The Natural Rights of Children

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Abstract:

What does libertarian theory, Murray Rothbard's theory in particular, tell us about the rights of children? The two foundational principles of Rothbardian libertarianism are the sanctity of private property and the rule of non-aggression. Persons, including children, are “self-owners.” Yet children, at a young age, are not yet capable of functioning fully as “self-owners.” They must be cared for, and the caring will necessarily involve some degree of aggression in the form of supervision and restraint. Parents and other caregivers play the role of trustees; and just as the beneficiary of a trust has the right to petition a court to change trustees or terminate the trustee relationship, so a child, able to express his preferences when it comes to the nature and degree of supervision and restraint too which he will be subjected, should equally enjoy that right while, in terms of property rights, a biological caregiver may have better "title" than an adoptive caregiver to be the child’s “trustee” given the child’s inability to express a preference for one or the other. What may seem to a contemporary sensibility as an extreme degree of childhood independence in the choice of caregivers and other freedom from supervision and restraint was common in pre-industrial America and continues to be the rule in some native cultures.

Key words:

Children; rights; libertarianism; babies switched at birth

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I. Introduction

There are four sections in this paper. In section II we offer, and analyze, Rothbard’s libertarian theory of children. Section III is our attempt to apply preference-based child rights theory. The burden of section IV is to offer a brief history of children’s rights. Section V is our conclusion.

II. Rothbard

We shall attempt to analyze the natural rights of children from a libertarian perspective (Rothbard, 1973A; Huebert, 2010). This philosophy is predicates upon two basic premises the non-aggression principle (NAP), that no one may initiate force or the threat thereof against an innocent person and private property rights based on homesteading. The latter holds that he who first makes use of a resource enjoys the exclusive right to its use. Only through voluntary transfer can the right to use/exploit a resource be legitimately obtained. However, private property rights and the implication of the non-aggression principle is not so cut and dried when it comes children. Here, some degree of aggression is unavoidable. And not only unavoidable, but also justified. At a tender age, children are unable to care for themselves. Caretakers must necessarily exercise a certain amount of “aggression” for the child’s benefit: carrying, feeding, and nurturing the child without his consent. Under current law, when the child reaches the age of eighteen, the caregiver’s authority terminates.2

Rothbard (1998, 98) writes, “The right of self-ownership by each man has been established for adults, for natural self-owners who must use their minds to select and pursue their ends.”

Children are a challenge for all political philosophies, and libertarianism constitutes no exception. The problem is that cognitive development occurs gradually (Gopnik, 2010). At each stage the child acquires greater understanding of the world but these steps usually occur at different rates; and some children may never fully develop their cognitive abilities. Not only do children develop cognitively at different rates, there are qualitative differences in their modes of cognitive development.

Unfortunately, in today’s world of clinically zealous psychiatrists, in tandem with the judicial system’s readiness to acquiesce in questionable diagnoses, resulting standards could provide justification for nanny state like policies, and even various kinds of child abuse.3 Mental

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1 The authors owe a debt of gratitude to Michael Makovi for inspiring the writing of this article. The usual caveats, of course, apply.
2 Different jurisdictions proscribe different ages, typically ranging from 14 to 21, depending upon the issue involved.
3 There are some libertarians (e.g., Molyneux, 2012, undated) who make the argument that spanking is incompatible with the libertarian non-aggression principle (NAP). What do libertarians of this sort offer, instead, for child rearing? First and foremost, reasoning with the child. But, suppose he is too young, or too excited, for any such tactic to be fruitful? Then, second, there is the “time out”: the child is confined to his room until he learns his lesson, and or has calmed down and has become amenable to reason. The difficulty here is that imposing a time out on a youngster, strictly speaking, is also a violation of the NAP. If one adult were to compel another to take a break along these lines
disorders could be excessively invoked as grounds for curing/eliminating the rights of adults. Delayed cognitive development could provide zealous enforcers (psychiatrists, courts) with the justification to infringe illegitimately on a person’s right to monitor/determine his own conduct, even for adults.⁴

Furthermore, recent advancements in developmental psychology have challenged the dominant view that infants/small children as mindless creatures. Indeed, as recently as a generation ago, most (many) psychologists, philosophers and psychiatrists were of the opinion that infants and young children were irrational, egocentric and amoral beings, unable to understand the workings of cause and effect, to empathize with the experiences of others or to appreciate the distinction between reality and fantasy. Many people continue to hold this view. (Gopnik, 2010).⁵

Renée Baillargeon at the University of Illinois and Elizabeth S. Spelke at Harvard University propose that infants have the ability to understand principles of physics and relations of cause and effect (Baillargeon, Spelke and Wasserman, 1985). Children may be less egocentric and better able to understand the world than many commentators previously gave them credit for. Gopnik and Betty Repacholi (1997) contend that by the age of eighteen months, infants have acquired the ability to determine others’ preferences based on facial expressions (Gopnik, 2010). Recent advancements in child psychology suggest that youngsters are indeed able “to select and pursue their ends,” thus making them homesteaders of their own body, legal adults, by the standard Rothbard (1998) sets out.

