as protecting the necessary conditions for the (later) enjoyment of A-rights. These rights are second order claims to the preconditions of one's other rights. Each A-right has such preconditions. For example, a right to work is dependent on the availability of jobs, and a person's suitability for employment. Like other rights, these second order rights can be violated. This could happen if a person were denied the education required to be employable. In denying them the preconditions for their enjoyment of the right to work the right is rendered practically meaningless and is frustrated.

34. Feinberg, "Right to an Open Future," 90.

35. Feinberg, "Right to an Open Future," 78.

36. This interpretation will become clearer soon; Schapiro, "Childhood and Personhood," 580.

37. Feinberg concedes that children—as well as adults—have some welfare rights not grounded directly in autonomy: Feinberg, "Right to an Open Future," 76.

38. Feinberg, "Right to an Open Future," 76.

39. Dena S. Davis, *Genetic dilemmas : reproductive technology, parental choices, and children's futures*, 2nd ed. (Oxford : Oxford University Press, 2010), 26.

Importantly, this frustration can occur even before one is able to enjoy their A-rights. For example, Davis speaks of an adult's right to procreation being frustrated if they were sterilised as a baby, before they have a right to procreation.⁴⁰ However, a less extreme example is available. One's right to vote could be frustrated in advanced if they were permanently removed from the electoral roll as a young child by clerical error. Again, this constitutes frustration before the child has a right to vote at all. It is this notion of frustration that Feinberg seems concerned about. For him, frustration—through the denial of necessary preconditions—constitutes violation of one's future A-rights.

ii. *Right to an Open Future*

Feinberg argues that taken together protected future A-rights culminate in a right to an open future. For him, this right protects the conditions necessary for one's later enjoyment of autonomy. Again, we can think of decisions made in childhood that continue to affect one as an adult by limiting the decisions they can *actually* make. For example, removing a child from the education system before they finish primary school will reduce the amount of options they will have when they are older - what jobs they can apply for, what careers they can pursue, what hobbies they can enjoy, even what media they can consume. Feinberg sees this closing-off of options as a threat to autonomy – it limits one's practical ability to self-govern. In not being able to become a teacher, or doctor, or read *Crime and Punishment*—Feinberg claims—the adult will have a reduced capacity to be autonomous and have a reduced ability to pursue self-fulfilment.⁴¹

This position assumes that a precondition for autonomy is a certain amount of 'open' options. In other words, choices that a person can practically make. Like other A-rights, the right to autonomy presupposes the right to open options. In turn, the right to an open future protects autonomy by preserving choice. It demands that irreversible critical life decisions, or 'serious and final commitments' are not made prematurely.⁴² In doing so it keeps options open and saves such decisions for when a child

40. Davis, *Genetic dilemmas*, 26. See also: Joseph Millum, "The Foundation of the Child's Right to an Open Future," *Journal of social philosophy* 45, no. 4 (2014): 527.

41. Feinberg, "Right to an Open Future," 82-3.

42. Feinberg, "Right to an Open Future," 80-2.

gains the capacity for proficient autonomy. Like individual rights-in-trust the right to an open future is second order in nature. In preserving choices, it protects the conditions that Feinberg argues are necessary for the full enjoyment of autonomy. As such, violation of the right to an open future equates to a violation of one's right to autonomy.

Feinberg's account answers our protectionism and paternalism intuitions. First, the right to an open future restricts actions made by both guardians and the state. Specifically, it holds that restrictive decisions are not made on behalf of the child before they have the capacity for autonomy or before they are able to make these serious decisions themselves. Feinberg focuses on education,⁴³ but he and other writers have argued that even over restrictive parenting practically reduces future autonomy.⁴⁴ Forcing a child to play sport rather than learn an instrument or study maths instead of art closes off options. Indeed, it pigeonholes interests, potential talents and even careers. For Feinberg, the restriction of choice in each of these areas represents a real breach of protected liberties of choice. The preservation of future choice here explains our protectionism intuition. Specifically, children have greater claims to an open future than adults because they have a right to be self-directing themselves when they become capable.⁴⁵ The choices they will make as autonomous agents warrant greater protections, because they can be frustrated before the agent is even autonomous.

Importantly, the right to an open future also calls for the restriction of choices made by the child themselves. Indeed, it gives further reasons to deny A-rights to the not yet autonomous. Feinberg argues that respect for future autonomy demands the paternalistic treatment of children. This is perhaps most explicit in the case of basic education. If the right to an open future prevents guardians withdrawing their children from education early, it must also prevent a child from refusing to go to school. In both instances the availability of future options is jeopardised and one's future autonomy rights are violated. Giving young children free choice also threatens future autonomy in other ways. Left to their own

43. Feinberg, "Right to an Open Future," 82.

44. See eg, Jason Chen, "The Right to Self-Development: An Addition to the Child's Right to an Open Future," *Journal of Social Philosophy* 47, no. 4 (2016): 442; Mianna Lotz, "Feinberg, Mills, and the child's right to an open future," *Journal of Social Philosophy* 37, no. 4 (2006): 540-3; Claudia Mills, "The Child's Right to an Open Future?," *Journal of Social Philosophy* 34, no. 4 (2003): 499.

45. Conversely, adults do not possess the right to an open future as they are already self-governing agents.

undeveloped decision-making capacities children unjustifiably place themselves at risk.⁴⁶ For example, if a child drives too young and is paralysed upon impact with another vehicle their future autonomy is also frustrated - the real options open to them are substantially reduced. As such, Feinberg answers our paternalism intuition. Indeed, children have less of a claim to A-rights because they don't yet have the capacity for autonomy. However, this deficiency also means that decisions made by the child substantially risks the future enjoyment of autonomy.⁴⁷ In sum, both special protections and paternal treatment are grounded in potential autonomy.

iii. Critiques of the Right

Feinberg's account has been criticised for its implications and argument structure. In this section I will argue that both lines of critique rely on an uncharitable reading of Feinberg. As such I will initially defend Feinberg's account. In doing so, however, I will expose what I believe are two fatal flaws—its reliance on the capacity for autonomy and its focus on future personhood.

Unjustifiable Implications

Mills and Millum have argued that Feinberg's right to an open future is unjustifiably and unrealistically demanding. Mills argues that taken as a positive right, the right to an open future requires the maximisation of a child's options.⁴⁸ Seen in this way the right to an open future would exhaust the resources of the state with children needing to be taught about everything - allowed to learn any instrument or play every sport, for example.⁴⁹ However, even taken as a negative right, Feinberg's account places large burdens on both the state and guardians. For example, Millum states that the right would mean that guardians could not change their child's school if this would result in less subjects

46. See, for eg, Feinberg, "Right to an Open Future," 89.

47. Feinberg, "Right to an Open Future," 78.

48. Mills, "The Child's Right to an Open Future?," 500-3; See also, Lotz, "Feinberg, Mills, and the child's right to an open future," 544-5.

49. Millum, "The Foundation of the Child's Right to an Open Future," 530; See also, Chen, "The Right to Self-Development," 443.

being offered to their child.⁵⁰ Such a restriction means that guardians could never change cities or jobs, representing ‘serious hardships’.⁵¹

Invalidity

Feinberg has also been critiqued for his argument structure. Millum and Chen argue that Feinberg begs the question in favour of the existence of the right to an open future.⁵² Both see rights-in-trust as protecting a child's *own* future interests. In other words, the right to an open future protects the child's ‘*personal* interest in growth... development’ and future autonomy, to use Feinberg's language.⁵³ This means that we are respecting children's autonomy when we preserve choice even though there is no autonomy to respect.⁵⁴ As such, Feinberg's argument relies on the claim that if it is wrong to unjustifiably restrict autonomy for adults, it is wrong to do the same before adulthood. This argument jumps to the conclusion that the right to an open future exists.⁵⁵

Feinberg's Intuition

I argue that both lines of critique rely on uncharitable reconstructions of Feinberg's account. Indeed, both concerns can be addressed if we return to the intuition upon which Feinberg relies - the idea that rights are violated if the conditions necessary for their enjoyment are frustrated prematurely. Grounded in this intuition, the right to an open future is best taken as a minimal negative right.⁵⁶ The right protects conditions necessary for autonomy by preserving choice. Such a project doesn't require the maximisation of options.⁵⁷ Rather, for one's right to autonomy to be preserved one merely needs to be

50. Millum, "The Foundation of the Child's Right to an Open Future," 530.

51. Noggle, "Children's rights," 108.

52. Millum, "The Foundation of the Child's Right to an Open Future," 529; Chen, "The Right to Self-Development," 447.

53. Feinberg, "Right to an Open Future," 79 (emphasis added).

54. Chen, "The Right to Self-Development," 447.

55. Chen, "The Right to Self-Development," 447.

56. Lotz, "Feinberg, Mills, and the child's right to an open future," 545-6.

57. Lotz argues for a similarly founded minimal view of Feinberg's right. See, eg, Lotz, "Feinberg, Mills, and the child's right to an open future," 539, 45-6.

able to make critical and important life decisions. Feinberg uses such language himself.⁵⁸ To preserve choice is not to maximise options but merely to keep some number of particularly important ones open. Beyond this, informed by this intuition we can clarify where Feinberg places his moral concern. The intuition continues into Feinberg's grounding of the right not in the child's future autonomy but rather the potential adult's autonomy. Indeed, Feinberg is careful to write that it is the adult a child is to become 'whose autonomy must be protected now *in advance*'.⁵⁹ The right is anticipatory in that it preserves autonomy before the capacity for it emerges. Such a reading is necessary if we recall that A-rights protect autonomy, a capacity that Feinberg argues children don't possess.

Framed in this way—a way I believe is necessary—Feinberg's account overcomes concerns about implausibility and invalidity. It removes the absurd implications and avoids the leap in the argument that Millum and Chen question. Autonomy is respected only when it is present, and it is this respect that warrants anticipatory protection. Without such preservation—the protection of critical life decisions—one's A-rights would be violated.

However, if we take Feinberg to be solely focused on future autonomy his account further suffers from two issues. First, the role of autonomy as a moral distinguisher. Second, the focus on future and potential adults as the sole unit of moral concern. The balance of this section will explain both flaws and suggest that a consideration of interest is necessary as a result. Such an account of children's rights will be the subject of the next section.

Autonomy Capacities & Development

Feinberg thinks of autonomy as a capacity or proficiency to act autonomously. We can infer this from Feinberg's dismissal of children's free choice. Recall that he believes that granting free choice to children would harm their future ability to act autonomously. This is because children tend to make bad decisions – unjustifiable or risky choices.⁶⁰ This interpretation is also necessary if we remember that

58. Feinberg, "Right to an Open Future," 80-2.

59. Feinberg, "Right to an Open Future," 78 (emphasis added).

60. Feinberg, "Right to an Open Future," 89.

Feinberg motivates the protection of autonomy in its instrumental value. Indeed, one's autonomy ought to be respected largely because it tends to positively contribute to their pursuit of the good.⁶¹

In turn, we can bifurcate proficient autonomous capacities. Specifically, we can say one is proficiently autonomous if they tend to make decisions that both display good reasoning and contribute to one's good. Autonomous agents decide rationally and reflectively, relying on experience and knowledge – they make *good* decisions. However, these decisions must also tend to further the decision maker's interests and contribute to their self-fulfilment – they are *good* decisions. This notion of capacity is vital to both the autonomy-account and rights-in-trust.⁶² It is in this sense that Feinberg argues that children lack autonomy. However, such a notion of autonomy functions problematically as a moral distinguisher between adults and children. Indeed, it is at times both over and under-inclusive.

The ability to make good decisions isn't resolved or even stabilised past childhood. For Feinberg it is potential autonomous capacities that demand respect. However, if it is justifiable to deny free choice to children for promise of future autonomy it also seems justifiable to deny adults the same for promise of more developed future autonomy. In each situation free choice risks the future use of a more developed capacity. In turn, it risks the enjoyment of autonomy rights. For example, if a young adult decides to drop out of university, they are closing off options in a similar way to a child refusing to go to school. In reducing options for future careers, the young student is threatening the conditions necessary for practical autonomy that they will enjoy later in life as a more proficient autonomous agent.⁶³ Just as for the reluctant primary school student, it is a future—more developed—autonomous agent who will have their choices reduced. However, we can think of the same past young adulthood. In fact, we could apply Feinberg's logic continually throughout one's life such that autonomy is preserved until one has the most developed proficiency for good decision making.

