Do Children Have "Rights-in-Trust?"

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Do parents hold children's rights "in trust?" Or does the language of trusts smuggle fiduciary relationships into accounts of parental rights and duties? In this essay I consider the elements of legal trusts as they relate to the moral relationship between children and their caregivers. Though many accounts of upbringing structurally resemble trustee/beneficiary relationships, it remains unclear who grants moral trusts, what their purpose is, how trustees are selected, and even who the proper beneficiaries are. Absent such information it is difficult to see what, exactly, the trust model is supposed to accomplish, beyond asserting the existence of certain fiduciary relationships without actually justifying them. The possibility that upbringing-as-rescue might establish an equitable moral trust is contemplated, though such a trust demands so little from caregivers as to be an unlikely candidate for a plausible theory of upbringing. I conclude that the trust model of children's rights should be handled with caution, and perhaps simply discarded in favor of alternative approaches.

I. INTRODUCTION

Contemporary theories of children's rights frequently reference Joel Feinberg's distinction between rights ordinarily attributed to adults ("*A*-rights") and those characteristic of children ("*C*-rights"). The most interesting "*C*-rights," according to Feinberg, are the

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"anticipatory autonomy rights" he characterizes as "rights-in-trust."[1] It has elsewhere been remarked that the "idea of a trust is so familiar to us all that we never wonder at it. And yet surely we ought to wonder."[2] What I will call the "trust model" of adults exercising stewardship over children's rights "in trust" is borrowed from common law jurisprudence so frequently[3] that its apparent meaning has been reduced to something like "controlled by one for the benefit of another," but this is neither a necessary nor a sufficient condition for the existence of a trust. This essay explores the elements of trusts as they relate—or fail to relate—to children's rights.

The idea of caregivers holding children's rights "in trust" has *prima facie* descriptive appeal. To the extent that children—most obviously, infants—can be said to have rights at all,[4] they are characteristically ignorant they possess such things and would anyway be incapable of exercising them. In ordinary cases, overcoming that ignorance and incapacity will require some amount of paternalism from caregivers. Caregivers are not in this pursuit generally considered to have plenary authority over children, even though they have, at least initially, plenary *control*. Intuitions that caregivers are obligated to wield that control to the child's benefit, and forbidden from wielding that control in furtherance of their own projects, bear clear analogy to the fiduciary duties of trustees, who are obligated to manage trusts to the advantage of identified beneficiaries. So the claim that children have "rights-in-trust" looks like a potentially helpful

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[1] Joel Feinburg, *The Child's Right to an Open Future,* in FREEDOM AND FULFILLMENT: PHILOSOPHICAL ESSAYS 76, 77 (1992).

[2] Frederic William Maitland, *The Unincorporate Body*, in 3 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 271, 272 (H. A. L. Fisher, ed., 1911).

[3] *See, e.g.,* David Archard, CHILDREN: RIGHTS AND CHILDHOOD 72 (2nd Ed., 2004) ("The caretaker . . . chooses for the child in the person of the adult which the child is not yet but will eventually be. One way in which this line of thought has been expressed is by means of the notion of a 'trust.'"); Harry Brighouse & Adam Swift, FAMILY VALUES: THE ETHICS OF PARENT-CHILD RELATIONSHIPS 53–54 (2014) (". . . the person holding and exercising . . . rights, as trustee or fiduciary, possesses them not because they promote her well-being but because her possessing them is instrumental to the well-being of the person for whom she is acting as fiduciary. Many arguments for parents' rights see them this way.").

[4] I take no position here on the specific nature of rights. Any account on which it is incoherent to hold rights "in trust," or in which children have no rights, will already be compatible with my arguments; any account on which it is coherent to hold rights "in trust" should be susceptible to my complaints.

illustration of the relationship between caregivers and children's rights.

