Beyond the Best Interests of Children: Four Views of the Family and of Foundational Disagreements Regarding Pediatric Decision Making

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This paper presents four different understandings of the family and their concomitant views of the authority of the family in pediatric medical decision making. These different views are grounded in robustly developed, and conflicting, worldviews supported by disparate basic premises about the nature of morality. The traditional worldviews are often found within religious communities that embrace foundational metaphysical premises at odds with the commitments of the liberal account of the family dominant in the secular culture of the West. These disputes are substantial and ultimately irresolvable by sound rational argument because of the failure to share common foundational premises and rules of evidence. It is in light of these fundamental disagreements that there is a need to evaluate critically the claims and agenda advanced by the Convention on the Rights of the Child.

Keywords: Convention on the Rights of the Child, family, pediatric medical decision making, secularism, traditionalism

I. INTRODUCTION: THE REMARKABLY CONTROVERSIAL CHARACTER OF THE FAMILY

The family is controversial. Conflicting views regarding parental authority, the rights of children, and their bearing on the bioethics of pediatric decision making, when considered apart from the status of the family, are not as provocative as when they are appreciated in terms of conflicting views of the nature of the family. The family touches on a range of moral issues that
are battles in the culture wars. The roots of the political incorrectness of the traditional family run deep. They are anchored in moral and metaphysical understandings of the nature and meaning of morality as well as the character of human flourishing that are in conflict with liberal, sociodemocratic visions of the good life and human flourishing. These deep disagreements issue in moral and ontological disputes about the nature of the family, the appropriate character of human sexual relationships, and/or for that matter the moral authority of the social unit that raises children (Engelhardt, 2007a, 2007b).

These disputes in turn fuel the many moral and cultural conflicts that underlie different views of parental authority, of the normativity of the family as a heterosexual unit, and of the propriety of gender-essentialist claims regarding differences in roles between husbands and wives and fathers and mothers. These controversies are sustained in the public forum by the collision between moral communities, religious, and otherwise, committed to disparate comprehensive traditional or post-traditional views of reality, morality, and the nature of human flourishing. Their partisans seek in various ways to reconstruct or deconstruct the family and parental authority. Some of the disputants are embedded in religious and/or traditional accounts of the human condition, whereas others are embedded in ideologies born of the Western Enlightenment and the French Revolution that give precedence to secularity, liberty, and equality. The antagonists are often sustained by intermediate social institutions and groups (e.g., ideological associations, private foundations, and particular political parties).

This exploration of the nature of the family is on many levels difficult. First and most obviously, there is the difficulty of grounding the rights of all children in liberty and autonomous choice, because children also include infants. The class of children is heterogeneous in ranging from infants who possess no autonomy to mature minors who may be only 15 years old but nevertheless may possess more maturity and autonomous decisional capacity than some adults who are widely accepted as having decisional capacity. Also and much more controversially, even when children possess as much or more decisional capacity as many adults, they often live within the thick social envelope of the family and its de facto authority and power. A reformative social policy that required the recognition of mature minors as in full or nearly full authority over their own lives independently of their life within their families and the family’s authority would substantially transform the character of the family and change the nature of pediatric decision making, a circumstance applauded by some and resisted by others.

Second, the contemporary sociology of the family compounds the difficulty of giving a conceptual account of the family. To begin with, given the widespread prevalence of divorce, parents and children can no longer be presumed to be united in the same family; however, one is to understand a family. Divorce and repeated divorce have generated complex sets of interconnections between children and biological parents, as well as other adults,
all of whom are to some extent involved in the raising of the children. This social fabric is frequently more complicated and controversial than the age-old negative portrayal of the roles of stepparents after the death and remarriage of a parent. Beyond this, many women now reproduce without benefit of marriage, often with anonymously supplied sperm. This state of affairs significantly encumbers a simple exegesis not only of parental authority but also of the nature of the family. Many human reproductive units are now increasingly informal so that it may appear to be unclear what structure of the family, if any, is usual. In many countries, married couples as a usual reproductive unit are giving way to the acceptance of registered couples as the statistical norm. This phenomenon itself is further qualified by informal agreements between women and those with whom they choose to sire their children. Then there is the increasing phenomenon of homosexual alliances involved in the raising of children. To speak of the family in traditional terms as a social unit built around the ideal of monogamous, formally married heterosexual couples and their children are consequently highly controversial. Such understandings of the family involve a view of familial unity that is often no longer the population norm and that is in addition in many ways counter-cultural. Reflections on this state of affairs has produced a complex and growing literature of different levels of sophistication and contentiousness. Against this background, the traditional concept of family has become highly politically incorrect. The salience of new views of the family and/or of new social and reproductive units and/or associations that would displace the traditional family has generated fierce battles in the culture wars (Hunter, 1992). This state of affairs underlies controversies at the foundations of the bioethics of pediatric decision making.