This permanent delaying of choice is an undesirable outcome. It is discordant with our intuitions that children have rights that are different in kind to even young adults. It is also at odds with

61. Feinberg, "Right to an Open Future," 91-2.

62. See, for eg, Brennan, "Children's Choices or Children's Interests," 60.

63. Surely we can continue to make better decisions—more reliably good decisions—throughout life.

Feinberg's aim to protect autonomy.⁶⁴ Perhaps he could resolve this issue by stating that passed a minimum level of autonomous functioning (achieved when one reaches the age of majority, for example) respect for one's autonomy cannot involve an appeal to future capacities or development. To put it another way, it is fully formed autonomy that requires immediate respect.

However, even then, autonomy is a flawed distinguisher. Indeed, if we have moral justification for denying free choice to children, we must commit to denying free choice to adults who display even temporarily bad decision-making capabilities.⁶⁵ It seems that respect for autonomy requires preservation of options in both situations. An adult can fail to make relevantly good decisions. Just like for children an adult's decisions can risk future autonomy and self-fulfilment. It can similarly frustrate the conditions necessary for the enjoyment of autonomy. For example, a 50-year-old could get drunk and decide to quit her job, making a decision she would have not made if sober. The next day she would have less options open to her. Her decision here, didn't further her own good, nor was it the result of good decision-making. Her decision represented a lapse in rational and reflective judgement. The instrumental value of autonomy to her self-fulfilment diminishes.

In such a situation it seems that Feinberg demands that one's A-rights be temporarily disabled to preserve the conditions necessary for autonomy and self-fulfilment. When an adult starts to make bad decisions—whether due to temporary disablement or not—we can think of their autonomy rights as being suspended. This seems to be necessary if we see the capacity for autonomy as a precondition for A-rights. Indeed, if we were to take the capacity for autonomy seriously it would regularly result in the temporary denial of a rights to adults making bad decisions. This also doesn't align with our intuitions or Feinberg's aims.⁶⁶

Conversely children sometimes make relevantly good decisions - ones that display good decision-making abilities and further their pursuit of a good. Such capacities—however temporary—seem to demand respect.

64. Feinberg, "Right to an Open Future," 78.

65. See also: Houlgate, "Children, Paternalism, and Rights to Liberty," 271-2.

66. Feinberg, "Right to an Open Future," 78.

In turn, it appears that some arbitrary line is drawn before which bad decisions are definitive—they demand a restriction to autonomy—and beyond which bad decisions are largely morally irrelevant. As such, it is as if the distribution of autonomy is predetermined. No matter what children do, they cannot have it. Conversely, whatever adults do they cannot lose it.⁶⁷ Schapiro makes the absurdity of this move clear, writing ‘that an adult’s right to make her own choices does not depend upon the likelihood that her doing so will be beneficial, whereas a child’s right to do to the same does’.⁶⁸ In other words, autonomy has intrinsic value only when it tends to be instrumentally valuable. Such an arbitrary distribution renders the proficiency difference a flawed moral distinguisher. Its unwanted outcomes suggest that autonomy is an unhelpful moral distinguisher.

Future & Future Harm

Putting aside autonomy, Feinberg’s approach problematically places moral focus on future adults. In doing so, the approach risks morally alienating children. Specifically, the approach first requires there to be a future to assign moral worth to. Second, the approach ignores the effects of decisions felt by the child themselves.

If children have claims to certain goods only because they have a potential future, then children need to have a future to have rights-in-trust. If a child is not going to live into adulthood there is nothing demanding a child’s future be kept open. For example, on Feinberg’s account it would be wrong to deny a child the opportunity to learn to play an instrument or learn to paint because this would close off options. However, it seems that for Feinberg it would not be wrong to deny a terminally ill child these opportunities. This clearly seems incorrect. Beyond this, rights-in-trust depend not only on the existence of a future but future autonomous capacities. Indeed, children need the conditions necessary for autonomy protected only if they will develop the capacity for autonomy at some later point. On Feinberg’s approach, a child with a severe mental disability—such that they could never make

67. Absent total disablement. See, also, Houlgate, "Children, Paternalism, and Rights to Liberty," 272.

68. Schapiro, "Childhood and Personhood," 582.

relevantly good decisions—would also have no claim to these opportunities. It would not be wrong to deny them the chance to play an instrument or paint. Again, this seems incorrect.

In each of the above examples we could say that it is wrong to deny a terminally ill or severely disabled child opportunities to learn because of the harm the child herself suffers. It aligns with our intuitions to say that it is wrong to deny a child such opportunities even if they don't have an autonomous future. More generally, it is not only the future autonomous adult that suffers when a child is withdrawn from school early or denied opportunities to learn an instrument. Clearly, the child themselves—qua their childhood—suffers some loss.⁶⁹

Feinberg's account, morally concerned only with the rights of future adults, fails to capture this loss in the same way it fails to adequately protect the terminally ill or severely disabled child. This deficiency gives us good reason to look beyond the autonomy account. Indeed, we want an account that not only aligns with our paternalism and protectionism intuitions but does so without relying on arbitrary distinctions of autonomous capacities and without morally alienating children.

C. Children's Interests

In the section to come I argue that we can better capture our protectionism and paternalism intuitions by turning to an interest-based account of rights. Beyond this, the interest-account can also adequately capture Feinberg's grounding thought—that future rights demand second-order protection prior to their enjoyment. Importantly, however, the interest-account can do both without morally alienating current children or children without the prospect of an autonomous future. This section will take the following structure. First, I will give an overview of the interest-account and its motivations. I will then explain how the account can capture both our protectionism and paternalism intuitions through a consideration

69. See, for eg, Samantha Brennan, "The Goods of Childhood and Children's Rights " in *Family-Making: Contemporary Ethical Challenges*, ed. Françoise Baylis and Carolyn McLeod (Oxford University Press, 2014), 42. See also: Mills, "The Child's Right to an Open Future?," 506-7.

of children's developmental interests. Finally, I will consider children's interest in their childhood going well. I motivate children's rights to future agency, carefreeness, and connection throughout.

i. Interests: Needs & Wellbeing

Interest-theorists hold that rights protect one's access to goods that fulfil fundamental needs. This protection is motivated by the notion that having one's fundamental needs met allows their life—all things being equal—to go better. At the most basic level this means that rights uphold or promote wellbeing. Indeed, Noggle writes that 'rights protect... conditions most vital to the right holder's wellbeing'.⁷⁰ However, others frame the project to be more extensive. Brighouse argues that rights 'guarantee the claim of each person to those things without which an acceptable life is not possible'.⁷¹ Similarly, Houlgate states that the meeting of one's basic needs is necessary to allow one to 'achieve' the best life they are capable of.⁷² As such, one can frame rights as not just ensuring wellbeing in some minimal sense but also securing the minimum goods required for human flourishing.⁷³ Indeed, rights maintain a threshold of resources below which one cannot conceive of or pursue the good. In turn, we can think of rights as protecting both universal and particular needs – human necessities and individual wants.⁷⁴

Importantly, the interest-account also protects one's claim to autonomy. This is because self-determination is a crucially important source of wellbeing in one's life. Recall, autonomous agents are better placed to further their own good and draw wellbeing from exercising autonomy itself. Such instrumental and intrinsic value means that we have a universal interest in autonomy.⁷⁵ Importantly, however, on the interest-account—unlike for autonomy-theorists—the capacity for self-government isn't a necessary precondition for possessing rights. Indeed, Brighouse writes that 'welfare rights justify

70. Here we can think of one's right to shelter, nutrition etc. Noggle, "Children's rights," 102.

71. Brighouse, "What Rights (If Any) Do Children Have?," 37.

72. Houlgate, *The Child & the State*, 99.

73. Brighouse, "What Rights (If Any) Do Children Have?," 37.

74. Brighouse, "What Rights (If Any) Do Children Have?," 37-9.

75. Brighouse, "What Rights (If Any) Do Children Have?," 38.

themselves'.⁷⁶ To have rights on an interest-account an agent must merely possess publicly articulatable needs that warrant protection and therefore create claims on others. In turn, even very young children can have rights.⁷⁷

ii. *Developmental Interests*

One clear interest children seem to have is in developing into adults, specifically, autonomous, self-sufficient and self-fulfilled adults. In this section, I explore three accounts of developmental interests that are structurally similar to Feinberg and therefore similar to each other. I do so to argue that together they overcome the limitation in Feinberg's work, ensuring that children are not subject to blanket moral alienation. I quickly take each in turn now, concluding that children have rights to conditions necessary for their development and future autonomy, including to connection.

The development of autonomy: Brighouse & Swift

Brighouse & Swift argue that the fundamental interest of children is in becoming an autonomous agent that can look after their own wellbeing upon maturity.⁷⁸ In other words, they have an interest in realising 'their potential to exercise the kind of agency characteristic of normally functioning adults'.⁷⁹ Importantly, they suggest that children alone are unable to further this interest, and 'are entirely dependent on others... for the resources and conditions needed to develop'.⁸⁰ In arguing this, Brighouse and Swift mirror Feinberg, concerned that children tend to make decisions that ineffectively further their interests, or entirely undermine them. Indeed, left alone, they 'consume poisons, walk into busy

76. Brighouse, "What Rights (If Any) Do Children Have?," 39.

77. Noggle, "Children's rights," 104-5; Brighouse, "What Rights (If Any) Do Children Have?," 38.

78. Harry Brighouse and Adam Swift, *Family values : the ethics of parent-child relationships* (Princeton: Princeton University Press, 2014), 63.

79. Brighouse and Swift, *Family Values*, 67.

80. Brighouse and Swift, *Family Values*, 58.

roads, and fall through windows'.⁸¹ They also argue that children can't further their interests in part because of the obscurity of their specific future interests.

As such, children are not in a position to further their own developmental interests. The consequence of this claim answers our protectionism and paternalism intuitions. Specifically, children must be supported in their development through 'care and constraint'.⁸² Children have stronger claims than adults to goods and conditions required for their social, intellectual, and moral development.⁸³ However, children also have less claims to autonomy than adults. Brighouse & Swift go so far as to write that 'adults have a duty to manipulate and coerce children into doing what will promote the development of their capacity for autonomy'.⁸⁴ It seems that the 'right kind of care' involves moral training and education and—importantly—does not involve the 'mere indulgence' of children's immediate interests.⁸⁵

Self-sufficiency: Houlgate

Houlgate argues similarly to Feinberg, Brighouse and Swift.⁸⁶ He claims that we have a fundamental interest in having our needs met.⁸⁷ Indeed, without one's needs met, they cannot conceive of or pursue their good. Simply, they cannot devote the resources needed to ensure they flourish or participate in valued projects.⁸⁸

Importantly, Houlgate distinguishes between two notions of need. Everyone has what he calls 'ends needs' - basic needs tied to a minimum conception of the good, like nutrition and shelter. However, especially vulnerable people also have 'means needs'. Houlgate defines this as the inability to

81. Brighouse and Swift, *Family Values*, 63.

82. Brighouse and Swift, *Family Values*, 63.

83. Brighouse and Swift, *Family Values*, 64.

84. Brighouse and Swift, *Family Values*, 70.

85. Brighouse and Swift, *Family Values*, 63.

86. Houlgate, *The Child & the State*; Houlgate, "Children, Paternalism, and Rights to Liberty."

87. Houlgate, *The Child & the State*, 100.

88. Houlgate, *The Child & the State*, 113.

independently satisfy 'ends needs'. We can think of means needs as mapping onto ends needs, for example, the inability to go and purchase food, or find shelter.

