

The Insufficiency of Negative Rights for Children

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DRAMATIS PERSONAE

To the question “What rights do children have?” liberals have answered in a number of ways. The childhood one has, after all, will have important consequences for the rest of one's life, but what constitutes a rights-respecting childhood according to liberalism is an open question. In popular discourse, parents act with the assumption that, short of physical harms and neglect, they may raise their children in whatever manner they deem best. Society agrees: only when demonstrable harms exist does the state step in, and then only in extreme cases. A common liberal response to the question of justice toward children is the following: children have the right to have their future autonomy protected, so that they may pursue as adults their conception of the good life. This position is called the right to an open future. While the right to an open future is popular among liberals, I will show that the theory and others like it are inadequate.

My goal for this paper is as follows. I hope to show that negative rights to be free from undeserved harm are insufficient, as are rights which only protect future autonomy by preventing indoctrination.

I shall begin by making the case for potential autonomy based on a common interpretation of liberalism — that a good life involves having a conception of the good, that we ought to have the freedom to pursue those ends, and, what I will argue is often overlooked in liberal theories of children's rights, that discovering and questioning beliefs is necessary to achieve the good life. By framing the features a child's adequate upbringing would have, we will be led to the negative right to be free from certain kinds of harm, both physical and psychological. This right, which I will call the right to an open future, has been argued for by others.

When considering what rights, if any, children have, immediate obstacles arise. The

category 'children' is often defined by what they lack compared to adults: young children cannot make informed decisions about the future, and are thus not allowed to vote;¹ they cannot comprehend the consequences of their actions, and are thus not allowed to do things like drive a car. Infants possess far fewer adult traits than a fifteen-year-old, yet both are considered to be in the same group legally speaking.² As infants develop into young children and then teenagers, they acquire more adult characteristics, such as the ability to consider further into the future, to make responsible autonomous choices, and to understand the long-term results of those choices. It is not unjust discrimination that adults are given the power to make important choices for their young children, rather than letting the children decide for themselves, for children are incapable of making responsible and informed decisions about important matters of their lives.

The sense of autonomy I have in mind is more robust than purely independent decision-making. In addition to independence are the traits needed to successfully navigate the particular society one is born into (the skills required in a developed, democratic society if Canada is the country in question). Autonomy in this sense involves more than the ability to make choices for oneself. One must possess certain skills — the ability to read, for instance — in order to be autonomous, because such skills are required for living in a developed society. Viewed in this way, children are not autonomous. They will, however, become autonomous given the right type of upbringing. Why is autonomy so important? It need not be considered fundamental to a life going well. After all, we can imagine a society ruled by a benevolent dictator who makes decisions regarding our lives which produce a better outcome than if we had made decisions for ourselves. In comparison, for many it is difficult to see why if I live life x , in which I autonomously make decisions, rather than life y , which turns out exactly the same except that my

¹ The emphasis is on 'young.' Perhaps a case can be made for sixteen-year-olds being allowed to vote; it might empower them to care more about social issues.

² Or nearly so. A fifteen-year-old can begin to learn to drive in Alberta, whereas a ten-year-old cannot. Still, a fifteen-year-old lacks the full package of rights a legal adult of eighteen possesses.

decisions were not autonomously made, life x should be considered a better life. Liberal theories, however, think that autonomy does play a role, so we shall now turn to those arguments.

THE LIBERAL PRECONDITIONS FOR LEADING A GOOD LIFE

Will Kymlicka argues that, according to many liberal theories, there are two preconditions for leading a good life. Kymlicka begins with the claim that “our essential interest is in leading a good life, in having those things that a good life contains.”³ It is not enough that I believe that I am leading a good life, for it is possible that I am mistaken. This fact underlies my deliberation about important decisions and causes me to ask if the projects I am pursuing are worthwhile. Importantly, the fact that I deliberate over important decisions only makes sense if I believe that my essential interest is in living a good life, and not just a life that I believe is presently good. Kymlicka states that

while we may be mistaken in our beliefs about value, it doesn't follow that someone else, who has reason to believe a mistake has been made, can come along and improve my life by leading it for me, in accordance with the correct account of value. On the contrary, no life goes better by being led from the outside according to values the person doesn't endorse. My life only goes better if I'm leading it from the inside, according to my beliefs about value.⁴

