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Parental Control Rights

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Abstract

Parents typically direct many aspects of their young children's lives and often believe that they deserve protection from interference by governments and third parties as they exercise this prerogative. Justifications for such parental control rights sometimes rely on the interests of children or of society. But they can also rely directly on the interests of parents. This paper considers whether parental control rights can be justified based on parental interests. It first considers two parental interests sometimes put forward as warranting parental control rights: an interest in intimacy and an interest in acting as a fiduciary. The first fails as a justification for parental rights because intimacy is unlikely to be undermined by most intrusions on parental control. The second fails because it misunderstands the nature of fiduciary roles. The paper then considers an alternative parental interest – the interest in nurturing, counseling, and educating. It argues that this interest requires both authenticity and discretion in order to play a meaningful role in a parent's life and that facilitating meaningful nurturing, counseling, and educating warrants protecting parental control rights, subject of course to limitations based on sometimes conflicting rights of children and of society.

Parental Control Rights

Scott Altman¹

Some parents claim a right to direct their young children's lives – a right to decide where children will live; who children will associate with; what moral guidance and religious activity children will be exposed to; and how children will allocate much of their time.² These control rights include two related prerogatives: (1) that parents are permitted to set rules for their children and, within limits, to enforce those rules; and (2) that non-parents generally refrain from subverting parental efforts to guide and shape their children. Such rights become important when governments or individuals intervene, and when children seek help from outsiders in resisting parental choices.³

Obviously, parental control rights do not include the right to succeed in controlling everything that happens to a child. Such control is not possible; fate and children's own preferences conspire so that parents at best have a chance to influence their children's lives without too much interference by government or third parties. None of these rights is alleged to be absolute, and all of them fade as children grow older and claim more control over their own lives.

Parental rights to direct their young children's lives, and possible justifications for such rights, are much disputed. Some justifications are indirect; they support parental control rights based on interests other than those of the parent, such as the interests of children or of society. Without discounting such child-centered and society-centered justifications, this paper explores whether parental control rights can be justified directly based on parental interests.⁴

¹ For helpful comments, I thank Ron Garet, Greg Keating, Andrei Marmor, Daria Roithmayr, and Nomi Stolzenberg.

² Parental rights include things other than control rights. There is also the right to become a parent and the right to associate with one's children. Although these are all related, they have distinct justifications. In a prior paper I argued that an interest in intimacy justified parental rights of access – a right to see one's children regularly. I considered whether intimacy could also justify other alleged parental rights, such as a broad right to direct a child's upbringing, but concluded (as have prior writers) that it could not. Altman, "The Pursuit of Intimacy and Parental Rights" in The Routledge Companion To Philosophy Of Law (Andrei Marmor, ed., 2011)

³ The sort of immunity I have in mind is against government dictate when the child's parents agree with each other. When parents who are equally entitled to the decision-making authority disagree with each other, government intervention can be understood partly as dispute resolution rather than simple regulation.

⁴ Justifications for parental rights that derive both from children's interests and from the interest of parents are sometimes called dual-interest theories. See Matthew Clayton, **Justice and Legitimacy in Upbringing** 54 (Oxford U press 2006). I accept the basic idea that parents should control their children's upbringing both because it is in the interest of parents that they have these rights and that these rights are in the interests of children and of society. But the most important disputes about parental rights arise when parents have an interest in exercising a right (or exercising it in a specific way) that does not advance their children's interests. In exactly these cases, a theory of parental rights based partly on parental interests will sometimes condone a parental right to harm children. Dual interest theories sometimes pursue a different strategy;

Does the Direct Justification of Parental Rights Matter?

Why does it matter whether parental rights can be justified by parental interests? Even without considering parental interests, we have strong reasons to protect parental decisions from outside interference. First, parents generally know their children well and care about their welfare. So most of the time, parents will make better decisions for their children than will others. This happy coincidence means that there is often little gap between children's welfare and parents' decision making. Second, parental rights might be necessary compensation for the work parents do – necessary in the sense that some people would not become parents (or would not be responsible parents) absent a right of control, including a right to make parenting choices that society dislikes. Parental rights thus benefit children and society by enticing people to become parents or to carry out their parenting duties well. Third, in a pluralist society where views of the good differ, some parents will inevitably want to rear children in ways that others view as non-ideal. Protecting those decisions allows varied ways of life to flourish and limits government efforts to dictate one view of the good.

Parent-centered justifications might be unimportant in actual application because theories about rights seem so adaptable. Writers who deny the existence of parental rights (or who derive such rights from child-centered values) regularly advocate for policies that protect parental prerogatives on grounds like those outlined above. On the other side, advocates for parent-centered justifications acknowledge that states may regulate to prevent serious harms to children, to protect a child's right to an open future or an older child's right to make decisions for himself, or to promote society's need for educated citizens.

Indeed, many important disputes about parental rights depend not primarily on whether parents have control rights (or on their justification), but instead on the scope and strength of opposing rights.⁵ The apparent disconnect between justifications for parental rights and conclusions about public policy

they suggest that parent's interests justify the right to become a parent or the right to associate with children, but not the right to control a child's upbringing. See, e.g., Sarah Hannan and Richard Vernon, "Parental Rights: A Role Based Approach," 6 **Theory & Research in Ed.** 173, 184 (2008). I reject this view.

⁵ This point is made by Matthew Clayton. He reviews several accounts of the interest children have in autonomy. On some accounts – especially those that emphasize capacity to revisit commitments – parents may aim to indoctrinate their children so long as the techniques of indoctrination are sufficiently mild as to allow for later reflection. But on other accounts, in which autonomy requires that people have mature capacities before they are intentionally indoctrinated in ideas, many conventionally accepted parental efforts at education would violate children's autonomy rights.

counsels caution about inferring practical consequences too quickly from theoretical arguments.