On Houlgate's account, children have both types of need. He argues that children cannot satisfy their own basic needs partly because they are unable to make good decisions.⁸⁹ Like Feinberg, Houlgate argues that children fail to properly consider evidence and delay the gratification of immediate desires.⁹⁰ This answers our paternalism intuition. Children's decisions tend to place them in worse positions and require paternalistic intervention.⁹¹

However, children's means needs clearly extend to their development itself. Arguably, children have an interest in having their needs met reliably into the future. For this to occur, they must develop into the sort of agent who no longer possesses 'means needs'. In other words, a self-sufficient agent. Vitaly, if we are to believe Houlgate and Feinberg, children alone cannot further this interest, as they make poor decisions.⁹² They have both an 'ends' means and a 'means' need for their own development. Such vulnerability answers our protectionism intuition. Indeed, children have claims to the resources required to meet their ends and means needs, and to the resources needed for their development into self-sufficient agents. For example, education. In this light, paternalistic intervention ensures a child's diminished decision-making capabilities doesn't undermine their future ability to be self-sufficient.⁹³ For example, by ensuring that children attend school and receive an adequate education.

Self-fulfilment: Chen

Finally, Chen argues that children—like all humans—have an interest in their self-development or 'self-fulfilment'.⁹⁴ He defines this development as the furthering of one's talents, actual skills, and interests.⁹⁵

89. Houlgate, *The Child & the State*, 66, 70.

90. Houlgate, *The Child & the State*, 101; Houlgate, "Children, Paternalism, and Rights to Liberty," 273.

91. Houlgate, *The Child & the State*, 101.

92. Houlgate, *The Child & the State*, 101.

93. Houlgate, *The Child & the State*, 101. See also, Houlgate, "Children, Paternalism, and Rights to Liberty," 273.

94. Chen, "The Right to Self-Development," 450.

95. Chen, "The Right to Self-Development," 450.

Importantly, without such direct ties to one's self, development is meaningless. For Chen, such self-development 'is a necessary component of a full human life'.⁹⁶

He argues that children have a claim to the conditions needed for the development of their talents across multiple domains.⁹⁷ This answers our protectionism intuition. Importantly, like Feinberg, he claims that this includes the protection of a child's future options. Indeed, Chen writes that 'genuine and original self-development requires exposure to a variety of activities and experiences'.⁹⁸ As such, by pigeonholing their children's interests, 'parents are limiting the ways that children can develop themselves'.⁹⁹

A child's right to development: Connection

Together these three approaches establish that children have rights-grounding interests in their own social, emotional, and moral development. Such a claim amounts to a right to the conditions that allow for the child's development in each of these areas. One such condition is social and emotional connection. This section will briefly discuss the necessity of relationships and interactions for a child's social, emotional, and moral development. I do not seek to entirely motivate each specific condition here. I merely seek to suggest that the condition can be motivated and seems intuitive.

The presence of affectionate care in a child's life is instrumentally important for their development.¹⁰⁰ Brighouse & Swift argue that a 'parental' or caring relationship ensures that a child can learn moral rules and the skills necessary for autonomous functioning. Specifically, they suggest that 'self-regulation' is best learned through observation of one's carers. They write, 'the child needs to

96. Chen, "The Right to Self-Development," 450.

97. Including, for example, music, mathematics, language: Chen, "The Right to Self-Development," 452.

98. Chen, "The Right to Self-Development," 450.

99. Chen, "The Right to Self-Development," 453.

100. Here I take 'love' to mean affectionate care – carers that act *as though* they love their charge. There is a divide in the literature about whether children are owed this or pure 'unconditional love'. The goods of connection that I hint at here are ones that can be secured through mere affectionate care. See, for eg, Samantha Brennan and Colin Macleod, "Fundamentally Incompetent: Homophobia, Religion, and the Right to Parent," (United Kingdom: Routledge, 2017); Riccardo Spotorno, "Homophobes, Racists, and the child's right to be loved unconditionally," *Critical review of international social and political philosophy* ahead-of-print, no. ahead-of-print (2021); S. Matthew Liao, "The Right of Children to Be Loved," *The journal of political philosophy* 14, no. 4 (2006).

observe these traits modelled in her immediate environment, and in people whom she identifies'.¹⁰¹ As such, affectionate care is the 'right kind of care' for Brighthouse & Swift.¹⁰² Liao has argued further that such a relationship is necessary for a child's proper development by ensuring emotional and psychological stability, and promoting self-worth.¹⁰³ Beyond this, a relationship of affectionate care makes it more likely that a child's interests, talents and needs will be recognised and responded to appropriately. Increasing the likelihood of helpful cost-incursion, affectionate care is instrumentally valuable for Chen and Ferracioli, ensuring that a child engages in projects of worth and those that contribute to her self-fulfilment.¹⁰⁴

Secondly, social interactions are fundamental for a child's development into a morally proficient, autonomous agent. Indeed, social interactions serve as vital practise for children as they begin to navigate the world with more autonomy. They allow children to learn, adopt and practise moral rules - how we are to interact with each other.¹⁰⁵ Such 'trial and error' is necessary for a child to develop the capacities and character necessary for adult life.¹⁰⁶ Social interactions also allow children to practise autonomy in circumstances of reduced risk. Brennan writes that children ought to be given, 'certain freedoms on a trial basis'.¹⁰⁷ In such circumstance, interactions with friends and family are important test-cases.

101. Brighthouse and Swift, *Family Values*, 73.

102. Brighthouse and Swift, *Family Values*, 58.

103. S. Matthew Liao, "Being Loved as a Fundamental Condition for Children," (New York: Oxford University Press, 2015), 74-9.

104. Chen, "The Right to Self-Development," 453; Luara Ferracioli, "The State's Duty to Ensure Children are Loved," *Journal of ethics & social philosophy* 8, no. 2 (2017): 11-2. See also: Luara Ferracioli, *Parenting and the Goods of Childhood* (Oxford University Press, 24 Aug 2023, 2023).

105. Ferracioli reveals that childhood friendships are a site of moral development: Ferracioli, *Parenting and the Goods of Childhood*, 105. See, also: Nell Bernstein, *Burning down the house: the end of juvenile prison* (New York, NY: The New Press, 2014), 188-90.

106. Ladd, "Paternalism," 19.

107. Brennan, "Children's Choices or Children's Interests," 62. See also, Brighthouse, "What Rights (If Any) Do Children Have?," 43.

Interest in Future Autonomy: Feinberg (and his flaws)

Beyond this, together, the three approaches allow us to capture Feinberg's grounding intuition that rights to future autonomy warrant protection now.¹⁰⁸ Some have argued that rights accord only to fundamental interests that one currently has.¹⁰⁹ As such, one has a right to autonomy because it is both a universal interest *and* because they can act autonomously. This makes sense initially. Indeed, it seems odd to speak of one's interest in driving to work if they don't know how to drive or don't have a car. It seems even odder to speak of such an interest as warranting protection as a right. In similar ways, interests-theorists have argued that children don't have a rights-warranting interest in autonomy like adults.¹¹⁰

However, recall that for Feinberg the existence of rights necessitates the existence of second-order rights – claims to the conditions necessary for the enjoyment of a bundle of rights. Such a consideration sits nicely within an interest-account of rights. Simply, we have a fundamental interest in ensuring we can enjoy our rights even if this is only at some later point. Taken together, the three accounts explored above entail protection for the conditions necessary for wellbeing and flourishing into adulthood. A child's interests in their future autonomy, self-sufficiency, and self-development ground claims similar to those furthered by Feinberg – the protection of future options.¹¹¹ Indeed, an adult cannot enjoy her right to any of these if significantly restrictive decisions were made for her during childhood.

In turn, we might want to dismiss these approaches as similarly flawed to Feinberg's. One such flaw is Feinberg's moral alienation of children. For Feinberg, when a child is denied an opportunity, it is not the child that is wronged, but the future adult.¹¹² However, for Brighouse and Swift, Houlgate and Chen, the child, *as they currently are*, possess the rights.¹¹³ In other words, it is the child's right in their

108. See also, Noggle, "Children's rights," 105.

109. See, for eg, Wilfred Beckerman and Joanna Pasek, "The Rights of Future Generations," in *Justice, Posterity, and the Environment* (Oxford University Press, 2001): 21.

110. Or at least immediate autonomy: Noggle, "Children's rights," 104-5.

111. See, for eg, Feinberg, "Right to an Open Future," 80-2.

112. Feinberg, "Right to an Open Future," 78.

113. Brighouse and Swift, *Family Values*, 63; Brighouse, "What Rights (If Any) Do Children Have?," 42; Houlgate, *The Child & the State*, 101; Houlgate, "Children, Paternalism, and Rights to Liberty," 273; Chen, "The Right to Self-Development," 454.

own development that is being protected. As such, we can avoid the initial charge of blanket moral alienation. Simply, when a child is denied the conditions needed for their development and later enjoyment of rights, it is her interests that are frustrated, and herself that is wronged. This better matches out intuitions.

iii. Intrinsic Goods

Despite this, however, solely considering a child's developmental interests risks morally alienating the terminal-ill or severely disabled child. Recall that Feinberg's approach requires the child to have the potential for proficient autonomy.¹¹⁴ Similarly, the three approaches of the last section infer that the child has a future in which she will be autonomous, self-sufficient, or self-fulfilled. It is this potential future that warrants protection for Brighthouse & Swift, Houlgate and Chen. As such, those without this potential do not have developmental interests and are not protected by developmental rights.

Importantly, the interest account allows us to overcome this concern of specific moral alienation. This is because we can argue that children have an interest in their childhood going well regardless of its possible instrumental role. This section will explore such an argument. In doing so, I will explain how—in combination with a developmental account of children's rights—it can best answer our paternalism and protectionism intuitions. I will first look at how we may ascribe intrinsic value to childhood. I will then turn to the implications of this view for children's rights.

A non-instrumental account of childhood

What I have discussed so far has taken childhood to be a detriment or—in Brennan's words—'something to be gotten over, grown out of as quickly as possible'.¹¹⁵ Indeed, she asks whether it would be rational to take a pill to avoid childhood altogether.¹¹⁶ Feinberg, Schapiro, Brighthouse & Swift,

114. See, for eg, Feinberg, "Right to an Open Future," 78.

115. Brennan, "The Goods of Childhood and Children's Rights " 37.

116. Brennan, "The Goods of Childhood and Children's Rights " 37.

Houlgate, and Chen all see childhood as a period of incapacity and underdevelopment.¹¹⁷ In contrast, adulthood is marked by the full protection of rights, complete agency, and completed development. On such a view, ‘the essential task of children’ is to become autonomous adults.¹¹⁸ In turn, childhood has only instrumental value – one’s childhood goes well only insofar as it contributes to their development into adulthood, and we would be warranted in taking Brennan’s pill.

If we are to argue that children have an interest in their childhood going well, regardless of its instrumental role, we must first argue that childhood has some kind of intrinsic value.¹¹⁹ I will argue that Gheaus’ approach is the most convincing and, as such, that childhood does have intrinsic value. This is because children have better access to some intrinsically valuable goods than adults.¹²⁰

Intrinsic value, access, and enjoyment

One way of claiming that childhood has intrinsic value is by suggesting that children have access to different valuable goods than adults or have differing access to common goods. Such access would render childhood valuable regardless of its instrumental role.

Defenders of an intrinsically valuable view of childhood have often relied on the suggestion that the demands of adulthood reduce adult’s ability to access or enjoy goods that are commonly valuable. Unburdened by these demands, children are best placed to enjoy goods like imaginative play, carefreeness, innocence, and parental love. Such goods have in turn been deemed distinctive of, or unique to childhood.¹²¹

117. See, for eg. Feinberg, "Right to an Open Future," 78; Schapiro, "Childhood and Personhood," 577; Brighthouse and Swift, *Family Values*, 62; Houlgate, "Children, Paternalism, and Rights to Liberty," 273-4; Chen, "The Right to Self-Development." See also: Sarah Hannan, "Why Childhood is Bad for Children," *Journal of applied philosophy* 35, no. S1 (2018).

118. Anca Gheaus, "Unfinished Adults and Defective Children: On the Nature and Value of Childhood," *Journal of ethics & social philosophy* 9, no. 1 (2017): 3.

