The Moral and Legal Status of Children and Parents

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Certain festivals will be established by law at which we shall bring the brides and grooms together. ... As the children are born, officials appointed for the purpose ... will take them.¹

INTRODUCTION

Children and their parents are, of course, intimately related. Many of our most closely held values and personal preferences flow, and indeed much of our moral identity arises, from our experiences in familial life. Socrates recognized this in The Republic and proposed that the bond be immediately severed as one means to secure a more just society for all citizens of the state. It might be tempting to dismiss this radical suggestion as an antiquated idea of Greek philosophy, but we would be short-changing ourselves by doing so. Through provocation, Socrates and Plato challenge us to think deeply about the nature of human good, the purpose of human life, and as a consequence, about procreation, child rearing, and the role of parents and the state in acting as responsible custodians for future generations. They further remind us that any descriptive account of the moral and legal status of children and parents must be built on certain core assumptions that, however widely shared, may or may not ultimately prove justifiable. A modest goal for this chapter is to introduce these concerns to the reader without presuming conclusive answers.

THE MORAL STATUS OF CHILDREN AND PARENTS

It seems sensible to start our discussion with some common intuitions about families that find expression in our developed social norms. First, we largely accept that children enter the world partly pre-wired, but not entirely pre-formed, and are thrust onto a continuum of sensory experience that matures over time to help generate interests, preferences, and
values. Second, we largely accept that most persons who are also parents are uniquely positioned and motivated to positively fill these experiences through their caregiving. Finally, we largely believe that it is no trivial moral matter that most parents love their children more deeply than anyone else and that they most often willingly enter the domain of parenting prepared to sacrifice their own interests for the sake of their children in ways they would not (nor be expected to) do for others. These foundational beliefs are succinctly captured in a recent United States Supreme Court opinion:

The law’s concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions. More important, historically it has recognized that the natural bonds of affection lead parents to act in the best interests of their children. As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point.²

In a pluralist society like the United States, it is further accepted that there is no singular path to human flourishing. There is harm we might all agree is best avoided, but beyond that, there is no singular prescription for success. What generally follows is that we more or less accept that there is no exclusive path by which to rear our offspring. Here, as in most liberal democracies, parents can raise their children as Mormons or as atheists, to develop a love of jazz piano or NASCAR racing, to excel at mathematics or carpentry:

Reasonable people disagree both about the nature of the good life and about the how to prepare children to lead it. Consequently, although there is consensus that certain practices are harmful to children, it is much more common to find a practice is controversial but reasonable: many parents think it harmful, many others think it beneficial, and there are reasoned arguments on each side.³

The conservative scholar Leon Kass points to a further complexity regarding what is best for our children:

Even were we to agree that it were desirable that our children be well-behaved, excellent in their studies, or able to handle disappointment, there are tough questions about which means are best suited to these ends.⁴

Genuine indeterminacy about our children’s best ends and the means to achieve them helps buttress a societal predisposition to allow parents some elbow room to raise kids as they see fit.

However, even as we are prepared to acknowledge a reasonable basis for ambiguity and imprecision in determining what is best for children, we are reluctant to abdicate all notions of responsibility, that is, to throw up our hands and yield unfettered authority to parents. This is hardly a postmodern epiphany; consider the prescient claim of the 17th-century political philosopher John Locke:

The Power, then, that Parents have over their Children, arises from that Duty which is incumbent on them, to take care of their Offspring, during the imperfect state
of Childhood. To inform the Mind, and govern the Actions of their yet ignorant Nonage, till reason shall take its place, and ease them of that Trouble, is what Children want, and the Parents are bound to.5

More recently, the philosopher Gerald Dworkin has argued:

There is ... an important moral limitation on the exercise of ... parental power, which is provided by the notion of the child eventually coming to see the correctness of his parent's interventions. Parental paternalism may be thought of as a wager by the parent on the child's subsequent recognition of the wisdom of the restrictions.6

In these commentaries written more than 300 years apart, we see a core moral constraint that is meant to peek at the foot of anyone bearing responsibility for child rearing. The fact is that most children will outgrow their dependent states; most children eventually become capable of autonomous self-governance, free to accept or reject their parents' worldviews. As such, childhood can be conceptualized as a gradual process of physical and mental separation, of individuation and self-identification.