Third, those who are in controversy regarding the nature of the family often speak past each other because they are embedded in such different and conflicting paradigms of the family. Post-traditional, post-Christian, post-Confucian, postmodern societies lack the moral commitments needed in order to find a place for traditional forms of parental authority that are not reducible to acting in trusteeship for the best interests of children and that constrain the growing autonomy of the child. Traditional and post-traditional views of the family are separated by foundationally different moral and ontological commitments.

Fourth, in the face of robust commitments to post-traditional views of the family, the traditional family flourishes. Despite widespread family instability, if not anomie, traditional and intact families often, if not usually, act as if they were in authority over their children in ways that cannot be reduced to the best interests of their children. Moreover, they act against their children’s autonomous choices. In particular, parents often impose on their children choices that are not in the best interests of their children, but in the best interests of the family. Such impositions tend to occur without any public policy response. For example, societies generally accept parents as in authority
to emigrate to areas where the quality and extent of health care for the children may be diminished. In addition, parents often limit and focus their children’s choices in order to control and direct their future. Parents frequently act not to open their children’s future to the full range of generally secularly acceptable ideological and religious possibilities. Such constraint on the child’s future occurs in its mild forms when parents establish and impose within their family an ideology or religion that tends to limit their children’s choices, as with respect to the use of contraception and abortion. This occurs in more dramatic forms, as in the case of the Jewish circumcision of boys, where the character of the male organ is changed because of a commitment to a thick, religiously grounded, or at least community-grounded view of the child’s best interests and the strength of parental authority, so as to pursue a view that is not in accord with a general secular view of the child’s best interests.

This essay explores these disagreements and their implications for the bioethics of pediatric decision making. It does so through the prism of contrasting four different accounts of the family: a sociobiological account, a categorical account, a liberal social-constructivist account, and a libertarian social-constructivist account. It is the second account of the family, which account supports traditional familial structures, that is under pressure from liberal egalitarian ideologies, which raise the question as to why, presuming men and women are free and equal, should they in fact avail themselves of marriage with its associated traditional moral and social expectations, or at least with its traditional gender-essentialist hierarchies? The answer to such questions is de facto ever more in the negative as couples cohabit and at times reproduce bound by their own particular formal or informal agreements. These latter social units are usually best understood in terms of the third or liberal account of the family or in terms of the fourth or libertarian account. Nevertheless, children are often and traditionally treated as simply under the authority of their parents. The parents are acknowledged, within rather broad constraints, as in authority over their children beyond any consideration of the best interests of the child. Given how many families function and have traditionally functioned, it is de facto impossible to consider parents as mere trustees established by society to protect the best interests of their children under the oversight of society without a much more sustained argument regarding the account of the nature and authority of families, the moral standing of parents, and the moral weight of tradition. The challenge is to understand this geography of disagreement.

II. THE FAMILY AND THE CONVENTION ON THE RIGHTS OF THE CHILD

In this essay, special attention is given to the question of parental authority through a focus on the conflicts engendered by the Convention on the Rights
of the Child (1990). The Convention has the force of reducing parental authority to the parents acting as trustees of “the best interests of the child” (Article 3), thus creating a conflict between the traditional authority of parents (i.e., of parents being in authority over their children) and the authority of the child grounded in putative rights of children in pediatric decision making. However, appealing to the child’s best interests will not provide uncontroversial guidance. Among other things, one must decide by whose standards the child’s best interests are to be determined. Even if parents may usually affirm that they are acting in the best interests of their children, they often engage standards of best interests different from those of the general society. These differences in moral perspective express themselves in controversies regarding the provision of information concerning contraception, sexuality, and access of minors to abortion, all issues tied to family building. An illustration of such differences in best-interest standards is provided by the British case of Gillick v West Norfolk and Wisbech Area Health Authority (1985), where the court ruled against a mother who did not want her 15-year-old daughter to receive sex and contraceptive education from the local National Health Service physician. This case involves not just conflicting views of the nature of the child’s best interests (i.e., of how to appreciate and come to terms with the moral and other normative issues associated with human sexuality), but the more vexing issue of parental or family authority in and of itself (i.e., the nature and scope of the authority of parents and the family as a whole to determine the moral views of their children).

The Convention is controversial because of its far-reaching implications regarding the moral integrity of the family and the authority of parents regarding children. The Convention invites a restructuring and deflation of parental authority in light of ideologies that accent individual self-determination and self-realization as well as equality. These transformations of the family are advocated in the face of the circumstance that the traditional family is a context where, within unequal roles of authority and moral standing, family members learn self-discipline and regard for others. The post-traditional moral visions that underlie the Convention seek to anchor social institutions, including the family, in concerns for liberty and equality, as well as in terms of a libertarian focus on the emerging autonomy of the child. The traditional family and its commitments are at loggerheads with those of the Convention.