Nevertheless, practical outcomes sometimes turn on whether parental control rights derive from parental interests. Parental powers that depend only on child-centered or society-centered justifications are contingent and vulnerable. They guarantee parents no control over their children if child welfare (objectively measured) can be improved by overriding parental directives.

Consider as an example a law that aims to address three perceived problems among young people: growing timidity, failure to work well in teams, and declining physical fitness. The new law requires that children participate in a team sport (promoting physical fitness and teamwork); and (2) that they participate in an outward-bound style program (promoting both physical fitness and confidence in the face of fear).

The goals pursued by this law are not urgent enough to over-ride a robust parental right. Children deprived of team sports and outward bound can go on to live happy and fruitful lives. At the same time, the goals might be well supported by science as helpful both to children and society, and therefore appropriate matters of state interest. They are not particularly ideological, and so are not apt to be disallowed by those concerned with government-imposed orthodoxy or the need for diverse views of the good in society. And they are not so intrusive that people subject to such regulation would forego parenting rather than rear children under such limitations.

If parents have a right to direct their children's upbringing, they should be able to resist this law. Team sports might be thought objectionable by some parents as demeaning to individual effort and skill, and by other parents as supporting tribalism and discrimination against out-groups. Sport in general might be thought to waste time better spent on study or on music. And outward bound might be thought simply unduly risky. Whether parents, rather than governments, are entitled to assess these tradeoffs depends on whether parents have control rights and on why they have them.

Similar examples might arise from parental efforts to impart values that the state thinks inappropriate. Consider parents who believe that striving always for excellence leads to happiness and that having soft attitudes toward those who fail (or worse, those who violate rules) is itself a moral failing. The parents instruct their children in these views and express disdain for those who model forgiveness toward failure or wrongdoing. The state where these parents live has concluded that such lessons harm children -- that children with unforgiving world views tend to suffer later in life from higher rates of violence, divorce, and illness. So the state mandates that all schools, public and private, offer instruction in empathy. The parents refuse to allow their children to be so taught. If parents have a right to shape their children's values, they are entitled to resist

this law (subject to inquiry into conflicting rights of the child and of society). But if parental prerogatives depend on a rebuttable presumption that parents act for their children's welfare, a state might legitimately intervene in this case to provide children with beneficial lessons in empathy.

Yet another example comes from the, perhaps short-lived, controversy over "free range parenting." In reaction to overly-cautious parenting styles, some parents have begun to allow their children to wander unsupervised in settings that would have seemed unremarkable a generation ago, but that now strike many people as too risky. In a few cases, parents have been charged with neglect for allowing children to play unsupervised, even when the children were not harmed and when no evidence of specific danger was present.⁶

The Direct Justification of Parental Rights

The case for deriving parental control rights from parental interests rests on two claims. The first is that parents are people whose interests are no less deserving than their children or than other members of society. Parenting has long been understood to affect important interests of children, parents, and society. Deriving parental rights exclusively from interests of children and society would treat parents as means only, rather than as persons whose interests count equally with others.⁷

The second claim is that parents' interest in control is the kind of interest that can warrant a right: an interest that contributes to the fundamental success of a parent's life. The following sections examine candidates for parental interests that might justify control rights.

Before examining these candidates, I should address one parent-centered argument often advanced for control rights: Parents are entitled to direct the upbringing of their children because doing so is the inevitable consequence of directing their own lives. Parents profoundly affect their children when they choose where to live, whether to attend church, and how to allocate money between family vacations and charity. Insofar as these choices are also

⁶ See Clemens Wergin, The Case for Free Range Parenting, NYT March 20, 2015

⁷ William Galston makes this point. On his view, control over children must coordinate three sets of interests – children, parents, and society. While, values connected with each "must find appropriate expression in practical decisions, there is no guarantee that they will fit together into a harmonious whole. Pressed to the hilt, any one of them will entail costs to the others that may well be judged excessive." LIBERAL PLURALISM 94. See also Colin MacLeod, Conceptions of Parental Autonomy, 25 **Politics & Society** 117, 121 (1997) (describing the problem of parental autonomy as depending on an egalitarian thesis that interests of parents, children, and society matter equally). This argument has sometimes been rejected as inappropriate, most notably by James Dwyer. See, Dwyer, Regulating Child Rearing in a Culturally Diverse Society. A version of the argument can also be found in Hannan and Vernon. "Parental Rights: A Role-Based Approach" at 184. I take up this concern below.

protected by a parent's right to shape her own life, they might count as parental control rights.

This argument is not sufficient to establish the sort of broad parental rights often claimed. The rights protected are only incidentally rights to control a child's upbringing. Perhaps a parent is entitled to bring a child to church services because the parent herself is entitled to go and is also entitled not to spend money to hire a babysitter. But this incidental right does not encompass the broad right to direct a child's religious upbringing by, for example, choosing to send the child to a religious school, or preventing the government from insisting that the child study evolution. A broad right to control a child's upbringing requires more than the inevitable effects we have on children when we exercise our rights to live our own lives. A parent-centered justification for control rights thus requires a specific parental interest that control rights advance.

Which Parental Interests Justify Control Rights?

