

LITTLE LIBERALS: A CHILD-CENTRED APPROACH TO THE INCULCATION  
OF VALUES

Little Liberals

(Thesis format: Monograph)

by

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Graduate Program in Political Science

A thesis submitted in partial fulfillment  
of the requirements for the degree of  
Doctor of Philosophy

The School of Graduate and Postdoctoral Studies  
The University of Western Ontario  
London, Ontario, Canada

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Values**

is accepted in partial fulfillment of the  
requirements for the degree of  
Doctor of Philosophy

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## *Abstract*

In a liberal-democracy, the proper role of parents and of the state in forming children's beliefs involves several separate but interrelated debates: These concern the conceptual space that children occupy within liberal theory, the basis of the 'control rights' adults are said to have over children, and the tension between the values of autonomy and diversity, which are foundational values for a liberal-democracy. To clarify these debates, competing paradigms are identified in political theories that address them: A dual-interest view and a child-centred view. The former 'balances' the interests that parents *and* children have in the child-rearing relationship, and the latter takes the interests of children as paramount when making decisions aimed at ordering children's moral lives. Only child-centred views are consistent with the moral equality required by liberalism. Parental rights should be viewed not as ownership rights or expressive rights but as instrumental rights that they hold as their children's primary caretakers. These rights necessarily include an interpretive role in relation to their children's best interests, and hence an entitlement to transmit their beliefs to them. Objections based on children's autonomy are largely groundless: They unhelpfully set autonomy and diversity at odds with one another, they risk undermining the possibility of meaningful lives, and they demand an "open future" that is impossible. Nevertheless, for democratic reasons the state properly exercises authority over the content of education for future citizens.

**Keywords:** Children's rights, child-centred, children in liberal theory, open future, diversity, autonomy, civic education, parental rights, belief-formation

## *Dedication*

To my young son Dakota with hope for both his present and future.

## *Acknowledgements*

I would be remiss if I didn't take this opportunity to thank two people who were instrumental in helping me finish this project. The first is Prof. Richard Vernon. Of the three schools at which I was offered admission, Western was my least favoured option. I didn't know anyone in the department and the school's reputation for conservatism unnerved me. I chose Western simply because living in London allowed me to fulfill certain familial obligations. Knowing what I now know, if I had the choice to make again only this time with no personal constraints, I would still choose Western and that is almost entirely due to Richard. I do not believe that a better supervisor is to be found. Richard has been nothing but gracious and supportive, and he is just good company over a cup of coffee. It has been a privilege to work with an academic of his caliber and I wish to thank him for his direction and his generosity of spirit.

I would also like to thank my extremely thoughtful husband Keith. Keith, I know, keeps a running list in his head of things to do just to keep my day running smoothly. He always puts me first, even when I don't deserve it. And he even *volunteers* to change dirty diapers. He is the most reliable person I have ever met and the truest friend I have ever had. I am a very lucky woman.

## *Table of Contents*

Title Page.....	i
Certificate of Examination.....	ii
Abstract.....	iii
Dedication.....	iv
Acknowledgements.....	v
Table of Contents.....	vi
Introduction.....	1
Chapters	
1. Children as an Afterthought: The Construction of Children in Liberal Theory	
1.1 Locke and Early Liberal Thought.....	9
1.2 Locke and Children.....	15
1.3 Rights-Talk.....	23
1.3.1 Rights and the Family.....	27
1.4 What is a Child?.....	30
1.4.1 The Proprietary View.....	30
1.4.2 The Liberationist View.....	38
1.4.2.1 The Consequentialist Argument for Agency.....	41
1.4.2.2 The Instrumentalist Argument for Agency.....	42
1.4.3 Children as ‘Becomings’.....	45
2. What Rights (if any) do Parents Have?	
2.1 Introduction.....	51
2.2 The Dual-Interest View.....	55
2.2.1 The Intimacy Argument.....	59
2.2.2 The Expressive Liberty Argument.....	71
2.3 Parents <i>qua</i> People/Parents <i>qua</i> Parents.....	77
3. ‘Liberals-in-Waiting’ (1): Autonomy vs. Diversity?	
3.1 Introduction.....	87
3.2 A Tale of Two Liberalisms.....	88
3.2.1 Locke and the Reproduction of Parental Values.....	91
3.2.2 Millian Autonomy: Two Views.....	95
3.2.3 Autonomy and Diversity: Two Sides of the Same Coin?.....	100
3.3 Kukathas and Associative Rights.....	107
3.3.1 The Right-to-exit.....	108

3.4 The Problem of Adaptive Preference-Formation.....	113
3.5 Kymlicka’s Liberal Consensus.....	121
3.5.1 The Importance of Culture.....	123
3.5.2 The Revisability Criterion.....	128
4. ‘Liberals-in-Waiting’ (2): A Right to an Open Future?	
4.1 Introduction.....	132
4.2 What is an ‘Open Future’?.....	134
4.3 The ‘Liberal-in-Waiting’ .....	138
4.3.1 Instrumental Autonomy.....	138
4.3.2 Choice and Meaningfulness.....	148
4.4 Moral Limits.....	158
4.4.1 An Education-for-Independence.....	160
4.5 Conclusion.....	167
5. The ‘Democrat-in-Waiting’: Children and Civic Education	
5.1 Introduction.....	170
5.2 Parental Educative Choice.....	174
5.3 How Public is the Private?.....	187
5.4 What is an Appropriate Civic Education for a Pluralistic Society?.....	191
5.4.1 Reciprocity and Toleration.....	194
5.4.2 The Convergence Thesis.....	198
5.5 Exposure vs. Indoctrination.....	201
5.6 Younger vs. Older Children.....	210
5.7 Conclusion.....	217
Conclusion.....	219
Appendix.....	228
Bibliography.....	233
Curriculum Vitae.....	246

## *Introduction*

This project is about the formation of children's values in the context of a liberal democracy. How their values are formed, and so who can properly influence their formation, are ideas that are important to the overriding goal of making children's lives go better, now and into the foreseeable future. And before we can know what legal and political rights children ought to have – and that parents ought to have vis-à-vis their children – we must investigate the relational status of parents and children. Such an examination involves several separate, but interrelated debates: The conceptual space that children occupy within liberal theory, the basis of the 'control rights' adults are said to have over children, and the tension between two values that are seen as formative for liberal democracy – diversity and autonomy.

The notion of the best interests of the child is one that is said to guide decision-making about children. And on its face, it seems hard to contradict. But beneath the surface of this seemingly innocuous truism lie several unanswered or contestably-answered questions. It doesn't seem true that the interests of children alone should be taken into account in every instance in which the lives of children are implicated. Other people, after all, must share both intimate and political space with children and the adults they will eventually become, and thus the interests of others cannot be safely ignored. We must figure out how these interests fit into a scheme wherein the interests of children are said to be paramount. It is also not at all obvious what might inform a child's best interest. While it is clear that some things are universally needed (love, acceptance, food and shelter) from the point of view of a moral education the interests of children are less easily discerned.



On one hand it is thought that all people have an interest in making decisions for themselves in ways that allow them to live lives that they find meaningful. On this view, autonomy is a universal human good for children – no less than for adults, who jealously safeguard their ability to live the life that they have freely chosen – because at some point children transform into adults. However, the qualities that one might normally embrace in order to live autonomously are seemingly at odds with some ways of life that are, in fact, meaningful. What gives a way of life meaning is that one embraces it as one's own, oftentimes regardless of whether or not one has *chosen* it in any strong sense. It is arguable that children have an interest in being a fully participating member in the cultural life of the family and will, in any case, be exposed to particular ways of life that may or may not conduce to any particular formulation of autonomy. How are we to understand the moral right that parents have to induct their children into their value-sets separately from the practical fact of this exposure and the induction that is likely as a result? Or are parents required to mitigate such induction by exposing children to alternative ways-of-life (Clayton 2006)?

Indeed, even the capacity to choose is given from within the different contexts-of-meaning to which we are exposed early on – hence the communitarian critique of liberalism (Sandel 1982; MacIntyre 1988). On this view, those things that we cling to as the most meaningful, such as culture and religious values, are products of early exposure and consistent upbringing rather than thoughtful, dispassionate reflection. And since there are many and incompatible such contexts-of-meaning, the diversity found within the liberal polity is oftentimes at odds with the view that autonomous self-reflection is the

means through which we come to embrace most wholeheartedly those things that we care about the most.

The emergence of the family as a focus of sustained study within the discipline of political philosophy is relatively recent. Prior to the radical questioning that was emblematic of the general social climate of the 1960s any commitment to a thorough and deep study of the family was reserved generally for sociologists and anthropologists.<sup>1</sup> In many ways this seems *à propos*. After all, political philosophy is largely about the analysis of power and the justification of force. Prior to the 1960s, most thinking about the family began with a set of fixed assumptions about the ubiquity, instrumentality and fundamental nature of the institution of the family, complete with gender divisions ordained by nature (or god) and hierarchies between parents and children as old as Aristotle's *Politics*. Political *science* as a discipline was interested in investigating the family in as much as it questioned the best ways to achieve certain unquestioned goals, namely the socialization of children to the given political order toward the end of assuring stability and order (Elshtain 1982). But to the extent that the power imbalance among individuals within the family was a result of proper socialization, there was no call to justify it.<sup>2</sup>

Historically, the default position has been that parents are the natural educators of their children. Generally speaking, observers have chosen to justify this position rather than to supplant it.<sup>3</sup> In rare cases, though, this default position has been challenged by

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<sup>1</sup> The Index of the 1967 *Encyclopedia of Philosophy* has no entries for parents, infants or families and only four for children. By contrast there are hundreds for angels.

<sup>2</sup> Elshtain's point, beyond the need to question the power disparity within the family unit, is that the social order itself went unquestioned and there was little interest in discussing whether *this* was the social order which children then *ought* to be brought up to embrace.

<sup>3</sup> A number of justifications are offered including a Lockean view about 'owning' the fruit of one's productive labour. For a taxonomy see Austin (2007).

those who believe that parents ought not or are not required to undertake their children's moral education. For instance, 'child liberation' theory analogizes the historical oppression of women, non-whites and the poor with the putative oppression of children and claims that the time has come to recognize the autonomy-rights of children as belonging to the same legal and political framework that governs adults (Holt 1974; Farson 1974). Others wonder whether in order to live up to liberalism's commitment to equality, the state ought to rear children. On one hand, this will allow women to realize their equality aims, by not being tied to motherhood (Firestone 1971), and on the other it would allow future citizens to realize their equality aims because communal rearing eliminates the inherent advantage (and disadvantage) that emanates from different familial contexts (Munoz-Dardé 1999; 2002).<sup>4</sup> By and large, however, such objections and ruminations come from a minority of observers and it is within the framework of the rights of parents to rear their children (be they biological or adopted) that justifications about children's moral education take place.

This project seeks to develop a child-centred justification of the moral education of children, while acknowledging the interests of others. It does so, generally, by arguing against the dual-interest view that sees the interests of parents *qua* parents as deserving (some) protection over the interests of children. Unlike most child-centred theories, however, it rejects the particular formulation of children's autonomy-interest that is generally annexed to the view that children have a right to what is termed an 'open

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<sup>4</sup> We can contrast these views of communal rearing with that of Plato for whom, ideally, children were also to be reared in common by the state (at least the children of the guardian classes). The difference is that the rearing in common by the state for Plato had to do with the attempt to equalize not opportunity for women or for children, but to lessen private interests of those who were to guard and rule in the interests of all equally. It is only in communalizing the rearing of children for this reason that it became clear that the role of women, no longer having the responsibility for the children and private household, had also to be rethought, culminating in them joining the ranks of guardians as either warriors or philosopher-queens. See Okin (1979: chap.2).

future'. It does so by exposing the necessarily interrelated values of diversity and autonomy and suggests that autonomy as it is normally formulated by those proffering appropriately child-centred views, misconceives the inherently dialectical nature of children's burgeoning value-sets.

**Chapter one** introduces the problem of the construction of children in liberal thought. It does so by reviewing the genesis of the status of individuals as 'free and equal', which is integral to liberalism, through the thought of the prototypical early liberal John Locke. I investigate the extent to which early liberal thought, being based on the rational individual, can integrate the special case of children given their arguably underdeveloped rationality. I go on to briefly examine a few alternative views about 'rights talk' and place such views in the context of the family around which most conceptions of children's lives revolve. Finally, I assess three contestable views about how best to conceptualize children in the context of accepted liberal theory, in order to posit a conception that can act as a referent as I proceed.

**Chapter two** reviews the main arguments forwarded in defense of what is called the 'dual-interest' view, wherein parents can advance some of their parental interests at the cost of an acceptable loss to their children's interests. I compare this to a 'child-centred' view in order to see which is consistent with liberal theory. Along the way, I employ a distinction regarding the different types of rights parents might be said to have that is advanced by Brighouse and Swift (2006). This distinction is central to this project because how we understand parental rights will determine what answer we get to the question of what kinds of considerations may be taken into account when parents object to state-imposed exposure to certain values, particularly in the context of public

education. Moreover, I offer a crucial distinction between parental and non-parental interests in order to clear up confusion that is often encountered when discussing parents and children. This distinction allows us to examine with greater specificity the different kinds of considerations parents may permissibly take into account when making decisions that inevitably affect their children.

**Chapter three**, entitled ‘Liberal-in-Waiting (1): Autonomy v. Diversity?’ in many ways addresses the crux of our problem. Autonomy and diversity are contending values within a liberal-democracy and each is seen to imply a different answer regarding what and whose values are appropriately passed on to children.<sup>5</sup> It has become somewhat fashionable to trace each value to different organizing moments in the trajectory of liberal thought, such that ‘Lockean liberalism’, with its concern for religious tolerance and peaceful co-existence is associated with diversity, and ‘Millian liberalism’, with its explicit concern for individuality is associated with autonomy; but such categorizations are simplistic. Autonomy itself is given a variety of treatments within liberal theory such that it isn’t clear that putative adherence to this value would yield a singular outcome. The point of this chapter is, first, to review Locke and Mill in order to assess the extent to which it can be said that each thinker unproblematically embodies each value, respectively. Second, I attempt to unpack the problem that is at the root of the diversity/autonomy dichotomy – that options can only be chosen within contexts that may have already pre-empted the choice.

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<sup>5</sup> Amy Gutmann has made the point that it is not a question of *whose* values, but *what* values in the sense that as separate persons children are owed certain things regardless of the wish of others, including parents. Therefore the issue is only ever that of discerning what they are owed, and thus what values they ought to have, without reference to whose they are, which on her view is not relevant (1980). For our purposes, the question as to whether or not the provenance of values (i.e., *whose* they are) carries any freight remains to be determined.

**Chapter four**, entitled ‘Liberal-in-Waiting (2): A Right to an Open Future?’ continues the discussion from the previous chapter with the point of canvassing the general argument that in the name of their autonomy-interest children have a right to what is termed an ‘open future’. The concept of an open future is generally characterized as the right to have options kept maximally open as a derivative of the right of children to choose autonomously, in the future, what values they will embrace and endeavours they will pursue. I unpack this proposition and assess the two main arguments that are said to legitimize it, namely the desirability of making choices that are authentic to us and the desire to pursue better rather than worse options. I do so in order to determine whether the conception of autonomy inherent in the ‘open future’ model is well-equipped to deliver either or both of these things.

**Chapter five** addresses the appropriateness of a broadly construed civic education in a liberal society and asks whether – and to what extent – it can be imposed even in the face of parental opposition. This chapter seeks to determine whether parents’ rights may be adduced in the name of restricting exposure to certain kinds of civic education and on what basis might we conclude that they may or may not. In so doing, I re-visit a view that was investigated in chapter 2, that religious freedom protects the parental imposition of religious views, and I extend it by reviewing the claim that such an imposition might also amount to a violation of children’s religious liberty. I further look at whether the age of the respective children is meaningful to the end of discovering whether exposure to objectionable views is, *per se*, a violation of children’s religious freedom.

Finally, I offer a concluding chapter and an appendix. In the appendix I offer a brief analysis of a recent Supreme Court of Canada decision with regard to a

controversial civics course that the Government of Québec has made compulsory. I suggest some ways that the ruling echoes and at least one basic way in which it might depart from my theory.

# ***1. Children as Afterthought: The Construction of Children in Liberal Theory***

## *1.1 Locke and Early Liberal Thought*

Barbara Arneil posits that the problem of the status of children within liberal theory begins with the very problems for which early liberal theorists were seeking a solution. She claims that when all were equally subject to the arbitrary will of the king, the distance between the status of children and adults was not great, but the ends of citizenship to which early liberal thinkers were committed and the basis upon which these ends were constructed “shape the way in which children are constructed” (Arneil 2002: 74). The move toward citizenship and away from subjection, and the idea of the rational self-governing agent that is taken as the model for theories of citizenship, exclude children from the outset. To explain this judgement let us briefly recall what Locke, the prototypical early liberal, was trying to do.

The fundamental premise of Lockean liberalism is that all are born free and equal.<sup>6</sup> This is a very different proposition from the one to which Locke was responding in his *Two Treatises of Civil Government* (1689). Locke’s *First Treatise* was a direct repudiation of Robert Filmer’s thesis in *Patriarcha* (1680), which attempted to defend an absolutist monarchy by virtue of the putative grant bestowed upon Adam and his male progeny by god to be, essentially, king of the world. Filmer draws a parallel between parental right and monarchical right, both having been divinely instituted and originating

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<sup>6</sup> While Locke is often thought of as the ‘father of liberalism’ owing to several paradigmatic conceptions about the limits of state power and the freedom of the individual that have followed self-consciously into the present age, there has been a relatively longstanding debate as to whether, on careful reconstruction of Lockean thought, he would actually be considered a liberal today. In large part, the content of this debate speaks more about our presently disparate notions of what liberalism itself is rather than whether Locke was or was not a liberal. Regardless, his contribution to liberal thought, of any strain or conception, cannot be overstated. For analyses of Locke’s thought see Dunn (1982), Grant (1987), and MacPherson (1962).



in the person of Adam; the original sovereign. The right that Filmer believes that god bestowed upon Adam as sovereign over his children “is the fountain of all regal authority, by the ordination of God himself; it follows that civil power...is by divine institution” (Filmer 1966: 255).

Locke’s response to Filmer is devastating.<sup>7</sup> In his *First Treatise*, Locke convincingly demonstrates the incoherence and inconsistency found within Filmer’s ridiculous premise that one could trace a regal lineage from Adam to all the kings of the world and thereby justify the ‘divine right of kings’. In Locke’s *Second Treatise*, he sets forth a theory of man and his natural right to property for his own comfort and preservation, as well as the conditions under which civil authorities are legitimately to be obeyed. The theory establishes certain central features of contemporary liberal thought; the equal status of persons, the idea that the prior condition of man is not subordination, but liberty, and that the civil authorities, far from being divinely ordained, exist at the behest of those they are meant to serve.

At its inception, then, liberal theory’s concern was “to create citizens of a state rather than subjects of a king” (Arneil 2002: 70).<sup>8</sup> The changing status of the individual from subject of the king to citizen of the state, that is, from an object of some other’s design to an agent in one’s own right, underlies the *limits* to state power that is one of the hallmarks of liberal thought that most self-consciously followed Locke into the present age. These limits presupposed that individuals were not only born free and equal but were

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<sup>7</sup> One commonly accepted view for Locke’s decimating attack on Filmer is that it was inexpedient to attack Hobbes, a fellow rationalist, directly, and therefore Locke chose the ‘easier target’ of Filmer to express his opposition to monarchical rule. For a challenge to this position, see Thomas I. Cook’s ‘introduction’ to Locke (1966).

<sup>8</sup> Locke was not strictly opposed to monarchy. The preface of the original edition claims that the object of writing the *Two Treatises* is “to establish the throne of our great restorer, the present King William” (in Cook: “Introduction” to *Two Treatises of Government* 1966), but monarchical government was subject to all the same constraints of legitimacy as all others forms of government: Ongoing consent and limitation.

endowed with reason and, thus, were capable of discerning these limits; thus, also capable of being self-governing. Self-government required “the creation of a free and tolerant political society conducive to unfettered inquiry, critical self-examination, and enlightened action” and this could only be guaranteed by a constitutional arrangement whereby government acted as a “trustee of the citizens for their security and well-being” (Wood 1984: 99).

According to Locke, this trusteeship was assigned by the citizens themselves by use of the device of the social contract. Locke rejects Hobbes’ earlier description of man in the state of nature being perennially engaged in a ‘war of each against all’ as a state not of equal liberty, but of equal license. By contrast, for Locke the very idea of liberty implied *normative barriers*, which made society naturally possible. For Locke, “even in the state of nature [ ] there is an enforceable and effective moral law...” (Wolff 2006: 21). Human entitlement was not virtually boundless as it was for Hobbes. Rather, man was entitled to do the *least necessary* to secure himself and his possessions. The ‘inconvenience’ of the state of nature which led to the founding of civil society, is precisely that humans *err* in their determination of what is and is not necessary to secure a right to dispose of themselves and their possessions as they see fit; they err in their determination of where these normative barriers lie in particular circumstances. Locke writes:

I doubt not that it will be objected that it is unreasonable for men to be judges in their own cases, that self-love will make men partial to themselves and their friends, and, on the other side, that ill-nature, passion, and revenge will carry them too far in punishing others, and hence nothing but confusion and disorder will follow...I easily grant that civil

government is the proper remedy for the inconveniences of the state of nature (1966: 127).

The containment of one's liberty, for Locke, was found at the point at which one's liberty impeded another's. This idea remains the bedrock position of much contestation over rights and is repeated by John Rawls in his first basic principle of liberty: "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others" (Rawls 1971: 60).<sup>9</sup>

For Locke, the understanding of such limits as all other things comes from the use of man's god-given reason. Reason tells us that we have a natural right to our own preservation – for god would not have placed us in the middle of such bounty only for us to starve to death – and thus reason provides the justificatory force for why we may make use of natural goods that are common to all, without the explicit consent of all others – for such consent would be impossible to obtain. Reason also tells us what the limits to such appropriation rightly are (1966: 133-35). Most notably, reason determines why the state is limited in what it may do. Being based on consent, what it may do is limited by what consenting parties would permit it to do. Locke argued that people would not have consented to enter into civil society from the state of nature unless their lot was, on the whole, improved by the new arrangement "for no rational creature can be supposed to change his condition with an intention to be worse" (1966:186). The civil authority, therefore, exists as facilitator of what we cannot otherwise acquire, namely "comfortable, safe and peaceable living amongst one another, in a secure enjoyment of [our] properties..." (1966: 169). This consists primarily of a judicial system and the

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<sup>9</sup> Over time Rawls came to formulate this principle differently, such that its final restatement in the early 90s included that people were to have the "same defensible claim" to "a fully adequate scheme of basic liberties..." See Freeman (2007) ch.2.

enforcement of contracts to create the necessary stability to engage in exchange and transactions with some expectation that the conditions under which promises were made will be realized. In situations where such conditions are not realized and certain promises are broken, the civil authority acts as a guarantor by, in some way, coercing the offending party to live up to their obligations.

The fact of the civil authority acting as guarantor plays a part in Locke's impassioned defence of religious toleration as well, and thereby underscores the appropriate limiting of the state's mandate to 'civil concerns'. As Locke comments in *A Letter Concerning Toleration* (1689), in the last instance the state can always put things right by compensating someone for a loss suffered as a result of, say, ill success in trade, but who could 'put right' the endangered soul of someone who followed not his conscience, but the wrongful dictates of the civil magistrate regarding the appropriate way to worship god? Since with regards to the "life to come" it was not possible for the magistrate to ease one's suffering or to restore someone "to a good estate" it was not reasonable to think that people would consent, beforehand, to being bound by the religious dictates of another rather than by their own consciences (Locke 1993: 407-08).

For Locke, moreover, the constant negotiation of the appropriate limits of state intervention is implied. Locke's final defence of 'an appeal to heaven' with regards to the appropriateness of rebellion brings this point home. Locke proposes that if government transgresses the limits of its rightful authority, citizens are legitimated in rebelling against that government. When confronted with the question "who shall be the judge whether the prince or legislative act contrary to [the public's] trust?" it is, in the final analysis, god, and men who rebel against the government in the belief that they are

legitimated in doing so, will have to make ‘an appeal to heaven’ and answer to god for their deeds: “in that state the injured party must judge for himself when he will think fit to make use of that appeal and put himself upon it” (1966: 245-46).

We see, then, that the basis of liberal theory at its inception was the capacity of free and equal citizens to consent to the social, political and economic arrangements to which they were then duty-bound to adhere. Moreover, Locke’s paradigmatic elucidation of the limits to state action; the protection of the ‘private’ sphere within which the state’s interference is illegitimate, is a pillar of liberal thought that requires the ongoing negotiation possible only with access to one’s ability to discern ‘natural’ limits in the first place. From Locke onward, liberal thought has largely consisted of an examination of these limits: Their exposition and justification even while the question of consent remains a problem for liberal theory for reasons familiar to political theorists.<sup>10</sup> All of this, however, is predicated on one’s *capacity* to consent in the first place. If the problem of people withholding their consent is a difficulty for liberal theory, the fact of the *inability* to consent is more difficult still. While all individuals are said to be born free and equal, the required ability to access one’s reasoning faculty is thought to be *in embryo* at birth and not fully developed until one reaches the age of maturity, which is defined, precisely, by the fact that one now has fully developed access to one’s reasoning capability.

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<sup>10</sup> David Hume (1748) provides one of the earliest critiques of consent theory. In a telling passage he writes: “Can we seriously say, that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives from day to day by the small wages he acquires? We may as well assert, that a man, by remaining in a vessel, freely consents to the dominion of his master though he was carried on board while asleep, and must leap into the ocean, and perish, the moment he leaves her.”

### *1.2 Locke and Children*

Locke deploys contrasts between the proper role of the civil authority in matters of religion and the proper role of coercion to ‘tutor’ and educate young apprentices and artisans to the full exercise of their talents. These contrasts serve to underwrite the difference Locke sees between adult citizens, who by definition are not in a state of tutelage, and those that are, i.e., people who are appropriately admonished and coerced to develop certain attributes to their full potential. In making his point that the power of the father to correct his son is distinct from the power of the magistrate to correct citizens, Locke explicitly notes that a young child requires the care of his parents until such time as “the child is once come to the state of manhood, and to be the possessor and free disposer of his goods and estate” (Locke 2010: 137). It is, therefore, the question of ‘manhood’ which determines the controversy and not the efficacy of the civil authority to bring about a particular state of affairs.<sup>11</sup> In a defining quote on the subject, wherein Locke responds to Jonas Proast, the interlocutor with whom he engaged in a 14-year debate on the subject of religious toleration, he writes:

But then you will ask, is it not this usefulness and necessity that gives this power to the father and mother? I grant it. “I would fain know then,’ say you, ‘why the same usefulness, joined with the like necessity, will not as well do in the case before us?’ And I, Sir, will as readily tell you: because the understanding of the parents is to supply the want of it in minority of their children and therefore they have a right not only to use force to make their children apply themselves to the means of acquiring any art or trade, but to choose also the trade or calling they shall

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<sup>11</sup> For discussions about the role of rational capacity and the use of force in Locke see Waldron (1988), Bou-Habib (2003), and Vernon (1996).

be of. But when being come out of the state of minority, they are supposed of years of discretion to choose what they will design themselves to be, they are also at liberty to judge what application and industry they will use for the attaining of it (2010: 138).

At one and the same time, we see Locke's view of children and his view of citizens: His view of children is used as a foil for his position with respect to the rights of citizens and it is in contradistinction to his view of citizens that children are to be understood.

Be that as it may, Locke differs from Hobbes who maintained that the power one had over one's infant was virtually absolute. In a famous passage, Hobbes concludes that parents had the right to sell their children as slaves or to sacrifice them for the sake of peace (1640: II.4.8). Hobbes' view of children threatens to undermine the consent model that establishes him as the progenitor of modern political philosophy. Hobbes attempts to ground children's obligation to their parents (caregivers) in the 'hypothetical' consent of the children themselves, that is, what we might take to be their consent if they had the capacity to understand what was in their own interest. While 'hypothetical consent' models are themselves questionable<sup>12</sup> in this case we have an attempt to justify the absolute rights of parents over their child. The main problem is that what is found to be in children's interest is to be 'preserved' rather than killed by those persons (initially mothers) who have 'dominion' over them. On the basis that children would choose preservation over being killed if they 'knew what was good for them', the legitimacy of their obedience to the one who 'preserves' them based upon their 'consent' follows. For this reasoning to be sound, however, Hobbes must assume what he attempts to explain;

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<sup>12</sup> Dworkin has written that: "A hypothetical contract is not simply a pale form of contract; it is no contract at all" in *Reading Rawls* (1975), pp. 17-18. CF Stark (2000) and Wolff (2006) 152-57 and 169-71. See Wolff (2006) 152-57 and 169-71.

that is, the legitimacy of absolute parental authority is assumed *a priori*, and this is done based on the fact of parental *power* rather than legitimate authority. In other words, authority presupposes power rather than legitimizing it; thus it threatens to undermine the very consent model that it seeks to justify.

With regards to Hobbes' view of children, one observer has asked: "Why should we be bound by hypothetical connections that purport to outline our best interests, for example, rather than remaining ourselves the judges of our own best interests? Why defer to those who claim to be able to derive truths about our best interests?" (King 1998: 18). In one way or another, this is a central question for liberal thinkers from the post-Reformation onward (Appiah 2005: ch. 5). An answer to this question with regards to, specifically, children is possible, but it must begin with a conception of children as distinct from adults in relevant ways. Hobbes fails precisely because he cannot properly account for the distinction which he clearly intuits and, instead, his view of filial obligation threatens to undermine his notion of consent in other areas.

Locke's views are closest to our contemporary view of children. Archard says of Locke's view on parenting that "[t]he condition of children – incapable of supporting themselves and of acting for their best interests – justifies parents in acting on behalf of their children..." (Archard 1993: 7). Indeed, Locke comments that the duty parents owe is restricted to their right to use the care and reason god bestowed upon them for the child's good (Locke 1966: 151) and, moreover, is not grounded in any natural right of parents by virtue of their reproductive role, but is "inseparably annexed" to the provision of "nourishment and education" such that the right of guardianship "belongs as much to the foster-father of an exposed child as to the natural father of another" (1966: 152). But



it is a view not without its difficulties. Locke is silent as to what the duty to care for one's children until such time as they reach the age of reason actually entails, beyond the general directive to provide nourishment and the duty to "inform the mind" of their progeny (1966: 148-49).<sup>13</sup>

The idea of 'reason' in Lockean thought should not be bound up too readily with other concepts that are used by critics of liberal thought as indicating liberalism's impoverished view of the human as a fundamentally asocial creature or the idea of the liberal subject as an atomistic individual, more detached from the obligations to tribe and kin than is realistic, such that our 'partial' ties are abstracted out of existence.<sup>14</sup> Rather, reason provides the basis for us to articulate a common understanding necessary if our partial (and incompatible) ties are not to bind us to a situation whereby we degenerate into chaos. Partiality is an 'inconvenience' to be *mitigated* if we are to live peaceably among others, rather than a condition to be overcome altogether. Locke's theory, far from being atomistic, amounts to an associational view, which view was more concerned with the *fact* of plural viewpoints than it was with their genesis. Much of the ongoing debate he has with Proast involves the idea that as long as individuals hold their beliefs sincerely, it does not matter whether their beliefs are a result of deep inner struggle and rigorous review of all and opposing ideas, or simply having, in the words of Paul Bou-Habib, "the right intentions" (2003). In his *A Second Letter Concerning Toleration* (1690), Locke responds, sarcastically, to Proast's argument that since men generally neglect to undertake a thorough examination of the grounds of their religion they need to

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<sup>13</sup>Elsewhere, Locke provides a fairly stringent regimen regarding what children require, including fresh air, but the overall tenor of his prescriptions is about raising decent, law-abiding people – boys somewhat differently from girls. What constitutes a 'moral education' to Locke seems to be fairly narrow in scope.

<sup>14</sup> See Sandel (1982) and (2006), Vernon (2005: chapters 1-2).

be coerced in order to ensure that they have ‘considered’ sufficiently (2010: 146-49). Locke claims that the only conclusion to be drawn from Proast’s argument is that a countryman should abandon his family, leaving them to starve for he would need to “leave off plowing and sowing,” sell his farm implements and artisanal tools for books to learn Greek and Latin, and spend all his time in contemplation of the sacred texts in order to satisfy Proast that he had ‘sufficiently considered’ the grounds of his belief (2010: 96). Such a notion, for Locke, (and for most of us) is absurd. On one hand, then, the genesis of one’s views, for Locke, was irrelevant. For present purposes, however, it is all important. We would look askance, for instance, at the idea, mentioned above, that parents had not only the right to use force to help children develop their talents to “acquire any art or trade” but could also choose by force the particular “art or trade” the child would acquire; we have learned too much about the lives of ‘child stars’ and world-class athletes not to be troubled by the notion for two main reasons. First, we are rightly troubled by how such children fare; for their own sakes. We recognize that the kind of training, moral or otherwise, that children receive when they are young precludes the kind of ‘choice’ that Locke seems to refer to when he claims that once the child is of age she can choose for herself how to make use – or whether or not to make use – of the skills she has previously developed. It is not so easy to escape the training received in one’s formative years, and this has a bearing on the kind of lives that children will come to lead and the relative fulfilment they are likely to experience. Secondly, such training will have a bearing on the kind of lives that children will come to lead and therefore the relative contributions they will make to the society in which there are reciprocal duties.

Of course our thinking about children has evolved considerably since Locke's time even despite the relatively modern ideas Locke had about children. This evolution is tied to the evolution of our thought about individuals and societies generally and not simply about the place of children within them. It is only in the latter half of the 19<sup>th</sup> and in the 20<sup>th</sup> centuries that the basis for exclusion of the poor, non-whites and women became increasingly (and demonstrably) out of keeping with the basic liberal premises of individual equality, liberty and rationality. By now, however, there is little doubt that political discourse of the late 20<sup>th</sup> and early 21<sup>st</sup> centuries has been dominated by the interrelated ideas of democracy and individual (liberal) rights.<sup>15</sup> The idea that individuals have rights in view of their status as humans is paradigmatic, so too is the idea that these rights serve to protect, facilitate or enhance individual choice or agency; again, the liberal as self-governing agent. By the end of the 20<sup>th</sup> century virtually no one claimed to be anything other than a democrat, even if they did so begrudgingly as in Churchill's (in)famous quote that "democracy is the worst form of government, except for all those other forms that have been tried from time to time." Just as "[p]olitical regimes of all kinds throughout the world describe themselves as democracies" (Held 1996:1) often despite their internal workings rather than because of them, few of us do not, in some vein or other, couch our demands in the language of rights: "rights are the language of priority in modern society ..." (in Dwyer 2008: 14).

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<sup>15</sup> The ideas of democracy and liberalism are often said to exist in some considerable tension. At its most extreme democracy can be viewed as requiring little more than the expression of the unconstrained preferences of the greatest number and liberalism, at its most extreme entailing nothing more substantial than 'allowing subjects a large measure of personal freedom' (in Vernon 2001: 5).

The purpose of early liberal theorists was to actively change the status of the individual from other-directed object to self-directed subject.<sup>16</sup> This altered status, however, was predicated upon capacities which are denied to children, namely reason and the capacity for self-government. As such, the status of children within liberal theory has usually been characterized by what it is that they lack in virtue of what it is that adults possess which make them, but not children, fit for citizenship. Thus, children are thought of as ‘becomings’ rather than ‘beings’ and, according to Arneil, infants, being completely devoid of rationality, are literally non-existent within liberal theory (Arneil 2002: 74). With its focus on the rational, self-governing chooser, liberal theory has always subsumed children within the authority of some or other entity.

Owing to the disjoint between our general impressions regarding children’s incapacity and the basic ideas about rational self-sufficiency upon which much liberal theory is based, it is perhaps unsurprising that so much of what is said about children imports dubious premises and carries unpleasant implications. As many observers have noted, it has been difficult to avoid importing property analogies into our thinking about children, even while all present observers acknowledge that children are not the *literal* property of their parents. Jan Narveson, notoriously, denies moral status to very young children altogether (1988; 2002). By contrast, at least one observer has noted that the same putative lack of rationality that kept historically marginalized peoples from access to the equal protection afforded by their status as ‘rights bearers’ now needs to be examined with respect to the similarly false construction that has been built around the idea of young people and we need, similarly, to re-examine their rights (Farson 1975).

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<sup>16</sup> The use of the word ‘subject’ here, as in a subject/agent who *acts*, should not be confused with the use of the word ‘subject’ to denote the *subjection* of one to the will of another, as in the ‘subjects of a kingdom’ etc...

And yet we resist the idea that children are merely small adults. Instead, they are seen as sufficiently *different* from adults, in either kind or degree, to justify a species of differentiated rights.

In the past thirty years, a growing body of literature has self-consciously extended ‘liberal’ categories to children. This might seem to be a strange enterprise given how difficult it is to conceptualize children along liberal lines, as espoused above. I have stated that liberal theory is largely concerned with altering the status of the individual in the present, from other-directed subject to self-directed agent and that the only power over the agent that is legitimate is that to which the agent has consented. At the same time, I have proffered that children require protection and guidance in order to bring them to such a time as they are able to make decisions for themselves.

Beginning with the revelation of feminists in the mid 20<sup>th</sup> century that liberal categories were inadequate to protect the interests of individual members of families, precisely because ‘the family’ was seen as a single entity that belonged properly within the private sphere, interference within which was impermissible, some liberal theorists have sought to reconstruct the public/private dichotomy in order to extend the concepts of power and rights to individuals *within* families (Okin 1989; Chambers 2002; 2008). Such reconstruction, however, has met with resistance on several fronts. In the first place, the basis for the reciprocal duties which made society, not possible but ameliorable on the Lockean view, was thought to *mitigate* partiality; partiality forms the best understanding and a desirable characteristic of familial association, rendering the extension of ‘liberal categories’ to the family context potentially inapposite. In the second place, extending to children the decision-making capacities normally reserved for adults could run counter to

the overriding goal of improving the lot of children generally. Given all of this, how are we to understand the power parents have to make decisions on behalf of their children?

### 1.3 Rights-Talk

Famously, Ronald Dworkin has said that rights act as ‘trumps’, that is, in a contest between a demand of right and some other demand, ‘rights’ are always the greater and therefore trump non-rights demands, even those that could be said to be desirable and serve some common good (1984).<sup>17</sup> Of course, this leads to any number of questions: How do we know what is a right and what is not? What do we do when rights – as they often do – collide? Can rights be exercised on behalf of others or must they be claimed by the person whose rights they are? For present purposes I am concerned mainly with the following question: What purpose does the existence of rights actually serve?<sup>18</sup>

James Griffin argues that our human rights tradition has protected our standing as persons, which personhood distinguishes us from non-human animals and is also distinguishable from basic human capacities that themselves do not distinguish us from non-human animals i.e., the capacity to feel pain, or the need to eat and drink, and therefore properly endows *agents*, rather than simply humans, with rights.<sup>19</sup> People (humans) who are incapable of exercising agency (infants, coma patients) do not, properly have ‘human rights’ (2002: 28). For Griffin, this position does not eradicate the idea that non-agents i.e., coma patients and infants, are actually *owed* something, that is,

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<sup>17</sup> More recently, Judith Jarvis Thomson has claimed that rights act as high cards rather than trumps (cited in Brennan 1995).

<sup>18</sup> There are two main functions that rights are said to serve and this gives rise to two main categories of rights – those that protect our agency and those that protect our interests. With regard to children, an interest-view of rights is apposite since rights give rise to a duty on the part of others and yet do not, on the interest view, require that the right-holder be the one to press any particular claim. This is consistent with our general view that we have duties towards others who cannot press claims – children and comatose patients for instance – and that these are important enough to require duties on the part of others to either perform or refrain from performing an act. It is this idea of rights that is adopted here.

<sup>19</sup> See also Frankfurt (1988).

that others have moral duties toward them, even if these duties on the part of others do not amount to corollary rights on the part of coma patients and infants etc...

This ‘choice’ view of rights, that rights are endowed to those who are capable of exercising agency, implies two other views of rights: First, that rights which cannot be enforced cannot properly be so-called and that rights can only be so-called if they can be claimed by the agent/chooser herself. This is because one who lacks the capacity to choose likely lacks the capacity to make claims. Relatedly, a right that cannot be enforced cannot be claimed – at least in the more narrow sense meant here by enforced, that is, by a coercive power that has the means to make it so. We might, colloquially, *say*, for instance, that children are *owed* many things that could not be enforced, for instance, a mother’s love, but to the extent of its unenforceability, the language of ‘right’ is inappropriate on this view. A problem arises here: To say that for a right to exist it must be possible to claim it, that is, to enforce it legally, is to make in the words of one observer, “moral rights parasitic on the law” (Wringe 1981: 43). Such a view is incoherent since to have a right that one could legitimately claim is to say that one has a *moral* right to the thing in question such that its legal claim is a legitimate one. Moral rights, then, are necessarily *prior to* – rather than consequent with or dependent upon – their enforceability.<sup>20</sup>

Be that as it may, a narrow conceptualisation of ‘right’ is not self-evidently inapposite.<sup>21</sup> In the first place, we might wonder how rights are to be taken seriously if they are unenforceable. Rights that are unenforceable might be said to be little more than paper-tigers and undermine the very purpose of distinguishing between a right and

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<sup>20</sup> For a seminal analysis on conceptualizing rights see Hohfeld (1919).

<sup>21</sup> CF Glendon (1991).

something else, for instance, an act of charity.<sup>22</sup> A further and presently compelling argument is that ‘rights-talk’ generally is so loose that the all-important idea of a right has been lost to frivolity. At least one observer has claimed that rights-talk has led to ‘rights inflation’ (Iverson 2008: 19). People claim to have a right to any number of things that lessens the urgency of rights-claims overall: ‘I have a right to do what I want in my own home’ or ‘I have a right to drive a car’ are examples of the kind of ‘loose’ talk that seems to muddy the waters.<sup>23</sup> When compared to the urgency of the claim that one has a right to the religious expression of their choice, say, the right to drive a car seems hardly to capture the same kind of demand. On the one hand, we might view the former as a moral right, which gives rise to the (legal) rights that protect it (such as the First Amendment of the *US Constitution* or Canada’s *Charter of Rights and Freedoms*), while the second demand might be said to find its complete justification in no more than the fact of its not being legally prohibited. Both are kinds of rights, but each relies upon different kinds of justification for its existence. And the right to do what one wants in one’s own home is hardly correct. Few of us would grant that inviting a religious proselytizer for whom one had opened the door in for a cup of tea, encompassed within it the ludicrous proposition that one was legitimated in then hacking them to pieces. The real-life examples, of course, can be multiplied in ways that speak more readily to the issue at hand, namely, the public/private divide for it is with regards to issues of domestic rape and violence

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<sup>22</sup> CF Fleischacker (2004) for his argument that the idea that everyone ought to be guaranteed a certain level of subsistence is a relatively modern one which distinguishes between the idea of justice and previous ages’ views about how to deal with poverty which took the form of emphasizing the beneficence of the giver thereby prompting their charity.

<sup>23</sup> In fact the latter right has been subject to judicial interpretation. See *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* [1999].



against women and children that the absurdity of the ‘private family’ in any strict sense anyway, is so obvious.

For some observers rights-talk is more than just muddy and unclear, it is harmful. It emphasizes what one is owed rather than what one owes to others and exacerbates ‘me-first’ thinking. The general criticism of rights-talk is that with its focus on what one is owed, it teaches people to concern themselves with themselves, rather than with their responsibilities to others. It is said that a focus on rights emphasizes selfishness and self-centredness and negates other values traditionally associated with virtue such as sacrifice, duty and self-reliance.

Mary Ann Glendon refers to the state of political discourse in the US of the early 90s as guided by the sound-bite, which, she says, the “intemperate rhetoric of personal liberty” seems particularly well suited to (1991: x). Her thesis is that rights-talk has impoverished democratic deliberation to the extent that rather than seeking to find creative solutions to both garden-variety problems as well as the larger social problems that plague us we tend to invoke our putative right in something in an effort to ‘trump’ other considerations.<sup>24</sup> Judges who deliberate over competing claims are trained “in a legal system that has difficulty thinking about long term effects and with envisioning entities other than individuals, corporations and states” (30). As such, criticism of rights-talk becomes self-fulfilling: To have one’s claims taken seriously they must be re-fashioned as rights, but rights are deliberated upon within a system that must eschew much harm that cannot be squeezed into the absolutist paradigm that competing rights claims tend to bring to the fore. Glendon comments that earlier notions of individualism

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<sup>24</sup> It should be noted that Glendon believes the problem of rights-talk is more serious in the US than in England or Canada where the discourse of rights is less ‘extravagant’ (1991: 20).

emphasized the individual as a site of virtuous behaviour, but “the current strain is characterized by self-expression and the pursuit of self-gratification, rather than by self-reliance and the cultivation of self-discipline” (in Glendon 1991: 173). Others agree. Ronald Beiner opines that the communitarian critique of liberalism identifies “deficiencies in the character-building capacities of liberal culture” (1992: 36). Allan Bloom reiterates a similar point when he concludes that, today, young people are told that their choices are completely theirs to make, and that one’s country expects little of them (in Beiner, 1992: 36). Today, we are more likely to think that we have a right *not* to participate in contributing to the wider society or to vote in civic elections than we think that it is our responsibility to do so, despite the historic connection between an informed and active populace and the ongoing protection of rights generally.