The collision between parental authority and the aspirations of the Convention reaches beyond the issue of attempting to reduce the authority of parents to the best interests of the children in giving priority to the child’s liberty interests without a critical account of whether the priority given to liberty is in the child’s best interests. First, the Convention underscores a putative right, grounded in liberty commitments that appear to be independent of any appeal to the child’s general best interests, in order to support the child’s right to participate in all pediatric decisions. For example, Article 12.1 of the Convention on the Rights of the Child endorses the participation rights of
the child and is directed to bringing parental authority into question, even where parental authority is grounded in the non-liberty–oriented best interests of the child. The Convention states: “Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.” As described, the authority of the child as a free agent is invoked as having force independently of any countervailing authority of the parents or considerations of the best interests of the child. The child is regarded as a free individual who is autonomous in the sense of having an entitlement to focus his own view of his best interests and of his flourishing, independently of, and indeed contrary to, the ideology and religious commitment of the parents and their consequent view of the child’s best interests. In this account, the child’s autonomy is given at least limited priority over other best interests of the child.

Further, Article 13.1 requires that “The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds . . . ”. This Article undermines the authority of the family to establish its own regnant ideology through the parents’ restricting their children’s access to opposing moral as well as ideological views (as when the parents might say, “You may not bring such books into our house”). The purported rights of the child advanced by the Convention are far from uncontroversial, especially for those parents who have a thick view of the human good and human flourishing. Among other things, parents may wish to restrict the access of their teenagers to information and ideas such as pornography on the web, in addition to directing their children’s sex education. Concerns for the authority of parents bear not just on the weight that one should give to the best interests of the child and the autonomy of the child as a free agent as reflected in questions regarding the scope, character, and force of the so-called participation and expression rights of children in medical decision making. They bear also on what it means to have a family and be a parent.

In summary, the Convention brings the traditional standing of families and the traditional authority of parents into question in ways both broad and fundamental by not recognizing parents as in authority over their children, save as trustees of their children’s best interests. Children are portrayed as having an agential autonomy that grounds rights to participation, expression, information, and ideological freedom that does not take into account an independent parental authority. These purported rights set the authority of children in collision with the authority of their parents. This recasting of the parental moral authority in the Convention’s account of the rights of children bring into question any sui generic status, authority, or sovereignty of the family. The result is that the family is reduced to a collection of disparate individual authority centers within the family, so that the family as a social entity does not possess an independent authority and integrity of its own.
Given the fragmented or even informal character of some family units, this state of affairs may in many cases constitute as an unavoidable default position regarding the family. The Convention’s erosion of the independence and integrity of the family also raises the question of who bears the burden of proof, and indeed what burden of proof, when it is alleged that parents are acting beyond their authority, however limited and deflated. In addition, there is the issue of whether the state or the family should presumptively be the usual judge in such matters, a matter made more salient in the case of divorced and/or disagreeing parents. When families are intact, such puzzles regarding the scope and character of parental authority and about the status, sovereignty, and the authority of the family often go unnoticed. Nevertheless, the nature, authority, and moral significance of the family, as well as the status of the family as a social ideal, engage contrary viewpoints that are in considerable conflict in most contemporary societies. These conflicts are at the heart of the culture wars. They have substantive implications for the bioethics of pediatric decision making.

III. FOUR VIEWS OF THE FAMILY

The status of the family and its proper role in pediatric decision making can be better appreciated by examining and contrasting four accounts of the moral and ontological standing of the family that underlie conflicting views of the child’s status in pediatric decision making. The first account is a sociobiological account of the family, the second is a categorical account, the third is a liberal social-constructivist account, and the fourth is a libertarian social-constructivist account. Each account of the family involves a different appreciation of familial integrity, sovereignty, and authority, as well as of the nature of parental authority, the relationship between men and women in the founding of families, and the status of children. How one judges the proper relation of children to parental authority and therefore the place of children in pediatric decision making is a function of the background moral and ideological views of the family. The four accounts of the moral and ontological standing of the family present cardinal disputes associated with the family and the status of children. This list of four accounts is not meant to be exhaustive, but rather heuristic. It is meant to underscore major contemporary areas of moral interest associated with the family and its bearing on bioethics of pediatric decision making.