Law professor Dena Davis amplifies the moral "ought" that follows from the ubiquitous biological fact that children outgrow their dependent states:

Morally the child is first and foremost an end in itself. Good parenthood requires a balance between having a child for our own sakes and being open to the moral reality that the child will exist for her own sake, with her own talents and weaknesses, propensities and interests, and with her own life to make.7

Davis is sharply critical of parental decisions that purposefully appear to permanently close off opportunities for children. A paradigmatic example involves "choosing" a pre-fetus known to carry a gene that generates certain future phenotypic disability such as deafness. Whatever posited benefit the child may perceive to gain from growing up in a nurturing and loving family that celebrates the rich culture found in deaf communities, Davis argues, cannot totally justify the harm done by deliberately narrowing the child's future life prospects. Nontrivial interests of the child are being sacrificed for her parents' happiness. Put more provocatively, the child has become little more than instrumental, being used as a means to her parents' ends.

The force of this moral worry about using children as a means to our ends need not reach all the way back to pre-birth reproductive choices by would-be progenitors. There can be legitimate concern about some deliberate decisions by parents that appear to narrow children's life prospects after they are born. Consider the long-standing controversies involving families and religious cults in the United States. Although our laws have tended to tolerate children being brought up in such isolated communities, partly on the assumption that exposure to religious ideas and devotional
life are not inherently harmful activities, our qualms about such practices of indoctrination are not entirely absent. Fanatical parents may not use the forbidden “sticks and stones,” but if their efforts to inculcate so severely limit a child’s exposure and understanding that, once arriving at maturity, she needs years to re-engage with modernity, we might not rest comfortably believing no real harm has been done. No doubt, what counts as serious and substantial psychological injury is notoriously much harder to measure than physical harm, but this difficulty in quantification does not deny its existence.

Taken to an extreme, the claim that children ought to be regarded as moral ends in and of themselves, that they “are deserving of respect and are not to be objectified,” can serve as a conceptual basis to critique a host of controversial parenting choices. Some child advocates have even called for state licensing of parents: “Society must be much more proactive in assuring that only people who can properly raise children are allowed to become and remain parents.” For such theorists, the opportunity to rear children is not a right or a trump over almost all other considerations, but rather a contingent and temporary grant of authority, a custodial privilege capable of quick revocation. The moral issue is cast in terms of “justice across generations”:

[This] calls for a metaphor of dynamic stewardship, in which power over children is conferred by the community, with children’s interests and their emerging capacities the foremost consideration. Stewardship must be earned through actual care-giving, and lost if not exercised with responsibility.

Such radical conceptualizations of the proper relationship between children and parents are obviously not without criticism. An extreme (and anachronistic) reaction has us retreating back to an Old Testament–like understanding of proper parent–child relationships, where blind obedience to parental will is the commanded norm and, for example, where capital punishment is authorized for children who curse or rebel against their parents.” A more sophisticated response capitalizes on the widely held intuition that preservation of the psychic bond between parents and their children is of utmost moral importance:

The influences of some parental authority and responsibility are inevitable in view of the natural dependence of children. Rather than inhibiting optimal child development, however, this element of the parent–child relationship may be the child’s most valuable source of developmental sustenance. ... Children have many special needs that must be met in their quest for maturity and independence. The most critical of these needs is a satisfactory and permanent psychological relationship with their parents.”