119. Or that we would not be warranted in taking Brennan’s pill.

120. Gheaus, "Unfinished Adults," 4.

121. Brennan, "The Goods of Childhood and Children’s Rights " 42-3. See also: Anca Gheaus, "The 'intrinsic goods of childhood' and the just society," in *The Nature of Children's Well-being: Theory and Practice*, ed. Alexander Bagattini and Colin Macleod (Springer, 2014), 38.

However, while these claims might be empirically true, they are unhelpful. Indeed, it is not enough to ground childhood's intrinsic value on what Hannan has deemed 'socially contingent practices'.¹²² Doing so suggests only that we should allow adults better access to goods of value and not that childhood has distinct value. Gheaus, in her own earlier work, writes that 'we should aim to make the lives of children and adults more alike by making more space for childhood goods in the lives of adults'.¹²³

Gheaus, in a series of recent papers, puts forth a more nuanced argument.¹²⁴ Rather than focusing on the demands of adulthood, she turns to the unique developmental status of children. Specifically, she suggests that children have distinctly valuable cognitive capacities, and the ability to explore and experiment. I now take each claim in turn.

Cognitive abilities: curiosity and creativity

Gheaus relies on developmental psychology and neuroscience to claim that children are more imaginative, creative, and open-minded than most adults. She argues this is so because children 'lack strong prefrontal control' in their underdeveloped brain.¹²⁵ Citing Gopnik, she explains that prefrontal control is useful for focus in adulthood but impedes our 'general learning and the free use of imagination'.¹²⁶ Without this control, children tend to learn faster, and think more creatively and freely.¹²⁷

Gheaus suggests that these cognitive abilities allow children to be better at philosophical, scientific, and artistic thinking than most adults. Indeed, she writes that 'children are, on average, better

122. Hannan, "Why Childhood is Bad for Children," 8.

123. Gheaus, "Intrinsic Goods" 51.

124. Gheaus, "Unfinished Adults."; Anca Gheaus, "Children's Vulnerability and Legitimate Authority Over Children," *Journal of applied philosophy* 35, no. S1 (2018); Anca Gheaus, "Childhood after COVID: Children's Interests in a Flourishing Childhood and a More Communal Childrearing," *Philosophical inquiry in education* 29, no. 1 (2022).

125. Gheaus, "Unfinished Adults," 10.

126. Gheaus, "Unfinished Adults," 10. See: Alison Gopnik, *The philosophical baby: what children's minds tell us about truth, love, and the meaning of life*, 1st ed. (New York: Farrar, Straus and Giroux, 2009).

127. Gheaus, "Unfinished Adults," 11; Gheaus, "Children's Vulnerability," 68.

able than adults to engage with... basic philosophical questions'.¹²⁸ Further, that children can 'spontaneously' adopt a 'scientific frame of mind'.¹²⁹ Also, that 'children's artistic abilities are an average superior to those of adults'.¹³⁰ Importantly, the claim here is not that children *alone* have the ability to be philosophical, scientific, or creative. Nor is it that children can be such things in the same way adult philosophers, scientists, or artists are. Rather, Gheaus argues simply that 'those individuals who do not grow up' to be working in those professions 'are likely to have been better at raising philosophical questions or pursuing beauty as children than as adults'.¹³¹

She argues that these goods are intrinsically valuable and 'important enough to make the lives that contain good'.¹³² As such, children's underdeveloped brain gives them access to 'valuable goods... that are less accessible to [most] adults'.¹³³

Conditions of childhood, experimentation, and variety

Second, Gheaus argues that children are better placed to experiment and explore than adults. Importantly, this is in part because children's underdeveloped brain warrants paternalistic treatment and the denial of agency. Protected from 'long-term consequences' and facing an open future, 'children are free to experiment with important things', including relationships, interests, and even personalities or 'selves'.¹³⁴ Such privileged access to experimentation has intrinsic value for Gheaus. Indeed, she writes that childhood experimentation makes 'the overall life of an individual more complete' than if childhood was skipped with Brennan's instant adulthood pill.¹³⁵

128. Gheaus, "Unfinished Adults," 9.

129. Gheaus, "Unfinished Adults," 10.

130. Gheaus, "Unfinished Adults," 9.

131. Gheaus, "Unfinished Adults," 10.

132. Gheaus, "Children's Vulnerability," 68-9.

133. Gheaus, "Unfinished Adults," 11.

134. Gheaus, "Unfinished Adults," 13; Gheaus, "Children's Vulnerability," 69.

135. Gheaus, "Unfinished Adults," 12.

Intrinsic goods: claims and protections

Taken together, these abilities ‘make childhood an intrinsically good phase of one’s life’.¹³⁶ Importantly, this is not because children have access to distinct goods in childhood. Rather, children have more ‘privileged access’ to valuable goods also valued by adults.¹³⁷ Such differing access—a result of children’s lack of development rather than ‘socially contingent practices’—is enough to ground the claim that childhood has intrinsic as well as instrumental value.¹³⁸

In turn, children are owed the goods that allow them to enjoy their childhood. For Gheaus, this necessarily involves the opportunity to enjoy the goods of childhood. Beyond this, however, children are owed conditions that make the enjoyment of their childhood—and its goods—more likely. I argue that, as such, children are owed carefreeness and connection.

Carefreeness

Brighouse & Swift have argued that a carefree disposition—being free from the burden of ‘responsibility’—is a valuable good in childhood in and of itself.¹³⁹ However, carefreeness also ensures children can enjoy their childhood. Recall that Gheaus argues that a good of childhood is the ability to experiment free of ‘long-term consequences’.¹⁴⁰ She seems to suggest that this is achieved—at least in part—through imaginative play with friends. Such play does not seem accessible to a child if they are emotionally burdened.¹⁴¹ Beyond this, it might be that certain levels of emotional anguish reduce a child’s ability to stake a claim in their future such that they can experiment with and explore its scope and content. It seems that the depressed child cannot play with their future in ways Gheaus deems necessary, and in ways that imbue their life with valuable variety.

136. Gheaus, "Childhood after COVID," 66.

137. Gheaus, "Unfinished Adults," 8.

138. cf Hannan, "Why Childhood is Bad for Children," 8.

139. Brighouse and Swift, *Family Values*, 69.

140. Gheaus, "Unfinished Adults," 13; Gheaus, "Children’s Vulnerability," 69.

141. Gheaus, "Children’s Vulnerability," 69. See also: Luara Ferracioli, "Carefreeness and Children's Wellbeing," *Journal of applied philosophy* 37, no. 1 (2020): 114.

Beyond this, carefreeness allows children to endorse the projects that they undertake. Specifically, carefree children are better able to enjoy activities and see them as worthwhile.¹⁴² Ferracioli argues that children's wellbeing is dependent on their subjective endorsement of objectively good projects.¹⁴³ As children are less able to make rational arguments about the worth of projects they undertake, they must feel positively towards them. She writes that 'children can come to endorse a project or relationship on the basis that it produces joyfulness, satisfaction, pleasure, amusement, and delight'.¹⁴⁴ Such a positive affect is more likely if the child is free from emotional anguish.¹⁴⁵ Indeed, worry and stress take up a child's 'mental space' such that they are less likely to feel positively about worthwhile projects they undertake.¹⁴⁶

Connection

Some have argued that children are owed affectionate care as it is an intrinsically valuable good of childhood.¹⁴⁷ However, affectionate care also clearly allows for the enjoyment of one's childhood more broadly. Ferracioli has suggested that love is owed to children because it increases children's wellbeing during childhood.¹⁴⁸ In this context, love ensures that a caregiver will 'pay special attention to the children's dispositions and talents' and allow her to participate in activities that explore these.¹⁴⁹ Such projects, reliably supported by caring affection, increase the likelihood of meaning in a child's life.¹⁵⁰

142. Ferracioli, "Carefreeness," 112.

143. Ferracioli, "Carefreeness," 106-7.

144. Ferracioli, "Carefreeness," 114.

145. Ferracioli, "Carefreeness," 115.

146. Ferracioli, "Carefreeness," 115.

147. See fn 100. Gheaus, "Children's Vulnerability," 66; Brennan and Macleod, "Fundamentally Incompetent: Homophobia, Religion, and the Right to Parent," 236-7.

148. Ferracioli, "The State's Duty to Ensure Children are Loved," 2-3.

149. Ferracioli, "The State's Duty to Ensure Children are Loved," 11.

150. Ferracioli, "The State's Duty to Ensure Children are Loved," 14. See also, Chen, "The Right to Self-Development," 452.

Returning to our intuitions

Children's strong claims to such goods and conditions answers our protectionism intuition. However, so does children's dependence on adults for their enjoyment of such goods. Indeed, children's enjoyment of childhood and its distinct goods is dependent on conditions beyond their control. Gheaus states that because children cannot 'control... their time, social interactions and material resources, children are at the mercy of adults' for the enjoyment of their childhood.¹⁵¹ Such vulnerability grounds protection.

Childhood's intrinsic value also goes some way to also answering our paternalism intuition. Simply, if some of the distinct goods of childhood depend on a lack of development, responsibility, and agency, we owe children the denial of these things. This is especially true for carefree experimentation, which Gheaus states is dependent on a child being 'unburdened by... responsibility'.¹⁵² Macleod argues similarly that mature agency is 'corrosive to some goods of childhood', including carefreeness, play and exploration.¹⁵³ He argues against 'assigning rights of moral authority to children at too young an age', or even assigning 'demanding adult tasks, roles, and responsibilities'.¹⁵⁴ Simply, if children are to enjoy the distinct goods of childhood, they must be treated as children – that is paternalistically.

Clearly, the denial of the good(s) of childhood is a wrong regardless of the future of the child. Indeed, it is wrong to deny a terminally-ill or severely disabled child the opportunity to engage in experimental play or caring affectionate relationships. As such, an interest-account of rights—including both an instrumental and intrinsic conception of childhood's value—best matches our intuitions.

151. Gheaus, "Children's Vulnerability," 69.

152. Gheaus, "Children's Vulnerability," 69.

153. Colin Macleod, "Agency, Authority and the Vulnerability of Children," in *The Nature of Children's Well-Being: Theory and Practice*, ed. Alexander Bagattini and Colin Macleod (Dordrecht: Springer Netherlands, 2015), 55.

154. Macleod, "Agency, Authority and the Vulnerability of Children," 58.

III. Justifying Juvenile Incarceration

This chapter will sketch out how one might justify the practice of juvenile incarceration. I will survey possible justifications of punishment and their applicability to children. I will ultimately argue that we can best justify the practice with reference to the moral education theory punishment – that punishment facilitates moral development. I conclude by discuss necessary constraints this justification entails – for instance, on how we incarcerate juveniles.

A. Traditional Justifications

Justifications for punishment can broadly be divided into utilitarian and retributive accounts.¹⁵⁵ Utilitarian theories justify punishment ‘as a means to the prevention of evils’.¹⁵⁶ In other words, punishment is justified as it produces some good consequence – usually the prevention of wrongdoing and the promotion of community safety. Here, punishment’s justification is tied up with its purpose (for example, deterrence and incapacitation). In contrast, retributive theories justify punishment without recourse to its consequence or purpose. Instead, proponents hold that ‘the only acceptable reason for punishing a man is that he is committed a crime’.¹⁵⁷ As such, the purpose of punishment is often stated as mere just dessert. This section will briefly discuss these justifications as they apply to juveniles. As such, I do not discuss the full content of these justifications nor their implications. I simply seek to explore what consequence children’s status (or lack of moral status) has for a justifying account of their incarceration.¹⁵⁸ In doing so, I will suggest that the theory of moral education best matches our beliefs about juvenile incarceration and the account of children's rights supported in the previous chapter.

155. H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2 ed. (Oxford: Oxford University Press, 2008), 8-9.

156. Joel Feinberg, "Introduction " in *Punishment*, ed. Joel Feinberg and Hyman Gross, The Dickenson series in philosophy. (Encino, Calif: Dickenson Pub. Co., 1975), 2.

157. Edmond Pincoffs, "Classical Retributivism," in *Punishment*, ed. Joel Feinberg and Hyman Gross, The Dickenson series in philosophy. (Encino, Calif: Dickenson Pub. Co., 1975), 23.

