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A Rational Theory of the Rights of Children

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Abstract:
Libertarianism has often found itself under attack from those with misplaced maternal instincts, who champion the state as the honorable protector of the vulnerable – and there is no one more in need of protection than a helpless infant. Consequently, much of the vitriol aimed at libertarianism and its laissez-faire attitude has included morbid references to child abuse and exploitation which would supposedly result from its implementation. It is therefore imperative that more work be done on the topic of children's rights in order to reinforce the philosophical framework developed by Murray Rothbard [9] and expanded on by Walter Block and others [2], [3], [5], [6]. The purpose of this paper is to provide an independent rational foundation for the conclusions drawn by Block and co-authors [2], [5] and to expand on parts that are insufficient.
Keywords: anarcho-capitalism, childhood, children's rights, libertarian, libertarianism, guardianship, non-aggression principle, self-ownership.

1. Introduction

From its inception, libertarian theory has had an enormous problem standing before it: how to reconcile the existence of developing self-owners within the framework of property rights and non-aggression. It is not at all obvious how the rights of children, or lack thereof, are to be derived from the aforementioned principles. It is all too easy for subjective cultural values concerning children to sneak their way into an otherwise sound argument. In order to develop a rational theory on this topic, these seemingly self-evident attitudes must be identified and dismissed. Similarly, it is imperative to reject the "wisdom of repugnance" which would dismiss a rational theory solely on the grounds that it produces conclusions abhorrent to the popular mores of a given society.

In essence, libertarianism is a philosophy of conflict resolution and can only answer questions in the realm of competing claims, such as: how property is established and transferred, who the rightful claimant of a contested property is, and what the rights of a property holder (and consequently the

obligations of others towards that property) are; i.e., libertarianism has no judgement to bear on a situation in which there is no conflict, other than how it relates to a hypothetical conflict. Given that the sole inquiry for libertarian ethics is what the legitimate use of force in society is [4, p. xiii], this conclusion can be derived from the non-aggression principle, which holds that force can only be justly wielded against an aggressor; since voluntary agreements are by definition non-aggressive, no forceful interference may be levied against them, and thus they need not be addressed in the context of libertarian ethics. Therefore, the primary situations to be covered in this theory are:
1. Conflicts between a child and his guardian over his own autonomy,
2. Conflicts between a guardian and someone he claims to have done harm to his child,
3. Conflicts between a former child and someone he claims to have harmed him,
4. Conflicts between two potential guardians over the claim to a child.

2. Childhood and Autonomy

There is an unchallenged assumption underlying all discourse on this topic: the idea that there is a clear and universal distinction between children and adults, and that once someone has crossed from childhood into adulthood, he should be thenceforth considered a permanent adult for all intents and purposes (other than a few arbitrary exceptions passed into law), with a regression back to childhood being an impossibility. To examine this further, a rationale for the concept of childhood is in order. It shall be demonstrated that it is the lack of the ability to express one's will, not the lack of physical or mental maturity, that creates the necessity for such a concept.

If human beings were somehow born with a fully developed brain and the knowledge required to utilize it, childhood would be utterly unnecessary. These emergent adults would be immediately capable of negotiating for their own care, whether from their biological parents or from anyone else willing to care for them. They would be considered no less of adults than one such as Stephen Hawking late in his life, who, despite having most of his body paralyzed, and thus had to be cared for similarly to a child, was still justly considered an adult in every sense. It would be irrational for them to be denied their adult status on the basis of an inability to command their muscles or to care for themselves, which many regular adults also lack to varying degrees. There is no functional difference between one who was once able to walk and one who has yet to be able to walk that justifies denying autonomy to either. This remains true for all physical characteristics related to human development: lacking senses, speech, locomotion, body mass, reproductive capabilities, secondary sex characteristics, etc. does not disqualify adults from having legal autonomy. Thus, a lack of physiological maturity has no bearing whatsoever on the necessity of childhood. The rationale for the placement of children in a special class must then be related to their lack of psychological maturity.

Next, a situation in which a person regresses from his adult autonomy shall be examined in order to narrow down this rationale. Someone who slips into a coma is temporarily relieved of his consciousness and all of the mental faculties that it entails, so he cannot be considered any more autonomous than an infant, who does not lack consciousness, can; he must be placed into the same category of functionality as a child in order to maintain logical consistency. This becomes evident when one considers the practice of transporting an unconscious person to a hospital without his consent (which would be considered abduction if done to a conscious adult), which is analogous to a parent carrying his child. A malfunction in such mental faculties that enable consciousness thus renders one a temporary child, with one's guardian to be determined by default to be the first person to "homestead" (appropriate) such a role; an act such as bringing him to a hospital would certainly suffice. The caveat to this analogy is that a comatose person has been autonomous previously, and thus has had the opportunity to make his wishes known as to who should care for him and how he should be treated if such a situation were to occur. This is essentially the same as a written will, with the exception that he may yet emerge from the coma.

