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Setting Standards for Parenting—By What Right?

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ABSTRACT: Mental health professionals, like other professionals involved in family matters, feel constrained when advocating for the interests of children by the belief that parents are entitled to custody and control of their children's lives, regardless of what others may think of their parenting behavior, absent severe harm to the children. This belief is morally untenable, and the legal doctrine of parental rights that is its concrete embodiment is inconsistent with other well-established legal principles and should be abandoned. Children alone should have legal rights in connection with their upbringing, and those rights should include an entitlement to much higher standards of parenting than the law presently imposes.

KEY WORDS: Parents' Rights; Children's Rights; Parenting Standards; Child Advocacy.

By what authority may child development experts propose, and the state adopt, standards for parenting? The traditional view in our culture, and the current law regarding parenting in this country, is that parents have a right to raise their biological offspring and to do so as they see fit, absent clear and convincing evidence of severe harm to the children. For 'experts' and state authorities to impose more than the most minimal requirements on parents, many would argue, is to violate this right of parents.

This norm is so pervasive that it colors the work of mental health professionals involved in family court proceedings concerning custody, visitation, abuse, and neglect of children. For example, although psychologists are asked to provide only psychological evaluations of family members, they routinely make recommendations regarding parental involvement in a child's life based on whether they have found sufficient evidence to meet this legal standard for termination

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of parental rights. Rarely if ever does a psychologist recommend terminating a parent-child relationship simply because the child would, on the whole, be better off if the court did so. Yet such is frequently the case even when the parent's conduct has not been so egregious as to satisfy the legal standard. Child protective agencies, lawyers (including lawyers for children), and judges, too, are under the spell of parental rights, frequently to the detriment of children.

This article explains why the cultural norm and legal doctrine of parents' rights is illegitimate, and why they should be abandoned in favor of norms requiring that parents meet high standards of care. It shows that parents' rights are incompatible with well-established moral and legal principles that stand on a firmer theoretical foundation—principles regarding the nature and purpose of individual rights, respect for persons, and society's obligation to persons unable independently to further their own interests. Consistent with these other principles, children alone should be accorded rights in connection with their upbringing, and those rights should include a claim on the rest of society to ensure that persons who enjoy the privilege of acting as their parents carry out their role in a manner that is consistent with the children's interests.

Why Parents Rights Are Wrong¹

Parental childrearing rights are wholly anomalous within our culture. In no other context does the law or popular morality recognize individual rights to plenary control over the lives of other persons. Why is this so? First, the notion of individual rights is founded upon the principle of self-determination; persons have a fundamental interest in controlling their own lives, and an enforceable claim against interference by other persons is necessary to protect that interest. A right to control the life of *another* person cannot rest on the same foundation.

Second, it violates the respect we owe to others as persons to assert that someone is entitled to control their lives. Importantly, this is the case even regarding persons who are not competent to further their own interests. With respect to incompetent adults, including adults who never have been competent, the law accords certain individuals merely a *privilege* to assume control over some aspects of the incompetent adult's life, and requires that those individuals exercise this privilege in a manner consistent with the interests and rights of the

incompetent adult.² We regard the role of a caretaker for an adult as akin to that of a trustee, rather than that of a property owner.

Legal and philosophical writing on the subject of rights clearly reflects this understanding of rights. When the Supreme Court interprets constitutional rights it speaks, for example, of an individual's right to determine what *she* will say or write, what religion *she* will practice, how she will use *her* property, what medical procedures will be done *to her*, and how *her* criminal defense will be conducted. More directly, when individuals have claimed a right to control or make important decisions for other adults, the courts have invariably denied that claim. For example, courts have in the last thirty years eviscerated the legal rights that husbands enjoyed in the past to control the lives of their wives, and have rejected claims by parents of adult offspring who were in a persistent vegetative state, mentally ill, or mentally retarded that they are entitled to decide the course of medical care for their offspring. Additionally, courts have interpreted the Thirteenth Amendment prohibition of slavery very broadly to preclude any contractual rights that would empower one person substantially to control the life of another person, even though contract rights are predicated upon mutual consent.

Given the widespread acceptance of, and compelling reasons for, the principle that rights protect only *self*-determination and, correspondingly, that no one is *entitled* to control the life of another person, there should be a presumption against the validity of any class of 'other-determining' rights. Parents' rights constitute such a class. Proponents of parents' rights should therefore be required to provide justification for them sufficient to overcome this presumption. The Supreme Court's rationale for establishing constitutional parental rights was simply that there was a long tradition of parental 'autonomy' (a misnomer, insofar as the term means *self*-rule) in this country, which is no justification at all. Some philosophers and legal theorists, though, have proposed justifications for parents' rights, based upon the unique characteristics and situation of children, and these justifications ring true to many people. To understand why parents' rights are wrong, therefore, it is necessary to understand why these purported justifications are unsound.