The first precondition, therefore, is “leading life from the inside.” It is a nice phrase but it is open to different interpretations. I take Kymlicka to be using “leading life from the inside” as an equivalent to “believing for oneself that one's life is going well.” Note, however, that I can believe in the value of my life projects, but may have been coerced into believing them. The second precondition is that persons must be free to examine and question beliefs about the good

³ 1989. 10.

⁴ Ibid. 12.

life. To do this, we need the resources to consider those beliefs, along with the freedoms to examine without coercion. Out of this second precondition come the liberties promoted by liberals, such as freedom of expression, freedom of mobility, freedom of the press, and concerns for education.⁵ The case for a right to autonomy is rooted in the liberal notion that our goals can be wrong and that we can revise them. Learning about the good (and revising our pursuit in light of new beliefs) is also important for other liberals, such as John Rawls⁶ and Ronald Dworkin.⁷

Although Kymlicka does not make it a formal precondition, another important factor for the preconditions to obtain is that one must believe that one's projects are defeasible. Rawls's thin theory of the good describes those things which all rational people would find useful in pursuing their interests regardless of what those interests happen to be. This includes the liberties because, he says, parties have an interest in being able to revise their conceptions of the good. He states that “[People in the original position] do not think of themselves as inevitably bound to, or as identical with, the pursuit of any particular complex of fundamental interests ... Rather, free persons conceive of themselves as beings who can revise and alter their final ends and who give first priority to preserving their liberty in these matters.”⁸ Protection of the liberties — the second precondition — is something all people have as a fundamental interest.

Rawls states that any person considering a conception of the good will realize that the particular conception is revisable. The fallibility of any conception remains a possibility, so any person must view her conception of the good as revisable in principle.⁹ As we have seen, Kymlicka adds the further point that we must understand our beliefs as defeasible if we are to make sense of the deliberating we do regarding decisions in our lives. Rawls agrees: “There is no

⁵ Ibid. 13.

⁶ 1999. 180–185.

⁷ 1983a. 24–30.

⁸ 1999. 131–132.

⁹ I use Rawls because his arguments for liberalism are well-known. I do not think, though, that what I have used commits me to a fully Rawlsian position.

guarantee that all aspects of our present way of life are the most rational for us and not in need of at least minor if not major revision.”¹⁰

Kymlicka's two preconditions are only successful at defining what makes a life go well if used together. Leading my life from the inside is possible only if I am also able freely to reflect on my beliefs. I might, for instance, think that I am leading a good life, but it may be the case that I was coerced into the beliefs that I hold. In such a case I meet the first precondition — I am leading my life from the inside because I believe in the practices to which I subscribe — but not the second condition, because I am unable to freely revise my point of view. Alternatively, I can have the freedom to revise my ends, but fail to lead my life from the inside. I might be told that one way of life is good, and have the capacity to judge for myself that it is not, but be forced to live it nevertheless. Worse still (and perhaps just as likely as failing to meet only one precondition), I might fail to meet both preconditions. The two preconditions are closely linked in that being led from the outside (which fails to take seriously the person's interest in autonomy) is due to a disregard for the second precondition. As we shall see, the right to an open future focuses on protecting the first precondition, but neglects the second, making it insufficient according to liberalism.