Parents' Interests in Intimacy

Control rights are sometimes said to derive from a parent's interest in intimacy. According to Ferdinand Schoeman, intimacy requires parental control rights because intimate relationships require autonomy and privacy. Regulating intimate relationships "would inevitably result in a redirection or 'socialization' of these relationships"⁸ and "require the parties to think of themselves primarily as serving public ends and as having public duties."⁹

Schoeman does not explain why regulations inevitably have these effects on relationships. Perhaps he assumes that regulations would be extremely pervasive. Certainly a state would undermine intimacy if it placed cameras in homes to monitor parental behavior and then intervened to correct every perceived parental misdeed. Intimate relationships cannot thrive without being sheltered from constant observation. Nor are they really relationships if participants lack all control over their actions and merely carry out an outsider's dictates. In this sense, intimacy requires some degree of privacy and autonomy.

That a minimum threshold of privacy and control is necessary for intimate relationships does not establish Schoeman's conclusion of broad parental control rights. Lost intimacy seems far less likely if we contemplate more realistic regulations. For example, there is no evidence that parent-child intimacy is more difficult because governments require car seats for infants. This simple safety regulation does not cause parents to think of themselves primarily as serving public ends. I see no reason to assume intimacy would decline if governments forbid corporal punishment at home or required comparative religion curricula at school. To the contrary, intimacy seems quite resilient.

⁸ 91 Ethics 6, 15

⁹ Ibid. at 16.

Narrower claims connecting intimacy to parental control have also been advanced. Harry Brighthouse and Adam Swift, for example, though arguing for parental control rights primarily on another ground, urge that parental control rights are occasionally necessary to protect intimacy. Their main example is sharing parental enthusiasms with the child. Sharing enthusiasms is thought important for parent-child intimacy because: an ongoing relationship requires having at least some shared interests, enthusiasms, and values; shared enthusiasms provide the interactions that foster intimacy; and a relationship in which enthusiasms cannot be shared would be constantly self-conscious.¹⁰

Brighthouse and Swift's argument connecting parental rights with intimacy seems to presume extreme governmental intrusion. Intimacy would be difficult if the state forbid parents from ever encouraging their children to prefer one thing over another. But such a regime is not plausible. No one thinks that an upbringing without viewpoints would benefit children. The question of parental rights arises in the context of asking whether parents are entitled to make decisions that outsiders regard as non ideal. So a more realistic inquiry about parental rights would ask whether state intrusion limited to correcting perceived errors would undermine intimacy.

Imagine a government that forbids parents from using tobacco products in front of children or allowing young children to see violent video games. This limitation on sharing enthusiasms would not prevent most families from having enough shared values and experiences to maintain intimacy. And it would not require such pervasive self-consciousness as to make intimacy impossible.¹¹ Only in cases of extravagant regulation (or the rare parent interested in nothing besides tobacco and violent video games) would state intrusion into parental decisions undermine intimacy by preventing mutually enjoyable experiences and shared enthusiasms.

My reply to Shoeman and to Brighthouse and Swift -- that their imagined extreme interventions are unrealistic and that plausible interventions by outsiders to protect children (or social interests) would not harm intimacy -- might be

¹⁰ Harry Brighthouse & Adam Smith, "Parents' Rights and the Value of the Family", 117 *Ethics* 80,104 (2006). See also Harry Brighthouse & Adam Smith, Family Values: The Ethics of Parent-Child Relationships 151 (2014) ("valuable relationships require parents to be free to engage with their children in ways that produce mutual identification and reflect the parents' judgments about what is valuable in life.").

¹¹ The self-consciousness argument is in tension with Brighthouse and Swift's specific account of how parental intimacy differs from other intimacy: unlike intimate adult relationships, fiduciary obligations "often require [parents] to be less than wholly spontaneous and intimate . . . The good parent sometimes masks her disappointment . . . She does not inflict on the child . . . all her spontaneous reactions or all her emotional responses." "Parents' Rights and the Value of the Family" 93-94. The duty to restrain sharing and spontaneity that Brighthouse and Swift see at the core of good parenting is surely consistent with at least some duties not to share enthusiasms if the state concludes such restraint is needed for child welfare.

thought mistaken.¹² Plausible interventions in the family might not threaten to destroy all intimacy; any harm to intimacy would be too small to detect. But small undetectable harms are still harms and might accumulate into large harms.

This response seems to me mistaken for two reasons. First, some harms persist even when they are small: A punch in the face is a large harm; a soft punch is a small harm; a gentle, but unwanted touch is a smaller harm still, but a harm nonetheless. But not all harms follow this pattern. Enclosing a claustrophobic person in box is a large harm; putting her in a small room is a smaller harm. But putting her in a large room is no harm at all. Once she has sufficient space to feel comfortable, enclosure does not interfere with her interests. Intimacy may be more like personal space than like bodily integrity. Requiring that children wear helmets does not make parent-child intimacy more difficult, even in a small or undetectable way. Rather, it leaves more than enough room for parents to establish intimacy with their children, and therefore harms intimacy not at all.

Second, even if some regulations intrude undetectably on intimacy (thus counting as small harms), and even if such small harms could accumulate into large harms if aggregated, it is not clear what follows. Parental interests in intimacy are the sort of interest that can justify a right. But the right need not be powerful as against trivial harms, or against harms that could become large if aggregated in circumstances where no such aggregation is likely.

Perhaps, though, the argument from intimacy to control rights has more force for subgroups in the population whose intimacy is peculiarly vulnerable to outside intrusion. For example, separatist groups that seek to shelter their children from modern or secular influences might fear that forced exposure will alienate children from parents and thus undermine intimacy.