Possible rationales for parents' rights may usefully be divided into three categories, according to whose interests they invoke: children's interests, parents' interests, or interests of society as a whole. First, some proponents of parental rights rightly point out that children need nurturing and protection by others and that the best way we

know how to provide this is by supporting an intimate relationship with a single set of parents, free from unwarranted interference by outsiders. This argument appears implicitly to assume the existence of an intact family with nurturing, cooperative parents, and is of limited force for that reason. Leaving aside that problem, however, it simply does not follow from this premise that parents should have childrearing rights.

Ordinarily, in order to protect a person's interests, we assign rights to that person, not to someone else. Why do we not do the same in the case of childrearing? We could attribute to children whatever rights are necessary to protect and promote their special developmental interests. For example, children could be said to possess a right to a relationship with a nurturing set of parents, and to be free from any state interference in this relationship that is not, on the whole, beneficial to them. One might object here that children, at least young ones, are not capable of asserting and effectuating rights. However, such a capacity is not a precondition for having rights. Just as in the case of incompetent adults, children can possess rights and have someone else, such as their parents, act as their agent to assert and effectuate those rights in legal fora.³ Indeed even newborn children already possess many rights—for example, a right not to be killed and rights to property.

Another set of arguments for parents' rights centers around the interests of parents themselves. There can be no doubt that parenting is extremely important to most adults, and the most fulfilling part of the lives of many. Moreover, parenting is a great responsibility, and many would argue that substantial parenting rights are appropriate compensation for all that parents sacrifice. These arguments, too, however, are unconvincing. First, parental rights are not necessary to protect most adults' interest in being parents. If, as suggested above, children themselves have a right to an undisturbed relationship with their parents, so long as the parents do not act in a manner substantially contrary to the children's interests, then adults would continue to be able to act as parents, and to do so with a considerable degree of freedom, even in a world with no parental rights. All that parents' rights are *necessary* for is to allow parents to harm their children without interference by others. The relevant questions are therefore whether parents have an interest in harming their children and, if so, whether that interest is such as to warrant the protection of a right.

In response to the first question, I would simply point out that bad parenting and child abuse hurt parents as well as children. The long-

term interest of parents in having a healthy relationship with their offspring throughout their lives depends to a great extent on the quality of the early relationship and on their children's judgment, as they mature, regarding the quality of the upbringing their parents provided. In addition, bad parents often incur criticism or even condemnation from their community even if their conduct does not rise to the level of legally actionable abuse. Thus, parents as well as children might actually be better off, in the long run, as a result of greater community involvement in directing their childrearing efforts, including setting standards that parents are expected to meet. This is especially likely if, along with imposing additional requirements, our society began providing parents greater support than it now does, to ensure that any parent who wants to be a good parent has the skills, knowledge, and resources needed to do so.

The answer to the second question surely must be that even if parents do have an interest in being free to act in ways substantially contrary to the interests of their children, such an interest is by no means a fundamental interest nor sufficient to outweigh the interest of their children in their not being free so to act. Parents denied this freedom may feel great frustration and anger, but no aspect of their basic welfare is impaired thereby, and most people would, or at least should, be offended by the suggestion that a right to harm one's child is appropriate compensation for performing parental tasks. Certainly they would be offended by a similar suggestion regarding any caretakers for adults.

At this point, parents' rights advocates might retreat to the position that, though perhaps not *necessary* to protect the core of adults' interest in serving as parents, a set of parents' rights more limited in scope than those presently existing—i.e., protecting freedom only within bounds defined by children's interests, is an *appropriate* way of protecting that adult interest. Attributing to parents merely a legal privilege to act as parents, they might assert, does not adequately reflect the importance of parenting. There are several reasons, however, why this weaker claim is also unsound.

First, embedded in the concept of a right is a notion of moral entitlement that is inappropriate in the case of parenting. We typically regard persons as entitled to things that constitute a fundamental interest for them or that they deserve because of their actions. Parenting satisfies neither criterion. Properly speaking, an interest is fundamental not simply when it is of great subjective importance to an individual, but rather when denial of it would impair the ability of

an otherwise healthy individual to pursue any higher aims in life. Food, shelter, medical care, and education are fundamental interests. Being a parent is not; it is, rather, one of the higher aims that people may or may not pursue in their lives.