In some significant ways, children are unable to lead their lives from the inside. They are impressionable, and so are easily led from the outside. And, especially at a young age, they are incapable of internalizing complex beliefs. Of course, parents are granted the fiduciary responsibility to raise children for this reason: children can make choices about the good, but those choices are likely to be made without full consideration for their impact. Newborn infants require around the clock attention, and no doubt certain activities — speaking to them, proper nutrition — help their development. As infants turn into young children, different needs take

¹⁰ 1981. 27.

over: six-year-old children no longer need constant attention: they can be given more freedom but also have a different set of needs to foster their development. If the line between teenager and adult is vague, this is as it should be. Steadily increasing the responsibilities young adults have is an effective way of preparing them for autonomous living. So, there are important differences between infants, children, and teenagers. What those differences are, and how each characteristic is best fostered, is not the issue at hand. Rather, it is sufficient to note that such differences exist, and that requirements will change throughout the development of the child.

Adults have an interest in leading the best possible life, recognizing that valuing the chosen life for oneself is important. That interest in leading one's life from the inside — living autonomously — ought to be fostered in children. A life where one is told what to do rather than being able to make decisions for oneself is usually, all things considered, worse. The fact that this is not always the case (there are seemingly happy people who have been coerced into their lifestyle, or who give up autonomy) only shows that there are exceptions to this rule. Claiming that autonomy is important in a life going well is sufficient to show that for most people most of the time it is worth protecting. To state that autonomy ought to be developed in children takes the view that children should be taught the skills necessary to be autonomous, as they will be best suited as adults to decide the direction of their lives.

A moderate view of rights protects fundamental interests, but holds that those interests may be outweighed by other demands. We say that children have a right to be free from physical harm because they have a fundamental interest in being free from that harm. Recognizing harm becomes more difficult when psychological harms are considered. Certainly psychological harm is possible — a parent refusing to show affection to a child is such a case. Other activities are less clear. One might think that fundamentalist Christians raising their children to believe the

children are going to hell counts as psychological harm, and is therefore unjust. The difficulty with calling it such is that the parents believe that such teaching is necessary if the child is to be saved; to raise the child otherwise would be a worse wrong than to teach her about hell. The fact that the rest of us do not believe in fundamentalist Christianity is a bad criterion for deciding it is unjust to raise a child that way, because the falsity of a position (or the paucity of followers) need not mean it is harmful and therefore unjust. (Falsity is an especially bad indicator. Consider that the majority of parents in the western world raise their children to believe in Santa Claus, and I suspect that by far most children are left to figure the truth out on their own, rather than have their parents tell them.)

For the reasons presented, children are not given the freedom to autonomously choose their upbringing. They are not allowed to choose to live with a different family, or drop out of school when they are twelve; nor ought they be given the freedom to have complete choice over which friends they have, or what they eat. There is a high probability that they will make poor choices which will negatively affect their lives if they are given the freedom to do so, so adults are justified — obligated, in fact — to make choices on children's behalf. But while children lack autonomy, they will develop into autonomous individuals as adults. The best way for the lives of adults to go well is for them to be given the freedom to make choices regarding how their lives will go. Therefore, children must have the type of upbringing that will preserve their autonomy if they are to lead inwardly valuable lives as adults.

This is the claim being made for autonomy: not that you can limit the autonomy of a non-autonomous thing, but that you can restrict the autonomy it will eventually possess. The focus is on future autonomy being violated, not present autonomy for beings that might or might not have it.

THE RIGHT TO AN OPEN FUTURE

From the line of reasoning so far we can justify the right that children ought to be free from those actions which limit their future autonomy. Following Joel Feinberg, one of the theory's major proponents, it is called the right to an open future.¹¹ Feinberg argues that children have the right to a maximally open future, so whenever a possible future is restricted, that is an unjust action toward a child.¹² His argument accords with what I have so far described about autonomy. Children not only lack the knowledge of how to acquire the skills they need to live a certain lifestyle, they also lack knowledge of the lifestyle in the first place, so they ought to be given as many options from which to choose as possible, according to Feinberg. For example, a child raised by Protestant parents might not have the knowledge that one can be a humanist instead, or at the very least consider it a viable alternative. In comparison, children whose parents are interested in sports might never be given the option, or even the possibility, of learning to play the violin. A major reason for these limits is certainly the resources the family has to explore such possibilities, but it is not the biggest reason. One can develop an appreciation for Chopin without owning a grand piano, and while if the goal is to become a pianist merely listening will be insufficient, the appreciation of music is a start. In the other direction, a child raised by parents who have an interest in literature, but not sports, will be denied the knowledge of what it is like to appreciate sports. Feinberg's argument, therefore, has intuitive appeal.