### *1.3.1 Rights and the Family*

In the context of the family, things are said to be dire. Some observers claim that rights in the family negate loving ties of intimacy and “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” (Schoeman 1980: 9). Even the ready acknowledgement that children are ‘owed’ something and are not mere parental vassals does not quiet criticism of rights-talk. Sandel’s sophisticated criticism of Rawl’s *A Theory of Justice* is one of the best exemplars of this (1982). Sandel takes aim at the very root of calls for justice by calling into question Rawls’ underlying premise that “[j]ustice is the first virtue of social institutions” (Rawls 1971: 3).<sup>25</sup> Sandel claims Rawlsian justice

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<sup>25</sup> While Rawls claims that the monogamous family is a social institution, he pulls back from incorporating it within the constitutional arrangement. Okin’s *Justice, Gender and the Family* (1989) takes aim at what she perceives to be Rawls’ failure with regard to his discussion (or lack thereof) of the family. In her view,

is a *remedial* virtue, which obtains in the presence of “fallen conditions”. To imply circumstances whereby justice is necessary is to concede other, *competing*, virtues whereby they would be unnecessary, such as the prevalence of benevolence. It might be appropriate for justice to prevail in conditions where one would be hard-pressed to satisfy the rival interest of someone who resided within one’s political community, but whom one had never met and with whom one shared little, but within the family calls for justice are seen as begetting the “fallen conditions” that might, on proper inspection, be better served by circumstances of benevolence, from the moral point of view. It seems helpful to quote Sandel at length. He writes:

When I act out of a sense of justice in inappropriate circumstances, say, in circumstances, where the virtues of benevolence and fraternity rather than justice are relevantly engaged, my act may not be superfluous, but might contribute to a reorientation of prevailing understandings and motivations, thereby transforming the circumstances of justice to some degree. And this can be true even where the ‘act’ I perform out of justice is ‘the same act’ as the one I would have performed out of benevolence or fraternity, except in a different spirit. As in Rawls’ account of stability, my act and the sense of justice that informs it have the self-fulfilling effect of bringing about the conditions under which they *would* have been appropriate. But in the case of the inappropriate act of justice, the result is to render the circumstances of justice more pressing without necessarily evoking an increase in the incidence of justice to a similar degree (1982: 34-5).

The difficulty here is that Sandel’s point does not take proper account of the fact that benevolence and fraternity, while part and parcel of all ‘well functioning’ familial relations, simply do not themselves always obtain. It might be one thing to say that Rawls

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theories of justice are incomplete to the extent that they don’t tackle the gender inequalities that exist within families and which are subsequently reproduced generationally.

overstates the case by saying that justice is *the supreme* value of *all* social institutions, but it is quite another to dismiss the question of justice in the family altogether. One might note that circumstances of justice can have the equal and opposite consequence than that identified by Sandel, which is that a concept of justice can bring a change in the circumstances of benevolence and fraternity. This is true by working on what it is that we believe others ought, rightly or justly, to have. In relationships marked by power relations, as is the case with parents vis-à-vis their children, the question of *acting upon* what we believe children ought rightly to have might yet remain a question of benevolence, and can be rendered conceptually distinct from the question of examining *what it is* that they ought rightly to have. The desire to act for the good of others is different from knowing of what that good consists. Largely, questions of justice in the family have taken aim at the myriad ways in which *assumed power* relations have unwittingly reproduced circumstances that have had ill effects upon those who are the most vulnerable to the decisions made by others and to the extent that seeing others as rights-bearers increases one's view of the obligation one has in view of those others, rights-talk is beneficial even within the family.

A secondary function of rights-talk is noted by Brighthouse who claims that "a great deal of rights-thinking does not involve the assertion of rights. It involves waiving one's rights" (2002: 34). According to Brighthouse, the gesture of waiving one's rights within intimate relationships out of love or respect for the wants and desires of others is a profoundly powerful gesture. While this gesture is unavailable to children who lack the emotional resources and the coercive power to give this gesture the meaning with which

it may be imbued by adults, he concludes that the fact of seeing one's child as a rights-bearer shapes our actions toward our children (34-5).

Relatedly, Dwyer makes the important observation that criticism of rights-talk with respect to children always comes from those whose rights vis-à-vis children are presently established. After all, the opposite view of restricting the rights of children is to increase the rights parents have in view of them (2006: 12-14). In other words, rights within the family already exist. By default, these rights extend to parents. The question is not that of whether rights in the family ought to exist, but who shall have what rights.

Justice, in the first place, gives us the vocabulary to examine how we ought to conceive of how it is that people, particularly the most vulnerable among us, ought to be treated, in a language that assumes a greater priority than that of 'should', precisely because of the enormous investment liberal theory has made in the idea that justice ought, normally, to prevail and that the idea of rights is the best means through which to articulate that idea. In an equal and opposite way, Dwyer opines that talk of fulfilling responsibilities on the part of the powerful rather than focusing upon the rights of the powerless, appeals to the power-holders' desire to 'be good' and 'moral'. This desire, however, suffers from the same incompleteness that Sandel maintains talk of justice does, but on the opposite side of the question. Rights-talk in the family is important because it gives us the language through which we can articulate present inequities and imbue them with the moral priority they deserve. Dwyer maintains that to the extent that rights-talk elevates the moral claims of a person and "to the extent that one believes significant change in treatment of children is morally requisite, one will find rights-talk useful" (14). In order, however, to determine what the treatment of children in our society ought

morally to require, it might be beneficial to examine several implicit and explicit conceptions of children and childhood that are presently observable within liberal society.

## ***1.4 What is a Child?***

### *1.4.1 The Proprietary View*

Throughout much of Western history, children were viewed as the property of their fathers. Under Roman law, a father had the power of life or death over his children. Hobbes stipulates something very similar. Elements of such proprietary views are evident even now. For instance, it has been a central tenet for the better part of the 20<sup>th</sup> century that parents have the right to ‘pass on’ their religious beliefs to their children. One statement of this tenet is given by a Justice of the *Québec Court of Appeal* who, in 1957 wrote that “...the right to give one’s children the religious education of one’s choice...find[s] [its] existence in the very nature of man” (*Chabot v. Comm. De Lamorandière*, 716 and 722).<sup>26</sup>

Barbara Bennett Woodhouse argues, convincingly, that at least two of the great US constitutional challenges of the 20<sup>th</sup> century with regards to parental choice in education – *Meyer v. Nebraska* (1923) and *Pierce v. Society of Sisters* (1925) – were underwritten by a view of the child as the *property* of the parent. In *Meyer*, a state law prohibiting the education of children in any ‘modern’ language other than English was overturned, just as *Pierce* overturned a state law making illegal non-publicly funded schooling.

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<sup>26</sup> Recently, the Supreme Court of Canada has explicitly narrowed the leeway parents have to oppose instruction that parents believe interferes with their inherent right to ‘pass on’ religious value. We look at this in more detail in our appendix.

These landmark decisions are often touted as articulations of 1<sup>st</sup> amendment doctrine, and vindications of religious freedom and toleration of diversity (Woodhouse 1992: 997). Woodhouse reminds us, instead, that the laws that were overturned in both *Meyer* and *Pierce* were as a result of their violation of the 14<sup>th</sup> amendment of the US constitution, proscribing the abridgement of life, liberty or property without due process (1992: 1089-1092). She argues that the issues at stake had less to do with toleration of diversity and religious freedom, than they did with the restriction that these laws placed on the rights of parents to dispose of their children as they saw fit. More to the point, however, is the insight that these decisions could only be seen as articulations of 1<sup>st</sup> amendment principles, by importing the very same ‘ownership’ premises inherent in 14<sup>th</sup> amendment doctrine; that is, by regarding children’s viewpoints as coterminous with those of their parents. When, in 1943, the judiciary ruled that under the 1<sup>st</sup> amendment children could not be forced to salute the flag if such went against their religious convictions, the implicit suggestion was that children are naturally the transmitters of parental viewpoints, since it was the latter’s convictions that were being played out, but the protection to do so was being allocated as a right properly protecting the religious interest of the children themselves (*Barnette v. West Virginia*). Woodhouse claims that, even though no one views children as *literal* property – with the accompanying power to, say, buy, sell and destroy at will – the rhetoric of property relations is retained in many instances when speaking about children and that “our culture makes assumptions about children deeply analogous to those it adopts when thinking about property” (1992: 1042).<sup>27</sup>

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<sup>27</sup> A similar argument is made by Brennan and Noggle (1997: 20).

Jan Narveson's is just such a contemporary proprietary view, exemplifying many of these assumptions. Narveson employs a 'labour theory' to ground the property rights of parents in their children, arguing that owing to the productive effort exerted to get them here children are "the 'property' of their (biological-AB) parents in so far as they are anybody's" (2002: 267). This might be taken to be no more than a claim that, all things being equal, the biological parents ought to have something like 'first refusal rights' with regards to the upbringing of these children they have exerted effort to bring into being.<sup>28</sup> And this is partly what Narveson means. The other part is that children are not born moral *agents*, but are, instead, moral *patients*. They begin life as the virtual property of their parents with regards not only to who those rightful parents *are* (the biological ones unless they themselves move to sever that relationship), but also to what parents may *do* in respect of those children (266).<sup>29</sup>

Narveson recognizes that the proprietary view does not, in fact, give a dispensation to parents to do whatever they may please with their children. This, he notes, would be out of keeping with any theory of property rights since all such rights are limited (267). Property rights are limited to the extent that they impede the rights of others: I may not throw a chair I own through a window that I do not own, because of the

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<sup>28</sup> Such views are complicated by the extent to which our technological capacities renders mere 'biological substance' only *part* of some children's conception and/or gestational development. Moreover, the 'effort' exerted by biological parents is also complicated by such a view, since it is not always clear *who* exerted the most effort in cases where the biological material of life does not cohere with the gestational agent. For a view that it is gestation, which ought to be privileged in allocating parental rights see Hall (1999: 73-82). Furthermore, 'labour theories' would seem to privilege mothers over fathers a good deal of the time and in some instances a biological father's 'effort' would fall well below that of a nurse, doctor, midwife or any number of friends and relatives who care for the mother while she is pregnant and through delivery, and yet these are not thought to have any parental rights vis-à-vis the child in question.

<sup>29</sup> It should be noted that most 'proprietary' views have as much to do with the idea that biological parents are the rightful parents of children as they do with the idea that parents (however allocated) may do virtually what they wish with their children as if they were actually property. These ought, in fact, to be treated as related but separate issues: One having to do with the relationship/control rights of parents over children and the other with the allocation of these rights i.e., who will have them.



violation this presents to the owner of the window. In this way, although Narveson is correct to note that even property rights are limited, it might be said that proprietary views do not limit rights in the correct way. On this view, what parents may do to their children is not based on any consideration as to the effect it will have upon the *child*, but is instead limited by the infringement of the rights of third parties (Austin 2007: 12-13, Narveson 1988: 273-74). It is elementary for Narveson, for instance, that parents have an obligation to raise their children to be peaceable and not to become murderers, liars, or rapists, owing to the harm their becoming so will bring to third parties (Narveson 2002: 272; 1988: 274). Beyond this, however, Narveson claims simply that “parents have wide scope” (2002: 276).

One reason why this is so, and about which he is correct, is that there is no obviously best path in life that is right for all people; that it is reasonable to think that a child born to Vietnamese peasants isn't inherently being done a disservice by being raised as...well...a Vietnamese peasant (275). His point here is that the way of life a child eventually embraces is given in large part by that child's environment and that this is not morally problematic given that many different environments exist, any number of which can be plausibly good.<sup>30</sup> He writes that: “the child's family lives in a certain way, does what it does, and the child naturally falls in with it” (ibid). Narveson's problem is that between the extreme of having a child's life dictated by what he derisively refers to as the Central Committee for Children, on one hand, and the opposite extreme of the family simply ‘doing what it does’ on the other hand, there is virtually no account of

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<sup>30</sup> For similar arguments see William Galston (2002) and Stephen Gilles (1996). For a view that what is important is a suitable *number* of different options from which to choose, see Joseph Raz (1988). In order to take account of the fact of great divergence not only across geographical space, but certainly across historical space, Amy Gutmann argues that what children are owed is related to the kind of ‘society’ into which they will most likely find themselves as adults (1980).

children as separate beings with unique qualities and needs. Narveson has no account of *children* only of *people*, but as was previously identified, that account is modeled after characteristics peculiar to *adult* people.

The reason this is so is because Narveson believes that only full-blooded Hobbesian contract theory can be rationally defended. On this view our general moral framework results from our contracting not to impede others in exchange for their not impeding us in the pursuit of self-referential preferences. Thus, our morals are said to be ‘by agreement’.<sup>31</sup> Since the resulting moral space is put into place by these contractors, and contractors contract as a result of the rational desire to ensure peace, those who lack the requisite rationality cannot be contractors and are, therefore, not proper subjects of moral concern from the *general* moral viewpoint. It is for this reason that children are not born moral agents; being initially incapable of weighing options that conduce to any course of action which reflects their interests. They are only moral *patients* and moral *agents* are under no moral obligation to consider their interests when interacting with them (2002: 266). Once they become moral agents, they also cease to be ‘property’, but not before (1988: 273).

Narveson believes that any obligations parents have are as a result of a *particular* duty to *particular* children owing to a willingness to take on the task of raising and nurturing them. He does not believe that members of society at large have a *general* duty to moral patients (1988: 274; 2002: 266). This presents us with the following logical conclusion: Infanticide is not morally prohibited since moral *patients* have no moral standing other than what moral agents choose to bestow upon them, and, in the case of

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<sup>31</sup> This comes from the title of David Gauthier’s book *Morals by Agreement* (1987) which sets out to defend Hobbesian contractarianism.

children, the views of their ‘owners’ are decisive (Narveson 2002: 266).<sup>32</sup> The implication of this is that parents who, for one reason or another, feel no sentiment toward their particular child are under no moral obligation to keep her alive, and society has no generalizable right or obligation to intervene. There is an obligation not to treat any child in such a way that she will likely turn out to be a psychopath and harm others, but, counter-intuitively, nothing to require that a child, prior to its moral agency, be kept alive.

Narveson recognizes that the libertarian ideal he espouses is “in no other area of moral philosophy...at quite such discomfort in relation to ordinary opinion” (1988: 274). This is likely why the language he uses is guarded. He claims that given the number of people who would happily claim an unwanted child, we would not see many people choosing to kill their young children rather than turning them over to others who would care for them (ibid). (Although if you care not at all for your child, such that you are contemplating killing her, why you would not kill her as soon as turn her over to someone who *would* care for her is unclear. The only suggestion Narveson offers is the willingness to “save us the pain of seeing a child killed” [ibid].) But his answer to the question “should parents be forced to turn their children over to others rather than kill them?” is “probably not” (ibid).

Narveson’s formulation, however, is at even greater odds with ‘ordinary opinion’ than he acknowledges. There are two elements necessary for a ‘full blooded’ Hobbesian view, neither of which, taken alone, is sufficient. Narveson takes account of the fact that

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<sup>32</sup> We might envision a circumstance of such scarcity that it is morally preferable to kill a child very nearly after it is born, than to allow it to live, possibly to die of starvation, or to allow it to live and endanger the provisions of others, but we are not, here, talking about a situation of such dire circumstances, but one of relative affluence.

it is only moral *agents* who are properly contractors, but he does not properly formulate, leastways along Hobbesian lines, when moral agency begins. He claims that it begins very early on; that early on children display the possession of a will (2002: 273) and that “even quite young children exhibit rationality, after all, and perhaps we should say that even infants do” (271).<sup>33</sup> His suggestion is that having a will and rationality equates to moral agency, but while these are necessary, they are not sufficient conditions for Hobbesian contract theory. What is also required is “a large repertoire of powers...includ[ing] the power to make life worse for others” (Narveson 2002: 270; 1988: 270). For Hobbes, man’s equal capacity underwrites the contract. If you have no capacity to hurt me in any way, then I have no rational reason to make a contract with you, since such contracts protect *mutual* advantage (Kymlicka 2002: 132-33). This is why, for instance, Narveson insists that “[c]atering to the unfortunate is the work of charity, not justice [...]” (2002: 272). On this more thoroughly Hobbesian view, the rational agency which would see children graduate from moral patients to moral agents, will *not* occur nearly as early as Narveson suggests. It certainly will not occur simply because, as a two year old, say, a child has a *will* to waddle over to a shiny object she spies. Thus, Narveson’s account challenges our intuitions to a far greater degree than even he seems to realize.<sup>34</sup>

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<sup>33</sup> Since rationality on the Hobbesian view requires the ability to recognize some basic interests and to contract with others to protect these mutually. Even if rationality here includes a very poor ability to recognize interests and very low ‘contracting power’, that even infants might possess such rationality seems quite impossible.

<sup>34</sup> Narveson suggests that even if the theory with which he is working is wildly contrary to our most cherished convictions, things are not as bad as we think. This seems to be, however, because Narveson is satisfied that in practice people would be ‘helpful’ and ‘charitable’ and so forth. This does not, however, affect the fact that these things are not given by his theory (which is, after all, a theory of *justice* or what people are *owed*), but is given simply by what he takes most people to be – “namely helpful” (2002: 272)

We might, of course, turn Narveson's problem on its head and say that if a given theory cannot account for generalized moral convictions that are held even against the well reasoned and articulated views of that theory, than it is the theory that is inadequate rather than our generalized moral convictions. And to the extent that it cannot account for how strongly we adhere to the idea that the infirm and vulnerable ought to be protected, often in proportion to their vulnerability rather than excluded because of it, Hobbesian contract theory is found wanting.<sup>35</sup>

#### 1.4.2 The 'Liberationist' View

On the opposite extreme to the proprietary view is the children's rights movement, which has always stood opposed to the view of children as parental property; which view had explicitly undergirded the idea that children could be made to work to 'pay back' what had been invested in them by way of the provision of food and shelter etc... (Woodhouse 1992: 1036-38). What 'rights' children are thought to have, however, is itself a site of contention. At one end of the child's rights movement is the view that has come to be known as 'child liberation', and which is viewed by its proponents as the movement's culmination.

Children's rights can be fruitfully viewed as being of two possible kinds: Those which protect children's interests (welfare rights) and those which protect their decisions (agency rights) (Brennan 2002; Minow 1986: 8). From the mid 19<sup>th</sup> to the mid 20<sup>th</sup> centuries, the children's rights movement was concerned with the *welfare* of children (Woodhouse 1992: 1051-55; Minow 1986: 8-11). By contrast, the views of 'child

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<sup>35</sup> See Okin (1989) for a view that contract theory obscures the importance of moral and educational development.

liberation', which developed in the latter half of the 20th century, are concerned with the 'agency' of children; that the decisions that children make about their own lives should be decisive. This is the starkest possible position against the notion of children as property. It also opposes the idea that what constitutes children's welfare is decisive, the nature of which is generally determined by adults.<sup>36</sup>

The arguments of child liberationists stem from the initial proposition that all people, in virtue of their status as human beings, possess moral rights. Child liberationists believe that children should have the same rights as adults in virtually every avenue of life; including the right to vote, work, travel, own property, live with whom they please (or by themselves if they so choose), and the right to fashion (or reject altogether) their own education (Holt 1974: chaps.17-21, 24; Farson 1974: chap. 7).

Child liberationists advance arguments similar to those at one time advanced by the women's movement. Women had historically been denied the rights bestowed to men on the basis that they lacked the requisite capacities (reason, rationality) upon which their extension and their appropriate exercise were based.<sup>37</sup> Like feminists who claimed that women did, in fact, possess these capacities within their status as human beings, child liberationists claim that children do not differ markedly from adults in the relevant capacities that endow adults with the rights that they have. This is not to say that child liberationists do not recognize that children possess characteristics that, generally

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<sup>36</sup> The agency of children is not always easily extricated from their welfare to the extent that we think of what is good for people, generally, to be in keeping with some view of their opportunity to decide for themselves what that is. The preoccupation with 'autonomy' within political philosophy is largely of this kind. The 'child liberationist's' view centres around an understanding of children's capacity as being largely indistinguishable from that of the average adult, hence their focus on agency over welfare. The tension between the two kinds of rights is elucidated in Minow (1986: 11-14).

<sup>37</sup> We use the past tense not to indicate that women are now unproblematically equal, but rather to indicate that the most recent 'wave' of the women's movement tends to focus on other arguments, having achieved the legal and formal rights that the first two waves of the movement were more narrowly focused on.

speaking, adults do not. Among such characteristics are children's smallness, powerlessness, ignorance and anxiety (Holt 1974:124), their clumsiness, inexperience (113, 119), their inconsiderateness, self-absorption, selfishness and impulsiveness (114), their hopefulness and trustfulness (118). It is to say, rather, that the characteristics that are said to render children incapable of utilizing appropriate judgement in regards to long-term interests (theirs and those of others), do not debar adults from the exercise of their legal rights even when they display the same poor judgement and similar characteristics.

Child liberationists paint a compelling picture as to the inconsistency with which the law is applied, and yet they come at it from a curious angle. They do not, generally, argue that children are as capable of employing sound judgement as are adults. Rather, they argue that since adults who display the poor judgement of children are not debarred from exercising their rights, children should not be debarred from exercising the same rights, even if we acknowledge that they are almost inevitably going to do so poorly.

It is not *literally* true that child liberationists do not acknowledge that children display differences from adults that *are* relevant to the exercise of rights. Without question a 5-day old infant is incapable of exercising any rights whatsoever. This is true of a 9-month old and likely most two-year olds as well.<sup>38</sup> In fact, prior to the capacity for speech, and therefore the ability of children to articulate their wish to exercise whatever rights they are said to have, it is virtually impossible to comprehend children's rights in terms of anything *except* their welfare. The burgeoning power of speech, however, like

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<sup>38</sup> Howard Cohen acknowledges that children lack the requisite capacities to make decisions which best reflect their interests. His solution is that children could employ the services of one whose 'expertise' they would utilize, just as others employ the expertise of lawyers and accountants. This is, of course, circular. If children had the capacity to recognize 'good' advice from 'bad' advice in the first place, they would not need to 'borrow' the capacities of others.

other basic motor skills virtually all children eventually acquire, demonstrates the very fact of children's nature, which is that they are not only moral 'beings' in and of themselves, but that they are also in the process of 'becoming'.<sup>39</sup>

The focus on agency as the single all-important, 'stand-alone' value, which ought to be privileged in all instances, is impoverished in child liberationist circles because it neglects the very reason for which agency is deemed valuable. First, agency rights are said to be appropriate since people are the best judge of their own interests; this is the *consequentialist* argument. The second argument for the importance of agency is that it is *intrinsically* valuable, since part of what it means to be human is to make choices which, in our own estimation, reflect values and life-plans that are important to us.

#### *1.4.2.1 The Consequentialist Argument for Agency*

The consequentialist argument is an empirical claim and disputable to the extent that it is demonstrable that people do not always do what is in their best interests, even on a view that they are the ones to determine what their interests are. For example, a person who valued health and did not wish to die young of cancer or heart disease, is not serving the interests she herself recognizes having by smoking a pack of cigarettes a day or consistently eating fatty foods while getting no exercise. And child-liberationists, by and large, do not dispute that people make poor choices. The extension of this line of examination is whether or not it is also an empirical fact that children make even poorer choices, on average, than adults, in terms of protecting their own interests.

In her book, *In their Best Interests? The Case against Equal Rights for Children*, Laura Purdy argues, convincingly, that they do make poorer choices than adults (1992).<sup>40</sup>

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<sup>39</sup> For a discussion of how liberal theory negates the first aspect of children's nature see Arneil (2002).



She documents two major historical attempts at child-directed education, that is, education that was completely dependent upon the choices of the children involved. In both cases even the researchers concluded that the experiments had failed. Children had been incapable, overall, of making choices leading to productive, co-operative and meaningful experiences both in the present and as they grew older, against the predictions of the researchers. Purdy makes two relevant arguments. The first is that if experience counts towards wisdom, then it seems reasonable to allow people to have a period wherein they are working with ‘a safety net’. The basic problem for Purdy is that on the child liberationist account rationality works in a vacuum, as if the capacity to determine consequences did not increase with age and experience. Experience is subject to decreasing marginal utility with additional units counting for less than earlier ones (132-34). While it is not clear when, exactly, such optimality is reached, nor is it the case that it is the same for every individual, according to Purdy it is clear that it does not happen early enough to justify the main arguments of the child liberationists. Purdy’s second argument is that adducing evidence of how badly adults choose does not undermine the case that children need to learn certain skills and facts about life on the view that if adults often do choose badly, it is worrying to imagine how badly they would have chosen as children, absent the opportunity to do so in relative safety and within bounded guidelines (52).

#### *1.4.2.2 The Instrumentalist Argument for Agency*

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<sup>40</sup> Purdy’s further concern is that children must be taught to make choices that are good for *others* if they are to live in a political and moral space with others.

The second argument in defence of agency, the instrumentalist view, claims that our lives go better when the choices we make cohere with the particular values, ideals and life-plans that are the most meaningful to us and when we have been able to make that determination for ourselves, even if it turns out we have made it wrongly. This, of course, raises the following question, particularly in light of the ‘becoming’ that characterizes children’s nature: If I, for instance, make choices which lead me to become a drug addict such that later in life I am so addicted that I cannot envision wanting to live any other way, does that not constitute as appropriate a use of agency as any other on the view that my life is well lived in my own estimation? One answer is to acknowledge that most drug addicts, were it not for the fact of their addiction, would recoil at the idea of a future like the kind exemplified by a drug addict’s life circumstances. It is something like this that is meant by the ‘retroactive consent’ model to paternalistic treatment Robert Noggle and Samantha Brennan forward when they claim that “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” (1997: 4). A further answer might involve recognizing that since children do not yet have a coherent set of life-plans or an established value-set, the idea of protecting their agency, leastways in any strong sense, finds only shallow justification on this view.

There remains an important difference between children and women (or other right-seeking groups), in terms of the denial of rights, which goes unnoticed by child liberationists when they attempt to identify childhood ‘oppression’ with the oppression of other rights-seeking groups, and that is that childhood is not an ascriptive identity as such. First, while it is beyond one’s control, it is almost always changeable. Moreover, it is universal. Everyone began life as a child. One *outgrows* childhood and will, eventually,

come to have the same rights as all other adults in a way that cannot be said of those who are denied rights based on other ascriptive identifiers. Even if the claim of child liberationists is correct that children act ‘childishly’ in part because they are made to act so by adults, and that they could exercise better judgement if they were allowed to do so it does not follow that the metaphorical safety net to which Purdy alludes must be removed in order for them to be allowed to take on more responsibility and exercise more (and better) judgement than they often do (or are expected to) at present.

Finally, the most telling problem with ‘child liberation’ is exemplified in the following: Holt imagines that a child should “have the right to travel and to live away from home without the parents’ permission” (1974: 195). He claims that since adults get lost on occasion it will not be harmful to the child if he should get lost “as long as the child knows how to get in touch with his home, or with friends, or as long as he has *on or with him his name and address*” (199, emphasis added).<sup>41</sup> Holt’s response to the imagined objection that some children might not know how to get in touch with their homes or friends is the following absurdity: “We can only say that a child who would travel so far without that information is so reckless and foolish that even now the law and his parents can probably not keep him out of trouble” (ibid). If we substitute the words ‘impulsive’, ‘ignorant’, and ‘trustful’, which Holt readily admits children are by nature, for the words ‘reckless and foolish’ in the previous quote, we have Holt’s completely incoherent sketch of childhood.<sup>42</sup> In the words of Archard and Macleod “the

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<sup>41</sup> The italics are meant to draw attention to the fact that Holt is conceiving of a child so young that he may not actually know his name and address by heart, but must at least have it *on or with him*.

<sup>42</sup> A similarly incoherent sketch is provided by Farson (1974). In *Birthrights* he cites as part of a list of all the ways children are dominated by adults, the fact that “in stores or restaurants (almost all of which are designed only for adults) children don’t act like children” (2) and in the following pages claims that child liberation is about the removal of double standards, not all standards and that “[j]ust as adults must abide by regulations, standards, and schedules, so children must responsibly abide by these same rules” (5).

liberationists' extremely problematic assimilation of adults and children [is] so easily refuted that they [have] little impact on the research agenda of mainstream political theory" (2002: 3).

Both the proprietary and the liberationist views gloss over the unique quality of this phase in a person's life, making their present condition and their future outcomes overly dependent upon the whims and inclinations of others. This, of course, includes the irresponsible decision to treat children's agency as decisive; turning Holt's complaint that welfare rights amount to the rights *adults* believe children should have on its head, since, owing to children's powerlessness, any and all rights children have amount to the rights adults believe children should have, including agency rights.

This particular quality of 'becoming' implicit in childhood is best understood in the following way: First, as persons of moral worth children are beings worthy of consideration in the present. This is true if we set aside the Hobbesian view set out by Narveson that children's present considerations ought to be informed by little more than the future consequences their upbringing poses for others and we consider children's futures as adults important precisely because of their moral worth as persons, that is, for their own sakes. Second, that the sort of decisions and opportunities of which persons will be capable as adults, are given in part by their relationships as children, and that their relationship with their parents is among the most influential of these. Moreover, children are worthy of consideration in the present owing to the importance of their quality of life in the here and now. This is startlingly evident when we recall the sad lot of children with terminal illnesses. These children will never make it to adulthood and it seems hard to imagine that any parent whose child had lived a joyless life of little more than preparation

for adulthood would take any comfort in that fact that the child *would* have known some joy and happiness...had she only lived long enough.

#### *1.4.3 Children as 'Becomings'*

A more compelling account of childhood is offered by Tamar Shapiro (1999). On Shapiro's account, what separates childhood from adulthood is the solidity of the value-structure, which gives meaning to agency in the first place. Children have interests in developing the capacity to pursue a course of action toward the realization of their future commitments (agency) as well as interests that are separate from the substance of these burgeoning commitments (welfare). Such interests include things that children may or may not be aware of needing; such as, say, adequate skills in literacy and numeracy, or even things children might repudiate; such as eating their vegetables although they require proper nutrition. In Tamar Shapiro's words: "We think of children as people who have to be *raised*, whether they like it or not." Such 'raising' involves obligations on the part of the adult world which include "duties to protect, nurture, discipline and educate" (716). The very issue of what comprehensive commitments and values children will develop in order to then pursue them is thrown into stark relief. So too, is the basis of the obligations we have toward children.

Shapiro uses a Kantian analysis in order to determine that there is nothing fundamentally troublesome with treating children as beings who are incapable of realizing their own ends. At first glance, this seems problematic owing to the stringency with which Kantian ethics disallows the bypassing of another's will. At second glance, this bypassing of another's will, largely understandable when it comes to children for reasons suggested above, is yet problematic on Kantian grounds, because even while we

might understand that children are not yet capable of making autonomous choices it is not immediately clear what empowers adults to do so on their behalf. By way of elaboration, Shapiro acknowledges that adults' decisions in the world are imperfect realizations of final ends and yet within a Kantian ethic there is no opportunity for one adult to bypass the will of another on this basis.<sup>43</sup>

A similar point is made by Joe Coleman. In "Answering Susan: Liberalism, Civic Education and the Status of Younger Persons" (2002), Coleman interrogates how liberals might justify enforcing certain educational requirements with regards to the development of civic qualities in younger persons that they would find utterly objectionable to enforce upon voting adults. Unlike the liberationists, Coleman does not argue that since adults who choose poorly are still legally entitled to vote, children should not be debarred from it even when they choose poorly. Nor does he argue that there is an unfair disparity precisely because at the level of the individual some young people possess citizenship capacities way over and above those displayed by adults. Instead, Coleman provides empirical evidence that indicates that, on average, there is no difference between the capacities liberals generally view as necessary to good citizenship between adults and adolescents (164-70).<sup>44</sup> Indeed, Coleman suggests that the kind of abstract reasoning required to operationalize the moral powers Rawls takes to be necessary for good liberal citizenship, eludes almost *everyone*. Why then is a bypassing of the individual's will an

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<sup>43</sup> The obvious caveat is that for Kant this assumes a certain kind of adult; one who is 'independent'. A usual list of those who do not make the cut includes servants, day labourers, children and women. An important distinction, however, is that it is only women for whom this status of 'dependent' is necessary and unalterable. Kant's exclusion of them, however, is not relevant for our purposes since we can alter the substance of 'dependent' and 'independent' to suit our contemporary conceptions of women's moral status and, if warranted, that of children as well.

<sup>44</sup> Note that Coleman is speaking about post-pubescent 'adolescents' and not pre-pubescent 'children'.

obligation with respect to children on the basis that their decisions are, likewise, imperfection manifestations of final ends?

The very title of Shapiro's paper 'What is a Child?' is meant to get at this dichotomy by making explicit something which many of us already intuit about childhood: That it is more than merely a chronological place on a continuum. Shapiro determines that despite the imperfect realization of adult autonomy, there is yet a difference between adult imperfection and children's imperfection such that there is not simply a difference in degree between adults and children, but there exists a difference in *kind* between them. The difference in kind exists because adults have, generally, acquired the basic structure within which they choose, even if imperfectly, ends which correspond to the ordering of values which has created the edifice of this structure: "The adult, *qua* adult, is already governed by a constitution, so to speak" (729). Adducing Rawls, she writes: "it seems reasonable to claim that there is a limited domain of essential questions, the answers to which determine the agent's 'basic structure'" (730). It is from within the 'basic structure' to which these answers give rise that adults determine action; in accordance with a particular ordering of essential values already in place, notwithstanding that these values are alterable and occasionally become subordinated altogether as the adult continues through her life. The child has yet to order any such basic values in any consistent or coherent manner (729).<sup>45</sup>

That there are instances which repudiate this general rule does not make the rule ungeneralizable nor does the oft observed truism that a person who is 17 years and 364

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<sup>45</sup> This explains, in part, why it is easy to become fast friends in childhood and early adolescence with people that we could never imagine developing such close relationships with had we met them when we were adults. Notwithstanding differences in personality and temperament, worldviews are sufficiently underdeveloped so as not to play a part in our choice of friends; something which changes, often considerably after we have reached adulthood.

days old is not remarkably different from the person she becomes at the stroke of midnight.<sup>46</sup> The fact that there is an obvious tension implicit in determining the appropriate ‘end date’ of childhood, so often necessary for the purpose of realizing legal ends, does not, again, tell against the fact that childhood is characterized by a marked difference in capacity given not only by a lack of experience but by physiological factors (such as brain development).<sup>47</sup> All together, these things direct us to a ‘gradualist’ approach, whereby children and their expressed wills are given gradually more weight as they mature (Brennan 2002: 63-66) so too they should be expected to take on additional responsibility. The *gradualist* approach need not contravene the *difference in kind* approach. We can, for instance, recognize that children are *gradually* moving toward a kind of threshold at which it becomes reasonable to think of them as adults; the threshold marking the important *difference* referred to by Shapiro. This also speaks to Coleman’s point, since he also seems to implicitly recognize that the fact of legal distinctions, which may be inaccurate from the point of view of the average capacities of adolescents and adults respectively, need not detain us from making conceptual distinctions. In the end, such distinctions might lead us to re-think the *age* at which we assume adulthood is achieved, but that is a different question.

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<sup>46</sup> One possible way of meeting this objection is to treat particular children in particular ways. This is the thinking behind ‘child emancipation’ laws, for instance, which, albeit under rather stringent conditions, can allow for a minor to eschew parental control over some or all aspects of her life. This is largely no different in principle from the protection offered ‘adults’ who by dint of some (usually mental) ailment are not treated as other adults would be. See Minow (1986: 3-5) for a discussion on the patchwork nature of line-drawing relating to children as it presently exists in law, and how the ‘line-drawing’ exercise is a crude substitute for the variable competencies adults presume are needed for different tasks. Minow’s point is that this is a misunderstanding of what we are actually engaged in when we line-draw and the real point is to understand the varying relationships children have to their communities (parents, state) rather than to pinpoint conceptual differences between childhood and adulthood. In other words, the law treats children inconsistently because they are not the real focus of most of the legislation that affects them (6-8).

<sup>47</sup> Research shows that our prefrontal cortex, that part of our brains responsible for controlling our impulses, moderating social behavior and engaging in long-term decision-making, is not fully developed until sometime in our mid 20s.



For the purposes of this project I take it as uncontroversial that children demonstrate a marked difference in their capacities with regards to the pursuit of a rational course of action which reflects their interests and takes appropriate account of the interests of others, and that that fact is a part of the reason to bestow upon adult others the right to make decisions on their behalf. Just as children's independent status as persons requires us to take seriously their interests in the first place, their lack of decision-making power with regards to being in the precarious position they are in as children requires that some adult others take on the responsibility of having control rights over them. In other words, having been put in the precarious position of childhood by the actions of others, and lacking the capacity to be completely independent, some other must also bear the responsibility of caring for them. It is virtually universally accepted within liberal democratic societies, that children are rightfully cared for by either adults who choose to parent them or by institutions of the state in instances where no appropriate adults exist. We have an obligation toward children precisely because we do not generally hold accountable people who had no 'say' over the actions that bring them dire consequences.<sup>48</sup> Children are in such dire straits in that without intervention by some other they will surely suffer through no act of will of their own. Of course, who that some other should be is itself a discussion that implicates the very basis of the control rights adults hold over children as well as what those adult others are permitted, not permitted or obliged to provide once they have been identified.

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<sup>48</sup> Our *obligation* to care for children might be a different matter from our *willingness* to do so as a result of things quite other than obligation, for instance sheer 'human feeling', although we do believe that both play a large part in our understanding of why children in general ought to be cared for.

## ***2. What Rights (if any) do Parents Have?***

### *2.1 Introduction*

I have argued that children are generally, and rightfully, viewed as beings who lack the capacity to contemplate their own interests from the point of view of long-term consequences. It is quite clear that beings that eat glue with relative gusto, for example, might lack an informed view of what is best for them. Our understanding of children is premised, principally, upon the notion that they are vulnerable and require the intervention of others to meet even their most basic needs: Very young children cannot take care of themselves and would quite literally die without the intervention of another. In the general case within liberal democratic societies, it is the biological (and in more rare cases adoptive) parents who move, with relative ease, to fill this role. The role they assume is characterized by a variety of general obligations. At the very least, children may not be harmed; either emotionally or physically. They must have their basic needs for food and shelter adequately met. There is some minimum requirement of care and affection given by the legal requirement not to neglect the children in one's guardianship. In other words, this relationship is understood as fashioned, in part, by the needs of children.<sup>49</sup>

The necessary corollary to this is that parents are in the position of having to constantly make decisions with regards to the children in their care. These decisions range in importance from when the child will have dinner, whom she will befriend, what

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<sup>49</sup> It is here understood that children do not always have these needs met. Rather, the point is we consider these things to be the very least to which children are entitled. Moreover, these comments are not intended to advocate the right of the state to apprehend the children of economically poor parents in the absence of abuse or neglect. It is here understood that there are instances of 'neglect' that arise from the fact of poverty rather than from the lack of parental care and concern. For example, a single mother who must leave her young children at home alone while she works, unable to afford a babysitter, is not what is envisioned here and would not constitute neglect in the way that it is here meant. CF Brennan and Noggle (1997) for an argument that advances the 'stewardship' view.

school she will attend, what kinds of extracurricular activities she will engage in, to what general values; religious and secular, she will be exposed to, and with what frequency and how intensely.

The parent-child relationship is characterized by both the strong bonds which exist between most parents and their children as well as the enormous influence parents have over their children's future outcomes. As such, both parent and child have very strong interests in the relationship being conducted in certain ways. Very generally, children have a strong interest in having their needs met as completely as possible and parents have a strong interest in moulding the relationship in ways that best reflect their particular view of the parenting role.

In general, parents undertake parenting not as a burden to be endured, but as a meaning-giving activity that is central to their life-plans. Parents, usually, do not view the children in their care as simply duty-obliging entities, but as imbuing them with a *combination of obligations* in regards to what these persons require, now and in preparation for the future; physically, morally, emotionally and intellectually, and the *right* to direct children's activities within some kind of sphere of sovereignty within which parents have exclusive title. This exclusivity would disallow the intervention of both *private* third parties (one's next door neighbour, say, or one's elderly aunt) and also *public* third parties (agencies of the state) from having a legitimate right to substitute their judgement for that of the parents in matters that fall within this sphere.

There are many reasons why this might be seen as desirable. In the first place, it might be said to lend support to constancy and stability which is thought highly beneficial to the personal development of children. As well, children are enabled to

develop a strong interpersonal bond with another, based on the development of patterned expectations constitutive of, ideally, loving and nurturing guidance. Also, it allows parents to experience a unique sense of joy and fulfillment as they help mould their children into particular kinds of adults. There are also many things which are problematic with it: The intense vulnerability of children means that bad parental decisions can be as harmful for children as good parental decisions are beneficial. Likely, too, within the context of a broad sphere of sovereignty, many poor decisions are made with which we cannot legitimately interfere, without evacuating parental rights of their content.

There are many who believe that evacuating parental rights of much, and in some cases all, of their content would be perfectly acceptable, even laudable. Feminists have exposed the largely confining nature of the ‘private family’ (deBeauvoir 1949; Friedan 1963) and have even contemplated its abolition on the basis of the liberation of women (Firestone 1970). Others have questioned its desirability from the point of view of the unequal opportunities it invariably fosters for women (Badinter 2010)<sup>50</sup> and the children they raise (Munoz-Dardé 1999; 2002).<sup>51</sup> By and large, however, thinking about children occurs in the context of the ‘private’ family with large discretionary power which must, nonetheless, be balanced against the requirement that the state may mandate the provision of certain things, even, occasionally, against the express wishes of parents. Even within this context, however, it remains unclear what grounds the right to parental decision-

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<sup>50</sup> Badinter takes aim, specifically, at what she thinks of as ‘modern’ French motherhood, whereby France’s generous social programs aimed at aiding women to ‘mother’ their children has created a crop of young mothers who actually smother them and that it is this that is presently holding women back. This is a variation on the ‘mommy wars’, referring to the controversy over such things as the length of breastfeeding, and other aspects of ‘helicopter’ parenting, however, seen from the point-of-view of the effects it has on women rather than on their children. For an overview of the rise in helicopter parenting see Acocella (2008).

<sup>51</sup> Munoz-Dardé explores a theme introduced by Rawls. Rawls does not ‘question’ the existence of the family, leastways not in any strong sense, but recognizes the inequality extant from one family to another and the effect this will have on a society’s provision of equality of opportunity.

making. In an influential work, Harry Brighouse asked ‘what rights (if any) do children have?’ (2002). I now pose the question in regards to parents: What rights, (if any), do parents have?

On the one hand it seems *à propos* to allow parents some considerable leeway in order to make decisions on behalf of their children, consistent with what is not harmful to them and what provides for their present and future needs. Since there is widespread disagreement about what constitutes these needs, the strictures for parental leeway must be relatively flexible and quite wide. But what constitutes the scope of such leeway is, in part, given not only by the discernible interests of children, but by what we conclude is the *basis* for parental rights in the first place. If we conclude that parents have rights which arise from their own interests, then there might be times when we view as acceptable that certain interests of children may be infringed in order to satisfy the interests of parents, as in the model for adjudicating between equal and conflicting rights. If parents have rights which arise only from the provision of their children’s needs, then our answer to conflicting interests will be different. In either case, the scope of the legitimate sphere of exclusivity is shaped, in part, by our foundational arguments for parental rights. On what, then, are parental rights grounded? We have two main contenders. The first is a child-centred view. This view claims that only the interests of children give rise to any parental rights. The second is a dual-interest view. This view claims that the interests of both children and parents must be taken into account when speaking about a parental sphere of sovereignty.<sup>52</sup>

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<sup>52</sup> ‘Dual-interest views’ are occasionally referred to as ‘parent-centred’ or ‘adult-centred’. These latter two terms are misleading because they seem to refer to a view that would privilege the interests of parents *overall*, when, normally, these terms actually refer to a model that ‘balances’ the interests of both parents

The child-centred view seems like a ‘natural’ to ground a right of parental control since it deems singularly important the fact that all people are endowed with equal moral worth; an idea that is implicit in the liberal premise of being born free and equal. Child-centred views are thought by their proponents to provide the strongest protection for the interests of children as persons with a moral status separate from, but equal to, that of adults. By contrast, the dual-interest view is thought by proponents to ground a parental right in the strong interests *both* parties have in the relationship, fearing that child-centred views are incapable of adequately protecting parents from the intrusions of others, most notably the state, that we would normally view as intolerable. Principally, ‘dual-interest’ theorists opine that child-centred views would not, for instance, view the transfer of children to more capable parents as any violation of a parental right, in and of itself.

In this chapter I will argue the following two things: First, parental rights arise exclusively from the interests of children. Second, the rights parents have as *parents* are not the same as those that they retain as *people*; a distinction which will help us to address some of the concerns posed by proponents of the dual-interest view.

## 2.2 The Dual-Interest View

Few (thankfully) argue that children ought to be treated exactly as adults or that parents rightly ‘own’ their children as they do the furniture.<sup>53</sup> When most people think of their children (or other loved ones) as being ‘theirs’ the presumption is not generally one of

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and children, hence the preferable term ‘dual-interest’. *Proprietary* views of the parent-child relationship might appropriately be termed ‘parent-centred’ and have been previously addressed.

<sup>53</sup> See Woodhouse (1992) for an interesting discussion on the rhetoric of property ownership as it applies to children. Her point is that no one believes children are *actual* chattel who can command no commensurate duty (after all, it isn’t legal to torture animals and yet we certainly have something very akin to a straightforward property relationship with some of them), but rather the implicit ‘categories’ of classical ownership inform much of our legal and philosophical thinking about children.

ownership, but one of primacy; that is, loved ones are those whose interests and wants are melded with our own such that they are given a status of primacy in our own eyes, over the interests and wants of others. Stephen Gilles notes, for instance, that it is a rare person who loves all children as firmly as her own (1996: 958) – although she might recognize that she does not love her own children any more than other parents love theirs.