The peculiar concept of a will isolates the fundamental characteristic of childhood. How can property still be under the control of someone who no longer exists? If postmortem communication were not possible, property would instantly revert to the state of nature upon the death of its owner, belonging to whoever first appropriates it from nature. However, since the ability for a person to have his wishes known transcends his existence, the principle of inheritance was formed. Suppose that people would be subsequently reincarnated into new bodies after their deaths, that they would somehow retain all their memories, which would emerge into consciousness after childhood, and that their past persons could be immediately and easily identified via inspection of their new bodies. In this hypothetical, children would be akin to both the bodies of the comatose and the property of the recently passed – they would be the inheritance of their past selves to be safely delivered to their reincarnated consciousnesses. Of course, no one would be obligated to take that task on himself, but if someone were to voluntarily agree to care for the child (i.e., to become the parent or guardian), he would effectively become the executor of the will of the child's past self, bound to the terms contained within it. This thought experiment reveals that it is nothing other than one's own will that is to govern him, and that a guardian ought to be viewed as the faithful executor of that will, with the period of childhood akin to a regency of oneself, or a stewardship of one's body.

There is a corollary revelation which can be extracted from this thought experiment. An objection can be raised: before the reemergence of the former consciousness, the child is a unique person, and thus, at a certain level of development, should not be subjected to the will of that consciousness. However, this objection is asserting that the child ought to have a higher authority over himself than the testator, who has already been shown to have a higher authority than the guardian. It must therefore be asserting that the child in this thought experiment also has a higher authority over himself than his guardian, so it follows that he should already be considered an adult with the autonomy to govern himself. By extension, it is also asserting that, in the real world, all "children" at or above that given level of development are actually autonomous adults. For the purposes of the thought experiment, that is an impossibility, because the consciousness of the testator would have reemerged at the first moment in which those conditions were true. But in reality, it also shows that anyone who would make that objection holds a much different notion of the nature of childhood than their laws or parenting practices would suggest; notably, that the period of the lack of psychological characteristics in children which bestow adult status upon them is substantially shorter than convention dictates.[1]

Now that the principles of childhood have been established, it is necessary to reconcile them with the mundane fact that the will of a child cannot be known prior to his expressing it, at which point he would cease to be a child. An additional complexity presents itself in the continuum problem, i.e. the transition from childhood to adulthood is gradual rather than instantaneous, so there is no singular point in time at which a person graduates from being a child. These issues shall be addressed in the following hypothetical: imagine the scenario of an encrypted last testament (being consequentially analogous to one's premature will), which an interested party agrees to decrypt over time. What is to be done with the estate during that time? It must doubtless not be damaged or consumed until such a time as the will has been entirely decrypted, with its voluntary manager responsible for preserving it in the interim. Should it be damaged or consumed during that period, either by the manager or by a third party, whoever has done such damage or consumption would be held liable, and that person would be disqualified from managing the property in the future, provided that someone else is willing to assume that role. As such, anyone who harms a child should be held liable for the damage done and be forbidden from being the guardian of that child in the future, provided that someone else is willing to assume that role.[2] As bits and pieces of the will are decrypted, the estate manager would be obligated to follow any instructions which are capable of being understood with the information available at the time. As such, as a child develops, his guardian is obligated to relinquish authority over to the child in domains of behavior which the child can express his informed will on. In a contention between a child and his guardian over such authority, a court can listen to the testimony of the child in order to

determine if he truly understands that which he is saying, or if he is merely blathering on about a decision which he lacks the comprehension necessary to make.[3,4]

3. Ages of Majority and Consent

These conclusions are in stark contrast with the present laws of most governments, which do not bestow adult status until a person has reached a designated age, usually 18, with various exceptions for activities such as drug use, vehicle operation, employment, sex, etc. While congruence with established law or tradition has no bearing on the validity of a rational theory, it is worth noting that the contemporary view of childhood is not at all the historical norm. As Walter Block and co-authors outline in their paper on children's rights, "Other cultures and polities, ancient and modern, have granted children freedoms not permissible even for adults in much of Europe and the United States. The view that children require constant monitoring on the part of parents, guardians and the state, particularly governmental schools, is a relatively recent phenomenon" [5, p. 87]. In addition to being much too late in most instances, the universality, rigidity, and arbitrariness of the status quo of majority designation makes it intolerable to any rational thinker who can step outside of his culture for a moment and analyze it from a neutral perspective.

