The Moral Status of Children: Children’s Rights, Parents’ Rights, and Family Justice

Introduction

Mainstream ethical philosophy has had little to say about issues of family justice.\(^1\) Even feminist moral theories often focus more on questions of justice for families than on questions of justice within them.\(^2\) In contrast, there is a large body of literature on children’s rights in sociology and legal theory. But little of this theorizing rests on a foundation in moral philosophy any stronger than a vague appeal to the notion of the best interests of the child.

This paper is an attempt to provide a philosophical foundation for thinking about the moral status of children. It is driven by what we think are widespread convictions about how we ought to treat children—convictions that we share.\(^3\) In part, we hope to develop a theory that accords with and justifies our moral convictions and the public policies we favor. However, we intend to do more than merely clarify our own intuitions. Not only will we begin to construct philosophical foundations for the approach to children’s issues that we advocate, but we will also stake out various possible ways of arguing for those foundations. In addition, we will begin to apply the philosophical theory that we develop to moral and public policy issues about parenting, adoption, and foster care.

The paper, then, has three parts. In the first, we propose several plausible claims that place constraints on theorizing about the moral status of children. We think that these claims constitute an attractive commonsense understanding of children’s moral status. However, the three claims appear to be inconsistent. And if the three claims do capture a commonsense picture of the moral status of children, then that picture would seem to be inconsistent as well. In the second part of the paper, we offer a rights-based theory of the moral status of children that, we claim, both meets the

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constraints that define the commonsense position and resolves its internal conflicts. Finally, we discuss what our theory implies about the moral nature of parenting and about how public policies dealing with children ought to be reformed.

1. The Commonsense Understanding of Children’s Moral Status

a. Three commonsense claims about the moral status of children

We think that any acceptable theory of the moral status of children must be compatible with three claims: that children deserve the same moral consideration as adults, that they can nevertheless be treated differently from adults, and that parents have limited authority to direct their upbringing. These claims embody a position that we think is quite plausible and attractive. In fact, they define a position that seems to be the subject of a large and growing consensus about the moral status of children in contemporary liberal democracies. Though this consensus is of some evidential value in itself, there are independent considerations to support the three claims. While they do not conclusively prove that the claims are true, they do show that the claims are very plausible. Indeed, the considerations we will discuss seem sufficient to shift the burden of proof onto those who would reject the three claims.

But while each claim seems independently plausible, the set seems prima facie inconsistent. This apparent inconsistency is evidence of certain tensions in our commonsense thinking about children. The philosophical challenge here is to develop a theory that embodies and makes sense of all three claims in a way that resolves the tensions between them.

The first claim is simply that the moral status of children is on a par with that of adults. Call it the Equal Consideration Thesis.

*The Equal Consideration Thesis*: Children are entitled to the same moral consideration as adults.
Notice that this thesis demands moral consideration for children that is equal to that of adults. This means that children are to be taken seriously as moral agents, and that their moral claims are not to be discounted merely because they are children. As we will argue later, this thesis does not necessarily imply that children always have exactly the same duties and rights as adults. It seems to us that two people can receive equal moral consideration without having exactly the same package of moral rights and duties. But the Equal Consideration Thesis does mean that the moral status of children does not depend merely on their age. The mere fact that they are children does not give them an inferior moral status.

The basis for the Equal Consideration Thesis is the fact that children are persons. Because they are persons, they are entitled to the same moral consideration to which anyone is entitled merely in virtue of being a person. In other words, a certain moral status attaches generally to all persons, including children. To deny this would be to claim either that persons do not derive moral status from their status as persons, or that children are not persons. Because neither of these claims is particularly plausible, it does not seem plausible to deny the Equal Consideration Thesis.

The second thesis that makes up the commonsense view of the moral status of children concerns the legitimacy of treating children differently from adults. Call this the Unequal Treatment Thesis.

The Unequal Treatment Thesis: Children—at least at certain ages—can be legitimately prevented from doing certain things that it would be illegitimate to prevent adults from doing.

Most of us accept this thesis. Well-known and plausible examples of things we allow adults but not children to do are voting, driving cars, owning firearms, signing contracts, and drinking alcohol. The Unequal Treatment Thesis is so widely held and so central to most people’s understanding of the moral status of children that it would be difficult to accept a theory that denied it.

Other considerations besides the appeal to intuition and current practice support the Unequal Treatment Thesis. One is public
policy. No matter what we decide about children’s moral status, as a practical matter, few of us are ready to endorse letting children—especially young children—vote, sign important contracts, or have unrestricted access to firearms, alcohol, tobacco, automobiles, and so on. While it is probably an overstatement to say that this would lead to utter chaos, we do take it to be an empirical fact that the results of such a radical shift in public policy would be pretty undesirable both for the children and for adults. Thus there seem to be strong practical reasons for favoring the Unequal Treatment Thesis.

