

Dana Howard's highly original and insightful paper contains enough substantive claims to stimulate good discussion on its own. However, given that I have limited space and that my primary purpose is to stimulate discussion, in what follows I'd like to focus on those aspects of the paper which I either disagree with or which stand in need of further clarification.

Howard's first target is Gerald Dworkin's future-oriented consent model in which parental paternalism is justified just so long as children can reasonably be expected to one day appreciate the correctness of that intervention. Howard objects to this account because children: (1.) lack the capacity to truly consent and (2.) have not yet formed their own values and voice. In order to emphasize the importance of these two points Howard uses Dworkin's example of a seemingly 'unreasonable'<sup>1</sup> Christian Scientist who denies their child a life-saving blood transfusion under the assumption that their child would grow up to choose physical death over a blood transfusion that would, so the belief goes, will cut them off from eternal life. The example is supposed to get us to see that, even if it could be assured in advance through manipulation or illegitimate coercion that the child will adopt the same values, any theory that allows for this possibility is insufficient.

First off, a quibbling point: this would certainly be an unreasonable Christian Scientist indeed, as this is not a belief Christian Scientists hold. Jehovah's Witnesses are the only Christian sect that has this particular belief about blood transfusions<sup>2</sup>. Secondly, even if we replace the references throughout the paper with the intended religious group holding this belief, I'm not so sure it is an accurate portrayal of Dworkin's theory to place the emphasis on what *actually* comes

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<sup>1</sup> Howard simply says that the weighting of these beliefs in this manner 'may be seen [by some] as attaching unreasonable weight to some value'. See conference booklet Pg. 43.

<sup>2</sup> Dworkin was simply mistaken about this. Christian Scientists simply believe in prayer as the first thing to be consulted in times of illness, but they have no strict prohibitions on seeking medical treatment or accepting transfusions (despite individual cases of CS parents who cause the deaths of their children by not availing themselves of hospitals—something allowed by their religion). See: Macklin, R. *Consent, Coercion and Conflict of Rights*. Pg. 376 (n. 2). In: *Critically Thinking about Medical Ethics*. Also see: Sheldon, M. *Ethical Issues in the Forced Transfusion of Jehovah's Witness Children* for a more adequate and sensitive treatment of the issue of religious refusal of blood transfusions. Pgs. 376-80 of above reference & originally printed in: *The Journal of Emergency Medicine*, Vol. 14 (1996) Pgs. 251-57.

about rather than what could be *reasonably expected* to come about. Dworkin clarifies what he means by construing parental paternalism in this way: ‘Parental paternalism may be thought of as a wager by the parent on the child’s subsequent recognition of the wisdom of the restrictions’.<sup>3</sup> So, there is an element of self-legislation on the part of the parent to see to it that, whatever interventions they undertake, they be of the kind which it is reasonable to expect the child to one day see as sensible. Dworkin would certainly be against the type of manufactured consent Howard is worried about. Lastly, Dworkin would deal with the ‘paternalism or death’ type cases in a fundamentally different manner, as is made clear when he states: ‘[paternalistic interventions in cases like these are] a kind of insurance policy which we take out against decisions that are far-reaching, potentially dangerous and irreversible’. Given these clarifications, I’m not sure Dworkin’s future-oriented consent model is as problematic as Howard makes it out to be (even though problems still remain).

My second main point is in relation to the paper’s mode of presentation insofar as it obscures what is possibly doing a great deal of ‘behind the scenes’ argumentative work. The paper quietly transitions from the initial Mill-inspired question of ‘When is paternalism over children justified’ to ‘When is *parental* paternalism over children justified?’ Indeed, given that children naturally grow up within a family structure, it seems entirely appropriate for ‘non-domination in the family’ to be the locus of the argument. And, given the paper’s implicit theme that ‘the personal is political’<sup>4</sup>, it seems to make sense to ask: When is paternalism justified in relation to *my* children? However, this mode of presentation can make it look like a particular ethos of non-domination in

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<sup>3</sup> Dworkin, G. *Paternalism*. In: *The Monist*. (1972) Pg. 77

<sup>4</sup> See: conference booklet Pg. 44, note 102. Also see: G.A. Cohen’s *Rescuing Justice and Equality* Pgs. 116-150 for an anti-Rawlsian inspired critique of Susan Okin’s inclusion of the family in the basic structure. In short, Cohen thinks Okin’s call to include the family in the basic structure fails to see the problems with the fact that the basic structure itself is the subject of Rawlsian justice. Howard seems to want to follow Okin’s lead and also reject a particular (I think mistaken) interpretation of Rawlsian primary goods. This leaves me curious as to what her views are regarding the Rawlsian notion of the basic structure and also who the primary subjects of justice are.

the family is doing the work of justifying paternalism over children all by itself. Instead, a careful reading of the piece and a deeper understanding of the civic republican tradition Howard relies on reveals that laws and social conventions are doing much of the work in securing non-domination.

As Howard admits in a few references, her theory of non-domination in the family which is supposed to justify certain kinds of parental paternalism is itself ‘parasitic on [there] being just institutions and social norms in place that [make] the familial relationship legitimate... the relationship itself is still one of unjust domination without the proper social and political structures in place’. She also notes that, ‘The republican model directs us [to] restrict [parental] capacity through legal or social reprimands’<sup>5</sup>. If all this is true, if the theory of non-domination in the family is parasitic on legal reprimands formulated within just social and political structures, then we appear to be in danger of collapsing back into freedom as the space of non-interference presumably carved out by legal rights that Howard wanted to avoid at the beginning of the paper.

