

# **Ethical Independents: Children and Rights in Democratic Theory**

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## ABSTRACT

One of the important features which characterize contemporary democracies is their commitment to the equal and universal provision of individual rights: each citizen is to be accorded an extensive set of personal liberties, and no citizen is to be accorded any more or less than any other. However, interesting complications arise when we think about how this commitment applies to children. On the one hand, children are citizens of the state, and thus have reasonable claim to a universally-accorded package of individual rights. On the other hand, children live under the auspice of their parents, and often seem ill-situated to access or exercise many of the rights which they are due as citizens. This thesis examines the extent to which the commonplace exemption of children from a full scheme of ‘ethical independence rights’ (including religious, expressive, or associational freedoms) is consistent with democratic principles. It argues that democratic values yield a strong presumption in favour of protecting ethical independence rights for children, and that the most prominent objections to this view are ultimately unpersuasive.

*Introduction*  
The Political Status of Children in Democratic Societies

*Democratic Tensions*

It is a basic requirement of democratic institutions that they treat their citizens as equals. Political institutions which fail to do so are undemocratic. A political regime which grants more votes to men than women, for example, or which bars certain ethnic groups from holding public offices, cannot be considered democratic in any meaningful sense even if it elects its officials or holds votes on legislation. Since treatment as equals is a constitutive requirement of democratic institutions, any institution which departs from this requirement departs from the very idea of democracy itself.

One of the important ways in which democratic institutions treat their citizens as equals is through the equal and universal provision of individual rights. This is the idea that each citizen is to be accorded an extensive set of personal liberties, and no citizen is to be accorded any more or less than any other. The commitment to equal and universal provision is so strong among contemporary democracies that most have embedded it in the very constitution of their societies, as reflected in the *Canadian Charter of Rights and Freedoms*<sup>1</sup>, the *United States Bill of Rights*<sup>2</sup>, or the French *Déclaration des droits de l'Homme et du citoyen*<sup>3</sup>, to name just a few. Each of these documents gives concrete expression to the idea that, as a matter of democratic justice, individual rights must be accorded equally and indiscriminately, regardless of "...race, national or ethnic origin, color, religion, sex, age, or mental or physical ability."<sup>4</sup>

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<sup>1</sup> Government of Canada. *Canadian Charter of Rights and Freedoms*, R.S.C, 1985 Appendix II, No. 44.

<sup>2</sup> *United States Constitution*. Amendments 1-10.

<sup>3</sup> National Constituent Assembly of France. *Déclaration des droits de l'Homme et du citoyen*. August 26, 1789.

<sup>4</sup> *Canadian Charter*, s. 15(1).

However, despite its ubiquity in democratic law, many critics have questioned the extent to which equal and universal provision is realized in practice, particularly when it comes to members of vulnerable or marginalized groups. For example, multicultural theorists like Will Kymlicka have suggested that, while formally entitled, many cultural minorities are unable to make meaningful use of their rights because they lack access to a ‘societal culture’, or a familiar cultural community which enables them to contextualize their choices.<sup>5</sup> Similarly, liberal feminists like Susan Okin have argued that rigid gender roles perpetuated through private family arrangements often prevent girls and women from exercising the rights which they are formally due.<sup>6</sup> While these theorists differ in their focus, they are both motivated by the assumption that no scheme of individual rights is just if it operates to the disadvantage of certain individuals. In a democratic context, equal and universal provision are prerequisites for any plausible scheme of rights, so there is great cause for concern when these standards are not being met in practice.

While often overlooked, children represent another group whose access to individual rights remains questionable, particularly with regard to a special subgroup which I will call ‘ethical independence rights.’ Ethical independence rights refer to those particularly salient rights which are aimed at protecting a citizen’s ability to form, revise, and pursue their *own* conception of good. Primarily, these include “freedom of conscience and religion,” “freedom of thought, belief, opinion and expression,” and “freedom of association”<sup>7</sup>, though others could reasonably be construed as serving a similar function. Children often lack access to these rights due to their membership in the inherently coercive parent-child relationship. In the context of this relationship, children are naturally subject to their parent’s authority and are profoundly influenced by the environment cultivated for them: they live with the consequences of the

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<sup>5</sup> Will Kymlicka. *Multicultural Citizenship*. (Oxford: Clarendon Press, 1995).

<sup>6</sup> Susan Okin. *Justice, Gender, and the Family*. (New York: Basic Books, 1991).

<sup>7</sup> *Canadian Charter*, s. 2(a), 2(b), and 2(d), respectively.

decisions made on their behalf, and they often become the inheritors of their parents' religious, cultural, or moral persuasions. There is nothing novel or odd about this relationship, and its authoritarian character seems generally appropriate in the face of children's physical and cognitive underdevelopment. However, when we take into account the democratic commitment to the equal and universal provision of individual rights, its legitimacy is called into question. Besides being the offspring of their parents, children are also citizens of the state, and thus have reasonable claim to a universally-accorded package of individual rights. It seems to follow, then, that if some of those rights are being disrespected or withheld from children, there is cause for democratic concern. For example, if a child is brought up according to a specific ethical code (perhaps one dictated by an organized faith), or set out on a particular 'life path', as it were, are her ethical independence rights being meaningfully respected? By the time she reaches an age where she can fully understand those rights and exercise them through her own decisions, will she be equipped with the intellectual tools to do so, or will she be limited by her upbringing? Similarly, do her parents have a right to raise her as they please (perhaps as an extension of *their own* religious or expressive freedoms), or are they constrained in some way by her ethical independence rights? In many ways, there seems to be a fundamental tension between our democratic commitments on the one hand, and our political treatment of children on the other. This tension is the focus of this thesis.

### *Interpretive vs. Normative Approaches*

As democratic citizens, *are* children entitled to rights protecting their ethical independence? There are two ways that we might go about answering this question. The first is to take an interpretive approach and assess whether or not, according to laws that actually exist,

children are entitled to rights which protect their ethical independence. By this approach, we might look at the text of constitutionally-enshrined rights documents and analyze whether or not they can reasonably be interpreted as including children within their purview. For example, according to its text, the *Charter* guarantees that its provisions apply equally to all Canadians regardless of “...race, national or ethnic origin, color, religion, sex, *age*, or *mental or physical ability*,”<sup>8</sup> suggesting that the fundamental freedoms it contains apply to children as well as adults. On this interpretation, we may conclude that as Canadian citizens, children are *legally* entitled to “freedom of conscience and religion,” “freedom of thought, belief, opinion and expression,” and “freedom of association,”<sup>9</sup> among others. However, while the interpretive approach may illuminate how children figure in current legal regimes, it is ultimately of little *theoretical* utility. This is because simply identifying children’s current legal status *as a matter of fact* says nothing about whether or not that status is appropriate or justified. On what basis should children be entitled to the fundamental freedoms articulated in the *Charter*? How would their accordance protect children’s (or anyone’s) ethical independence? Can such freedoms intelligibly be extended to children given their physical, cognitive, and emotional immaturity? Simply establishing children’s legal entitlements leaves many important theoretical questions unanswered.

A more useful strategy is to take a normative approach and assess whether or not, according to a defensible conception of democratic citizenship, children *ought* to be accorded rights which protect their ethical independence. The advantages of this strategy are twofold. First, by requiring us to outline a defensible conception of democratic citizenship, the normative approach forces us to confront and sort out many of the contentious presuppositions which the

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<sup>8</sup> *Ibid.*, s. 15(1). Emphasis added.

<sup>9</sup> *Ibid.*, s. 2(a), 2(b), and 2(d), respectively.

interpretive approach takes for granted. For instance, why is it that individual rights are ‘guaranteed’ in democratic societies? Why are rights involving ethical independence considered to be ‘fundamental,’ or particularly important? What physical or cognitive capacities do such rights presuppose in their bearers, and do children possess those capacities to a sufficient degree? The answers to these questions are by no means obvious, so a thorough examination of children’s democratic entitlements must engage with them directly. However, in addition to being more theoretically comprehensive, the normative approach is also more practically useful. This is because by identifying children’s democratic entitlements at the level of theory, we acquire a normative standard against which to evaluate legal regimes in practice. Such a standard may be used to justify legal practices which accord with its principles, condemn legal practices that diverge from its principles, or serve as a guide to legal reform.

### *Bridging a Gap in Theory*

Up until recently, normative questions surrounding the political status of children have been largely ignored by political theorists. As David Archard and Colin M. Macleod point out, the most influential theories of justice in the latter twentieth century—including those of John Rawls<sup>10</sup>, Ronald Dworkin<sup>11</sup>, Robert Nozick<sup>12</sup>, or Michael Walzer<sup>13</sup>—contain almost no sustained discussion of how their principles apply to children, or how consideration of children may shed light on their defensibility.<sup>14</sup> However, recent developments in both political theory and practice have given theorists a new sense of urgency in understanding how children figure within just

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<sup>10</sup> See John Rawls. *A Theory of Justice*. (Cambridge, MA: Harvard University Press, 1971). See also *Political Liberalism*. (New York: Columbia University Press, 1993).

<sup>11</sup> See Ronald Dworkin. *Taking Rights Seriously*. (Cambridge, MA: Harvard University Press, 1977). See also *Sovereign Virtue: the Theory and Practice of Equality*. (Cambridge, MA: Harvard University Press, 2000).

<sup>12</sup> See Robert Nozick. *Anarchy, State, and Utopia*. (New York: Basic Books, 1974).

<sup>13</sup> See Michael Walzer. *Spheres of Justice: A Defense of Pluralism and Equality*. (New York: Basic Books, 1983).

<sup>14</sup> David Archard and Colin M. Macleod. “Introduction” in David Archard and Colin M. Macleod (Eds.) *The Moral and Political Status of Children*. (Oxford: Oxford University Press, 2002), 4.

societies. On the side of theory, an emerging interest in multiculturalism and group recognition has raised contentious questions regarding how children may be implicated in the reproduction of cultural or religious identity. These questions have prompted theorists to ponder the proper relationship between child, family, and state, and to elaborate the possible rights (if any) to which children are entitled.<sup>15</sup> On the side of political practice, there has been increasing recognition of children as potential rights-bearers by both democratic and non-democratic states. The widely-ratified United Nations Convention on the Rights of the Child (1989), for instance, outlines an extensive set of rights to which children are legally entitled, and indicates a broad international consensus that children are rightly regarded as subjects to whom justice is owed. This has sparked debate among theorists regarding whether or not this status is appropriate given children's unique physical, cognitive, and emotional characteristics.<sup>16</sup>

Engagement with these (and other) questions has contributed to a deeper understanding of the important issues surrounding children's political status, and has enabled political thinkers to bridge a major gap in theory left by their intellectual predecessors. However, the body of literature surrounding children's rights is still relatively small, and at least on one side, seems to be dominated by analysis from a single evaluative perspective. Many prominent *defences* of children's rights have been written on the basis of uniquely liberal premises<sup>17</sup>, including the assumption that "... autonomy plays an important role in enabling people to live flourishing

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<sup>15</sup> Ibid., 4.

<sup>16</sup> See David Archard. *Children: Rights and Childhood* (Second Edition). (New York: Routledge, 2004), 58-69.

<sup>17</sup> See Archard, 2004; Harry Brighouse, *On Education*. (New York: Routledge, 2006); Eamonn Callan. *Creating Citizens*. (Oxford: Clarendon Press, 1997); Matthew Clayton. *Justice and Legitimacy in Upbringing*. (Oxford: Oxford University Press, 2006); Joel Feinberg. "The Right to an Open Future" in *Whose Child? Children's Rights, Parental Authority, and State Power*. Eds. W. Aiken & H. LaFollette. (Totowa: Littlefield, Adams & Co., 1980), pp. 124-153 (hereafter Feinberg, 1980a); Hugh, LaFollette. "Freedom of Religion and Children." *Public Affairs Quarterly*. Volume 3 (1) (January 1989) pp. 75-87; Colin Macleod. "Shaping Children's Convictions." *Theory and Research in Education*. Volume 1 (3) (2003), pp. 315-330; Adam Swift. *How Not to Be a Hypocrite: School Choice for the Morally Perplexed Parent*. (London: Routledge, 2003).

lives.”<sup>18</sup> By these accounts, extending ethical independence rights to children is thought to be an important priority because such rights allow them to live their lives in what is taken to be a valuable way, i.e. “...according to convictions that are the product of [their own] critical and rational reflection.”<sup>19</sup> While these accounts may illuminate how children’s rights figure within the liberal tradition, they face a major disadvantage when invoked as defenses for children’s rights generally. This is because the main premise on which they are built—that “...autonomy plays an important role in enabling people to live flourishing lives”<sup>20</sup>—is a deeply contentious one, and one that is not likely to carry much weight with citizens who reasonably reject autonomy as a constitutive element of the good life. In this sense, while the standard liberal defense of children’s rights may persuade those already sympathetic to value of autonomy, it is unlikely to persuade those who are not, including members of religious or cultural communities who find meaning in adherence to scripture or clerical authority. The significance of this defect is amplified when we consider that the groups who *reject* the value of rational autonomy are usually the groups who are most likely to disregard children’s ethical independence rights in the first place<sup>21</sup>—in other words, the citizens at whom the standard liberal argument is directed are precisely the citizens who are unable to accept it.

A better defense of children’s rights is one that can be framed in terms of values or principles that *all* democratic citizens can reasonably accept, regardless of the various religious, philosophical, or moral doctrines which divide them. The following thesis provides such a defense by justifying children’s ethical independence rights according to a shared (or potentially sharable) conception of democratic citizenship. Not only is such an account more inclusive as a

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<sup>18</sup> Brighouse, 2006, 15.

<sup>19</sup> Clayton, 2006.

<sup>20</sup> Brighouse, 2006, 15.

<sup>21</sup> See for example *Wisconsin v. Yoder* 406 U.S. 205 (1972); *Mozert v. Hawkins* 827 F.2D 1058 (6<sup>th</sup> Cir. 1987).

philosophical defense, but it also provides a unique contribution to a currently underexplored area in the literature.

### *The Democratic Strategy*

The following thesis is aimed at establishing a single claim: that as democratic citizens, children are entitled to rights protecting their ethical independence. However, to even suggest this claim is to invoke a number of contentious presuppositions regarding the nature of democratic citizenship, as well as the interests and capabilities of children. First, it assumes a conceptual link between democracy and individual rights; second, it assumes a conceptual link between democracy and ethical independence; and third, it assumes that it is both intelligible and desirable to attribute rights to children. Establishing children's democratic entitlement to ethical independence rights will require substantiating each of these assumptions by defending them against potential criticism. Since each assumption is deeply contested in the theoretical literature, each forms the subject of a separate chapter.

Making the claim that children are entitled to ethical independence rights by virtue of their democratic citizenship rests on a prior assumption that a close relationship exists between democracy and individual rights. However, many theoretical interpretations dispute this relationship, suggesting that 'democracy' and 'individual rights' are conceptually separate and even *antagonistic* ideas. According to these interpretations, 'democracy' essentially refers to a set of procedures for collective decision-making designed to realize the ideal of rule by the people, while 'individual rights' are associated with substantive principles of justice that exist outside of, and perhaps prior to, political procedures. Rather than capturing an important part of the democratic ideal, individual rights actually serve the function of *constraining* democracy by

limiting the scope of the decisions produced by the democratic process. While some theorists claim this is necessary to ensure the justice of democratic outcomes, others claim that it is illegitimate, and that it prevents the will of the people from effectively authoring binding collective decisions. Chapter One engages with this controversy as a means of establishing a conceptual link between democracy and individual rights. It argues that contrary to ‘proceduralist’ interpretations, democracy is best understood as a normative idea built on fundamental values of autonomy and equality. While these values have important procedural implications in the form of equal voting, they also have substantive implication in the form of individual rights.

Even if democracy requires the provision of individual rights, why are rights protecting ethical independence considered to be particularly important? Some theorists reject that they are. According to these interpretations, governments should be in the business of facilitating good lives for their citizens, and part of what this means is curbing their ethical independence by encouraging ethically valuable options and discouraging base or ignoble ones. As a means of elucidating both the function and significance of ethical independence rights, Chapter Two defends such rights against these ‘perfectionist’ objections. It argues that democratic institutions must inevitably operate against a backdrop of reasonable moral pluralism, meaning that law and public policy must be justified independently of the comprehensive doctrines which divide citizens. This commitment to neutrality implies the accordance of ethical independence rights to all democratic citizens, which serve the function of shielding them from ethical compulsion by enabling them to form, revise, and pursue their *own* conception of the good.

Even if children are theoretically entitled to ethical independence rights by virtue of their democratic citizenship, can they intelligibly be thought of as right-holders? If they can be, should

they be? In the contemporary literature, three strands of argument have been raised objecting to the extension of ethical independence rights to children. The first strand of argument objects to the very idea of thinking about children and the family in terms of rights, suggesting that it distracts us away from the more important goal of promoting their immediate developmental interests. The second strand of argument claims that extending ethical independence rights to children compromises parental authority, and that it is inconsistent with respecting the right of parents to raise their children in accordance with their own religious, cultural, or moral traditions. Finally, the third strand of argument simply claims that even if it is intuitively appealing or theoretically sound to extend ethical independence rights to children, the fact remains that they lack the necessary cognitive capacities required to exercise them. As a means of defending the democratic presumption in favor of extending ethical independence rights to children, Chapter Three outlines and engages with each objection, arguing that each is ultimately unpersuasive. It ends by sketching an alternative ‘trust-based’ account of children’s rights which is immune to the criticisms they raise.

*Chapter One*  
Democratic Rights: Procedure vs. Substance

*“I hold it to be an impious and detestable maxim that, politically speaking, the people have a right to do anything; and yet I have asserted that all authority originates in the will of the majority. Am I, then, in contradiction with myself?”*

- Alexis de Tocqueville, *Democracy in America*

*Introduction*

Individual rights seem to play an important role in democratic societies. Indeed, the concepts of ‘individual rights’ and ‘democracy’ have become so intertwined or even synonymous in contemporary political discussion that commitment to one usually implies commitment to the other—and few may question the coherence of that position. The common perception that these two concepts are closely or even necessarily related is perhaps due in part to the manner in which they have been connected in political practice. The eighteenth century revolutionary cries of “liberty, equality, fraternity” which lead to democratization in America and Europe seem to reflect an assumption that individual liberties and popular government among equals are mutually supportive elements of a single democratic ideal. The same sentiment has been carried on in contemporary political struggle, with oppressed populations under tyrannical regimes often calling for democratization as a remedy for various injustices, including the violation of personal liberties. Moreover, and perhaps most significantly, constitutionally enshrined rights guarantees have become a staple of modern democratic societies. All around the world, democratic states have proudly embedded individual rights as unequivocal components in the very constitution of their societies, as demonstrated through the *Canadian Charter of Rights and Freedoms*<sup>22</sup>, the *United States Bill of Rights*<sup>23</sup>, the French *Déclaration des droits de l'Homme et du citoyen*<sup>24</sup>, and Part III of the *Indian Constitution*<sup>25</sup>, to name only a few. So the general

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<sup>22</sup> See *Canadian Charter*.

<sup>23</sup> See United States Constitution, amendments 1-10.

<sup>24</sup> See *Déclaration des droits de l'Homme et du citoyen*.

assumption that a close relationship exists between democracy and individual rights is justified. But is it coherent?

Contrary to the common intuition that the two concepts are mutually cooperative, many theoretical interpretations actually point to an inherent *separateness*, or even antagonism, that exists between them.<sup>26</sup> Such interpretations encourage us to take note of a sharp conceptual distinction between the two ideas. By these accounts, ‘democracy’ essentially refers to a set of procedures for collective decision-making designed to realize the ideal of rule by the people, while ‘individual rights’ are associated with substantive principles of justice or morality that exist outside of—and perhaps prior to—political procedures.<sup>27</sup> Rather than capturing an important aspect of the democratic ideal, individual rights actually serve the function of *constraining* democracy, or limiting the scope of the decisions produced by the democratic process. This function may be evaluated in two different ways, depending on one’s perspective. For the advocate of individual rights, such constraint is necessary to promote justice. Majoritarian decisions produced by the democratic process have the potential to violate a special moral status that each individual is due according to more fundamental principles of justice. Individual rights help prevent this by placing limits on democratic outcomes, only accepting as legitimate those which respect or are consistent with that status. For the democrat, however, such

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<sup>25</sup> Ministry of Law and Justice of India. *Constitution of India*. Part III.

<sup>26</sup> For contemporary statements, see Richard Arneson, “Democratic Rights at the Workplace and National Level” in David Copp, Jean Hampton, and John E. Roemer (eds.) *The Idea of Democracy*. (Cambridge: Cambridge University Press, 1993); Bruce Ackerman, *We The People: Foundations*. (Cambridge, Massachusetts: Belknap Press, 1991); Chantal Mouffe, “Democracy, Power, and the Political” in Seyla Banhabib (ed.) *Democracy and Difference: Contesting the Boundaries of the Political*. (Princeton, New Jersey: Princeton University Press, 1996); Jeremy Waldron, “The Constitutional Conception of Democracy” in David Estlund (ed) *Democracy*. (Malden, Massachusetts: Blackwell Publishers, 2002); Thomas Christiano, “Introduction” in Thomas Christiano (ed) *Philosophy and Democracy: An Anthology*. New York: Oxford University Press, 2003). For classic statements, see Isaiah Berlin. “Two Concepts of Liberty” in *Four Essays on Liberty*. (Oxford: Oxford University Press, 1969); Benjamin Constant. “The Liberty of the Ancients Compared with that of the Moderns” in Biancamaria Fontana (Ed. and Trans.) *Constant: Political Writings*. (Cambridge: Cambridge University Press, 1988); and John Stuart Mill. *On Liberty and Other Essays*. Edited by John Gray. (Oxford: Oxford University Press, 1982).

<sup>27</sup> Corey Brettschneider. *Democratic Rights: The Substance of Self-Government*. (Princeton: Princeton University Press, 2007), 7.

constraints are sometimes illegitimate. By this perspective, the legitimacy of collective decisions should not derive from their accordance with controversial or abstract principles of justice that not all participants accept or endorse. Rather, the legitimacy of collective decisions ought to be determined by the fairness of the procedures which produced them, and the equal capacity of all individuals to take part in the process. The constraining function of individual rights injures democracy in this sense, because it can prevent the will of the people from effectively authoring binding collective decisions.<sup>28</sup>

The idea of separateness between individual rights and democracy frustrates the common assumption of compatibility because it seems to force us to choose between the two concepts, or at least strike an unhappy balance in which aspects of one ideal are sacrificed for the sake of the other. If we commit ourselves to individual rights, it seems like we have to accept a diluted view of democracy, where the will of the majority can only legitimize collective decisions insofar as they adhere to preconceived principles of justice. On the other hand, if we commit ourselves to democracy, we may leave ourselves open to accepting as legitimate majoritarian decisions or preferences which seem clearly unjust. These troubling aspects of constraint have been heavily emphasized in the contemporary literature, and have consequently shaped the philosophical debate as a kind of balancing act. Here the question is not one of reconciliation, but of *how far* democracy ought to be compromised for the sake of other substantive values, such as those invoked by individual rights.<sup>29</sup> Incommensurability, it seems, is assumed as a fact of the discussion.

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<sup>28</sup> For a classic statement on this idea, see Jean-Jacques Rousseau's discussion on the tension between the rights and duties of sovereigns and the rights and duties of private citizens in *The Social Contract and the Discourses*. (Trans.) G.D.H. Cole. (New York: Everyman's Library, 1993), 203-207.

<sup>29</sup> Ronald Dworkin. *Freedom's Law*. (Cambridge: Harvard University Press, 1996), 15.

So what to make, then, of the assumption that democracy and individual rights are two aspects of a single political ideal? Does the inherent separateness between the two concepts render that assumption hollow? It might if the idea of separateness itself was sound. However, there is good reason to be suspicious of it. The idea of inherent separateness is predicated on what has been described as a “pure proceduralist” conception of democracy, where the legitimacy of the outcomes is strictly a function of the procedures which brought them about.<sup>30</sup> This conception may be too narrow. Democratic procedures like equal voting in collective decisions are not self-justifying, but are informed by substantive principles of political morality which *make* them appealing.<sup>31</sup> For example, implicit in the paradigmatic idea of equal voting are closely related notions of autonomy and equality. The assumption that citizens ought to have a vote on political decisions in the first place is based on a commitment to self-determination, or the idea that citizens should have a say in the important decisions that affect their lives rather than having those decisions imposed upon them. The assumption that each citizen should have the *same* influence points to a commitment to fairness and equality; since it is unfair that some people should have more influence than others on matters which affect the entire collectivity, each individual ought to have an equal say in political decisions. It is *because* we are attracted to these substantive principles of political morality that we endorse democratic procedures, for democratic procedures seem to provide the best expression of these values in political practice. When democracy is recognized as being built on certain substantive values, individual rights not only become *compatible* with democracy, but become a democratic *requirement*. This is because the democratic process cannot logically give way to outcomes which undermine the very principles which give that process its authority. This will result in limits on democratic

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<sup>30</sup> Brettschneider, “Balancing Procedures and Outcomes in Democratic Theory: Core Values and Judicial Review.” *Political Studies*. Volume 53 (2005), 424.

<sup>31</sup> See Brettschneider, 2007; Dworkin, 1996.

outcomes, not as external ‘constraints’ which fly in the face of democracy, but as an *expression* of democracy itself, and a respect for the principles on which it is built.

The following chapter will elaborate the necessary relationship between democracy and individual rights to assert that the equal and universal accordance of substantive individual rights is an unequivocal requirement of democracy, properly understood. This will be used as a means to introduce the problem of children’s exemption from a full scheme of individual rights, with special reference to a group of rights associated with an individual’s ability to form, revise, and pursue their *own* conception of the good. The chapter proceeds in three parts. Part I explicates procedural theories of democracy and concludes that they are unable to ground substantive rights despite the fact that their underlying principles require them to. Part II elaborates and defends an alternative ‘status-based’ conception of democracy which avoids the structural problems associated with proceduralism. According to that conception, democracy is best conceived as being built on fundamental values of equality and autonomy, which have procedural *as well as* substantive implications. Finally, Part III introduces the problem of children’s exemption, arguing that the commonplace failure to respect or uphold a full scheme of substantive rights for children is inconsistent with democratic principles, and is in deep need of justification.

### *1.1 The Paradox of Proceduralism*

Before critiquing the capacity of procedural accounts of democracy to support substantive individual rights (such as religious, expressive, or associational liberties disconnected from participatory rights), it is first necessary to consider how such accounts have been justified, as well as the kinds of intuitions they tend to support. Many procedural accounts of democracy are unapologetic about not leaving much room for substantive rights, so it is not enough to

simply point out this fact or provide an explanation for it. Rather, we have to show that the exclusion of substantive rights is misguided with reference to the values which proceduralist accounts *do* accept—this way the critique will be of the failure of proceduralist accounts to take their premises to a logical conclusion, rather than their failure to make sense of external values which they reject anyways. In order to achieve this, an elaboration of procedural accounts of democracy is required.

Procedural accounts understand democracy as consisting in a set of procedures for collective decision making designed to realize the ideal of rule by the people. Insofar as this is the case, the democratic legitimacy of collective decisions can be evaluated solely with reference to the procedures which produced them: if the decision making process satisfies a designated set of democratic principles, then the outcome is legitimate regardless of its substantive character.<sup>32</sup> With the evaluative focus on the process, procedural accounts of democracy have generally centered on articulating what fair procedures consist in, and what conditions they have to meet for their outcomes to be considered legitimate and binding. One of the most familiar variants is democratic majoritarianism, which refers to the idea that “...political procedures should be designed so that, at least on important matters, the decision that is reached is the decision that a majority or plurality of citizens favours...”<sup>33</sup> Usually this entails providing as many people as possible with an equal say in collective decisions, and accepting as legitimate the decision which the most people prefer.<sup>34</sup> At first glance, this seems fair. Since each person is given an opportunity to influence the decision, and no one is given any *more* influence than anyone else, it seems fair to take the resulting outcome as an authoritative expression of the will of the people.

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<sup>32</sup>Fabienne Peter. “Pure Epistemic Proceduralism.” *Episteme*. Volume 5(1) (2008), 35.

<sup>33</sup>Dworkin, 1996, 16.

<sup>34</sup>Brettschneider, 2007, 12; Thomas Christiano. “Democracy as Equality” in David Estlund (ed) *Democracy*. (Malden, MA: Blackwell Publishers, 2002), 33-34.

And if the purpose of democratic procedures is to elicit the will of the people in law and public policy, than any deviation from that outcome would seem patently undemocratic and illegitimate.<sup>35</sup>

While most procedural theorists agree that the fairness of the procedure confers legitimacy on the outcome, few endorse unbridled majoritarianism as a tenable method for collective decision-making, despite the popular perception that it captures the very *essence* of democracy. This is because unrestrained majoritarianism has the capacity to result in self-stultifying outcomes, or outcomes which contradict the very principles which give rise to democratic procedures in the first place.<sup>36</sup> Implicit in the idea of democratic decision-making are substantive values of autonomy and equality, values which *make* democratic procedures seem fair and authoritative.<sup>37</sup> The value of autonomy is present in the act of decision-making itself. In contrast to autocratic political regimes where decisions are made by a set of elites and dictated to the people, democracy requires that citizens have a say in collective decisions, and exercise self-determination through authoring the very laws and policies that bind them.<sup>38</sup> Democracy also requires that citizens are treated equally in their capacity as self-determining agents, for if the ability to participate in collective decisions is greater for some than it is for others, the outcome loses its legitimacy to those who were denied equal authorship.<sup>39</sup> It is not hard to imagine circumstances in which the procedures of majority rule could give way to outcomes which contradict these values. Acting out of a fair procedure, a majority could violate the value of autonomy by voting a monarch into office, or violate the value of equality by voting to

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<sup>35</sup> See Bruce Ackerman's discussion of 'dualist democracy' in Ackerman, 1991, particularly 6-16.

<sup>36</sup> For a classic statement on this idea, see Alexis de Tocqueville's discussion of the 'tyranny of the majority' in *Democracy in America*. (New York: Alfred A. Knopf, 1945), 254-270. See also Mill, 1982, particularly 5-19.

<sup>37</sup> See Dworkin, 1996; Brettschneider, 2007; Robert Post. "Democracy and Equality". *Annals of the American Academy of Political and Social Science*. Volume 603 (January 2006).

