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Paternalism and the Moral Status of Children

A dissertation submitted in partial satisfaction
of the requirements for the degree Doctor of Philosophy
in Philosophy

by

Ingrid Steinberg

2015

ABSTRACT OF THE DISSERTATION

Paternalism and the Moral Status of Children

by

Ingrid Steinberg

Doctor of Philosophy in Philosophy

University of California, Los Angeles, 2015

Professor Tyler Burge, Chair

In liberal societies, paternalism is widely thought to be wrong in relation to adults, but morally permissible or even required when applied to children. Yet our justification for treating and regarding children paternalistically is more complex than it may at first appear. I construct a principle, the “Child Paternalism Principle,” that states conditions under which we are justified in subjecting children to paternalism. To be justified, paternalism must be appropriately indexed to a child’s actual developmental stage and level of competence. Furthermore, paternalism is not justified when it fails to respect the dignity of a child. The Child Paternalism Principle takes the burgeoning fields of developmental-, cognitive- and neuro-psychology seriously, providing an ethical framework through which to filter scientific evidence. In Chapter I, I explicate a child-centric conception of paternalism, according to which to treat a person paternalistically is to treat her *as if she is a child*. An elaboration of the conception reveals important limits on the paternalistic treatment of others, even if they are children. A number of thinkers express skepticism about the appropriateness of appealing to a notion of competence when attempting to justify paternalism towards children. In Chapter II, I defend the use of a notion of competence

against these skeptics. Chapter III describes what follows from recognizing that, like adults, children are persons. As persons, children are the bearers of dignity, and are therefore the proper subjects of respect. Acts of paternalism that degrade, humiliate, or express contempt are not compatible with respect for children's dignity. Chapter IV describes and defends the Child Paternalism Principle, and explains conditions under which it is permissible to apply in particular cases our general presumption that children are the proper subjects of paternalism. Chapter V applies the Child Paternalism Principle to the question of whether adolescents should be made to inform their parents of their abortion decisions. I argue that adolescents should not have to inform their parents, but neither should they be left entirely alone with their decision. Assuming an idealized setting not characterized by ideologically-driven agendas, there should be state-provided services that scaffold adolescents' still-developing decision-making processes.

The dissertation of Ingrid Steinberg is approved

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2015

For Aaron and Jonathan

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INTRODUCTION

A commitment to individual liberties is the hallmark of liberal societies. Interfering with individuals' self-determining decisions is considered morally justified, if it at all, only in extreme circumstances. Paternalism tends to be frowned upon. When it is directed at children, however, paternalism is normally regarded as morally justified, or even morally required.

Given their immaturity, our justification for treating and regarding children paternalistically can seem obvious. Yet, although I think that in many cases paternalism towards children is indeed morally justified, I believe that our justification is neither obvious nor straightforward. In this dissertation I offer a justification of paternalism that captures the complexity of our moral obligations towards children, and that can also function to guide our practical deliberations about when and whether to treat particular children, in particular circumstances, paternalistically.

While there has been a great deal of discussion in the philosophical and legal literature about ethical issues relating to paternalism among adults, there has been relatively little attention paid to the question of whether, and under what circumstances, paternalism towards children is morally justified. Especially considering that the term "paternalism" is lexically derived from the father-child relation, a dearth of attention to ethical questions about paternalism towards children has impoverished more general discussions about paternalism.

I believe that, embedded in our everyday conception of paternalism, is the idea that to treat someone paternalistically is to treat her *as if she is a child*. In Chapter I, I develop and defend this "Child-Centric Conception" of paternalism. In the course of so doing, I challenge a

widespread assumption that some or other form of adult authority over children is always justified.

I contrast the Child-Centric Conception of paternalism with a traditional conception of paternalism, the Neo-Millian Conception, according to which, in order for an act or attitude to be paternalistic, it must meet three conditions. These are, first, that the act or attitude must be motivated by the interests of the subject. Second, that the act or attitude must contravene the will of the subject. And third, that the act or attitude must limit the freedom or autonomy of the subject.

Using a series of cases, I argue that, while the three conditions of the Neo-Millian Conception feature in paradigmatic cases of paternalism, they are not constitutive of paternalism. That is, an act or attitude can still be paternalistic when it is not motivated by the interests of the subject, when it does not contravene the will of the subject, and when it does not limit the freedom or autonomy of the subject.

In elaborating the Child-Centric Conception of paternalism, I delineate an account of the circumstances in which an act or attitude of paternalism is *unjustified*. According to the Child-Centric Conception of paternalism, it is unjustified to treat or regard a person paternalistically when:

- (A) *she is not a child and she is not childlike in relevant respects, or*
- (B) *she is a child, but the act or attitude is appropriate only in relation to a less mature child, and/or to a child at an earlier developmental stage, or*
- (C) *she is a child, but the particular act or attitude nevertheless infringes on her legitimate domain of autonomous function.*

In Chapter III I add a further condition:

- (D) *the particular act or attitude fails to respect the dignity of the person.*

(B), (C), and (D) raise important considerations that should impact deliberations about when and whether a particular paternalistic act or attitude is justified. (B), the idea that paternalism is unjustified when it treats a child as if she is younger or less mature than she is, means that if paternalism is to be justified, it must be indexed appropriately to a child's developmental stage and actual level of competence. (C), the idea that even a child can have legitimate domains of autonomous function that should not be infringed upon, enjoins us to acknowledge that in some circumstances even a child may not be the proper subject of any form of paternalism. (D) emphasizes that acts of paternalism are not justified when they contravene the dignity of the subject, whether she be a child or an adult.

Chapter II elaborates on the requirement that paternalism must be indexed to a child's developmental stage and actual level of competence. It seems obvious that a central reason why we are justified in treating children paternalistically has to do with facts about children's developmental immaturity. Specifically, it seems clear that paternalism towards children is justified, at least in part, by children's underdeveloped ability to govern themselves. The fact that children lack self-governing competencies seems necessary to justify not only particular instances of paternalism towards children, but also our background presumption that, in general, children are the proper subjects of paternalism.

If facts about children's incompetence compared to adults are necessary to justify paternalism towards children, then any plausible justification must acknowledge and utilize the latest relevant findings in the scientific literature. In recent years, there have been considerable advances in the science relating to child development, particularly in relation to children's capacities for judgment and decision-making at different ages and developmental stages. These

advances have taken place in the fields of cognitive and developmental psychology, and also in the field of neuroscience.

Yet in the relatively small philosophical literature on children in general, and on questions of adult authority over children in particular, the relevant scientific evidence has not been attended to. In some cases the scientific evidence about child development and competence has been explicitly rejected as a tool for helping to answer ethical questions about children's treatment. In theorizing about children's rights and about adults' obligations towards children, some scholars have expressed considerable skepticism about relying on a notion of children's relative incompetence. Implicitly or explicitly, these "doubters" have also tended to deny that the science that describes children's relative incompetence is relevant to theorizing about the justification of paternalism towards children. In Chapter II I describe and respond to a number of arguments that criticize the use of a notion of competence for theorizing about the justification of paternalism towards children.

Some of the doubters have voiced practical objections to the use of a notion of competence: they believe that competence-talk as a vehicle for deliberating about paternalism towards children ultimately leads to poor outcomes for children. Others have more theoretical objections to the use of a notion of competence for deliberating about paternalism towards children.

I begin Chapter II by describing the historical backdrop against which the conversation about children's competence unfolds. In the United States the last couple of centuries has witnessed considerable ambivalence in public opinion and in the law with respect to the moral status of children. On the one hand, children have become an increasingly restricted and protected group. On the other hand, in the not-too-distant past, legislation sought to hold children

to adult levels of responsibility for criminal offenses. I believe that ambivalence about children's moral (and consequently, legal) status is reflected in the attitudes of some of the critics.

I then detail some of the objections that have been raised to the use of a notion of competence in constructing an account of the moral justification of paternalism towards children. I describe and evaluate some of the alternatives to the use of a notion of competence that the doubters have put forward. And I explain why I find all of the alternatives unsatisfying.

I conclude Chapter II by responding to the objections of those who doubt the usefulness of a notion of competence for justifying paternalism. In response to those with practical worries about the use of a notion of competence, I argue that there is nothing intrinsically harmful about using competence considerations in deliberating about how to treat children. Harmful outcomes have arisen, historically, from *the way* in which competence has been invoked, rather than from its use per se. Responding to those with concerns about whether we can have adequate knowledge about differences in competence between older children and adults, I argue that a close look at the science reveals that we have more nuanced knowledge about children's competence relative to adults than the critics acknowledge. I suggest that many of the doubters' concerns (both theoretical and practical) derive from an assumption that either children's relative incompetence must be the *only* consideration underlying our justification of paternalism towards children, or we must reject the use of the notion of competence altogether when we theorize about the justification of paternalism towards children.

I suggest a more balanced approach. I agree with the doubters that competence considerations, taken on their own, will not be sufficient to ground a justification of paternalism towards children. However, I argue that considerations of competence will be a necessary

component of any plausible justification of paternalism towards children, alongside other normative and empirical considerations.

Chapter III elaborates on an obvious but often overlooked fact about children: namely, that they are persons. The liberal conception of personhood includes an understanding that persons are the bearers of dignity. In virtue of their dignity, persons are the proper subjects of respect. Personhood has traditionally been associated with rational agency. Overriding an adult's rational agency is, other things equal, an assault on her dignity, and a sign of disrespect. Children, who may lack full rational agency, present a challenge to this picture of personhood. If respect for adults requires honoring their rational agency, and hence, refraining from paternalism in many circumstances, we may ask: what does respect for children who lack full rational agency require? And what implications for their treatment and regard follow from the claim that children are the bearers of dignity?

I begin Chapter III with an exploration of dignity in our inter-personal relations. I suggest that, in order to properly honor another person's dignity, one requires considerable knowledge about her personal characteristics and about her social and cultural circumstances. I then examine the way in which respect for a person's dignity contrasts with degradation, humiliation, and the expression of contempt. I use a discussion of aspects of Shakespeare's *Merchant of Venice* to illustrate how one's knowledge about a person, combined with the inter-personal nature of one's relationship with her, impacts whether one's paternalistic treatment of that person can properly be characterized as respectful.

A central feature of the liberal understanding of what respect for persons requires is the idea that adults have a right to make self-determining decisions in a broad range of circumstances. Yet most children lack the high levels of autonomy that characterize adults'

decision-making capacities. Because of children's relative incompetence with respect to judgment and decision-making, allowing a child to make her own self-determining decisions is sometimes more a sign of neglect than of respect.

Children lack the full autonomy characteristic of adults. However, I argue that they enjoy *partial* autonomy from a young age. That is, within certain domains of function, children are capable of making responsible and reasonable decisions. The domains in which children are able to function autonomously gradually widen as children mature, ultimately culminating in a normal adults' capacity to successfully navigate self-determining decisions within her community and cultural setting.

So, although children lack full (adult-level) autonomy, from a very young age they enjoy partial autonomy: that is, the ability to make successful self-determining decisions within certain limited domains of function. I defend the view that autonomy, even in its partial form, has both instrumental and non-instrumental value to human beings, including children. In addition, from infancy children possess human agency. I suggest that this human agency also has non-instrumental as well as instrumental value.

I argue that part of what is required in order to respect the dignity of a child is that we take into account the value of the partial autonomy and the human agency that the child already possesses, and not merely the value of the full autonomy that she may one day come to have. Sometimes honoring partial autonomy and human agency may require refraining from paternalistic intervention, even if one reasonably predicts that the intervention will secure future advantages for the child. In this way, the requirement that we honor children's partial autonomy and their agency places substantial limits on adults' moral entitlement to treat children paternalistically.

The property of dignity is a feature of persons that requires that persons not be degraded, humiliated, or treated with contempt. In this sense, dignity grounds a moral requirement on oneself and others that one be respected. Honoring the dignity of a child is not exhausted by respecting her partial autonomy and agency. Honoring dignity also requires giving due weight and consideration to the social and communal impact to the child that may predictably ensue as a result of either embarking on paternalistic action, or refraining from it. If your respect for a child's partial autonomy leads you to grant her certain decision-making freedoms, but a likely outcome of granting such freedoms is that the child will suffer humiliation or degradation in the wider community, then it may disrespect her dignity to permit her those particular freedoms.

In Chapter III I emphasize that respect for dignity requires that the non-instrumental value of children's partial autonomy and agency should be given significant weight in our deliberations about whether and when it is justified to treat children paternalistically. At the same time, I maintain that respect for dignity is not exhausted by respect for agency and autonomy. Respect for dignity also requires an awareness of the potential social and communal consequences of a child's being granted certain freedoms. In some cases, the need to guard against these projected consequences may trump the value of allowing children to express their agency and autonomy.

Chapter IV brings together the empirical considerations about what children are like that I introduce in Chapter II, and the normative considerations to do with children's personhood and dignity that I develop in Chapter III. I delineate and defend five theses, the "Child Paternalism Theses" (or "CP Theses"). The CP Theses are condensed into a single principle, which I call the "Child Paternalism Principle" (or "CP Principle").

The CP Principle reads as follows:

Since children are persons who are significantly less competent at making personally and socially responsible self-determining life choices than adults are, and since they are at a critical stage of developing their capacity for self-determination, it is morally justified for adults to adopt a presumption that children are the proper subjects of paternalistic treatment and regard.

According to the CP Principle, adults are justified in adopting a presumption that children are the proper subjects of paternalism. The empirical component of the CP Principle is three-fold. First, children are developmentally immature and vulnerable. Second, children are relatively incompetent decision-makers compared with adults. Third, children are persons. Children's personhood is a fact, with normative implications. Because they are persons, children are bearers of dignity. As such, adults have an obligation to respect that dignity, just as they are obligated to respect the dignity of all other persons.

Adults are justified in adopting the CP Presumption because children are persons who have certain distinctive characteristics, including relative incompetence and developmental vulnerability. These features of what children are like, together with their personhood, generate adults' obligations to protect and nurture children, and also to respect their dignity. These obligations in turn form the basis of adults' justification for holding the general presumption that children are the proper subjects of paternalism. The obligations simultaneously function as constraints on the ways in which adults are entitled to apply the presumption in particular cases.

Only when a particular child is in fact developmentally immature, or when she is in fact relatively incompetent, is it appropriate to apply the presumption that children are the proper subjects of paternalism, to her. For, packed into the notion of presumption is the idea that any particular application of a presumption may be rebutted if the grounds for holding the presumption in the first place are not instantiated in the case at hand.

I argue that, when applied carefully to deliberations about paternalism towards children, the CP Principle will frequently justify some sorts of paternalistic intervention or regard, but not others. However, at other times, it will become evident that *no* form of paternalism is warranted in relation to a particular child in a particular set of circumstances. In this way, the CP Principle functions to justify certain forms of paternalism towards children in some cases, while at the same time helping us to identify those cases in which no form of paternalism towards children is justified.

The CP Principle is offered as an action-guiding tool that can help to guide deliberation about when and whether to treat or regard children paternalistically. Many of the examples given in Chapters I-IV in defense of various aspects of the principle focus on close interpersonal relationships, particularly those between parents and their children. However, the CP Principle is not only intended as a guide for deliberating about how to treat or regard one's own children or other children in close relationships with oneself. It can also serve as a guide to be used by policy-makers, legislators and judges when deliberating about potentially paternalistic laws and policies affecting children.

The application of the CP Principle presented in Chapter V is intended to illustrate how the CP Principle can be applied to policy and legally-oriented deliberations about the treatment of children. Chapter V takes up a controversy that arose as a result of two apparently conflicting amicus briefs submitted by the American Psychological Association (APA) to the Supreme Court. The first brief was submitted in 1989 in relation to a case concerning whether adolescents should be made to inform their parents of their abortion decision. In that brief the APA argued that adolescents have the cognitive sophistication to make their own abortion decisions. Therefore, they should not be required to inform their parents of their decision. The second brief

concerned a 2005 case pertaining to whether adolescents should be subject to the death penalty. The APA argued that adolescents' immaturity supports a ban on the death penalty for children under the age of 18. Not surprisingly, the APA was accused of flip-flopping in its recommendations.

Representatives of the APA responded that the science of adolescent development actually supports the two briefs, and can explain why the briefs appear to conflict. The science shows that adolescents reach adult levels of sophistication with respect to logical reasoning and information processing much earlier than they reach full maturity in other ways. Adolescents remain psychosocially immature well into the late teens. In addition, capacities for self-regulation only reach full development by the early twenties. Psychosocial immaturity leads adolescents to make poor and often highly risky decisions in circumstances characterized by high arousal and peer influence. In certain environmental contexts, adolescents' psychosocial immaturity derails their cognitive sophistication.

The APA representatives argued that the contexts in which typical abortion decisions are made are normally conducive to adult-level decision-making among older adolescents. They claimed, by contrast, that the contexts typically associated with violent crimes are likely to involve high arousal and peer influence. Psychosocial immaturity is significantly more likely to overwhelm adolescents' decision-making abilities in violent criminal contexts than it is in the context of deliberating about whether to have an abortion.

In Chapter V I suggest that the APA's defense of their alleged flip-flop does not support the core difference that they claim lies between the two cases. In particular, I argue that the science alone cannot support their argument that older adolescents should not have to inform their parents about their abortion decisions. I maintain that one can mount a better argument

against requiring adolescents to inform their parents of their abortion decisions if one makes use of an ethical framework like the CP Principle.

The CP Principle does not dismiss the science about adolescent development. It included the science alongside other, normative considerations. In particular, the CP Principle invokes adults' obligation to nurture and protect children, together with our obligation to treat and regard children with the respect that their personhood demands. These combined considerations support a nuanced understanding of how we should think about adolescents embarking on an abortion decision. On the one hand, adolescents are sophisticated reasoners. On the other hand, unless they find themselves within appropriately supportive contexts, adolescents' psychosocial immaturity may lead to more impulsive and risky decisions than decisions that would be made by similarly placed adults. I argue that respect for children's dignity requires us *not* to restrict adolescents' freedoms to make their own abortion decisions. Respect also requires that we do not force these adolescents to inform their parents. Rather, respect for adolescents' dignity requires providing appropriate scaffolding for their decision-processes, such as free counseling and access to transportation and financial assistance. Appropriate scaffolding can enable adolescents to successfully make their own abortion decisions.

The CP Principle gives important guidance about how to make use of the burgeoning science about child and adolescent decision-making and judgment in deliberating about children's treatment. On the one hand, as I argue in Chapter II, it is a mistake to discount or reject the scientific evidence. On the other hand, the science should not be invoked in the absence of a child-centered ethical framework. Such a framework must recognize children's personhood and the special obligations that adults have towards children given their personhood and given the distinctive characteristics that children share. Without a child-centered ethical

framework, adult decision-makers risk engaging in simplistic deliberations, with consequent outcomes that fail to reflect the complexity of our moral obligations to children.

In this dissertation I have put forward the CP Principle as a candidate child-centered ethical framework. It provides a theoretical justification of our general presumption that children are the proper subjects of paternalism. At the same time, the CP Principle is intended to function as a deliberative tool for those who must make decisions about how to treat and regard children in particular circumstances. If carefully and sincerely applied, the CP Principle promises to enrich deliberation about paternalism towards children in such a way that, ultimately, more just outcomes will ensue.

CHAPTER I

A Child-Centric Conception of Paternalism

Introduction

Individual liberties are a cornerstone of Western liberal democracies. Following John Stuart Mill, it is now widely accepted that, in a great many circumstances, individuals should be free to make their own decisions. Paternalistic intervention is considered warranted only when self-determining decisions pose serious and direct threats of harm to others, or (in some cases) when decisions threaten extremely severe, possibly even life-threatening outcomes for the decision-maker herself.¹

Yet the individual liberties that many in our society so fiercely protect rarely extend to children and adolescents. (Unless further specified, I shall refer to both adolescents and younger children simply as “children” from here on.) Both in public domains and in private familial contexts, children are routinely subject to forms of adult authority that would be deemed serious infringements of personal liberty if applied to adults.² Legally, there are age limits on driving, voting, and on purchasing alcohol and cigarettes. Children’s authority to make their own medical

¹ John Stuart Mill, *On Liberty*, (London: Penguin Books, 1974). First published in 1879.

² Of course, not everyone adopts the strong anti-paternalist stance that I have characterized here. Some philosophers, for example, advocate structured forms of paternalism aimed at adults. See, for example Sigal Ben Porath, “Paternalism, (School) Choice, and Opportunity,” in *Paternalism: Theory and Practice*, ed. Christian Coons and Michael Weber (Cambridge: Cambridge University Press, 2013): 247-265. Still others advocate forms of paternalism towards adults that are, they think, less objectionable because they do not involve coercion in any direct sense. See Cass Sunstein and Richard Thaler “Libertarian Paternalism is Not an Oxymoron” *University of Chicago Law Review*, 70 (2003): 1159-1202. Yet I doubt that even those who are less inclined to adopt strong anti-paternalist views will deny that there remains an extensive range of circumstances in which paternalism towards adults is wrong, in which paternalism towards children is appropriate and perhaps even morally required. It is this distinction between what we take to be instances of paternalism that are justified when applied to children, yet unjustified when applied to adults, that I am trying to isolate here.

decisions is circumscribed. They have limited legal opportunities to engage in the labor force. Schooling is compulsory. Children are not allowed to be sexually active. These legal differences between children and adults find many counterparts in attitudes and behaviors in the family domain. For example, parents and other adult caregivers may enforce bedtimes or curfews. They may forbid a child to go out unaccompanied. They may insist that a child do her homework, or take a fever-lowering medication.

Adult authority over children is so pervasive in our society that we frequently lose sight of the fact that children have their own – often legitimate – views about what should happen to them. Deeply entrenched assumptions about the legitimacy of adult authority over children often play out in legal disputes about children’s medical treatment or educational opportunities, which tend to pit parents against the state, with relatively little attention paid to the views of the children affected. In this chapter I aim to challenge the pervasive assumption that some or other form of adult authority over children’s decisions is always justified.

Paternalism and Adult Authority Over Children

It is natural to think about restrictions on children’s liberties in terms of a conception of paternalism. The paternalistic treatment of unimpaired adults is sometimes described pejoratively as treating adults “as if they were children.”³ As Sigal Ben-Porath puts it: “Paternalism is considered an affront to the earned status of adulthood because it represents an assumption that the recipient of paternalism, the patronized agent, is viewed as less capable, less rational, and less autonomous than the patronizing party.”⁴ This description might lead us to the (erroneous)

³ For discussion of this practice, see Joel Feinberg, “The Child’s Right to an Open Future,” in *Whose Child?: Children’s Rights, Parental Authority, And State Power*, ed. William Aiken and Hugh LaFollette (Totowa, N.J.: Littlefield Adams, 1980): 141-142.

⁴ Ben Porath, “Paternalism, (School) Choice, and Opportunity.”

assumption that treating children paternalistically can never be wrong: for what could be wrong with treating children as if they are children?

And indeed, unlike racism and sexism, which are widely condemned, there seems little public inclination to question whether prevailing paternalistic practices towards children are, on the whole, morally justified.⁵ There is, of course, considerable public controversy about what *forms* particular paternalistic interventions may justifiably take. For example, spanking children remains a widespread practice in the United States, although psychologists tend to oppose it -- arguing that spanking does not work as an effective disciplinary tool. Proponents of spanking dispute the psychologists' claims -- adhering to the age-old maxim "spare the rod and spoil the child." Such discussions seldom address the question of whether or not spanking is morally acceptable, *irrespective* of outcomes for development or discipline.⁶

I want to break away from the widespread assumption that particular acts of paternalism towards children are to be evaluated solely on the basis of how well they allegedly "work." Instead, I leave open the possibility that sometimes a given exercise of paternalism towards a child is morally wrong, even though it may "work" to achieve a desired end, and even though it may not harm (and may even benefit) the development and future prospects of the child.

In order to identify which exercises of adult authority over children are and are not morally justified, it will be helpful to employ the notion of paternalism. We may then ask: Under what circumstances is it morally permissible to treat or regard children paternalistically? The

⁵ For a contribution to the philosophical literature on the subject, see Tamar Schapiro, "What Is a Child?" *Ethics* 109 (1999): 715–738; and "Childhood and Personhood," *Arizona Law Review* 45 (2003): 575–594. Schapiro does not question whether paternalism towards children is justified, as a whole. She does, however, attempt to articulate the grounds for the justification.

⁶ For a recent example of an outcomes-focused critique of spanking, see M. J. MacKenzie et al., "Spanking and Child Externalizing Behavior Across the First 9 Years of Life: Evidence for Transactional Processes Involving Cumulative Risk," *Journal of Youth and Adolescence* (March 2014).

question is particularly salient in circumstances in which similar exercises of paternalism towards adults are not morally permissible.

In using the notion of paternalism, however, we immediately encounter a problem. As I shall suggest, our traditional conception of paternalism proves too narrow to helpfully answer the full range of questions about whether and when adult authority over children is morally justified. To circumvent this problem, in this chapter I defend a specific conception of paternalism, the “child-centric conception.” This conception of paternalism has not been explicitly recognized in the philosophical literature. In comparing the child-centric conception with a traditional conception of paternalism, the “neo-Millian conception,” I argue that the child-centric conception does the better job of capturing our ordinary understanding of the concept of paternalism. Furthermore, I suggest that, unlike the neo-Millian conception, the child-centric conception of paternalism can help us to deliberate about the scope and limits of adults’ morally justified authority over children.

The Child-Centric Conception of Paternalism

According to the child-centric conception of paternalism, *to treat a person paternalistically is to treat her as if she is a child*. One objection to this characterization - at least, if we assume that paternalism towards adults is wrong in many circumstances in which it is justified in relation to children - may be that it is too broad. Sometimes we seem to treat an adult as if she is a child in ways that do not seem to be objectionable in themselves. For example, one might give a child-sized portion of food to an adult.⁷ However, as I shall use the phrase, if one merely happens to give a child-sized portion of food to an adult, this is not to treat the adult “as if

⁷ I am grateful to Seana Shiffrin for pointing out this objection.

she is a child.” It is merely to give her a small portion, which coincidentally is the size of portions typically given to children. But if one is serving food to a group of young children, and one intentionally (or even absent-mindedly) gives the same small portion to their adult caregiver or older sibling while giving full portions to other adults present – then this is evidence that one is treating the caregiver or sibling like a child, and it is, other things equal, unjustified. So, on my understanding “treating person A as if she is a child” expresses an implicit or explicit commitment to the idea that such treatment is appropriate due to child-like features of A. Where in fact A does not have the relevant child-like features, such treatment is normally not morally justified.

The child-centric conception of paternalism has tended to be overlooked as a source of insight into our characterization of paternalism. The cover of a recent collection of articles on paternalism features a photograph of a pair of adult hands guiding a child’s hands at a potter’s wheel.⁸ Yet while a couple of the articles in the collection touch on paternalism as it applies to children or youth, the articles base their characterizations of paternalism on relationships among adults.⁹

Given the lexical origins of the term “paternalism,” it is somewhat surprising that the child-centric conception of paternalism has been overlooked. Dictionary definitions date the original use of the term “paternalism” to the 1880’s, a decade after John Stuart Mill published *On Liberty*, a work that has deeply influenced our conception of paternalism. These dictionary definitions highlight the fact that, in ordinary usage, the term “paternalism” draws an analogy

⁸ Coons and Weber, *Paternalism*.

⁹ Gerald Dworkin, for example, puts forward eight possible definitions of paternalism. All take the subject of paternalism to be an abstract “person” or “Y”. There is no mention of a distinction between childhood and adulthood. See “Defining Paternalism” in Coons and Weber, *Paternalism*, 25-38 at 28-31.

with the fatherly treatment of children. For example, one leading dictionary defines paternalism as:

The system, principle, or practice of managing or governing individuals, businesses, nations, etc., in the manner of a father dealing benevolently and often intrusively with his children.¹⁰

And another says that paternalism is:

1. The principle and practice of paternal administration; government as by a father; the claim or attempt to supply the needs or to regulate the life of a nation or community in the same way as a father does those of his children.¹¹
2. The principle of acting in a way like that of a father towards his children.¹²

The child-centric conception of paternalism aligns itself with the above dictionary definitions in insisting that paternalism be understood in terms of the fatherly (or, rather, parent-like) treatment of children.¹³

At first blush, the child-centric conception of paternalism may seem to support the widespread assumption that we are justified in treating children paternalistically in most circumstances in which the paternalistic treatment of adults is wrong. Indeed, the conception may even appear to entail the conclusion that paternalism towards children is *always* justified. For, what could be wrong with treating a child as if she is a child? Yet I aim to show that there

¹⁰ *Random House Unabridged Dictionary*, 2006.

¹¹ This and the preceding definition draw attention to a frequent, though not exclusive, use of “paternalism” to describe practices of government.

¹² *The Compact Edition of the Oxford English Dictionary* (Oxford: Oxford University Press, 1971).

¹³ It is, of course, significant that the term “paternalism” is gendered. “Fatherly treatment” is historically associated with highly authoritarian patriarchal structures. So the term “paternalism” can invoke the image of a highly authoritarian style of parenting. In this chapter I limit myself to considering paternalism as a “parent-like” treatment of children – remaining neutral about the extremes of authority that male heads of households have historically embodied.

are many sorts of circumstances in which paternalism towards children is *unjustified*. With this end in mind, I now want to explore how unjustified paternalism towards children can be accounted for given a child-centric conception of paternalism.

Unjustified Paternalism and the Child-Centric Conception

If one holds a child-centric conception of paternalism, one might be tempted to characterize instances of unjustified paternalism as follows:

An act or attitude is an instance of unjustified paternalism if it treats an adult as if she is a child.

This characterization requires considerable refinement. First, we should add that sometimes we are justified in treating an adult “as if she is a child” because we (correctly) regard that adult as relevantly “like a child” in a given circumstance. Due to some or other psychological incapacity, a particular adult may be temporarily or permanently incapable of making a reasoned decision about her own interests; and so we step in. So an initial revision reads as follows:

An act or attitude is an instance of unjustified paternalism if it treats a person as if she is child, when she is not a child and she is not childlike in relevant respects.

A further amendment is needed to account for the fact that at least some instances of paternalism directed at children are morally unacceptable. Some unjustified instances of paternalism result from treating older children as if they are younger or less mature than in fact they are. As Joel Feinberg puts the point:

[T]here is a series of stages in a child’s growth between total helplessness and incapacity at the beginning and near self-sufficiency at the threshold of adulthood. Blameable “paternalism” must consist in treating a child at a given stage as if he were at some earlier, less developed, stage.¹⁴

¹⁴ Feinberg, “The Child’s Right to an Open Future,” 141.

So, we may try this:

An act or attitude is an instance of unjustified paternalism if it treats a person as if she is child, if:

(a) she is not a child and she is not childlike in relevant respects, or

(b) she is a child, but the act or attitude is appropriate only in relation to a less mature child, and/or to a child at an earlier developmental stage.

This last characterization allows for a teenager to legitimately complain that an adult is treating her “like a child” – when the treatment is appropriate only in relation to a much younger child.

Yet (b) does not complete the picture. There are times when an act of paternalism towards a child is wrong for reasons other than that it treats a child as if she is younger or less mature than in fact she is. For example, it may be appropriate for an adult to maintain some oversight over which pajamas a toddler wears on a cold winter’s night. Yet the parent oversteps the limits of her legitimate authority if she insists that the toddler wear the red pajamas rather than the yellow ones, supposing that the yellow pajamas are just as warm, safe, and so on. So, in a particular set of circumstances, even if a child’s developmental stage warrants parental authority, that authority has limits. Recognizing that justified parental authority has limits and that these limits fall substantially short of abuse and neglect, suggests the following amended account of unjustified instances of paternalism:

An act or attitude is an instance of unjustified paternalism if it treats a person as if she is child, when:

(a) she is not a child and she is not childlike in relevant respects, or

(b) she is a child, but the act or attitude is appropriate only in relation to a less mature child, and/or to a child at an earlier developmental stage, or

(c) she is a child, but the particular act or attitude nevertheless infringes on her legitimate domain of autonomous function.

There are at least three elements of circularity in the above characterization. First, I have not specified what would constitute an adult being childlike “in relevant respects.” Second, I

have not indicated what makes an act or attitude appropriate with respect to one level of maturity or development, but not to another. Third, if an act or attitude infringes on a legitimate domain of function, then it is surely unjustified. For my present purposes, these elements of circularity are not a shortcoming. The characterization is not intended to provide an exhaustive definition of paternalism. Rather, it shines a light on the considerations that must feature in any comprehensive characterization of paternalism that is broad enough to distinguish between justified and unjustified instances of paternalism towards children.¹⁵ The child-centric conception of paternalism is designed to function as a starting point for highlighting aspects of paternalism that are all too seldom noticed.

The Neo-Millian Conception of Paternalism

A rather different conception of paternalism has traditionally permeated philosophical discussions of the subject. I shall call this traditional conception the “neo-Millian conception of paternalism,” because it stems from John Stuart Mill’s well-known “harm principle”:

[The] principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.¹⁶

Readers today are likely to reject Mill’s restriction of the harm principle to “member[s] of a civilized community.” However, Mill was correct to insist that the principle does not apply to all human beings. It does not apply to children, or to adults with certain psychological

¹⁵ The remaining chapters of this dissertation are devoted to developing (Chapters II-IV) and applying (Chapter V) such a characterization.

¹⁶ Mill, *On Liberty*, chapter I, paragraph 9, 68.

impairments. Mill himself was quite clear that his principle does not apply to children. As he put it:

It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others must be protected against their own actions as well as against external injury.¹⁷

The neo-Millian conception of paternalism holds that three requirements must be met in order for an act to be paternalistic. First, the act must be undertaken with a particular purpose in mind; namely, to benefit or protect the person interfered with. (Henceforth, I shall refer to this purpose as “serving the interests” of the subject). Second, the interference must be against the will of the person subject to the exercise of power. Third, the interference must in some way limit that person’s freedom or autonomy.¹⁸

Gerald Dworkin provides a typical statement of the neo-Millian conception of paternalism:

Paternalism is the interference of a state or an individual with another person, against their will, and justified by a claim that the person interfered with will be better off or protected from harm.¹⁹

¹⁷ Ibid., chapter I, paragraph 10, 69.

¹⁸ All of these aspects of the neo-Millian view have been convincingly challenged by Seana Valentine Shiffrin, “Paternalism, Unconscionability Doctrine, and Accommodation,” *Philosophy & Public Affairs* 29 (2000): 205–250. My chapter provides an alternative angle, and distinct reasons, for challenging the neo-Millian view. My approach differs from Shiffrin’s in that it leaves room for there being justified instances of paternalism. According to Shiffrin’s characterization, paternalism is always wrong. As such, she is committed to the counter-intuitive claim that justified exercises of parental authority are not instances of paternalism. Shiffrin discusses a way in which her account may be interpreted by those like myself who “insist that our treatment of children is paternalist” in footnote 24, p. 219 of her paper.

¹⁹ Gerald Dworkin, “Paternalism,” *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Fall 2008 Edition), <http://plato.stanford.edu/archives/fall2008/entries/paternalism/>.

Dworkin adds that paternalistic interference involves “some kind of limitation on the freedom or autonomy of some agent.”

The way in which the neo-Millian conception of paternalism draws on Mill’s harm principle is obvious. Both Mill’s principle and the neo-Millian conception of paternalism address the question: under what circumstances is it justified to constrain the freedom or autonomy of another person? The question is supposed to arise when the interference is “against the will” of the person interfered with. Mill presents and rejects the idea that improving or maintaining a person’s welfare, interests, or good can justify constraining her “liberty of action.”²⁰ As with the child-centric conception, the neo-Millian conception of paternalism is compatible with there being both justified and unjustified instances of paternalism.

In drawing on Mill’s harm principle, the neo-Millians have tended to assume that paternalism necessarily involves actively interfering with or exercising power over others. Given this assumption, it is natural to think of paternalism in terms of acts. However, I think that it is obvious that the concept of paternalism covers more than just acts. There are also paternalistic attitudes. And there are paternalistic institutional and social conditions, and paternalistic customs (henceforth “paternalistic conditions”). Although paternalistic attitudes and paternalistic conditions are commonly associated with acts, in order to count as paternalist they do not have to be, or involve, acts. My objections to the neo-Millian view will be formulated in terms that allow for paternalism to extend beyond acts.²¹

²⁰ Mill himself (as far as I know) did not use the term “paternalism” in relation to his principle. However, his principle is often understood as representing a strong anti-paternalist stance. The stance is anti-paternalistic because Mill denies that improving or maintaining the welfare, interest, or good of a person is sufficient justification for interfering with the liberty of that person.

²¹ Noticing that attitudes as well as acts can be paternalistic reveals a double way in which the moral status of children differs from that of adults. Children are justifiably subject to more broad-ranging restrictions on their liberty than are adults. However, adults are restricted in the extent to which they can

Using the child-centric view of paternalism as a guide, I will suggest that it is a mistake to characterize paternalism as being necessarily subject to *any* of the three requirements that the neo-Millian view puts forward. I will show that there are instances of paternalism that:

- 1) are not motivated in any way by the interests of the subjects of paternalism,
- 2) do not run counter to the wills of the subjects of paternalism; and
- 3) do not limit the freedom or autonomy of the subjects of paternalism.

In evaluating the neo-Millian conception of paternalism, I rely primarily on intuitions about whether an act or attitude is *justified* on paternalistic grounds. There are paternalistic acts or attitudes that are not justified. So, acts or attitudes that are justified on paternalistic grounds will form a subset of paternalistic acts. Establishing that an act or attitude is justified on paternalistic grounds shows, at the same time, that the act or attitude is an instance of paternalism.

To say that there are instances of paternalism that do not meet the three neo-Millian requirements is not to deny that the three requirements are in fact met in many standard, paradigmatic cases of paternalism. But it matters that the requirements are not constitutive of paternalism.²² Noticing that the three requirements are not constitutive of paternalism allows us to identify paternalistic acts, attitudes, and conditions that are not always recognized as such.

justifiably regard children as culpable for their actions. It makes sense that the limitation on morally condemning children goes hand in hand with permission to restrict children's behavior. As adults, if we cannot hold our children fully responsible for their acts, it seems right that we can try to prevent them from performing wrong acts in the first place.

²² Some other contemporary accounts of paternalism also acknowledge a broader conception of paternalism. Advocates of libertarian paternalism promote a conception of paternalism that is non-coercive. See Sunstein and Thaler "Libertarian Paternalism is not an Oxymoron." And as already mentioned in footnote 18, Seana Shiffrin has provided influential arguments supporting a broader conception of paternalism. The arguments in this chapter are intended to provide independent support for a broad conception of paternalism.

Recognizing a broader conception of paternalism will in turn facilitate a more nuanced understanding of the scope and limits of morally justified adult authority over children.

It may be objected that in defending the child-centric conception of paternalism I am merely entering into a semantic dispute with the neo-Millians. I think that the dispute is not merely semantic. The neo-Millian conception of paternalism fails to capture important differences between adults and children that are relevant to their moral status. In my view, a consequence of this failure is that the neo-Millian conception can only give limited insight into the circumstances in which it is justified to exercise authority over other persons – including over other adults. In identifying the child-centric conception of paternalism I take myself to be describing a genuine kind. If I am right that the correct description of the kind “paternalism” is represented by the child-centric conception, then it makes sense to expect that employing the child-centric conception will yield the best answers to questions about whether and when the authoritative treatment of others – both children and adults – is justified.

In the following discussion I take up each of the three neo-Millian requirements in turn.

The First Requirement of the Neo-Millian Conception

The first requirement of the neo-Millian conception of paternalism is that the interests of the person who is a subject of paternalism necessarily motivate the agent engaging in paternalistic behavior or holding a paternalistic attitude.

In this section I argue that a paternalistic act or attitude may be morally justified even when the interests of the subject play no role in motivating the act or attitude. I begin by suggesting that, ironically, Mill’s own views about when it is justified to exercise power over others support my rejection of the first requirement. I then introduce some cases designed to further motivate a rejection of the first requirement.

Mill held that if a person engages in activities of which we disapprove, but that threaten no definite damage or definite risk of damage to anyone other than the person herself, it is unjustified to subject the person to either social or legal forms of punishment or censure. Only when "...there is a definite damage, or a definite risk of damage, either to an individual or to the public, [is the case] taken out of the province of liberty and placed in that of morality or law."²³

Mill distinguished between what I shall call "definite" and "indefinite" harms.²⁴ The distinction is not sharply drawn. The idea seems to be that when a person's activities or decisions lead to a violation of a "distinct and assignable obligation to others," an individual poses a definite threat of harm to others. When a person's action poses a definite threat of harm to others, in some circumstances she may lose her right to freedom from public moral censure and/or to legally sanctioned restrictions with respect to that action.²⁵ For example, Mill suggested that we are justified in punishing or curtailing violent behavior that results from drunkenness, but we are not justified in punishing or curtailing drunkenness itself. He understood violent behavior to constitute a definite damage or harm to others, whereas drunkenness itself poses at most an indefinite threat of harm to others. For Mill, the fact that our interference will prevent a person from harming herself, or that it may limit indefinite harms to others, is no justification for overriding or publicly censuring her chosen activities.

Mill is careful to point out that even in cases where a person's actions present a definite harm to others, it may *still* be impermissible to interfere with her freely chosen activities:

²³ Mill, *On Liberty*, chapter IV, paragraph 10, 149.

²⁴ Mill himself speaks in terms of "definite damage" and the failure to honor "distinct and assignable obligations." I speak in terms of definite harms, rather than definite damage – though this may not fit neatly with Mill's own use of "harm."

²⁵ Mill, *On Liberty*, chapter IV, paragraph 10, 148.

[I]t must by no means be supposed, because damage, or probability of damage, to the interests of others, can alone justify the interference of society, that therefore it always does justify such interference.²⁶

Here Mill has in mind competitive activities, such as access to professional status within a limited field. For Mill, one cannot rightly restrict someone's pursuit of a profession, even if successful pursuit would harm others who may thereby be shut out of the professional field. So, according to Mill, in order to justify coercively interfering with an adult's self-determining behavior, it is necessary, but by no means sufficient, to show that the behavior constitutes a definite harm to others.

Now, as we saw earlier, Mill explicitly states that his harm principle does not apply to children. Mill's view in this regard accords with many of our current practices, which tend to presuppose that adults are entitled to circumscribe the activities and decision-making authority of children to prevent them from harming themselves as well as to guard against both definite and indefinite threats of harm to the community. For example, alcohol prohibition is just the sort of restriction that Mill believed should not be imposed on adults.²⁷ However, he would probably have favored preventing children from consuming alcohol. Today, prohibiting alcohol consumption among adolescents tends to be justified in one of two ways.²⁸ First, alcohol is prohibited on the grounds that it is harmful to the very adolescents who consume it.²⁹ Second,

²⁶ Mill, *On Liberty*, chapter V, paragraph 3, 163.