Nonetheless, there is a difference between the foundational arguments made by those who proffer a child-centred approach to child rearing versus those made by observers proffering a dual-interest view.<sup>54</sup>

Child-centred views conclude that any rights parents possess exist only because such rights serve the interests of the child. Dual-interest approaches, by contrast, are marked by a view toward a kind of reciprocity. While dual-interest approaches do not view the interests and needs of parents as the only (or even paramount) consideration, they differ from child-centred approaches in that they lend *considerable* weight to the interests and needs of parents, arguing that such interests are weighty enough to ground certain *basic* parental rights (Galston 2002: chap. 8; Callan 1997: chapter 6; Schoeman 1980). Helpfully, Harry Brighouse and Adam Swift distinguish between these two kinds of parental rights: Those which inhere in the parents and exist to serve their interests are *fundamental* and those which are invested in parents in order to enable them to carry out the job of parenting in the best interests of their children are *instrumental* (2006). Both rights, of course, are conditional and limited (2006: 81, 88-89). Proponents of either

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<sup>54</sup> Neither the child-centred nor the dual-interest view ought to be taken as a ‘watertight compartment’. This is because, in the first place, dual-interest approaches are always concerned with the interests of children even though they pay considerable attention to the interests of parents. Child-centred approaches, by contrast, are concerned with the interests of children in respect of the child-rearing relationship rather than parents, but they also display some concern (as do dual-interest approaches) to the needs of the wider society. In other words, the extent to which the manner in which children are raised affects the wider society figures in both approaches to more or lesser degrees.

approach acknowledge that parents have instrumental rights (the right to make *some* decisions on behalf of their children for their own good) even if they do not all agree what these entail and why parents have them. Our concern here is whether or not parents have any *fundamental* rights.

According to one prominent view, rights exist when they ground an interest “of sufficient weight to warrant the imposition of duties on others” (Callan, 1997: 136). Callan claims that positive and negative rights are important facets of ‘rights talk’ because they enable us to identify the scope of duties to which the right in question obliges others.<sup>55</sup> He claims that negative rights “[form] part of the agreed background to disputes about parental educational role” (1997: 136). He offers the example of a totalitarian state that prescribed the education of children in every facet, claiming that such a state would clearly violate the rights of parents: Whatever else might also be violated, the negative right of non-interference is clearly violated in this example, and it is against this background that the discussion about the scope of parental rights takes place. For Callan, there is no moral interest in arguing that parents do not have a right to educational choice, but rather what is the scope of the right (*ibid*). Although it is not hard to imagine that a totalitarian state violates the rights of people in myriad ways, we must be able to identify in what *sense* rights are thereby violated. To say that the right to free speech, for instance, benefits the listener because it allows her the possibility of hearing and acknowledging truth, is a very different argument, requiring a very different response, from the one that claims freedom of speech benefits the speaker by virtue of being the logical extension of freedom of conscience. What is important here is not the

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<sup>55</sup> The classic formulation of ‘positive’ and ‘negative’ rights is, of course, Isaiah Berlin’s in ‘Two Concepts of Liberty’.



right itself, but how the right is tied to the purpose it is meant to serve. This in turn allows us to determine, in part, the scope of the right in given instances. For Hart this determination takes the form of the ‘core’ of a given right or law and the ‘penumbra’ of the same right or law (1958). For instance, the ‘core’ of the right to free speech clearly includes the protection of political speech – notwithstanding any difficulty around what might be considered ‘political’ speech. The ‘penumbra’ would require us to determine the purpose for which free speech is a right, in other words, is it meant to protect *just* political speech, which it was clearly intended to include, or other kinds of speech as well? Once we understand the principle we can determine what level of constitutional protection non-political speech such as commercial speech and, say, pornography, ought to receive. Similarly, the distinction between fundamental and instrumental rights helps us to determine the content of a parental educative right and when the right should be set aside. In other words, the answer to the question regarding the scope of parental rights is *given*, in part, by whether such rights are viewed as fundamental or instrumental.

The two most common grounds for fundamental parental rights are, respectively, the ‘intimacy argument’ and the ‘expressive liberty’ argument. The former claims that the parents’ interest in developing a particular kind of intimacy with their children, one made possible only by sharing certain ‘enthusiasms’, is what grounds a fundamental parental right while the latter claims that the right to form the values of one’s child stems from the right of individual adults to order their own lives as they see fit.

### *2.2.1 The Intimacy Argument*

Ferdinand Schoeman (1980) and Brighouse and Swift (2006) argue that the right to intimacy with one’s children is an interest of a significant enough weight that it can

ground a moral claim to raise children “in a context of privacy, autonomy and responsibility”, which can then “morally insulate persons in such relationships from state obtrusions” (Ferdinand 1980: 6). Brighouse and Swift argue that “what parents fundamentally have a right to is an intimate relationship of a certain kind with their children” (2006: 102). While Brighouse and Swift agree on the whole with Schoeman, they nonetheless seek to distinguish their own views from his. They observe that, while Schoeman’s conclusions are fundamentally correct, he takes the wrong path to get there, thereby missing some important points along the way.

Schoeman concludes the following: That intimate relationships, generally, are conducive to human flourishing and therefore intimate relationships with one’s children, being one of several kinds of such relationships, are also conducive to human flourishing (Brighouse and Swift 2006: 89-90). Schoeman argues that intimacy itself requires a stay on the interference of the state on the basis that such interference renders the relationship insecure and transacted less on “the parties’ own terms” (1980: 15). There is a sense in which interference forbids the free, genuine and spontaneous giving of oneself that occurs within relationships marked by intimacy. Brighouse and Swift attribute, I believe correctly, to Schoeman the view that “[i]f you think an outside agent is monitoring, or dictating the terms of, a relationship, you cannot be sure of your own views or motives, or those of the person the relationship is with” (Brighouse and Swift 2006: 89). To the extent that Schoeman is correct that intimate relationships, whatever their general shape, ‘give root’ to our lives, then interference in them would constitute an, at least partial, uprooting of the very thing that grounds a meaningful existence. Indeed, Schoeman notes

that the reason people most often give for wanting children in the first place is to experience the intimate nature of this particular relationship (1980: 8).

Brighthouse and Swift do not believe, however, that Schoeman goes far enough in undergirding a fundamental parental right (89-91). They attribute to Schoeman an argument that provides both parent-centred (they occasionally use the term adult-centred) *and* child-centred reasons for preserving relationships that already exist (because intimate relationships are *ipso facto* conducive to human well-being), however, they fear that this does not ground an argument which would protect the development of *new* parental relationships (90). Brighthouse and Swift's objection proceeds on the following assumption: Approaches that are concerned with the best interests of children necessarily suffer from the fundamental flaw that has come to be labelled the 'Plato Worry' (Hannan and Vernon, 2008)<sup>56</sup> on which view there is no violation of any parental right if children are redistributed from merely adequate parents to empirically better ones. Since, on this view, redistributive schemes that reflect children's best interests do not, in and of themselves, violate any putative parental right to rear, Schoeman does not offer an argument that protects the right to *new* relationships, ones *prior* to the development of the intimacy which grounds his view.

Brighthouse and Swift's objection proceeds from the basis that most people would find it intuitively wrong to redistribute children in this way, even if it was the case that empirically better parents could be found. A fundamental parental right would preclude

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<sup>56</sup>The 'Plato Worry' gets its name from Plato's scheme to redistribute the children of certain classes of people in *The Republic*. In that work, Plato's concern was not for the interests of children but for the polis as a whole. The goal was to eliminate private interests among the elite classes by disallowing knowledge of one's biological child. All children would be reared in common and therefore all children would be thought of as one's own child. The 'Plato Worry' gets its name from the *fact* of the scheme to seize children from the procreative parents rather than the *purpose* for which this was to be done.

this kind of redistribution because such a scheme would completely set aside the separate but integral interests of parents in having the opportunity to *be* parents (as long as they were adequately good).<sup>57</sup> Brighthouse and Swift do not believe that Schoeman can provide the proper grounding for a fundamental parental right because the reasons he offers for the rights of parents are overly intertwined with the interests of children. On Schoeman's account, the rights parents possess as a result of it being conducive to their well-being are conducive to children's well being as well. Schoeman would need a 'stand alone' argument nested in the interests of parents in parenting in order to avoid the 'Plato Worry' and Brighthouse and Swift do not believe he proffers one (Brighthouse and Swift, 2006: 90).

Schoeman would certainly not agree that his view does not protect parents from the 'Plato Worry'. He writes: "to set terms for emotional parenting more stringent than required for the protection of children from abuse and/or neglect constitutes an interference in a person's claim to establish intimate relations except on society's terms" (1980: 17). While this sounds like a decided rejection of any scheme to redistribute

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<sup>57</sup> Such redistribution could preclude the formation of new relationships with one's biological children. However, Brighthouse and Swift point out that this is not their concern; that they do not have an argument for why biological parents should be privileged over adoptive parents. Brighthouse and Swift are talking exclusively about a general interest, among those who have the desire, to rear children as a central meaning-giving activity in one's life. They explicitly claim that they do not possess any particular arguments which would indicate that these persons ought to be, primarily, the biological parents. This view complicates their overall argument to a rather large extent. Clearly, in the case of those people who purposely endeavour to have biological children, the purpose is almost always in order to have the opportunity to rear them, in which case redistribution would be necessarily very traumatic and where it occurred it could preclude the *formation of new* relationships. It is a fundamental right not to have this happen that they are arguing for and the reason they believe it is necessary to do so is because Schoeman's view would not protect the formation of these new relationships; it would only protect those relationships that already exist. In the case of adoptive parents, however, the case is different since they do not have a default relationship with children. These are people who must wait for the opportunity for others (private or public agencies) to determine that they are suitable to have children distributed to them in the first place, in which case they do not seem to possess any fundamental right to the formation of new relationships. As such, the inability to determine whether biological or adoptive parents ought to be privileged complicates matters.

children away from those parents who meet the adequacy threshold, Brighthouse and Swift comment that the problem with the ‘Plato Worry’ is not, as Schoeman suggests, that redistribution would occur based on ‘society’s terms’ where such terms are understood to be no more than the fickle will of the majority. Brighthouse and Swift point out that such majoritarianism is presently anathema to any liberal society (2006: 91). Instead, any redistributive scheme would be constitutive of “firm and binding standards given by justice” (Ibid). Such standards would be ‘choice-insensitive’<sup>58</sup> in that they would not reflect any particular conception of the good, but would reflect criteria it is felt all people must meet.<sup>59</sup> In this way they would be no different from other standards set within liberal societies including whatever ‘minimal threshold’, the need for which to protect children from neglect and abuse Schoeman acknowledges, all parents would be required to meet whether or not fundamental parental rights could be ascertained. As such, Schoeman’s wish to avoid the ‘Plato Worry’ falters on his own misunderstanding of what kind of terms could be adduced in order to determine when redistribution was appropriate: They would not be ‘society’s terms’ but what ‘justice required’. This being the case, Schoeman fails to secure the fundamental rights parents would need in order to reject redistributivist schemes in the *absence* of abuse or neglect. Brighthouse and Swift

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<sup>58</sup>The terminology comes from Ronald Dworkin’s work on distributive justice from *Sovereign Virtue* (2000) in which he defends a distributive scheme that is ‘choice-sensitive’ and ‘circumstance-insensitive’. In other words, the distributive scheme would reward the choices of individuals (to work hard, to not gamble away their fortunes), but would be insensitive to circumstance, in other words, would redistribute in such a way as to compensate for the capriciousness of ‘luck’. In a liberal society, however, the state ought to be neutral with regard to the permissible choices of its citizens and as such any redistribution as given by the Plato Worry would not use as a criterion the relative merit of permissible choices of citizens and would therefore be ‘choice-insensitive’.

<sup>59</sup> The very question as to whether or not there are such criteria and whether ‘standards of justice’ are not themselves expressions of the majority is an important one. On one reading, Brighthouse and Swift are merely quibbling with terminology as what Schoeman means by ‘society’s terms’ might very well come to the same thing as the ‘standards of justice’ given by Brighthouse and Swift, since these constitute, in a manner of speaking ‘society’s terms’. After all, liberal values are justified, by and large, by the fact that members of liberal societies *consent* to them, even if only generally and in abstraction.

believe that on a child-centred approach, merely adequate parents cannot be guaranteed the opportunity of *forming* intimate relationships with children whom they could rightfully 'parent'. A 'stand alone' parent-centred argument, one which recognizes the weighty interest at stake, is required.<sup>60</sup>

Brighouse and Swift believe that they have found such a 'stand-alone' parent-centred argument and that it is based in the unique moral quality of the parent-child relationship (98-99). They acknowledge that liberal theory views as anathema control rights over others that do not inhere in the interests of those others, leastways where those others have demonstrated the incapacity to choose for themselves. It has been pointed out, for instance, that while we have a desire to have intimate relations with others (friends, spouses) and this desire is, likewise, an important interest that is advanced because central to the meaning of the lives of most people, this interest does not ground a right of control over these others (Hannan and Vernon 2008); a spouse need not stay with us if they choose not to, nor must a friend return our phone call if they are inclined not to. We are neither allowed to insist that these intimate others exhibit particular moral qualities in a way that can be called a right regardless of how much the continuing intimacy of our relationship depends upon their doing so. Clearly, of course, children are in a different position from adults and as such our relationship with them is necessarily different. This necessity to have at least an initial right of control over them is not here in dispute for reasons that have already been canvassed. What is in dispute is the understanding which grounds that right of control.

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<sup>60</sup> It should be noted that Brighouse and Swift do not equate fundamental parental rights with extensive parental rights arguing that instrumental rights can be quite extensive and fundamental rights can be quite limited. At issue is the basis of the right and not the extensive array of areas its exercise rightly covers. Brighouse and Swift are arguing on behalf of a limited, fundamental parental right.

Brighthouse and Swift contend that the parent-child relationship is unique, not easily substitutable and “contributes to one’s flourishing of a different kind” (2006: 96), from intimate relationships with adult others. It is the unique moral quality owing to these things that differentiate it from all other relationships which might normally be adduced as an objection to the claim Brighthouse, Swift and Schoeman forward. While the unique moral qualities of the parent-child relationship which Brighthouse and Swift adduce are rightly stated, it is not clear that these bestow upon the parent-child relationship a privileged position with regards to these different, but similar, relationships. It might as easily be said that an intimate relationship with a spouse to whom one has made substantial (and lifelong) commitments or the intimate relationship one has with a lover are unique in their own right, not easily substitutable and contribute to one’s flourishing in substantive ways; that they are more than “mere desires, however intense” (98). The fact, then, that the parent-child relationship is *unique*, does not *ipso facto* mean it is *weightier* and therefore in some important way privileged.

Brighthouse and Swift’s very premise is problematic. They readily note that one of the most compelling reasons parents have for wanting to take on the challenge of this kind of relationship is precisely because children may not exit these relationships. In other words, the fact of children’s intense vulnerability is one of the central aspects that make caring for them so appealing (95-6); a reference to the unique moral quality of the relationship which grounds their argument. However, this fact would seem to lend credence, on a liberal view, to *strengthening* rather than weakening the protection of children’s interests. Whatever the ‘weight’ of this particular relationship its merits cannot be ascertained with respect to how much it serves the interests of the power-holder

(parents). The fact of its 'uniqueness' does not provide the justificatory force they need to claim that the parents' interests may be indulged with some (acceptable) loss to the child's on the view that the power holder has a particularly weighty interest in it being so (102).

Brighthouse and Swift are careful to note that the parent-child relationship, as they see it, is governed by "stringent and nondiscretionary moral norms" (92) and as such offers a good deal of protection to the interests of children. Nonetheless, they seem to be putting the cart before the horse: They object to aspects of Schoeman because his formulation does not ground fundamental parental rights and therefore does not protect, in their view, against the 'Plato Worry' and such redistribution violates fundamental parental rights. However, in order for the redistributivist scheme referred to in the 'Plato Worry' to be a violation of fundamental parental rights, such rights must exist. It is clear from Brighthouse and Swift's objection that they have already constituted that parents have fundamental rights and that such rights can be invoked as a defence against the 'Plato Worry'. In other words, their objection relies upon the *a priori* existence of a right they (and Schoeman) fail to establish. The reason they fail is because their defence trades on a difference in kind that is not meaningful to the conclusion they reach. Brighthouse and Swift determine quite reasonably that, all things aside, weighty interests ground rights. They further argue that people have a weighty interest in a particular kind of intimate relationship with their children. The obvious objection is that where the weighty interest of the parent ought to ground a right the potentially contravening interests of the child ought to act as a counterweight such as to deprive the parent from holding any such right all. After all, fundamental parental rights are such that parents may act on these rights to



satisfy their own desires for a particular kind of relationship with their children even to the extent of an acceptable loss to the children's interest, thereby using children as a means to the parents' ends.

Callan and Galston also acknowledge the good of parent/child intimacy, although this does not form the crux of their overarching arguments for fundamental parental rights. Unlike Brighouse and Swift who specifically disavow that fundamental parental rights are grounded in any expressive or associative interests parents have (102) both Callan and Galston tie the good of intimacy to these other interests (Galston 2002: 101-108; Callan 1997: 143). While acknowledging that they are linked, I will extricate one from the other in order to examine them as distinct claims.

Callan claims that "the good of intimacy cannot be divorced from concerns about the adults that children will become" (1997: 143-4). There is more than one reason why this might be so; however the reason to which Callan alludes is that the kind of people children will become will have an impact upon the possibility for the continuing relationship between the parent and that child (144). This is not, of course, completely separate from the necessary fact that parents will rear their children in ways they believe are best for the children themselves and that such ways cannot be divorced from the values and beliefs that parents embrace. It is clear that, even with regard to instrumental rights, it is impossible (and undesirable) to avoid forming, leastways in part, children's values and that the formation of children's values will normally stem from parental actions that are perfectly permissible. This practical fact need not overshadow our examination of the implications of the intimacy argument taken on its own. I might not wish for my child to join the military because I disapprove of the ways in which the

rhetoric of patriotism is employed to suit ends that are disingenuous, or, at least, ideologically wrong-headed in my view. That I will rear my child to share this view in the hope that he will never join the military is a safe bet to make. But the issue raised by Callan takes this view a step further and implies that the underlying issue is that once it is determined that the child does not share the parental view in question, a link in the chain of intimacy is likely softened and it is the prevention of this softening to which parents have a fundamental right. In this sense, the scope of parental rights is not, instrumentally, to protect the interest of the child (although such an interest may be, inadvertently, protected by this as well). There is a specific function which is meant to be served and it is to protect the relationship between parent and child in a way that serves the aspirations of parents.<sup>61</sup>

An interesting observation is *à propos* here. Rarely do children turn out exactly as one had envisioned. In fact, a large part of the parental role entails the consistent amelioration of intimacy despite the lack of and not because of shared commitments and values; that what is unique about the parent-child relationship is that it is largely based on building a relationship with one's children "regardless of your differences" (Hannan and Vernon 2008: 6; Mills 2003: 504-05). As a corollary to this, Callan points out that an *incessant* concern for how children will 'turn out', precludes the "sheer fulfilment of sharing a life with my child now" (1997: 143), negating the possibility that the child can

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<sup>61</sup> Of course, it is normally in the interests of children as well that intimate relationships between parent and child be maintained. That, however, is not the focus here, as that would proffer a child-centred argument for intimacy. Moreover, the emphasis in Callan, although it is not explicit, seems to be on the withdrawal of intimacy from the parent's side rather than from the child's. Even if this latter assessment is incorrect, it is still the case that the intimacy argument for fundamental parental rights is exclusively focused upon the good of intimacy and the damage of its loss in terms of the parent's feelings, hopes and aspirations and not the child's (Callan 1997: 144).

enjoy the ‘good’ that is that relationship in the present.<sup>62</sup> If the above is correct, then intimacy between parent and child does not require the commitment to similar values as has been so adamantly advanced by Schoeman and, to a lesser extent, Brighthouse and Swift. This, of course, is not *strictly* true in the sense that *some* parents will require a commitment to certain integral values in order for intimacy to remain unharmed. And, if it turns out to be the case that parents have a fundamental right to this intimacy then the fact that shared commitments are not required in *general* for a successful parent-child relationship does not tell against the right in specific instances where clearly it *is* required.

I can use a starker example than the military for illustrative purposes. Imagine a gay child who is born into a deeply religious household in which homosexuality is thought to be a terrible sin. Likely, the gay child has few greater interests than in not believing in homosexuality’s sinfulness since it is likely that such a view will seriously disable him from the kind of feelings of self-worth and self-esteem that children require. Whatever else, self-hatred does not give one a good start in life. By contrast, the strong interest of these parents, on the intimacy view, is to have a heterosexual child. Clearly their interests collide. On the ‘intimacy argument’ parents may act “within limits” to ensure that the realization of their fear of estrangement will not come to fruition (Galston 2002: 102). Limits exist because dual-interest views necessarily take into account the countervailing interests of children. On no account may parents do whatever they please in order to ensure intimacy even if it is the case that they have a right to such intimacy;

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<sup>62</sup> In the previous chapter we elaborated on this point by pointing out that a parent of a terminally ill child would find cold-comfort in the fact that they had hitherto raised that child with an exclusive focus on how that child would be in the future, since that child will not have one and would have also missed out on the good of a presently satisfying relationship.

the dual-interest view is one of ‘balance’ and ‘reciprocity’. What these limits are given by, however, is unclear. It doesn’t seem right that any theory purporting to be a liberal one could embrace the clearly deleterious effects that catering to the interests of the parents in the above example would bring. One would, also, be hard-pressed to liken the ascriptive identity of homosexuality for which one is, for all intents and purposes, hard-wired, to other burgeoning commitments.<sup>63</sup> In other words, inducting children into certain values when they, as of yet, have none cannot be equated with inducting a homosexual child into a view of life which concluded that his homosexuality was deeply aberrant. None of this is to defend a view that pits fundamental parental interests against those of children. To construct the family as a bastion of conflicting interests is not only largely inaccurate, but it “ful[fills] the worst fears of critics of rights in the family context” (Hannan and Vernon 2008: 3). In most cases, parents believe that the values they are passing along are sound and appropriate. In most cases, too, it might be appropriate to allow parents to pass along these values. It is here suggested, nonetheless, that most dual-interest proponents would view it as morally impermissible, in the example of the gay child, to allow parents to pass along the view of the aberrancy of homosexuality on the basis of the ‘intimacy’ argument because the interests of the child would be so obviously ill-served.<sup>64</sup> This is not an issue of simple line-drawing wherein

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<sup>63</sup> There was a recent controversy when the actor Cynthia Nixon, who is in a relationship with another woman, claimed that although she knew it was not for all gay people, for her it was a ‘choice’. This angered many gay-rights activists who have been fighting for the recognition that as an ascriptive identifier rather than a ‘lifestyle choice’ discriminatory laws and policies are unconstitutional to the extent that homosexuality falls into the, to use Dworkin’s terminology, ‘circumstance’ rather than ‘choice’ category. Clearly, for some it is a choice and for others (likely the majority) it is a question of circumstance. More importantly, is the underlying question as to why the state should take any position whatsoever about whom you sleep and life-partner with...

<sup>64</sup> And since, of course, parents cannot know in advance if their child is ‘hard-wired’ to be gay, this provides a strong argument against the moral legitimacy of imparting anti-gay values to children whatsoever, more about which in chapter. 4.

we might argue that drawing the line in any given place does or does not cohere with some underlying principle; that issue will always be present. Rather, line drawing requires a theoretical framework in order to justify why the line ought to be drawn at any given place. Schoeman, Brighthouse and Swift contend that fundamental parental rights to intimacy allow for the privileging of parents' interests even at some (acceptable) loss to the child's. What such a view would further require is a theoretical basis for deciding how much of a child's interest may be subsumed within parents' before the limits must be drawn. Nonetheless, I have already demonstrated that the privileging of interests in the name of the advantage to the one possessing control rights is anathema to liberal theory and provided reasoning for why the parent-child relationship is not an exception to this general rule.

There is another purpose which the argument for fundamental parental rights might be adduced and that is the exclusion of third parties from having legitimate control rights within the sphere determined to be protected by the right to intimacy with one's child. This is one of the ways in which Galston ties intimacy to expressive liberty. When we are speaking about expressive liberty in the context of child-rearing we are talking about such norms in the context of exclusivity. In other words, the nature of being able to rear *my* child in accordance with *my* expressive liberty is not simply that I may be allowed to do so, but that I and *not others* may be allowed to do so with respect to my child. The deep connection between expressive liberty and intimacy ties particular children to particular parents. Galston, for instance, claims that "when I say a child is 'mine' I am acknowledging responsibilities and asserting authority beyond what I owe or claim vis-à-vis children in general" (2002: 103).

This seems to be the way in which Callan formulates his theory as well. He shifts the emphasis from whose interests may be privileged in a contest between those of parents and children to the sovereign sphere within which the decisions of *others* may not intrude. He offers at least two salient examples for why we might view this as necessary, both of which will be taken up below. It is not clear, however, that fundamental rights are necessary to keep the intrusions of third parties at bay or that the examples he provides serve the point that they are. As Brighouse and Swift insightfully comment, even though fundamental rights are generally thought to be expansive, this need not be the case. Fundamental rights can be construed as rigidly limited, and instrumental rights can be construed as allowing tremendous leeway (2006: 81, 87-9,105). If, then, we do not require fundamental rights to protect an appropriate sphere of parental authority and it is inappropriate for parental intimacy-interests to be privileged over those of children, is there some other reason we can think of which might yet ground fundamental parental rights?

### *2.2.2 The Expressive Liberty Argument*

The expressive liberty argument is concerned with the interests of parents that attach to the expression of particular values that are deemed weighty enough to ground a fundamental right. Galston is one of the main proponents of this particular view. He believes that the most basic reason to secure constitutional norms is so that we might live according to our deepest commitments. Our ability to do so constitutes our ‘expressive liberty’, the right to which it is the fundamental objective of liberal democratic societies to secure (2002: 101-08). In turn, our ability to raise our children according to such commitments constitutes “an essential element of expressive liberty” (102).

Galston claims that there are fairly stringent limits to parental authority. These limits preclude turning our children into ‘automatons’ who at no future time could be reasonably expected to exercise even the capacity to question the determinative judgements of their parents (104-05). Children must also learn to respect certain basic citizenship values such as law abidingness and the willingness to tolerate even the wrong choices of others (107).<sup>65</sup> The very basis of expressive liberty requires us to permit others to live in ways we would consider ‘unfree’: Others should be allowed to live in ways we would not wish to on the basis that there are many ways in which one can live that more than ably meet the bar of what it could mean to live a meaningful life.

This argument for expressive liberty trades on the notion that we have a particularly weighty interest in raising our children to adhere to the same values we do. Aside from the parent-child intimacy to which it is linked, and which I have already discussed, it is not entirely clear what this interest entails. Callan puts it this way: “the freedom to rear our children according to the dictates of conscience is for most of us as important as any other expression of conscience [...]” (1997: 143). So, it is clear that our desire to rear our children with the values that we wish to is important to us, but the question is why, precisely, is this so? The expressive liberty argument is more appropriately understood as an amalgam of at least two other (sub) arguments for parental rights.

The first (sub) argument which makes up the expressive liberty argument is that of intimacy which I have just canvassed. To recap, this is constitutive of the following idea: My right to rear my child in accord with my commitments, that is, my expressive

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<sup>65</sup> For a critique of this aspect of Galston see Brighthouse (1998: 719-745). See, also Callan (1994) for a criticism of Galston’s proposals for civic education.

liberty, not only hinges upon my capacity to exclude others, thereby tying me intimately to my children and keeping others from having a like relationship with them, but also allows me to act, ‘within limits’, to steer my children away from ways of life that might undermine my continuing intimacy with them (Galston 2002: 102). The second (sub) argument is what I will call the ‘interpretive capacity’ argument; that is, the fact that we are charged with the task of parenting our children means that we must necessarily have considerable scope to make decisions on our children’s behalf. Without a wide parameter of scope to prevent us from perennially and self-consciously assessing even our most basic decisions, the very term ‘parenting’ is voided: Parenting would entail little more than being the night manager at an inn wherein a place to rest is provided, a meal or two thrown in, and advice is dispensed as to the area’s amenities, but guests are more or less free to do as they please – or as they are told by the local constabulary. It is unlikely that such a notion of parenting would hold much appeal for most people or that on such a model children could be assured of getting the nurturing and direction they require. Interpretive capacity is tied to one’s expressive liberty owing to the necessary connection between the beliefs parents possess and their ability to make decisions on their children’s behalf. Even if, as parents, it was appropriate to ask us to perennially assess even our most basic decisions, this would provide little direction. As has been noted, we cannot divorce what we believe to be good from what we pass along to our children and it is only reasonable that we think of as good those values and commitments to which we adhere: “[W]e cannot but draw upon the comprehensive understanding that gives our values whatever coherence and grounding they may possess” (Galston 2002: 102).<sup>66</sup> Even if much of what we decided was wrong, this situation likely would not be ameliorated by

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<sup>66</sup> See also Gilles (1996: 960-61).



replacing it with a situation wherein parents were in a constant state of anxiety and uncertainty over being found wanting at every turn, with the possible consequence being the removal of their child by the state.

Charles Fried refers to the issue of rights with regards to the family as both ‘complex’ and ‘peculiarly elusive’ (1978: 150). Using a framework of ‘positive’ and ‘negative’ rights, Fried concludes that the right to form the values of one’s children as well as their life-plans can be grounded in the conception that this right is an “extension[] of the basic right not to be interfered with in doing these things for oneself” (152). For this reason, Fried is often thought to be evoking a fundamental parental right akin to that based on the expressive liberty Galston forwards. Fried recognizes that children cannot be said to accept or refuse such formation. It is at least partially for this reason that he believes the most appropriate analogy is to regard the child as an extension of oneself (ibid). Nonetheless, he recognizes that it is a parent’s duty to “care for and educate the child in the *child’s best interests*” (ibid, emphasis added) even while he recognizes that a child’s values must come “from somewhere”. In this case, we seem to have had the problem re-stated for us. On Fried’s view, the problem seems to be how to disentangle the necessary fact that parents will make decisions on their child’s behalf, which will have the *effect* of forming, at least in part, their values, from the idea that this fact ought to give rise to a *fundamental* parental right to do so.

Aside from wanting to secure some sphere of sovereignty as to parental decision-making, and bracketing the ‘intimacy’ component for the moment, it isn’t clear that on a careful examination expressive liberty does not unwittingly turn on a child-centred view after all. Interpretive capacity, that is, the necessary leeway parents must have to make

decisions in order for parenting not to be an experience full of anxiety and fear and void of meaning, subordinates the parental interest in expressive liberty to the question of what we think of as being in our children's interest. As Callan expresses it "the reward we seek from the work (of child rearing) is perhaps opaque in its deepest aspects, but much of it surely has to do with the gradual realization in the life of the child of those educational ends that give content to our understanding of success in child-rearing" (1997: 143).

While Callan is correct to refer to the opacity of the interest at stake, I take it to mean that we have an interest in passing along to our children what we think of as good precisely because our love for them means that it matters to us that they derive the benefit of our experience of what that is and that it is the realization of these things in our child that constitutes our educational ends. Formulated this way, this is more properly a child-centred argument.

Galston, too, elucidates the expressive liberty argument in a way that could arguably be conducive to the child's best interest, even though he takes pains to make clear that he is talking about parental interests and espouses a 'reciprocity model' (103). The reason for his avowal of a reciprocity model is because he believes that without it parents would not possess any right to introduce their child to their respective values and commitments. In other words, without the expressive liberty that grounds a fundamental right to, at the very least, "introduce their children to what they regard as vital sources of meaning and value, and to hope that their children will come to share this orientation" (2002: 105) such a right could not be protected. Interestingly, Galston himself immediately provides a *child-centred* view for why such an "introduction" to parental

“values and commitments” might be beneficial. He claims that a coherent framework of belief might very well promote informed choice in the adult the child will become (ibid).

Many others observe a similar importance in a child’s access to a coherent culture (Ackerman 1980: 141-42; Callan 1997: 138-39). This point, however, notes the *child’s* interest in the parents’ capacity for ‘expressive liberty’ and not the parents’. The capacity for expressive liberty is a part of the ‘interpretive capacity’ that attaches to parents as a result of two things: The child’s interest in being a part of a family unit wherein a cultural framework can be acquired, and, as I will subsequently argue, the parents’ liberal right to themselves live according to their own norms and values. The important point here is that this right does not attach to a *fundamental* right to pass along such norms and values inhering in the interests of the parents *qua* parents, but is constitutive of an instrumental right and, as was previously noted, will have the unalterable consequence of forming the child’s values as a result of a liberal right the parents themselves have to live by their own lights.

As a result of the argument that sees a benefit to the child of allowing parents to introduce their children to their cultural and religious norms and values, as well as the parental right to live by their own lights, which will necessarily have the effect of “introducing” a child to values that the parents believe are “vital sources of value and meaning”, an appropriate sphere of sovereign parental decision-making can be morally justified via means that do not attach importance to fundamental parental rights, but achieve the stated purpose of protecting their expression nonetheless.

### 2.3 *Parents qua People/Parents qua Parents*

I have claimed that it is inappropriate, within a liberal framework, to base control rights over others on the interest of the one who possesses such control. I have done so by examining the ‘intimacy argument’, which views children, partially, as means to their parents’ ends. I have also examined the ‘expressive liberty’ argument and demonstrated that it tends to, either, collapse into the ‘intimacy’ argument, or else it can be reformulated so that it becomes, properly, a child-centred view. Criticism of child-centred approaches turns on the fact that they pay little or no attention to the interests of parents and it is from this that we get a view toward a kind of reciprocity that captures the fact that “parents and children serve, and are served by, one another in complex ways” (Galston, 2002: 103). There is a fear that, absent a dual-interest view, the despotism that is patriarchy is reversed and that no justice can be done to the “hopes that parents have and the sacrifices they make in rearing children” (Callan 1997: 154). This fear of having the tables reversed overlooks the most important aspect of all parent-child relationships which is that they are special, in large part, because they are inherently unequal. It is from the fact of the vulnerability and powerlessness of children that our entire discussion stems. That being the case, the idea that patriarchal despotism could be reversed in equal and opposite ways if we do not heed the fundamental rights of parents is wrongheaded; it negates two things: First, that even on the child-centred view parental educative authority could be conceived so as to provide adequate scope to parents’ “hopes and sacrifices” owing to parents’ *instrumental* rights to order integral aspects of their children’s lives. Second, on *no* view being canvassed here could children have equal scope and therefore the notion of a reversed despotism is an inappropriate way of viewing the parent-child relationship, regardless of which lens is used through which to view it.

There is one way in which we can, however, respond to the above concerns of dual-interest proponents. Proponents of the dual-interest view are concerned that the interests of parents are always subsumed within those of their children and wonder why it is that the interests of children should always ‘win out’ (Clayton 2006: 48-54) This is a trenchant point, given that the liberal defence of child-centred views is that children ought to have their interests considered *equally* with those of adults and not that children deserve *greater* consideration than do adults. In *Prince v. Massachusetts* (in Feinberg 1980), for instance, the judge allowed to die a 24-year old Jehovah’s Witness rather than order a blood transfusion, leaving her three children motherless. Joel Feinberg claims that in this instance, “both natural parents were determined to decide against the children’s interests” (1980: 130). I am neither criticizing nor defending either the parents’ decision or the judge’s ruling here. I adduce it only to say that to view the case as deciding ‘against’ the children’s interests, though it may have been so, reveals the kind of conflation between parental and non-parental interests that I seek to disentangle.

We can respond to opponents of the child-centred view by distinguishing between, specifically, *parental* and *non-parental* interests. Parental interests refer to the interests parents have as they relate to their children and their ongoing relationship with them i.e., interests which stem, specifically, from their role as parent. Non-parental interests refer to interests parents have that reflect one or other of the many different roles parents also inhabit as people, such as their role as a friend or spouse, their role as employee or professional and any attendant career aspirations they may have, their role as citizen and any important civic duties they may wish to fulfil, their role as a member of a given religious congregation and so forth.

As previously stated, individual persons retain the right to live in accordance with their own norms and values even upon becoming parents. Although adherence to these will necessarily have some kind of effect upon their children, even if it was not the case that children benefited from inclusion in said practices parents would, nonetheless, retain the right to live according to their affirmed values.<sup>67</sup> Parental *rights*, be they instrumental or fundamental, are best understood as protecting those decisions which are undertaken with the direct purpose of ordering the life of the child in some way. In this light, parental rights can be viewed as *other*-directed, while the liberal rights parents retain by virtue of their status as persons can be viewed as *self*-directed: Rights to decision-making that protect their non-parental interests.

Not all of the decisions that parents make which have an impact upon a child could be said to be an exercise of a distinctly *parental* right in the way being established here. This is because not all decisions parents make are undertaken with the specific purpose of ordering the lives of their children (although ordering their lives is a likely consequence of many and perhaps most decisions parents make). We might say, for example, that it is permissible for parents to pursue certain interests at some cost to their children's as when a parent takes a job in a faraway city and uproots her children from their schools and friends in an effort to advance her own interests in furthering her career, without necessarily adducing a dual-interest approach. Although it might well be within a parent's right to make such a decision, such a decision is not properly an exercise of a *parental* right, in the way meant here, for the reason stated above. We need not view the dual-interest/child-centred paradigms as relevant frameworks within which to evaluate

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<sup>67</sup> If it was deemed, however, that children were *harmed* by inclusion, the rights parents maintained and the conditions under which they exercised them would require a different theoretical framework.

*every* decision parents undertake which might, nonetheless, affect the family. We might, instead, view these paradigms as being evocable in the context of *parental* rights, which rights are other-directed.

Michael Austin implicitly recognizes the complexity of the parental interests at stake when he writes that “[...] parents generally prefer sacrificing some of their *non-parental* interests because they take their *parental* interests to be stronger and more significant than whatever sacrifices raising their children involve” (2007: 30, emphasis added).<sup>68</sup> Here Austin uses the language of interests in order to distinguish those that emanate from one’s role as a parent and those that emanate from one’s myriad other roles. The difference between the conception of parental rights that I am describing here and the one that Brighthouse and Swift envision is that within their schema *other*-directed decisions can be undertaken for the purpose of benefiting the decision maker. Whereas here, while other-directed decisions can vie for prominence against self-directed ones, with the case that certain very strong interests of the parents (to find a better job, say, in another city) can be forwarded against the relatively less important interests of the children (to stay in the same city and not to be parted from their friends), other-directed decisions cannot be undertaken to benefit the decision maker. No doubt, of course, parents retain enormous leeway to interpret which shall be considered the ultimately important interest; which ones are, in fact, self-directed and other-directed, the difference between which is rarely clearly delineated. This, however, is the case even when parents are said to have fundamental rights, and, perhaps it is even more so the case then.

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<sup>68</sup> Nonetheless, Austin, too, opposes child-centred views because he does not believe they take adequate account of parents’ interests. What is unclear is whether he believes it is parental interests or non-parental interests that may be privileged when discussing the sphere of sovereignty parents are said to have to order the lives of their children.

Callan offers an example, one of parents who, able to choose between paying for piano lessons for their musically talented child and going to Disneyland, choose the latter. Callan claims that on a view constrained by “the best interests of their child, a strong case would exist for saying that the parents had no right to this particular choice” (Callan, 1997: 145). However, Callan recognizes that most of us would not feel that parents had no right to this particular choice (even though many of us would strongly disagree with it) for the following reason: The lack of access to a widely conceived ‘interpretive capacity’ would prove to be invasive to a degree that could not be justified by what good it might accomplish. About this Callan is correct. However, there are separate kinds of rights at stake here that need to be unpacked. The first is the moral right to the choice, and the other is the legal right. On a child-centred view, parents might not have the moral right to the option they chose, even though they might have the legal right. Legal right might be here given not because parents had a moral right to the choice, but because there is no reasonable way to police many of the choices parents make that are not morally permissible without doing ‘more harm than good’. Therefore, people might not agree that the parent had the moral right to this choice, even though they would not want the choice to be restricted legally for other reasons. The fact that we would not want a choice to be legally restricted, does not lead ineluctably to the idea that something is morally permissible and vice versa.<sup>69</sup>

The other issue, however, is that it is not clear that on a child-centred view, the choice in question is *not* morally permissible. If we understand the arguments of those who proffer a dual-interest approach to be based on parental interests in what kind of

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<sup>69</sup> As a further example, one might say that children have a strong moral right to be loved, but love is not something that they can claim or be guaranteed.



value structure the child develops, then for the choice to go to Disneyland to be morally impermissible it must have been undertaken principally with the view to barring the development of certain kinds of values and life-plans (or to develop certain other ones), within the child because they did not cohere with the parents' wishes for the child for reasons that have to do with the parents' interests vis-à-vis the child. Moreover, any decision the parent undertakes is presumably one that allows them to weigh their own interests as people with wants, needs, and desires of their own that exist outside of their parental role, that is, their non-parental interests. Of course, parents can choose badly: They can be selfish and put their minor interests ahead of their children's relatively major ones and so forth. But that is neither here nor there for the moment.

Callan further objects that child-centred approaches cannot "adequately protect (parental) choice in some of the most flagrant cases of repression" (1997: 140). Here Callan presents the example of the Soviet Union where children whose parents belonged to certain Christian denominations were consequently taken away from these parents (ibid).

Callan believes that a view that privileges the weighty interest of parents must be forthcoming in order to avoid the egregious measures taken by the Soviets. Callan does not, however, state the issue in the terms necessary to serve the purpose for which he provides the example. He intimates that on a child-centred view no parental rights would be violated by the Soviets' apprehension of Christian children. For this to be a plausible example, Callan needs to take the next logical step which is to say that on a child-centred view the children must do better than they would have had they been left with their original families. He claims that many children were no doubt harmed by this

apprehension, but that on other occasions this may not have been so (140). While he is correct in noting that whether children do better or worse is not relevant from the point of view of the violation of *parental* rights, if we are genuinely concerned about what a child-centred theory could allow we must acknowledge that on the child-centred view children must be thought to do better by the arrangement, otherwise there is simply no impetus for what amounts to a lateral move.

This example might, *prima facie*, seem to bear a striking resemblance to the ‘Plato Worry’. Be that as it may, the important difference between this example and the ‘Plato Worry’ is the following: While a child-centred view might concern itself, genuinely, with the best interests of the child, such interests must be tied to “what justice requires” and not merely “society’s terms”. What offends us about this example – or what ought to offend us about this example – is not the putative violation of fundamental parental rights but the persecutory nature of the discrimination. The liberal rights of parents as people are invested in them as individuals. Moreover, they are thought to be important precisely because the state cannot be the arbiter, in a liberal society, of which conceptions of the good are valuable and which are not. Of course, this is not *literally* true, in that liberal societies privilege the kind of neutral reasoning that is said to allow for the flourishing of individuals regardless of their conceptions of the good. Like any other society, therefore, liberal polities cannot help but inculcate certain basic norms and conceptions. What differentiates liberal societies from other kinds of political arrangements is the notion that decisions, particularly ones which have as their purpose the privileging of certain norms over others, must be defended according to fairly stringent strictures of impartiality rather than on the basis of competing truth-claims. In

light of these things, the wholesale removal of children from a disparaged religious sect in the absence of evidence of abuse or neglect constitutes the violation of the liberal rights of the individual people belonging to this sect rather than the fundamental parental rights of the parents in question.

That the Soviets might have genuinely *believed* that the sect(s) in question were contrary to children's interests is in no way dispositive – although it nonetheless presents a practical problem. In order for us to evaluate this situation we would require an understanding of the *reasons* for the apprehension. Since the Soviet Union, however, was not a liberal society we should not expect that any justification they would offer would be in keeping with liberal norms.

Parents as *people* have wants, needs and (non-parental) interests of their own, separate from their hopes and aspirations for their children and their ongoing relationship with them. How to weigh these interests against those of their children – and how to weigh the different interests of several children – requires a different calculus than the one I am attempting to lay bare when I refer to parents, specifically, in regards to their role as caretakers of their children's future values and their fundamental right to pass their own values on to their children (their parental interests). This role refers to their direct control rights over their children with regards to the values and ideals with which their children shall be raised; their capacity to 'form' their child's basic value set and life-plans.

The argument here is that a conceptual separation must be made between those decisions that, while affecting the children, do so indirectly. I am not opposing *child-centred* views to *parent-centred* views. In other words, I am not saying that the interests

of children are weightier than those of their parents. In fact, my examination is premised on the idea that children are individual entities with interests as important as (but not more important than) those of adults. The argument here is that with regards to, specifically, the rearing of children, a distinction must be made between parents as *parents* who must be said to exercise their control rights over children with a view toward the best interests of the child, and parents as people who have their own interests, the pursuit of which, while impacting the child, does not constitute an attempt to directly shape the basic value-set that that child will be expected to embrace. Child-centred views ought to privilege the interests of the child in *relevant* circumstances and not under any and all circumstances. This, however, is not the same thing as a ‘dual-interest’ view which argues that parental interests in forming their children’s values may ground a fundamental parental right in the parents’ interests in who that child will become owing to the right to ‘intimacy’ with one’s child or as an extension of parents’ ‘expressive liberty’.

In practice, of course, distinguishing between what is in the child’s best interests separate from the values the parents prioritize is an extremely difficult task. Clearly parents believe what is in the best interests of the child is, generally, to live by the kind of values they believe to be the best ones and these will be ones they themselves have already affirmed. This distinction between the child-centred and the dual-interest approach, however, is more practically important when we attempt determine under what conditions others, namely the state, may interfere with decisions that parents undertake. For instance, when it comes to educational authority the permissibility of resisting state intrusion in the form of required curriculum in all schools will be framed very differently

if we assume that parents have an ineluctable right to inculcate within their children their own comprehensive doctrines as either an extension of the right to live by their own comprehensive beliefs as Galston claims, or as a right attached to the very decision to have children, as Shoeman argues. If we take a child-centred approach we may not assume the ineluctable ties between, either, the right to procreate or the right to exercise freely with the right to induct one's children. As such, we have a less sturdy platform from which to resist certain types of state intervention. Since parents, however, are more than their children's 'innkeepers', but less than their children's 'proprietors', this is not inappropriate.