The general topic of parenting in separatist groups has been extensively discussed, with many plausible arguments advanced both for and against permitting parents to shelter their children. But these arguments offer little help in thinking generally about parental control rights and intimacy. In particular, it is not obvious why those who make their intimate relationships peculiarly vulnerable to outside interference should be able to generate a duty to avoid harms to their intimacy. Perhaps in the case of separatist religious sects, we can see a justification: fundamental religious commitments require that they live in intimate settings that are highly vulnerable to outside harms. In such cases, we may find ourselves inclined to accommodate their needs. But the accommodation stems from respect for religious needs, and an inclination not to force people to choose between religious obligation and family intimacy. It does not reflect a general deference to those who choose make themselves unusually

¹² Brighthouse and Swift might actually accept my argument. In another context, they note that “A parent should be able to sustain a successful relationship without any particular shared interest or values.” *Family Values* at 157.

vulnerable to lost intimacy and therefore does not offer a general basis for parental control rights.

Parents' Interest in Being Fiduciaries

Brighthouse and Swift argue for parental control rights based on a second interest often invoked for this purpose: parents' interest in being fiduciaries. Being a fiduciary – acting for the welfare of another – is a fundamental good for many people.¹³ Fiduciarity is important for parents (and for their children) according to Brighthouse and Swift because it facilitates a relationship “in which the adult offers love and authority, a complex and emotionally challenging combination of openness and restraint, of spontaneity and self-monitoring, of sharing and withholding.”¹⁴ Fiduciarity is thus valuable because it supports a specific valuable relationship.

Brighthouse and Swift connect the interest in being a fiduciary (and the relationship it supports) to parental control rights in part through the role of value inculcation. Parents, they say, are entitled to influence their children's values because influencing values is an integral part of fostering a child's moral development, which is itself key to a parent's fiduciary duty.¹⁵ The argument from a parent's interest in being a fiduciary to a right to provide needed guidance has some appeal. But on reflection, this argument does not work. The interest in acting for children's welfare need not encompass selecting the moral instruction children receive.

Fiduciary duties are often fulfilled within externally set constraints, including externally selected values. Consider the fiduciary duties of a trustee. If I am appointed to administer a large trust for the benefit of two children, I cannot give half the corpus to a charity merely because I think undue wealth will harm the children whose interests I am charged with advancing. To the contrary, my discretion as a trustee must be guided by conventional understandings of the child's welfare (or by the benefactor's express wishes). On this standard model of fiduciarity, one can successfully work for other people's good without choosing the good one pursues.

Does the fiduciary relationship that parents have an interest in establishing differ from typical fiduciary relationships in a way that makes externally guided discretion problematic? Brighthouse and Swift do not address this question

¹³ A similar argument for parental rights is advanced in Samantha Brennan & Robert Noggle, “The Moral Status of Children: Children's Rights, Parents' Rights and Family Justice” 23 *Social Theory and Practice* 1 (1997) (describing parental rights as stewardship rights). For an account of parents as legal fiduciaries, see, Elizabeth Scott & Robert Scott, 81 *Va. L.Rev.* 2401(1995). The Scotts understand parental rights as in-kind compensation for performing fiduciary tasks.

¹⁴ *Family Values* at 93

¹⁵ “Parents' Rights and the Value of the Family” 104.

directly. They insist that any relationship demanding spontaneity and openness requires a “substantial sphere of interaction unmonitored by authorities.”¹⁶ But just as with intimacy, we have reason to wonder whether the good of parental relationships would be undermined by plausible regulation. Indeed the desired relationship that Brighthouse and Swift describe includes a mix of spontaneity and self-monitoring and of sharing and withholding. Since some withholding and self-monitoring are at the core of a parent-child relationship, modest intrusion by the state to require that parents withhold some lessons that harm children likely would not undermine the relationship that justifies parental control.¹⁷

Sarah Hannan and Richard Vernon offer a similar account. They begin from the same insight as Brighthouse and Swift – that parents have an interest in being fiduciaries toward children, an interest that justifies a right to become a parent and to associate with one’s child. But they emphasize that once parents enter a fiduciary relationship, its contours cannot be governed by the parents’ interests.¹⁸ Indeed, the vulnerability of children requires that the relationship protects children and not parents.¹⁹ Hannan and Vernon note that although liberal theories generally justify rights based on interests, they never allow individual interests to justify rights to control another person. For this reason, fiduciary powers exist exclusively to promote the beneficiary’s interests.

What do Hannan and Vernon mean when they say that parents have an interest in becoming fiduciaries, but that their interests may not affect the relationship they are entering? They certainly cannot mean that a parent who becomes a fiduciary must thereafter act only for the benefit of children. Fiduciaries are not slaves who must sacrifice their own welfare to benefit those in their care.²⁰ Parents may allocate resources for their own benefit, even if redirecting those resources might have benefitted the children – for example saving for retirement rather than paying for college tuition. Lawyers may withdraw from cases when their clients cannot pay, even though withdrawal often harms clients. Fiduciary duties require that people who exercise control of others give the interests of those others due consideration, not absolute weight. As

¹⁶ Ibid. The argument for an unmonitored sphere takes a somewhat paradoxical form. Brighthouse and Swift argue that parents are usually not entitled to shape their children’s values. But they are entitled to relationships that cannot thrive if too much regulated or monitored. As a result, parents have a right to lives that, because unmonitored, allow them “the space to do what they have no right to do.” 151-52.

¹⁷ Brighthouse and Swift state clearly that parents have no right to influence their children’s values except to the extent that doing so is needed to support an appropriate relationship. Ibid. 119. They also conclude that on their theory, parents should have much “less discretion over their children’s upbringing than they currently do.” 177.