First, the family is often somewhat straightforwardly considered to be a sociobiological reality, a fact of the matter, a natural social unit constituted around the long-term sexual, reproductive, and social association of a man and a woman who accept responsibility for their children. This social unit may even encompass bonds of care for the parents of the man and the woman forming the family as well as their parents for them, thus increasing
the inclusive reproductive fitness and over-all success of the family. Whether regarded as a natural sociobiological category or alternatively as a useful classificatory fiction, this account of the family allows the recognition of a tie between social and biological phenomena (the sexual, social, and reproductive pairing of men and women, and their begetting of children) and the realization of particular important human goods (e.g., the successful raising of children and the nonabandonment of parents). The family as a sociobiological reality is not just a fact of the matter. Its structure is also taken as normative, even when not associated with marriage (i.e., an informal but long-term alliance of a man and a woman would suffice). Once the family in this sense is affirmed, for example, because it supports inclusive reproductive fitness, this account implicitly affirms particular background values such as the value of the long-term survival of the human species. Because this sociobiological account of the family privileges a stable heterosexual social unit, this account has become increasingly politically, culturally, and morally controversial. It collides with post-traditional accounts that understand the family as a social unit that encompasses, as full-fledged examples of the family, associations such as single mothers and their children, single fathers and their children, as well as homosexual couples with children either adopted or produced through third-party-assisted reproduction.

Sociobiological accounts of the family become more controversial, the more they are invoked as offering a biological basis for the differences of function and authority characterizing the traditional roles of husbands and wives, as well as fathers and mothers, thus offering a biologically based support for gender essentialism. Insofar as such accounts acknowledge a natural authority of husbands over wives as well as of parents over children until children are ready to establish families of their own, such accounts collide with liberal aspirations to recast the family around and through the equal liberty of its members. As a sociobiological structure, even as a structure conducive to inclusive fitness, the family turns out not to be an obvious fact of the matter, as might first be thought, but an occasion for substantive moral and political controversy about alternative family structures and social arrangements, along with their undergirding values. Again, controversy is salient, insofar as sociobiological accounts of the family offer a biological basis for the drives and inclinations that generally undergird the functioning of traditional understandings of heterosexual, patriarchal, marital, familial structures.

Second, the family has been regarded as a normative form of social being. As such, what may have been appreciated as a sociobiological given is further understood as a morally normative category of social life and not merely a sociobiological fact of the matter. This further ontological claim regarding the reality of the family typically expresses itself in a number of subsidiary claims about the structure and constitution of the family. The ontological claim usually presupposes a morally normative structure through which families have a moral unity, so that the best interests and authority of families cannot
be reduced to the best interests of the family members without a loss of meaning. The family in this sense constitutes a domain of morally normative interactions that possesses a social reality of its own, so that the family in realizing its sphere of normativity possesses at least a limited authority over its members and against the state with its competing claims to be a guardian of the best interests of individual family members. Given this account, those who would interfere in the conduct of families, including the state, are expected to meet a burden of proof in order to veto, override, or interfere with family decisions. The more one takes seriously the independent normative character of the integrity of the family, the more the state and others bear a moral onus probandi with respect to interventions into family life and parental decision making. This reaches to pediatric decision making so that the family and parents should not bear the burden of showing that they are not acting in abusive or improper fashions. The stronger the integrity of the family, the more morally offensive will be intrusions by child advocates into the intimacy of the family.

This account’s affirmation of an original, albeit limited, sovereignty of the family over its members is not grounded merely in considerations of subsidiarity (i.e., in the claim that the family is usually the most efficient level at which to realize certain social and/or moral goods such as the raising of children and the realization of their best interests). Nor is it grounded in the consent of its members to the authority of the family. Instead, in this account of the nature of the family, the family is taken to be sui generis as an authoritative social unity. The family is appreciated as a moral unity in its own right framed by relatively non-negotiable social structures whose general contours are to be discovered, not created, and which in different instances are more or less fully or deficiently realized, so that in its proper or ideal character the family involves at least a man, his wife, and their children (and perhaps even grandparents). As a consequence, a widow with her children presents a deficient instance of a family. The family as a normative form of social being in this account constitutes the higher truth of the family as a sociobiological reality within which the human and/or personal dignity of the family members is fully realized in and through the family as a category of social reality. Within this reality, persons discover themselves and their moral obligations within a social unity sustained by and within a web of preexisting moral responsibilities. The family is recognized as a form of social life in the absence of which important possibilities for mutual acknowledgement would go unrealized.

Categorical accounts of the family are justified by different views of the nature of social reality ranging from traditional Christian and Confucian understandings to that of G. W. F. Hegel. As a morally normative way of being, the sociobiological character of the family is given an explicit moral and ontological status, thus tending to endorse sex- and age-specific categories of authority as well as a gender essentialism (i.e., men and women
recognized as ontologically distinct and as such bearers of different moral
obligations). Given the acknowledgement of the family as an independent
social reality, this account also tends to endorse familism, an affirmation of
the moral priority of relations within the family along with the authority of
the family. All of this is in contrast to an individualism that approaches per-
sons as isolated sources of authority (Fan, 2007b). In the light of this fa-
milism, children (or for that matter the parents) are not considered merely as
isolated individuals. Instead, they are appreciated in terms of their place
within their family. It is worth noting that the second account of the fam-
ily tends to produce children beyond a replacement rate (Longman, 2004).