²⁷ Mill, *On Liberty*, Chapter V.

²⁸ Alcohol consumption among children is sometimes restricted by making it illegal for adults to sell alcohol to minors, rather than by making it illegal for minors to possess it. Nevertheless, legislation forbidding the sale of alcohol to minors is designed to prevent the consumption of alcohol by minors. In effect, enforcing the law restricts minors' freedom to consume alcohol.

²⁹ Both immediate and longer term harms may be appealed to. An immediate harm may be that it is associated with higher school dropout rates, or that binge-drinking leads to alcohol poisoning. A longer-term harm that is sometimes appealed to is the fact that the majority of alcoholics began drinking as adolescents.

prohibition is defended on the grounds that alcohol consumption by adolescents commonly leads to antisocial behavior: an appeal to an indefinite harm.

For Mill, because the potential harms caused by drunkenness are indefinite, stopping an adult from drinking alcohol is not justified. However, an equally indefinite threat of harm seems to justify interfering with children. I suspect that Mill would allow that an indefinite threat of harm to others, even in the absence of harm to the child who chooses to consume alcohol, is sufficient to ground the prohibition of alcohol among children -- *because* they are children. If I am right, Mill himself may be taken to support the child-centric conception of paternalism. For if the threat of indefinite harm to others is sufficient to justify paternalism towards children, then one does not need to be motivated by a child's interests in order for one's interference or restriction to be justified on paternalistic grounds.

Let us now consider some cases that further support the view that one does not need to be motivated by a child's interests for one's treatment of a child to be justified on paternalistic grounds:

One evening a father insists that his adolescent daughter stay home to care for a younger sibling rather than go out with her friends. The father has an important business meeting to attend. The daughter has many opportunities to go out with her friends, so there will not be any serious social or emotional consequences if she stays home on this particular evening. In short, suppose that under the circumstances the daughter *should* stay home. I stipulate that the father's sole objective in insisting that his daughter stay home is to ensure that the younger sibling is cared for in his absence, and to allow him to attend his meeting. Even so, the father's intervention seems clearly paternalistic.

I believe that, other things equal, the father is justified in insisting that his daughter stay home. And, I believe that his insistence is justified even if the daughter's interests play *no role at all* in motivating his exercise of authority. Let us stipulate that the daughter would have a more rewarding and stimulating evening if she went out with her friends. Her interests run counter to the demands of her father.

The father is justified in making his daughter stay home *because she is a child*.³⁰ We may suppose that he correctly considers his daughter to have fallen short in her moral reasoning: she is making decisions in an immature way. He steps in, overriding her fledgling moral agency in the interests of arriving at an outcome that is morally acceptable for the whole family. In the case specified, the daughter's own interests do not feature.

Now, it might be objected that the case seems like a case of justified paternalism only because we do not really believe that the father could justifiably make his daughter stay home without having her interests at heart. On this view, if the father is justified in making his daughter stay home on paternalistic grounds, it is only because her decision to go out is morally wrong, and as such, is bad not just for him, but also for herself. We can think of a morally wrong decision as being bad for the person making it in (at least) two ways. It can lead to poor outcomes. Or (it may be maintained), it is intrinsically bad for a person to engage in moral wrongdoing.

³⁰ Obviously, more detail is required. I am supposing that, with respect to the father's act, the daughter is not more mature or at a later developmental stage than is appropriate for this sort of restriction. There will no doubt be cultural differences in intuitions about whether (and at what ages) restricting one's teenage children's movements is acceptable. In the following chapters I argue that we should align our practices (and resulting intuitions) with our most up-to-date knowledge about the competencies and maturity of certain age-groups in certain sorts of circumstances, as well as with our individualized knowledge of the competencies and maturity of the particular children affected.

Let us consider first the claim that the father must implicitly be motivated by the poor outcomes *for his daughter* that would result from her going out against his wishes. Although she would have a nice evening, perhaps the daughter's defiance would negatively impact her character development; or maybe it will seriously harm her relationship with her father. But suppose that the father correctly believes that this one instance of disobedience will not have any lasting negative impact on his daughter's moral development. In fact, suppose that he correctly understands that such an act of rebellion would turn out to be a beneficial exercise of adolescent defiance; a growth experience. And let us further suppose that the father, in deeming his child not fully mature, will not unduly resent her decision – he will consider it “normal” adolescent behavior. As such, the daughter's decision will not significantly sour family relations. Even so, it seems plausible to think that the father is justified in making his daughter stay home.

Now let us consider the claim that it is intrinsically in the daughter's moral interest to do what is right, even if moral-developmental, relational or practical outcomes are not significantly affected by this one moral transgression. Even if it is intrinsically in the daughter's interests that she avoid wrongdoing, I do not see how it could be necessary that the father be motivated by this so-called fact (or even, that he believe it) in order for his treatment of the daughter to be justified on paternalistic grounds. For the idea that one can have an intrinsic interest in moral rectitude is both highly abstract and controversial. There is no reason to suppose that the father must possess such a notion about morality in order to justifiably insist that his daughter stay home at night. Even if the father is a philosopher, his theoretical orientation may lead him to deny that his daughter has an intrinsic interest in moral rectitude. And even if he happens to be wrong – even if his daughter really does have such an interest – surely the father does not need to be motivated by this interest in order to be justified in making his daughter stay home.

I believe that what makes the father justified in insisting that his daughter stay home is an attitude that he (correctly) holds in virtue of the fact that she is still a child. The father considers his daughter to lack full maturity with respect to making moral decisions. And when the stakes are high, and she is in the wrong, he steps in to make the moral decision on her behalf. In this case he steps in to protect the interests, not of the daughter herself, but of others (including himself) who are affected by her actions.

Notice that the paternalistic nature of this sort of “stepping in” intervention is also evident in cases in which the issue of wrongdoing does not arise at all. Consider, for example, the case of a mother who successfully insists that her toddler take a nap at a certain time, in order to attend to the needs of another child, or to her own needs. Suppose that the toddler does not need to take a nap at that particular time, and in fact, would be slightly better served if she were allowed to nap later instead. It seems clear that the mother is justified in making the toddler nap at a time that works for the mother. The justification is paternalistic: the mother would not be justified in making an adult family member, or even an older child, take a nap at a certain time.³¹ In insisting that the toddler naps now, the mother stands in for the toddler in terms of the exercise of moral powers. The toddler is unable to comprehend her place in the moral order. She is not yet fully capable of engaging in reciprocal relationships with others. Given that the toddler is not able to make socially considerate decisions for herself, the mother constrains the toddler’s behavior in order to protect the interests of others.

In the toddler case, the idea that the interests of the child in behaving morally are somehow motivating the parent is completely taken out of play. There is no sense in which, in

³¹ The fact that the mother’s decision is not made with a view to serving the toddler’s interests does not mean that acting on just *any* motivation would be justified. If the mother believed that the toddler would be significantly harmed by having to nap now, her treatment of the toddler would not be justified.

resisting napping, the toddler is doing something wrong. Neither the moral development of the child, nor the child's purported interest in avoiding wrongdoing, could feature in the mother's motivation. By stipulation, other more prosaic interests of the child are not what motivates the mother. And yet, the case seems clearly one in which the mother's action is justified on paternalistic grounds.

I want to emphasize that the sorts of interventions and restrictions that are justified in relation to children *even when their own interests are not thereby served* are often not justified in relation to similarly placed adults. As Mill noted, we are not justified in interfering with or restricting adults either to protect their own interests, or on the grounds that they pose an indefinite threat of harm to others. And he also insisted that we are sometimes not justified in interfering with or restricting adults even when their actions pose a definite threat of harm to others.

I have been suggesting that paternalism towards children is sometimes justified even when the children's interests are not motivating factors. Sometimes, paternalism towards children is justified purely on the grounds that it serves the interests of others.

Now one might complain, contra the view that I have attributed to Mill, that protecting the interests of others cannot justify an adult's restriction of or interference with a child on *paternalistic* grounds. One might insist that such restriction or interference is to be justified on self-protective grounds, with paternalism playing no role at all in the justification. To see why this complaint is unsuccessful, let us return to the father-daughter case. It might be suggested that the father is justified in insisting that his daughter stay home on self-protective grounds alone; and that, as such, what justifies the father's action has nothing to do with paternalism.

Although Mill does not claim that self-protection is always sufficient justification for interfering with the liberties of others, the objector might insist that in the father-daughter case self-protection *is* sufficient justification for interfering with the daughter's liberty. But in order for this objection to be convincing, the charge has to be that the father's action can be justified solely on grounds of self-protection, even if the person whose liberties he restricts is an adult, rather than an adolescent. But in fact, the justification for the father's action relies on the fact that his daughter is still a child.

Consider a modified version of the father-daughter case, in which, instead of the daughter, the father insists that his adult sister, who is living with the family, stay home to babysit. To parallel features of the daughter's relation with the father, we may suppose that the sister is financially dependent on the father. Now, perhaps the sister ought to stay home. Perhaps it would be ungrateful of her not to stay home. Yet, if she declines, it would be unjustified for the father to *insist* that she stay home. The father *may* be justified in later declining to continue to financially support his sister.³² But we do not think that he is entitled to keep his sister at home.³³ Insisting that a person stay home is appropriate in relation to a child or adolescent, but it is not appropriate in relation to an adult.

One might suggest that the father's particular parental relationship with his daughter, together with the special responsibilities that he bears towards her as her father, grounds his

³² It is important to notice that there are actions the father is justified in taking that he would not be clearly justified in taking if the harms presented by the sister were less definite, or only applied to herself. In response to the sister's refusing to help out with the family, it may be justified for the father to remove his financial support. But if the sister was, say, drinking alcohol in moderation – and drinking at all was something the father disapproved of – in such a way that there was no definite harm to the family, it seems less plausible that the father would be justified in removing his support.

³³ Although perhaps it is justified for the father to morally censure his sister in a way designed to inflict punishment. It certainly seems appropriate for the father to resent and blame his sister with an intensity that would be out of place in relation to his daughter.

justification for interfering with her but not with her aunt. But this suggestion defers consideration of the key issue. Of course the father has special responsibilities towards his daughter, and a unique relationship with her as his child. But it is just this relationship, together with the paternalistic treatment that is thereby justified, that needs to be explained.

I have been using the metaphor of “stepping in” to make socially and morally responsible decisions on a child’s behalf to try to capture why paternalism is justified not only to protect the interests of a child, but also to protect others who are impacted by her immature decisions. I have suggested that our intuition that the father’s behavior is justified does not rely on an implicit assumption that the daughter’s interests must, somehow, be motivating her father. And, I have responded to the objection that the wrongness of the daughter’s action (together with its negative outcomes for the father) is alone sufficient to justify interference, by showing that the father is not justified in restricting the liberties of his adult sister in similar circumstances.

Both the father-daughter case and the toddler napping case are examples in which some specific *acts* are appropriately characterized as acts of paternalism, even in the absence of a motivation to serve or further the interests of the person treated paternalistically. In addition, it is not a necessary feature of paternalistic *attitudes* that they be motivated by the interests of the subject. Tamar Schapiro describes a case that, with a little elaboration, supports the view that a subjects’ interests need not feature in the motivation of a person holding a morally justified paternalistic attitude.

Illustrating her conception of a paternalistic attitude, Schapiro describes a six-year old child who, thoughtlessly or mischievously, has drawn with a permanent marker on her father’s office desk. Schapiro stipulates that the child should have done better, and could have done

better. Nevertheless, we expect the father to respond differently to the child's action than he would to the similar action of an adult. As Schapiro puts it:

[I]nsofar as the father regards his daughter as a child, his frustration with *her conduct* will not take the form of resentment towards *her*. Instead of feeling she has violated or wronged him, he will feel disappointed in her behavior...as I am imagining it, the father makes a separate allowance for the fact that his daughter is "only a child" by taking a supervisory, rather than a participatory attitude towards her with respect to her misconduct.³⁴

In adopting what Schapiro calls a "supervisory" attitude that will underpin his response to his daughter's activity, the father of the Sharpie-wielding girl likely has his daughter's developmental interests at heart. But whether or not the father's attitude is paternalistic does not depend on his being motivated by those interests. He might adopt a "supervisory" attitude as a mode of self-defense against the psychological ravages of the resentments that would build if he failed to do so, without consideration for the developmental or other benefits that may accrue to the child as a result of the attitude. What justifies a paternalistic attitude in cases like the Sharpie case is that it is the appropriate attitude to hold in relation to a child. Perhaps it would be beneficial to an adult subject if one adopted a paternalistic "supervisory" attitude towards her: she would at least be spared one's resentment. Nevertheless, such an attitude taken towards a normally functioning adult is not justified – it is a sign of disrespect.

The above examples are intended to lend support to my claim that being motivated by the subject's interests is not a necessary condition for an act or an attitude to be morally justified on paternalistic grounds. I turn, now, to the second requirement of the Neo-Millian view.

³⁴ Schapiro, "Childhood and Personhood," 578.

Against the Second Requirement of the Neo-Millian View

According to the second requirement of the neo-Millian view, paternalism does not only require the imposition of a restriction on another person. It requires that the restriction be coercive. There is a large debate about what sorts of actions constitute coercion. My concern is to engage with Mill's claim that under certain circumstances it is wrong to interfere with adults *against their will*.³⁵ I shall refer to this sense of coercion – according to which interference with another person is against his or her will – as “coercion in Mill's sense.” In the next section I will take issue with the assumption that paternalism must involve any restriction of an individual's autonomy, regardless of whether or not it is coercive in Mill's sense. But for present purposes, let us consider paradigm cases of paternalism: cases that involve restricting a person's liberty or autonomy in such a way that the person's will is straightforwardly contravened.³⁶

The first thing to notice is that there are some restrictions that accord with a person's will but that are nevertheless paternalistic. Suppose that I have been brought up to hold a certain set of values, which I now wholeheartedly endorse. If, perhaps even unknown to me, the social system is set up to prevent me from acting against these values, the system may still be paternalistic.³⁷ I do not have to disagree with the system of values in order for its imposition to

³⁵ “Against their will” is terminology lifted straight from Mill's harm principle (see p. 24); the terminology also features in Gerald Dworkin's characterization of paternalism.

³⁶ One way in which a person's behavior may be restricted by the exercise of authority, without the restriction conflicting with the person's will, is this. Individuals sometimes voluntarily submit to, or perhaps even seek out restrictions. For example, I might ask you to hide the chocolates and not reveal their location even under subsequent pressure from me. If you later refuse to give in to my pleas for chocolate, it is not clear that you are acting against my will. On some interpretations, you are in fact helping me to act in accordance with my will.

³⁷ Here it seems that whether the system is paternalistic, as opposed, say, to merely oppressive, will be influenced by the motives of those who set up the system, or by the purposes the system is supposed to serve. If those who set up the system sincerely take themselves to be restricting access to information at least partly in the interests of those restricted, then I think the system is paternalistic. Whether or not it is justified is a separate question. (Although I have argued that it is not a necessary condition of paternalism

be paternalistic. I do not have to be aware of potential restrictions should I choose to deviate from the values I have. And, I would not need to be opposed to the potential restrictions should I come to be aware of them, in order for the system to be paternalistic.

There is, then, a way in which a person may be subjected to paternalistic restrictions that are non-coercive in Mill's sense. Restrictions that do not conflict with the activities a person already wants to engage in, or with the decisions and choices that a person is in any case disposed to make, may be paternalistic.

The way in which paternalistic acts may be non-coercive in Mill's sense points to an important difference between the moral status of children and that of adults. Even in cases where both children and adults do not object to the content of a restriction, there are circumstances in which it is justified to impose a restriction on children, but not on adults. For example, a child who is required by law to attend school may do so willingly and even joyfully. The state's restriction is non-coercive in the sense that, at the present time, the restriction does not run counter to the will of the child. Suppose that such a restriction would be equally non-coercive in relation to an adult who happens to want to go to school. It would be wrong to *require* the adult to go to school. This is an example of a kind of restriction that is both paternalistic and non-coercive in Mill's sense, and that is justified in relation to children but that is not justified in relation to adults.

The types of restriction discussed above, while not directly opposing the will of their subject, are still coercive in the sense that *if* the restricted person were to change her attitudes and begin to resist the restriction, the restriction would presumably continue to hold. But, it might be thought that what determines whether or not a restriction is paternalistic is the status given to

that an actor be motivated by a subject's interests, I do not deny that in paradigm cases of paternalism agents *are* motivated by the subjects' interests.)

both the subject's actual and possible views regarding the imposition of the restriction. So it is not whether the content of a restriction or the imposition of a restriction actually runs counter to the will of the person restricted that matters in terms of qualifying an act as paternalistic. What matters is whether or not the subject *would* have the power to lift the restriction if she wanted it lifted. On this view, paternalism necessarily contravenes at least the *potential* will of its subjects.

However, even the requirement that the restriction have coercive force in this broad sense, is not necessary in order for a restriction to be paternalistic.³⁸ Consider a situation in which young children's access to certain media is restricted. Suppose that the children have no knowledge of the nature of the media, or even that it is being restricted. The children have no opportunity to form a desire to be exposed to the restricted media. Now suppose that if the children were in fact introduced to the media and came to demand access to it, their demands would be met. So it is not the case that there is a background coercive stance, just waiting to come into effect should the children come to demand access. Nevertheless, it seems to me that the initial restriction on children's access to the media in question is a clear instance of paternalism.

According to the neo-Millian view, an act is not paternalistic unless it imposes a restriction that is "against the will" of its subject. I have argued that there can be instances of paternalism in which a restriction is imposed on an individual where the restriction does not need to run counter to the actual or potential will of the restricted person.

It may seem that the second argument against the neo-Millian view applies only to acts – to the actual imposition of restrictions – and not to attitudes. But the argument applies to attitudes as well. An unexpressed attitude does not interact in any direct way with the will of a

³⁸ I am grateful to Tyler Burge for discussion of this issue.

subject. Nevertheless, there may be a case in which, if a person knew that she was the subject of a paternalistic attitude, she would not like it. In such a case one could say that the attitude is against her will. But not all justified paternalistic attitudes are like this. Consider again Schapiro's example of the six-year-old girl who has drawn on her father's desk with a Sharpie. The father adopts a paternalistic attitude to the child's action: he does not allow himself to resent the child as he would a similarly placed adult – because she is a child. It seems beside the point for characterizing the father's attitude as paternalistic, whether the child would care one way or the other what his attitude is. But suppose that the child does care: it would hardly be surprising to discover that the child is *glad* to be regarded more leniently in such a case. So, adopting a paternalistic attitude would seem just as likely to accord with the will of the subject, as it is to conflict with the subject's will.

Against the Third Requirement of the Neo-Millian Conception

According to the third requirement of the neo-Millian conception, any instance of paternalism necessarily limits or attempts to limit a person's freedom or autonomy. Yet paternalistic acts do not necessarily function to limit autonomy. Seana Shiffrin gives the example of A, who refuses to help B build a cabinet, solely on the grounds that A thinks it will be good for B to build the cabinet without assistance. For Shiffrin, unilaterally overriding B's request for help without attempting to persuade B to attempt the cabinet alone – that is, without engaging with B's reason – is both paternalist and wrong.³⁹ It is wrong because the action 'works around B's agency' even though it does not infringe on B's autonomy rights.

Now, this sort of manipulation is standard fare for parents of young children. Suppose that little Joey, although capable, is resistant to putting on his own shoes. Suppose, furthermore,

³⁹ Shiffrin, "Paternalism, Unconscionability Doctrine, and Accommodation," 213.

that Joey does not like to go outside without shoes on. His father sets up a situation in which Joey is invited to go outside for a desirable activity at a time when there is nobody around who is free to help Joey with his shoes. Significantly, although the father deliberately works around Joey's agency to get him to put on his own shoes, Joey's freedom of action is not limited by the strategy. He remains free to put on his shoes, go outside without shoes, or remain inside. This is an example in which a child's freedom is not impacted in any straightforward way, and yet in which the father clearly acts paternalistically. Unlike in Shiffrin's example, in the Joey case, because the subject is a young child, it is plausible to think that the father's paternalistic action is (other things equal) morally justified.

The above two cases suggest that although there are justified acts of paternalism towards children that do not directly restrict children's freedom, many such acts are nevertheless characterized by manipulation. In such cases, there is a residual sense in which an individual's autonomy is not fully honored. While one may technically be free to make one's own choices, when one is manipulated, one's potential choices may be effectively limited by the intentional moves of someone else.⁴⁰

It is worth investigating whether these elements of manipulation persist in instances of paternalism that do not take the form of acts. As mentioned earlier, in addition to paternalistic acts, there are paternalistic attitudes, as well as paternalistic conditions. Let us begin with paternalistic conditions. By "paternalistic conditions" I have in mind longstanding institutional

⁴⁰ One type of sometimes-justified paternalistic act may seem to avoid even elements of manipulation. Consider the parent who stands ready to intervene should a child go beyond the bounds of what the parent believes is safe or acceptable behavior. Now, suppose that in a given case, the parent, while "standing ready" does not intervene. In such a case, it looks as though the child has been granted full autonomy. However, if the parent stands ready to intervene, there is an important way in which the child is not granted full autonomy: as soon as she strays beyond the realm of what the parent considers acceptable, the child will be restricted. So while she may not be manipulated in this case, I believe that the child is still subject to authoritative restriction.

and social habits or customs that may affect individuals without anyone undertaking a particular act that circumscribes the activities of those affected. For example, a society may have a longstanding custom that children under a certain age are not to engage in sexual activity with others. Even if children in this society are not actively restricted or prevented from engaging in sexual behaviors by particular acts of adults or institutions, the children's liberty to engage in sexual behavior would still be limited by the social expectations that proscribe the behaviors. Just as the public proclamation of moral disapproval can limit the liberty or autonomy of individuals, so the presence of customs or conditions can function as significant barriers to a person's freedom to engage in certain activities.⁴¹

The above examples suggest that both paternalistic acts and paternalistic conditions necessarily involve, if not overt restriction of autonomy, at least manipulation. But when we consider paternalistic attitudes, we will notice that even manipulation is not a necessary component of paternalism. For an unexpressed moral attitude does not, on its own, necessarily restrict the freedom or autonomy of another person, or manipulate her in any way.

Consider, once again, the paternalistic attitude adopted by the father of the Sharpie-wielding six-year-old. On its own, the father's paternalistic attitude does not limit or threaten his daughter's autonomy, or manipulate her current or future choices. Simply having an attitude does

⁴¹ Mill noted the fact that the force of public opinion can alone threaten a person's freedom. He insisted that we are not justified in making a person's life "uncomfortable" just because we disapprove of that person's behavior. As he put it, such a person "...may be to us an object of pity, perhaps of dislike, but not of anger or resentment; we shall not treat him as an enemy of society." Mill, *On Liberty*, chapter IV, paragraph 7, 146. The fact that public moral evaluations may unduly interfere with the liberties of individuals is under-emphasized in contemporary discussions of paternalism. However, the third requirement of the neo-Millian conception is consistent with the view that an act or attitude can be subject to justification on paternalistic grounds both if it coerces another person in Mill's sense, and if it limits freedom or autonomy via the force of public opinion. For, Mill's point was that public opinion has coercive force.

not necessarily interfere with anyone's freedom, though, as Mill emphasized, expressing those moral attitudes in public does tend to compromise individual freedoms.

As we have seen, then, paternalistic conditions do impose restrictions on individual freedoms. And there are some paternalistic acts that, although they do not directly infringe on individual autonomy, nevertheless retain elements of manipulation that we may still view as encroaching on individual freedoms. But in the case of paternalistic attitudes, there are clear cases in which no form of coercion, manipulation, or other attempts to circumscribe autonomy is present at all – and yet the attitude is still appropriately viewed as paternalistic – and indeed, is justified on paternalistic grounds.

Conclusion

I have used intuitions about justified paternalism towards children to suggest that none of the three neo-Millian requirements are necessary for an act or attitude to be an instance of paternalism. An act or attitude can be paternalistic when it is not motivated by the interests of the subject, when it is not against the will of the subject, and when it does not place constraints on the freedom or autonomy of the subject.

The child-centric conception of paternalism better reflects the way in which we deploy the notion of paternalism in ordinary usage than does the neo-Millian conception, which cannot account for a plethora of ways in which we normally consider ourselves to be engaging in paternalistic behavior or thinking. Furthermore, the child-centric conception is expansive enough to capture the complete range of authoritative treatment of children that underpins differences in

moral status between children and adults. So the broader child-centric conception of paternalism captures a usage of the notion that matters for normative deliberation.⁴²

The child-centric conception of paternalism provides a nice starting point for deliberating about whether and in what ways to treat or regard children paternalistically in particular circumstances. Recall that the child-centric conception of paternalism facilitates the following account of unjustified paternalism:

An act or attitude is an instance of unjustified paternalism if it treats a person as if she is child, when:

- (a) she is not a child and she is not childlike in relevant respects, or
- (b) she is a child, but the act or attitude is appropriate only in relation to a less mature child, and/or to a child at an earlier developmental stage, or
- (c) she is a child, but the particular act or attitude nevertheless infringes on her legitimate domain of autonomous function.

If we allow the limitations on justified paternalistic treatment suggested by (b) and (c) to guide our deliberations regarding whether and when to engage in paternalism towards children, we will immediately be constrained by two important considerations. First, we will recognize that in order to be morally justified, any paternalistic act or attitude directed at a child must be appropriately indexed to the actual developmental status and relevant competencies of the impacted child. Second, we will acknowledge that there are some morally unjustified exercises of paternalistic authority over children that do not harm the children except insofar as they inhibit the children's agency, thereby demonstrating a lack of appropriate respect.

⁴² Shiffrin likewise defends the idea that a broader conception of paternalism is preferable because it better tracks "why paternalism matters" ("Paternalism, Unconscionability Doctrine, and Accommodation," 212). However, I do not believe that the conception she ultimately defends, according to which paternalism is always wrong, fully captures why the notion of paternalism matters (or should matter) to us. For, as I have been suggesting, the child-centric conception of paternalism can help us to draw important distinctions between the justified and unjustified authoritative treatment of children – and to explore the tension between our treatment of adults as compared to that of children. So, I believe that the child-centric conception should be favored, because of its promise in assisting us in our normative deliberations.

To my knowledge, there has been little philosophical work aimed at understanding, in any detail, how these two considerations should feature in our deliberations about whether and when to treat or regard children paternalistically. In the following chapters I develop an account of the scope and limits of morally justified adult authority over children. The account uses the child-centric conception of paternalism, together with the considerations that it reveals as salient, as a starting point for developing an action-guiding theory capable of distinguishing morally justified from morally unjustified instances of paternalism towards children.

CHAPTER II

Paternalism and Children's Competence

Introduction

Liberal societies insist on the fundamental equality of all persons. They also prize individual liberties.⁴³ They place a high value on self-determination: the freedom to make one's own decisions about issues that affect the course of one's life. In libertarian-oriented societies like the United States, self-determination has come to seem, to many people, an even more essential "equal access" good than a range of other basic goods such as education and protection from poverty.

However, children and adolescents (henceforth "children") are routinely denied an opportunity to make important decisions affecting their lives. They are not allowed to vote, or to choose not to attend school. Children are legally restricted from entering the labor force, engaging in contractual agreements, being sexually active, and making decisions about their own medical treatment. In many cities children are limited by curfew laws that do not apply to adults. In their personal relationships children are subject to the authority of parents and other adults. Generally regarded as objectionable in relation to adults, paternalism is widely assumed to be justified in relation to children.

Our justification for relating paternalistically to children is less obvious and more complex than it may seem. In this chapter I begin the task of articulating why, and under what circumstances, paternalism towards children is justified. If sincerely applied to moral and

⁴³ In practice, legislation and often even moral attitudes that express these values tend to apply to citizens, rather than to all persons. The ethics of immigrants' rights and moral standing, given the

political decision-making, a clearer understanding of the grounds of our authority over children will help to ensure that children are accorded the respect and dignity that their humanity demands.

Especially in the political arena, the paternalistic treatment of children (and, more generally, their difference in moral status from adults) is often talked about in terms of differences in *rights*. Children are denied some basic human and civil rights. They are typically granted protections and benefits (which are also called “rights”) for which adults are not eligible. Talk about paternalistic treatment covers a broader range of cases than does rights-talk, which tends to be linked to the powers of the state. For example, a child may have a right to an attorney in legal proceedings. But even if, in a certain set of circumstances, it is a wrongful exercise of paternalistic power for a parent to refuse to let a child play with another child on the playground, to insist that the child has a *right* to play with the other child is to stretch our understanding of the term. I am interested in the justification of paternalism in the broad, moral sense. Some of the forthcoming discussion, though, will take place in the narrower political realm of rights-talk.

Those who seek a justification of paternalism towards children are concerned to understand why or whether we are justified in assuming the following about children’s moral status:

- (1) Children are not entitled to the same sorts of liberties and rights to self-determination as are adults;
- (2) Children are to be held to correspondingly lower levels of responsibility for their actions than are adults; and
- (3) Children are entitled to certain benefits and protections not available to adults.

purported values of equality and liberty held by Western democracies, is the subject of a separate discussion.

My focus in this dissertation is primarily on (1). My goal is to provide an account of the circumstances in which it is justified for adults to circumscribe children's freedom in ways that would not be morally justified in relation to other adults.

There are two "levels" at which it seems natural to seek a justification of paternalism towards children. First, we may seek to justify what I shall call our "background presumption" that children are to be treated according to different moral and legal standards than adults.⁴⁴ Second, we may seek to evaluate the ways we relate to children in particular sets of circumstances. That is, we may seek to justify what I shall call "particular instances" of paternalism.

By "particular instances" I have in mind a broad spectrum of circumstances, ranging from localized exercises of parental authority to far-reaching political and legal constraints placed on children. A father requiring his daughter to wear her pink shoes, a teacher insisting that all of her 5-year-old students hold somebody's hand when crossing the street on a field trip, and a Supreme Court ruling that restricts adolescents' access to abortion are all particular instances of paternalism. "Particular instances of paternalism" also encompasses the granting of specific benefits and protections, such as education rights and child welfare services.

There is a tendency among philosophers to focus primarily on justifying the background presumption in a way that does not have action-guiding implications for how we should treat

⁴⁴ Tamar Schapiro describes what needs to be justified at this level a "background practice," which is the general practice whereby "adults as a class are, *de jure*, in a position to decide which rights children ought to have." Adult authority over children, she says, "is a structural feature of the background practice within which adult-child relations take their shape." "Childhood and Personhood," *Arizona Law Review* 45 (2003): 591. See Chapter IV for further discussion.

children in particular instances.⁴⁵ The attitude seems to be that deliberation about particular instances of paternalism can be safely left to the parents, guardians, teachers, and policy-makers to whom such decisions usually fall.

This focus on justifying the background presumption to the exclusion of justifying particular instances of paternalism presents a potential hazard. If we assume that the philosopher's task is done once a justification of the background presumption is put forward, we risk giving an implicit nod of approval to those adults who take themselves to have *carte blanche* authority in their relationships with children, so long as the adults' actions and attitudes can be construed as paternalistic.

It is obvious, however, that such *carte-blanche* authority is not justified. Even if the background presumption is justified, it does not follow that a particular instance of paternalism towards a child is justified. For example, even if we accept a father's general authority over his fourteen-year-old daughter, we may dispute that he is justified in preventing her from wearing green socks on the grounds that he thinks that the color green is unlucky. On a grander and perhaps more controversial scale, we may deny that the father is morally justified in preventing his daughter from obtaining an abortion, while accepting his authority to regulate other aspects of her behavior.

I believe that a central task of the philosopher is to articulate principles for justifying particular instances of paternalism. This does not mean that a justification of the background presumption has no value. It is undeniable that as a society we do hold such a presumption. It is worth understanding whether we are justified in doing so, and if we are justified, why.

⁴⁵ See for example, Tamar Schapiro, "Childhood and Personhood," and Robert Noggle, "Special Agents: Children's Autonomy and Parental Autonomy," in *The Moral and Political Status of Children*, ed. David Archard and Colin Macleod (Oxford: Oxford University Press, 2002), 97-117.

Furthermore, as I will elaborate in Chapter IV, the content of a good justification at this general level can help to guide action at the level of particular instances.

In this chapter I argue that facts about the nature of children's *competence* relative to adults are a necessary component of any good justification of the background presumption that children are the proper subjects of paternalistic authority. As I discuss in Chapter IV and demonstrate in Chapter V, incorporating considerations of competence into our justification of paternalism towards children at the general level can ultimately help to guide deliberation about how to treat and regard children in particular instances.

“Competence” as a Candidate for Justifying Paternalism

Our justification for presuming that children are the proper subjects of paternalistic authority can seem obvious. It will be noted that children are less mature than adults. They are in the process of developing their capacities for autonomy - and paternalistic restrictions may be designed to aid and safeguard this development. Children are less experienced. They are less proficient in a number of respects. They are not as wise in the ways of the world as are adults, and as a result, they are vulnerable to exploitation. Younger children are physically smaller than adults. Children's deficits relative to adults make them more likely to come to harm if left to their own devices. Children who are allowed adult levels of autonomy are more likely to cause harm to *others*. Some children have not achieved full moral agency; and as such should not share in the responsibilities and corresponding liberties typically granted to adults.

Most — perhaps all — of these rationales rely on a claim that children are in some relevant sense less mature, skilled, experienced, capable, competent, or proficient in ways that affect their autonomy, than are adults. I shall refer to this range of presumed differences between adults and children as a difference in *competence*.

The use of a notion of competence to deliberate about and to justify the paternalistic treatment of children is widespread. It is thought that, in virtue of children's relative incompetence, adults are entitled to exercise authority over children both for children's own safety and protection and for the protection of others. Children are denied certain rights to self-determination on the grounds that they have underdeveloped or still-developing capacities. Welfare and protection rights for children are frequently defended in terms of children's lesser competence and their consequent vulnerability.⁴⁶ Furthermore, children's relative incompetence is often taken to mitigate their moral and criminal responsibility for wrongdoing.

A number of philosophers and legal scholars have expressed skepticism about the legitimacy of incorporating the notion of children's competence into a theoretical justification of paternalism towards them. Some have gone so far as to reject outright the use of the notion of competence to justify paternalism towards children. In this chapter I defend the use of the notion of competence to justify paternalism, against their concerns. Seeing why the critics of the use of a notion of competence are mistaken can help us to clarify how competence should be used to justify paternalism. In practice, the notion of competence is often invoked in random, inconsistent, and/or politically expedient ways. By clarifying its role in justifying paternalism, misuses of the notion of competence can be exposed and rejected.

Those who have objected to the use of a standard of competence in justifying paternalism towards children have drawn divergent conclusions. Some have concluded that paternalism

⁴⁶ Similarly, the paternalistic treatment of those adults who genuinely lack the capacities and competencies relevant for self-determination is thought to be justified. For example, in some contexts a caregiver may be justified in overriding an Alzheimer's patient's impulsive choices, knowing that the patient is unable to keep track of her own longer term interests.

towards children is not in fact justified.⁴⁷ Others, taking it for granted that paternalism *is* justified, infer that something other than a difference in competencies between children and adults must be doing the justifying work.⁴⁸

Regardless of the conclusions drawn, there are several common objections to the use of a standard of competence for justifying paternalism towards children. In Section 1 of this chapter I present some of the objections to the use of a notion of competence to justify paternalism towards children that have been put forward by philosophers and legal theorists. In Section 2 I describe and evaluate some alternatives to the use of a notion of competence suggested by the critics whose objections are discussed in Section 1. I suggest that none of the suggested alternatives is satisfying. Finally, in Section 3 I evaluate and ultimately reject the objections to the use of a notion of competence that were described in Section 1. I conclude that consideration of children's competence relative to adults must form part of any plausible justification of paternalism towards children.

The objections to the use of a notion of competence to justify paternalism towards children can be best understood if situated within their historical context. So it is worth reviewing some details of the historical context before introducing the objections.

Historical Context

In recent times, the history and sociology of childhood was not a topic of sustained study until, in 1960, the French historian Philippe Ariés published an influential book arguing that the

⁴⁷ See for example John Holt, *Escape From Childhood* (New York: Dutton, 1974), Richard Farson, *Birthrights* (Penguin, 1978), and Howard Cohen, *Equal Rights for Children* (Totowa, N.J.: Rowman and Littlefield, 1980).

⁴⁸ Some who hold this view include Schapiro, "Childhood and Personhood," Noggle, "Special Agents," Martha Minow, "Rights for the Next Generation: A Feminist Approach to Children's Rights" *Harvard Law Journal* 9 (1986):1-24, and Katherine Hunt Federle "Rights Flow Downhill" *International*

institution of childhood – which he characterized as the segregation of children in a separate practical and moral realm – is a relatively recent social phenomenon.⁴⁹ Ariés drew on artwork and historical documents to suggest that, during the Middle Ages, children beyond infancy were regarded as small adults and were fully integrated into the adult community.

Ariés’ historical methodology, together with his contention that childhood itself is a new phenomenon, has been widely contested.⁵⁰ However, it is indisputable that attitudes towards children’s moral status have changed dramatically over the last few centuries, resulting in a greater separation between the worlds of childhood and adulthood.

In the United States, the close of the nineteenth century witnessed the beginning of a fairly dramatic shift in attitudes and practices regarding children’s moral and legal status.⁵¹ These changes were brought about in part by the “child-saving” movement. The child-savers were women progressive reformers who sought to give children greater welfare protections and to ensure that they were not subject to adult-style punishments for criminal and other offenses. Perhaps most notably, the child-savers were responsible for the founding of the first juvenile court in 1899. This court was a precursor to the current juvenile justice system.⁵²

Journal of Children’s Rights 2 (1994): 343-68. The Minow and Federle articles are reprinted in Michael Freeman, ed., *Children’s Rights*, Vols. 1 and 2, (Vermont: Ashgate, 2004).

⁴⁹ Philippe Ariés, *Centuries of Childhood: A Social History of Family Life* (New York: Vintage, 1962). The original French edition of the book was published in 1960.

⁵⁰ For a discussion of a range of weaknesses in Ariés’ approach, see David Archard, *Children: Rights and Childhood* (Oxford: Routledge, 1993), 20-25.

⁵¹ See, for example, Joseph M. Hawes, *The Children’s Rights Movement: A History of Advocacy and Protection* (New York: Twayne, 1991) and Margaret K. Rosenheim, *A Century of Juvenile Justice* (Chicago: University of Chicago Press, 2002).

⁵² See, for example, Rosenheim, *A Century of Juvenile Justice*, and Allen Freeman Davis, *American Heroine: The Life and Legend of Jane Addams* (Chicago: Ivan Dee, 2000).

Notwithstanding the efforts of the child-savers, and partly because of ways in which their efforts misfired, the path towards a greater separation between children's and adults' moral status has been far from straight. A societal ambivalence towards the separation of childhood from adulthood has played out in the history of the juvenile justice system. The juvenile justice system was supposed to treat children who broke the law or acted in socially undesirable ways differently from adults: instead of formal trial proceedings a juvenile court was to make determinations about a child based on the idea that (presumably, unlike adults) a child could be reformed.⁵³ Rather than being punished, the child was to be placed in social circumstances that would allow her to develop in more personally and socially desirable ways.⁵⁴

The juvenile court was granted a great deal of discretion. The court was expected to act much like a benevolent parent, perhaps substituting for inadequate or absent parenting in children's lives. Conceiving of the court as a kind of substitute parent had unfortunate consequences. Even the best-intentioned judge does not have the deep and ongoing interpersonal and communal ties to the children that come before her that most parents have to their own children. While some children benefited from the system, the outcomes for many children were worse than had there been no separate court. In many cases, children were removed from their families and incarcerated in institutional settings of questionable quality for protracted and unregulated periods of time. These incarcerations were frequently the result of "status offenses" like truancy or vagrancy that are not criminal offenses if committed by an adult.⁵⁵

⁵³ I do not endorse the unhappy idea that adults cannot be reformed. I merely note the prevailing attitude whereby it has been widely assumed that children are "reformable" in ways that adults are not.

⁵⁴ Rosenheim, *A Century of Juvenile Justice*.

⁵⁵ For a discussion of the history of the way status offenses have been dealt with in the Juvenile Justice System, see Julie J. Kim, "Left Behind: The Paternalistic Treatment of Status Offenders Within

The intent of the juvenile justice system was to set up proceedings in an informal way, with judges tasked not with meting out punishment, but rather, with determining a course of action best for the child and for the community. A consequence of this informality was that many children entering the system were denied standard rights to due process, such as access to an attorney. This omission was reversed in the Supreme Court's landmark ruling in *In re Gault* (1967), in which the Court affirmed children's rights to due process, stating that the 14th Amendment and the Bill of Rights do not apply exclusively to adults.⁵⁶

In the 1980's and 1990's, amidst fears about increasing youth crime, there was a backlash against the juvenile justice system's ability to hold children to lower levels of criminal responsibility than adults. Many states passed laws that allowed children to be tried as adults, making some children eligible for capital punishment and mandatory life-without-parole sentencing.⁵⁷ At this point, while children continued to be deprived of many of the freedoms and rights enjoyed by adults, they could nonetheless be held to the same standards of responsibility as adults for serious crimes.

Recently the pendulum has swung back a little. The Supreme Court has overturned the death penalty for children and rejected mandatory life-without-parole sentencing for non-homicide offenses committed by juveniles.⁵⁸ In California, a law was recently passed that allows

the Juvenile Justice System," *Washington University Law Review* 87 no. 4 (2010): 843-867.

⁵⁶ *In re Gault*, 387 U. S. 1 (1967).

⁵⁷ For a brief overview of the changing legal landscape with respect to sentencing children for serious crimes, see MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice: Bringing Research to Policy and Practice in Juvenile Justice, http://www.adjj.org/downloads/552network_overview.pdf

⁵⁸ *Roper v. Simmons*, 543 U. S. 551 (2005). The US Supreme court held that it is unconstitutional to execute a person for a crime committed while under the age of 18. For more information see: The Death Penalty Information Center website, <http://www.deathpenaltyinfo.org/u-s-supreme-court-roper-v->

many of those sentenced to life without parole for crimes committed while under the age of 18 the ability to have their sentences reviewed after they have served 15 years.⁵⁹

Critics of “Competence”

What are we to make of these fluctuating attitudes towards children’s legal status, and implicitly, their moral status? How are we to interpret the inconsistent ways in which our society has historically related to children, placing considerable restrictions on their freedom while at times holding them to adult standards of responsibility?

