

## A Friendly Critique of a Child's Right to an Open Future

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In an inspiring and provocative essay, Joel Feinberg considers appropriate forms of a child's rights, and identifies these as "a child's right to an open future."<sup>1</sup> A test case of this right is *Wisconsin versus Yoder*, a landmark case. This case shows what happens to a 15-year-old adolescent who is denied the right to decide on her education. In that case, the court ruled that Amish parents may take their children out of school altogether after the eighth grade and into their own technical, vocational, farming schools. According to Justice W.O. Douglas, Barbara, then 15, and all the other Amish children whose parents exercise the right to take their children out of school will be denied the opportunity to become surgeons, astronauts, musicians, or engineers. Barbara's life will be truncated and deformed. Justice Byron White sided with the Amish parents, and is joined philosophically by Feinberg, but only because the Amish children's rights are pitted against the survival of the Amish sect.

Like Justice Douglas, some people claim that Barbara has a right to go to a conventional school after the eighth grade in place of an Amish vocational school. Her parents claim that they have a right to decide. Whose claims are we to take most seriously? According to Justice Douglas, Barbara has a right to be heard regarding her education. Barbara has moral standing in court. It is, after all, her future, according to Douglas, not her parent's future that is at stake. The court, however, ruled that Barbara does not have such a right.

Barbara's parents have a legal right to keep her on an Amish farm and to forego the opportunities, in Douglas's words, of her choosing to become "a pianist or an astronaut or an oceanographer."<sup>2</sup> To exercise these options, she "will have to break away from the Amish tradition."<sup>3</sup> Barbara's parents can "harness" her to the "Amish way of life," and if her education in the ninth and tenth grades is "truncated," (to quote Justice Douglas) her "entire life may be stunted and deformed."<sup>4</sup> According to Douglas, "if a parent keeps his [or her] child out of school, beyond the grade school, the child will be forever barred from entry into the new and amazing world of diversity that we have today."<sup>5</sup>

The view that it is morally acceptable to keep an adolescent stunted and deformed is acceptable to some philosophers. According to one philosopher, if dwarf parents could choose to have either dwarf or normal children, the parents may justifiably choose to give birth to dwarfs in place of normal children.<sup>6</sup> Parents who exercise their right to decide to have dwarfs instead of normal children without considering how seriously they harm the interests of their offspring are exercising those rights under an ownership model. Condemning one's child to be a dwarf flies in the face of adult procreative responsibilities to their children. Parents owe their children more than to raise them as dwarfs. A reason for parent's procreative responsibilities is that children have rights to develop physically, emotionally socially, morally, esthetically and intellectually. The Amish example presents a

basic issue: To what extent, if any, do children and adolescents have legal, moral, and intellectual rights? In response to this case, I will try to show that children have rights to develop, (henceforth abbreviated CRD) rather than a right to an open future (henceforth abbreviated CROF); and that a conception of CRD provides a justifiable basis for deciding which view in this case is worth taking most seriously.<sup>7</sup>

First, I will argue that Feinberg's CROF is flawed, even inconsistent. I will try to do so by showing that the paradigm of such a right precludes the legal, moral and intellectual roadblocks that *Wisconsin v. Yoder*, and aided by Feinberg, places in a child's way. Secondly, even if Feinberg's CROF could be spared from this flaw, such a right is inadequate to sustain a child. CRD is more inclusive and conceptually enriched than CROF. I will draw out the difference as we proceed, but the bare bones of the difference between these rights is that CROF is a liberty right, whereas CRD involves appropriately constrained forms of freedom, care, nurture, and enlightenment.

#### FEINBERG'S CONCEPTION OF A CROF

Feinberg argues elegantly on behalf of a CROF. His argument is, however, puzzling, in part. In one passage, Feinberg seems strongly supportive of children's rights. He writes that

an education that renders a child fit for only one way of life, forecloses irrevocably his other options. He may become a pious Amish farmer, but it will be difficult... for him to become an engineer, a physician, a research scientist, a lawyer or a business executive (*FF*, 82).