Given an acceptance of the moral integrity and the standing of the family,
this cluster of accounts oppose any arrangement for pediatric decision making
that affirms as a norm the child as in authority apart from the family, such as
in the child’s independent medical decision making, or through participation
rights for children apart from the family (e.g., as occurs with the provision of
contraceptives to, and the sexual education of, children absent parental
permission). It is not merely that children are acknowledged as unequal to
their parents in their obligations and experiential resources, but that parents
and children are appreciated as bound by status obligations. The obligations
that connect parents and children are such to which they may never have
committed themselves and to which they need never have consented in order
for the obligations to have moral force. This account of obligations establishing
parents as in authority over their children is substantively at loggerheads
with the Convention’s moral and policy commitments and agenda, namely,
of reducing parental authority to that of being trustees of their children’s best
interests, as well as of being advocates of independent expression and
participation rights for children.

In contrast, the third or liberal account of the family is grounded in the
autonomy of its members constrained by particular concerns for liberty and
equality interests. In this account, the family is a unity created through the
consent of its participants, limited by an ideal view of proper individual self-
realization framed in terms of controlling interests in the liberty and equality
of persons. Whereas the second account recognizes the family as having an
ontological reality, the third as well as the fourth accounts are nominalistic:
the family is not treated as a reality in itself, but rather the reality of the family
is found in its constitutive members. The family rises out of and is reducible
to their agreement to collaborate. The family qua family has only a secondary
reality as a social structure framed around an affirmation of liberty and equality
as a cardinal value. So understood, the family is aimed, as far as possible, at
pursuing the free and unmanipulated collaboration of those who agree to
form a family. However, the consent authorizing the family’s structure must
be manipulated in order to ensure the affirmation of liberty and equality as
understood within a pre-established view. That is, this third understanding
regards the family as an artificially constructed social unity whose character
as well as whose legitimate lines of authority and obligation are constituted
through, and are open to reform by, the agreement of free, equal, and
consenting individuals, but only as long as their agreements are in conformity
with a background view of proper liberty and equality. This account recasts
the family into a social unity within which adult members are held not only
to have equal authority but also, as far as possible, through their mutual
agreement to be interchangeable in their familial social roles. There are no
social roles that have a prior standing or presumptive validity on the basis of
sexual difference (i.e., this account rejects gender essentialism).

Given the liberal social-constructivist account’s accent on liberty and
equality, there is a commitment to augmenting and to recognizing the par-
ticipation rights of children in pediatric decision making. Indeed, as far as
possible, robust participation rights for children are to be realized in all areas
of life. For this reason, children are as soon as is feasible to be asked not just
to give assent to treatment, but to give independent consent. Grounded in a
liberty-oriented and egalitarianly-directed ideology of human dignity, this
account of the family offers a moral perspective meant to bring illiberal
sociobiological inclinations and historically grounded, traditional social
commitments into conformity with an ideal view of the collaboration of free
and equal men and women. Because of the focus on “authentic” liberty in
contrast to choices made on the basis of a false consciousness or parental
manipulation, this account supports a child-liberationist agenda that affirms
strategies that aid children in forming their own views of morality and human
flourishing independently of their parents. The goal is for children to act on
their own views apart from their parents and in accordance with the particular
view of liberty that this account holds to be normative. Instances of this account
will vary, given different accounts of appropriate liberty and equality.