The Unequal Treatment Thesis also seems plausible on contractarian grounds. Most of us are glad that our parents did not hand us a shotgun, a six-pack, and the keys to the car on our sixth birthday. The Unequal Treatment Thesis seems plausible partly because grown children would recognize that they themselves needed to have their actions restricted when they were young children. Most of us would give a sort of "retroactive consent" to having had various sorts of restrictions placed on us when we were children—even if we did not agree with them at the time.5

The third commonsense thesis concerns the legitimacy of the role parents play in raising children. We’ll call it the Limited Parental Rights Thesis.

*The Limited Parental Rights Thesis:* Parents can legitimately exercise limited but significant discretion in raising children.

It is difficult to see how one could deny this thesis. Children are immature in a number of ways. Their limited cognitive powers and experience make them prone to mistakes in judging their own interests and how to further them. The healthy mental, physical, and emotional development of children seems to require that someone have the responsibility to nurture and protect the child, and the authority to exercise her own judgment in doing so on a day-to-day basis. Given that someone must do these things, and that children are often too immature to do so, it seems natural to assign parents the right to do so. For this reason, parents are typically thought to be free to make choices for their children that range from seemingly trivial ones like how to dress their children,
to very serious ones like how to discipline them, and how and where they should be educated.

b. Are the three claims consistent?

The Equal Consideration Thesis, the Unequal Treatment Thesis and the Limited Parental Rights Thesis capture what seems to be the common sense position about the moral status of children. This commonsense position contrasts with extreme views that deny one or more of the claims. It contrasts on one side with the children-as-property view that denies the Equal Consideration Thesis and takes children, especially young ones, to be owned by their parents. On the other side, the position staked out by the three claims contrasts with the extreme child libertarian view that regards children as having exactly the same package of rights and freedoms as adults. That view denies the Unequal Treatment Thesis and the Limited Parental Rights Thesis. It claims that parents have no rights qua parents and that children should be treated in exactly the same way as adults. Our position treads the middle ground between these two extremes.

The philosophical challenge is to see whether there is any middle ground here to tread. For the Equal Consideration Thesis seems to conflict with the Unequal Treatment Thesis and the Limited Parental Rights Thesis. It is puzzling how unequal treatment and even very limited parental rights could be consistent with a thoroughgoing acceptance of the claim that children have the same moral status as other persons.

2. Reconciling the Three Claims

a. Is the Equal Consideration Thesis compatible with the Unequal Treatment Thesis?

Much of the moral status a person has comes simply from the fact that she is a person. Since children are persons, they have this same basic moral status. This moral status is an important source of rights (often called "human rights"). Whatever rights adults have
simply in virtue of being persons, those same rights belong to children as well. We won’t try to give and defend a list of human rights here, but we take them to include the rights to life, liberty, property, and freedom from deliberate harm.

The question, then, is whether giving equal moral consideration in the form of recognizing the basic human rights of children precludes treating children and adults differently. Notice that we said above that *much* of a person’s moral status derives directly from her status as a person. But personhood is not the only source of moral status. A person’s moral rights and duties typically depend on many other things in addition to her status as a person. Roles, for example, often confer moral status. A doctor or a lawyer, for instance, has duties in virtue of her role over and above those that she has merely in virtue of being a person. Roles also sometimes confer rights: one’s role as a student confers certain rights against her teachers, for instance. Promises are another obvious source of moral status: the promisor has duties and the promisee has rights that neither has merely in virtue of their status as persons. The fact that I may have such a right and you don’t is not evidence of my superior innate moral status, but rather is a result of other facts, namely the fact that the promise was made to me and not to you. Similarly, property produces a complex network of rights and duties that result not merely from anyone’s status as a person. Need and differences in political power also would seem to affect one’s moral status: those who are in need or oppressed would seem to have a moral claim on us that others do not.

It appears, then, that granting equal moral consideration does not imply that each person has the same package of rights and duties. Rather, to accord someone equal moral consideration is to do two things. First, it is to respect the moral status she has merely in virtue of being a person. Second, it is to be willing to consider any other moral claims she might make due to other factors that affect her moral status. So whether unequal *treatment* is consistent with equal moral *consideration* will depend on the nature of the differential treatment at issue. That is, equal moral consideration is compatible with some sorts of inequalities in treatment but not others. It requires the recognition of the basic moral status each
person has, but does not require equal treatment in every way. For this reason, we claim that the Unequal Treatment Thesis is compatible with the Equal Consideration Thesis. Children can have a total package of rights and duties that differs from that of an adult; yet this is compatible with children having the same moral status, and thus the same basic rights, as any other persons.