Here the claim is not that we should discourage children from realizing their future independence and maturity; rather it is that the only means to
ensure such a successful transition and passage into adult life is by making parental authority "sovereign." 11

[Children] struggle to attain a separate identity with physical, emotional, and moral self-reliance. These complex and vital developments require the privacy of family life under the guardianship by parents who are autonomous. ... When family integrity is broken or weakened by state intrusion ... [the effect on the child's developmental progress is invariably detrimental. 12

Thus, the reasoned push-back from the overtly "child-centered" model for evaluating the rights and responsibilities of parents focuses our attention on the perceived consequences for the child's welfare when parental authority is questioned or undercut by others. This argument boils down to an empirical claim about the inevitably worse outcomes for children who lose a vital parental connection through the interference of nonfamilial "child liberators."

Unfortunately, just as we face difficulty in measuring the degree of harm in the case of controversial child-rearing practices, we face difficulty in substantiating the evidentiary claim that the detrimental effects on children are too overwhelming when parental bonds are severed by the state. In fact, just as we know that some young adults find their voice and begin to flourish capably once freed from an oppressive child-rearing regime, we also know from experience that not all children are destined to suffer irreparable psychic damage when they are separated from wantonly neglectful parents. Still, few seriously dismiss the importance of stable and enduring relationships between parents and their children, and any realist will sensibly cast a skeptical eye at the available alternatives the state or communities to date have been able to consistently provide.

To summarize, then, if we remain steadfast in prioritizing the liberty-loving, autonomous individual in our normative outlook, we set ourselves up for inescapable moral tension in thinking about the ideal relationship between parents and their children. Children become adults, and this implies that any control parents have over their children is necessarily temporary. It means that children will eventually have the opportunity to reject their parents' worldviews. It further suggests that there may be times when we should be prepared to limit parental dominion over a child when the latter's ongoing welfare is in doubt. The controversy centers around what should constitute sufficient harm to children such that we are prepared to intercede on behalf of these vulnerable individuals. There is a real cost to interceding that cannot be lightly dismissed, and we have yet to generate broadly appealing, socially constructed alternatives. The reader is perhaps best served by recognizing the absence of convincing empirical evidence to support the more strident arguments from any advocacy camp about the ultimate consequences for children of our action or inaction. The strongest claims from both child "liberationists" and family "sovereignists" appear too sweeping.
THE LEGAL STATUS OF CHILDREN AND PARENTS

The tension reflected in competing moral understandings of the proper relationship between parents and their children bubbles to the surface in modern American law:

Legislatures nor courts have developed a coherent philosophy or approach when addressing questions relating to children’s rights. ... The absence ... is not surprising. The status of children in society raises extremely perplexing issues. The demand for children’s rights calls into question basic beliefs of our society. ... Most legal and social policy is based on the beliefs that children lack the capacity to make decisions on their own and that parental control of children is needed to support a stable family system, which is crucial to the well-being of society. ... On the other hand, our society is unwilling to treat children merely as the property of adults.13

Transparent recognition of the problems we face in socially constructing the optimal relationship between children and their parents nowadays disguises a historical tendency in American law to grant tremendous deference to parents in almost all family matters. Despite the conceptual basis offered by John Locke prior to the founding of the United States, the realization of substantive legal rights for children is a relatively modern occurrence. Indeed, before the 20th century, children were, arguably, more akin to property than persons in the eyes of the law.

While it is true that parents were not free to destroy children as they might personal property, the law did little to discourage valuing them primarily as economic commodities. In 1836, the first state child labor law was passed in the United States and required only that all children in Massachusetts under the age of 15 working in factories attend a minimum of three months of school.14

In 1900, one out of every six children between the ages of ten and fifteen worked for wages. One-third of the workforce in southern textile mills was children aged ten to thirteen.15