The basis for these static and all-encompassing laws is not in science or reason, as many deceive themselves into believing, but rather in social convention [5]. There is no widespread agreement, even among countries with similar cultures and levels of development, as to the proper ages of consent and majority. On average, a person's brain is not fully developed until the age of 25 [1], so if there were any objective age to grant adult status, it would be that. However, no country has adopted this standard, presumably because most people have long stopped visibly growing by that point. As with human fetal development, custom tends to be biased towards physical appearance concerning the recognition of human rights.[5] Even so, it is not at all necessary for one's psychological development to be complete before adult status is attained. In a nontrivial sense, people never stop developing psychologically, as they gain wisdom from every new experience, reflection, and insight as long as they live.[6]

Apart from these laws being arbitrary, there is no single age that can be justifiably chosen at all, regardless of how strong the evidence was in its favor, since every individual person develops at a different rate. A universally designated age of consent or majority is a consequence of the inflexible and domineering nature of the state apparatus, which enables certain groups of people to impose their own ways of life onto others. Attempts at addressing these issues by passing certain nuanced exceptions, such as "Romeo and Juliet laws" as a response to insufficiencies in the age of consent, are only sloppy attempts at patching up a system of law which is fundamentally unsound; regardless of how it is amended, the present system of using age as a proxy for maturity will continue to result in the oppression of those who are mature for their age and/or the abuse of those who are immature for their age. The only solution to this dilemma is the adoption of a rational theory of children's rights into law as a baseline, which can be built upon in a decentralized manner with families and communities setting their own rules and customs in a voluntary fashion, rather than relying on arbitrary state edict.[7]

4. Child Abuse, Custody, and Punishment

So far, this theory has only addressed child abuse in the context of an analogy to estate management, using the ambiguous language of harm, liability, and disqualification. The reason that a clear and forthright stance on the matter has not hitherto been presented is this: aggression against a child cannot be outright prohibited in the same way it can with adults. Aggression is usually defined in libertarian theory as the initiation of forceful action against another's property without his consent. As a child cannot yet express his will, he is unable to consent to anything, so the concept of aggression becomes

meaningless. The acts of carrying, dressing, cleaning, medicating, etc., which would qualify as aggression if carried out against a nonconsenting adult, are, conversely, essential in providing care for a child. Thus, a different standard must be sought for the incorporation of child abuse into the theory.

It may be tempting to invoke a standard of "best interest of the child" in order to distinguish licit and illicit acts done to him, but this brings with it a baggage of utilitarian calculus that leaves too much room for doubt to be consistent with libertarian ethics. As he is lacking a discernable will, the view of a child as a thing that can be damaged, rather than as a person that can be subjugated, is the proper frame within which to address the problem. It is critical to reiterate that the role of guardian is not as the owner of a child, but as the owner of the exclusive right to raise that child [5]. As such, while any damage done to a child by one other than his guardian still constitutes a violation of the guardian's right, damage done to him by his guardian now constitutes an abandonment of that right, which requires said guardian to notify any interested parties that the child is available for adoption, or else he would be guilty of forestalling guardianship [2], [3].

Next, a specification of what acts qualify as damaging is required. Since a child's preferences cannot be known, the proper method of raising him is impossible to determine, so his guardian is largely free to engage in any actions that he wishes to in relation to the child, as long as he does not deprive him of his innate function or form. While refusing to feed (or care for in other ways) a child cannot be understood as an act of harm, since the resources required for such care belong to the guardian and not the child, it still constitutes an abandonment of guardianship rights, but cannot carry a penalty other than one for forestalling. Rather, harm in this context can only be rendered by an active (rather than passive) behavior on the part of an adult against a child. This rules out any form of neglect.

There must be a direct causal link between the action and the effects suffered for it to be considered harmful. For instance, saving photographs of the child in amusing outfits has no plausible benefit and may bring about a negative response from him when he has grown up, but this cannot be considered damaging, as no act within the photoshoot itself deprived him of anything, and any potential maleffects are suffered entirely in retrospect, so they are not relevant to the act itself. In contrast, verifiable psychological damage suffered by a child, which is directly attributable to an act of torment inflicted on him by an adult, deprives him of his natural mental functioning which is innately his. This also applies to physiological damage, of which verification and attribution is considerably easier. Any scarring, maiming, mutilation, or other disfigurement, which deprives a child of his innate body, and was suffered as a result of actions taken against him by an adult, likewise qualifies as damage.

