



LIBERTARIAN THEORY AND CHILDREN'S RIGHTS

THE FIDUCIARY MODEL, RATIONALITY, INTERESTS, AND THE CHALLENGE OF ABORTION

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Philosophical Notes No. 61

ISSN 0267-7091

ISBN 0 948317 520 X

An occasional publication of the Libertarian Alliance, 25 Chapter Chambers, Esterbrooke Street, London SW1P 4NN
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FOR LIFE, LIBERTY AND PROPERTY

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Introduction

Libertarianism as a legal philosophy holds that a current distribution is just if and only if the transactions leading to this distribution were themselves just. Furthermore, justice in transactions is defined solely by non-coercion. Therefore, for libertarians any distribution is just if it is the outcome of formally voluntary interaction, and it would be unjust to use violence or other forms of coercion to alter this distribution. Since government is an agent of coercion, libertarians generally argue that the government should at most enforce laws against coercion. The only liberty governments may legitimately guarantee is negative liberty, freedom from harm.

Libertarianism runs into a definitional difficulty when it defines itself solely in terms of “non-coercion”, “protection of property rights”, and “system of negative liberty”. All these terms beg the question of how appropriate property rights are to be assigned.¹ To say that property rights must be protected is meaningless unless we first have a correct criterion for assigning property rights.

For the purposes of this paper, however, I will define libertarianism as the legal philosophy holding that persons are always entitled to the products of their “honest industry” and that persons may never be coerced to do what is in their own interests so long as they do not violate the equal freedom of others. Although it is not technically correct, as noted above, I will call the above rights rights to “negative liberty”, to distinguish those rights from “welfare rights”, which include rights to things that one has not gotten through one’s own industry or the voluntary bequest of someone who has. I wish to analyze libertarianism in the context of children because children pose a problem for a comprehensively libertarian political philosophy. The problem for libertarianism and liberalism in general is that children have special rights to provision and protection that go beyond mere negative liberty and at the same time have fewer rights than adults to engage in self-destructive behavior. In two ways, then, children present a problem for libertarianism and even for liberalism, insofar as it is antipaternalistic and allows individuals to pursue their own conceptions of the good: it is justifiable to force adults to provide for children, and it is justifiable to force children to do what is in their own interests. (There are those “children’s rights” advocates who argue that children have the same rights as adults. Rather than engaging in a lengthy refutation, I will simply assume that they are wrong. The point of this paper is to examine whether libertarian theory is consistent with the more or less “traditional” view of children’s rights.)

Libertarians, therefore, have to draw a distinction among adults, who have certain rights, children, who have other rights, and mere objects, which have no rights. Can a libertarian consistently maintain libertarian rights for adults and paternalism and welfare rights for children, without making children into non-persons? Important for formulating distinctions between children and adults and between children and dumb property is the philosophical anthropology or metaethics of libertarianism. Some libertarians find their basis for rights in rationality (a Kantian conception), divine creation (a Lockean conception), or other human attributes, such as “project pursuit” (Lomasky 1987) or interests. In this paper, I will examine which of two differing conceptions of human dignity (“rationality” and “interests”) is best suited to a plausible account of children’s rights and obligations, and whether any of them can be consistent with a broadly libertarian legal theory. If libertarianism for adults is inconsistent with the traditional conception of children’s rights, then other liberalisms will have to take note, for every liberal theory endorsing a traditional conception of children’s rights wishes to maintain some distinction between adults’ rights and children’s rights. No liberal theory wishes to treat adults as children.

A Traditional View of Children’s Rights: The Fiduciary Model

Before proceeding, it is necessary to describe what precisely is a plausible account of children’s rights and obligations. This model will serve as the standard by which to judge the competing rationality-based and interest-based theories of personhood. Since I have ruled out beforehand the positions on either extreme, that parents own their children, or that children have all the rights of adults, I have left open one important model of children’s rights: the fiduciary model. Under this model, parents are considered the “trustees” of their children and are supposed to develop their capacities for rationality, functioning in a democratic system, and bodily well-being. Failure to care for the trust properly entails dismissal from trusteeship. This was the model proposed by John Locke:

From [Adam] the world is peopled with his descendants, who are all born infants, weak and helpless, without knowledge or understanding. But to supply the defects of this imperfect state, till the improvement of growth and age hath removed them, Adam and Eve, and after them all parents, were by the law of nature under an obligation to preserve, nourish, and educate the children they had begotten, not as their own workmanship, but the workmanship of their own maker, the Almighty, to whom they were

to be accountable for them. (*Second Treatise of Government*, para. 56)

God creates and therefore owns children and gives them to parents in trust, and the parents are to preserve, nourish, and educate the children God has given them.