Some critics have blamed this inconsistency on our use of a notion of children’s relative incompetence to justify paternalism towards children. They voice a number of objections to our use of competency standards. I shall describe these objections in the following section. But first, it should be noted that some of the objections outlined below have a decidedly pragmatic flavor. Competency standards are criticized because historically (and implicitly, potentially) the actual implementation of such standards in policy-making has resulted in poor, unfair or inconsistent outcomes for children.

Pragmatic criticisms of competence standards may seem beside the point if one’s project is to identify a theoretical justification for paternalism. But negative consequences resulting from the implementation of an ethical theory are not irrelevant to the status of the theory. I believe that a good ethical or political theory should be action-guiding. In reasonable social and political conditions such a theory should be amenable to somewhat successful implementation. Historical

[simmons-no-03-633](#); *Miller v. Alabama*, 567 U. S. (2012). The US Supreme Court held that it is unconstitutional to engage in mandatory life without parole sentencing for crimes committed while a person was under the age of 18. (For further information see the National Juvenile Defender Website, <http://www.njdc.info/news.php>).

⁵⁹ California Senate Bill 9 (SB9) came into effect on January 1, 2013. A subsequent bill, SB 260, in effect since January 1, 2014, allows parole to be determined by taking into account the age of a youth at the time the crime was committed.

and foreseeable failures of implementation should tell against a normative ethical theory. In Chapter IV I articulate the Child Paternalism Principle, a principle that is formulated with a view to guarding against failures of implementation.

I turn, now, to the critics' objections to the use of a notion of competence to justify paternalism.

Section 2. Objections to the Use of a Notion of Competence

In an early article published in 1986, legal scholar Martha Minow observes that legislation affecting children's rights to self-determination is ripe with inconsistencies.⁶⁰ For example, at the time of her writing, an eighteen-year-old could legally consent to her own abortion without telling her parents, yet truancy law required that she obtain parental permission to miss school; and a seventeen-year-old could be subject to the death penalty but was treated like a child with respect to employment and marriage laws.⁶¹

Minow attributes the inconsistent legal treatment of children to a prevailing tendency to rationalize legislation by contrasting childhood with adulthood in terms of "a notion of variable competencies that would adjust legal status in light of a range of competencies demanded for contrasting situations."⁶² She argues that invoking a variable standard of competence fails to describe and, in fact, often masks the real motives behind legislative practice.

⁶⁰ Minow, "Rights for the Next Generation."

⁶¹ *Ibid.*, 3-4. While details in the legal landscape have changed since the 1980's, there remain dramatic inconsistencies in our legal treatment of children today.

⁶² *Ibid.*, 2.

Minow notes that we typically appeal to a range of considerations when determining or rationalizing children's status:

[T]here is no one line or single characteristic commonly understood to signify adulthood. Different demarcations result from focusing on age, behavior, biological development, indications of mental status, and relationships between the individual and other persons, not to mention any combination of such factors.⁶³

Minow attributes at least some legal inconsistency to the unsystematic way in which this range of considerations, which she calls "proxies" for competence, is invoked. She suggests that unacknowledged political motives having little to do with children themselves determine legislation that is ostensibly made to protect or promote children's interests. The various proxies are appealed to in retrospect, according to which of the proxies does the best job of rationalizing the desired outcome.

Two examples can help to illustrate the way in which these unacknowledged motives operate. First, the nineteenth century progressives (the "child-savers") sought to achieve legislation providing for a range of protections and services for children. However, these reformers were motivated by broader humanitarian concerns, with paternalistic measures becoming, in Minow's apt phrase, "more palatable when focused on children."⁶⁴ The progressives' ultimate objective was across-the-board improvements in welfare services, with children being an important and relatively tractable first step.

A more recent example, at the other end of the political spectrum, is the way in which claims about children's relative incompetence have been used to justify restricting their access to

⁶³ Ibid., 2.

⁶⁴ Ibid., 9. See also Davis, *American Heroine*.

abortion.⁶⁵ Many of those who seek legislation that makes it difficult or impossible for adolescents to access abortions, likely have a broader agenda. They would like to deny abortions to *all* women. However, until they are able to achieve this end, they focus on more pragmatic piecemeal limitations. Again, legislation restricting individual liberties is “more palatable” when applied to children.⁶⁶

In both of the above examples, children’s relative incompetence is appealed to in an ad-hoc way to support the independent legislative goals of the policy-makers. It is undeniable that, unless it is put forward within a more comprehensive and detailed theory, using a notion of children’s relative incompetence to justify paternalism can indeed lead to manipulation and hypocritical application.

While Minow rejects the use of competence standards to justify paternalism on the grounds that politicians and legislators routinely abuse such standards, other critics have denied that paternalism is justified at all, implicitly ruling out children’s relative incompetence as a possible justification for paternalism. Writing in the 1970’s and early 1980’s and heavily influenced by the women’s liberation and civil rights movements, a number of educators and activists began to argue in favor of children’s liberation.⁶⁷ The idea was that, just as women and members of all

⁶⁵ Abortion for teens in the United States is legal, but various states place restrictions on adolescents. Some states require that teens obtain permission from one or both parents. Other states require that teens’ parents are informed of a teen’s decision to have an abortion with some waiting period (usually 24-48 hours) prior to the abortion. In all cases, following a 1983 Supreme Court ruling, a teen may obtain a judicial bypass to avoid the need to obtain parental consent. See *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft*, 462 U. S. 476 (1983).

⁶⁶ See Chapter V for a more comprehensive discussion of ostensibly paternalistic legislation that aims to restrict adolescents’ access to abortion.

⁶⁷ These “child liberationists” included John Holt, *Escape from Childhood*, Richard Farson, *Birthrights*, Howard Cohen, *Equal Rights for Children*, and Shulamith Firestone, *The Dialectic of Sex: The Case for Feminist Revolution* (New York: Bantam, 1971): 72-104.

racial groups should be equals under the law, so too, children should have all of the rights and obligations typically accorded to other citizens.

The following comments by John Holt give some feel for the concerns of the child liberationists:

We might think of human life as a sort of curve, starting at birth, rising to various peaks of physical, mental and social power, continuing for some time on a kind of plateau, and then slowly declining to old age and death. This curve of life is different for all human beings. Sometimes it is cut abruptly short by death. But for every human being, that curve is a single curve, a wholeness. It is, of course, a curve of continual growth and change. To some degree we are different every day from what we were the day before.

But this growth and change are continuous. There are no breaks or gaps in it. We do not, like some insects, suddenly turn from one kind of creature into another that is very different. Here the fact of childhood ends and the institution of childhood begins. Childhood as we now know it has divided that curve of life, that wholeness, into two parts - one called Childhood, the other called Adulthood, or Maturity. It has made a Great Divide in human life, and made us think that the people on opposite sides of this divide, the Children and the Adults, are very different. Thus we act as if the differences between any sixteen-year-old and any twenty-two-year-old were far greater and more important than the differences between someone aged two and someone aged sixteen, or between someone aged twenty-two and someone aged seventy. For with respect to the kind of control he has over his own life, the ability to make important choices, the sixteen-year-old is much closer to the two-year-old than he is to someone of twenty-two.⁶⁸

Holt notes that children mature gradually. Humans do not mature like butterflies, all of a sudden emerging from the cocoon of childhood ready to fly. A sixteen-year-old is closer to a twenty-two-year-old in capacities and abilities than she is to a two-year-old. Yet in designating her as a child we place her in the same moral category as the two-year-old with respect to our authority over her.

Holt observes that in the process of paternalistically relegating children to a different moral and social category, we tend to exacerbate the very incompetencies that we used to justify

⁶⁸ Holt, *Escape from Childhood*, 25.

paternalism in the first place. He argues that by circumscribing children's activities we deny them the experiences required to fully develop the competencies expected of autonomous adults.⁶⁹

Now, if it is true that paternalistic treatment and regard exacerbates children's relative incompetence, then it is doubly objectionable, even perverse, to use claims about children's lesser competence to justify treating or regarding them paternalistically. For this would be to justify paternalism in terms of something that paternalism in part creates.

Legal scholar Katherine Federle has made a similar point in relation to children's rights.⁷⁰ Given that the source of children's lack of power is their relative incompetence and consequent vulnerability, Federle argues that assigning or denying children rights in virtue of their incompetence exacerbates the very power imbalances that rights have traditionally functioned to redress. Federle argues that because children are disempowered in virtue of their lesser capacities, it is wrong to use a notion of competence - the very source of children's disempowerment - to justify according children different rights to those of adults. Like Holt, she objects to using a source of children's difference to justify acts and attitudes that perpetuate that difference.

Federle focuses on the political role of rights as a way to challenge social hierarchies.⁷¹ Given this concern, one might expect her to limit her criticism of the use of competence

⁶⁹ Holt's hypothesis is supported by the work of psychologists who examine cultural differences in human development. Barbara Rogoff describes capacities and skills developing at different rates and emerging at vastly different ages in varying social contexts. Barbara Rogoff, *The Cultural Nature of Human Development* (New York: Oxford University Press, 2003).

⁷⁰ Federle, "Rights Flow Downhill."

⁷¹ Or at least, I believe this is the most charitable way to interpret her view. In places Federle seems to take herself to be engaged in a more theoretical undertaking. She advocates developing a new

standards to cases in which children are denied self-determining powers in virtue of their relative incompetence.

And indeed, Federle does object to invoking children's relative incompetence to justify restricting children's self-determination rights. But somewhat surprisingly, she also objects to justifying welfare and protection rights in terms of children's underdeveloped competencies.⁷² This step is surprising because welfare and protection rights, in granting children additional benefits, surely function to redress rather than exacerbate the power imbalance between children and adults. Federle appears to believe that, because incompetence is a source of children's relative lack of power, there is an in-principle reason not to use claims about children's relative incompetence to justify *any form* of differential treatment, regardless of the practical outcomes for children.

The objections of Minow and Holt that I presented above are largely pragmatic, centering on the idea that paternalism justified in terms of children's relative incompetence tends to result in poor and unfair outcomes for children. Federle's objection is more theoretical. She believes that the use of competence standards should be rejected regardless of outcomes. Other critics have also proposed theoretical objections to the use of standards of competence to justify paternalism. In addition to her practical observation that appeals to competence often function as a convenient smokescreen for the policy-makers' real agenda, Martha Minow puts forward an epistemic worry.

Minow is skeptical about the possibility of knowing when children's competence is and is not relevantly different from that of adults. She describes the problem as follows:

theory of rights that will not link rights with the possession of certain capacities. (Ibid., 365). I shall address this aspect of her thinking later in the chapter.

⁷² Ibid., 364-367.

[An] effort to understand the current legal universe in terms of rational line-drawing presents a theoretical defect: it pretends that competence is the only issue, and that there are knowable boundaries between competence and incompetence for any given societal task.⁷³

She adds that: “there are no uncontroversial principles to pinpoint the kinds of competencies crucial to accord an individual independent decision-making power and to relinquish paternalist control.”⁷⁴

Two challenges to the use of competence to justify paternalism are evident in the above passages. First, there is a claim that competence is not the only factor relevant for distinguishing between childhood and adulthood. Second, there is a claim that there is no way to establish non-controversial standards for assessing the kinds of competencies that are relevant for making such distinctions. This latter claim seems to result from an epistemic anxiety: that the relevant differences are in principle unknowable.⁷⁵

In addition, like Holt, Minow is skeptical that the divide between adults and children is wide enough to make sense of using differences in competence to justify paternalism. While Holt notes that cutoffs between childhood and adulthood distort and exaggerate children’s incompetence, Minow suggests that such cutoffs overplay the extent to which even adults can be regarded as fully independent. She believes that it is a convenient fiction to claim that rights to

⁷³ Minow, “Rights for the Next Generation,” 5.

⁷⁴ Ibid.

⁷⁵ Such a deep theoretical worry seems at odds with Minow’s more pragmatic approach in the rest of her article. In places Minow explicitly allows that a normative theory that relies on a notion of competence may be true. She says: “A theory of variable competence may make theoretical or programmatic sense, but it does not supply the rationale for the particular choices the law has made up to this point.” Elsewhere, she expresses doubt that the complexities of legal practice will ever allow for successful use of a competence standard “however appealing [such a standard] may be as a normative theory.” (Ibid., 4-5). Nevertheless, Minow is clearly also worried that we simply cannot know with sufficient clarity the relevant differences between children of varying ages and adults.

self-determination hinge on genuine competence to act with independence. Even adults depend on others in a myriad of ways. As she puts it: “Legal rules that imply that only independent people may enjoy rights fictionalize the actual grants of rights to people who remain dependent in many ways.”⁷⁶

Given adults’ dependence on others, Minow denies that autonomy rights are — or implicitly, ought to be — granted on the basis of measurable competencies. She says: “Granting someone independence is a political or moral choice made by each society to fulfill its own purposes - not a rational decision gauged by psychological or other measures.”⁷⁷

Like Minow, Robert Noggle and Tamar Schapiro also have concerns about the role of the known (or alleged) facts about children’s differences from adults in justifying paternalism towards children.⁷⁸ But they are less concerned about the difficulty or alleged impossibility of identifying the relevant differences.⁷⁹

Noggle’s approach is to deny that facts about competence actually support paternalism. He assumes that if competence is to differentiate children and adults for moral purposes, the relevant competence is what he terms “cognitive competence.” Noggle characterizes cognitive abilities as involving logical reasoning abilities against a background of a certain level of knowledge. In

⁷⁶ Ibid., 5.

⁷⁷ Ibid., 5.

⁷⁸ Noggle, “Special Agents”; Schapiro, “Childhood and Personhood.”

⁷⁹ It is worth noting that unlike Minow, whose article dates back to 1986, Noggle and Schapiro are writing in the current century against the backdrop of burgeoning research in the social sciences on children’s differences from adults. Although they do not reference this research, Noggle and Schapiro are writing in a social context in which the increasing body of social-scientific research about children’s differences from adults has influenced important legal decisions and is widely disseminated in popular culture. So it is not surprising that they are less skeptical about our ability to know relevant differences between adults and children.

addition, Noggle describes older children as effective “simple agents.” They are “capable of the deliberate, intentional and (more or less) rational pursuit of goals.”⁸⁰

Focusing on the justification of parental authority, Noggle rejects the idea that the paternalistic treatment of children can be justified on the grounds that children have relevant cognitive and simple agency deficits relative to adults.⁸¹ He insists that older children and adults have comparable levels of cognitive function and simple agency:

It is a gross exaggeration to claim that older children suffer from the kind of global cognitive deficit that would, in and of itself, make a person a legitimate candidate for paternalistic authority...An adolescent often has quite formidable cognitive capacities, and may possess better reasoning skills (and maybe even more knowledge) than some perfectly competent adults...The problem is that parental authority seems to outlast the global cognitive deficits that characterize infancy and early childhood.⁸²

Tamar Schapiro questions the role of “the facts” in a different way. She describes our use of the notion of competence to justify paternalism as embedded in a “proficiency view” of our justification of paternalism. A proficiency view holds that “a child’s lack of reason [which is presumed to justify paternalism] consists in her being incapable of making good choices.”⁸³

Here, in more detail, is how Schapiro describes the proficiency view:

To say that children lack reason... [is to say that] that they are incapable of deliberating well. Accounts of what it is to deliberate well vary somewhat. On most accounts, the standard is prudential: children's lack of reason consists in their incapacity to make choices which protect and advance their own interests. On other accounts, the claim is that children are not able to make well-reasoned choices generally, whether or not the question bears on their own interests. Finally, there are some versions of the argument that take the relevant standard to be one of moral reasoning. Each of these standards, moreover, can be given either a substantive or a procedural interpretation. The substantive interpretation holds

⁸⁰ Noggle, “Special Agents,” 100.

⁸¹ *Ibid.*, 99.

⁸² *Ibid.*, 99.

⁸³ Schapiro, “Childhood and Personhood,” 579.

that children lack reason insofar as they tend to fail to arrive at good conclusions, the conclusions which are in fact demanded by prudence, rationality, or morality. According to the procedural interpretation, children lack reason insofar as they fail to employ procedures that constitute good reasoning.⁸⁴

Schapiro does not deny that children are, in general, less proficient choice-makers than are adults. Nevertheless, she does not believe that a proficiency view can justify the background practice (or as I have termed it, the general presumption) whereby we adopt a paternalistic attitude towards children. This is because, like Minow, Schapiro is cognizant of the fact that adults themselves are sometimes equally poor choice-makers.

Schapiro points out that if we adopt a strong anti-paternalist stance toward adults (a stance characteristic of liberal and libertarian societies) we allow that there are many circumstances in which we ought not interfere with adults' decision-making autonomy, even when they make bad choices.⁸⁵ Indeed, if adults who persistently engaged in poor deliberation were routinely accorded the moral status of children, strong anti-paternalist views would collapse. Imagine that all adults who are deemed to deliberate poorly are reclassified as children for moral purposes. The freedom of many adults to run their own lives and pursue their own ends would be provisional. We will have created an underclass of adults who lack basic liberties.

For the anti-paternalist, poor choice-making in "normal" adults does not warrant paternalistic intervention except in extreme circumstances. By extension, Schapiro believes that poor choice-making in children likewise cannot function to warrant paternalism.

Schapiro has an additional worry. She is concerned about the use of facts alone to justify a normative conclusion. As she puts it:

⁸⁴ Ibid., 580-581.

⁸⁵ Ibid., 583.

There is, I believe, a tendency in the literature to focus on justifying empirical claims about children's capacities for reasoning or lack thereof, while neglecting the task of articulating and defending the principles on the basis of which a given deficiency in reason is taken to warrant paternalism.⁸⁶

Schapiro concludes that facts about children's lack of proficiency (or, in my terminology, incompetence) cannot warrant adopting a background practice whereby children are subject to the authority of adults.

In the foregoing discussion I have presented several objections to the use of a notion of competence to justify paternalism towards children. Before replying to the objections, it is worth evaluating some alternatives to the use of a notion of competence that the critics have suggested.

Section 2. Alternatives to the Use of Competence Standards

In this section I describe and evaluate three alternatives put forward by those who reject the view that children's relative incompetence must play a central role in justifying the background presumption that children are the proper subjects of paternalism.

First, there is a view that paternalism towards children is not justified in the first place. Strictly speaking this view is not an *alternative* to the use of the notion of competence to justify paternalism. Rather, supporters of the view believe that children should be granted all of the same rights and responsibilities as adults.⁸⁷ Second, there is a recommendation stemming from a feminist orientation, that we reorient ourselves by thinking about paternalism in terms of children's relationships with adults, rather than in absolute terms to do with competence.⁸⁸ Third,

⁸⁶ Ibid., 581, footnote 12.

⁸⁷ This is the "child liberationist" view. See: Holt, *Escape From Childhood*, Farson, *Birthrights*, Cohen, *Equal Rights for Children*, and Firestone, *The Dialectic of Sex*.

⁸⁸ Minow, "Rights for the Next Generation."

there is a suggestion that paternalism is justified in terms of children's lack of specifically *moral* agency. Moral agency is characterized as distinct from and irreducible to children's lack of autonomy-related competencies.⁸⁹

I shall now describe and evaluate these alternatives to the use of a notion of competence to justify paternalism.

1. Paternalism Towards Children is Unjustified

Child liberationists believe that we do not need an alternative to competence to justify paternalism, because paternalism towards children is not justified in the first place.

Most of the liberationists advocate that we abandon the institution of childhood altogether.⁹⁰ They envision a society in which children of all ages are granted all of the rights and responsibilities of adults, including the right to vote, to bear arms, to access drugs and alcohol, to engage in sexual activity, to choose where and with whom to live, to work for money, to enter contractual relations, and so on. In Holt's case, at least, the radical nature of the position is tempered by an understanding that these rights and responsibilities will be made available to children on a progressive basis. That is, children will be able to take advantage of their rights only as they become capable of demanding and executing them. So, presumably a three-year-old will not typically avail herself of her right to vote, and few, if any, six-year-olds will pass a driving test.

Holt recognizes that a sudden transformation of our laws and customs to grant children full adult rights and responsibilities is politically and practically unfeasible. Rather, he envisions us

⁸⁹ Noggle, "Special Agents," and Schapiro, "Childhood and Personhood."

⁹⁰ Holt, Farson and Firestone hold this view. Howard Cohen, in suggesting that children should be supplied with special advocates, seems to want to preserve the institution of childhood in an altered form.

working gradually towards this goal with small changes taking place over time. He says, somewhat inspirationally: “the point is not to worry about what is possible, but to do what we can.”⁹¹

Even so, Holt goes too far. Younger children are able to demand rights before they have the capacities to make sensible use of them. For example, a ten-year-old is perfectly capable of demanding that his right to bear arms be honored. Furthermore, children are too susceptible to adult manipulation to be reliable choice-makers about some aspects of their lives. For example, Holt believes that children should be able to choose to live with adults or within institutions of their choosing (assuming that there are adults or institutions such as group homes willing to have them). But imagine a young girl befriended by a male teacher at school who asks to exercise her right to leave her parents’ home and live instead with the teacher. Today Holt’s view seems outdated and unrealistic given our current sensitivity to children’s vulnerability to pedophilia and other forms of adult manipulation and abuse.

Another child liberationist, Howard Cohen, recommends that, just as an adult without accounting skills might seek the advice of an accountant, children should be helped and advised by professional adult guides, with final decisions about important life events being left to the children themselves.⁹²

A shortcoming of Cohen’s analogy is that an adult seeking an accountant presumably already has some essential competencies in place, perhaps not with regard to accounting, but with regard to seeking and critically evaluating the advice of others. Of course, even an adult may be taken in by a dishonest or incompetent advisor. But children’s inexperience, immaturity

⁹¹ Holt, *Escape from Childhood*, 22.

⁹² Cohen, *Equal Rights for Children*.

and impressionability make them significantly more susceptible to abuse and indoctrination than adults. Younger children are simply not in a position to choose or evaluate their own advisor.

The child liberationists overstepped the mark in insisting that the institution of childhood, together with all legal and moral differentiation between adults and children, should be abolished entirely. Nevertheless, the liberationists, in opening our minds to a radically different attitude to children's autonomy, helped to shed light on the considerable distance that lies between taking ourselves to have carte-blanche authority over children's affairs, and denying that adults have any rightful authority over children. Both extremes fail to give children appropriate moral consideration. Total adult authority denies the emerging autonomy that children possess and leads to a failure to respect children as (developing) persons. But total freedom for children overlooks the reality that children have significant deficits and developmental needs that make them exceptionally vulnerable.

2. Adopt a Feminist Reorientation, Focusing on Relationships

Martha Minow describes a historical progression whereby public emphasis on children's protection has been gradually replaced by a focus on securing children's rights to self-determination. She believes that both approaches, which are typically justified in terms of children's levels of competence relative to adults, fail to address the real needs of children.⁹³ Minow proposes replacing these two historical approaches to children's legislation with a third, feminist approach: a focus on relationships. She suggests that we "develop a perspective on

⁹³ It is worth noting that the historical prioritization of child protection is itself both recent and culturally specific. See Rogoff, *The Cultural Nature of Human Development*, and Howard Chudacoff, *How Old Are You?: Age Consciousness In American Culture* (Princeton, NJ.: Princeton University Press, 1992).

children's rights that refrains from comparing the abilities of children and adults."⁹⁴ Instead of relying on a standard of competence, we should develop a perspective that addresses children's "mutual needs and connections."⁹⁵

Minow does not present details about what this third, "relationships" approach would look like. Perhaps she has in mind the idea that we should legislatively acknowledge the dynamic and interdependent needs and interests of all people, both children and adults, who must coexist. In my view such a reorientation would be most welcome. However, it is difficult to see how a focus on relationships, however desirable, is any less reliant on conceptions of children's variable competencies relative to adults, than is a focus on protections or on self-determination. Children's relationships with and dependencies on adults differ from reciprocal adult relationships at least partly *in virtue of* children's differences in competencies. Any focus on relationships, together with the justification of adult authority over children within such relationships, necessarily puts children's relative incompetence and vulnerability center-stage. So, a "relationships" approach does not *replace* an approach that relies on a notion of children's relative incompetence. Instead, such an approach invites us to use the notion of competence in a richer and more nuanced way.

3. A Notion of Moral Agency Does the Justifying Work

A third alternative to the view that paternalism is to be justified in terms of children's relative incompetence is a view that children's lack of moral agency underlies our justification of paternalism towards them. Significantly, the notion of moral agency in this context is understood to be distinct from, and irreducible to, competence. In what follows I evaluate the suggestions of

⁹⁴ Minow, "Rights for the Next Generation," 2.

⁹⁵ *Ibid.*, 2.

Robert Noggle and Tamar Schapiro, both of whom believe that a good justification of paternalism will rely on a notion of moral agency rather than on standards of competence.

3.1 Robert Noggle on Moral Agency

As I described earlier, Noggle rejects the view that differences in cognitive competence or simple agency justify parental authority over older children. Noggle suggests that “there is a much more profound difference between children and adults that affects how they are able to relate to other persons as moral beings.” The difference is that children (even older children) lack what he calls “full moral agency.” According to Noggle, children have not yet formed stable “moral selves.” Adults are part of the moral community, whereas children are prospective or probationary members of that community. He says: “I will suggest that children lack the fully developed capacity for the kind of moral agency that allows adults to interact with other moral agents on equal terms.”⁹⁶

Now, the basis for our agreement or disagreement with Noggle’s position is surely empirical. We rely on our knowledge of and experience with older children (including our memories of being older children ourselves). Our views should also be influenced by the findings of developmental psychologists and other social scientists who are able to identify more subtle and more widely generalized differences and similarities between adults and older children.

Cognitive capacities can be specified (or, in the language of the social sciences, “operationalized”), observed, and measured, as can individuals’ abilities to set and pursue goals. But capacities associated with moral agency can likewise be specified, observed and measured. Noggle does not reference the considerable and growing body of evidence from the

⁹⁶ Noggle, “Special Agents,” 100.

psychological sciences that bears on moral differences between children and adults. So we are not given any hard evidence with which to compare and contrast children and adults. He simply asserts that all children, including older children, are not fully-fledged members of the adult moral community.⁹⁷

Noggle characterizes deficiencies in children's moral agency as more "profound", "deeper" and "more radical" than any difference in cognitive capacities or simple agency between adults and children.⁹⁸ Relying on abstractions, on claims about certain differences being "deeper" or "more profound," makes the alleged differences between children and adults seem mysterious: something that must be accepted on faith rather than on the basis of evidence.

Although Noggle does not seem to believe that his argument requires direct empirical support, in places he does attempt some explanation of moral difference that is amenable to empirical evaluation. It will be instructive to explore one example: Noggle argues that one of the reasons that children are not yet full members of the moral community is that they lack what he calls "temporal extension." Let us evaluate this claim.

Noggle contrasts simple agency and temporally extended agency as follows:

A person displays simple agency when she sets and deliberately pursues some goal, or deliberately provides for her immediate needs and interests. A person displays temporally extended agency when she has and pursues a set of goals that remain fairly stable over time, or when she provides for both her short- and long-term interests and needs.⁹⁹

⁹⁷ He does not intend this to be an observation about the way in which children are in fact conventionally treated. He appears to have in mind some actual difference in the nature of children that limits their ability to be part of the moral community.

⁹⁸ Ibid., 100-101.

⁹⁹ Ibid., 101.

Noggle notes that infants and very young children lack commitments, values and projects completely. As they get older, children begin to develop preferences that are “less grossly biological.” However, he says, “most of the young child’s non-biological preferences are simple and fleeting.”¹⁰⁰

Now, even in relation to very young children, the claim that children’s non-biological preferences are simple and fleeting seems hard to support. Many preferences that may become lifelong tendencies begin to display themselves at a very early age. Certain food aversions, social preferences (introversion or extroversion), and interests (for example, in machinery, nature, or music) can be quite evident from a very young age. These preferences often turn out to be anything but fleeting.

By the time they reach adolescence, children’s differences from adults with respect to the constancy of their preferences seems even harder to establish, at least at the level of abstract speculation. The idea that older children are not temporally extended, that their preferences are “simple and fleeting,” is implausible.

Of course, we must acknowledge recent work in developmental psychology demonstrating that adolescents exhibit lower levels of what is termed “future orientation” than adults. Adolescents are more likely to favor present gains over future advantages than are adults.¹⁰¹ But this is not to say that children lack an ability to imaginatively engage with future eventualities, or to make meaningful long-term plans.

Noggle begins his paper by arguing that *older* children’s cognitive capacities and simple

¹⁰⁰ Ibid., 102.

¹⁰¹ See for example: L. Steinberg et al., “Age Differences in Future Orientation and Delay Discounting,” *Child Development* 80 (2009): 28-44.

agency are insufficiently different from adults' for us to justify paternalistic authority in terms of children's incompetence in these areas. Yet, oddly, in introducing children's lack of temporal extension as part of an alternative justification of paternalism, Noggle suddenly points to the underdeveloped temporal extension of *younger* children. The move is odd because surely he would acknowledge that younger children are also significantly different from adults in terms of cognitive function and simple agency — the very aspects of competence that he denies are sufficiently different between older children and adults to justify paternalism.

Suppose that there is compelling evidence to show that younger children are significantly lacking in temporal extension. And suppose that temporal extension maps onto moral agency in a way that simple agency and cognitive competence do not. Establishing these “facts” would still fail to elevate moral agency above simple agency and cognitive competence as *the* candidate for justifying paternalism towards children. For, as already noted, younger children clearly lack simple agency and cognitive sophistication as well.

Noggle rejects simple agency and cognitive competence as candidates for justifying paternalism on the grounds that older children and adults are too similar with respect to these competencies to justify paternalism towards children but not towards adults. To show that moral agency is a better candidate, Noggle will need to demonstrate that there are aspects of moral agency that significantly distinguish older children from adults. Let us explore whether Noggle's specific claims about children's lack of temporal agency could plausibly distinguish older children from adults for purposes of justifying paternalism towards children.

Noggle suggests that children lack the degree of temporal extension that adults have, for two reasons. First, adults have stable preference structures organized around fairly stable values

and concerns. Second, adults have experienced their preferences changing over time.¹⁰² I shall evaluate these reasons in turn.

Although Noggle insists that adults have stable preference structures, he admits that “gradual adjustments can add up to fairly radical transformations.”¹⁰³ Nevertheless, he maintains that:

[S]uch a transformation can still be seen as the intelligible unfolding or logical evolution of a single ‘moral self’— a single locus of agency that is temporally extended through time and which retains its identity through these relatively orderly incremental changes.¹⁰⁴

What is this “moral self” that adults have that children (even, presumably, adolescents) lack? If by “moral self” Noggle has in mind the notion that adults are slower to change and more set in their ways than children, this hardly makes the case for children’s different moral status. Being set in one’s ways can sometimes function as a moral roadblock, rather than as an indicator of moral sophistication.

Noggle argues that children are not ready to function as full members of the adult community because they have not fully absorbed its norms.¹⁰⁵ But sometimes the norms of a community are morally wrong. At such times, it is often the children, who are less entrenched in adult traditions and “stable” ways of thinking, who act as a catalyst for social progress. At these times adolescent idealism is morally preferable to adult stagnation.

History provides many examples of political unrest in which children and adolescents, rather than adults, have occupied the moral high ground. One chilling instance occurred on June

¹⁰² Noggle, “Special Agents,” 103.

¹⁰³ Ibid., 102.

¹⁰⁴ Ibid., 102.

¹⁰⁵ Ibid., 109-112.

16, 1976. Thousands of South African black school students marched in protest at having Afrikaans (the language of oppression) introduced as the language of instruction in schools. The march was organized by a coalition of high school students, and resulted in many deaths as police fired at the crowd. Hector Pieterse, aged 12, was made posthumously famous by an iconic press photograph of his dead body being carried off by relatives. Pieterse was too young even to fit into Noggle's category of "older children." Yet he was able to take a correct, if fatal, moral and political stand.¹⁰⁶

In the absence of further evidence it seems no more clear that older children are morally deficient relative to adults, than it is evident that older children are incompetent relative to adults with regard to cognitive capacities and simple agency. To genuinely understand children's differences from adults vis a vis moral agency, we will need to take a careful look at the empirical evidence.

Our stereotypes do support a view of adolescents as more impulsive, having less stable values and being less well able to engage as moral citizens. However, there are many adolescents who seem perfectly well grounded, with clear and often deeply held moral convictions. Many adolescents engage with the moral community in enthusiastic, responsible, and sometimes exemplary ways.

I turn, now, to the second reason that Noggle gives for children lacking the degree of temporal extension – namely, that adults have experienced their preferences changing over time.¹⁰⁷ Noggle suggests that because of their life experience, adults are well aware that a current

¹⁰⁶ A more recent example is Malala Yousafzai.

¹⁰⁷ Ibid., 103.

impulse or desire may not sustain itself into the future. They are more likely to evaluate current desires and preferences in the light of more accurate predictions about their future states.

A meaningful difference between adults and very young children in this regard seems plausible. However, it is not clear how much a lower number of such experiences will hamper the decision-making abilities of a fifteen-year-old compared with a more experienced twenty-year-old.¹⁰⁸ Even fairly young children have some conception of the ways in which their preferences and desires change over time. Certainly, by adolescence, considerable experience will already have mounted. It seems strange to assume that by the time one has reached majority, one has suddenly acquired “enough” experience. In the absence of further evidence, it is not clear why the experiential difference between a 15-year-old and a 20-year-old holds so much more weight than the far greater experiential gap between a 20-year-old and a 70-year-old.

As I have said, Noggle believes that children lack the attributes that full membership in the moral community requires. A claim of this sort requires empirical justification. Yet Noggle approaches the issue in an abstract manner. To the extent that he makes empirical claims about children’s differences from adults, he relies on received stereotypes that do not hold up to close scrutiny. (For example: the ideas that children’s changing values do not represent stable moral selves, and that children lack temporal extension.) And these are the same stereotypes that support the social fact of children’s current exclusion from full participation in the moral community. To see whether we are justified in excluding children in this way, we must look beyond the assumptions that underpin children’s current exclusion.

¹⁰⁸ In fact, as I discuss at some length in Chapter V, evidence from the cognitive and brain sciences suggests that differences in impulsivity between adolescents and adults have less to do with relative experience, and more to do with hormonal and other physiological changes associated with puberty, together with older children’s still-developing self-regulation capacities.

Based on the evidence provided, Noggle's claim that moral agency separates adults from children is no more plausible than is the view that cognitive and simple agency capacities are sufficient to justify the different moral status of children.

It has been part of my aim in this discussion of Noggle's position to illustrate why relying on abstract notions of moral agency, or on received stereotypes about children's capacities, will fail to secure a satisfying justification for according children a different moral status to adults. Instead, robust empirical evidence should be our guide. I now want to make a similar point about an approach recommended by Tamar Schapiro.

3.2 Tamar Schapiro on Moral Agency

Schapiro believes that empirical facts about the psychological differences between children and adults cannot help to justify our general presumption that children are the proper subjects of adult authority. Instead, she sets out to provide a principled, normative justification for the difference in moral status between adults and children. She endorses what she calls "the attributability view."

The attributability view is the view that "a child's lack of reason consists in her being incapable of making her own choices, whether good or bad."¹⁰⁹ The attributability view is to be distinguished from "proficiency" views, which focus on how *well* children are able to perform certain functions relative to adults. The attributability view denies that children's apparent choice-making behavior constitutes "real" choice-making at all: children are not yet able to deliberate for themselves because their true "selves" are not yet formed. As Schapiro puts the

¹⁰⁹ Schapiro, "Childhood and Personhood, 579.

position: “Despite appearances to the contrary, there really is no will there, or rather ... the will that purports to be there is not intact or well-constituted.”¹¹⁰

On Schapiro’s view, paternalistic treatment of children is justified because it does not interfere with autonomy (or an individual’s will) in the first place; children, she claims, lack wills in the requisite sense. Schapiro’s thought is that while coercively interfering with another person’s bad choices may be wrong, coercively interfering with “choices” that do not genuinely represent the will of a person, is a different matter. Even with adults, paternalistic interference is warranted in circumstances in which we have good reason to believe that an apparent choice does not reflect a person’s will. For example, we are wont to say “she’s not herself” before interfering with a temporarily depressed person on the brink of a self-destructive choice.¹¹¹ In such cases we may sometimes justify deception and coercion on the grounds that we are not interfering with the person herself. If anything, we are solicitously representing the person while her will is temporarily absent.

In the following sub-sections, I discuss three reasons for thinking that the attributability view fails to provide a good justification of the general presumption that children are the proper subjects of adult authority. I argue, first, that failure to give empirical backing to claims that children’s wills are not yet fully formed characterizes children in a purely normative way, and provides no discernible bridge to understanding or justifying the status of actual children. Second, the attributability view as Schapiro elaborates it depicts very young children as more like animals in terms of their autonomy-related capacities than they are like other human beings. This picture encourages us to think of children’s wills as being absent. But the children-as-

¹¹⁰ Ibid., 584.

¹¹¹ Ibid., 584-5.

animals analogy has long been discredited. Third, in characterizing children as lacking wills, the attributability view paints a depersonalized picture of children – with a danger that we will be led to regard children as non-persons not eligible for a similar sort of respect to that we accord adults.

I shall now take up these claims in more detail.

Empirical vs. Normative Justification

A part of Schapiro’s objection to proficiency views is that these views rely on citing empirical differences in competencies between adults and children; but only a further principle can show that the fact of these differences justifies according children a different moral status to adults. Yet it seems to me that the attributability view suffers from the identical problem in reverse: it is a principle that does not yet apply to anything in the real world.

The attributability view denies that children are full moral agents – characterizing them as those “on the way” to developing full selves or wills. However, it does not connect this claim with empirical observations of what children are actually like at various stages of their development. In the absence of empirical backing, there is little reason to suppose that the attributability view applies to actual children. Indeed, as we have observed, older children sometimes demonstrate superior moral agency to that of their parents’ generation.

At best, what the attributability view can say is that if a human being lacks a fully-formed will, then adopting a paternalistic attitude to that person is justified. (It is worth noting that if we understand “paternalism” to involve, at least in paradigm cases, an interference with others’ autonomy, in most cases paternalism towards children becomes an impossibility on the

attributability view. This is because if children lack wills, then it is impossible to interfere with their autonomy.)¹¹²

Even if we accept that adopting a “paternalistic” attitude toward those without fully developed wills is both justified and (somehow) possible, it is a further step to claim that children (real children, as opposed to Schapiro’s normatively-characterized children), lack wills. Recall that Schapiro rejects proficiency views on the grounds that they fail to distinguish adequately between adults who may be more or less proficient, and children who may be more or less proficient. We all know children who seem surprisingly cerebral and who show a remarkable degree of what psychologists call “executive function.” And then again, there are countless examples of adults who behave in less mature ways. Proficiency is something that, as Schapiro notes, an individual at various stages of life, including childhood, may have more or less of. But why are we to think that a will is somehow different? Why not regard some children as having wills that are more well-formed than some adults? Surely, just as a person of any age may be more or less proficient in her choice-making, she may also have a more or less well-formed will.

There is only one way to defend the claim that *real* children lack fully developed wills. This is to appeal to the empirical facts corresponding to what we understand by “having a fully developed will.” The relevant facts would be facts about children’s proficiency (or what I call

¹¹² You might think that Schapiro could simply help herself to the broader characterization of paternalism that I put forward in Chapter I. There I was at pains to show that interfering with another person’s will is not a necessary condition for an act’s being paternalistic. But notice the difference in our two positions. I did not deny that paradigm cases of paternalism towards children involve interfering with children’s wills. I merely presented cases showing that there are *some* instances of adult-child interaction that are most naturally described as involving paternalistic treatment or attitudes, yet which do not involve interference with a child’s will. Schapiro’s view is more radical. In her view, it seems, adopting so-called “paternalistic” attitudes toward children never involves an interference with children’s wills or autonomy. I do not endorse this outcome.

competencies) relative to choice-making and moral agency. The attributability view can only do its justifying work if it is accompanied by robust evidence to do with what children are actually capable of doing.

Children Depicted as Animal-like

Although Schapiro's avowed strategy is to seek a normative justification of paternalism towards children, in places she tacitly acknowledges the need for empirical support. For example, she says:

If a full person is one who has completed the task of liberation from nature, a child is one who has yet to complete the same task. How are we to think of this? First, it helps to notice a very general empirical fact about the way human beings develop. Our capacity to reflect upon our perceptual and motivational impulses develops gradually. Thus those at the very beginning of human life, infants, are in an important respect more like nonhuman animals than they are like adult human beings.¹¹³

This particular appeal to so-called empirical fact makes a questionable claim about what children are like. In characterizing children as lacking wills, Schapiro, drawing on Kant, reverts to an old idea that younger children are more like animals than they are like fully-fledged persons. Schapiro paints a picture whereby children begin life in something akin to an animal state, driven entirely by instinct, only gradually replacing instinct with rational control.¹¹⁴ Children, she says, need to be brought out of their animal state "by carving out a space between themselves and their first-order desires and perceptions."¹¹⁵

The picture of children-as-animals originally described by Kant was given justificational support by a view that gained prominence in the 19th century. In 1866, Ernst Haeckel proposed a

¹¹³ Schapiro, "Childhood and Personhood," 588.

¹¹⁴ Ibid., 587-9.

¹¹⁵ Ibid., 589.

“biogenetic law”, often summarized as “ontogeny recapitulates phylogeny.” The law claims that the development of the individual human being from embryo to adult follows the same route as the evolutionary development of the species. Like the Kantian view, the biogenetic law supports a picture whereby children enter the world in an essentially animal state, and gradually develop the capacities characteristic of human beings. Now, As David Archard points out, Haeckel’s law has long been discredited in scientific circles.¹¹⁶ Yet the view has been extremely influential in shaping our thinking about child development. Freud, for example, took the view quite seriously, as did G. Stanley Hall, who founded the field of adolescent psychology.¹¹⁷ If one believes that very young children exist in a primitive animal-like state, almost entirely governed by instinct, it can seem natural to assume that the distinctive choice-making capacities of autonomous human adults are almost entirely absent in infants and very young children, only gradually emerging as they get older.

The problem with the view that infants and young children are in an almost purely instinctual animal state is that it is false, as a raft of evidence from contemporary developmental psychology attests. Numerous studies show what many parents and caregivers already know: that even infants and very young children exhibit distinctively human rudimentary capacities associated both with prudential choice-making and with moral agency.¹¹⁸ For example, very early on children make emotional and social connections that prefigure later developmental

¹¹⁶ Archard, *Children: Rights and Childhood*, 41.