<sup>38</sup> Post, 25-28.

<sup>39</sup> *Ibid.*, 28-29.

disenfranchise a minority of the population. Obviously these outcomes would not generally be considered tenable in a democratic context, but the reason is not because the procedure was unfair—assume that each individual had an equal and adequate say in the decision—rather, the reason is because they contradict the substantive principles which give democratic procedures their normative weight.

Does it follow that democratic outcomes ought to be constrained so as to adhere to these principles? Perhaps not immediately, but if we are going to accept the idea that the legitimacy of democratic outcomes derives from the fairness of procedures, we need a more robust theory which is better able to make sense of democratic values. Many procedural theorists have conceded as much; proper democratic procedures cannot coherently give way to blatantly undemocratic outcomes, so some form of qualification is necessary.<sup>40</sup> For Jeremy Waldron, “...there cannot be democracy unless the right to participate is upheld...”<sup>41</sup>, so a universal ‘right of rights’ (or right to participate in law-making) is a necessary precondition for fair democratic procedures.<sup>42</sup> Unlike the brand of majoritarianism described above, this condition explicitly affirms the values of autonomy and equality that underlie democracy, and thus allows us to avoid legitimizing bizarre outcomes like disenfranchisement—such outcomes would be absurd by this account, because democracy cannot exist when the universal right of rights is not maintained. Moreover, the strictly procedural right of rights can reasonably be thought to imply other protective liberties to ensure the legitimacy and “moral respectability” of the democratic process. For example, since meaningful participation is not likely if citizens are unable to express and

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<sup>40</sup> See Thomas Christiano, “The Authority of Democracy” *The Journal of Political Philosophy*. Volume 12 (3) (2004), 287-288; Waldron, 2002, 51.

<sup>41</sup> Waldron, 52.

<sup>42</sup> Jeremy Waldron, “Participation: The Right of Rights.” *Proceedings of the Aristotelian Society*. Volume 98 (1998).

exchange views, freedom of speech and association may become further conditions of a fair democratic procedure.<sup>43</sup>

Initially, Waldron's participatory condition seems to provide a more appealing procedural account of democracy. Not only does it seem to avoid blatantly contradictory outcomes, but it also seems capable of supporting a number of important rights we often associate with democratic citizenship. But what about other seemingly important substantive rights not directly connected to participation, such as the right to privacy or the right to marry? Are these kinds of rights given protection in Waldron's account? While Waldron is careful to state that "The idea of democracy is not *incompatible* with individual rights"<sup>44</sup>, no particular individual rights—including those connected to participation—have a guaranteed place in his account. This is because democratic societies are inevitably marked by pervasive and widespread disagreement over what democracy requires and the content of the rights it presupposes. While citizens may well reach agreement on many of the rights that seem inherent to a democratic culture, we cannot assume this *a priori* by characterizing certain rights as off-limits or non-negotiable, for this presupposes agreement when no agreement has taken place. According to Waldron, if people are to be treated with genuine respect as self-governing agents in a political community, "...then we have no choice but to adopt procedures for settling disagreements which do not themselves specify what the outcome is to be."<sup>45</sup> Thus, for Waldron, individual rights in democratic societies are generally 'up for grabs'.

Does this mean that Waldron's account is susceptible to the same kind of contradiction as unrestrained majoritarianism? Is the right of rights up for grabs as well? The right of rights itself cannot be up for grabs in Waldron's account, because the very notion of taking disagreement

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<sup>43</sup> Waldron, 2002, 52.

<sup>44</sup> Ibid., 51. Emphasis added.

<sup>45</sup> Ibid., 73.

seriously is based on the assumption that all members of a political community have a right to participate in making the laws that bind them. It is on the very *basis* of the right of rights that we cannot designate another substantive right as off-limits, for by doing so we disrespect those who disagree with its value and undermine their ability to participate in lawmaking. To put it another way, the reason why individual rights are up for grabs in a democracy is because we have to take disagreement seriously, and the reason why we have to take disagreement seriously is because we recognize a universal right of rights among members of the political community. Thus, the right of rights cannot logically be up for grabs in Waldron's account.

However, when we recognize the extent to which Waldron's account is built on the right of rights, we see a possible weakness. Waldron admits that the right of rights is not a self-justifying principle, but draws its appeal from values of autonomy and equality. When democratic citizens exercise the right of rights, they are asserting "...that issues of principle affecting them—the people—should be settled, ultimately, by them only on a basis that [pays] tribute to their fundamental equality."<sup>46</sup> So to assert the fundamental importance of the right of rights is to assert the fundamental importance of autonomy and equality. But if we are really concerned with the fundamental autonomy and equality of individuals, why arrest those concerns at the level of participation? Why not extend them into the realm of substantive rights? If we take them seriously, it seems that we are compelled to. To illustrate, consider a fair democratic procedure based on the right of rights that gives way to an anti-gay marriage statute. In this scenario, widespread disagreement exists on the issue of marriage rights, so in the spirit of respect for each individual's equal right to take part in lawmaking, a referendum is held. The results show that a majority of citizens agree that a right to marry should be upheld for unions of men and women, but should not extend to same-sex couples. This is problematic. It was in

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<sup>46</sup> Waldron, 1998, 329-330.

recognition of the fundamental equality and autonomy of citizens that disagreement is taken seriously and a referendum is held, yet the results of the referendum seriously denigrate these values for homosexuals in the community. Not only are they denied an important right to which others are entitled, but their life opportunities have also been limited in a meaningful way. But the cost of this outcome is not only borne by homosexuals in the community—the right of rights takes a blow as well. For if the values which underpin the right of rights are disregarded in others areas of society, they lose their normative force as supports for a universal participatory right. We cannot simultaneously assert the fundamental importance of the right of rights while forsaking its constitutive values in matters outside of participation. If we take these values as fundamental, as Waldron thinks we should, we are compelled to extend them beyond the realm of participation and into the realm of substantive rights. Only this way can we ensure that they are respected by democratic outcomes.

But what about disagreement? Do we not show disrespect to people who disagree with these rights? It is true that by extending the values of equality and autonomy to the realm of substantive rights we designate certain matters as off-limits, and thus fail to respect disagreement on such matters. However, accepting *some* form of agreement (or at least grudging compliance) on these issues *has* to be seen as a necessary extension of agreement on the equal right of individuals to participate in lawmaking. For if disagreement is so pervasive as to preclude *any* conceivable agreement on these issues *as extensions of the right of rights*, then there is no good reason why we should expect citizens to agree to an equal right of participation in the first place. And if disagreement permeates the right of rights—the very *basis* on which we are required to take disagreement seriously—then Waldron’s theory collapses altogether.

Thus, rather than leaving substantive rights ‘up for grabs’ in a democratic context, it seems as though the principles which initially justify Waldron’s procedural account—equality, autonomy—actually compel us to protect certain substantive rights as natural *extensions* of those principles. By failing to do so and disregarding those principles in matters outside of participation, we end up undermining the justificatory basis for equal and universal participation in the first place. It follows that if procedural accounts of democracy are to remain coherent, they must provide room for certain substantive rights that flow from the very principles which ground the fairness of their procedures.

Thomas Christiano has attempted to satisfy this requirement through an egalitarian conception of procedural democracy, one which gives way to a number of substantive rights as necessary corollaries of the principles which ground fair procedures. Christiano’s account follows Waldron’s insofar as it recognizes that disagreement is an inevitable characteristic of any political community. For Christiano, deep disagreement surrounds the arrangement of “collective properties”, or the important communal features of society in which each individual has a vested interest. Such features are diverse, and include everything from the basic structure of civil rights, to the choice of national symbols or the level of environmental protection a community decides to adopt.<sup>47</sup> Because collective properties define the basic environment in which citizens live, each has an unavoidable stake in how they are arranged, and an enormous interest in promoting their own preferred arrangement.<sup>48</sup> However, since not everyone agrees on what the best arrangement is, citizens must find a way to make decisions about collective properties that can be seen as legitimate and binding. According to Christiano, the fairest method for decision-making in this context is a democratic procedure in which each individual has equal political resources to

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<sup>47</sup> Christiano, 2002, 35.

<sup>48</sup> *Ibid.*, 35-37.

advance their interests and influence the outcome.<sup>49</sup> At first glance, this does not look much different than Waldron's right of rights, as both respond similarly to widespread disagreement by providing each individual with an equal say in collective decisions. However, equality of political resources actually leaves much more room for substantive rights as a result of its origins in an egalitarian principle of justice, something Christiano calls "equal consideration of interests."<sup>50</sup> This principle, as well as its important implications regarding substantive rights, requires further elaboration.

Christiano's commitment to equality of political resources is based on the egalitarian assumption that individuals ought to be treated equally if they are equal in the relevant way. This is a familiar principle of justice that has historically fueled objection to all sorts of unwarranted prejudice.<sup>51</sup> For example, consider a racist political regime such as South Africa under apartheid. We may claim that such a regime is unjust because it promotes the interests of some citizens (whites) over the interests of others (blacks) on the basis of factors which are arbitrary from a moral point of view (race/skin color). What *is* relevant from a moral point of view is the fact that, regardless of race, each citizen of South Africa has a life to live and interests to advance, and since all South Africans are equal in this regard, justice demands that the regime treat them accordingly and give equal consideration to the interests of each. Christiano takes equal consideration of interests to be a fundamental tenet of political morality, and one that must inform any legitimate political community. In the context of communities marked by disagreement over collective properties, the best expression of this principle is an equal

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<sup>49</sup> Ibid., 45.

<sup>50</sup> Ibid., 32.

<sup>51</sup> Ibid., 33. It is important to note that this Aristotelian principle of justice has also been the *root* of much historical injustice, including the subjugation and disenfranchisement of women, who were not considered to be 'equal' to men in the relevant way. See for example Catherine Mackinnon. *Women's Lives, Men's Laws*. (Cambridge, MA: Harvard University Press, 2005); Martha Nussbaum. *Sex and Social Justice*. (Oxford: Oxford University Press, 1999).

distribution of political resources, implying that each individual is given an equal vote, campaign finance, access to information, ability to form coalitions, and any other resource that may be relevant to collective decisions.<sup>52</sup> While not everyone can have their interests *satisfied* in the arrangement of collective properties, an equal distribution of political resources ensures that each will have their interests *considered* in the decision-making process, allowing them to accept the outcome as legitimate and binding. No one is able to cry foul at the resulting arrangement because each had the same opportunity to advance their interests as everyone else.

So how does Christiano's account imply substantive rights that move beyond procedural resources? This is where the egalitarian principle of justice re-enters the argument. According to Christiano, equal consideration of interests must be "...a weakly public principle," meaning that it must be one that "...people can in principle see to be in effect or not."<sup>53</sup> He identifies two separate reasons for this. The first reason has to do with its efficacy: insofar as equal consideration of interests is a principle that citizens can appeal to in order to guide and criticize their relations with one another, it is most effective if it is publically known and implemented.<sup>54</sup> However, the second reason has to do with the interest that citizens have in being recognized as moral equals in communities marked by deep disagreement. Since "...each person has a fundamental interest in being treated as a person with equal moral standing among his fellow citizens,"<sup>55</sup> equal consideration of interests is best implemented in a public way, so that the equal status of each citizen can be duly recognized and affirmed.

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<sup>52</sup> Christiano, 2002, 44-45.

<sup>53</sup> Christiano, 2004, 270. Christiano qualifies this assertion by stating that it must take into account the limitations of human cognitive abilities. In this sense, "...publicity does not require that each person actually see that he or she is being treated justly. It requires only that each person can see that he or she is being treated justly given a reasonable effort on his part." (270).

<sup>54</sup> Ibid., 271.

<sup>55</sup> Ibid., 273.

Democratic procedures satisfy the publicity condition because they can clearly be seen to treat the interests of each citizen with equal weight: by providing each citizen with equal political resources, democratic procedures perceptibly demonstrate a commitment to their equal moral standing. However, in addition to informing democratic procedures, Christiano believes that the publicity condition can also ground substantive rights (or what he calls ‘basic liberal rights’), for the universal protection of substantive rights can be seen as a condition of treating citizens as equals in a public way. As he explains,

...each person has fundamental interests in being able to conduct their lives by their own lights, at least in certain defined areas of human activity... These and other interests are so fundamental to the well-being of a person that no society that set them back for all or some substantial proportion of the population could be thought to advance the common good. And no society that set them back for a few could be thought to be giving the interests of each equal consideration. Those whose liberal rights were set back would have reason to think that their equal moral standing was not recognized and affirmed by others... Thus, any fundamental undermining of a person’s basic liberal rights would be a publicly clear violation of equality of advancement of interests.<sup>56</sup>

Thus, publically treating citizens as individuals with an equal moral standing not only implies granting them equal political resources with which to make collective decisions; it also implies upholding their basic liberal rights.

Does Christiano’s account meet the requirement noted above, that procedural accounts must recognize substantive rights as extensions of the principles which ground their procedures? Initially, it seems that it might, for the same principle which gives way to equality of resources also gives way to substantive rights. It is on the basis of equal consideration of interests that we are first lead to an equal distribution of political resources. However, the condition of publicity which informs equal political resources also gives rise to a number of substantive rights, for “...any fundamental undermining of a person’s basic liberal rights would be a publicly clear

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<sup>56</sup> Ibid., 289.

violation of equality of advancement of interests.”<sup>57</sup> Unlike Waldron, Christiano recognizes that the principles which ground the fairness of procedures have important implications beyond the realm of participation. Democratic procedures cannot meaningfully be thought to embody equal consideration of interests if the idea of equal moral standing which *informs* that principle is flouted in other areas of society. Thus, equal consideration of interests must stretch beyond participation and give way to certain substantive rights.

While Christiano’s account is undoubtedly preferable to Waldron’s insofar as it recognizes and affirms substantive rights, we ought to be suspicious of its ability to provide them with a firm grounding. The first reason for this is specific to his account. It is not clear that a commitment to public equality *alone* can ground the substantive liberal rights that Christiano claims it does, including freedom of association, freedom to choose one’s aims in life, and any other right which is directed at enabling citizens to “...conduct their lives by their own lights...”<sup>58</sup> This becomes apparent when we consider that a regime could satisfy the publicity condition by publically providing each citizen with *no* substantive rights whatsoever. In this sense, the criterion of equal distribution does not necessarily indicate the content of the rights being distributed.

However, the second reason why Christiano’s account fails to ground substantive rights is general to his proceduralist project. Christiano still wants to claim that the legitimacy of democratic outcomes derives from the fairness of their procedures, and this ultimately means that “...democratic decision-making retains its justice even when many of the outcomes are unjust.”<sup>59</sup> We have seen that substantive rights cannot possibly be given a secure footing when their existence is wholly or partially at the whims of democratic procedures, because this inevitably

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<sup>57</sup> Ibid., 289.

<sup>58</sup> Ibid., 289.

<sup>59</sup> Ibid., 290.

leaves them open to being disrespected or overridden in light of other majoritarian goals. But we have also seen that this is illogical, even on proceduralist terms. This is because there are specific substantive values—autonomy and equality—which underlie the fairness of democratic procedures, values which *make* those procedures fair. Proceduralists cannot deny these substantive values because they must appeal to them in order to justify their accounts. But when the substantive basis of procedures is explicitly recognized, a fatal problem emerges: the proceduralist must maintain that the legitimacy of democratic outcomes derives from the fairness of their procedures, while opening to the door to outcomes which violate the values which *lend* fairness to procedures in the first place. If the proceduralist accepts this, he has contradicted himself and undermined the basis for fair procedures; yet if he rejects it, he has drifted away from proceduralism and implied that democratic outcomes must accord with some substantive criteria. This is the paradox of proceduralism: procedural accounts necessarily imply substantive rights but are definitively unable to support them. This paradox signals the need for a reconceptualization of democracy, one which affirms the substantive basis of democratic procedures and is able to make sense of the rights that it presupposes.

### *1.2 Status and the Substance of Democracy*

Before providing an alternative conception of democracy able to support substantive rights, it is first necessary to respond to an important objection that may be raised at this juncture. Given that the focus of this discussion has been on the need for substantive rights to be accommodated in a democratic context, it might be tempting for some to drift back to the idea of external constraint. If it is too unpalatable that certain rights should be jeopardized by majorities, why not simply constrain democratic procedures with respect to those rights? We can still uphold

democratic outcomes on virtually all other matters, but there are some principles of justice that are non-negotiable and substantive rights fall into that category. There are certainly many writers who have expressed similar views.<sup>60</sup> Richard Arneson, for example, has defended a purely instrumental conception of democracy, where its value consists entirely in its tendency to produce just outcomes. According to Arneson, the primary function of democratic procedures is to protect more fundamental rights associated with justice, such as free speech, privacy rights, material distribution rights, and so forth. Insofar as this is the case, it is entirely legitimate, perhaps necessary, to disregard or revise democratic outcomes which do not reflect that goal.<sup>61</sup>

This line of justification is problematic within a modern democratic context. Notice that Arneson's instrumental account is predicated on the assumption that there are relatively objective principles of justice external to democracy that we can appeal to in order to judge the legitimacy of democratic outcomes. These principles usually tend to be based on natural rights theories or abstract ideas about what it means to be human.<sup>62</sup> For example, George Kateb implements one of these ideas by grounding substantive individual rights in an "existential" notion of inherent human dignity. For Kateb, all human beings equally demonstrate an incredible distinctiveness in the community of species, and are thus owed an extensive set of personal and political rights which reflects that shared distinctiveness.<sup>63</sup> The problem with appealing to these kinds of ideas to ground substantive rights is that they tend to be very controversial, and thus nearly impossible to sustain in diverse communities marked by what John Rawls has called the fact of reasonable

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<sup>60</sup> See Arneson, 1993; Steven Wall. "Democracy and Equality." *Philosophical Quarterly* (57) 228 (July 2007), 416-438. Some epistemic theorists, such as David Estlund, have expressed softer views along similar lines, judging democratic procedures by their capacity to result in just or 'true' outcomes. See David Estlund, *Democratic Authority: A Philosophical Framework*. (Princeton: Princeton University Press, 2007).

<sup>61</sup> Arneson, 1993, 118.

<sup>62</sup> Brettschneider, 2007, 9.

<sup>63</sup> See George Kateb *Human Dignity* (Cambridge, Massachusetts: Belknap Press, 2011), particularly chapter one. For a further discussion of how Kateb uses human dignity to ground individual rights, see also *The Inner Ocean: Individualism and Democratic Culture*. (Ithaca: Cornell University Press, 1992).

pluralism.<sup>64</sup> In modern democracies, people hold a variety of comprehensive doctrines (or conceptions of the good), not all of which are necessarily compatible with whatever controversial idea of personhood is meant to ground substantive rights. Thus, constraining democratic outcomes with reference to these ideas is not likely to be seen as tenable from the perspective of those who do not accept them. For example, suppose that we were to justify the substantive rights of a diverse community on the basis of Christian morality. Then suppose that a majoritarian legislature passes a law which violates one of those rights. The argument to constrain or revise the law in light of this violation is not likely to carry much weight with Jews, Muslims, atheists, or any other non-Christian in the community, because they may not accept the original premise on which it is built (i.e. the uniquely Christian conception of morality or personhood). Two consequences follow. The first is that substantive rights are given a weak foundation. Insofar as not everyone is able to accept the premise on which they are built, they become less forceful in commanding people's respect. The second is that in cases where substantive rights *do* constrain democratic outcomes, non-Christians are shown a great deal of disrespect with regard to their procedural rights. This is because, as Waldron rightly noted, their ability to participate in procedures and affect results becomes undermined on the basis of principles which they dispute.<sup>65</sup> If substantive rights are to be given a strong foundation in democratic societies, they must be based upon principles or values which everyone can reasonably accept, and since abstract theories of justice or personhood do not satisfy this criterion, substantive rights require an alternative grounding.<sup>66</sup>

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<sup>64</sup> See Rawls, 1993.

<sup>65</sup> Waldron, 2002, 73.

<sup>66</sup> For contemporary discussions on related ideas of ethical neutrality and public reason, see Bruce Ackerman. *Social Justice in the Liberal State*. (New Haven: Yale University Press, 1980); Ronald Dworkin. *A Matter of Principle*. (Cambridge: Harvard University Press, 1985); Charles Larmore. *The Morals of Modernity*. (Cambridge: Cambridge University Press, 1996); Steven Lecce. *Against Perfectionism: Defending Liberal Neutrality*. (Toronto: University of Toronto Press, 2008) (hereafter Lecce, 2008a); and Rawls, 1993.

The exclusionary problems associated with external constraint can be avoided by looking to values *internal* to democracy to ground substantive rights. As discussed in the previous section, democratic procedures are not merely value-neutral mechanisms for collective decision-making, but derive their justification from substantive values such as equality and autonomy. When we recognize this fact, we begin to see that democracy is a normative idea with implications that stretch beyond the realm of participation. The substantive values that inform democratic procedures must also inform their outcomes, for if these values are flouted in other areas of society, they lose their normative force as the basis of procedures themselves. Understood in this way, democracy sets its *own* limits in accordance with its constitutive values, and these limits will invariably be set in a way that implies a wide range of substantive rights. Grounding substantive rights in this way is a much more tenable approach in pluralistic democracies, for we are not relying on controversial theories of justice or personhood for their justification. Rather, we are simply appealing to the values of democracy itself, values that all democratic citizens are able to accept.

In order to better understand how democratic values imply substantive rights, it is worth exploring a theory that presents a more integrated, value-based approach toward democracy. Corey Brettschneider's recent "value theory of democracy"<sup>67</sup> recognizes that democracy is a normative idea built on substantive values, and that these values have important implications that stretch beyond participation. Contrary to the procedural theories described above, Brettschneider suggests that the *status* of democratic citizens is more fundamental than their role in democratic procedures, and it is on the basis of this idea that he is able to draw important conclusions regarding the necessary compatibility between democracy and substantive rights.

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<sup>67</sup> Brettschneider, 2007.

Brettschneider's value theory of democracy is premised on a specific articulation of the democratic ideal delivered by Abraham Lincoln at the Gettysburg Address. This is the idea that democracy implies "government of the people, by the people, for the people."<sup>68</sup> What is important about Lincoln's articulation is that it moves beyond a strictly procedural conception of democracy and invokes what it means to be a democratic people generally. Firstly, the notion of government *of* the people indicates the source of legitimate authority, or the idea that coercion is best authorized by the very people who are being coerced. Secondly, the notion of government *by* the people indicates that the people are entitled to a procedural role in authoring the very laws that coerce them. Finally, and most significantly for our current discussion, the notion of government *for* the people indicates that laws and policies "...must reflect the status of citizens as the ultimate source of authority by respecting their interests and by ensuring that state coercion does not treat them in a manner that undermines that status."<sup>69</sup> Understood in this broader sense, democracy implies more than a universal right to participate in lawmaking. It implies that each citizen is treated in a way consistent with their status as an individual ruler in a community of equals.

By taking a more integrated approach toward the idea of democracy, the focus of the concept shifts from the particular *role* that citizens play in democratic procedures to the general *status* that they hold in democratic society. This approach still allows us to capture the important procedural rights that citizens are due, because these rights flow from their status as rulers and reflect the ideal of government *by* the people. However, it also allows us to capture an aspect of the democratic ideal that procedural accounts *cannot* support. This is the idea that laws and policies generated by the democratic process be *for* the people, and respect their fundamental

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<sup>68</sup> Abraham Lincoln. "Gettysburg Address" delivered November 19, 1863.

<sup>69</sup> Brettschneider, 2007, 21.

interests as free and equal rulers. By shifting focus to the *status* of democratic citizens, we are able to make sense of both aspects of the democratic ideal, and this ultimately allows us to promote fair procedures *and* substantive rights with reference to the same principles.<sup>70</sup>

So what are these principles? What constitutes the idea of democratic status?

Brettschneider identifies three “core values” that lie at the heart of democracy, and which give shape to the idea of democratic status: equality of interests, political autonomy, and reciprocity.<sup>71</sup>

Equality of interests is the idea that the interest of all citizens be given equal weight in collective decision-making, regardless of their social position, class, or any other arbitrary distinction.

Political autonomy is the idea that citizens be treated as individual rulers in a society characterized by collective self-rule. Reciprocity, finally, is the idea that the treatment of citizens through law and public policy be defensible in terms that each are able to accept. Because this will usually entail reference to the shared values of equality or autonomy, reciprocity is more of an “organizing value” which directs the application of the other two.<sup>72</sup>

It is important to note that the status these values confer on citizens not only shapes the procedures by which laws are made, but it also shapes the substantive character of laws themselves. This is because the democratic ideal implies government *by* and *for* the people, and this means that citizens occupy two distinct roles in relation to law. In addition to being the *authors* of law, democratic citizens are also its *addressees*, so their democratic status must be respected with regard to that role as well.<sup>73</sup> For example, while equality of interests implies ‘one person, one vote’ to ensure that each person’s interests are being given equal weight in the actual *process* of decision-making, it also implies that the resulting outcome *treat* individuals as having

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<sup>70</sup> Ibid., 22-23.

<sup>71</sup> Ibid., 23.

<sup>72</sup> Ibid., 23-26.

<sup>73</sup> Ibid., 29-38.

equal interests, for any failure to do so would be a violation of their status as addressees. Similarly, while political autonomy implies that each person is able to exercise self-determination through helping to shape the laws that bind them, the actual laws that are adopted must also *treat* citizens as self-determining agents who are entitled to direct their own lives free from paternalistic interference. The important conclusion to draw here is that citizens' status as addressees places limitations on democratic outcomes, and that these limitations can best be understood in the language of rights. To clarify this relationship, consider the following illustrations.

Imagine that under fair procedures, a democratic legislature passes a law prohibiting any form of flag burning, public or private, on the basis that the flag is an important symbol of national unity.<sup>74</sup> Is this law legitimate under the value theory of democracy? In assessing this law's legitimacy we must evaluate it from two perspectives, that of the author, and that of the addressee. With reference to the first perspective, we may conclude the law is legitimate, meaning that it came about in the *right way* and thus reflects the ideal of government *by* the people (assume that each individual had an equal say in every relevant way). However, this is only one aspect of the democratic ideal; we must also determine whether it satisfies the ideal of government *for* the people, or whether it respects the democratic status of addressees. With regard to this second perspective, we may ultimately conclude that the law is illegitimate, because it violates the core value of political autonomy. As democratic citizens, individuals are entitled to be treated as self-determining agents able to direct their own lives, and an important facet of this entitlement is being able to formulate and express their own political views.<sup>75</sup> Thus,

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<sup>74</sup> See *Texas v. Johnson*; see also Dworkin's discussion of this problem in Dworkin, 1996, p.32-33.

<sup>75</sup> Brettschneider, 2007, 45.

from the perspective of the addressee, there is a strong presumption in favor of rights guaranteeing freedom of conscience and expression.

To provide another illustration, consider the gay marriage referendum discussed earlier in this chapter. While the anti-gay marriage statute was adopted in the right way through fair procedures, it is still illegitimate from the perspective of the value theory of democracy, due to its substantive character. Firstly, by treating the interests of heterosexuals as more important than those of homosexuals, the anti-gay marriage statute violates equality of interests. Secondly, by restricting the capacity of homosexuals to determine the course of their own lives in a meaningful way, the statute may also be said to violate political autonomy. In this case, the democratic status articulated by the core values yields a strong presumption in favor of a universally accorded right to marry.

We could easily elaborate on more specific examples, but the main point to extract here is that the most championed substantive rights in contemporary democracies—including freedom of religion, expression, or association—can be defended with reference to values *internal* to democracy itself. When we object to the flag-burning or anti-gay marriage statute, we are not objecting that they fail to live up to some set of external criteria, such as that designated by an abstract theory of justice or personhood. Rather, we are simply pointing out that the substantive character of each law fails to reflect democratic values, the very same values that justify the procedures which brought them about. Thus, by shifting focus to the *status* of democratic citizens as articulated by the core values, we are able to justify fair procedures *and* a wide range of substantive rights with reference to the same principles.

This is an important conclusion that yields three attractive implications. The first implication is that the accordance of substantive rights is no longer parasitic on the act of

participation, and in this sense becomes more inclusive. For many democratic theories, substantive rights are merely instrumental, serving only as accessories to facilitate better participation.<sup>76</sup> We have seen this is in connection to Waldron's account, where free speech and association are justified only insofar as they enable citizens to express and exchange views for the purposes of collective decision-making. However, this is not the case when we adopt a status-based approach toward democracy. While procedural rights such as the right to vote are relegated to actual or potential participants in procedures, substantive rights are accorded to *all* individuals who occupy the role of *addressees* of law. This is an important requirement, for a properly democratic community cannot reasonably be thought to deny the substantive rights of those who *cannot* or *choose not* to participate in procedures. For Brettschneider, this ultimately means that "...those who are ineligible to participate in democratic procedures should still be entitled to democratic treatment as addressees of law," and this includes resident aliens as well as children.<sup>77</sup>

The second implication of taking a status-based approach toward democracy is that substantive rights no longer remain susceptible to charges of sectarianism. Unlike the approaches of Arneson or Kateb, the status-based approach does not rely on abstract and controversial theories of justice or personhood. This is significant, because in diverse communities like contemporary democracies, many citizens are patently unable to accept these justifications due to their comprehensive commitments. The status-based approach avoids this problem by building on the relatively uncontroversial values that most democratic citizens already accept, such as the basic tenets of equality and autonomy. These values are already deeply ingrained in democratic

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<sup>76</sup> See Christiano, 2004; Waldron, 2002. See also Joshua Cohen, "Democracy and Liberty" in Jon Elster (ed) *Deliberative Democracy*. (Cambridge: Cambridge University Press, 1998), for a discussion of how substantive rights are necessarily implied by the procedures of deliberative democracy.

<sup>77</sup> Brettschneider, 2007, 32.

institutions like equal voting, which receive wide acceptance from citizens of all comprehensive backgrounds. Insofar as diverse citizens are able to embrace these democratic institutions, they ought to be able to embrace the principles which guide them, as well as their natural extensions in the realm of substantive rights.