Political resistance to legislative attempts to regulate child labor was fierce at the turn of the century, and a public alarm was sounded to combat creeping communist ideology and the destruction of sacred family autonomy.15 Federal efforts to gain control of and regulate child labor were not successful until 1938 after passage of the Fair Labor Standards Act.16 Contemporaneously, evolving normative ideas about the moral status of children helped spur the creation of the American juvenile court system. The first state juvenile court system was established in 1899 in Illinois, and the model spread relatively quickly, with 46 states establishing a separate adjudicatory system for minors by 1925.16 Before its establishment, child “delinquents” were treated no differently than their adult counterparts, being forced into adult prisons for punishable behaviors.
It is worth emphasizing here that the federal Constitution and the Bill of Rights make no explicit mention of children or parental rights and responsibilities. While perhaps tempting, it is a historical mistake to assume that the treasured liberties held by adult citizens of the United States automatically transferred to children upon ratification of these documents by the Constitutional Congress. Indeed, it was not until a trio of United States Supreme Court opinions were delivered in the first half of the 20th century that the legal rights and responsibilities of children and parents began to be addressed at a constitutional level. These three cases are essential to understanding how modern American jurisprudential thought has come to define the relationship between children, parents, and the state.

Two cases, *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, vindicated parental rights “to direct the upbringing and education of children under their control,” the latter case specifically denying states the authority to compel mandatory attendance at public schools. The *Pierce* opinion memorably states:

The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

In *Meyer*, the Court even went so far as to specifically reject the Platonic ideal of subordinating family sovereignty to the needs of the state: “[T]heir [Greek] ideas touching the relation between individual and state were wholly different from those upon which our institutions rest.”

The third case, *Prince v. Massachusetts*, involved a custodial adult guardian and her 9-year-old niece, both of whom were Jehovah’s Witnesses. Together, they preached on the street and handed out literature to passers-by, despite having been warned on a prior occasion that such activity was in violation of state child labor laws. Before the Supreme Court, the primary question involved to what extent two constitutional liberty interests – first, religious freedom specifically protected by the First Amendment and, second, a basic right of parents to raise their children free from interference – could be circumscribed by a state’s *parens patriae* power. The *parens patriae* power was a traditional and established legal mechanism inherited from British law that granted government the authority to protect those persons who were deemed especially vulnerable or incapable of caring for themselves.

*Prince* is a landmark opinion, and distinct from its two predecessors, in decisively affirming the authority of the state, on suitable occasions, to intervene in family life. Interestingly, the Court did not reject the *Meyer–Pierce* line of reasoning, but instead modified its earlier position:

[T]hese decisions [*Meyer* and *Pierce*] have respected the private realm of family life which the state cannot enter. But the family itself is not beyond regulation in the public interest. ... and neither rights of religion nor rights of parenthood are
beyond limitation. ... The state’s authority over children’s activities is broader than over like actions of adults.¹⁹

Thus, if Meyer and Pierce are best understood to be constitutional vindications of parental rights, Prince cautions against excessive exuberance. In the eyes of the Supreme Court, children clearly have cognizable interests that are separable from those of their parents.

Child advocates have long celebrated the Prince opinion because it definitively establishes a basis for legally questioning controversial parental activity that might harm children. The opinion is also perhaps the legal pronouncement best known to many pediatricians because of the following rhetorical flourish:

Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.²⁰

The Court’s concern for children in Prince is not countenanced merely in negative terms. Not only are parents obliged to avoid martyring their children, to avoid negligent or reckless endangerment, but they along with society have positive duties:

A democratic society rests, for its continuance, upon healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection.²¹

Thus, the justification for allowing the state to intervene in family matters not only stems from the moral separability of the child’s interests from the parents’, but also is based on the fact that the very existence of society depends on a continual replenishment of capable adult citizens. Perhaps, we can see in this language the footing for an argument about “dynamic stewardship” and “justice across generations.”²²