Locke's trusteeship model has received acclamation from many quarters. Ian Shapiro endorses it, though he wishes to place it on secular foundations.² If we remove God as settlor (initiator) of the trust relationship, then whom shall we erect in his place? Shapiro wishes to make the state a fellow trustee, with the parents, not the settlor. The state does not own children after all, and therefore should not be considered, philosophically, their rightful protector, *ipso facto*. Instead, we should probably consider the hypothetical future person into whom the child will grow to be the settlor of the relationship, i.e., the person for whose good the trust relationship is to be conducted.

To whom then do parents in a trust relationship owe their obligations? And to whom do children owe their obligations? If every right correlates with an obligation, then it seems that the parents' right to exercise paternalistic power over their children entails an obligation on the part of the children to their parents, and children's rights seem to entail an obligation on the part of the parents to their children. But do children really owe obligations to their parents? Shapiro notes that parental benefits to children cannot be the foundation for children's obligations, since children cannot be said to have consented to accepting these benefits, nor even to being born.³ Locke interpreter A. John Simmons attacks the view that children have any general obligation to obey their parents, on the grounds that parental obligations are superseded by natural law.⁴ Children have no duty to obey immoral commands, and parents may indeed lose the right (against the rest of society) to raise their children if they frequently issue such commands. (Nevertheless, we might say that children owe some pragmatic obligation to obey parents' commands in the realm of morally indifferent actions.) In general, the difficulty is in attributing rights and obligations to beings that cannot understand them.

Therefore, it seems wrong to say that parents owe their obligation to provide their young children nourishment and education to those young children, because young children cannot understand their rights to such things, nor can they be allowed to waive them, as other rights can. Nor do children owe their obligation to refrain from self-destructive behavior to their parents, for children's proper development and survival is not necessarily in the interests of the parents, and we would not want parents to be allowed to waive the right and obligation to prevent their children from engaging in self-destructive behavior. The trusteeship model provides an answer to this conundrum. As Simmons argues, the "natural account of children's rights to attempt is one that is 'forward-looking' — that is, one that somehow anticipates the child's future status as an autonomous, rational agent, capable of planning, self-control, and moral action."⁵ In Kantian language, we might say that the child's empirical self owes its obligations to the child's timeless noumenal self, and that par-

ents likewise owe their obligations to the noumenal person "behind" the child they are raising. But if we wanted to avoid endorsing Kant's transcendental idealism, we could simply say instead that the current child and its parents owe their obligations to a hypothetical person reflecting the child's future interests.

This, then, is the fiduciary model of children's rights and obligations that I assume to be correct. It holds children to be rights-bearers as hypothetical adults and to be subject to paternalistic oversight insofar as it advances their growth into adulthood. Children are therefore distinct from property in that they have rights, and they are distinct from adults (in the libertarian view) in that they have welfare rights and are subject to paternalism. Why then do human beings have rights in the first place? This is the question that the rationality-based and interests-based conceptions of rights seek to answer. Since I am assuming in this paper for the sake of argument that adults have rights to negative liberty, and that children have rights to positive provision and some, but fewer, rights to negative liberty, I will proceed by determining which conception, rationality or interests, is consistent with these propositions. This methodology will allow the reader to determine whether any conception of personhood can make libertarianism for adults consistent with the fiduciary model of children's rights, for this determination would answer to the original question: can libertarian theory account for a traditional view of children's rights and obligations? Of course, answering this question establishes neither that libertarianism for adults is true, nor that either rationality or interests is the true foundation for rights. One may want to argue that, although a rationality conception is consistent with the traditional view of children's rights and with the libertarian view of adult's rights, while the interests conception is not (as the paper will conclude), libertarianism is wrong, so that the rationality conception's consistency with it is not a point in its favor.