This point is crucial, and so it is worth elaborating. The reason that unequal treatment is consistent with equal consideration lies in an important difference between two kinds of rights. On the one hand, there are basic rights (often called "human rights") that everyone has; they attach to persons simply in virtue of their being persons. The rights not to be harmed or killed fall into this category. On the other hand, some rights are constructed from basic moral rights plus other factors. They depend in part on facts about the persons who bear them, facts about the relationships of which they are a part, facts about previous commitments they have made, and facts about the societies in which they live. Often these constructed rights are attached to roles. Doctors, for example, have the right to prescribe medications, lawyers have the right to partake in certain legal proceedings, teachers have the right to conduct classes, judges have the right to rule on cases, referees have the right to make binding decisions, and so on. A person can have a role-dependent right only if she can fill the role in question. When rights depend on roles, if you can’t play the role, then you don’t get the right. So whether one has a role-dependent right is partly a function of the capacities and abilities of the person to play the role associated with that right. Many political rights derive partly from certain roles one has, such as the role of citizen, or voter, or automobile operator. If a person does not fulfill the qualifications necessary for the role with which these rights are associated, then she need not be accorded those rights. Thus the relative lack of maturity of children counts against their having certain role-dependent rights; since they are not mature enough to play those roles, they cannot have the rights attached to them. And this is the reason that they can be denied the right to drive, to vote, and so forth. But it is a mistake to conclude from their lack of these constructed, role-dependent rights that they are not being given equal moral consideration.
Consider the right to drive an automobile. This right derives from and protects a certain way of exercising a basic right to freedom of movement. It depends on more than just one's status as a person. It is also dependent on a person's occupying a certain role, what we might call the role of "driver." Like other roles, the role of driver is a complex of rights and duties. And like other roles (such as those of doctor and lawyer and teacher), it requires certain qualifications consisting of skill, judgment, training, and so on. Because children lack these qualifications, they can be legitimately denied the rights associated with this role. We do not deny this right to children simply because they are children, but because they lack the relevant abilities. But to deny children the right to drive automobiles is not to deny them the basic human rights due to them in virtue of their status as persons. Indeed, we deny the right to drive to anyone—regardless of age—who lacks the abilities associated with the role to which the right to drive is attached.

b. Is the Equal Consideration Thesis compatible with the Limited Parental Rights Thesis?

i. The nature of parental rights

How can we reconcile equal treatment of children with the parental right to make decisions for them? An answer to this question will depend on the nature of and the basis for parental rights. In this section we will sketch the formal nature of parental rights. In the next, we will offer a theory about the basis of parental rights.

We claim that the Limited Parental Rights Thesis is best interpreted as the claim that parental rights are rights with thresholds. A right with a threshold is a right that can be permissibly infringed, that is overridden, when at least one of two conditions is met. First, a right may be overridden when it conflicts with a stronger right. For example, if my car will either run over Susan's foot or Fred's entire body, then Susan's right not to be harmed in this way gives out in the face of Fred's stronger claim. Second, a right may be overridden if doing so will bring about a large enough benefit to others. Consider a common property right
to the ownership of one’s car. While in general we take this right seriously, there are conditions under which the right may be permissibly infringed. Suppose that the car was needed to transport a dying person to the hospital, or that the police required it to apprehend a felon who presents a clear and grave danger to the community. Most people think it is permissible for the right to be infringed and the car used—even without the consent of the owner—to transport the dying person or apprehend the criminal. One natural kind of account of what has happened to the property right in such cases is that it has been overridden by what is at stake for others.

Both of the conditions for overriding a right are often satisfied in interactions between parents and children, when parental rights conflict with children’s rights and children’s needs. An application of the first overriding condition to the realm of parental rights is the commonsense judgment that a parent’s right to make choices involving the child generally gives out at the point at which the child’s right not be harmed is violated. The alternative to claiming that parental rights have thresholds after which they give out would be to posit parental rights so strong that they could not be overridden by the child’s right not to be harmed. This seems equivalent to granting parents a property right in the child.

The second overriding condition is often satisfied when the child’s needs are not being met. These unmet needs sometimes will justify overriding a parental rights claim. We won’t give a full account of exactly when a child’s unmet needs will justify the infringement of a parental right, but some preliminary remarks are certainly in order. First, the fact that parents do have rights means that so long as the child is not being harmed, parental rights are generally not to be infringed merely to provide some marginal benefit for the child. This is one value of describing the situation in terms of parental rights rather than in terms of competing interests. Thus, for example, if a set of parents is doing an adequate job of nurturing their child, then one cannot justify terminating their parental rights simply because some other set of parents has more money to clothe and educate the first parents’ child.
Second, the rights of parents may be overridden if the parents are not meeting the child’s needs, or if they are violating the child’s rights (or allowing others to do so). For example, parents might lose their parental rights if the child is severely neglected or abused. But so long as the parents are not harming their child—either directly, as in the case of outright abuse, or indirectly, as in the case of neglect—their rights cannot justifiably be infringed.

An interesting third application of the overriding conditions is one we will mention for the sake of completeness but not discuss in any detail here. Some might think that parental rights can be overridden by potential substantial benefit to people other than the parents or the children involved. One might think that the interests others have in how we raise our children count towards overriding parental rights. Jan Narveson argues that parental rights are limited in just this way. He claims that children do not have rights since, on his view, all rights are contract-based and children cannot engage in contracts. According to Narveson, parents have property rights in their children. Narveson thinks that these property rights are limited, though, because of the effects that children can have on people besides their parents. Writes Narveson:

In view of humans’ enormous potential for third-party effects, there is certainly a large public interest factor in the construction of these rights. We can reasonably restrict what parents may do in light of this potential.