In this passage, Feinberg seems to favor CROF without state or parental roadblocks. Yet, in another passage, Feinberg defends Amish parent's rights to "yank" their adolescents out of the ninth and tenth grades of a conventional public or private school in favor of a rural Amish vocational school. Feinberg agrees with the majority decision in *Wisconsin versus Yoder*; he contends "that the decision in *Yoder* was not "mistaken." Feinberg agrees with Justice White. "These justices," Feinberg says, "join the majority only because the difference between eight and ten years is minor in terms of the child's interests, but possibly crucial for the very survival of the Amish sect" (*FF*, 82-6). Feinberg quotes Justice White (with approval) where White wrote that: "This would be a different case for me if respondent's claim were that their religion forbade their children from attending any school at any time and from complying in any way with the educational standards set by the State."<sup>8</sup>

Feinberg distinguishes three kinds of rights in the relationships between children and adults. Rights held in common between children and adults, Feinberg calls A-C rights; rights belonging only to adults he calls A rights, such as "the legal rights to vote, to imbibe," to choose one's religion, or "to stay out all night" (*FF*, 76). Feinberg distinguishes two kinds of C rights (or children's rights), dependency rights for "food, clothing, shelter, care, and protection," and "rights-in-trust. These are autonomy rights in escrow, which are saved for children when they reach adulthood" (*FF*, 76-8).<sup>9</sup> The rights-in-trust of a child to walk in the future can be violated, for example, "by cutting off the child's legs" (*FF*, 77). Feinberg identifies these rights-in-trust as the CROF (*Ibid.*). For this purpose, Feinberg uses a trustee metaphor. The trustee protects children's rights, in part, against children themselves, and in part, presumably against parents who violate these rights.

To Feinberg, an impartial court decision is one that aims "to send a child out into the adult world with as many opportunities as possible, thus maximizing their [individual] chances for self-fulfillment" (Ibid.). One might conclude from these passages that Feinberg's position in *Wisconsin* would be with Justice Douglas; surprisingly, however, Feinberg does not side with Douglas.

#### FEINBERG'S ARGUMENT IN SUPPORT OF JUSTICE WHITE'S VIEW

Feinberg's regard for an adolescent's ROF makes it surprising to find Feinberg endorsing Justice Bryan White's opinion. In White's view a span of two more years in the ninth and tenth grades does not outweigh "the survival of the Amish sect" (*FF*, 78-86).<sup>10</sup> Ever since that decision, one hears over and over that two years, the ninth and tenth grades are not significant in the life of an adolescent of 14 and 15. We hear this again from Feinberg.

Some festering questions remain. What happens to the effort to maximize opportunities for children's self-fulfillment? Two years of "dropping out of" school may mean the end of children's goals for free and fulfilling lives.

According to White with whom Feinberg agrees,:

The State is...attempting to nurture and develop the human potential of its children,...Amish or non-Amish; to expand their knowledge, broaden their sensibilities, kindle their imagination, foster a spirit of free inquiry and increase the human understanding of tolerance.<sup>11</sup>

Feinberg sides with Justice White's view that the loss of two years, the ninth and tenth grades, does not outweigh "the importance of the concededly sincere Amish religious practice to the survival of that sect."<sup>12</sup>

#### IN DEFENSE OF JUSTICE DOUGLAS' POSITION

Are Amish children's rights-in trust to an open future less open than those of non-Amish children? Is the difference between ending one's education at the eighth grade only "relatively slight?" What percentage of adolescents who leave school after the eighth grade actually resume their studies in the eleventh and twelfth grades, the normal prerequisites of college? If there is evidence to support the claim that a student who drops out at the ninth and tenth grades is unlikely to continue to seek further schooling, what happens to a CROF? Laudatory as Feinberg's conception of a CROF is, with its implication for "rights in trust," there may well be an ambiguity in Feinberg's characterization of "rights-in-trust."