¹⁸ Sarah Hannan and Richard Vernon, “Parental Rights: A Role Based Approach,” 6 **Theory & Research in Ed.** 173,185 (2008). Similarly, Brighthouse and Swift argue that adults have the right to become parents based on their own interests, but that their rights as parents derive entirely from children’s interests. Family Values 93-94.

¹⁹ “Parental Rights: A Role Based Approach,” 6 **Theory & Research in Ed.** at 186.

²⁰ Brighthouse and Swift make a parallel point about fiduciaries not being slaves. Family Values 98, 121-22.

even Hannan and Vernon note, “in a liberal society, premised on equal moral consideration, one’s pursuit of one’s chosen life project is necessarily constrained, for others have life-projects too.”²¹ This certainly means (as Hannan and Vernon intended) that parents cannot make decisions about children without regard to the child’s current and future aims. But it also means that parents cannot be required to make decisions about children without regard to the parents’ life projects. Liberal theory and actual institutions both recognize that institutional roles must accommodate the reasonable life-projects of all participants, including those who exercise power over others.

Hannan and Vernon must mean something narrower when they claim that parents’ fiduciary roles protect only children’s interests. Perhaps they mean to distinguish parental actions that incidentally affect children from parental actions authorized by their roles as fiduciaries. When parents act as individuals in ways that affect children (such as when they spend money), parents need not be absolutely selfless. But when parents act exclusively as fiduciaries – using authority granted to them only because children need protection – parents must exercise pure fiduciary loyalty.

This narrower view of fiduciary relationships has some appeal. A person’s interest may justify them occupying a role in which power over another is exercised. But once in that role, power can be exercised only based on the reason for creating the role, not on the reason the person wanted to occupy it.²² This image of a fiduciary seems to match our practices. For example, someone may yearn to be a lawyer because it is lucrative, or interesting, or a way to advance particular social goals. But a lawyer may not exercise power as a fiduciary to advance these goals at the expense of client welfare. In advising a client about whether to settle a case, the lawyer may not offer advice based on which outcome is most financially, intellectually, or politically advantageous to the lawyer.

Despite its appeal, the narrow view of a parent’s fiduciary role has a problem. It depends on being able to distinguish cases where parents legitimately pursue their own ends (with due concern for their children’s interests) from those where parents exercise power exclusively as fiduciaries and thus must act only for their children’s welfare. Presumably this distinction depends on whether the choice involves one of the parent’s life projects (in which case the parent can pursue her own interests).²³ For example, in deciding where to live or

²¹ “Parental Rights: A Role Based Approach” 180

²² ibid. 184-85

²³ One might think the distinction turns on why the parent is given power to decide an issue. If the parent has power because the child lacks sufficient maturity to make decisions, then the power is purely fiduciary. But this approach does not work. If parents want to relocate, we presume that the parents may bring their children. This presumption relies on the idea that the parents are entitled to decide where to live. But we presume that the child will follow because children are not mature enough to live on their own or to decide on their residence. This illustrates that all parental powers to make decisions about children ultimately derive in part from

whether to spend limited funds on private education, the parents may consider how this affects their own goals. In deciding whether to send the child to a religious school, or to require or forbid the child to participate in sports, the parent must consider only the child's welfare.

I see three difficulties with this distinction. First, it cannot accommodate a parent for whom raising a religious or athletic (or ambitious, or empathic) child is itself part of a parent's life project. In many ways, this example is at the core of disputes over parental control rights. If the government believes that empathy lessons are important for every child's personal development, but a parent regards creating rigid and unforgiving children as important – not just to the child's welfare, but to their own success as parents – we cannot know what rights the parent has unless we know how to address parents who seek to create children with certain dispositions, talents, or experiences as a core reason for becoming a parent.

Second, the distinction separates permissible and impermissible actions in a way that treats identical effects on child welfare very differently. For example, parents who decide to live in a remote location could do so if they wanted a rugged and isolated life, subject to welfare requirements for their children, including requirements for protecting a child's future autonomy. But a parent who wishes to make the same decision about where to live based centrally on a desire to raise children who are separated from civilization would potentially be subject to restraint if society decided that this outcome was not ideal for children.

Third, an institution in which fiduciary responsibilities must be exercised exclusively for the benefit of children as conventionally understood might be so restrictive toward how parents exercise their fiduciary duties as to preclude parenting from being a meaningful part of a life project. As Hannan and Vernon note: "If we want to devote a large part of our life to the project of parenting, would that project not include wanting to give to our children the best chance of a good life as we see it? What other idea of a good life should we want to give them, if not our own?"²⁴

The next section explores an account of parental interest that captures this understanding – that parents have an interest in producing good outcomes for children based on the parents' understanding of the good. But perhaps the value in being a fiduciary can be salvaged as a basis for control rights just by reflecting on the importance of value pluralism and scientific uncertainty. After all, parental control rights would not much matter if we all agreed about what outcomes best served children and what steps best ensured those outcomes.

children's incapacity. Therefore incapacity cannot help us to distinguish parenting choices that incidentally affect children from those where pure loyalty is owed.

²⁴ Ibid. 181.

How do fiduciary structures cope with moral and predictive disagreement? The answer varies depending on context. As to moral disagreement, trustees usually look to the values expressed by the benefactor. In the absence of such guidance, trustees usually conform to conventional norms or, when appropriate, the beneficiary's values. As to factual uncertainty, trustees have broad discretion. They can choose among uncertain investments. But here too, consensus about instrumentally irrational means constrains trustees not to pursue idiosyncratic theories. So in general we do not seem to think that the value of being a fiduciary is undermined by limiting fiduciary discretion in the face of moral or predictive disagreement.