The Rationality Conception: Implications for the Fiduciary Model and Libertarianism

What it is that parents are supposed to develop in their children, and what are children to acquiesce in as necessary to that development? Is it "rationality" or "interests"? The answer to this question has to do with what it is that gives humans moral worth.

The key, then, to raising children above the level of property while not to the level of adults is a nuanced normative philosophical anthropology. In other words, which characteristics of human beings give them rights? Which characteristics do children have, and which do they lack, and what are the implications for children's rights? The conception that both Locke and Kant endorse, perhaps the more traditional view, is that "rationality" is what gives human beings rights, and that children, lacking certain parts of rationality, do not have the full complement of rights. It is important not to make this view a hierarchical one, because it also gives children "positive rights" over their parents (to education, nurture, provision). Interestingly, their partial lack of ration-

ality leads to children's having claims that fully rational adults must fulfill. This is interesting and slightly counter-intuitive because hierarchical theories typically claim that some group lacks full rationality and is "inferior" and obligated to obey some other group because they lack full rationality. Besides hierarchical theories, which I will not address further, I will occasionally refer to the "paternalistic" theory of rights as a foil for both the rationality and interests theories. The "paternalistic" theory holds that persons have a right only to pursue that which is in their own interest (or the interests of the whole). This theory makes no intrinsic distinction between children and adults: paternalistic coercion is potentially legitimate when applied to either children or adults; however, it may be more necessary for children as a practical matter because they haven't learned what most adults have. The paternalistic theory is implicit in utilitarianism, which holds that any person's activities must be constrained so as to maximize social welfare (whether total or average). Utilitarianism makes no distinction in principle between children and adults. The paternalistic theory is also implicit in post-Kantian German idealism, which would have the empirical self put in subjection to the "Ideal Will". In simpler language, it would have it that all persons are put "in trust" in the way that children are.

The "rationality" conception has the problem of defining and then unpacking the concept of rationality. For the purposes of moral philosophy, the relevant rationality is moral rationality: the ability to reason about actions and their justification. Beings that can reason about moral matters are in turn accorded moral worth. Therefore, a being has full rights if that being can reason morally, and any being that can reason morally has full rights (the categories overlap each other completely). That a person has rationality in this sense does not mean that that person will necessarily exercise that rationality on any occasion. Rationality is a capacity, not an actualization. By making this distinction, the rationality conception avoids the paternalistic counter that a person not acting rationally may be forced to do so.

Because non-human animals and objects do not have the capacity to reason about their "actions", they do not have rights under the rationality conception. Human infants and fetuses cannot reason either, because they do not have language. Nor do they have interests or pursue projects, at least not to a greater extent than any lower animal. Do they not then have rights? Most thinkers in both the rationality and "interest"-based camps would like to say that they do, at least after a certain point of development. Lomasky, for example, reasons that an infant must have rights, for we cannot say that an infant becomes an entirely new person with age. The person undergoes change, but not generation or corruption.⁶ He uses an example to show that we must consider an infant and the person who grows out of that infant to be one and the same person:

[Consider the case] of administering to an infant a very slow-acting poison, one that does not begin to take effect for thirty years or so. It is the adult, we might say, who suffers from this act and not the

child. More accurate, though, would be to describe the case as one in which that person experiences pain, spasms, nausea, etc., during his adult years because he is that person who was poisoned thirty years prior ... Evidently someone has been harmed, but who? Should we say that it is Baby Jones? No, because he passes through his infancy unaffected by the dose. Then Adult Jones? But no harmful act was committed any time during Jones' adult years ... One could not say that an act harmful to Adult Jones takes place with the administration of the poison, since there does not (yet) exist the subject of the harm.⁷

Maintaining that Baby Jones and Adult Jones are separate persons leads to the intuitively difficult position that administering the poison was a harmful act to no one. Even more wildly implausible is the implication of the separate-person view that murdering an infant harms no one, because no adult ever exists to suffer the wrong.