¹¹⁷ *Ibid.*, 41; G. Stanley Hall, *Adolescence*, 2 vols., (New York: Appleton, 1904).

¹¹⁸ See for example: Alison Gopnik, *The Philosophical Baby: What Children's Minds Tell Us About Truth, Love, and the Meaning of Life*, (New York: Farrar Straus Giroux, 2009). Of particular interest is a body of work conducted by Judith Smetana and colleagues (cited in Gopnik). This work reveals that even very young children have a surprisingly sophisticated understanding of moral and social conventions.

milestones. Young children are capable of joint attention, and they become aware of themselves as individuals, separate from, yet connected to others. They exhibit sympathy and empathy. And they begin to develop the early signs of rational thought.

It is important that early capacities associated with moral agency are not cast as purely cognitive (logical or intellectual) reasoning capacities. Younger children's moral difference from most animals is signaled not just by cognitive divergence but also by differences in the ability to engage emotionally and empathetically with others, and to have a sense of themselves as separate from, yet connected with, other people.¹¹⁹

Now, it may be tempting to characterize the very early stages of moral development as “not really” displaying moral capacities; as presenting proto- or quasi-moral capacities. But this would be a mistake. Like other capacities, moral capacities can only be properly understood in

¹¹⁹ The following anecdotal story adds color to the picture provided by the scientific findings mentioned in the previous footnote.

Temple Grandin is a well-known spokesperson for individuals with autism, and she herself has autism. She also designs humane livestock slaughterhouses. Grandin notes that she has an intensely empathetic insight into the moods and feelings of livestock. But she battles to understand the states of mind and feelings of other human beings. Interviewing Grandin, Oliver Sacks speculated that children would fill some intermediary place in her empathic understanding. But as Sacks reports, Grandin struggles with children:

“On the contrary, Temple said, she had great difficulties with children -- trying to talk with them, to join in their games, (she could not even play peekaboo with a baby, she said, because she would get the timing all wrong!) -- as she had had such difficulties herself as a child. Children, she feels, are already far advanced, by the age of three or four, along a path that she, as an autistic person, has never advanced far on. Little children, she feels already ‘understand’ human beings in a way she can never hope to.” Sacks wondered, further, how well Grandin could understand apes: “Would she find them impermeable, the way she found children and other human beings? (‘With farm animals, I feel their behavior,’ she said later. ‘With primates I intellectually understand their interaction.’)” Oliver Sacks, “An Anthropologist on Mars,” in *An Anthropologist On Mars: Seven Paradoxical Tales*, (New York: Alfred A. Knopf, 1995).

In noticing Grandin's difficulties I do not mean to suggest that she and other adults like her should be regarded as any less autonomous or as lesser moral beings within the human community. On the contrary, the impressive ways in which Grandin compensates for her difficulties speaks to her immense cognitive sophistication and underlines the perhaps uniquely flexible way in which human beings are able to adapt to localized psychological deficits. Rather, Grandin's difficulties with children and even with apes points to the way in which dramatic differences between most animals and humans extends to very early in life -- so that it is misleading to think of children as, “like animals,” almost completely lacking the attributes, capacities and competencies characteristic of autonomous human agency.

their developmental context. As Barbara Herman notes, it would be odd to think that “the linguistic activity of infants was ‘baby language’ — acquired to suit the needs and abilities of infants — supplanted later on by something entirely new.”¹²⁰ Similarly, it would be odd to think of the early socio-emotional and rational capacities that later develop into full-fledged moral capacities as separate capacities. As Herman explains: “Little in our development looks like that: crawling is integrally connected to walking, babble to speech, mimicry to mature social relations.”¹²¹ Infants’ and children’s rudimentary socio-emotional and rational capacities are an early instantiation of those functions that will ultimately be required for full moral agency.

Depersonalizing Children

My final worry about the attributability view is that it implicitly diminishes the moral status of children. As I discuss at length in Chapter III, respecting children as persons is sometimes consistent with treating them paternalistically. However, thinking of children as not really having wills, as not being “themselves” yet, depersonalizes them. I believe that it shows disrespect to question whether a person (even a very small person) has a present will.

The worry can be illustrated by examining an analogy that Schapiro draws between a child who lacks a fully formed will (who is “not herself”) and a depressed person who is “not herself.”¹²² We think of the temporarily depressed person as in some sense “absent” in will - and we anxiously await the return of the person to her usual self. Yet it seems clear to me that when we engage with children we ought to display a very different attitude in most cases. We should

¹²⁰ Barbara Herman, “Responsibility and Moral Competence,” *Moral Literacy*, (Cambridge, Mass.: Harvard University Press, 2007), 101.

¹²¹ *Ibid.*, 101.

¹²² Schapiro, “Childhood and Personhood,” 584.

engage with the child as *this* particular individual, *this* particular self. We should delight in the *present* person in all her willfulness and only under strain, one hopes, would we (adult caregivers) genuinely wish that the child would reach - right now - a different, more grown-up level of being.

Both Noggle and Schapiro suggest that empirical differences in competence or proficiency between children and adults cannot justify paternalism toward children. Noggle makes an empirical point when he contests the truth of claims that older children are cognitively deficient relative to adults. But he then goes on to tacitly reject the use of empirical language to describe children's relevant differences from adults. Instead he characterizes children's deficiencies in terms of a more abstract notion of moral agency. So while Noggle does make use of empirical claims to support aspects of his argument, he does not invoke empirical evidence in a way that supports his overall view. Schapiro's rejection of the empirical facts is more direct. She gives a normative description of childhood, with no evident way to build a bridge between that account and the actual children she purports to be talking about.

One of my goals in the above discussion of the use of a notion of moral agency to justify paternalism has been to demonstrate that a good justification of paternalism towards children must begin with a clear understanding of what the actual, empirical differences between children and adults are. Schapiro is right, of course, that simply providing a list of empirical differences does not settle questions of value about to how we ought to treat and regard children. I acknowledge that something needs to be said beyond stating facts about differences. To this end, in Chapters III and IV I develop an account of how the empirical evidence relates to questions of value.

I hope that I have convinced the reader that the alternatives to adopting a competence view to justify paternalism towards children suggested by some of those who oppose competence views are not satisfying. My remaining task, which I undertake in the next section, is to show that the objections to the use of competence standards that I outlined earlier, can be overcome.

Section 3. Replies to the Objections

In Section 1 I mentioned a number of objections to justifying paternalism towards children in terms of competence. I now want to address these concerns. As I will show, many of the objections rely on an overly narrow understanding of the ways in which competence can or should be invoked to do its justifying work.

Some of the concerns mentioned earlier are practical, dealing with the historical and potential danger to children that may result from certain uses of competence standards to justify paternalism. Other concerns are more theoretical, suggesting principled reasons why children's relative incompetence cannot justify paternalism. The practical and theoretical concerns are not easy to pull apart, for the critics tend to invoke both sorts of concern in tandem. But I shall do my best to separate out the various issues.

I begin by addressing the more practical concerns.

Objection 1: A Competence Justification is Bad for Children

Holt worries that relegating children to a separate moral sphere exacerbates children's incompetence relative to adults. Older children are denied opportunities to take on responsibilities and duties that will increase their experience and develop their competencies. Minow is concerned that competence can be characterized in so many different ways that the concept is easily used to rationalize decisions that are politically motivated and that may have little to do with the interests of children.

Both Holt and Minow are right to expose the way in which the notion of competence has been misused. In my view, though, they are overly pessimistic to conclude that our only option in the face of this reality is to abandon any attempt to use the notion of competence to justify paternalism.

The notion of competence is most likely to be abused or misused when competence is invoked as the *only* relevant consideration in determining whether a potential paternalistic act is justified. When competence is invoked as one of a number of considerations, it is less likely to be subject to abuse. For example, suppose we were to say that paternalism is justified only if a child is relevantly incompetent *and* if the proposed act of paternalism does not negatively impact the child's development. In such a case, Holt's concern that paternalism will exacerbate children's incompetence is offset by the constraint that paternalism must not hinder development. Other things equal, acts of paternalism that exacerbate incompetence will not be morally justified. For exacerbating incompetence is likely to function to hinder development.

Minow's concern that the notion of competence is used in politics to rationalize decisions is also offset if we envision competence being invoked as one of several considerations. It will be much harder to arbitrarily rationalize decisions if one must check one's approach off against several considerations before one's decision can be determined to be justified.

Minow is concerned that it is all too easy to appeal to proxies for competence, such as age, maturity, biological development, and so on, in order to justify independently motivated desires to restrict children's choices. But we will only get away with such ad-hoc appeals to proxies for competence if we fail to acknowledge other obligations, such as our duties to facilitate children's development, to protect them from harm, and to recognize their personhood.

Minow and Holt are right to worry that appeals to children's incompetence, in the absence of other considerations, can lead to an abuse of power on the part of adults. However, it does not follow that we must avoid using the notion of children's incompetence in our deliberations about when and whether to treat children paternalistically. Rather, the concern directs us to investigate what other factors, in addition to children's relative incompetence, must feature in our deliberations.

Objection 2: A Competence Justification is Perniciously Circular

I turn, next, to an apparently more theoretical line of criticism that I earlier attributed to Holt and Federle. Holt and Federle appear to believe that paternalism necessarily exacerbates or is a partial cause of children's incompetence relative to adults. If this is true, then paternalism justified in terms of children's relative incompetence involves a pernicious kind of circularity. For it involves using children's incompetence (the partial result of paternalism) to justify paternalism (the partial cause of incompetence).

The worry is implicit in Holt's objections to the effects of drawing a hard line between childhood and adulthood when it comes to justifying paternalism towards children. Federle makes the point explicitly in relation to children's rights: she says that to use incompetence to justify according children different rights to those of adults is to use the source of children's lack of power to further disempower them.

This line of criticism turns out to be less theoretical than it may at first appear. For there is nothing intrinsic to paternalistic treatment or regard that necessarily results in children's relative incompetence being exacerbated, or in children's power being further undermined. The criticism derives its plausibility from the fact that, in practice, paternalistic restrictions do frequently hinder the development of children's competencies. But these unfortunate practical outcomes

derive from exercises of paternalism that would be deemed *unjustified* if evaluated within a moral framework that incorporates both competence and other facts about children's development, together with normative constraints generated by children's personhood.¹²³ For example, exercises of paternalism that take seriously the need to nurture children's developing autonomy are unlikely to result in treatments that overly restrict children's developing competence.

To cast the issue in Federle's language of rights: it is by no means clear that granting children different rights in virtue of their incompetencies necessarily exacerbates their powerlessness (though we cannot deny that in practice this often happens). Differential rights can, in practice, alleviate the circumstances of children's powerlessness. It is obvious how this works in relation to welfare and protection rights. Rights can help to ensure that children are granted basic services and protections by the state. Rights give children and their advocates a mechanism for making claims that may redress imbalances of power.

Federle's argument seems stronger in relation to children's self-determination rights. For surely, if we restrict children's rights to make their own choices in the name of their relative incompetence, we do use their lack of power to further their powerlessness. To show why, even in relation to self-determination rights, Federle's objection to the use of competence standards fails, I want to briefly examine the portion of the United Nations Convention of the Rights of the Child that deals with rights to self-determination.¹²⁴

Currently the Convention of the Rights of the Child (henceforth, "the CRC") is the most influential international manifesto of Children's Rights. The CRC was adopted by the UN

¹²³ See Chapter IV for the development of such a framework.

¹²⁴ United Nations Convention on the Rights of the Child, 20 November 1989, <http://www2.ohchr.org/english/law/crc.htm>.

General Assembly in 1989 and has been ratified by all UN members except for the United States and Somalia. The CRC relies on assumptions about children’s varying capacities (or in my terminology, competencies) relative to adults to determine and to specify the implementation of children’s rights. Article 12 of the CRC requires States Parties to give children a voice in decisions that affect their lives. Article 12 has been widely praised for focusing international attention on children’s rights to self-determination, and not only on their rights to certain protections. The article stipulates provisions for increasing children’s participation in decisions affecting their lives. So, one would expect Article 12 to function to empower, rather than to disempower children. If the implementation of Article 12 empowers children, and if Federle is right that invoking differences in competence ultimately disempowers children, we might expect the article to ignore questions relating to children’s relative incompetence. Yet Article 12 leans heavily on an understanding of children’s developing capacities to determine the scope and implementation of self-determination rights. The key text is Article 12.1:

States Parties shall assure to the child *who is capable of forming his or her own views* the right to express those views freely in all matters affecting the child, the views of the child being given due weight *in accordance with the age and maturity of the child.*¹²⁵

The right to express his or her views is straightforwardly linked to a child’s being *capable* of forming those views. Further, a child’s “maturity” (together with her or his age) determines how much weight is given to those views.

¹²⁵ Ibid., (my emphasis).

In General Comments on the CRC published in 2009 what is meant by “being capable of forming his or her own views” is broadly interpreted.¹²⁶ It is noted that, according to research, children are able to form views from the youngest age, even before they can express those views verbally.¹²⁷ The comments interpret Article 12 as requiring States Parties to give children an opportunity to express their views in ways *consistent with their capacities*. This includes seeking their views through “non-verbal forms of communication including play, body language, facial expressions and drawing and painting.”¹²⁸ In this way even very young children have an opportunity to participate in decisions that affect their lives.¹²⁹

Without acknowledging substantive differences in capacities, an opportunity to involve even very young children in such decisions would be unavailable. Only by recognizing differences in capacity can appropriate forums be provided in which young children will have a genuine opportunity to air their views.

Admittedly, the CRC takes it for granted that final decisions about issues affecting children’s lives will rest with adults who represent both the children’s interests and wider social concerns. So in this sense rights-talk relying on capacities, as represented in the CRC, does limit children’s power. Yet, it is far from clear what a feasible alternative could be. For children, especially younger children, do lack competencies relevant to making life choices.

¹²⁶ United Nations Convention of the Rights of the Child, General Comment No. 12 (2009), Committee on the Rights of the Child, Fifty First Session, <http://www.coe.int/t/dg3/children/participation/CRC-C-GC-12.pdf>

¹²⁷ UN CRC General Comment No. 12, note 20 cites G Lansdown, “The evolving capacities of the child”, Innocenti Research Centre, UNICEF/Save the Children, Florence (2005).

¹²⁸ UN CRC General Comment No. 12, Item 21.

¹²⁹ There is also a requirement that States Parties inform children of the role that their views have had in determining a final outcome. (See point 45 in the General Comments) This requirement acts as a safeguard against children’s “participation” becoming a formality without genuine weight being given to their views. The addition of a right of appeal would function as a further safeguard.

The result of ignoring children's differences and according them identical rights to adults is, in effect, to "abandon children to their rights."¹³⁰ Consider, for example, a one-year old given the right to vote, but with no special provisions for representing her actual needs and preferences. The one-year old will not be able to exercise her right. In effect the right is meaningless and hardly functions to empower the child.

Federle herself does not construct an alternative "capacity-free" theory of rights. But she does provide some preliminary thoughts. She says:

The kind of rights I envision are not premised upon capacity but upon power, or, more precisely, powerlessness. They are rights which accord the rights holder power: the power to command respect and deference, to challenge hierarchy, *to be treated nonpaternalistically*. Furthermore, having the kind of rights I am speaking of should prohibit others from defining the nature and extent of those rights and deciding the identity of rights holders.¹³¹

In Federle's view, rights should be construed as claims that can be made by the powerless – or by their representatives – on the powerful: claims to "command respect and deference." As she envisions rights, any individual or social group that lacks power within an hierarchical structure has fundamental rights that, if respected, will limit the power of those at the top.

In Federle's view, it seems, a rights holder's "claim" is constituted by the holder's powerlessness and others are to be prohibited "from defining the nature and extent of those rights and deciding the identity of rights holders." But if rights are to be assigned to the powerless irrespective of their capacities, and if those in power are not permitted to define the nature and extent of those rights or to decide the identity of rights-holders, then all creatures that have less

¹³⁰ For this turn of phrase, see Bruce C. Hafen, "Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their 'Rights'," *Brigham Young University Law Review* 3 (1976): 605-658.

¹³¹ Federle, "Rights Flow Downhill," 365. (My emphasis).

power than those adult human beings who wield the most power, are presumably candidates for being rights-holders. Rights-holders will include not only oppressed social groups and children, but also animals of all types, plants, and perhaps even non-living things.

Extending the use of rights-talk beyond human beings to animals and the natural environment is of course, hardly a new idea.¹³² But, assuming that such an extension is defensible, if we cannot rely on capacities to determine the nature and extent of the rights to accord to animals and the natural environment, on what basis are we to differentiate the rights held by these vastly different sorts of entities? Perhaps we should consider individual and group *needs* rather than their capacities.¹³³ However, Federle's position rules out substituting needs for capacities, given her prohibition on those in power making determinations about the nature and extent of rights. Focusing on needs has a strong paternalistic overtone: those in power determine what rights are to be extended to others based on their established needs.¹³⁴

If we accept Federle's view, we should extend the mandate of the child liberationists to the natural world. That is, just as the child liberationists advocated extending the vote, labor rights, sexual freedom rights, and so on, to children, we should extend these rights to dolphins, ants, trees and mountains. But to do so would fail to achieve Federle's political objective of redistributing power. Genuine power will not be in the hands of these rights-holders, whose rights will not be fitting for the sorts of creatures or things that they are. The right to vote, for example, would be even more meaningless if granted to a tree, than it is when granted to a one-

¹³² See, for example, Tom Regan, *The Case for Animal Rights*, (University of California Press, 1983).

¹³³ Martha Minow recommends a reorientation along these lines in "Rights for the Next Generation."

¹³⁴ I assume, for present purposes, that there exists a reliable way to determine what are the needs of others.

year old. Power is not granted to the less powerful by failing to allow considerations of capacity to feature in justifications of paternalism and rights to self-determination.

It is worth noting that even if our only concern were to establish and justify rights and restrictions for competent *adult* human beings, it would be a mistake to remove considerations of capacities from our deliberations. Rights and responsibilities go hand in hand. Yet the ways in which we are justified in holding even adults responsible for their actions depends upon an understanding of typical adults' capacities and competencies. English law uses "the man on the Clapham Omnibus" as an example of a hypothetical reasonable person, someone who is intelligent and of "normal" rationality, but not a specialist. This "man" is held up as the example against which to test whether it is reasonable to hold a person legally responsible for negligence. So, even for adults, an understanding of normal functioning and competence features in our deliberations about responsibility and freedom.

Federle correctly points out that if rights are based on capacities, children, whose capacities for self-determination are not as well-developed as those of adults, will continue to be less powerful than adults. But this difference in power cannot be side-stepped. For if children are naturally dependent and vulnerable, the most respectful way to treat them may well be to restrict their freedom in some domains. This is not to deny that excessive or misplaced exercises of power by adults can harm children. But the proper response to the abuse of power in this case is to regulate and restrict power's exercise, rather than to abandon it altogether.

I think that the CRC is exemplary in achieving a middle ground for children's participation in decisions affecting their lives. While it does not grant children final authority over life decisions, it makes extensive provision for consulting in a sustained and intense way with even very young children. The drafters of the CRC and the follow-up comments sought to maximize

children's participation in life-affecting decisions by recognizing and compensating for the ways in which children lack the fully developed capacities with which to express their views. They saw that genuine respect requires acknowledging and accommodating relative incapacity, rather than ignoring it.

I now turn to some remaining theoretical objections to the use of a standard of competence to justify paternalism towards children. These have to do with questions about what is known, or could possibly be known, about children's relevant differences in competence from adults.

Objection 3: Relevant Differences in Competence are Unknowable

As we saw earlier, Minow doubts that it is possible to know the relevant differences between children and adults for purposes of variable application of paternalistic restrictions. Now, it is one thing to admit that establishing boundaries between competent and incompetent individuals at a group level is not a simple matter, and that it is likely to involve some degree of inaccuracy. It is another thing to claim that such boundaries are impossible to know.

We know that a five-year-old lacks certain key competencies that a fifteen-year-old typically possesses. Whether to draw a line at age twelve or fourteen for a particular issue may be less clear. However, our knowledge and science can be used to considerably narrow down the boundary area, so that lines can be drawn somewhere within a reasonable range. The fact that it is difficult to arrive at precise boundaries should not lead us to abandon any consideration of children's relative incompetence when such boundaries must be drawn; neither should the difficulty push us to ignore the valuable information that our psychological and social sciences provide us in making such determinations.

In the 1980's, at the time during which Minow was writing, skepticism about our ability to know relevant differences between children and adults was more understandable than it is today.

At that time there was relatively little research or scientific evidence in this domain. As I elaborate in Chapter V, while the science of child development remains young, today there are numerous studies that show a range of differences between children and adults in maturity, specifically with regard to emotional and social behavior, as well as in relation to corresponding differences in brain physiology and function.¹³⁵

These studies suggest that while older children in our culture perform as well as adults do on cognitive tests administered in controlled environments, they do not perform as well as adults in circumstances of high emotional arousal, in the presence of peers, and in other non-controlled circumstances. It is now well documented that older children are more susceptible to risk-taking, impulsivity, and peer pressure than are similarly placed adults. These susceptibilities are particularly relevant in criminal contexts, where they can — and should — be regarded as mitigating factors in determining culpability. As the science matures, there is no reason to

¹³⁵ See, for example Dustin Albert and Laurence Steinberg, “Judgment and Decision Making in Adolescence,” *Journal of Research on Adolescence* 21, no. 1, (2011): 211-224, Ashley R. Smith, Jason Chein, and Laurence Steinberg, “Impact of Socio-Emotional Context, Brain Development, and Pubertal Maturation on Adolescent Risk-Taking,” *Hormones and Behavior* 64, no. 2 (2013): 323-332, Laurence Steinberg et al., “Age Differences in Future Orientation and Delay Discounting”; Sindy Sumter et al., “The Developmental Pattern of Resistance to Peer Influence in Adolescence: Will the Teenager Ever be Able to Resist?” *Journal of Adolescence* 32 (Aug. 2009): 1009-1021; Laurence Steinberg et al., “Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model,” *Developmental Psychology* 44 (Nov. 2008): 1764-1778; Laurence Steinberg and Kathryn Monahan, “Age Differences in Resistance to Peer Influence,” *Developmental Psychology* 43 (Nov. 2007): 1531-1543; Laurence Steinberg, “Risk Taking in Adolescence: New Perspectives from Brain and Behavioral Science” *Current Directions in Psychological Science* 16 (April 2007): 55-59; Laurence Steinberg, “Cognitive and Affective Development in Adolescence,” *Trends in Cognitive Science* 9 (February 2005):69-74; Laurence Steinberg and Elizabeth Scott, “Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty,” *American Psychologist* (Dec. 2003): 1010-1018; Margo Gardner and Laurence Steinberg, “Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study,” *Developmental Psychology* 41 (July 2005): 625-635; Elizabeth Cauffman and Laurence Steinberg, “(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults,” *Behavioral Sciences and the Law* 18 (2000): 741-760. Additional sources for the application of adolescent development science in Juvenile Justice contexts may be found in the publications of the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, <http://www.adjj.org/content/index.php>.

believe that there is any in-principle epistemic barrier to understanding general differences between children and adults. Furthermore, in interpersonal relationships, parents who are good observers may know a great deal about their own children's capabilities and weaknesses. This knowledge will often be more detailed and nuanced than that provided by the scientific evidence. I do not mean to imply that we should treat the science, or parents' knowledge of their children's abilities, as incontestable truths. But I do want to emphasize that differences between children and adults are not fundamentally mysterious and unknowable. Even if our knowledge is patchy or flawed, it is important to recognize and utilize what we do know.

Objection 4: Relevant Differences in Competence Do Not Exist

Robert Noggle believes that we can and do know certain relevant differences in competence between children and adults; but that older children are not relevantly different from adults. Without citing them, Noggle seems to have in mind studies showing that when older children are tested in controlled settings, they are able to perform comparably to adults in certain reasoning activities.¹³⁶ Noggle also relies on anecdotal evidence about older children's reasoning abilities. But he fails to acknowledge that children's ability to reason well in controlled settings, and even their ability to function as what he calls "simple agents" in such settings does not exhaust the relevant differences between adults and children.

As I take up in more detail in Chapter V, an important question is whether older children are able to function with adult levels of competence in the typical contexts in which they find themselves on an everyday basis: the normal circumstances in which they exercise their moral

¹³⁶ Steinberg and Scott ("Less Guilty by Reason of Adolescence," 1011) reference this body of research. They say "...it is often asserted that, by mid-adolescence, teens' capacities for understanding and reasoning in making decisions roughly approximate those of adults." They cite as examples B. Fischhoff "Risk Taking: A Developmental Perspective," in J. Yates (ed.), *Risk Taking Behavior* (New York, Wiley: 1992): 133-162 and L. Furby and R. Beyth-Marom, "Risk Taking in Adolescence: A Decision-Making Perspective," *Developmental Review* 12 (1992): 1-44.

agency in the community. Typically, adolescents do not only find themselves in a private testing room in conditions of relative calm. They also find themselves out in the community, with their friends, in environments where they may have access to alcohol and drugs, driving cars with their peers, and so on. How they function in these settings is as relevant to attempts to justify paternalism towards them as is how they answer questions in a calm test-taking environment.¹³⁷

In failing to acknowledge the established social and emotional differences between older children and adults, Noggle does not take all of the relevant differences in competence into account. When the full range of differences is recognized, it becomes clear that, notwithstanding areas of cognitive parity, older children differ in important ways from adults in areas relevant to their choice-making capacities.

Like Noggle, Schapiro believes that children are not consistently lacking in competence (or “proficiency”) relative to adults. Schapiro rejects what she calls the proficiency view of why we are justified in adopting a paternalistic attitude towards children. She points out that adults are frequently poor choice-makers, just like children. As such she believes that we cannot make distinctions between children’s and adults’ proficiency that are firm enough to justify paternalism towards children but not towards adults.

Schapiro notes that children’s lack of proficiency tends to be understood in one of two ways: the tendency to arrive at poor decisions (bad practical or moral outcomes), and the use of poor deliberative *procedures* to arrive at a given decision, whether good or bad. She goes on to reject all versions of the proficiency view. But I believe that Schapiro’s argument only holds up against versions of the proficiency view that focus solely on the alleged fact that children’s

¹³⁷ See the citations in footnote 135. As Cauffman and Steinberg put it, “[T]o the extent that adolescents are less psychosocially mature than adults, they are likely to be deficient in their decision-

unsupervised choices result in worse *outcomes* for children themselves and for the community, than do adult choices.

Let us examine what is wrong with the idea that it is not children's incompetence per se that justifies paternalism; rather, it is the alleged fact that, if allowed to make self-determining decisions, children's incompetence results in significant harms to themselves or to others. The poor outcomes, rather than the fact of children's incompetence, are taken to be doing the justifying work here. I shall call this the "Harm Thesis."

It is easy to see why this formulation of the Harm Thesis cannot justify paternalism that singles out children. Suppose that preventing harm were sufficient to justify paternalistic interference. This would justify paternalism towards adults as well as towards children. Yet our practices allow us to interfere in children's potentially harmful decision-making while prohibiting us from interfering in similarly harmful decisions that may be made by adults.

A more sophisticated version of the Harm Thesis could perhaps circumvent this problem. Suppose that what justifies paternalistic interference with children's choices is not the potential for harm as such, but rather the substantially greater probability of harm resulting from children's choices, compared with the choices of adults. Call this the "Probable Harm Thesis."

The Probable Harm Thesis can be considered in two parts. First, we may observe that if we do not restrict children's choices, they are disproportionately likely to cause harm to themselves. Second, we may believe that children left to their own devices are more prone than adults to cause harm to others (both children and adults). John Stuart Mill famously distinguished between these two aspects of potential harm in setting up his "harm principle" (discussed at length in

making capacity, even if their cognitive processes are mature," ("(Im)maturity of Judgment in Adolescents, 1012).

Chapter I).¹³⁸ He maintained that we are only entitled to intervene forcibly in an adult's decisions when those decisions pose a definite threat of harm to individuals other than the adult in question. Implicitly, undertaking activities that threaten harm to oneself is an adult's own business.¹³⁹

Curfew laws in some cities in the United States are a good example of the way in which our paternalistic practices toward children differentiate children from adults on both dimensions of the Probable Harm Thesis. Curfew laws are normally applied to minors and not to adults. They are justified both in terms of the safety of the minors themselves, and in terms of "public safety" - that is, the safety of others. For example, the Los Angeles Police Department describes the purpose of its curfew laws for minors as aiming "to establish a safer community and to better protect kids from becoming victims of crime or becoming involved in delinquent behaviors."¹⁴⁰

One problem with the Probable Harm Thesis is that we are sometimes faced with situations in which the expected outcomes of free choice are identical for children and adults, yet in which we still consider children, and not adults, to merit paternalistic intervention.¹⁴¹ To illustrate: suppose that I am in a position to prevent my grown-up daughter, a mountain climber, from

¹³⁸ John Stuart Mill, *On Liberty*, (London: Penguin, 1974/1879), Chapter I, paragraph 9, 68.

¹³⁹ The contrast between our attitudes to adults and children is sharpest when we contemplate intervening in choices that will harm the choice-maker. However, as I stressed in Chapter I, Mill's principle allows considerable room for adults to engage freely in activities that threaten harm to others as well. This aspect of Mill's principle still underlies attitudes to many adult freedoms in liberal or libertarian-leaning societies, such as the United States.

¹⁴⁰ The Los Angeles Police Department website, http://www.lapdonline.org/juvenile_division/content_basic_view/2011

¹⁴¹ Following Jean Jacques Rousseau, one might adopt the more radical position that by the time most humans reach adulthood they have become corrupted and cynical and that, in many cases, a child will be more likely to select the less harmful path. *Emile, or On Education*, trans. Alan Bloom (USA: Basic Books, 1979.)

attempting a peak that has never been successfully climbed before, and that has resulted in numerous climber deaths. And suppose that there is compelling reason to believe that even the best climber is unlikely to survive the attempt. Paternalistic instincts are likely to surface here. However, if the climber is able to show that she is in other respects sane, and that she understands the nature of the risks involved, it is doubtful that I would be justified in coercively standing in the way of her attempt. Yet it is plausible that I would be justified in preventing my experienced and highly trained ten-year-old daughter from attempting the same slope, even if I considered her to be as skilled a climber as her adult sister.¹⁴²

Even in circumstances in which the outcomes of children's choices are on average demonstrably worse than those of adults, a second problem arises. If we accept the Probable Harm Thesis, we must find a way to distinguish children's greater propensity to make harmful choices from groups of adults that are more prone to harmful behaviors than the general population. Otherwise we will be forced to embrace some rather objectionable consequences. There are certainly groups or categories of adults whose members are more likely to make harmful choices than the rest of the adult community. Yet most people would recoil from concluding that such differences justify singling out these sub-groups for paternalistic treatment.

For example, compared with women, men are statistically more likely to drive recklessly. Yet we do not deny them drivers' licenses. Committed mountain climbers may be substantially

¹⁴² I have presented the case from the point of view of a parent. But I believe the point would still hold if we assume that the adult in a position to prevent the expedition is not a parent, but another adult: say, a representative of the state. Normally of course, the parents would have authority over a child's mountain climbing activities. But if the risks were great enough, we might expect the state to intervene and override parental permissiveness. Such interference would be on the grounds that the parents were not appropriately protecting the child from harm - that they had failed in their basic parental duties. In June 2010, 16-year-old Abby Sunderland stirred controversy when her attempt to become the youngest person to sail solo around the world ended in an expensive rescue mission. Critics suggested that her parents should not have allowed her to attempt the journey, but in this case there was no state mechanism to

more likely than the general public to engage in life-threatening behaviors. Yet we do not — and should not — have any special authority over them. And, suppose that members of certain minority racial or ethnic groups are shown to be statistically more likely than the general public to engage in risk-taking (and hence, potentially harmful) behaviors. This should not incline us to subject these groups to paternalistic restrictions that are not applied to the broader community.

Intuitively, children have a different moral status from adults with respect to their autonomy even in cases in which potential harm to self or others is identical for children and adults. Neither the Harm Thesis nor the Probable Harm Thesis seems sufficient to justify paternalism toward children in circumstances in which paternalism toward similarly placed adults is not justified. This is not to say that the potential for harm has no role to play in understanding why we are justified in according children a different moral status from adults. But a satisfying justification cannot rely solely on the notion of harm. Something else is required.

As I have said, when Schapiro rejects what she calls “proficiency views” as a source of justification for paternalism towards children, she rejects two views at the same time. First, she rejects the view that allegedly poorer practical or moral outcomes of children’s decision-making relative to that of adults, can justify paternalism. In the foregoing discussion, I have supported this move.¹⁴³ But in dismissing proficiency views Schapiro also rejects a view that paternalism towards children can be justified by *the way in which* children arrive at decisions. For as

interfere with the parents’ permission. Admittedly, this case is less clear-cut than if we were dealing with a younger child.

¹⁴³ I have not said much directly about specifically moral outcomes, though I take it that my arguments apply to both practical and moral outcomes. Furthermore, I believe that my comments in earlier sections about the way in which adolescents often occupy the moral high ground relative to adults in their community, is evidence that moral outcomes do not distinguish older children from adolescents in ways that can exhaustively justify paternalism.

Schapiro acknowledges, proficiency in choice-making can also be understood in a procedural way.

Now, as I have already noted, the accumulating evidence from developmental psychology and from the cognitive and brain sciences suggests that the procedures by which older children arrive at self-determining choices are not equivalent to those of adults.¹⁴⁴ In addition to their lack of experience, in the course of making decisions, children must navigate social and emotional pressures that differ substantially from those faced by adults.

One article, reviewing the available cognitive science literature, lists the following psychosocial factors as relevant to the quality of adolescent judgment and decision-making:¹⁴⁵

- 1) There is evidence that susceptibility to peer influence increases during early adolescence, peaking at around age fourteen.
- 2) Gambling studies suggest that adolescents' risk-taking decisions are driven more by considerations of reward, and less by considerations of risk, than are the decisions of adults.
- 3) Adolescents are more likely than adults to discount future consequences.
- 4) Adolescents demonstrate weaker abilities of "self-management" than do adults. They are more impulsive, with impulsivity actually increasing between middle adolescence and early adulthood. Adolescents also have more difficulty regulating their moods, impulses and behaviors.
- 5) The experimental behavior characteristic of adolescence frequently is not indicative of later adult values and characteristics. Some of the inclinations that drive criminal choices among adolescents are characteristics of the adolescent developmental stage, and change in predictable ways as adolescents mature. So these inclinations are less appropriately attributed to an adolescent's "character" than similar inclinations that may appear in an adult.

In addition to the evidence from cognitive science, brain studies are beginning to lend further weight to our growing understanding that while adolescents have similar cognitive capacities to adults, their decision-making in real-world contexts is compromised by

¹⁴⁴ See citations in footnote 135.

¹⁴⁵ Steinberg and Scott, "Less Guilty by Reason of Adolescence," 1011-1014.

underdeveloped social and emotional abilities.¹⁴⁶ Brain systems linked with cognitive activity mature gradually during adolescence. However, brain systems linked to psychosocial features of behavior tend to correspond to pubertal maturity. As puberty sets in, there are actually increases in sensation-seeking, risk-taking and reckless behavior. So the developmental trajectory of adolescence should not be thought of in a purely linear way, as a time during which adolescents become increasingly competent.

There is, then, burgeoning evidence from cognitive and brain science to suggest that the procedures by which adolescents arrive at life-affecting decisions are different to those used by adults. Cognitive abilities that adolescents possess may be blocked or overcome by psycho-social factors.

The above evidence suggests that Schapiro is much too quick to reject proficiency views of the justification of paternalism out of hand. Proficiency views that focus solely on the outcomes of choice-making do fall short of providing a full justification of paternalism; for as I have acknowledged, bad outcomes can and do result from the choices of both children and adults; and anti-paternalism towards adults does not allow us to use bad outcomes to justify treating adults paternalistically except in the most extreme circumstances. But Schapiro is wrong to reject proficiency views that forefront the different social and emotional competencies that distinguish children's decision-making procedures from those of adults. The way in which decisions are reached amongst adolescents differs markedly from decision-making trajectories of adults. These differences must form a part of our justification of paternalism towards children.

¹⁴⁶ Steinberg, "Risk Taking in Adolescence" and Steinberg and Scott, "Less Guilty by Reason of Adolescence," 1013.

In this section I have evaluated the objections to using a notion of competence to justify paternalism towards children that were introduced in Section 1. I have argued that none of these objections stands up to close scrutiny.

Conclusion

The discussion in the previous section was designed to show that criticisms of the use of a notion of relative incompetence to justify paternalism towards children do not hold up when we construct a richer account of what justifies paternalism towards children, allowing facts and values other than relative competence to also feature in our deliberations. Chapter III and IV are devoted to developing such an account.

In this chapter I began by listing a number of objections that have been put forward by legal theorists and philosophers, who object to the use of a notion of competence for purposes of deliberating about the justified treatment of children. I evaluated the alternatives that these thinkers put forward, and found them all wanting. I concluded with an evaluation of the objections, and argued that none of the objections holds serious weight.

Considerations of children's competence relative to adults must form part of any comprehensive justification of paternalism towards children. My arguments have emphasized the fact that considerations of children's relative incompetence cannot do all of the work in justifying paternalism. In the following chapters I develop an account of the justification of paternalism towards children according to which competence considerations interact with considerations of development and with a requirement that we respect the dignity of children. Competence is not the only consideration. However, it is a consideration of significant importance, and it must feature in our deliberations about how to treat children if we are to arrive at just determinations about their treatment and regard.

CHAPTER III

Children as Persons: Dignity, Agency, and Partial Autonomy

“There appear to be two lives, one serious and respectable, the other indulgently tolerated, less valuable. We say: a future person, a future worker, a future citizen. That children will ... really begin to be serious only in the future.”

“The child is a foreigner who doesn’t know the language, isn’t familiar with the street plan, is ignorant of the laws and customs of the land. At times he likes to go exploring on his own; when things get rough, he asks for directions and help. What he needs is a guide who will politely answer his questions.”

— Janusz Korczak¹⁴⁷

Introduction

From a moral point of view, human life and human personhood do not necessarily coincide. Philosophers routinely draw moral distinctions among certain stages or conditions of human life, assigning “personhood” to one stage or condition, but not to another. For example, whether human fetuses are persons has been a question central to some philosophical arguments about the moral permissibility of abortion.¹⁴⁸ And there is controversy about whether human beings in a vegetative state, or anencephalic infants, should be regarded as persons.

Children present us with a different set of questions about life-stage and personhood. While we may argue about the personhood of fetuses with respect to the permissibility of abortion, there is consensus that children are persons in the sense that killing them is wrong in just the

¹⁴⁷ “The Child’s Right To Respect” in Janusz Korczak, *When I Am Little Again, and The Child’s Right to Respect*, translated by E. P. Kulawiec (University Press of America: Maryland, 1992/1929), 174 and 176.

¹⁴⁸ Although, in an influential paper Judith Jarvis Thomson presents a pro-abortion argument that does not rely on establishing that fetuses are not persons. See Judith Jarvis Thomson, “A Defense of Abortion” *Philosophy and Public Affairs* 1 (1971): 47-66.

same way in which killing adult human beings is wrong. However, there is a sense of personhood that does not apply in a straightforward way to children.

I have in mind an idea of personhood associated with liberal thought, and with the Kantian moral tradition in particular. According to this tradition, rational agency is a defining feature of persons. For Kant, the ultimate value of one's rational agency is that one can legislate the moral law for oneself. Persons have a special value - what Kant calls a "dignity" - that derives from their rational agency. We are obligated to respect persons in virtue of this dignity. Kant described persons as having a dignity or worth beyond all price. It is this dignity that is taken within the Kantian tradition, and within the human rights discourse that is its heir, to capture the inviolability of the human person.

Rational agency is attributed to normal adults insofar as they are members of a kind characterized by rational agency. It is also frequently attributed to normal adults as something that they are taken to possess at the current time. Rational agency enables normal adult human beings to function autonomously. Adults are autonomous to the extent that they have the capacity to shape their own lives.

Certain forms of interference with a person's autonomous function constitutes disrespect, and fails to honor a person's dignity. Torture and isolation, intended as they typically are to undermine a person's psychological control over what she says or does, are paradigmatic examples of forms of treatment that fail to respect human dignity. Cases in which human dignity is disrespected are not always so dramatic. Even well-meaning forms of interference can degrade or humiliate, and thereby constitute a failure to respect human dignity.

Now, there is an obvious way in which children (and perhaps even fetuses) can be characterized as persons under a broadly liberal-Kantian description. It may be said that while

children do not possess fully developed rational agency, they hold within them nascent capacities for moral agency: they are the *kinds* of creatures that, during a normal lifespan, develop rational agency. On this picture, personhood attaches to the kind of being that you are, rather than to any particular capacities that you may or may not possess at a given time.

Characterizing children's personhood as a *kind* attribute can explain why we are morally required to treat children as persons with respect to decisions that affect their lives as a whole. For example, a *kind* picture can explain why it is wrong to indoctrinate a child in such a way that her prospective adult autonomy is significantly compromised. However, a *kind* picture of personhood has little to say about how we should treat children with respect to decisions that impact children primarily while they are still children. For example, it is consistent with a *kind* perspective to prioritize benefits that are expected to accrue to a person when she reaches adulthood, and is in full possession of her rational agency, even if those benefits pose considerable cost to the occurrent wellbeing of a child.

Indeed, it is sometimes suggested that, because children are not fully rational agents, they are not fully persons; they are at best on their way to being full persons. As such, we are authorized to direct children's lives on their behalf, so long as we do so with an eye to facilitating the future autonomy of the adult that the child may eventually become.

A problem with this sort of approach is that it fails to acknowledge that, while children do not enjoy the sort of full autonomy that is characteristic of the normal adult, they also do not lack autonomy or agency entirely. From birth, children are agents, and they quickly begin to develop psychological capacities that foreshadow full autonomy. From a fairly young age, it is fair to characterize children as *partially* autonomous.

In this chapter I outline conditions that must be met in order for our treatment of children to be correctly characterized as respectful. The account takes into consideration the value of children's agency and partial autonomy *while they are still children*. I draw on the Kantian idea that human dignity — the idea that each human being has a worth beyond all price — is derived from human autonomy. The account of autonomy that I present is not strictly Kantian. However, it is inspired by Kant's idea that autonomy is valuable for itself and not merely instrumentally. I argue that a recognition of children as persons who possess both agency and partial autonomy circumscribes the moral permissibility of interfering with children's self-directed choices and activities.