Perhaps parents' fiduciary duties differ from those we impose of trustees and lawyers because value pluralism has different consequences in the family context than elsewhere. After all, disagreement between parents and governments often arise over difficult moral questions about which we cannot expect consensus. We have strong political reasons to prevent governments from dictating orthodoxy in such matters.

No doubt appropriate respect for diversity and concern about government abuse strongly counsel deference to parental choice. But these concerns do not tie parental rights to parental interests in being a fiduciary. They are political reasons for protecting parental prerogatives. In this sense, they do not justify parental rights based on the good of being a fiduciary. They justify parental rights based mostly on the well-known concern for restraining government in the face of value pluralism.

Before providing an alternative account of the interest underlying control rights, I must return to Hannan and Vernon's assertion that we never permit the interests of a person with power over others to shape that relationship.²⁵ Contrary to Hannan and Vernon's assertion, we do sometimes allow the interests of people who exercise power over others to shape institutions in which they operate.²⁶ Consider our practice of protecting the custody rights of parents who provide very poorly for their children's welfare: parents who have addictions, or who suffer in terrible poverty, or who lack important skills and dispositions needed by children. In all but the most serious examples of neglect and abuse, we allow children to remain in the care of their parents. No doubt reasons of child welfare and of preventing state abuse can be marshalled in defense of this

²⁵ This objection might be thought irrelevant to the case of young children, who must be in the control of one or more people, whether a parent, the government, or someone else. But this observation misses the objection's core point. Even granting that children cannot choose for themselves, we need to know whether the person choosing has the right to make choices that harm children to some extent (as measured by some consensus on child welfare) because having this ability advances the chooser's interest.

²⁶ Outside of family law, this is true for prisons and institutions for the mentally ill, where rules protect workers from danger posed by the residents. Sometimes these rules are oppressive. But even if well-run institutions, rules balance the interest of the residents and the workers who oversee them. Much the same can be said for most schools.

practice. But overwhelmingly, we allow parents who provide badly for their children to retain custody because we recognize the importance of this association to the parents. If associational rights are protected despite harms to children because such associations are key to parental life projects, why should we not take the same view of control rights? Our actual practice suggests that a parent's interest in entering a not-purely fiduciary relationship with children can justify having an impurely fiduciary relationship.²⁷

Of course, we might be wrong to leave children in the custody of merely adequate parents.²⁸ But it seems incredible that our duties toward children are so absolute as to require what in any other circumstance would be an obvious injustice. As Matthew Clayton has argued, most children will become parents themselves someday. Reasonable people (not knowing if they were to be parents or children, or both) would not resolve conflicts between the interest of parents and children by opting for decisions that benefit children only.²⁹

Parents' Interests in Nurturing, Counseling, and Educating

Parents seek to nurture, educate, and counsel their children, helping them to grow into happy, good or productive adults. Nurturing, educating, and counseling are good activities – good for the person doing them, not just good for the person made happy and productive or for the society in which they live.³⁰

How is an opportunity to nurture, educate or counsel connected to control rights? To be valuable, these activities demand authenticity, which in turn requires discretion. Merely being present when guidance is given and having that guidance come from a parent does not fulfil the core purpose of parenting. Nurturing and guiding another person requires that the lessons taught (and the methods used to teach them) be authentic: that the teacher offer her own lessons, not lessons chosen for her, that the exemplar choose the life she models, rather than have that model imposed on her. Discretion – and the use of that discretion to choose (within constraints) what is good for the child – is

²⁷ Another example of a significantly parent-centered rule concerns relocation by custodial parents after divorce. Rules about such relocation vary greatly by jurisdiction. But many jurisdictions embrace the view that courts may not use the threat of changing child custody as a means of deterring relocation, even if it seems obvious that continuing the current custody arrangement and deterring relocation is best for the child (and that the threat would work). Concern about justice for custodial parents seems the obvious reason for this rule. See Altman, "Should Child Custody Rules be Fair" 35 *Journal of Family Law* 325 (1996).

²⁸ This seems to be the position adopted by Jim Dwyer. Dwyer, "The Child Protection Pretense: States' Continued Consignment of Newborn Babies to Unfit Parents" 93 *Minn. L. Rev.* 407 (2011).

²⁹ Clayton at 56.

³⁰ Caretaking – providing protection, comfort and aid -- is another important value. This same value motivates people to enter medical professions and to care for the elderly. Although caretaking is an important good that parents pursue, I do not think it key to understanding the parental right of control.

constitutive of the good people seek through parenting, rather than being a mere convenience needed by parents in order effectively to act for the child's benefit or to maintain a desirable relationship.³¹

Parenting without substantial discretion over how and what to teach and counsel is no more parenting than reading someone else's text from a teleprompter is being a journalist, painting by numbers is being an artist, or reading aloud from a state-chosen textbook is being a teacher. Perhaps these things, if done well, have some good effects. But they are not good for those who want to participate meaningfully in important tasks. To participate is to offer something of yourself, not just to be a vehicle through which others act.

Parents' interest in nurturing, educating, and counseling with authenticity differs from a mere interest in being a fiduciary. A fiduciary's task is faithfully fulfilling a mission as an agent for someone else. Parents do not regard their task as fulfilling someone else's mission. Rather, their life project is to help create a good or happy person within the context of a loving relationship. The point of shaping another person (to the extent this is possible) is lost if we are compelled to shape that person toward a view of goodness or happiness that we ourselves reject.