It has shortcomings, however. The greatest shortcoming is that Feinberg is unable to restrict how open the future ought to be. He at times suggests that only significant life choices

¹¹ 1980. 124–153.

¹² There is disagreement over how committed Feinberg is to the maximally open future position. At times he talks of “[sending children] out into the adult world with as many open opportunities as possible,” (p. 135). But at other times accepts some significant restrictions to the upbringing of children. Most significantly is his agreement with the majority opinion of the U.S. Supreme Court case *Wisconsin v. Yoder*. I think Feinberg is better interpreted as serious about the maximally open future claim, but mistaken about its applications.

matter, but at other times states that as many options as possible should be available to the child.¹³ If he is sincere about believing that childhoods must be maximally open, reflection on this claim leads to unappealing consequences. The result seems to be that if I teach my daughter to play the piano, I have left that possible world open for her (the one where she knows how to play the piano and can go on to be a concert pianist), but, having failed to give her tuba lessons, I have closed the tuba-playing world for her. Later in life she may very well prefer to have learned the tuba over the piano, so I am culpable for that shortcoming. According to Feinberg's argument, I have committed a wrong by making her future less open. If this is true then I will never be able to act justly, for with every decision I make in an effort to make my daughter's life a good one, I am closing off other possible good lives which she, on reflection, may come to prefer. In fact, reflection only covers a small portion of it: there are all of the other possible lives she did not even conceive of which might have made her better off. But to learn every possible musical instrument is impossible. A theory that is unattainable in both theory and practice ought to be ruled out.¹⁴

The implausibility of Feinberg's view does not mean it is off track completely. His argument runs into difficulty because it leads to the maximally open future claim. Other issues exist. One problem with Feinberg's position is that it is unclear how, past a certain threshold, contact with different ways of life will continue to benefit a child. If I learn piano as a child, that I did not also learn the tuba does not mean my life has been made worse off, because I could always choose to switch in the future. In cases where a possible world becomes completely closed off, so long as I have been given enough opportunities, one might think my life will be

¹³ Ibid. 135, 151.

¹⁴ Note that this claim is different from the demandingness objection to consequentialism. I am not claiming that the right to an open future is too demanding because parents have supererogatory options that the right does not recognize. Instead, it is unattainable theoretically, because regardless of the efforts of parents, a maximally open future will never obtain. One might think that Feinberg's argument can be salvaged if he states that parents must promote the most open future that they can, but later arguments show why this too is problematic.

sufficiently autonomous. On this view, which we may call the right to a sufficiently open future, so long as I am given enough opportunities no unjust action has been performed. But this position has its own set of problems. The greatest difficulty it has to overcome is establishing exactly where the threshold for sufficient autonomy should be set. On the one hand, the sufficiently open future argument needs a threshold to establish what constitutes sufficient autonomy so that it does not collapse into the maximally open future view. On the other hand, it needs to defend against the opposing criticism (call it the minimalist position), which holds that protecting autonomy is not worthwhile.

An unsatisfying solution to the problem might be to state that, while the location of a threshold cannot be clearly identified, such a threshold nevertheless exists. Those content with this approach might develop a number of thought experiments to better outline where the threshold lies, but will be forced to concede that each individual case may require a unique interpretation.