The exception to this would be surgical procedures (or, conceivably, other acts) that treat conditions which pose a greater threat to a child's innate health than the damage associated with the procedures themselves. A life-threatening cancer, for example, warrants treatments of increasing severity up to the point of death. In contrast, genetic abnormalities (or, in the case of certain ritual practices such as circumcision, normalities) that benefit only the outward appearance of a child may not be corrected via damaging surgery. Similarly, operations which seek to improve the functioning of a child beyond his natural capacity by replacing parts of his body may not be performed, unless such modification is necessary to treat a threatening health condition (such as the amputation of a severely damaged limb). As the preference of a child for these alterations cannot be known, the preservation of his natural form is required by default, giving way only to prevent further damage from occurring.

Contrary to contemporary attitudes, corporal punishment inflicted upon a child does not necessarily constitute damage, as the harm it causes is often temporary. Unless the brutality is great enough to inflict lasting physical or mental damage, the use of corporal punishment can only be considered an alternative method of discipline under libertarian ethics. As in measures of force, the precise degree of damage necessary to be considered illicit cannot be objectively quantified and must thus be judged on a case-by-case basis.

A critical question remains unanswered: without government involvement in childcare, how are children going to be protected from such abuse, and how are abusive guardians going to be held

accountable? Assuming such abuse occurs on the guardian's own property (for otherwise it would be under the jurisdiction of the property owner), the most obvious answer would be a system of mutual responsibility among families and between neighbors. Even in absence of those however, since the damaging of a child constitutes abandonment, any passerby who witnesses such damage is free to claim temporary guardianship until such a time as a permanent guardian can be found, and can call for assistance if it is necessary to rescue the child from the clutches of the previous guardian. If the previous guardian contests the claim of abuse, the dispute can be settled in court. For prosecution of the abuser, the new guardian has sufficient interest, having assumed responsibility for the child's care. Of course, the child himself can pursue prosecution when he is able.

What then is the proper punishment for a perpetrator of child abuse? Adhering to Rothbard's formulations [9, pp. 149-162], punishment is at the sole discretion of the plaintiff, and may not exceed the crime in either kind or degree, lest it become a crime itself. In addition to retribution, the plaintiff may demand restitution, i.e. to force the perpetrator to provide the resources necessary in order to repair the damage done to the child, to the extent that this is possible. The method by which the damage is repaired need not be satisfactory to the plaintiff, so long as it is indeed repaired to its original state. The alternative would lead to the justification of the imposition of bizarrely inefficient means of restitution, such as forcing a vandal to repaint an edifice using a tiny brush meant for fine art. As such, a perpetrator of child abuse may only be forced to pay for years of routine psychotherapy if such a method is proven to be both effective and the most efficient known way to achieve healing. These criteria eliminate the possibility of a convicted child abuser being forced to provide lifelong therapy that may or may not treat the conditions caused by the abuse.

In the course of retribution, the lack of the child's developed will is paramount. It is not as in cases of aggression between adults, where if one person assaults another, the latter may assault him back in the same way. A more fitting comparison would be to the vandal of estate property. While the course of restitution is clear, the extent of retribution is not. Even if the vandal happens to be the manager of another estate, an equivalent vandalism may not be done against such property, as it is not under the ownership of the vandal himself. In addition, the same as was done to the estate may not be done against the body of the vandal, as one's body is a more valuable form of property than most else.[8]

How may the punishment be satisfied then? The subjective attribute of value must be looked to if an objectively equivalent form of property cannot be found in the possession of the vandal. As justice in libertarianism is a descriptive rather than prescriptive theory, a belonging of the vandal that is about as valuable to him as the estate was to its owner need not be sought; retribution of equal magnitude to the crime is only the upper limit of libertarian justice, and is in no sense proper or ideal. Rather, the plaintiff may seek a belonging under ownership of the vandal and describe how he wishes to damage it; a judge need only answer whether such property damage as described exceeds that which was inflicted upon the plaintiff. If not, such retribution may be justly carried out; otherwise, it would constitute a crime itself. In this way, the troublesome question of value equivalency may be avoided entirely.