In Section 1 I elaborate on the view that persons are to be respected in virtue of their dignity. I present an account of the role of dignity in our inter-personal relationships.

First, I suggest that in many circumstances, in order to properly honor another person's dignity, one requires a considerable amount of knowledge about her particular psychological, social, and cultural circumstances. Considerable depth of knowledge is required to honor the dignity of children, because children at different developmental stages differ substantially both from adults and from one another.

Second, I explore the way in which dignity contrasts with degradation, humiliation, and the expression of contempt. Even acts that otherwise do not harm their targets can be harmful, and can disrespect human dignity, to the extent that they degrade, humiliate, or express contempt.

I then use a literary example — the case of Shakespeare's character Shylock from *The Merchant of Venice* — to illustrate how particular facts about an individual, together with the ways in which other people relate to a person (including whether they humiliate or degrade the person) impact whether particular interactions constitute failures to respect human dignity.

In Section 2 I explore the idea that children are the bearers of both partial autonomy and human agency. I argue that children's agency and their partial autonomy have both instrumental and non-instrumental value to them.

In Section 3 I describe ways in which acknowledging children's partial autonomy and their agency impacts our understanding of children's dignity and what is required in order for adults to fully honor that dignity. I argue that the non-instrumental value associated with children's partial autonomy and with their human agency substantially limits adults' moral entitlement to treat children paternalistically.

Section 1: The Notion of Dignity

The idea of dignity that I draw on in this chapter derives from Kant and from the liberal tradition, and finds itself expressed in modern form in human rights discourse. Dignity is the foundational concept of the Universal Declaration of Human Rights.¹⁴⁹ The preamble to the United Nations Declaration on The Rights of the Child (CRC) invokes the notion of human dignity to underpin the specific rights that are attributed to children.¹⁵⁰ As discussed in Chapter II, the CRC grants children both rights to protection and care, and also, the right to have a say in what happens to them. So the CRC specifically recognizes that adults have obligations to children that extend beyond adults' obvious fiduciary duty to protect and educate children on behalf of the

¹⁴⁹ Universal Declaration of Human Rights, <http://www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=eng>. Exactly how rights and dignity relate in the UDHR as well as in other human rights documents is not always clear. See "Why a Handbook on Human Dignity?" in *The Cambridge Handbook of Human Dignity: Interdisciplinary Perspectives*, edited by Marcus Duwell et al. (Cambridge: Cambridge University Press, 2014).

¹⁵⁰ United Nations Declaration of the Rights of the Child (Preamble), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.

future adults that they may one day become. The adult community is also required to recognize and honor the partial autonomy and (I shall suggest) human agency of children while they are still children.

How does this requirement to honor the partial autonomy and human agency of children translate into the actual decisions that we make as parents, educators, and policy makers? I believe that a good way to begin to make sense of this requirement is to start with what underpins children's rights in the first place: their human dignity.

In this section I shall suggest that in our interpersonal relationships, in order to fully honor a child's dignity, great care must be taken to understand the particular psychological, social, and cultural circumstances of the child in question. In addition, I argue that even if certain forms of interference with a child may be expected to benefit her once she becomes an adult or when she is an older child, certain ways of treating a child are morally impermissible to the extent that they disrespect her dignity at the current time. Treatment of children that is humiliating, degrading, or expressive of contempt is morally impermissible even if the treatment also promises instrumental benefits to the child or to wider community.

Because actions required to honor the dignity of children are sometimes markedly different from actions needed to honor the dignity of adults, it is sometimes thought that "dignity" does not apply to children. And indeed, in some contexts it does sound odd to talk about children as the bearers of dignity. As Michael Rosen describes the disconnect:

Surely no one who subscribes to the idea that human dignity is a fundamental value and requires the protection of the state would deny that a young child falls within the scope of that protection. But what is less dignified than a two-year-old? One could, I suppose, argue that the child has grace. But dignity? Definitely not!¹⁵¹

¹⁵¹ Michael Rosen, *Dignity: Its History and Meaning* (Harvard University Press: Cambridge, Mass. 2012), 77.

Nevertheless, in my view children are fully persons in the sense that they are the bearers of dignity. There is nothing partial about the dignity that they bear or the respect that they are owed. In the forthcoming discussion I explore two aspects of the notion of dignity that have recently been discussed in the literature. These are dignity as a status term, and dignity as the absence of degradation and humiliation. Engaging with these aspects of the notion of dignity will facilitate a richer account of how paternalism towards children must be limited and shaped by the moral requirement that we honor the dignity of a child.

Dignity as a Status Term

Jeremy Waldron enjoins us to think of “dignity” as a status term.¹⁵² Historically, dignity was associated with the powerful and the aristocratic. We still retain this usage when we talk of state dignitaries, and of the dignity of certain highly regarded roles, such as that of a judge. Dignitaries were individuals of high social, political, or class rank who cultivated a certain upright “dignified” bearing, which Waldron terms the “orthopedics of dignity.”¹⁵³ There were unique rules, protections, and privileges that applied only to dignitaries.

Waldron describes the English case, in 1606, of one Countess of Rutland, who, having failed to pay a debt of a thousand pounds, was imprisoned for several days. Subsequently the Star Chamber held that the seizure and imprisonment of the Duchess, though it would have been perfectly legal had she been a commoner, was not legal in her case. One of the reasons given by the court for this exceptional treatment was that the prohibition on her seizure and imprisonment was required out of “respect for her dignity.”¹⁵⁴ Waldron notes that today (at least in our culture)

¹⁵² Jeremy Waldron, *Dignity, Rank, and Rights* (New York: Oxford University Press, 2012).

¹⁵³ *Ibid.*, 22.

¹⁵⁴ *Ibid.*, 56.

such legal distinctions of rank and associated dignity have been largely done away with. As he points out,

Now we apply this noble presumption [that the seizing of a noble's body is not justified in order to retrieve a debt] to all debtors ...we accord them the same dignity ... *no one's* body is allowed to be seized; no one can be held or imprisoned for debt.¹⁵⁵

In liberal societies, granting differential rights based on slavery, women's oppression, racial distinctions and so on, is now seen to involve moral and legal distinctions among human persons that are not warranted. These distinctions between human beings, which Waldron terms "sortal" distinctions, imply that there are different *kinds* of human beings. Where such distinctions continue to manifest themselves in the law and in interpersonal relationships, we ought to deplore them.

Those who accept the general motivation underpinning the Universal Declaration of Human Rights apply the notion of "dignity" to all human beings, and acknowledge that human rights apply equally to all human beings. In this way there has been a "leveling up" of humans in terms of legal status (and, I believe, also in publicly recognized moral status). The liberal view is that all persons should be accorded an equal and high regard. All are to be recognized as the bearers of a dignity that was formerly reserved for a select few.

Waldron distinguishes sortal status from "condition status." (He has legal status in mind, but I think the distinction applies in the moral domain as well). Condition status applies to individuals "in virtue of certain conditions they are in, that they may not be in forever, or that they may have fallen into by choice or happenstance." Such conditions include stages of life (including childhood), choices (such as marriage, felony, military service, being an alien), or

¹⁵⁵ Ibid., 56-57.

“some of the vicissitudes that ordinary humanity is heir to” such as lunacy, or the consequences of bad luck or management (such as bankruptcy).¹⁵⁶

At least in the law, different rules can properly apply to a person because of her different condition status, even if the law recognizes her as a person and hence as the bearer of human dignity. On Waldron’s picture, children are treated differently under the law because of their different condition status, and not because they are regarded as having a different sortal status. Dividing up legal (and by extension, moral) status into sortal and condition categories explains and tracks current practice in liberal societies. A good example is the legal category of “status offenses” in the juvenile justice system. Activities such as truancy and running away can land a child in juvenile court and a reformatory institution; whereas the same actions undertaken by an adult are not legal offenses at all.

So, in liberal societies, at least, children are accorded a different legal status (and also, a different social status with respect to their proper treatment in interpersonal relationships). According to Waldron, the different status is grounded in children’s *condition* — a fact about what they are temporarily like — and not in facts about the kind of creature a child is.

Of course, to recognize that it may be justified to treat children differently because of their condition status leaves it open whether the laws and customs that are actually applied uniquely to children are morally justified and are consistent with honoring children’s dignity. Children are not different sorts of beings. They are still persons, even though they may be justifiably subject to different forms of treatment. Therefore, children are still to be treated with equally high regard. So although paternalism is justified towards children in a range of circumstances in which it is not justified towards adults, only those cases of paternalism in which children are accorded the respect that is due to every person, regardless of her condition status, are justified.

¹⁵⁶ Ibid., 58.

To notice that children have a different condition status to adults is merely a beginning. It then becomes important to develop an account of the condition of childhood that specifies which sorts of differential treatment are and are not justified. I believe that respect for children's dignity should be an important consideration guiding deliberation about paternalism in particular cases.

Adopting the constraint that we must respect children's dignity requires that we factor into our deliberations each child's particular psycho-social profile and capacities. For the condition of childhood is not only temporary. While a person is "in the condition of childhood" she will undergo vast developmental changes. In order to determine which treatments and attitudes are consistent with respect for particular children's dignity, adults will need to work on a case-by-case basis to understand the particular developmental and competence conditions of the children in question.

To sum up. Waldron's account of dignity as a status reinforces the idea that, notwithstanding their different condition status, children share the same sortal status as adults. As such, they are no less the bearers of dignity than are adults. Respect for children should be a fundamental limiting condition on permissible paternalism towards children. In most cases, in order to ensure that a potential paternalistic intervention is consistent with respect for a child, an adult will need to know specific details about the condition of the child given her developmental stage, her personal characteristics, and her socio-cultural circumstances.

Dignity as the Absence of Degradation and Humiliation

I want to turn, next, to another aspect of our notion of dignity. Dignity is commonly contrasted with degradation and humiliation. Honoring a person's dignity is clearly not compatible with degrading or humiliating her.

Those who degrade or humiliate others often do so via an intentional or unintentional expression of contempt. When one expresses contempt, one communicates that one does not regard one's target as a moral equal. Expressions of contempt can themselves constitute a harm to others, even when the expression is isolated from other harms. The effect of the contempt in dishonoring a person's dignity can be conceptually separated from other aspects of a harm inflicted. Michael Rosen calls acts that are harmful primarily because they are expressions of contempt "dignitary harms." As he puts the point:

When you torture me, you humiliate and degrade me, but the harm is not just that: you cause me extreme pain and thereby deprive me of effective self-control. To do so would be impermissible and would violate a basic human right whether or not it was also associated with an expression of contempt. The worst of what the Nazi state did to the Jews was not the humiliation of herding them into cattle trucks and forcing them to live in conditions of unimaginable squalor; it was to murder them. Yet this does not mean that dignitary harms are unimportant.¹⁵⁷

Of course, murder itself, in disrespecting the inviolability of the person, is the ultimate expression of contempt for a person. So, strictly speaking, the notion of "dignitary harm" should include egregious acts such as torture and murder. Nevertheless it is important to recognize that expressions of contempt can take many forms. Degradation and humiliation are a component of terrible harms such as murder and torture. But one can express contempt, and thereby disrespect a person, in many lesser ways. These less dramatic expressions of contempt are sometimes incorrectly regarded as morally insignificant.

Compare a situation in which a child is corporally punished by being struck and seriously injured, with a situation in which a child must bend down in front of her peers and be lightly tapped on the behind. Both situations involve humiliation and degradation. The former involves a grave physical harm as well. Many forms of paternalism towards children are degrading or

¹⁵⁷ Rosen, *Dignity*, 158.

humiliating in ways that, in the absence of serious physical or obvious long-term psychological harm, are not widely recognized.

Expressions of contempt are not always conscious or even intended as such. In some cultural contexts, we can be unaware of the way in which our behavior is degrading to others. When Thomas Jefferson addressed his slaves, it is unlikely that he (and possibly even the slaves themselves) regarded his treatment as degrading. Yet because the master-slave relationship is inherently degrading for the slave, Jefferson's communications with his slaves surely were degrading, and failed to respect human dignity.

Some acts that would be disrespectful if they were directed towards adults do not undermine the dignity of children. Telling an adult guest that she has had enough dessert is an example of misplaced paternalism. But it may well be an appropriate and not-disrespectful form of paternalism in relation to a six-year-old. Yet behaviors that are straightforwardly humiliating or degrading when applied to adults, such as shaming, are equally wrong when applied to children. Acts that humiliate or degrade disrespect a subject's dignity. Asking whether particular acts of paternalism are consistent with honoring children's dignity can guide deliberation about which forms of paternalism are and are not morally justified.

A Literary Example

I have noticed that when the subject of dignity is raised in conversation, references to literary works occur almost immediately. This is no surprise as literature offers a site of information that is rich in the sort of psychological detail that can deepen our understanding. So it seems appropriate to make use of a literary example to elaborate on the features of dignity that I began to draw attention to in the previous discussion. These features were, first, that respect for a child's dignity, especially in contexts in which we treat her differently from adults because of

her different “condition status,” requires us to take a close look at the particular circumstances in which the child finds herself, as well as the particular psycho-social profile of the child. Second, dignity is to be contrasted with degradation, humiliation, and the expression of contempt. Humiliation and degradation are evident in egregious violations such as murder and torture. But they may also be present in the often-overlooked daily interactions of individuals. Cultural norms may make it difficult for people to recognize their treatment of others as expressions of contempt and hence, as the source of a morally impermissible disrespect for another person’s dignity.

My literary subject is Shakespeare’s Shylock, from *The Merchant of Venice*. Shylock is an obvious choice not least because (until he descends into talk of revenge) he gives what must surely be one of the most poignant pleas for human dignity in literature. He says:

Hath not a Jew eyes, hath not a Jew hands, organs, dimensions, senses, affections, passions, fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer as a Christian is? If you prick us, do we not bleed? If you tickle us do we not laugh, if you poison us do we not die, and if you wrong us, shall we not revenge? If we are like you in the rest we will resemble you in that.¹⁵⁸

Shylock notes that if a Jew is like a Christian in all other respects, a Jew may help himself also to the villainy that he claims is typically practiced by Christians against Jews:

If a Jew wrong a Christian, what is his humility? Revenge. If a Christian wrong a Jew, what should his sufferance be by Christian example? Why, revenge.¹⁵⁹

Shylock has made a loan to Antonio, a wealthy and well-connected Christian Venetian. Antonio has no respect for Shylock. He despises Shylock for being a Jew, and for engaging in money-lending practices. When he sees Shylock around town, Antonio spits in his beard and

¹⁵⁸ William Shakespeare, *The Merchant of Venice*, first published 1596, Open Source Shakespeare, <http://www.opensourceshakespeare.org/views/plays/playmenu.php?WorkID=merchantvenice>, Act III, Scene I.

¹⁵⁹ *Ibid.*, Act III, Scene I.

calls him a “cur.”¹⁶⁰ Nevertheless, when Antonio needs money to help his friend, he turns to Shylock. In response to Antonio’s contempt for the practice of lending money for interest, Shylock proposes, and Antonio — confident in his ability to repay — agrees, that should Antonio fail to repay the loan by the due date, he will forfeit a pound of his own flesh, to be taken from whatever part of his body Shylock chooses. In the course of the play Antonio’s ventures are frustrated and he is unable to meet his debt. And so the two appear before the duke with Shylock demanding his pound of flesh, to be cut close to the heart. Shylock is intent on achieving full revenge against Antonio, the man who has publicly held him in such contempt.

Now, Shylock himself is not a very nice person. He is miserly, grouchy, and vengeful. He has a deeply held reverse contempt for Antonio, though his powers to express it are circumscribed by his social position. But we shall focus on Shylock’s dignity.

Shylock is about to come face-to-face with the source of his downfall. Portia is a beautiful heiress who is to marry Antonio’s friend Bassanio. Bassanio is the man on behalf of whom Antonio originally sought Shylock’s loan. Portia appears before the duke disguised as a lawyer’s apprentice, and asks Shylock to show mercy to Antonio, giving a discourse on the virtues of mercy as opposed to Shylock’s preference for “justice.” When Shylock refuses to release Antonio from his contract, Portia invokes a law to the effect that if Shylock, a Jew, sheds a drop of Christian blood, his property will be confiscated. Seeing that he has been outwitted, Shylock backs down, and tries to escape first with his principal, and then with nothing at all. If Portia had believed her own soliloquy on the virtue of mercy, then having not only secured Antonio’s life but also having unjustly cleared Antonio’s debt to Shylock, she could easily have stopped at this

¹⁶⁰ “Cur” means a dog of uncertain parentage, or a base or cowardly person.

point, and let Shylock depart defeated and (already) somewhat humiliated. But Portia seems intent on twisting the knife. She invokes another law:

Tarry, Jew,
The law hath yet another hold on you.
It is enacted in the laws of Venice,
If it be prov'd against an alien
That by direct or indirect attempts
He seeks the life of any citizen,
That party 'gainst the which he doth contrive
Shall seize one half his goods, the other half
Comes to the privy coffer of the state,
And the offender's life lies in the mercy
Of the Duke only, 'gainst all other voice.
In which predicament I say thou stand'st;
...
Down, therefore, and beg mercy of the duke.¹⁶¹

The contrast between mercy and justice that runs throughout the play has close links with the notion of dignity. If one is charged and fairly sentenced according to a law that applies equally to all, there is no loss of dignity. Shylock, it becomes evident, is actually not subject to the same laws as everyone, for it turns out that Shylock's design on Antonio's life is a crime only in virtue of the fact that he is an "alien" (a Jew). His is a status offense. Nevertheless Shylock makes his initial claim (for Antonio's pound of flesh) on the correct understanding that the law of Venice upholds contracts, no matter who the signatories. With respect to contracts, he and Antonio are equals before the law. No wonder that Shylock is so fixated on the idea of justice.

When Portia says: "Down, therefore, and beg mercy of the duke" she is ordering Shylock to literally abase himself before the duke. In contrast to the dignity of reasonable laws that apply equally to all, if one must "abase oneself" and beg for mercy, one must acknowledge an

¹⁶¹ Shakespeare, *Merchant of Venice*, Act IV, Scene I.

imbalance of power and status. A person demands justice, but begs for mercy. But Shylock does not initially beg for mercy. Instead he says:

Nay, take my life and all, pardon not that:
You take my house, when you do take the prop
That doth sustain my house; you take my life,
When you do take the means whereby I live.¹⁶²

In Venice at the time, money-lending would have been one of the few legal means of generating income open to a Jew. Confiscating Shylock's wealth would leave no capital from which to make loans. To confiscate Shylock's wealth would be to remove his means of subsistence. At this point Portia gives Antonio an opportunity to exercise what she hypocritically calls "mercy." She says: "What mercy can you render him, Antonio?" Antonio then agrees to forfeit his half of the penalty, on condition that Shylock becomes a Christian and that he sign over all his money to his daughter Jessica and son-in-law Lorenzo upon his death.

Shylock has long endured the curses, contempt, and legal disadvantages associated with being a Jew in Venice. Yet he has not chosen to convert to Christianity to ameliorate his condition: he has remained firm in his loyalty to his faith. What sort of humiliation must it be to him to convert, especially given his understandable animosity towards Christians? How can forcing Shylock's conversion possibly be sold as embodying mercy? (One wonders whether the audiences of the time, with less enlightened views about the status of Jews, saw this at all.) Further, Shylock's daughter Jessica has abandoned him and eloped with the Christian Lorenzo, in a most callous way. Jessica has stolen many of Shylock's treasures, including a ring of sentimental value that belonged to Shylock's late wife. Shylock learns that Jessica has coldly sold this ring at a market. Signing over his wealth to Jessica in the face of this betrayal will be a

¹⁶² Ibid., Act IV, Scene I.

further humiliation.

It is of course true, as Shylock's acquiescence attests, that losing half his wealth, converting, and signing over his remaining wealth to his daughter on his death is, all things considered, preferable to Shylock than being stripped of all his wealth, or worse — being killed. So, one form of indignity is avoided. Nevertheless, the outcome for Shylock is humiliating and degrading.

It is plausible that Antonio does not see the wrong that so powerfully strikes the contemporary reader. For, to Antonio, becoming a Christian is a good thing. He likely believes that in converting Shylock, he will be saving Shylock's soul. Similarly, Antonio sees nothing wrong with Jessica's alliance with Lorenzo — in his view, she has moved up in the world, from being the daughter of a lowly Jew to marrying a Christian. (To Shylock, the alliance is wrong because it constitutes a rejection of his faith and by extension of himself as father, and because it was entered into via elopement and theft). So Antonio would regard a failure of Shylock to pass on his wealth to his daughter as bad for Jessica (who, in his eyes, has done no wrong), and also, as out of accord with the usual order of filial relationships. Viewed in this light, the “penalty” that Antonio suggests has a decidedly paternalistic flavor. What he is asking for is what he believes (undoubtedly with an element of bad faith) will be good — good for the world, and good for Shylock.

I hope that I have convinced the reader that Antonio's treatment of Shylock is morally reprehensible. Suppose, somewhat charitably, that Antonio is motivated by a well-intentioned but misguided paternalism. One way to make sense of Antonio's behavior is to question whether

or not Antonio has adequately brought to bear the particularities of Shylock's situation on his deliberations.

Let us suppose that Antonio sincerely believes that he is acting for Shylock's good. Such a belief must surely be the product of deep acculturation: there would have been a widespread contempt for Jews in Venetian society that Antonio shared. It seems fair to expect that people in Antonio's position were not operating in a social context in which they would be likely to pay attention to Shylock's point of view, and to notice and empathize with Shylock's predicament, given both his social position and his personal characteristics. It appears that Antonio, who earlier in the play feels no compunction at spitting in Shylock's beard and calling him derogatory names, is blind in this way.

When Shylock pleads for Antonio to remember that Jews have eyes, passions, blood, laughter — that they are human beings — he reminds Antonio of a fact that of course Antonio knows. But Antonio does not share the liberal-Kantian view that all human beings are the bearers of dignity and as such, are the proper subjects of respect. Shylock's plea reminds us that Jews are human beings, and that in virtue of their humanity, they are the bearers of dignity. Antonio is unable or unwilling to acknowledge that Shylock's shared humanity makes Shylock like Antonio in being worthy of respect. Meanwhile Shylock, in saying that he will seek revenge, that he is like Antonio in this way too, grasps at the one action that he thinks can restore his dignity in the face of the prevailing contempt.

Ironically, if his paternalism is sincere, Antonio goes too far in assuming likeness. He assumes that what is good for Antonio (Christianity) is good for Shylock. The role of the recognition of likeness in facilitating respectful treatment of others must be applied at the right level of abstraction. It cannot be applied to particular beliefs, attitudes, preferences and so on.

Dignity requires that not only likeness, but also difference, be recognized. Antonio's behavior can be construed as a sort of perversion of the Golden Rule. He has, at one level of description, treated Shylock in a way in which he, Antonio, would like to have been treated. If Antonio (and his psychology) were somehow to inhabit Shylock's body and current circumstance, Antonio would want to be made a Christian and to have his money go to Jessica. The mistake would be harder to make if Antonio considered the reciprocal ethic embodied in the Golden Rule in the guise in which it is presented in the Old Testament: "Love your neighbor as yourself." For love requires an attempt to understand and to know the other person. Genuine love needs and wants details about the other.

In some moods I am tempted by an even less charitable interpretation of Antonio's motives: one that brings out how not only respect for dignity but, in some cases, acts of degradation require a detailed understanding of personal psychology and circumstance. Suppose that Antonio is fully aware of what a terrible blow it will be to Shylock to convert, and how deeply humiliating it will be for him to sign over his wealth to the daughter who has betrayed him. If Antonio is aware of Shylock in this way, then perhaps he uses the details precisely to maximize humiliation, with the added bonus that in appearing to everyone else to be acting mercifully, Antonio raises his own stature in the eyes of the community, while simultaneously further debasing Shylock. This last interpretation illustrates the fact that merely knowing the personal circumstances of another is not enough to ensure that dignity is upheld. One must also be committed to upholding that dignity.

Lessons for Respecting the Dignity of Children

When it comes to children, the need to take into account psychology and circumstances is amplified because children are different from adults in so many ways: psychologically,

circumstantially, and developmentally. And they are not a homogeneous group — they differ dramatically from one another. So the knowledge that is required to genuinely respect children’s dignity is substantial. We need to know both about the developmental stage of the child and the capacities that are typical for that stage. We need to know about the personal psychological characteristics of the child as well as her social circumstances. (Similarly, we would need to know about what Shylock is like both personally and as a Jew in Venice in order to have the tools to respect his dignity). To hypothesize about what children would want for themselves if they were adults is equivalent to Antonio’s move (on my first reading of the play), whereby he assumes that what Shylock *would* want, if he were a Christian, is an appropriate way to apportion “merciful” treatment. Instead, respect for children’s dignity requires that we consider not only what we imagine they will come to want when they are adults, but also what children actually want for themselves while they are still children.

In the foregoing discussion I have elaborated on two features of dignity that are relevant for deliberating about morally permissible forms of paternalism, namely, the need to focus on particular details about an individual subject’s psycho-social profile, and the fact that respect for dignity is incompatible with acts that degrade or humiliate.

The claim that children lack rational agency and autonomy is often used in attempts to justify paternalism towards children. In the next section I describe ways in which children’s partial autonomy and agency is valuable to them. In order to ensure that children are respected as the persons that they are, these values should feature prominently in adults’ deliberations about when and whether to treat children paternalistically.

Section 2. The Values of Partial Autonomy and of Human Agency in Children's Lives

Children are the bearers of both agency and of partial autonomy. In this section I suggest that the less-than-full autonomy enjoyed by older children, as well as the human agency associated with infants, has both instrumental and non-instrumental value. The non-instrumental value of agency and autonomy factors into what constitutes respect for children's dignity, and it limits what forms of children's treatment or regard are morally permissible.

I begin by developing the view that the possession of autonomy is not an all-or-nothing phenomenon, and that consequently, autonomy is not only to be valued in those individuals (typically normal adult human beings) who are regarded as having "full" autonomy. I suggest that partial autonomy in children has both instrumental and non-instrumental value. I then extend the idea that partial autonomy has non-instrumental value, to forms of human infant agency that fall below what we ordinarily think of as even partial autonomy. I suggest that human agency, even of the youngest infant, has non-instrumental value that prohibits interference in the absence of a sufficiently good moral reason.

Children's Autonomy

By "autonomy," I have in mind a set of capacities and functions associated with the higher level intellectual and moral reasoning that develops during childhood and that is honed and sustained among adult human beings in congenial environmental circumstances. As I am using the term, to say that a person is fully autonomous is to say that she is self-governing, that she is able to direct her own life, or that she is able to live a life of her own choosing.¹⁶³ In Rawlsian

¹⁶³ Exactly what constitutes full adult autonomy is the subject of extensive debate in the philosophical literature. For an overview, see Sarah Buss, "Personal Autonomy," *The Stanford*

language, a fully autonomous person will have a conception of the good, and the ability to reflect on and potentially revise her conception of the good. A fully autonomous person will also have a sense of justice. That is, she will understand that, from a moral point of view, the freedoms that help her to shape her own life are necessarily circumscribed by the needs of others to engage in a similar project.¹⁶⁴ Autonomy in the sense I have in mind is usually taken to differentiate humans from all or most other animals. The paradigm of a fully autonomous person is an adult human being in good mental health and in congenial socio-economic and political circumstances.¹⁶⁵

I take it as a given that autonomy has not only instrumental value, but also non-instrumental value.¹⁶⁶ In this sense my understanding of autonomy has a Kantian flavor. But my sense of autonomy differs from Kant's in that it is descriptive of a natural phenomenon. On my account, autonomy is a capacity that develops over time in human beings. It therefore makes

Encyclopedia of Philosophy, ed. Edward N. Zalta (Spring 2014 Edition), <http://plato.stanford.edu/archives/spr2014/entries/personal-autonomy/>.

In determining whether an action is autonomous, some accounts center on how coherent an action is with respect to one's motivations. These accounts associate autonomy with being able to identify with and endorse one's actions. Other accounts take one's responsiveness to reasons, or one's responsiveness to one's own reasoning, as a key requirement of autonomous action.

The argument of this chapter holds regardless of which (if any) of these accounts is correct. Any plausible account of full autonomy must allow for the gradual development of capacities for autonomy as children grow.

¹⁶⁴ John Rawls, *A Theory of Justice*, (Cambridge, MA: Belknap Press of Harvard University Press, 1971).

¹⁶⁵ For an account of autonomy that links the possession of autonomy with mental health, see Sarah Buss, "Autonomous Action: Self-Determination in the Passive Mode," *Ethics*, Vol. 122 no. 4 (July 2012): 647-691.

¹⁶⁶ I recognize that not all readers will agree with this viewpoint. Unfortunately here is not the place to defend this common, if not universal, understanding of the value of autonomy. For the reader who believes that autonomy has only instrumental value, it is worth noting that many of the claims I make about the role of the non-instrumental value of autonomy in children's lives can be recast in terms of instrumental value. For example, my recommendation that we do not overlook the non-instrumental value of children's exercising autonomy, can be recast as: we should consider the instrumental value of children's exercise of autonomy in relation to their present or occurrent wellbeing (while they are children) and not merely in relation to their future (adult) wellbeing.

sense to talk of persons as being more or less autonomous. And it makes sense to ascribe *partial* autonomy to those who have some, but not all of the self-determining functionality of normal adults.

Autonomy of some degree can be ascribed to those who are not fully autonomous. A child exhibits a degree of autonomy when she chooses which color pajamas to wear, even though she may lack the competence to make a complex medical decision. An Alzheimer's patient can still be autonomous in certain domains of function, even though her disability means that she is not fully autonomous.

Personal and Environmental Autonomy

The conception of autonomy that I am invoking has both a “personal” and an “environmental” aspect.¹⁶⁷ By “personal autonomy” I mean an individual's psychological capacity to make personally and socially responsible self-determining life choices. By “environmental autonomy” I have in mind the societal circumstances that make it possible for a person to make her own self-determining choices.

I model the personal/environmental distinction on Isaiah Berlin's well known distinction between positive and negative freedoms.¹⁶⁸ According to Berlin, one has positive freedom (or, in my terminology, “personal autonomy”) when one has a certain control over ones own self. Personal autonomy involves the psychological capacity for self-government. Paradigmatic threats to personal autonomy include brainwashing, indoctrination, and addiction. One has

¹⁶⁷ It would be more natural to make a distinction between “internal” and external” aspects of autonomy. But since these terms have become technical terms in philosophy I use alternative terms.

¹⁶⁸ “Two Concepts of Liberty,” in Isaiah Berlin, *The Proper Study of Mankind: An Anthology of Essays*, edited by Henry Hardy and Roger Hausheer (New York: Farrar, Straus and Giroux, 2000), 191-242.

negative freedom (or what I am calling “environmental autonomy”) when one’s self-determining activity is free from interference by other people. The more one is left to one’s own devices by other people or by the state, the more environmental autonomy one has.¹⁶⁹

I include both aspects of autonomy in my account because, especially in relation to children, the possession of personal autonomy (and its development) is crucially influenced by environmental factors. The personal autonomy of both adults and children may sometimes be substantially curtailed by uncongenial social or environmental conditions. For example, we may ask ourselves whether Nelson Mandela was autonomous while imprisoned on Robben Island. In one sense, of course, he remained fully able to direct his thoughts and ideas — to the point that he was ultimately able to play a pivotal role in engineering political change. However, from an environmental perspective, Mandela’s autonomy was substantially curtailed by his imprisonment. His ability to direct his life and to effect change in the world was severely circumscribed. Indeed, curtailing Mandela’s action and activity was a central purpose of those responsible for his imprisonment.

It is significant that in cases of extended imprisonment, especially where there is solitary confinement and extreme restrictions on personal control over one’s day to day functions, the extent of one’s personal autonomy may thereby be reduced or, in cases in which insanity results, obliterated. Consider cases of extreme duress or coercion. If one is presented with two terrible options, the fact that one is cornered into choosing the least bad option does not mean that one

¹⁶⁹ What it means to tolerate and facilitate individual self-determination can be widely or narrowly construed. On a wide construal, a society must allow for a person to choose among a range of different lifestyles, limited only by the constraints of justice. On a narrow construal, a society may be described as tolerating and facilitating self-determination if it allows for a range of possible life pathways within culturally constrained limits.

does so freely. One's "choice" to divulge state secrets to the enemy rather than submit to further torture is hardly to be construed as the result of the exercise of personal autonomy.

Or, consider a story I once read about an incident in the Warsaw ghetto. A group of Jews is hiding silently in the ghetto. As the group hears the footsteps of the Nazis approaching, an infant starts to cry. When an attempt to soothe the infant fails, the infant is taken from its mother, and smothered to death. The "choice" to smother the infant was surely rationally defensible. Nevertheless, I do not believe that such a "choice" should be characterized as an autonomous choice. In certain sets of circumstances, externalities can make it impossible for a person to make genuinely autonomous choices. Some situations are so grotesque that none of the available options is such that one can be considered to have acted autonomously.¹⁷⁰

Given his immense personal strength, Mandela retained a remarkable degree of autonomous control while he was imprisoned. However, his personal autonomy was not entirely independent of his environmental circumstances. In even worse conditions his personal autonomy might have been compromised.

So, one's individual capacity for autonomous thought and action is deeply interwoven with one's environmental circumstances. On my understanding of autonomy, a person is autonomous when she is self-determining within reasonably congenial social, economic, and political circumstances. As such, the extent to which a child should be considered autonomous is determined not only by her level of cognitive and psycho-social development, but also by her environmental circumstances.

¹⁷⁰ An exception may be when one decides to sacrifice one's life rather than make an "unacceptable" choice. The decision to die under such circumstances represents a refusal to continue to live in a world where even one's best option can not be described as something that one could autonomously choose. So, for example, when Wendy (from J.M. Barrie's *Peter Pan*) chooses to walk the plank rather than join the ranks of the pirates, she seems to be making a choice that is best characterized as autonomous.

The Development of Autonomy in Children

The interconnectedness of the personal and the environmental components of autonomy is especially noticeable when one considers the development of autonomy in children. A child's sense of self emerges gradually as she interacts with an attachment figure - usually a parent or primary caregiver. She begins to cognize her own emotions as she sees them reflected in the mirroring facial expressions of the caregiver. Via interactions with the environment, the child comes to develop a self, an identity, and the necessary framework within which to become an autonomous person. Absent certain key interpersonal interactions in childhood, normal adult full autonomy will not be achieved. Even once adulthood and full autonomy are achieved, given sufficiently adverse experiences (such as torture) the self may disintegrate and the ability to function autonomously once there is a return to normal environmental circumstances may erode.

Children as the Bearers of Partial Autonomy

It is common to talk of adults as having autonomy and of children as entirely lacking autonomy — as being at best the future possessors of autonomy or as being merely “on the way” to achieving autonomy. For example, Tamar Schapiro argues that paternalism towards children is justified because children are “not yet themselves.” According to Schapiro, children are unable to govern themselves. She says:

Given that children are not yet in a position to govern themselves, they need to be protected from their own cognitive and volitional wantonness. In so protecting them, we protect them not from themselves, but from the workings of their animal nature, which in the early stages of life tends to have the upper hand on both their perceptual and motivational impulses.¹⁷¹

¹⁷¹ Tamar Schapiro, “Childhood and Personhood,” *Arizona Law Review* 45 (2003): 575. See Chapter II for a detailed discussion of Schapiro's approach.

But this all-or-nothing distinction between the self-governing capacities of adults and children obscures what is otherwise obvious - that capacities for autonomy develop gradually as children grow.¹⁷² It is more accurate to think of the possession of autonomy on a continuum, where normal adult levels of function are regarded as full autonomy, and anything less is regarded as (more or less) partial autonomy. By “full autonomy” I do not mean to imply god-like capacities. I mean normal adult autonomy - represented by the kind of relatively sane adult we think it is normally wrong to treat paternalistically.

Autonomy is not an all-or-nothing attribute. It develops gradually as children grow, and it may also decline gradually or quickly for some people as they age and succumb to Alzheimer’s disease or other forms of senility. There is a vast difference between a 3-month old reaching for one toy rather than another, and a ten-year-old making a decision about her medical treatment. The ten-year-old can understand consequences, she can understand her condition, and she may well be positioned to make a responsible choice. But the ten-year-old also differs from a normal adult in important ways. She lacks the experience, as well as the cognitive, emotional, and social

¹⁷² Of course, philosophers readily acknowledge the gradual nature of children’s development. For example, the point is made repeatedly in one collection of relevant articles: David Archard and Colin Macleod, eds., *The Moral and Political Status of Children*, (Oxford, Oxford University Press, 2002). See “Introduction,” p.4, James Griffin, “Do Children Have Rights?” 28, and Harry Brighouse, “What Rights, (If Any) Do Children Have?” 46. These authors admit that as children become more mature, it is appropriate and even required to assign them greater responsibilities, and to simultaneously adjust the nature of paternalistic intervention and regard.

However, in many of the theories typically presented, some of the same philosophers who acknowledge the gradual development of children, give arguments that they begin by suggesting apply to all children, yet which on closer analysis rely on a presumption that children do not have any autonomy at all. These arguments actually apply only to very young infants. For examples of this sort of slide, see Griffin, “Do Children Have Rights,” Robert Noggle, “Special Agents: Children’s Autonomy and Parental Authority” in Archard and Macleod, *Moral and Political Status of Children*, and Brenda Almond, “Education and Liberty: Public Provision and Private Choice,” *Journal of Philosophy of Education* 25 (1991): 196 (first full paragraph). See Chapter II of this dissertation for a detailed critique of Noggle’s approach.

development of an adult. While the 10-year-old is in no sense a “mere” agent, she is not fully autonomous either. The 10-year-old enjoys partial autonomy.

Even very young children possess nascent capacities associated with autonomy. As they grow older, these capacities develop so that children become more and more adept at a range of functions associated with full autonomy. For example, they become increasingly skilled at decision-making. They learn to negotiate with others and to reach compromises. They come to evaluate and make reasoned decisions about whether to engage in risk-taking activities. They begin to make decisions based on moral considerations. And they begin to identify with, and take responsibility for, the choices that they make.

As I began to discuss in Chapter II, recent work in developmental psychology has shed light on the domain specificity of certain adolescent capacities associated with autonomy. That is, in certain domains of function (such as in a calm test-taking environment), an adolescent may have adult-level decision-making abilities. Whereas in circumstances of high emotional arousal and/or peer influence, the same adolescents perform substantially worse than normal adults do in similar circumstances.¹⁷³

Even though I consider adults to be fully autonomous, it is worth noting that adults, too, are best understood as having domain specific autonomy. Drop an English speaking adult (with no knowledge of the local language or culture) in the middle of rural China, and, in the absence of a translator, I think it is morally acceptable, even required, for a passing ten-year-old Chinese child to treat this adult paternalistically. The adult lacks the experience, understanding, and skills to function autonomously in the new environment.

I conceive of developing autonomy as a series of widening domains of independent

¹⁷³ See Chapter V for in-depth discussion of these findings.

function. The full autonomy of the normal adult constitutes a fairly wide functional domain within a particular socio-cultural context. So, full autonomy is the normal functional range of an adult, such that, within reasonably familiar and congenial environmental circumstances, the adult can craft a life for herself that is substantially self-determined. She is able to live her life without requiring significant paternalistic intervention. This does not mean that the adult has no need of the help, care, or guidance of others. However, she has the skills, capacities, and experience to be an active agent in securing and sometimes, in limiting, such assistance.

Children have more limited domains of autonomous function. A toddler may be well equipped to choose which color pajamas to wear, but she may not be competent to choose between summer and winter pajamas. An eight-year-old may be able to engage in autonomous decision-making within the domain of a safe playground occupied by same-aged friends. However, she may be ill-equipped to make important medical decisions on her own.

The Instrumental and Non-Instrumental Value of Children's Autonomy

As children grow and develop, the domains in which they are able to function adequately well — in which they exhibit sufficient autonomy for paternalistic intervention to normally be inappropriate — gradually widen. A child may benefit, developmentally, from being given an opportunity to make self-determining decisions in choice domains in which she is not fully autonomous. An opportunity to practice, even at the risk of making mistakes, is a crucial requirement for the development of full adult autonomy. But the occurrent value of being granted the freedom to exercise one's developing autonomy does not lie purely in the developmental benefits of exercising autonomy.

I believe that autonomy is a central ingredient in a flourishing human life, not merely because of the goods that frequently emanate from it, but because having space in which to

exercise autonomy is itself essential for human wellbeing. Just as children thrive when, under congenial conditions, they are allowed to play without excessive interference, so adults are at their best when they are able and permitted to govern their own lives. Of course, to say that autonomy has non-instrumental value is not to suggest that autonomy always trumps other values. If you can save my life by preventing me from self-governing, in some situations you will be justified in so doing. Depending on further details of the case, the value to me of staying alive may well trump the value of my being free to govern myself.

When you save my life, you also act to ensure that I am around to govern myself in the future. So it might be said that, even in a case where one restricts a person's choices in order to save her life, autonomy trumps other values. But I do not think that autonomy always trumps other values. Consider a terminally ill patient suffering from dementia, who has very little time to live. Suppose that the patient repeatedly engages in self-harming behaviors, causing herself injury and considerable pain as a result. I believe that it is justified to try to prevent the patient from engaging in these behaviors. It is justified to intervene, not because one thereby prolongs the patient's life and hence, her future agency and (in this case, partial) autonomy, but because the intervention protects the patient from pain.¹⁷⁴

I have taken it as a given that autonomy has non-instrumental value for adults. I have characterized autonomy as a capacity that develops and sometimes declines across a normal human lifespan. Given that children have partial autonomy, there is no reason to suppose that children's autonomy is any less valuable to them from a non-instrumental point of view, than it is to adults.

I believe that the non-instrumental value of being allowed opportunities to act freely

¹⁷⁴ I am grateful to Tyler Burge for discussion of this point.

extends to an even more basic level than is captured by the notion of partial autonomy. In the forthcoming discussion I suggest that even very young infants have agency, and that this agency has both instrumental and non-instrumental value.

Children as Agents

Consider the following scenario. A three-month-old infant is within reach of two toys, a bear and a block. The infant reaches for the bear. As she reaches, the infant's caregiver redirects her hands to the block. The infant picks up the block, examines it with her hands, eyes and mouth, then drops it and reaches again for the bear. The caregiver once again redirects the child's hand to the block.