### ***3. Liberals-in-Waiting (1): Autonomy vs. Diversity?***

#### *3.1 Introduction*

In considering whether and how liberalism can make a space for children, we need to confront the quite prevalent current view that there is not one but (at least) two versions of liberalism, and that the two versions have very different implications for the forming of children's beliefs. One version is supposed to tell us that we must maximize children's autonomy by inculcating critical capacity; the other is supposed to tell us to safeguard and secure cultural memberships.<sup>70</sup> The tension is obvious. But the 'two liberalisms' thesis is schematic and overdrawn, and entirely unhelpful in the case of children. This is because the protection of cultural membership cannot reasonably come at the expense of children's interests; therefore there are limits to the value of cultural membership. But children's interests cannot be understood purely as a capacity for critical revision without potentially undermining cultures that do not seek to maximize autonomy. In the end, while there might be two foundational values, there can only be one version of liberalism, leastways where children are concerned. Adults might have the opportunity to privilege one version over the other because whichever one they choose will be the one which best

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<sup>70</sup> This is not to say that autonomy and diversity are the only values that are held to be pre-eminent within liberal theory. Equality has a claim to being foundational. It has been said that no political theory, liberal or otherwise, that did not have equality as its base could be taken seriously as a political theory, that is, that all modern theories have the *same* foundational value, that of equality (Kymlicka 2002: 3-4). What distinguishes different theories that have this same foundational value depends upon what the particular theory proposes to equalize, for instance, resources, or opportunities, or liberty. Liberal theory proposes moral equality that is attractive precisely because we have no "antecedently correct" view of the world against which we could assess various political arrangements, those, for instance, that did not show equal concern and respect to all persons. (Lecce 2008: 192). Equality, then, is foundational, but it does not tell us what is to be equalized or in what way the equal concern and respect that it supposes is to be made manifest in any given instance. Autonomy and diversity are the values most often invoked with respect to the rearing of children and both values can be seen as interpretations of what equality demands. On one hand, equality requires that all children have access to an education that protects their future autonomy, in part so that they are enabled to make (future) decisions on par with those who would otherwise have access to such an education. On the other hand, equality demands that all families be shown equal concern and respect by deeming their particular religious and cultural values as worthy of a certain level of non-interference.

accommodates their pre-existing views. The same cannot be said for children whose lack of pre-existing views is the prominent feature about the debate regarding what and whose views they should adopt.

I will first outline the ‘two liberalisms’ view and turn to an examination of Locke and Mill to reveal that the ‘two liberalisms’ thesis offers a false dichotomy. As such, tracing liberal theory back to each thinker as its supposed progenitor is misguided. I proceed to the views of Kukathas in order to locate some of the problems created for children when cultural membership is privileged without due regard for children’s objective interests. Finally, I turn to Kymlicka as a means of clarifying what is important about cultural membership, but suggest that here too his view is misguided.

### *3.2 A Tale of Two Liberalisms*

Galston claims that “properly understood, liberalism is about the protection of diversity not the valorization of choice” (1995: 223). Ronald Beiner agrees. He says that “[t]he official ideology of liberal society, endlessly expounded by liberal theorists, is of course diversity – the rich multiplicity of different conceptions of the good or of the ends of life” (1992: 23).<sup>71</sup> And Gray contends that “liberalism has always had two faces... [On one] view, liberal institutions are seen as applications of universal principles. [On another], they are means to peaceful co-existence” (2000: 2).

For Galston, the problem can be resolved by making compatible the historical ‘moment’ of liberalism with the struggles of the Post-Reformation rather than the later ‘historical impulse’ of the Enlightenment and the attendant privileging of ‘the examined life’ over “reliance on tradition or faith” (Galston 1995: 525). The reason this is so is that

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<sup>71</sup> Elsewhere, Beiner says that “liberalism is principally a doctrine of the limitation of state power” (26).

the arguments proffered for the protection of diversity offer “the best hope of maximizing opportunities for individuals and groups to lead lives as they see fit” (527). Much is left unproblematized here. Any life that one ‘sees fit’ to live will depend, largely, upon what type of life one is exposed to in the first place. Parents, for instance, who kept their child captive, Rapunzel-like, in a tower her whole life where she was taught to fear everything and everyone, would not normally be thought to have been within their moral rights to do so, even if this child looked upon them fondly and wished never to experience anything beyond her tower walls: The life she sees ‘fit’ to live could hardly have been otherwise, and she could hardly be expected to endorse anything else.

Liberals who focus upon diversity give greater weight to arguments that the family should be left alone to reproduce its values as it wishes, in keeping with liberalism’s protection of belief and (within limits) the practices that follow from these beliefs. There are liberal and non-liberal arguments for why this is. I canvassed certain non-liberal arguments in chapter two and concluded that children could not be used as a means to parents’ ends, and therefore certain arguments for the inculcation of particularistic values were excluded as anathema to liberal thought. This conclusion, however, only excludes some *reasons* for imparting particularistic values, but that can hardly be the whole story. For instance, the conclusion forwarded in chapter two would have little to say about the example above, as long as the parents were genuine in their desire to do what was best for their child as they understood it. Perhaps they really believe that exposure to the world is a worse option than being trapped in a tower!

On the other hand, the focus upon the individual’s capacity to revise her ends of life; to live ‘the examined life’ in such a way as to make it clear that the life chosen



genuinely adheres to the values one embraces as one's own, carries with it many implications in large part because exposure to diverse ways of life will have the likely effect of precluding some perfectly acceptable ways of life.

Each 'strand', then, of liberal thought carries with it particular implications for the rearing and education of children that are ruled out by the opposing view. On one hand, valuing diversity as the manifestation of respect for the various lives people choose to lead, suggests that children will be expected to adopt the views to which their parents expose them. If this is indeed a foundational value, what principles would legitimate the state to substitute its judgement for that of parents in determining to what values children should be exposed without undermining that respect? On the other hand, to value autonomy is also to claim to respect the various lives people choose to lead. This, however, suggests that children will be expected to adopt views which they have chosen after a rational deliberation of the merits of various and often countervailing views, which runs counter to some ways of life people value. The problem we encounter is something akin to that of the chicken or the egg dilemma: To posit that the value of diversity is the primary value within liberal society is to *presuppose* the milieu within which children could potentially lack the resources to remove themselves from ways of life that are objectively deleterious. However, to posit that autonomy is the primary value within liberal society is to presuppose a milieu within which children are likely to renounce ways of life that conduce to their overall well-being.

There is a way out of this dilemma, however it requires us to jettison the either/or view of liberalism. It is fundamentally misguided to try to substantiate an argument about the place of children in liberal theory by referring back to Locke and Mill and their views

about diversity and autonomy, respectively; because, when unpacked, each thinker's views on the subject reveal very little awareness of the unique space that children inhabit. Locke, for instance, has little to say about the legitimacy of belief-*formation*, and therefore, in his view, parental views are reproduced unproblematically. If we take seriously the ideal that moral concern ought to extend equally to children, the view that parental norms and values can be unquestioningly reproduced is limited. This realization brings into sharper focus the requirement of some conception of autonomy as a correlate to belief-formation. Thus, Locke as the defender of 'diversity liberalism' is problematic in terms of children. Mill, by contrast, demonstrates more concern with *how* people come to hold their beliefs. By insisting that individuals consciously choose paths that they think are best able to lead to outcomes that are important to them, we enable the fundamental flourishing of the individual, which flourishing is under constant threat of conformity and *inauthenticity*. Mill offers a strong view of 'choice' in the name of one's individuality, but this view is undermined by a second view that Mill also offers, which acknowledges that one's ability to choose is informed by circumstances and inherent proclivities that one *cannot* choose. Thus, the use of Mill as an example of autonomy is complicated by his reliance upon the pre-existence of diverse and unchosen options.

Generalizations about the meaning and desirability of diversity and autonomy conflate how we ought to think about the protection of beliefs that are fully-formed, with how we ought to think about the formation of these beliefs. They therefore substitute the one for the other as if they were conceptually interchangeable without taking note of the important distinction between them, revealing the manner in which children are metaphorically shoe-horned into conceptual spaces in which they don't quite fit.

### 3.2.1 Locke and the Reproduction of Parental Values

The Lockean focus upon the ends to which civil society is limited (chapter one) and the large parameters that this implies for the toleration of conflicting religious and moral commitments, leads to a society in which diverse views will inevitably flourish. This had little to do with any view on Locke's part that diversity was inherently good.<sup>72</sup> Notably, in Locke's earlier work he had concluded that the magistrate had the authority to pronounce on how people should worship in matters that were 'indifferent', that is, neither explicitly forbidden nor required by scripture. It was by realizing that what counted as an 'indifferent' matter was itself the basis for deep contestation that he reversed himself and became the exemplar of liberal toleration. This, it has been argued, had less to do with a re-examination of the relation between belief and knowledge, than with the question of what motivated people (Vernon 1996: chap. 1). It was, then, Locke's realization of the extraordinary lengths to which people would go in order to publicly affirm the beliefs and practices that their consciences dictated that forced him to re-examine his earlier thoughts on the distinction between private belief and public practice.<sup>73</sup>

In his concern about the individual's *sincerely held* belief, Locke rejects the grounds necessary to use the power of the magistrate to force people to 'consider' the

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<sup>72</sup> For Locke, however, the ensuing diversity had its limits. For instance, he claims that non-Christians are to be tolerated in order to provide a better opportunity to eventually convert them. See Locke (2010: 68).

<sup>73</sup> In *A Letter Concerning Toleration*, Locke opines that it is not religion or the diversity of opinions that it spawns which has produced "all the bustles and wars...upon account of religion", but the "refusal of toleration to those who are of different opinions" (1993: 431). The communitarian critique contorts this aspect of liberal thought by suggesting that the revisability criterion that is prominent among some liberals reveals an erroneous liberal belief regarding the ease with which people relinquish and take-up attachments. By contrast, liberal thought emanates from the realization of how jealously people guard their present attachments.

nature of the true religion. The intensity of coercive power needed in order to turn one away from a sincerely held belief into believing something else was potentially endless, and would lead to all manner of torments as ‘recalcitrants’ stubbornly held fast to their present beliefs and required greater and greater incentives to demonstrate that they had, in fact, thoroughly considered the nature of the ‘true’ faith that they presently rejected (Locke 2010: 96). Locke agrees with Proast that it is desirable that people should examine the grounds of their views. However, his challenge to Proast is that this “business of search” is outside the domain of political control. Locke writes: “it is beyond the power or judgement of man...to determine what is everyone’s duty in this great business of search, enquiry, examination or to know when anyone has done it” (97).

This is a slight, but importantly different point from that made in the argument forwarded by Waldron – that Locke’s arguments for toleration were owing to the *incapacity* of the state apparatus to alter people’s beliefs (Waldron 1988). Locke concedes in *A Second Letter Concerning Toleration* that persecution *might* work to alter some people’s beliefs in *some* circumstances, *sometimes* (2010: 72).<sup>74</sup> Locke’s argument here, however, regards the logical impossibility of knowing *when* one had ‘sufficiently’ considered since the only proof Proast’s argument could accept as evidence was the individual’s total conversion. In this way, Locke’s view reveals a ‘weak’ requirement for autonomy. Notwithstanding that people should hold their beliefs ‘sincerely’, and that it is to be wished that they consider the grounds of their belief, it is impossible to know when one’s search had been sufficient since the only evidence available was that they had

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<sup>74</sup> Presently, we know enough to realize that it is very possible to alter beliefs by putting people into those situations whereby they are more likely to arrive at answer x than answer y, say, by restricting access to information about y or by offering a comparatively abundant and positive assessment of x. And so coercion as a means to bring about the ‘right circumstances’ is not at all irrational. However, Locke’s main point is that it is, to use his word, “impertinent”, that is, it is not legitimate to do so in religious matters.

changed their minds. Surely, as Locke points out, this logic is flawed. What might such a test reveal if required of all those who presently conform to the true religion?

Galston's use of Locke to ground an argument that traces liberalism back to the Post-Reformation in order to determine that diversity is the fundamental liberal value is unhelpful with regards to the overriding question under examination. That question is: What and whose values ought children to be taught within a liberal society? In Locke's scattered writings on children and education, for instance, his main concern is that children should be educated to the gradual exercise of their reason and mastery of their appetites. It has been argued that this stems, not from a lack of awareness on Locke's part of the question of children's developmental needs beyond the realm of the merely intellectual (such as their emotional needs). It was rather that the "singular objective [was] to produce 'rational citizens ...'" (Arneil 2002: 73): the duty the father acquires to "inform the mind" of his offspring during their "imperfect state of childhood". What was to supply the content of caring for children beyond this was simply of no concern to (early) liberal theory because it was largely viewed as a natural phenomenon, undertaken by women within the private sphere, and not a properly 'political' question (ibid).<sup>75</sup>

The important point in all this is that liberalism understood on the Lockean view of protecting diversity as the outgrowth of protecting individuals' 'sincere belief', takes as its model those whose views are already fully formed in the first instance, and assumes unquestioningly their generational reproduction in the second instance thereby leading us away from rather than toward the issue under examination: The legitimate basis of belief-

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<sup>75</sup> Perhaps most importantly, the question of what constituted 'rational enquiry' was not thought to have more than one plausible answer. Diverse opinions should be allowed to flourish, but that was not because each of them was potentially correct. By contrast, one commentator has noted that, by the late 20<sup>th</sup> century, "even a minimal appeal to shared rationality [was] suspect" (Beiner 1987: 1).

*formation* within a liberal polity (since what Locke is really talking about is belief-*protection*). The very fact, though, that two of the central values within liberal theory concern autonomy and diversity demonstrates the ill-fit of children within liberal theory. ‘Autonomy’ liberals seek to protect children’s *future* autonomy precisely because it is acknowledged that children are ill-equipped to exercise that capacity at present while ‘diversity’ liberals often subsume the rights and interests of children within those of their parents or, more amorphously, their religious or cultural communities. Both approaches belie the reason for which protection of diversity is generally thought important to liberals, including Locke: Because it protects ways of life and beliefs that people *actually* possess in the here and now. In this regard, Harry Brighouse comments: “Liberals are so impressed with the intimate connection between persons and their conceptions of the good because persons are presumed properly to regard them as their own...” he continues “...but we should not regard children’s conceptions as their own, because they are unequipped to make them genuinely their own” (1998: 738).<sup>76</sup>

At this point, it might seem *à propos* to turn toward an examination of Mill. Mill is often thought of as the seminal figure among political philosophers on the question of the correlation between autonomy and human flourishing. It has become commonplace among political philosophers to refer to ‘Millian liberalism’, by which is meant liberal thought as a *substantive* political philosophy that appropriately privileges autonomy, that is, critical and dispassionate enquiry of customs and social mores, as the particular endowment of the human being. We shall see, however, that despite the use of Mill as a

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<sup>76</sup> See also Brighouse (2002: 46-51) and Feinberg (1980: 125).

staunch purveyor of ‘autonomy liberalism’ it is difficult to discern from Mill’s thought a straightforward view of what it consists in.<sup>77</sup>

### 3.2.2 Millian Autonomy: Two Views

Mill writes that the end to which all humans must direct themselves is “the individuality of power and development” (1998a: 64). For Mill, autonomy was an essential element of human well-being: “if a person possesses any tolerable amount of common sense and experience, his own mode of laying out his existence is best, not because it is the best in itself, but because it is his own mode” (ibid: 75). With these famous words, Mill indicates that the value of autonomy is to be found in the human good that is inherent in the capacity to choose rather than in its consequences, for instance, because it can furnish society with truth as he elsewhere proclaims. Nor is it good because humans are the best judges of what is good for them, although this possibility does provide at least one rejoinder to arguments for paternalistic intervention. Mostly though, it is best simply because it was chosen by the agent herself, as a function of the simple human desire to choose one’s own path. In the words of Dostoevsky “[w]hat man wants is simply *independent* choice, whatever that independence may cost and wherever it may lead” (in Dworkin 1988: 62).

Remarking on Mill, however, Richard Arneson notes that, at times, Mill’s views on individuality seem only somewhat related to autonomy because Mill’s conception reveals that autonomous agents can act in ways that reduce rather than increase their

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<sup>77</sup> Given the strong anti-paternalism in Mill’s thought, one observer has argued that the notion of ‘Millian liberalism’ in the way it is normally meant, overestimates the extent to which Mill espoused paternalistic intervention in the name of inculcating autonomy (Barry 2001: 119-20)

individuality (1980: 479-481).<sup>78</sup> The case in point is that of Mill's discussion of the institution of Mormon marriage. Despite Mill's disapprobation of the way the institution of marriage is practiced by the Mormons he claims that it is "as much voluntary on the part of the women concerned in it, and who may be deemed the sufferers by it, as is the case with any other form of the marriage institution" (1998a:102). What accounts for this voluntary choice on the part of women is viewed with some disdain by Mill and is found "in the common ideas and customs of the world" such that, marriage propagated as the one thing needful for women, renders it quite understandable that women would rather choose to be one of several wives than risk being no one's at all (1998a:102).

Mill's writing obscures as much as it reveals about how one is to understand what constitutes individual choice that is appropriately 'one's own'. He writes, for example, that the end to which all humans must direct themselves is "prescribed by the eternal and immutable dictates of reason" (64). Reason, thus, stands in opposition to custom *qua* custom, because it is by employing one's reason that the merit of various customs is evaluated: "it would be absurd to pretend that people ought to live as if nothing whatever had been known in the world before they came into it," however "custom merely *as* custom, does not educate or develop in him any of the qualities which are the distinctive endowment of a human being" (65). Mill opines that even where custom contains educative merit, it is only by the individual's making a choice, rationally and deliberately, that this merit can be ascertained and deemed appropriate for the person at hand, because, first, what is good for one person is not necessarily good for another, and second, experiences may be misinterpreted by others such that things that seem good to them, in

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<sup>78</sup> Mill never actually uses the word 'autonomy' in the whole of *On Liberty*. Instead, his views about 'individuality' in *On Liberty* are generally thought to be synonymous with or at least an adequate substitute for the concept of autonomy.



reality are not. So, while customs act as “presumptive evidence, and as such, have a claim to [one’s] deference” (ibid), even then they must not be taken at merely face-value. A *choice* to adopt these preferences must be made because it is only in choosing that a person exercises her distinctively *human* capacities.

We might compare this view with that proffered by Harry Frankfurt in his seminal contribution to the personal autonomy literature. Frankfurt argues that we share many things with other species that are integral to us as persons including the ability to deliberate and make decisions based on prior thought (1988). What distinguishes us, then, as persons is not the simple capacity to choose, as Mill suggests, but to choose *based on the capacity to assess the basis of the choice itself*. Consciousness does not begin with the response to changing environments, which even plants exhibit. It does not even begin with the capacity to decide on a course of action as between two or more possibilities, which even non-human animals exhibit (Frankfurt 1988; Dworkin 1988: 15). Rather, consciousness begins with the reflexivity of a secondary awareness of a primary response. Only humans, then, form second-order volitions, that is, we are not only moved to do certain things because we want to, we are moved to want to want certain things and we want to have certain motives. However, not even all humans are persons in the relevant sense. Frankfurt refers to humans who are incapable of formulating second-order volitions as ‘wantons.’ For Frankfurt, children fall into this category. It is not, then, that children cannot *act* freely, but that they cannot *will* freely.

‘Hierarchical’ approaches such as Frankfurt’s are said to suffer from several major defects, the most important for present purposes is that of manipulation. On Frankfurt’s account, and similarly to Locke, it does not seem to matter how the desires

come to be as long as the agent identifies with them. On this account, a victim of brainwashing or one who undergoes hypnosis could have implanted volitions not ‘their own’, which they then come to identify with strongly, and yet it seems difficult to accept that such desires would count as ‘one’s own’ in a sincere or genuine way.

Mill, too, seems to suffer from some uncertainty on this account since the human capacity to exercise choice entails filtering the available information through the conduit of the cognitive structure of the person in question, and this structure is largely informed by the cultural milieu in which one finds oneself and in which one was raised. In *The Subjection of Women*, Mill contemplates the fact that gender equality, for instance, has not only to fight the indifference and hostility of men, but that of women also: “All women are brought up from the very earliest years in the belief that their ideal of character is the very opposite of men; not self-will, and government by self-control, but submission, and yielding to the control of others” (1998b: 486).

Having noted that deliberate choice is the hallmark of one’s distinctive humanness on one hand, but that the information upon which one acts is necessarily understood differently depending upon one’s milieu on the other, Mill reveals the more challenging view that human beings not only have different tastes, but also require different conditions for their spiritual development (1998a: 75). He suggests that humans have, not only a ‘human’ nature, something that distinguishes the human animal from other, non-human animals, but that individuals have an ‘individual’ nature as well, something that distinguishes human animals one from the other: “humans are not like sheep and even sheep are not indistinguishably alike” (ibid).<sup>79</sup>

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<sup>79</sup> Mill’s ‘autonomist’ views are tempered by the subjects to whom autonomy was meant to be extended, prompting Appiah to remark that, contra those who fault Mill for his putative ethnocentric privileging of

We are left then with two contending views of autonomy: On the first view, one is expected to examine their own customs and those of others in order to ascertain which of these best coincides with their inherent inclinations (our ‘individual nature’). This view lends itself to the idea that dispassionate and rational calculation of myriad and contending views is the most desirable state for a human being, and the only way to reveal what is distinctively ‘human’ about the species as well as about the particular, individual specimen of the species. On the other view, the ability to examine is not only given by inherent inclinations, which includes the fact that some people are more inherently capable of rational deliberation just as some people are more ‘independently-minded’ than others, but more to my present point, by the very customs into which children are born which, as Mill readily remarks in relation to women, are already moulding their inherent inclinations in important – but likely imperceptible – ways.

### 3.2.3 *Autonomy and Diversity: Two Sides of the Same Coin?*

According to Appiah, Mill found no *inherent* value in diversity, but only in the act of self-creation. For instance, Appiah says that if one were to find herself genuinely holding exactly the same beliefs as her neighbours this would not necessarily be as a result of her thoughtlessly ‘aping’ them. It would not, then, necessarily tell against the beliefs in question being genuinely authentic to both herself *and* her neighbours (2005: 6). Mill writes: “unity of opinion, *unless resulting from the fullest and freest comparison of opposite opinions*, is not desirable” (1998a: 63; emphasis added). On the one hand, then,

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autonomy, Mill is ethnocentric precisely where he leaves off autonomy since he claims that “backward states in which the race itself may be considered in its nonage” are ripe for despotic rule. In other words, the ‘harm principle’ whereby an individual’s action can be prevented against that individual’s will only to prevent harm to third parties, does not obtain in ‘backward’ states, where the people are analogized with children. Children then are likewise excluded from the ‘harm principle’ in that their actions can be prevented in order to prevent harm to themselves (in Appiah 2005: 144).

unity of opinion is not bad *per se* (and conversely, diversity is not good *per se*.) That said, without diversity it is hard to see how the comparison of opposite opinions might be effected. Lecce and Appiah agree that, for Mill, “diversity emerges as both a by-product and precondition for personal choice” (Lecce, 2008a: 53; Appiah 2005: 40-5, 141-54). This suggests the need to *protect* diversity as a necessary precondition owing to, at least, the *instrumental* value of personal choice (that is, choice maximizes overall welfare).<sup>80</sup> One can imagine, for instance, that there might come a time at which a critical mass of people, all authentically holding the same conception, unwittingly impedes the reproduction of other conceptions against which one can test one’s own opinions and beliefs thereby making the only condition under which Mill stipulates that unity of opinion is acceptable, virtually impossible to achieve.<sup>81</sup>

Unlike Locke for whom diversity was a simple fact with attendant problems to be surmounted, Mill thought diversity was instrumentally valuable because in the context of dissension from any dominant value one of two things would likely occur: One, we would discover the error of our initial thinking and correct it (1998a: 71). Two, having tested our initial thinking and finding it to be true, we would never hold such truth merely by habit such that it was held passively, as something now dead and believed only through inertia. Truths that are held to be no more than custom take on the pallor of *mere* custom, that is, something that is believed unquestioningly. The truths immanent in such customs are endangered as a result:

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<sup>80</sup> There is a debate regarding whether Mill turns in his utilitarian credentials for the sake of privileging the natural liberal rights of the person or not. Such liberal theorists as Feinberg and Arneson have been accused of articulating this view, while Lecce argues that Mill’s utilitarianism is evident in the genesis of the liberal rights he thought ought to be protected. On this view, Mill believed legal protections ought to be afforded to basic liberal rights because their protection served overall utility at some second-level order of welfare maximization.

<sup>81</sup> See Lecce (2008a: 53-55) for a discussion of the four distinct grounds upon which Mill argues for the utility of diversity.

There is only too great a tendency in the best beliefs and practices to degenerate into the mechanical; and unless there were a succession of persons whose ever-recurring originality prevents the grounds of those beliefs and practices from becoming merely traditional, such dead matter would not resist the smallest shock from anything really alive, and there would be no reason why civilization should not die out... (1998a: 72).

Truth is, thus, a fragile thing which requires a constant re-assessment in order not only to replace it with something better when something better comes along, but to constantly assure ourselves – and thereby give us the reasons to provide to others – that it is, in fact, the truth: “Complete liberty of contradicting and disproving our opinion, is the very condition which justifies us in assuming its truth for purposes of action” (24). Without access to these justifications, passive truth could easily be replaced by energetic falsity, with a dire consequence: The death of civilization!

The implicit interrelationship between diversity and autonomy in Mill is given an explicit treatment by Joseph Raz, who believes that “to be autonomous a person must not only be given a choice but that he must be given an adequate range of choices” (1988: 156). Raz posits that a commitment to autonomy *entails* a commitment to diversity, what he calls ‘moral pluralism’, since it is through this that one can have access to an adequate range of options which reflect the many capacities that are contained within the many individuals who make up what we think of as society (164). Raz contends that there are not only distinct ways of life that are morally acceptable but that they display distinct virtues that are unattainable elsewhere (159). Diversity then is necessary for autonomy, but as against the unifying logic of (singular) truth-seeking which sits in some considerable tension with the (multiple truths of) diversity, Raz believes that

incompatible virtues cannot be rank ordered: They do not derive from the same source or speak to the same common principles (160). Truth-seeking stands in some tension with the notion of diversity even while diversity is necessary for the autonomy of agents.

It is here that the special case of children is paramount. The provision of diverse options to satisfy certain substantial inclinations presupposes that such inclinations not only exist *in embryo* metaphorically speaking, but are sufficiently well-developed for their satisfaction to be meaningful. If choice is meaningful because it protects substantial inclinations beyond that of merely choice itself, such inclinations must, in some important way, be considered authentic to us. It is this authenticity in children that is questionable. The guarantee of sufficient options to satisfy substantial inclinations only makes sense in the case of children on either or both of two conditions. One, that individual characters are sufficiently different by nature that society will inherently tend toward diversity and thus require an adequate array of options from which to choose, and/or that diversity as it presently exists is sufficiently well-protected as to promote diversity through the familial/communal reproduction of sufficiently different motivations for action.

Locke, for instance, refers to children as “white paper” (1690: ss. 216), with minds “as easily turned, this or that way, as water itself” (ss.2) suggesting that environment is all important.<sup>82</sup> Elsewhere, however, he refers to their inherent “natures and aptitudes” (ss. 66). Taken together, this suggests that Locke did not view children as blank slates purely created by their environmental conditioning, but rather that the focus on environment assumed the fact that children’s inherent proclivities were beyond anyone’s direct control. This is not to say that a particularly bold child cannot be made

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<sup>82</sup> Locke says that nine tenths of what we are, is as a result of our education (1690: ss. 1).

timid and vice versa through social conditioning, either through a concerted effort to do so or as an unintended consequence of other environmental factors (although Locke himself claimed to believe that one's "native stock" could be "a little mended" but not transformed altogether (ibid). It is to say, however, that since social conditioning begins at birth – and perhaps, even, *in utero* – the way a child's inherent inclinations might be shaped by their conditioning is largely unknowable. So too, then, are a child's 'inherent' inclinations in the first place. As such, the difficulty with regard to the question of what constitutes 'authenticity' in children remains.

Mill's view of children reveals a tendency to assume away the problem of the interaction between one's inherent proclivities and the manner in which they are acted upon by external circumstances. Mill identifies authenticity with what Waldron calls "a sort of inner vocation" (2008: 166). Using the metaphor of a tree, Mill establishes that, like a tree, an individual must grow and develop "according to the tendency of the inward forces which make it a living thing" (1998a: 66). If we refer back to my earlier claim that Mill views the human as both a species with a particular 'human' nature and also that each specimen has a particular 'individual' nature, the point of this arboreal metaphor becomes less rather than more obvious: Do the "inward forces" of the oak differ from that of the spruce or do all trees have the same "inward forces"? When transferred to the rearing of children the question regards whether we all have similar needs in view of our humanness, in which case we are all owed what would promote and nurture their fulfillment. What might those needs be if we all also have an 'individual' nature that is acted upon by environmental factors in such a way as to alter it? There is a further difficulty. Mill writes: "it is the privilege and proper condition of a human being, arrived

at the maturity of his faculties, to use and interpret experience in his own way. It is for him to find out what part of recorded experience is properly applicable to his own circumstances and character” (in Waldron 2008: 166). The difficulty becomes apparent when we turn our attention to the question of what we might term the ‘choice-paradigm’ through which information must be filtered. By the time one is in the ‘maturity of his faculties’ his ‘choice-paradigm’ might already be largely given, precluding the rigorous ‘search’ upon which Mill, elsewhere, seems so intent.

For Mill, (as for Raz), it is apparent that autonomy and diversity are mutually reinforcing. On Mill’s view, living an authentic life of self-creation is the primary condition of the human species, which authenticity is possible because there are myriad customs some of which will require our deference and some which we ought to reject as inapposite for ourselves, even though they are perfectly appropriate for another. This will result in the diversity that is both the pre-condition to making choices and the result of authentically made choices. At times, however, Mill seems to both acknowledge and distance himself from the view that autonomy can be conceptualized independent from the cultural prism(s) through which options are weighed and choice, whatever its other bounds, is exercised;<sup>83</sup> he seems to view the relationship between autonomy and

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<sup>83</sup> Diversity of opinion can be achieved in myriad ways. Mainly, it is achieved by virtue of the different ‘contexts-of-choice’ that presently exist and are reproduced in the familial and communal context. Diversity of opinion, however, can also be achieved by the methods that are promulgated by autonomist liberals, namely, exposure to competing societal values. The imposition of the ‘revisability criterion’ which is part and parcel of the open future theory according to which children are *owed* exposure to diverse societal values, is criticized as the imposition of conformity. Some observers have even analogized it to the Communist education regime in the former Soviet Union (Redish and Finnerty 2002-2003: 76-81). But this analogy, if not actually disingenuous, is hugely overstated. Even if we could agree that exposure to diversity in the name of autonomy amounted to a paralyzing conformity (as if millions of children all equally adamant in their right to think differently from each other were synonymous with them all thinking that Father Mao is irreproachable) the other ingredients of a ‘closed society’ are lacking; such as formally censored press, and a secret-police and a decided orientation against questioning received truths. That said, we are not, here, advancing the view that children have a right to an open future, merely that it is *a* means (if not *the* means) to advance diversity.



diversity as unfolding organically. He acknowledges that individuals might require different environments for their spiritual development, and that even poor choices such as those women who choose the life of a Mormon wife are still freely-made choices that are autonomous on some formulation of the term. Notwithstanding, when it comes to children and belief-formation, in many ways the implications of his views do not differ substantially from those of Locke. For instance, in *On Liberty* he opines that while the formal education of children ought to be mandatory, for reasons that most liberals can easily suppose, he does not prescribe the content of that education, fearing that too much state intervention in education will act against the individualistic currents he is adamant to defend (1998a 117-18). This puts us into something of a conundrum since present arguments for an ‘education-for-autonomy’ through common schooling largely proceed along the lines that liberalism, as elucidated by Mill, requires the privileging of autonomy as, at least, instrumentally necessary in order for one to be self-fashioning, but it is not at all clear how far Mill himself would have supported this view.<sup>84</sup>

All of this is to say that Millian autonomy as the basis for liberalism is less obviously supportive of the kinds of state intervention that is defended in its name. Moreover, the fact of his two views of autonomy restates one of our main problems, which is how to conceptualize autonomous choice when circumstances work to alter our perceptions of our options. This is unproblematic if, for instance, the fact that one existed within a given choice-paradigm was proof, in and of itself, that one positively embraced whatever choice-paradigm it was and was genuinely at peace or fulfilled by the life which that paradigm presupposed, but our psychological disposition seems inherently

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<sup>84</sup> Mill does support exposure to any and all schools of thought on the basis that ‘so and so holds such and such a view’ is a *fact* regardless of the merit of the view. It is concern over this very kind of exposure that informs our present examination.

more complex than that. For instance, in her autobiographic tales, Ayan Hirsi Ali convincingly traces her mother's unhappiness and violent outbursts to repressed frustration and anger at her lot in life as a devout Muslim in a deeply religious and illiberal country, even while her mother actively embraces the very values and customs that make up her life circumstances (2007; 2010). Ali's mother is a classic personification of what many scholars (feminists in particular) following Jon Elster's work on rationality consider to be the problem of adaptive-preference formation.

Adaptive preference-formation represents a problem that is at the core of my examination. Given that environmental factors such as the inculcation into particularistic value systems act to alter the perception of these very systems, how do we begin to untangle the implications for belief-formation in children? The two most common answers are that (a) children are owed an 'open future' in the name of their future autonomy and (b) that children will unproblematically come to embrace those views into which they are inducted. Both answers are unsatisfying. The first for reasons that I will elucidate in the following chapter, but in essence privileging autonomy in the way open future theorists understand the concept posits an overly restrictive view of the child's best interest; and the second, because the measure of a child's best interest cannot be taken without a conception of those interests beyond the mere embracing of any particular value system, leastways not without permitting some practices that are clearly deleterious. Chandran Kukathas' theory exemplifies this latter problem and it is to his view that I will now turn.

### *3.3 Kukathas and Associative Rights*

In his well-known essay ‘Are there any Cultural Rights?’ (1992), Chandran Kukathas argues that if the concern to preserve cultural communities exists in order to provide people with meaningful choice, then it makes little sense to speak of ‘liberalizing’ cultures that do not already value choice or the possibility of revising one’s ends. Kukathas’ point seems simple enough: To interfere in the lives of individuals on the basis that their way of life is morally inferior or in some way inconsistent with human flourishing runs the risk of judging groups by standards that they themselves do not recognize. It is this sort of imposition about which liberals should be leery (122). Kukathas claims to be able to do justice to the cultural aspirations of individuals by *denying* that there is any such thing as a right to one’s culture (107). Instead, any putative right to culture would be subsumed within the liberal right to associate, which all individuals retain. In this way, the freedom to live in accordance with values one genuinely recognizes and embraces is protected. Kukathas’ solution to the problem of being forced to live along lines that one does not embrace is a substantive ‘right-to-exit’.<sup>85</sup>

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<sup>85</sup> The assimilation of the ‘liberal association’ with the ‘cultural community’ as Kukathas would have it, will not find favour with everyone. In his assessment of the communitarian critique of liberalism, Allen Buchanan writes: “In the activities that are the life of a community, individuals think of themselves primarily as members of the group, and of their values as the values of the group. At least in the course of these activities, the distinction between “mine” and “ours” breaks down or at least recedes into the background” (1989: 857). The same cannot be said for the value the liberal places upon the ‘association’ since the association is one that reflects common *interests* (rather than constitutive characteristics): my interests are advanced at the same time as yours are and these happen to, for a time, coincide. The difference between the two concepts is important. It is held that the liberal association is little more than a way of ‘getting on,’ and has little to do with the fundamental question of one’s very identity and therefore carries none of the *gravitas* that one’s cultural community does nor any of the deeply felt implications. But it is not clear that this assessment is correct. Many liberals disagree that the ties of ‘association’ are necessarily less pressing than ties of ‘community’. It is true that not all groups that are considered free associations carry the kind of constitutive elements that the communitarian critique claims that one’s cultural community does. For instance, a baseball club is considered a free association. On the other hand, it is equally true that not all free associations, such as one’s membership in a baseball club, are considered by liberals to be equally binding on the individual. Religious groups, for instance, while categorized as free associations for the purposes of liberal theory, are not considered so because liberals believe religious

### 3.3.1 The Right-to-Exit

Kukathas' argument suggests that the *de facto* position we ought to take with regard to groups is that their members accept their present way of life, however unjust such ways might be from a liberal standpoint (132-33).<sup>86</sup> For Kukathas, all that is required to make this assumption tenable is the ongoing participation of those individuals in the life of that group since those who do not acquiesce are free to demonstrate this by having a (substantial) right to exit the group.<sup>87</sup> All other rights are either derivative of that or are bestowed by the group itself (1992: 117). If individual members no longer recognize the legitimacy of the group, they may work to change the practices of the group

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commitments are normally chosen, because they believe such commitments can be easily dismissed, or because they believe they are not normally viewed as integral to one's personal identity.

<sup>86</sup> To clarify, Kukathas is only concerned with illiberal communities. This seems apposite, given what he claims is his purpose, which is to elaborate a view of liberal theory that can take heed of people's interest in their cultures and he does this in response to those, namely Kymlicka, who he takes to argue that interference in illiberal cultures is justified in the name of liberal norms.

<sup>87</sup> Barry claims that any analysis of the right-to-exit is impoverished to the extent that it lacks a categorization of exit costs. Some believe that the reason a right-to-exit might be non-credible, is that some costs are simply 'too high' to pay and therefore would reasonably impede one's exit and therefore render the right 'non-credible', but this would be to misunderstand what Barry is saying. Kukathas, for instance, claims that as long as one is not physically impeded from exiting, then the right is credible. Any further examination would be to impose upon others what *kinds* of considerations they ought to take cognizance of before assessing costs. For instance, for some the loss of family who would now disown one for exiting a group would be insurmountable and would prevent consideration of leaving while, for another, no cost, however high, could prevent exit: What for one is a high cost is not so for another. However, Barry's categorization of exit costs is not a question of *degree*, but of *kind*, and this is an importantly different focus. For Barry, there are 'intrinsic costs', 'associative costs', and 'external costs' to exit. Intrinsic costs are logically and irremediably intertwined with the act of exit itself. If you believe that '*Extra Ecclesiam nulla salus*', then exiting might be too high a cost for you. Given that one's immortal soul is imperiled, it might be empirically the highest cost possible, but this does not make the right-to-exit non-credible, since there is no logical mediation possible here between the act of exit and its consequences, at least as viewed by the putative 'exiter'. External costs, by contrast, are those that are imposed that are neither integral to the act of exit nor are of such a character that their imposition can be viewed as necessary to the distinct character of the association itself. Such costs may be empirically 'lower' than intrinsic costs, but this is irrelevant and anyway coincidental if it is the case. External costs ought to be remedied because they are neither necessary to the character of the group, but they may be sufficiently high such as to render exit less likely than is reasonable. The test, here, takes away some of the subjectivity with regard to a 'high' or 'low' cost and seeks to make a more objective evaluation. (2001: 150-151.)

from within, but the ability to do so cannot be safeguarded. To do so would be to interfere impermissibly in the internal arrangements of groups. Individuals may leave the group, either individually or in concert with others, and this right *must* be safeguarded, whether it is recognized by the rest of the group or not.

It is Kukathas' belief that any group that consistently failed to take cognizance of the desires of its members would soon find itself dying a 'natural' death; an end Kukathas claims people would work to avoid. It is for this reason that he claims that the right-to-exit is more than merely formal and has 'substantial *bite*' (133). In this way, too, Kukathas' cultural communities are akin to 'democratic majorities' and can be subjected to the same influences and contending individual interests that make up democratic politics on a wider scale as contending interests shape and re-shape the group from within (108-118). As Kukathas rightly notes, neither interests nor group characteristics are static. They are, (permissibly) altered internally; by contending forces, and externally; by co-mingling with members from the dominant culture. But there is a 'free rider' problem that Kukathas ignores, which is that while the liberal state has no right to interfere in illiberal cultures illiberal cultures are parasitic upon the wider liberal society. The Millet system of diverse, but closed communities, for instance, cannot be a liberal one on Kukathas' view, not because of the internally illiberal arrangements of the groups, but because within such an arrangement exiting dissenters have nowhere to go. Their right-to-exit can only be protected as long as the larger society is a liberal one (133-34).<sup>88</sup> If

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<sup>88</sup> Despite this, on Kukathas' view it is not the responsibility of the state "to pursue the task of creating a harmonious and cohesive society-one that makes for a stable social unity that will endure over a substantial period of time" since, he claims, this lies outside the capacities of state institutions (1998: 697). We must admit that it is not clear what marks the difference between creating a 'harmonious and cohesive society' which is *not*, in his estimation, the business of the state, and the requirement that the liberal state "should not be concerned about anything *except* order or peace" (694, emphasis added). Kukathas accepts that one way of ensuring peace might be to engage in the kind of practices which recognize the specifically cultural

the liberal state has no business ensuring that cultures comply with liberal norms beyond ensuring the right-to-exit, and this can only be ensured if the larger society is liberal, which itself is either impermissible or impossible to enforce, it is not clear that a right-to-exit is itself enough to even ensure the continuation of a right-to-exit.<sup>89</sup>

Let us assume, though, as we likely safely can, that as a practical fact the liberal majority culture is not going to disappear anytime soon. This tells us little about the fate of children who cannot exercise the right-to-exit anyway. In his critique of Kukathas, Barry points out that the act of ritual scarring of one's children, an activity Kukathas claims is permissible, can only be understood in the context of its *ritualized*, i.e., its cultural, form (2001: 141-146). On this view, the only coherent reading of Kukathas is that he must endorse a regime whereby any kind of scarring could be performed on another, as long as the person being scarred was a member of a group that embraced this practice. Likewise, Kukathas maintains that it is questionable why those cultures which do not value schooling, leastways not formal schooling, such as Roma ('gypsy') culture and the Old Order Amish, should be forced to send their children to school at all (1992: 126). Unless a dispensation is provided to these children owing to the particularly cultural character of their views of formal education, there seems to be no reason why a

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nature of some rights-claims. Kukathas says that "[p]eace may require, among other things, different ways of devolving political power" (694). Such ways could include 'group representation rights' and 'self-governing' rights (694-95). However, for Kukathas, this would be a purely pragmatic rather than normative stance.

<sup>89</sup> This is particularly true when, as Kukathas rightly states, satisfying claims for cultural recognition can run the danger of creating further claims: "Groups do not always demand recognition because they exist; sometimes they exist (at least in their particular sizes and characters) because they have been granted recognition" implying that devolution of power to sub-group politics likely leads to ongoing demands for a further devolution of power and so on (1998: 693). Moreover, we might note that those who wish to exit liberal society cannot have the same right to exit as do those who exit one of the many cultural communities within the broader liberal society. At that point, we are more appropriately talking about a right-to-enter. One might have the right to 'exit' liberal society, in a manner of speaking, to join the Old Order Amish, say, but liberal society cannot guarantee the right-to-enter, since cultural communities are free associations and as such are free to establish their own membership criteria.

particularly irresponsible parent who saw no reason for her child to attend school should be forced to do so either, since “the point of saying that there are ‘no cultural rights’ [is] that the motive behind an action should be irrelevant to its legality” (Barry 2001: 143-44). Before we conclude that Kukathas has been ‘hoisted on his own petard’, it should be noted that this is not an inference that Kukathas rejects. As noted above, he maintains that it is not “appropriate for the state to be in the business of education in the first place” (Crites 2007: 181). In other words, he *avoids* the trap Barry sets for him at the risk of proffering a theory that is even less provident for the welfare of children than Locke’s own views were, in that the reproduction of norms is given an unproblematic treatment, despite the potentially deleterious consequences of such norms. At the very least, Locke recognized the centrality of the interests of children in terms of their upbringing, as I canvassed briefly in chapter one, even if he was mostly silent about what informed those interests. On a coherent reading of Kukathas, however, what would prevent, say, the abuse of children as a function of a sadistic grouping of adults joined together for this purpose?<sup>90</sup>

Like Narveson, Kukathas has no adequately liberal account of children. What makes Kukathas’ theory a (putatively) liberal one is that individuals are free to leave arrangements they no longer can abide, period. Indeed, this is the only right that is guaranteed to an individual as a member of a ‘group’. Children, however, are not free to leave. They have no choice, but to be forcibly inducted into whatever way of life they were born into. This, too, is not a conclusion Kukathas rejects. By contrast, he claims that “only to a very small extent” is the nature of the liberal association voluntary:

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<sup>90</sup> Deborah Hawkins points out that Kukathas’ response to queries about what protection might be afforded to the most vulnerable members of groups, often women, children and dissenters, is both circular and inadequate (2004).

“Membership is usually determined by birth rather than by deliberate choice...” (1992: 116).

My point is not that children do not possess the capacities to give meaningful assent to the world around them and therefore they ought to be protected from the decisions of others (even though that is, at least partially, true) for the question will remain why impose *this* view of the world and not *that* one. The insight that children cannot meaningfully acquiesce to anything can only do *some* of the work here. I am not arguing that children ought to be protected from coercive induction. Rather, in recognizing that children cannot but be coercively inducted I argue that Kukathas’ framework, which explicitly offers no more than the protection against forcible induction, cannot apply to children as a coherent theory. In Kukathas it is made manifest precisely because his arguments against the legitimacy of ‘cultural rights’ lead to the conclusion that there is virtually no obligation parents must undertake on behalf of their children and very little that is impermissible with how they may treat them.