We are then faced with an apparent antinomy. If rationality is the basis for rights, then we cannot say that children have rights, but if we deny rights to children, then we also deny rights to the adults who grow out of those children. The antinomy results from the fact that a person is at one time non-rational and at later times rational. Therefore, rationality cannot be the sole basis for personhood and moral worth. But the interest-based view can take no consolation from this, for it faces the same difficulty. Instead, we could say that the potential for rationality is the basis for rights, but maintain a distinction between the rights that one gains through full rationality and the rights that one gains through mere potential rationality.

Typically, the fleshing out of the implications would run as follows. Adults with full rationality have the full complement of rights. They may do as they please so long as they do not harm others. Furthermore, in the libertarian view, coercive paternalism directed toward making adults pursue their own interests effectively is absolutely prohibited. For children, however, the structure of rights is different. Because they lack full rationality but have the potential for attaining it, they are prohibited from acting in ways that might destroy their rationality. The extreme examples of such destruction are suicide and extreme drug abuse. But even beyond this, children have an obligation to foster their moral rationality and personhood to the greatest extent possible during their minority in anticipation of their majority. Children also have a right to demand from their parents sufficient resources to pursue personhood, through gaining some measure of autonomy and responsibility. For a libertarian endorsing the rationality basis for rights, we might say then that for adults and children there are different criteria for attaining rights over things. Children have a right to things insofar as that right advances their pursuit of rationality and personhood. Derivative from this proposition is the idea that children have a right to a minimum level of provision to pursue their goals.

This sort of "libertarian" thus forsakes libertarianism with regard to children. Indeed, the resourcist formulation of

children's rights is strikingly like egalitarian liberal formulations of all persons' rights, excepting the paternalism, which liberals do not generally endorse. (The rationality-based resourcism is different from the interest-based resourcism. The former holds that children have a right to resources as a means of attaining responsibility and moral rationality, hence personhood. The latter holds that resources are good in themselves; what matters is the child's "interests", however that may be defined. Also, what matters is not the potential for personhood: the child having desires has rights, the same rights as adults, who also enjoy a right to a minimum level of resources.) Can a libertarian maintain this distinction between an autonomist basis for children's rights and another basis (say, labor-mixing or initial-claim) for adults' rights?

It is evident that the rights children enjoy spill over into the rights adults may exercise. The obligation to provide children a minimum level of provision is enforceable through the state or other coercive means. Natural parents are considered to have this obligation, unless they alienate it to adoptive parents, because the act of sexual intercourse can plausibly construed as consent to caring for the potential offspring of any such union.⁸ Parents also exercise coercive power over their children in areas where they could not exercise coercive power over other adults. Furthermore, the rights of potential personhood could obtain before birth, placing restrictions on what pregnant women may do to their fetuses. For libertarianism to retain its general tenor of voluntarism and minimal state intervention, it will have to maintain that most intra-family obligations can be settled without recourse to the state. When should the state enforce children's interests?

Ian Shapiro wishes to make a distinction between children's "basic interests" and children's "best interests".⁹ In terms of the preceding discussion, "basic interests" would include freedom from harm, which all human beings, adults and children, enjoy, and the minimum level of social goods to keep helpless children alive, healthy, and educated. "Best interests" include the resources and courses of action required for maximal pursuit of rationality. Shapiro holds that the state is the primary custodian of children's basic interests, and the parents are the fail-safe custodian,¹⁰ while parents are the primary custodian of children's best interests, and the state the backup guarantor.¹¹ This distinction recommends itself upon first glance, but it needs to be hedged. We would hope that parents, for example, would always seek to guarantee their children's basic interests, by refraining from harming them, and by securing for them basic nutrition and education. The state should not step in unless the parents fail. The point Shapiro seems to be making is about interpretation. The state has the authority to interpret what counts as children's basic interests and the authority to determine whether parents are securing them, while parents have the right to determine what counts as children's best interests, and whether they are being fulfilled. If so, then there is virtually no role for the state in defending children's best interests, since parents will almost always interpret their own actions as being in their children's best interests.¹² I think that this is in fact the correct conclusion, and it staves off the possibility of bureaucratic

control over child-rearing, including "parent-licensing" schemes. Most libertarians (with regard to the rights of adults) would be comfortable with allowing the state or other coercive institutions a role in forcing parents to provide basic necessities such as food, clothing, and shelter to their children.