The problem is that referring to various of children's *C*-rights as "rights-in-trust" begs an important question about caregiving, reinforcing without argument the unproven implication that children should be the sole beneficiaries of the control caregivers wield over them. Because so many accounts of children's rights *mention* some analogy to trusts without spending any time *exploring* the analogy, my hope is that an attempt to bridge the gap will prove enlightening. Of course, one objection that will have already occurred to some readers is that treating "rights-in-trust" as substantially analogous to legal trusts potentially confuses a helpful illustration for a substantive argument. But if identifying *C*-rights as "rights-in-trust" does represent a throwaway illustration rather than a substantive claim, it should be possible to show as much by conducting precisely the analysis I propose to undertake in this essay.

II. WHAT IS A TRUST?

The first thing to get clear on is what constitutes a trust. Though some analogous practices existed in the ancient world,[5] contemporary trusts have their origins in the development of equity courts in medieval England:

> It all started with transfers of land made to the use of the transferor or of a third person. Such transfers began not long after the Norman Conquest and had become common before the fifteenth century. At first no legal problems were involved since the beneficiaries of the use had no legal remedies. They had to trust to the honor of the transferee [to handle the property as promised]. But early in the fifteenth century the chancellors began to enforce the claim of the beneficiary against the transferee. They held that he should be compelled in equity to do what

[5] *See, e.g.*, David Johnston, THE ROMAN LAW OF TRUSTS (1988) (discussing the Roman *fideicommissum*, roughly analogous to contemporary testamentary trusts).

> conscience required him to do. They punished him for contempt if he refused to carry out the purposes for which the property was given to him. There was no remedy in the courts of law but there was now a remedy in equity.[6]

In courts of equity, trusts developed separately from property and contract law. Though analogy to both areas of jurisprudence is sometimes drawn, historically trusts became the vehicle *de jure* of social experimentation *in spite of* the laws of property and obligation as then constituted, notably in historic effect enabling married women to hold their own property long before the legislature saw fit to allow it.[7] Legislatures often find themselves in the position of specifically disallowing clever implementations of trust law, as when the profiteering behavior of American corporations in 1890 inspired the Sherman Act[8]—the inception of *anti*trust law. The trend of social innovation through trust law continues; of particular significance to the present inquiry, it has in recent decades been argued that courts should formally adopt trust law as the model for recognition and enforcement of children's legal rights.[9]

Today, the separation of law and equity has been largely done away—and given the contemporary tendency toward codification, the common law is not what it once was, either. But it continues to be true that arrangements of obligations are only properly trusts when they have certain features. These vary somewhat by jurisdiction, but in general there must exist

1) a grantor's or settlor's
    a. capacity and
    b. intent
2) to impose particular duties on a trustee

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[6] Austin W. Scott, *The Importance of the Trust*, 39 UNIVERSITY OF COLORADO LAW REVIEW 177 (1966).
[7] Maitland, *supra* note 2, at 278.
[8] 15 U.S.C. §§ 1–7.
[9] *See* Connie K. Beck, Greta Glavis, Susan A. Glover, and Mary Barnes Jenkins, *The Rights of Children: A Trust Model*, 46.4 FORDHAM LAW REVIEW 669 (1978).

3) as concerning some identifiable trust property (corpus),
4) in order to fulfill the purpose of the trust
5) for the good of some identifiable beneficiary,
6) all subject to the demands of public policy.[10]

So-called "trust-fund babies" make paradigmatic poster-children: a wealthy grandparent (settlor) gives possession and control of a sum of money (corpus) to a parent, guardian, attorney, or other responsible party (trustee) with instructions like "use this to cover schooling expenses" (purpose). There may be other instructions, including investment instructions or provisions for the trustee to be reimbursed for their management of the corpus—and those who benefit (beneficiaries) are sometimes the recipients of interest (i.e. income)[11] accumulated through wise trust management, rather than recipients of any portion of the corpus. In fact those identified as beneficiaries of trust income need not be the beneficiaries of the trust corpus when, or if, it is disbursed—at which point the trust terminates, which always occurs when the corpus no longer contains any property (or stated differently, when there is no corpus). Finally, the whole process must comport with public policy; there are a variety of ways for trusts to violate public interest, but some trust purposes that preclude enforcement in the United States are the promotion of bigotry and the restraint of marriage. Note that failure to benefit the public is not construed as harm; trusts are not required to *benefit* the public, though many trusts do exist to promote public interests.