The scenario sounds like some sort of psychology experiment. But suppose it is not. Suppose that the caregiver routinely redirects the child for no morally relevant or sufficiently good reason. I believe that there is something deeply wrong with the caregiver's actions. Redirecting the child's hands for no good reason seems a morally unjustified interference with an infant's agency.

Of course, to make sense of the case, one will have to posit some or other motivation. A natural candidate is one in which the caregiver has misguided intentions. For example, we may suppose that, following the guidelines of his religious group, the caregiver is attempting to "break the will" of the child in order to instill in the child an unwavering obedience to authority. It is important, though, that so long as his reason is not one that can outweigh the harm done by interfering with agency, the caregiver will have done wrong regardless of how well-meaning or benign his intentions.

Interfering with animal agency for no morally good reason raises similar concerns. Suppose that two dogs are attempting to play together. Each time the dogs approach each other,

the handler whistles, calling the dogs back to heel. As a training exercise, followed by time to play, the handler's behavior is unobjectionable. But suppose that this is not a training exercise. Suppose that at all times the handler interferes with the dogs' movements, seldom allowing them to move around freely, even in an enclosed area.

It seems to me that in both the infant and the dogs case, the adults' behavior is not justified from a moral point of view. The infant and the dogs are wronged because the agency with which they are naturally endowed has been undermined without a sufficiently good moral reason.

An equivalent wrong is not perpetrated when a person repeatedly flips a rock, first one way, and then the other, and then cracks the rock in two, perhaps because it feels good to control the environment. It is not possible to wrong the rock, for the rock has neither sentience nor agency. Even if one's actions towards the rock are unreasonable — suppose because they are based on an unfounded superstition — this does not make them *morally* wrong.¹⁷⁵

Many people would agree that arbitrarily or unreasonably causing pain to a sentient being wrongs that being.¹⁷⁶ It is rarely remarked that arbitrarily or unreasonably interfering with the instinctive or otherwise “natural” activities of a sentient being that has agency likewise wrongs that being. The examples of the infant and the dogs are designed to highlight the value associated with basic animal and human agency.

¹⁷⁵ Of course one can be morally culpable for damage to the environment even in the absence of directly harming a sentient being. Here though, I think it is reasonable to conceive of the subjects of the wrong as the sentient beings who will be affected by the environmental damage, rather than the non-sentient environment itself.

¹⁷⁶ Kant held that we can only have direct moral obligations to humans or other rational beings - but his insistence on this point is, in my view, correctly recognized by some Kantians as a problem within his writings, to be criticized rather than accepted. See for example: Christine Korsgaard, “Interacting with Animals: A Kantian Account,” in *The Oxford Handbook of Animal Ethics*, ed. Tom L. Beauchamp and R. G. Frey (New York: Oxford University Press, 2011), 91-118.

Sometimes human infants are characterized as being “animal-like” in lacking an ability to reflect on their choices. But, as discussed in Chapter II, from a very young age, infants begin to display capacities associated with the high-level cognitive and moral function characteristic of human adults. So although I think that unreasonable interference with animals’ agency wrongs animals, I also believe that, because infant agency is developmentally aligned with human autonomy, unduly interfering with human infant agency is an even more significant wrong.

The Instrumental Value of Children’s Agency

The motivation to exercise one’s agency is critical for childhood development. Infants are driven to explore their environments, to attempt new movements with their bodies, and to connect with caregivers. The toddler learning to walk is determined to keep trying, even after multiple falls. When an infant smiles she typically elicits a loving response from her caregiver. In so doing she strengthens the developmentally crucial attachment relationship, and begins her education in understanding and recognizing human emotion in herself as well as in others. Exercises of infant agency are necessary in order to facilitate the intense physical and psycho-social learning that must take place in order for children to acquire the skills and experiences required for development.

It is essential for children’s development that they actively engage not only with the physical environment but also, and even more importantly, with other people. Children’s learning is a participatory process, requiring both their own agency and the agency of other human beings, especially caregivers.¹⁷⁷ Children in healthy environments learn or are conditioned to secure care by undertaking certain actions. Crying will elicit a nurturing response,

¹⁷⁷ See L. S. Vygotsky, *Mind in Society: The Development of Higher Psychological Processes*, eds. Michael Cole et al. (Cambridge, Mass.: Harvard University Press, 1978, and Barbara Rogoff, *Apprenticeship in Thinking: Cognitive Development in Social Context* (New York: Oxford University Press, 1990).

smiling will return a smile. Infants who do not receive appropriate responses to their instinctive attempts to connect and to secure care, may eventually become despondent and cease agential activity. Or they may develop other psychological pathologies.¹⁷⁸ An infant whose hand is repeatedly redirected when she reaches for a toy will eventually cease her reaching behavior.¹⁷⁹ She will be discouraged from engaging in the kind of exploration that is essential for her development.

Children have a substantial developmental interest in being allowed to exercise their agency. In particular, they have a strong developmental interest in being able to engage as agents with their caregivers. However, children's interest in being allowed to exercise their agency is not merely instrumental.

The Non-Instrumental Value of Agency

Like animals and adult human beings, children derive not only instrumental, but also non-instrumental value from exercising their agency. The non-instrumental value of agency means that children have an interest in being allowed to exercise their agency not only to the extent that

¹⁷⁸ Psychologists characterize the set of pathologies associated with the lack of opportunities to form attachments relationships as Reactive Attachment Disorder. Reactive Attachment Disorder is a common affliction of institutionalized and neglected children. Considerable research has been done to investigate the effects of insufficiently robust or non-existent attachment relationships among institutionalized Romanian orphans. See for example Charles H. Zeanah et al., "Attachment in Institutionalized and Community Children in Romania," *Child Development* 76:5 (2005): 1015-1028, Mary Carlson and Felton Earls, "Psychological and Neuroendocrinological Sequelae of Early Social Deprivation in Institutionalized Children in Romania," *Annals of the New York Academy of Sciences* 807.1 (1997): 419-428, and Samantha L. Wilson, "Post-institutionalization: The Effects of Early Deprivation on Development of Romanian Adoptees," *Child and Adolescent Social Work Journal* 20.6 (2003): 473-483.

¹⁷⁹ Animals display similar conditioned responses early in life. Adult coots reduce the size of their flocks by selectively pecking at some of the chicks when they beg for food. These chicks eventually stop begging for food and starve to death. J. A. Horsfall, "Brood Reduction and Brood Division in Coots," *Animal Behavior* 32.1 (1984): 216-225.

future benefits may accrue to them, but also because the exercise of agency has occurrent value to the them.

In some situations children's interest in being allowed to exercise their agency is overridden by other, competing interests. The toddler about to run into a busy road has an interest in not being run over that dramatically outweighs her interest in exercising her agency in the particular circumstance. However, competing interests do not always outweigh the value of a child's freedom to exercise her agency. For example, other things equal, a toddler has an interest in playing on an age-appropriate jungle gym that outweighs her caregiver's concern that the toddler's carefully arranged hairstyle might be disturbed by the play.

Unlike adults, who may be motivated to engage in learning activities in part by an understanding of the instrumental benefits the learning will bring, young children are unaware of such benefits. Children engage in agential activity because they are instinctively driven to do so. A core ingredient of human and animal flourishing is the ability to function as an agent in a reasonably congenial environment. Animals in zoos may be safer and better fed than they are in the wild, but it is plausible that it would be better for the animals themselves to be living their lives as animal agents in the wild. Similarly, an overprotected child who is not allowed to engage in physical play for fear of injury may genuinely be exposed to fewer risks than a child with more physical freedom. But a child denied opportunities for physical play is, I believe, worse off than one who is allowed to exercise the sort of agency that is normal for a child. And the reasons she is worse off are not exhausted by the lost developmental opportunity.

I think it is obvious that a toddler's interest in playing on a jungle-gym outweighs her caregivers concern that she will upset her fancy hairdo. The caregiver's concern is outweighed by the instrumental and the non-instrumental value to the toddler of being permitted to exercise

her agency. Being allowed to climb on the jungle gym has instrumental benefits for the toddler in the sense it will facilitate her motor skills or otherwise aid in her development. However, being free to climb on an available jungle gym is valuable to the child as an exercise of agency in the moment, apart from any future benefits. Being allowed to do what one chooses to do is valuable regardless of what the thing is that one chooses to do, and regardless of the instrumental benefits that may or may not ensue.

The non-instrumental value of agency inheres in the contribution that the exercise of agency has to an individual agent's occurrent wellbeing. A terminally ill child with only days to live has as much to gain, if not more, by being allowed to play freely, as does a healthy child. Indeed, it seems plausible that adult caregivers will be even more inclined to allow a terminally ill child to engage in risky agential activities, than they would be to allow a healthy child similar freedoms. In the healthy child, potential negative future outcomes may offset the present value of being allowed to exercise her agency. For the terminally ill child, there is little to lose in terms of negative future outcomes. So the present value of exercising agency is more likely to outweigh other concerns.

In insisting that agency has non-instrumental value I do not mean to imply that this value can be entirely separated from its instrumental value. Allowing children to exercise their agency for some significant portion of time during childhood is clearly required in order for children to flourish. It is not simply that children derive joy or satisfaction from being allowed to make their own choices. For not all instinctively enjoyable experiences qualify as having non-instrumental value. Consuming a large quantity of high fructose corn syrup may be a highly satisfying experience for an infant, but the pleasurable value of the experience is dramatically outweighed by the physical harms that will result — harms that will negatively impact future experiences of

the individual, including long-term health. Exercising agency can be construed as having non-instrumental value both because it contributes to human flourishing and because it facilitates development.

Indeed, it seems plausible that human agency takes on its special value because of its developmental connection to partial autonomy and later, to full autonomy. That is to say, if infant agency were not the forbearer of partial and full autonomy, efforts to interfere with it might be less morally problematic. But to say that the developmental trajectory of infant agency confers value on that agency is not to say that each exercise of infant agency is valuable because of the developmental benefits of that particular act. The non-instrumental value infant agency may be sourced in infant agency's position in the normal developmental structure of human beings. Nevertheless, each individual exercise of agency does not have to be instrumentally beneficial to a child's development for it to be of non-instrumental value to the child.¹⁸⁰

Partial Autonomy and Agency in Children

I have been suggesting that partial autonomy and human agency have both instrumental and non-instrumental value for children. In the next section I discuss ways in which these values should factor into deliberations about the paternalistic treatment of children. In particular, I suggest that, when we deliberate about paternalism towards children in particular cases, we should consider whether any proposed action is consistent with honoring a child's dignity, given the partial autonomy and agency that the child enjoys.

¹⁸⁰ I am grateful to Barbara Herman for discussion of this point.

Section 3: Implications for Honoring Children's Dignity

Because children are only partially autonomous, honoring children's dignity requires substantially different behaviors and attitudes than does honoring adults' dignity. For example, while it may be a sign of respect when one allows an adult the freedom to make her own medical decisions, allowing a two-year-old the identical freedom is tantamount to neglect.

In Section 1 I introduced a conception of dignity according to which, in order to fully respect a child's dignity, one must pay careful attention to the particular psycho-social profile of a child, and one must avoid acts that degrade or humiliate. One way in which children's dignity is sometimes disrespected derives from a failure to recognize the actual level of autonomy within certain domains that a child is already capable of. When we make choices on behalf of a child who could make those choices on her own, when we restrict a child's activities when in fact the child has the capacities to navigate the activities herself, or when we exercise authority over children in circumstances in which there is little risk to the child or to others in allowing her to pursue her own course, we risk degrading her. Just as it is wrong to treat an adult paternalistically when one erroneously treats her like a child, so it is wrong to treat an older child as if she is a younger child.

Children's dignity may also be threatened when adults fail to recognize the non-instrumental value of human, including infant, agency. It is wrong to arbitrarily or unreasonably restrict an infant's agency — because such restriction fails to recognize the infant as a person, and thereby, to honor her dignity. Autonomy may be largely absent in the youngest children, but the idea that we need to respect their dignity nevertheless applies. Treating people with dignity is incompatible with treating them in degrading or humiliating ways. In this sense, dignity applies to all persons, from the youngest child to the oldest and most senile adult.

With older children, it is essential to recognize and honor their partial autonomy, and it is important not to underplay the value that this autonomy has to them *while they are still children*. But especially while their autonomy is only partial, there are other values associated with interpersonal relations that may sometimes outweigh a straightforward concern to respect children's partial autonomy. Putting children's dignity center-stage can help us to weigh these different values.

In order to ensure that children's dignity is appropriately respected one must first ensure that one's treatment of the child does not directly degrade or humiliate. To do this, one requires a detailed understanding of the child's actual capacities and developmental needs. In addition, it is important to evaluate the effect of children's potential choices on their status within the wider community. In deliberating about the paternalistic treatment of children one must therefore not only look at one's dyadic relation with the child and ask whether one's treatment of the child comports with honoring her dignity. One must also ask how the projected outcome of letting a child make her own decision in a particular instance will affect the way in which she is regarded in the broader community. A partially autonomous person's choices may foreseeably lead to humiliation or degradation by others within the broader community, and this potential assault on her dignity may outweigh the value of allowing the child to exercise her autonomy.

Consider the Alzheimer's patient who wants to take off all her clothes and go for a walk. If we think of our obligations to the patient in terms of the need to respect her (partial) autonomy, or to honor her "mere" agency, we may conclude that we should let the patient take her walk, so long as we are sure she will not get lost or injured. Employing the notion of dignity allows us to weigh the important values associated with the patient's agency and partial autonomy against social considerations that affect how others will respond, and how they will subsequently regard

and treat her. Interpersonal relationships matter for a person's dignity. The Alzheimer's patient stands in relation to other persons even when she is largely unaware of these relationships. While respect for autonomy plays a dominant role in honoring the dignity of a normally functioning adult, other factors in addition to respect for agency and/or partial autonomy come into play when we are dealing with a person who is not fully autonomous.

A similar point can be made in relation to children. Those charged with children's care must consider the impact on a child's dignity of potential effects of her behavior in the wider community. I believe that adults are sometimes entitled to paternalistically intervene in children's decision-making activity when that activity is likely to result in a child being humiliated or degraded by members of the wider community.

As already discussed, there are close conceptual links between the notions of dignity and of autonomy. As such, employing the notion of dignity in deliberating about the paternalistic treatment of children will require us to give weight to facts about children's partial autonomy and agency. But utilizing the notion of dignity can also serve to focus attention on wider impacts of a child's potential choices that may affect her standing in the community. Sometimes the value of allowing free exercise of autonomy and agency, and other values associated with honoring children's dignity, will conflict. If respect for dignity is a constraint on permissible paternalism towards children, then deliberations about paternalism must include considerations about children's autonomy and agency. However, respect for dignity also requires that we incorporate other considerations, such as the threat of humiliation or degradation within the wider community, into our deliberations.

Conclusion

Even when it overrides children's heartfelt wishes, paternalism is sometimes justified. But paternalism is never justified when children's agency and partial autonomy are utterly disregarded. To avoid contempt, respectful paternalistic deliberation will take children's perspectives, desires, and potential choices into account. In order to honor the dignity of a child, an adult exercising paternalism over a child should be, in principle, in a position to acknowledge the child's perspective, and to provide the child (or the child's representative) with good reasons for overriding the child's own preferred course of action.¹⁸¹

I hope that showing that children's agency and partial autonomy have both non-instrumental and instrumental value can help to temper a tendency in the literature to overemphasize future outcomes at the expense of children's present experience.¹⁸² Children's relative incompetence and developmental stage can sometimes lead adults to disregard particular children's personal psychological circumstances, and to overlook the extent of their maturity and competence when they deliberate about how to treat them. There is a tendency to assume that the

¹⁸¹ Article 12 of the United Nations Convention on the Rights of the Child gives a nice articulation of this requirement. "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

¹⁸² For a description of the problem in the literature, see Harry Brighouse, "How Should Children be Heard?" *Arizona Law Review* 45 (2003): 700. For a nice exception, see Colin Macleod, "Primary Goods, Capabilities, and Children," in *Measuring Justice: Primary Goods and Capabilities*, ed. Harry Brighouse and Ingrid Robeyns (New York: Cambridge University Press, 2010), 182. As Macleod notes: "Children with very austere and dreary childhoods can acquire a sense of justice and a capacity for a conception of the good. They can even become fully autonomous. Similarly, children who are not exposed to a range of stimulating and entertaining aesthetic, athletic, and cultural activities can develop into productive, responsible citizens capable of recognizing and responding to the rights of others while pursuing ends of their own. But that fact, even if it can be widely generalized across children, does not justify the conclusion that such children are not disadvantaged compared to other children who during

values and preferences children express, because they are sometimes more transient than those of adults, do not have the same gravitas. “She’s just a child,” we might say. “She doesn’t know what she is talking about.” I believe that these assumptions underplay the moral significance of children’s own beliefs and values. A focus on children’s present dignity when deliberating about how to treat them will help to mitigate any tendency to dismiss the psychological space in which children find themselves.

Children are no less susceptible to feelings of humiliation and degradation than are adults. Indeed, acts of derogation are particularly harmful to children because many children lack the cognitive resources to process what is happening to them, even while they are at some level aware that they are being treated badly. An adult may be able to distance herself from humiliation by her understanding of the perpetrator’s motivation. A child is more likely to internalize the humiliation — to think of herself as deserving of her treatment.

It is obvious that when deliberating about how to treat a child, the future consequences to the child, or to the adult that she may one day become, are morally relevant. However, we must also give weight to the present dignity of the child — the dignity of the child *as a child* — in our moral deliberations. Many abuses take place under the guise of future benefits to children. Think of the parent who publicly shames her child in order to “teach her a lesson.” Even if the lesson is learned, and the child’s sense of self-worth is not substantially diminished in the long run, there remains a harm to the child’s present dignity that future outcomes cannot negate. Focusing on present dignity forces deliberation away from a purely future-directed orientation that disregards present personhood.

their childhood are provided with both good developmental conditions and rewarding non-developmental goods.”

Getting our treatment of children right — being paternalistic only when paternalism is genuinely called for — is no simple matter. It requires an understanding of children's differences from adults, as well as particular knowledge about the psycho-social profiles of the children in question. And even as we acknowledge the need to focus on the details, we have to be realistic. Even the most diligent parent or lawmaker has severe limits on her knowledge and on what it is reasonable to expect her to make herself aware of. Sometimes, we cannot in the time available be reasonably expected to know much more than the approximate age of child. In such cases we must rely on our best understanding of what childhood is like at various stages and move ahead. But where further evidence *is* reasonably available, it must be applied. As I shall elaborate in the next chapter, in some sets of circumstances a careful examination of the details will reveal that our general presumption that paternalism of one form or another is permissible towards children, does not hold in a particular case.

I have suggested some ways in which the notion of dignity can help to inform deliberation about paternalism towards children in a way that truly recognizes children as persons. Dignity is a rich notion, with many connotations. Although this richness has its dangers, I believe that it is ultimately a strength when it comes to deliberating about real life situations regarding children. Appealing to the values of agency and of partial autonomy is essential if we are to discriminate well between justified and unjustified instances of paternalism towards children. In hard cases, the notion of dignity, by also focusing attention on the potential effects of a child's choices on her standing within the wider community, does additional work.

CHAPTER IV

The Child Paternalism Principle

Introduction

Many people believe that normal adults should not be subjected to paternalistic treatment or regard, except in extreme circumstances. Yet we take it for granted that paternalism towards children is usually justified, and is sometimes even morally required. In this chapter I shall put forward a justification of paternalism that accounts for the disparity between children and adults with respect to permissible paternalism.

It seems indisputable that paternalism towards children is morally permissible in a substantially wider range of circumstances than is paternalism towards adults. But the fact that paternalism towards children is more widely justified than it is towards adults does not mean that, short of abuse and neglect, paternalism towards children is always morally justified.

It is easy to discriminate unjustified cases of paternalism that are straightforwardly abusive from cases that are morally permissible. The parent who “disciplines” her child with a switch, causing physical injuries plainly engages in unjustified paternalism. Whereas it is obvious that the parent who physically prevents her toddler from running onto a busy road acts in a morally justified – indeed, morally required – way.

Harder cases are those involving morally questionable exercises of paternalism, yet which are not obviously instances of abuse or neglect. Consider the parent who lightly spans a child in order to punish her for pushing her sister. Or the parents who refuse to let a healthy ten-year-old go on a much anticipated school field trip because of an unsubstantiated fear that she will

contract an illness. Or the parents who fail to give any consideration to the strongly expressed desire of their adolescent child to attend public school rather than be homeschooled.¹⁸³

There are at least two reasons to focus on cases of unjustified paternalism that fall short of abuse or neglect.

First, these are cases in which children are treated or regarded in morally impermissible ways that tend to be overlooked as sites of concern, precisely because they fall short of abuse and neglect. There may be no visible scars, or measurable long-term disadvantages, or noticeable psychological damage. Yet the children concerned are nevertheless wronged.

Second, when we fail to understand not only *that* this subset of paternalistic cases is unjustified, but also, *why* it is unjustified, we risk sliding into abusive or neglectful behaviors. For example, in a harrowing account of familial child abuse, psycho-analyst Elizabeth Young-Bruehl describes a tendency in abusive families to fail to recognize children as persons, and thereby, to adopt a prejudicial attitude towards them. Before they are abused, children in abusive homes are dehumanized – or rather, depersonalized. Young-Bruehl argues that this depersonalization paves the way towards behaviors that would not be contemplated if the child were regarded as a person.¹⁸⁴

How, then, are we to think about these hard cases, in which abuse and neglect are not obviously present, yet a particular exercise of paternalism is nevertheless morally unjustified? In Chapter III I defended the idea that, in virtue of their personhood, children are the bearers of dignity and that, as such, they are the proper subjects of respect. I argued that genuine respect

¹⁸³ It is of course possible to deny that the above sorts of cases are properly characterized as cases of paternalism. See Chapter I for an argument that these cases do constitute paternalism.

¹⁸⁴ Elizabeth Young-Bruehl, *Childism: Confronting Prejudice Against Children* (New Haven: Yale University Press, 2012).

requires a detailed understanding of another individual's psycho-social profile and social circumstances. The idea that genuine respect requires details about the other is particularly relevant when adults interact with children. Children differ in substantial ways from adults and so generalizations about "what people are like" do not apply in straightforward ways to children. On the other hand, it is difficult to make a separate set of generalizations about "what children are like" because children differ so dramatically from one another at various stages of development.

Notwithstanding the need for adults to focus on a detailed understanding of a child and her context when deliberating about potential paternalistic interventions, I believe that adults are morally justified in adopting a general presumption that, other things equal, it is permissible to treat and regard children paternalistically. In this chapter I delineate the conditions that must hold in order for the presumption to be applicable in a particular case. Once we have an account of what grounds the presumption, we can identify more accurately those cases in which the presumption that children are the proper subjects of paternalism does not apply.

In the first part of this chapter I present and unpack a principle, which I call the Child Paternalism Principle (or "CP Principle"). This principle details the conditions that ground the moral permissibility of our adopting a presumption that children are the proper subjects of paternalism. The account is designed to be action-guiding. That is, it is formulated in a way that can assist us in deliberating about hard cases.

In the second part of the chapter I counter the idea that we are justified in adopting a hard-and-fast rule stating that paternalism towards children is permissible. Instead, I suggest that what is justified is something much weaker, namely, the holding of a presumption that children are the proper subjects of paternalism. Understanding what is justified when we take ourselves to be

justified in treating or regarding children paternalistically as a “mere” presumption will help us to see that there are many circumstances which we ordinarily do not regard as morally questionable, in which it is not in fact justified to treat or regard a child paternalistically.

Part 1: The Child Paternalism Principle (or CP Principle)

In Chapter II I defended the idea that children’s competence must be a central component of any adequate justification of paternalism. Yet, as described in Chapter II, appealing to children’s competence (or relative lack thereof) cannot, by itself, guide us in deliberating about the morally permissible treatment and regard of children. Other relevant factors interact with considerations of relative competence. In the following discussion I describe and explain the CP Principle and a set of five theses from which it is derived. The CP Principle presents an account of what justifies paternalism towards children that includes the question of children’s competence alongside other considerations.

The CP Principle reads as follows:

Since children are persons who are significantly less competent at making personally and socially responsible self-determining life choices than adults are, and since they are at a critical stage of developing their capacity for self-determination, it is morally justified for adults to adopt a presumption that children are the proper subjects of paternalistic treatment and regard.

The CP Principle incorporates key requirements of a set of more detailed Child Paternalism Theses (or “CP Theses”). The CP Theses culminate in the thesis that we are justified in adopting a presumption that children are the proper subjects of paternalism. I shall call the presumption that it is morally permissible to treat and regard children paternalistically, the Child Paternalism Presumption, (or “CP Presumption”).

The CP Theses read as follows:

*(1) As a general rule, children are significantly less competent at making personally and socially responsible self-determining life decisions than are adults.*¹⁸⁵

*(2) Children are at a critical stage of developing the competencies needed to become autonomous adults.*¹⁸⁶

(3) Children are persons. Because children are persons who are developing and who are immature, the adult community has an obligation to respect children as immature and developing persons, and to recognize that, like adults, children are bearers of human dignity.

(4) The adult community has an obligation to protect children and to help children develop into autonomous adults, capable of making personally and socially responsible self-determining life decisions.

Given Theses (1) to (4),

*(5) The “CP Presumption” Thesis: adults are justified in presuming that, other things equal, it is morally permissible to treat or regard children paternalistically.*¹⁸⁷

Let us now explore the theses and how they relate to one another.

Theses (1) and (2)

(1) As a general rule, children are significantly less competent at making personally and socially responsible self-determining life decisions than are adults.

¹⁸⁵ By “adults” here I have in mind children’s future adult selves as well as other persons who are currently adults.

¹⁸⁶ Although human beings continue to develop and expand their competencies across the lifespan, childhood development is more rapid and intense. Disruptions to development at this stage will have significant and disproportionate lifelong effects. Furthermore, development during childhood takes children from a place where they are almost entirely incapable of guiding their own lives, to a place where they can govern themselves.

¹⁸⁷ The theses above may also support, in some circumstances, the stronger claim that it is not only permissible, but it is also *required* that children be treated or regarded paternalistically. For now I am content to focus my defense on the weaker claim. I elaborate on some of the most important conditions that are allowed for in the “other things equal” clause of Thesis (5) in my forthcoming discussion of the five theses.

(2) *Children are also at a critical stage of developing the competencies needed to become autonomous adults.*

Theses (1) and (2) make two distinct empirical claims about children's competence relative to adults: (1) that children's competence is significantly *underdeveloped* compared with adults, and (2) that it is in a rapid and important stage of *developing*.

Consider the ways in which children's competencies are underdeveloped. Children lack a range of skills, competencies, and developed capacities that adults typically possess. Very young children lack rational capacities to deliberate prudentially and morally. Older children may have relevant rational capacities, but lack the experience and emotional maturity to use those capacities effectively in certain kinds of circumstances, such as when under stress or in the company of peers. Some of children's incompetencies are sourced primarily in their inexperience. Other competencies are not acquired until certain biologically- or psychologically-driven developmental milestones are met.¹⁸⁸

Biologically- or psychologically-driven development, and experiential acquisition of competencies, are never entirely separate. Without appropriate cultural, social and educational exposure and practice, key developmental milestones will not be met. Children with developmental disorders may struggle to acquire adult levels of competence relevant to making their own decisions, regardless of exposure to a wide range of educational, social, and cultural experiences. I shall refer to the complex of children's relative lack of skills, experience, knowledge, and rational, social and emotional competencies as children's *immaturity*.

¹⁸⁸ By "biologically- or psychologically-driven milestones I have in mind relatively automatic developmental changes that may vary in timing but do not vary in substance among human beings.

Thesis (3)

(3) Children are persons. Because children are persons who are developing and who are immature, the adult community has an obligation to respect children as immature and developing persons, and to recognize that, like adults, children are bearers of human dignity.

In Chapter III I developed an account of children's personhood that took as its starting point the idea that all persons are bearers of dignity, and as such, are the proper subjects of respect. Because children are persons, they too are the proper subjects of respect. Because children are persons, the adult community has an obligation to accord them the level of respect that is due to all persons, whether they be adults or children. Nevertheless, the ways in which it is morally permissible for adults to treat children may differ substantially from the ways in which it is morally permissible to treat adults. This is because, as Theses (1) and (2) indicate, children are persons with certain significant and distinctive differences from adults. These differences mean that the sorts of actions that are respectful towards children will sometimes differ from the sorts of actions that are respectful towards adults.

The claim that children are persons might seem to beg the question regarding whether we are justified in treating children paternalistically. One might assume that, in order to show that paternalism is justified, we have to show that children are *not* persons, or at least, that they are not fully persons. But it does not follow from the fact that one is permitted to treat or regard an individual paternalistically, that the individual is not a full person. Paternalism is justified not because children are *not* persons, but because children are persons of a certain sort. In Chapter III I developed an account of children as persons according to which treating a child paternalistically can be done in a way that is consistent with respecting and upholding the dignity of that child.

Thesis (4)

The adult community has an obligation to protect children and to help children develop into autonomous adults, capable of making personally and socially responsible self-determining life decisions.

Thesis (4) is generated by children's immaturity, as outlined in Theses (1) and (2), in combination with children's personhood, described in Thesis (3). I believe that Thesis (4) is obviously true. So I do not plan to mount a detailed defense of this thesis. However, I do want to make some comments about the nature of those adults' obligations towards children that depend on children's being immature persons.

Children are at a particularly rapid and sensitive stage of moral, social and cognitive development. The experiences and opportunities that children have while they are still children are crucial to their development into responsible and autonomous moral agents. As such, children's developmental needs have a special status: adults have an obligation to nurture and facilitate the acquisition of autonomy-related skills and competencies. Sometimes this responsibility will require that adults restrict children's occurrent choice-making opportunities in order to protect the development of future autonomy. At other times, in order to facilitate development, adults will be obligated to allow children to make their own decisions (including their own mistakes) even when they lack the maturity to do so well. In this way Thesis (4) justifies some forms of paternalism towards children, but it also limits which forms of paternalism are justified. Often, restrictive paternalism is required in order to protect and nurture children. But sometimes, in order to facilitate children's development, less rather than more adult intervention is called for.

Stemming from the practical and interpersonal consequences of children's immaturity, cultural and social practices have emerged that give certain adults not only authority over, but also responsibility for, certain children. Some of these established practices may turn out to be

morally unjustified. One of my aims in articulating the CP Principle and the set of CP Theses on which it depends, is to provide a framework for evaluating these practices.

It is worth noting that justified paternalism is not limited to cases in which the negative effects of immature decision-making are likely to fall on the immature decider. Adults are sometimes justified in treating or regarding children paternalistically in order to facilitate the smooth sharing of lives. Adults are responsible for children. In many cases, adults cannot justifiably exit from their relationships with the children for whom they are responsible. Children's immaturity may lead them to function as less than full moral agents. Children frequently fail to give due weight to the needs and interests of the adults with whom they share their lives. Because of children's moral deficiencies, adults are (up to a point) entitled to treat children paternalistically in order to protect the adults' own interests, even when a child's own interests are not directly threatened by her immaturity.¹⁸⁹

The above discussion reveals that our grounds for holding the CP Presumption have to do with at least three sorts of considerations. First, children are immature. This immaturity may lead them to adopt poor decision-making procedures that may threaten the wellbeing or future interests of the children themselves.¹⁹⁰ Adults have an obligation to protect children from hazards associated with their incompetence. Second, given children's unique and highly time-sensitive developmental needs, adults have an obligation to nurture children's development.¹⁹¹ Third,

¹⁸⁹ See Chapter I for a more complete discussion of this issue.

¹⁹⁰ As discussed at length in Chapter II, the genesis of the poor outcomes matters: for it is often noted that adults also make decisions that lead to poor outcomes. It is not the poor outcomes per se that is doing the justificatory work. Rather, it is the causal relationship between children's immaturity and the poor outcomes that matters.

¹⁹¹ Theses (3) and (4) are not entirely distinct. For part of what respect for children entails, given their developmental status, is that we are obligated to nurture, (and certainly, not to subvert) their development.

adults have rights to protect their own interests given children's inability to function as fully cooperating moral agents and also given social and cultural conditions that render adults responsible for children.

Moral Constraints on Paternalism Towards Children

Theses (3) and (4) are needed to justify the adoption of a general background presumption that children are the proper subjects of paternalism. In addition, they operate as moral constraints on any permissible exercise of paternalism. Even in relation to sets of circumstances in which the CP Presumption is appropriately held by an adult, not all exercises of paternalistic restraint or regard are justified. In order to be justified, particular acts or attitudes of paternalism must be consistent with respect for the child, and must appropriately weigh the child's need for protection against the child's developmental interests.

The obligations presented in (3) and (4) will fall variably on adults to an extent that depends on their particular relationships with children. For example, a parent is obligated to protect her children from danger while granting them the freedom and opportunity to develop core competencies; a legislator has a duty to ensure that laws restricting adolescents' freedoms do not unduly interfere with their ability to develop autonomy-related skills and attitudes; and a childless adult is obligated to pay taxes that fund public schooling and child welfare services.¹⁹²

Thesis (3)'s claim that children are persons, is needed to show how Theses (3) and (4), which function as normative constraints, are based in facts — detailed in (1) and (2) — about what children are like. Without the claim that children are persons, we might seem to be falling into the naturalistic fallacy. For it may be said that nothing moral follows from mere facts about

¹⁹² I realize that in certain political circles this last claim may be questioned. This dissertation explores our treatment of children within a basically liberal framework.

what children are like. But the claim that children are persons is a factual claim (about what sorts of beings children are) with normative implications. Certain things follow about how we should treat a being once it is identified as a person. So the recognition of children as persons functions as a bridge between the empirical and the normative. The obligations outlined in (3) and (4) are generated by the facts about children described in (1) and (2), given that children are persons.

Thesis (5): The CP Presumption Thesis

(5) Adults are justified in presuming that, other things equal, it is morally permissible to treat or regard children paternalistically.

The conclusion in (5), that adults are justified in presuming that, other things equal, it is permissible to treat or regard children paternalistically, is generated by Thesis (4) in the following sense. Given what children are like, protecting them from hazards associated with their incompetence while at the same time nurturing their developing autonomy will require some or other sort of paternalistic oversight. In addition, limitations in children's competencies, in particular, their inability to function as fully-fledged moral agents, justifies paternalism towards children when it is needed to protect the interests of adults or of the wider community. The interests of adults must be carefully weighed against the sometimes-competing interests of the children themselves.

Thinking about what is justified as a presumption, rather than as a hard-and-fast rule, is called for by both Thesis (3) and Thesis (4), which function not only to ground the CP Presumption, but also to jointly limit what sorts of situations are to be regarded as ones to which the CP Presumption can justifiably be applied. In Part 2 of this chapter I shall defend the view that although we are justified in adopting the CP Presumption, characterizing what is justified as a *presumption* leaves it open that an adult may be morally required to acknowledge that the CP

Presumption does not apply in a particular case. But first, it is worth reflecting on the value of invoking a general principle to justify paternalism towards children.

Why We Need the CP Principle

When we recognize children as persons, and when we acknowledge that a child's actual competence must be a driving force in adult deliberations if paternalistic intervention is to be morally justified, we are led to see that acts or attitudes of paternalism towards children must be evaluated in a case-by-case manner. The details of a particular child's psychosocial profile, together with her social circumstances, must inform our deliberations about whether and when to treat or regard children paternalistically.

Given the need to focus on the details of particular cases, a question arises. Why do we need a principle, such as the CP Principle, that gives a *general* justification of paternalism towards children? Why not treat adults and children exactly alike, evaluating each individual according to her actual (or at least, her reasonably knowable) levels of cognitive and emotional competence? Those who meet some threshold of competence will be accorded a certain level of autonomy, and those who fall below that level will be treated or regarded paternalistically. Do we need, in addition, to justify our attitudes and actions towards children as a group?

I think that we do. In our daily practices there is a presumption that adults have the necessary features to be accorded a wide range of freedoms. And there is a presumption that children lack the relevant features. These presumptions perform a valuable social function. In many cases we have to make decisions based on very little evidence or knowledge about a particular individual. In other cases our evidence may be unclear or confusing. Whether a person is a child or not is a source of valuable insight into that person's probable capacities.

The usefulness of our holding a presumption that children as a group are the proper subjects of paternalism is perhaps most clear in cases in which we are faced with a stranger. In the absence of more particular information, an individual's life-stage can give us important information about the likely psychosocial profile of an individual, and about whether she is equipped to make her own decisions.

Consider, for example, John Stuart Mill's well-known bridge case. Mill describes a situation in which a stranger is about to cross a faulty bridge. In a case where there is a known risk, but not a certainty of "mischief", Mill believes that it would be wrong to forcibly stop an adult whose reasoning is not obviously impaired from crossing the bridge. He says:

When there is not a certainty, but only a danger of mischief no one but the person himself can judge of the sufficiency of the motive which may prompt him to incur the risk: in this case, therefore, (unless he is a child, or delirious, or in some state of excitement or absorption incompatible with the full use of the reflecting faculty) he ought, I conceive, to be only warned of the danger; not forcibly prevented from exposing himself to it.¹⁹³

According to Mill, we are to presume that a person is well-placed to assess risks and make her own decisions about whether to take a given risk, unless we are presented with evidence that the person is in fact not well placed to make the decision for herself. One of the sufficiently compelling forms of evidence that suggest that a person is not well-placed to make a risky decision, is the fact that she is a child.

For Mill, if the person about to cross a "risky" bridge is a child, then we are entitled, if necessary, to forcibly restrain the child. However, it is worth noticing that our entitlement is not as black-and-white as it may initially seem. Our reaction to a two-year-old about to cross the bridge should be dramatically different from our reaction to a sixteen-year-old. With a two-year-old, it may be appropriate to pick her up and whisk her out of harm's way, without much in the

¹⁹³ John Stuart Mill, *On Liberty*, ed. Gertrude Himmelfarb (Penguin Books, 1985/1859), 166.

way of discussion. In the case of a sixteen-year-old, even if, in the end, it is justified to restrain her, it will only be justified after substantial effort has been put into negotiating with and reasoning with the adolescent. And, should the adolescent present strong and clearly thought-out reasons for taking the risk, perhaps her adolescent status will be insufficient to justify restraining her.

In the bridge case, the fact that a person is a child does less work in justifying our presumption that paternalism is called for, than does the fact that a person is about two years old, or about sixteen years old. While we are justified in holding a general attitude that paternalism towards children is morally permissible, this attitude must be conditional on evidence in particular cases. So, what form a particular act of paternalism may or may not permissibly take will depend on contextual features. Furthermore, as I will show, in some situations, or in some domains of function, even though a person is a child in the sense that she is under the culturally accepted normal age for children (which is 18 years old in our culture), this does not mean that she should be treated as if she is a child.

As I see it, our problem is not that we adopt a presumption that children are the proper subjects of paternalism. Rather, our problem is that once we have adopted the presumption, we may mistake the presumption for a hard-and-fast rule that applies to all children in all circumstances. It is easy to assume that whenever we are faced with a child, no matter what the circumstances, we are *entitled* to treat or regard her paternalistically. I shall argue that when we acknowledge the presumption for what it is, we will recognize that, from a moral point of view, our authority over children is more circumscribed than it may at first appear.

Part 2: The Child Paternalism Presumption

In the rest of this chapter I take up Thesis (5): the idea that adults are justified in adopting a presumption that, other things equal, it is morally permissible to treat or regard children paternalistically. In particular, I elaborate on the work that is done by characterizing what the CP Theses jointly justify as a *presumption*. I demonstrate how the use of the notion of *presumption*, combined with the grounding conditions represented in Theses (1) to (4) (and given in truncated form in the CP Principle) lends itself to action-guiding deliberations with respect to particular instances of paternalism. In this way the CP Principle can function as more than an abstract theoretical justification of paternalism towards children. It can also serve as a deliberative tool for parents, other caregivers, and policymakers who are tasked with making decisions that impact children's lives.

The Action-Guiding Promise of the CP Presumption

Before examining the notion of presumption more closely, it will be instructive to distinguish the action-guiding aspect of my approach, from the approach of an alternative philosophical justification of paternalism towards children put forward by Tamar Schapiro.¹⁹⁴

Like me, Schapiro believes that we need a general justification for our treatment and regard of children as a group. She describes what she thinks needs to be justified as the background practice whereby we stand in a non-reciprocal relationship of authority with children. In this relationship, "adults as a class are, *de jure*, in a position to decide which rights children ought to have."¹⁹⁵

¹⁹⁴ Tamar Schapiro, "Childhood and Personhood," *Arizona Law Review* 45 (2003): 575–94. I discuss other aspects of Schapiro's account in Chapter II.

¹⁹⁵ *Ibid.*, 591.

As she puts it:

I will be proceeding on the assumption that it is the practice as a whole [of treating or regarding children paternalistically] the content of which is implicit in the paternalistic attitude, that needs to be justified. Hence the test of a good justification will not be whether it allows us to see, action-by-action, why every instance of paternalistic intervention is justified. The test is, rather, whether the justification explains why the basic relations between persons who are adults and persons who are children is not fully reciprocal.¹⁹⁶

For Schapiro, the content of our background practice towards children is given by what she calls “the paternalistic attitude.” The paternalistic attitude is the general restrictive and protective stance that adults take towards children. In holding the paternalistic attitude, adults consider themselves to have rights or even obligations to restrict certain freedoms and impose certain benefits on children.

Schapiro stipulates that what needs to be justified is not particular acts of paternalism but rather the relationship in which we stand to children. She notes that a test of a good justification of this relationship will not need to take into account its application to particular cases.

I disagree with Schapiro that the test of a good justification is not “whether it allows us to see, action-by-action, why every instance of paternalistic intervention is justified.” I believe that a good ethical theory should have the potential to guide action in particular sets of circumstances. A good justification of paternalism towards children should provide guidelines that help a mother, tasked with deciding how and when to intervene in her child’s activities, to deliberate about what is the morally appropriate course of action. And it should provide guidance for the legislator, activist, teacher, social worker and judge. This is not to say that a good ethical theory must (or could) provide a formula or prescription for action. It goes without saying that the rich contextual and socio-cultural features of any given situation generate complexities that will not

¹⁹⁶ Ibid., 579.

submit to a formulaic prescription. However, a good ethical theory should provide deliberative guidelines — moral markers — that will feature prominently in the moral deliberations of a reasonable person who takes the theory seriously.