Importantly, since the Prince decision, American courts have never seriously doubted whether children enjoy independent legal rights. The decision helped lay the groundwork for the landmark desegregation decision, Brown v. Board of Education,²³ which specifically granted to children equal protection under the laws guaranteed by the Fourteenth Amendment. Around a decade later, the due process rights under the same amendment were similarly secured in another opinion, In re Gault,²⁴ a case involving a 15-year-old juvenile who had been committed to a state institution until the age of 21 without the benefit of adequate adjudicatory procedures. Today, it may seem odd that establishing children’s legal rights in the United States required a long struggle by dedicated advocates over a hundred years. The fact that our laws have evolved over time to better reflect enlightened normative ideas about children speaks to the power of social and political movements. To the extent that our developed laws can and do reflect broad
moral consensus, they represent society's ultimate, and arguably most powerful, expression of how we ought to regard the lives of children.

Nevertheless, the pragmatic utility of law today to assist in resolving many acute pediatric bioethical dilemmas at the bedside remains decidedly equivocal. Part of the reason resides in the fact that symbolism contained in opinions like Pierce is, at best, an ideal approximation. We should not fool ourselves into believing that we know what circumstances actually suffice to suggest the impermissible martyrdom of our children. The resolution of specific controversial cases involving children and their mental and physical health requires attention to the particular details, to the messy context in which the drama is being played out. By necessity, judges must pass authoritative judgment on whether actual or proposed conduct, behavior, or decisions are sufficiently harmful or risky to warrant punishment or prevention. Not surprisingly, judges, just like the rest of us, are apt to disagree on occasion. Consider the outcome in two more recent state cases involving parents who refused on religious grounds to treat their children with conventional cancer therapy. In one instance, a 3-year-old child was thought to stand a 40% chance of cure, and in the other, a 12-year-old was thought to have a 25–50% chance of long-term survival. The court in the former case sided with the parents' decision and emphasized the risks and adverse effects of the treatment itself and the statistical likelihood that it would fail. The court in the latter case said nothing about the risks of treatment and ordered the treatment over the objections of the parents.

How do we explain such seeming legal inconsistencies? Students of law, perhaps more so than students of medicine, are comfortable living with conceptual ambiguity:

[R]ules and principles of ... law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined.

Thus, for students of law, each new bioethical case represents an opportunity to revisit earlier established characterizations of harm, benefit, justice, and other necessarily abstract terms. The job in the courtroom is to convincingly make the facts of a particular case fit the logic of the controlling principles. Here, it cannot be overemphasized that both facts and laws are subject to human construction and interpretation. Judges, regulators, and juries, like physicians, parents, and ethicists, are all influenced by a constellation of historical and concurrent social and cultural forces, and all invariably must emphasize some details or ideas over others in rendering
an opinion about any particular case. In the words of the early-20th-century Supreme Court jurist Oliver Wendell Holmes, "The life of the law has not been logic; it has been experience."36

In the context of pediatric health care, we now appreciate that a prudential goal for judges and state authorities is to respect (i.e., avoid interfering with) reasonable decisions made by parents on behalf of their children and/or minors who demonstrate the capacity to maturely speak for themselves. It is important to note that, when we grant some significant legal space for reasonable differences of opinion, we necessarily create the opportunity for a clash between closely held values. Thus, we are now in the habit of debating what kinds of choices parents make for their children or childrearing conduct should be questioned by the state. And in the case of older children, we are now in the habit of debating when the preferences of these adults-in-the-making ought to be honored regardless of parental opinion. It should not be surprising that judicial decisions that touch on core pediatric bioethical dilemmas occasionally appear to be inconsistent. It should not be surprising that states map inconsistently in providing adolescents either in statutory or in common law with the opportunity for general emancipation, limited emancipation, and/or mature-minor exceptions in the medical decision-making context. While a lack of uniformity may be lamentable from the standpoint of predictability, it reinforces the observation that a pluralist society like the United States is not likely to resolve through law a deep, underlying substantive moral debate about whether, when, and how the state ought to regulate the relationship between children and their parents.