Another approach to "rights-in-trust," however, and one that Feinberg discusses, is that these are autonomy rights that children have when they are "more fully formed and capable" to exercise "free choice" (*FF*, 76). Such rights-in-trust, can, however, be violated in advance of their becoming adults. The violating conduct guarantees now that when the child is an autonomous adult, certain key options will already be closed to [him or her] (*FF*, 77). Children's rights-in-trust are intended to help them fulfill their "future interests." Feinberg, however, also accords parents with "supervisory rights," as he joins Justice White (*FF*, 87).

In still another view of "rights-in-trust," one might refer instead to the parental or state role in the protection, support, and advocacy of a child's or adolescent's rights, rights a young person is not yet ready to exercise, but which belong to that person and to no one else. Adopting Charles Dickens's terminology, these rights

may be referred to as rights to “great expectations” or as rights to develop with freedom, care, nurture, and enlightenment. Readers of Dickens’ *Great Expectations* will recall that Jaggers, the attorney, tells Pip that Jaggers’ client, who wishes to remain anonymous, bequeaths “a sum of money amply sufficient for your education and maintenance.” This sum of money is designed to enable Pip to a life “of great expectations.” To this end, Jaggers tells Pip “to please consider me your guardian.”<sup>13</sup>

One may accordingly distinguish trustees from guardians. Trustees both hold and act on the authority belonging to others, often by exercising considerable discretion, as Justice White has done by joining the majority in *Yoder* to allow parents to take their children out of conventional schooling for the ninth and tenth grades. The role of guardians is to protect what belongs to others, somewhat like night watchmen or watchdogs guard those in their care in Plato’s *Republic*.<sup>14</sup> Guardians are constrained against taking liberties with those in their charge. Rights under guardianships are different from rights-in-trust in that they allow far less discretion to the guardians.

Feinberg says much that points to parents as protectors or guardians. “It is characteristic of parents...not only to protect children from their own folly, but also to protect them from external dangers generally.” (*FF*, 79-86). In some pages in Feinberg’s illuminating essay, the adolescent’s right is to an OF. In other pages, parents with the help of *parens patriae* are morally permitted “to bend the twig” by pulling an adolescent out of the ninth and tenth grades. It is therefore puzzling for Feinberg to side with Justice White.

#### INTEREST-BASED RIGHTS OVER WILL-BASED RIGHTS

The heart of the difficulty that plagues those who support parent’s rights ahead of adolescent’s rights may be a reliance on an excessively narrow conception of liberty rights, which readily dovetails with a child’s right to an open future. Some writers identify rights with liberty rights interpreted as proprietary rights exclusively, rights to choose and to be left alone, but not rights to much else. One could identify some problems of liberty rights with some excesses of the proprietary view. Such rights even include “the right to do wrong.”<sup>15</sup> Rights are not, however, tied exclusively to “Lone Ranger” morality, where too few constraints apply. For if people’s liberty rights are unaccompanied by references to claim-rights, public interest and assistance rights, general manifesto rights and general abstract rights, then even their liberty rights languish.

The proprietary view sets inadequate limits to an understanding of one’s right as one’s due. A liberty right occasionally endorses the practice of making slaves out of children. One speaks about “my children” and then extends that to owning them and then to doing as one wishes to one’s children, as the example of the dwarf child showed. People who do not mind the reign of parents’ proprietary rights can manage to remain quite detached and even indifferent to the suffering and death of children who are victims of parental abuse. To have a right, which some parents claim, means that one feels assured that one is not wrong to exercise one’s rights, which may even include depriving one’s children of two years of schooling. A conceptual source of such a view of liberty rights is that to have a right means that one has no obligation

to refrain from doing what one has a right to do; and from such a conception of one's liberty right, the conclusion seems quite readily to follow that to have a liberty right is to have "the right to do wrong."<sup>16</sup> But this, I am trying to show in this essay, is a mistaken view of one's liberty rights.