So the short answer to the question "what is a trust?" is "a trust is a collection of obligations and entitlements centered on the disposition of certain property." The finer details of trust creation, management, and enforcement can be set aside; it should be sufficient here to ask,

[10] *See* UNIFORM TRUST CODE § 402 (amended 2010) (detailing requirements for the creation of a trust).
[11] Most trust literature refers to trust income as interest, but in an effort to avoid confusion between the interests people have and the interest generated by a trust, I will favor "income."

"if children have rights-in-trust, who are the settlors, trustees, and beneficiaries? What is the corpus and what is the purpose of the trust?" Even assuming that the obvious interpretation of Feinberg's reference to "rights-in-trust" positions children as beneficiaries, with parents or guardians as trustees, the settlor is totally absent and the corpus and purpose maddeningly *ad hoc*.[12] What kind of income accumulates in a moral trust, if any, and how much of the corpus is it permissible to expend in pursuit of the trust's purpose? Every answer given bears implications for other questions in the series, making it difficult to discuss any single element of children's moral trusts without addressing the trust in its entirety.

III. Are Children Alone Beneficiaries of Rights-In-Trust?

Nevertheless, the clearest element in the trust model of children's rights is *probably* the beneficiary, given that the motivating difficulty of Feinberg's account is the relationship between children, their rights, and the control certain adults have over those rights. The idea of "rights-in-trust," if it is to have any value, ought to explain something about why children should neither be abandoned to their own devices nor treated as property owned in fee, and perhaps also why adults are or are not morally blameworthy in their various interactions with children's rights. This places caregivers, not children, under plausibly fiduciary obligations, suggesting that children are indeed the beneficiaries on the trust model.

But children are in some sense not entirely themselves, to the extent that we can distinguish the rights or interests children have "in so far as they are children" from the rights or interests they have "in so far as they will develop into adults."[13] One way to approach the distinction might be to consider the difference between "income" beneficiaries and "remainder" beneficiaries in traditional trusts. An income beneficiary is one who receives regular payments

[12] In fact Feinberg himself attaches some relevant disclaimers to the idea of "rights-in-trust," however these disclaimers are not generally cited by others who discuss the "rights-in-trust" view.
[13] Archard, *supra* note 3, at 62.

from profits generated by the trust corpus, while a remainder beneficiary takes control of the corpus at the termination of the trust. On the trust model, children might be income beneficiaries in the present and remainder beneficiaries in the future, insofar as choices made on behalf of the child today impact the choices that will later be available to the child's adult self. Children are often different enough from their adult selves that a conflict of interest may exist between the two; on the trust model, such a conflict would be the trustee's responsibility to mediate. For example, consider a child with a present interest in playing video games, whose parent believes the child's adult self will have an interest in having practiced piano instead. Suppose for purposes of discussion that the trustee is a parent, the purpose of the trust furnishes no particular guidance on the matter, and both the present interest in playing video games and the future interest in having instead practiced piano are legitimate "properties" in the corpus of the relevant trust. Is it permissible (or obligatory) for the parent compel the child to practice piano?