In his criticism of Kymlicka’s theory of ‘minority rights’, Kukathas inveighs against Kymlicka’s use of “meaningful individual choice” as the barometer for assessing the moral permissibility of cultural practices. Kukathas asks: “why make ‘meaningful individual choice’ the basis for supporting cultural membership” (121)? One might as easily ask why make ‘exit’ the basis for assessing acquiescence? This is not as flippant as it may sound once we take into account the question Jon Elster asks, which is: ‘how can individual preference be construed as the basis of social justice and the preferred basis of assessing the value of individual choice, when preferences may be shaped by a process that preempts the choice (1983: 109)?



### 3.4 The Problem of Adaptive Preference-Formation

‘Sour grapes’ is a causal (rather than intentional) form of preference-formation (Elster 1983: 117), most associated with the (unwitting) downgrading of unavailable options.<sup>91</sup> One does not ‘choose’ to ‘look on the bright side’ for instance, because the mechanism is unintentional. Nor, however, does it play on the perception of the situation. In other words, the particular mechanism we are presently concerned with does not imply *misreading* the situation whereby one might console herself, say, after having been rejected for a desired employment position by saying ‘the boss was clearly just threatened by my ability.’ Instead, it plays on the *evaluation* of the situation, in which case we unwittingly downgrade unavailable options in our own qualitative assessment as in ‘I never wanted that stupid job anyway!’ This phenomenon carries important implications for my question. The idea of living the kind of life one sees fit must tackle the question of what measures are being used to determine fitness. Assuming that we are, here, concerned with human liberty, understood widely as the ability to live the life one sees fit, it would seem counterintuitive to regard as free someone who did little more than resign herself to the inevitable.

With regard to the position of adults the problem of sour grapes is difficult enough. Unless we treat adults as beings who have sprung, Athena-like, from their fathers’ foreheads, with no childhood to speak of, then the question of the legitimacy of moral choices is itself conditioned by the earlier options available to them that set the stage for their later choices. (This was Narveson’s point when he proffered that parents

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<sup>91</sup> Following Aesop’s fable of the Fox and the Grapes, Elster called this process ‘sour grapes’ because in that tale the fox, unable to reach the grapes, commented that in the end he didn’t really want them anyway as they were ‘sour’.

have a duty not to raise their children such that they will likely turn out to be rapists, murderers or another kind of social deviant.) Versions of this idea are everywhere present. It is why we have different standards for adults than for non-adults in legal proceedings. It is also why we have such lines of defense as battered-wife syndrome for certain crimes.

Kukathas' right-to-exit solution, while appealing on a certain view of individual autonomy, is inadequate in light of an examination of adaptive preference-formation. It is not that subjective welfarism has no place whatsoever. After all, even if it cannot be the *only* measure of well-being it seems hard to ignore altogether one's assessment of their own circumstances in an analysis of their individual freedoms and capabilities to function. But in light of the vulnerability that distinguishes childhood, Kukathas' theory is unworkable, because circumstances might occur which irremediably alter one's future prospects even in ways that one is aware of and which the (future) exit option will not successfully reverse. Among the most chilling examples is female circumcision.<sup>92</sup>

However, even the notion that parents can rightly keep their children from being educated is problematic if, say, as an adult no amount of education will ever allow you to catch-up to the level of skill demonstrated by those who could read and write from the time they were seven or eight.

Feminist theory has largely adopted the language of adaptive preference-formation, and has adapted it to an examination of women's lives (Chambers 2008;

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<sup>92</sup> Alice Walker's *Possessing the Secret of Joy* (1993) is a wonderful tale about an African woman attempting to come to terms the twin blights of colonial and gender imperialism as well as her own genital mutilation as a teenager, which she willingly undergoes as a means of identifying with her African culture.

Nussbaum 2000).<sup>93</sup> This is particularly the case when we examine the tension that has emerged between feminist theory and multicultural theory. At one time it might have seemed that feminists and multiculturalists had found common cause: They similarly attack the liberal concept of ‘free choice’ from the standpoint that it is far less easy to rid oneself of the ‘entanglements’ into which one is born than liberals are said to imagine and that such entanglements, moreover, reflect particular power relations that subsequently reproduce themselves; power relations that are said to be universal, but which actually privilege particular groups (whites, men etc...) They are strange bedfellows, however, to the extent that multiculturalists argue on behalf of the kind of ‘group autonomy’ that put the rights of individual women within those groups at risk of the very kind of sexist hierarchies that liberal feminists understandably reject. In the words of one observer: “In its demand for equality for women, feminism sets itself in opposition to virtually every culture on earth” (Pollitt 1999: 27).

The application of universal principles has been thought to be the best bulwark against the exclusionary and arbitrary exercise of raw power. For much of the 19<sup>th</sup> and 20<sup>th</sup> centuries, for instance, the fight for enfranchisement of the poor and racial and gender equality took the guise of arguing that motivating principles had not been universally applied on the mistaken belief that the poor, non-whites and women were not

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<sup>93</sup> Writing about India, Amartya Sen noticed that in relatively poor regions, complaints about ill-health tended to be lower than in relatively rich regions. Sen explains this by arguing that where the remedy to poor health is unlikely, people deal with this deprivation by convincing themselves that there is no such gap between regions. Sen argues that by way of the same unconscious process women in rural India came to believe that their nutritional needs were vastly inferior to those of their husbands and children. These observations lead Sen to reject ‘subjective welfarism’ as a definitive measurement of well-being. It is this which leads to Sen’s ‘capabilities’ approach, which Nussbaum subsequently takes up. The capabilities approach is about the ability to realize one’s ends, rather than their actual realization. Unlike the ‘liberal’ concept of equality of opportunity, the capabilities approach views equal opportunities as only one of several criteria. The capabilities approach focuses on the multi-dimensional basis for assessing welfare, unlike the formal freedom to choose which was hitherto dominant in economic and many political models (1999: chaps. 3,4 and 8).

sufficiently possessed of the qualities that would allow them to make proper use of their rights or were not properly ‘human’ at all. On this view, the problem has not been the lack of unifying principles, but the lack of applying them in a unified way.<sup>94</sup> This view is, today, challenged on the basis that such ‘universalist’ approaches often amount to displays of power by other means; that universal principles are themselves oppressive because they misunderstand and misarticulate the complexities of being ‘racially/culturally’ and/or ‘sexually’ situated (Herr 2008).

In her well-known essay “Is Multiculturalism Bad for Women?” (1999) Okin tackles the challenge that multicultural theory presents. In its most compelling formulation, it claims to be an extension of the liberal principle of equality. It embodies “the radical idea that people in other cultures, foreign and domestic, are human beings, too – moral equals, entitled to equal respect...” (Cohen, Howard, Nussbaum 1999: 4). This invites us to take seriously the extent to which (some) liberal theory obfuscates the contestation of power and jettisons certain viewpoints from the debate from the outset. However, one can claim to deserve equal respect in order to engage in particular cultural practices, without requiring that the culture, in turn, extend similar respect to individual members who come to reject certain aspects of the culture. The problem is especially acute with regards to the officially subordinate position of women within many cultures. The liberal, in particular, is challenged by the problem of adaptive preference-formation because, counter-intuitively, it requires us to *resist* rather than to fulfill the espoused desires of the individuals in question. Indeed, it is offered that owing to the phenomenon

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<sup>94</sup> The Bill of Rights which declares that ‘all men are created equal’ even as it is written by slaveholders provides one of the most obvious cases in point.

of adaptive preference-formation, only by *resisting* ‘subjective welfarism’ is a “radical critique of unjust institutions” even possible (in Baber 2007: 105).

With that said, the situation is not quite as clear-cut as some make it out to be since to protect individuals from the problem of adaptive preference-formation requires that we posit for them what is in their best interest. As an example, Katha Pollitt claims to have a friend who had disagreed with the French government’s ban on the *hijab* in school<sup>95</sup> until she heard a Muslim girl on TV who wanted the ban because without it she would be *forced* to wear the *hijab* (1999: 29-30). The desire to support whichever position best expressed the individual’s liberation against the threat of external imposition, revealed a simplistic assessment of which position that was because for every girl forced to wear the *hijab* is a girl forcibly prevented from wearing it.<sup>96</sup> Moreover, it isn’t entirely clear what the nature of the imposition that is being rejected is exactly. Certainly, Pollitt’s friend’s sensibilities would not likely have been engaged had the discussion centred around whether or not parents could force their female children to wear ‘western’, but otherwise modest attire when they, in fact, want to attend school dressed like Lady Gaga. It isn’t clear that the *hijab* does not serve a similar purpose in the context of non-western attire.

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<sup>95</sup> The ban extends to any obviously religious adornment.

<sup>96</sup> The debate over whether or not to allow women to wear the *hijab* while playing sports, particularly football (soccer) is relevant here, as we would likely consider it to be a mark of female liberation to play sports (notably, Saudi Arabia, where girls and women are forbidden from playing sports, will now be the only country in the world not to send any female athletes to the 2012 Olympics), and yet many women will not play without the *hijab*. In some cases, girls and women are permitted by their families to engage in sports, as long as they dress appropriately (wear *hijab*). While we might not think much of this parentally-imposed condition, as a practical fact it is more important to safeguard these girls and women’s ability to play than to forbid them on the basis of disapproval of this particular condition. (This, of course, speaks nothing to the issue of ‘safety’ which is a separate issue, although FIFA rules forbid religious symbols so safety is not the only issue.) More to our actual point is the fact that many girls and women do not want to play without the *hijab* because they prioritize their religiosity before playing sports.

In order to avoid ethnocentric assessments about what constitutes such important liberal ideals as emancipation, equality and autonomy, Bhikhu Parekh suggests that multicultural theory allows for a more nuanced understanding of the variety of roles women play and the myriad understanding of their own lives they can have than is offered by liberal accounts (1999: 70, 75).<sup>97</sup> Parekh proffers that in France and the Netherlands, for example, some girls opted for the *hijab* precisely because it allowed them a modicum of autonomy by signaling to both white and Muslim boys what kind of activities they were available for (1999: 73).<sup>98</sup> Anecdotally, I have heard of college girls in Canada choosing to wear the *hijab* as a mode of youthful rebellion against their parents, who want their children to live as ‘Canadians’ and to shed what their parents, but not they, view as an outdated and repressive garment out of keeping with their acquired Canadian-ness. In these accounts is the view that cultures are neither static nor homogenous and the customs and traditions of various cultures possess meaning that is, in many cases, particular to the agent herself. In some cases, these meanings are perfectly commensurate with ideas of gender respect and dignity and, either way, cannot be rectified from the outside (Herr 2008).

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<sup>97</sup> This line of thinking has been suggested as the liberal rejoinder to communitarian critiques of liberalism, and it has been, increasingly, the response that liberals have offered. For instance, Rawls has maintained that justice as fairness “is the most reasonable doctrine *for us*. We can find no better charter for *our* social world” (in Beiner 1992: 18) and Amy Gutmann remarks that “the unencumbered self is...the encumbrance of our social world” (in Beiner 1992: 18).

<sup>98</sup> For a detailed examination of the phenomenon of educated adult women returning to orthodox religion in the Jewish and Muslim world, see Smolin (1995-1996). Indeed, even though she comes down very harshly on Islam as being, at its root, a religion of violence and male dominance, Ayaan Hirsi Ali’s book *Infidel* (2007) details the author’s initial response to choosing to wear the *burka* (being covered from head to toe in black) as a bulwark against the wandering eyes of men on the street. In the context of liberal feminists’ rightful preoccupation with male sexual violence and the discomfort that can come as a result of being ogled and knowing that one is being assessed in a sexual manner, Ali’s account offers a slightly different narrative. On the other hand, the idea that the best response to the male view of women as sex objects is to ‘hide women away’ is deeply unsatisfying.

For these and other reasons, Ranjoo Seodu Herr claims that the attribution of ‘false consciousness’<sup>99</sup> to minority women who defend ways of life and cultural practices which others might describe as non-liberal, is empirically false. Notwithstanding that women in ‘dominant’ cultures suffer from ‘constrained agency’<sup>100</sup> he maintains that minority women who are constrained are not equally constrained one as the other, in the first instance, owing to stratification along lines other than gender. Factors such as income and education play a part. More to the point, these women view themselves as “active participants in cultural discourses, capable of implementing change” (2008: 33).

What the above demonstrates is that liberal norms and the typical use of the concept of autonomy is complicated by the diverse conceptions of the good that do not adhere to these norms and which are notably increasing among liberal nations, particularly with the increase in the numbers of Muslim immigrants to Western European and North American countries.<sup>101</sup> We need a theory that is capable of elucidating the

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<sup>99</sup> False consciousness is similar to adaptive-preference. It is the Marxian thesis that the proletariat unwittingly identify their interests with that of their oppressors such that ‘the ruling ideas in any society are the ideas of the ruling class’.

<sup>100</sup> A recent statistic that every six days, a woman is murdered in Canada by her domestic partner seems to bear out the idea that women within dominant cultures are not free from systemic abuse. The further statistic that only about 22% of domestic incidents are reported, (possibly explainable, in part, by the self-admonishing “I asked for it”) further bears this out.

<http://www.canadianwomen.org/facts-about-violence>

<sup>101</sup> For a view that ‘official multiculturalism’ is failing in Canada see Neil Bissoondath’s *Selling Illusions*. The increase in the rise of Muslim immigration has prompted several recent legislative enactments prohibiting the *niqab* and *burka*, for instance, in France and Belgium and the Netherlands (which takes effect in 2013). Other countries have varying degrees of bans, for instance, for public servants such as in Turkey and Québec. However, there is some uncertainty around the actual motivation for the bans. In France, for instance, the ban is, like most other places, justified in the name of female autonomy. However, if a woman in France is stopped by police in the street wearing a face veil, she is not forced to remove it. Instead she is brought to the police station where her identity is confirmed. This procedure speaks to a security-based justification, which has not been nearly as prominent as the ‘autonomy’ justification. If, in fact, the issue was that of female autonomy, there does not seem to be any reason to go to the police station, where they would either force her to leave without the face covering, which they could confiscate in the street, or allow her to leave with it in which case the trip to the police station also seems completely purposeless.

interrelatedness of cultural diversity and autonomy that relies on a nuanced view of what it is about cultural identities that is worthy of protecting.

Kymlicka is self-consciously influenced by Mill's views about liberal democracy and takes his project to be the development of "a distinctively liberal approach to minority rights." In order to develop such an approach, he claims to lay out the "basic principles of liberalism" (1995: 75). He claims that there is now a consensus within liberal theory, that of 'liberal multiculturalism' and what remains to be discussed is *which* type of multiculturalism we will adopt.<sup>102</sup> His examination requires him to 'go beyond' the liberal tradition in order to establish a robust defense of both cultural diversity *and* individual autonomy (and since one acquires one's cultural bearings in childhood, the protection of cultural diversity has implications for children). Kymlicka does this by defending a view of minority rights that requires not only the *negative* rights that are familiar to liberals, but also *positive* protections in the form of group-differentiated rights and in so doing comes very close to striking the proper balance between diversity and autonomy. For the most part, he manages to avoid Kukathas' accusation that he would, inappropriately, seek to 'liberalize' groups, because Kymlicka's prescription for liberalizing groups is very much in keeping with the manner in which Kukathas claims that groups are *permissibly* altered (Kymlicka 1995: 163-72).<sup>103</sup> Where Kymlicka's

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<sup>102</sup> Since there are many liberals who would disagree with this assessment it is difficult to call it a consensus. Cf Barry (2001), Kukathas (1992). Kymlicka believes he is merely drawing out the logical implications of the acceptance of diversity and to that extent seems to view liberal multiculturalism as the consensus view.

<sup>103</sup> Kymlicka observes a difference between *identifying* non-liberal practices and *intervening* in groups that are non-liberal. Of the latter instance, he maintains that coercive intervention is generally only justified in extreme cases of rights abuses, such as the existence of slavery or a maniacal leader that did not enjoy popular support and yet maintained rulership through tyranny. Otherwise, inducements to liberalize by, first, merely providing the example, is preferable and very akin to what Kukathas says about the cultural character of a group being altered by interaction with the majority culture. In virtually all instances, however, a very nuanced approach that took into account the nature of the group including its history and



argument fails is in its prescription for the kind of education children require in order to be autonomous. First, it elides the distinction between the kind of choices liberals, historically, have sought to protect and what substantive conditions are necessary for meaningful choice. Since Kymlicka largely bases his view about the interrelatedness of toleration of diversity and autonomy on an examination of the historical record, the work required to defend his more robust view of meaningful choice is overlooked. In sum, therefore, he relies on an inadequately defended conception of autonomy, which I shall examine in greater detail in chapter 4.

### *3.5 Kymlicka's Liberal Consensus*

Kymlicka's discussion regarding the link between autonomy and liberalism relies on familiar arguments about the necessity of being exposed to different conceptions of the good and being able to "examine them intelligently" (1995: 81, 92). In the end, a liberal state is distinctive, he maintains, in part because it does not just protect one's ability to revise their conception of the good, by for instance allowing individuals to exit groups without legal penalty<sup>104</sup> but it provides the conditions under which such revision will take place in the form of a liberal education.<sup>105</sup> This provides a strong point of

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'status' (national minority, recent immigrant, long-term immigrant group etc...) and the nature of the non-liberal practice is required before intervention was warranted and even then it should be employed sparingly.

<sup>104</sup> See footnote 85 regarding 'exit costs'.

<sup>105</sup> Kymlicka is circumspect about whether there would be any exemptions to such an education. Some groups (those who were accommodated through exemptions long before the term multiculturalism even existed such as the Amish and Hutterites) have been allowed to withdraw their children from school prior to the age required of others. It is likely, though, that only national minorities, such as the Quebecois and Aboriginal peoples, both of which groups are said by him to require rights of self-government, would be allowed to evade such an education. In the case of the Quebecois, this is particularly complicated since, for all intents and purposes, Quebecois society is already a liberal one with an arguably fully intact societal culture inclusive of liberal educational institutions and in this way is not easily assimilated to Aboriginal societies. It is not clear then, on what basis this liberal society could be exempt from requiring a 'liberal

contention for those who accuse Kymlicka of being ‘drawn down the path of interference.’ The problem here lies in Kymlicka’s conception of autonomy. Doing the conceptual ‘heavy lifting’ is an elision between what internal restrictions the state ought to resist in order to protect individuals from ‘bad’ minority rights and what the ability to revise one’s conception of the good requires. His view is grounded in the child’s autonomy-interest in being capable of revising her own conception of the good, without an adequate conception of how the interest is upheld by the requirement. This is something I shall discuss in detail in the following chapter, in terms of the child’s right to an open future, which is predicated on learning about many and varied conceptions of the good. However, Kymlicka’s treatment of the value of cultural membership and the reasons group-differentiated rights are appropriate to a liberal theory bears some discussion.

The origins, as I have noted, of a set of ideals that are recognizably liberal are in the 17<sup>th</sup> century debate regarding religious toleration. Kymlicka notes, however, that religious tolerance has historically been of two kinds: That in which a diversity of different groups could flourish, such as obtained within the Millet system at the time of the Ottoman Empire, whose constitutive groups did not allow *individual* freedom of conscience. In other words, individuals could be punished for apostasy and heresy, but as a group they were allowed to govern themselves according to the dictates of their own faith. The other kind of religious tolerance is that developed by Locke and constitutes, specifically, *liberal* tolerance. This kind of tolerance focuses upon the *individual’s* right

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education’ to those polyethnic group members who reside within its borders, which the dominant liberal society in English Canada is required, on his view, to do.

to live according to the dictates of her own conscience.<sup>106</sup> To the extent that group rights are only coherent if they serve to protect, in some fashion, the individuals who make up that group, religious tolerance only becomes liberal in character when it recognizes the *individual's* right to reject religious dictates and revise her own ends. Kymlicka claims this shows that “liberals have historically seen autonomy and tolerance as two sides of the same coin” (1995: 158).

With that said, Kymlicka seeks to ‘revise’ the liberal tradition in order to make sense of our present insistence on the importance of cultural membership to people’s actual, lived experience, claiming that, historically, liberal theory has not given this adequate weight. This is not a new liberal claim about the importance of ‘membership’ to people’s lives, rather it is a new way of recognizing what is at stake with regard to the various ways ‘membership’ is treated.

### 3.5.1 *The Importance of Culture*

Kymlicka believes that cultures are important not only because they are important to people generally, but because they provide the framework in which people can exercise that which, he maintains, has always been important to *liberals*, namely, meaningful choice. Autonomy, then, is at the root of liberalism, but access to aspects of one’s culture<sup>107</sup> enhances meaningful choice and in this way diversity and autonomy are part

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<sup>106</sup> Rawls has expanded the paradigm of, specifically, religious toleration to include the toleration of comprehensive conceptions of the good more broadly. For a view that Rawls fails in this attempt see Kirstie McClure (1990).

<sup>107</sup> Importantly, the term ‘societal culture’ is not coterminous with the term ‘culture’ more broadly, for Kymlicka. Members of polyethnic groups who left behind societal cultures in their countries of origin, no longer have access to a societal culture other than the dominant liberal one. Their members are expected to integrate into the dominant societal culture, even while *aspects* of their cultures are afforded a level of protection. That is because a *societal* culture “provides its members with meaningful ways of life across the full range of human activities, including social, education, religious, recreational, and economic life,

and parcel of each other (1995: 82-84).<sup>108</sup> The strong bifurcation between choice and circumstance that is given by the communitarian assessment, for instance, is stark in the extreme and “run[s] the risk of obliterating autonomy entirely and of dissolving the self into a concatenation of unreflective roles imposed by one’s social position” (Buchanan 1989: 871). Of course as we know from the discussion of early liberal theory in chapter one, liberalism’s focus on the individual as ‘free’ and ‘equal’ opposes the notion that social position ought to be the dominant factor that determines one’s ‘life-chances’. Kymlicka rejects the communitarian critique on the further ground that, as a fact, people *can* and *do* revise their own ends; he acknowledges however that such revision is extremely challenging and, moreover, cannot be required within a liberal society, but that liberal society makes it a genuine possibility (Kymlicka 1995: 91-92; Rawls 2005: 31).

Kymlicka believes the reason for which we attach such importance to cultural membership lies deep in the human condition. He accepts the benefit of ‘effortless belonging’, whether an evolutionary fact related to survival or a psychological fact of the human animal, as the basic building block of liberal society (1995: 93). It is not, he

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encompassing both public and private spheres” (Kymlicka 1995: 76). Ethnic groups within poare not legitimated in setting up their own societal – that is *institutionally intact* – cultures. Societal cultures are more than shared values and memories, for instance. Importantly, too, individual cultural values can shift even while the societal culture remains constant. The strongest example for this in the Canadian context is likely Québec, wherein values before and after the sweeping changes of the Quiet Revolution were transformed, even while there remained a distinct societal culture on the definition above.

<sup>108</sup> Notably, Kymlicka distinguishes between polyethnic groups and national minorities and affords a different level of protection for the cultures of each. Canada, for instance, has two national minorities – the Quebecois and Aboriginal peoples – and these are afforded protection for their *societal* cultures in the form of rights of self-government. Polyethnic groups, by contrast, have some responsibility to integrate owing to the putative choice that many of them made to emigrate to Canada. Polyethnic rights are different from national rights and refer to “adapting the institutions and practices of the mainstream society so as to accommodate ethnic differences” (Kymlicka 1995: 97). They do not include setting up institutions that would enable the flourishing of their separate societal cultures in the way that national minorities’ rights to self-government would do. Having said this, not all polyethnic groups are similarly placed one as the other. Refugees and the descendents of African-Americans cannot be said to have chosen to emigrate in the way that a, so called, economic immigrant to Canada or someone who came to Canada to go to university and stayed can be said to have.

emphasizes, that cultures are meaningful in and of themselves, but they are meaningful because “it is only through having access to a societal culture that people have access to a range of meaningful options” (83). This is not so because a range of cultural options will allow the liberal a chance to ‘shop around’ and to find the culture that is ‘the perfect fit’ for her, although that may be, at least occasionally, true. Rather a societal culture provides the context from *within* which particular actions and gestures are understood; therefore, they inform the decisions that we, in turn, make about what kind of lives we want to lead.<sup>109</sup> And integration to the dominant societal culture, and therefore access to the ‘context of choice’ it can provide, is made more likely by accommodating certain claims of ethnic groups rather than rejecting them. This is because we are, presently, deeply attached to those cultures into which we have already been inducted; the influence of which deeply penetrates and informs our sensibilities, overall (1997: 87).

The fact that the dominant culture could do justice to people’s autonomy-interest at some indeterminate time, must abstract from any autonomy-interest individuals presently have.<sup>110</sup> Kymlicka’s view that aspects of one’s culture deserve protection

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<sup>109</sup> Other thinkers, such as Charles Taylor, relate the importance of cultural coherence more directly to identity. In *The Politics of Recognition*, Taylor draws a parallel between the view others have of one’s culture and the individual members’ of that cultures feelings of self-worth (1994). Furthermore, among Rawls’ list of ‘primary goods’ is ‘the basis of self-respect’, which some have translated in much the same way as has Taylor and have used this as an argument that favours the proscription of certain kinds of ‘group libel’. By contrast, it is said that how we are viewed by those outside of our own culture is largely irrelevant to those inside it since what matters for our self-respect is how others whom we acknowledge as capable of understanding us and to whom we extend our respect view us and these are likely to be others from within our own cultures.

<sup>110</sup> It is for this reason that Kymlicka’s argument self-consciously ‘goes beyond’ the liberal tradition, which had always provided a ‘negative’ right to choose what cultural practices the individual wished to embrace and/or reproduce and insists that a presently relevant theory of liberalism must include ‘positive’ rights to culture. These would engage the liberal state in actively protecting cultural membership by recognizing differentiated rights. One of the reasons for which a presently liberal argument might require a revision of the liberal tradition in order to take better account of the importance of cultural membership, has to do with the imbalanced way in which cultures are said to be able to reproduce themselves, owing to the decisions of members of the majority culture. Locke’s example of Melibaeus and the calf provides the classic exposition of the ‘negative’ right to participate in a given culture. As part of his treatise on religious toleration, Locke maintains that whatsoever is permitted outside of the context of religion is permitted

because our own cultures are presently important to us explains why it is that parents may expose their children to their present cultures: Because in the first place, parents are already attached to them and in the second have a right to live accordingly which will necessarily expose their children to them. It provides a reason to find agreeable a species of differentiated rights – external protections against the decisions of the majority culture – which intend to limit the impact that such decisions will have on the group.

### 3.5.2 Revisability Criterion

Kymlicka states that our aim as liberals should be to seek to ‘liberalize’ non-liberal cultures.<sup>111</sup> The reason this is so is because the liberal seeks to offer ‘external protections’ in the first place because the protection of cultural identity enables

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within it as well. He argues that if it is lawful to slaughter a calf for meat, it is lawful to slaughter a calf to sacrifice it to one’s god, however much the magistrate may think it perverse to worship god in this way. However, if the magistrate was to decree that for a time, owing to a shortage of bulls overall, that the killing of all calves should be suspended, it would be suspended for all, regardless of the reason for which one wished to kill the calf. For Locke, then, there was a ‘negative’ right to be left alone to worship as you pleased, but no right to have your religious practices protected beyond this (Locke 198: 42). Essentially, the state was under no moral obligation to take account of the consequences to your religious program of its various dictates, as long as its motivations were legitimately secular. ‘Positive’ rights are of a different sort, and suggest that we must take active measures to ensure a culture’s viability. There are different arguments for why this is so and different perspectives about the limits of state intervention in order to bring about this state of affairs. Be that as it may, arguments for positive rights overall begin with the premise that even the most facially neutral position imports particular considerations that hide ethnocentric tendencies. This is the starting point behind virtually all feminist and multicultural theories. Catherine MacKinnon provides us with the most perverse example. She claims that when, as a woman, one’s employment health benefits did not cover the expenses related to pregnancy, this was not viewed as gender discrimination because the employment health plan did not cover men for such expenses either: “concealed is the substantive way in which man has become the measure of all things” (1987: 34). On this view, it would be argued that the ease with which Locke’s magistrate can order a decree banning the killing of calves owing to legitimate, secular reasons, might prove less so if he happened to belong to a religious sect for which the slaughter of calves for worship was sacred. It is this line of thinking that brings us to the ‘rule-and-exemption’ approach elucidated (but generally rejected) by Brian Barry. Here the *motivation* behind certain ‘rules’ must be legitimate, that is, they do not serve simply to restrict an undesirable practice for its own sake, but, importantly, they move beyond the ‘negative’ right proffered by Locke and may also take into account the *consequences* these rules will have for certain groups. They may then offer ‘culturally based *exemptions*’ in order to address these differential consequences (2001: 40-50). Kymlicka concludes that “since mainstream institutions privilege the majority’s culture and identity in so many ways, and since people’s interests in culture and identity are so important, the question we face is not whether to adopt multiculturalism, but which *kind* of multiculturalism to adopt” (Kymlicka 2001: 35). For Kymlicka, the fact of adopting *some* version of differentiated rights as a normative value is now the liberal consensus.

<sup>111</sup> I am using non-liberal and illiberal interchangeably, although not all do.

meaningful choice and that ‘internal restrictions’ works against this (1995: 94). It is, he says, essential to take account of the way in which some cultures “undermine rather than support individual autonomy” and therefore requires us to distinguish between ‘good’ and ‘bad’ minority rights (2001: 22).

For Kymlicka, then, since diversity can exist without any recognizably liberal norms in place, i.e., the Millet system, it is impossible to divorce liberalism from the requirement of autonomy, understood as the right to revise one’s ends. Kymlicka’s argument takes the following steps. First, by comparing different versions of religious tolerance historically, he determines that specifically liberal tolerance requires that people be protected from *both* forced conversion *and* that they be protected in their voluntary conversion. He contrasts this to those societies, both historical and contemporary, that have claimed that freedom of conscience ought to be interpreted so as to exclude proselytizing and apostasy (1995: 82). With freedom of conscience so interpreted, different religious orders would tolerate each other, but these orders would not be allowed to try to convert non-members, nor would individuals receive any legal protection should they decide to leave their present religious arrangements. I take this to mean that a ‘right-to-exit’ and the attendant determination of what conditions make such a right credible, would be non-existent. Kymlicka determines that only those societies which protect the individual *from* forced conversion and *to* voluntarily convert are demonstrably liberal (82, 158).

Second, Kymlicka believes that liberal tolerance requires that people be formally free to question, adapt, convince and convert, through the protection of such ‘negative rights’ as the freedom to associate (whereby people acquire access to different kinds of

information). This is the main element lacking in the Millet system of tolerance. He says that there is no *requirement* to revise within a liberal society, but a liberal society makes revision a genuine possibility by “requiring children to learn about other ways of life (through mandatory education), and makes it possible for people to engage in radical revision of their ends (including apostasy) without legal penalty” (82).<sup>112</sup> There is an elision evident between the first and second elements of the preceding proposition. The determination that any recognizably liberal society ought to protect individuals’ right to ‘engage in radical revision of their ends’ is importantly different from the requirement that ‘children learn about other ways of life’ than their own. Clearly, the latter is not necessary in order to ensure the legal protection of one’s capacity to revise. Instead, it is a statement about what the capacity to revise, itself, requires, namely an open future via an education that canvasses competing values (81). But a strong capacity to revise is not the same thing as the ‘autonomy’ that, historically, liberal toleration sought to protect by insisting on legal protection against forced membership. Rather, it is a new account about what revision entails.

The view of autonomy on offer is too value-laden to act as the counterbalance to diversity that it is Kymlicka’s intention to elaborate, rather, it trumps it. What allows Kymlicka an escape route is precisely the fact of children’s not yet having meaningfully embraced particular ways of life, a consideration that can go some way toward justifying exposure to ways of life which children do not already embrace: Because we are not supplanting ways of life to which children are already firmly attached, they are not done a

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<sup>112</sup> It is unlikely that this requirement extends to national minorities, but only to polyethnic groups. Some of these groups may have cultural practices which are illiberal (though certainly not all or even most), but they are distinguished from national minorities in that they do not have a right to self-government. They are, therefore, integrated into the dominant liberal culture – not assimilated – in ways that national minorities simply are not, including via the educational institutions of the dominant liberal society.



moral wrong by being exposed to alternate ones. And since Kymlicka prescribes children should be provided with a 'liberal education' that would expose them to countervailing values as a corollary to their own autonomy-interest, there is no necessary inconsistency between a liberal education, which Kymlicka views as necessary for autonomy, and the importance to children of their cultural membership, which deserves strong – but varying – protection on Kymlicka's view. But to say that there is no inconsistency between one thing and the other is importantly different from saying that children are *owed* a particular kind of education in the name of their own autonomy. The view of autonomy on offer is an impoverished one. On one hand, it does not take adequate account of the way in which exposure to countervailing values is a poor substitute for meaningful options. On the other hand, it imposes a particularistic view that negates the fact that by its very imposition it alters the cultural milieu in ways that likely preclude – and likely have the intent of precluding – ways of life that are both meaningful and in keeping with the autonomy-interest of those persons raised within those cultural milieus. It is to an examination of these objections that I now turn.

#### 4. *'Liberals-in-Waiting' (2): A Right to an Open Future?*

##### 4.1 Introduction

In chapter two, I canvassed arguments in the philosophical literature on the parent-child relationship regarding whether, specifically, parents' interests (*qua* parents) ought to be taken into account when making decisions about children. It was argued that the child-centred view, rather than the dual-interest view, is compatible with the ideal of viewing children as equal moral agents. Furthermore, it was determined that owing to the large discretion parents maintain to order integral aspects of their children's lives, we need not be concerned that, within necessary limits, the child-centred view hinders the parents' ability to make decisions by requiring a constant and debilitating need to self-assess. Nor should we be concerned that their ability to make *self*-directed (which I distinguished from *other*-directed) decisions is hindered even though these might affect the family and/or have the *consequence* of forming, in part, children's value-sets.

Parents do, then, maintain the right to induct their children into their values. Despite Galston's erroneous critique, parents do not need *fundamental* rights in order to do so. They may do so on the *instrumental* grounds that children's interests are served by being fully participating members in the cultural life of the family and owing to the parents' rights to live according to the values they adhere to, which, I have argued, will necessarily have the effect of inculcating in children particular values and ways of life.

Generally, child-centred proponents espouse the view that children ought to have what has been termed an 'open future'. It isn't that proponents of an 'open future' dispute that parents may, even ought, to inculcate their particularistic values into their children, but rather that there are particular requirements that others ought to meet (normally the

state) with regard to children's upbringing, even when these invite opposition from parents.

An 'open future' is thought by its proponents to offer at least two necessary things. The first is to instill the capacity to live up to the liberal ideal of non-imposition. The idea that one can choose *autonomously*, that is, without the imposition of the will of others, one's own life plan and value-set, is arguably one of the bases of liberal thought, even while its pretensions to being a value superior to others provides the basis for many critiques (Galston 1995; Sandel 1982; 2006; Gilles 1996; Burt 1993).

The second thing for which an 'open future' is thought necessary is the preparation for equal participation in the democratic political order (Gutmann 1980; Gutmann and Thompson 1996; Feinberg 1980). To this extent, citizens are required to understand basic institutions and how they operate, as well as certain organizing principles. It is argued that for these things to be substantive and meaningful, rather than merely procedural and formal, children must develop certain basic capacities, such as the capacity to think critically and assess competing ideas. How else in a democracy, it is proposed, is one to make a reasonable decision about what best represents one's own interests? Moreover, how else is one to discharge this responsibility with a view to understanding the impact one's decisions might have upon others and to make appropriate decisions in light of this?

Opponents of children's right to an 'open future' argue that the preservation of children's future autonomy via an education-for-autonomy, guides the development of their embryonic values and ideas of the good in ways that are far more particularistic than proponents are willing to admit; that such an education "excludes quite as much as it

includes” (Gilles 1996: 948). According to these critics, autonomy is transformed from mere instrument to being, itself, one of the contested conceptions of the good, which is then, indefensibly, privileged. They argue that proponents of an ‘open future’ do not pay enough heed to the fact that once a child has been educated for autonomy it is extremely unlikely that she would ever choose a life whereby the ongoing practice of autonomy is not a central feature. This being the case, critics argue that the claim to mere instrumentality is chimerical. Moreover, they argue that the particularistic directions in which an education-for-autonomy oftentimes leads, provides an inferior moral upbringing than children would otherwise have.

In this chapter I argue that an open future is not properly a right of children, in that it is not something that they are owed as a corollary of any autonomy-interest they have. In the first place, it tends to conflate the quantity of options with the quality of options. In the second place it neglects the dialectical nature of how children come to choose, that is, from the interplay among their inherent natures, the choice-paradigm in which they already exist and the influences to which they will be exposed, even if the number of such influences is relatively small. This is not to say, however, that an open future *violates* children’s rights. There might also be instrumental reasons for which children ought to be exposed to countervailing influences in the form of appropriate civic lessons in the name of good citizenship, a topic to which I shall turn in the following chapter.

#### 4.2 What is an ‘open future’?

The term ‘open future’ originates with Joel Feinberg in his well-known essay “The Child’s Right to an Open Future” (1980). The right in question is one of the few

rights, perhaps the only right that is peculiar to children. This right in general requires protecting children's *future* interests in having autonomous choice, by *presently* guaranteeing the conditions that will enable them as adults to make informed decisions. On this view, a child's autonomy is held *in trust* just as one might hold in trust the legal decision-making authority vis-à-vis another's estate, with the proviso that this authority may only be exercised in a way that would meet with the approval of the person in whose interest such authority is held (Noggle 2002; Feinberg 1980).<sup>113</sup> Contestation over the specific content of this right in any given instance fills reams of scholarly books. Virtually all commentators agree, however, that any convincingly liberal society must provide a set of minimal conditions for child-rearing in which the future pursuit of chosen activities is made possible. In other words, the possibility for future choice may not be irremediably closed-off. What then distinguishes the 'open future' view from among other views that generally agree to the need for minimal conditions to protect future capacities to choose? The answer is both a difference in degree and in kind.

According to Arneson and Shapiro autonomy requires: "(1) the maximization of options and (2) the development of critical reason" (Arneson and Shapiro 1996: 388). On this analysis, an 'open future' distinguishes itself by positing a difference in degree by choosing to espouse 'maximal' rather than 'minimal' choice-sets as being what children require to protect future autonomous choice (Feinberg 1980: 136). Additionally, it distinguishes itself by virtue of its difference in 'kind'. The understanding of 'critical reason' is based upon "generally accepted methods of enquiry" (in Fish 1999: 92). The phrase 'generally accepted methods of enquiry' is a broad one into which much could fit,

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<sup>113</sup> This view of parenting is sometimes called the 'trusteeship' view.

but here it includes basic canons of scientific evidence, that is, that evidence garnered from the fields of physics and biology can be adduced to understand most natural phenomena.<sup>114</sup> Moreover, it includes the idea that every value and conception of the good is a potential candidate for unbiased, critical assessment.

The ‘open future’ argument is proffered on putatively ‘Millian’ grounds, that is, on the grounds that autonomous choice is a basic liberal precept. The argument is twofold: First, individuals have a right to an autonomous choice about the kinds of lives they want to lead and second, they require certain kinds of critical capacities in order to make good democratic citizens. In the literature these two reasons are, almost invariably, conflated (Gutmann 1980: 338, 350; Feinberg 1980).<sup>115</sup> Theorists argue that children require an ‘education-for-autonomy’ for reasons of independent self-governance, which argument is thought to subsume *both* our first and second reasons. Self-governance is a vague concept generally related to the ideal of non-imposition, that is, the right not to

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<sup>114</sup> The notion of ‘scientific enquiry’ is all-important. This is because much (though not all) of the controversy over what values children will be exposed to has its basis in religious belief. And where this is the case, the question of values is inextricably linked with questions of fact (Carter 1987). This is also the case when it comes to the link between fact and values that are not religiously based. For instance, the ‘culture wars’ and the controversy over what curriculum should be taught to children takes as its base a difference over what facts ought to be emphasized. For instance, ought we to focus upon the good that the founding fathers did or the fact that they were slave-owners? For detailed accounts of the ‘culture wars’ see Ravitch (2002). The link between facts and values here still incorporates canons of evidence that, broadly speaking, are scientific even if they do not actually adduce evidence from the ‘scientific’ fields, such as biology and physics. This is because the pursuit of historical knowledge, which incorporates scientific canons based on observable data, that is, *physical* evidence, is relevant to the question of which facts to emphasize. That presidential hopeful Michelle Bachmann claimed in an Iowa speech that America’s love of diversity and tolerance extended to the founding fathers who fought “tirelessly until slavery was no more in the USA” reveals the depth of the problem Ravitch explores (2010).

<sup>115</sup> In *Mozert v. Hawkins*, the opinion of Justice Kennedy most reflects this. *Mozert* regards the case of a reading series to which some parents objected owing to its depiction of themes and values which they found incommensurate with their own. Objecting parents argued to be able to ‘opt-out’ of classes in which the books were to be used, as a means of remedying what they argued was a First Amendment violation. Justice Kennedy claims that preparing students for “citizenship and self-government” requires that they be taught to think about “complex moral and social issues” in such a way that would invariably increase their capacity to assess opposing values, which capacities would likely extend to questioning their own values (in Burt 1994: 57). For a thorough account of the legal and ethical issues involved in *Mozert* see Stolzenberg (1993).

have the views of others imposed upon oneself. It is thought by proponents of a child's right to an 'open future' that roughly the same capacities that are necessary from the point of view of the child's right to live the life to which she is most suited and which most coheres with her espoused values and conception of the good are also necessary for equal citizenship and that equal citizenship is required in order to give substance to the ideal of non-imposition.

By contrast, I argue that the two parts of the argument actually lead to *different* rather than the same conclusions and that they actually amount, therefore, to two separate arguments. The reason this is so is because the *subject* of the right, while thought to be the same, that is, the ubiquitous 'child', is actually different. In the first argument, the subject of the right is the child herself (or more accurately, the 'future adult' she will become). The concern here is to safeguard her right to choose for herself, in the future, the particular kind of moral values and conceptions of the good she will want to adopt and abide once she is of an appropriate age to make that determination. I argue that in the second argument, the subject of the right is twofold: The subject of equal citizenship is both herself *and* others. The concern here regards the ability to make appropriate decisions that will contribute to the society in which she is a part whose decisions will, necessarily, affect *other people* and not herself alone. In order to bring out the implications of each more clearly, then, I shall distinguish between these two arguments, which I call, respectively, the 'liberal-in-waiting' and the 'democrat-in-waiting' argument. The remainder of this chapter will be devoted to the former. I will take up the 'democrat-in-waiting' argument in the subsequent chapter.

### 4.3 The 'Liberal-in-Waiting'

On what I am calling the 'liberal-in-waiting' view, proponents of an 'open future' believe that children need to be exposed to an 'open future' for their own sake, in order to determine, without the imposition of given social roles, their own future conceptions of the good. Children are thought incapable until a certain level of maturity is reached to make decisions which cohere with their own world-views, such world-views themselves being nascent, therefore encouraging their capacity to do so *in the future* is a central objective. On the 'liberal-in-waiting' view, what are at stake are the moral allegiances, values and conceptions of the good that the person will choose for herself when she is of an age to do so. It is thought that this idea is consistent with the consent ideal within liberal thought, in that children, if they had the wherewithal to consent, would want their future options kept open and thus are presently owed the conditions that will enable that in the future. In this way at least one observer has argued that 'future autonomy' can be included in a list of Rawlsian 'primary goods' (Gutmann 1980).

#### 4.3.1 Instrumental Autonomy

Autonomy is viewed by many 'open future' proponents as purely (or at least predominantly) instrumental and characterized as a conduit through which the latent possibility of every child, to live the life that is best suited to her, may be discovered (Arneson and Shapiro 1993; Mill 1998a: 66, 68). In other words, during the course of the child's development the child need not (in many cases should not) be taught to embrace the ideal of autonomy.<sup>116</sup> Rather, the ideals she will come to embrace are to be arranged by her via the choice-mechanism that autonomy enables. This mechanism includes

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<sup>116</sup> When we say 'should not' we mean that autonomy should not be taught as a supreme ideal in the context of the plural education system.



rational deliberation via canons of scientific enquiry of a maximal number of possible goods. This instrumentality is said to work equally well for virtually every possible conception of the good. For this reason, an education-for-autonomy is not thought to hinder the requirement of the liberal state to remain neutral as among competing conceptions.

In the course of receiving an ‘education-for-autonomy’, however, children *are* raised, however unwittingly, to embrace autonomy as a value. Owing to this, it is argued that they could never be expected, therefore, to lead a life that then embraced its lack (Callan 2002). Once one has been trained to choose autonomously and to value critical detachment and dispassionate evaluation, it seems unrealistic that one could be brought to the point of deciding to continue down the path that the training had started you on, only to muster all those decision-making propensities to turn around and go back. To say, then, that persons trained to choose autonomously could reject a way of life that would engage the ongoing exercise of autonomous choosing is to identify ‘autonomous choosing’ with a skill – the ability to size up alternatives and make better than worse decisions. If it were true that that was all that it entailed, then there would be no basis to resist children’s training in autonomous choosing. In fact, to the extent that it enabled the realization of better than worse options, there would be reason to embrace it. But its rejection arises from the fear that autonomy on the open future view entails something rather different; that it is more accurately viewed as an internal disposition or an evaluative orientation – the fundamental propensity to attach moral value not, simply, to choosing, but to choosing in a particular way and through particular cognitive processes, ones that assemble the relevant lessons from the previous training that has led to the

moment of choice. These processes consist in assessing, comparing and evaluating, and not *merely* in choosing. Once viewed this way, it seems much more difficult to accept that autonomy, as the open future theorists frame it, could attach to ways of life that reject what the internal disposition fundamentally entails: The moral value in critical evaluation of one's pre-conceived views based on the idea that it is necessary to critique and assess any and all views. *This* orientation cannot sit comfortably alongside ways of life that reject the moral value of critique – or at least that reject the particular *mode* of critique relevant here. How would one now close-off the very disposition through which one had chosen what one takes to be the most meaningful plan of life whatever that plan turned out to be?