The third and final implication of taking a status-based approach toward democracy is that it enables us to make better sense than alternative theories out of one of the most basic assumptions in contemporary political experience: that there exists a strong and necessary relationship between democracy and substantive individual rights. Despite suggestions of inherent separateness, the status-based approach illuminates the necessary *coexistence* of democratic participation and the accordance of substantive rights. These values are not antagonistic, but are two aspects of a single democratic status built on a shared set of values. When we take the core democratic values of equality and autonomy seriously, we are forced to extend them in two directions, in order to ensure the dual commitment of government *by and for* the people. This will result in a full set of procedural rights to ensure that citizens *author* the laws that bind them. However, it will also result in a wide set of substantive rights that reflect citizens' status as *addressees* of law. By embracing both aspects of democratic citizenship, we extend the core values to their natural conclusion and include democratic participation *as well as* substantive individual rights within a single political ideal.

We should pause for a moment to address a potential criticism. Some may object to the preceding conclusion, suggesting that it conflates two conceptually distinct ideas of autonomy: while substantive individual rights may be considered to be an expression of *personal* autonomy, they certainly frustrate *collective* autonomy, or the ability of citizens to collectively determine the laws that bind them. This much is certainly true, and insofar as we take collective autonomy

to be indicative of democracy, we should concede that there *is* a sense in which democracy and individual rights are pitted against one another. However, there is a simple response to this criticism which mitigates its detraction from our main conclusion: collective autonomy is not the *only* conception of autonomy at play in the idea of democracy. While democracy is attractive to the extent that it exemplifies collective self-rule rather than collective subjugation under a monarchy or autocracy, it is also attractive insofar as it enables individual citizens to pursue their own goals by determining, in part, the environment in which those goals are pursued. As Christiano emphasizes, democratic procedures are valuable because they enable citizens to promote their own preferred arrangement of collective properties, which is significant because such properties define the context in which citizens can pursue their own self-directed goals.<sup>78</sup> Thus, while it is true that individual rights may in some ways be hostile to an idea of *collective* autonomy, they can still find justification in the principles of equality and *personal* autonomy which underlie democratic procedures, and thus can still be thought of as an expression of, rather than as a hindrance to, democracy.

### *1.3 A Problem Appears: Ethical Independence Rights and the Exemption of Children*

The paradox endemic to procedural theories signals the need for a reconceptualization of democracy, one which is able to make sense of democratic values and the substantive rights they presuppose. Rather than being self-justifying, procedural theories of democracy are actually built on substantive values such as equality and autonomy, which lend authority to democratic procedures. However, since procedural accounts maintain that the legitimacy of outcomes is strictly a function of fair procedures, these values are susceptible to being violated or overridden according to majoritarian goals and preferences. Herein lies the paradox: if such goals are

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<sup>78</sup> See Christiano, 2002.

allowed, these values lose their normative force as supports for fair procedures; if they are constrained, the theory ceases to be procedural altogether. We can avoid the paradox of proceduralism by adopting a status-based approach towards democracy. This approach shifts focus from the *role* that citizens play in democratic procedures to the *status* they hold in democratic society. This status is based on the core values of equality and autonomy that underscore democracy, and encompasses two distinct roles that citizens occupy in relation to law: that of its *author* and that of its *addressee*. On the basis of democratic status we are able to account for procedural rights, because upholding equality and autonomy in relation to citizens' role as authors implies that they are each entitled to an equal role in creating the laws that bind them. However, we are also able to account for substantive rights, because upholding equality and autonomy in relation to citizens' role as addressees implies that the laws that are created reflect the fact that their interests matter equally, as well as the fact that they are self-determining agents entitled to direct their own lives. This translates into a number of specific rights aimed at protecting this status, including freedom of expression, freedom of religion, and freedom of association. Ultimately, the status-based approach reveals that substantive rights do not contradict democracy; on the contrary, they are a democratic requirement.

The idea that substantive rights are *required* in a democratic context is not a new one, but one that is already widely assumed and reflected in political experience. One only has to look in the text of a constitutionally-enshrined rights document to reveal that the equal and universal provision of substantive rights is a paramount commitment among democratic governments. The *Canadian Charter of Rights and Freedoms*, for example, stresses that the various freedoms it expounds are “guaranteed”<sup>79</sup>, and that they are to be accorded equally and indiscriminately regardless of “...race, national or ethnic origin, color, religion, sex, age, or mental or physical

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<sup>79</sup> *Canadian Charter*, s. 1.

ability.”<sup>80</sup> However, this sentiment has been the subject of much philosophical scrutiny over the past few decades. Motivated by concerns of access regarding marginal or vulnerable groups, many thinkers have questioned the extent to which equal and universal provision are realized in practice. For example, multicultural theorists such as Will Kymlicka have suggested that, while formally entitled, many cultural minorities are unable to make meaningful use of individual rights because they lack access to a “societal culture” that enables them to understand the world.<sup>81</sup> Liberal feminists such as Susan Okin have also suggested that patriarchal family arrangements can seriously threaten the extent to which privately oppressed girls or women are able to meaningfully exercise the rights which they are formally due.<sup>82</sup> While these writers differ in their focus, they are all driven by the same assumption that no scheme of individual rights is just if it operates to the disadvantage or exclusion of certain groups or individuals. In a democratic context, equal and universal provision are prerequisites for any plausible scheme of rights, so there is great cause for concern when these standards are not being met.

While commonly overlooked, children represent another group whose access to substantive rights remains questionable, particularly with respect to a special group of rights labeled ‘ethical independence rights.’ Ethical independence rights refer to those particularly salient rights which protect an individual’s ability to form, revise, and pursue their *own* conception of the good. Primarily, these include “freedom of conscience and religion,” “freedom of thought, belief, opinion and expression,” and “freedom of association”<sup>83</sup>, though other rights may reasonably be construed as serving a similar function. Children often lack access to these rights due to their membership in the necessarily coercive parent-child relationship. In the

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<sup>80</sup> *Ibid.*, s. 15(1).

<sup>81</sup> Kymlicka, 1995.

<sup>82</sup> Okin, 1991.

<sup>83</sup> *Canadian Charter*, s. 2(a), 2(b), and 2(d), respectively.

context of this relationship, children are naturally subject to their parent's authority and are profoundly influenced by the environment cultivated for them: they live with the consequences of the decisions made on their behalf, and they often become the inheritors of their parents' religious, cultural, and moral persuasions. There is nothing novel or odd about this relationship, and its authoritarian character seems generally appropriate in the face of a child's physical and cognitive underdevelopment. However, when we take into account our democratic commitment to the equal and universal provision of substantive rights, its legitimacy is called into question. Status-based democracy has demonstrated that as *addressees* of law, even children are entitled to a full scheme of substantive rights, and this includes the special group of ethical independence rights noted above.<sup>84</sup> It seems to follow, then, that if some of these rights are being unduly disrespected or withheld from children, there is great cause for democratic concern. For example, if a child is brought up according to a specific ethical code (perhaps one dictated by an organized faith), or set out on a particular 'life path', as it were, are her ethical independence rights being meaningfully respected? By the time she reaches an age where she can fully understand those rights and exercise them through her own decisions, will she be equipped with the intellectual tools to do so, or will she be limited by her upbringing? Similarly, do her parents have a right to raise her as they please (perhaps as an extension of *their own* religious or expressive freedoms), or are they constrained in some way by her ethical independence rights?<sup>85</sup> If we are truly committed to the equal and universal provision of substantive rights in democratic societies, as we so often purport to be, then these are important questions to raise.

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<sup>84</sup> Brettschneider, 2007, 32.

<sup>85</sup> See Archard, 2004; Brighouse, 2006; Callan, 1997; Clayton, 2006; Amy Gutmann. *Democratic Education*. (Princeton: Princeton University Press, 1986); Feinberg, 1980a; Lafollette, 1989; Steven Lecce. "How Political is the Personal? Justice in Upbringing." *Theory and Research in Education*. Volume 6 (21) (2008), pp. 21-45 (hereafter Lecce, 2008b); Macleod, 2003; Swift, 2003.

While there are no straightforward answers, one thing *is* clear: given our democratic commitments, the exclusion of children from a full scheme of ethical independence rights demands moral justification. Defenders of the status quo must be able to point to a reasonable explanation as to why children are excluded, and why their exclusion is not morally problematic. In the contemporary literature, three prominent justifications have been offered. The first suggests that it is inappropriate to think of children and families in terms of rights, and that according rights to children may distract us from promoting their more immediate developmental interests. The second suggests that according children ethical independence rights is inconsistent with respecting the rights of their parents, and that it would place undue constraints on the ability of parents to shape their children's upbringing. Finally, the third objection suggests that even if it is intuitively appealing to extend ethical independence rights to children, the fact remains that they lack the cognitive capabilities necessary to exercise them. These are all relevant points, though to assess their normative force as justifications, we must evaluate how they stand up to philosophical scrutiny. However, before we can do this, we need to gain a deeper understanding of the central idea on which they all hinge: the idea of ethical independence rights. Only when we understand such rights can we begin to assess their application to children.

### *Conclusion*

Despite theoretical assertions of inherent separateness, there is a strong and necessary relationship between democracy and substantive individual rights. Substantive values of equality and autonomy underlie democratic procedures, and these values must also inform outcomes if a theory of democracy is to remain coherent. We can achieve this coherence by taking a status-based approach toward democracy, one which shifts focus from the role that citizens play in

democratic procedures to the status they hold in democratic society. This approach recognizes that citizens occupy two distinct roles in relation to law, and that the core values of equality and autonomy must inform both roles. This results in a number of procedural rights consistent with citizens' status as *authors* of law, but it also results in a number of substantive rights consistent with their status as *addressees* of law. However, when we recognize that democracy requires the equal accordance of substantive rights to *all* addressees of law, a problem appears. Under the auspice of their caregivers, children seem to lack access to an important group of substantive rights called ethical independence rights, which are aimed at protecting their ability to form, revise, and pursue their *own* conception of the good. Given the democratic obligation of equal accordance to all addressees, the general exclusion of children is cause for democratic concern, and demands justification.

*Chapter Two*

## Conceiving the Good: Ethical Independence in Pluralistic Democracy

*“A person should be free to do as he likes in his own concerns; but he ought not to be free to do as he likes in acting for another, under the pretext that the affairs of another’s are his own affairs.”*

- John Stuart Mill, *On Liberty*

### *Introduction*

Chapter One concluded by noting a philosophical problem that is prevalent among Western democracies: a troubling discrepancy between our fundamental democratic commitments and our political treatment of children. The core values of equality and autonomy which underscore the idea of democracy necessarily give rise to a number of substantive rights which reflect citizens’ status as *addressees* of law. Included in this group is a special subgroup labelled ‘ethical independence rights’, which are aimed at protecting citizens’ ability to form, revise, and pursue their *own* conceptions of the good. From a democratic perspective, children ought to be entitled to these rights by virtue of their status as addressees of law. However, their general treatment within the context of the parent-child relationship potentially threatens this entitlement. Because children are often raised so as to adopt the specific religious, cultural, and moral persuasions of their parents, there is a sense in which their ethical independence rights may be disrespected, or simply inaccessible. Given our democratic commitment to the equal and universal accordance of substantive rights to all addressees of law, this general exemption requires justification. Prevalent justifications have focused on the inappropriateness of extending ethical independence rights to children, the incommensurability between upholding children’s rights and respecting the similar rights of their parents, and the cognitive inability of children to exercise or make use of ethical independence rights. In order to assess the normative force of these justifications, we first need to gain a deeper understanding of the central idea on which they hinge. Thus, the following chapter will explicate the idea of ethical independence rights, for

only when we understand what such rights *consist* in can we assess their possible applicability to children.

So what *are* ethical independence rights? One way of answering this question is to simply provide a list of rights which reflect their intended purpose, or which seem to protect citizens' ability to form, revise, and pursue their own conceptions of the good. In this vein, we might say that ethical independence rights include "freedom of conscience and religion," "freedom of thought, belief, opinion and expression," or "freedom of association"<sup>86</sup>, because these rights all seem to contribute to the ability of citizens to decide for themselves how best to live their lives. However, while this might be accurate as a statement about ethical independence rights, it is ultimately unhelpful as an explanation. This is because it is precisely the interest they protect—i.e. the ability of citizens to form, revise, and pursue their own conception of the good—that *requires* explanation, so pointing to the particular rights which support that interest only begs the question. Given that our concern so far has been the connection between substantive rights and democratic values, a better strategy of explicating ethical independence rights might be to demonstrate how the interest they protect necessarily flows from democracy's constitutive values. In this sense, our project is to show how the democratic commitment to equality and autonomy necessarily yields a commitment to ethical independence, and the provision of rights which protect that interest for all democratic citizens. By pursuing this strategy, we will gain a more comprehensive understanding of ethical independence rights, highlighting both their purpose and significance within a democratic context. This kind of understanding will prove indispensable later on, when we take on the task of assessing their applicability to children.

So how *does* the democratic commitment to equality and autonomy yield a commitment to ethical independence? To understand this connection, it is first necessary to understand the

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<sup>86</sup> *Canadian Charter*, s. 2(a), 2(b), and 2(d), respectively.

relationship between democracy and moral pluralism. Moral pluralism (or simply ‘pluralism’)<sup>87</sup> is the idea “...that there are various forms and styles of life which exemplify different virtues and which are incompatible,”<sup>88</sup> and it finds expression in democracy both empirically and normatively. From an empirical point of view, moral pluralism is simply a ‘fact’ about contemporary democracies, or a demographic feature of the citizens living there. Far from embracing a common doctrine, democratic citizens tend to differ widely in their ethical commitments, contributing to a public culture marked by a diversity of religious, philosophical, and moral doctrines.<sup>89</sup> However, beyond simply being a fact about democratic societies, moral pluralism is also a normative idea deeply embedded in the very *concept* of democracy itself. In fact, the idea that there are widely diverging, yet equally legitimate modes of life can be understood as one of democracy’s most fundamental presuppositions, for in its absence, democracy’s constitutive values lose their intelligibility. To explain: if, from the perspective of political institutions, pluralism was rejected in favour of a view that recognized only *one* legitimate mode of life (*x*), then there would be no sense in upholding the values of equality and autonomy. There would be no sense in giving equal consideration to the diverging interests of different citizens, because the only interests considered legitimate would be those associated with *x*. Likewise, there would be no sense in treating citizens as individuals entitled to direct their own lives, because the only direction recognized as valid would be the one headed toward *x*. In order for the constitutive values to take on the significance ascribed to them in democratic contexts, they must operate on an assumption of moral pluralism: giving equal consideration to the diverse interests of citizens *necessarily assumes* that there are diverging interest that are equally legitimate, while treating citizens as individuals who can direct their own lives

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<sup>87</sup> ‘Moral pluralism’ and ‘pluralism’ will be used interchangeably.

<sup>88</sup> Joseph Raz. *The Morality of Freedom*. (Oxford: Clarendon Press, 1986), 396.

<sup>89</sup> Rawls, 1993, 3-4.

*necessarily assumes* that there are multiple directions they can be taken. This is not to say that *all* conceivable interests or modes of life must be permitted by democratic institutions—clearly some doctrines, such as virulent forms of racism, run antithetical to democracy and thus cannot be supported by its principles—however, the important point for now is that democracy must rest on *some* assumption of pluralism, otherwise, its constitutive values lose their normative bite. In this sense, pluralism is not merely consistent with or encouraged by democracy, but forms a crucial part of its conceptual core, giving both shape and meaning to its constitutive values.

The necessary relationship between democracy and moral pluralism has important political implications, shaping in part what it means for institutions to treat their citizens as equal and autonomous. The most important implication for our current discussion concerns the constraints it places on the kinds of justifications that can be given for political decisions. Because citizens disagree about their ethical doctrines, and their disagreement is taken to be reasonable, such doctrines cannot be used as the basis for law or public policy. This is because their controversial nature precludes all citizens from being able to accept them, and this kind of preclusion is inconsistent with democratic values. It is inconsistent with the value of equality because it does not show equal consideration for the interests of citizens who reasonably disagree with the chosen ethical doctrine. Moreover, it is inconsistent with the value of autonomy because the institutional arrangements it prescribes may detract from the ability of dissenting citizens to direct their lives according to their *own* reasonable ethical precepts.

Therefore, in order for democratic institutions to maintain their commitment to equality and autonomy amidst moral pluralism, they must assume a position of *neutrality* between competing conceptions of the good.<sup>90</sup> This means that important<sup>91</sup> political decisions must be

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<sup>90</sup> For statements on neutrality see Ackerman, 1980; Dworkin, 1985; Larmore, 1996; Lecce, 2008a; Rawls, 1993.

justifiable to citizens in terms that *all* are able to accept, and accordingly, that law and public policy must not be used as tools to advance controversial conceptions of the good.<sup>92</sup> In this sense, an important part of what it means to treat citizens as equal and autonomous is to respect their ethical convictions by refraining from disadvantaging them through biases in law or public policy. One of the important offshoots of this doctrine is the equal and universal provision of certain protective liberties, or what we have so far been calling ‘ethical independence rights.’ Since it is not the place of democratic institutions to publically advance particular conceptions of the good, ethical independence rights are accorded to citizens to ensure their ability to form, revise, and pursue their *own* conceptions of the good without undue interference by the state or their peers. Examples of such rights include “freedom of conscience and religion,” “freedom of thought, belief, opinion and expression,” and “freedom of association”<sup>93</sup>, though others could reasonably be interpreted as serving a similar function. These rights are vitally important in democratic societies: not only is their accordance a necessary extension of equality and autonomy, and thus an unequivocal requirement of democratic justice, but they also prove indispensable to the ability of citizens to live good lives amidst pervasive disagreement about what that means.

The purpose of this chapter is to further elaborate these ideas as a means of explaining both the function and importance of ethical independence rights in a democratic context. It will argue that the doctrine of ethical neutrality, and the provision of ethical independence rights it entails, is not only a necessary *requirement* of democratic values, but that it is also the most

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<sup>91</sup> Both John Rawls and Charles Larmore suggest that neutrality in terms of justification applies primarily to constitutional matters (what Rawls calls ‘constitutional essentials’ and what Larmore calls the ‘fundamental principles of political life’). Outside of constitutional matters, both writers suggest that strict neutrality may not be necessary, and that ordinary political decisions may be justly determined through majority voting. See Rawls, 1993, 214; Larmore, 126.

<sup>92</sup> See Ackerman, 1980, 10-12; Dworkin, 1985, 191; Larmore, 123; Rawls, 1993, 191-194.

<sup>93</sup> *Canadian Charter*, s. 2(a), 2(b), and 2(d), respectively.

plausible means of facilitating good lives in societies marked by pluralism. The chapter proceeds in four parts. Part I establishes that in addition to being a necessary presupposition of democracy, moral pluralism is also a reasonable and legitimate condition of human life given the diversity of human experience and our communicative limitations. The fact that democracy implies moral pluralism does not necessarily mean that it is cogent, so some sort of justification must be provided to suggest that it is. Part II introduces the unique challenges that accepting moral pluralism poses for the ability of democratic institutions to pursue what might otherwise be thought of as a legitimating goal: the goal of promoting good lives for citizens. It also outlines democracy's response to that challenge in the doctrine of neutrality and provision of ethical independence rights. As a means of contrast, Part III analyzes prominent objections to neutrality from the perspective of perfectionist or teleological theories. It demonstrates that such theories are not only incompatible with democracy through their violation of its constitutive values, but that they are also potentially self-defeating through their capacity to thwart good lives for citizens. After establishing the necessity of neutrality as an extension of democracy, as well as its plausibility in promoting good lives, Part IV briefly explains the function of ethical independence rights as trumps over perfectionist preferences in law and public policy, suggesting that this understanding of ethical independence rights gives them a special significance within the context of families.

### *2.1 Accepting Moral Pluralism*

According to John Rawls, "The political culture of a democratic society is always marked by a diversity of opposing and irreconcilable religious, philosophical, and moral doctrines."<sup>94</sup> This is not just a matter of historical contingency, but a "...permanent feature of the public

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<sup>94</sup> Rawls, 1993, 3-4.

culture of democracy,”<sup>95</sup> and the predictable result of “...the powers of human reason at work within the background of enduring free institutions.”<sup>96</sup> In other words, the moral pluralism characteristic of contemporary democracies is not just a condition they currently have to deal with; it is partly a *creation* of democracy, and can be expected as an ongoing by-product of free democratic institutions. The correlation Rawls draws between democracy and moral pluralism should not be a surprising one, as it is both supported and reflected by the status-based conception of democracy. According to that conception, moral pluralism is not only an inevitable by-product of democratic institutions, but also figures as one of the key premises on which they are built. Recall that the idea of democratic decision-making is built on substantive values of autonomy and equality: each citizen is to be given a say in the important decisions that affect their lives, and the say of each citizen is to count equally in the decision-making process. Also recall that these values transcend the procedural realm of decision-making to confer a special status on citizens generally: all citizens are to be *treated* as individuals entitled to direct their own lives, and their competing interests are to be *treated* as being worthy of equal consideration. As mentioned above, it is not difficult to see how these values are necessarily rooted in a prior assumption of moral pluralism. First of all, the idea that citizens should be treated as individuals entitled to direct their own lives necessarily assumes that there is a plurality of directions in which they might be taken, and that choosing the direction is the prerogative of the individual whose life it is. Moreover, the idea that citizens’ interests are to be treated as being worthy of equal consideration necessarily assumes that there are diverging interests which are equally legitimate, or which are equally permissible. Thus, democracy both *assumes* and *affirms* moral

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<sup>95</sup> Ibid., 36.

<sup>96</sup> Ibid., 4.

pluralism: its constitutive values presuppose moral pluralism as a starting premise, while its free institutions facilitate and perpetuate it continually.

It is important to note that nothing in the above paragraph suggests that moral pluralism is itself an intelligible idea. Democratic values must assume it for *their* cogency, but that does not necessarily confer cogency on *it*. In one way, this means that the relationship between the two concepts could be a liability, for if moral pluralism was shown to be incoherent, then we would have strong grounds to be suspicious of the democratic principles that presuppose it. Therefore, in order to defend the democratic implications of moral pluralism, such as ethical neutrality and the accordance of ethical independence rights, we must justify *accepting* moral pluralism in the first place. So what reasons do we have to believe moral pluralism is an intelligible idea? Why should we allow it to inform our political theories at the ground level?

One of the reasons given for accepting moral pluralism is because, as Rawls notes, it is a *fact* of contemporary democracies.<sup>97</sup> Political contexts in which citizens hold diverse and irreconcilable doctrines have become the “...normal state of affairs,”<sup>98</sup> so it seems that any plausible political theory must assume moral pluralism as a premise and be able to respond to the challenges it presents. However, this simply side-steps the question of whether or not moral pluralism is cogent in the first place, closing a logical circle. Remember that the reason why moral pluralism requires justification is *because* it is a necessary presupposition of democracy. Insofar as this is the case, we cannot appeal to democracy *in* that justification, for the very soundness of democracy depends on the soundness of moral pluralism. A better justification, then, is one that can explain why moral pluralism is a reasonable idea in its own right, independent of any connection it bears to democracy.

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<sup>97</sup> Ibid., xix.

<sup>98</sup> Brian Barry. *Justice as Impartiality*. (Oxford: Clarendon Press, 1995), 27.

Rawls provides exactly this kind of independent justification through his discussion of the ‘burdens of judgement.’<sup>99</sup> According to Rawls, given the diversity of citizens’ associative points of view, intellectual affinities, and affective attachments, it is unrealistic to assume that they are likely to arrive at a common conception of the good.<sup>100</sup> Not only that, but it is also unlikely that they will be able to arrive at one through subsequent deliberation, no matter how honest or thorough. This is because even in the conscientious exercise of reason and judgement, individuals inevitably encounter various ‘hazards’ which tend to preclude consensus on controversial subjects like ideas about the good. Such burdens of judgement may include the difficulty of evaluating evidence, disagreement about the weight of evidence or relevance of certain considerations, the indeterminacy of our moral concepts, and the inherent diversity of our personal experiences.<sup>101</sup> Taken together, “They are the contingent but inescapable imperfections of our capacity to reason together toward agreement,”<sup>102</sup> and they contribute to a lasting *disagreement* among parties that is both reasonable and irreducible. However, we should not lament this fact or look upon it as a regrettable condition of human life, for it does not necessarily mean that moral pluralism is a problem without solution. On the contrary, it means that moral pluralism *is not necessarily a problem*, and it gives credence to the view that “Different conceptions of the world can reasonably be elaborated from different standpoints...”<sup>103</sup>

Is Rawls’ justification for the reasonableness of moral pluralism a persuasive one? In one sense, it seems to challenge a major tenet of post-Enlightenment thought, that is, the Kantian notion that the proper exercise of human reason will eventually lead us to the same conclusions

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<sup>99</sup> See Rawls, 1993, 54-58.

<sup>100</sup> *Ibid.*, 56-58; see also Isaiah Berlin. “The Pursuit of the Ideal” in Henry Hardy and Roger Hausheer (ed) *The Proper Study of Mankind*. (London: Chatto & Windus, 1997), 9-11; and Larmore, 170-71.

<sup>101</sup> Rawls, 1993, 56-57.

<sup>102</sup> Callan, 1997, 25.

<sup>103</sup> Rawls, 1993, 58.

about morality.<sup>104</sup> It does so by suggesting that reason itself is no guarantee of consensus, and that when we consider the great diversity of human experience, we will find that the exercise of reason actually tends toward *disagreement*, even among the conscientious and well-meaning. However, this departure from tradition should not be cause for scepticism, as the tradition itself finds little support in experience. It is commonplace that discussion or debate taking place in good faith results in controversy rather than consensus; within our daily lives we encounter it constantly. From philosophical debates about the meaning of life, to pragmatic discussions about which options to choose, we often find ourselves at odds with our interlocutors in a way that is both permanent and irreducible. However, our reaction is seldom to question their rational capacities, or to suggest that their failure to reach the same conclusions as us is caused by a defect in reasoning—by most accounts, this explanation would be both condescending and far-fetched. Instead, we are more likely to concede that our disagreement stems from static differences in the way we see the world, incommensurability in the values we happen to hold, or a fundamental divergence in the goals we are trying to pursue, and we are likely to accept that disagreement (sometimes grudgingly) in light of those differences. In this sense, given a) that the burdens of judgment reflect experience, and b) that the good-faith disagreement resulting from them is ubiquitous, there seems to be no good reason *not* to be persuaded by Rawls' justification for the reasonableness of moral pluralism. In fact, the burden of proof ought to lie with critics of moral pluralism, Kantian or otherwise, who suggest that fundamental disagreement about ethics is in some way *unreasonable*. As Charles Larmore writes,

...we will miss an important truth if we suppose....that the peculiar fact requiring explanation is likelihood of reasonable disagreement about complex questions of how we should live...Reasonable disagreement in the handling of complex questions is perhaps just what we

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<sup>104</sup> Kant suggested that the proper exercise of human reason would lead us all to a single set of universal maxims with which to guide our moral lives. See Immanuel Kant. *Groundwork on the Metaphysics of Morals*. Translated by James W. Ellington. (Indianapolis, IA: Hackett Publishing Co, 1983).

should expect (though our philosophical tradition has always preached that reason is what brings us together)...<sup>105</sup>

Thus, accepting moral pluralism is not only necessary insofar as it is permanent fixture of democracies, both empirically and conceptually, but it is also logical when we consider the diversity of human experience and the communicative barriers it erects. However, while moral pluralism is a legitimate and reasonable condition of human life both assumed and affirmed by democratic institutions, it can also be a recipe for difficulty and strife within democratic communities. One particular difficulty concerns the uncomfortable constraints it seems to place on the ability of political institutions to pursue what might otherwise be thought of as necessary and legitimating goals. The most poignant example of this difficulty concerns a goal of utmost importance to democratic citizens and institutions alike: the goal of promoting good lives.

## 2.2 *Can Democracy Facilitate Good Lives?*

Despite the various differences that divide democratic citizens, one commonality connects them all: each citizen has a vested interest in living a good life. Insofar as this is the case, any plausible theory of democratic institutions must be responsive to that interest, for any theory that precluded good lives would be "...a perverse political vision fit only for masochists and the ethically blind."<sup>106</sup> However, the task of facilitating good lives in the context of contemporary democracies is complicated by the fact of pluralism. We have seen that the political culture of contemporary democracies is inevitably marked by a diversity of religious, philosophical, and moral doctrines, and that not all of these doctrines are necessarily compatible with one another. So while the *concept* of living a good life forms a common focal point of ethical commitment, the various *conceptions* of what such a life consists in differ and clash

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<sup>105</sup> Larmore, 170-171.

<sup>106</sup> Dworkin, 2000, 238.

among citizens. Hence, the complication: how can democratic institutions facilitate good lives when there is no consensus on what a good life *is*?

The dilemma this question reflects becomes even more apparent when we consider that the very task of facilitating good lives *does* seem to rely on some settled idea about what makes life good—otherwise, there would be no compass with which to guide institutional arrangements. If this is the case, however, the cogency of democratic theories falls seriously under threat, for the task of facilitating good lives then seems to come at the expense of democracy’s constitutive values. To remain coherent, democratic institutions must reflect their constitutive values first by treating citizens as having interests worthy of equal consideration, and second by treating citizens as individuals entitled to direct the course of their own lives.<sup>107</sup> If facilitating good lives requires settling on a specific conception of the good amidst a plurality, then both of these values may be subject to violation: the most vital interests of citizens who disagree with that conception may not be given equal consideration, and their capacity to direct their lives according to their own doctrines may be unduly hindered in the resulting institutional arrangement. This violation holds even if the chosen conception is endorsed by a vast majority, for democracy’s constitutive values confer a special status on *all* citizens. Sacrificing even a few for the sake of the rest would denigrate democracy into a brute utilitarianism, or the kind of unrestrained majoritarianism that has been shown to be self-defeating.<sup>108</sup>

At first glance, then, the commitment to equality and autonomy seems to preclude democratic institutions from actively<sup>109</sup> facilitating good lives, for it prevents them from adopting a settled conception of the good with which to guide institutional arrangements. In one sense, this may seem to deliver a blow to the attractiveness and plausibility of status-based

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<sup>107</sup> See Chapter 1, particularly 27-37.

<sup>108</sup> *Ibid.*, 15-18.