Notice that the impossibility of ascertaining the future-child's actual interests never enters consideration. The trustee's duty is not to act according to unknowable interests, but to preserve or possibly enlarge the corpus according to the trust's stated purpose, while balancing competing claims on the income and the remainder. A trustee's judgment about what is best for beneficiaries can be challenged, but in general it is enough that trustees have a reasonable belief that their choices satisfy the purposes of the trust for the benefit of the beneficiaries. So a parent could permissibly insist that the child practice piano rather than play video games based on that parent's (possibly mistaken) belief in the eventual value to the child of music training over video game prowess, but not based on that parent's desire to avoid the regret of paying for piano lessons for a child who doesn't practice.[14] In the latter case, it is the parent's benefit, not the

[14] I note in passing that while these reasons are reversible, I have never met a parent who required their children to play video games for a set amount of time each day in an effort to avoid the regret of purchasing video games their

present or future child's, being pursued; it would be a breach of trust. Simply being *mistaken* about the interests the child's adult self will actually have does not constitute a breach of trust, in much the way that a bad investment would not, by that fact alone, constitute a breach of a traditional trust with a monetary corpus. Pursuing the *parent's* interests with no regard for the *child's* interests is what constitutes a breach.

One peculiarity of trust law, however, is that trustees are often beneficiaries themselves. Too great a unity of identity between trustee and beneficiary can collapse the trust, for to exclusively control and exclusively benefit from a piece of property constitutes simple ownership. But a common use of legal trusts is to spare one's heirs the cost and inconvenience of probate after one's death; this is accomplished by moving property into a trust of which one is the exclusive beneficiary until death, at which point the property is dispersed to the remainder beneficiaries (one's heirs). In other words, there is no reason in principle why the settlor of a child's "rights-in-trust" would be unable to specify any number of beneficiaries beyond the child and the child's adult self. Parents, siblings, church, state, really any entity could be an intended beneficiary, depending on how "rights-in-trust" originate. Notice, no matter how morally repugnant it might seem, that parents can and sometimes really do choose to have children for their own personal benefit, or the benefit of other parties. A recent controversial example in medical practice is "savior siblings," children conceived for the explicit purpose of providing stem cells or organs to treat an older child's illness.[15] It may well be objectionable for parents to hold their children's rights in trust for the benefit of *someone else*, but this would have to be

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children never played. With the advent and growth of "eSports," in which professional video gamers showcase their skills and compete for cash prizes, will children of the future drill jungling and laning the way children today drill scales and arpeggios? While it is beyond the scope of this essay, the idea seems sufficiently ridiculous that it almost certainly bears careful consideration at some future point.

[15] Some of the emotional challenges presented by such arrangements were popularized in Jodi Picoult's MY SISTER'S KEEPER (2004), a few years after the situation was first medically described by Yuri Verlisnky et al. in *Preimplantation Diagnosis for Fanconi Anemia Combined With HLA Matching*, 285.24 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 3130 (2001).

argued on other grounds; no feature of the moral trust model precludes it, for it is the settlor, not the beneficiary, who establishes both the corpus and the purpose of a trust.

IV. WHERE DO MORAL TRUSTS COME FROM?

"Settlor" is a term incorporating at least two roles: the creator of the trust, who establishes its purpose, and the grantor of the trust, who imparts the corpus. The creator of a trust usually *is* the grantor, but sometimes it is a court imposing some remedy in equity. As part of establishing the trust, the settlor also selects trustees and beneficiaries. On the trust model of children's rights, the identity of the settlor may tell us something about the nature of the corpus, and vice-versa. For example, in their argument for judicial adoption of trusts as the model for children's legal rights, Beck et al. suggest that although "the state [may play a] role as trustee, in its legislative functions it operates also as the settlor of the trust."[16] I do not wish to suggest that legal rights are or ought to be coextensive with those explicitly granted by the state, but Beck et al. are at least thinking in the right direction. If the corpus of children's legal "rights-in-trust" consists exclusively of legislatively-granted legal rights, then of course the legislature *is* the settlor, and the legislature's purposes in granting those rights is the purpose of the trust, binding the trustees (whoever they may be).

So who settles rights-holding trusts? The answer is unclear—and possibly something of a political question. For example, in a Platonic Republic, the mandatory separation of children from birth parents in furtherance of state interests paints a very clear purpose and method for those entrusted with the management of children's rights.[17] However to the extent one believes moral rights exist against or prior to civil governments, the state could not be the settlor (at least, not the sole settlor) of a trust holding children's rights in the corpus. The state might still be the

[16] *Supra* note 9 at 675–676.
[17] *See* REPUBLIC 457c–461e.

creator of that trust, where equity demanded such a thing, but the role of grantor would still need to be filled. In liberal societies, especially, it seems unlikely that states will in the ordinary case be either the creators or grantors of children's rights-holding trusts.