Autonomous choosing as a skill may be engaged regardless of one's conception of the good: People make choices all the time from within the particular ways of life to which they subscribe. But to define autonomy in terms of critical capacities and maximal options is to transform it into something quite different from a mere skill. Instrumental autonomy belies the necessarily *active* part an 'education-for-autonomy' plays in actually shaping the evaluative character of those who are to do the future autonomous choosing. The instrumental conception of autonomy is such that its character is transformed from a mere instrument through which all other conceptions are evaluated to being one of the contested conceptions of the good itself.

This view of personal autonomy is normally seen as unproblematic by those whose substantive conceptions of the good cohere with the capacity to constantly and critically appraise and re-appraise the truth-claims, life-ends and value-sets which form the basis of one's present outlook. For those, however, whose conceptions of the good

are marked by, say, substantial deference to hierarchy, authority and tradition, instrumental autonomy is particularly troubling as the only conceptions liable to be rejected are those which cohere with the ideals of deference to authority, hierarchy and tradition (Callan 2002: 122-24; Beiner 1992: 24-25).

We must begin with the understanding that the division we are principally concerned with when we are claiming to require an ‘education-for-autonomy’ is not simply a distinction among different values or conceptions of what is a ‘good’ life that children will be expected to identify and acknowledge, but among *incompatible* values and conceptions – notably between those that are thought to be autonomy-promoting and those that are thought to be autonomy-inhibiting. The distinction between the two is made by Arneson and Shapiro in the course of a thought experiment, meant to demonstrate that state enforced autonomy-promotion does not violate liberal norms of neutrality. In this experiment a guardian must choose which of the two ways-of-life increases the odds for her charge of choosing a way-of-life that will complement her inherent ‘bend’ toward, either, a ‘secular’ (autonomy-promoting) or ‘traditionalist’ (autonomy-inhibiting) way-of-life. Arguing against Arneson and Shapiro’s thesis that an ‘education-for-autonomy’ is neutral because those provided with one can as readily choose to live *either* an autonomy-inhibiting *or* autonomy-promoting life, Callan writes that “autonomy is internal to the character of the agent, and therefore, young adults who have learnt to choose autonomously will to that extent be inclined to reject autonomy-inhibiting lives, even when they (autonomy-inhibiting lives-AB) might be more suited to their (first) nature” (2002: 126).<sup>117</sup> This is because the environment in which one is raised matters to the kind

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<sup>117</sup> See also Mills (2003) for a critique of Feinberg and the possibility of even quasi-neutrality as it pertains to an education-for-autonomy.

of life options not only that one will have available to them in the future, but also to which options will be viewed as viable ones, as well as what options will be necessary in order for the agent to be capable of satisfaction. It is only logical, then, that an autonomy-promoting education can only promote autonomous choice if an autonomy-inhibiting education does the opposite, for it is in relation to an autonomy-inhibiting education that the promotion of autonomy is understood. In this way, we glimpse the error of viewing autonomy as instrumental since if an ‘autonomy-inhibiting’ education did not have the opposite effect of an ‘autonomy-promoting’ one, what would be the point in arguing on behalf of either?

Callan accepts the premise that children *do* have an inherent (first) nature, which certain types of influences will either complement or alter.<sup>118</sup> Whether or not this is even important will depend principally on whether or not we view complementarity with one’s first nature as decisive in terms of an appropriate conception of autonomy, that is, some life-plan or course of action genuinely being ‘one’s own’. In the previous chapter I largely credited this view to Mill. Particularly stirring in this regard is Mill’s famous analogy of the tree which must be allowed to “grow” and “develop” according to its ‘inner tendencies’. An even stronger statement of this view has been given recently by Matthew Clayton (2006).

Clayton writes: “children are not blank slates, which must be filled with convictions if they are to develop the powers necessary for autonomy...” Rather, “children are born with particular proclivities and will in due course acquire particular

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<sup>118</sup> According to Rudolph Schaffer, psychological research demonstrates that good parenting must take into account children’s inherent individuality since different children respond differently to identical situations. Therefore, children’s psychological development cannot be explained purely in terms of upbringing (1990: 222).

interests and beliefs as they experience alternatives that are offered to them” (120). He argues, for instance, that children ought not to be inducted into any comprehensive views before the approximate age of ten; the age at which he supposes children can begin to make sense of the world around them in a way to enable them to begin making reasonable decisions about their own value systems. Until that time, the protection of natural proclivities and the exposure to maximal alternatives is how we allow children to develop the powers necessary for autonomous choice. On Clayton’s view, the development of autonomy is an organic process that emphasizes children’s innate tendencies as the driving engine behind it. When we remember that the point of privileging autonomy is not that children will then make thoughtful decisions that cohere with some pre-programmed worldview, but that they will be enabled to develop worldviews that cohere with their ‘first natures’ (as Callan puts it) or their ‘particular proclivities’ (as Clayton says), then we do not seem to have a strong basis for resisting the development in children of the ‘powers necessary for autonomy’, leastways on the liberal-in-waiting view. This is because on Clayton’s view (like Arneson and Shapiro), exposure to competing influences help the individual develop her innate propensities and surely nothing can be more indicative of autonomy than such development. But Clayton’s view encounters a number of problems.

Clayton’s statement of the ‘open future’ view, first, is a particularly demanding one because, unlike so many others, he argues that *both* parents and the state have a moral duty to provide children with an ‘open future’; requiring that parents refrain from inducting children into their particular values,<sup>119</sup> and second that this is justifiable by the

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<sup>119</sup> He claims that parents may do so as long as it is not their intention to induct their children and as long as they introduce their children to “other religious and irreligious traditions” (110). In other words, a certain

analogous relationship between the family and the state. Historically, such analogies have been utilized to justify the subordinate position of non-patriarchal familial members.<sup>120</sup>

Clayton's revival of the analogy has the purpose of turning the analogy on its head. Rather than contending that the divinely appointed monarch is called upon to do within the realm of the commonwealth what was assumed to be the role of the patriarch – a kindly Filmerian figure but one who was not accountable – within the family, Clayton argues that authority within the family is accountable to all members by requiring particular conditions for its use. In this way, the commonwealth is not modelled on the family, with all that that assumed about *parental* authority, but the family is modelled on the liberal state, with all that that assumes about *political* authority (Clayton 2006: chaps. 1 and 3). Since the liberal state is said to be neutral as among conceptions of the good, by likening the family to the liberal state the family must then assume the same requirements of neutrality with regard to the moral upbringing of children, (with the caveat that the morals with which children are raised are commensurate with other values the liberal state is said to require for its continuance) (Clayton 2006: chap. 4).

Neutrality within the liberal state is defended on the grounds of treating people with equal concern and respect in the context of plural conceptions of the good. Since children have no discernible conceptions of the good, by extending the analogy of the

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act can be undertaken if motivated by certain kinds of considerations that is precluded if motivated by other (impermissible) considerations even if the effect is the same.

<sup>120</sup> Aristotle says that rule by a husband over his wife is “as a statesman; over children as by a king” (*Politics* Bk. 1 sec. xii). However, he recognizes that this analogy is limited since rule by statesmen usually involves people ruling and being ruled in turn, whereas rule of the husband over the wife is a permanent feature of gender relations. Rule over children is considered “royal” because a monarchy is an example of a constitutional arrangement wherein one rules affectionately and as a result of age. Otherwise, however, there is no inherent difference between monarch and subject, just as children (boys) are no different at birth than their fathers were. The fact of the non-permanence of childhood accounts for the different ‘type’ of rule a father has over his children than that which he has over his wife. (Where female children fit is another question.) For a deconstruction of the gender-bias inherent in Aristotle's philosophy see Okin (1979: chap.2).

liberal state to the organization of ‘the family’, we have no choice but for children’s ‘first natures’ to act as a suitable substitute for adult citizens’ developed conceptions of the good that the liberal state is beholden to protect. Accordingly, we are morally required to keep open virtually all options in order that the ‘first natures’ of children can be allowed to develop with as little interference as possible, similarly to how the liberal state must interfere as little as possible with its citizens’ developed conceptions of the good.

Although interesting and novel, Clayton’s thesis runs into both practical and conceptual difficulties for which reasons it is not compelling. In the first place, there are dissimilarities that strain Clayton’s analogy. For instance, the family is characterized by a degree of love and empathy beyond that which is usual or even expected within a political organization whereby most members have no direct or personal ties one with the other. We cannot afford to be underwhelmed by this important fact. While it does not provide us with enough reason to think that elements of a liberal society are always inapposite in the familial context (a point canvassed in the first chapter), we can neither afford to be complacent about the particular reasons for which the issue of children’s moral upbringing invites such fevered discussion and that is precisely because we do not view ourselves as equally indebted to all children; we view our indebtedness to our particular children as requiring that we provide them with the benefit of what is in our view (for ultimately we can have no other view), the best moral upbringing for them. In relation to this, it should be noted that the ideal of Rawlsian public reason is no more than the attempt to divine the normative basis of a political morality in the context of deep

pluralism.<sup>121</sup> To attempt to import it, as Clayton does, to the familial context, ignores the very premise of the deep pluralism which prompted it. This fact substantiates our earlier claim: Parents will necessarily impart to their children the values that they deem to be meaningful. This is not merely an empirical fact to be set within our normative scheme, but is a necessary part of the normative scheme itself, in that parents have a moral duty to provide to their children an appropriate moral upbringing. Within a pluralistic society governed by principled norms of conscientious freedom, the moral duty to provide such an upbringing cannot be neatly disentangled from the fact of the plural moral upbringings that are necessarily engendered.

Clayton examines and rejects several arguments in favour of the view that parents have such a moral duty. One is the intimacy argument, which I canvassed thoroughly and rejected in chapter 2 and so will not take it up here. The second is the ‘inevitability view’. On this view, parents cannot help but guide their children according to their own comprehensive ideals. Clayton finds this unsatisfying because “it is too strong to claim that parents cannot detach their aspirations for their children from their own specific conception of what is good or virtuous” (113). Certainly this is true of *some* of us, *some* of the time. For instance, I might recognize that there is a plurality of good lives possible, and so be perfectly accepting of the fact that other families will rear their children differently from how I rear mine. This accepting attitude might extend to how I view the public school curriculum, whereby although I espouse, say, atheism, vegetarianism and a concerted critique of capitalist social organization, I would not necessarily push to have such views replicated in the classroom... moreover, if I embrace

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<sup>121</sup> For criticisms of Rawls’ exclusion of the family from the requirements of public reason see Okin (1989; 1994). For a critique of Rawls’ Justice as Fairness see Sen (2009: chap. 2), and for a critique of the difference principle see Cohen (2000: chaps. 9; 2008).



the Rawlsian ‘burdens of judgement’ I can accept that views incompatible with mine might be just as reasonable as are my own. But from these truisms it is a longer stretch to reach Clayton’s conclusion which is that parents “need not believe that the virtues they practice must also be ones their children should pursue” (113). One reason he offers for why this might be so, is the possibility that parents themselves acknowledge about the fallibility of their own judgements and their hope that if some or other of their views turns out to be mistaken, their children will come to reject such views later on. But arguments from sceptical premises are unhelpful, mainly because comprehensive views are not generally founded upon scepticism, but upon deep conviction and sincerity, however mistaken. As Nagel says: “if I believe something I believe it to be true. I can recognize the possibility that what I believe may be false, but I cannot with respect to any particular present belief of mine think that possibility is realized” (1987: 217).<sup>122</sup>

In the final analysis, Clayton’s view is distinguishable from my own not because I claim that it is impossible to avoid imparting one’s comprehensive views – although I believe that Clayton pays less attention to the difficulty here than is merited – for Clayton

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<sup>122</sup> In a discussion arguing that epistemic absence does not necessarily conduce to an unstable political order, Susan Mendus (2002) offers something akin to Clayton’s claim. She says that the ‘believer’ might be able to differentiate between the fact of their belief and the fact of their belief being true. She argues that statements such as ‘I believe P will occur’ and ‘P will occur’ are two different kinds of statements. Her point is that in making either statement the speaker has access to the very same reasons and no more because “[ ] believing is believing true [ ], but they are not thereby the reasons for p’s actually being true.” Here Mendus distinguishes between what one *takes* to be true (whether correctly or not) and what is *actually* true (whether or not one will ever know this and whether one will ever have access to the correct reasons to know it). Mendus writes: “reasons for believing true may be distinct from reasons for truth itself, and the believer may acknowledge that, while also acknowledging that he has no access to the different reasons that might apply in the two cases.” This, however, is no longer to be a ‘believer,’ (since ‘believing is believing true’), but to be a ‘conjecturer’ who acknowledges that he cannot proffer a (for him) truth statement because he knows he might be wrong (after all he acknowledges that he does not have access to the different reasons that might demonstrate this thereby acknowledging that such reasons either do or might exist) (2002: 27-8). But, even though it is the case that the believer can distinguish, in the abstract and at a distance from a present controversy, between his own belief and the fact of truth, he cannot do so in the context of a present controversy or presently held belief without adducing the very scepticism that seems to counteract any genuinely comprehensive view...unless that comprehensive view happens to be a deep attachment to complete scepticism. But if that were the case, Clayton’s view of ideal rearing would likely be widely adopted and there would be little call to argue for it.

does not claim it is inappropriate to inculcate into children our own comprehensive views, *per se*. Rather, he claims that it is inappropriate to do so without *also* providing children with access to alternative and competing views, in which case inculcation is legitimate only if it is an unintended consequence of a larger attempt to avoid inculcation (110-111). Neither is the issue that people will not likely abide by his prescription (although likely they won't), for we can separate the fact of something's legitimacy from its practicality. Rather, for Clayton it is illegitimate for parents *not* to expose their children to myriad and countervailing viewpoints because of the restraints that the ideal of public reason imports into the familial setting. I, however, reject the appositeness of the analogy, as previously noted. Furthermore, Clayton's view of autonomy is vulnerable to the same criticisms Callan offers of Arneson and Shapiro's thought-experiment. But even if we do not accept the criticism that Callan offers, or accept that it applies to Clayton, we might yet have other reasons for rejecting an 'open future' as a right grounded in children's autonomy-interest – even if we do not also argue that it is a violation of children's moral rights to have such an education – for reasons that have to do with the quality versus the quantity of options.

#### *4.3.2-Choice and Meaningfulness*

While open future theorists focus on the capacity of an 'education-for-autonomy' to provide 'meaningful choice' (Gutmann 1980: 341-343, 350) this view is criticized for what it seems to purport about the *nature* of choice: How 'open' is 'open' and at what point does 'openness' cease to lead to meaningful options?

Claudia Mills offers a trenchant critique, focusing on what it means to have a future that can be called 'open' and what is lost (rather than gained) by it (2003). Like

Callan, Mills contends that the ‘open future’ view tends to see autonomy as entailing little more than the capacity to choose among a large array of options, many of which conflate the capacity to choose one’s future occupation with autonomy *tout court*; whereby the ability to choose being either “an engineer, a physician, a research scientist, a lawyer, or a business executive” (Feinberg 1980: 132) is viewed as encompassing more rather than less choice and that such choice is either a demonstration of autonomy or coterminous with it. There is an implicit suggestion that all views are equally good, and that ‘more is better’.<sup>123</sup> But in the context of a qualitative difference among options, it isn’t clear that the quality of the choice can be directly mapped onto the quantity of options, or at least that ‘more choices’ means ‘better choice’. If we accept Callan’s point that the main cleavage does not concern differences of the type alluded to with regard to various career options, but instead concerns the difference between ‘autonomy-promoting’ and ‘autonomy-inhibiting’ lives, then we have a very different perspective. This perspective forces us to more thoroughly examine what is at stake in rejecting, so called, autonomy-inhibiting lives. In other words, for the ‘more is better’ view to obtain, we must first assume that the type of choices alluded to above are inherently worth having for their pursuit to be worthy of protection. On the Razian view (adduced in the previous chapter) this is (partially) so: An adequate array of choices must be protected in order to allow those with different inherent inclinations to pursue lives that cohere with these inclinations so that people may come to lead lives of self-fulfilment. In other ways though, Raz remarks on the importance of qualitative difference among options: “A choice between hundreds of identical and identically situated houses is no choice, compared with a choice between a town flat and a suburban house” (in Mills 2003: 500).

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<sup>123</sup> For a valuable discussion on the relative merits of more or less choice see G. Dworkin (1988: chapter 5).

Since it is not possible to include all possible options (and at the risk of straying into utilitarian philosophy), the total expected fulfilment yielded from options that are available must prove, on the whole, higher than those which are precluded. Choices must be made as to which are the most meaningful to protect. In other words, we must accept that the benefit offered from being able to choose among being an engineer, physician and business executive, is inherently more conducive to meaningful choice than having the more 'narrow' option of being raised, say, to be an Amish farmer or housewife/mother. But this is a difficult thing to accept uncritically if we recognize the much larger qualitative difference between the life of an Amish farmer understood as one possible 'type' of life and the life of someone who could choose among the options adduced above as another 'type'. In other words, the choice is not as among *several* 'types' of life; that of an Amish farmer, *or* an engineer, *or* a physician *or* a business executive, but that between *two* types: The life given by the kinds of concerns which preoccupy the Amish farmer and the live given by the kinds of concerns which preoccupy one who can choose among the various occupations adduced above: "...from the point of view of the Amish parent, all the various career options...are all ways of living in the world, pursuing money, prestige, and professional satisfaction, focusing on worldly reward rather than on living in harmony with god" (Mills 2003: 500).

At this juncture, I must reiterate the point regarding the built-in bias of instrumental autonomy: That the type of life to which one is exposed will largely dictate what one will need in the future in order to have a sense of fulfilment. This point has its 'dark side' with regard to the problem of adaptive preference, and for that reason we should tread carefully. But what that 'dark side' requires us to do is to critically assess the

possibility for a particular way of life to be fulfilling on an objective basis of what constitutes a reasonably 'good life'. It is, in part, for this reason that Gutmann's assessment of an 'education-for-autonomy' as a 'primary good' is questionable: It isn't clear that there aren't desirable values that are precluded by such an education. It isn't clear then that one would want an 'open future' whatever else one would want, in the same way that one can be said to want other primary goods.<sup>124</sup> This is, in part, because meaningfulness is largely an *a posteriori* determination: It is as much dependent upon past choice-sets as it is upon future ones.

This above point becomes more appealing once we bear in mind that options are 'closed-off' every day that do *not* normally give rise to concerns about restricting the right of children to an 'open future'. Any opportunity that a child has to pursue a future as a world-class athlete or artist, or as an 'elite' professional of any significance (Nobel prize-winning laureate or astronaut, say) will depend upon choices that are made now that close-off alternative options. The qualitative difference among options reduces the strength of the argument that 'more is better' (Callan 2002: 118).<sup>125</sup>

It seems impossible to say that a life devoid of any and all choice could be either reasonable or meaningful. Moreover, it would be largely impossible because even on a view that one never seriously questioned the dictates of their faith and never wavered in

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<sup>124</sup> This criticism might be said to be similar (but is importantly different) from Rawls' inclusion of material wealth as a 'primary good', given that there are some ways of life which eschew material wealth (the priesthood) and would not include it (some brand of socialists perhaps). The important difference being that 'material wealth' is merely shorthand for the capacity to afford an adequate amount of food, clothing and shelter that one can reasonably be thought to want and which in advanced capitalist society is normally required in order to acquire these things. It does not, then, require that one accept that capitalist society is either (a) the best means of social reproduction nor (b) does it preclude people from using material wealth to work against the evils they believe it brings by, for example, donating to charity or other 'good' causes nor that a life of chose austerity is inherently bad nor that a life of spiritual contemplation is not a reasonable conception.

<sup>125</sup> The focus on *qualitative* differences among options is further explored by Mills (1998: 154-165).

their belief about, say, what god wanted from them (obedience, devotion, self-sacrifice) or about their final ends (to become a great stage actor) options abound: God wants my devotion and obedience, but what does that entail in this particular instance when I must choose between two paths that seem, both, to be required of me? What path will help rather than hinder me in my pursuit of artistic genius?

Further to this, on one way of looking at things, the possibility of rejection is required in order that any course of action be meaningful at all. It would seem difficult, for instance, to take satisfaction from continued moral allegiance to a particular way of life if there was, literally, no possibility to stray from it whatsoever. On this view, what is appealing about living according to particular moral dictates is the continued allegiance to such dictates even in the face of alternatives that tempt us to do otherwise. I offer this, even on the understanding that straying would not ever be seriously contemplated by some individuals owing to the strength of their allegiance to the way of life in the first place: The requirements of 'literal possibility,' are, notably, minimal here. Callan points out, for instance, that when people say they had 'no choice' but to respond a particular way to a moral imperative, what they mean is that their choice was based upon a 'categorical' rather than 'competitive' evaluation of the different options. In such an instance the point is not that they did not choose at all, but that alternate options simply did not count as eligible options owing to the categorical nature which obtained, from their view, of the available choice-set (Callan 1997: 56). A mother who steadfastly refuses to turn her son in to the police for a crime she knows he committed might be said to have made a choice based upon a categorical rather than competitive evaluation. Certainly, she could not be said to *literally* have had no choice. On the other hand,

literalness cannot be the salient measure of choice otherwise ‘your money or your life’ would seem to fall into the same category of option-sets as the choice between declaring either comparative literature or sociology as your college major! By the same token, reasonable choice cannot be viewed as a complete openness to all options. Choice matters precisely because we do not normally view all options as interchangeable.

It is difficult to conceive of any way of life undertaken in an advanced liberal democracy that was so ‘closed’ so as to preclude choice in the way I mean it. It would have to preclude even minimal knowledge that there exist other ways of life even if such ways are unexamined and little about them is known. On this view, even the Amish (or the Hutterites to offer a more local example), our best comparator group in terms of a ‘closed’ and ‘traditionalist’ society, do not count as having a lack of meaningful choice. That is because their engagement with the world is enough that all can be expected to have minimal knowledge that there is a mainstream society from which they differ. It may well be impossible to *quantify* what constitutes an adequate parameter of choice, but to make autonomy and choice coterminous in the way that ‘open future’ theorists tend to, would be to falsify the way in which even those who live what I have been calling ‘autonomy-inhibiting’ lives actually live.

Tevye from *Fiddler on the Roof* (1971) provides the perfect example to illustrate this point. When his two eldest daughters wish to deviate from traditional marriage rites, Tevye asks himself whether his faith and tradition can sustain the deviations. He concludes that they can. He draws the line, however, at the request of his youngest daughter, who wishes to marry outside the faith. This, he cannot countenance. He never deviates from his faith which dictates all his actions, even while he struggles to determine

what adherence to his faith, respectively, allows him and forbids him to abide, all the while, therefore, being forced to examine, deliberate and make choices. (Interestingly, his daughter goes against his wishes, risking her relationship with her father. Nonetheless, by the end of the tale, there are signs that Tevye will, eventually, forgive her. Four decades later we are still awaiting a sequel to see if that's true...)

At issue is the fact that some critics recoil at the (often superficial and demeaning) picture that is painted of those who reject conventionally 'western' ideas as to what constitutes the critical assessment that is said to be constitutive of autonomy in the first place.<sup>126</sup> The kind of evidence that acts as proof in defence of any given truth-claim or course of action is itself part of a wider frame of reference that requires the assumption of its own privileged position in order to be accepted as the default frame of reference. Many non-liberal ways of life, however; certain sects of Catholicism and Judaism among possible others, have long traditions of critical reflection and scholasticism, and entail the exchange of reasons with regard to interpretation of sacred texts and what implications these carry for those who try to live in accordance with the dictates of these texts. These engage in critical assessment, but refer to a different modality of rationality altogether. As Stanley Fish argues, those who believe in biblical inerrancy "will regard the lack of fit

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<sup>126</sup> Carter (1987) notes that the liberal response to those who attempt to bring religion into public discourse is all-too-often to dismiss them as lunatics, such that "even the religious left is sometimes offended by the mainstream liberal tendency to mock religious belief" (977). Carter examines the constitutional record of laws passed in order to give 'equal time' to 'scientific creationism' as to 'evolutionary theory'. He concludes that liberalism has a blind spot when it comes to religious belief because the constitutional record prohibiting 'equal time' laws as violations of the 'Establishment Clause' of the First Amendment, turn on accounts that, however true (such as the fact that 'creation science' is just bad science) ought not to inform the constitutionality of the laws themselves and that the only other proof the courts have of the establishment of religious belief inherent in creation science is the fact that the views are informed by and therefore consistent with religious belief. Surely, however, not everything consistent with or informed by religious belief can be said to be unconstitutional on a First Amendment analysis. Carter opines that in the final analysis, what threatens liberals about religiously-motivated fact-finding is the assumption that the deeply religious are incapable of reason and that this incapacity threatens the liberal order. Shelley Burt (1994) and George W. Dent Jr. (1987-1988) also opine that the goals of religious parents are often misunderstood and mischaracterized.



between their own conclusions and the conclusions that might be reached by the ‘generally accepted methods of inquiry’ as the severest judgment possible on the generally accepted methods of inquiry” (Fish 1999: 92). (On this view, the fact that human beings cannot walk on water only serves to further prove that Jesus was the son of god, rather than that he never walked on water!) What Fish’s statement does *not* entail, however, is that people who reject ‘generally accepted methods of enquiry’ reject all methods of enquiry, or exchange of reasons, or attempts to rectify cognitive dissonance, or internal dissension, all of which are important hallmarks of critical assessment in keeping with the ‘generally accepted methods of enquiry’ which Fish’s argument implicates.

According to ‘open future’ theorists, liberal theory ought to work backward when it comes to children, viewing them as repositories of liberal values waiting to be unleashed. From this point of view, childhood is a training ground for people’s generally much longer lives as adults. It is recognized that persons have the right to practise the religious values that they are presumed to have freely chosen. The neutrality as among ends to which liberalism is thought to aspire is based on the model of adults with fully developed belief systems. Must, however, liberalism be neutral as regards belief formation in children even if it must be as regards formulated ends of adults? On one view, no harm is done by imposing beliefs onto children by virtue merely of their being imposed, simply because what is anathema about imposition is that what is imposed supplants what is already there. This does not, however, secure us the right to impose any beliefs whatsoever and in any fashion that moves us.<sup>127</sup> Why might this be so?

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<sup>127</sup> In Manitoba, a young girl went to school with Swastikas temporarily tattooed on her. Eventually, teachers called Children’s Aid who apprehended her. In interviews with social workers the 8-year old

Previously, I identified several issues that are relevant here. The first is that cultures are important because people have an interest in ‘effortless belonging’. Children also, then, have such an interest. Moreover, parents import a moral duty to raise their children with the particular values that they believe to be the correct ones.

Mills states it nicely. She says “All parents can really do to produce children who share their faith is precisely that: to share their faith with them as long as the children are willing to let them share it [.]” (2003: 504). After this time, (Mills puts it, unsurprisingly, at around age 12), parents must demonstrate respect for the *present* autonomy of children (what I in chapter one referred to as their ‘being’ in contradistinction to their ‘becoming’) by dealing thoughtfully with their children’s withdrawal from or criticism of the ways of life which their parents wish for them to pursue, and the reasons the children offer for such withdrawal and criticism.<sup>128</sup> Evidence gleaned from the field of child psychology suggests that such ‘thoughtful dealing’ with the child’s individuality is necessary for competent parenting (Schaffer 1990: 222-226).

Proponents of the child’s right to an ‘open future’ posit a much more stringent requirement. Rather than the minimal requirement that children must not have the capacity for future autonomy irrevocably hindered and that parents are subject to

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explained that all non-white people should die. This provides an example as to the limits of what a parent may reasonably be allowed to teach a child on the basis that society has a legitimate interest in what kind of people children will turn out to be. The Act under which she, and subsequently her younger half-brother, were apprehended, allows for the state to apprehend children to protect the child’s “life, health or emotional well-being”. The judge hearing the case as to the permanency of the removal agreed that the parents’ values and their associations threatened the children’s emotional well-being. However, he concluded that the racist markings were not in and of themselves enough to justify a permanent removal of the children. The judge concluded that an assessment of parenting skills and the kind of home environment offered needed to be conducted and that such an assessment had to be done in isolation from the beliefs that the parents had and had inculcated (2010 MBQB 32).

<sup>128</sup> J. Morgan asserts that “the parent is at risk of violating the [the child’s right to an open future] only if his treatment of the child does not respect her emerging identity” suggesting that emerging identity both requires respect from the moral point of view and that it is distinct from (although influenced by) the “experiences that others provide for her” (2005: 371).

thoughtful dealing with the child's possible rejection of parental values, 'open future' proponents posit the maximal requirement that they must be taught in the present about the future exercise of this capacity. Indeed, it is possible that on one formulation of this view, the latter is required by the former. In the most extreme examples of confusion on this issue, it is proffered that children's espoused wishes should be taken into account...unless they espouse the wish not to have available to them an 'open future'. In other words, if children, of an agreeably appropriate age, defend their own right to an 'open future' as against their parents' objections, then the espoused wishes of the children should be taken into account. By contrast, "they ought not to be granted the right to restrict their options against their parents' wishes and the state's requirements" because their espoused wishes then act as proof that they are not yet able to discern their own interests (Gutmann 1980: 354). So what ought parents to do with regard to sharing their enthusiasms with their children?

In words sometimes credited to JFK: "There is something immoral about abandoning your own judgement..." Parents are duty-bound to share their moral values with their children. Moreover, doing so is as much a fact about parenting as is changing diapers. Such morals may include of course, esteeming such thing as value-pluralism (the belief that there are many, equally viable and incommensurate values) and scepticism (the belief that there is no concrete way to discern any ultimate truths with certainty), as much as it does that there is only one true god and that the bible contains the complete truth of all there is to know. Regardless of the relative virtue of the values themselves (for there are many values that are highly dubious and some that are positively loathsome) the

fact of instilling in one's child the measure of what one takes to be valuable is a basic moral condition of good parenting.

#### *4.4. Moral Limits*

We recognize moral claims in a variety of ways. First, adults have moral rights to live according to their best lights. Second, adults as parents, have a moral *duty* to inculcate their moral ideals into their children. These duties stem from the child's right to have the benefit of some moral grounding. I recognize that what I am calling a 'moral grounding' could, potentially, be constituted by the substance of virtually any number of different values. Either way, it is both a practical fact that parents will inculcate into their children (or attempt to do so) the religious and cultural values that they deem superior as well as their moral duty to do so. The only alternative is to accept the amoral upbringing of children: The idea that children are to be given no basis to determine right from wrong or the context from which to view anything as fundamentally valuable or meaningful. It seems hard to imagine how one might esteem a rudderless life and to the extent that parents may act to prevent this, they must. Further, children have a right to be participating members of the culture to which the family belongs, owing to their own need for effortless belonging: In both the cultural and the familial sense.

Moreover, we recognize moral rights and duties as distinct from, although importantly related to, legal rights and duties, although the latter ought normally to be premised on the former in some rational way. Without getting into a Kantian analysis of perfect and imperfect rights and obligations, suffice it to revisit my example from chapter 2 with regard to the parents and their choice to spend money on a family vacation rather than use that money to develop in their child her particular musical talents. I determined

that parents may or may not have a moral right to a given choice even if we would be unwilling to conclude that they did not retain a legal right to make it.<sup>129</sup> With that distinction in mind, I turn to what are the moral limits to the inculcation of values in childrearing.

Above, I contended that the ‘open future’ view inappropriately conflated choice with autonomy in the first instance, and privileged autonomy above all other values in the second. Moreover, it portended to a maximal account of options, whereby virtually all options are to be viewed as equally good, equally available and the moral agent ought to be encouraged to choose among them. I argued that children did not have a right to an open future. However, I have yet to elucidate the kinds of minimal criteria that must be met for children to be provided with a legitimate upbringing from the moral point of view.

Virtually all observers agree that children may not have their future capacity for choice irremediably negated. Rather than argue that children must have options kept maximally open, I claim that children must be reared for eventual independence. I pause to reiterate that for the moment I am bracketing the kinds of considerations that will come into play, when we consider the individual as a member of the wider society and, for now, restrict my discussion to the minimal moral criteria for upbringing from the point of view of the effect upon the child alone.

#### *4.4.1 An Education-for-Independence*

What might it mean to be reared for independence as opposed to autonomy? Some might suggest that there is little difference in that both are concerned with a kind of ‘self-

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<sup>129</sup> Although we also claimed that it was not clear that this choice was morally impermissible anyway.

government', and freedom from the imposition of the will of another. I posit, however, that the use of the term 'autonomy', particularly in the context of the 'open future' view, posits an overly strong emphasis on the virtue of 'choosing' in order to accord with one's moral basis without due regard for the largely un-chosen moral basis itself. By contrast, the term 'independence', leastways as I am using it, has much more to do with the ability to make decisions without requiring guidance or input from others.

Adducing Thomas Hill's example of the Deferential Wife, Callan suggests that servility in the Deferential Child, can be understood as believing in an "overriding duty to serve her parents" (1997: 153). He claims that it is impermissible to rear a child in such a way that even as an adult she has no ability to question the dictates of her parents even when logic and future evidence would militate against the wisdom of their views (Callan: 152-57). It is difficult to know from mere observation where respect for parental authority normally viewed as desirable, fuses with mere subservience as the overriding moral consideration just as it is difficult to determine the way in which servility as defined above, distinguishes itself from many of the 'autonomy-inhibiting' life options I claimed were permissible to impart. Deference to faith-based gender roles, say, might seem to fall into the 'autonomy-inhibiting' category. They can, however, be distinguished from the servility apparent with the Deferential Wife, for whom acquiescence to her husband's will is her single overriding objective. Conceptually, at least one difference is the spirit in which one undertakes what one believes to be one's role. To say, for instance, that there exist gender roles and we ought to live accordingly is not *ipso facto* to say that such gender roles include that women's primary moral function is to be subservient to the will of her husband. This is so even if that will is benign, in other

words, even if the husband encourages her to be more independent simply because he believes that that will make her happy.<sup>130</sup> If she proceeds to do things that would normally be indicative of greater independence, i.e., she finds employment outside of the home, she embarks on occasional overnight excursions with female friends, only because she believes that she ought to do as her husband instructs, then she is not embarking upon these activities in the ‘right spirit’ as it were, and thus is actually exhibiting not independence, but subservience: Experiencing the imposition of another’s will as her own. Again, from a practical point of view, it might be difficult to distinguish between similar activities undertaken in a different spirit. One who seeks employment outside the home, say, because she genuinely wants to might be practically indistinguishable from one who seeks it because her husband genuinely wants her to. Furthermore, it might be difficult to distinguish between doing something out of subservience, that is, because we understand our primary moral obligation to be submitting to the will of another person, and doing something about which we are uncertain, on the advice of a trusted and respected loved one.

Finally, it might be difficult to distinguish from doing something for loved others because we wish to make them happy, which as I stated in chapter one often takes the form of waiving our rights vis-à-vis loved others, simply because our love for them motivates us to put their own needs and wants ahead of our own, even when our own are legitimately to be privileged from a neutral point of view. In other words, one can commit identical acts from different motivational bases or in a different spirit, and that matters to our overall point.

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<sup>130</sup> Callan notes that while “[s]ervility and despotism are mutually reinforcing vice [] there is benign as well as malevolent despotism (1997: 153).

Children must be taught to do things in the proper spirit. Children must have engendered within them the confidence to make their own decisions. Moreover, they must be taught that their wants and needs matter as much as those of others. This of course, leaves myriad options open with regard to the moral framework within which they will make decisions including how they will evaluate and prioritize their wants and needs in relation to those of others. Some parents will impart a view that their children should learn to always assert their needs and wants on the basis that others will do the same and that getting one's needs met is a contest that you sometimes win and sometimes lose. More desirably, some parents will teach their children that there are times when it is necessary to assert one's needs and wants and other times when it is not and the fact of the matter is that it is often difficult to know which is which. The important point in all this is that the spirit in which actions are undertaken cannot be one of subservience, that is, that one is morally beholden to the will of another. Unlike an 'education-for-autonomy' an 'education-for-independence' has little to do with scrutinizing the moral framework from within which one makes decisions (although such scrutiny is not thereby precluded). This largely brings us back to Mills point, above, that the most a parent can do is share their faith with their children, for as long as their children let them. Respecting children's present autonomy largely requires allowing them to 'take the lead'.

There are, moreover, certain things that are morally impermissible for parents to impart. Parents may not impart racist or homophobic ideologies to their children. This is not just because of a need to impart ideals upon which good democratic citizenry can be built, more about which in chapter 5. It is because it does a disservice to the child herself. This is particularly true in the case of children born to homophobic parents. Since it is not



possible, leastways at this point, to either predict or prevent the birth of a gay child, children must not be subjected to an anti-gay ideology for reasons established in chapter two.<sup>131</sup> The same is true, although differently so, for children exposed to racist ideology. In the context of a pluralistic society where people regularly encounter people of different races: In the grocery store, in university, in the workplace, when dealing with public service workers, it is a disservice to children to raise them in such a way as to encourage stressful encounters with the myriad people she will encounter everyday that will be, potentially, of a disparaged race. I am reminded of a scene from the movie *Crash* (2004).

In the movie, a racist man is on the phone with a woman trying to get medical help for his father, through his HMO. Things are not going well and in an attempt to bring the conversation to a more personal level, he asks the woman her name. When she tells him it is Shaniqua and the man realizes she is African-American, the conversation takes a turn for the worse as she becomes the focus of his frustration owing to her race. Rather than improving the situation owing to a capacity to intimately explain the details of his father's situation, the situation is worsened owing to the man's predisposition toward the woman because of her race.<sup>132</sup>

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<sup>131</sup> CF Sandel (2007) and Jecker, Jonsen and Pearlman (2012) for pertinent discussions on the issue of genetic engineering. Even if we were able to predict and thereby prevent the birth of a gay child, this practice would be exceedingly questionable from both an ethical and prudential point-of-view. As an example, we know that there is an imbalance with regard to the ratio of men to women in China, owing to that country's 'one child' policy. This imbalance is partially owing to the sexist manner in which the policy was implemented by individual families who, hoping for a boy, would sometimes kill their female children. Nonetheless, it is not clear how such a policy would fare from the point-of-view of ratios were it to be implemented without any sex-selection process. In other words, does such a policy, applying (as it did in China) to such a large number of people, play havoc with nature's method of sex selection and would the selection of heterosexual children carry unpleasant practical and ethical consequences? The question of sexual-orientation selection, which its potential implications for reproduction, the ability for others to find mates of the same sex, and the ethical considerations of potentially removing from existence a 'deviation' that is found in nature, is equally fraught with problems.

<sup>132</sup> Similar, real-life examples can be found. In 2009 a young girl went to school with racist graffiti stenciled on her body. The following day she and her half-brother were apprehended by social services. During the court proceedings to determine whether the apprehension should be permanent, the judge heard

Parents have a wide area of ‘interpretive capacity’ in which they may make decisions that are in their view in the best interest of their children. They may expose children to the values, religious and otherwise, which they believe are superior and hope that their children come to respond to these values and embrace them as their own. They may make a strong case for why it is that these values are the ones that ought to be adopted. Moreover, they need not expose their children to a large variety of different options and to weigh the ‘pros’ and ‘cons’ of the various ones. But they must deal honestly with their children. They must respond with openness and thoughtfully to their children’s legitimate queries when and if they arise. Moreover, while parents may shield their children from many of the more unsavoury aspects of life on the basis that there are appropriate ages at which to reveal these, they must develop a kind of plan about when and how to introduce these difficult subjects to their children. In other words, they must attempt to develop within their children eventual independence, which independence includes the capacity to make decisions without the input of another. Nothing in this precludes parents from inculcating in their children a particular value-structure from within which conditions must be assessed and decisions reached, but it does preclude an upbringing that attempts to shield children altogether from knowledge of any kind of life other than the one they presently know, or an upbringing which does not attempt to cultivate the eventual independence of the child as she emerges into adulthood.

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evidence regarding the father’s parenting skills, which, somewhat unsurprisingly, were woefully inadequate. Among other pieces of evidence adduced were two incidents involving what were initially everyday encounters with non-whites that turned violent, clearly owing to the father’s racist worldview. One of these incidences involved a gun. Both of these incidents were witnessed by the young girl, and reportedly left her traumatized; clearly not conducive to her well-being now or in the future, nor to the well-being of her (step) father whose views they are. *Director of Child and Family Services v. D.M.P* (2010).

Even if we accept that (a) an ‘education-for-autonomy’ is biased despite its pretensions to neutrality, (b) it erroneously conflates quality with quantity, (c) it pretends that choice and autonomy – understood as the capacity to critically assess and revise based on ‘objective’ canons of enquiry – are coterminous, it isn’t clear that even on its own terms an ‘open future’ does the job it expects of itself. I take this to be that it leads to human flourishing because it enables children to develop given aptitudes and to make choices that cohere with their value-set. One does not learn to become masterful at a given sport or instrument by successive tries at consistently alternating ones, any more than one can absorb what is meaningful about a particular way of life in what amounts to a cursory and superficial exposure to it (Mills 2003).

Moreover, the question then of quantity and quality raises its head again: If choice is meant to offer more than the option to choose for its own sake, then the quality of the options to be provided are all-important. Other theorists have chimed in on the superficiality of choice presented in a society with a deep consumer ethic, one whose advertising seems bent on having you believe that your personhood is truly expressed by something as irrelevant as the design of the ‘skin’ you choose for your cellphone. (Actually, you are encouraged to purchase several so that you can alternate depending on how you ‘feel’ on any given day.) Some have commented, rightly, that the attempt to provide something more meaningful than choice that follows a consumer ethic is not only required, but must be zealously safeguarded given how pernicious the consumer ethic model is because such a model re-focuses our attention overly on our own immediate wants and requires far too little in return. In this regard, Allan Bloom writes: “a young person today begins *de novo*, without the givens or imperatives that he would have had

only yesterday. His country demands little of him and provides well for him, his religion is a matter of absolutely free choice and...so are his sexual involvements” (in Beiner 1992: 36).<sup>133</sup>

Choice for choice’s sake carries little meaning at worst, and at best carries no more meaning, on the whole, than lives that reject choice as a fundamental virtue. It isn’t clear that those raised in the way that the ‘open future’ view would have it are happier, healthier, have better relationships with their families, etc... than are others. Evidence suggests, for instance, that people who are religious fare far better in dealing with emotional and life upheavals than do their non-religious counterparts (Clark and Leikes). Nothing here is meant to indicate that we can safely conflate ‘open future’ theory and atheism, or religiosity with a rejection of the ‘open future’ view, (although much of the opposition to the ‘open future’ view comes from religious corners). It is to say, simply, that the correlation between the fact that the deeply religious better withstand life’s upheavals than do the specifically non-religious, and report a level of satisfaction and well-being equal to or in excess of those reported by the non-religious, ought to give us pause.

#### *4.5 Conclusion*

So, what conclusions should we draw from the above examination? First, the requirement of an ‘education-for-autonomy’ is problematic owing to the ‘authenticity’ problem: It isn’t clear that an ‘education for autonomy’ better enables people to lead the lives in the direction that their inherent inclinations would dictate; it as likely as not moulds us in a direction ‘away from’ rather than ‘toward’ our inherent inclinations. Two,

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<sup>133</sup> Galston makes a similar observation (2002: 105), so too does Callan (2002).

it isn't clear that an 'autonomy-for-education' leads us toward empirically better and more meaningful lives.

If Callan and Mills' objections are to be taken seriously, it might be that the majority of approaches that could safely be called 'child-centred' tend to view autonomy in terms that are too demanding to withstand the objections advanced by critics within the context of a modern society marked by deep plurality. On the other hand, if, as has been previously argued, parents do not possess an ineluctable right to impose their own value-sets and comprehensive ideas of the good upon their children, it might seem unproblematic if parents should find an education-for-autonomy troubling, leastways from a normative if not a pragmatic viewpoint: The fact that they might find it troubling does not tell against it being in their children's best interest.

Typically, *opponents* of the right to an 'open future' argue on behalf of a dual-interest view. This view unwittingly subsumes the rights of children within those of parents which I have argued is inappropriate on a liberal view. On the other hand, *proponents* of an 'open future' typically argue on behalf of a child-centred view. This view is consistent with liberal theory's focus on non-imposition and the equal moral worth of persons, but their conclusion often stems from conceiving autonomy as something that can be held in trust. This denies the actual process of personal moral development, and, as well, it has the effect of negating the *personhood* of children by focusing on their future selves, without paying due regard to their present selves.

The child's best interests can only be understood with reference to the particularity of the individual child's present 'situated-ness'; that autonomy is not something that *can* be held in trust, because autonomy cannot be removed, wholesale,

from the constant and ongoing development of the person, which development is often given by many of the factors that an 'open future' would reject. I do not reach this conclusion with reference to the claims of either parental interests that are other-directed, or the interests of ethnic/religious communities as such, but reframe the issue from the point of view of the child herself. This argumentation rests on a conception of the child that is not readily given by most liberal theories; the child is, at once, in the process of not only becoming, but of being. An adequate account of children must address their present situated-ness as members of particular families and communities etc... in order to do justice to their present selves, even if such selves are understood to be *also* in the process of transition. It is this process of transition which allows us a good deal of latitude to determine the substance of their interests. As a corollary to this, the determination of which interests lead best to human flourishing cannot be accomplished without reference to external factors which we might reasonably accept as the basis for determining what constitutes an objectively 'good life' and which factors are met by any number of conceptions of the good.