Though the rationality conception may lead to an attractive position on children's rights by making the distinction between rights based on full rationality and rights based on potential rationality, it seems at least possible that any rights theory acknowledging multiple bases for rights and offering some human beings welfare rights might put libertarianism on a slippery slope. If children have rights to be provided for in virtue of their vulnerability, what about the poor and sick? While some libertarians would argue that there are moral imperatives requiring human beings to care for each other need, all libertarians share a general antipathy toward creating legal rights out of these moral obligations. Libertarians are uncomfortable with rights to health care, a minimum level of income, and so forth. Is this consistent with the rationality conception of rights?

I cannot find an indication of logical inconsistency here. It seems consistent to maintain that children hold rights claims to positive goods against their parents in virtue of their potential rationality, so that they might develop into fully rational adults, and yet to hold that impoverished or vulnerable adults do not have the same sorts of welfare rights, since they are already fully rational. The interests view, discussed below, seems much more to demand that persons' substantive autonomy be enhanced than the rationality view, which seems concerned primarily with the formal prerequisites for rational autonomy. This is not to say that welfare-liberal views are inconsistent with the rationality conception. Far from it. A libertarian theory of rights for adults does not follow necessarily or analytically from the mere proposition that human beings have rights in virtue of their rationality. To reach libertarianism, one must couple with this proposition about the grounding of rights more controversial premises about how property is obtained, and about how the world works (for libertarianism to have any relevance to the contemporary world, it must maintain that very few injustices have occurred in the past, or that all these injustices have somehow shaken or cancelled out over time).

The Interests Conception: Implications for the Fiduciary Model and Libertarianism

The interest-based theory holds that rights come not from human rationality but from the ability and desire of humans to pursue projects. This theory represents a middle ground between Kantian deontology and utilitarianism. While it retains the deontological concept of rights, it makes rights dependent on human happiness. Hence the view is often called "welfarist". Under this view, human beings have rights because they need a "sphere of autonomy" to pursue their interests. While this sphere includes the noninterference upon which libertarians focus, it also includes some basic level of "social goods", including income, shelter, education, and so forth. While

Rawls did not endorse this theory in his *Theory of Justice*, that book gave rise to the debate over welfarist and autonomist conceptions of justice. Interestingly, while this view is usually associated with “welfare liberalism”, libertarian Loren Lomasky uses it for his foundation of rights.¹³ Lomasky, like others, argues that the attraction of “project pursuit” as the appropriate normative anthropology behind rights is that it does not require the extreme Kantian view of autonomy, under which actions are truly virtuous only when they are undertaken for the considerations that practical reason dictates. According to Lomasky, the Kantian view of autonomy ignores the fact that the vast majority of our actions spring from our habits and upbringing, not from reflective reasoning. Therefore, reflective rationality cannot be the universal good underlying all rights claims.¹⁴

In fact, this is a common misinterpretation of Kant. Kant argued that while it is best for actions to be motivated by duty to the moral law, it is still good for them to correspond to morality’s outward demands even if they are motivated by heteronomous (i.e., selfish) motives. He did not argue that an action is worthless unless one has reflected on its value and one’s motivation in undertaking it.¹⁵ Many of our good actions, such as duty to parents and sympathy for the oppressed, are motivated by instinct rather than reason, but it is not “virtuous” (in Kant’s technical sense) to act on instinct alone. We would be acting both virtuously and rightly had we reasoned to correct moral conclusions.