158. Christopher Bennett, "Children, crime and punishment," in *The Routledge Handbook of the Philosophy of Childhood and Children*, ed. Anca Gheaus, Gideon Calder, and Jurgen De Wispelaere (Routledge, 2019), 397-8.

i. *Utilitarianism: deterrence and community safety*

One reason why we might incarcerate juvenile offenders is to promote community safety. Incarceration may achieve this, for example, through specific and general deterrence. However, regardless of the specific aims of the system, in motivating the practice with reference to its possible consequences this justification is purely utilitarian.

Importantly, reference to this justification is commonplace and especially explicit in discussions of the youth justice system in Queensland. Calls for community safety encouraged the government to introduce its recent suite of amendments. Queensland Premier Anastacia Palaszczuk made this motivation apparent when introducing the reforms. Simply, the reforms' 'one central aim' was 'to ensure Queenslanders and their communities are safer'.¹⁵⁹ Further, Parliament justified its violation of its own Human Rights Act by suggesting that it was 'necessary' for 'the safety of the community'.¹⁶⁰ This aim is also echoed within the Youth Justice Act itself, its guiding principles recently being amended to ensure a focus on community safety.

Clearly, children can be accommodated within a utilitarian justification of punishment. However, in isolation, utilitarian justifications of punishment are unhelpful and problematic. Simply, if we are to justify juvenile incarceration *only* by pointing to its good consequences we encounter a problem – studies consistently show the lack of such consequences. Indeed, globally, incarceration doesn't deter youth offending and actually increases the likelihood of reoffending throughout one's life.¹⁶¹ This much is true in Queensland where 86.6% of young people incarcerated will reoffend within 6 months of their release and around half will reoffend as adults.¹⁶²

159. Qld. *Parliamentary Debates*. Legislative Assembly 21 February 2023. (Anastacia Palaszczuk Premier).

160. Qld. *Parliamentary Debates*. Legislative Assembly. 23 August 2023. (Dianne Farmer, Minister for Employment and Small Business, Minister for Training and Skills Development and Minister for Youth Justice).

161. David Huizinga et al., *Effect of Juvenile Justice System Processing on Subsequent Delinquent and Criminal Behavior: A Cross-National Study*, Final report to The National Institute of Justice, (Washington D.C., US: National Institute of Justice, 2004), 116.

162. Queensland Family and Child Commission, *Queensland Child Rights Report*, (Queensland Government 2023), 27; Mark Lynch, Julianne Buckman, and Leigh Krenske, "Youth Justice: Criminal Trajectories," *Trends and issues in crime and criminal justice*, no. 265 (2003): 2; Mark Halsey and James Armitage, "Incarcerating young people: the impact of custodial 'care'," in *Youth Offending & Youth Justice* ed. Monica Barry and Fergus McNeill (London: Jessica Kingsley Publishers, 2009), 2.

However, utilitarian justifications of punishment are problematic even if the practice produces some good consequences. Specifically, such justifications morally alienate the detained, treating them as mere means. In subjecting detainees to hard treatment to further some larger aim utilitarian justifications disregard their moral worth. This disrespect mirrors the moral alienation of children I argued against above, and similarly encourages us to look elsewhere. Beyond this, in motivating punishment with reference to its good consequences utilitarian theories seem to allow for the hard treatment of innocent people.¹⁶³ Simply, if the imprisonment of innocent people increased community safety (perhaps by acting as a general deterrent) utilitarians cannot give compelling reasons as to why they shouldn't be imprisoned.¹⁶⁴ This doesn't align with how most people think of punishment – as a consequence of one's bad behaviour. In turn, we can think of utilitarian justifications as treating detainees as mere means rather than ends. We could rectify this by turning to retribution as a justification.

ii. Retribution, ends and agents

On a retributive account the only purpose of punishment is just desserts.¹⁶⁵ Punishment, here, is justified only by the wrongdoing of the offender and flows from their behaviour. Pincoffs outlines this Kantian theory stating that the offender's commission of an offence entails punishment because 'to commit an act, is to commit oneself to the universalisation of the rule by which one acted'.¹⁶⁶ In other words, to mistreat another is to allow – or rather demand – similar treatment of oneself. In Pincoffs words, 'in willing the crime [the offender] willed that he himself should suffer in the same degree as his victim'.¹⁶⁷

In doing so, retribution treats the offender as an end rather than a mere means. However, it also respects the moral agency of the offender. Pincoffs writes that to punish someone is to 'address [them]

163. C. Nino, "A Consensual Theory of Punishment," in *Punishment: A Philosophy and Public Affairs Reader*, ed. A. John Simmons et al. (Princeton University Press, 1994), 95-6. See also: David Boonin, *The problem of punishment* (Cambridge: Cambridge University Press, 2007), 41.

164. See, for eg, Boonin, *The problem of punishment*, 84.

165. Feinberg, "Introduction " 4.

166. Pincoffs, "Classical Retributivism," 22.

167. Pincoffs, "Classical Retributivism," 22.

as a rational being, aware of the significance of [their] action'.¹⁶⁸ Importantly, this treatment must entail both moral attributability and a minimum level of proficiency. The retributionist must assume that the offender knew the moral implications of her act and understood that her treatment is 'made inevitable by her own choice'.¹⁶⁹

This narrative doesn't fit nicely with our views about children. Recall the work of Schapiro and Tiboris. Schapiro is committed to the view that children are not moral agents.¹⁷⁰ In fact, children are incapable of possessing moral agency. Schapiro suggests that a necessary consequence of this lack of agency is that children are not taken to be participants in moral discussions or projects like punishment. Instead, she writes, children's 'violations... are dealt with from a supervisory, rather than a participatory perspective'.¹⁷¹ However, it seems that moral participation is a necessary feature of pure retribution. Indeed, to feel blame towards another, and punish them by applying their own moral rules is to respect them as a moral equal. If Schapiro is correct, children cannot be moral agents, and – as such – they are not the right subjects of retribution.

However, even if we are unconvinced by Schapiro's claims there is an important difference in moral proficiency between adults and children. Such a difference suggests that children cannot be held morally culpable to the standard required by retributivists. Tiboris argues that children have substantially reduced moral—or normative—competency.¹⁷² In other words, due to their inexperience and developing brains children are less good than adults at recognising and adequately responding to normative information. Prone to peer influence and unable to mediate immediate desires children are 'less competent at using features of their moral agency to meet social demands'.¹⁷³ This incompetency gives us reason to reject the application of retributive theories to juveniles. Indeed, children shouldn't

168. Pincoffs, "Classical Retributivism," 22.

169. Pincoffs, "Classical Retributivism," 22.

170. Schapiro, "Childhood and Personhood," 588-9.

171. Schapiro, "Childhood and Personhood," 577.

172. Tiboris, "Blaming the Kids," 85.

173. Tiboris, "Blaming the Kids," 85.

be taken as fully developed moral agents – people capable of ‘willing’ crimes and committing themselves to the universalisation of their principles.¹⁷⁴

B. Moral education and communication

In sum, to make a claim about what an offender deserves by virtue of their misbehaviour seems to entail a judgement about her moral agency and proficiency. Children don't have the requisite levels of proficient moral agency and are not the right subjects of retribution. As such, we might want to look elsewhere.

I argue that a hybrid theory of punishment as moral education best matches our desires for juvenile incarceration and our intuitions about children and their interests. This section will provide an account of this theory as espoused by Hampton.¹⁷⁵ I will explain how this theory better addresses juveniles. I will then address conditions for the justifiability of punishment that the theory entails.

i. Punishment as moral expressions

Hampton argues that punishment is an expression of moral boundaries by the state.¹⁷⁶ As such, she seems to adopt Feinberg's view that punishment 'is a conventional device for the expression of attitudes'.¹⁷⁷ However, while Feinberg argues that punishment expresses various messages, Hampton asserts that the dominant message communicated by punishment is of a moral kind. Specifically, she labels punishment as 'electrified fences' that express something to the offender.¹⁷⁸ First, that 'there is a barrier' (or consequence) stopping certain actions.¹⁷⁹ Second, that this barrier exists around these actions

174. Tiboris speaks of children being less blameworthy for their moral transgressions as a result of their reduced normative competency. See, for eg, Tiboris, "Blaming the Kids," 86.

175. See: Jean Hampton, "The Moral Education Theory of Punishment," in *Punishment: A Philosophy and Public Affairs Reader*, ed. A. John Simmons et al. (Princeton University Press, 1994). Others have furthered similar theories: Boonin, *The problem of punishment*, 181-2.

176. Hampton, "Moral Education," 115.

177. Joel Feinberg, "The Expressive Function of Punishment," *The Monist* 49, no. 3 (1965): 400.

178. Hampton, "Moral Education," 116.

179. Hampton, "Moral Education," 116.

'because' they are morally wrong.¹⁸⁰ As such, punishments express a moral message to the offender and society.¹⁸¹ They do so through an 'unpleasant experience' – the disruption of 'the wrongdoer's freedom to pursue the satisfaction of his desires'.¹⁸²

ii. *Moral purpose of punishment*

If punishments are moral messages, they are expressed partly to educate the offender. Indeed, punishments may at least teach the offender that they cannot do the thing they attempted. For example, they tell the juvenile offender they cannot punch their classmate. Ultimately however, punishment seeks to teach the offender that they cannot punch their classmate because it is morally wrong and 'should not be done for that reason'.¹⁸³ Hampton doesn't clarify what is meant by moral education here. However, it seems likely that at least some offenders know that their offence represents a transgression of moral rules. In turn, the job of punishment is not to merely to reform their beliefs but their character, or their ability to reliably follow their own moral principles. Such a conception of moral education is shared by Ladd who writes that good 'moral decision-making... is a matter of judgement, self-knowledge, and character'.¹⁸⁴

Punishment must disrupt wrongdoers' freedom to facilitate this moral development.¹⁸⁵ Hampton argues that the deprivation of agency communicates that there is a 'barrier of a very special sort' to immoral actions.¹⁸⁶ It makes this moral message especially salient by linking the consequences of wrongdoing to what offenders 'care about most – the pursuit of their own pleasure'.¹⁸⁷ This deprivation also helpfully mirrors the harm caused by the offender's wrongdoing in ways that allow the offender to reflect upon their actions.¹⁸⁸

180. Hampton, "Moral Education," 116.

181. Hampton, "Moral Education," 117.

182. Hampton, "Moral Education," 129, 31.

183. Hampton, "Moral Education," 116.

184. This view is common amongst Aristotelians: Ladd, "Paternalism," 18.

185. Hampton, "Moral Education," 112.

186. Hampton, "Moral Education," 130.

187. Hampton, "Moral Education," 130.

188. Hampton, "Moral Education," 131.

Hampton suggests that this purpose of punishment is utilitarian. Indeed, she writes that punishment is ‘justified as a way to prevent wrongdoing’.¹⁸⁹ However, in focusing on the offender’s need for moral education she treats them less instrumentally than the pure utilitarian. She writes that punishment is only justified ‘insofar as it can teach... wrongdoers... the moral reasons for choosing not to perform an offence’.¹⁹⁰ Hampton is concerned with deterrence, but deterrence for the right reasons – that the offender makes a morally good choice. This requires the possession of a certain level of moral proficiency, including not only normative competency,¹⁹¹ but also moral character.¹⁹² As such, punishment is partly a means of ‘promoting moral choice’ for the person who is being punished, not simply a means of promoting ‘a larger social end’.¹⁹³ This means that the justification of juvenile incarceration is not undermined solely by high rates of recidivism. Indeed, it seems that Hampton would deem the punishment of offenders ‘a good’ even if it merely allowed for moral education without guaranteeing reform, and in turn, deterrence.¹⁹⁴

This treatment of offenders roughly mirrors pure retribution in that they are treated as moral actors for whom punishment is a good ‘for’ rather than a harm done ‘to’.¹⁹⁵ However, unlike pure retribution moral education doesn’t presume some level of moral proficiency or attributability. Rather, it assumes the contrary, that offenders are bad moral agents in want of moral training.

iii. Moral education and children

This view of punishment – training for bad moral actors – best matches our beliefs about what juvenile incarceration should do. Juvenile justice seeks to correct moral transgressions by promoting the

189. Hampton, "Moral Education," 117.

190. Hampton, "Moral Education," 117.

191. Tiboris, "Blaming the Kids," 85.

192. Ladd, "Paternalism," 18.

193. Hampton, "Moral Education," 118. This shift away from social purpose might encourage us to dismiss Hampton’s theory as entirely non-utilitarian. However, punishment here has a ‘moral goal’. As such, her theory cannot be merely retributive. See also: Boonin, *The problem of punishment*, 181-2; For a more general view of consequentialism and morally educative punishment, see: John Shook, "Dewey’s Rejection of Retributivism and His Moral-Education Theory of Punishment," *Journal of social philosophy* 35, no. 1 (2004): 76.