In my view, whether one is attempting to justify a paternalistic attitude, or a presumption that paternalism towards children is morally permissible, a key requirement for a successful justification is that it provide resources for guiding action in particular instances. It is for this reason that I prefer not to characterize what needs to be justified as an attitude, for not all attitudes rely for their legitimacy on grounding conditions. I prefer, instead, to characterize what needs to be justified as a presumption which is only justifiably in place when its grounding conditions are in place. For, as we shall see, the idea that a presumption is only as good as its grounding conditions is built into the very notion of presumption.

The Notion of Presumption

The term “presumption” is used in everyday language in two senses. First, “presumption” is sometimes used to describe actions or attitudes that are perceived to be arrogant or disrespectful. This sense of presumption is often invoked in response to individuals who take themselves to have a certain right or authority when in fact they lack the relevant right or authority. This sense of “presumption” overlaps in an interesting way with the idea of unjustified paternalism. Telling an adult how to conduct herself in a manner more appropriate to instructing a child is both presumptuous and an instance of unjustified paternalism.

A second sense of “presumption” is this. “Presumption” is used to denote a claim that is taken to be true for the purposes of further reasoning or action, even though there may be some uncertainty about the truth of the claim. To the extent that I invoke the everyday sense of “presumption” in my discussion, I shall rely primarily on this second sense of the term.

“Presumption” is also a technical legal term. A presumption is a rule of law which compels a judge or jury to conclude that a certain fact is true in the absence of evidence to the contrary. For example, in many jurisdictions the courts may be bound by a legal presumption that a person who has disappeared and not been seen or heard from for seven years, is dead. (I shall call this “the presumption-of-death”).

Legal presumptions are not logical inferences from facts, and they are not necessarily instituted on evidentiary grounds. For example, a court is bound to presume that an accused person is innocent unless or until evidence to the contrary proves guilt “beyond a reasonable doubt.” This is a procedural rule designed to protect the innocent. Legal presumptions function as practical accommodations for situations of uncertainty.

Most legal presumptions, as well as presumptions made in practical reasoning, have the following features in common. First, applications of the presumption are rebuttable. Second, presumptions place the burden of proof to the contrary away from the person or institution holding the presumption.¹⁹⁷ In the forthcoming discussion I explain these two features in more detail, and show how each feature applies to the CP Presumption.

The First Feature: Presumptions as Rebuttable

To be clear about what it means for a presumption to be rebuttable, we must distinguish between what I shall call a “presumption-rule” and a presumption made with respect to particular circumstances. To see the difference, suppose that someone attempts to use the presumption-of-death in requesting a court to declare person A dead. Evidence brought to the contrary (such as a recent authenticated letter from A) will rebut the presumption that A is dead. But the

¹⁹⁷ There is a class of legal presumption in which presumptions are characterized as non-rebuttable. I leave this sort of presumption aside. To the extent that I model my notion of presumption on legal presumption, I have rebuttable legal presumptions in mind.

presumption-rule underlying any application of the presumption-of-death is not itself rebuttable. No amount of evidence that A is alive will rebut the presumption-rule that *if* a person has vanished without trace for seven years, he or she is legally presumed dead.

Of course, the presumption-rule itself may be contested. Opponents may suggest that the presumption-of-death rule is not a useful mechanism for allowing people to move forward with their lives when someone has disappeared. Or they may present evidence that in many more cases than previously recognized, people do turn up alive after seven years. But to contest the presumption-rule is not to rebut the presumption. Strictly speaking, to say that a presumption is rebuttable is to say that a particular instance of the application of a presumption-rule is rebuttable.¹⁹⁸

As with legal presumptions, while the CP Presumption is not itself rebuttable, it can certainly be contested. One can question its grounds, perhaps by showing that children are not in general significantly less competent, less mature, and developmentally vulnerable relative to adults.¹⁹⁹ Or one can deny that the CP Presumption follows from the grounding conditions, even if they are true.²⁰⁰ But to say that the CP Presumption is rebuttable is to say that each time the CP Presumption is applied in a particular situation, its application is subject to rebuttal. So one may accept the CP Presumption as a general rule, while denying that a given paternalistic act or attitude directed at a child is morally permissible. In any particular set of circumstances, and with

¹⁹⁸ Edna Ullman-Margalit, "On Presumption," *The Journal of Philosophy* (1983): 150.

¹⁹⁹ For a view along these lines see John Holt, *Escape from Childhood* (Harmondsworth: Penguin Books, 1975).

²⁰⁰ For a view along these lines see Howard Cohen, *Equal Rights for Children* (Totowa, N.J.: Rowman and Littlefield, 1980). The views presented by Holt (footnote 199) and by Cohen are discussed in more detail in Chapter II.

respect to any particular child or children, the presumption that paternalism is morally permissible is rebuttable.

In legal contexts a presumption-rule sets up formal conditions needed for the acquisition and presentation of counter-evidence. For example, a person accused of a crime is presumed innocent “unless or until proven guilty in a court of law.” The CP Presumption is not, however, a legal presumption. While the CP Presumption shares some features with legal presumptions, it also shares features with the types of presumptions made in practical reasoning. The CP Presumption shares with legal presumptions a widespread acceptance in the community, but it is like presumptions of practical reasoning in that it is not officially encoded in the law. So it is worth exploring whether presumptions undertaken in practical reasoning are rebuttable in an analogous sense to the way in which legal presumptions are rebuttable.

Employing a presumption in practical deliberation does not involve setting up formal conditions for rebuttal. Rather, it involves settling something in one’s mind, and making a decision to reason and act as if some claim is true. I may, for example, presume that you will be late for a meeting (because you have been consistently late in the past) and plan my arrival time accordingly. This presumption will be rebutted as soon as I have strong enough reason to believe that in this case, you are likely to arrive on time. Perhaps I see you in the distance as I am approaching, or you call from our meeting place to ask where I am. My presumption can also be rebutted ahead of time. Perhaps someone convinces me that all of the times that you were late before were characterized by a set of circumstances that do not apply in this case. Admittedly, the line between what counts as evidence that is reasonably available to me (and that I am therefore responsible for considering), and evidence that must be actively sought out (for which the burden of proof falls away from me), is not easy to draw. There will inevitably be a grey

area. Nevertheless, once I presume that you will be late, I have settled something in my own mind. I am no longer wondering whether you will be late. Unless some evidence to the contrary that is strong enough to rebut the presumption appears before me, I can now act *as if* it is certain that you will be late.²⁰¹

In order to be rebutted, applications of both legal presumptions and of presumptions made in practical reasoning require that certain evidence come to the attention of, or be reasonably accessible to, the deliberator. What will count as relevant evidence depends on the conditions that ground or justify the presumption-rule. So, the test of whether or not the CP Presumption applies to a particular case lies in the relation of the grounding conditions of the CP Principle to the case.

A closer look at the examples of both legal presumption and presumption in practical reasoning mentioned earlier will demonstrate how the grounding conditions of a presumption function to justify a presumption-rule.

Consider, first, the presumption-of-death rule. A ground for the presumption-of-death is that in most cases, when someone has been absent for as long as seven years, it is likely that she is dead. There is not a logical connection between a person's absence for a certain length of time, and his or her death. In this sense the term of seven years is somewhat arbitrary. However, the presumption does track probabilities. Seven years is a long time not to be heard from and still be alive. It would be silly to suggest that we change the presumption time frame to two weeks.

Another ground for the presumption-of-death is that those left behind when someone vanishes

²⁰¹ Of course, I could still act if I refrained from presuming. I might decide that as I do not know whether or not you will be late, I will arrive on time and bring some work to do in case you are late. Or I might decide to be late, and take my chances that you will arrive on time and be annoyed. But notice that a different decision process is involved when I refrain from presuming. My reasoning and justification for action are different when I acknowledge circumstances of uncertainty, from when I presume that something is in fact the case.

have a strong need to continue with their lives. And so the presumption-of-death rule is put in place to allow those left behind to carry on, to remarry, to access funds, and so on. There are, then, both evidentiary and normative aspects underpinning the legal presumption-of-death. One is entitled to invoke the presumption-of-death rule in cases in which all of the grounding conditions of the rule are met. When the grounding conditions are not met, the presumption is rebutted.

Next, consider my presumption that you will be late. I would not be justified in holding the presumption if you have been regularly on time for meetings with me. The implicit presumption-rule – that people who are routinely late for a certain sort of meeting can be expected to be late in a given instance --does not apply to *you*. For you are not a person who is routinely late.

The grounding conditions of the CP Presumption are specified in the CP Principle and the CP Theses on which it is based. Our presumption that children are the proper subjects of paternalism is grounded in facts about children's underdeveloped competence relative to adults, and in facts about children's unique and highly time-sensitive developmental needs. A limiting condition on justified paternalism towards children is that any instance of paternalism must necessarily be respectful of children's personhood: it must uphold their dignity.

The CP Presumption would not itself be justified if the grounding conditions that permit paternalism did not pertain in a general way. If, as a general rule, children were not less competent than adults, and if they were not at a significant developmental stage, there would not be good reason for our society to adopt or make use of the CP Presumption.

When one holds the CP Presumption with respect to a particular child in a particular circumstance, one's justification is not only that one is faced with a child. The child must share

relevant features of the children described in the CP Principle relative to the activity or choice at stake. When one applies the CP Presumption to a particular case, the child in question must lack competence relative to adults, not just in some general sense, but in relation to the particular decision that she must now make. It disrespects the child to make a decision on her behalf when in fact she is quite capable of making it herself. Or, the child must have developmental needs that are relevant to paternalism in the particular circumstance. For example, even though an older child may have some generalized developmental need to be protected from some disturbing media images, if the child has the maturity to handle a particular image on the news that may be unsuitable for a younger child, in some circumstances one may not be justified in preventing her from looking. There is a point at which, although she is a child, and although in a general sense she is still developmentally vulnerable, it will be inappropriate and unwarranted to prohibit a child's access to particular media images.

So, when one applies the CP Presumption to particular cases, even though one may be faced with what is understood in our culture to be a child (normally someone under the age of 18), the particular individual and the particular circumstances may not fulfill all the grounding conditions for applying the CP Presumption to the case at hand.

Corresponding to the CP Principle's grounding conditions, there are a number of ways in which a particular instance of paternalism towards a child may not be justified by the CP Presumption.

An instance of paternalism may fail to respect a child's dignity. As such, Thesis (3) will be undermined or overlooked by the particular exercise of paternalism. In such cases, the CP Presumption does not apply. Paternalism that depersonalizes a child is normally not morally

permissible, notwithstanding any claimed benefits for future development. “This is for your own good” is no justification when the treatment concerned demeans, humiliates, or shames a child.

One example of a widespread practice that fails to honor children’s dignity is corporal punishment. It is sobering to reflect on the fact that corporal punishment in schools is still legal in 19 US states.²⁰² Corporal punishment involves a physical assault on a child. Equivalent assault of an adult is regarded as a criminal offense. Ironically, our children, whom we acknowledge to be among the most vulnerable in our society, in many places have no legal redress against forms of physical violence that are not permitted in relation to adults. Corporal punishment is plainly an assault on children’s dignity. It harms not only by causing physical injury and therefore, pain, but also by humiliating children. There is no sense in which the CP Presumption can justify instances of paternalism that involve corporal punishment.

Another way in which the grounding conditions of the CP Principle may fail to be met was alluded to when we considered the child exposed to media images. When a child is sufficiently competent relative to a particular choice set, or within a particular choice domain, it may be wrong to intervene paternalistically. Suppose that a child must choose between playing a sport and learning a musical instrument. And suppose that the child, being, say, fifteen, has the cognitive skills needed to weigh the benefits of each, and to make a reasonable decision. If practical concerns affecting the parents such as cost, time, and transportation are not at issue, it is not permissible for the parents to veto the child’s choice one way or the other. For a key grounding condition of applying the CP Presumption is that children are significantly lacking in competence relative to adults. Other things equal, in choice-domains in which a child is in fact competent, the CP Presumption is rebutted.

²⁰² For more information on corporal punishment in U.S. law see *The Center for Effective Discipline*, <http://www.stophitting.com/index.php?page=statesbanning>.

Lastly, there are domains in which children lack competence in relevant ways, but in which risks of harm to the child or the wider community stemming from this lack of competence are outweighed by other considerations. The risks may be outweighed by the developmental benefits of children being granted autonomy. Or they may be outweighed by the intrinsic value of freedom — the sheer joy that a child may derive from being left to her own devices. In such cases the application of the CP Presumption is rebutted.

The Second Feature: Presumptions as Shifting the Burden of Proof

The legal example of the presumption of innocence provides a good illustration of the way in which presumptions shift the burden of proof away from those making the presumption. To say that a person accused of a crime is to be presumed innocent unless or until she is proved guilty, is to say that although she stands accused of a crime, the court will hold her to be innocent until such time as countervailing evidence is formally presented. To rebut the presumption of innocence, the “other side” must put forward counter-evidence.²⁰³

Accepting a presumption may be thought of as tipping the scale in favor of the claim presumed. In order to tip the scale in the other direction, and to achieve a rebuttal, an opponent of the presumption will need to provide evidence that the presumption does not hold in a particular case.

In some cases the standard of evidence required for a rebuttal exceeds the standard of evidence required in order to characterize a claim as a presumption. For example, the accuser needs to provide, not merely good evidence of an accused’s guilt. The evidence must be “beyond a reasonable doubt.” But not all presumptions require such strong evidence in order to be

²⁰³ Of course, the accused herself may provide part of the evidence via a confession. But if she remains silent, and nobody else comes forward with sufficient evidence that she is guilty, her innocence will be upheld.

rebutted. My presumption that you will be late is rebutted by evidence that you are occasionally on time. Presumptions can be weaker or stronger depending on their grounds.²⁰⁴

In cases of practical reasoning, the way in which the burden of proof is shifted away from the deliberator who adopts a presumption lacks the formal features of the legal context. When I presume that you will be late, there is no person or institution tasked with seeking out and presenting any existing countervailing evidence. The burden of proof is shifted away from me in the sense that, if the presumption is reasonable, I am not rationally obligated actively to seek out countervailing evidence. I am not required (though I may be permitted) to interview your other friends about your punctuality, or to call you to see where you are. Nevertheless, there is an implicit “unless or until” clause associated with my presumption. I am rationally entitled to proceed on the presumption - to act as if the claim “you will be late” is true - unless or until strong enough countervailing evidence becomes available in a way that is reasonably accessible to me.²⁰⁵

The nature of the evidence required to rebut a presumption in practical reasoning sometimes depends on normative as well as on empirical grounds. For example, suppose that I have no idea whether or not you are coming to my dinner party. I will be hard-pressed to decide whether to set a place at the table for you. If I presume that you will be coming, I can then go ahead and set a place for you. In the absence of evidence, my presumption may have normative grounds, following a sort of etiquette rule: if someone is invited to your party, always set a place at the table, unless you are certain that he or she will not attend. In this case, although the

²⁰⁴ See Ullman-Margalit, “On Presumption,” 152-154.

²⁰⁵ Of course, from a moral (rather than a merely prudentially rational) point of view, I may not be entitled to act on the presumption that you will be late. If one thinks of an agreement to meet up somewhere as a kind of promise, then it may be wrong for me to be late, even if I am convinced that you are highly likely to also (wrongly) be late.

justification for presuming your attendance is normatively grounded, my holding the presumption is open to rebuttal based on empirical evidence. You may send a note apologizing, for example. Or a trustworthy mutual friend may inform me that you are not coming. Importantly, once I hold the presumption, there is no burden of proof on me actively to seek out verifying or disconfirming evidence. So although the presumption is rebuttable, I am not responsible for attempting the rebuttal. In practical deliberation, the burden of proof is with whoever may dispute my presumption. Oftentimes, nobody will care to dispute it.

Nevertheless, I am not entitled to continue to hold the presumption in the face of rebutting evidence that is reasonably available to me. So the presumption may be rebutted even if no other parties actively take on a rebutting role. For example, in the dinner party case I would not be rationally entitled to continue to hold the presumption after receiving an apology note. Significantly, it is not just evidence that I happen to be aware of that can count against the presumption. If I possess an unopened note from you that I suspect indicates one way or another whether you are planning to attend the party, and if I willfully refuse to open the note, it is no longer rational for me to continue to presume your attendance. So although the burden of proof falls away from the deliberator adopting a presumption, reasonably available counter-evidence will count against the deliberator's presumption.

In legal contexts, and in practical deliberation, holding a presumption that has reasonable grounds normally absolves the deliberator from actively seeking out evidence that may rebut the presumption. So we might expect that once the CP Presumption is applied there is no requirement that we seek out disconfirming evidence beyond what is reasonably available to us. And indeed, in one respect, there are important limits on what sorts of lengths adults are required to go to in accessing reasonably available evidence.

Before a parent makes paternalistic decisions affecting her child, the parent is not morally required to have her child undergo cognitive and emotional testing to establish her level of maturity. She is not required to read all of the latest works in developmental psychology. However, in deciding whether or not to intervene in a decision that her child is in the process of making, or in an activity that the child is undertaking, the parent *is* required to bring to bear on her deliberations her existing knowledge, based on her observations and personal relations with the child, about the child's maturity and competence to make the decision for herself.

The sort of countervailing evidence that we may consider reasonably available to a deliberating adult will vary not only with situational context but also by the nature of the adult's relationship with a child. Parents who live with their children may be expected to have deep and nuanced understandings of their children's developmental needs and maturity. As such, parents are well positioned to discriminate in a fine-grained way between situations in which paternalism towards a particular child is warranted, and situations in which it is not. Adults in less close relationships with particular children cannot be expected to have as nuanced a picture of a particular child's capabilities. So, for example, we cannot expect a teacher who has known a child for a couple of weeks to discriminate in as fine-grained a way about whether paternalism towards the child is justified, as the parents of the same child can be expected to do. So a teacher may be justified in particular exercises of paternalism that would not be morally permitted by a parent. However, the teacher, in adopting the CP Presumption, must be open to revising her decision in the face of evidence presented by the child, her parents, or some other source.

Adults, then, are not required to go to any and all lengths to access potentially countervailing evidence to their application of the CP Presumption in a particular case. However, there remains an important disanalogy between the way in which the burden of proof shifts in

most cases of legal and practical reasoning presumption, and the way in which it shifts when we are deliberating about paternalism towards children.

Children are not well equipped to come forward in their own defense. Younger children may lack the cognitive skills and communicative savvy to object to the way in which they are treated. In many cases, a child may not even recognize that a particular paternalistic act is unjustified. Sometimes children assume that their unjust treatment is deserved. While a four-year-old may be competent with respect to one choice-set, such as choosing which Lego structure to build she may lack the competence to successfully express and defend her interest in building the structure of her choice, rather than the structure her parent is trying to foist on her.

Older children may have the cognitive and social skills with which to defend their case, yet in our society they lack the legal power and financial resources that are typically available to adults. And, significantly, they lack political power. They are not allowed to vote. An example of an older child's lack of power to defend his own interests against the presumption that his parents are entitled to exercise paternalism over him in a particular set of circumstances, is the case of Josh Powell.²⁰⁶ Powell is now a young adult. He grew up in Virginia, where he was homeschooled. When Powell reached high school age, he decided that he wanted to attend public school. His parents had made use of a Virginia State law that allows parents a religious exemption from all state oversight of their children's education. Powell's parents refused to allow Powell to attend public school despite his wishes. The state law in question requires that in order for a religious exemption to be granted, the views of the child concerned must also be taken into account. Notwithstanding this requirement, school authorities repeatedly turned down

²⁰⁶ Susan Svrluga, "Student's Homeschooling Highlights Debate Over Va. Religious Exemption Law" *Washington Post*, July 28, 2013, http://articles.washingtonpost.com/2013-07-28/local/40859230_1_josh-powell-virginia-law-education

Powell's formal requests to attend public school. The school board refused to override Powell's parents' wishes, even though those wishes conflicted with Powell's own desire to avail himself of a public school education, and even though the law was on Powell's side.²⁰⁷

The school board presumed that Powell's parents had full paternalistic authority over Powell, even when the law required that Powell's voice be heard. While Powell was competent to make a decision about his schooling, he lacked the skills and political savvy to effectively defend his own legal rights. Powell's condition — the condition of childhood — placed him in a particularly vulnerable position. I believe that the school board was entitled to start their deliberations with a presumption that paternalism towards Powell was justified. But given Powell's vulnerability and lack of power, they were not justified in assuming that there was no burden of proof on them to represent or at least, listen to, Powell's side of the argument.

It may be argued that the school board should have honored Powell's request because evidence was surely reasonably available to support the view that, in Powell's case, the CP Presumption did not apply. Given reasonably available evidence the board would not have been entitled to adopt the CP Presumption in the first place. But my point is that even if there had *not*

²⁰⁷ According to the Washington Post, the school Superintendent Cecil Snead defended the school district's failure to honor Powell's wishes, denying that it broke with the law. He commented that the intent of the law must be that a child's desire to be excused from school attendance is "with the parent's blessing." If any person who is opposed to attending school is excused, he argued "I might not have any children in school at all." But the point of the law is surely to ensure, not that any child who wants it should be allowed an exemption from schooling, but rather, that no child who wants to attend school should be denied this opportunity by his or her parents or guardian. It does not follow from requiring that, to be granted, an exemption must be desired by *both* parents and children, that if a child alone desires an exemption, it should be granted.

The Powell case is especially interesting because educational disputes are typically characterized as taking place between parents and the state, rather than between children and those who supposedly have authority over them. So, for example, in the much-discussed case, *Wisconsin vs. Yoder*, when the Supreme Court allowed an Amish community to remove their children from public schooling after the 8th grade, the justices paid surprisingly little attention to the question of what the children affected may or may not have desired. Powell's case raises both moral and legal questions about the role that children themselves should have in determining their own educational opportunities.

been reasonably available evidence to support Powell's position, the board would still not have been justified in assuming that there was no obligation on their part to seek out and evaluate evidence in Powell's favor.

As in the case of practical deliberation in general, in applying the CP Presumption there is no formal "other" on whom the burden of proof falls. Advocacy groups may try to influence not only policy and legal decisions but also the attitudes and actions of individual adults. But for the most part, the best-situated defenders of a counter-view are the children themselves. And children are often ill equipped to make their own case, lacking the experience, skills and status to cogently put forward their own views. In any particular case, adults are not only responsible for recognizing evidence that rebuts the application of the CP Presumption. They are also required to correct for the fact that children lack powers to assert and defend their own position. This correction will in some cases require that children have an opportunity for their own views to be heard.²⁰⁸ In cases in which children are not even aware of an injustice done to them, it will require that adults take up the position of children's representatives, or appoint individuals to represent children's interests. In this way, there will be an "other side" with the power to bring forward rebutting evidence.

The above discussion suggests that when we adopt the CP Presumption, the burden of proof does not shift as cleanly to the "other side" as it may in legal contexts where there is a formally appointed representative of the other side, or in practical deliberations in which a vulnerable "other" is not targeted. As parents, educators, and policy-makers we are entitled to

²⁰⁸ In this respect, the United Nations Declaration of the Rights of the Child is exemplary. Article 12 insists that children be given a meaningful voice in decisions affecting their lives. See *United Nations Human Rights*, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

adopt the CP Presumption. However, this does not absolve us of a responsibility to ensure that children's views about their treatment, as well as independent arguments against paternalism in particular circumstances, be given due weight and consideration.

To say that, in the case of paternalism towards children, the burden of proof does not fall as dramatically on the "other side" as it does in many other sorts of cases is not to say that the idea of the burden of proof falling away from the deliberator plays no role in applications of the CP Presumption. The idea that the burden of proof shifts away from the deliberator when a well-grounded presumption is adopted can help us to make sense of some general attitudes that we justifiably hold towards children and that we rightly do not hold towards adults.

For example, compare two individuals, A and B, both of whom are eligible for an experimental medical treatment that promises to cure a severely disfiguring skin condition, but that is associated with serious side effects in a minority of cases. A is fourteen years old. B is thirty four years old, but has some cognitive deficits that make him, according to a psychologist, cognitively on a par with a twelve-year-old. Both A and B live with their parents and rely on their parents' financial support.

Suppose that both A and B make it clear that they would like to try the experimental treatment. It seems to me that there is something less morally concerning about A's parents deciding to veto his choice, than there is about B's parents' decision to veto B's choice. In B's case, we may reasonably expect that there be a stringent process whereby B's parents must demonstrate B's incompetence to make his own medical decisions before they be allowed a veto. The burden of proof lies with B's parents. In A's case, suppose that we follow the CP Principle. We begin by applying the CP Presumption to the case at hand. If the application is rebuttable,

where does the burden of proof lie? It seems to me that A's parents are not required to prove that A lacks relevant capacities. A's age makes it prima facie reasonable to assume that paternalism is warranted. However, there is a burden on the parents to consider A's specific cognitive and emotional competencies as an individual. They are obliged to listen to A, to talk to him about the decision, and to provide reasons why A's view is overridden. In addition, I think that the state has an obligation to play a mediating role. Given that there is no guarantee that A's parents will appropriately consider A's competence and views, should A continue to request the experimental treatment, there should be some mediating forum to which A can appeal, so that he can ensure that his voice is given due weight.

The way in which A should be treated in the medical case differs from the way in which B should be treated. In B's case, we start with the presumption that B has the authority to make his own medical choice, and his parents must *prove* that he lacks competence. In A's case, we are justified in starting with the presumption that paternalism is justified. We are then required to provide mechanisms to ensure that A's position be heard and adequately considered. A is nevertheless still the subject of paternalism, whether it be his parents or representatives of the state who end up having the final say.

The two features of the notion of presumption discussed above – its rebuttable nature and the way it shifts the burden of proof – have important consequences for the ways in which the CP Presumption may justifiably be invoked. Applying the CP Presumption to particular cases is justified when the nature of the child in question, together with her circumstances, matches the grounding conditions of the CP Principle. Otherwise, the presumption is rebutted with respect to the particular application. Although adults are entitled to begin with the CP Presumption in relating to children, they are not absolved of recognizing reasonably available evidence that the

CP Presumption does not apply to the case at hand. Given children's lack of power, adults also have an obligation, where feasible, to ensure that children's voices are heard. And in circumstances in which children lack the capacity to give voice to their own interests or concerns, adults have an obligation to find or appoint children's representatives who can seek out and present counter evidence, should there be any. In everyday interactions, the "representative" may simply consist in an adults' conscious consideration of the child's perspective. Where policies are being crafted, formally appointed representatives are called for.

Forms of Paternalism

There are many circumstances in which a particular exercise of paternalism towards a child is morally prohibited yet in which paternalism per se is not ruled out. Take, for example, corporal punishment. The CP Presumption – the idea that it is morally permissible to treat or regard children paternalistically – does not apply with respect to a particular proposed intervention that involves corporal punishment. Corporal punishment is ruled out by the grounding condition that children's dignity must be upheld. In a particular case, the fact that corporal punishment is not justified, does not rule out the possibility that other forms of paternalistic intervention are justified. A teacher is justified in disciplining children (and thereby treating them paternalistically) in some ways but not in others. So the CP Presumption may be rebutted with respect to one particular *form* of intervention, but not with respect to others.

In some circumstances even if an adult correctly refrains from active interference with a child, the adult may still be justified in maintaining a paternalistic *stance* with respect to the child. Picture a mother standing with arms outstretched ready to catch her toddler in case he should fall while attempting to walk down a flight of stairs. In the circumstance, the mother may

not be justified in preventing her child from taking the stairs, yet she is nevertheless authorized and indeed, perhaps required, to stand ready to intervene should things go wrong.

So even in cases in which active paternalistic intervention is not justified, an adult may sometimes justifiably adopt a paternalistic stance in relation to a child. In a particular case, we may ask whether the particular stance, based on the application of the CP Presumption to the case, is justified. That is, we may ask whether the CP Presumption as applied to adopting a paternalistic *stance* is rebutted by facts about the child or about the wider circumstances.

To see what is involved in taking a paternalistic stance, consider a scenario suggested by Tamar Schapiro. Schapiro describes a father asking his two-year-old daughter which pajamas she would like to wear.²⁰⁹ If the daughter chooses her pajamas without incident she is not subject to an active exercise of paternalistic restriction. Nevertheless, the child is still the subject of paternalism in this case. For of course, as Schapiro correctly observes, it is not as though “anything goes” with respect to the child’s choice. If the daughter refuses to wear anything at all, or insists on summer pajamas on a chilly winter night, we may suppose that the father stands (justifiably) ready to intervene.

Suppose that we tweak Schapiro’s example of the father asking his two-year-old daughter what pajamas she wants to wear. Suppose that the young girl in question is not two years old, but rather, a “typical” healthy sixteen-year-old teenager. Imagine that the teenager’s father vetoes her decision to wear summer pajamas on a chilly night. Here the girl’s father seems to overstep the limits of his authority. Other things equal, to “make” the teenager wear winter pajamas would be to treat her more like a two-year-old than like a sixteen year old. Demanding that the daughter wear winter pajamas is an exercise of paternalism that is out of sync with the actual

²⁰⁹ Schapiro, “Childhood and Personhood,” 577.

levels of competence and developmental sophistication of a typical teenager.

I do not mean to suggest that parents are never justified in intervening in the pajama choices of their teenage daughters. If we adjust the description enough, paternalistic intervention may turn out to be justified after all. Suppose, for example, that the teenage daughter intends to wear the cooler pajamas at a co-ed summer camp, and that her father deems them inappropriately revealing, with potential consequences that the teenager is not mature enough to admit. Here it seems that, if persuasion and explanation fail, the father may be justified in vetoing the teenager's choice.

When No Form of Paternalism is Justified

Given the above description, it is tempting to conclude that with respect to any child, and any set of circumstances, adults are always justified in adopting the CP Presumption. Particular acts of paternalism may be ruled out when we evaluate the circumstances of the case against the grounding conditions. But some or other form of paternalism, whether it is active interference or a paternalistic readiness to intervene, is always justified.

The picture according to which, in a given interaction, some forms of paternalism are justified, but others are not, covers many sorts of situations. The CP Principle can be used to guide deliberation with respect to which forms of paternalism are and are not justified in a given set of circumstances.

But I do not believe that this picture, whereby some or other form of paternalism is justified in relation to children, covers all possible scenarios. Consider again the teenage daughter choosing between summer and winter pajamas. It is true that if we describe a different situation (one in which the summer pajamas are unwisely revealing in a co-ed situation) we can show that the father may be justified in paternalistically intervening.

But when we invoke a principle like the CP Principle, the idea is that it should be able to guide deliberation with respect to a *particular* set of circumstances. Suppose that we hold the camera steady on our original scenario. We have a teenage girl sleeping at home with her family, deciding what to wear to sleep. The CP Presumption is clearly rebuttable with respect to this child's pajama choice. Other things equal, paternalism, whether it is active interference or a readiness to intervene should the child not do as one hopes she will, is not appropriate in relation to a teenager's pajama choice.

A typical sixteen-year-old is capable of discerning how cold she feels, and of predicting the (minor) consequences should she choose unwisely. Developmentally, a typical sixteen-year old also requires ample opportunities to make her own decisions, including making mistakes, especially when the consequences of those mistakes are minor. The grounding conditions represented in Theses (1) and (2) do not apply in the right way to make the CP Presumption appropriate with respect to a teenager's pajama choice when going to sleep alone at home.

So, while the CP Principle sometimes guides us towards one form of paternalism rather than another, the rebuttable nature of the CP Presumption leaves it open that in any particular set of circumstances, *no* form of paternalism towards a child, whether active or merely the adoption of a paternalistic stance, is justified.

In the rest of this chapter I would like to focus on those cases in which, with respect to a particular domain of function, or a particular set of circumstances, *no* form of paternalism is permissible, even though a child is involved. In such cases it is not that the CP Presumption applies subject to certain conditions, thus ruling out certain forms of paternalism. Rather, the point is that the CP Presumption does not apply at all.

There are at least two types of situation in relation to which the CP Presumption is rebutted in the full sense in which no form of paternalism is morally permitted. First, there are cases in which immaturity relevant to the case at hand is misattributed to a child. Second, there are cases in which a child's incompetence or developmental needs have little bearing on the case. In such cases, very little hangs on whether a child makes one choice or another, or on whether a child engages in one activity or another. I shall discuss these two types of cases in turn.

Cases Involving Misattribution

The first sort of case involves a misattribution of immaturity and incompetence to a child who is in fact quite competent relative to the decision at hand, or whose development requires that she be given the space to make her own mistakes. This sort of scenario is well represented by the teenage pajama case. The teenager has the capacities and the developmental need to make her own decision. If her father intervenes, he is treating her as if she is a much younger child than in fact she is. In such a case he fails to bring to bear on the situation facts about her actual competence and development. He runs together all "children" as equally incompetent. His presumption that the daughter is the proper subject of paternalism in this case, is rebutted.

Consider also this case. Sixteen-year-old Jane has won a scholarship to spend the summer abroad volunteering in a country of her choosing. If Jane floats the idea of going to war-torn Syria, it seems plausible that her parents would be morally justified in vetoing the plan, out of concern for Jane's safety. But what if Jane is choosing between Paris and London? Are her parents morally justified in vetoing Paris as a destination? Whether they are justified will depend on further details. So, let us suppose that the parental veto is motivated by a dislike of French people and customs, and hence, a desire that Jane not be exposed to them. In such a case, the veto seems morally unjustified.

In a case where there are no reasonable or substantial grounds for concern about Jane's safety or development, it seems that Jane should be free to make her own decision. Her parents are entitled (up to a point) to try to persuade her to choose one destination over another. However, should Jane stick to her guns and insist on Paris, it seems to me that the parents would be overstepping the proper limits of their authority to forbid it. (I have specified that Jane has won a scholarship, to take out of play any idea that her parents have the authority to choose how to spend their money with respect to Jane's activities). I believe that, with respect to a decision about whether to spend the summer in Paris or London, other things equal, a sixteen-year-old is entitled to make her own decision, free from coercion and free from actual or potential interference beyond reasonable attempts to persuade.²¹⁰

Why should Jane be free to make her own decision in this sort of case? In Chapter III I discussed the values of agency, autonomy, and dignity. I argued that these goods are goods for all persons, regardless of age. Honoring dignity is non-negotiable with respect to persons. So acts that are humiliating or degrading are never permissible on paternalistic grounds. But restricting a child's freedom does not necessarily humiliate or degrade her. Sometimes, concerns for safety given children's relative incompetence, or children's developmental needs will require that children's freedom be curtailed. Such restrictions are justified when a child's actual level of competence, or her particular developmental need, is such that *not* restricting her freedom would pose a serious threat of harm to the child or to the wider community. The harm in question must be sufficient to outweigh the value to the child of being allowed to exercise her agency and act in an autonomous way. Of course, among deliberators, there is likely to be substantial disagreement

²¹⁰ Even attempts to persuade are not necessarily morally neutral. Given the large influence that parents sometimes have over their children's thinking, certain forms of attempted persuasion may not be morally justified. In fact, forms of attempted persuasion that may be perfectly acceptable in relation to

about how to weigh the values of autonomy and agency against risks to the child or the community. However, as a society we will have made considerable progress if we at least acknowledge that there are these competing values. All too often policy-makers and caregivers act as if the only factor that has bearing on the decision-making process is risk. The goods of agency and autonomy as they apply to children are frequently not even acknowledged.

The value of being allowed to exercise agency and autonomy at least within certain domains does not apply exclusively to older children. It is plausible to suggest that a ten-year-old is wronged if she is denied a coveted opportunity to go on a school field trip because a parent has an irrational fear of her contracting an illness via exposure to public spaces. And a two-year-old who is prevented from deciding between wearing her yellow or her red pajamas to bed because the parent thinks red looks better on her, is likewise wronged.

It might be objected that what is doing the work in these examples is not so much the fact that children should have total autonomy in the sorts of circumstances described, but rather, that the parents are characterized as making irrational or unreasonable decisions on their children's behalf. As a result of poor parental decision-making, the wellbeing of the child will be negatively impacted. On this view, it is a child's wellbeing and not her agency or autonomy that is at stake.

However, we do not need to assume that the harms of parental interference in these sorts of cases extend beyond the harm of denying autonomy. Suppose that Jane's parents are experienced enough to correctly predict that Paris will be unpleasant for Jane. Suppose that the ten-year-old's field trip is objectively a waste of time. And suppose that the two-year-old really does look cuter in red and will get extra cuddles if she wears red, which will please her immensely. If we still think harms have been done, as I think we should, this is because we assume that there is, *prima*

adults may be unacceptable in relation to children at certain stages of development, precisely because of children's susceptibility to influence.

facie, something independently wrong with interfering with a child's agency or autonomy, beyond the interference's effect on the child's wellbeing. Children are entitled to make their own decisions in these domains even if those decisions will (somewhat) negatively impact their wellbeing.

Notice that if the parents in these examples were making the same choices for *themselves*, the choices would not be subject to the same sort of moral constraints. An adult is morally entitled to choose not to go to Paris because she doesn't like Parisians, to choose to wear one color rather than another because she thinks it looks better on her, and to choose to forego a desired outing out of a neurotic concern for her health. What the examples suggest is that the parents are not entitled to use some forms of reasoning that are acceptable for the purpose of making personal decisions, when they are making decisions on their children's behalf. In particular, parents are not entitled to override the preferences of their children for no weightier reasons than to honor the parents' own preferences. Parents are not morally justified in restricting a child on the basis of their own irrational fears or sentiments (although, parents' moral culpability may be mitigated to the extent that they are unaware that their fears or sentiments are irrational).

I believe that in some choice domains children are entitled to absolute authority over self-determining decisions. The particular cases I have put forward may seem rather trivial. However, the point that they highlight has application in the case of major life-affecting decisions as well. It is plausible that choices that some children are morally entitled to make for themselves include: an adolescent's decision to have an abortion; an older child's decision to have recommended minor surgery; and a high-school-aged child's refusal to be homeschooled. In these cases, given appropriately specified details, it may be morally impermissible to

coercively interfere with a child's decision. It may likewise be morally impermissible for parents or others with authority to hold a paternalistic attitude, and stand ready to intervene should the child choose a course of action that they oppose. Just because a parent is entitled to refuse an abortion for herself, or to choose to forego an optional but recommended medical procedure for herself, or to choose what educational opportunities she pursues, this does not mean that the parent has equal authority to make such a determination on behalf of her child if the child's views diverge from that of the parent.

I turn, now, to the second type of case in which the CP Presumption is rebutted with respect to all forms of paternalistic intervention and regard.

Cases in Which Little Hangs on Activities or Outcomes

Recall that the CP Presumption only applies to our interactions with children to the extent that the grounding conditions apply in a given set of circumstances. The grounding conditions are children's maturity, children's developmental needs, and adults' personal rights given their non-fully-reciprocal moral relationship with a child.

Yet there are some situations in which none of the grounding conditions are relevant to the nature of the decision that a child is attempting to make. Recall the toddler choosing between the yellow and the red pajamas. Nothing much hangs on her decision one way or the other. The child requires no great level of maturity in order to make a decision about which pajamas to wear. She does not have to reason about the weather, understand that being too cold at night might lead to illness, and so on: for we have stipulated that the pajamas are identical in every regard except color. There are no developmental needs that will be injured by allowing her to decide for herself. Indeed, there is a case to be made that being allowed to make her own choice is a developmental need: so paternalistic intervention in this case could harm rather than help her

developmental needs. And the parent's self-protective need (a mere preference for one color over the other) is surely not significant enough to warrant interfering with the child's choice. If the parent is so superstitious about yellow that she will not be able to sleep if the child wears the yellow pajamas, there may be a case for paternalistic intervention. However, in the case as described the parent merely wants her own way. Cases like this one, where not much hangs on a child's making an autonomous decision, are not included among cases to which the CP Presumption applies. Our presumption that, in general, paternalism towards children is morally permissible does not extend to cases of petty intervention with a child's agency or autonomy.

I think that this finding is significant. In our culture, we overlook the petty cases: because not much hangs on a particular decision, we overlook the wrong that may be done when one denies a child an autonomous choice for no reason other than that she is a child. As discussed at length in Chapter III, the value of exercising one's own agency extends to even more primitive levels than that of sophisticated cognitive choice-making. Something is wrong when an infant reaching for one toy is repeatedly redirected to another toy for no reason other than that the parent likes to control his behavior. Here an infant's agency is being interfered with *for no good reason*. Our sense that something is wrong with this parental behavior is rooted in our recognition of the value of individual agency — a value that applies to all agents, regardless of their level of cognitive sophistication.

Arbitrary interference with children's agency is not morally permissible. The fact that an act of paternalism arbitrarily interferes with a child's agency functions to rebut the application of the CP Presumption to the case.

Conclusion

The discussion in this chapter begins to illustrate the many ways in which the CP Principle can help us to deliberate about which exercises of paternalism towards children are justified, and which are unjustified. Furthermore, it supports the idea that in relation to some children, in some sets of circumstances, *no* form of paternalism will be justified.

An adult who takes the CP Principle seriously must acknowledge that many kinds of exercise of authority fall outside the realm of the CP Presumption. She will have to admit that arbitrary and petty exercises of authority are not justified. Furthermore, she will need to acknowledge her obligation to be cognizant of relevant features of a child's maturity, development and these features' interaction with her own needs when she deliberates about whether and how to exercise paternalistic control over the child. The CP Principle gives the adult a fair amount of leeway: she is not expected to go to extreme lengths to acquire evidence that may rebut a given application of the presumption. Sometimes she will need to make very quick decisions. In the absence of countervailing evidence that comes immediately to mind the CP Principle will allow the adult to act as if paternalism is justified in this case. However, in accepting the CP Principle the adult must come to recognize and navigate a complex moral landscape. In some cases, an adult must compensate for a child's lack of power by ensuring that the child has an opportunity to voice her own views. Such compensation may involve an adult playing the role of the child's representative, or it may require soliciting help from external children's representatives.

The CP Principle does not provide a formula for adjudicating between the different grounding considerations. Perhaps a child is immature and there is some danger of harm to her, yet developmentally she will benefit from being able to make her own decision in this case. An

adult deliberating about the case will have to weigh the various concerns. The CP Principle is action guiding to the extent that it points to those areas that need to feature as desiderata in practical deliberation. An adult is not entitled to discount evidence about a child's developmental needs and maturity of which she is already aware, or of which she can reasonably be expected to be aware.

Significantly, the CP Principle is not compatible with our prevailing tendency to intervene paternalistically with children's decisions on the basis of purely consequentialist reasoning. Sometimes a child's choice will result in a worse outcome for her than if a parent made the choice for her. But this possibility, while it may weigh in a parent's deliberations, is not the only relevant factor. As children get older and gain experience and maturity, they are increasingly entitled to the space to make their own mistakes. Even when they are very young, in cases in which relatively little hangs on a child's decisions or activities one way or another, in many cases adults are not entitled to deprive a child of her autonomy or of her agency in the name of paternalism.