The welfarist view is therefore not superior to the rationality view on the grounds that it incorporates a better understanding of human nature. Nor does the welfarist view deal better with the problem of children than the rationality view. The weakness of the rationality view was that it had to be multivalent in order to be plausible. It had to grant certain beings rights in virtue of their rationality, and other beings different rights in virtue of their potential rationality. All other things equal, a single standard for obtaining rights would be superior for its simplicity. The project-pursuer theory does not provide this standard either, however. Very young children are no more project pursuers than they are autonomous rational beings. Lomasky himself adopts a multivalent standard for rights, granting children certain rights in virtue of their potentiality for project pursuit, in a way exactly parallel to the way in which the rationality conception granted children rights.¹⁶ The project-pursuit standard, meanwhile, is inferior to the rationality conception for its vagueness. What exactly is a “project”? If children may engage in any project permissible to adults, then what about self-destructive projects? The welfarist conception, with its tendency toward relativism among individuals’ pursuits and values, does not seem to take seriously the difference between adults and children: it would allow children to determine their own values and pursuits without constraint.

It is also not clear that the welfarist conception is compatible with libertarianism, even of the most general kind. Lomasky himself admits that his project pursuit standard allows some rights to provision:

To the extent that a civil order of maximal liberty is one in which persons can provide for themselves and are able to secure the willing aid of others, welfare rights will remain in the background. There is, however, no assurance that liberty will universally guarantee to each person the requisites for satisfactory prospects of project pursuit ... Is it the case that those in exigent straits may demand welfare goods as a matter of right? ... [Y]es.¹⁷

This minimal guarantee of welfare rights is surely consistent with a “moderate libertarianism”. But does the project-pursuit standard limit itself, as Lomasky claims, to just this level of state provision? If the role of the state is to allow persons to pursue whatever projects they desire, then does the state have an obligation to help a poor person pursue an expensive project, say, flying to the moon? Lomasky might argue that ensuring this project would require taking resources from other persons’ projects. But then the project-pursuit standard would imply absolute equality in state assurance of projects, given that resources are limited. And perhaps we could add a Rawlsian qualifier: given that attempts at bringing social project-pursuit opportunities into absolute equality might entail significant costs to everyone in the society, we should instead try to maximize the project-pursuit opportunities of the least advantaged. Philosophically this is quite far from libertarianism.

Lomasky might argue instead that the role of the state is not to guarantee individuals the ability to pursue any project they might dream up, but instead to ensure only that they can pursue at least some sort of project. This standard certainly limits welfare rights: all the state must do is to guarantee that a person lives and has enough energy to engage in a minimal kind of project, perhaps tic-tac-toe. But then this standard limits liberty rights as well, allowing the state or private individuals to aggress against others so long as they do not kill them or reduce them to abject misery. After all, a wealthy individual who surrenders fifty per cent of her income still has enough to pursue some kind of project. This conclusion is, of course, anathema to libertarians.

But I have probably been treating Lomasky’s position unfairly. It seems that instead he wants to make “project pursuit” a mere placeholder for “rationality/autonomy” in the Kantian scheme. Thus, we should have respect for persons in virtue of their existence as project pursuers or potential project pursuers and treat them as ends-in-themselves for that reason. But I think that the substitution is not so easy. Pursuing a project requires only hypothetical rationality at most, instinct at the least. It does not require categorical rationality, the ability to reason about ends rather than just about means to one’s preconceived ends. Can someone who wholly lacks the ability to think about ends be herself an end? If not, then it is not “project pursuit” that confers rights, but rationality.

“Interests” is an even more slippery criterion than “project pursuit”. All organisms have interests of some sort, some genetically driven destiny. Many beings have nervous systems that give them sensations of pleasure and pain. If interests are defined as utility, then surely all

vertebrate animals have interests. Do we want to ascribe rights to, say, lions, who in turn seem to be stubbornly impervious to the rights demands of antelope? Dworkin (1993) would like to maintain an interests-based theory of rights that includes fetuses after about the seventh month of gestation but excludes non-human animals. For Dworkin, something has interests if it has consciousness: some form of mental life.¹⁸ But it is difficult to see how a newborn infant is more conscious than any other vertebrate animal.

Another intuitive difficulty for an interests-based rights theory is that it is susceptible to paternalism. After all, people often fail to do what is in their own interests. A knowledgeable observer could in theory force them to do the right thing. (Again, a possible defense from an anti-paternalistic interests-based rights theorist would hold that interests are merely a placeholder for rationality: it isn't that we ought to force people to do what is in their interests; it is rather that we ought to respect people in virtue of the fact that they have interests. But then what does it mean to respect persons' interests-bearing nature, in the same way that Kantians claim we ought to respect persons' rational nature?)