194. See, for eg, Hampton, "Moral Education," 135.

195. Hampton, "Moral Education," 119.

offender's moral development. This project is mirrored in statutes that allow the state to differentiate between juvenile and adult offenders. For example, the guiding principles of juvenile justice in Queensland state that 'a child who commits an offence should be... held accountable and encouraged to accept responsibility... and... dealt with in a way that will give the child the opportunity to develop in responsible, beneficial and socially acceptable ways'.¹⁹⁶ In other words, youth justice systems are keyed to facilitate rehabilitation in ways that adult correctional institutions might not be.¹⁹⁷ One way of motivating this separation is by suggesting that in our treatment of juvenile offenders we primarily seek to morally educate them.

However, more importantly, a theory of punishment as moral education best matches the account of children's rights furthered in chapter 1. In other words, such a theory closely aligns with our views about what children are owed and why they are owed such goods. Recall the claim that children are owed goods necessary for their development. This must include support for the child's moral development, which is necessary for a good adult life.¹⁹⁸ Morally educative punishment provides such support.

Recall also, that children are owed such conditions because without support children are unable to further their own interests, including in morality. In other words, children are 'bad' autonomous actors – they make wrong decisions and reason badly.¹⁹⁹ This lack of proficiency clearly extends into the moral domain, including moral decisions and development.²⁰⁰ In turn, morally educative punishment aligns with the belief that children are incomplete moral agents. Hampton sees punishment as a necessary response to bad moral actors – those who have a lack of moral proficiency. Punishment entails bad moral agency. Such bad agency seems to capture children – agents with awful normative competency but good moral potential.²⁰¹ In fact, children seem like the paradigm subjects of moral

196. *Youth Justice Act 1992* (Queensland), Section 9(A)(B)

197. See, for eg, Houlgate, *The Child & the State*, 138; Alexandra Cox, "Fetishizing the will in juvenile justice policy and practice," in *The Routledge Handbook of Criminal Justice Ethics* (Routledge, 2017), 301.

198. See, for eg, Brighouse and Swift, *Family Values*, 64.

199. See, for eg, Brennan, "Children's Choices or Children's Interests," 60.

200. See, for eg, Schapiro, "Childhood and Personhood," 580; Ladd, "Paternalism.,"; Tiboris, "Blaming the Kids."

201. Tiboris, "Blaming the Kids," 85.

education through punishment, a view Hampton herself endorses.²⁰² In this light punishment seeks to promote and improve the child's moral agency and better their proficiency.

In this light, institutional correction is another means of supporting the child's moral growth in conditions where the child alone cannot do so. As such, it is a necessary extension of the state's other paternal educational institutions. It seems that rights theorists—including Feinberg—would support the institutional correction of children's moral *wrongs* as a means of encouraging moral *rights* in childhood and adulthood.²⁰³

iv. Education and autonomy: conditions for justifiability

If we adopt Hampton's justification of punishment, we must adopt two necessary conditions.²⁰⁴ First, that punishment is only justifiable if it allows for the possibility of moral education.²⁰⁵ It is clear that punishment cannot guarantee moral development. Indeed, it cannot even guarantee deterrence for the wrong reasons i.e. non-moral reasons.²⁰⁶ However, if punishment is to be justifiable it must at least allow for moral development to occur. This means that punishment must provide the conditions necessary for moral development. Absent such conditions there could be no possible benefit to the detainee.²⁰⁷ Bennett suggests that this also means that punishment is only justified if the offender can identify the deprivation they suffer as a consequence of their wrongdoing.²⁰⁸ Without such an identification, the offender cannot contemplate the morality of their behaviour in the way Hampton envisions. However, punishment must also not teach bad moral lessons to the offender. Hampton writes that 'when the state climbs into the moral gutter... It cannot credibly convey either to the criminal or to

202. Hampton, "Moral Education," 121-2, 29-30.

203. See, for eg. Feinberg, "Right to an Open Future," 89.

204. There is an important distinct question, here, that is beyond the scope of my thesis: the moral permissibility of justifiable punishment. Children are not usually contemplated by theorists answering such questions: Bennett, "Children, crime and punishment," 403. For more, see: Boonin, *The problem of punishment*; Christopher Heath Wellman, "The Rights Forfeiture Theory of Punishment," *Ethics* 122, no. 2 (2012).

205. See, for eg. Boonin, *The problem of punishment*, 182-3; Hampton, "Moral Education," 117.

206. Hampton, "Moral Education," 139.

207. Hampton, "Moral Education," 141.

208. Bennett, "Children, crime and punishment," 403.

the public its moral message'.²⁰⁹ This entails a certain level of treatment despite deprivation, including respect for the detainee's natural rights.²¹⁰

Second, for punishment to be justified it must not encroach on the offender's moral autonomy. Recall that Hampton wishes to deter offenders for the right reasons. She writes that 'the goal of punishment is not to destroy the criminal's freedom of choice, but to persuade him to use his freedom in a way consistent with the freedom of others'.²¹¹ As such, punishment is not justified if it would diminish or damage the offender's autonomy and moral freedom. For Hampton this rules out the use of invasive treatments like EKG shock therapy.²¹² However, I argue that this also rules out treatment that reduces one's future (practical) autonomy. I argued in the last chapter that it is wrong to severely limit the amount of options open to person in the future. Such restrictions limit one's practical autonomy and threaten a necessary precondition for its enjoyment.²¹³ Any punishment that severely risks future open options seem to violate this extended condition by reducing one's practical ability to choose.

IV. The Detained Child's Interests

In this final chapter I will discuss how the current practice of juvenile incarceration undermines detained children's interests in both their childhood and future and for this reason is morally indefensible. Specifically, I will argue that the practice of juvenile incarceration violates a child's right to carefreeness and connection, and their right to future autonomy. I will identify these violations as they occur within Queensland's youth justice system ('YJS'), a system that is representative of most modern approaches to youth incarceration. To this end, this chapter takes the following form. First, I provide a brief

209. Hampton, "Moral Education," 127.

210. Most defenders of rights forfeiture—the notion that offenders lose claims that would usually protect them from the harm associated with punishment—hold that offenders do not forfeit all their rights. As such, punishment must respect at least some of the offender's natural rights. See: A. John Simmons, *The Lockean theory of rights*, Studies in moral, political, and legal philosophy, (Princeton, N.J: Princeton University Press, 1992), 158.

211. Hampton, "Moral Education," 126.

212. Hampton, "Moral Education," 126.

213. See, for eg, Feinberg, "Right to an Open Future," 77.

overview of Queensland's YJS. I then discuss how children's rights-grounding interests are frustrated by the current practice of incarceration, highlighting how this undermines its justifiability and permissibility.

A. Queensland's Youth Justice System

On any given day, 275 young people aged 10 and up are detained in Queensland.²¹⁴ 86% of these detainees are yet to be sentenced and most will spend over 100 days in detention.²¹⁵ The majority of young people are held between two youth detention centres ('YDCs'), where each detainee has a private, secure room containing a bed, toilet, shower, desk, and shelf.²¹⁶ Rooms are organised into units that house 10 or so young people.²¹⁷

While detained, young people follow a set routine or 'structured day' that begins at 7am and ends at 7:30pm.²¹⁸ Outside of the structured day, young people are locked in their cells. During the day young people must attend school and split their remaining time between vocational programs and behavioural support programs. Young people are incentivised to follow these programs and YDC rules through a privilege and buy-up system.²¹⁹ Detainees gain points that can be used to purchase treats and consumables by being 'safe', 'respectful', 'responsible' and 'active'.²²⁰ However, the structured day and programs are often disrupted by the use of 'separation' or lockdowns. Young people can be left locked in their cells during the day for their own safety and centre security.²²¹ Recently, however, staff

214. Child Rights Report, 21.

215. Child Rights Report, 33; Australian Institute of Health and Welfare, *Youth Justice in Australia 2021-22*, JUV 140 (AIHW, Australian Government, 2023), 31; Queensland Department Youth Justice, "Detention Centre Data," (Declaration, 2020). These indicators are all above the national average. See, eg, *Youth Justice in Australia 2021-22*.

216. Routine in detention, Queensland Government updated 22 July 2022, <https://www.qld.gov.au/law/sentencing-prisons-and-probation/young-offenders-and-the-justice-system/youth-detention/daily-life-in-detention/routine>.

217. *Commissioner of Police v Leo Horan (a pseudonym)* [2022] QChCM 2, [13].

218. Routine in detention, Queensland Government.

219. Queensland Department of Youth Justice, *YD-1-2 Youth detention - Behaviour Support*, (Queensland Government, 2023), 2.

220. Youth Behaviour Support Policy, 5.

221. "Understanding separation in youth detention," Queensland Government, updated 24 May 2023. <https://www.qld.gov.au/law/sentencing-prisons-and-probation/young-offenders-and-the-justice-system/youth-detention/about-youth-detention/separation>; Behaviour Support Policy, 6.

shortages have resulted in detainees being locked in their room alone for an average of 21 hours a day.²²² Cases in Queensland's Children's Court reveal the extent and effects of these lockdowns. Complete lockdowns—known as night mode—and unit lockdowns—known as continuous cell occupation—occur when YDCs 'have significant staff shortages'.²²³ Young people might not be able to leave their cells or only do so in rotating groups of four at a time.²²⁴ During such lockdowns, detainees cannot access phones, educational services, or behavioural programs. Magistrates have found that these increasing lockdowns mean that young people are often only attending school, and other programs, once or twice during their time in detention.²²⁵ One detainee at the Cleveland YDC told the ABC 'we never have enough staff to do programs'.²²⁶

While most are detained in YDCs, 'some 50-70 children' aged 10 and up are held in police watchhouses daily throughout Queensland.²²⁷ Most are held in police custody for 2 weeks but there have been reports of young people being detained for 5 weeks. These watchhouses are not designed to accommodate children. There are less staff, no shared 'unit' common areas, recreational facilities, or permanent educational and support programs.²²⁸ Held in watchhouses, young people spend more time alone in their cells than they would at YDCs. Cells are near those holding adults, often have no windows and lack proper bedding or private toilets.²²⁹ The Queensland government's 2023 reforms legalised the holding of children in adult watchhouses, allowing this practice to continue despite criticisms.²³⁰

222. Brooke Fyer, Kristie Wellauer, and Brigid Andersen, "Surviving Outland," *ABC News* 2023, 05/08/2023.

223. *Commissioner of Police v Leo Horan (a pseudonym)*, [12].

224. *Commissioner of Police v Leo Horan (a pseudonym)*, [13].

225. *Commissioner of Police v Leo Horan (a pseudonym); Director of Public Prosecutions v JG* [2023] QChC 3, 7; Ben Smee, "'Like Guantánamo': the children locked in solitary for weeks at a time in Queensland youth prison," *The Guardian* 2023, 6/6/23; Fyer, Wellauer, and Andersen, "Surviving Outland."

226. Fyer, Wellauer, and Andersen, "Surviving Outland."

227. Youth Advocacy Centre, *The use of Queensland watch houses to hold children*, 1 (YAC, 2019), 4. Young people are held in watchhouses when there no available beds in the two permanent YDCs: Child Rights Report.

228. The use of Queensland watch houses to hold children, 5-6.

229. Ben Smee, "'I'll never forget': after 32 days without sunlight in a Queensland watch house, Nick's hair was falling out," *The Guardian* 2023, 27/08/23.

230. *Child Protection (Offender Reporting and Offender Prohibition Order) and Other Legislation Amendment Act*.