Recall the example of domestic abuse used at the beginning of the paper: ‘in the absence of domestic abuse laws, the negative conception of freedom considers a woman free even if she is under the constant threat of abuse, just as long as it comes to pass that her husband never hits her’. Notice that the absence of law is in fact what does all the work here. While it is true that theorists of freedom as non-interference often mistakenly develop a rather ham-fisted stance that sees law as uniformly constraining rather than enabling<sup>6</sup>, I see no reason why this stance is a theoretically necessary. And, if it is not a necessary consequence of accepting freedom as non-interference, then I am also not so sure there’s much of a substantive difference between freedom as non-domination and a (slightly more sophisticated) version of freedom as non-interference.

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<sup>5</sup> See conference booklet Pg. 45. My bracketed insertions for clarifying purposes.

<sup>6</sup> For a good discussion of how non-interference typically views law as constraining, see: Pettit, P. *Republicanism: A Theory of Freedom and Government*. Pgs. 63-79

If I understand the civic republican notion of freedom correctly, then freedom as non-domination cashes out to be something like freedom from the structural possibility that someone with a greater amount of power could—with complete impunity—arbitrarily interfere in spheres where one is competent to make decisions<sup>7</sup>. The stipulation of a lack of impunity implicitly references sanctions through either law or convention, and highlights why laws as enabling conditions of freedom are so important for civic republicans. In the context of the present discussion these would be laws such as mature minor statutes, emancipated minor statutes and ‘special consent’ statutes (which I’ll save for Q & A). But, I see no reason why someone who endorsed a more sophisticated version of freedom as non-interference couldn’t also hold a similar view of law as enabling or securing freedom. So, in the end, this portion of my commentary is an invitation for clarification as to the relevant differences between the two conceptions.

Thirdly, I think Howard needs to say more about precisely why the capacity to contest is necessarily always tracking the best interests of a child. She notes that contestation allows children to develop their ‘own voice’ and ‘become people in their own right’, but nothing more than this. Similarly, I’m curious as to what constitutes desirable contestation versus merely contestation that is unreasonable or based on objectively bad reasoning processes (making generalizations based on small sample sets, improper inferences, ad hominem arguments, etc...). Presumably Howard wants a *certain kind* of contestation to be fostered in children, and not merely contestation in general—but I would invite her to say more about what precisely this means and also the institutions beyond the family which would cultivate this kind of contestation.

Lastly, I don’t think that Howard’s portrayal of Rawlsian primary goods is entirely accurate—although this might simply be a symptom of Gutmann’s appropriation and use of it.

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<sup>7</sup> I take this formulation to capture the three criteria Howard lists. See pg. 44 of conference booklet. Footnote 103 explains where I ‘impunity’ comes from.

Roughly speaking, primary goods include income and wealth, rights and liberties, opportunities and the social bases of self-respect. It is important to realize that Rawlsian primary goods matter not merely because they are ‘what we want whatever else we want’<sup>8</sup>—because they are goods that any rational adult wants. Instead, primary goods matter because of the way in which they came about *cooperatively* through what Rawls refers to as the basic structure.

The basic structure is both the vehicle of social cooperation and the primary subject of justice. In brief, the basic structure is ‘the way that major social and political institutions fit together as one system of cooperation’<sup>9</sup>. For Rawls then, justice is not something that simply accrues between persons regardless of whether they are in cooperation with one another or not. Instead, justice only arises within the context of an overarching pattern of cooperation composed of smaller social and political institutions (including the family). Howard was presumably referring to something like this when she spoke of her theory as being parasitic on just institutions and social norms. For Rawls, Just institutions are what confers justice on the distributive outcomes which effect individuals. Seen in this light, the reason that primary goods matter is that they are the socially produced surplus constituting the needs and claims *of citizens* rather than the humanitarian needs *of persons* (which are supposedly already assured by the ‘social minimum’ we get from Rawlsian Justice as Fairness). The key point is this: we care about how primary goods are distributed not because we know what a just outcome of distribution looks like but *because* primary goods are cooperatively produced via the basic structure. Marginal inequalities in the distribution of these goods are then explicable by the fact that one’s access to primary goods indicates how society values a given individual’s cooperation. Put differently, access to primary goods serves as a ‘proxy’ for how one’s social participation is recognized by the basic structure.

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<sup>8</sup> This formulation from *Theory of Justice*.

<sup>9</sup> Garthoff, J. ‘Glossary of Rawls’s Terminology’. Distributed in *Philosophy 402: Rawls’ Theory of Justice* (2009).

Now, this account differs from the characterization Howard gives of primary goods as ‘a contentious list of objective goods that every person ought to hold regardless of his or her subjective interests’<sup>10</sup>. It matters that we get clear about why it is that primary goods matter because this then also lets us see why an exclusive focus on the family as the most basic structural element of political life is not enough to get us to a full theory of justice. Indeed, Howard agrees that ‘Philosophers rightly see the family as the first political institution with which the citizen of a state comes into contact. But the family and its structure is not only integral to the production of future citizens, [the family and its structure have themselves] been designed and reformed by political factors’<sup>11</sup>. However, if this is the case, it seems like it would be better to pay attention to the ways in which social and legal institutions of non-domination (or perhaps non-interference) outside the family help shape those families themselves. In short, instead of focusing on ‘What justifies *parental* paternalism over children?’ we will perhaps access more wide ranging insights about justice if we hold fast to the initial Mill-inspired question: ‘What justifies paternalism over children in general?’ Or, as I like to think about it as a teacher and adviser ‘When is paternalism over *other people’s* children justified?’

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<sup>10</sup> See conference booklet. Pg. 47

<sup>11</sup> See conference booklet. Pg. 44