Among five grades of rights, more constraints are added to later types of rights. The process of constraints culminates with general abstract rights, which reveal decisive limits. These rights rule out certain behavior, and are expressed in the form, "You have no right to do X." On any list of what one has no right to do to children, one would include enslavement. Some lists of rights that rule out certain practices would also include not preventing children from completing conventional schooling, which was ably argued by Justice Douglas. Freedom has limits, including the freedom that children and parents have. Mothers and fathers cannot do almost anything they want to do to their children, such as selling them into slavery, or handcuffing them for life, or preventing them from developing to the optimal limits of their capacities. There are several kinds and also degrees of freedom. These include blanket freedom from non-interference to limits designed to prevent various kinds of harm, such as cigarette smoking and unprotected sex, and limits that rule out sexual harassment and rape. Added limits to a child's freedom are designed to maximize that child's freedom to develop.

In an ownership view of liberty rights, if a person is helpless, too bad for him or her. In this view, no one has a right to be given help. That view seems morally impoverished, for it fails to account for a person's incapacity to express liberty rights, especially if a person is either too poor, too physically or emotionally disturbed, too unenlightened, or too powerless to exercise the autonomy rights Feinberg discusses. There are cases in which a person does not know best and in which that person needs help to make the wisest decision, whether that person is an Amish adolescent considering whether to go to the ninth and tenth grades or an adolescent's parents.

To throw this case in relief, let us consider the case of Martin, age 14, who had a cleft palate and harelip in need of surgery. Martin's father believes in "mental healing" and in letting "the natural forces of the universe work on the body."<sup>17</sup> Martin's father refuses surgery to repair his son's seriously deformed and unattractive jaw. Martin agreed with his father. Martin is consequently disfigured. As an adolescent, Martin will need to have the avoidable physical and emotional roadblocks removed if he is to flourish.

Now let us turn to a contrasting case. Henry lives in a community where the only liberty rights are old-fashioned rights to be left alone. As Henry reaches the age of walking and running effectively, his parents say, "Let him go. If he can't make it on his own in the streets, or if he gets hit by a car, too bad. He's got to grow up some time. Might as well be now." So Henry's parents are free of him and Henry is free to roam the streets. Henry can grow up like Oliver in Dickens' novel *Oliver Twist* and become a good pickpocket.<sup>18</sup> Henry may have unreflective liberty rights, but not rights helpful to his future, should his parents be so thoughtless and uncaring as to let Henry do as he wishes with no concern for how he grows up.

In an important respect, Henry's case is like Barbara's or Martin's. Their parents looked after their children in a way that stunted their development. These parents placed roadblocks in the way of these children's development. But Henry, too, is being stunted by being rendered helpless. Henry needs a physical, emotional, and intellectual compass that will help him find his way about in the world. There are almost no rational restraints to interfere with Henry's parents' liberty rights. But neither do the other children have safeguards to protect their best interests.

Then there is Phillip, 13, a boy with mild Down's syndrome in need of heart surgery, whose natural parents refused to consent to the procedure. Phillip's parents, who never wanted a child with Down's syndrome, said in court that "he is better off dead than alive." Phillip's parents assume the liberty right to dispose of their son, and, in effect, to condemn him to death. With his lower than average IQ, he is in his parents' words "an embarrassment."<sup>19</sup>

Phillip's, Henry's and Barbara's parents can do almost anything, and in the eyes of the law, never do any wrong. It is a strange doctrine that the only kinds of rights are liberty rights to be left alone. These parents, with their liberty rights, can do pretty much as they please to their children, leaving their children with little opportunity for defense. The view invoked in defense of one's rights to control what happens in and to one's body has recently been called the "will" or "choice" view of rights; this view represents an unduly strong form of anti-paternalism.<sup>20</sup> Identifying one's rights with one's will and desire exclusively is not the only way to decipher one's autonomous liberty rights as an adolescent or parent. One may connect one's autonomous liberty rights to one's best rational interests. There are rational grounds of justified interference with one's momentary, irrational liberties on behalf of one's rationally considered liberties. Children and adults may be restrained from unknowingly harming themselves; and be helped against blocking their rights to develop, which include their rights to become enlightened.