B. The Effects of Incarceration

This next section will highlight ways in which this system violates children's rights by frustrating their key interests. Specifically, I argue that Queensland's—and most modern—YJS violate a child's right to carefreeness, connection, and future autonomy. To do so I will primarily rely on the work of Bernstein and Smee who have conducted interviews with young people in the US and Queensland respectively.²³¹ Throughout, I will discuss the implications these potential rights violations have for the justifiability and permissibility of juvenile incarceration.

i. Carefreeness

Incarceration robs young people of a carefree disposition that is both intrinsically and extrinsically valuable in childhood. The practice of juvenile detention is keyed—it seems—to remove comfort. Indeed, it is not only often a violent, 'chaotic' environment,²³² but by its very nature undermines a child's faith in themselves and their future.

Bernstein speaks of young people's fear and anxiety in facilities that ostensibly exist to care for them and their moral growth.²³³ Incarceration is necessarily traumatic, and such trauma is exacerbated by the widespread use of separation and force by staff.²³⁴ Detained young people fear the use of force, but also fear violence from other young people.²³⁵ These fears are not unfounded, especially in Queensland.²³⁶ Indeed, officers used force against young people 2490 times in 2021.²³⁷ 97 assaults occurred in YDCs that same year.²³⁸ The situation is worse in Queensland watchhouses. One young

231. Bernstein, *Burning down the house*; Smee, "'Like Guantánamo'."; Smee, "'I'll never forget'."; Ben Smee, "Violent and vulnerable: Ricky, 14, has been to jail 15 times. In Queensland's youth justice system, he lost hope," *The Guardian* 2023, 07/06/23; Ben Smee, "Strip searches and suicide attempts: the reality for children in Queensland watch houses," *The Guardian* 2023, 26/08/23.

232. Bernstein, *Burning down the house*, 98.

233. Bernstein, *Burning down the house*, 89.

234. Sue Burrell, *Trauma and the Environment of Care in Juvenile Institutions*, (National Child Traumatic Stress Network, University of California, Los Angeles 2013), 5.

235. Bernstein, *Burning down the house*, 89.

236. For the prevalence and emotional effect of abuse in detention more broadly, see: Carly B. Dierkhising, Andrea Lane, and Misaki N. Natsuaki, "Victims Behind Bars: A Preliminary Study of Abuse During Juvenile Incarceration and Post-Release Social and Emotional Functioning," *Psychology, public policy, and law* 20, no. 2 (2014).

237. Child Rights Report, 35.

238. Child Rights Report, 40.

person told Smee that he could hear and see adult detainees, and that they often threatened him with sexual violence.²³⁹ He was so stressed that he couldn't sleep, and his hair started to fall out.²⁴⁰

Studies consistently show the negative effect incarceration has on young people's mental health. Indeed, while young people often enter the system with mental health conditions, they are more likely to report symptoms of mental illness the longer they are detained.²⁴¹ This mental toll leads to high rates of self-harm and attempted suicide in detention. This unfortunately is also apparent in Queensland, with over 164 incidents of young people self-harming in YDCs reported in 2021-22.²⁴²

Negative effects on a young person's mental health tend to persist post-release and into adulthood.²⁴³ One young person told Bernstein that he was worried that 'part of the prison [was] still stuck inside' his head.²⁴⁴ The same detainee who told Smee that his hair fell out said that his time in detention still effects his sleep. He shared, 'I'll never forget what it was like in there... I don't mean to think about it but sometimes it's just there'.²⁴⁵ Another told Smee that it felt like his experiences in incarceration will follow him everywhere.²⁴⁶

One reason why juvenile incarceration might cause lasting mental anguish is that it undermines young people's own beliefs about themselves. If punishment expresses sentiments on behalf of the state,²⁴⁷ juvenile incarceration tends to convey a disheartening one – that young people are getting treated as they deserve, and don't deserve more. Detainees told Bernstein that incarceration changed

239. Smee, "I'll never forget".

240. Smee, "I'll never forget".

241. Stephen Stathis et al., "Use of the Massachusetts Youth Screening Instrument to assess mental health problems in young people within an Australian youth detention centre," *Journal of paediatrics and child health* 44, no. 7-8 (2008): 442; Elizabeth Cauffman, "A Statewide Screening of Mental Health Symptoms Among Juvenile Offenders in Detention," *Journal of the American Academy of Child and Adolescent Psychiatry* 43, no. 4 (2004): 436.

242. Child Rights Report, 38.

243. E. S. Barnert et al., "How Does Incarcerating Young People Affect Their Adult Health Outcomes?," *Pediatrics* 139, no. 2 (Feb 2017).

244. Bernstein, *Burning down the house*, 195.

245. Smee, "I'll never forget".

246. Smee, "Violent and vulnerable".

247. See, for eg, Feinberg, "The Expressive Function of Punishment," 400; Hampton, "Moral Education," 115.

the why they felt about their worth and their future. They spoke of the 'leaching away of hope' and the 'sense of worthlessness... being tossed into a cage...instilled'.²⁴⁸

This prevalent mental anguish and undermining of self-worth impacts the detained child's ability to be carefree. This has both intrinsic and extrinsic importance. Recall that for Gheaus one of the goods of childhood is the ability to dream, explore and experiment freely.²⁴⁹ I argued in chapter 1 that the enjoyment of this good requires a certain level of carefreeness. Indeed, a child cannot meaningfully play, explore, or experiment with their future selves and lives if they are burdened with mental anguish. Nor can they do so if they see their future as a lost cause. For Gheaus, the detained child is robbed of an ability to play and dream that reduces the richness of their childhood and the variety of their life.

However, the effect on a child's disposition has other consequences. Recall that for Ferracioli carefreeness is a necessary precondition for wellbeing in childhood.²⁵⁰ For her, an emotionally unburdened child is more likely to find meaning in, or assign meaning to, projects of objective worth. The detained child is mentally anguished and is therefore, less likely to be able to find meaning in ways required for an objectively good childhood. The frustration of a child's intrinsic and extrinsic interests in carefreeness renders the practice of juvenile incarceration *prima facie* impermissible.

ii. Connection

Beyond this, juvenile incarceration undermines detainee's developmental and intrinsic interests in human connection. Specifically, the detained child is denied conditions necessary for their proper social, emotional, and moral development. However, they are also often practically denied connections to family that constitute an intrinsic good of childhood.

248. Bernstein, *Burning down the house*, 65,155.

249. Gheaus, "Unfinished Adults," 13; Gheaus, "Children's Vulnerability," 69.

250. Ferracioli, "Carefreeness," 112-5.

Social

Halsey and Armitage write that YDCs ‘are primed to deliver socio-emotional detachments to their clients’.²⁵¹ This first section will explore what social detachment might mean for the detained child and their development.

Social detachment is a necessary result of incarceration, with young people being isolated from society and even their fellow detainees. Young people told Bernstein that detention made them feel socially isolated, ‘alone and very far from home’.²⁵² She goes so far to suggest that the detained child experiences ‘social death’ while incarcerated, having been ‘airlifted’ out of and excluded from their communities and ‘hidden away’.²⁵³ Burrell reveals the extent of this social death, detainees being removed from friend groups, school, employment, sporting teams etc.²⁵⁴

Beyond this, however, detainees are physically and emotionally isolated from one another. Recall the high levels of separation in Queensland’s two YDCs. Young people often spend 21 hours or more a day alone in cells where they have limited access to phone calls and only interact with centre staff through intercoms.²⁵⁵ During continuous cell occupation detainees only interact with 3 other young people when out of their cells.²⁵⁶ This situation is considerably worse in watchhouses where young people spend more time in their cells and often don’t interact with other young people at all.²⁵⁷ Bernstein argues that this extensive use of isolation is the ‘natural end point of a juvenile justice system that is predicated from the very start on isolation’.²⁵⁸

However, behavioural programs—like those facilitated in Queensland—also go some way to isolate detainees. Cox suggests that these programs encourage individual responsibility at the expense of relationships between young people. Indeed, detainees are ‘encouraged to do their time “alone” –

251. Halsey and Armitage, "Incarcerating young people," 8.

252. Bernstein, *Burning down the house*, 26.

253. Bernstein, *Burning down the house*, 316.

254. Burrell, *Trauma and the Environment of Care in Juvenile Institutions*, 2.

255. Fyer, Wellauer, and Andersen, "Surviving Outland."

256. *Commissioner of Police v Leo Horan (a pseudonym)*, [12].

257. Smee, "Strip searches and suicide attempts."

258. Bernstein, *Burning down the house*, 129.

through contemplation, introspection, and self-control – rather than with the assistance of others'.²⁵⁹ As a result, silence between young people is enforced and relationships between young people are stifled.²⁶⁰

Such social isolation amounts to a denial of the conditions necessary for proper development. Indeed, development requires interactions and social connections. A child cannot learn to navigate moral and social situations absent interactions. Nor can they form their identity or find their place in society while removed from it. The result is that the detained child leaves incarceration with their social, emotional, and moral growth stunted. Young people made this apparent to Bernstein, telling her that post-release they had difficulties navigating relationships and social interactions.²⁶¹ Some also spoke of their inability to feel secure in society or their identity.²⁶² If children are owed the conditions necessary for their development into morally, socially and emotionally equipped adults, then they have claims to social connections.²⁶³ The detained child is denied these interactions and, in turn, has her right to development frustrated.

If incarceration is justified as a means of facilitating young people's moral education, the frustration of this developmental interest in connection is especially important. Indeed, in removing social interactions from the detained child's life, juvenile incarceration dramatically reduces the prospects of moral development. As one young person told Bernstein, it makes no sense to teach someone how to live in the community by taking them out of it.²⁶⁴ Moral development requires social interactions and practice. In reducing the detained child's potential for moral development, juvenile incarceration undermines its own justification and conditions.

259. Cox, "Fetishizing the will," 306.

260. Cox, "Fetishizing the will," 306.

261. Bernstein, *Burning down the house*, 188.

262. Bernstein, *Burning down the house*, 189.

263. See, for eg, Brighthouse and Swift, *Family Values*, 64.

264. Bernstein, *Burning down the house*, 190.

Emotional

However, this isolation also undermines a young person's interest in connections with family or carers. Ferracioli, Brighthouse & Swift, Macleod and Liao argue that children have a right to familial and parental connections as they allow for affectionate care.²⁶⁵ Such a claim is motivated by the value of such care – affectionate carers role model good behaviour and ensure that one's childhood has meaning.²⁶⁶

Juvenile incarceration reduces the ability for detainees to find these connections or enjoy their benefits. Indeed, the detained child in Queensland has limited access to phone calls during lockdowns and, if detained in a watchhouse, might not be able to consistently receive visits from carers.²⁶⁷ In other words, while incarceration doesn't entirely disrupt relationships of affectionate care, it significantly reduces the positive of these relationships as felt by children. However, incarceration also renders it impossible for young people without such connections to be placed in situations that may lead to the experience of affectionate care. In frustrating her interests in affectionate care, juvenile incarceration violates the detained child's rights and is prima face impermissible.

iii. Future Autonomy

Juvenile incarceration negatively effects a child's ability to enjoy their autonomy in the future, and—as such—violates detainee's right to future autonomy. Incarceration does so in two ways. First, by disrupting detainee's development of proficient autonomous capacities. Second, by closing off future options, or inducing the belief that options are closed off when they are in fact not. Importantly, in practically reducing future autonomy, juvenile incarceration violates a necessary precondition of its justifying aim. Specifically, it fails to morally educate the detained child because it reduces her ability

265. See fn 100.

266. Brighthouse and Swift, *Family Values*, 73; Liao, "Being Loved as a Fundamental Condition for Children," 74-9; Brennan and Macleod, "Fundamentally Incompetent: Homophobia, Religion, and the Right to Parent," 236-7; Ferracioli, "The State's Duty to Ensure Children are Loved," 12; Gheaus, "Children's Vulnerability," 66.

267. The use of Queensland watch houses to hold children, 5.

to choose well *for the right reasons*.²⁶⁸ This final section will account for juvenile incarceration's stifling effect on future autonomy.