Rothbard’s contributions to libertarian philosophy preceded much current research into early cognitive development. The time has come to update Rothbard’s theory in light of this research.

Focusing on the caretaker, Rothbard writes that his right to make decisions on behalf of the child is not absolute:

“But surely the mother or parents may not receive the ownership of the child in absolute fee simple, because that would imply the bizarre state of affairs that a fifty-year old adult would be subject to the absolute and unquestioned jurisdiction of his seventy-year-old parent. So the parental property right must be limited in time. But it also must be limited in kind, for it surely.

he would be seen, clearly, to have engaged in kidnapping. That is exactly what a time out constitutes. Forcing someone against his will to calm down, or stand in the proverbial corner, or be confined to his bedroom is considered an assault (a threat); backing it up with physical violence would constitute a felony. Libertarian critics of spanking cannot be allowed to have it both ways, to have their cake and eat it too. If they want to treat children as full rights bearing persons, such that it would be a libertarian crime to violate the NAP against them, then they must adopt the same policies toward them as they would properly do so for other adults: the threat or the initiation of violence would be strictly prohibited. No time outs either. No one, certainly not the present authors, are making the case for harsh spankings, whippings, etc., that brutalize the child, that amount to child abuse. But, a loving and very light use of brute force can sometimes, very likely rarely, be more beneficial to the child than harmful. “This spanking hurts me more than it does you” can actually be an accurate description of this child raising technique.

⁴ There is no one who has done more to combat this type of legislative and judicial over-reach than Thomas Szasz. See on this Szasz (1963, 1979)

⁵ Gopnik, a professor of psychology at the University of California, Berkeley, specializes in cognitive and language development.
would be grotesque for a libertarian who believes in the right of self-ownership to advocate the right of a parent to murder or torture his or her children.” (Rothbard 103, 1998).

It follows that parental ownership is not an absolute but is of the nature of a guardianship relationship. In short, every baby from the moment of birth, possesses the right of self-ownership by virtue of his potential to become an adult. It would therefore be a violation of the child’s rights if a parent or caretaker were to mutilate, torture, murder or subject a child to physical or emotional violence (Rothbard 103, 1998).

The relationship between the parent and child is not the only example of trustee rights in libertarian philosophy. The theory applies as well to those who may be unable to communicate their preferences (Block, 2011). It is not disability that creates dependency. An individual may be temporarily disabled by, for example, falling under the influence of alcohol, opiates, marijuana, and other such substance that significantly reduce cognitive functioning yet hardly require legal supervision. A social drinker or recreational drug user may be so intoxicated that he may require the assistance of a caregiver, but so long as he is able to express his preferences, the appointment of a caretaker would violate his rights. The criterion upon which to base the need for a caretaker should not be mental disability, but an inability to express one’s preferences.

Rothbard asserts that a child has attained the right to be self-governing (adult status) once he “leaves or ‘runs away’ from home.”6 (Rothbard 103, 1998). If we invoke the child’s ability to express his preferences as a guide to the attainment of the full panoply of adult rights, disability, in itself, would be insufficient ground to deny them.

Strictly speaking, an individual becomes self-governing at the moment of birth. When the infant reaches the toddler stage and begins to acquire facility with language, he becomes able verbally to express his preferences. At that point, a caretaker’s rule may relax and continues to diminish as the child grows until, at age eighteen, legal emancipation begins and is rendered complete at age twenty-one. However, many individuals are qualified for partial or even complete emancipation prior to age eighteen let alone age twenty-one.

Full emancipation implies that a parent or guardian would lose all legal control of his child. However, in the free society, there would also be such a thing as partial emancipation. Here, the legal relationship takes on the nature of an implicit contract. The caretaker provides such essentials as food, education, health care and housing. In return, the child follows the caretaker’s rules. The relationship between caretaker and child, in this respect, is akin to the relation between a diner and a restaurant, at which the diner pays for his meal. If the child refuses to abide by the conditions dictated by his, caregiver, he has, as Rothbard states, “[r]egardless of his age,... the absolute right to run away and to find new foster parents who will voluntarily adopt him, or to try to exist on his own (Rothbard 103, 1998).”