Recently, D.N. MacCormick distinguished between a "will-based" view of rights, which emphasizes values associated with one's negative liberties and rights of another kind, which MacCormick calls "an interest based view" of rights, which emphasizes benefits conferred equally on all persons regardless of their capacities to exercise their wills. These rights include adolescent's rights to "care and nurture."<sup>21</sup> *The U. N. Declaration of Human Rights* (1948) shows that Articles 1–21 are oriented by a "will-based" view; whereas Articles 22–27, which include the right to a decent standard of living for everyone, are oriented by an "interest-based" view.<sup>22</sup> Rights of this kind have a crucial bearing on deciding quality of life issues quite differently from deciding under the influence of the "will-based" view of rights. And in some crunch cases, these interest-based rights may even override will-based rights. In particular, Barbara's parents' rights to decide for their daughter may be constrained by her own rights to develop which may be characterized as her rights to freedom, care and enlightenment.<sup>22</sup>

There are cases in which a person does not know best and in which he or she needs help from a good friend or relative to make a wise decision. If Barbara's parents block her right to enlightenment even for two years, they may not know best;



and such a condition may call for Barbara's rights to enlightenment, exercised on her behalf by others, to override her parents' will-based rights to decide her future. If a wise friend knows that there is a future for an adolescent in which a parent could, after a time, retrospectively (or counterfactually) say, "Thank you for advising me when I wanted to send my child to an Amish vocational school instead of the ninth and tenth grades," on the grounds that it is an adolescent's right to be enlightened, then we do not think such a wise friend wronged either the parent or adolescent. Ordinarily, to deprive parents of their rights is to do something wrong. But that cannot quite be said about denying Barbara's parents' rights. For Barbara and her parents could conceivably be grateful afterwards, on quite justifiable grounds, for giving priority to Barbara's rights to enlightenment.

The kind of rights this appeal might require is not to the older political liberty rights view, which says, "Don't interfere," but the newer one which says, "Help me, assist me, care for me." A view of rights which addresses an adolescent's rational interests seems the more adequate at such a time. These deeper interest-based rights to be free to live well with other people and to pursue happiness through the development of one's capacities provide the conditions for the subsequent exercise of autonomous, decision-making rights. As these liberties are constrained by rational interests, they become liberties that are augmented and strengthened.

Children's and adolescents' liberty rights, like Henry's and Oliver's rights to stay out all night, are not enough to characterize children's liberty rights. There are also interest-based rights that restrain a parent from interfering with their children's enlightenment rights. Children's interest based rights to develop with appropriate forms of freedom, care, and enlightenment set aside their parents' liberty rights to have their children stay out of school for the ninth and tenth grades.

#### LIBERTY RIGHTS WITH RESTRAINTS

The issue before us is whether Amish parents have a moral right to send their children to Amish schools for the ninth and tenth grades. Analogously, Martin Sieferth's ugly jaw deformity, without surgical repair, will imperil his future prospects. Does Sieferth's moral right to have surgical treatment override his father's preference for faith healing? On the basis of arguments for limiting Sieferth's parents' liberty rights on behalf of improving his jaw deformity, one may conclude that Sieferth's interest-based rights, which include his rights to enlightenment, morally override his parents' liberty rights to decide. For although Martin is his parent's child, they do not own him.