So, if an 'education for autonomy' doesn't lead, necessarily, to a more meaningful life-path (in fact it might lead to less meaningful ones) and if it doesn't make us live the life that is more authentically our own (because it shapes us into things that would simply be different, but not necessarily better-or worse) then it is not a 'right' that children can be said to have for it doesn't do what rights are intended to, which is to serve the interests of the people whose rights they are. In other words, assuming our intention is to provide children with either a more meaningful or authentic life i.e., one that is neither empty nor imposed, the right to an 'education for autonomy' does not fit the bill on the 'liberal-in-

waiting' argument. This is not to say that an 'education-for- autonomy' is *impermissible*. I have not determined that, *ipso facto*, an 'education-for- autonomy' leads to empirically worse or *inauthentic* lives. We can have access to an 'open future' without suffering some of the failings pointed to above just as I have argued that a so-called 'autonomy-inhibiting' life need not lead to a life paralysed by the impossibility of meaningful choice. It is to say that on the above argument an 'open future' is not morally required. If, however, we can determine that an 'education-for-autonomy' is required on another view, then the 'liberal in waiting' view offers little in the way of an objection to its imposition in that instance. One candidate for the imposition of at least some components of an open future is the requirement of inculcating in children civic values. Arguably the components of an open future which facilitate good citizenship are coincident with those that facilitate autonomous-choosing. I now turn, to an examination of the legitimacy of imposing appropriate civic values.

## ***Chapter 5: The Democrat-in-Waiting: Children and Civic Education***

### *5.1 Introduction*

In chapter 3, I said that autonomy and diversity were core commitments of the liberal polity. Properly conceptualized, they work in tandem to preserve the individual's ability to live according to their conceptions of the good. In the previous chapter, I said that the conception of autonomy that is generally posited by 'autonomy liberals', which takes the form of a putative right to an open future, is inappropriate as it regards children. This is because in an attempt to ensure that children are not inducted into views that render future autonomy impossible – or that they are inducted into views that make future autonomy inevitable – the conception of autonomy offered tends to equate abundance of choice with autonomy without taking account of the quality of the choices and with little regard for the particular individual child whose proclivities these choices are meant to satisfy.

I have argued that an open future is not properly a right of children on two counts: First, the notion of autonomy that grounds this view negates the dialectical nature of what choices can be convincingly seen to be 'one's own', and second, it offers future possibilities that, on the whole, are not objectively more appealing than those that might be offered by any number of upbringings that do not adhere to the 'open future' ideal. The argument, then, that an 'open future', with its focus upon the maximization of autonomy, is owed to a child is mistaken. This, however, is importantly different from saying that an open future is inherently bad for the child or that it constitutes a violation of children's rights (or of that of their parents). Given that, the fact that developing certain capacities might promote an open future is not an argument against the



inculcation of these capacities or the values that are thought necessary for their effective deployment.

There are other interests that might be properly satisfied by the inculcation of certain aspects that tend to be annexed to the type of upbringing contemplated by proponents of an open future. Specifically, the interests that members of the wider society have in the moral quality of children (and particularly the adults they will become) can be satisfied by the inculcation of appropriate civic values; the inculcation of which might tend to enhance – by way of what has come to be known as ‘the convergence thesis’ – those aspects of autonomy that I contended were not a right properly speaking of children. These include the ability to dispassionately and critically assess myriad contending viewpoints, one’s own included.

Many different reasons exist for questioning or even rejecting what can be termed the common-school curriculum. Among these are the democratic paradox, that is, the idea that the universal inculcation of the values deemed necessary for good democratic citizenship simultaneously undermines plurality and autonomy (Reddish and Finerty 2002-2003); the negative effect that education developed by the majority (white, middle class) is said to have on minority children (Arons and Laurence III 1980); the objection to particular teaching methods (discursive, say, rather than authoritarian); objections to the usefulness of particular subjects (too much math, not enough music), or objections to specific material – chief among such candidates are sex education, the theory of evolution, and civic values. Objections to the teaching of civic values normally takes the form of objections to positive depictions of gender role-reversal, the

normalization of homosexuality or the putative equality of myriad religious viewpoints and/or contestable values, sometimes thought to be synonymous with ‘moral relativism’.

Numerous solutions have been developed to deal with these controversies. For instance, ethnocentric schools,<sup>134</sup> charter schools that focus on the Arts or separate schools focused on teaching within the parameters of a particular faith or in which children will be instructed in a language other than the national language.<sup>135</sup> With regard to some issues, in particular controversial civic lessons, one solution is thought to be found by way of exemptions from those aspects of the curriculum to which parents object. The relative merits of each of these putative solutions could themselves be the basis of an entire thesis. In one way or the other, however, they all speak to a common principle: Parental control of educative choice brought about by at least some displeasure with at least some aspects of the common school curriculum.

In chapter two, I recognized the following: Parents had only instrumental (rather than fundamental) rights to order their children’s value-sets. I argued that the ‘liberal standard’ is to view children as creatures of both their parents and the state. Both, however, would be required to order the lives of children in the best interests of the children themselves, as instrumental rights are meant to do, rather than weighing heavily the best interests of parents (*qua* parents) as fundamental rights presuppose. As noted, there is much overlap in terms of what parents can actually effectuate through the use of both kinds of rights. Instrumental rights, for instance, can be adduced easily to defend

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<sup>134</sup> In 2011, the Toronto District School Board approved the creation of an Afrocentric high school, the second of two Afrocentric schools in the Toronto area. The first was an elementary school.

<sup>135</sup> See Callan (1997: chap.7) for an account of the ways in which separate and common schools do and do not map onto charter schools. In other words, a Catholic school might constitute a charter school, but that does not tell us whether it is common or separate for the purposes of the relevant distinction regarding the inculcation of appropriately universal civic values.

such things as allowing parents to introduce children to parental religious views, only here it would be on the basis that to be a fully participating member of the cultural life of the family is in the child's interest.

Two issues previously left unexplored now present themselves: First, what are we to do when parents' notions of the child's best interests clash with those of the state? Given the wide leeway with which instrumental rights imbue the parents to order the lives of their children, the difficulty here is obvious. Parents may genuinely believe, for instance, that to 'spare the rod is to spoil the child' and that a particularly harsh and punitive regimen for even minor infractions is in the best interest of the child, but the state would be delinquent if it turned a blind eye to child abuse in the name of parental rights, just because parents believed it, dementedly, to be child-centred.<sup>136</sup> The legitimacy of instrumental rights cannot be, *in and of itself*, the basis for which parents may do what they would not otherwise be permitted to. Second, I have not considered the legitimacy of the claim that society itself has on the development of its future citizenry.

This chapter seeks to develop a child-based analysis that nonetheless recognizes the claims of the society to inculcate appropriate civic values. The analysis will take the following form: That children are either served by or are leastways not normally harmed by the inculcation of appropriate civic values, that parents maintain limited rights to order the value-sets of their children, and that only a reasonable apprehension of harm to the

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<sup>136</sup> In 2001, several families who were members of the Church of God, which believes in corporal punishment, fled to the US from Aylmer, Ontario to escape what they believe are persecutory child welfare laws. See Claiborne (2001).

child ought to be dispositive with regard to excepting that child from mandated civic education.

### *5.2 Parental Educative Choice*

Virtually all observers agree that there is a minimal requirement with regard to what things a child must know. It would be impermissible, for instance, to prevent a child from acquiring basic literacy and numeracy. Beyond this, however, there seems to be little agreement as to what a child must be taught. Even arguments that a child must be taught basic citizenship values, which find wide agreement, leave many cold. Proponents of a strong deference to parental educative choice argue that even if this is so, there is no reason to doubt that parents are as able as others (namely the state) to inculcate these values in their children (Burt 1994; Gilles 1996; Galston 2002; Dent Jr. 1987-1988) and only where they fail to do so, ought the state to intervene.

It is largely agreed, then, that society at large is owed future citizens who can live up to the demands of being law-abiding and can cleave to the ideals of their society to a great enough extent that the society itself can be reproduced. This view takes as its basis the notion that the state has a right to maintain an orderly and peaceful society and to reproduce itself, and that citizens of the state have a right to the protection from and cooperation of those people with whom they will have to share political (and other) space.

Moreover, children are afforded the protection of the state no less than other citizens. The form of the intervention might differ, but that children are not unilaterally the creatures of either their parents or of the state is the rule. For instance, virtually all observers agree that parents may not beat or starve their children precisely *because* they

are not, unilaterally, the creatures of their parents. These observations are generally uncontroversial.<sup>137</sup> It is *within* these (albeit broad) parameters that I situate what might be thought of as maximal and minimal parentalist accounts.

A maximal parentalist account would show *strong* deference to the educational choices of parents and protect these choices as parental educative rights, limited only by the parents' failure to impart basic skills of literacy, numeracy, the ability to make commonsensical judgements of basic logic and the minimal requirements of citizenship: That the law must be obeyed and that the legal rights of others must be respected. A minimal parentalist account, by contrast, would show strong deference to the state, limited by the state's requirement to be neutral with regard to the inculcation of values. In all this, much depends upon what are conceived as requirements of citizenship, how are we best to understand the rights of others and whether or not there is such a thing as neutral values. In situations where agreement cannot be reached, the question of maximal or minimal educative rights must find some other basis for justification. On the child-centred view that I advocate, the child's best interests must motivate parental decisions regarding education. The question to be answered, then, is who decides what values will be imparted to children in situations where there are conflicts between opposing or incompatible assessments about what those interests are?

A sophisticated, but ultimately flawed, answer to this question is offered by Gilles. Gilles uncontroversially claims that, for myriad reasons, it is parents and not states that have the most incentive to act in children's best interests. And the state that is committed to neutrality as among reasonable conceptions of the good has no reason to

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<sup>137</sup> Chapter 1 looked at Narveson's strongly libertarian theory which claims that parents maintain a right to kill their very young children, but this is a view that is very minimally shared and in any case parents may not beat their children.

privilege one conception over another. Therefore, the only way for the state to be consistent to the principle of neutrality is to give parents very wide leeway in terms of educative rights, as long as the conceptions into which they seek to induct their children are reasonable ones. Therefore, on his view the best interests of the child ought to be pursued as parents define it as long as their definitions are reasonable.

Gilles claims that the issue is not whether or not parents can imagine that there exist other (even valuable) ways to live beside those that they wish to impart, it is that their way is the only one that they are *competent* to impart (1996: 967). No doubt this is a valuable insight – the fact that I wish to impart a particular way of life need not mean, *ipso facto*, that I believe it is the only view of life worth having. This observation, nonetheless, need not detain us, principally because while true it does not speak squarely to the question at hand. Parents are not concerned only that they be allowed to impart the way of life that they are competent to impart while allowing others (namely the state) to impart *different* values as if the issue was one of them being forced to teach children ways of life about which they knew nothing and finding themselves, thereby, foundering. The issue here is when *others* (the state) seek to impart values against the wishes of the parents for reasons that have nothing to do with competence, either theirs or that of the ones doing the imparting. The obvious solution to the problem of being forced to teach values that one is not competent to teach, would be to teach one thing at home and allow the school to teach something else. This putative ‘solution’ is the very problem to be resolved.

Stephen Carter has said that “contemporary liberalism faces no greater dilemma than deciding how to deal with the resurgence of religious belief” (1987: 977). The

reasons have to do with the incompatibility between religious beliefs (leastways those religions he canvasses) and what liberalism dictates. What matters, for him, is the irreconcilability between the very (different) natures of our respective norms of deliberation, that is, the centres of meaning from which we make judgements about the world. However, a different challenge now arises and that is to meet objections that emanate from within the logic of liberalism itself.

Liberals are said to pass too quickly over objections to their preferred account, which account includes two ideas that are usually found at its heart. The first idea is that as long as the state does not specifically endorse a particular view, then merely exposing children to it does not violate liberal neutrality. The second idea is that liberal theory, with its penchant for rational enquiry, can disassociate ‘facts from values’ such that laws that require equal time to the teaching of, say, creationism as it devotes to teaching the theory of evolution can be dismissed on the basis that one teaches facts about the world and the other teaches particular religious values and it is this latter which impairs neutrality.<sup>138</sup> As critics of liberalism have pointed out, however, the distinction between facts and values rests on the very epistemic premises that many people reject (Carter 1987; Fish 1987; 1999; Sandel 1982).

Galston offers us this simple test. He asks us to imagine how we would feel if our children were being taught something to which we were deeply opposed. His point is that the content of the learning is irrelevant since, from the point of view of liberal neutrality and the equal concern and respect it putatively embodies, what matters is how we would feel about this: To imagine that one’s child is being taught that evolution is just a theory and that, really, we were made fully formed in the Garden of Eden, is no less egregious to

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<sup>138</sup> This is the view that was upheld in *Edwards v. Aguillard*, (1987) and challenged in Carter (1987).

the ‘scientific-minded’ than to teach the truth of evolution is to the fundamental religionist. If, as the scientific-minded, we would not agree to the Adam and Eve thesis being taught to our children, then the evolutionary thesis must also be excluded as an option for the children of religious fundamentalists (2002: 117). While it is impossible to remove all content that someone would find objectionable without reducing education to something hardly worth attaining (Callan 1997: chap. 7; Ravitch 2002)<sup>139</sup> exemption from objectionable material is meant to be seen as the obvious resolution of Galston’s challenge. However, this is not the only interpretation available. Rather than assume that a liberal view would allow both the scientific-minded parent and the religious fundamentalist to each restrict exposure of the opposite view from their children, we can as easily say that the correct liberal view is that if I believe it is appropriate for the children of the fundamental religionist to be exposed to the theory of evolution if this is what is determined by appropriate democratic processes, than I am willing to have my child exposed to the religious thesis under the same circumstances.

Galston’s ‘test’ brings one major issue to the fore and that is the nature of rights and what it means to insulate people from majoritarian deliberation. Clearly, liberals are interested in siphoning off a reservoir of private conscience and in protecting people in their ability to lead lives in accord with what their consciences dictate. Some observers argue that the moral education of children should not be subject to the will of the majority since that would violate parental rights, which rights act as ‘trumps’ *against* majoritarianism. Now, Galston’s concern is about the expressive liberty of parents and their ongoing intimacy with their children, the legitimacy of which considerations I disputed in chapter 2. A stronger basis for Galston’s thesis can be found, however, by

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<sup>139</sup> See also Hirschhoff (1977-1978).



arguing not from parental interests, but from within the demands of liberal neutrality itself: Since whatever constitutes a reasonable conception of the good must be allowed, the state acts illegitimately when it promotes some reasonable views over others. Is this what the state does when it imposes a certain education on children whose parents oppose it? Gilles believes so and he argues that there are compelling reasons to give parents not only the right to transmit their values to their children, but also the right to reject schooling that promotes values contrary to their own (1996: 938). For Gilles, the question comes down to who has the legitimate authority to decide the educational direction of children when there exists a conflict between the preferences of parents and the mandate of the state, *in light of* the liberal requirement of state neutrality vis-à-vis conceptions of the good.

Gilles does make certain concessions to the idea of the family and the intimacy it requires in order that it be a well-functioning unit, for both the sake of children and parents. In this way, he tips his hat to the dual-interest view (940-41). However, Gilles' argument can be reformulated. To be compelling, his view needs to be more sophisticated than merely stating that parents may impose whatever views they choose to as long as these views are reasonable, for we would still need to understand the basis of the parents' right to have children exempt from exposure to views to which they object. Why, for instance, would both the state *and* parents not be allowed to introduce children to any number of reasonable views? The issue then is not the nature of the views that is, reasonable vs. unreasonable. That they are reasonable is a necessary but not sufficient reason to allocate the strong deference to parental authority that Gilles does.<sup>140</sup> The most

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<sup>140</sup> Gilles recognizes this and argues against the view that the state may also introduce children to views that are also reasonable, but his argument is incoherent. He attempts to elaborate a 'free speech' argument to

promising prong of his argument acknowledges the need to be guided by considerations of the child's best interest.

Gilles claims that it is parents and not the state that are more likely to pursue and defend the best interests of children. He claims that because notions of best interests are inherently tied to conceptions of the good, understanding which better serves the interest of the child requires that we determine whether the state or parents serve the interest of the child best as parents and the state, *respectively*, conceive that interest (1996: 940).

The focus, though, is not the objection that since parents know their particular children better than the state, then the one-size-fits-all model that might be said to characterize state mandated programs caters to their needs – the satisfaction of which is in children's interest – less efficaciously than can parental discretion. Rather, the argument here is that since liberal society has only reached *broad* consensus on such societal values as tolerance and law-abidingness, and this broad consensus cannot translate into “concrete,

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protect what he calls “parental educative speech”. On this view, not only do parents have a free speech right to communicate their values to their children, but they have the right that agents of their choosing “teachers and schools” also communicate parental values. As a corollary to these *indirect* free speech rights, parents have the further right to oppose educational requirements that their children be exposed to views to which they object, on free speech grounds. This position is flawed thoroughly. In the first place, free speech does not (nor should it) guarantee one an audience. People have the right to free speech for reasons that have to do with their own need to express themselves freely, and the right for society as a whole to engage in healthy deliberation in order to arrive at the best policy options for a democratic society. So even if parents had a free speech right to communicate their values to their children (which arguably they do, but since they may communicate their values to their children for any number of reasons, they do not need a free speech argument to protect their ability to do so) the further argument that they have a right that the speech of others, to which they object, will *not* find its way into the ears of their children, simply does not follow on free speech grounds. In fact, in some instances the opposite is happening. The Tennessee state legislature passed a law in April 2012, permitting teachers, who were so inclined, to discuss creationism alongside the theory of evolution. (A similar ‘teacher free speech’ law was passed in Louisiana in 2008.) In Tennessee, teachers are permitted to ‘discuss’ the merits of climate change and human cloning. Aside from the obvious ‘I know a law that is trying to provide constitutional cover for a religionist agenda when I see it’ (since the law’s scope does not extend to other objectionable and controversial subjects that conservatives might be less fond to have explored), this seems to be moving the direction of education away from that proposed by Gilles. This is not to say, however, that such a law would pass constitutional muster. Nor is it to suggest that the putative merits of evolution, climate change and human cloning should not be criticized. Rather, the fact that these are allowable in the context of the science curriculum (rather than, say, religion or civics class), seems aimed at cloaking the dubious merits of the ensuing discussion in the legitimacy of science without all that pesky stuff like the imprimatur of the scientific community: Tastes great *and* its less filling!

legally enforceable educational requirements without outrunning and undermining that consensus” (941), the very fact of enforcing educational requirements is, inherently, to take sides among various conceptions of the good. He claims that “[s]o long as both parents and the state define the child’s best interest in terms of a reasonable conception of the good, we have no reason to prefer one definition over the other” (940).

According to Gilles, even the thickest conception of the good upon which we can hope to achieve consensus will be dramatically less complete than most people would agree is necessary for an education that lived up to the requirement of being informed by the child's best interest. The problem, then, is of the application of this non-neutral principle, which cannot hope to yield consistent results.<sup>141</sup> Even if we could all agree that the child’s best interests ought to guide children’s moral education (the non-neutral principle), we cannot hope to agree upon what informs those interests (952). What we *can* do, Gilles proposes, is acknowledge that parents have more incentive to act in their children’s best interests as they understand them, than the state has to act in the children’s best interests as it understands them (953-955). Parents, therefore, have a strong presumption to the state’s deference in terms of educational choice because the liberal state has no reason to prefer one definition of the child’s best interest over another as long as both fit into an understanding of what constitutes “reasonableness”, which understanding is necessarily expansive owing to the very pluralistic society for which the liberal state is necessary in the first place (940). This deference “should approach (though not necessarily equal) the deference we give to the self-regarding choices of adult individuals” (939).

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<sup>141</sup> A non-neutral principle is one wherein there is espoused agreement to the principle from all people, but the problem arises with the dramatically different ways in which each person (or groups of people) understands the substance of the principle. See Gerald Dworkin (1975).

For the moment, it is not enough to say that since children do not yet have their own beliefs and values the exercise of which requires protection, then there is no illegitimacy in imposing value-set A over value-sets B through Z, since that raises the obvious question: Why A and not any one of B through Z? The answer to *this* question cannot simply be “because this is what the majority wants” without inviting further examination as to the legitimacy of democratic processes and outcomes and the appropriateness of such having any bearing on the question at hand. The majority, by definition, does not represent the myriad conceptions of the good that are allowed to flourish within the liberal state. Instead, the state, on one view, must act as protector of the rights of parents to *oppose* the majority, by, for instance, allowing parents to reject schooling of which they disapprove. This puts us in something of a quandary. We cannot recognize the right of parents to be left alone to pursue their respective versions of the good without recognizing *some* limits of which I have acknowledged at least two kinds: Those which protect children from the actions of their parents and those which are necessary to instill certain basic requirements of citizenship. For instance, parental values that insisted that parents could sacrifice their children would not be considered ‘reasonable’ since clearly they do not conduce to children’s well-being. Likewise, it would normally be considered ‘unreasonable’ to argue that children could be taught that black people ought to return to Africa as this undermines the very toleration that allows those to argue that in the name of said toleration they should be allowed to induct their children into the conceptions of their choosing.<sup>142</sup> No rights are absolute and there is no

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<sup>142</sup> What constitutes a ‘reasonable conception’ of the good is subject to much disagreement. Some posit that reasonableness on a Rawlsian view, being epistemologically based, disallows any number of generally accepted views of the good (Steinberger 2000). Others argue that what is required is only moral reasonableness (Lecce 2008: 214-221) which would leave be any conception that recognized the right of

way around the question of where the limits are. Operationalizing these limits is where we find the greatest disagreement.

Gilles is not specific about what constitutes a reasonable versus unreasonable conception of the good, in order to conceptualize when parents are imparting one or the other. He insists, however, that most parents do an adequate job of teaching their children “the essential prerequisites for adult life and liberal citizenship” (941) and only if they fail to do so is the state then justified in “overriding parents’ educational authority” (940). This argument fails since the conclusion is undermined by the premise: If we cannot agree to what these basic values are how are we to know when they have not been properly conveyed in order to require intervention? Moreover, even if we can agree, as we largely can, that tolerance, say, is a basic citizenship value, we cannot agree upon what it requires. The idea that we have no reason to prefer one reasonable conception over the other fails because Gilles has missed the main issue, which is disagreement regarding whether the *private* reasonableness of, for instance, believing in biblical inerrancy translates into *public* reasonableness of, for instance, voting in favour of a constitutional amendment banning gay marriage. In other words, those whose marriage options are restricted owing to such a ban would likely find the views that support it unreasonable. Clearly, however, many more would not find them so. More to the point is the important possibility of distinguishing between our personal convictions (that the Bible provides the whole truth) and the public expression of them (this means that I must

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others to the same considerations of civic toleration and respect as they expect. This is akin to political morality (Vernon 2001: chap.2), which basis is the understanding that in view of the fact that we necessarily face shared consequences by virtue of our decisions as to how to allocate resources and direct the enforcement mechanism of the state, every citizen is owed not only good reasons for shared decision-making, but the equal right to participate in forming those reasons and the ability to convince others of the superiority of their own reasons.

oppose gay marriage). While the former is acceptable as a personally-held belief about the nature of the world, it is its public expression that we encounter problems. But it is practically impossible for many to sever one from the other, for reasons well elucidated by communitarian critics of liberalism (Sandel 1982; MacIntyre 1988)

Furthermore, while Gilles' argument is sophisticated, it imports either one of two things that the argument itself seems to rule out. The first is a kind of epistemological scepticism, which concludes that we simply have no basis for discerning generally and in concrete terms what is in children's best interests. But, this cannot be what Gilles means. If it was then the deference we pay to parental discretion would need not merely *approach* the deference we give to the self-regarding decisions of adult individuals. Rather, the deference we pay would necessarily *equal* that deference, because on a sceptical account there would be no way of correctly establishing any criterion that would account for the distinction between 'approaching' and 'equalling'. In other words, the reason we only 'approach' rather than 'equal' the deference paid to adults' self-regarding decisions is because there *is* discernible space between what adults can be allowed to do to themselves and what they can be allowed to do to their children. If this is so, then there must also be a way of determining what is in children's interests, such that the wishes of parents can be overridden in order to promote these interests. And if we *can* discern general and concrete interests, why must we pay such a strong deference to parental educative authority as against majoritarian wishes to impart particular values?

One possible answer is that we have achieved, as Gilles maintains, a consensus that children must be allowed to acquire literacy, numeracy, basic citizenship skills, and powers of logical deduction (945, 984-987). Therefore, it might seem reasonable to

confine ourselves to teaching that upon which we, as a society, have achieved consensus. The marginal difference at that point, between what deference we must show to the self-regarding decisions of adults (d1) and the deference we must show to the other-regarding decisions of parents (d2), could be explained by the fact that those who deviate from their responsibility to provide those things we had hitherto reached consensus upon, can reasonably expect legitimate state interference. In other words, the distance between d1 and d2 is explainable in terms of society's consensus position. But this answer is unsatisfying in two ways: First, any situation that would call for state intervention would exemplify that we do not, in fact, have unanimous consent since there would be no reason for parents to deviate from it unless they did not agree, thereby outrunning even the consensus that Gilles claims we *do* have. In this way, the marginal difference between d1 and d2 cannot be explained by reference to our consensual settled convictions on the matter. We might think that we can safely discount the views of those who deviate from the consensus position as being unreasonable since Gilles accepts that unreasonable conceptions need not be respected in terms of parental educative authority. However, this option is not available to us. This is because a consensus threshold simply does not provide us with a basis to determine that some people's conceptions are unreasonable: By definition even the unreasonable count as part of the consensus threshold. We can only make this distinction with reference to the *majority*, which Gilles has ruled-out. Second, if consensually settled conviction is the only reason for which there is a difference between d1 and d2, then a breakdown in consensus would lead Gilles to conclude that we could no longer educate even according to the minimal criteria the consensus had originally indicated, since this criteria no longer meets the minimal requirement for

enforcement – namely consensus. And since we know that Gilles believes that the state can intervene to educate according to this basic criterion where parents fail to do so, there must be a means to determine when that is. Part of the problem is that Gilles sets the bar impossibly high. He writes: “The overarching standard should be that parental educational choices are to be free from coercive state interference, direct or indirect, unless there is *consensus* that those choices are unreasonable in terms of basic human needs or essential liberal competencies” (945). It isn’t clear what, precisely, this would prohibit. Gilles must either allow the majority more sway to fashion the requirement of mandated education than he is prepared to do, or else abandon his hopes for education to the Kukathasian realm whereby virtually nothing is impermissible as regards parental educative (and other parental) rights.

The second consideration that is imported might be said to rescue the above formulation from the charges of skepticism previously adduced, but it fails because its premise must also be ruled out. In a reformulation of the Galstonian test adduced above (pp. 177-179) Gilles invokes the Rawlsian device of the ‘veil of ignorance’ to defend the claim that it is compatible with liberalism that parents should have the right to a strong presumption in their favour on the basis that behind a veil of ignorance people would choose to be allowed to raise their children as they see fit (970). Gilles says that the veil is a good device to solve this problem for we would not want to give up our right to educate our own children as we see fit and therefore all others would have the same right to educate their children as they see fit, hence demonstrating equal concern and respect in a pluralistic society. Here, though, Gilles embraces what is often seen as one of the fundamental *criticisms* of Rawls’ theory and the device of the ‘veil’; namely, that it is



‘heads of households’ that are thought to be the original choosers behind the ‘veil’.

While the Rawlsian original position can save itself from this particular criticism by extending membership in the original position to people other than the ‘heads of households’, unless one extends membership to children – which only the child liberationist view rejected in the first chapter would tend to do – then objections to Gilles’ particular use of it remain. One could not exclude women or non-whites from the original position and then argue on behalf of whatever decision the choosers – on this example white men – arrived at on the basis that this is what they would have chosen behind the veil of ignorance if behind the veil there could never be other than white men. Behind the veil the choosers cannot choose circumstances for those positions in which they could never possibly find themselves without undermining the entire purpose of the device, namely, that one chooses circumstances that one would be willing to accept on the basis that one does not know in advance in what circumstances they will find themselves once the veil is lifted. In Gilles’ use of the veil, children who may *not* choose are subject to whatever conditions parents choose *for* them. It is not clear, however, that were children to choose behind the veil that they would agree that it is their parents and not the state who should have decisive (or nearly so) authority (976).<sup>143</sup>

### 5.3 *How public is the Private?*

At this point we might ask: Why do liberals favour *restraints* on majoritarian processes if they also seek deliberative processes and outcomes that are supported by the majority?

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<sup>143</sup> This discussion assumes that it is appropriate to use the veil of ignorance for specific questions of rights and their allocation. Being that the veil is a means of ‘thinking through’ the basis of constitutional arrangements at their most general, it is unclear whether the device is equal to the task of resolving the particular manifestations of those general constitutional principles.

For instance, Galston (2002), Burt (1993) and Gilles (1996) all claim that liberal-democratic principles ought generally to allow parents to have their children exempted from material to which they object. We might refer back to Locke's stipulation that we *would* only agree to state power, required here to enforce the 'winning' views, knowing that some things would be pre-emptively (and protectively) taken off the agenda from the get-go, precisely because the outcomes of majoritarian procedures could require minorities to live in ways that were both anathema to them and without the possibility of any adequate recompense (Vernon, 2001: chap. 4).<sup>144</sup> Such 'precommitment' gives rise to the 'private/public' divide that is, as I have said, central to virtually all versions of liberalism. I also said, however, that the parameters of the 'private' and the 'public' were not themselves given, but subject to the capacity for individuals to rationally discern the normative barriers that the fundamental condition of equal liberty implied. Some precommitment is necessary in order to "protect citizens' ability to participate in the political process" (Lusztig 2010: 694; Holmes 1995: chap. 5). We might think of such 'process-enabling' rights as being those that are most familiar to us, such as the right to vote, to speak freely, and to assemble with others. Moreover, other 'outcome-substituting' limitations are necessary in order to preserve the very values that liberals and others depend upon in order to participate in the political process, such as the "the rights to life, liberty and security and the right not to be deprived of these without due process of law" (Lusztig 2010: 694).<sup>145</sup> But it is less clear how far limitations may be

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<sup>144</sup> Moreover, in Locke's time this had led to cycle after cycle of violence as succeeding groups tried to press their claims to the exclusion of the claims of others.

<sup>145</sup> As the 'war on terror' has made abundantly clear, however, even this list admits of controversy. 'No fly' lists and security certificates have made it clear that what counts as due process can be mitigated by what counts as security.

used to substitute outcomes in the realm of – particularly religious – belief that so often spill into the public domain.

Michael Lusztig calls those moral issues that are most appropriately resolved in the private sphere, “live-and-let-live” issues. Live-and-let-live issues are, in the first instance, intractable and, in the second, content-neutral, by which is meant that their private resolution “has no direct and substantive impact on others” (ibid). This, of course, is the major thing in its favour, for if such and such a thing has no substantive impact upon others, and yet has enormous importance to us, we would not want the majority to be able to decide such a thing for us. The paradigmatic case is, of course, that of religious worship. The most obvious objection to be offered here is that the fact of religious freedom being a paradigmatic case for ‘private resolution’ does not *ipso facto* secure all religious issues from public deliberation. This is so for two essential reasons. In the first instance, the more likely that one is to have whatever one does for a ‘religious reason’ removed from public scrutiny, the more likely one is to recast one’s preferences as religious thereby attempting to evade legitimate democratic deliberation.<sup>146</sup> The second is that it is not immediately obvious where the dividing lines between a ‘private’ and ‘public’ issue are in any given instance.

Lusztig, for example, inveighs against Canada’s Human Rights Act and the decisions of various human rights tribunals to which the Act has given birth. In the two cases he cites, the issue was that of religiously motivated speech against the legalization

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<sup>146</sup> A good example is the case of *Corporation of Presiding Bishops of the Church of Jesus Christ of Latter-Day Saints v. Amos*. In this case, the Mormon Church fired the building engineer who oversaw the gymnasium which they owned and which was used for non-religious purposes, because he failed to receive a ‘temple recommend’ as he did not conform to Mormon religious practices. The U.S Supreme Court allowed the exemption for religious organizations found within title VII of the Civil Rights Act to apply to the case, despite the lack of a rational connection between the religious activities of the church and the activities the employee performed.

of gay marriage. Under a ruling of one such provincial human rights tribunal, Pastor Boisson and the Concerned Christian Coalition were ordered to pay damages to complainants with regard to a letter the Pastor had written in the *Red Deer Advocate* in which he called upon citizens to defend ‘traditional marriage’. They were further ordered to “cease publishing in newspapers, by email, on the radio, in public speeches, or on the internet, in future, disparaging remarks about gays and homosexuals” (*Lund v. Boisson* 2008). Lusztig claims that the decision “effectively precludes [the Pastor] from giving a sermon pertaining to his religious views on homosexuality” (2010: 704). What is noteworthy here is that Lusztig claims that in addition to having barred the Pastor from expressing his *political* views, the judgment forbids him from expressing his *religious* views (ibid). There is not, then, such a clear division between ‘political’ (and therefore public) and religious (and therefore private) views.

Lusztig casts the Pastor’s views as being of the “live-and let-live’ variety; views which, by definition, are seen as intractable and content-neutral (705). Since, however, these views are both political *and* religious the clear-cut decision to relegate them to the private sphere is undermined. That these views are content-neutral seems insupportable. Insofar as preaching the merits of traditional marriage in opposition to the merits of legalizing gay-marriage carries with it a foreseeable impact it can hardly be so. Indeed, the whole point of writing letters (expressing political views) and delivering sermons (expressing religious views) is geared at convincing others to share these views in order to bring pressure to bear on those legislators who might otherwise be favourably disposed to legalizing gay-marriage, or to bring pressure to bear on those who might otherwise vote for them. The idea that such activities are content-neutral is blandly false, then, since

their very purpose is to have an impact upon others whether directly (by convincing them to share these views) or indirectly (because if successful, gays will be prevented from marrying).

The relegation of issues to ‘public’ and ‘private’ realms is said to offer false dichotomies: Whereas liberal restraints make popular will subject to individual rights prior to and outside of the political process, purely majoritarian processes reflect the majority’s will in ways that might cease to be acceptable to those who continually ‘lose’ in the deliberative process. In this way, the relegation of issues to one or the other realm provides “a criterion” rather than a “standard—that is, it tells us what kind of thing should count as a consideration, but it does not give us a way of measuring it that others can reliably replicate” (Vernon, 2001: 90). Deliberation over education is clearly appropriate, but more to the point, the removal of some from the outcome of this deliberation in the form of rights-based exemptions fails both to take into account the legitimate demands of others and to discern the reasonable limits to their own demands.

### *5.3 What is an Appropriate Civic Education in a Pluralistic Society?*

The ‘democrat-in-waiting’ argument states that for reasons of self-governance, children need to be taught certain values that lead to good democratic citizenship. Such is usually characterized by the ability to participate in the democratic polity on equal, liberal-democratic terms as others. Moreover, the ‘democrat-in-waiting’ argument views as imperative that the democratic state should require, via one route or another, the inculcation of certain values in order that democracy itself continues to flourish. With this, there are very few observers who disagree. Gerald Dworkin, for instance, writes: “it is a reasonable feature of a good society that it is self-sustaining in the sense that people

who grow up in such a society will acquire a respect for and commitment to the principles which justify and regulate its existence” (1988: 11).

According to Gutmann and Thompson children have a (future) right to make intelligent use of their civil liberties, both for their own benefit *and* to protect the rights of others (Gutmann and Thompson 1996: 65). This provides the basis for thinking of a ‘civic education’ as a right properly of the child. Moreover, the strong interest that the wider society has in the upbringing of its future citizens provides the basis for a strong societal claim in how these citizens are geared toward citizenship. The ‘democrat-in-waiting’ argument is distinguished, then, from the ‘liberal-in-waiting’ view by the fact that, here, both the individual *and* members of the larger society can be said to be the beneficiaries and to carry the burdens of however well or poorly individual members of its citizenry embrace the democratic values that are deemed necessary for the continued flourishing of the larger society as a whole, as well as how well adults eventually function within it.<sup>147</sup> Since children will normally become members of the wider, democratic society, securing allegiance to defensibly minimal civic values is appropriate.

Civic education can include the panoply of various values, facts and competencies that might be said to be concerned with the proper functioning of a democratic regime. These can include strongly republican ideals whereby civic engagement is thought of as a moral duty and perhaps, in Aristotelian fashion, the exemplification of humanity’s highest ideal. One objection is that to the extent that it is viewed as imposing a particular value, it is contested as inappropriate for a pluralistic society, some of whose members

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<sup>147</sup> Since democratic decision-making is collective by definition, it is impossible to neatly disentangle each individual’s input from the whole and examine it separately. We must proceed on the assumption that the quality of collective decision-making reflects to a greater or lesser extent, the quality of decision-making of individual citizens. For an examination of the relative superiority of group decision-making see Surowiecki (2004).

might decidedly disavow the intrinsic worth of politics, some who might even think of politics as profane. The more modest view is that civic participation is justified merely as the necessary price of accepting the benefits of the liberal order (Kymlicka 2002: 294). And while this view is not usually accompanied by prescriptions that *require* civic participation – and judging by low voter-turnout within advanced liberal polities, citizens are just as likely to think it is their right *not* to participate in democratic politics than they believe it is their duty to do so – <sup>148</sup> it can be invoked to defend the inculcation of traits thought required to live up to the modest ideal should people choose to do so.

We can divide a civic education into the following three components: knowledge, skills and virtues. *Civic knowledge* can be understood as facts and concepts about civic affairs “such as history, structure, and functions of government” (Murphy 2004: 224). Notably, the separation of ‘facts’ from values does not render the realm of civic knowledge uncontroversial. After all, the ‘culture wars’ has clarified the extent to which the question of ‘facts’ in school, particularly with regard to history, is subject to as much controversy as are questions of *values*.<sup>149</sup> Rather, the point is to distinguish between those things that can be called facts within the parameters of contestable academic discourse, and those things that rest on value judgements that, while more or less defensible given other generally accepted ideals about the culture of democracy (to which I shall return), rest upon normative judgements that could never admit of scientific investigation and/or replication and so forth. The second component, *civic skill*, can be defined as the “trained capacities for deploying civic knowledge in the pursuit of civic goals, such as voting, protesting, petitioning, canvassing and debating” (ibid). These

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<sup>148</sup> This should not be taken to mean that *electoral* politics is the only or even the best way to participate in democracy.

<sup>149</sup> See Ravitch (2002).

skills are important for anyone's ability to participate in the democratic polity in order to contribute to fashioning policy to their liking regardless of their preferences, ideals and values etc...The third component, and an important corollary to other two, is civic *virtue*. This speaks to the *motivation* with which individuals employ their civic skills and what purposes they attempt to serve when they enlist the use of their attained civic knowledge. For instance, some things are ruled out such as fraud and deception. (However, since even this is not necessarily self-evidently so the necessity of imparting civic virtue takes on some shape.) More to our point is the question of the *public-spiritedness* with which citizens within a liberal polity ought to engage one another. Whatever else upon which liberals diverge, it is relatively uncontroversial among them that democratic politics must proceed from a principle of reciprocity whereby we are prepared to grant others no less than the same terms we are prepared to abide ourselves. This is the fact of life in modernity. Once we reject the political privilege that was the hallmark of pre-liberal society, our only alternative remains a "continuing ethic of reciprocity in politics, in which claimants must content themselves with claims that they are also prepared to 'allow' to others" (Vernon 2001: 32).<sup>150</sup>

### 5.3.1 Reciprocity and Toleration

The so-called 'deliberative turn' of the 80s and 90s (Dryzek 2000) refocuses democratic politics *away* from the 'you win some and you lose some' of competing interests based upon "a set of preferences, fixed prior to and independent of the political

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<sup>150</sup> Although I claim that this is a liberal notion, the fact remains that even those who deride liberalism employ its language and concepts. We need look no further than self-proclaimed conservatives in the US who regularly rely on the constitution, an essentially liberal document, and the notion of the rights contained therein to argue against the very liberalism that they are adducing. This confusion leads to the incoherence of attempting to use the constitution to restrict the rights of, for instance, gays and lesbians in the name of religious freedom while deriding the liberalism that would extend rights to gays and lesbians.



process” (Kymlicka 2002: 290) and the ability to ‘capture’ policy-making at any one time, and *toward* the ability to co-operatively arrive at reasonable outcomes even within a context of disagreement with one’s fellow citizens. Kymlicka refers to this as the shift in contemporary democratic theory “from ‘vote-centric’ to ‘talk-centric’ theories of democracy” (ibid). He continues: “it is increasingly accepted that [the] ‘aggregative’ or ‘vote-centric’ conception of democracy cannot fulfill norms of democratic legitimacy” (ibid). One reason why this might be so is based on the question of reciprocity. The *legitimacy* of ‘talk-centric’ rather than ‘vote-centric’ theories of democracy rests on the fact that people have the equal opportunity to convince others of the superiority of their position and to meet various objections. ‘Vote-centric’ theories, by contrast, provide no avenue for citizens “to distinguish claims based on self-interest, prejudice, ignorance, or fleeting whims from those grounded in principles of justice or fundamental needs” (ibid). The difference, however, matters. For instance, I might share someone’s view simply because I respect and admire that person whose view it is, and therefore assume their view to be the correct one.<sup>151</sup> However, if I were to discover that this view was informed by naked self-interest rather than fairness or concern for the common good, I might take a closer look and revise my holding of that opinion. In other words, ‘talk-centric’ theories hold citizens to be rational creatures capable of discernment even while it does not (for it cannot) *require* them to come to certain conclusions or to vote for particular outcomes for reasons *other* than naked self-interest.

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<sup>151</sup> Hobbes claimed that we believe things that are told to us in proportion to our pre-conceived views of the person telling us, rather than based on the thing itself, which will oftentimes regard something we know little or nothing about.

The notion of persuasion inherent in ‘talk-centric’ theories finds currency with democratic principles, for without it minorities<sup>152</sup> would be subject not only to views and ways of life they may find morally repugnant, but they would no longer even have any reason to accept such views at all for what makes defeat acceptable, at least theoretically, is that minorities too have the opportunity to convince others and meet objections. This is one way, at least, in which all participants, eventual winners and eventual losers, can be said to be equal (Vernon, 2001: chap. 4). It finds favour with the majority principle associated with democracy because for a demand to be successful it must secure the support of a majority and therefore ‘talk-centric’ views are based on the idea that one needs to *convince* others in order for any particular demand to be successful: “The need to convince others, as opposed to just reinforcing one’s own convictions, creates pressure to root out special pleading from one’s case, to generalize one’s principles, and to learn what others find important” (68).

Closely aligned with the idea of reciprocity is that of toleration, for without toleration for the right of others to choose to live in ways that we would find unacceptable for ourselves, the spirit of reciprocity would be most ungenerous. The public-spiritedness that animates calls for reciprocity and openness to the claims of others also animates toleration. A morally defensible civic education, then, “must affirm the importance of respecting the many different ways of life that individuals permissibly choose within the framework of free institutions, even when those differences divide them at the deepest level of identity” (Callan 1997: 12).

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<sup>152</sup> Minorities, here, refers to views or outcomes that do not, ultimately, find favour with the majority rather than referring to any particular group of people e.g. ‘visible minorities’.

What this means in essence is that a common school curriculum must embrace the minimally necessary elements of a common culture that allows for the scope of reasonable conceptions that persist within the polity itself. These include the expectation that people should be able to justify their claims on the same terms as they expect from others and the extension of toleration for those claims with which we disagree, but which are nonetheless reasonably permissible within a society marked by pluralism. Reasonable conceptions do not, of course, exhaust the landscape of all conceptions that exist within a liberal polity. Unreasonable conceptions also exist.

Some have stated that the difference between reasonable and unreasonable conceptions is acceptance or rejection of Rawls' "burdens of judgement" (Brighthouse 2010). Rather than viewing conceptions of the good that differ from our own as essentially wrong, the "burdens of judgement" refers to the notion that people's conceptions of the good result from a combination of the culture in which they were raised, their individual life-experiences, and the limits of their individual rationality, and that the fact of this combination makes such views *as reasonable* as our own (Rawls 2005: 54-71). *Unreasonable* conceptions, those that do not accept the "burdens", need not be either intolerable or intolerant. Some people might still accept, for instance, that others have something like an individual right to lives along lines that are wrong and ill-thought, without giving up their right to be treated equally as a citizen with equal duties and privileges. In this way, even if they do not accept the Rawlsian 'burdens' they do not directly oppose the common culture and the public-spiritedness that it suggests. Some unreasonable conceptions, however, *do* directly oppose the common culture by suggesting that limits should be placed on the rights and duties of certain citizens. Neo-

nazis who would restrict citizenship to whites display an unreasonable conception that is counter to the common culture.

#### *5.4.2 The Convergence Thesis*

To talk about a common culture or a morally defensible common education is not to talk about unanimity. Even if we could all agree that some civic education was necessary, we cannot hope for unanimity about what this would entail. Many theorists contend that there is little difference between a civic education geared toward good citizenship and one geared, for instance, toward ‘autonomy’ precisely because skills such as critical thinking which are thought necessary in order to be able to make decisions that reflect one’s motivating values, whatever values these may be, are the same skills which would enable one to critically reflect upon their own received values and the very factors which motivate their decisions, thus autonomy and democratic decision-making become one and the same (Brighouse 1998; Gutmann 1995; Feinberg 1980). Furthermore, as I have previously noted, what some find objectionable about this is the focus upon the examination of received truths that are thought unquestionable. This mingling of democratic decision-making and autonomy-promotion is referred to as the ‘convergence thesis’.

It seems reasonable that one must be well-schooled in the proper functioning of a democratic polity in order to “employ the political freedoms of democratic citizenship” (Gutmann 1980: 350). This is because “the value of a liberal democracy to its citizens is in large part contingent upon the ability of its citizens to exercise their political rights intelligently...” (ibid). The ability to operate effectively within a democratic order is therefore twofold: On one hand it adds to the individual’s ability to choose among

conceptions of the good by itself being one such conception, that is, one can choose to embrace a life of civic engagement as an inherent good. On the other hand, democratic politics acts as the instrument which, if used ‘intelligently’ may enable one to employ one’s freedoms effectively, whatever these are understood to be. This latter view is clearly less problematic on its face than the former, and yet it leads to the objection that even a defensibly minimal civic education does by the back door what it cannot by the front; namely, that by promoting autonomy as a necessary corollary to the inculcation of civic values, it espouses ideals that are too contestable to achieve the sought after agreement (Callan 2000). Others have argued that there is a “significant divergence between the implications of only using education for civic aims and using education to promote autonomy” (Fowler 2011: 89). The successful teaching of good democratic values will not *necessarily* yield the convergence thesis, since it is not the case that the requirements of good civic education would promote autonomy *to the degree* that would satisfy those who believe autonomy-promotion to be a goal of education in and of itself (93).