Narveson is forced to the position that other adults’ interests in our children limit our rights because he believes both that we cannot do whatever we want to our children—for example, we may not kill them—and that children do not have the right sort of status (as rational contractors) that would allow their rights or needs to override parental rights. Of course we disagree sharply with Narveson’s claim that children are the property of parents. It is interesting, though, that even a libertarian such as Narveson accepts limits on the rights of parents.

In summary, we claim that parents do have rights, but because those rights have thresholds, they can be infringed if this is necessary for preserving the rights of the child or for making sure that her needs are met. If the parents fail to meet their child’s needs
at all, then even if they do not actively harm the child, their parental rights can be overridden. Viewing parental rights as rights with thresholds is part of the explanation of how parental rights can exist even though we grant equal moral consideration to children. The rest of the explanation will depend on claims about the basis for parental rights.

ii. The basis for parental rights

Our view of the basis for parental rights can be seen as a development of John Locke's claim that parental rights are based neither on parental ownership of children nor on the rational consent of children to be governed by their parents. According to Locke, parental power is "that which parents have over their children, to govern them for the child's good."\textsuperscript{11} Locke argues that parents must govern children until children develop the use of reason and come to be able to govern themselves. Yet, there is an important difference between our view and Locke's. While we share with Locke the belief that the basis of parental rights is the parents' responsibility for the welfare of children—as Locke puts it, "for the help, instruction, and preservation of their offspring"\textsuperscript{12}—we also believe that children's rights also impose limits on the rights of parents.\textsuperscript{13}

If parental rights were something like property rights over the child, then reconciling equal consideration with parental rights would be difficult, if not impossible. Counting a person as the property of another person is clearly inconsistent with granting her equal moral consideration. Of course, we claim that parental rights are nothing like property rights. Instead, they derive from the fact that children are often incapable of effectively exercising their rights and making rational decisions about their interests.

Parental rights are necessary to allow the parents the freedom to effectively protect and nurture children. Parental rights, then, are what we will call "stewardship rights." A stewardship right is a right someone has in virtue of being the steward—as opposed to an owner—of someone or something. This conception of parental rights explains both why children's rights take priority over most other considerations and why parents still have much freedom to
raise their children. In this way, it reconciles the Limited Parental Rights Thesis with the Equal Consideration Thesis.

The stewardship conception of parental rights gives the parent a complex moral status. That status involves two main factors. The most important is the rights of the children themselves, together with the fact that children are typically incapable of fully exercising and protecting these rights. Children need help in asserting their rights, and it is the role of the parent-as-steward to give them this help. A second factor from which the moral status of parents derives is the needs of the child. These needs are many—a need to be nurtured, a need to be educated, a need to be fed, and the need to develop the capacities to satisfy her own needs and exercise her own rights, to mention just a few. Because children are not yet mature, they often do not possess the capabilities necessary to effectively satisfy all of their own needs. The role of the parent is to both see that these needs are met, and to help the child develop the capabilities for satisfying her own needs in the future.

An important implication of this way of thinking about the moral status of parents is that, morally speaking, parenthood is not primarily a biological relation. Rather, it is a relation of care, advocacy, and protection. Now in most cases, the person best suited and most motivated to take on this role of care-giver, advocate, and protector will in fact be the biological parent. But it is not biology that makes someone a parent, rather, it is the fulfilling of a complex and demanding role in the life of a child. Stewards typically take on their duties voluntarily, and ideally the role of parent-as-steward will also be undertaken voluntarily. In cultures where contraception, abortion, and adoption are all genuine options, the role of parent often is in fact undertaken voluntarily. But just as the parent-as-steward model implies that children are not property of their parents, it also suggests that adults should have a choice as to whether to become parents.

The role of parent-as-steward gives the parent a set of duties toward the child. These duties are threefold. First, there is the duty not to violate the rights of the child. Second, there is the duty to prevent others from violating the rights of the child. Third, there is the duty to promote the interests of the child. While the first
and second duties are, in the Kantian sense, more or less perfect duties, the third is and must be an imperfect duty. Thus the parent has a great deal of leeway in deciding how to promote the interests of the child, and to a large extent it is up to her to decide what fulfilling this duty will amount to. It is difficult to see how it could be otherwise.

Because the duty to advance the interests of the child is an imperfect duty, it gives the parent the right to exercise considerable discretion in raising children. In other words, the fact that she has this imperfect duty to advance the child’s interest means that she has the right to exercise her own judgment in carrying it out. But—and this is crucial—the rights of the parent to make decisions for the child are only rights to exercise discretion in fulfilling the duty to promote the interests of the child. Thus on this stewardship conception of parenthood, parental rights only extend to deciding how to promote the child’s interests. They do not constitute anything like property rights over the child. And they exist only insofar as the parent is indeed promoting the interests of the child.

The stewardship conception of parental rights allows us to posit parental rights—and thus keep the state from meddling too much in family affairs—without treating the child as property of the parent. In this way, we can explain why parents have the right to exercise considerable discretion in raising their children without owning them. That is, it explains both the fact that parents have the right to exercise considerable discretion in limiting the freedom of their children, and the fact that the parents’ rights to do so do not outweigh the basic rights of their children. It explains, in effect, why parental rights have the thresholds that they do.