Other possible settlors might include abstract or incorporeal entities like nature or deity; it's not clear to me that much can be helpfully said of these. If we have indeed been endowed by a divine creator with certain unalienable rights, identifying the corpus and purpose of any resultant trust is going to be more a theological undertaking than a philosophical one. Maybe that's okay, but if we're going to assert that children's "rights-in-trust" are connected in some way with the nature or creation of children, might we simply treat children themselves as settlors? This seems unlikely; identifying children as the settlors of their own trust results in either infinite regress or final appeal to practicality instead of theory. If we think "rights-in-trust" are just an essential feature of live-born humans, children lack the competency to select their own trustees and so would need a trustee to appoint an appropriate trustee to appoint an appropriate trustee, *ad infinitum*—or, more practically, would be arbitrarily assigned trustees in the form of parents and/or the state.

If it is the child's nature that grounds the child's interests, then the settlor of the trust might instead be the creator of the child. Naturally, states cannot be said to *create* children any more than children can be said to create themselves—rather, parents are usually the creators of their children in a clear and not at all esoteric way. Could they be settlors of a trust bearing their children's rights or interests? The idea that we receive our moral rights from our parents is undoubtedly peculiar, all the more so when it is realized how rarely some parents reflect on their children's rights *after* their children are born, much less prior to conception. Given that a settlor must have both the capacity and intent to create a trust, it would be difficult to maintain on the

trust model that every procreative act meets the requisite criteria, even if some do. On the other hand, setting aside failure of intent, treating parents as settlors of their children's "rights-in-trust" fits the pattern of many ordinary parenting practices. Sometimes parents create and even raise children for surprisingly specific reasons.[18] Biological parents tend to select themselves as trustees, but placing children with relatives or for adoption looks like an act of selecting alternative trustees.

One way to address the apparent shortcomings of each candidate for settlor might be to simply think of them as joint settlors. This would require states and parents and perhaps also children and nature and God to all agree, however, not only on the purpose of the trust (the "best interests of the child?") but also the identities of the beneficiaries and trustees. This seems unlikely to occur. Is it instead a mistake to assume that each individual only has *one* trust containing *C*-rights? Do children have a trust containing their legal rights, established and managed separately from a trust containing their personal interests, with yet another for their moral rights, and so on? Resorting to a plurality of trusts complicates things exponentially, such that any reference to children's "rights-in-trust" points in so many directions as to hopelessly tangle the inquiry.

V. Do Moral Trusts Have an Identifiable Trustee?

If we can't clearly identify the settlors of children's moral trusts, and are even a little fuzzy on the identity of appropriate beneficiaries, useful assertions concerning the corpus, purpose, or identity of trustees may need to be grounded in something beyond the trust model alone. It might seem obvious to some that parents should fill the role of trustees, with children as beneficiaries and the corpus of their trust a right to an "open future," but it will seem equally obvious to others that the state fills the role of trustee, with the community as well as the child

[18] *See supra* note 15 and accompanying text.

filling the role of beneficiary, all the child's rights forming the corpus. Such a communitarian attitude would be no less accurately labeled a "rights-in-trust" view of childhood than the one advanced by Feinberg, even though it might constitute a rejection of everything else Feinberg claims about children's rights. Is this a good reason to shrug our shoulders, accept the trust model as a merely imperfect metaphor, and move on to more substantive concerns?