Another possibility is to take a different view to the maximally open future demand. Instead of claiming that children must be introduced to as many different ways of life as possible, one can claim that children ought to be raised in as unbiased a manner as possible. On this view, parents must refrain from imparting any comprehensive lifestyle on their children, whether followed by the parents or not. Thus, it would be unjust to raise a child as a Roman Catholic because Catholicism demands that its followers follow a comprehensive set of doctrines regarding morality and metaphysical beliefs. A child who is commanded to adopt a comprehensive lifestyle is being raised in a biased manner. For a proponent of this approach, parents and the community are still required to teach children the fundamentals for living in society — how to read, that stealing is wrong, etc. — but otherwise must refrain from passing on

beliefs such as which political party is best, whether one is better off socialist or capitalist, and in which religion (if any) one should believe.

THE RIGHT TO PUBLIC REASON: A VARIATION ON A THEME

Matthew Clayton argues for an approach, related to Feinberg's, which he calls the right to public reason, but which amounts to the right to a sufficiently open future.¹⁵ Clayton states that raising a child with a comprehensive conception of the good life is wrong because it violates the child's right to future autonomy. He argues for what he calls the precondition view of autonomy, putting it as follows:

the precondition view asserts two constraints on the treatment of individuals.

First, others are not permitted to enrol individuals into comprehensive practices without their autonomous consent. Second, others are not permitted to seek to impart comprehensive convictions to individuals prior to their possession of the capacity for a conception of the good. The intrinsic merit of these constraints is that they are constitutive of legitimate relations between free and equal individuals.¹⁶

The precondition view of autonomy claims that it is wrong to enrol children in comprehensive practices because children are incapable of making autonomous decisions about their enrolment in the practice. For Clayton, protecting one's open future means introducing one only to those practices which a free and equal individual would reasonably adopt. To violate a child's right to an open future is to limit the scope of the freedom she would otherwise have to live a life of her own choosing.

The precondition view resolves many of the difficulties that Feinberg's maximally open

¹⁵ 2006.

¹⁶ Ibid. 103.

future position cannot. First, it limits the scope of the right, so that, while demanding, it is possible to achieve the sense of open future in question (Clayton says it has “revolutionary implications for parents and public authorities”).¹⁷ Second, it provides a clearer definition of what an open future is, and what it means to violate it. Although it still possesses some vagueness — exactly how can we tell what counts as reasonable to the public?¹⁸ — it provides a much more detailed means of deciding what constitutes permissible actions in which parents can engage. Clayton reveals his theory's trouble, however, in outlining some of the practices he thinks his theory forbids. For instance, he states that child baptism is unjust because it is performed on a non-consenting individual.¹⁹ We can expand this to include any involvement in a religious community because the child is incapable of consenting to participation in the comprehensive practices demanded by the religion. Clayton is right in believing that the public reason approach is demanding. For example, many reasonable people reject religious observance, so taking a child to church is illegitimate on this view.

The problems with Clayton's view become clear when he describes what he considers illegitimate. The act of baptism is non-voluntary, but the fact that an act is performed on a non-voluntary agent does not mean that it violates future autonomy. While Clayton gives examples from the Anglican church stating that baptism is the first step to entering someone into the faith (and so therefore entering a comprehensive lifestyle),²⁰ he is mistaken in claiming that it is baptism itself that is autonomy-violating, instead of the acts which follow: enrolling the child in Sunday school, taking confirmation classes, and in all ways treating her like a member of the flock.

Choosing baptism is not just choosing a poor example, it illustrates a flaw with the

¹⁷ Ibid. 102.

¹⁸ Rawls attempts to answer this question in *Political Liberalism* (1996: Columbia University Press).

¹⁹ 2006. 88.

²⁰ Ibid. 87.

precondition view of autonomy. It is incapable of separating acts which are non-voluntary (which all acts are for an infant) with acts which will diminish the future autonomy of the child.