So it appears that by distinguishing basic rights to which all persons are entitled from constructed rights that depend on factors besides one’s status as a person, and by thinking of parental rights as stewardship rights and thus as right with thresholds, we can reconcile the three claims that make up the commonsense position with regard to the moral status of children.
c. Rights, conflict, and the moral nature of parenting

Some will claim that conceptualizing the parent-child relationship in terms of rights introduces an element of conflict between parents and children. While this line of thought is implicit in the anti-rights position of many feminists, it has been most explicitly developed by Ferdinand Schoeman. While Schoeman does not deny that children have rights, he does think that "talk about rights of children . . . may encourage people to think that the proper relationship between themselves and their children is the abstract one that the language of rights is forged to suit." He worries that talk of children's rights "might foster thinking about the relationship between parent and child as quasi-contractual, limited, and directed toward the promotion of an abstract public good."

Schoeman's worries about the "dangers" of talking about the rights of children are based on two main claims. First, he notes that "via intimate relationships, one transcends abstract and rather impersonal associations with others and enters personal and meaningful relationships and unions." These relationships, he continues, are so important that "not only are [they] central to defining who one is, but human existence would have little or no meaning if cut off from . . . such relationships." Second, Schoeman claims that according rights is detrimental to relationships because rights emphasize the separateness of persons while relationships emphasize the union of persons: "the language of rights typically helps us to sharpen our appreciation of the moral boundaries that separate people, emphasizing the appropriateness of seeing other persons as independent and autonomous agents." He also thinks that talk of rights introduces the "the prospect of state intervention into a relationship" that "depresses the sense of security of the relationship" and "makes people hesitant to see their interests fused with those of another."

We do not deny that deep, committed, personal relationships are constitutive of a full, meaningful life. Nor do we deny that according rights to children makes the family a more public institution by introducing the possibility that society might intervene on behalf of those whose rights are violated. But unlike Schoeman, we think that this is an advantage of rights—they often
make claims on all of us that we can ignore only at our moral peril; they move children into the public realm, so to speak, so that they are not at the mercy of parents. Our most central disagreement with the anti-rights position of Schoeman and others is over the claim that talk of rights is somehow incompatible with deep personal relationships. While this topic is too large to deal with fully here, a couple of points are in order.

Rights and relationships both enshrine and respect the same thing: the unique value of persons. Because rights and relationships share this goal, recognizing rights is perfectly compatible with being in a relationship. For genuine relationships with others exist partly on the basis of respect for the other as a person, and so they already involve the same attitude toward persons that rights embody. Certainly relationships involve more than just respect, but they do involve respect. Someone who fails to respect another as a person can only engage in pathological relationships with her. According someone rights and engaging in a genuine relationship both involve (but are not exhausted by) respect for the other.\(^\text{19}\) So in good relationships, people will respect each others’ rights as a matter of course, with no need to become obsessed with "legalistic" thinking that emphasizes distinctions between persons at the expense of relationships.

Yet it is often difficult to tell from the outside what sort of relationship (if any) is in place. It is typically much easier to tell whether rights are being violated. So while we certainly favor strong and healthy relationships between parents and children, we do not think that this is incompatible with talking about rights. Indeed, we think rights are necessary in part because we need a way to tell whether a relationship is healthy or not. Rights are one tool for doing this: a pattern of systematic rights-violation by one partner in the relationship is certainly a sign that the relationship is pathological. (And surely those who extol the virtues of relationships do not want to defend relationships of that sort.)

Because children have the same moral status as other persons, we are morally obligated to take their rights seriously. In addition to basic rights, children have various needs, and these needs create (imperfect) duties for parents. One kind of injustice to children occurs when parents ignore children’s rights in an effort to fulfill
their duties to provide for the children's well-being. Of course, the
two kinds of duties will sometimes be in conflict, and part of the
role of parents as stewards is to strike some sort of balance between
them, or as a last resort, to subordinate one to the other. Since the
perfect duty to respect rights is always more stringent than the
imperfect duty to promote interests, there will in general have to
be a lot of utility at stake for the child—or perhaps her future ability
to exercise her rights—before the child's rights should be
infringed. But since children's rights do have thresholds, there will
be cases where this is permissible. 20

But even in cases where the rights of the child must be infringed,
the parent must not do so by completely ignoring the rights that
get subordinated. This is part of what it is to take a right seriously:
that in cases where a right must be infringed or limited, one should
try to infringe or limit it as little as possible. Thus the moral nature
of parenting is in large part a balancing of the duty to nurture with
the duty to respect the rights of the child. And taking her job
seriously requires that the parent minimize—both in number and
in scope—whatever infringements or limitations are necessary,
and that she look for other ways for the child to exercise
meaningfully whatever rights must be infringed or limited.