I'm skeptical—at minimum, because I find it difficult to believe that so ubiquitous a metaphor with such obvious appeal should turn out to be a throwaway illustration, and a surprisingly incomplete one at that. What many contemporary theories of upbringing appear to assert is that adult caregivers have a special obligation to use their control over children (sometimes termed "parental rights") for the sole benefit of those children. The trust model of children's rights can support this assertion because trustees have fiduciary obligations by virtue of their position in equity, but those fiduciary obligations arise from the relationship between the settlor and the trustee concerning the corpus, *not* from the relationship between the trustee and the beneficiaries. For one thing, beneficiaries generally have *no* enforceable interest in the trust corpus until after the trust has been settled. An account of children's rights that uses the trust model strictly as an illustration of the relationship between the trustee and the beneficiary, excluding troublesome questions concerning the identity of the settlor, requires some other justification for the fiduciary nature of that relationship, because that relationship is *described* by resort to trusts, but never grounded. In order to maintain that adults have a special obligation to use their control over children for the benefit of those children, some other argument must be provided. Otherwise, the trust model will function to simply smuggle fiduciary duties into accounts of children's rights by way of linguistic convention.

This might be a reason to prefer accounts of children's rights that do not assert "rights-in-trust" or anything like them. A children's liberationist who believes that no one should exercise control over children, for example, will certainly need no justification for trusteeship; such a theory would naturally assert that no such justification exists. Opposite liberationists there are proprietarian accounts of childhood asserting something like ownership of one's children in fee; because any successful proprietarian account *ipso facto* justifies total control over one's children, the lesser power of trusteeship need not be established.

However I find both liberationist and proprietarian accounts unpersuasive because I think children and parents both have strong reasons to reject such arrangements; I think that children have special claim on their parents, such that both liberationist and proprietarian views would deprive children of something they are owed. The trust model of children's rights occupies a rough continuum between the liberationist and proprietarian positions, positing an inverse relationship between a child's capacity for self-determination and the extent of parental authority. Like the trust model itself, this continuum has intuitive appeal: the more capable a child grows, the less appropriate it seems for parents to exert control. The central puzzle is why and how adults ought to *pursue* capability growth and the accompanying diminishment of power—what it is that justifies an adult's fiduciary relationship absent a clear settlor of a child's moral trust. The fact of a child's incapacity and expected maturation seems to explain why it is in their best interests to *have* a fiduciary, possibly even why it would be best for parents to fill the caregiving role, but it does not seem to justify the imposition of fiduciary responsibilities on any particular person, and *that* is the kind of justification needed to identify a specific "trustee" over a child's "rights-in-trust" absent some clear settlor making a direct appointment.

One possible justification might be found in a *duty to rescue*. At common law—where the trust model originates—there is no general duty to rescue; if I see someone drowning in a pond, I am under no legal obligation to intervene. But if the person in the pond is there because I pushed them—if I am responsible for their peril—then a duty to rescue does arise.[19] My responsibility for their circumstances obligates me to act in their best interests, and if I do not, then I am liable for such harm as may befall them. Because human infants are altricial, they are in a more or less perpetual state of peril from the instant of birth until several years into their upbringing. At minimum, they will actually starve to death if food is not placed directly into their mouths. People who procreate are directly responsible for this peril. The only rescue possible is to attend to a child's upbringing, either by seeing to it oneself or persuading someone else to assume the burden.

Doubtless some will find this a peculiar justification for the identification of biological parents as the trustees (at least initially) of a child's moral trust. David Archard suggests it is a "strange idea that the irreducible brute fact of procreation 'creates' moral rights and duties," adding that while "it is not too odd to think of a created duty to care for what one has brought into being, it is mysterious how this same event generates a right to rear."[20] But if we add upbringing-as-rescue to the trust model of children'' rights, it's not mysterious at all. What Archard identifies as a "right to rear" just picks out those powers it is both necessary and feasible for parents to wield if they are to fulfill their obligation to rescue their child from his or her own incapacity.