This point deserves to be underscored, given the particularity of the views
of liberty that are presupposed, and their independence from actual consent.
Liberty or authentic autonomy is understood from a hypothetical perspective
from which one is ideally to pursue one’s interests unmanipulated by tradition,
authority figures, or illiberal inclinations. As a consequence of a canonical
understanding of liberty, one is not at liberty peaceably and freely to decide
to be at liberty as one chooses. Instead, one is obliged to choose constrained
by a purportedly canonical account of free and autonomous action. Further,
one is not to alienate one’s liberty in trade for other goods, goals, or concerns.
Limiting liberty in one sphere (e.g., a child’s agreeing to follow his parents’
advice and enter a hospital for medically necessary treatment) is legitimated
when it increases the child’s over-all liberty (e.g., by maximizing the child’s
own health). As a consequence, the child’s hospitalization and treatment
should occur in a fashion that as far as possible augments the child’s capacity
as a moral agent growing in autonomy. Even though actual consent appears
to be accented in this account, actual consent is in fact limited, because the
commitments to liberty and equality are generally treated as inalienable and
unwaivable so that they may not be set aside by the actual free choice of family members. Actual free choices made in rejection of the particular normative account of liberty and equality tend to be treated as expressions of a false consciousness. For example, the education of a daughter in the obligation to be respectful and supportive of her future husband would be regarded as anti-liberal and morally corruptive in undermining appropriate autonomous self-identity and personal moral development. As already noted, a hypothetical account of the proper consent of the members of the family defines the legitimacy of actual consent. The result is a commitment to establishing policy and legal incentives that can revise traditional (e.g., patriarchal) family structures (Rawls, 1997). This liberal account of the family as a socially constructed association is taken to be the higher and reforming truth of the first sense of the family as a basic sociobiological unity and the perspective from which it should be reformed. This account is usually also advanced in critical opposition to the second account of the family.

According to the liberal social-constructivist account, familial or parental authority in pediatric decision making is legitimate only insofar as, and only for as long as, (1) the parents act as trustees of the child’s best interests, including the child’s liberty interests, and as long as (2) the child has not become a mature minor, an individual able to choose on his own and to exercise his own participation rights in pediatric decision making. Within moral side constraints that assure that the liberty and equality interests of the child are not alienated by the child’s free choice, it is the mature minor who is to be recognized as in authority as the judge of his own best interests. Because the authority of the parents is both fully reducible to the pursuit of the best interests of the child in making his own choices, and constrained by the authority of a mature minor to define his own best interests, family authority over children is at best justified in terms of considerations of subsidiarity. The family’s authority over children is to be understood to be acceptable only as long as it is reasonable to accept parents as the most effective trustees of the best interests of the child, limited by the participation rights of the child. Parents are to have authority over their children in the very sparse sense that, insofar as state institutions cannot better directly manage the raising of children, the parents should be in charge. In such circumstances, the family’s trusteeship must always be open to close social oversight and state interventions, an arrangement increasingly taken as a matter of fact, given the ubiquity of court-imposed custody agreements defining the relationship of biological but divorced parents and their children. This account of the family sustains a hermeneutic of suspicion against any claims of parental authority over their children that are not clearly fiduciary, that do not show an openness to a religiously and ideologically unconstrained future for the child, and that do not retreat before the child’s growing autonomy. It is a view that is opposed to children being raised within a thickly religious or ideological context unless that ideology affirms the proper view of liberty
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and equality. This liberty- and equality-based account of children tends as well to invite the state to reform parent-child relationships so as to render them compatible with its account of the liberty and equality of children.

This third account of the family, through its accent on liberty and equality, is anti-traditional. It has been supported by some feminists, homosexual activists, and other defenders of post-traditional moral and cultural understandings of social structures who seek to liberate the family from socio-biological constraints, patriarchal structures, and the confines of traditional moral, social, and religious norms by pursuing goals ranging from achieving equality for women to empowering children to have their own view of proper action, so as to be effective moral agents in medical decision making as soon and as far as is feasible. In referring to “family,” this account of the family does not assume that the parents are united in a formal marriage, or that the adults of the family unit are of opposite sexes. Because of this account’s commitment to equality, the background values undergirding this view of the family encourage suspicion regarding the traditional family itself. The family, after all, has tended to be authoritarian and patriarchal as well as a major impediment to equality in general and to the realization of fair equality of opportunity in particular, in that intact families tend to regard themselves as social units with goals and interests that often tend to collide with the egalitarian goals and interests of a post-traditional society. Families tend to be focused more on the good of the family than on the good of society.

The liberal social-constructivist approach to the family and its views regarding the authority of parents over their children confronts the problem that there is no uncontroversial moral view with content through which to give content to this account of the family and thus to ground this account’s claims. All concrete accounts of the best interests of spouses and children, as well as of human flourishing, presuppose one among the many possible particular rankings of core values and of right-making conditions. The question is which among the competing accounts and their rankings ought to be embraced. To justify the third account as canonical, one needs first to secure a particular moral vision, a particular Sittlichkeit, such as that to which Hegel appeals. The third account presupposes the contingent content of a particular sociohistorically embedded moral perspective drawn from the Enlightenment and the results of the French Revolution, which produced these different views of the priority of liberty and equality (Engelhardt, 1996, 2000, 2006).

The liberal social-constructivist account of the family, as a consequence of the salience of moral pluralism, turns out itself to be plural as well as to be only one particular cluster of accounts grounded in one of a number of possible approaches to moral views (Engelhardt, 1996, 2000, 2002, 2006).