But this statement has to be interpreted sympathetically. Otherwise, we arrive at the specter of a two year old throwing a tantrum, and wanting to run away from home in a fit of pique, right then and there. Surely, this cannot be the libertarian position. However, if we interpret Rothbard as saying that this can indeed be done, but not right then and there, not at a

6 In the spirit of Rothbardian terminology, we can say this occurs “when the child has homesteaded himself.”
moment’s notice, not without a by-your-leave from anyone apart from a baby in his “terrible
twos.” This is not the beginning of the process, but rather the end of it: a court must pronounce
judgment that this is indeed in the best interests of the tiny tot. Time must be used for sober
analysis of the situation. Experts (social workers, psychologists) must be brought in to verify the
facts of the case. Then and only then may this “absolute right to run away and to find new foster
parents” be fully implemented. A two year old cannot just be allowed to wander off to be on his
own, because he resents the fact that he is not allowed to eat all the ice cream he wants because
his parents fear he will get a stomach ache. If these “runaway” rights of children are to be
implemented in a reasonable way, judicial support must be acquired.

III. Applying Preference-Based Child Rights

We now have the means to examine more pointedly the ethical dilemmas involved in
determining the respective rights of children and their caretakers. Consider the case of Rebecca
Chittum and Callie Conley, switched at birth at the University of Virginia Medical Center in
presumptive mother, discovered that the child she raised as her daughter, Callie, was born as
Rebecca Chittum. Shortly thereafter, Rebecca’s biological parents, were killed in a car crash.
Rebecca’s grandparents became Callie’s caregivers. Callie’s biological mother unsuccessfully
sued for custody while seeking to maintain custody of Rebecca. (“National News Briefs”,
November 1999). Let us reiterate, since it is important to be able to see precisely who is who in
this case: Callie’s biological mother, Paula Johnson, sued for custody of Callie who was being
cared for by Rebecca’s adoptive grandparents after Rebecca’s adoptive parents were killed in a
car crash. And Paula Johnson sought to keep custody of her adoptive daughter, Rebecca. Had
Johnson prevailed in court, she would have been the mother of both babies.

The Rothbardian theory of children’s rights helps us determine the just outcome though
the result may seem curious. Rothbard poses two scenarios. The biological mother’s right may
prevail because she gave birth to the child. Or the presumptive parents’ right may prevail
because they initially raised the child.

Initially, the parents play the role of the child’s trustee. The fact of biological parenthood
defeats any claim to the contrary. In that event, Callie’s biological mother would be awarded
custody. Callie, who had thus far lived as Rebecca, the presumptive granddaughter of her current
caretakers, would be forced to live with a stranger. A preference-based approach, in sharp
contrast, looks to the child. Assuming she is capable of stating her preferences, she would choose
her guardian may even, were she capable of doing so, choose to live on her own.

Assume the switch was discovered at a time when the children were unable to express a
preference. In this case, the rights of the biological and presumptive parents would be identical.
Say two women go out to eat on a cold winters night, each wearing a black coat which they

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7 In a previous iteration of this paper, we wrote “balancing” instead of the word now that now appears in the text,
“determining.” This change was purposeful, and substantive. Libertarians do not “balance” rights. People either
have rights, or they do not, and it is the function of the libertarian analyst to shed light on which is which.
8 That is, parents have a better claim to the child than any outsiders, because of their natural link to the child
(Kinsella, 2006).
decide to leave at the coat check. Upon leaving the restaurant, each woman collects her coat from the coat check, but the attendant accidentally mixed up the two coats. Now, do the women own their original coats or do they own the new one they kept by mistake? Clearly, no matter how much time had passed, each woman would still own her original coat and have all rights to take her coat back, after all it is she who homesteaded it first. So it is in the case of the switched children. If the child is still in a trustee-dependent relationship with the guardian i.e, unable to demonstrate preference, then custody should be given to the biological mother.

Let us put this matter in other words. If the child is too young to choose, then the biological parents get the private property rights nod vis a vis the “mere” caregivers. Why? For two reasons. First, a genetic relationship is a more direct version of “homesteading” than is bringing up the baby. The mother and father have a greater connection to their offspring than someone who, due to this accident, brought up their child. Second, the fact of birth preceded, in time, what came later. Other things equal, which they are not in this case, that alone would move us strongly in the direction of awarding the child to her natural parents. Given the first point, genetic connection, these two considerations together align justice on the side of biology.