This task is particularly difficult when the need for nurturing
collides with the basic right of self-determination. The right to
self-determination is not, of course, the right simply to follow any
whim that arises. Rather, it is something like a right to choose a
life-plan and to control how it is implemented. The eight-year-old
deciding she wants to be a firefighter is not choosing a life plan,
though she is learning some of the skills she will need to do so
later on. So while her choice need not be accorded the same status
as that same choice when she is twenty-three, it is not to be
completely dismissed either. Creative compromises can enable
parents to respect the rights of children even when some specific
ercise of them must be overruled. Thus a parent ought not to
give in to her eight-year-old child's demand that she be excused
from math class on the grounds that she wants to be a firefighter
when she grows up. Yet the right to self-determination plus the
right to nurturing together create a duty to the parent to educate
the child in what it takes to choose and implement a lifeplan. Part
of that education no doubt involves playing games of "what do I want to be when I grow up." One way a parent can respect the aspiring firefighter's right to self-determination, while still overruling the decision to forgo math classes, would be to encourage her to explore what it is to be a firefighter while still requiring the math classes. Thus the parent might require her to do her math but also take her to visit fire stations and talk with firefighters. Of course, when a child begins to exhibit a stable preference for a certain life-plan, it may be the sign that the child is now beginning to make a more earnest decision, and that the "real" life-choice might well end up being for this very form of life, or one closely related to it. When this occurs, the choice will, of course, need to be granted a higher status than before.

This is but one example of how parenting involves the duty to balance the rights and interests of the child, and how those rights and interests might be balanced creatively. Our point is twofold. First, the rights of the child are not mere prima facie rights. Even if some of them must be overridden in a particular case, they do not vanish completely. The moral nature of parenting involves more than simply deciding whether the need for nurturing should take precedence over a right in a given situation. It also involves seeing to it that any rights subordinated are still respected as much as possible. Second, the parent is uniquely placed to do this sort of balancing, both because she knows the child—and thus is able to devise the sort of creative solutions such dilemmas require—and because she identifies with her—and thus can take an interest in making sure that all of the child's rights are respected, even when certain exercises of some of them must be disallowed. Presumably in cases like this, where much of the right is left intact, the threshold is lower. That is, if the parent can find a way to only partially infringe a right—by some creative compromise of the sort mentioned above—then she may do so in conditions in which a more extreme infringement of the right would be impermissible. Thus for the parent who respects the spirit of the basic rights of the child, and who is willing to infringe them only when necessary and only to the degree necessary, the rights of the child will generally not interfere with the effective nurturing of the child.
3. Public Policy Implications

Conceiving of parental rights as stewardship rights limited by children’s own rights has important and interesting implications for public policy. One advantage of this conception of family rights is that it does a better job than its rivals of justifying the sort of public policy that seems desirable.

There are two principle rivals to the rights-based approach to public policy that we favor. The first, which is official public policy in the United States and Canada, is the so-called "Best Interest Test." The best interest test is a consequentialist standard that looks to the child’s future for guidance in matters of custody and care. The first thing worth noting about the standard is that it requires that we maximize the child’s future well-being. (After all, it is the best interest test and not the good enough interest test we are discussing.) The difficulties that we believe beset the best interest test are not unique; they follow directly from the consequentialist nature of the test. First, it requires that judges have a standard of well-being by which to assess children’s interests. As a policy the best interest guides judges by requiring that they decide what is in children’s best interest, but it leaves open to interpretation what is in a child’s interest. While judges will most often make it their practice to ask children what the children would like to see happen, the best interest test does not require this. Thus, the best interest test does not guarantee the recognition of children’s rights.

Second, the maximizing nature of the test makes more intervention in the lives of families likely. That the best interest test is not used more often to justify intervention suggests that judges have other standards on which to base their decisions. In considering only the child’s best interest, the test would license the removal of children from homes where doing so would only produce a small net gain for the child. No consideration is given to any claim parents might have to their children. Thus, the best interest test is not compatible with a recognition of even limited parental rights.

The second rival to the rights-based approach to public policy is the Clear and Present Danger Standard, which has been
suggested as a replacement for the Best Interest Test. This approach emphasizes the autonomy of the family unit and seeks to insulate it from state interference. In one version, the state would only be allowed to intervene if "serious physical or emotional harm to the child is imminent and the intervention is likely to be less detrimental than the status quo." If one of the problems with the Best Interest Test was its potential to justify too much state intervention, then the problem with the Clear and Present Danger Standard is that it justifies too little. Not only does this standard prohibit the state from taking custody of children to secure minor benefits—a prohibition most of us would endorse—but it also rules out more limited interventions in less than critical cases. Indeed, the Clear and Present Danger Standard allows society to intervene only when the situation has gotten far enough out of hand that tragedy is imminent. It seems far better for society to intervene earlier, while there is time to help salvage the relationship between parent and child. Earlier intervention is likely to offer the possibility of less drastic action that can keep families together and prevent family situations from getting bad enough for the Clear and Present Danger Standard to come into play. By waiting until that standard comes into play, we make it far more likely that we will need to break up families and reassign custody. By intervening earlier, it is likely that in many cases this will not be necessary. And this seems to be a huge advantage for anyone who truly values families. In any case, it seems imperative for anyone who values children as persons to advocate a public policy that intervenes when the child’s rights are being violated, even if these violations are not enough to constitute clear and present danger.