<sup>109</sup> i.e. through ethical partiality in law and public policy.

democracy. Pursuing a good life and the various commitments and relationships it contains forms the paramount project of any individual, so a political theory limited in its ability to accommodate that project would seem to draw accordingly limited appeal. However, proponents of democracy and its constitutive values provide a much different interpretation. According to them<sup>110</sup>, if we accept moral pluralism as a legitimate and reasonable condition of human life—as we must—the only way democratic institutions *can* facilitate good lives is by *refraining* from actively promoting any particular conception of the good. Determining what gives value to life is the prerogative and responsibility of the individual whose life it is, not the state's. Therefore, the only role that the state has in facilitating good lives is to ensure that political decisions be made “...so far as is possible, independent of any particular conception of the good life,”<sup>111</sup> and to provide citizens with the necessary resources and liberties required to pursue their own conceptions with minimal interference.<sup>112</sup> Extending beyond this role by favouring certain conceptions of the good through law and public policy may improve the lives of citizens who happen to subscribe to those conceptions; however, it is also likely to make the lives of those who reject them more difficult, and this is patently inconsistent with the constitutive values of equality and autonomy. Therefore, amidst moral pluralism, the best way for democratic institutions to promote good lives for their citizens is to assume a position of neutrality between competing conceptions of the good. They can actively provide the resources and liberties required for citizens to pursue their own conceptions freely, but must refrain from influencing the content of those conceptions by favouring some over others in that distribution.

Is this doctrine of neutrality a tenable means of facilitating good lives in democratic societies? There are good reasons to believe that it is, but in order to understand their strength it

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<sup>110</sup> See Ackerman, 1980, 10-12; Dworkin, 1985, 191; Rawls, 1993, 191-194.

<sup>111</sup> Dworkin, 1985, 191.

<sup>112</sup> Will Kymlicka. *Liberalism, Community, and Culture*. (Oxford: Clarendon Press, 1989), 12-13.

will first be helpful to investigate some prominent objections from rival theories. Many philosophers<sup>113</sup> have been sceptical of both the plausibility and desirability of neutrality, providing several different arguments against it. Some claim that neutrality is actually a hoax, and that the ideas that inform it, such as freedom of choice and personal responsibility, are implicitly rooted in an autonomy-based conception of the good.<sup>114</sup> Others have claimed that neutrality simply does not work, that the resources and liberties accorded by neutral institutions are meaningless unless exercised against the backdrop of ‘authoritative horizons’, or preconceived ideas about what the good life is.<sup>115</sup> Most have questioned the credibility of moral pluralism, suggesting that we *can* in fact differentiate between better and worse lives, and that it is the responsibility of governments to promote better ones for their citizens.<sup>116</sup> While these arguments differ in the specific criticisms they present, they all seem to share a common thread: they all assume that we cannot separate the question of what is right from the question of what is good. According to these theories, before we can determine what justice requires, or how political institutions should be structured, we first have to consider the *ends* to which they are directed: promoting human interests and facilitating good lives. This necessarily entails coming to some determinate conclusion about what good lives are, and then defining as right the institutional arrangements which best promote them. Because these theories take an idea of human good or excellence as the end of political institutions, they are often referred to as

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<sup>113</sup> See Callan, 1997; Raz, 1986; Michael Sandel. *Liberalism and the Limits of Justice*. (Cambridge: Cambridge University Press, 1982); Charles Taylor. *The Ethics of Authenticity*. (Cambridge: Harvard University Press, 1992).

<sup>114</sup> See Callan, 12-42; Thomas Nagel. “Rawls on Justice.” *Philosophical Review*. Volume 82 (1973), pp. 220-234; Raz, 1986, 117-124; Sandel, 1982, 15-65.

<sup>115</sup> See Taylor, 31-41.

<sup>116</sup> Several thinkers have based their theories around a specific conception of human virtue; prominent examples include Aristotle. *Politics*. Edited and Translated by Ernest Barker. (New York: Oxford University Press, 1958); Hannah Arendt. *The Human Condition*. (Chicago: University of Chicago Press, 1958); and Friedrich Nietzsche. *Thus Spoke Zarathustra*. Translated by R.J. Hollingdale (New York: Penguin Books, 1969).

*perfectionist* or *teleological* (from the Greek *telos*, meaning ‘end’ or ‘goal’).<sup>117</sup> In order to appreciate the plausibility of neutrality as a means of facilitating good lives, it is worth considering some prominent perfectionist objections as a means of contrast. Through this contrast, it will become evident that perfectionist theories are not only obviously untenable in democratic contexts marked by pluralism, but that they are also unlikely to promote good lives by rejecting it. From this conclusion, we will gain a sense of the importance of protective liberties in pluralistic contexts, and why the interest they protect—the capacity to form, revise, and pursue one’s *own* conception of the good—is an unequivocal democratic entitlement.

### 2.3 Perfectionist Objections

According to Aristotle, the end of the *polis* (or state) is to promote citizens’ highest human capacities. Therefore, “Before we can undertake properly the investigation of...the nature of an ideal constitution...it is necessary for us to determine the nature of the most desirable way of life.”<sup>118</sup> Aristotle’s classic teleology reflects the core perfectionist assumption that we cannot detach considerations about what is right from considerations about what is good; since what is right must be *informed* by what is good, the two questions are intimately related and must be taken up concurrently.<sup>119</sup> It is on the basis of this assumption that perfectionists criticize political theories such as the status-based conception of democracy. Opposite teleological theories, status-based democracy assumes a *deontological* form: it first defines principles of right independently of the good, and then permits whatever individually-formed conceptions of the good that can fit

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<sup>117</sup> Michael Sandel. *Justice: What is the Right Thing to Do?* (New York: Farrar, Straus, and Giroux, 2009), 186.

<sup>118</sup> Aristotle, 279.

<sup>119</sup> See W.D. Ross. *The Right and the Good*. (Oxford: Clarendon Press, 2002); Henry Sidgwick. *The Methods of Ethics*. (London: Macmillan and Co., 1874).

within their boundaries.<sup>120</sup> From the perfectionist perspective, this form is deeply mistaken. By attempting to separate the right from the good, the status-based conception of democracy fails to recognize the necessary relationship between them, leading to odd institutional prescriptions which can actually *limit* or *stifle* good lives (a significant defect if the supposed end of political institutions is to *promote* or *facilitate* them). To further illustrate this perfectionist critique, consider the following scenario.

Imagine that a democratic legislature passes a law restricting the private consumption of pornography. The justification behind the law is that pornography disables its consumers from engaging in meaningful sexual love, which can only take place within the context of a monogamous heterosexual relationship. Since the vast majority of citizens happen to subscribe to that idea of sexual love, the law is easily passed with little opposition. How does this law weigh on both the deontological and teleological scales? From the deontological perspective of status-based democracy, such a law would be illegitimate, regardless of the fact that it is endorsed by a significant majority. This is because what matters for status-based democracy is the maintenance of its constitutive values (or ‘principles of right’) and the special status they confer on citizens, not the promotion of ethical ideals. It does not matter that the community may be better off if pornography were banned, or that consumers may lead more fulfilling lives if they dropped their *risqué habit*—democracy’s constitutive values trump these considerations, and prevent them from being used as justifications for political decisions. Taking precedence over aggregate virtue is the requirement that democratic institutions treat *all* citizens according to the same principles, regardless of the different conceptions of the good they happen to hold. The principle of autonomy requires that institutions treat all citizens as individuals entitled to direct their own lives, while the principle of equality requires, among other things, that they not suffer

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<sup>120</sup> For definitions and descriptions of deontology, see Kymlicka, 1989, 21-40; Sandel, 1982, 1-14.

disadvantage in the distribution of resources and liberties (including those afforded by the criminal law) just because their preferred way of life is deemed depraved by others.<sup>121</sup> So long as these values are maintained and respected, status-based democracy holds that citizens ought to be able to pursue whatever conception of the good suits their own tastes and proclivities, even if that conception takes them down less fulfilling paths than they otherwise might have taken.<sup>122</sup>

Teleological theories may provide a much different interpretation of the above law. We say ‘may’ here because the interpretation given will depend on the conception of human good that is guiding that particular theory, and some conceptions could conceivably arrive at the same conclusion as the deontological interpretation by embracing erotic exploration or imaginative fantasy.<sup>123</sup> However, for the sake of the discussion, assume that the teleological theory in play takes heterosexual monogamy to be an important feature of the human good, and that eradicating pornography *will* contribute to the realization of that feature in the lives of consumers. Assuming all of this, the above law could be nothing but entirely legitimate—even *necessary*—from the teleological perspective. Since teleological theories take the purpose of political institutions to be the promotion of good lives for their citizens, governments have the *responsibility* to shield their citizens from base or ignoble forms of life by enacting these kinds of laws. What is right to do must be guided by what is good, and in this situation, what is right to do amounts to restricting the private consumption of pornography. It is through a failure to recognize this necessary

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<sup>121</sup> See Dworkin, 1985, 353.

<sup>122</sup> It is important to note that all of this assumes that the consumption of pornography *is* in fact a private matter, and that it does not somehow compromise the autonomy or equality of other citizens. If this were the case—if the pornography in question was child pornography, or if it was shown to contribute to gender inequality, for example—then there may be good reason to ban it in the context of status-based democracy. However, such a ban would have nothing to do with perfectionist or teleological considerations; rather, it would be justified instead by its connection to democracy’s constitutive values.

<sup>123</sup> Richard Arneson claims that the political implications of perfectionist theories cannot be determined independently of the conception of the good guiding that particular theory: “What type of politics makes most sense depends not only on the claim that human good is objective but on its content.” (42) See Richard J. Arneson. “Perfectionism and Politics.” *Ethics*. Volume 11 (1) (October 2000), pp. 37-63.

relationship that status-based democracy goes wrong. Through adherence to abstract principles of right, the status-based conception of democracy avoids interference in the private lives of consumers, thus enabling them to continue in their base habit and miss out on an important part of what makes life valuable. But this is an absurd priority, for if adherence to abstract principles does not yield good lives, then they are worthless from the perspective of political institutions. After all, if the point and purpose of political institutions is to promote good lives for their citizens, adhering to principles of right that do not advance that goal simply amounts to shirking their cardinal duty.

Whatever intuitive appeal the teleological interpretation has stems from the fact that *all* citizens share in a desire to live good lives. Insofar as this is the case, it seems reasonable, perhaps even natural<sup>124</sup>, that governments should play a role in that desire by structuring law and policy so as to promote the human good. However, in order for this idea to carry any weight, it must assume what we have already discredited in section 2.1: that it is possible to identify an uncontroversial conception of the good with which to guide institutional arrangements. As we have already seen, this kind of consensus about the good is a fiction. Ethical disagreement is the natural product of the diversity of human experience coupled with our communicative limitations, and what is more, Rawls' account of the burdens of judgement suggests that it is reasonable. This means that any assumption of ethical consensus relied upon by perfectionist theories is ultimately unfounded, resulting in significant problems for their compatibility with democracy, as well as their internal consistency. Both of these problems can be understood in connection to what Rawls calls the "fact of oppression."<sup>125</sup>

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<sup>124</sup> Raz makes the claim that perfectionism is a 'natural' aim for governments in "Facing Up: A Reply." *Southern California Law Review*. Volume 26 (1988-89), 1230-32.

<sup>125</sup> Rawls, 1993, 37.

The fact of oppression is the idea that within the context of moral pluralism, "...a continuing shared understanding on one comprehensive religious, philosophical, or moral doctrine can be maintained only by the oppressive use of state power."<sup>126</sup> In other words, because citizens disagree about their ethical doctrines, the only way to maintain universal adherence to a single one is by pressuring dissenters into adopting whatever precepts that doctrine requires (this was the logic behind the medieval Inquisition, which sought to maintain adherence to the Catholic faith by intimidating or torturing heretics). The fact of oppression becomes especially relevant to perfectionist theories when we consider that they must operate against an inevitable backdrop of reasonable ethical disagreement. To explain: insofar as perfectionist theories take the end of political institutions to be the promotion of the human good, they must rely on some settled idea of what the human good consists in. Institutions will then be structured so as to reward ways of life that conform to that idea, and penalize or discourage ways of life that depart from it.<sup>127</sup> However, ethical disagreement means that not everyone will agree on whatever conception of the good is meant to guide institutions. The effect is that those who disagree with that conception will be subject to various forms of oppression or compulsion in the resulting institutional arrangement: they will be forced to either abide by that conception against their own best judgment, or else face disadvantages in the distribution of resources and opportunities as a result of their dissent. It is true that these forms of oppression are softer and more subtle than the torture and intimidation associated with the Inquisition. However, it is also

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<sup>126</sup> Ibid., 37.

<sup>127</sup> See Will Kymlicka's discussion of perfectionism in *Contemporary Political Theory: An Introduction*. (Oxford: Oxford University Press, 2002), "Perfectionist arguments... say that resources should be distributed in such a way as to encourage the 'realization of distinctly human potentialities and excellences,' and to discourage ways of life which lack these excellences. Such theories are 'perfectionist' because they claim that certain ways of life constitute human 'perfection' (or 'excellence') and that such ways of life should be promoted, while less worthy ways of life should be penalized." (190)

true that they are directed toward exactly the same end: pressuring dissenters into abiding by an ethical doctrine they otherwise reject.

As mentioned above, the fact that perfectionist theories must resort to some form of oppression or compulsion amidst ethical disagreement carries two important consequences. The first is that they are patently inconsistent with democracy, for the various forms of compulsion they must employ violate its constitutive values. Attaching prohibitive penalties to dissenting, yet reasonable modes of life not only shows unequal consideration for the interests of their adherents (thus violating the value of equality), but it also hampers their ability to direct their lives according to what *they* deem valuable (thus violating the value of autonomy). However, the incompatibility between perfectionism and democracy runs even deeper than the problems generated by compulsion, and can be stated at a more fundamental level: while democracy must *assume* moral pluralism for its cogency, perfectionist theories must *reject* it for theirs<sup>128</sup>, meaning that the two theories cannot be held concurrently. Remember that in order for its constitutive values to take on any meaning, democracy must assume some form of moral pluralism: giving equal consideration to the interests of citizens necessarily assumes that there are diverging interest which are equally legitimate, while treating them as individuals entitled to direct their own lives necessarily assumes there are multiple directions they can be taken. Perfectionist theories cannot accept moral pluralism to the same extent, for they are predicated on the assumption that there is a settled and identifiable conception of the human good that political institutions are meant to promote. In this sense, they must reject moral pluralism in favour of a more one-dimensional view of morality, which by extension contradicts democracy's constitutive values. Rather than giving equal consideration to the interests of all citizens,

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<sup>128</sup> Raz refutes this claim by suggesting that moral pluralism is a necessary component of a perfectionist theory based on autonomy. However, it will be demonstrated below that this refutation ultimately fails, as the kind of moral pluralism Raz makes room for is not the kind of pluralism that is relevant from a normative point of view.

perfectionist institutions need only consider those which conform to the operative conception of the good. Rather than treating citizens as individuals entitled to direct their own lives, perfectionist institutions must work to facilitate their adoption of whichever way of life is taken to designate the human good. Insofar as perfectionist theories must adopt a settled conception of the good in order to guide institutions, they must accordingly reject moral pluralism, and are thus incompatible with democracy and its constitutive values.

This is a significant point; however, it is important to note that simply pointing to the inconsistency between perfectionism and democracy does not necessarily amount to an endorsement of democracy. On the contrary, perfectionists may point to the same inconsistency to reiterate their teleological creed: that democracy's overbearing focus on principles of right disables it from promoting the good. In this sense, it may be true that perfectionism is incompatible with a democratic conception of justice, however this just speaks to the primacy of perfectionism, as the realization of democratic justice will likely come at the expense of greater values. Proponents of this view may suggest that the presence of ethical disagreement does not actually pose a problem for perfectionism, because facilitating good lives for dissenters is an important political responsibility even if they do not recognize their lives as being improved. How does this claim work? Perfectionists may suggest that, equipped with the liberty to make their own decisions, people often decide against their best interests and lead worse lives as a result. Drug addicts refuse rehab, couch potatoes refuse exercise, and the lazy or unambitious refuse personal growth—the examples are familiar and many. Taking this into account, it may seem that in some cases, respecting citizens' ethical independence in accordance with equality and autonomy simply amounts to abandoning them to a worse fate<sup>129</sup>; and if plausible political

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<sup>129</sup> See Kymlicka's discussion of this perfectionist suggestion in relation to communitarianism in Kymlicka, 2002, 213-19.

institutions must be responsive to the flourishing of human lives, this certainly counts as a strike against democracy. In this sense, it is a mistake to think of the gentle compulsion employed by perfectionist theories as a kind of ‘oppression’. Rather, it should be thought of as a kind of protection, or a well-meaning mechanism designed to save citizens from themselves.

Is this suggestion coherent? Can compelling citizens against their own ethical judgements really make their lives go better? If the answer is yes, then the inconsistency between perfectionism and democracy becomes less problematic, as promoting good lives may well be possible only by rejecting (when necessary) democracy’s deontological principles of right. However, if the answer is no, then perfectionist theories face a fatal problem of self-defeat, for rather than facilitating *good* lives for citizens, they would then be contributing to *worse* lives for any dissenters affected by compulsive measures. There are good grounds for believing that the answer is, in fact, ‘no’, leading us to the second consequence of the fact of oppression: perfectionist theories are likely to be self-defeating.

Many commentators<sup>130</sup> have been sceptical of ethical compulsion as means of facilitating good lives, suggesting that it is more likely to be counterproductive than successful. This is because ethical compulsion essentially negates a fairly non-controversial precondition of living a life that is good (at least in the eyes of its author): the condition of endorsement. The condition of endorsement (or so-called ‘endorsement constraint’<sup>131</sup>) is the idea that “...no life goes better by being lead from the outside according to values the person doesn’t endorse.”<sup>132</sup> In this sense, we cannot improve a person’s life by compelling them to adopt ethical precepts they reject, because

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<sup>130</sup> Dworkin, 2000; Kymlicka, 1989. Mill’s earlier anti-paternalism expressed through the ‘harm principle’ also seems to reflect a similar sentiment. See Mill, 1982.

<sup>131</sup> T.M. Wilkinson uses this term in “Against Dworkin’s Endorsement Constraint.” *Utilitas*. Volume 15 (2) (July 2003), pp. 175-193.

<sup>132</sup> Kymlicka, 1989, 12.

their attitude toward those precepts is a crucial factor in determining whether or not they will lead to improvement.

The appeal of the endorsement constraint is twofold. Firstly, as a general precondition of good lives, it is non-sectarian and thus widely accessible. We cannot improve the life of a devout Christian by compelling him to reject his religion anymore than we can improve the life of an atheist by forcing him to attend church. In this sense, the endorsement constraint applies regardless of the substantive content of a person's ethical convictions, allaying concerns that endorsement itself is necessarily rooted in a controversial conception of the good. Secondly, the endorsement constraint also seems to carry a powerful intuitive appeal, the strength of which can be illustrated by considering its relation to two features central to our ethical lives: religion and sexuality. With regard to the former, we may accept that praying to God is a worthwhile activity, but only insofar as the person praying actually *believes* that it has some value or purpose. As Kymlicka writes,

You can coerce someone into going to church and making the right physical movements, but you won't make someone's life go better that way. It won't work even if the coerced person is mistaken in her belief that praying to God is a waste of time. It won't work because a life goes better only if led from the inside (and some values can only be pursued from the inside).<sup>133</sup>

In this sense, forced religion is a futile effort because the value in prayer is contingent on endorsement, or a genuine belief in God that cannot be instilled from the outside. The same may be said about sexuality. We can take the compulsive measures required to persuade a homosexual to adopt heterosexuality, but it is preposterous to suggest that this will make his life go better. This is because the value of sexuality is not simply a function of the form it takes, whether heterosexual, homosexual, monogamous, or polygamous; rather, its value derives

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<sup>133</sup> Ibid., 12. For a classic statement on religious endorsement, see John Locke's *A Letter Concerning Toleration*. James H. Tully(ed). (Indianapolis: Hackett, 1983).

crucially from the endorsement of participants, and their individual affirmation that it contributes meaning to their lives.<sup>134</sup>

Thus, endorsement of activities and ethical precepts is usually a necessary precondition for their value, meaning that the kind of paternalism or ethical compulsion perfectionist theories must employ is likely to be self-defeating.<sup>135</sup> However, we should be careful not to overstate the endorsement constraint as a kind of categorical proposition. Richard Arneson and T.M. Wilkinson have both noted that *even if* we accept the endorsement constraint as a precondition of value, it does not necessarily lead us to a resounding rejection of paternalism; on the contrary, it may provide a justification.<sup>136</sup> In many cases, a person may currently object to an activity or precept they are compelled to adopt, only *later* to realize that it contributes value to their lives. For example, a person may be bullied into entering a particular career at the behest of their parents or teachers, but later endorse it as a rewarding or satisfying part of their life.<sup>137</sup> In this sense, it seems that *future* or *overall* endorsement counts as well, which might actually *justify* ethical compulsion in certain cases. Ronald Dworkin (to whom the endorsement constraint is often attributed) concedes that we may have to weigh possible future endorsement against present endorsement, and that the resulting balance may in some cases justify restricted paternalism:

It overstates the point to say that [the endorsement constraint] rules out any form of paternalism, because the defect it finds in paternalism can be cured by [future] endorsement, provided that the paternalism is sufficiently short-term and limited so that it does not significantly constrict choice if the endorsement never comes. We know that a child who is forced to practice music is very likely later to endorse the coercion by agreeing that it did, in fact,

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<sup>134</sup> Dworkin makes a similar point: “[Some] may think that an active homosexual blights his life by a failure to understand the point of sexual love. But [they] cannot think that a homosexual who abstains, against his own convictions and only out of fear, has therefore overcome that defect in his life.” See Dworkin, 2000, 269.

<sup>135</sup> See Dworkin, 2000, 216-218.

<sup>136</sup> See Arneson, 42-46; Wilkinson, 181-188.

<sup>137</sup> Wilkinson, 82.

make his life better; if he does not, he has lost little ground in a life that makes no use of his training.<sup>138</sup>

However, while endorsement may leave room for restricted paternalism in some cases, such as compelling a child to practice piano, it is not likely to leave much room for the kind of ongoing ethical compulsion required by perfectionist institutions. This is because endorsement in the relevant sense carries special stipulations which seem to rally against the measures governments must take to compel citizens into adopting ethical doctrines. For endorsement to be normatively significant, it must be *genuine*, or the product of the individual's own reflective judgment. According to Dworkin, endorsement "...is not genuine when someone is hypnotized or brainwashed or frightened into conversion. [It] is genuine only when it is itself the agent's performance..."<sup>139</sup> The condition that endorsement must be genuine to count as significant casts yet *another* shadow of suspicion on ethical compulsion, for it means that even if dissenters eventually come around and endorse the ethical precepts they have been compelled to adopt, their endorsement will then be negated by its very origins in compulsion—in other words, it will cease to be genuine, and thus become meaningless from a normative point of view. Remember that perfectionist institutional arrangements are structured so as to reward ways of life that conform to the operative conception of the good, and to penalize ways of life that depart from it. Such penalties may take the form of threats or physical coercion, but are more likely to be associated with prohibitive disincentives, such as taxation or disadvantages in the distribution of liberties and resources. Against the backdrop of such penalties, we cannot be sure that subsequent endorsement is in any way genuine, meaning that the compulsion which brought it about cannot be justified with reference to it. This ultimately suggests that ethical compulsion is

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<sup>138</sup> Dworkin, 2000, 269.

<sup>139</sup> *Ibid.*, 269.

inconsistent with endorsement, meaning that compulsive measures are likely to contradict the perfectionist aim of promoting good lives for citizens. Dworkin summarizes this point well:

We would not improve someone's life, even though he endorsed the change we brought, if the mechanisms we used to secure the change lessened his ability to consider the critical merits of the change in a reflective way. Threats of criminal punishment corrupt rather than enhance critical judgment, and even if the conversions they induce are sincere, these conversions cannot be counted as genuine in deciding whether the threats have improved someone's life. [Perfectionist ethical compulsion] is therefore self-defeating.<sup>140</sup>

We should consider one final and important objection. Note that the preceding argument claims that perfectionism fails for two interrelated reasons: first, it fails to take moral pluralism seriously by asserting a settled conception of the good amidst a reasonable plurality; and second, it must resort to oppressive measures in order to cultivate the ethical allegiance of dissenters (resulting in the violation of democratic values as well as the endorsement constraint). Some may suggest that even if this argument succeeds, it is ultimately a hollow victory, because the criticisms it wages are only felt by the most extreme or implausible variants of perfectionism. It may be true that Aristotelian republicans would oppressively insist on a narrow conception of the good, but this is scarcely true of other, more attractive perfectionist theories. In its more plausible version, "Perfectionism is simply the view that legislators and officials may consider what is good and valuable in life and what is ignoble and depraved when drafting the laws and setting the framework for social and political relationships,"<sup>141</sup> and nothing in this more benign iteration necessarily implies a pinhole view of the good or the oppressive use of state force.

This is a troubling objection. If a perfectionist theory could embrace moral pluralism and avoid oppression, then it would essentially become immune to the above criticisms, casting suspicion on status-based democracy and its deontological implications regarding ethical

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<sup>140</sup> Ibid., 218.

<sup>141</sup> Jeremy Waldron. "Autonomy and Perfectionism in Raz's Morality of Freedom." *Southern California Law Review*. Volume 62 (1988-89), 1102.

neutrality. Joseph Raz purports to supply just such a theory in *The Morality of Freedom*. In order to test the scope of the preceding arguments, it is worth briefly considering Raz's perfectionist theory, which is widely regarded as one of the most sophisticated and comprehensive in the contemporary literature.<sup>142</sup> As we will see, despite appearances, Raz's more sophisticated perfectionism actually contains many of the same failures as its less refined predecessors, suggesting that such failures are "...symptomatic of perfectionist political moralities generally."<sup>143</sup>

Raz's liberal perfectionism attempts to allay concerns of ethical monism or state oppression by holding at its core a value familiar to deontological theories of liberalism or democracy: personal autonomy. For Raz, "The value of personal autonomy is a fact of life. Since we live in a society whose social forms are to a considerable extent based on individual choice... we can prosper in it only if we can be successfully autonomous."<sup>144</sup> But how do we become successfully autonomous? According to Raz, our circumstances must satisfy three conditions. First, we must have the adequate mental capabilities to make meaningful decisions, including "...minimum rationality, the ability to comprehend the means required to realize... goals, the mental faculties necessary to plan actions, etc."<sup>145</sup> Second, we must be substantively independent, meaning free from coercion which may limit our decisions, and free from manipulation which may pervert our decision-making process.<sup>146</sup> Third, and finally, we must have an adequate range of meaningful options from which to choose, including "...options with

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<sup>142</sup> See Lecce, 2008a, 11; Waldron, 1100.

<sup>143</sup> Lecce, 2008a, 98.

<sup>144</sup> Raz, 1986, 394.

<sup>145</sup> Ibid., 373.

<sup>146</sup> Ibid., 377-78.

long term pervasive consequences as well as short term options of little consequence, and a fair spread in between.”<sup>147</sup>

This third condition of autonomy seems to provide the root of Raz’s perfectionism. In order to prosper in our lives, we must live them autonomously. However, for Raz, the “Autonomous life is only valuable if it is spent in the pursuit of acceptable and valuable projects and relationships.”<sup>148</sup> Herein lies the perfectionist bent: in order for governments to facilitate citizens’ autonomous capacities—and by extension their ethical prosperity—they are required to “...create morally valuable opportunities, and to eliminate repugnant ones.”<sup>149</sup> In other words, because autonomy is only meaningful insofar as it is directed toward valuable pursuits, governments must work to create an adequate set of valuable options from which citizens can autonomously choose. As with other perfectionist theories, this task of facilitating good lives necessarily entails coming to some determinate conclusion about which options are morally valuable, and which are morally repugnant. Insofar as this the case, Raz admits that “...the autonomy principle is a perfectionist principle”<sup>150</sup>, yet he believes that it escapes the unattractive pitfalls of more ‘narrow’<sup>151</sup> perfectionist theories, including ethical monism and oppression.

First of all, Raz claims that a commitment to autonomy does not lead to an implausibly narrow conception of the good; on the contrary, it forces us to embrace moral pluralism. Since autonomy can only be exercised through making meaningful choices between adequately diverse options, it cannot be realized in an ethically monistic context, for if there is only one prevailing

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<sup>147</sup> Ibid., 374.

<sup>148</sup> Ibid., 417.

<sup>149</sup> Ibid., 417.

<sup>150</sup> Ibid., 417.

<sup>151</sup> To borrow Arneson’s phrase. See Arneson, 2000.

option that is viable (say Nazism in 1930s Germany), then there are no meaningful choices to be made. In this sense, "...valuing autonomy leads to the endorsement of moral pluralism."<sup>152</sup>

Second of all, insofar as autonomy is taken to be the conception of human good guiding Raz's perfectionism, oppression is ruled out as means of pursuing perfectionist goals. We can identify two reasons for this. Firstly, insofar as autonomy implies moral pluralism, the very need for ethical compulsion is mitigated. Since there is not a single, narrow ethical doctrine being promoted, there are not scores of citizens disagreeing with it, meaning that institutions are not faced with the oppressive task of compelling dissenters (at least not to a great extent). Secondly, and more to the point, since "Coercion is both actually and symbolically a threat to autonomy,"<sup>153</sup> employing oppressive tactics against citizens directly contradicts the value of autonomy, and this fact alone rules out the use of oppression as a means of achieving perfectionist goals.<sup>154</sup> However, this is no matter for Raz, as he believes that perfectionist goals can be pursued through non-coercive means, including subsidizing options that are morally praiseworthy, and taxing options that are morally depraved. As he claims,

...not all perfectionist action is a coercive imposition of a style of life. Much of it could be encouraging and facilitating action of the desired kind, or discouraging undesired modes of behaviour. Conferring honours on creative and performing artists, giving grants or loans to people who start community centers, taxing one kind of leisure activity, e.g., fox hunting, more heavily than others, are all cases in which political action in pursuit of conceptions of the good falls far short of threatening popular images of imprisoning people who follow their religions, express their views in public, grow long hair, or consume harmless drugs.<sup>155</sup>

Does Raz's theory really evade the criticisms waged by the preceding argument against perfectionism? It may appear to do so at first glance, as a focus on autonomy *does* seem to both invite moral pluralism and evade oppression. However, upon closer inspection, we can see that

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<sup>152</sup> Raz, 1986, 399.

<sup>153</sup> Waldron, 1989, 1140.

<sup>154</sup> Raz, 1986, 418.

<sup>155</sup> Ibid., 161.