Another, less obvious limitation of law in productively resolving pediatric bioethical dilemmas can be seen by evaluation of the infamous Baby K case.36 In this case, the hospital sought declaratory legal relief to avoid the provision of stabilizing life-sustaining treatment to an anencephalic child were she to present in the future to the emergency room in respiratory distress. The involved medical community argued that such treatment was futile and/or inhumane given the child's neurological status. The mother of the child desired such interventions if and when necessary to maintain life. The district court of eastern Virginia relied on, among other things, a "plain language" interpretation of the applicable federal statute, the Emergency Medical Treatment and Labor Act (EMTALA), and held that treating physicians would be required to provide the needed treatments to stabilize the child or risk statutory violation. Not surprisingly, this decision has been derided by many as a paradigmatic instance of the law's insensitivity to clinical ethics.

Arguably, however, a more complete accounting of the judicial decision would acknowledge that a judge must attend not only to the bioethical issue at hand, but also to the implications of his or her judgment for our system of legal adjudication as a whole. This does not necessarily mean that the
decision was decided satisfactorily from the standpoint of what was “best” for Baby K, the providers, or the hospital; rather it redirects our attention to other important social values that are introduced once a bioethical controversy enters the courtroom. Respect for the principles of statutory construction, respect for controlling precedent, and deference to higher authorities of law are each independent and critical considerations that a judge must attend to in formulating a legal opinion. Adhering to the accepted, formal rules of judicial interpretation is something society has a profound interest in seeing our judges do — as such an assurance promotes our confidence in our legal system. In deciding Baby K, a judge could reasonably justify a problematic bioethical outcome by respecting what he or she understood to be the clear command of the U.S. Congress in enacting EMTALA, by not reading more into the statute than was transparently there.

This is not to say that such a sentiment actually motivated the judge in the case, but instead to suggest why some, if not most, lawyers could look at the decision and accept it as a matter of judicial construction of statutory law. Physicians, on the other hand, will have a much harder time swallowing such a legalistic explanation because they tend to focus on the core bioethical problem that brought the case to the courtroom in the first place: an essentially brainless child was being subjected to lifesaving treatments that she could never evince an interest in receiving. What is crucial for our discussion is to appreciate that the deciding judge could have been sympathetic to the physicians’ moral worry, and perhaps even harbored doubt about the benefit of such interventions, but nevertheless found that a source of legal remedy is not to be found in EMTALA. Taken further, a thoughtful decision might direct the dissatisfied to the proper source of remedy: the legislature. If physicians want to change what their professional obligations consist of in cases such as this, they need to push their representative lawmakers to make for that precise allowance. Either the relevant law itself must be changed through amendment, or another source of controlling law must be successfully invoked to warrant a different judicial opinion.

The point of this exercise is to highlight a demonstrable disconnect between those in clinical medicine who sincerely seek an acceptable moral solution at the bedside and our judicial system, which is charged with providing an acceptable legal solution for all of society. Commenting on the law’s inherently conservative nature and its need to serve as a reliable guidepost for future behavior in order to promote social stability, the preeminent Supreme Court jurist Benjamin Cardozo stated nearly a century ago:

[The] work of modification is gradual. It goes on inch by inch. Its effects must be measured by decades and even centuries. Thus measured, they are seen to have behind them the power and the pressure of moving glacier.41

Cardozo’s commentary highlights an important tension we must recognize in any discussion relating law to clinical ethics: the former is fundamentally
a tool of governance and therefore subject to procedural constraints and pragmatic limitations of implementation and execution. The latter is fundamentally about how our conduct and actions can best be justified at the bedside of a patient. The two do not always share the same end purpose. As Cardozo suggests, and *Baby K* shows, the timeline for meaningful change in law is often incongruent with pressing ethical needs in clinical medicine.