It seems, then, that the rights-based approach does a better job than either the Best Interest Test or the Clear and Present Danger Standard at respecting the value children have as persons. In what follows, we will spell out some more specific policy recommendations that would follow from adopting the kind of rights-based approach we favor.

As we noted earlier, most American states and Canadian provinces claim a commitment to promoting the best interests of children. The Best Interest Test is used for determining whether
to remove children from their families and for determining in whose care they are to be placed. But despite this official commitment to the Best Interest Test, the present system often continues to treat parental rights as though they were absolute property rights. For instance, many states and provinces have policies that place first priority on keeping biological families together. The justification for this policy is supposed to be a concern for the child’s best interests. The argument is that it is almost always in the child’s best interest to stay with their biological family rather than be placed in the foster care system or put up for adoption. Though the empirical details here are not within the scope of this paper, it seems highly unlikely that the "biological families first" principle always promotes the interests (not to mention the rights) of children. Consider the large numbers of children who spend much of their childhood in and out of foster care. Given that it is relatively easy to find adoptive homes for younger children but more difficult as children get older, it seems that concern for the child’s rights and needs ought to favor severing parental rights earlier rather than later, if it seems likely that the family situation will not improve. Now either we are wrong about what is in fact in children’s best interests or what is really motivating public policy is an unspoken appeal to very strong parental rights—which look here suspiciously like property rights—which give biological parents priority over the rights and interests of their offspring.

In many cases, the child’s need for nurturing—and maybe her rights as well—cannot be advanced if she is kept in the present home. Thus her rights to maintain relationships with her parents may have to be subordinated to her need for proper care. And thus the child may need to be placed in foster care and perhaps an adoptive arrangement. But though the child’s right to continue the relationship with the biological family must in these cases be subordinated, it does not disappear. If there is indeed a relationship between the parent and the child, then the child ought to be allowed to maintain it in whatever manner is compatible with the advancement of her need to be nurtured.

Often this will mean that the child should not be removed from the parent’s home. Indeed, the criteria for when a child should be
removed are implied by the stewardship notion of parental rights. So long as the parent is able to protect the rights and advance the interests of the child, there is no justification for terminating the parental rights. There are two main reasons why a parent may be unable to protect the child’s rights and to advance the child’s interests. The first is a lack of resources or knowledge. These can and should be remedied whenever possible. Thus our theory favors educational programs, financial assistance to single parents, state-sponsored childcare, drug rehabilitation programs with special emphasis on and priority given to parents (generally mothers), and, when necessary, state-sponsored programs to bring housekeepers, nutritionists, and so forth into the home. All these are ways to provide for the nurturing of the child while respecting her right to maintain the personal relationships with her biological parents. The second way a parent can fail to be in a position to advance the child’s interest is for her to fail to identify with the child. Cases of deliberate abuse and extreme neglect are prima facie evidence of a lack of identification with the child’s interests. In such cases removal of the child may well be warranted.

When removal is necessary, an effort should be made to allow continued contact between the child and parent, at least to the extent that the child has formed a bond with the parent. In cases of abuse or neglect, this bond may well be lacking; indeed, if the parent fails utterly to identify with the child’s interest, it is not clear that any significant relationship could exist between the parent and child.

One striking example of the children-as-parental-property model in current policy is that the transfer of custody from foster to adoptive families is often based on a model of commodity transfer rather than the development of a new bond between persons, persons who often already have bonds. Current policy often ignores the fact that children come into new arrangements with bonds formed in previous arrangements. Though open adoptions are becoming more common, this trend seems to be more a matter of individual initiative than public policy. Closed adoptions treat children not as persons with attachments, but as commodities that can be transferred with no strings attached. For this reason, we advocate open foster arrangements and open
adoptions. In an open adoption that has occurred as a result of a foster arrangement, the adoption should be open with respect to the foster parents as well as the biological parents, especially when the child has formed significant bonds with the foster parents.

There are other ways in which the current system treats children as commodities rather than persons. Certain actions by the adoptive (and, for that matter, the biological) parent, which are permissible under current U.S. and Canadian law, clearly violate children's rights. Thus an adoptive parent is allowed to arbitrarily change a child's name, to discard photographs of the child's life before the adoption, to effectively (and maybe legally) prevent any contact by the biological or foster parents. We also advocate reforms to disallow this sort of disrespect for the basic rights of children.

In short, our theory advocates that we respect the fact that even quite young children are persons; they have identities, histories, and personal attachments. These are the kinds of things that are constitutive of humanity. Our theory enshrines these things in the vocabulary of rights, and thus requires us to treat children as persons and accord them the moral status that other persons have.

We conclude by saying that devising a coherent and attractive view of the moral status of children is no easy matter. Indeed, it is a project we have only just begun here. But given the importance of what is at stake both for our personal lives—and the lives of our children—and for society at large, this is a project well worth carrying out.25

Notes

1. See Susan Moller Okin, *Justice, Gender and the Family* (New York: Basic Books, 1989). Okin argues that both historical and contemporary theorists of justice leave out the family either by assuming it to be just, or assuming that the family lies outside the scope of justice.