Development of (proficient) autonomy

Modern juvenile incarceration, including Queensland's YJS, locks children away and supplements their moral, emotional, and social development with behavioural interventions. Both facets of incarceration negatively effect the detained child's ability to develop proficient autonomous capacities necessary for adulthood. I take each practice in turn now.

The practice of detaining young people removes the possibility for situations that serve as important training for autonomous adulthood. Bernstein makes this loss explicit. In reducing detainee's 'human connection' incarceration ensures they miss 'many if not most of the central developmental tasks of adolescence'.²⁶⁹ Indeed, the detained child cannot practice making 'independent decisions'.²⁷⁰ Nor can she start 'taking on increased responsibility'.²⁷¹ This is exacerbated in Queensland's YJS where young people spend 21 hours a day without interacting with others, or engaging in programs that are meant to prepare them for release.²⁷²

These practise runs—naturally arising outside of detention—are valuable for the development of proficient autonomy – the ability to choose, reason and implement well.²⁷³ Recall that it is this conception of autonomy that is to be protected in adulthood. In turn, a child's right to future autonomy grounds claims to opportunities for the practicing of autonomy and to the gradual increase of responsibility.²⁷⁴ The detained child has no such opportunities. Rather, 'the otherwise gradual transition

268. Hampton, "Moral Education," 116.

269. Bernstein, *Burning down the house*, 35.

270. Bernstein, *Burning down the house*, 35.

271. Bernstein, *Burning down the house*, 35.

272. Fyer, Wellauer, and Andersen, "Surviving Outland."

273. Where well means furthering one's personal and universal interests. See, for eg, Schapiro, "Childhood and Personhood," 580; Brennan, "Children's Choices or Children's Interests," 60.

274. Brennan, "Children's Choices or Children's Interests," 62; Brighthouse, "What Rights (If Any) Do Children Have?," 43.

from dependency to self-sufficiency is undermined by the enforced dependency of prison life'.²⁷⁵ The result is that young people are released 'lacking necessary skills to cope with adult responsibilities'.²⁷⁶ This is especially an issue for young people detained at 15-17 and released on the cusp of autonomous adulthood – that is the majority of detainees in Queensland's YJS.²⁷⁷

Programs that are ostensibly designed to prepare detainees for autonomy, unhelpfully—or even problematically—do so. Specifically, behavioural support programs in youth justice systems like Queensland's shape detainee's 'in ways that damage and can destroy [their] agential capacities'.²⁷⁸ Cox argues that this is a result of these program's primary focus on centre safety, 'compliance with rules and procedures' and 'deference to staff authority'.²⁷⁹ Such a focus is clear in Queensland's behavioural support program. Indeed, the detained child must 'be respectful... safe... responsible [and] active'.²⁸⁰ It seems that this amounts to complete compliance with centre rules and the encouraging of others to do the same.²⁸¹ As such, while young people are encouraged to follow rules, they fail to 'learn how to set rules themselves or cultivate an understanding about' morality.²⁸² Enforcing 'passive compliance... rather than active engagement' behavioural programs fail to prepare detainees for autonomy and adulthood.²⁸³ This conditioning is clear from Bernstein's interview with one released young person who said, 'I don't feel right unless I have someone telling me, "this is the right thing to do", someone watching me'.²⁸⁴ Such conditioning negatively effects the detained child's ability to act autonomously post-release, including into adulthood.

That young people are released from incarceration unequipped for autonomous functioning suggests that the practice fails to achieve its justifying purpose. If youth incarceration is aimed at ensuring children develop into good agents, it is unequivocally failing. This failure goes some way

275. Bernstein, *Burning down the house*, 187.

276. Ashley Nellis, "Addressing the Collateral Consequences of Convictions for Young Offenders," *The Champion* July/August (2011): 20. See also: Bernstein, *Burning down the house*, 187.

277. Queensland Department of Youth Justice, "Detention Centre Data,"

278. Cox, "Fetishizing the will," 302.

279. Cox, "Fetishizing the will," 308.

280. Behaviour Support Policy, 14.

281. Behaviour Support Policy, 14.

282. Cox, "Fetishizing the will," 310.

283. Cox, "Fetishizing the will," 310.

284. Bernstein, *Burning down the house*, 189.

towards explaining the high rates of recidivism and criminalisation that flow from systems like Queensland's. 86.6% of young detainees in Queensland will reoffend within 6 months of release.²⁸⁵ Around half of them will be arrested as adults.²⁸⁶ Reports from officers in Queensland's YDCs suggest that detainees become more violent in detention, even if they were arrested for non-violent offences.²⁸⁷ Statistics globally reaffirm these findings. A landmark study by Huizinga et al, found that those incarcerated as juveniles are more likely to offend as adults than those juveniles with similar offending histories and backgrounds who were not detained.²⁸⁸ Studies have also shown that those incarcerated as juveniles are 38 times more likely to be imprisoned for offences committed as adults.²⁸⁹ Such statistics have led to the conclusion that 'contact with the youth justice system is inherently criminogenic'.²⁹⁰ This is a stark finding given that studies continue to show that most young people will 'age out' of offending naturally.²⁹¹

Future Options

These high levels of recidivism may possibly be explained by the limiting effect juvenile incarceration has on one's practical autonomy.

For Bernstein, youth incarceration represents 'the wholesale sacrifice of a young person's future'.²⁹² We can interpret this claim through a child's right to an open future. Recall that a child's interest in future autonomy grounds claims to the practical conditions necessary for its future

285. Child Rights Report, 27.

286. Halsey and Armitage, "Incarcerating young people," 2; Lynch, Buckman, and Krenske, "Youth Justice: Criminal Trajectories," 2.

287. Fyer, Wellauer, and Andersen, "Surviving Outland."

288. Huizinga et al., *Effect of Juvenile Justice System Processing on Subsequent Delinquent and Criminal Behavior: A Cross-National Study*, 116; Lesley McAra and Susan McVie, "Youth Justice?: The Impact of System Contact on Patterns of Desistance from Offending," *European journal of criminology* 4, no. 3 (2007): 315-8.

289. Uberto Gatti, Richard E. Tremblay, and Frank Vitaro, "Iatrogenic effect of juvenile justice," *Journal of child psychology and psychiatry* 50, no. 8 (2009): 994.

290. McAra and McVie, "Youth Justice?," 318.

291. Andrew Golub, *The termination rate of adult criminal careers*, 90-30 (Carnegie Mellon School of Urban and Public Affairs, 1990), 23; Barry Holman and Jason Ziedenberg, *Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, (Justice Policy Institute, 2013), 7.

292. Bernstein, *Burning down the house*, 10.

enjoyment. Specifically, it demands both that significant life decisions are ‘saved’ for the child upon developing proficient autonomy and that a minimum amount of these options remain open.²⁹³ Absent these conditions one cannot practically enjoy their right to autonomy as an adult.

Bernstein argues that many young people experience ‘post-prison punishment’ – they struggle to return to education and find employment.²⁹⁴ This struggle extends throughout the young person’s life and is represented in global studies. Studies show that in the US, 43% of those receiving education in YDCs will not return to education post-release.²⁹⁵ Of those detained at 15, only 15% will make it through high school.²⁹⁶ Huizinga et al found that the incarceration of a young person increases the chances of unemployment in adulthood and reduces the chances of having a ‘stable or skilled job’.²⁹⁷ Burrell suggests that the detained child also has difficulty receiving welfare, immigrating, or even holding a driver’s licenses.²⁹⁸ I argued in chapter 1 that such closed-off options reduce adult’s ability to practically enjoy their autonomy.²⁹⁹ The detained child—and their future self—experience such a closing off as a result of their incarceration. This closing off may explain why some young people go on to reoffend during adulthood.³⁰⁰

However, the detained child might also perceive certain options as closed when they are in fact not. The emotional hardship and the necessary isolation of incarceration compound here, such that future options appear slim to the released young person. Bernstein writes that ‘incarceration undermines a juvenile’s faith in their own potential’, ‘damaging... spirits in ways that are difficult to repair’.³⁰¹ One young person told her that while incarcerated ‘the side of him that aspired to something better...

293. Feinberg, "Right to an Open Future," 82.

294. Bernstein, *Burning down the house*, 185.

295. Linda A. LeBlanc and Judy C. Pfannenstiel, *Unlocking Learning: Chapter 1 in Correctional Facilities* (US Department of Education 1991), x.

296. R. Balfanz et al., "High-poverty secondary schools and the juvenile justice system: how neither helps the other and how that could change," *New Dir Youth Dev*, no. 99 (Fall 2003): 72; Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities, 9.

297. Huizinga et al., *Effect of Juvenile Justice System Processing on Subsequent Delinquent and Criminal Behavior: A Cross-National Study*, 134.

298. Sue Burrell, "Collateral Consequences of Juvenile Court: Boulders on the Road to Good Outcomes," in *A New Juvenile Justice System*, ed. Nancy Dowd (New York, USA: New York University Press, 2020), 334.

299. See, for eg, Feinberg, "Right to an Open Future," 82.

300. Studies consistently demonstrate that a lack of education and employment dramatically increases the likelihood of reoffending. See, for eg, Bruce Chapman, "Unemployment duration, schooling and property crime," *Crime and justice bulletin*, no. 74 (2002).

301. Bernstein, *Burning down the house*, 9, 194.

withered'.³⁰² Another told her that post-release, he 'felt kind of helpless'.³⁰³ One told Smee 'that he knew no matter what he did, that he couldn't escape' his future.³⁰⁴ Such young people, unable to find jobs or finish their education, conditioned by incarceration to see themselves as worthless 'monsters',³⁰⁵ removed from the community and emotionally damaged by isolation, see rearrest as inevitable.

A clear harm is suffered by the detained child and their future self, here, the amount of options open to them reduced such that their interest in future autonomy is thwarted, their right to self-government frustrated before they have a chance to make good—or better—decisions about their lives. Importantly, however, such a restriction of future options radically reduces the likelihood of rehabilitation and dramatically increases the likelihood of re-entry into the justice system as adults.³⁰⁶ Indeed, unable to find employment, uneducated and unhopeful, the detained child's future seems destined to set them up for failure. This frustration of future chances—and future autonomy—suggests that juvenile incarceration fails to achieve its justifying aim of moral education. The detained child cannot choose well and is actually encouraged by their situation to not do so.³⁰⁷

If we are to justify juvenile incarceration as a means of moral education, the frustration of the detained child's interests in carefreeness, connection and future autonomy presents a fundamental challenge. Indeed, the current practice of juvenile incarceration thwarts interests that are vital for a child's moral development. In doing so, the practice undermines its own justification and renders itself unjustifiable. Beyond this, however, by frustrating the detained child's interests in carefreeness and connection—by violating her rights to the enjoyment of her childhood—without corresponding benefit to her moral development, the practice is *prima facie* impermissible.

302. Bernstein, *Burning down the house*, 90.

303. Bernstein, *Burning down the house*, 175.

304. Smee, "Violent and vulnerable."

305. Bernstein, *Burning down the house*, 117.

306. Burrell, "Collateral Consequences," 345; Huizinga et al., *Effect of Juvenile Justice System Processing on Subsequent Delinquent and Criminal Behavior: A Cross-National Study*, 116.

307. Bernstein, *Burning down the house*, 193.

V.

In sum, I have argued that children have rights borne from their fundamental interests, that these interests—at least in part—justify juvenile detention and shape its permissibility, and that the current practice of juvenile detention that Queensland’s YJS is representative of violates some such interests. Specifically, I have claimed that current systems of juvenile incarceration frustrate the detained child’s interests in carefreeness, connection, and future autonomy. As a result, these systems undermine their own justification—the moral education of young people—and are *prima facie* impermissible.

Importantly, this thesis has not addressed what youth justice *should* look like. This is an important—and difficult—topic for further research. However, it seems to me that if we are to properly respect children’s interests in their childhood and their future, and if we are to facilitate moral development, the use of isolation in youth justice systems must radically change. Young people’s wrongs must be addressed within the community—and within conditions that allow them to enjoy their rights to carefreeness, connection, and future autonomy—not outside of it. Only then will juvenile incarceration be justifiable and permissible.

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