This approach to justifying the imposition of a fiduciary relationship between certain specific adults and certain specific children raises at least two further issues, one of which I will

[19] See RESTATEMENT (SECOND) OF TORTS § 315 (1965).
[20] Archard, *supra* note 3, at 165.

mostly set aside. The common law duty to rescue is sometimes regarded as inappropriately constrained; it seems to be a matter of general agreement that even if I lack a legal duty to rescue a drowning stranger, I have a *moral* duty to rescue a drowning stranger, provided I can do so with a reasonable expectation of safety to myself. So it's entirely possible that there may be quite a large number of people with some moral obligation to see to any given child's upbringing-as-rescue, even though they are not at all responsible for the child's peril. Might this justify some community (or state) interest in upbringing? This, too, seems plausible on the trust model, though for purposes of this essay, it is sufficient that we have identified even one adult—much less two—on whom it is justified to impose a fiduciary duty to see to a child's interests, at least at infancy.

VI. The Purpose and Corpus of a Moral Trust

The second issue raised by the notion of upbringing-as-rescue is that it does not appear, by itself, to impose much in the way of fiduciary duties. Rescuing a child from the peril of being a helpless infant mostly requires a few years' worth of food and shelter. We might extend the metaphor (though perhaps by now we should know better than to try) to include potentially life-preserving skills like reading or swimming. We might seek to address perils arising from social circumstance, enrolling my child in self-defense classes or teaching her how to read social cues and be alert for danger. But what about piano practice and video games? What about other issues, like education or the disposition of large inheritances? Nearly no one is out there arguing in favor of infanticide,[21] but if a parent's fiduciary or trustee obligations arise from something like a duty to rescue, what can be said about the many ways parents shape children's lives beyond the demands of life itself?

[21] *But see* Alberto Giubilini & Francesca Minerva, *After-Birth Abortion: Why Should the Baby Live?*, 39 Journal of Medical Ethics 261 (2013) (arguing in favor of infanticide); Johnathan Swift, *A Modest Proposal* (1729).

To this point I have left as open as I could the question of what it is, precisely, that adults exercising control over children's lives are controlling. In a legal trust, what the trustee controls is the corpus—typically some real property, a sum of money, shares of a company, or arguably "any transferable interest, vested or contingent, legal or equitable, real or personal, tangible or intangible."[22] What adults control when they handle an infant is essentially everything—where the child travels, what the child eats and sees and hears, when and how the child does these things. Some of this is essential to keeping the child alive, but much of it is incidental to that task; keeping an infant fed or a toddler sheltered requires quite a lot of effort and attention that is difficult to provide without also determining much about the child's environment, which in turn determines much about how the child's future self will develop. We might well wonder whether the control exercised over a child based on fiduciary obligations to preserve the child's life generates further fiduciary obligations relating to the child's well-being, that is, to ensuring as far as possible that the child's life *goes well*.

Certainly many parents *feel* thusly obligated, to various degrees. But trustee control over a corpus is granted for some *purpose*, and that purpose—not other purposes for which the corpus might be used, or secondary affects use of the corpus might have—is what binds the trustee in equity. In the absence of a clear settlor, identifying something like a duty to rescue as the source of parental rights and obligations also suggests that parental obligations are fairly minimal, even though the corpus with which they are entrusted might be managed to achieve a great many ends beyond subsistence living. Of course it is quite permissible to manage a trust *really well,* achieving gains beyond the expectations of either the settlor or the beneficiaries! But it is not excellence to which trustees are obligated; mere competence in satisfaction of the trust's purposes is quite sufficient. Does this obligate parents too lightly? On one hand, children can and

[22] George Bogert & George Bogert, HANDBOOK OF THE LAW OF TRUSTS § 25 at 69 (5th ed. 1973).

do live through physical beatings, and worse. Surely parents are obligated against administering physical abuse? On the other, children have a great many interests the denial of which does not constitute peril into which their parents have placed them by virtue of conception. Surely a child's interest in loving relationships, adequate education, and the like obligate parents to provide more than a meal and a bed?