Unlike fiduciaries, parents assert a right sometimes harm children's interests, conventionally understood, exactly because individual parents have unconventional values and predictive theories. This is not to say that parents can cause children serious harm, that they can systematically violate the rights of children, or that parents may go entirely unmonitored. Absolute dominion and immunity from monitoring simply do not follow from parental need for authenticity and discretion. The rights of children and of society constrain parental control rights. But insofar as non-derivative parental rights exist, these other interests will not always take priority.

Authenticity in nurturing, counseling, and educating differs from an image often associated with parental rights: parental prerogatives to replicate themselves.³² On this caricatured view, parental control rights serve to manufacture mini-me's (or to manufacture the people parents wish they might have become – mini- couldabeen's). No doubt all parents fall prey to this

³¹ My argument focuses on the good of nurturing, teaching, and counseling. These goods I assert cannot be meaningful unless authentic, which cannot happen without discretion. I do not mean to make the separate argument that creativity and authenticity are the goods that justify parental control rights. No doubt these are important components of a good life. But they can be found outside parenting. And almost no one manages to have a life in which all of their activities exhibit creative and authentic expression. So the need for creativity and authenticity in general cannot support parental control rights.

³² Brighthouse and Swift accuse Colin MacLeod and Edgar Page of justifying parental rights based on self-replication, which Brighthouse and Swift call selfish and narcissistic. Family Values 103. See also Bryan Caplan, **Selfish Reasons to Have More Kids** (2012) (on desire to rear his own clone).

temptation on occasion; some parents do so to a fault. But focusing on how parental rights might be invoked by the most vain and self-obsessed diverts attention from a more common and important understanding. Parents who want their children to be happy or good or productive have diverse views on what will lead to those outcomes and on what those outcomes really mean. The desire for self-replication based on vanity, or for self-correction based on regret, are not the interests that warrant parental control rights.³³

The position I have outlined resembles in some ways William Galston's theory of expressive liberty. Galston explains that people must be free from constraints that make it difficult for them:

to live their lives in ways that express their deepest beliefs about what gives meaning and value to life. Expressive liberty offers us the opportunity to enjoy a fit between inner and outer, conviction and deed. . . . Part of what it means to have deep beliefs about how one should live is the desire to live in accordance with them. . . .

[T]he ability of parents to raise their children in a manner consistent with their deepest commitments is an essential element of expressive liberty. . . . parenting is typically undertaken as one of the central meaning-giving tasks of our lives. . . . loving and nurturing a child cannot in practice be divorced from shaping that child's values. In so doing, we cannot but draw on the comprehensive understanding that gives our values whatever coherence and grounding they may possess.³⁴

Galston's emphasis on authenticity – the need for parental choices to be embraced by the parent in order for parenting to be a meaning-giving activity – seems to me right. One can quibble about using the word “expressive” to describe the importance of authenticity.³⁵ But the core concept captures part of the good in parenting.

Galston errs, in my view, by limiting his theory to deep commitments and comprehensive understandings. His position makes some sense in the context of a book about liberal pluralism and education, where conflicting comprehensive views on morality loom large. But from the perspective of parental control rights, the theory provides too narrow a justification. Most parenting decisions rely on

³³ I am not arguing that we ought actually to police parental motives for wanting to control their children. Rather, I am explaining why the desire to shape a child's identity deserves to be treated as a potentially worthy life goal, rather than as a sign of self-obsession.

³⁴ 101-102

³⁵ All our important choices in life might be understood as expressive. Our choices reveal (to others and to ourselves) what we most value. But this revelation (the expressive aspect) need not exhaust – indeed need not be important – to the goals of parenting. One can value helping others, shaping them to be happy and productive by making thoughtful choices about their lives, without finding primary value in what these choices reveal about you.

simple judgments, which need not be connected to deep commitments. For example, I allow my children to ride horses, but not to play football or ride motorcycles, because I regard the former but not the latter as involving benefits that justify the risks. Nothing in this specific assessment relies on deep commitments or comprehensive understandings. But it is typical of actual parental decisions. On Galston's account, these do not seem to qualify as protected parental choices.

A better account recognizes that authenticity matters to parents in ways analogous to any creative endeavor. It requires very broad discretion in the shaping of outcomes. Small choices matter, even if not connected to deeply held beliefs, because broad control is the essence of authenticity.

Is the Interest in Nurturing, Counseling and Educating Sufficient to Justify Parental Control Rights?

Even if nurturing, counseling, and educating are important human goods pursued through parenting, they might not justify robust parental rights. Consider four reasons for doubting the connection: (1) People can satisfy their desire to nurture, counsel, and educate as teachers, ministers, camp counselors, coaches, or scout leaders. Since parenting is not the only site for pursuing these goods, parents need not be given special privileges; (2) Parental rights attach to specific children – biological children, adopted children, or perhaps children cohabiting with the parent. Why should the interest in nurturing, counseling, and educating attach to these specific children; (3) Nurturing, counseling, and educating can be done without exercising control; and (4) Authenticity cannot justify strong parental rights because authenticity is not actually threatened by most intrusions on parental authority.

The first concern – that parenting is not sufficiently special to warrant a right since the goods of parenting can be pursued by non-parents – is mistaken for reasons of both form and substance. The form of this argument need not be accepted. That there are alternative avenues for pursuing a good does not show that we lack reason to protect one such avenue. Identifying parenting as one site where an important interest is well-pursued should be enough to warrant protecting parental rights, all else equal.

Substantively, parenting differs from being a teacher, camp counselor, or child care provider in important ways. The role is occupied as to a specific child for much longer. It thus offers an opportunity for the long-term project of nurturing from start to end, so to speak. Insofar as this is part of the project parents undertake, it is not actually one that can be pursued in many other places.