Raz's perfectionism actually suffers from the same pitfalls as its more hard-line predecessors, suggesting that perfectionist theories, even in their most expansive and sophisticated iterations, are both structurally inconsistent with democracy and likely self-defeating.

First of all, insofar as autonomy necessitates a variety of diverse options from which to choose, it is true that Raz's focus on autonomy invites *a kind* of moral pluralism. However, it is not the right kind. The 'right' kind of moral pluralism is the pluralism which arises naturally from the diversity of human experience coupled with our communicative limitations. This kind of pluralism expresses the reasonable ethical diversity that citizens *actually* cultivate, and as such, respecting moral pluralism in this sense amounts to respecting citizens' capacity to decide *for themselves* the best way to live. The moral pluralism presented in Raz's theory does not reflect this organic version. Rather than being the natural product of human diversity, Raz's pluralism is the artificial product of institutions, which decide *on citizens' behalf* which options are valuable and which are worthless. This brand of pluralism is meaningless from a normative point of view, as the recognition of moral pluralism is only significant inasmuch as it affirms citizens' equal ability to decide for themselves how to live. Raz's moral pluralism may provide citizens with a choice between select options; however, insofar as citizens do not get a say in what the options are, such a choice supports only a weak conception of autonomy.

Furthermore, while subsidization and taxation may be non-oppressive means to pursue perfectionist goals, they are certainly textbook examples of ethical compulsion, which we have seen amount to the same thing: pressuring dissenters into adopting ethical precepts they might otherwise reject. This is problematic for two reasons. The first reason is because, as we have already seen, ethical compulsion violates the endorsement constraint, and insofar as this is the case, Raz's theory runs the risk of becoming self-defeating, facilitating *worse* lives rather than

better ones. However, even more problematic for Raz is the fact that his non-coercive means of subsidization and taxation represent an internal contradiction in his theory. Remember that the second condition of autonomy holds that individuals must be independent, meaning free from coercion that may limit their decisions, and free from manipulation which may pervert their decision-making process. But what purpose do taxes and subsidies serve *other* than to manipulate the process of decision-making? By attaching certain penalties or rewards to activities and general modes of life, taxes and subsidies manipulate the opportunity costs associated with them, impeding the ability of citizens to decide between options on the basis of their attitudes and desires alone.<sup>156</sup> Such manipulation can only be a drastic *affront* toward autonomy, insofar as autonomy implies “...a life freely chosen.”<sup>157</sup>

Thus, not only does Raz’s theory fail to support the normatively relevant brand of moral pluralism, but it also must employ ethical compulsion to cajole dissenters into adopting ‘valuable’ options, rendering his theory internally inconsistent, incompatible with democracy, and potentially self-defeating. However, as we have seen, these problems are not unique to Raz’s theory, but apply to perfectionist theories generally. Insofar as perfectionist theories assume a teleological form, taking the end of institutions to be the promotion of the human good, they must adopt a settled conception of the human good to guide institutions. Asserting such a conception amidst a reasonable plurality is bound to violate democracy’s constitutive values, for equal consideration will not be given to the interests of those who disagree with that conception, and their ability to decide *for themselves* how to live may also be compromised in the resulting institutional arrangement. Moreover, even if such a conception *was* to be asserted amidst a reasonable plurality, it is not likely to achieve the aim of promoting good lives. This is because

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<sup>156</sup> See Lecce, 2008a, 122.

<sup>157</sup> Raz, 1986, 371.

individual endorsement is usually a precondition for the value of ethical precepts, meaning that institutions are not likely to make citizens' lives go better by forcing them to adopt activities or modes of life they otherwise reject.

The doctrine of ethical neutrality remedies these problems. Rather than justifying law and policy with reference to the ethical doctrines which divide people, neutral institutions seek to justify them according to values which *all* citizens are able to accept<sup>158</sup>, allowing them to take seriously moral pluralism in a way that is consistent with democracy's constitutive values. First of all, by refraining from using controversial ethical doctrines as the bases of law and public policy, neutral institutions avoid unduly disadvantaging citizens who reasonably disagree with them, upholding the constitutive value of equality. As the preceding critique of perfectionism shows, institutions cannot treat citizens equally while attaching liberties, resources, or opportunities to the acceptance of a particular ethical doctrine; since citizens inevitably disagree about their ethical doctrines, this will always leave some citizens at a marked disadvantage in that distribution. Moreover, by refraining from disadvantaging certain citizens through ethical biases in law and policy, neutral institutions also uphold the value of autonomy. In the absence of manipulative opportunity costs, citizens are able to decide for *themselves* how to live their lives, not on the basis of a cautious cost-benefit analysis, but in accordance with their own attitudes and beliefs about value, giving greater clout to the notion of "...a life freely chosen."<sup>159</sup>

Thus, insofar as institutions may only treat citizens as equal and autonomous by abstracting from the ethical doctrines which divide them, ethical neutrality is a requirement of

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<sup>158</sup> In the case of status-based democracy, this will usually mean with reference to the shared values of democratic citizenship: equality and autonomy. This point indicates a broader idea of 'public reason' or 'reciprocity' which cannot be elaborated here. For more in-depth statements on this idea, see Brettschneider, 2007; Joshua Cohen. "Procedure and Substance in Deliberative Democracy" in Seyla Banhabib (ed.) *Democracy and Difference: Contesting the Boundaries of the Political*. (Princeton, New Jersey: Princeton University Press, 1996); and Rawls, 1993, particularly 212-254.

<sup>159</sup> Raz, 1986, 371.

democratic justice. However, contra the teleological assumption, there is no reason to believe that maintaining democracy's principles of right comes at the expense of the good. It is true that democratic institutions are limited in their capacity to actively promote ethical doctrines through partiality in law and public policy, and as such, it is true no citizens can reap the benefits that partiality may provide. However, it is also true that no citizen will suffer the prohibitive *disadvantages* that accompany subscribing to an unpopular doctrine, and in this sense, no one is any less privileged than anyone else in their ability to pursue the good. Furthermore, when we take into account the endorsement constraint, we are actually lead to the conclusion that ethical neutrality may be a *more* plausible means of facilitating good lives than perfectionism. This is because in the context of ethical disagreement, perfectionist institutions must employ compulsive measures against dissenters, most likely contributing to *worse* lives as a result. By according citizens the necessary resources and liberties to pursue *their own* conceptions of the good with minimal interference, ethical neutrality satisfies the endorsement constraint, and upholds the values of equality and autonomy which constitute democratic citizenship.

#### 2.4 Ethical Independence Rights as Trumps

Now that we have demonstrated how ethical independence necessarily flows from the constitutive democratic values of equality and autonomy, it is beneficial to briefly explain how the accordance of rights protects that interest, before going on the draw any conclusions regarding the applicability of such rights to children. Ethical independence rights act as 'trumps' over perfectionist (or 'external') preferences in law and public policy.<sup>160</sup> In this sense, they shield

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<sup>160</sup> See Dworkin, 1977, 266-278; and "Rights as Trumps" in Jeremy Waldron (ed.) *Theories of Rights*. (Oxford: Oxford University Press, 1984), 153-167. Dworkin focuses on a brand of preference utilitarianism as an example, though perfectionist preferences apply directly insofar as they "... [state] a goal for the community as a whole." (1984, 153).

individuals from the potential disadvantages associated with political decisions which express an ethical goal for the community as a whole. In order to understand this idea, it is worth looking into Dworkin's original formulation of 'rights as trumps' set against a brand of utilitarianism implicit in democratic decision-making.

The idea of rights as trumps is informed by a sentiment familiar to the status-based conception of democracy. This is the sentiment that, as a matter of political morality, democratic citizens are entitled to be treated with equal concern and respect by political institutions. Treating citizens with concern means treating them "...as human beings who are capable of suffering and frustration,"<sup>161</sup> while treating them with *equal* concern means distributing goods and opportunities equally on the grounds that all citizens share in these capabilities. In this sense, equal concern broadly correlates to what we have been calling 'equal consideration of interests', or the constitutive value of equality.<sup>162</sup> On the other hand, treating citizens with respect means treating them "...as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived,"<sup>163</sup> while treating them with *equal* respect means that no citizen's liberties or opportunities should be constrained on the basis that their conception of the good is less worthy or noble than another's.<sup>164</sup> In this sense, equal respect broadly indicates an individual's entitlement to direct their own life, reflecting what we have been calling the constitutive value of autonomy.<sup>165</sup>

While democratic citizens are entitled to be treated with equal concern and respect by political institutions, this status may be threatened by decisions produced by the democratic

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<sup>161</sup> Dworkin, 1977, 272.

<sup>162</sup> Ibid., 273.

<sup>163</sup> Ibid., 272.

<sup>164</sup> Ibid., 273.

<sup>165</sup> Dworkin may take issue with 'autonomy' as a label, as equal concern and respect are meant to indicate that protective liberties derive from a substantive value of equality, not liberty. However, insofar as the constitutive value of autonomy designates an individual's entitlement to direct their *own* life, or decide for *themselves* how to live, it is virtually synonymous with what Dworkin calls the principle of 'equal respect.'

process. According to Dworkin, majoritarian decision-making (imperfectly) reflects a utilitarian logic: it attempts to satisfy the preferences of the most people by weighing those preferences equally in a utilitarian calculus, accepting as legitimate the decision which most people prefer.<sup>166</sup> At first glance, this system may seem intuitively appealing due to its egalitarian bent: because “...[it treats] the wishes of each member of the community on par with the wishes of any other,”<sup>167</sup> it appears to treat citizens with equal concern and respect. However, as Dworkin points out, this egalitarian appearance is often illusory. The reason for this is because majoritarian decision-making indiscriminately takes into account *two* types of preferences citizens hold: personal and external. This distinction, as well as important implications regarding rights, requires further explanation.

As Dworkin claims, when a citizen expresses a preference for one option rather than another in a democratic decision, there are actually two types of preferences that may be at play. One type of preference is *personal*, which expresses a desire for one set of goods or opportunities to be assigned to *oneself*. The other type of preference is *external*, which expresses a desire for one set of goods or opportunities to be assigned to *others*.<sup>168</sup> To illustrate this point, reconsider an earlier example. Imagine that a majoritarian legislature successfully voted to criminalize the private consumption of pornography on the grounds that it is morally depraved. Such a decision not only takes into account the *personal* preferences of citizens who may not wish to consume or be exposed to pornography themselves; it also takes into account their *external* preferences about how others should conduct their lives with regard to pornography. This is problematic for the utilitarian calculus, for it crushes whatever egalitarian appeal it had.

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<sup>166</sup> See Dworkin, 1977, 276.

<sup>167</sup> *Ibid.*, 275. The intuitive appeal of majoritarian decision-making was discussed in Chapter One in relation to the ‘paradox of proceduralism’. See Chapter One, 15-18.

<sup>168</sup> *Ibid.*, 275; see also Dworkin, 1985, 196.

Rather than being entitled to an equal chance at promoting their self-regarding goals through public institutions, consumers of pornography suffer marked disadvantages simply because the more numerous do not approve of the way they live. As Dworkin claims, this kind of decision “...reflects not just some accommodation of the *personal* preferences of everyone, in such a way as to make the opportunities of all as nearly equal as may be, but the domination of one set of *external* preferences, that is, preferences people have about what others shall do or have.”<sup>169</sup>

The problem for actual majoritarian legislatures is that it is virtually impossible to distinguish between citizens’ personal and external preferences in political decisions. It is impossible from an institutional perspective because an individual vote simply expresses a citizen’s *overall* preference, meaning that there is no way to enforce their personal preferences while ignoring their external preferences.<sup>170</sup> Moreover, it may also be impossible from a psychological perspective, since personal and external preferences often overlap. Citizens *themselves* may not be able to distinguish between the two, as their personal preferences may be parasitic on external preferences, and vice versa.<sup>171</sup> These difficulties yield the following solution: since the inclusion of external preferences in majoritarian decisions threatens citizens’ entitlement to be treated with equal concern and respect, citizens are accorded protective liberties designed to shield them from decisions reflecting external preferences. As Dworkin explains:

The concept of an individual political right, in the strong anti-utilitarian sense... is a response to the philosophical defects of a utilitarianism that counts external preferences and the practical impossibility of a utilitarianism that does not. It allows us to enjoy the institutions of political democracy, which enforce overall or unrefined utilitarianism, and yet protect the fundamental right of citizens to equal concern and respect by prohibiting decisions that seem, antecedently, likely to have been reached by virtue of the external components of the preferences democracy reveals.<sup>172</sup>

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<sup>169</sup> Dworkin, 1985, 196. Emphasis in original.

<sup>170</sup> Dworkin, 1977, 276.

<sup>171</sup> *Ibid.*, 276-77.

<sup>172</sup> *Ibid.*, 277.

Thus, by acting as trumps over perfectionist considerations in law and public policy, ethical independence rights shield citizens from the disadvantages associated with political decisions that express an ethical goal for the community as a whole. Accordingly, we can understand them as serving three democratic ends. First of all, they safeguard autonomy. By ensuring that law and public policy is not justified according to controversial conceptions of the good, ethical independence rights eliminate any manipulative opportunity costs associated with ethical decisions. As such, citizens equipped with ethical independence rights are able to act on their *own* beliefs about value without being influenced by prohibitive penalties: they can form, revise, and pursue their *own* conception of the good without fear of forfeiting any of the resources, liberties, or opportunities to which they otherwise may be entitled as democratic citizens.

Secondly, ethical independence rights also safeguard equality. By trumping perfectionist considerations in law and public policy, ethical independence rights ensure that political decisions reflect an equal consideration for the ethical interests of *all* citizens, regardless of how popular or unpopular those interests are. Institutions cannot treat citizens equally while attaching liberties, resources, or opportunities to the acceptance of particular ethical doctrines; since citizens inevitably disagree about their ethical doctrines, this will always leave some citizens at a marked disadvantage in that distribution. By blocking political decisions based on perfectionist or sectarian premises, ethical independence rights serve to eliminate these inequalities, ensuring that the interests of all citizens are given equal consideration through law and public policy.

Finally, in addition to supporting the constitutive values of autonomy and equality, ethical independence rights facilitate good lives for citizens. Since perfectionism inevitably results in ethical compulsion—and thus a violation of the endorsement constraint—the best way

for institutions to facilitate good lives for *all* citizens in the context of moral pluralism is to accord them the resources and liberties required to pursue their *own* conceptions of the good with minimal interference.

Understood as ‘trumps’ over external preferences, ethical independence rights actually seem to have an important application in the context of families, for the tendency of parents to raise their children so as to adopt their own religious, cultural, or moral doctrines seems to reflect parents’ external preferences about how their children should live. To put it another way, the ethical compulsion that children experience under the auspice of their parents seems to be *precisely* what ethical independence rights are meant to rally against, suggesting that rather than being *irrelevant* to the context of families, such rights are *especially* relevant to the context of families. Thus, given children’s vulnerable position in relation to their parents in conjunction with their status as addressees of law, it would seem as though democratic values yield a strong presumption in favour of extending ethical independence rights to children. However, many critics have rejected this presumption, claiming that extending ethical independence rights to children is either contrary to their interests, contrary to the interests of their parents, or altogether unintelligible given their cognitive limitations. With a more comprehensive understanding of ethical independence rights in place, we are now in a position to assess these objections in the next chapter.

### *Conclusion*

The constitutive democratic values of equality and autonomy are predicated on an assumption of moral pluralism: treating citizens’ interests with equal consideration necessarily assumes that there are diverging interests which are equally legitimate, while treating citizens as

individuals entitled to direct their own lives necessarily assumes that there is a plurality of directions in which they might be taken. This necessary relationship between democracy and moral pluralism has important implications for democratic institutions, as it shapes what it means for them to treat citizens as equal and autonomous. Because citizens disagree about their ethical doctrines, and such disagreement is taken to be reasonable, such doctrines cannot serve as the basis of law or public policy; their controversial nature precludes *all* citizens from being able to accept them, and such preclusion is inconsistent with democracy's constitutive values. Therefore, in order to maintain their commitment to equality and autonomy amidst moral pluralism, democratic institutions must assume a position of neutrality between competing conceptions of the good. This means that important political decisions must be justified in terms that *all* citizens are able to accept, and that law and policy must not be used as tools to promote controversial conceptions of good. One of the important offshoots of neutrality is the accordance of ethical independence rights, including freedom of religion, expression, and association (among others). Since it is not the place of governments to advance controversial conceptions of the good among citizens, ethical independence rights are accorded to ensure their ability to form, revise, and pursue their *own* conceptions of the good without undue interference by the state or their peers.

As a natural extension of democratic values, the doctrine of neutrality is a requirement of democratic justice; however, it also seems to be the most plausible means of facilitating good lives in a political context marked by pluralism. This fact becomes evident upon contrasting neutrality with its rival alternative, perfectionism. We have seen that perfectionist theories object to neutrality by suggesting that it is the purpose of governments to actively promote the human good through partiality in law and public policy. As such, governments must adopt a settled conception of what the human good consists in, and then structure institutions so as to promote

it. However, this is problematic given the fact that perfectionist theories must operate against an inevitable backdrop of ethical disagreement. Not all citizens will agree on the conception of the good meant to guide institutions, and the effect is that they will be subject to ethical compulsion in the resulting institutional arrangement. This fact renders perfectionism incompatible with democracy, as compelling citizens against their own ethical judgments fails to treat their interests with equal consideration, and insults their ability to direct their lives according to their own beliefs about value. However, it also renders perfectionism self-defeating: because endorsement of ethical precepts is usually a precondition for their value, compelling citizens to adopt precepts they otherwise reject is not likely to make their lives go better.

The accordance of ethical independence rights protects citizens from these disadvantages by acting as trumps over perfectionist (or ‘external’) preferences in law and public policy. In other words, they shield citizens from ethical compulsion, allowing them to form, revise, and pursue their *own* conception of good. Understood in this way, they seem especially relevant to children, as the ethical compulsion experienced within the parent-child relationship seems to be exactly what ethical independence rights are meant to rally against. Must the parent-child relationship also be constrained by ethical independence rights, then?

Chapter Three  
Extending Ethical Independence Rights to Children

*“Children, I confess, are not born in this full state of equality, though they are born to it. Their parents have a sort of rule and jurisdiction over them, when they come into the world, and for some time after; but it is only a temporary one. The bonds of this subjection are like the swaddling clothes they are wrapt up in, and supported by, in the weakness of their infancy: age and reason as they grow up, loosen them, till at length they drop quite off, and leave a man at his own free disposal.”*

- John Locke, *Second Treatise of Government*

*Introduction*

The previous two chapters have been aimed at demonstrating a strong democratic presumption in favour of extending ethical independence rights to children. Before introducing the major objections to this view, it is first helpful to briefly review the line of reasoning that has gotten us to this point. The first chapter argued that, contrary to proceduralist interpretations, democracy is best understood as a normative idea built on substantive values of equality and autonomy. While these values have important procedural implications in the form of equal voting, they also have substantive implications in the form of individual rights. It was suggested that we can account for both sets of implications by taking a ‘status-based’ approach towards democracy, one which shifts focus from the particular *role* that citizens play in democratic procedures to the general *status* they hold in democratic societies. According to this approach, citizens occupy *two* distinct positions in relation to law—that of its *author* and that of its *addressee*—and the constitutive values of equality and autonomy must inform *both* positions for an account of democracy to remain coherent. This results in a standard set of procedural rights, as upholding equality and autonomy in relation to citizens’ status as authors implies that they are each entitled to an equal role in creating the laws that bind them. However, it also results in a number of substantive rights, as upholding those values in relation to citizens’ status as

addressees implies that the laws that are created reflect the fact that their interests matter equally, and that they are self-determining agents entitled to direct their own lives.

One of the important implications of status-based democracy is that the substantive rights to which citizens are due are no longer parasitic on their participation in democratic procedures, but derive instead from their status as addressees of law. This means that citizens who *cannot* or *choose not* to participate in democratic procedures are nevertheless entitled to a full scheme of substantive rights, including the special subgroup of ethical independence rights aimed at protecting their ability to form, revise, and pursue their *own* conception of the good. From a democratic perspective, children ought to be entitled to these rights by virtue of their status as addressees of law. However, their general treatment within the context of the parent-child relationship potentially threatens that entitlement. Because children are often raised so as to adopt the specific religious, cultural, and ethical doctrines of their parents, there is a sense in which their ethical independence rights may be disrespected, or simply inaccessible. Since democracy's constitutive values require the equal and universal accordance of substantive rights to *all* addressees of law, children's exemption from a full scheme of ethical independence rights demands justification.

Assessing the validity of children's exemption from a standard scheme of ethical independence rights requires a thorough understanding of what those rights consist in. Thus, the second chapter was dedicated to explicating ethical independence rights by demonstrating how they flow from democratic values. It was argued that ethical independence rights are the necessary product of democracy's constitutive values operating against an inevitable backdrop of moral pluralism, and that they have a special application in the context of families given children's vulnerable position in relation to their parents. Because citizens reasonably disagree

about their ethical doctrines, such doctrines cannot be used as the basis for law and public policy—their controversial nature precludes *all* citizens from being able to accept them, and such preclusion is inconsistent with democratic values. It is inconsistent with the value of equality because it does not show equal consideration for the interests of citizens who reasonably disagree with the chosen ethical doctrine. Moreover, it is inconsistent with the value of autonomy because the institutional arrangements it prescribes may detract from the ability of dissenting citizens to direct their lives according to their *own* (reasonable) ethical precepts. Therefore, in order for democratic institutions to maintain their commitment to equality and autonomy amidst moral pluralism, they must assume a position of neutrality between competing conceptions of the good. This means that important political decisions must be justified in terms that *all* citizens are able to accept, and that law and public policy must not be used as tools to promote controversial conceptions of good. An important offshoot of neutrality is the accordance of ethical independence rights, such as freedom of religion, expression, or association (among others). Since it is not the place of governments to advance controversial conceptions of the good, protective liberties are accorded to citizens to ensure their ability to form, revise, and pursue their *own* conceptions of the good, without interference by the state or their peers.

One way of interpreting the function of ethical independence rights is to think of them as ‘trumps’ over law or public policy that expresses an ethical goal for the community as a whole. In this sense, they are meant to shield individuals from ethical compulsion, or other citizens’ ‘external preferences’ about what they should have or how they should live. Understood in this way, ethical independence rights seem to have an important application in the context of families, for the tendency of parents to raise their children so as to adopt their own religious, cultural, or moral doctrines seems to reflect parents’ external preferences about how their

children should live. Put another way, the ethical compulsion that children experience under the auspice of their parents seems to be *precisely* what ethical independence rights are meant to rally against, suggesting that rather than being *irrelevant* to the context of families, such rights are *especially relevant* to the context of families. Given a) children's status as addressees of law, and b) their vulnerable position in relation to their parents, it seems as though they are appropriate candidates for rights protecting their ethical independence. Thus, democracy's constitutive values yield a strong presumption in favor of extending ethical independence rights to children.

Even if the theoretical link is sound, something still might seem strange about extending sophisticated ethical independence rights to children. This skepticism has been duly noted in the contemporary literature surrounding children's rights, which contains three strands of argument objecting to the extension of ethical independence rights to children. The first strand of argument objects to the very idea of thinking about children and the family in terms of rights, suggesting that it distracts us away from the more important goal of promoting their immediate developmental interests. The second strand of argument claims that extending ethical independence rights to children compromises parental authority, or that it is inconsistent with respecting the right of parents to raise their children in accordance with their own religious, cultural, or moral traditions. Finally, the third strand of argument simply claims that even if it is intuitively appealing or theoretically sound to extend ethical independence rights to children, the fact remains that they lack the necessary cognitive capacities required to exercise them. Each of these objections support strong intuitions and raise relevant issues concerning the merits and drawbacks associated with according rights to children. However, as we will see, none are capable of making a persuasive case against extending ethical independence rights to children;

rather, they simply signal the need to reimagine the nature of children's interest in those rights, as well as the means by which that interest is protected.

The following chapter defends the democratic presumption in favour of extending ethical independence rights to children against the three prominent objections, and proposes an alternative account of children's rights which is immune to the criticisms they raise. It proceeds in four parts. Part I elaborates the definitive features of the modern conception of the child. Since the nature and scope of children's rights will depend in part on how they are characterized, it is necessary to clarify what a child *is* before outlining the kinds of rights they are due. Part II outlines and responds to each of the three prominent objections, demonstrating how each is incapable of making a persuasive case against extending ethical independence rights to children. Ultimately, it suggests that each objection suffers from at least one of two major defects: a misunderstanding of the nature and scope of ethical independence rights, or an overly-narrow view of children's interest in them. Drawing on Joel Feinberg's 'rights-in-trust', Part III elucidates an alternative trust-based account of children's rights which is immune to some of the major criticisms raised by the objections, yet still capable of protecting children's ethical independence in a way that is both effective and meaningful. Finally, Part IV eases lingering critical concerns regarding a trust-based account of rights by demonstrating how it satisfies the conditions that the objections prescribe for an account of children's rights to be plausible.

### *3.1 The Modern Conception of the Child*

So far the term 'child' has been used somewhat indeterminately, loosely referring to a group of young human beings who share some unique set of attributes which distinguish them from adults. To be sure, some of these attributes are familiar and uncontroversial: children are

often thought of by definition as being cognitively incompetent, emotionally immature, and physically dependent on their parents or caregivers for survival. However, a more detailed picture of the child obscures these familiar attributes, revealing fundamental ambiguities which complicate our moral thinking about children. Since the nature and scope of children's rights will vary according to how they are characterized, we have a special interest in briefly addressing these ambiguities and clarifying what we mean when we talk about 'children.'

According to David Archard, conceptions of childhood (and hence, children) can differ along three separate indexes: its *boundaries*, its *dimensions*, and its internal *divisions*.<sup>173</sup> The boundary of childhood is simply the point at which it is deemed to end, or the threshold at which the child transitions into adulthood.<sup>174</sup> Some conceptions of childhood may fix boundaries antecedently, while others may leave them vague and open to contingency. For example, many Jewish cultures fix a firm upper limit on childhood at the age of thirteen for boys, and usually twelve for girls. At this point, the child undergoes the *Bar* or *Bat Mitzvah* coming-of-age ritual, and is then deemed responsible for their actions within the community. However, the boundaries associated with other conceptions of childhood may not be so clearly defined. A biological conception of childhood, for example, may attach its boundary to the onset of puberty and development of reproductive capacities. Not only is this indicator less precise, being a gradual and ongoing process, but it also differs *among* children: while some children may reach biological adulthood before the age of twelve or thirteen, others may not reach it until well after.

The second sense in which conceptions of childhood can differ is in terms of their 'dimension', which refers to the specific vantage point from which a distinction between children and adults is being drawn. As Archard claims, "These include a moral or juridical perspective

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<sup>173</sup> Archard, 2004, 31.

<sup>174</sup> *Ibid.*, 31.

from which persons may be judged incapable, in virtue of their age, of being responsible for their deeds; an epistemological or metaphysical viewpoint from which persons, in virtue of their immaturity, are seen as lacking in adult reason or knowledge; and a political angle from which young humans are thought unable to contribute towards and participate in the running of the community.”<sup>175</sup> Because childhood can be articulated with reference to different criteria, what we take to be a ‘child’ in a given context will depend on what criteria we take to be relevant. For example, a young person on trial in a criminal court may be deemed mature enough to tell the difference between right and wrong, and as a result, get tried as an adult. However, that same person may still be deemed too immature to participate in complex activities of governance, and thus be barred from applying for public offices. In the former instance, the relevant criteria for assessing ‘childishness’ is a basic sense of justice or morality; in the latter instance, the relevant criteria is a more stringent level of cognitive development and civic education. In this sense, the nature and boundaries of childhood differ according to the perspective from which it is being evaluated.

Finally, conceptions of childhood can also differ in terms of their internal divisions, or the way in which they break childhood up into its various subcategories. For example, in the contemporary West, childhood is commonly divided into three distinct stages: infancy, characterized by extreme dependence and vulnerability; ‘childhood proper’, characterized by increased independence and cognitive development; and adolescence, characterized by physical and mental maturation and preparation for adult roles. The term ‘child’ may be understood to encompass all stages from birth until adulthood, or it may be understood to simply refer to the period between infancy and adolescence.<sup>176</sup>

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<sup>175</sup> Ibid., 32.

<sup>176</sup> Ibid., 34.

The fact that childhood is an ambiguous concept which varies according to context has important implications for our thinking about children in relation to rights. First of all, we must concede that the rights-based perspective from which we evaluate children is only one of many, and that the nature and boundaries that perspective implies may conflict with other conceptions of childhood. Second, we must recognize that children are not a homogenous group; that there are important physical, cognitive, and moral differences between the various stages of childhood which may merit differential treatment in terms of rights. However, while the inherent ambiguity of childhood complicates our moral thinking about children, it does not necessarily mire that thinking in a kind of relativism where our treatment of children becomes contingent on whatever conception of childhood we adopt. On the contrary, we can identify some fairly stable features of a broad, modern conception of childhood which can serve as a foundation for thinking about children's rights.

In addition to the commonly recognized attributes of cognitive incompetence, emotional immaturity, and physical dependence, we can identify three important features of the modern conception of childhood dominant in Western democracies.<sup>177</sup> First of all, insofar as children are often characterized by the adult qualities they lack, the modern conception of childhood is largely parasitic on that of adulthood.<sup>178</sup> Whereas adults are "...rational, physically independent, autonomous, and [have] a sense of identity that derives partly from critical reflection upon [their] beliefs and desires,"<sup>179</sup> children are irrational, physically vulnerable, needy, and have unstable

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<sup>177</sup> Using the phrase 'modern conception of the child' to refer to the conception dominant in Western democracies does not necessarily imply that contemporary *non*-Western conceptions are somehow not 'modern' in the normative sense of the word. See Archard, 2004, 24-25.

<sup>178</sup> See Archard, 2004, 29; Steven Lecce. "Should Democracy Grow Up? Children and Voting Rights." *Intergenerational Justice Review*. Volume 9 (4) (2009), 133.

<sup>179</sup> Lecce, 2009, 134.

personalities which are driven largely by emotion and impulse. In this sense, a child is often taken to be the inverse of an adult.

Second of all, the modern conception of childhood is gradual. Infants do not momentarily transform into adults, but steadily develop through each stage of childhood, progressively acquiring knowledge and maturing physically, cognitively, and emotionally. The gradual aspect of development informs our treatment toward children: as they continually grow older and become more mature, our treatment becomes less overbearing, and we proportionally grant them more responsibilities.