The foregoing discussion has been intended to show that for someone committed to a libertarian theory for the rights of adults and a fiduciary model of the rights of children, it is more plausible to endorse the rationality-based theory of rights than the project-pursuit or interests-based theories of rights. The latter tend to be inconsistent with libertarianism for adults and also tend to introduce intuitive difficulties.

A Challenge to Libertarianism as Practical Program: Abortion

One issue in particular seems to make hay out of all theories of rights for children and poses a problem for libertarianism in particular. That issue is of course abortion. (There are some libertarians, e.g. Murray Rothbard (1973), who argue that since the fetus is "trespassing" on the woman's body, it may be expelled by the woman for any reason and at any time whatever. By this logic, parents could throw their newborn infants into the streets to prevent them from "trespassing" in their homes. Since at the beginning of this paper I assumed that thoroughgoing libertarian views that take children to be miniature adults are false, I will not deal further with this position.) If we take Lomasky's example of the slow-acting poison, we would be hard-pressed to indicate any point at which a human-being-to-be does not have rights. Would administering poison (or a genetic mutation) to a zygote, such that the human being who would grow from that zygote would endure much pain and perhaps death, be a punishable offense? Would it be immoral at all? If so, then it seems we are ascribing the same rights to a zygote in virtue of its potential rationality that we ascribe to young children.

But the anti-abortion side does not have a monopoly on vivid thought experiments. Imagine¹⁹ that there is a drug which prevents embryos from being miscarried. In fact, it is thought by some that thalidomide did exactly that.

The vast majority of pregnancies end in natural miscarriage. The mother's body has a mechanism that automatically aborts seriously deformed embryos. These miscarriages can take place as late as the third month. If an embryo is entitled to the same rights as an infant, then it would seem that persons have a moral obligation, and perhaps a legally enforceable one, to save the embryo. Perhaps there should be a legal requirement that all women take thalidomide upon realizing that they are pregnant. It does not matter that the embryo is deformed, so long as it exhibits the potential to develop into a rational human being. (It must be in the process of forming a brain.) But this conclusion stretches the intuition. It demonstrates that in fact we do not ordinarily think of embryos in the same way that we think of infants.

Dworkin argues that in fact very few people really believe that very young fetuses and embryos are persons and have rights. He points to opinion polls which suggest that most people find abortion to be immoral, but most do not want it banned.²⁰ He suggests that one reasonable position would hold it immoral to destroy human life, which has intrinsic value, wantonly, but not make illegal such destruction until very late in the pregnancy, for until very late in the pregnancy an abortion violates no one's rights. While to resolve the controversy, I think we ought to take Dworkin's standard, which seems reasonable enough, I do not think it is so manifestly absurd to hold that a very young embryo has rights. Dworkin's standard is as follows: once the fetus has developed a recognizably human brain that can sense pain and present the appearance of both sleeping and waking states (around six and a half months),²¹ we can afford that fetus the status of "potential person" and all the attendant rights. Rather than basing these rights on the fetus' "interests" as Dworkin does, I would base them on its potential for rationality. Any being with a brain has interests, and the embryo apparently begins to develop a brain much earlier, somewhere around forty days. Nevertheless, there are many, perhaps swayed more by the first thought experiment above, who would oppose this standard as potentially allowing the violation of rights, and the standard certainly is not wholly compelling, even if defensible.

Nevertheless, any rights-based liberal view (such as a libertarian one) would make it plain that the intrinsic value of human life in itself does not make acceptable legal restrictions on a woman's right to destroy that life. A woman's right to destroy that life is potentially bounded only by defensible rights claims of the organism within her. On the other side of the abortion debate, there are others who argue that rights are irrelevant. Some feminists would argue that abortion should be legal because making abortion illegal institutionalizes social gender hierarchies. For these thinkers, the rights of the fetus (and of the mother) are a distraction. Again, rights-based liberal views would have to reject this line of argument. Overcoming social hierarchies, a goal perhaps as worthy as that of preserving life, does not in itself provide a justification for ignoring rights claims. The possibility that a fetus might have rights must first be addressed. To argue otherwise would be to say that

allowing (an activity that might be) murder is justified to remedy social inequalities. This is surely an implausible claim.