Moreover, it is difficult to imagine a set of neutral criteria satisfaction of which should be sufficient to establish that a person deserves to control the life of another person. Even if Mother Theresa had devoted all of her self-sacrificing efforts throughout her career to nurturing a single incompetent adult, we would not say that she *deserves* to control that person's life. To say that parents deserve to control their children's lives because they voluntarily undertook the responsibilities of childrearing, or simply because they had intercourse, is thus inconsistent with our general concept of moral deservingness. Furthermore, it need not be the case that parents feel less important in a world without parents' rights. In fact, transforming our understanding of parenting from an entitlement to a privilege should raise the self-esteem of good parents, since they can feel proud of being worthy of this important privilege, while the moral bankruptcy of the currently prevailing notion that biology alone entitles one to be a parent substantially devalues the currency of parental rights.

Additionally, there is a practical objection to retaining even a set of parental rights that is formally more limited. Because of the rhetorical force that claims to a parental right now have, judges would be unlikely in practice to keep parents' rights within bounds defined by children's interests, at least in the foreseeable future. To move the focus of public discussion and legal proceedings regarding childrearing to where it belongs—on the interests of children, it is necessary to eliminate parental rights altogether.

The final category of arguments for parents' rights appeals to certain collective goods that these rights protect—for example, cultural pluralism and the institution of the family as the basic unit of western society and democratic culture. Given the reasoning presented above, it is easy to see where these arguments go wrong. First, they incorrectly assume that parents' rights are the only possible means of preserving parent-child relationships and preventing state standardization of all children. I have shown, to the contrary, that rights assigned to the persons who alone have fundamental interests at stake in connection with childrearing—children themselves—are adequate for these purposes. Within limits defined by the welfare interests of children there is ample room for a diversity of belief systems and ways of life.

Moreover, even if it were necessary to sacrifice the welfare interests of children in order to satisfy diffuse social interests such as cultural pluralism, it would be improper to do so. Certainly we would reject a suggestion that some adults should be made the object of others' right of control in order to promote such social ends (imagine, for example, if members of dwindling religious minorities were accorded a right to seize mentally ill homeless persons from city parks and indoctrinate them). Respect for the personhood of children requires that we similarly reject such an argument for parental rights.

In sum, none of the interests to which proponents of parents' rights appeal can support such rights, not even the interests of children. Lurking on the sidelines throughout this discussion, however, has been the question: Who decides what children's interests are? Someone must decide, and it might appear that by arguing against parents' rights I have assumed that the state and its cadre of child development experts always know more than parents about what is best for children. That is not the case. Even if it were true that parents always know best, we should not say that they therefore have a right to decide how their children's lives will go, but rather that their children therefore have a right to have the parents, rather than the state, decide. But the question of who decides is still germane, particularly in considering whether to establish uniform standards of parenting.

Some interests of children are more or less generic, while others vary significantly according to the unique characteristics of different children. With respect to the latter category of interests, parents are often in the best position to determine where they lie. For the sake of the children, parents should make the decisions concerning those interests. With respect to generic features of children's well-being, however, it stands to reason that persons who make a career of studying child development and who are recognized within their profession as doing excellent work, are generally better qualified than most parents to make decisions. We should say, therefore, that children have a right to a uniform state standard in relation to those matters.

At this point, some will object that conclusions about interests often, if not always, depend on value judgments, and imposing majoritarian values on all parents is contrary to the principle of toleration that is central to modern western political culture. It is helpful to recall in this context, however, that we grant the state authority to establish uniform guidelines for permissible conduct by individuals toward other persons who are not their children, even though such guidelines reflect value judgments not shared by all persons. For ex-

ample, laws prohibiting racial discrimination in housing or sexual harassment in the workplace embody majoritarian values that some members of our society reject, but such laws do not thereby offend the principle of toleration.

Discomfort with state-imposed standards for parenting derives in large part from a belief that parent-child interactions are of a different order and somehow trigger toleration concerns not present in the case of laws governing interactions among adults. Toleration, however, is closely tied to the principle of self-determination, and as pointed out above, parenting is not self-determining behavior; it is "other-determining." The failure to see it as such, and the failure to see that setting parenting standards does not violate the principle of toleration, must rest on a failure fully to recognize the distinct personhood of children.