Finally, children in contemporary democracies are usually thought to possess an independent moral status which sets limits on how others, including their parents, may treat them. In this sense, they are persons rather than property. This distinctive feature of the modern conception of the child marks an important shift from previous conceptions, which were often based on a proprietary notion of parental authority. For example, the ancient Roman doctrine of *patria potestas* held that the father (or *paterfamilias*) held an absolute right of life or death over his child, relinquished only by the father's death or manumission.<sup>180</sup> This idea was carried on centuries later through Thomas Hobbes, who held that "Children...whether they be brought up and preserved by the father, or by the mother, or by whomsoever, are in most absolute subjection to him or her..."<sup>181</sup> However, in contemporary democracies, the notion that children are simply the property of their parents to be disposed of according to the parent's will is considered morally impoverished, if not objectionable. This sentiment is not only reflected in prevalent attitudes and child welfare legislation, but also finds widespread support on the international stage. For example, the United Nations Convention on the Rights of the Child (UNCRC) (1989)

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<sup>180</sup> Archard, 2004, 8.

<sup>181</sup> Thomas Hobbes. *The Elements of Law* (Second Edition). (Ed) Ferdinand Tönnies. (London: Frank, Cass, and Company, 1969), 134.

is signed by 140 states<sup>182</sup>, and guarantees children a wide range of rights protecting their welfare and choices. Such rights include a right to life and survival<sup>183</sup>, a right to be protected from exploitation and abuse<sup>184</sup>, a right to an adequate standard of living for physical and mental development<sup>185</sup>, a right to a name<sup>186</sup>, a right to freedom of expression<sup>187</sup>, and a right to freedom of thought, conscience, and religion<sup>188</sup>, among others. The UNCRC reflects the modern view that children are persons in their own right, and as such, are entitled to a standard of treatment which is consistent with that status.

Thus, coupled with the attributes of cognitive incompetence, emotional immaturity, and physical dependence, the preceding three features of the modern conception of childhood provide us with a fairly stable foundation for thinking morally about children. However, it is important to note that a foundation is *all* they provide. Simply identifying the important features of the modern conception of childhood does not necessarily provide any reliable prescription for the rights that children are due. On the contrary, such features can be ambiguous themselves, and may be interpreted in conflicting ways. For example, in one sense, the fact that children are defined by the adult capacities they lack seems to provide a *prima facie* reason for treating them differently in the accordance of rights, lending support to the view that children's exemption from a full scheme of rights is justified. However, in another sense, the fact that rights are accorded in an all-or-nothing fashion does not seem to sit well with the gradual aspect of development; if the relevant differences between children and adults are only ones of degree,

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<sup>182</sup> United Nations. "United Nations Treaty Collection." Accessed July 12, 2011. Available from [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=IV-11&chapter=4&lang=en)

<sup>183</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, article 6. Accessed July 12, 2011. Available from <http://www2.ohchr.org/english/law/crc.htm> (hereafter referred to as UNCRC).

<sup>184</sup> *Ibid.*, article 19.

<sup>185</sup> *Ibid.*, article 27.

<sup>186</sup> *Ibid.*, article 7.

<sup>187</sup> *Ibid.*, article 13.

<sup>188</sup> *Ibid.*, article 14.

then it would seem inappropriate to *entirely* deny children rights in light of them. Even international legislation is unclear when it comes to children's moral or legal status. While the UNCRC is widely recognized by the majority of states, many of its provisions are directly contradicted by other UN covenants. For example, the International Covenant on Economic, Social, and Cultural Rights (1966) asserts that parents have the liberty to "...ensure the religious and moral education of their children in conformity with their own convictions,"<sup>189</sup> which seems to directly oppose the child's independent right to freedom of thought, conscience, and religion as articulated through the UNCRC. Moreover, Archard notes similar contradictions *internal* to the UNCRC, which ultimately undermine its utility as a coherent statement of children's entitlements.<sup>190</sup>

So while the nature and scope of children's rights necessarily depends on how they are characterized, a characterization of children does not necessarily elucidate the nature and scope of the rights they are due. Where does that leave us? Having articulated a modern conception of the child, we can now review the major philosophical arguments for and against children's rights *in light of* that conception. The following section will outline three major arguments *against* extending ethical independence rights to children. After exposing their weaknesses, we will then turn to an alternate account of children's rights which is both compatible with the modern conception of the child, and reflective of the democratic principles which undergird ethical independence.

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<sup>189</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, article 13.3. Accessed July 12, 2011. Available from <http://www2.ohchr.org/english/law/cescr.htm>

<sup>190</sup> See Archard's discussion of the UNCRC in Archard, 2004, 58-69.

### 3.2 *Three Prominent Objections*

The contemporary literature surrounding children's rights contains three strands of argument objecting to the extension of ethical independence rights to children. The first strand of argument objects to the very idea of thinking about children and the family in terms of rights. It suggests that a more comprehensive understanding of children's development will lead us away from talk about rights and toward a theory of familial intimacy in which the appropriate treatment of children is regulated by obligations and bonds of affection. The second strand of argument suggests that parents have a special authority over their children which entitles them to shape their children's ethical convictions. It claims that an important facet of a parent's *own* ethical independence involves the ability to transmit their cherished religious, cultural, and moral beliefs to their children, and that the measures required to protect or promote children's ethical independence rights are apt to violate that entitlement. Finally, the third strand of argument suggests that even if it is intuitively appealing or theoretically sound to extend ethical independence rights to children, the fact remains that their cognitive deficiencies preclude them from making any use of them. In this sense, because children lack the important cognitive prerequisites for having an interest in such rights—including rationality, stable personalities, and developed ethical convictions—according them a full scheme is practically meaningless, and thus not normatively required.

While each of these arguments has been influential in thinking about children's rights, none of them are ultimately persuasive. As we will see, each argument suffers from at least one of two major defects: a failure to understand the nature and scope of ethical independence rights, and/or an overly narrow view of the nature of children's interest in them. However, in order to understand the force of these defects, it is first necessary to review each argument in turn,

considering each in its best light, and paying special attention to the important intuitions they support.

### 3.2.1 *An Ethic of Care*

According to Michael Sandel, rights-based justice is not, as Rawls suggests, a paramount virtue.<sup>191</sup> Rather, it is simply one value among many, and is sometimes incommensurable with the other important values which ought to command our allegiance.<sup>192</sup> This tension is clearly illustrated in the context of the family. At least in their ideal manifestations, families reflect a special set of virtues which have little, if anything, to do with justice. They tend to be characterized by a strong sense of community and shared fate, and instead of being regulated by a stringent set of rights and rules, "...relations are governed in large part by spontaneous affection..."<sup>193</sup> Another way of putting it is to say that the family is generally characterized as *lacking* the circumstances which make justice attractive as a 'remedial virtue': since parties are *not* "...mutually disinterested persons [putting] forward conflicting claims on the division of social advantages,"<sup>194</sup> there is no need for a system of rights and rules to adjudicate between them. In fact, because the family virtues of community and benevolence are separate from, and in some ways incommensurable with, the virtue of justice, introducing the latter into a family context may come at the expense of the former:

[I]magine that one day the harmonious family comes to be wrought with dissension. Interests grow divergent and the circumstances of justice grow more acute. The affection and spontaneity of previous days give way to demands for fairness and the observance of rights. And

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<sup>191</sup> Rawls claims that "Justice is the first virtue of social institutions, as truth is of systems of thought." See Rawls, 1971, 3.

<sup>192</sup> See Sandel, 1982, 28-40.

<sup>193</sup> *Ibid.*, 33.

<sup>194</sup> Rawls quoted in Sandel, 1982, 29. See also Rawls, 1971, 128. For a characterization of the circumstances of justice which informs the arguments of both Rawls and Sandel, see David Hume. "An Enquiry Concerning Principles of Morals" in Alisdair MacIntyre (ed) *Hume's Ethical Writings*. (New York: Collier Books, 1965), particularly 35-53.

let us further imagine that the old generosity is replaced by a judicious temper of unexceptional integrity and that the new moral necessities are met with a full measure of justice, so that no injustice prevails...Are we prepared to say that arrival of justice, however full, restores to the situation its full moral character...?<sup>195</sup>

Sandel's dystopian illustration of the justice-based family suggests that there is something about familial intimacy that cannot be expressed in terms of rights. As such, introducing rights into the affective family has the regrettable effect of transforming it into something it is not: a liberal association of independent right-holders. The supposed incommensurability between justice and familial intimacy has led some critics to propose alternate systems of ethics that are more appropriate for intimate settings. One influential proposal has been an 'ethic of care' based on familial obligation and the cultivation of caring relationships.<sup>196</sup> According to Barbara Arneil, an ethic of care as applied to children has four salient features: first, it focuses on responsibilities and obligations over rights and rules; second, it conceives of the family as a community rather than an association; third, it emphasizes the connectedness, rather than separateness, between individuals; and fourth, it takes seriously the activity of care-giving in both the private and public realms.<sup>197</sup> Arneil claims that an ethic of care is preferable to a theory of rights when thinking about our treatment of children because it provides a more accurate interpretation of their interests. Contrary to the image projected by many contemporary accounts of children's rights<sup>198</sup>, children are not simply citizens-in-waiting whose primary interest is to one day become autonomous adults. Rather, they have distinctive interests *as* children, including exposure to attention, kindness, and affection.<sup>199</sup> An ethic based

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<sup>195</sup> Sandel, 1982, 33.

<sup>196</sup> For the most prominent statement of this view see Carol Gilligan. *In a Different Voice*. (Cambridge: Harvard University Press, 1982). For a direct application of Gilligan's view to the issue of children's rights, see Barbara Arneil. "Becoming versus Being: A Critical Analysis of the Child in Liberal Theory" in David Archard and Colin M. Macleod (Eds.) *The Moral and Political Status of Children*. (Oxford: Oxford University Press, 2002).

<sup>197</sup> Arneil, 89-92.

<sup>198</sup> Examples may include Feinberg, 1980a; and Clayton, 2006.

<sup>199</sup> Arneil, 87.

on obligation and the cultivation of caring relationships can better respond to these interests than one based on individualism and competing rights-claims.

Shelly Burttt agrees that the contemporary focus on children's rights tends to distract us from promoting their well-being in a more immediate sense. Drawing on recent paediatric and psychological literature<sup>200</sup>, she identifies six needs that children have to ensure their healthy physical and psychological development: "These are the need for ongoing nurturing relationships; the need for physical protection, safety and regulation; the need for experiences tailored to individual differences; the need for developmentally appropriate experiences; the need for limit setting, structure, and expectations; and the need for stable, supportive communities and cultural continuity."<sup>201</sup> Burttt claims that when we take this more expansive view of children's needs, the case for respecting their ethical independence rights becomes less compelling. Legitimate parenting ought not to be measured by its conduciveness to children's autonomy, or the preservation of an 'open future', but by its focus on meeting a child's basic developmental needs. On this view of parenting, Burttt claims that there is nothing wrong or unjust about fundamentalist upbringings in which parents seek to "...raise their children to understand themselves as in some important way *lacking* a choice about what they do or who they are."<sup>202</sup> So long as parents' choices fulfill their children's developmental needs, they remain ideal exercises of parental authority.<sup>203</sup>

An additional reason to adopt an ethic of care over a theory of rights is that not all of what we owe to children can necessarily be expressed in terms of rights. For example, Onora

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<sup>200</sup> See T. Berry Brazelton and Stanley I. Greenspan. *The Irreducible Needs of Children: What Every Child Must Have to Grow, Learn, and Flourish* (Cambridge, Mass.: Perseus, 2000).

<sup>201</sup> Shelly Burttt. "The Proper Scope of Parental Authority: Why We Don't Owe Children an 'Open Future'" in Stephen Macedo and Iris Marion Young (Eds.) *Child, Family, and State*. (New York: New York University Press, 2003), 260.

<sup>202</sup> *Ibid.*, 246.

<sup>203</sup> *Ibid.*, 261.

O'Neill distinguishes between three types of fundamental obligations we have to children, only two of which can be articulated in terms of rights. First, we have obligations to do or omit some action for *all* children, such as our obligation to refrain from abusing or molesting them; second, we have obligations to do or omit some action for *specified* children, such as our duty to provide special care for our own children; and third, we sometimes have obligations to do or omit some action for *unspecified* children, but not *all* children, such as our more general duty to treat them with a caring disposition.<sup>204</sup> The first two sets of obligations can be thought to carry corresponding rights, as both the right-holder and those bound by the right can be identified: children may have a right not to be abused or molested by *any* adult, and they may have a right to be protected and cared for by their *own* parents. However, the third set of obligations cannot carry corresponding rights, because unlike the previous two, *who* and *what* they involve for their execution will vary according to context (in this sense, they are 'imperfect' obligations). According to O'Neill, "What it will take to discharge [imperfect obligations] will differ with circumstances; these circumstances will in part be constituted by social and institutional arrangements that connect specific children to specific others..."<sup>205</sup> However, "...so long as the recipients of the obligation are neither all others nor specified others, there are no right holders, and nobody can either claim or waive performance of a right."<sup>206</sup> An example of an imperfect obligation in this sense might be the obligation of teachers or social workers to treat the unspecified children under their watch with care and kindness, even though this is not necessarily a 'right' that is institutionalized in the role. However, the fact that these obligations carry no corresponding rights does not mean that our duty to discharge them is optional or less immediate; rather, it simply means that a scheme of rights cannot account for them. We can

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<sup>204</sup> Onora O'Neill. "Children's Lives and Children's Rights." *Ethics*. Volume 98 (3) (April, 1988), 447-48.

<sup>205</sup> *Ibid.*, 448.

<sup>206</sup> *Ibid.*, 448.

imagine teachers or social workers coldly and impersonally discharging their institutional duties, thus upholding children's right to education or protection, respectively; however, we would hardly consider this method of treatment morally sufficient, even if all rights are being met. In this sense, what is morally owed to children is often above and beyond that which is prescribed by rights.

The idea of an ethic of care undoubtedly carries a strong intuitive appeal. It seems to reflect a more attractive vision of families as affective communities, and it pays special attention to the developmental needs of children which no plausible theory of parenting could possibly ignore. However, the real question is whether or not the obligations associated with an ethic of care are incompatible with a theory of rights. A closer look reveals that contrary to the picture painted by the above critics, caring obligations and respect for rights are *not* mutually exclusive ideas; rather, the two often go hand in hand. First of all, contrary to Sandel's suggestion, it is not at all clear that conceiving of family members as right-holders is to necessarily "...concede, implicitly at least, the circumstances of benevolence..."<sup>207</sup> It is true that affective ties may erode if family members fervently and incessantly claim rights against one another, but there is no reason to believe this would be the case. As Harry Brighouse notes, claiming rights against others is only *one* aspect of being a right-holder, and it may not be the most salient aspect in the context of families: "...a great deal of rights-thinking does not involve the assertion of rights. It involves waiving one's rights; neglecting one's own interests for the sake of others; noticing that right-holders have refrained from asserting their rights out of affection, or consideration of one's interests; regarding others as right-holders and so respecting their rights even though one's own

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<sup>207</sup> Sandel, 1982, 32.

selfish interests are thereby harmed.”<sup>208</sup> In this sense, recognizing family members as right-holders need not invoke animosity; rather, it is simply to recognize their special moral status, and provides yet another level on which to discharge care. Moreover, there is also a sense in which Sandel misinterprets the point and purpose of rights within a family context. As Waldron notes, a scheme of rights applied to family settings is not meant to *replace* the bonds of affection that tie families together, but simply to secure the entitlements of each family member in the unfortunate cases where those bonds break down.<sup>209</sup> In this sense, “...there is a need for an array of formal and legalistic rights and duties, not to constitute the affective bond, but to provide each person with the secure knowledge of what she can count on in the unhappy event that there turns out to be no other basis for her dealings with her erstwhile partner[s] in the relationship.”<sup>210</sup>

Second of all, there is no reason to believe that there is a necessary discrepancy between promoting children’s developmental interests and respecting their ethical independence rights. While Arneil and Burt are correct to recognize that children have special interests which cannot be served by, or articulated within, a scheme of rights, they are certainly wrong to infer that the promotion of those interests *excludes* a scheme of rights altogether. For example, Burt criticizes certain contemporary theories of children’s rights for their “...emphasis on preserving an open future as the litmus test of good parenting,”<sup>211</sup> suggesting that her more expansive view of children’s developmental needs makes that aspect of parenting “...seem somewhat beside the point.”<sup>212</sup> However, this is a false dichotomy. First of all, advocates of children’s rights can concede that ensuring the survival, growth, and healthy development of a child is a parent’s

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<sup>208</sup> Brighthouse, Harry. “What Rights (if any) Do Children Have?” in David Archard and Colin M. Macleod (Eds.) *The Moral and Political Status of Children*. (Oxford: Oxford University Press, 2002), 34.

<sup>209</sup> Jeremy Waldron. “When Justice Replaces Affection: the Need for Rights.” *Harvard Journal of Law and Public Policy*. Volume 11 (1988), pp. 625-647.

<sup>210</sup> *Ibid.*, 629.

<sup>211</sup> Burt, 262.

<sup>212</sup> *Ibid.*, 262.

primary responsibility; any conception of parenting which somehow preserved an open future for children in an ethical sense while ignoring their developmental needs would rightfully receive support from no one. Second of all, sufficiently promoting a child's developmental needs can be seen as a necessary prerequisite for respecting their ethical independence rights (or their 'right to an open future'), for a child can only make meaningful use of those rights if they possess the good health, intelligence, confidence, and self-respect associated with Burt's developmental criteria. Therefore, there is every reason to believe that respect for children's ethical independence rights could (or must) be discharged *in addition* to the developmental needs articulated by an ethic of care.

Third, and along similar lines, the mere fact that we owe children imperfect obligations does not preclude us from respecting their rights. O'Neill is correct to note that what we morally owe to children often goes above and beyond respect for their rights, and that some of what we owe may be better articulated in terms of imperfect obligations. However, as Archard notes, while "We do have imperfect obligations toward children...it does not follow that they, in consequence, do not have rights against us."<sup>213</sup> The idea that morally sufficient conduct entails more than respect for rights is not unique to our treatment towards children, but generalizes to our treatment of adults. Treating my friend in a morally sufficient fashion entails more than refraining from injuring him or intruding on his life choices; it also involves being positively kind to him and supporting him in various ways, whatever those entail. However, the fact that morally sufficient conduct in my role as a friend entails *more* than respect for his rights does not mean that he does not have any rights against me. If I were to injure him, or compel him against his will, I would not *only* be acting like a bad friend; I would also be violating his rights. In this

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<sup>213</sup> Archard, 2004, 124.

sense, the imperfect obligations associated with an ethic of care are not incompatible with a scheme of rights.

Finally, far from being incommensurable, there is also a more general sense in which justice and care are intimately connected. Just as a theory of justice void of care cannot supply a morally sufficient vision of our treatment toward others, nor can an ethic of care which is void of justice. Eamonn Callan is sceptical of the supposed dichotomy between justice and care, suggesting that any "...morally worthy love or similar caring attachments to particular others will include the recognition of the other as possessing the inviolability of those to whom justice is owed."<sup>214</sup> To illustrate this point, Callan draws out a scenario meant to highlight the moral depletion of an ethic based entirely on care:

A slave-owner knows that the slave he loves will leave him as soon as she is liberated, and that thought grieves him. But he also knows that the slave will never be happy without freedom, and because he cares unselfishly for her, he gives her freedom. However, the slave-owner does not think of his relationship with the slave in terms of moral (as opposed to legal) rights and duties. He does not think of the slave's freedom as something to which she has any right, and he conceives his act of manumission as a matter of benevolence above and beyond the call of moral duty.<sup>215</sup>

While the slave-owner's deep care for his slave eventually results in her liberation, there is something troubling about the fact that his actions and moral reasoning are based entirely on considerations of care. Regardless of the slave-owner's feelings toward her, we would generally think of the slave as having her own set of entitlements which command a certain standard of treatment from others (and on any plausible interpretation, this standard would prohibit bondage or oppression).<sup>216</sup> While the above critics are correct to suggest that considerations of justice and

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<sup>214</sup> Callan, 1997, 87.

<sup>215</sup> Ibid., 82-83.

<sup>216</sup> Joel Feinberg also highlights the moral depletion associated with a world void of rights through his 'Nowheresville' hypothetical thought experiment. Even in a world characterized by "...as much benevolence, compassion, sympathy, and pity as will conveniently hold without strain," (143) there is something missing when individuals do not have rights, and are thus unable to claim what is their due. See Joel Feinberg. "The Nature and

rights do not exhaust our moral obligations toward others, they are wrong to conclude that an ethic of care does. Morally sufficient treatment toward others will often involve caring considerations *in addition* to respect for their rights, but these additional considerations do not *take the place* of rights. Therefore, proponents of an ethic of care do not demonstrate that we are *not* obliged to respect children's ethical independence rights. At most, they simply demonstrate that this is not *all* we are obliged to do.

### 3.2.2 Parental Authority

While the first objection rejects the very idea of thinking about children and the family in terms of rights, the second objection works *within* a framework of rights, focusing on the supposed right of parents to raise their children on their own terms. In democratic societies, it is usually taken for granted that parents<sup>217</sup> occupy a special position in relation to their own children. Such a position is defined in part by its exclusivity: in holding it, parents are permitted to do certain things to, for, and with their own children that no one else is permitted to do.<sup>218</sup> One facet of this position involves an exclusive *duty* to discharge parental care. Parents must assume primary responsibility for their own child, and they alone must take the special measures required to ensure its healthy development. However, another important facet involves exclusive entitlement to a host of parental *privileges*. Not only do these include a monopoly over the everyday decisions regarding children (such as what they eat or when they sleep), but they also entitle parents to determine many of the ethical dimensions of their upbringing. In this sense,

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Value of Rights" in *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy*. (Princeton, NJ: Princeton University Press, 1980). (Hereafter Feinberg, 1980b).

<sup>217</sup> The term 'parents' is taken to denote the people who assume the role of caring for the child, including both biological and adoptive parents. We will leave aside the separate issue of whether or not biological parents have special rights to/over their children in light of that biological connection.

<sup>218</sup> Harry Brighouse and Adam Swift. "Parent's Rights and the Value of the Family." *Ethics*. Volume 117 (October 2006), 81.

parents may determine the experiences their children have, the kind of education they receive, the religious faith they subscribe to, and the cultural traditions they adopt. We should note of course that parental privileges are usually conditional on the satisfactory discharge of parental duties; however, so long as parents provide adequate care for their children, it is generally presumed that they may baptize, circumcise, chastise, and socialize without interference by the state or their peers.

Many thinkers have appealed to parental authority in order to object to the extension of ethical independence rights to children. The main worry is that such an extension will circumscribe that authority, or that it will create unwarranted constraints on the ability of parents to shape their children's upbringing. For example, if children have rights compelling others to respect their ethical independence, many fear that it will delegitimize the efforts of parents to share their religious faith, pass on their cultural traditions, or enroll their children in parochial schools. Objections based on parental authority are certainly the most prevalent in public discussion, and inform the popular sentiment, 'no one has the right to tell me how to raise my own kid.' However, it is important to note that they are only sustainable insofar as that authority is legitimate to begin with; otherwise, the power that parents exercise over their children is nothing more than oppression of the weak by the strong. This means that if proponents of parental authority want their objections to succeed, they must provide a reasonable justification for that authority independent of its popular appeal. How, then, is parental authority justified?

One of the most common justifications for parental authority focuses on its 'fiduciary function', or the special role that it plays in promoting children's interests.<sup>219</sup> By most accounts,

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<sup>219</sup> See Archard, 2004, 77-84; Brighthouse and Swift, 2006; Burt, 2003; Robert Noggle. "Special Agents: Children's Autonomy and Parental Authority" in David Archard and Colin M. Macleod (Eds.) *The Moral and Political Status of Children*. (Oxford: Oxford University Press, 2002); Laura Purdy. *In Their Best Interests? The Case Against Equal Rights For Children*. (Ithaca, NY: Cornell University Press, 1992). For an early articulation of the fiduciary

children lack the necessary experience and knowledge to make wise or informed decisions, and this makes them poor guardians of their own interests. Left to their own devices, children will often decide emotionally and impulsively, and they will often forgo their best interests in favor of more immediate desires. The role of the parent, then, is to act as a paternalistic caretaker, to make decisions on the child's behalf to ensure their best interests are being served. In this sense, the parent-child relationship is analogous to fiduciary relationships, such as the one between doctor and patient. Because the patient lacks the specialized knowledge required to cure his illness, he relies on the doctor's orders to ensure his good health.<sup>220</sup>

Notice that the fiduciary strategy is 'child-centered': parental authority is justified because, and to the extent that, it promotes the *child's* interests. In one sense, this strategy accords well with common intuition surrounding the proper *limits* of parental authority: since it is justified with reference to the child's interests, it ceases to be legitimate when those interests are no longer being served (as in cases where a child is being neglected or abused). However, justifying parental authority solely on the basis of the child's interests cannot account for the more extensive parental privileges noted above, such as the right of parents to shape the ethical dimensions of their child's upbringing. In fact, if children's interests were all that mattered, there would be nothing in principle wrong with redistributing children *en masse*, removing them from their parents' care and placing them in the hands of those better positioned to meet their needs.<sup>221</sup> So long as children's interests are being optimally served, the child-centered strategy can dispense with parental privileges altogether.

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function, see John Locke's discussion of limited parental authority in *Second Treatise of Government*. (Ed) C.B. Macpherson. (Indianapolis: Hackett Publishing Company, 1980), 30-42.

<sup>220</sup> See Noggle, 98.

<sup>221</sup> Brighthouse and Swift, 86. Plato expresses a similar sentiment through his advocacy of the abolition of the family and collective rearing of children by the state: "If a city is to reach the height of good government wives must be in common, [and] children and all their education must be in common..." (213) See Plato. *Republic*. Translated by G.M.A. Grube. (Indianapolis: Hackett Publishing Company, 1992), particularly Book V.

Of course, this point does not serve to justify a laissez-faire system of child redistribution; rather, it simply suggests that children's interests are not the whole story when it comes to parental authority. On any reasonable account, parents are not simply the guardians or purveyors of their children's interests, but also have an enormous personal stake in how their children are raised. Child-rearing often forms the center of a parent's identity and life-purpose, and their personal well-being is often tied up with their ability to raise their children in a way consistent with their deepest ethical beliefs. As Callan correctly points out, "The role of parent is typically undertaken as one of the central, meaning-giving tasks of our lives. Success or failure in that task, as measured by whatever standards we take to be relevant, is likely to affect profoundly our overall sense of how well or badly our lives have gone."<sup>222</sup> Understood in this way, the special privileges associated with parental authority are better justified with reference to the *parent's* interests, rather than those of the child. This means that if the objections from parental authority carry any normative weight, it is because respecting children's ethical independence circumscribes that authority in ways that are unfair to parents.

Contemporary advocates of parental authority often pursue this strategy, emphasizing the fact that a parent's most fundamental interests are usually tied up with their ability to shape their child's ethical convictions. This sentiment underlies the influential 'extension thesis', which states that the right of parents to make choices on behalf of their children is simply an extension of their right to make choices for themselves.<sup>223</sup> In a classic iteration, Charles Fried states that "...the right to form one's child's values, one's child's life plan, and the right to lavish attention on the child are extensions of the basic right not to be interfered with in doing those things for

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<sup>222</sup> Callan, 1997, 142.

<sup>223</sup> David William Archard. *Child, Family and the State*. (Hampshire: Ashgate, 2003), 92; see also David Archard. "Children, Multiculturalism, and Education" in David Archard and Colin M. Macleod (Eds.) *The Moral and Political Status of Children*. (Oxford: Oxford University Press, 2002), 148.

oneself.”<sup>224</sup> By this logic, because child-rearing forms such an integral part of any parent’s identity, the rights they have to determine the course of their own lives include a right to determine the course of their child’s life.

A more sophisticated defense of the extension thesis has been offered by William Galston, who claims that a parent’s right to raise their children in accordance with their own ethical convictions is a basic corollary of the fundamental freedoms they are due as democratic citizens. According to Galston, democratic citizens are entitled to a wide degree of ‘expressive liberty’, or “...the absence of constraints imposed by some individuals or groups on others that make it impossible or significantly more difficult for the affected individuals or groups to live their lives in ways that express their deepest beliefs about what gives meaning and value to life.”<sup>225</sup> The rationale for this entitlement is simple: the ability to act on one’s deepest beliefs about the meaning and value of life is a necessary precondition for living a life that is good (at least in the eyes of its author).<sup>226</sup> It is not difficult to see how expressive liberty has an important application in the context of families. For parents, acting on one’s beliefs about what gives meaning and value to life often entails transmitting those beliefs to one’s children, whether actively through proselytization, or passively through simply nurturing and caring for a child within the context of a specific world view. In fact, many of parents’ most valued expressive liberties are exercised within the context of families, and are often directed toward transmitting ethical values to their children. As Callan claims, “...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, and the freedom to organize and sustain the life of the family in keeping with our own values is

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<sup>224</sup> Charles Fried. *Right and Wrong*. (Cambridge, MA: Harvard University Press, 1978), 152.

<sup>225</sup> William Galston. “Parents, Government, and Children: Authority over Education in the Liberal-Democratic State” in Stephen Macedo and Iris Marion Young (eds.) *Child, Family, and State*. (New York: New York University Press, 2003), 223-24.

