

LOCKE, CONSENT AND THE RIGHTS OF CHILDREN



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“But to supply the Defects of this imperfect State, till the Improvement of Growth and Age hath removed them, Adam and Eve, and after them all Parents were, by the Law of Nature, under an obligation to preserve, nourish, and educate the Children, they had begotten.” (*Second Treatise*, sec. 56)

Apparently, then, Locke believes that parents may overrule bad choices that their children might make, including self-regarding actions. Leaving aside Locke’s duty of self-preservation, his theory permits adults to do as they wish with their own bodies. But this is not the case for children, because their lack of reason prevents them from making sensible choices. To permit a willful child from taking serious risks to his health or safety even if he wants to is permissible on this theory. Parents (and other adults as well) also seem to have a duty to refrain from taking advantage of the child’s weak rational faculties to exploit or abuse him. On top of this, Locke affirms that parents have enforceable obligation to preserve, nourish, and educate their children; not because they consented to do so, but because they have a natural duty to do so.

1. Locke’s Theory of Childrens’ Rights

Locke firmly denies Filmer’s theory that it is morally permissible for parents to treat their children however they please:

“They who allege the Practice of Mankind, for exposing or selling their Children, as a Proof of their Power over them, are with Sir Rob. happy Arguers, and cannot but recommend their Opinion by founding it on the most shameful Action, and most unnatural Murder, humane Nature is capable of.”

(*First Treatise*, sec. 56)

Rather, Locke argues that children have the same moral rights as any other person, though the child’s inadequate mental faculties make it permissible for his parents to rule over him to a limited degree.

“Thus we are born Free, as we are born Rational; not that we have actually the Exercise of either: Age that brings one, brings with it the other too.”

(*Second Treatise*, sec. 61)

On top of this, he affirms a positive, non-contractual duty of parents to provide for their offspring:

2. The Problem of Positive Parental Duties

The first difficulty with Locke’s theory of childrens’ rights is that the positive duty of parents to raise their children seems inconsistent with his overall approach. If, as Locke tells us, “Reason teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions” (*Second Treatise*, sec. 6), it is difficult to see why it is permissible to coerce parents to provide for their offspring. In general, in Locke’s scheme one acquires additional obligations only by consent. Even marriage he assimilates into a contract model:

“Conjugal Society is made by a voluntary Compact between Man and Woman.”

(*Second Treatise*, sec. 78)

We should note that in section 42 of the *First Treatise*, Locke affirms that the radically destitute have a positive right to charity.

“As Justice gives every Man a Title to the product of his honest industry so Charity gives every Man a Title to so much out of another’s Plenty, as will keep him from extream want, where he has no means to subsist otherwise.”

But this hardly rules out relying on voluntary charity if it is sufficient to care for all those in “extream want”. Quite possibly, this right would never have a chance to be exercised in a reasonably prosperous society, since need would be minimal and voluntary help abundant. Moreover, it is hardly clear that the duty to provide for the extremely needy rests only on some sub-group of the population. This passage seems to make it a universal duty of all of society’s better-off members.

For these two reasons, then, it would seem hard to ground positive parental duties on the child’s right to charity. For if the number of children with unwilling parents is sufficiently tiny, and the society in which they



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are born sufficiently rich, the preconditions for exercising the right do not exist. Moreover, there is no reason for parents, much less the parents of a particular child, to have a duty to that child; more plausibly, all able-bodied members of society are equally obliged to fulfill this duty.

Nor would it work to say that parental obligation is derived from the right of restitution for harm, which Locke explains a criminal owes to his victim:

“he who hath received any damage, has besides the right of punishment common to him with other Men, a particular Right to seek Reparation from him that has done it.”
(*Second Treatise*, sec. 10)

How has a child “recieved any damage” from his parents? At the time of birth, his mother has already endured a painful burden in order to give the child life. Far from having in any way harmed her newborn baby, a mother could easily claim to have long since dispatched her share of the social obligation to care for the radically destitute after nine months of carrying him. The father may or may not have assisted the mother in this process; but surely he can’t be said to have harmed the child in any way that would give the child a right to restitution from him.