The fourth view of the family escapes the challenge posed by moral pluralism of establishing a particular moral content (e.g., a particular ranking of goods) as morally canonical in that this account of the family is grounded in
the actual, nonrationally reconstructed consent of the family members (that may or may not include the biological parents of the children) to the family structure being established, a structure that may in fact be non-liberal and non-egalitarian. Family members, in remaining members of a family, convey legitimacy to the family’s authority over its members through the act of remaining within the family. By remaining within his family and by not seeking exit from the family (e.g., “As long as you stay in our house, you will act according to the family’s rules”), a child agrees to place himself under the authority of the family. As the child grows in decisional capacity, the child’s consent to the status quo also grows in its force. Because the libertarian account of the family presumes no particular normative view of the value of liberty, but only a recognition of the authorizing force of permission, this view can recognize both a progressive growth in and alienation of autonomy by the child to the family as the child grows in decisional capacity, thus further authorizing the child’s submission to the authority of the family. Because the family is a face-to-face relationship, the consent of persons to be under the authority of a particular family with its particular view of family sovereignty is more easily demonstrable than the consent of citizens to be under the authority of any particular state where such face-to-face consent does not occur. In addition, the constraints imposed by families on their members are usually far less than those imposed by states on their citizens. For example, it is usually easier to exit one’s family and to live on one’s own apart from one’s family as an emancipated minor than to renounce one’s citizenship and gain citizenship in another state.

The libertarian account of the family, like the third or liberal account, regards the family as a social construction or creation in contrast to the second or categorical account, which regards the family as a social unity or structure to be discovered. Unlike the third or liberal account, which is grounded in a particular view of liberty and equality that is to mold and direct the choices of parents and children, as well as to de-legitimate illiberal choices made by both wives and children under the ideological constraints of husbands and parents, the libertarian account accepts actual choice as legitimating whatever choices are made. The third account, given its commitments to liberty and equality, is directed against traditionalist versions of the second account that affirms robust and independent parental authority, as well as against traditional heterosexual and gender-essentialist understandings of marriage. In contrast, in the fourth or libertarian account where authorizing consent is unconstrained by any prior view of liberty and equality, family members are free to consent not to be free and not to be equal. Members of a family are at liberty to submit to family authority in whatever areas, including pediatric decision making, they choose. It is the authorizing force of consent that is directing, not a prior guiding view of how husbands and wives, parents and children, should associate and interact within families grounded in an antecedent contrasting view of liberty and equality. The libertarian social
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constructivist account thus compasses without prejudice both traditional and post-traditional families, as well as both traditional and post-traditional approaches to parental authority and thus to pediatric decision making.

In summary, the second, third, and fourth accounts in different ways reinterpret the family as a sociobiological fact of the matter, in the process warranting quite different approaches to pediatric decision making. The second or categorical account locates the authority of parents over their children not in the best interests of the children, but in the authority of the family as a way of social unity that has its own reality. This does not mean that within the categorical account considerations of the best interests of the child could not justify interventions by the state or others to protect family members. But the plausibility of such interventions would require meeting a substantive burden of proof for their justification. The third or liberal account of the family as grounded in concerns for liberty and equality lies at the roots of the claims made by the Convention on the Rights of the Child. Both the third account of the family and the Convention presuppose as normative a particular thick view of liberty and equality. The fourth account and its approach to pediatric decision making are grounded in the authorization of actual consent. Whereas the third account is critical of the second account and its affirmation of traditional parental authority, the fourth account can accept traditional views of the family, but only as a social construction, not as a \textit{sui generis} social unity or ontological fact given prior to the family’s authorization through consent. The fourth or libertarian account would thus affirm the position of the Convention for families that endorsed its undergirding ideology.

IV. CRITICALLY REEXAMINING THE STATUS OF THE FAMILY AND OF CHILDREN: FACING INTRACTIBLE DISPUTES REGARDING THE BIOETHICS OF PEDIATRIC DECISION MAKING

There is no one view of the family and what it ought to be. This diversity of views regarding the family grounds conflicting views of the family and of the roles parents should play in pediatric decision making. This plurality of views indicates that the Convention on the Rights of the Child is far from reflecting uncontroversial background values, uncontroversial social structures, or a universally shared approach to pediatric decision making. The Convention does not even reflect actual practices in many developed countries. Instead, it appears rather to be a manifesto on behalf of one particular moral vision regarding proper family structure and norms for pediatric decision making. In fact, the actual range of ways in which parents are widely accepted as properly governing their children currently violates the constraints proposed by the Convention on the Rights of the Child. \textit{Pace} the Convention, there is at least an informal de facto acceptance of the family’s authority over its children, even in the face of the mature minor’s capacity to make
reasonable decisions. To take one example of robust cultural divergence from the view endorsed by the Convention, family-based approaches to medical decision making continue to have an important place in Chinese culture (Fan and Li, 2004). They are generally accepted in Hong Kong medical law and practice (Tse and Tao, 2004). Culture and ordinary practice support family-based practices of consent for medical treatment and presume a moral and legal space for family autonomy and authority (Chan, 2004; Cong, 2004). The submission of the child to the authority of the family within Western cultures as a matter of fact does not generally conform to the Convention on the Rights of the Child. In particular, in actual practice in most states of the American Union, much more room exists for family authority than the convention or even the requirements of local black-letter law might initially suggest.