<sup>226</sup> *Ibid.*, 224. Here Galston appeals to the idea of ‘endorsement’ discussed in Chapter Two. See Chapter Two, 64-68.

as significant as our liberty to associate outside the family for any purposes whatever.”<sup>227</sup> In this sense, because child-rearing is a primary parental interest, “...the ability of parents to raise their children in a manner consistent with their deepest commitments is an essential element of expressive liberty.”<sup>228</sup>

It is worth noting that the more sophisticated rights-based extension thesis is not only a matter for theory; it has also been appealed to repeatedly in courts of law (both successfully<sup>229</sup> and unsuccessfully<sup>230</sup>) by parents who claim that their religious freedoms entitle them to near-absolute authority over their children’s upbringing. To illustrate a successful invocation of this idea, consider the famous U.S. Supreme Court case *Wisconsin v. Yoder* (1972). In 1971, a group of parents challenged Wisconsin’s mandatory education statute by removing their children from school two years before the stipulated age of sixteen. The parents were members of the Old Order Amish, whose religious commitments required them to maintain a pious and agrarian lifestyle in isolation from modern society. They claimed that enrolling their children in secondary school was inconsistent with those commitments because it would expose the children to ‘worldly’ influences; not only would such exposure endanger their continuation in the life of the community, but it would also jeopardize their belief in God and ultimate chance at salvation. The case eventually went to the Supreme Court, which ruled in favour of the parents, reducing the age of compulsory school attendance from sixteen to fourteen. According to the Court, while the state has a legitimate interest in providing compulsory education for its citizens, that interest is not exempt from a balancing process when it comes into conflict with fundamental rights, such as religious freedoms. Moreover, the Court also felt that the Amish parents had adequately

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<sup>227</sup> Callan quoted in Galston, 2003, 225-26. See also Callan, 1997, 143.

<sup>228</sup> Galston, 2003, 225.

<sup>229</sup> See *Wisconsin v. Yoder*.

<sup>230</sup> See *Mozert v. Hawkins County*.

demonstrated the sincerity of their religious commitments, and that enforcement of compulsory education past the eighth grade would directly compromise the free exercise of their religious beliefs.<sup>231</sup> In this sense, the religious freedoms of the Amish parents were thought to entitle them to extensive authority over their children's upbringing.

In one sense, the objection from parental authority is the most threatening objection to the proposed extension of ethical independence rights to children. The reason for this has nothing to do with its popular appeal, but is rooted in its theoretical justification: the right of parents to raise their children by their own lights can be justified with reference to the *same* principles which are used to justify protecting children's ethical independence in the first place. If it is not the place of governments to advance controversial conceptions of the good amidst a reasonable plurality, then why does this not legitimize diverse forms of parenting, including those which seek to proselytize children into specific religious, cultural, or ethical milieus? Why does the democratic commitment to ethical independence not protect the ability of parents to raise their children on their own terms, given the fact that child-rearing is often a parent's most important ethical project? Galston seems to pick up on this connection, claiming that "...in a society characterized by a deep diversity of moral and religious views, and accordingly by a deep diversity of family and communal ways of life, both empirical consent and normative legitimacy require that, to the maximum extent consistent with the maintenance of civic unity and stability, all permissible ways of life be able to find expression in the key choices families and communities must

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<sup>231</sup> See Justice Burger's majority opinion in *Wisconsin v. Yoder*. For detailed overviews and analyses of *Yoder*, see Brighthouse, 2006, 13- 26; Feinberg, 1980a, 128-140; Amy Guttmann. "Civic Education and Social Diversity." *Ethics* Volume 105 (3) (April, 1995), 565-576; Richard Arneson and Ian Shapiro. "Democratic Autonomy and Religious Freedom: A Critique of *Wisconsin v. Yoder*" in *Democracy's Place*. (Ithaca: Cornell University Press, 1996), 139-145.

make.”<sup>232</sup> Framed in this way, upholding ethical independence in the context of moral pluralism seems to *require* us to respect the ethical decisions of parents regarding their children.

Is this view cogent? Do the ethical independence rights of parents include the right to shape their children’s convictions? Initially, it may be tempting to answer ‘yes’: ethical independence rights protect the individual’s ability to pursue their own conception of the good, and a parent’s conception of the good usually involves transmitting their ethical beliefs to their children. However, despite appearances, these objections ultimately fail for one of two reasons: either they misunderstand the nature and scope of ethical independence rights, and are thus self-defeating, or they rely on a proprietarian conception of the child, and are thus incompatible with the modern view of seeing children as persons in their own right. Each of these failures can be illustrated within the context of the *Yoder* case.

First of all, while the religious freedoms of the *Yoder* parents certainly entitle them to form and act on *their own* religious convictions, they cannot plausibly entitle them to form or act on the religious convictions of *others*, lest they become self-defeating. By appealing to religious freedoms in order to protect their ability to proselytize their children, the *Yoder* parents are making two contradictory claims. On the one hand, they are claiming that others (i.e. the state) should not interfere in the free exercise of their religious beliefs; yet on the other hand, they are claiming that *they* should be able to interfere in the religious beliefs of others (i.e. their children). They cannot have it both ways. If they maintain the first claim, then they are precluded from making the second, for by affirming the inviolability of their own religious freedoms they are implicitly recognizing the similar inviolability of the religious freedoms of others. This recognition effectively precludes them from interfering in others’ religious beliefs, as freedom from interference is precisely what their own religious freedoms are meant to protect against.

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<sup>232</sup> Galston, 2003, 231.

Similarly, if they maintain the second claim, then they are precluded from making the first, as their unfettered intrusion on the religious freedoms of their children denigrates the normative force of their own. In other words, they cannot reasonably demand that their own religious freedoms be respected if they are not prepared to respect the similar freedoms of others.<sup>233</sup>

To reframe this point in the ongoing language of this thesis, we might say that the rights-based extension thesis is self-defeating because it wants to appeal to ethical independence rights in order to justify ethical compulsion. This is logically inconsistent, as ethical compulsion is precisely what such rights are meant to rally against. Remember, ethical independence rights are meant to shield individuals from other citizens' external preferences about what they should have or how they should live. Insofar as this is the case, they cannot be appealed to in order justify the subjection of others to *one's own* external preferences without becoming self-defeating. In this sense, we can say that ethical independence rights are necessarily *individual* in scope.

Political thinkers have recognized the individual scope of protective liberties at least since J.S. Mill, who famously stated that "A person should be free to do as he likes in his own concerns; but he ought not to be free to do as he likes in acting for another, under the pretext that the affairs of another's are his own affairs."<sup>234</sup> Contemporary commentators on children's rights also share in this conjecture, claiming that the extension thesis effectively 'extends' beyond the legitimate scope of individual rights. For example, Amy Gutmann maintains that "[A parent's] religious freedom does not extend to exercising power over their children so as to deny them the education necessary for exercising full citizenship or for choosing among diverse ways of life..."<sup>235</sup>, while Harry Brighouse and Adam Swift posit that "...there is no right to 'form one's

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<sup>233</sup> Hugh Lafollette makes a similar argument in relation to the *Mozert v. Hawkins County* case. See Lafollette, 1989.

<sup>234</sup> Mill, 1982, 116.

<sup>235</sup> Gutmann, 570.

children's values,' and certainly none that is the corollary of the right to do so for oneself."<sup>236</sup>

The individual scope of religious freedom was also not lost on Justice William O. Douglas, who wrote the dissenting opinion in *Yoder*: "The Court's analysis assumes that the only interests at stake in the case are those of the Amish parents, on the one hand, and those of the State, on the other. The difficulty with this approach is that, despite the Court's claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children."<sup>237</sup>

This brings us to the second failure of the rights-based extension thesis: the only way that it *can* succeed is by adopting an antiquated proprietarian conception of the child, where children are not individuals with moral entitlements, but a kind of property of their parents to be moulded in whatever shape their parents choose. This solves the problem of self-defeat because parents can consistently affirm the sanctity of their own religious freedoms while maintaining the right to proselytize their children—if their children have no entitlements to begin with, then the parents are not overstepping any moral boundaries. However, this strategy is clearly untenable, for the proprietarian conception of the child it invokes is patently inconsistent with the modern view of seeing children as persons in their own right. To borrow a phrase from Richard Arneson and Ian Shapiro, children are not simply 'empty vessels' to be filled with their parents' religious, cultural, or ethical convictions.<sup>238</sup> Rather, they are moral independents, and are entitled to be treated in a way that is consistent with that status.

Thus, the objections from parental authority ultimately fail to provide a persuasive case against the proposed extension of ethical independence rights to children. While it is reasonable to think that parents are entitled to *some* degree of authority over their own children, we should

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<sup>236</sup> Brighthouse and Swift, 105.

<sup>237</sup> See Justice Douglas' dissenting opinion in *Wisconsin v. Yoder*.

<sup>238</sup> Arneson and Shapiro, 154.

be skeptical of any assertion that their rights entitle them to shape their children's ethical convictions. Such an assertion must necessarily rest on a skewed interpretation of ethical independence rights, or an outdated proprietarian conception of the child.

### *3.2.3 Cognitive Incompetence*

The final objection to extending ethical independence rights to children does not rest on normative claims about the value or extent of the rights themselves; rather, it simply focuses on factual claims about a child's inability to exercise them. It is no secret that children, especially young children, lack many of the cognitive capabilities that adults possess. According to the modern conception of the child, such a lack virtually characterizes children to the exclusion of all else: whereas adults are rational, autonomous, and have a sense of identity that derives partly from critical reflection on their beliefs and desires<sup>239</sup>, children are irrational, heteronomous, and have unstable personalities which are driven largely by emotion and impulse. For many critics<sup>240</sup>, this level of cognitive incompetence is significant when thinking about what kinds of rights can be attributed to children. While rights protecting an individual's welfare may not require great cognitive proficiency on the part of the right-holder, rights protecting an individual's agency or choices certainly do: they require that the right-holder be a rational, competent chooser who is able to critically reflect on their decision-making process; that they have developed convictions, goals, or life plans on which to base their choices; that they possess basic practical reasoning skills in order to comprehend means required to realize ends; and that they are able to

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<sup>239</sup> Lecce, 2009, 134.

<sup>240</sup> See Brighouse, 2002; James Griffin. "Do Children Have Rights?" in David Archard and Colin M. Macleod (Eds.) *The Moral and Political Status of Children*. (Oxford: Oxford University Press, 2002); Noggle, 2002; Purdy, 1992.

independently act on their choices, among other things.<sup>241</sup> Since children lack most, if not all, of these requisite capacities, critics claim that they are inappropriate candidates for rights protecting agency, including (but not limited to) ethical independence rights. Recognizing this fact ultimately leads us to one of two conclusions regarding the proposed extension of ethical independence rights to children. The first is that it is futile: insofar as children cannot make meaningful choices on important matters, they cannot make use of rights which protect their ability to do so. The second is that it is dangerous: because such rights could have the effect of immunizing children's poor decisions, according them a full scheme may have harmful consequences for both their present and future well-being.

According to the interest theory of rights, a person has a right to  $x$  only if they have an interest in  $x$  "...of sufficient weight to warrant the imposition of duties on others regarding the protection or promotion of that interest."<sup>242</sup> By this logic, if I have a right not to be assaulted, it is because my interest in not being assaulted is sufficiently strong so as to elicit the duty in others to refrain from assaulting me. An obvious but important corollary of the interest theory of rights is that a person's claim to a particular right is necessarily contingent on their holding its corresponding interest; otherwise, the accordance of the right would be baseless, and would thus be meaningless from a normative point of view. For example, consider the issue of reproductive freedom. Because women have an interest in controlling their reproductive capacities, they can reasonably be said to have claim to rights protecting their access to birth control or abortion. However, the same cannot be said about men. Since men do not have reproductive capacities to begin with, they cannot have an interest in controlling those capacities. As a result, they cannot sensibly be ascribed rights which protect their ability to do so.

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<sup>241</sup> For similar accounts of the cognitive prerequisites for agency, see Brighouse, 2002, 37-39; Griffin, 20-21; Raz, 1986, 372-373.

<sup>242</sup> Callan, 1997, 136.

A parallel case can be made for children with respect to ethical independence rights. Insofar as ethical independence rights protect one's ability to form, revise, and pursue their own conception of the good, the requisite interest for holding such rights is a *capacity* for a conception of the good. According to Rawls, such a capacity involves having a "...conception of the ends and purposes worthy of our devoted pursuit, together with an ordering of those elements to guide us over a complete life."<sup>243</sup> On the basis of this definition, it would not be unreasonable to suggest that children lack many of the cognitive prerequisites for having a conception of the good. For instance, having a 'conception of the ends and purposes worthy of our devoted pursuit' necessarily entails having a stable and articulate set of values from which to judge the relative worth of diverse ends, the possession of which *itself* presupposes a level of experience and self-knowledge well beyond the reach of young children. Similarly, fashioning an 'ordering of those elements to guide us over a complete life' entails sophisticated skills of planning, prioritization, and temporal awareness, which can only be attributed to competent adults. While it is true that children are capable of 'simple agency', or the ability to form and act on strongly felt desires or preferences, they are generally incapable of a more cognitively demanding conception of the good, and thus do not satisfy the interest requirement for holding ethical independence rights.<sup>244</sup>

Brighouse suggests that taking an interest-based approach toward rights helps to justify the discrepancy between the group of rights we normally think are attributable to *both* children and adults, and the group we normally think are attributable *only* to adults.<sup>245</sup> General welfare rights (such as rights to shelter, nourishment, or healthcare) are attributable to both children and

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<sup>243</sup> Rawls, 1993, 104.

<sup>244</sup> For an elaborate overview of children's cognitive deficiencies see Noggle, 2002. According to Noggle, children are 'special agents' from a moral point of view: while they are persons, and thus entitled to moral concern, they lack the necessary capacities to be considered full-fledged members of the 'moral community', including temporal extension (the ability to pursue stable sets of goals over time), a sense of moral decency, and a developed value system.

<sup>245</sup> See Brighouse, 2002.

adults because both groups share in the requisite interest. Since each group has a sufficiently strong interest in procuring or having distributed to them those things which will contribute to their basic well-being (regardless of their ability to recognize that interest), each group can be said to have corresponding rights *to* those things. However, only adults can be thought to possess rights which protect agency, for only adults have a sufficiently strong interest in making choices. Unlike children, the ability of adults to make their own choices is inextricably tied to their well-being; as choice often serves as a necessary precondition for the value of their projects and commitments, adults can only lead fulfilling lives if they are free to choose *their own* endeavors (rather than having those endeavors imposed upon them).<sup>246</sup> However, the opposite seems true in the case of children. Since children lack the necessary experience and knowledge to make wise or informed decisions, their well-being is usually better served by having others, such as parents, make decisions on their behalf. In this sense, “...it is generally illuminating to think of children as bearers of welfare rights, but not, usually, as bearers of agency rights.”<sup>247</sup>

Brighouse’s argument reflects the standard liberal assumption that we are only obligated to respect the choices of persons who are rational and autonomous; to the extent that a person departs from this model of rationality and autonomy, designated adults or caretakers are justified in choosing paternalistically on their behalf.<sup>248</sup> This idea carries a strong intuitive appeal, for it often seems as if the well-being of vulnerable individuals *requires* that they be denied the ability to make their own choices. For example, ensuring the well-being of the elderly sometimes requires enrolling them in nursing homes against their best wishes, while ensuring the well-being of the otherwise mentally disabled often requires restricting their mobility in a number of

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<sup>246</sup> Ibid., 37-38.

<sup>247</sup> Ibid., 32.

<sup>248</sup> This idea has its roots in Mill’s liberty principle, which is “...meant only to apply to human beings in the maturity of their faculties.” See Mill, 14.

important ways. However, unlike the elderly or mentally disabled, paternalism serves a special dual purpose in the case of children: not only is it necessary to promote their *immediate* interests as children, but it is also necessary to promote their *future* interests as adults. This is because their ability to mature into rational and autonomous adults is necessarily contingent on their healthy development as children.<sup>249</sup>

Laura Purdy appeals to this function of paternalism to ground her claim that children should not be granted rights which protect their choices. According to Purdy, before children are able to exercise choice-based rights, they must have "...both the cognitive capacity to judge what is in [their] own interest and the character traits necessary to act on it."<sup>250</sup> This entails developing skills of rationality and long-term planning to identify interests, as well as the character trait of self-control to be able to act on them.<sup>251</sup> However, in order for children to properly develop these skills, their immediate choices and preferences must in some ways be restricted. For example, while many children would not independently choose to attend school, mandatory education is necessary for them to develop the rational and autonomous capacities which will enable them to make responsible choices as adults. In this sense, the ability of children to exercise rights to self-determination as adults requires that they be denied those very rights while they are still children.<sup>252</sup>

A final reason to reject children's rights on the basis of cognitive incompetence is that children generally lack the necessary knowledge and resources to be able to *claim* their rights against others in cases of apparent violations. This is significant, for by some accounts, the act of claiming is conceptually inseparable from holding a right. According to Joel Feinberg, "...it is

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<sup>249</sup> See *Ibid.*, 42; Purdy, 1992; Feinberg, 1908a, 127.

<sup>250</sup> Purdy, 37.

<sup>251</sup> *Ibid.*, 43-53.

<sup>252</sup> Archard, 2004, 81. See also Purdy, 51: "...if self control is central to a good life in human societies, then a case can be made that it is right to limit children's freedom (if that is what it takes) in order to help them to develop it."

claiming that gives rights their special moral significance,”<sup>253</sup> for it is by claiming that we are able to demand respect from others and thereby assert our moral dignity. However, the act of claiming presupposes a number of important resources and capabilities that are normally unavailable to children. It involves knowledge of one’s status as a right-holder; knowledge of a given right’s correlative duties; the ability to recognize rights-violations; and access to some form of moral or legal recourse in order to call-out and rectify violations. Because children lack the ability to claim rights, they are unable to capitalize on their value. As such, they are ill-positioned to be effective or even intelligible right-holders.

To the extent that the objections from cognitive incompetence are based on *factual* claims about a child’s mental development, it may seem difficult to poke holes in their logic. However, there are four important responses to the preceding arguments. First of all, it is important to note that the normative force of any objection from cognitive incompetence is progressively weakened by the gradual aspect of child development. It is true that young children lack virtually *every* cognitive capacity required to make meaningful decisions on important matters, but this becomes less true as children gradually grow and develop, to the point where it is no truer of mature adolescents than it is of adults. For some commentators<sup>254</sup>, this carries an important corollary: if children are denied rights solely on the basis of cognitive *incompetence*, then they ought to be granted rights in proportion to their increasing level of cognitive *competence*. Samantha Brennan pursues this line of reasoning through her ‘gradualist’ model of rights, “...in which children move gradually from having their rights primarily protect their interests to having

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<sup>253</sup> Feinberg, 1980b, 151.

<sup>254</sup> See Archard, 2004; Samantha Brennan. “Children’s Choices or Children’s Interests: Which do their Rights Protect?” in David Archard and Colin M. Macleod (Eds.) *The Moral and Political Status of Children*. (Oxford: Oxford University Press, 2002); Griffin, 2002.

their rights primarily protect their choices.”<sup>255</sup> For example, when children are very young they may be entitled to a basic ‘right to education’, which is designed to protect their interests by providing them with the knowledge and skills that will inevitably better their overall life chances (despite their inability to appreciate this fact). However, as they gradually grow and develop, their educational rights might reflect that development by becoming more choice-based in character. Such rights may come to include the right to choose their own courses, or even the right to refuse education altogether.<sup>256</sup> While it is undoubtedly important to recognize children’s cognitive limitations when thinking about the kinds of rights they are due, it is equally important to recognize their cognitive capabilities, which tend to increase sharply with age.

Second of all, we should be generally cautious of associating the accordance of choice-based rights with the quality of a right-holder’s decision or decision-making process. It is certainly true that children’s choices often run contrary to their interests, and in most cases, this is grounds enough to justify paternalism. However, it is also true that competent adults make poor decisions as well. They smoke, drink, and eat fatty foods; they ride their bicycles without helmets and cross the street without looking; they make bad investments and maintain damaging relationships. If we justify choice-based rights according to the quality of the right-holder’s decisions, we risk depriving many *adults* of the choices we would normally think they are entitled to make.<sup>257</sup> Now, this is not to suggest that children are on an equal cognitive footing with adults, or that we are obliged to respect their every decision; indeed, one of the important differences is that, unlike children, adults generally have the *option* of making rational or wise

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<sup>255</sup> Brennan, 63. Archard makes a similar point, claiming that “...not *all* children should be denied rights, but not all children should be given them. Instead there should be a presumption that younger children cannot whereas older children, that is teenagers, can exercise rights of self-determination.” See Archard, 2004, 93.

<sup>256</sup> *Ibid.*, 62.

<sup>257</sup> Lecce raises a similar point in connection to voting rights through a critique of Estlund’s epistemic theory of democracy. If knowledge or political wisdom does not provide the basis for voting rights, then it would seem as if older children who pass a certain intellectual threshold ought to be accorded the right to vote, for the only other alternative seems to be to *deny* the vote to any adults which fall below that threshold. See Lecce, 2009, 135-36.

decisions whether or not they decide to take it. However, it does suggest that ‘decision quality’ is a poor justification for choice-based rights.<sup>258</sup> A better justification may be the recognition of the right-holder as possessing a special political status, one which entitles them to make their own decisions regardless of input or outcome. This line of justification should not force us to respect every impulsive or potentially harmful decision that a child might make, though it may afford them a wider degree of discretion than other accounts allow (which is generally a good thing, as we can only teach children to be responsible choosers by “...letting them try out the business of choosing”<sup>259</sup>).

Third, there is good cause to be skeptical of the idea that the nature and value of rights consists primarily in the act of claiming. While the ability to claim rights is certainly an important aspect of holding them, rights can also be held in the absence of claiming, as they typically are in the cases of children, the elderly, the disabled, and the very ill.<sup>260</sup> Even though the members of these groups are unable to press *claims*, we still tend to think of them as *possessing* rights which indicate entitlements and set limits on how others may treat them (this is why we cannot rightfully steal from a man in a coma or assault a woman with dementia). In these cases, the inability of the right-holder to claim their rights does not suggest the *forfeiture* of those rights altogether; rather, it simply signals the need for institutional mechanisms by which those rights can be claimed on their behalf by competent third parties. As Brighthouse notes, “If a child cannot claim the rights that protect [their] interests, as they cannot when they are young, this does not count against their being rights: it simply indicates that when the state

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<sup>258</sup> Interestingly, this point invites some of the objections to perfectionism that were covered in the previous chapter. Justifying choice-based rights according to the quality of the decision necessarily presupposes some objective standard against which to measure the quality of decisions. However, in a context of moral pluralism, where citizens reasonable disagree about their religious, philosophical, and moral doctrines, such an objective standard is illusory.

<sup>259</sup> Brennan, 61.

<sup>260</sup> *Ibid.*, 54.

institutionalizes the rights, it must clearly specify who are the trustees for which interests, and devise mechanisms for holding them accountable.”<sup>261</sup>

While each of the last three responses provides relevant critiques to the preceding arguments, there is a fourth that is simpler and far more effective: we can accept the premise of cognitive incompetence while rejecting the conclusions that are drawn from it. In other words, we can accept that children are too immature to competently exercise choice-based rights, yet deny that this nullifies their interest in, or entitlement to, ethical independence. How does this work? As the preceding arguments suggest, children are not the sort of beings who are capable of exercising choice-based ethical independence rights: not only do their choices often yield more bad than good, but they also lack the requisite interest of having a conception of the good. However, this does not prove that children lack an interest in ethical independence *altogether*. Rather, it simply proves (and proves well) that a) their interest is not present-oriented, and b) that it is not well-promoted by protecting their immediate choices.

Taking these premises as sound, consider an alternative line of reasoning. At present, children are not the sort of beings who are capable of exercising choice-based ethical independence rights. However, assuming normal development, children will one day *become* the sort of beings who are capable of exercising those rights, and their ability to do so effectively and meaningfully will depend in many ways on how they are treated as children. For example, a child’s ability to *effectively* exercise ethical independence rights requires that they adequately develop the cognitive capacities which will enable them to make competent and informed decisions. These include rationality, critical thinking, the capacity for long-term planning, and basic knowledge of the world and its many options. Moreover, a child’s ability to *meaningfully* exercise ethical independence rights requires that, by the time they reach an age at which they

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<sup>261</sup> Brighouse, 2002, 38.

are capable of making their own ethical decisions, those decisions have not already been made for them; that they still have real options from which to choose, and that their ethical lot in life has not been determined solely by the contingencies of childhood. Framed this way, protecting children's immediate choices seems largely irrelevant, or at least peripheral, to promoting their ethical independence. What is more relevant is *presently* treating them in such a way as to respect their *future* ability to make important ethical decisions. This standard of treatment implies a much different set of correlative duties than those associated with protecting children's immediate choices. For example, it implies a duty on the part of the state to provide adequate educational resources, and it implies a duty on the part of parents to refrain from unduly foreclosing their children's future options.<sup>262</sup>

This alternative line of reasoning reveals the following: objections from cognitive incompetence do not demonstrate that we are *not* obliged to respect children's ethical independence rights; rather, they simply force us to re-imagine what respect for those rights entails. Interestingly, this conclusion is actually a better fit with the underlying logic of the objections in the first place. On the whole, the objections from cognitive incompetence seem to rest on an Aristotelian principle of justice, one which states that "...those who are equal should have assigned to them equal things."<sup>263</sup> Insofar as children are *unequal* in a normatively relevant aspect (their ability to exercise ethical independence rights), the objections conclude that it is appropriate and just to treat them *unequally* with respect to that aspect (the accordance of those rights). However, this is only partially true. While children and adults differ in one salient dimension, they are also equal in another, one which is more relevant to the accordance of rights: they are all democratic citizens, or addressees of law entitled to be treated as autonomous equals.

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<sup>262</sup> See Feinberg, 1980a.

<sup>263</sup> Aristotle, 129.

Because they share in this democratic status, they are equally entitled to the standard scheme of ethical independence rights which comes attached to it. However, the important cognitive differences between children and adults mean that the measures required to respect the rights of children will differ from the measures required to respect the rights of adults. While adults require that their *present* ethical choices are respected, children require that their *future ability* to make ethical choices is fostered.

Thus, each of the three objections fails to make a persuasive case against extending ethical independence rights to children: while the first two objections misinterpret the nature and scope of ethical independence rights, the third objection takes an overly-narrow view of children's interest in them. However, we should not dismiss the objections altogether, for each is instructive, and serves to set reasonable guidelines around what a plausible account of children's rights might look like. Taken together, the objections indicate three criteria that any defensible account of children's rights must satisfy:

1. It must be compatible with promoting children's developmental interests, including their physical and emotional well-being;
2. It must leave room for parental interests, including their interest in sharing their religious, cultural, and moral traditions;
3. It must take into account children's cognitive limitations, including their lack of ethical convictions, and their inability to make wise or informed decisions.

These criteria do not preclude us from extending ethical independence rights to children, though they do force us to reimagine what that extension means. Drawing on Joel Feinberg's

‘rights in trust’<sup>264</sup>, the remaining sections will outline an alternative account of children’s rights which is compatible with the above criteria, and capable of protecting children’s ethical independence in a way that is both meaningful and effective.

### *3.3 Ethical Independence Rights in Trust*

It was suggested above that respecting children’s ethical independence does not necessarily require us to protect their immediate choices, but requires us to treat them in such a way as to ensure their ability to make meaningful ethical decisions when they come of age. Joel Feinberg’s concept of ‘rights-in-trust’ reflects this logic, and as such, provides a promising model for thinking about children’s rights in democratic societies. However, before outlining the specific features of Feinberg’s model, it is first helpful to review the more general concept of a trust on which it is based.

In legal or financial terms, a trust refers to a three-partied relationship in which one party (trustor) transfers property to a second party (trustee) for the benefit of a third party (beneficiary). A fixed trust fund provides a clear case in point. In the event of an untimely death, parents may arrange for some of their assets to be allocated into a designated fund for their children, which is to be held in trust by the executor of their estate until the children reach a certain fixed age. The rationale is as follows: children are entitled to inherit the financial assets set aside by their parents, but lack the maturity to responsibly assume ownership of those assets while they are still children. A fixed trust fund solves this problem by delaying the transaction, holding off on the transfer of assets until the children reach an age at which they are capable of managing them.

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<sup>264</sup> Feinberg, 1980a.

A parallel case argument<sup>265</sup> can be made for applying the concept of a trust to children's rights. Just as children lack the maturity to take possession of their financial inheritance, so too do they lack the maturity to exercise choice-based rights; and just as the financial problem is solved by holding the assets in trust until the children mature, so too can their rights be held 'in trust' until they develop the cognitive capacities necessary to exercise them. Feinberg pursues this line of reasoning through his concept of 'rights-in-trust', which refer to choice-based autonomy rights<sup>266</sup> that are to be 'saved' for children until they mature into competent adults who are capable of exercising them. The basic idea is this: while children are incapable of exercising autonomy rights as children, they will one day become capable of exercising those rights as adults. Since their ability to do so meaningfully and effectively will depend on having a wide range of options from which to choose, their entitlement while they are still children is to have their future options kept open. As Feinberg writes,

When sophisticated autonomy rights are attributed to children who are clearly not capable of exercising them, their names refer to rights that are to be *saved* for the child until he is an adult, but which can be violated 'in advance,' so to speak, before the child is even in a position to exercise them. The violating conduct guarantees *now* that when the child is an autonomous adult, certain key options will be already be closed to him. His right while he is still a child is to have these future options kept open until he is a fully formed self-determining adult capable of deciding among them.<sup>267</sup>

Thus, rights-in-trust are not necessarily meant to protect the autonomy of children *as* children, as, for the most part, they lack the capacity for autonomous choice. Instead, rights-in-trust are meant to protect the autonomy of the *adult who the child is to become*, something which can be violated in advance by the active closure of future options.

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<sup>265</sup> For a useful explanation of the structural logic of parallel case arguments, see Clayton, 93.

<sup>266</sup> Feinberg uses the term 'autonomy rights' to refer to "...protected liberties of choice," (1980a, 125) including freedom of religion and expression. In this sense, autonomy rights are synonymous with, or at least include, what we have so far been calling 'ethical independence rights'.

<sup>267</sup> *Ibid.*, 125-26.

One way of elucidating Feinberg's model is to think of it in terms of a standard interest-based account of rights, where a child's *future* interest in autonomy imposes *present* duties on others regarding the protection or promotion of that interest. At first this may seem strange, for unlike typical interests protected by rights, a child's future interest in autonomy is not one that he *knows he has*. However, this should not count against its being an interest for at least two reasons. First of all, it is possible to have interests without recognizing them, and this is particularly true in the case of children. Staying healthy or receiving an education may not be interests that a child recognizes as such, though they are undoubtedly among the most important that a child has (and are usually thought to carry corresponding rights).<sup>268</sup> Moreover, interests do not usually have to be expressly endorsed to merit protection by rights. Even if I have no intention of expressing my political opinions, it would still be wrong for others to actively prevent me from doing so. In a similar vein, it would be wrong to stifle a child's future autonomy just because they are incapable of expressing or understanding their interest in it.