In sum, there is no justification for according to parents rights to direct the lives of their children as they see fit and, since such rights conflict with basic principles of law and morality, such rights are illegitimate. Courts and legislatures should eliminate them. Even though this is not likely to happen, child advocates should no longer be inhibited in talking about standards for parenting by an uneasiness about treading upon sacred ground or breaching a wall of entitlement. Parenting is a privilege, and as such may be conditioned upon satisfaction of any requirements the state sees fit to impose in order to protect and promote the interests of children.

Parenting Standards as a Right of Children

The first part of this article explained why parents' rights are illegitimate and therefore should not pose any obstacle to establishing rigorous, uniform standards for parenting. From this flows the conclusion that the state *may* impose substantial requirements as a condition for enjoying a parenting privilege. This is all the justification that child development experts need to propose new standards for the state to adopt. It is nevertheless worthwhile to consider whether it is possible to make the stronger claim that the state has an *obligation* to set high parenting standards, or whether it would instead be supererogatory on the part of the state to do so. Such an obligation might run to society as a whole—i.e., if high parenting standards would substantially improve the quality of life for all. In this part, though, I consider only the possibility that the state has an obligation

to children to impose requirements on parents more substantial than it presently does or, in other words, that children have a right to relatively demanding parenting standards.

When a child enters the world, what claims does she have on the rest of society? I believe the strongest response to that question would rest upon an appeal to the well-established political and legal principle of equality among persons. The political principle holds that a society's governing institutions must give equal consideration to the interests of all persons in establishing laws and policies, and must distribute any benefits it bestows equally among all persons unless there are reasons, based upon neutral, impartial principles, for an unequal distribution. The legal principle which partially embodies this political principle is set forth in the Fourteenth Amendment Equal Protection Clause and the Fifth Amendment Due Process Clause. It holds that the states and the federal government must accord the same legal protections to all similarly situated persons, absent adequate justification for doing otherwise. Thus, simply by virtue of being a person, a child has a claim on the rest of society to equal consideration in decision-making and, absent special justification, equal treatment by the law.

Using the equality principle, it is a relatively simple matter to argue for a number of particular rights for children, and these rights can in turn support a number of state-imposed requirements for parents. Certainly children have an equal claim to many of the same negative rights (i.e., rights to others' forbearance from certain actions) that adults possess—for example, rights against physical harms. For the most part, children in our society already do possess these most basic of rights, even against their parents, and the state has established standards for acceptable parental behavior that reflect these rights. The state often does not enforce these standards and rights, but formally they are in place.

Are there other rights that adults possess that children too should possess, and that would require higher standards for parenting than presently exist? Children's developmental interests and relatively limited capacities require that they enjoy some rights—such as the right against physical restraint—to a lesser degree than adults. The equality principle dictates, however, that, as in the case of adults who have diminished capacities, children's enjoyment of such rights be reduced only to the extent that is necessary to protect their interests or to prevent them from causing physical harm to others. This conclusion has some quite radical implications.

One implication is that many restraints that some parents and their proxies (e.g., private schools) presently impose on children's basic liberties—their freedom of thought, expression, and movement—violate the rights of the children, and the state therefore has an obligation to prevent such practices. It would therefore be appropriate to set standards for acceptable parental restrictions on children's liberties, based upon the best available evidence regarding the relationship between children's intellectual, moral, and physical freedom and their developmental interests. Such standards would surely be more stringent than those now in place.

Another, even more far-reaching, implication is that the state itself violates the rights of children whenever it forces them into an association that is not in their best interests. Adults enjoy a right not to be forced into association with anyone, absent conduct on their part that justifies doing so (e.g., criminal behavior may justify forced association with other criminals in a prison). Children, too, should enjoy a right against forced association, particularly when they are old enough to make a meaningful choice about with whom they want to associate, except insofar as placing them in a relationship that is involuntary on their part is in their interests or is necessary to prevent them from physically harming others.

From this it follows that the state violates the rights of children when it forces them into a relationship with a parent that is, on the whole, not in their interests. The state does effectively impose relationships on children, by establishing who has custody of them. Moreover, the state routinely and deliberately forces some children into relationships with parents whom the state knows to be bad parents, when it grants custody and/or visitation to a parent who is abusive but not sufficiently so to satisfy the existing legal standard for termination of parental rights. As noted at the outset, the mental health profession has by and large been complicit in this practice.

The associational rights of children would appear to require, however, that the state ensure at a minimum that any relationship in which it places children is, on the whole, in their best interests. This in turn suggests that the state has an obligation to children to establish standards for parenting set at least at the level where failure to satisfy them would mean that the child would be better off if the state limited or terminated contact with the parent. This level would, I believe, be sufficiently high to prohibit serious psychological and emotional, as well as physical and sexual, mistreatment of children.