Notwithstanding the above, the question of ‘spillover’ effect is real (ibid). And it does seem correct to say that the general tendency toward critical reflection, if undertaken with any degree of rigour, would greatly enhance the possibility of critical *self*-reflection and possibly even guarantee it (Cohen 2000: chap. 1). This is further substantiated by the fact that liberal-democratic decision-making itself requires a certain ‘critical-distance’ by which is meant the possibility of viewing the claims of others as arising from the same fundamental right to advance claims as do our own, and with the expectation that they will be dealt with on the same footing. This does not, of course, mean that one *would*

come to disparage one's own way of life for one might find myriad reasons to recommend it. The point is that one would not be taught that critical self-reflection is inherently good. Simply, though, that the ability to reflect upon anything with a certain 'critical-distance' greatly enhances the chances that such reflection would come to land on one's own way of life.

I believe that what I have said so far is correct: That parents don't have fundamental rights vis-à-vis their children, that while children are not owed an 'open future' it is neither morally prohibited to provide one nor the autonomy-promoting propensities that are annexed to other things which it is generally though reasonable to provide – namely some sort of civic education. The importance of liberal neutrality is that it provides a basis for introducing myriad viewpoints without violating the liberal principal of equal concern and respect. However, liberal neutrality is controversial. The manifestation of equal concern and respect is viewed by those who reject views other than their own as a distortion of truth and a preaching of moral relativism. Perhaps though, rather than looking for a strong and direct compatibility, we must content ourselves with a more permissive standard. For example, teaching that Christ is resurrected directly affirms the existence of god – a Christian one at that – whereas to say nothing at all about god is not to deny his existence. While this might be an obvious point, it must be remembered that in a pluralistic society wherein we cannot each hope to have our preferred worldviews exactly reproduced in our educational system, we must all content ourselves with lessons that are not directly incompatible. This, it should be noted, also applies to those who would embrace liberal neutrality. The truth of this point is largely ignored in the interest of establishing that liberal neutrality is, indeed, more

compatible with some ways of life than others. Critics often speak as if liberalism was itself a conception of the good; however, it is important to point out the extent to which liberals who believe in liberal neutrality also do not get the benefit of public institutions which affirm their personal worldviews. It could only be otherwise if we were to, erroneously, assume that the support for liberal neutrality stemmed from a belief in moral relativism, which it does not. I can embrace the need to present myriad and opposing viewpoints even while privately not accepting them all as equally good. Furthermore, I may very well engage my child in a discussion as to why I find particular views preferable. There can be little doubt, of course, that the critics are right to the extent that neutrality as I conceive it will accommodate some views more readily than others, but it need not be grounded on the rightness of those views.<sup>153</sup>

#### *5.4 Exposure versus Indoctrination*

Parental concern that children will come to reject by degree or in whole the viewpoints they wish to impart to their children if they are exposed to countervailing viewpoints or facts about life (alternate religious beliefs and sexualities, gender-equality) is not new in the annals of political philosophy, nor indeed of jurisprudence, as I have noted. Liberals have largely dealt with this concern by invoking a distinction between exposure and indoctrination, that is, the view that simply exposing people, in this case children, to the facts of pluralism and the liberal requirement that the state show equal concern and respect to all its citizens is not the same thing as endorsing pluralism or the ‘moral relativism’ that all views are equally true or desirable. *Mozert v. Hawkins* (1982) offers a case in point.

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<sup>153</sup> See Macedo (1995). See Raz (1990) for a rejection of the epistemic abstinence view.

At issue in *Mozert*, was the Holt reading series that was popularly used as a means of teaching reading skills. Plaintiff parents objected to their children's exposure to such things as doctrines of evolution, gender role-reversal, and role-elimination that were depicted in the series. After the school board forbade children from being excluded from the classes in which the series was used, parents took the school board to court citing a violation of their religious liberties and those of their children. During court proceedings "witnesses testified under cross-examination that the plaintiff parents objected to passages that expose their children to other forms of religion and to the feelings, attitudes and values of other students that contradict the plaintiffs' religious views without a statement that the other views are incorrect and that the plaintiffs' views are the correct ones" (*Mozert*: B II).<sup>154</sup>

Clearly, the idea that schools may not even expose some children to views that contradict those of their parents unless they are willing to explicitly confirm that those views are incorrect, is a non-starter. In an attempt to elucidate what was at stake for the objecting parents in *Mozert*, Stanley Fish states that what many failed to understand in *Mozert* was that "the distinction between 'teaching about' and 'teaching to believe in' – between exposure and indoctrination – rests on a psychology that is part of the liberalism" (1999: 92) the plaintiffs reject and did not want imposed on their children. He argues, therefore, that the distinction that liberals are fond of making between indoctrination and exposure no more relieved the school board from a duty *not* to expose than it would have from a duty *not* to indoctrinate. While Fish is correct about what the plaintiff parents objected to in *Mozert* he is incorrect about what their objection implies.

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<sup>154</sup> See Stolzenberg (1993) for a sophisticated analysis of the case and the varying claims, of varying merit, that parents made.



His argument is that the distinction between indoctrination and exposure was rejected by the dissenting parents in *Mozert* and *therefore* their claims to have their children removed from the course were justifiable on that basis. But, if we accept the argument that parents do not have an infeasible right to induct their children into their own particularistic views then what is relevant or not to the dissenting parents is not dispositive; some other basis for proceeding must be found.

I have argued that at least one such basis must be the interests of the child herself, which the parents are not uniquely capable of protecting. I have identified one particular interest and that is the child's interest in being a fully participating member of the family unit. On this basis, the decision in the *Mozert* case, which found *against* the parents, seems to reveal a bias toward identifying the child's interest with prototypically liberal values, which could debar a child raised in a non-liberal family from fully participating in the cultural life of that family. This is a trenchant point, which can be met by offering some context. First, it is likely that most families can withstand some level of deviation. Past a certain early age, people are not automatons that do little more than regurgitate what is told to them. Not replicating parental views exactly can hardly, in and of itself, equate to not being a fully participating member in the cultural life of the family. Second, it would be difficult to measure the point at which a child having been exposed to ideas that distance her from the viewpoints of her parents, is necessarily having her interests harmed. Indeed, any such child might be said at this point to have competing interests: On one hand to be a fully participating member in the cultural life of the family and on the other to be true to the beliefs and views she has come to develop, which put her at odds with the culture in which she was raised. It might be argued that had she not been

exposed to ideas that provided the impetus for her burgeoning and controversial ideas, there would be no *competing* interests, only her interest to be a fully participating member of the cultural life of the family. Two things might be said about this point. First, it is very difficult to neatly categorize and compartmentalize people's interests as if people were little more than vessels waiting to be filled with information, and even if true it cannot respond to the fact that there are some children who will feel naturally at odds with parental viewpoints. Second, it is appropriate to recall that the 'democrat-in-waiting' view requires that appropriate civic values are imparted for the benefit not just of the adult that the child will become, but for the sake of the wider society. In other words, while the child in question might now have competing interests that the exposure to countervailing values has precipitated, society also has competing interests: On one hand to secure a space whereby religious and other moral values can be expressed and practiced, while at the same time securing allegiance to values that make it possible for everyone to enjoy the equal benefit and burdens of the liberal order.

A few recent examples best exemplify the point. The first is the Ontario Liberal Government's recently-passed 'anti-bullying' legislation. Some religious groups oppose the legislation for two main reasons: First, it explicitly mandates queer-positive groups in schools where students have expressed a desire to form them. Second, it expressly outlaws bullying based on sexual orientation. This is noteworthy because a similar piece of legislation put forward by Conservative MPP Witmer did not. While opponents of the Liberal Party's legislation do not claim that they would allow bullying based on sexual orientation, the fact that they oppose its explicit proscription seems to be a means simultaneously to de-emphasize the extent of homophobic bullying and to enlarge the

‘wiggle room’ given to claims of religious freedom when gay-negative expressions are vented in the name of creedal adherence.<sup>155</sup> In this debate, religious parents have cast themselves as the victims of attacks on their religious liberty. This point resonates, in particular, among the province’s Catholic School Board.<sup>156</sup>

Beyond just anti-bullying legislation lay the concern that in order to make the legislation meaningful children must be taught that bullying is bad and in order to do that, examples of what it is and who is most susceptible to it are necessary. The position of faith groups that oppose gay-positive depictions in the curriculum is that while bullying for any reason is unacceptable, this can be taught without ‘affirming’ lifestyles which oppose their beliefs. We might think of this as something of a compromise position between the clearly unacceptable notion that homophobic bullying could be allowed in the name of religious freedom and the Liberal Party’s curriculum agenda which is guided by their policy document on equity and inclusive schools, which provides that teachers ought to use materials that reflect the diversity of their students. In combination with the government’s controversial anti-bullying bill, this would seem to suggest the inclusion of gay-positive materials (Ontario Ministry of Education 2009). The faith groups’ ‘compromise’ position, however, might simply not be efficacious. A 2011 report on homophobia, biphobia and transphobia in Canadian schools found that owing to the extent of harassment and the fact that administrators regularly “look the other way” when LBGQT individuals are targeted, Ministers of Education and school divisions should

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<sup>155</sup> In 2011, a controversy erupted over a proposed anti-bullying bill that included language which, on one hand, was viewed as merely protecting a zone of legitimate free speech from wrongful claims of bullying, and on the other hand, was viewed as a ‘blueprint’ for bullies to evade penalty. (An anti-bullying bill was eventually passed without the controversial passage.). See Fincke (2011).

<sup>156</sup> Though there has been some speculation, and despite much ado from parents and the clergy (although very few Catholic educators, who are by and large supportive) over the government’s anti-bullying bill, the Chair of the Ontario Catholic School Trustees’ Association said they would not be taking the government to court “at this time”(Swan 2012).

develop “respectful representations” of LBGQT people in their curriculum (Taylor and Peter et. al. 2011).

Inclusion of all common bullying incidences, which necessarily includes homophobic ones, is more likely to result in a lessening of bullying than simply abstract lessons that teach that bullying is wrong. Even workplace anti-harassment training for adults generally utilizes examples to clarify issues. Examples are very important to many learning-styles and are particularly so for children. Would such lessons not use any real-world examples? Likely they would. And if they do, the exclusion of examples of homophobic bullying might blunt the anti-bullying lesson when it comes to those who either identify as LBGQT or are perceived to. Here, then, we can identify a second interest of (some) children and that is for those children who do identify as LBGQT and who do come from homes where such identification is not acceptable, gay-positive images in the school can be said to serve their interests. Importantly, making exposure to such material voluntary, that is, allowing exemptions for those children whose parents find the material objectionable would be counterproductive in this instance. However, as in the famous words of Justice McReynolds: “a desirable end cannot be promoted by prohibited means” (Meyer 1923). The question that remains to be answered is whether or not in the context of claims of a violation of parental and children’s religious liberty the exposure mentioned above amounts to a prohibited means.

A second case in point is the province of Québec, which in 2009 implemented a course entitled Ethics and Religious Culture that was to be mandatory in elementary and high school (except grade 9). The Ministère de l’Éducation claims that the course, which exposes children to various world religions, is necessary in order to inculcate the values

necessary for life in a pluralistic society (Ministère de l'Éducation, Loisir et Sport 2008). Dissenting parents claim not to object to the value of toleration or to their children's exposure to views other than their own *per se*, but that exposure to contending views risks indoctrinating children into the view that all truths are equally valid, in opposition to whatever particularistic truth-claims are being taught at home. And it is owing to the mandatory nature of the course that their religious liberties and those of their children are violated.

The controversy over what civic values children should be taught is used as a springboard to the conclusion that the education of children is a matter of parental conscience and thus subject to the *limitations* of government interference found within the notion of liberal restraints on majoritarianism, which majoritarianism is expressed in governmental decisions. One of the problems with educational policy, then, is the liberal notion of consent or more precisely the question of *whose* consent ought to be sufficient. Since liberal-democratic societies are based on the consent of the governed and since agreement about what common schools should teach is not forthcoming, it is argued that parents are correct in claiming that they should be allowed to have their child exempt from certain aspects of the common curriculum to which they do not give their consent.

Indeed, claims for exemptions might be viewed as a compromise motivated by deeply democratic impulses in that claims are for exemptions from *particular* aspects of schooling rather than claims that certain curriculum should simply not be taught to anyone's children.<sup>157</sup> What might be said about this? Well, the fact of non-consent to particular outcomes, in this case the (perceived) outcome that children will adhere less to

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<sup>157</sup> It is possible, of course that this position stems from the fact that claims for exemptions come from a minority of parents who are, by definition, otherwise incapable of commanding that such and such a curricular item be nixed.

the values of their parents, is not necessarily an argument in favour of being exempt from those outcomes. Consent must be understood as being of two kinds: Consent to the most basic aspects of a democratic polity, and consent to the particular outcomes that that polity recommends through its democratic processes. Universal consent to either let alone both is quite simply impossible. If it were, democratic politics would be largely irrelevant.

Parents' free exercise rights are seen to be violated because they are constituted by the right not only to practise the religious beliefs of their choosing, but to pass along their beliefs to their offspring. As I have previously argued, however, such a right does not inhere within parental religious freedom, but only within the parents' instrumental rights to order the lives of their children along lines that meet the children's interests. The parental claim to a violation of their *children's* religious rights takes the following form: Children's religious rights are violated by exposure to ideas that contradict the beliefs they have not yet formed and that it is precisely for this reason that their exposure to such ideas is not to be permitted. There is a fundamental flaw with this particular formulation which is that a child whose beliefs are endangered precisely because they have not yet been formed cannot claim such protection of them.

Parents have a presumptive status in terms of educational authority. It is *presumptive* owing to the fact that they begin educating their children many years before children even reach school age. Moreover, their influence over their children extends far beyond that initial period. Naturally it will, at times, vie with other influences for children's allegiance. As earlier stated, the presumption is weak; it does not include an ineluctable right to an all-out veto of the state-mandated curriculum. If we can agree that

parents have, at least, a weak presumption in terms of educational authority then such a presumption requires that parents be given substantial discretion to order their child's moral education, which they are able to do in any number of ways throughout the child's upbringing. It follows from this that the state may not issue truth claims *which directly oppose* the values that parents impart under the gambit of such discretion. To do so would undermine the substantial discretion in the first place. This, however, should not be equated with the argument that any directive *which has the consequence* of challenging the desirability of these values should likewise be disallowed since parents do not possess the right to hold, in abeyance, the conclusions that children would otherwise reach until such time as they can direct them, as if children were mere puppets to be manoeuvred. It is for this reason that there remains an important difference between exposure and indoctrination and for this reason we cannot say that exposure and indoctrination are equally forbidden despite the possibility of their having similar consequences.

Dissenting parents, of course, will view positive depictions of things they view negatively as directly opposing their views. And perhaps this is inevitable. And it might not be possible to present to children opposing arguments about the un-desirability, say, of racism and ask them to reflect intelligently upon such arguments and then to choose a side. Rather we teach children that certain things, like racism and bullying, are wrong and once they have absorbed those lessons they can, as they mature, come to appreciate the force of the arguments that favour this view. Perhaps it is for this reason, however, that the relative age of the children to be taught matters very much to the debate. For instance, it is unremarkable to say that a basic liberal tenet is that the state may not issue truth-

claims about the relative rightness or wrongness of at least reasonable conceptions of the good. One objection, then, is that it will be difficult for very young children to grasp a distinction between (a) exposure to the fact of pluralism and (b) indoctrination into espousing the equal value of plural viewpoints to which they are exposed, forcing teachers, in fact, to do (b) in the name of (a). How does one explain to an eight year-old, for instance, that her best friend, Hassim, adheres to different religious tenets than she does, but that she need not believe they are as good or worthy as hers, that she can believe that Hassim's whole family is dead wrong, as long as she respects their right to be so? If the course merely exposes children to the incontrovertible fact of different people's viewpoints, without a correlative endorsement of the equality of these viewpoints, then there is no necessary violation of the tenet, but it is difficult to envision how it is possible with regards to, at least, prepubescent children to inculcate the civic toleration that is meant to lead to harmonious social relations without espousing the equal value and the equal truth-claim of all views. The distinction between older and younger children is especially important if we are concerned about a child-centred view, and harming children's interests.

### *5.5 Younger versus Older Children*

I am attempting to elucidate a child-based theory that nonetheless takes into account society's equally important need to impart basic civic values. Thus far I have determined the following: (1) children have an interest in being fully participating members of the cultural life of the family, but this interest is not harmed by a certain measure of deviation from parental viewpoints. (2) Society has an interest in imparting the kind of civic values upon which co-operation with one's fellow citizens in the ongoing reproduction of the



society is made possible. (3) Exposure to viewpoints incompatible with what one is taught at home might precipitate a deviation from parental viewpoints that is great enough that the interest identified in (1) is harmed, in which case it is likely replaced by the child's countervailing interest to live according to burgeoning viewpoints. (4) Some children have an interest in having positive depictions of alternate sexual-identities and gender-roles to which they will not normally have access. I have now considerably narrowed the scope of children whose interest could be harmed by exposure to viewpoints which are incompatible with what is taught at home. There is, however, a further argument to consider.

This argument claims that exposure to values and viewpoints other than what one learns at home, is harmful to children. One parent speaking about Québec's Ethics and Religious Culture course concurred, saying, "We can't do this to children. It will only confuse them" (The Star.com 2008). This 'harm principle' argument has been suggested previously. George W. Dent Jr. tells of children going home in tears because they are deeply frustrated and confused by the inconsistency between what they are learning at home and what they are learning at school (1987: 888). In fact, dissenting parents in the Québec case argued for an exemption from the course not only on grounds of a violation of religious rights, but also an article of the *Education Act* which allows for such for "humanitarian reasons and avoiding serious harms" (D.L. c. Commission scolaire des Chênes, 2009).<sup>158</sup> This claim holds some promise on a view that places the interests of

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<sup>158</sup> Parents lost at the school board stage. This decision was appealed all the way to the Supreme Court, but since the 'harm avoidance' is governed by the Education Act, the only recourse to win on this argument was by way of appeal of the boards' decisions, which here was based on the alleged intervention of the Education Minister. This was held to be unfounded and the boards' decisions (as all of them had, independently, refused exemptions) were never overturned. The Charter challenged will be discussed in our appendice.

children first; however it is not based on the putative violation of either parents or children's religious rights. And importantly, it is not at all clear that it could be applied equally well to, say, a sixteen year-old as to a six year-old. This is because it is unreasonable to suppose that a six year-old and a sixteen year-old are in the same position regarding their moral and emotional development, generally speaking.

Absent a conception of harm at this point, it seems at least reasonable to say that a six year-old who is in tears every day after school likely is being exposed to things which she is not yet ready to handle. On the other hand we expect that sixteen year-olds need to grapple with issues of values and morality, tolerance and conflict in a way rather different from that of a six year-old. Echoing a similar sentiment, Sylvain Lamontagne, one of the parents who opposed Québec's Ethics and Religious Culture course, claimed that the course is "a course for adults, not a course for kids" (The Star.com). Does such harm attach to a sixteen year-old as easily as it might to a six year-old? It seems far-fetched to suppose that an average adolescent is harmed simply because she is uncertain as to how to proceed once she is exposed to diverse moral judgments or of what to make of the fact of diversity. To a large extent quite the converse is the case: We are doing youth a disservice if we do not aid them through this process now. Indeed, even the spokesman for the *Coalition pour la Liberté en Éducation*, a group aiding in opposing the compulsory nature of Québec's ERC course, made this distinction between younger and older children (Fidelman 2009).

Owing to the distinction being made here between younger and older children, to proceed we must look at the case of elementary school children separately from that of

secondary school children.<sup>159</sup> Looking at elementary school children, I have already identified the following problem: That exposure to ideas different from those they learn at home may result in a kind of harm which we ought to avoid. This leaves us with two options. Our first option is to exempt from particular course content those children who would experience such harm. While this is largely unproblematic, and perhaps even required from a theoretical point of view, its practical implementation is considerably more difficult. For instance, would the standard for harm be how much distance there was between the views of parents and the views which might be introduced within the gambit of the course? If so, would such a standard then present a *normative* problem for dealing with those parents who oppose the course, but whose views are said to be ‘not that far apart’ from the ones to which children might be introduced? Would harm be ascertained before or after the fact? If before, on what basis would (potential) harm be ascertained since parents cannot be the sole arbiters of whether or not their children would be harmed by such exposure without putting us back to square one? If after, what harm might be done to children while we ascertain whether or not they ought to have an exemption? Our second option is to provide exemptions for all parents who request them regardless of the reason why. While this would deal with the previously identified difficulties, it would not address the issue for which the state brought about the course in the first place: Its important interest in developing certain civic qualities in its citizenry.

Allowing exemptions from objectionable course content represents a less drastic transition than the all-or-nothing approach that would exist otherwise. It is not that such an ‘all-or-nothing’ approach violates the religious rights of either parents or children, but that the optional approach has several advantages. First, it offers a practicable way of

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<sup>159</sup> In Québec, elementary school runs from K-6 and high school from 7-11.

avoiding the harm that I have identified as a normative barrier to instruction within the elementary school curriculum. Two, a more cautious approach might cool rather than stoke the hostility of parents, which is desirable from the point of view that, as this thesis has claimed, both parents and schools (as quasi-instruments of the state) have a responsibility to see that children's interests are protected. Presumably, this is better enabled by reducing conflict between parents and school boards whenever possible. The actual cost/benefit balance between avoiding harm to individual children at the (possible) risk of increasing (or at least not decreasing) intolerance would require a longer and more sustained discussion than is offered here but could take into account such factors as the number of children whose parents would seek an exemption and whether there were less conflictual ways of getting the idea of toleration across – including requiring the course at a later stage of development – the persistence and severity of certain intolerant attitudes and so forth. Whatever else, course curriculum regarding civic toleration cannot be developed in a vacuum and as material contexts change the curriculum should reflect that. It is owing to acknowledgement of this fact that we see the development of the gay-positive curriculum that has acted as such a flashpoint, that is, the incidents of gay-bullying that has had dire consequences has instigated concerted examination of the issue.<sup>160</sup> Moreover, it is possible that the mere fact of particular curriculum being presented to some children will have a desirable effect even on those not exposed to it.

(In elementary school in Québec prior to the rearrangement of the school boards, I recall

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<sup>160</sup> The preamble to Ontario's Accepting Schools Act, for instance, says that there is a need "for stronger action to create a safe and inclusive environment". In defending amendments to the original bill that would forbid principals from overriding student requests to form, specifically, gay-straight alliances and recognize them by that name at the students' request, Ont. Education Minister Broten has maintained that sexual minorities are more prone to bullying and that is why they get specific mention (Ferguson and Benzie 2012). Several studies bear this out (Taylor and Peter et. al. 2011; Berlan et. al. 2010).

wanting to attend the ‘morality’ courses that my non-Catholic friends attended and talked favourably about instead of the catechism classes I was required to attend as a Catholic student.) The overriding point is that on a child-centred approach the argument as to a violation of religious rights does not follow.

Turning to the somewhat different issue of secondary school, the standards shift. Owing to the age of the children at hand, there is a greater sense that they are capable of tackling these difficult issues and are not normally harmed by debilitating confusion which I identified as more likely among younger children. The fact of older children’s greater experience and cognitive development allows them to understand that not everyone thinks as they do even if this does not lead them to think others’ views are equally correct. What, then, do we make of a sixteen year-old who claims on his own behalf that mandatory attendance violates his religious rights? If we can claim that he is not normally harmed by exposure to diverse moral viewpoints precisely because of his age, must we not admit that he has standing to claim that he has a religion of his own? And if so, do we believe that exposing him to material he claims violates his religious faith actually does so? One answer to the question is not given by the age of the child but by the nature of rights themselves, for rights are always limited by consideration of the like rights of others. In a pluralistic society this consideration *necessitates* an adherence to the basic civic value of tolerance for the permissible choices of others, which value must, seemingly, start with explicitly acknowledging the fact of diversity from a slightly stronger base than merely begrudgingly. To the extent that it is adherence to this necessary value (and not to any particular faith or viewpoint) that a civic education is trying to inculcate, the situation is remarkably different from, say, the paradigmatic case

of forcing people to attend particular religious institutions against their will. But perhaps this answer merely claims that he ought to be exposed to certain countervailing viewpoints. The question of his right not to be is a separate one. However, this can be answered if we re-focus on the putative violation, bringing us back to the idea that indoctrination and exposure are not coterminous. In fact, the difference between one and the other becomes greater with the child's age and maturity. We also must look more explicitly at the particular claim in its proper context. What specific principles might one be elucidating if they argued that they should not be exposed to the fact of diverse viewpoints on religious grounds?

There are two possible positions such a plaintiff might take. P1 will be the view that I am confident in my religious allegiance and wish not to be troubled by exposure to other views. P2 is that I am either comfortable or uncomfortable with my present views, but either way, I fear the uncertainty I may experience if exposed to alternate views. Harry Frankfurt elaborates the point when he says that we not only care about certain things, but we care about caring about them and this sometimes guides us away from things which might divert or dissuade us from either following a particular path or from caring about following that particular path (1988: 87). Following from Frankfurt, on the P1 view, exposure would seem to carry virtually no risk at all since the person is said to be confident in his or her religious profession so there is no fear, on this view, that exposure will lessen their religious ardour, or otherwise impede their ability to publicly affirm and practise the faith of their choice. If it happens to challenge their religious ardour, so be it, but this is something that could only be known *after* the fact and cannot, logically, be the basis for the challenge.

The P2 view offers a slightly different challenge. On this view, the person is said to be fearful that exposure to diverse points of view might challenge their commitment to their beliefs. This view seems to require us to choose between the equally important considerations of religious freedom and civic tolerance. Although Frankfurt's observations are astute regarding what it is that people wish to protect, it might be that fear of having one's mind changed bears more in common with the issue brought forward in regards to younger children: That they don't yet have a religious viewpoint for which they need the protection of religious rights. It isn't clear that religious rights to free expression and to be free from indoctrination include the safeguarding of religious uncertainty. It might be the case though, that there should be an exemption for one who, on this view, is perhaps emotionally or psychologically vulnerable on the same harm principle adduced for younger children. Such exceptional circumstances, owing to their exceptionality, are not always foreseeable. While it is not a reasonable expectation that the average adolescent will be harmed by exposure to diverse viewpoints, where that might be the case, individual exemptions are likely more easily facilitated than with younger children, because older children are better able to articulate their views, including their concerns and fears and so forth, allowing us to better ascertain the specific nature of the issue at hand.

### *5.7 Conclusion*

Society has an interest in insuring that its citizens are able to invoke the toleration necessary for a functioning pluralistic society. On balance, then, we can conclude that *in general*, exposure to viewpoints that oppose those learned at home are either beneficial to or leastways do not harm children's interest. They are legitimate to the extent that they do

not directly oppose either the truth-claims that are made at home and that they are commensurate with the common culture of a democratic society. However, since it is more likely that harm will accrue to younger than older children for the reasons postulated above, a child-centred theory would hesitate to endorse mandatory attendance at courses that will knowingly expose children to material parents find objectionable as it will likely differ from what is taught at home, and might end in harmful confusion for younger children. In any case, the religious rights of neither parents nor children are violated and any argument as to an exemption from permissible civic education ought to proceed from the different bases offered here.



## Conclusion

Liberal theory begins with the seemingly innocuous proposition that people are born free and equal, notwithstanding the many ways in which this proposition has failed to be made manifest in the lives of millions since Locke's treatises established it as foundational. But this proposition, relying as it does upon our individual capacity to be self-governing and to consent, in some way or fashion, to the constitutional arrangements in which we find ourselves, has left children unattended in some back room of liberal thought.

As society's social relations changed, more attention was paid to the status of children as separate entities with individual needs and wants. The mid-19<sup>th</sup> century's growing concern with the 'welfare' of children and their moral status as separate from their instrumental benefit to the family, which was seen to be legitimately realized by making children work to 'pay back' what provision had been made for them, was partially responsible for spawning the common school movement (Woodhouse 1992: 1036-41). This movement was not uncontroversial, and many contemporary issues regarding whose values should be imparted to children were played out, albeit with certain distinguishing features. The general history goes as follows (and while this is a re-telling of the US record, the broad strokes are not far different in Canada): Catholics felt that only a Catholic education was suitable for Catholic children, Protestants – who held sway over the common school curriculum – claimed to offer a non-denominational curriculum, which was, however, god-laden – for the general position was that you may worship god in the wrong way, but only a religious upbringing was compatible with living a moral existence – and others claimed that the Protestants' 'common' curriculum

was less common than they believed. With some variation, this should be sounding very familiar. One distinguishing feature, however, is the *particular* values with which we are today concerned. Previously, the fight over whose moral values would be imparted was a fight over exactly that: Whose? Now, the fight is in large part over *what* values will be imparted, as Amy Gutmann tells us (1980). This might seem like a cheeky subtlety that signifies nothing, but it actually signifies quite a bit.

Taking children out of the back room of liberal thought and sitting them down in the front parlour requires a stronger acknowledgement of their distinctness from their progenitors than was commonly admitted, prior to the last few decades. In this time, our concern with how children are raised in such a way as to be self-governing, if not now then in the future, in the way that liberal theory has always presumed adults to be, has taken centre-stage. Thus, our present concern assumes large swaths of previous battles over whose values should be imparted, and adds a little something extra – the attempt to enable children to be self-governing individuals, in the various ways that that term can be taken. It means, at one and the same time, the ability to make decisions about one's own future good, and one's ability to make good decisions in the context of a democratic polity. Previous debates over the common school movement *did* demonstrate a large concern for the democratic potential of children – from the point-of-view of 'progressives', assimilation through a common curriculum would aid immigrants and the poor to reach their potential, and from the point-of-view of 'regressives', the sooner immigrants would leave behind their peculiarities the better. But the focus on children's autonomy as a good for the benefit of the adults they will become, *per se*, was largely absent.

Yet while children may now have a seat in the front parlour, where they can be both seen *and* heard, they cannot be left there by themselves. They cannot *be* self-governing presently, and attempts to ensure that they will be in the future have largely failed to take into account their present specificity. Moreover, the common conception of autonomy offered by those hoping to ensure a future self-governing potential, suffers from largely the same defect as did the Protestant common curriculum of a century ago: Its prescription is far less common than it believes. However, we cannot avoid our new realization that children are separate moral creatures with an equal moral worth. True, we cannot allow their own decisions to be dispositive as to how they ought to be treated and what they ought to be allowed to do as the child-liberation theory says, since the unique situation of children is that they require others to oversee that adequate attention is paid to their needs. The child-liberationists have been unable to get their concerns onto the child-rearing agenda because, despite offering a few words of wisdom, their overriding concerns are so patently without merit. With that said, the equal moral worth of children requires that the child's best interests should guide decisions made about them.

The child's best interest as the guiding factor when it comes to decision-making about children is surprisingly not the common view. The common view, whether it is expressly stated or merely implied, even unwittingly, is that the child's best interest is merely *one* guiding factor in decision-making about children. Commonly, it is held that the family unit and in particular parents have interests that are served by their relationships with children and by how children are reared and these interests give rise to what is sometimes known as the dual-interest view, that is, that these parental-interests ought rightfully to factor into our deliberation.

Clearly, parents have interests that are served by their relationship with their children, but such interests cannot be defined as subsuming children's interests while being consistent to liberal theory's proposition of free and equal persons – others cannot be used as means to our own ends. The instrumental status that children had prior to the 20<sup>th</sup> century, at the time that they were put to work to 'pay back' the material provisions given to them, cannot simply be refashioned into something more benign. Their instrumental status must be jettisoned. Once we jettison their instrumental status we are left with no option but to espouse a child-centred theory that places children's interests at the centre of any consideration about how to best fulfill their needs.

Thinking about children in this way clarifies some things even while it complicates others. It clarifies what stance we ought to take when we are confronted by certain kinds of claims about parental rights. Parents, as I have demonstrated, do have rights to order many aspects of their children's lives. Some claims, however, are non-starters because they adduce the interests of parents. One such claim is that children's exposure to material within the school curriculum to which parents object, violates parents' rights to free expression. The assumption underlying this claim is inappropriately outcome-based; the idea being that there is something like a right to guarantee, inasmuch as this is actually possible, that children come to embrace those values that the parents embrace. This claim annexes the right to introduce children to parental values to the right to prevent others from introducing opposing values in the name of parental free expression. A child-centred theory, however, unpacks this claim and shows it to be parent-centred and thus not an appropriate candidate to ground a parental objection. This claim, however, is generally accompanied by the similar claim

that an objection to views to which parents object can be grounded in *children's* religious rights. For different reasons, this claim is also a non-starter. Children don't (yet) have religious views to protect, leastways not ones that we consider appropriately theirs. It is for this reason that parents are so fretful about influences that they believe might steer them toward adopting views of which they disapprove. Hence, this claim is circular and the attempt to ground it in the child's interest fails not because it is not conceptually a child-centred claim, but because it is not a conceptually coherent claim.

Other things, however, can be complicated by the need to ground decision-making about children in the best interests of the child, namely the mistaken idea that children's interests come first in *any* decision that implicates them. A child-centred theory can be much more restrictive, as is the one conceived here, than most observers (critics and proponents of child-centred theories, alike) have noticed. Since liberal theory ought to view the interests of children as equally compelling as (but not more compelling than) those of adults, we need to distinguish between decision-making directly *about* children (those *other*-regarding decisions that parents make aimed specifically at ordering aspects of children's lives) and decision-making that indirectly *affects* children (those *self*-regarding decisions that parents make aimed at ordering their own lives, but which necessarily impact – often hugely – children). A prime example would be the difference between a decision about which other children one's own child ought to be allowed to play with, and a decision to take up a new job in a different city. Both order and affect the lives of children, but the first is an other-regarding decision aimed at directly ordering the life of the child – hopefully for her own good – while the second is a self-regarding decision aimed at ordering one's own life, which nonetheless indirectly orders the life of

the child. Now, clearly this is not a simple black and white issue. The relegation of a decision to the category of self-directed does not mean that any decision the parent undertakes is then legitimate. I cannot leave my young child unattended while I go to the bar simply because it is a decision not aimed at directly ordering the child's life. Moreover, parents' self-regarding decisions can often have more far-reaching consequences for children than other-regarding ones do. And surely, there are *no* instances wherein parents may undertake decisions that affect children whereby they may legitimately *discount* the interests of their children. Rather, the point here is that a child-centred theory is more restrictive than most have hitherto argued, because we can conceptually distinguish between (at least some) times when the child's best interest *must*, morally speaking, be front and centre and times when it need not be without actually undermining the theory altogether.

So far, we know that children are equal moral beings with equal moral worth and that their interests matter equally. Some such interests include being an equally participatory member of the cultural life of the family and all which that entails, including their right to have some moral grounding provided to them. All of this tells us that a child-centred theory is required by liberal thought – even while children are wedged uncomfortably within liberal categories. We also know that a child-centred theory can be more restrictive than most observers have imagined, that this is not inappropriate, and that it is capable of responding adequately to concerns that a child-centred theory does the reverse of what I earlier criticized; that it transforms parents into a means to children's ends. Clearly, good parents will largely accept this and often put their children's needs ahead of their own even when this is not morally required. This is

because loving, nurturing and giving are normally part of the parent-child relationship and parents accept this sacrifice as part of what loving parents do. But a child-centred theory is capable of viewing both parents and children as moral equals and can conceptualize a space wherein it is morally required that children's interests come first and a space wherein this is not required.

But this summation leaves at least one major piece of the puzzle yet unaccounted for. While a child-centred theory can tell us when at least some claims are inadmissible – thereby telling us that some things can be left out – it does not thereby always direct us toward what things ought properly to be left in. This uncertainty comes to the fore during debates about the common school curriculum. These debates often seem to pit two foundational values against each other: Diversity and autonomy. But these values need be not at odds. In order for this to be so, however, we need to acknowledge that there are many kinds of life that can be meaningful and deeply satisfying even if they adhere to ways of being that many of us would reject. Children will be brought up in households that live in some of these ways and if the value of autonomy is that it enables people to make decisions that are genuinely their own, we must conceive of autonomous decision-making in such a way that it could be compatible with choosing to live along the lines that are given by some of these ways. Once we do that, we see that children are not owed an 'open future' in the way that I have explicated that concept. But this is not as straightforward as it seems for the very fact of children's malleability – the fact that gives rise to the fevered debate about whose and what values will be imparted to them in the first place – also gives rise to the realization that even if an open future is not morally required, it is not impermissible. Essentially, it is morally neutral. But the fact that it is

morally neutral is a help to us and not a hindrance. This is because its moral neutrality gives the democratic polity large scope to legitimately prescribe a common school curriculum that does not violate the liberal rights of parents or children and can still respect the diversity and autonomy of citizens.

Once we have closed-off particular claims about what parents and children are and are not owed within the liberal polity, we necessarily place those things that do not properly belong to the private realm, into the realm of democratic deliberation. It becomes properly the place of the elected representatives and engaged citizens, through the usual thrust and parry of democratic politics, to ascertain what is and is not a proper common education in the liberal polity. I have confined myself to the discussion of the imparting of civic values, paying heed to the fact that they cannot be imparted in any old way. And as noted in chapter 5, there are many different reasons for which parents reject particular curriculum. Not all of it is values-based and where that is the case it might require a different treatment.

The last thing I wish to say is that a focus on children's interests requires us not simply to examine things in light of constitutional rights, but also in terms of good policy. A curriculum that did not violate children's rights, but harmed their interests would not be morally legitimate from this point of view; hence the necessity to examine things in light of age-appropriateness. Of course, once we do all these things, we can still choose badly: We can think that certain things are age-appropriate when they are not, for instance. But since parents can also choose badly, this fact does not undermine our argument. Rather, it places it squarely in the context of a liberal-democratic polity, whereby citizens deliberate (well or poorly) then choose (responsibly or irresponsibly)



and, hopefully, revisit and revise when necessary. And that is about the best that we can do.

## Appendix

How might a child-centred analysis play-out in some actual scenarios? There is no shortage of recent examples to muse over, but perhaps the most relevant one was decided by the Supreme Court of Canada earlier this year.

As mentioned in chapter 5, in 2009 the Government of Québec implemented a course that was made mandatory in all grades (save grade 9). And no exemptions were permitted to individual students. The course itself is divided into two parts: Ethical instruction and religious instruction. The first part is aimed at “developing an understanding of ethical questions that allows students to make judicious choices based on knowledge of the values and references present in society.” The second part is aimed at “fostering an understanding of several religious traditions whose influence has been felt and is still felt in our society today.” In both cases the preamble from which the preceding has been taken makes it clear that the intention of the course is not to undertake an exhaustive examination of contrary philosophical ideas, not to undermine anyone’s present beliefs, nor to “accompany students on a spiritual quest” (in *Commission Scolaire des Chenes* 2012: para. 34). The Minister of Education’s goal is to foster toleration.

The course was challenged at several levels by several parents with no success.<sup>161</sup> Writing for the majority of the Supreme Court, Deschamps J. concluded two things that were integral and which echo issues already discussed in the pages of this thesis. The first is that the course was neutral. And while the *Charter* does not have the equivalent of the ‘Establishment Clause’ found in the US constitution, Canadian case law has developed in

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<sup>161</sup>A separate challenge was launched by Loyola HS—a Catholic boys’ high school—claiming that a regulation of the Private School Act allows them to be exempt from the course as long as they provide an ‘equivalent’ course. Their action was upheld at trial. The judge’s ruling—and his inflammatory comparison of the government program to the Inquisition—are being appealed  
[http://www.mcgill.ca/files/prpp/Loyola\\_Judgment\\_English\\_Summary.pdf](http://www.mcgill.ca/files/prpp/Loyola_Judgment_English_Summary.pdf)

such a way as to realize the spirit of that clause (ibid at paras. 17-21). Deschamps J. recognized that strict neutrality is simply impossible. Any attempt to remove all mention of religion finds the opprobrium of certain groups and anything more content-laden then meets opprobrium elsewhere. With this fact in mind, neutrality itself cannot be the negation of everything and compatibility with everything. It must content itself with a lesser standard. Without adducing Mill, the Court interpreted neutrality along Millian lines. Although Mill maintained that state schools could exist alongside what we, today, would call confessional, private and/or charter schools, it was precisely to *prevent* the state from having undue influence over opinion and thought that Mill advocated that examinations on disputed subjects should turn on the “matter of fact that such and such opinion is held, on such grounds, by such authors, or schools, or churches” and that all such testing be “confined to facts and positive science exclusively” (1998a: 119). It is this very sort of state neutrality that is being challenged on the basis that it imposes ‘moral relativism’. The Court, however, rightly rejected the ‘moral relativism’ argument.

The second thing the Court concluded was that the objective proof of infringement was lacking. This is a two-step test. The first step is a sincere belief in the particular article of faith one claims is being breached (the sincerity test).<sup>162</sup> In this case, the parents believed that passing on their religious belief is required by the tenets of their faith. The second step is that an infringement can only be said to exist on some objective analysis that a given thing actually interferes with the tenet. The Court’s decision turned on the fact that no objective proof had been offered to substantiate that the course

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<sup>162</sup> In *Director of Child and Family Services v. D.M.P. et al.*, the defendant, whose children had been apprehended by family services owing to his racist beliefs, tried unsuccessfully to argue that the swastika and other symbols of ‘white pride’ that were found at his house and had been written in ink on his daughter, were part of his Norse mythological beliefs. This was determined to be false when he failed to demonstrate a basic knowledge of Norse mythology or to make any connection between it and the symbols.

prevented parents from passing on their religious beliefs. This was, in part, because the course was (a) too new to assess various delivery methods and (b) that the legislation itself did not prescribe anything by way of particular content, texts, methodology – the definition of the course is exceedingly open-ended. In a concurring judgement, Lebel J., claimed that *in the future* it might be possible to demonstrate that the course *does* interfere with this right and at that time the constitutional sands on this issue could shift. This is an important consideration when unpacked. The Court did not deny that there is a right to pass on one's religious belief that attaches to the parents' belief. In this way, the Court failed to reject a view offered by a justice of the Québec Court of Appeal from decades earlier: "That the right to give one's children the religious education of one's choice...find[s] [its] existence in the very nature of man" (*Chabot v. Comm. de Lamorandiere*, 1957: 716, 722). On a child-centred theory, such as I have developed here, parents have no such rights because such rights are necessarily fundamental rather than instrumental. I have claimed that they have a right to introduce their children to their beliefs, share them with their children and hope that they come to embrace them, but I have rejected that this right is attached to the basic liberal rights of parents to live according to certain religious beliefs. And it is not clear how any course could interfere with that, regardless of delivery. Perhaps, of course, the delivery method could be such that it impairs *neutrality* and thus violates equal concern and respect for those people whose religious views are not favoured. No doubt this is also a consideration, but this is not how the Court positioned it. Instead the Court said that to prove their case, parents would have to show that the "ERC Program [interferes] with their ability to pass their faith on to their children" (*Commission scolaire des Chenes* at para. 27). While the Court

decided correctly, it is not yet clear that it did so for the correct reasons. It really depends on what is meant by “ability to pass their faith on”, but importantly at no time did the Court dispute that parents had such a right, suggesting that the case here turns not on the non-existence of the right, as I would argue, but on its non-violation in the instant case. Of course, if the “ability to pass on belief” means no more than “introduce and share belief” then this would be unproblematic.

But the two-step test is somewhat troubling, nonetheless. In the first place, anything anyone claims is a sincerely held religious belief – once it passes the ‘sincerity test’ – is subject to two, and possibly three further considerations. The first is whether or not that belief is violated on an objective analysis, and the second is the like rights of others. The third possible consideration is a section 1 analysis in which the government may argue that a law which violates the *Charter* is justified in a free and democratic society. Of note is that the claimant does not need to establish that a given belief forms part of any recognized religious order. There are obviously good reasons for this. And I don’t mean to suggest that this will allow people to start desecrating cemeteries or playing their ukulele music at all hours of the day and night. Rights are balanced in highly sophisticated ways.

In the case of children, however, we know that their rights are fashioned largely as a reflection of what rights *others* are said to either have or not to have. In this way their rights can never really be equal and opposite. Moreover, US case law provides an example of what can happen when the Court, even if for good reasons, refuses to engage in *objective* analyses of the religious tenets themselves and the rational connection between the particular beliefs and the impugned legislation (chap. 5 fn143). But clear

thinking about rights is relevant precisely because the waters are getting muddier. This is evident from the following story: In 2012, the president of a group called The Culture Guard threatened an action in front of the BC Human Rights Board owing to the “hateful slurs” that were being used in a program called “Out in the Schools”. The claim is that this program promotes hatred against identifiable groups based on their religion and that the schools and the school board must ban the use of the “hateful slurs”. The slurs in question are the words “homophobe, homophobia, heterosexism and other similar terms”. There is no doubt, of course, that (a) these things exist and (b) that not everyone who belongs to a particular church or group evidences them and therefore care must be taken not to paint all people with the same brush. The irony here, though, is that such a charge could only come from an actual homophobe. Who other than a homophobe would claim that the words are “invented propaganda labels, used solely to incite hatred and disrespect for individuals and/or groups who oppose the false propagandist information being used by sex activists to indoctrinate students within the public education system” (Catholic Insight 2012)? It will be interesting to see how such claims fare.

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