No matter how the abortion issue is resolved, it presents a challenge for libertarianism because of the potential it introduces for state intervention. Libertarians do allow the state or other coercive institutions a role in enforcing laws against murder and theft, and moderate libertarians who endorse a plausible conception of children's rights further allow coercive institutions a role in forcing parents to provide for children's welfare and forcing children not to engage in self-destructive behavior, but it would be difficult for a libertarian of any kind to endorse the large-scale interventionist methods that would be required to enforce a complete ban on abortion. (The Dworkin standard is probably friendly to libertarianism as a minimal-statist program, for very few abortions take place in the last months of the pregnancy.) For this reason, all conceptions of children's rights that give them some welfare rights against their parents do stand in some tension with libertarianism as a minimal-statist policy program.

Nevertheless, it seems that it is theoretically consistent to maintain some libertarian theory of rights for adults and the fiduciary model of rights for children, though probably only a theory of rights based on rationality and potential rationality could consistently maintain both halves. Interests-based theories tend to be inconsistent with libertarianism and also seem to involve intuitive difficulties.

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NOTES

1. See for example Cohen, *Self-Ownership, Freedom, and Equality*, pp. 55-62 for an argument that any legal philosophy can call itself a philosophy of negative liberty and absolute protection of property rights.
2. *Democratic Justice*, pp. 99-100.
3. *Ibid.*, pp. 102-03.
4. *The Lockean Theory of Rights*, pp. 185-87.
5. *Ibid.*, p. 202.
6. *Persons, Rights, and the Moral Community*, p. 157.
7. *Ibid.*, pp. 157-158. Emphasis in original.
8. Some libertarians would like to see this consent as the foundation of a contract between parents and child, which would allegedly result in a traditional understanding of children's rights while retaining a unitary theory of rights for both adults and children. Unfortunately, it is implausible to regard the obligations parents have for children as contractual, since contracts can be dissolved through the "consent" of children (one can imagine scenarios), and since no child actually exists prior to conception to make such a contract.
9. *Democratic Justice*, pp. 116-139.
10. *Ibid.*, pp. 127-134.
11. *Ibid.*, pp. 134-137.
12. The state would step in only when parents cannot agree on what the children's best interests are, as in custody battles. In fact, this is the only example Shapiro uses of the state's legitimately enforcing children's best interests, p. 136.
13. *Persons, Rights, and the Moral Community*, p. 100.
14. *Ibid.*, pp. 42-45, 182-183.
15. Indeed, Kant argued that it is the "highest good" (*summum bonum*) for happiness and virtue to coincide, as even a cursory glance at the *Critique of Practical Reason* will reveal. See also Beck 1988, p. 238.
16. *Ibid.*, pp. 186-187. Lomasky argues, however, that "projects to which adults may permissibly commit themselves are also projects which adults may permissibly act to inculcate in their children". This seems too broad: would Christian Scientists then be permitted to deny lifesaving medical care to their children? The rationality conception deals with this by arguing that effectively allowing one's child to die is prohibitably, because it prevents the child from developing into a rational adult. The project-pursuit standard allows children to engage in virtually any "project" whatsoever, no matter how destructive. In principle, however, the interests conception might deal with this problem by arguing that engaging in some projects might not be in one's future interests, and these types of projects might be banned. This argument, applying equally to adults and children, comes close to the paternalistic conception.
17. *Ibid.*, p. 126. Emphasis in original.
18. Dworkin (1993), p. 16.
19. For this example I am indebted to a lecture by David Ramsay Steele. The thalidomide claim is entirely hearsay from this lecture — not that it matters for the purpose of the thought experiment, however.
20. Dworkin (1993), pp. 13-14.
21. Grobstein (1988), pp. 55, 130, quoted in Dworkin 1993, p. 17.