In sum, I am trying to answer the following questions in this essay: 1) What is the difference between Feinberg's CROF and his defense of *Wisconsin v. Yoder*? 2) What conceptual difference is there between CROF and CRD? Regarding question one, I tried to show Feinberg's inconsistency between two aspects of his argument. One aspect of Feinberg's argument is (what I regard as) his laudatory rejection of roadblocks to CROF. The other aspect of Feinberg's argument is his succumbing to Justice White's argument on behalf of the survival of the Amish sect. With Feinberg, the "survival" argument achieves moral priority over CROF. As for the second question, the conceptual and practical difference between CROF and CRD is that

whereas CROF is a right to freedom and fulfillment, and hence a liberty right, CRD involves children's growing up processes. I have tried to show that these processes of development imply children's rights to learn to make justifiable decisions. Children learn to make such decisions with the following three provisions: 1) Deliberate adult guidance, care and nurture of children's interests, with children respected as evolving persons; 2) application of readiness principles; and 3) the recognition that children have rights to learn to participate in making rules for living well with other people. CRD may accordingly be summarized as children's rights to freedom, care and enlightenment.

By way of brief conclusion, I tried to show in this essay that, despite Feinberg's eloquent defense of a child's right to an open future, with its emphasis on the survival of the Amish sect, there are reasons for preferring a conception of children's rights to develop, with its associations with fewer rationally contestable objections.

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1. Joel Feinberg, "A Child's Right To An Open Future," in Feinberg, J., *Freedom and Fulfillment, Philosophical Essays* (Princeton, NJ: Princeton University Press, 1992), 76–97. This book will be cited as *FF* in the text for all subsequent references.

2. *Wisconsin versus Yoder*, in *Having Children: Philosophical and Legal Reflections*, eds., O. O'Neill and W. Ruddick, (New York: Oxford University Press, 1979), 302.

3. *Ibid.*

4. *Ibid.* References to Barbara are to one of the three adolescents, Barbara Miller, who Justice Douglas pointed out had not been heard.

5. *Wisconsin versus Yoder* in *Having Children*, 302.

6. W. Ruddick, "Parents and Life Prospects," in *Having Children*, 133.

7. *Wisconsin versus Yoder*, in *Having Children*, 302.

8. *Wisconsin versus Yoder*, 230. Also in *Having Children*, 299.

9. Feinberg also refers to adult's "supervisory rights" (87).

10. A question arises to how one could ever evaluate two years of an adolescent's schooling, in conflict with the "survival of the Amish sect." See Feinberg, 86, who quotes from *Wisconsin versus Yoder*, 236.

11. *Wisconsin versus Yoder*, in *Having Children*, 299.

12. *Ibid.*

13. Charles Dickens, *Great Expectations* (New York: Signet Books, 1860/1976), 133–34.

14. G.M.A. Grube, *Plato's Republic* (Indianapolis: Hackett, 1974), 375a.

15. Jeremy Waldron, *Liberal Rights: Collected Papers* (New York: Cambridge University Press, 1993), 63–87.

16. *Ibid.* For a response to such a right, see Bertram Bandman, *Children's Rights to Freedom, Care and Enlightenment* (New York: Garland, 1999), 319–31.

17. "In the Matter of Martin Sieferth," in *Having Children*, 139.

18. Charles Dickens, *Oliver Twist* (New York: Signet Books, 1860/1960).

19. Adapted from George Will's column in *Newsweek*, April 14, 1980, 112.

20. H. L. A. Hart, "Bentham on Legal Rights," in *Jurisprudence*, ed. A. W. B. Simpson, (Oxford: Clarendon Press, 1977), 188–209.

21. D. N. MacCormick, "Rights in Legislation," in *Law, Morality and Society*, eds., P. Hacker and J. Raz (Oxford: Clarendon Press, 1977), 188–209.

22. Joel Feinberg, *Social Philosophy*, (Fairlawn, NJ: Prentice Hall, 1973), 94–97.

23. For a further study see Bertram Bandman, *Children's Rights to Freedom, Care, and Enlightenment*.