Admittedly, it may be hard in the abstract to take seriously the idea that our legal institutions might someday collapse if judges don't follow the rules. But perhaps more modestly, it should not be beyond us to understand there are separable and important procedural considerations that must be taken into account when law and legal institutions are harnessed to resolve medical ethical dilemmas. We may even need to remind ourselves on occasion that we all benefit from the maintenance of a reliable, robust, and predictable system of authoritative dispute resolution that is capable of evolving, albeit slowly. Regardless, a willingness to accept occasional bedside injustice for the sake of a greater societal or institutional "good" is one reason most clinical bioethicists appear to agree on one thing: the machinery of the law should be employed only as a last resort when it comes to resolving acute bedside dilemmas.

The law's real and sometimes imagined limitations help explain our reticence to engage its help to resolve many pediatric bioethical dilemmas. In tracking the history of American family law, Professor Carl Schneider notes that despite the remarkable and undeniable power to regulate parent and child relationships bottled up within the *parens patriae* doctrine, society seems perpetually reluctant to wield it. He suggests three reasons for this: first, we believe family life is private life and, therefore, subject to a sense of personal privilege and a right of noninterference; second, we believe interceding in family life to protect vulnerable parties actually risks further injuring the party the law seeks to protect (e.g., through deprivation of psychological bonds of affection); and finally, we believe the remedies that can be offered to rectify familial problems themselves are not particularly effective deterrents in situations where other social pressures have much greater influence over parental conduct. Schneider concludes:

The [state] tradition of non-interference persists not only because we fear the state's power, but also because we doubt the state's efficacy. The state's retreat from direct regulation of some areas of family life has reinforced the popular belief that "you can't enforce morality." And that retreat has encouraged people to believe that family law's ultimate goals of permitting, inspiring, and sustaining decent relations between ... parents and children can be secured - if society can secure them - only through comprehensive and costly social services and social reform.\footnote{11}

Thus, despite the high-minded rhetoric of the *Prince* opinion, today we sensibly remain tempered in our expectations of the law as it relates to children and families. Even as that watershed opinion set the stage for the
United States to put forever behind the days of unregulated child labor or of ignoring other blatantly harmful parental practices, government institutions today are still not much interested in defining "high duties" beyond the de minimis. State authorities do not routinely check up on parents to make sure such high duties are meaningfully fulfilled. As Chief Justice Burger intimated in the Parham opinion quoted earlier in this chapter, the legal default is to presume that parents do right by their children, and it is only for lived experience to tell us otherwise. We really need no further proof of the descriptive veracity of his opinion than the current system of child welfare and protection in the United States. It is largely a reactionary (excluding educational mandates) model; that is, typically, only when someone bears witness and publicly objects to the perceived maltreatment of children will the apparatus of the state wake up to consider intervention. We remain a long, long way from licensing parents to be parents.

Professor Schneider's comments point to a further complexity in considering the moral and legal status of children and parents. Health care providers, teachers, and other similarly professionally placed adults have been legally deputized to act as watchmen over society's children, but as any thoughtful child advocate knows, this is no straightforward task—for it takes us right back to the gray area of debating what is best for children and what is the best means to achieve agreed-upon ends. The task is further complicated by the fact that, as deputies, we bear intimate witness to the social determinants of child health that more often have little to do with parents behaving irresponsibly and more to do with the background conditions of poverty and poor education that conspire to limit a parent's ability to fully meet the needs of the child. The complete story is rarely as simple as a "neglectful" mother failing to bring her son his asthma medication during a particularly bad broncho-spastic episode that needs more than home inhaler treatment. Too often, it is that she cannot afford to move out of a place that exacerbates her child's chronic condition, she cannot afford child care for her other children, nor does she have the extra money to take an unreliable bus to get to the clinic to get her son seen in a timely manner. If she calls 911, she is treated unceremoniously and may even be asked to foot part of the outlandishly expensive bill. We risk oversimplification in categorizing much lamentable parental conduct in black-and-white terms; a more complete picture of what we ought to think of as harm must pay attention to what the surrounding community has or has not done to assist the most disadvantaged parents among us to do right by their children.