In application to child abuse, this logic remains unchanged. As guardians do not own their children, reciprocal punishment may not be inflicted upon one's child as punishment for his crime against another. However, in the case of damage against a child, reciprocal punishment against the perpetrator's own body is not illicit. Although, as the owner of a child's body (his own will) is yet to emerge, its value cannot be immediately determined, the objective equivalence of kind between the human body of the child and the human body of the perpetrator is sufficient in the evaluation of reciprocal punishment. So, while the underlying principles of punishment in child abuse are different from those of punishment in aggression against adults, the conclusion turns out to be the same.

The last potential conflict to be resolved is one between two or more potential guardians over their rights to guardianship. Rather than the current convoluted system of judging the parenting merits of the parties involved, libertarian ethics would return to the concept of "homesteading" the child as Rothbard first developed [9, pp. 165-166]. Assuming that the child is not able to choose for himself

(which choice would supersede all else), the person who first provided care for the child and had not since abandoned or transferred the role of guardian would retain the property right.[9] The biological mother is always the first guardian due to her role in prenatal care (barring a contractual agreement stating otherwise), but if she abandons or gives away her child, the guardianship right is transferred to the next provider, and if that provider abandons or gives away the child, to the next provider, ad infinitum. Thus, it is the objective facts of the case, and not the subjective qualities of the potential guardians, which determines who receives custody in any such dispute.

5. Closing

The current regime of government restrictions against adoption is responsible for a tremendous amount of harm against children who lack exclusive and dutiful caregivers. Apart from the abuse carried out by government agents themselves, in absence of these restrictions, a market facilitating commerce between people with a surplus of children and a deficit of resources, and people with a surplus of resources and a deficit of children, would naturally emerge [9, pp. 170-171]. In addition, the current attitude of entitlement on the part of both parents and children, not the least of which is due to the intrusion of the state and its distortion of rights and privileges, is extremely toxic for their relationship. Parents feel entitled to rule over their children, and children feel entitled to the care and finances provided by their parents. The resentment born from these conflicts, together with the state usurping the role of parent, has broken more than a few homes. A voluntary relationship between the parties as is consistent with libertarianism, and thus the understanding of mutual benefit, would make for much happier, healthier, and more fulfilling outcomes for all.

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Notes

1. Of course, a guardian does not lose *all* authority upon the declaration of his child's will. As long as one wishes to stay with his former guardian and receive his care, he must abide by whatever conditions accompany that agreement. The legal relationship simply morphs into one of landlord and tenant from one of guardian and ward.
2. Libertarianism rejects positive obligations, so no one may be forced to care for a child without his consent, even in the unlikely scenario that there are no other willing guardians. In such a case, the

abusive guardian would usually be preferable to no guardian at all. This issue is explored extensively in [2].

3. As with many conflicts, a court hearing is a last resort, with resolution being more likely to emerge from a discussion between parties. In addition, court precedent on similar issues would embed itself into culture, making such conflicts less frequent to begin with, and providing a convincing argument should they arise.

4. A system of privately funded and operated courts, as is consistent with voluntarist libertarianism, would in all likelihood substantially decrease the waiting times and costs associated with the legal process, especially in matters which require little deliberation such as this. The judicial system is no exception to the economic law that competition spurs the providers of goods and services to offer higher quality products for lower prices. For an overview of the privatization of courts, see [8, pp. 175-195].

5. While the rights of children in utero are derived in exactly the same way as their postnatal counterparts, the political implications of this are not in the scope of this paper but are sufficiently analyzed from a libertarian perspective in [3] and [6].

6. A common objection to early autonomy is the notion that young people could make mistakes that affect them for the rest of their lives. While adolescents do tend to act more recklessly [1], this is not a just reason to deny them autonomy. Mistakes are necessary for them to learn and grow, and debilitating ones cannot be confidently prevented with any measure short of chaining them down. Regulation of the non-aggressive behavior of youngsters is better handled via social stigma and household rules than enslavement on the part of a centralized regime of social control.

7. Libertarianism does not preclude the establishment of rules in addition to the non-aggression principle; provided that they are mutually agreed to by all relevant parties, any rules at all may be established, even ones that libertarians vociferously reject when imposed by states. In this way, a libertarian society would come to resemble the variety of forums, platforms, and servers on the internet, with each one having its own set of rules that must be followed by users, rather than a libertine paradise, where people could engage in any behaviors which are not directly forbidden by the NAP. Hans-Hermann Hoppe expands on this in [7, pp. 204-219].

8. This holds unless the vandal does not care very much for his own body, which, while unlikely, should not be unconsidered.

9. Block and co-authors give a detailed analysis of adverse child possession in [5].