The result is that medical treatment decisions can usually at law be made by parents on behalf of the children for a wide range of medical choices, even when those minor children could also be recognized at law to be in legal authority to make those medical decisions on their own. In part, this is the case because common law supports parental rights to control their children, including having access to their unemancipated mature minors’ medical records. In short, there is considerable latitude of authority under which, in the absence of specific contrary legislation, parents in the absence of any formal emancipation of the minor can make decisions for family members (Boisaubin, 2004; Cherry and Engelhardt, 2004). In part, this occurs de facto when there is an ideological agreement or concert on the part of parents and physicians. This is also the case because considerable familial autonomy and authority are accepted as existing in their own right at law, as long as this has not generally been set aside by statute (Boisaubin, Chu, and Catalano, 2007). This family authority is strengthened at the level of actual practice by traditional moral and religious commitments that support traditional family structures. The result is that in America, matters of actual practice frequently have an analogy to practice patterns in Hong Kong: the best interests and emerging autonomy of the child are officially underscored, whereas familial autonomy and authority generally flourish (Cherry and Engelhardt, 2004). This state of affairs leads to a tension between how families actually function and the aspirations of the Convention, thus intensifying the culture wars in pediatric decision making (Fan and Tao, 2004). This state of affairs also leads to the circumstance that there is less state interference in family decisions than surface commitments to liberty and equality as well as to the Convention on the Rights of the Child might initially seem to require.

In summary, we are confronted with foundationally disparate views of the nature of the family and of the authority of the family in pediatric decision making. These different views are embedded in robust, well-developed, and conflicting worldviews supported by different basic premises and rules of
moral evidence. The traditional varieties of these worldviews are often nested within religious communities that embrace foundational metaphysical premises at odds with the commitments of the third or liberal account of the family and of much of the dominant secular culture of the West. In addition, insofar as there are biological bases for inclinations that favor behaviors that support traditional approaches to the family, this “hard-wiring of humans” adds a biological basis for the contentions we face. The disputes at stake are substantial, often passionate, and intractable to resolution by sound rational argument because of the failure to share common basic premises, rules of evidence, and/or understandings of who is in authority to resolve the disputes. In the face of these disagreements, it will be important carefully to lay out and evaluate the geography of the disputes regarding the family and the character of proper pediatric decision making. One will need as well critically to assess the claims and agendas advanced by the Convention on the Rights of the Child.

NOTES

1. The literature directed to describing and evaluating the recasting and/or disintegration of the traditional family is vast and heterogeneous. See, for example, Blankenhorn (1996), Gallagher (1996), Whitehead (1998), Waite and Gallagher (2001), and Baskerville (2007).

2. An interesting example of the continued recognition of the robust authority of parents is provided by the supreme court of the state of Oregon, which has affirmed the rights of parents to have their sons circumcised. See Boldt v. Boldt, 210 Or App 368, 150 P3d 1115 (2006), in the Supreme Court of Oregon, January 25, 2008. For an introduction to some of the controversies regarding circumcision, see Dekkers, Hoffer, and Wils (2005).

3. The Convention on the Rights of the Child, adopted on November 20, 1989, and made effective as of September 2, 1990, was signed by 189 nations, but not by the United States. The actual legal force of the Convention is unclear in many if not most jurisdictions.


5. Chinese culture has maintained a complex commitment to traditional family structures. For an account of the tie between Confucian thought and its commitment to traditional family structures, see Fan (2007a, 2007b, 2009).

6. Hegel provides a categorical account of social reality. See G. W. F. Hegel, Elements of the philosophy of right §158–80, which affirms a categorical view of the family. In that account, the “family” is a social category that realizes the truth of a sociobiological reality. Absent an ontological realization of the sociobiological reality of the family as a categorical reality, the appreciation of the family is held to be one-sided and incomplete. This categorical interpretation of Hegel’s claims has been developed in Hartmann (1988). See, also, Engelhardt (1994, 211–24).

7. The family is in its very structure and focus anti-egalitarian. See Fishkin (1983).

REFERENCES


Gillick v West Norfolk and Wisbech Area Health Authority. 1985. 3 All ER 402 (HL).