My intuition is that parents have a great many obligations along these lines—but as far as I can tell, the obligations owed to children by the "trustees" controlling their autonomy simply aren't very extensive. I'm clearly wrong about this if God gives children to parents for some identifiable reason, or even if the purpose of a child's life is genuinely established by state interests or parental reasons for deliberate procreation. A trust with a clearly-settled purpose reveals much about trustee obligations and the identities and entitlements of beneficiaries. Asserting fiduciary obligations to preserve, enlarge, or maximize children's well-being or future opportunities in the absence of a clearly-settled purpose, based on the brute fact of adult control over infant autonomy, simply assumes too much. That a child *has* some interest, present or future, is not the reason adults have fiduciary duties toward children. Parents' fiduciary duty to keep their children alive, justifying plenary-but-waning control over children's autonomy, does not entail other fiduciary duties over how well their children's lives go. The moral trust model can only impose obligations as clear as its purpose; if no clearer purpose than upbringing-as-rescue can be established, then actions that do not endanger the child's life but may or may not cause the child's life to go well appear simply to be permissible.

VII. Conclusion

There is a common way of talking about children's rights that goes something like this: children are highly suggestible incompetents. They have an important but inchoate interest in

self-determination; until that interest vests, what's best for them is preservation or expansion of that inchoate interest. So far, the most effective approach to success in such endeavors appears to be allowing certain interested parties to more or less control children's lives until they are no longer children. Owing to children's suggestibility, however, placing them under the control of others seems detrimental to the aforementioned, albeit inchoate, interest in self-determination. For those who find liberationism an unpersuasive account of children's rights, the apparent inconsistency might be alleviated if adult power over children is limited to that of a fiduciary, with control not of the child simpliciter but of the child's rights, interests, autonomy, or future self "in trust." The problem with the "caretaker's thesis," as David Archard labels it, is that it "argues against the liberationist for a denial of self-determination but, in the last analysis, is unclear how much should be denied and what precise ends are served by the denial."[23]

What this essay has illustrated is that the trust model of children's rights, while descriptively appealing, smuggles in a substantive claim. The substantive claim is that caregivers have fiduciary obligations concerning children's rights. In the absence of a clear settlor or purpose (Archard's "precise ends") the trust model does not actually show that caregivers have any fiduciary obligations to children beyond, perhaps, some duty to rescue their children from the perils to which they were subjected by birth. Because it certainly *seems* as though parents have a great many obligations concerning their children's well-being, the mistake is an easy one to make, all the more so if one's theory needs some way to reconcile autonomy as an overriding interest with the observable fact that responsible parenting involves a great deal of paternalistic intervention in children's lives. None of this shows the trust model to be correct, nor yet incorrect, but it does suggest caution where "rights-in-trust" are used to explain parental obligations that have not been specifically grounded in some other way. One way to ground

[23] *Supra* note 3, at 79.

those obligations while maintaining the trust model would be to identify a clear settlor or purpose of a child's moral trust, but finding such a thing may require us to answer no less comprehensive a question than "what is the purpose of (this child's/person's) life?"

Fortunately, there are other ways to ground obligations, and there is, I expect, substantial room for analysis of caregiving even in the absence of fiduciary obligations, by focusing on the meaning of *rights* instead of asserting the existence of *trusts*. For example, it might seem strange to say that parents on the upbringing-as-rescue view have no fiduciary obligation against beating their children, but it wouldn't be a claim that adults have *no* obligation against beating their children; I expect I am quite obligated to refrain from beating *anyone,* never mind whether we enjoy a special relationship of trust. It might be objected that the relationship I have developed with my children, by virtue of stewardship over their "rights-in-trust," gives me *extra* or *special* reason to refrain from beating them, and this seems intuitively true, but in such a case it is not my identifiably fiduciary duty to refrain from beating my children. Beating my children is just something I have several decisive reasons to refrain from doing. If we model parent-child relationships in terms of what we have reason to do, or to refrain from doing, rather than in terms of what we are obligated or forbidden to do under the terms of some ill-defined relationship of trust, I think we will be able to say much, and more clearly, about what it is that really constitutes appropriate caregiving.