CHAPTER V

Applying the Child Paternalism Principle: A Case Study

Introduction

In Chapter IV I presented and defended the Child Paternalism Principle (CP Principle) which states:

Since children are persons who are significantly less competent at making personally and socially responsible self-determining life choices than adults are, and since they are at a critical stage of developing their capacity for self-determination, it is morally justified for adults to adopt a presumption that children are the proper subjects of paternalistic treatment and regard.

The CP Principle is designed to be action guiding. To say that the CP Principle is action guiding is to say that the Principle can provide helpful moral guidance to thoughtful and sincere adults who make use of it when they deliberate about how to treat or regard particular children. Of course, even thoughtful and sincere individuals who make use of the principle may end up making ethical mistakes. However, I hope that with clearer moral guidelines for deliberation, decision-making about the treatment of children will improve, and that more just outcomes will result.

The CP Principle can be applied to adults' decisions about how to treat particular children and adolescents with whom they share close relations. Many of the examples invoked in the earlier chapters feature parents making day-to-day decisions about whether and how to intervene paternalistically in their children's lives. I trust that it is fairly obvious how the CP Principle can be used to guide adult deliberation in these close interpersonal relations. The parent or other caregiver is enjoined to consider the child's particular competencies, developmental stage, personality, and social context when deliberating about paternalistic intervention. She must also ensure that any paternalistic intervention is consistent with respect for the child. She is required

to consider not only the future interests of the child, but also the interests of the child while she is still a child.

The CP Principle can also be applied to decisions about the treatment of groups of children or adolescents at the legal and policy level. As such, it can function as a guide to be used by policy makers, legislators, and judges. By way of illustration, in this chapter I apply the CP Principle to a legal dispute about the paternalistic treatment of adolescents. The application serves as one example of how the CP Principle (and the more detailed set of CP Theses on which it is based) can be a helpful tool for moral deliberation about the scope and limits of adult authority over children in legal and policy settings.²¹¹ My hope is that this application of the CP Principle can serve as a model for how scientists making recommendations to the courts, and also, judges deciding cases, could enrich their deliberations by placing them within a structured moral framework.

The dispute about the paternalistic treatment of adolescents that I plan to discuss arose after the American Psychological Association (APA) submitted two seemingly contradictory amicus briefs to the United States Supreme Court in response to two separate cases involving adolescents.

Two Court Cases and the American Psychological Association

In a 1990 ruling regarding the case of *Hodgson v. Minnesota*, the US Supreme Court upheld a Minnesota law that required adolescent abortion-seekers to inform both parents of their

²¹¹ The CP Theses and the CP Principle are developed and defended at length in Chapter IV of this dissertation.

decision to have an abortion at least 48 hours prior to having the abortion.²¹² The court upheld the law because it included a judicial bypass provision, which effectively enabled adolescents deemed sufficiently mature by the court to bypass the requirement.²¹³

Prior to the court deliberations, the American Psychological Association (APA) submitted an amicus brief suggesting that adolescents aged 16 and older are as cognitively sophisticated as adults with respect to their competence to make abortion decisions.²¹⁴ As such, the APA defended the view that it is unconstitutional to require that either parent be notified that their middle-to-older adolescent is planning an abortion. The brief cited empirical evidence that, as a group, adolescents aged 15 and older have equivalent cognitive capacities to adults. And it referenced studies showing that adolescents older than 14 engage in reasoning and process information about practical, moral and social questions with equal levels of proficiency to adults. As the brief put it:

[I]t is now generally accepted that by mid-adolescence (14-15) the great majority of adolescents of average intelligence do not differ from adults in their capacities to understand and reason about medical and psychological treatment alternatives, or in their abilities to comprehend and consider risks and benefits regarding treatment alternatives.²¹⁵

²¹² *Hodgson v. Minnesota*, 497 U. S. 417 (1990).

²¹³ It is worth noting that subsequent Supreme Court rulings have allowed for a narrowing of the criteria under which a minor can qualify for a judicial bypass. In *Lambert v. Wickland* (520 U.S. 292 1997) the Supreme Court held that in order to obtain a judicial bypass, a minor would need to prove to the court, not that she is competent to make the decision for herself, but that having an abortion is in her best interests. Implicitly, the Court indicated that it does not regard adolescents — even those who may be able to demonstrate that they are competent before a court — as competent to make their own abortion decisions. Rather, it allowed for the authority of the abortion decision-process to be shifted from the parents to the court.

²¹⁴ APA, 1989. American Psychological Association, <http://www.apa.org/about/offices/ogc/amicus/hodgson.aspx>.

²¹⁵ *Ibid.*, 7.

Yet the APA subsequently submitted a seemingly contradictory brief in the case of *Roper v. Simmons*.²¹⁶ The 2005 Supreme Court decision to abolish the juvenile death penalty barred the imposition of capital punishment for crimes committed by adolescents while under the age of 18. Previously, individuals could be executed for crimes committed at the age of 16 or older. The APA's amicus brief in this case described adolescents as developmentally immature, stating:

Given that 16- and 17-year-olds as a group are less mature developmentally than adults, imposing capital punishment on such adolescents does not serve the judicially recognized purposes of the sanction.²¹⁷

In support of the claim that older adolescents are less mature than adults, the APA cited evidence that older adolescents are significantly more impulsive, more susceptible to peer pressure, and more prone to risky and reckless behavior than adults. In addition, they noted that adolescents have been shown to be less future-oriented than adults, tending to poorly anticipate the consequences of their actions. Psychologists have described adolescents' impulsivity, susceptibility to peer pressure, poor future orientation, reward sensitivity, and high propensity to engage in risky behavior as contributing to adolescents' "psychosocial immaturity." The APA argued that criminal culpability is mitigated by adolescents' psychosocial immaturity, and that adolescents should therefore not face society's strongest criminal punishment.²¹⁸

It is hardly surprising that one of the Supreme Court Justices accused the APA of flip-flopping in its claims and recommendations. In his dissenting remarks in *Roper v. Simmons*, Justice Scalia wrote:

²¹⁶ *Roper v. Simmons*, 543 U. S. 551 (2005).

²¹⁷ APA, 2004, p.13. American Psychological Association, <http://www.apa.org/about/offices/ogc/amicus/roper.aspx>

²¹⁸ Ibid.

[T]he American Psychological Association (APA), which claims in this case that scientific evidence shows persons under 18 lack the ability to take moral responsibility for their decisions, has previously taken precisely the opposite position before this very Court.²¹⁹

In 2009 a lead author of the APA briefs, Laurence Steinberg, joined with some colleagues to write an article arguing that the two briefs were not inconsistent.²²⁰

The authors of the article argue that activities and social contexts typically leading up to a murder charge are quite different to the decision-making context of an adolescent seeking an abortion. Since adolescents are competent decision-makers in some decision contexts but not in others, it makes sense that adolescents should be treated like adults with respect to some decision-contexts, but not others. They suggest that adolescents can normally be expected to make well-reasoned decisions about abortion and other medical issues, even when they choose not to involve their parents in their deliberations. On the contrary, in the high-arousal, peer influenced contexts in which violent crimes typically take place, adolescents' ability to reason well and engage in adult-level decision-making processes is seriously inhibited. The article states:

By age 16, adolescents' general cognitive abilities are essentially indistinguishable from those of adults, but adolescents' psychosocial functioning, even at the age of 18, is significantly less mature than that of individuals in their mid-20s. In this regard, it is neither inconsistent nor disingenuous for scientists to argue that studies of psychological development indicate that the boundary between adolescence and adulthood should be drawn at a particular chronological age for one policy purpose and at a different one for another.²²¹

²¹⁹ Quoted in Nathalie Gilfoyle, "Understanding APA's Amicus Curiae Brief in *Roper v Simmons*," APA: March 5, 1990. In fact, it was Justice Kennedy who first asked whether the APA had flip-flopped, in oral argument re *Roper v. Simmons*.

²²⁰ Laurence Steinberg et al., "Are Adolescents Less Mature Than Adults? Minor's Access to Abortion, the Juvenile Death Penalty, and the Alleged APA 'Flip-Flop,'" *American Psychologist* 64 (2009).

²²¹ *Ibid.*, 10.

I find the argument that adolescents' psychosocial immaturity should act as a mitigating circumstance in capital crime cases overwhelmingly convincing. However, I am less certain that the accumulating evidence about adolescents' psychosocial immaturity is compatible with finding them to have adult levels of competence with respect to making abortion decisions.

In the rest of this article I focus primarily on the APA's opinion with respect to whether or not adolescents should have to inform their parents of their abortion plans prior to having an abortion.

I begin by reviewing the scientific evidence underpinning the defense of the two amicus briefs put forward in the Steinberg et al. article. I then evaluate the reasons the article gives for claiming that adolescent decisions about abortion are substantially more like the decisions associated with logical reasoning and information processing than they are like decisions made under conditions of high arousal. I suggest that these reasons are not satisfying.

I then turn to the CP Principle and apply it to the question of whether or not, from a moral rather than a legal perspective, the adult community should insist that adolescents inform their parents of their abortion decisions prior to having an abortion. I argue that adolescents should not be forced to inform their parents of their abortion decisions. However, I emphasize reasons for allowing adolescents to make abortion decisions without parental involvement that do not rely on an assertion that adolescents are functionally on a par with adults with respect to the type of decision at stake. I argue that the adult community should provide substantial decision-making "scaffolding" for adolescents potentially faced with abortion decisions, ranging from efforts to prevent unwanted pregnancies to counseling and financial assistance for those adolescents who nevertheless come to have unwanted pregnancies, regardless of whether or not they choose to seek an abortion.

The Science of Adolescent Judgment and Decision-Making

The key scientific evidence underpinning Steinberg and his colleagues' denial that the two amicus briefs represent a flip-flop on the part of the APA, has to do with recent findings about the asynchronous nature of adolescent development.²²² Prior to the beginning of this century, the bulk of research on adolescent decision-making focused on adolescents' decision-processing skills, based on a model of rational decision theory. This body of work demonstrated that adolescents' cognitive capacities, narrowly understood as their abilities to reason in logical ways and to process information, develop in a gradual and linear way from childhood through adulthood. By around the age of 15 or 16, adolescents are able to engage in logical reasoning tasks and information processing with the same facility as adults.²²³ In particular, when it comes to making decisions that involve risk, there is substantial evidence that adolescents are well aware of the risks that they take.²²⁴ Indeed, the research suggests that adolescents are "no worse than adults at perceiving risk or estimating their vulnerability to it."²²⁵

Yet as Steinberg has suggested, a focus on the similarity of cognitive abilities between adults and adolescents obscures other important differences between adolescents and adults.

²²² Much of the relevant evidence has accumulated in the years following the *Hodgson v. Minnesota* ruling.

²²³ D. Kuhn, "Adolescent Thinking," in *Handbook of Adolescent Psychology, Volume 1: Individual Bases of Adolescent Development*, ed. R. M. Lerner & L. Steinberg (Hoboken, NJ: John Wiley & Sons, 2009), 152 – 186; Dustin Albert and Laurence Steinberg, "Judgment and Decision Making in Adolescence," *Journal of Research on Adolescence* 21, no. 1 (2011): 216.

²²⁴ Elizabeth Cauffman and Laurence Steinberg, "Immaturity of Judgment in Adolescence: Why Adolescents May be Less Culpable Than Adults," *Behavioral Science and the Law* 18 (2000): 744; Valerie F. Reyna and Frank Farley, "Risk and Rationality in Adolescent Decision Making Implications for Theory, Practice, and Public Policy," *Psychological Science in the Public Interest* 7, no. 1 (2006): 1-44.

²²⁵ Albert and Steinberg, "Judgment and Decisionmaking in Adolescence," 213.

Research conducted by Cauffman and Steinberg showed that psychosocial maturity was a better measure of risky decision-making than was age.²²⁶ The psychosocial factors that were found to influence decision-making were responsibility (including self-reliance, clarity of identity, and independence), perspective (one's likelihood of considering situations from different viewpoints and placing them in broader social and temporal contexts) and temperance (tendencies to limit impulsivity and to evaluate situations before acting).

Tests of cognitive capacities have typically been done in laboratory situations, where adolescents have been asked to respond to hypothetical scenarios and reason through decisions. But these lab situations rule out the very contexts in which the psychosocial immaturity of adolescents reveals itself – namely situations of emotional arousal and/or peer pressure. The fact that adolescents are able to reason as well as, or with similar outcomes to, adults in situations of low emotional arousal and social influence says little about how adolescents in fact reason (or fail to reason) in the contexts of adolescents' everyday lives, punctuated as they are by peer influence and circumstances of high emotional and physical arousal.

One study that sought to understand the impact of real-world contextual decision-making compared adolescent and adult risk-taking in the presence of peers.²²⁷ Subjects played a game of chicken in which there was little time for reflection. All groups took greater risks in the presence of peers, but the effect was strongest among youths (age 18-22) and adolescents (age 13-16). A later study found that subjects who were told that a peer was watching them engage in a driving simulation increased risk-taking among adolescents' but not among adults. This finding suggests

²²⁶ Cauffman and Steinberg, "Immaturity of Judgment in Adolescence."

²²⁷ Margo Gardner and Laurence Steinberg, "Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study," *Developmental Psychology* 41, no. 4 (2005).

that simply believing that one is being observed by peers, regardless of whether or not the peers themselves encourage risk-taking, is enough to significantly heighten the risk-taking propensity of adolescents.²²⁸

As the above two studies exemplify, within the last 10-15 years, research into adolescent decision-making has shifted from a rational decision theory model to what is termed a “dual systems” model. Dual systems models distinguish between two distinct sorts of processes affecting adolescent decision-making. The first process, termed “cold,” refers to decision-making undertaken in circumstances of low arousal. Judgments undertaken as a result of “cold” processing are best described as “deliberative”, “controlled,” or “reasoned.” The second process, termed “hot” refers to decisions made in circumstances of high arousal, including in the presence of peers. “Hot” decisions are associated with “intuitive”, “reactive,” or “automatic” responses.²²⁹

Investigating the “hot” aspects of decision-making at different stages of adolescents’ psychosocial development has led to an accumulation of evidence suggesting that adolescents have a heightened sensitivity to rewards combined with a relative deficiency in their tendency to anticipate and learn from punishment. These tendencies lead adolescents to be more sensation-seeking and more likely to take large risks, than are adults.²³⁰ While capacities associated with

²²⁸ Gardner and Steinberg, “Peer Influence on Risk Taking”; Laurence Steinberg, *Age of Opportunity: Lessons from the New Neuroscience of Adolescence* (New York: Houghton Mifflin Harcourt, 2014), 93-94; for research on the neural underpinnings of peer influence on adolescents see Jason Chein, Dustin Albert et al., “Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain’s Reward Circuitry,” *Developmental Science* 14, no. 2 (2011): F1-F10.

²²⁹ Laurence Steinberg, “A Dual Systems Model of Adolescent Risk-Taking,” *Developmental Psychobiology* 52, no. 3 (2010): 216-224; Albert and Steinberg, “Judgment and Decisionmaking in Adolescence,” 212; Ashley R. Smith, Jason Chein, and Laurence Steinberg, “Impact of Socio-Emotional Context, Brain Development, and Pubertal Maturation on Adolescent Risk-Taking,” *Hormones and Behavior* 64, no. 2 (2013): 325.

²³⁰ Albert and Steinberg, “Judgment and Decisionmaking in Adolescence,” 218.

“cold” processes develop gradually and in a progressively linear way during adolescence, the sensation-seeking and reward sensitivity associated with “hot” processes spikes in early to mid-adolescence, and is linked to pubertal rather than to chronological maturation.

The asynchronous development of the “cold” and “hot” decision-making processes in adolescence is supported by recent discoveries in the brain sciences. Neuroscientific investigations support the hypothesis that while older adolescents have similar logical reasoning and information processing capacities to adults, their decision-making in real-world contexts is compromised by immature self-regulation capacities and heightened sensitivities associated with the onset of puberty.²³¹ Brain systems linked with “cold” reasoning and information processing activities mature gradually and in a linear way during adolescence. Adolescents come to reason logically and process information at adult levels by the age of 15 or 16. In addition, capacities supporting self-regulation develop linearly, but more slowly, peaking in early adulthood.²³² However, the development of brain systems associated with psychosocial functions is linked to pubertal maturity rather than to chronological age. Increased risk-taking and sensation-seeking behavior in adolescents is “linked to changes in patterns of dopaminergic activity around the time of puberty.”²³³

So, steady improvement in cognitive abilities takes place at the same time that pubertal changes lead to heightened sensation seeking, reward-sensitivity, and risk-taking. Sensation-

²³¹ Laurence Steinberg, "Risk Taking In Adolescence: New Perspectives From Brain and Behavioral Science," *Current Directions in Psychological Science* 16, no. 2 (2007): 55-59.

²³² Laurence Steinberg, "A Social Neuroscience Perspective on Adolescent Risk-Taking," *Developmental Review* 28, no. 1 (2008): 78-106.

²³³ *Ibid.*, 83.

seeking and reward-sensitivity peak well before self-regulation capacities are fully developed.²³⁴

As such, the science accounts well for the fact that adolescents are more likely to engage in highly risky decision-making activities than are younger children or adults. As Steinberg describes the situation:

[T]he increase in reward-seeking which occurs early and is relatively abrupt, and the increase in self-regulatory competence, which occurs gradually and is not complete until the mid-20s, makes mid adolescence a time of heightened vulnerability to risky and reckless behavior.²³⁵

How the Science Applies to the Abortion Case

Let us now turn to Steinberg et al.'s discussion of the alleged APA flip-flop. In most cases, adolescents who commit violent crimes do so in high arousal contexts in which their cognitive abilities are likely to be overwhelmed by factors relating to their psychosocial immaturity. Steinberg et al. claim that, by contrast, adolescents making abortion decisions generally do so in a more measured and thoughtful way.²³⁶ In defense of this point, they invoke studies showing that half of those adolescents who do not tell their parents that they are contemplating an abortion consult with some other adult figure. In addition, 35 states require all women seeking an abortion to receive counseling, with 24 states mandating a 24-hour waiting period between the counseling and the procedure. They take this evidence to show that "it does not appear as if a high proportion of pregnant teenagers decide to terminate a pregnancy under circumstances that are rushed or in the absence of adult advice."²³⁷

²³⁴ Smith et al., "Impact of Socio-Emotional Context," 330.

²³⁵ Steinberg, "A Social Neuroscience Perspective," 83.

²³⁶ Steinberg et al. "Are Adolescents Less Mature Than Adults?"

²³⁷ Ibid., 4.

I find the evidence cited in defense of the claim that few teenagers' engage in a decision-process with respect to their prospective abortion in a way that is rushed or lacks adult advisors, unconvincing. If half of adolescents who do not discuss their abortion with their parents consult with another adult, half do not. Similarly if 35 states require counseling for all women prior to having an abortion, this leaves 15 states in which there is no counseling requirement. A similar point applies in relation to the fact that 24 states require a waiting period.

It seems to me that, given facts about adolescents' poor ability to make good decisions in the face of high emotional arousal and peer pressure, both adolescents convicted of a murder, and adolescents contemplating an abortion, require special treatment. I am fully supportive of a ban against capital punishment for all adolescents. And I do not believe that adolescents facing an abortion decision should be forced to inform their parents. However, the fact that adolescents are more likely to be in situations of high arousal when making decisions leading to murder charges, than when making decisions about abortions, is not, on its own, enough to generate the discrepancy between the APA's attitude to adolescents facing murder charges, and adolescents facing abortion decisions.²³⁸ Given the scientific evidence about adolescents' diminished responsibility when in circumstances of high arousal, it seems to me that the fact that many adolescent murders are undertaken in circumstances of high arousal warrants legislation that prevents the court from imposing capital punishment *when the murder was undertaken in such circumstances*. In a similar way, the fact that adolescents have been shown to make decisions that are cognitively on a par with those of adults when they are in circumstances of low arousal,

²³⁸ In fairness, the APA briefs present a range of considerations in defense of their positions. My point is a theoretical one, aimed at Steinberg et al.'s suggestion that a higher likelihood of an adolescent being in circumstances of high arousal in murder situation than in an abortion-decision situation, lends weight to *generalized* rulings that would ban capital punishment for all adolescents, while treating all adolescents like adults with respect to abortion decisions.

supports allowing *those adolescents who can show that they are in circumstances of low arousal*, to make their decision without informing their parents. But, in the absence of other considerations, the scientific evidence alone does not support a rule that *all* adolescents should be allowed to make abortion decisions without informing their parents.

I believe that, in effect, the scientific evidence put forward in the Steinberg et al.'s defense of the two APA briefs supports allowing an adolescent not to inform her parents of her choice to have an abortion so long as she consults with another adult and so long as she does not make the decision in a hurry.

Interestingly, the authors suggest that only adolescents under the age of 16 must consult with an adult:

“The position taken by APA in *Hodgson vs. Minnesota* (1990), in favor of granting adolescents’ access to abortion without the necessity of parental involvement, therefore seems to us to be consistent with the available scientific evidence, *so long as youngsters under the age of 16 have the opportunity to consult with other, informed adults* (e.g. health care practitioners, counselors).”²³⁹

However, given that self-regulatory capacities have been shown to continue developing into early adulthood, the science suggests that even older adolescents will need to make their decision in an appropriately supportive social context in order for the decision to be made at an adult level.

Steinberg et al. note that in the *Hodgson* amicus brief, the APA focused on the cognitive capacities of adolescents, and not on their psychosocial maturity. The idea appears to be that adolescents’ abortion decisions are undertaken in contexts similar to those of lab testing situations in which adolescents have been shown to have cognitive capacities on a par with adults. But it is surely an exaggeration to suggest that an abortion decision is usually made in

²³⁹ *Ibid.*, 10 (my emphasis).

decision contexts that are not subject to peer pressure and that do not take place under conditions of high emotional arousal.

Making the decision to have an abortion does not involve the sort of impartial, unemotional decision-making that is involved in making a hypothetical decision in a laboratory type situation. It is reasonable to suppose that many adolescents facing an abortion decision – especially those who have, or think they have, reason not to inform their parents – will be frightened, emotional, and will turn to peers for counsel. Susceptibility to peer influence and other effects of psychosocial immaturity seems highly relevant to the abortion decision-making context. In the absence of evidence to the contrary, it seems likely that psychosocial factors like impulsivity, peer pressure, emotional arousal and a lack of future orientation will play a role in an adolescent’s deliberations about whether or not to have an abortion.

Steinberg et al. suggests that “unlike adolescents’ decisions to commit violent crimes, which are usually rash and made in the presence of peers, adolescents’ decisions about terminating a pregnancy can be made in an unhurried fashion in consultation with adults.”²⁴⁰ The fact that such decisions *can* be made in circumstances that are unhurried and in which an adult is consulted does not speak to the circumstances in which adolescents in fact make such decisions. At best, it seems, the science can support the following ruling: adolescents must be made to tell their parents about their abortion decisions unless there is clear evidence that the circumstances in which they make the decision are circumstances in which they are unhurried and consult with an adult. In effect, this is what the Supreme Court ruled when it declared that the Minnesota law being challenged was constitutional given its inclusion of a judicial bypass provision.

Overall, I do not think that the scientific evidence, taken on its own, provides compelling

²⁴⁰ Ibid., 4.

reason for the adult community in general, or the courts in particular, to insist that adolescents have a right to an abortion without informing their parents. In the forthcoming discussion I suggest that applying the CP Principle, which makes use of the scientific evidence alongside relevant normative considerations, can supply a stronger rationale for allowing adolescents to make abortion decisions without their parents' knowledge or consent.

Setting Up an Idealized Backdrop

The debate about whether and how to restrict adolescent access to abortion has played out in the public sphere against a backdrop of deep philosophical and political divide. Many anti-abortionists regard abortion as the morally impermissible killing or even murder of a human being. Many of those in favor of women's access to abortion believe that a woman has a right to control what happens to her body. Anti-abortionists would like to overturn *Roe v. Wade*, the 1973 Supreme Court ruling that struck down many state anti-abortion laws.²⁴¹ Until they achieve their goal of overturning *Roe v. Wade*, some anti-abortion activists have been attempting to restrict access to abortion in other ways. One approach at the state level has been to introduce legislation requiring adolescents to obtain parental consent, or at least, to notify their parents in advance of obtaining an abortion. If the motivation behind attempts to restrict adolescent abortion is to use any means possible to restrict access to abortion for women in general, then adolescents are being unfairly discriminated against. If adolescents are to be regarded persons, worthy of the same respect that is due to adults, then they must be treated equally before the law unless there is a specific reason to do with their adolescent status that merits differential

²⁴¹ *Roe v. Wade*, 410 U. S. 113 (1973).

treatment. The reason to treat adolescents differently cannot be that it is easier to pass restrictive legislation in relation to adolescents than it is in relation to adults.

The APA amicus brief submitted to the Supreme Court in *Hodgson vs. Minnesota* argued that adolescents are not relevantly different from adults with respect to their ability to make an abortion decision. For this reason, the brief recommended that adolescents not be required to inform their parents of their decision to have an abortion. Necessarily, the amicus brief formed part of a politically charged debate, and was submitted in response to a clearly defined and narrow legal question, specifically: “[w]hether a Minnesota statute requiring physicians to notify the parents of all unemancipated minors under the age of 18 at least 48 hours before performing an abortion was unconstitutional.”²⁴²

In the forthcoming discussion I want to abstract from the political and legal circumstances of *Hodgson v. Minnesota* and consider the question of adolescents’ access to abortion against an idealized backdrop in which the deep partisan divides and hidden agendas are absent. In the idealized situation I have in mind, I take it as a given that adult women have a right to abortion, with no restrictions on how this decision is to be made. As I imagine the situation, there are no mandatory waiting periods, no requirements of counseling, and so on.

Against this depoliticized backdrop I want to ask the question: should older adolescents (say, aged 15 or older) be subject to paternalistic restrictions with respect to their access to abortion? In particular, should these adolescents be required to inform their parents of their decision to have an abortion prior to having an abortion? (Different considerations may apply in the case of younger adolescents who are thought to lack adult-levels of logical reasoning and information processing decision-making sophistication). It is important to recognize that, given

²⁴² American Psychological Association,
<http://www.apa.org/about/offices/ogc/amicus/hodgson.aspx>

the idealized backdrop, whatever recommendations are generated by the forthcoming discussion may be poor candidates for implementation given the non-ideal conditions that prevail. However, the discussion is not for that reason of no practical value. The discussion has practical value to the extent that it focuses attention on what is really, morally, at stake with respect the paternalistic treatment of adolescents making abortion decisions.

Applying the CP Principle to the Adolescent Abortion Question

Recall that the CP Principle states:

Since children are persons who are significantly less competent at making personally and socially responsible self-determining life choices than adults are, and since they are at a critical stage of developing their capacity for self-determination, it is morally justified for adults to adopt a presumption that children are the proper subjects of paternalistic treatment and regard.

The CP Principle sets up four key considerations to hold in mind when deliberating about whether and how to subject adolescents to paternalistic intervention. In this case, the question we are to ask is whether we are morally justified, or even morally required, to interfere paternalistically in adolescents' abortion decisions. In particular, is it morally permissible or morally required to insist that adolescents inform their parents prior to obtaining an abortion?

I shall list the four considerations in the order in which I plan to discuss them. First, children are, in general, significantly less competent at making personally and socially responsible self-determining decisions than are adults. Competence is, however, variable among children, and adolescents are more likely than are other children to be competent to make their own decisions within certain choice domains.²⁴³ Second, children are at a critical and sensitive

²⁴³ See Chapter II of this dissertation.

developmental stage. Adolescents' brains are highly plastic — and so what happens to adolescents during adolescence is likely to have profound lifelong impact on the individual.²⁴⁴ Third, children are persons. As such, they are the proper subjects of respect, and any intervention in an adolescent's abortion decision must be consistent with respecting the dignity of the adolescent.²⁴⁵ Fourth, the first three considerations justify a *presumption* that paternalism is appropriate in relation to children. The presumption only holds in contexts in which children are in fact relevantly less competent than adults, and/or when protecting children's development is not possible in absence of paternalistic intervention. Furthermore, whether or not a particular form of paternalism is justified will be constrained by the fact that children are persons, and as such, are the bearers of dignity.

I shall now discuss these considerations in turn.

1. *Are Adolescents Competent Decision-Makers?*

In general, children are less competent to make socially and personally responsible decisions than are adults. How does this fact apply to older adolescents? As discussed in the previous sections, the scientific research suggests that adolescents are competent to make their own decisions in some choice domains, but not in others. In calm and non-emotional conditions and in the absence of peer influence, older adolescents are just as capable as adults are of making decisions for themselves.

As I have already suggested, the adolescent contemplating an abortion cannot be fairly

²⁴⁴ Steinberg, *Age of Opportunity*, 18-45.

²⁴⁵ See Chapter III of this dissertation.

compared with an adolescent undergoing a behavioral experiment in a laboratory atmosphere in which her reasoning and information processing abilities are being tested. In particular, an adolescent's responses to hypothetical questions about abortion may look quite different to her decision-process when she is faced with a real abortion decision. While the adolescent making an abortion decision is unlikely to be in the highest state of arousal typical of an adolescent engaging in a violent crime, neither is it fair to characterize her as engaging in a completely "cold" decision process.

It is likely that an adolescent making a choice about an abortion will be frightened, upset, perhaps angry. She may well consult with, and be highly influenced by, the advice of her peers or her sexual partner. Given the scientific evidence about adolescent maturation it seems to me that, if an adolescent should not be made to inform her parents of her situation, this cannot be because her decision-making in a typical abortion-decision context is equivalent in its sophistication to that of a similarly placed adult.

2. Adolescence as a Sensitive Developmental Stage Requiring Protection

Let us turn, next, to the second consideration: adolescents' developmental stage. There is no question that adolescents are at a sensitive developmental stage. Becoming pregnant places an adolescent girl in a strange predicament. On the one hand, she is still physiologically and psychologically a child and, as such, highly developmentally sensitive. On the other hand, if she chooses to continue her pregnancy and raise a child herself, she will thereby exit her childhood status within our culture.

In Chapter IV I suggested that adolescents' personhood, together with their developmental vulnerability, generates an obligation that the adult community nurture and protect that development. Ironically, while adolescents' potential abortion decisions have garnered

considerable legal and policy-oriented interest, little paternalistically-motivated attention seems to have been paid to pregnant adolescents who may be jeopardizing their development by *not* contemplating abortion. Adolescents who bear, or bear and raise a child, will have their childhood cut short at a critical developmental stage. They will face responsibilities for which they are poorly prepared. And they will be more likely to be economically and socially disadvantaged in their later life as a result of missed educational and labor opportunities. In the absence of an ideological agenda, if those who press for mandatory parental involvement in abortion decisions do so in part for the purpose of protecting the developmental interests of adolescents, consistency will require that they also press for medical professionals to inform parents that their adolescent child is pregnant, even when she does not seek an abortion. Early information about an adolescent child's pregnancy can enable a parent to advocate for an abortion that may well be in an adolescents' developmental interest.

Now, I do not think that adolescents should have to inform their parents that they are pregnant, whether or not they seek an abortion. This brings me to the third consideration: adolescents' personhood.

3. The Dignity Constraint

In Chapter III I argued that, because children, being persons, are the bearers of dignity, there are some ways of treating children that promise developmental or other instrumental advantages, yet that are nevertheless morally impermissible. In particular, I argued that children's autonomy and agency has non-instrumental value to them. I maintained that respect for children requires that the value of children's freedom to exercise their developing autonomy and their human agency should feature as a significant consideration in deliberations about how to treat them. This does not mean that children should be left entirely to their own devices.

Rather, it means that paternalistic interventions should allow the greatest possible freedom to the children affected, consistent with their safety and their developmental and experiential interests. Of course, this freedom will necessarily be limited by the needs of others in the community to also exercise their freedom and agency.

Given that children lack full autonomy, they will frequently require adult assistance in order to safely exercise the partial autonomy that they do have. For example, consider a toddler, trying to walk down a steep staircase. She may fall. The optimal response of a nearby caregiver is not to scoop her up out of harm's way. Neither is it to leave her entirely alone. Rather, if conditions allow, the caregiver should stand close to the toddler, ready to catch her if she falls. In order to respect children who enjoy only partial autonomy, and whose competence in various domains is still developing, we should ideally provide these children with scaffolding that will help them to successfully and safely complete the task that they are attempting.²⁴⁶

Scaffolding is useful for assisting children to develop their capacities. In addition, offering scaffolding rather than taking over children's decision-making processes, or inhibiting their agency, is a sign of respect. By way of comparison, consider a disabled adult who cannot walk, but who needs to get somewhere. One way to help her to move is to pick her up and take her where she wants to go. A more respectful way to help is to provide the adult with a wheelchair, so that she can get where she needs to get with some independence. And perhaps the most respectful solution, where possible, is to provide the adult with a prosthetic device, so that she

²⁴⁶ For an account of the importance of scaffolding for children's learning at various stages of development see L.S. Vygotsky *Mind In Society: The Development of Higher Psychological Processes*, ed. Michael Cole et al. (Cambridge, Mass.: Harvard University Press, 1978) See also, Barbara Rogoff, *Apprenticeship in Thinking: Cognitive Development in Social Context* (Oxford: Oxford University Press, 1990).

can walk. If a prosthetic solution is readily available but, without consulting the disabled adult, we choose instead to carry her wherever she wants to go, this will be an assault on her dignity.

Children, as the bearers of dignity, are no different. In circumstances in which, with some assistance, they are capable of making reasonable decisions of their own, other things equal it is disrespectful to deny children such assistance and instead to make the decision on their behalf.

When it comes to making a decision about an abortion, the science suggests that adolescents have fairly sophisticated capacities. However, in circumstances of high arousal and peer influence, their skills fall short of those of adults. What would be required in order to provide scaffolding for these adolescents? Scaffolding an adolescent's abortion decision does not necessarily require informing her parents. Neither does it require ceding to the courts the final decision about whether the adolescent should have an abortion.

Scaffolding an adolescent's abortion decision process will likely require ensuring that she has easy and free access to unbiased qualified adult advisors, and that she has sufficient time to make a decision. Mandatory waiting periods have been criticized as placing an undue burden on adolescents who tend to come forward for abortions later in pregnancy than adults, and who may lack transport and other freedoms to make abortion appointments in timely ways.²⁴⁷ The later in pregnancy that an abortion takes place, the more risky it is for the health of the patient. For these reasons I do not think that adolescents should be subject to mandatory waiting periods. However, I do think that counselors should be on hand at abortion clinics to guide adolescents in their decision process. And I believe that adolescents contemplating an abortion should have access to resources such as free transportation and other forms of financial assistance, which can allow an adolescent to delay her decision without encountering undue logistical burdens.

²⁴⁷ APA amicus brief re *Hodgson v. Minnesota*, 1989, 17.

Significantly, if the state provided scaffolding contexts in order to ensure that adolescents have the time and professional advice that they need in order to make a well-considered decision, parental involvement would not be required. Of course, many adolescents will willingly involve their parents in their abortion decision. But those who choose not to involve their parents may well do so with good reason. Parents do not always act in their children's best interests, nor are they necessarily the best-placed adults in the community to help their child make this difficult decision. It is a mark of disrespect to an adolescent to force her to inform her parents of a pregnancy. An adolescent who is reluctant to inform her parents of her pregnancy or abortion decision may legitimately fear having to endure humiliation or abuse as a result. Similarly, I believe that it is disrespectful and potentially humiliating to make an adolescent stand before a judge and "prove" that she is competent or that her abortion is in her best interest, in order to avoid having to tell her parents. Providing private unbiased counseling, and providing financial and other resources to enable the adolescent to have time to make her decision without enduring undue burdens, is a respectful way to scaffold adolescent decision-making.

4. The Presumption that Paternalism is Justified

The fourth consideration presented by the CP Principle is that we are justified in holding the CP Presumption, a presumption that it is morally permissible to treat children (in this case, adolescents), paternalistically. The CP Presumption holds to the extent that children lack relevant competence and/or have specific and sensitive developmental needs that will likely be put in jeopardy in the absence of paternalism. Furthermore, when paternalism towards a child is justified, the form that the paternalism can permissibly take must be consistent with respect for the dignity of the child. A child's dignity acts as a constraint on the circumstances in which the presumption that paternalism is justified, may hold. As I emphasized in Chapter IV, just because

some form of paternalism is justified, this does not authorize adults to intervene in just any way that seems fitting to them.

Variations in children's competence and developmental needs impact whether or not the CP Presumption holds in a particular case. In some cases, competence is not relevant to the decision-context. In decision contexts in which not much hangs, consequentially, on a decision one way or another (and in which developmental needs are not thereby served), paternalism is not morally justified. It is clear that the abortion decision context does not represent the sort of circumstance in which nothing hangs on the outcome. No matter what one's political persuasion, it is indisputable that a decision to have, or not to have, an abortion, will have serious and lifelong consequences for an adolescent.

Another type of context in which the CP Presumption fails to hold is in relation to a choice domain in which a given adolescent is fully competent to make her own decisions. In such a situation, the adolescent functions like an adult, and as such, should be treated like an adult. This is the stance that was taken by the APA's *Hodgson v. Minnesota* (1990) amicus brief. However, as I have argued above, given the science on adolescent development, together with the nature of the decision to have an abortion, many adolescents are unlikely to function with adult levels of competence when making abortion decisions, unless they have access to appropriate scaffolding.

I believe that the particularities of adolescents' predicament when they face abortion decisions justify paternalistic intervention that is designed to scaffold and support adolescents making their own decisions. The presumption that paternalism is justified does not warrant heavy-handed intervention in the case of adolescent decision-making about abortion. This is because adolescents are very close to being able to make adult-level decisions. They simply require appropriate contexts in which to do so. So the CP Presumption warrants the

paternalistically-motivated provision of additional services and forms of financial and logistical assistance to adolescents — provisions that acknowledge that adolescents face particular challenges and that sound decision-making requires appropriate contexts and supports.

The CP Principle lends support to a nuanced picture of how the adult community should respond paternalistically to adolescent pregnancies and the abortion decisions that follow for some adolescents. According to this picture, paternalistic intervention is called for in response not only to adolescents who seek abortions, but in response to adolescent pregnancy itself. For teenage pregnancy places enormous stresses on adolescent girls – stresses which they will likely need considerable assistance in order to manage.

It goes without saying that, as a society, it would be ideal if we used evidence-based methods to reduce the incidence of unplanned pregnancies, thus sparing adolescents' the need to go through this difficult decision process at all. For if abortion decisions are made in circumstances of relative calm, it is clear that the activities that lead to pregnancy are best characterized as involving “hot” decision-making processes. Steinberg has suggested that the best way to address adolescent risk-taking is not simply to provide adolescents with more information, for they are frequently well informed about the risks that they nevertheless take. Rather, the most effective strategy for reducing risk-taking is to address the *contexts* of risk-taking, and to limit contexts in which adolescents will find themselves in positions in which their psychosocial immaturity may overwhelm their otherwise sophisticated ability to reason and deliberate.²⁴⁸ Paternalistic intervention should ideally start well before an adolescent is faced with an abortion decision, and well before she becomes pregnant. Evidence-based (rather than ideologically motivated) measures to reduce adolescent pregnancy rates should be a top priority.

²⁴⁸ Laurence Steinberg, "Risk Taking In Adolescence: New Perspectives From Brain And Behavioral Science," *Current Directions in Psychological Science* 16, no. 2 (2007): 55-59.

These measures may include broader access to contraception services, rape-prevention strategies, efforts to limit teen alcohol consumption, and increased adult supervision of teens.

Even with the best strategies, some adolescents will still become pregnant. These young women will require special services and assistance regardless of whether or not they seek an abortion. The CP Principle supports the paternalistically-motivated provision of such services, while ruling out the specter of adults (whether they be parents or the courts) taking over the decision-processes of adolescents who are able to make reasonable self-determining decisions given appropriate support.

Conclusion

In Chapter II I criticized the views of a number of philosophers and legal theorists who reject the use of a notion of competence in justifying paternalism towards children. I suggested that these thinkers fail to appreciate the importance of the scientific findings about children's development and competence. I believe, and I have tried to show in this dissertation, that any plausible account of the extent of adults' morally justified paternalistic authority over children, must rely heavily on the available scientific evidence.

Scientific evidence is not, however, enough. Unless they deliberate within an appropriate ethical framework, when policy-makers, legislators, or judges attempt to make use of the science about adolescent development to determine whether and how to treat adolescents paternalistically, they risk engaging in overly simplistic reasoning. I have put forward the CP Principle as a framework that can facilitate more nuanced deliberation. Using the CP Principle as an ethical guide, I have suggested a way to see adolescents not quite as adults but also, not as young children on whose behalf adults are authorized to make decisions. The particular

recommendations that I have put forward make sense against an idealized backdrop that does not incorporate the politically and ideologically charged attitudes towards abortion that are currently influential on both ends of the political spectrum.

Unfortunately, some of the particular recommendations that I have put forward may not be suitable for the non-ideal conditions prevailing in America today. For example, there may be a legitimate concern that it is unlikely that counseling and other services will be implemented in non-ideological ways. If resources designed to help adolescents are in fact used to coerce or pressurize them one way or another, this will defeat the purpose of the intervention. So, in the most ideologically charged communities, perhaps the best course of action is the one recommended by the APA after all. Treating adolescents as if they are adults may be the best option given circumstances in which adults are likely to be unreliable sources of scaffolding.

Although my recommendations in this chapter are best suited to an idealized setting, I believe that invoking the CP Principle can be a helpful aid in deliberating about non-ideal circumstances. For it is likely that deliberative outcomes will be more nuanced and just, even in relation to non-ideal conditions, if the deliberators have a clearer sense of the ethical issues at stake.

In the philosophical literature there is a relative dearth of discussion about children, both in ethics and in other sub-fields. Among those thinkers who do take up ethical questions relating to adult authority over children, there is a tendency to dismiss or underplay the importance of applying our increasingly sophisticated scientific knowledge about children's development and capacities to these questions. As a result, policy makers, legislators, judges and other decision-makers lack a sufficiently child-centered ethical framework through which to filter the available scientific evidence. I believe that there is a pressing practical need to develop an action-guiding

framework that can assist decision-makers in applying the science, as well as other relevant moral considerations, to their deliberations about how children should be treated. In this dissertation I have outlined a candidate framework. The framework is offered as a first step in what I hope will become an extended conversation.

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