2. Will Kymlicka pursues this line of criticism of Okin in his "Rethinking the Family," *Philosophy and Public Affairs* 20 (1991): 77-97. Kymlicka faults Okin for remaining silent on crucial questions of family justice such as who has the right to form a family and what the rights of parents, especially fathers, are.
3. We do not think that this methodology is illegitimate. After all, in the more activist incarnations of political philosophy, practice often precedes theory. Even in such mainstream theories as that of Rawls, legitimate political theories are thought to be the outcome of an interplay of theory and pretheoretic moral convictions. What we are doing is no different, though it takes place at the level of applied political philosophy rather than political philosophy proper.

4. We ignore here the issue of whether a neonate counts as a person. Anyone who has been around infants knows that they begin at a very early age to develop into beings with enough features of personhood that they must be counted as persons. Whatever the metaphysical status of neonates with regard to personhood, public policy must count them as full-fledged persons, because by the time decisions concerning them are put into effect, they will usually end up being decisions about persons.

5. Note that the kind of contractarian argument we offer here, based on retroactive consent, is different from the contractarian argument Thomas Hobbes uses to establish unlimited parental rights. According to Hobbes, the child's consent while she is a child, "either expressed or by other sufficient arguments declared," establishes parental dominion over children. On Hobbes's view, children are the subjects of their parents when their parents preserve the children's lives and "every man is supposed to promise obedience, to him, in whose power it is to save, or destroy him." Needless to say, we disagree with Hobbes that threats of death—both in general and in the more specific case of the parent's threat to "expose" an infant—are a legitimate basis for authority. See Thomas Hobbes, *Leviathan* (London: Penguin, 1985), Part II, chap. 20, pp. 253-54.

6. Jan Narveson has endorsed this position, claiming that young children are "eligible for ownership" by their parents (personal communication, Spring 1995). See also the chapter on children in Narveson's *The Libertarian Idea* (Philadelphia: Temple University Press, 1988).


9. Later we will note some problems with interest-based approaches to public policy involving children.


12. Ibid., p. 88.
13. Locke's views of the moral status of children are controversial. While he is clearly an important early spokesperson for the view that parents do not have absolute authority over their children, it is also the case that the limits on parental power he proposes are not generated by a belief in children's rights. For some discussion of this issue, examine Laura Purdy's use of Locke in her book *In Their Best Interest?: The Case Against Equal Rights for Children* (Cornell University Press, 1992), and David Archard's chapter, "John Locke's Children," in his book, *Children: Rights and Childhood* (Routledge, 1993). We have benefitted from Susan Turner's useful examination and critique of Locke's view of children that is contained in "Li'l Savages: Locke and a Sort of Parental Dominion" (unpublished manuscript, University of Lethbridge, Alberta, 1996).


18. Ibid., p. 8. We will treat this "incompatibility thesis" as a conceptual claim. At times Schoeman and others write as though the thesis asserts an empirical fact. If the "incompatibility thesis" is supposed to be empirical, then we think it is pretty fair to say that Schoeman and those who hold similar anti-rights positions offer little in the way of empirical evidence to support it. Certainly it seems plausible to think that a preoccupation with rights might lead to a breakdown of relationships. But there is no reason to suppose that merely postulating and respecting rights is tantamount to, or necessarily leads to, a preoccupation with rights.
19. Compare a relationship with another person with a relationship one has with a pet. Both may involve care, but only one can involve relating to the other as another infinitely valuable, irreplaceable, unique person. To engage in a relationship with another person that is more than the relationship one has with a pet involves (among other things) having this attitude of respect for the other person as a person. While the best relationships may involve genuine unions, they are still unions of persons. Indeed, much of what makes a relationship meaningful and valuable is the fact that another person is involved. Yet this attitude of respect for the other as a person is the same attitude that is embodied in accordig rights to persons.


21. For a useful discussion of the distinction between prima facie obligations and obligations that do not go away even when they must be subordinated to other obligations, see Alan Donagan, "Moral Dilemmas, Genuine and Spurious: A Comparative Analysis," Ethics 104 (1993): 7-21, esp. pp. 16-21.


23. Ferdinand Schoeman, op. cit., endorses this standard and discusses some of the legal literature relevant to it. This approach would seem to hold appeal for cultural and religious conservatives, traditional libertarians, and those who (like Schoeman and some feminists) are leery of rights talk and who want to carve out autonomous spaces for personal relationships and guard them against outside interference.


25. We are grateful to Sandra Bartky, Dorothy Grover, and Charles Mills for useful feedback at the very early stages of this project. We thank Jan Narveson for his generous, extensive, and penetrating commentary, as well as for arranging for us to present an early version of this paper at the University of Waterloo in June 1995. We also thank Sara Lawrence for her comments and critique at that colloquium. Another version of this paper was presented at the 1996 meeting of the Canadian Philosophical Association. We thank the participants there and our commentator, Karen Wendling, for
useful comments. Parts of Noggle’s half were written while he was on a fellowship from the Graduate School at the University of Illinois at Chicago, and he is grateful for that aid. Finally, we are grateful to Ashleigh, Mallory, Gavin, and Nathan, who made us realize how important these issues are.

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