Conflating these two kinds of acts leads to some problematic results. First, if it is wrong to enrol a child in comprehensive practices, then the view almost certainly demands too much. While there is ambiguity in the use of 'comprehensive practice,' unless Clayton is using the term in a different way than is typical, the result is that many practices which seem permissible are rendered unjust on Clayton's view. Teaching a child piano, for instance, would be unjust; so too would introducing a child to a sport. Second, making a child participate in comprehensive practices will not necessarily violate her future autonomy. Depending on how influential the practice is to her upbringing, she may or may not continue practising it as an adult. But by far the greater worry is that there is no way of ensuring that the goal of children developing into autonomous agents will be realized. A problem with the maximally open future argument applies here as well: children will still be biased toward one comprehensive way of life because they will most often come into contact with the lifestyle their parents have adopted. Even parents who are dedicated to refraining from imparting any comprehensive beliefs will no doubt transmit many of them to their children by, for example, having a Bible or Torah around the house, or through the discussions a parent has with her child, how they spend their free time together, the community in which they live, and the music to which they listen. Interpreted in this way, Clayton's argument does not produce the result for which he is hoping.

Clayton's argument is not that children will turn into autonomous agents; rather, the argument rests on the fact that children are incapable of consent. But we have seen that non-consent as a criterion proves too much by rendering unjust many practices which do not violate autonomy. One way Clayton can resolve this problem is by claiming that only practices which

negatively affect future autonomy are prohibited. This would mean that certain practices which would have been unjust under Clayton's original view are now permissible. Baptism, for example, is not unjust. It is still wrong to raise a child to be Christian or Jewish or Humanist, but baptism itself is acceptable because it does not interfere with future autonomy. Defenders of the view might claim that this change is unnecessary. All that ought to be permitted, they might say, are those acts which are necessary for the child to flourish later on (such as proper nutrition and receiving an education). But it is unclear why the view needs to be so demanding. The burden of proof is on them to show what is wrong with baptizing a child, so long as baptism does not guarantee that the child will grow up and become a member of that religion. (Even then, there is still the burden of showing that the threshold for autonomy is placed so that being a member of a religion violates one's autonomy. I could be brought up in a church, but also taught how to reflect on my beliefs and choose for myself, depending on the church.)

The worry that children will absorb the comprehensive beliefs of those around them is much more difficult to resolve. It would be revolutionary indeed to have a law against taking a child to church, but that will not guarantee that the child will be capable of living autonomously as an adult. Growing up without coming into contact with a comprehensive lifestyle means that the child will likely adopt the most visible practices in a community. In North America, this will mean that children will often be most influenced by popular culture they see on television, in advertisements, and on the internet. Stopping parents from infusing their children with comprehensive beliefs means that Clayton's view demands other influences also stop. It would be a dramatic shift, and a seemingly unnecessary one, if all marketing toward children had to stop (although some current marketing practices are suspect), as well as most television programs. (To be clear, the precondition view of autonomy does not preclude parents and the

community from teaching children about comprehensive ways of life; it just means that one view cannot be promoted over another. Children would plausibly still have to be taught about socialism and capitalism, but unlike most religious instruction children receive, it would be done in a way that does not bias one over the other.)

The value of the precondition view over the maximally open future approach should not be discounted, but the problems implicit in it are too fundamental to be resolved. I began this paper by presenting an uncontroversial interpretation of liberalism, as described by Kymlicka's two preconditions. First, persons must live their lives from the inside (i.e. believe for themselves that their life goals are valuable). Second, persons must be free to revise their ends; this criterion justifies the freedoms liberals endorse. Also, although belief in defeasibility of one's life plan is not a precondition, it is necessary for the preconditions to obtain. Autonomy, I argued, is also an important part of meeting these preconditions. While children are not autonomous, I argued that they must have their autonomy developed if the two preconditions are to be fulfilled. Following this, I assessed the argument that autonomy can be developed by protecting children from being instilled with comprehensive beliefs about the good life. This right — the right to an open future — focuses on negative rights. There are a number of problems with the right to an open future, however, and I have argued that these problems are too numerous to salvage the position. The best way forward, then, is to recognize the strengths of the open future argument but find an approach which avoids its pitfalls.

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