Supposing then that children *can* have a future interest in autonomy, how is that interest promoted in the present? What are the duties it imposes on others, and who are the 'others' charged with fulfilling those duties? By most accounts, raising a child to become an autonomous adult involves two things: ensuring that they have an adequate range of options from which to choose, and ensuring that they develop the mental capacity for informed choice.<sup>269</sup> The duties imposed on others will thus be directed at satisfying these criteria, and can be understood to include both negative and positive duties divided between parents and the state.

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<sup>268</sup> Archard, 2004, 92.

<sup>269</sup> See for example Archard, 2004, 82; Arneson and Shapiro, 158; Clayton, 89; Feinberg, 1980a; Raz, 1986, 369-399.

First of all, as Feinberg points out, respecting a child's rights-in-trust will involve an important *negative* duty on the part of parents to refrain from actively<sup>270</sup> foreclosing their child's future options. This occurs when a child is enrolled into certain comprehensive doctrines at the expense of others, or when they are actively precluded from developing the knowledge or capabilities that will enable them to make autonomous choices.<sup>271</sup> For example, a child's future autonomy is compromised if they are instilled with "...an *unshakable* commitment to a particular religious community,"<sup>272</sup> because such a commitment will impair their ability to make their own religious decisions later in life. Similarly, a child's future autonomy is compromised if they are denied a minimal education, for they may not then be exposed to the knowledge or skills that will enable them to choose critically or reflectively between options. On strong interpretations, negative duties are thought to imply strict parental neutrality, where parents must refrain from raising their children within the context of *any* controversial ethical doctrine.<sup>273</sup> However, on more reasonable interpretations, such duties are thought to imply simple restraint in comprehensive enrolment, and a general presumption that parents "...postpone the making of serious and final commitments until the child grows into maturity and is legally capable of making them himself."<sup>274</sup>

Second of all, parents may also be thought to have minimal *positive* duties to actively foster the conditions for autonomous choice. As Mianna Lotz suggests, these may involve "...contributing toward ensuring that their child is provided with a range of feasible and valuable

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<sup>270</sup> We say 'actively' here because there is a sense in which parents cannot help but foreclose certain options simply by making the unavoidable choices associated with child-rearing—as Archard claims, "Each and every upbringing has an obvious 'opportunity cost', namely the absence of some other upbringing." (Archard, 2004, 82) More will be said about this below.

<sup>271</sup> Feinberg, 125; see also Clayton's discussion of 'autonomy as an end-state' in Clayton, 89-91.

<sup>272</sup> Clayton, 90.

<sup>273</sup> Ibid., 87-123.

<sup>274</sup> Feinberg, 1980a, 129. See also Lecce's response to Clayton's stronger extension of public reason to parental conduct in Lecce, 2008b.

options,” and “...seeking to develop in their child the skills and capacities for information seeking, critical reflection, deliberative independence, and the like.”<sup>275</sup> In this sense, parental duties may entail more than simply refraining from *stifling* a child’s future autonomy; they may also entail actively *facilitating* that autonomy in a number of important ways.

Finally, respecting a child’s rights-in-trust can also be thought to impose a number of *positive* duties on the state in its capacity as *parens patriae* (or ‘parent of the nation’). The first is a duty to provide adequate and accessible educational resources, so that all children have the opportunity to develop the knowledge and skills that will enable them to make autonomous decisions as adults.<sup>276</sup> The second is a duty to uphold children’s rights-in-trust in the face of potential violations by their parents. Just as the state upholds children’s welfare rights by intervening in homes where they are being neglected or abused, it may also be obliged to uphold their rights-in-trust by intervening in cases where their future autonomy is being seriously jeopardized.<sup>277</sup>

To briefly illustrate how rights-in-trust might work in practice, consider the specific case of religious freedom. By holding a child’s religious freedoms in trust, we are not protecting her immediate religious preferences—she has none—but we are protecting her ability to form her own religious convictions when she reaches an age at which she can better understand the meaning and significance of religious faith. In other words, we are protecting the religious freedoms of the *adult who she will become*, rather than the *child who she is*. Securing this *future* entitlement will involve *present* restrictions on our conduct toward her, and may involve the active discharge of duties designed to foster her ability to make informed religious decisions.

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<sup>275</sup> Mianna Lotz. “Feinberg, Mills, and the Child’s Right to an Open Future.” *Journal of Social Philosophy*. Volume 37 (4) (Winter 2006), 547.

<sup>276</sup> See Brighouse, 2006, especially 13-26; Callan, 1997; Gutmann, 1986, especially 19-47.

<sup>277</sup> Feinberg, 1980a, 140.

These may include sparing her from religious indoctrination, equipping her with the critical and reflective skills required to both question and understand her inherited faith, and exposing her to alternative options. All of these measures are aimed at ensuring that by the time the child reaches adulthood, her religious options are open, and she can make a meaningful and independent decision as to what faith, if any, suits her needs. She may decide to adopt the faith of her parents, or she may decide to adopt no faith at all. In any case, the decision will be *hers* to make.

Before going on to explain how rights-in-trust satisfies the criteria set out by the three objections, we should note a few important qualifications. First of all, we must recognize that total self-creation is impossible, and that the future autonomy that rights-in-trust protect will necessarily admit in degrees. Factors beyond a child's control will always contribute in part to who they become, and their influence will resonate far into future processes of belief- and desire-formation. For example, a child's socio-economic status, native culture, or geographic location are all factors that they did not themselves choose, but are nevertheless factors which will shape the adults who they will become, determining in part the options that will become available to them. However, these influences should not be seen as inhibiting to the exercise of autonomy, but as *necessary* to it. This is because autonomous choice cannot take place in a vacuum, but presupposes an established set of beliefs and desires off of which to evaluate and base decisions. Feinberg illustrates this point nicely by noting the impossibility of an independently formed self: "If the child is to determine his own life, and be at least in large part the product of his own 'self-determination', he must already have had a self fully formed and capable of doing the determining. But he cannot very well have determined *that* self on his own, because he would have to have been already a formed self to do that, and so on, *ad infinitum*."<sup>278</sup>

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<sup>278</sup> Feinberg, 1980a, 147.

Second of all, we should be generally wary of the language of ‘maximization’ that Feinberg uses to characterize parental duties. According to Feinberg, respecting a child’s rights-in-trust requires that parents “...send [the child] out into the adult world with as many open opportunities as possible, thus maximizing his chances for self-fulfillment.”<sup>279</sup> However, this is problematic for a number of reasons. First, a duty to secure as many future options as is possible seems to place an unreasonable burden on parents. The expense this duty represents in terms of time, money, and opportunity costs is likely to be unfeasibly demanding, suggesting that parental duties are better interpreted as involving the protection of an *adequate* or *sufficient* range of options. Second, and related, it is not at all clear that sheer numbers of options is what really matters for the meaningful exercise of autonomy. As Raz suggests, it is not the *number* of options that counts, but the *quality* of the options that are available: “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...”<sup>280</sup> In this sense, it may be more advantageous to protect a smaller number of meaningful options, rather than a larger number of trivial options. Additionally, we must also recognize that some valuable ways of life involve dedicated commitment to a single project from an early age, and that this will necessarily come at the expense of future options. Becoming a concert pianist or an Olympic-level athlete are both valuable life options, but achieving them requires years of focused training that will ultimately preclude engagement in other things.

The final qualification for rights-in-trust is that not *all* of children’s rights should be held in trust *all* of the time. As mentioned earlier, children can only become competent choosers if

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<sup>279</sup> Ibid., 135.

<sup>280</sup> Raz, 1986, 375.

they are able to “...try out the business of choosing,”<sup>281</sup> so there is certainly a case to be made for the kind of gradual accordance of choice-based rights associated with Brennan’s gradualist model. In this sense, rather than holding a child’s religious freedoms purely in trust until a predetermined age, parents might let their children make limited religious choices earlier on, in proportion to their level of cognitive development.

### *3.4 Easing Critical Concerns*

So how does taking a trust-based approach toward children’s rights respond to the three prominent objections? How does it satisfy the criteria they set out for an account of children’s rights to be plausible? Rather than responding to each objection in the order that they were presented (1, 2, 3), it is more useful to order the responses from the most to the least apparent (3, 1, 2). In this sense, we will move from cognitive incompetence, to an ethic of care, and finally, to parental authority.

First of all, taking a trust-based approach toward children’s rights responds to the objection from cognitive incompetence because it explicitly recognizes children’s cognitive limitations. In fact, the very idea of rights-in-trust can be thought of as a direct reaction to the problem of cognitive incompetence, as it is straightforwardly motivated by the assumption that children lack the mental capacities required to exercise sophisticated rights. Recall that the objection from cognitive incompetence raises two distinct worries about extending ethical independence rights to children. The first is that it is futile: insofar as children lack the ability to make important ethical decisions, they cannot make use of rights which protect their ability to do so. The second is that it is dangerous: because such rights would have the effect of immunizing children’s poor decisions, according them a full scheme may have harmful consequences for

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<sup>281</sup> Brennan, 61.

both their present and future well-being. A trust-based approach is able to avoid both of these problems because the rights it prescribes are not meant to protect children's immediate decisions; rather, they are meant to protect children's *future ability* to make meaningful decisions. This avoids the first problem because it does not suppose (against commonsense) that children have established ethical convictions off of which to base important life decisions. It also avoids the second problem because it does not command a duty in others to respect children's potentially harmful immediate choices.

Second of all, by shifting focus *away* from protecting children's immediate choices, the trust-based approach becomes compatible with promoting their developmental interests, including their physical and emotional well-being. As indicated above, one of the worries associated with extending choice-based rights to children is that such an extension may be inconsistent with their maturation into healthy adults. For example, if we are obliged to respect children's immediate choices, it may preclude us from taking the coercive measures that are often required to secure their healthy development, such as feeding them a nutritious diet or sending them to school against their best wishes. However, because children's rights-in-trust are not meant to protect their immediate choices, parents are given room to take the paternalistic measures required to promote their children's developmental interests. In fact, securing a child's healthy development should not only be seen as *consistent* with respecting their rights-in-trust, but should be seen as a *requirement* of respecting those rights, for a child's ability to make meaningful ethical decisions later in life presupposes that they possess the good-health, intelligence, confidence, and self-respect indicative of a healthy development. In this sense, adequately promoting a child's developmental interests can be thought of as a correlative duty associated with their rights-in-trust (though not derivative of those rights alone).

While it is relatively easy to understand how a trust-based model satisfies criteria (3) and (1), it is more difficult to see how it satisfies criterion (2), or the condition that rights-in-trust accommodate the interests of parents in sharing their religious, cultural, and moral traditions. In many ways, the correlative duties associated with rights-in-trust appear to be diametrically opposed to parental interests, and seem likely to frustrate their ability to shape the ethical dimensions of their child's upbringing. For example, the duty to refrain from foreclosing a child's future options seems to constrain the ability of parents to enroll their children in certain comprehensive doctrines (such as established churches or faiths), while the duty to expose a child to an education that will foster their critical and reflective capacities seems to frustrate the efforts of parents to pass on ethical precepts which emphasize faithful adherence to scripture or clerical authority. These concerns are not without warrant, for the central implication of rights-in-trust is precisely that they place ethical constraints on parental conduct with a view to the child's future ethical independence. However, contrary to the suppositions of some critics<sup>282</sup>, there is no reason to believe that respecting children's rights implies a sterile norm of parental neutrality, or a complete prohibition on the efforts of parents to share their cherished religious, cultural, and moral beliefs. We can identify a number of reasons for this:

First of all, complete parental neutrality is practically impossible. In raising a child, parents are constantly forced to make significant as well as mundane decisions, and the outcomes of those decisions will inevitably privilege some ways of life over others.<sup>283</sup> For example, parents must decide what to feed their child, which activities to enroll them in, how to discipline them, where they will live, with whom they will associate, and so forth. While the outcomes of these

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<sup>282</sup> See for example 'child liberationist' writers Richard Farson. *Birthrights*. (London: Collier MacMillan, 1974); and John Holt. *Escape from Childhood: The Needs and Rights of Children* (Harmondsworth: Penguin, 1974). For a more recent example, see Clayton, 2006.

<sup>283</sup> See Claudia Mills' discussion of the practical impossibility of neutrality in "The Child's Right to an Open Future?" *Journal of Social Philosophy*. Volume 34 (4) (Winter, 2003), 501.

decisions will secure children a certain set of future options, they will simultaneously close off others, for “Each and every upbringing has an obvious ‘opportunity cost’, namely the absence of some other upbringing.”<sup>284</sup> Therefore, complete parental neutrality is not only unattractive insofar as it precludes parents from sharing their ethical beliefs with their children, but it is also a practical impossibility, and so cannot be held as a standard against which to evaluate legitimate parenting.

Second of all, even if parental neutrality *is* somehow possible, it is not at all clear that it is the most effective means of securing children’s ethical independence. Feinberg concedes that *complete* parental neutrality is impossible, but that it can be “...approximated to some degree,”<sup>285</sup> presumably by ensuring that children are exposed to as many alternative lifestyles as possible, and that they are not prematurely committed to any one. However, this sentiment of maximization is again problematic. We must remember that children cannot make ethical decisions in a vacuum, but require a stable set of values and beliefs from which to evaluate options and base choices.<sup>286</sup> It is not clear that maximum exposure to diverse and conflicting lifestyles would contribute to such a stable foundation, suggesting that it is appropriate, if not necessary, for parents to provide their children with *some* kind of ethical base (and so long as this is the case, it may as well be the one that the parents themselves endorse). Also, bombarding children with as many options as possible is more likely to *hinder* their ability to make effective decisions rather than *enhance* it, suggesting that some degree of early commitment to ethical precepts may be beneficial for a child’s future ethical independence. As Galston claims, “...the

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<sup>284</sup> Archard, 2004, 82.

<sup>285</sup> Feinberg, 1980a, 136.

<sup>286</sup> As Noggle claims, “One cannot be a choosing agent unless one has some values or goals on which to base one’s choices; otherwise, choice degenerates into mere impulse or arbitrary whim. Even the choice to modify or reject some part of one’s own value system requires *some* values or goals to supply reasons on which to base that choice.” (113).

greatest threat to children in modern liberal societies is not that they will believe in something too deeply, but that they will believe in nothing very deeply at all. Even to achieve the kind of free self-reflection that many liberals prize, it is better to begin by believing something.”<sup>287</sup>

Third, childhood should not only be thought of as preparatory period for a future life of autonomous choice, but should be thought of as a constitutive element of a good life, or as valuable in and of itself. An instrumental conception of parenthood that is wholly directed toward securing a child’s open future is apt to be inconsistent with this view, for it will likely preclude the kind of intimacy that is often forged around the sharing of thoughts, beliefs, traditions, rituals, and the like. As Callan notes, “An obsession with the adult-in-the-making strikes us as a pathology of parenthood rather than an authentic human good to which we should defer. Indeed, one reason to deplore that obsession is precisely its tendency to frustrate the achievement of intimacy that others have identified as fundamental to the psychological significance of families for their members.”<sup>288</sup> A morally praiseworthy conception of parenthood seems to require the cultivation of intimate relationships, and such relationships will often involve the exchange or exploration of various religious, cultural, and moral beliefs between parent and child.

Finally, it is reasonable to think that parents have a *right*, as parents, to cultivate intimate relationships with their children, and such a right is not incompatible with respecting their rights-in-trust. For instance, while Brighouse and Swift maintain that “...there is no right to ‘form one’s children’s values,’ and certainly none that is the corollary of the right to do so for oneself,”<sup>289</sup>

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<sup>287</sup> William Galston. “Civic Education in the Liberal State” in Nancy L. Rosenblum (ed) *Liberalism and the Moral Life*. (Cambridge, MA: Harvard University Press, 1989), 101. Callan expresses a similar concern, suggesting that autonomous choice requires rationally *adhering* to ethical commitments in addition to rationally revising and evaluating them. See Eamonn Callan. “Autonomy, Child-Rearing, and Good Lives” in David Archard and Colin M. Macleod (Eds.) *The Moral and Political Status of Children*. (Oxford: Oxford University Press, 2002).

<sup>288</sup> Callan, 1997, 143.

<sup>289</sup> Brighouse and Swift, 105.

they do endorse a parental ‘right to intimacy’ which entitles them to share their lives with their children in a number of salient ways. These include sharing their time, their thoughts, their interests, their place of worship, or their enthusiasm for their cultural heritage.<sup>290</sup> It is important to emphasize that these parental privileges do not derive from a parent’s ethical independence rights (such as their religious or expressive freedoms), for this would invoke the self-defeating interpretation of ethical independence rejected above. Rather, parental privileges are better thought to derive from an independent right to intimacy which is *separate* from their own ethical independence rights, and *constrained* by the rights-in-trust of their children. In this sense, “Parents may not legitimately indoctrinate their children, but they do have a legitimate interest in being able deliberately to influence their children’s values and beliefs insofar as they can do so without compromising the child’s prospective autonomy.”<sup>291</sup>

Thus, while it is true that a child’s rights-in-trust place limitations on how their parents may act toward them, such rights should not prohibit parents from sharing their religious, cultural, and moral traditions with their children. Indeed, if the previous four points are correct, a plausible case could be made for the assertion that the sharing of religious, cultural, or moral precepts is not only an inevitable feature of (good) parenting, but a correlative duty associated with respecting a child’s rights-in-trust. However, these concessions should not overshadow the central implication of rights-in-trust, which is that they set a predetermined threshold for the bounds of legitimate parenting. Insofar as parents wish to proselytize their children by thwarting their deliberative capacities or shielding them from alternative options, their efforts run in violation of their child’s ethical independence, and are rightly subject to constraint.

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<sup>290</sup> Ibid., 102.

<sup>291</sup> Ibid., 104.

## *Conclusion*

Each of the three prominent objections fails to make a persuasive case against extending ethical independence rights to children. First, while the objection from an ethic of care demonstrates that considerations of justice and rights do not exhaust our moral obligations toward others, they fail to show how caring obligations are incommensurable with respecting children's ethical independence rights. In fact, a closer look reveals that rather than being mutually exclusive, discharging caring obligations and respecting children's rights often go hand in hand. Second, while the objection from parental authority demonstrates that parents have deep and sincere interests in shaping the ethical dimensions of their children's upbringing, it fails to show that parents have a right to shape their child's ethical convictions as an extension of the right to shape their own. Such an assertion either invokes a fundamental misunderstanding of the *individual* scope of ethical independence rights, or rests on an outdated proprietarian conception of the child that is inconsistent with the modern view of seeing children as persons in their own right. Finally, while the objection from cognitive incompetence rightly recognizes the futility and possible dangers of according children choice-based rights, it does not prove that children lack an interest in ethical independence. Rather, it simply forces us to reimagine the nature of children's interest in ethical independence, as well as the means by which that interest is protected.

A trust-based approach toward children's rights provides a promising model for thinking about children's rights in democratic societies. By shifting the focus of children's rights from protecting their immediate decisions to protecting their *future ability* to make ethical decisions, the trust-based approach becomes immune to the criticisms waged by the three prominent objections: it takes into account children's cognitive limitations, avoiding the futility and danger

associated with according them choice-based rights; it is consistent with promoting children's development interests, enabling parents to take the coercive or paternalistic measure that are often required to ensure a child's healthy development; and it leaves parents sufficient, though not unlimited, room to share their religious, cultural, and moral traditions.

*Conclusion*  
Democratic Implications

*Conclusion*

If democratic justice requires the equal and universal provision of individual rights, then the exemption of children from a full scheme of ethical independence rights can only be one of two things: a justified exception to the rule, or a pervasive social injustice. If the preceding arguments are sound, then the most plausible justifications fail, suggesting that children's exemption ought to be viewed squarely as the latter. According to the status-based conception of democracy, substantive individual rights must be accorded equally and universally to all citizens who occupy the status of *addressees* of law. Since children share this status with competent adults, they are equally entitled to an equivalent set of substantive rights, including those which protect their ethical independence. Moreover, operating against an inevitable backdrop of moral pluralism, democracy's constitutive values require institutions to assume a position of neutrality between competing conceptions of the good, and accord citizens protective liberties in order to shield them from ethical compulsion. Since children are particularly vulnerable to ethical compulsion under the auspice of their parents, they seem like particularly appropriate candidates for ethical independence rights. Finally, the most plausible objections to extending ethical independence rights to children fail. The objection from an ethic of care fails to demonstrate that discharging caring obligations to children is incommensurable with respecting their rights; the objection from parental authority must rest on either a self-defeating interpretation of ethical independence or a proprietarian conception of the child; and the objection from cognitive incompetence does not demonstrate that children are incapable of having an interest in ethical independence rights, but simply forces us to reimagine the nature of that interest as well as the means by which it is protected. Thus, democracy's constitutive values yield a strong presumption

in favour of extending ethical independence rights to children. What is more, such an extension is immune to the most prominent counterarguments currently available in the literature.

### *Implications*

What are the implications of the preceding argument? From a theoretical standpoint, the preceding argument has important implications that are both specific to the debate surrounding children's rights, as well as general to democratic theory as a whole. Specifically, the argument demonstrates that children's unique physical, cognitive, and emotional characteristics do not preclude us from extending them ethical independence rights, but simply force us to reimagine what that extension means. The trust-based approach provides a promising model for how we might go about extending ethical independence rights to children in a way that is both effective and meaningful. A child's ability to *effectively* exercise their ethical independence rights requires that they adequately develop the cognitive capacities which will enable them to make competent and informed decisions, such as rationality, critical thinking, the capacity for long-term planning, and basic knowledge of the world and its many options. Since the trust-based approach emphasizes the development of these capacities in children when they are young, it is more likely than standard choice-based accounts to enable them to effectively exercise their rights. Moreover, a child's ability to *meaningfully* exercise ethical independence rights requires that, by the time they reach the age at which they are capable of making their own ethical decisions, those decisions have not already been made for them; that they still have real options from which to choose, and that their ethical lot in life has not been determined solely by the contingencies of childhood. Since a trust-based approach seeks to ensure that a child has an adequate range of

future options from which to choose, it is more likely than choice-based accounts to protect their ethical independence in a way that is meaningful.

The preceding argument also provides a more stable justificatory framework for defenders of children's rights. Insofar as the extension of ethical independence rights to children is justified with reference to a shared conception of democratic citizenship, it is (in principle) acceptable from the point of view of *all* citizens, regardless of their religious, philosophical, or moral commitments. A major failing of standard liberal defences of children's rights is that they tend to operate on the basis of controversial premises, such as the assumption that rational autonomy is a constitutive element of the good life. This is problematic, as such accounts are then only acceptable from the perspective of citizens who happen to value rational autonomy. The trust-based approach avoids this problem by deriving its justification from the shared values of autonomy<sup>292</sup> and equality which underscore democratic citizenship. In this sense, ethical independence rights are not extended to children because such rights enable them to live substantively autonomous lives; rather, such rights are extended to children because they are democratic citizens, and treating citizens as equal and autonomous in the context of moral pluralism requires that they be permitted to form, revise, and pursue their *own* conception of the good. It is worth noting that, besides providing a more accessible *defence* of children's rights, the democratic approach also passes the test of neutrality required for legitimate law and policy in a democratic context.<sup>293</sup>

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<sup>292</sup> 'Autonomy' in this democratic sense should not be confused with the term 'rational autonomy' just mentioned. 'Autonomy' in the democratic sense simply refers to the entitlement of citizens to direct the course of their lives; conversely, 'rational autonomy' refers to a *particular way* in which a citizen may direct their life, i.e. "...according to convictions that are the product of [their own] critical and rational reflection." (Clayton, 2006, 104).

<sup>293</sup> This assumes, of course, that neutrality *is* a requirement of law and policy in a democratic context. However, this is an assumption which many writers dispute. While Chapter Two demonstrates how neutrality is consistent with democracy's constitutive values, a more thorough defence of neutrality was outside the scope of this thesis. For prominent objections to neutrality, see Thomas Hurka. *Perfectionism*. (Oxford: Oxford University Press, 1993); George Sher. *Beyond Neutrality: Perfectionism and Politics*. (Cambridge: Cambridge University Press, 1997); Raz,

In addition to specific implications for the debate surrounding children's rights, the preceding argument also has two broader implications for democratic theory generally. First, in accordance with much feminist thought<sup>294</sup>, it suggests that the realization of democratic justice is not only a public endeavour, but also has important implications that stretch into the so-called 'private realm' of the family. On the one hand, children's entitlement to ethical independence rights derives from a public conception of democratic citizenship; on the other hand, the most significant threats to those rights are likely to reside in the private sphere of the family, through the efforts of parents to enrol their children in restrictive comprehensive doctrines. This suggests that in order to uphold children's democratic entitlement to ethical independence rights, certain constraints may have to be placed on the private conduct of their parents.

Moreover, in accordance with recent multicultural theory, the preceding argument suggests that democratic treatment as equals does not always require equal treatment; rather, it sometimes requires differential treatment in light of normatively relevant differences.<sup>295</sup> Children's ethical independence cannot be meaningfully protected by simply according them the same package of choice-based rights as adults. Not only would such an extension be futile (insofar as children are incapable of making meaningful ethical choices), but it may also be dangerous (insofar as such rights would have the effective of immunizing children's poor decisions). In order to meaningfully protect children's ethical independence, we must go about it in a way that takes into account their special physical, cognitive, and emotional characteristics. A trust-based approach toward children's rights achieves this by encouraging the development of

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1986; and Steven Wall. *Liberalism, Perfectionism, and Restraint*. (Cambridge: Cambridge University Press, 1998). For a recent defence of neutrality, see Jonathan Quong. *Liberalism without Perfection*. (Oxford: Oxford University Press, 2011).

<sup>294</sup> See Mackinnon, 2005; Nussbaum, 1999; Okin, 1991.

<sup>295</sup> See Kymlicka, 1995; see also Dworkin, 1977, 272-73.

key cognitive capacities, and ensuring that their ethical options are open when they become capable of choosing between them.

### *Lingering Questions*

In addition to its theoretical implications, we should also recognize some *limitations* of the preceding argument. First of all, the defence of children's rights elaborated in the third chapter is not conclusive; rather, it simply indicates that the best objections available in the contemporary literature are unpersuasive. In this sense, while the defence of children's rights may be immune to the objections from an ethic of care, parental authority, and cognitive incompetence, it may be vulnerable to alternative objections that have yet to be raised.

Second of all, while the trust-based approach appears immune to the three prominent objections, it is only a model, and would require serious elaboration if it were to be applied in a policy setting. To begin with, the following kinks would have to be worked out (and this list is by no means exhaustive):

If maximization of future options is an unreasonable burden to place on parents, how do we specify a threshold at which a child's ethical independence rights are being violated? In other words, how do we measure the 'openness' of their futures?

If a child's rights should not *always* be held in trust, at what point should they convert into choice-based rights? If the conversion depends on the development of cognitive capacity, is specifying a particular age for conversion arbitrary?

It was suggested that children's ethical independence is not best promoted by sheer *numbers* of options, but by the quality of the options themselves. However, this seems to suppose what moral pluralism rallies against, which is some kind of objective standard against which to

evaluate the relative worth of various options. How do we dovetail our democratic commitment to anti-perfectionism with a need to distinguish between valuable and trivial options?

Moreover, how do we deal with the issue of talents and careers? Some valuable ways of life necessarily entail the forfeiture of future options from a young age. If parents enrol their children in these projects, are they violating their ethical independence rights? Can we expect children to choose themselves if they lack the cognitive capacities to make informed ethical choices? These are just a few of the questions which point to potential weaknesses in the trust-based approach to children's rights. A more thorough defence of such an account would have to respond to these and others.

Third, it was mentioned that the democratic justification for children's rights is preferable to standard liberal arguments because it is more inclusive: insofar as the extension of ethical independence rights to children is justified according to a shared conception of democratic citizenship, it should be acceptable to *all* citizens regardless of their comprehensive commitments. However, we might question the extent to which this actually matters, particularly in a more practical policy context. While the democratic strategy invokes a different justification than standard liberal accounts, it arrives at much the same conclusion: children ought to be accorded rights which set limits on how their parents may treat them. Parents who object to the standard liberal arguments are likely to find the democratic argument similarly unacceptable, insofar as it interferes with their ability to shape their child's ethical convictions.

Finally, much has been made of the threat that restrictive cultural or religious doctrines pose for children's ethical independence. However, we should also recognize a much broader threat that looms inside of television sets, on billboards, over radio airwaves, and through cyberspace. The homogenous consumer culture which dominates many Western democracies

does not facilitate ethical independence any more than fundamentalist religious or cultural communities do; rather, it encourages the same kind of unthinking servility to consumption and material wealth. This represents a potential problem for the trust-based approach toward children's rights. Ideally, rights-in-trust are meant to promote children's ethical independence by exposing them to the great diversity of ethical options that exist within a democratic society. However, the efficacy of this approach may be mitigated if that 'diversity' simply means different variations of the same "consumer hermeneutic."<sup>296</sup>

### *Future Research*

Philosophical arguments sometimes generate more questions than they answer. Of all the questions raised by the preceding arguments, two seem to stand out as especially pertinent subjects for future research.

1. One of the main implications of the trust-based approach is that certain limitations will be placed on the way that parents can legitimately rear their children. Is this a palatable implication in a democratic society? Ensuring that parents preserve an open future for their children would require extensive regulation that is likely to fly in the face another democratic commitment: the right of families to privacy in their own affairs. Does this suggest a fundamental conflict in democratic values? What role might the state have in augmenting the failure of parents to keep their children's future options adequately open (i.e. through public education)?
2. It has been demonstrated that, as a matter of democratic justice, children are entitled to rights protecting their ethical independence. However, it has also been argued on the basis of democratic principles that certain cultural or religious communities are

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<sup>296</sup> See Callan's discussion of consumer culture in Callan, 2002, 135-36.

sometimes entitled to special group-differentiated rights to ensure their preservation, including exemption from educational curricula. Are these goals commensurable? While derivative of the same principles, both sets of rights seem to pull in opposite directions. Respecting children's ethical independence rights seems to entail shielding them from comprehensive enrolment; however, ensuring the survival of vulnerable groups sometimes seems to entail facilitating their ability to comprehensively enrol their members so as to preserve their traditions and community. Can a democratic state reconcile its commitment to protect children's ethical independence with a commitment to cultural preservation? If so, how? If not, what does this say about democracy as a coherent political vision?

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