A deeper appreciation of the social determinants of the status of children and parents also helps to explain the limitation of the world's most enlightened and dramatic effort to better secure the legal status of children in recent times. In 1989, the United Nations published the Convention on the Rights of the Child. This remarkable document enumerates dozens of specific rights for children and responsibilities for member states.
as a formal means to promote and guarantee the welfare of all children under the age of majority. Interestingly, all member nations have ratified this convention except the United States and Somalia, making it the most widely ratified human rights treaty in history. The reasons for its failure to be accepted in the United States are complex, but a fascinating hint of the resistance harkens back to the turn of the 20th century and the fight against child labor laws: "[The convention is] the tool of a powerful feminist-socialist alliance that has worked deliberately to promote a radical restructuring of society." Less ideologically driven arguments that have discouraged the adoption of the convention in the United States are based on a concern about its potentially untoward impact on our well-developed domestic family laws.

Regardless of its political fate in this country, a more critical issue regarding the convention pertains to its general enforceability. When one speaks of legal rights and responsibilities such as those contained in the convention, we are necessarily led to a pragmatic consideration of implementation. It is one thing to claim a right to some good, and quite another to back that claim with the sanction of a recognized state authority in order to ensure free exercise of the right. The First Amendment's guarantee of freedom of speech by itself would be of little import if there wasn't an effective means to vindicate such liberty interests when threatened. It is important to recognize that the UN convention provides no authority to force nations into compliance with its terms. As example, Article 24 of the convention states:

State parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.

Yet we know that millions of destitute children in developing nations die each year from easily treated diseases, treatment for which is available to financially better off children whose families can afford to pay within those same countries. Similarly, by one estimate, in the year 2000, more than 250 million children were forced into labor and exploited for profit, yet the convention specifically protects children from "economic exploitation and from performing any work that is likely to be hazardous or interfere with the child's education, or to be harmful to the child's ... development."

Countries signing the convention are required to report on their progress to a UN committee in meeting its substantive requirements, but no formal mechanism for addressing individual complaints exists. That the convention commands broad acceptance is a major achievement — its nearly universal ratification surely emblemizes a welcome normative trend regarding the legal status of the world's children. But the gap between the declaration of children's rights and their effective enforcement remains appallingly wide in most countries. It is here where a more robust discussion
of the social determinants of child health matters most. We can continue to talk about the moral and legal status of children in academic halls and in international assemblies, but unless and until we more determinedly focus on the socioeconomic conditions that systematically marginalize many children and their families, much of our discussion might continue to be mistaken for empty rhetoric by those suffering on the ground.

CONCLUSION

In conceptually outlining the moral controversy surrounding the status of children and parents and briefly tracing the historical evolution of the legal status of children, this chapter is meant to provide a foundation for considering the numerous, more specific pediatric bioethical controversies discussed elsewhere in this book. Law, particularly in a pluralist society, is ill suited to the task of comprehensively quashing entrenched moral disagreements about the nature of family life. One enduring dilemma we face is: if we really believe that children are separable from their parents, and ideally should be entitled to a free and open future, we must cast a suspicious eye on custodial activity that purposefully and demonstratively narrows future mental and physical prospects. Yet if that is an essentially moral proposition, it is distinctly different from the following legal question: when should our suspicion translate into state action? An answer to this question requires a definitive characterization of the conduct or decision in question as harmful or not. Almost all pediatric bioethical controversies taken to the courtroom nowadays turn on an intractable disagreement about how best to understand the posited harm to the child. For many children in the world, the whole idea of debating the nature of their harm in a courtroom remains fanciful. Arguably, our social, lived experiences with and among children offer our most vital source of normative inspiration.

References


23. *In re Hamilton,* 657 S.W. 2d 425 (Tenn 1983).