Second, why does the interest parents have in nurturing, educating, and counseling attach to specific children? Several answers might be given. Insofar as the project of parental nurturing, counseling, and educating derives its meaning centrally from shaping a child over a long period, it must take place within an ongoing structure such as the family. As well, parental rights to control exist within a broader context of parental rights and duties. These include a right of association and a duty of support. These other rights and duties (I have argued elsewhere) derive from interests unrelated to the interest in nurturing, counseling, and educating.³⁶ But they warrant an ongoing connection between parents and specific children. Insofar as that connection is justified, the parental interest in nurturing, counseling, and educating becomes appropriately focused on the children to whom parents are already connected by a right of association and a duty of support.³⁷

The third concern – that educating and nurturing do not necessitate control– requires that we distinguish among several aspects of control rights. As I noted at the start, the control required by parental rights consist largely of two elements: that parents be permitted to set rules for their children; and that non-parents generally refrain from subverting parental efforts to guide and shape their children.

Why should the good of educating and nurturing demand either of these elements? The first element, rule-enforcement, does not seem central to counseling or nurturing. Ministers and counselors pursue these same goods without enforcing rules. Perhaps parents of young children must set rules to keep their children safe. But for children beyond a certain age, parents could pursue the goods of nurturing and educating without control rights. Parents can model good behavior and talk with their children about values – the same tools used by ministers and councilors who lack power to make and enforce rules.

This objection overstates the consensus on children and rules. For some parents, the idea of teaching by example and discussion only (rather than by enforcing rules) seems sensible once children become teenagers. But not all parents share this view of appropriate childrearing. If we are to take seriously the idea that parents have an interest in teaching their children about the good as parents see it, which includes giving effect both the parents' view of good

³⁶ Altman, "A Theory of Child Support" 17 *Int'l J. Law, Policy & the Family* 173 (2003); Altman, "The Pursuit of Intimacy and Parental Rights" in *THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW* (Andrei Marmor, ed., 2011)

³⁷ An additional answer to this concern might be found in parental duty. Many parents believe themselves not only entitled to direct their children's upbringing, but also obligated to do so. I have elsewhere argued that parents' associational rights derive in part from parents' duty (as they see it) to care for their own children. Perhaps the duty to nurture and educate children so that they pursue the good as a parent understands that good differentiates parental interests in nurturing and educating from parallel non-parental interests and explains the exclusive nature of parental rights.

outcomes and the parents' view of good means to reach those outcomes, we must accept varied views on when control, rather than discussion, is the best means of nurturing.

The second element of control rights – an entitlement that others not subvert a parent's preferences about a child's activities – may seem harder to justify. Non-parents often have an interest in nurturing, counseling, and educating; why should parental rights systematically take priority over the rights of non-parents in directing the upbringing of children? For example, if a school teacher pursues a career wanting to share the values of critical thinking, tolerance, and equality, why should we permit parents to shelter their children from such lessons?

Several distinctions warrant exclusionary rights for parents but not for teachers. Parenting is a project tied to specific children (rather than to whatever children happen to end up in the care of a given teacher or counselor). And the parental role is occupied as to a specific child for much longer.

Parenting involves a distinctively creative kind of counseling, nurturing, and educating. By creative I do not mean (only) that these tasks require innovative ideas. I mean also that parents want a central role in creating good and happy people. This aspect of creation is rewarding in part because it requires an ongoing effort over many years to help the child become good and happy, as the parent understands these goals. Allowing others to contribute to the project in ways that subvert the parent's efforts undermines this key element of parenting.

The final concern is that I am guilty of the same offense that I accused Shoeman and Brighthouse and Swift of committing: announcing an interest that is only threatened by imaginary and oppressive regulation. Authenticity can thrive within constraints just as intimacy can. Totalitarian parenting regulation would deprive parenting of its core attraction. But that does not mean that any particular intrusion threatens to make parenting pointless.

Certainly, parents can meaningfully nurture, educate, and counsel in the face of unwanted regulatory control. Indeed, the constraints of children's and society's rights require that they must. If I believe that risk taking is a core value to be encouraged, but the state requires that all children wear helmets for cycling and skateboarding, I am deprived of one means by which I can educate my children in the thrills and virtues of risk. I can still talk with my children about why I think these laws immoral, can live a risky life myself to model these virtues, and can engage with my children as teacher, counselor, and nurturer on all of the less regulated aspects of our lives. In this regard, nurturing, educating, and counseling with authenticity really are just like intimacy. They require a scope of freedom from regulation, but not an unlimited scope.

The difference between intimacy and authenticity lies in how regulation undermines the good being pursued. Regulation undermines intimacy only to the extent that it interferes with the process by which people create and sustain affection and other emotional connections. Whether this happens is largely contingent on empirical facts. By contrast, regulation directly undermines the potential for authenticity in nurturing, educating, and counseling. Authenticity requires individual authorship of goals and means. Any mandate of those goals and means thus threatens authenticity.

I do not mean that any regulation destroys the good of parenting. But all regulation harms the good of authenticity (even for those whose choices happen to correspond to the regulation's mandate). Whether the harms are trivial will depend on the case – both on how important the choice would have been to the parent as part of nurturing, educating, and counseling, and on whether regulation in the aggregate diminishes discretion to such a point that parents have little room for authentic participating in these goods.

I also do not mean to overstate the harm most people suffer from regulation. Control over many aspects of children's lives seems unimportant. Most parents delegate important aspects of nurturing, educating, and counseling, only sometimes with significant oversight. Nonetheless, most parents value making key choices about moral lessons, practical life skills, and exposing their children selectively.