3. The Question of Consent

The second difficulty with Locke’s theory of childrens’ rights is that he doesn’t integrate the theory with his overall contractualist approach. If Locke could find some sort of a contractual understanding between parents and their children (as he does for marriage and other social interaction), then the theory of childrens’ rights would better cohere with his overall theory. A contractualist approach might also better illuminate the nature and extent of parental duties.

4. Reconstructing the Theory of Childrens’ Rights

The best thing about Locke’s theory of childrens’ rights is that it explains why children must be treated differently in order to respect the human rights that they share equally with adults. Some thinkers in the Lockean tradition have been willing to defend the “rights” of children to be molested by adults, to buy drugs, to sell their legs, and so on. I think that there is a grotesque confusion here (as well as a lack of common sense), since it assumes that childrens’ serious lack of intelligence and information in no way taints the voluntariness of their consent.

While I am in agreement with Locke up to here, I think his theory needs to be reformulated. First of all, we should deny that parents have a non-consensual obligation to support their children. As explained earlier, even if we endorse Locke’s right to charity, no involuntary duties to one’s offspring follow.

Second and more basically, we should integrate the theory of children’s rights with Locke’s theories of contract and consent. The main obstacle to such an approach is that a child can’t consent in the normal sense; indeed, if he could, why would the child need a guardian in the first place? Tacit consent works no better than explicit

consent, since lack of rational ability undermines tacit consent too. The difference between explicit and tacit is merely in the manner of expressing consent; and if a child is rationally unable to say “I consent” then he is no more rationally able to indirectly imply that he consents. So neither explicit nor tacit consent work.

But despair not; for there is a third concept of consent, namely hypothetical consent. While this notion is ordinarily suspect, in the case of children it is uniquely useful. Adults must treat children only in ways to which they would consent, if their faculties were sufficiently developed. Everyone has the duty to treat children only in ways to which they would consent: there is a general obligation to refrain from using violence against children, molesting them, giving them poison or drugs, and so on. And a child’s would-be guardians can only become his guardians on terms to which the child would consent if his mind were mature. The precise content of the consent, being hypothetical, is of course quite vague (which, happily, implies that there is no need to sacrifice the pluralism inherent in wide parental discretion). But at minimum, the hypothetical contract would assure the needs of nourishment, preservation, and education. Though the child’s consent need merely be hypothetical, the consent of his guardian(s) much be actual (probably tacit rather than explicit). Since it is the mother of the child who automatically suffers a large cost to bring the child to term, there should be a strong presumption in favor of her exclusive guardianship. Naturally, she may share guardian duties with the father if they both consent through an agreement such as marriage; or she may give up her guardianship of the child through adoption.

Some may object that hypothetical consent is infinitely variable. (Robert Pollock told me that he heard a NAMBLA member recall how glad he was that he was molested as a youth.) But I think that every theory of childrens’ rights eventually appeals to hypothetical consent: for you could also deny that a child would refuse to be killed, or crippled, or castrated. On most modern Lockean rights theories (though not in Locke himself), such things are only a rights violation if the victim refuses to consent; so such things violate a child’s rights only if in some sense his consent is absent.

You might argue that all that is necessary to know is that it is extremely unlikely that the adult into whom the child will grow would consent to poisoning, castration, or molestation. That is one possible reply to the NAMBLA objection. Alternately, perhaps this suggests that it is futile to try to develop an exclusively political theory of morality. While the law should not try to instill a particular view of the good life in adults, children may be another matter. Maybe we should treat children as they would consent to be treated if they were not only rational, but also virtuous. If this view turns out to be right — and I am not sure that it is — our whole understanding of classical liberalism may change. In particular, classical liberal theories that try to address only political philosophy, remaining silent on all other questions, will turn out to be wrong. As might be expected, the anomalous case of childrens’ rights raises new and serious questions about the ultimate justification of a liberal order.