Is it possible to go even further and claim that children have a right

to still higher standards of parenting? The more common situation of children is not one in which they would be better off being removed from their parents' custody, but rather one in which their parents are simply not particularly good parents, because they are not as nurturing and considerate of, or knowledgeable about, their children's needs as perhaps they should be. In these cases, the parents' conduct is generally not such as would violate anyone's rights if directed toward other adults. For example, demeaning one's child or giving one's child an unhealthy diet, inappropriate clothing, and an unstimulating environment are bad parenting practices, but would not appear to violate any rights that are common to all persons. It therefore would be necessary to justify special rights for children in order to conclude that the state has an obligation to condemn and try to prevent such practices.

Here, too, the equality principle does a lot of work, this time by comparing the situation of children not with that of adults generally, but rather with that of other vulnerable populations. In our society, numerous laws guarantee groups of vulnerable adults special protections and benefits. In addition to ensuring members of these groups satisfaction of their basic material needs, laws impose trustee-like duties on persons who act as decision-makers and care-takers for elderly persons, mentally ill persons, and mentally retarded persons, requiring that they act and make decisions concerning the incompetent person's life in accordance with that person's wishes, to the extent these are not clearly irrational, and otherwise in accordance with the incompetent person's best interests. The state may penalize them if they are negligent in carrying out their duties. Insofar as children suffer from a similar inability to act independently to further their interests, they are entitled to the same state guarantee of competence and diligence on the part of their caretakers. The equality principle thus generates the conclusion that children have a right to parenting standards set at a level as high as that under which other fiduciaries operate, and that level is surely much higher than that of existing legal requirements for parents.

A final conclusion that the equality principle yields in connection with standard-setting for parenting is that every child also has a right to the same state-conferred protections and benefits that *other children* receive (I leave aside here the question whether children should have a right to roughly equal social circumstances). Courts have recognized this formal right to a limited extent, most notably in the substantive context of public education (e.g., *Brown v. Board of*

Education). In view of this right, if the state imposes any standards for parenting, it must apply those standards to all children equally, unless it is not in some children's interests, as defined by the state (recall the discussion above regarding who decides what are children's interests), to have their parents subject to the standards.

Many existing state and federal laws that set forth parental obligations, such as a duty to secure for children appropriate medical care or schooling that satisfies certain prerequisites, exempt parents who have religious objections to those obligations. These exemptions violate the equal protection rights of the children of the exempted parents and should be deemed constitutionally invalid.⁴ Likewise, a religious exemption to any new parenting standards that child development experts propose would be incompatible with the equality principle.

Conclusion

Arguing for elimination of parental rights and imposition of rigorous standards for parenting might appear to be parent-bashing. It is not. It reflects simply a desire to elevate children to a position of equal moral standing in our society and to give them their due. Anyone concerned with the welfare of children should also be very pro-parent, in the sense of endorsing public support for parents sufficient to ensure that, as far as possible, parents who want to be good parents are able to acquire the skills, knowledge, and resources necessary to be good parents. Knowing what it means to be a good parent is a prerequisite to providing the proper support, and the project of discussing and drafting clear parenting standards is directed toward that end.

References

1. For a more extended treatment of this topic, see Dwyer JG: Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights. *California Law Review* 82:1371-1447, 1994.
2. 'Right' and 'privilege' are terms of art in legal theory. A right is a claim upon others, requiring them to do or to refrain from certain actions. It entails a legal duty on the part of others, owed to the right-holder. A privilege is merely the absence of a duty not to do something—that is, being free to do something if one wants. It does not entail any claims against other persons. For example, if I lend my shovel to my neighbor, he enjoys a privilege of using the shovel, but no claim against me should I

- take the shovel back or impose restrictions on how he may use it. In addition to this legal distinction, there is a moral distinction between a right and a privilege, in that the former entails a sense of entitlement and deservingness that the latter does not.
3. It is important not to confuse this point with a radical child-liberation position. To say that only children should have rights in connection with their upbringing is not to say what the content of those rights should be. What particular rights children should have depends on where in fact their fundamental interests lie. If it is the case, as most believe, that it is not in children's interests to be liberated from all restrictions and parental governance, then it would be senseless to attribute to them a right to such liberation.
 4. Dwyer JG: *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*. *North Carolina Law Review* 74:1321–1478, 1996.