At what age is the child old enough to choose? There is no right answer to this question. Libertarian theory alone cannot vouchsafe us a clear response. There is a continuum problem here, one that no political philosophy, including libertarianism, can unambiguously answer.\(^9\) Whatever age is arbitrarily chosen, there will be youngsters below that age who are more mature than their contemporaries above that age. The only definitive answer emanating from this quarter is that the courts should decide this issue.\(^10\)

**IV. A Brief History of Children’s Rights**

The degree of freedom implied by libertarian theory, such as children’s freedom to choose their guardians or, in the alternative, emancipation, differs markedly from the contemporary view of children’s rights. But it comports with an older, widely held view of this issue. 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 (Liggio and Peden, 1978).

In the Middle Ages, children, when no longer toddlers, were taken to be miniature adults. They routinely participated in adult activities (Madoc-Jones, 1996). This attitude continued into the Renaissance, along with the widespread voluntary transfer of caregiver rights from unfit

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\(^9\)Given that statutory rape laws are justified, a position we now assume arguendo, what is the correct age at which they kick in? Clearly, going to bed with a five year old girl falls within the law, no matter how “willing” is the child. It is clear she has not yet reached, nor even come close, to the age of consent. And, of course, having intercourse with a willing 25 year old woman cannot be considered as rape. But what about 15? 16? 14? There is no clear right answer. This is a matter for the courts to determine. For more on the continuum problem, see Block and Barnett, 2008.

\(^10\) For the argument that these should be private, not governmental courts, see Benson, 1990, 2002; Friedman, 1979, 1989; Hoppe, 2001; Osterfeld, 1989; Peden, 1977; Rothbard, 1973B, 1982, 1991; Stringham, 1998-1999; Tannehill and Tannehill, 1984; Woolridge, 1970
mothers to churches but also, unfortunately, the lack of economic wealth also drove many mothers that could not afford their baby to commit infanticide (King p. 163, 2003).

During the European Renaissance, the practice arose of transferring to the Church and to lay caregivers children whose parents were thought to be unfit and that this alleged unfitness was frequently the consequence of an impoverishment that spurred the practice of infanticide. The onset of the Enlightenment, in line with developing theories of pedagogy-further eroded this older concept of children as autonomous beings (which was the view of the medieval church). Yet, in contrast to his Enlightenment view, the prevailing attitude regarding children, in pre-industrial America, was more akin to older, medieval concept of children, and this was because of the economic conditions of most Americans, at that time, conditions that required, among other things, child labor.

The view of kids as free individuals began to change during the enlightenment when adults began philosophizing about the differences between adulthood and childhood and developing theories of pedagogy. Children continued to hold onto their freedom into the industrial revolution, but such freedom was not the result of a more just society. It was an unavoidable consequence of the pre-developed America with little wealth that children had to act grownup by working and living like adults.

Then, in contrast to prevailing American attitudes toward children, the native Wintu people of Northern California more thoroughly honor the freedom/rights of children. For example, in English, if you "take a baby" somewhere, there is an implicit sense of coercion. The Wintu language puts it differently: "I went with the baby." "I watched the child" would be, "I watched with the child". The Wintu could not coerce someone even if they wanted to: language alone would not allow them to do so.11

When a Wintu child asks, “May I…?” he is not asking for permission so much as for clarification about whether or not the proposed action comports with community norms. In that way, the child feels less at the mercy of a lone adult whose standards may seem capricious and arbitrary (Griffiths, 2013). Griffiths12 tells of tribes in which “five-year-olds wield[ing] machetes with deftness and precision” and, in one instance, of an eight-year-old Igloolik13 child who carved the body of a caribou without mishap and of children in West Papua who set their own daily schedule, eating, sleeping, and playing as the spirit moved them.14

V. Conclusion

Rothbard’s theory of the natural rights of children, though radical in the contemporary American context, is normative in the context of more traditional cultures. The framework he

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11 Of course, it is not a contradiction in terms to say that this occurred. But if a language lacks even nomenclature to describe a given act, it is likely that it rarely takes place.
12 Jay Griffiths is an author who writes about her explorations of the wilderness and encounters with indigenous people on most continents.
13 Igloolik is an Inuit Hamlet in Northern Canada.
14 The determination of whether or not these claims are actually true is beyond the expertise of the present authors.
laid out was an important step in articulating rights to one of the last minorities in the United States to obtain legal and political rights, minors. The crucial issue Rothbard raises is the weight to be given to a child’s preferences in the matter of strict/mandatory vs. permissive/optional caregiving.

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