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PARENTS AS LIBERAL FIDUCIARIES

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Abstract

The relationship between parents and children is unique in the law. On the one hand, parents exercise more power over their children than is found in any legal relationship other than ownership; but parents, unlike owners, must act to promote their children's welfare. At the same time, the parent-child relationship poses perhaps the single most difficult challenge to the liberal aspirations of private law—at once committed to not endorsing some contested view of the good life; and to letting individuals, including children, decide for themselves.

This Article outlines a novel theory of the legal relationship between parents and children as a kind of distinctively "liberal trust." Just as trustees in property are empowered to make decisions in the "best interests" of their beneficiaries, parents exercise broad legal powers in their children's "best interests." But unlike trust law, which endorses a particular view of what the interests of beneficiaries are, family law, for reasons of liberalism, leaves up to parents how to think about their children's welfare.

On this view, some kinds of parental behavior—that not in the interests of children on the parent's own terms, for example—violates the duties of the parental role; a principle enforced in some cases by specified rules, such as abuse and neglect laws. At the same time, the law sometimes imposes limits on parental behavior for reasons external to the logic of the parent-child relationship—certain aspects of educational minima, for example. Seeing parenthood in this way helps situate it among private law relationships and sheds light on its normative structure.

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INTRODUCTION

"You've talked to my father," says a young Michael Corleone, "about my future? My future?"[1] "Mikey," Tom Hagen replies, "he has high hopes for you."[2] There are few relationships in life as familiar, as invariably complex, as those between parents and their children—universal and in every case unique; the *Telemachy*[3] to *King Lear*,[4] *Pride and Prejudice*[5] to *The Road*[6] (not to mention, of course, *Oedipus*).[7] At the same time, the parent-child relationship is a *legal relationship*—comprised of a specified bundle of legal powers and duties the law allocates between persons.[8] Roughly, parenthood is a legal relationship that grants parents broad powers over the legal lives of their children, subject to the duty to use those powers in their children's "welfare;" to promote their "best interests."[9]

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[1] The Godfather Part II (Paramount Pictures – 1974).

[2] *Id.*

[3] HOMER, THE ODYSSEY (Emily Wilson, trans., 2017).

[4] WILLIAM SHAKESPEARE, KING LEAR (1606).

[5] JANE AUSTEN, PRIDE AND PREJUDICE (Penguin Classics ed. 2007)

[6] CORMAC MCCARTHY, THE ROAD (2006).

[7] SOPHOCLES, THREE THEBAN PLAYS: ANTIGONE; OEDIPUS THE KING; OEDIPUS AT COLONUS (Robert Fagles trans., 1984); *see also, e.g.*, Katharine K. Baker, *Equality and Family Autonomy*, 24 U. PA. J. CONST. L. 412, 458 (2022) ("Children in this country are raised in many different kinds of what one might call families and by many people whom one might or might not call parents.").

[8] *See, e.g.*, Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L. J. 1448, 1455 (2018) (describing the way in which the legal relationship of parents and children is constructed by law); GREGG STRAUSS, RECONSTRUCTING PARENTAGE 9 (2025) (using "parenthood" to "refer to the bundle of parental rights and duties" constructed by law).

[9] *See, e.g.*, PIERCE V. SOC'Y OF SISTERS, 268 U.S. 510 (1925) (holding that the parental power to "direct the upbringing and education of children under their control" is a "fundamental" constitutional right); TROXEL V. GRANVILLE, 530 U.S. 57 (2000) (holding that parents have a constitutional right to decode who their children interact with); PARHAM V. J.R., 442 U.S. 584, 602 (1979) (recognizing the "family as a unit with broad parental authority over minor children"); Angela R. Holder, *Special Categories of Consent: Minors and Handicapped Newborns*, in 3 TREATISE ON HEALTH CARE LAW (Michael G. MacDonald et al. eds., 1991) § 19.01 (describing parents' common law right to make medical decisions on behalf of their children); *see also* MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: A HISTORY OF CHILD CUSTODY IN THE UNITED STATES 6–7 (1994) (recognizing that broad parental powers have always been constrained by the duty to act in the best interests of children in American law); *see also* Scott Altman, *Are Parents Fiduciaries?*, 42 L. & PHIL. 411, 412 (2023) ("Parents exercise broad discretion while making choices for vulnerable people.").

The language here is difficult, because as far as I can tell, the law and the literature uses phrases like "best interests," "interests," and "welfare" more or less interchangeably in both family and fiduciary law. The important point is that all three of these phrases suggest a posture of decision-making oriented towards what is *good for* an entity, rather than what that entity *wants* (or some other standard). *See infra* Part II.A.

The unique content of the parent-child relationship has long challenged legal theory.[10] Parenthood is, indeed, difficult to situate among other legal relationships—parents have more non-consensual power over their children than anywhere in private law save property; but unlike owners, parents must exercise their powers in their children's interests.[11] At the same time, making sense of the legal relationship between parents and children poses persistent challenges to the *liberal* aspirations of private law—committed as it is to leaving contested, foundational questions of how life ought to be lived to *individuals*; both parents *and* (at least one day) children.[12]

This Article offers a novel account of the legal content of the parent-child relationship as a kind of "liberal trust." As scholars have long suggested,[13] the relationship between parents and children is a *fiduciary* legal relationship—like that between trustees and beneficiaries, agents and principals, directors and shareholders, and many more, parenthood falls into the set of legal relationships in which one person is empowered to make decisions on behalf of another, subject to some standard.[14] Indeed, just like trustees—fiduciaries empowered to make property management decisions on behalf of its "beneficial owners"—parents are directed to use their wide-

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[10] *See, e.g.*, David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 525, 545 (2000) ("[T]he Court's parental-rights cases remain profoundly murky.")

[11] *See infra* Part I.C.

[12] *See, e.g.*, Leszek Kolakowski, *On the Practicality of Liberalism: What About the Children?*, 7 CRITICAL REV. 1, 5 (1993) ("The matter at hand is whether a radically liberal society is conceivable. I think not, and one of the main reasons for this answer is children."); Christie J. Hartley, *Political liberalism and children*, 175 PHIL. STUDS. 1095, 1108 (2018) ("[T]he state, as the ultimate protector of the interests of children as citizens, has an interest in making sure that all children are educated so that, when they reach adulthood, they can pursue their interests and assume the responsibilities of citizenship in a liberal democratic state."); *see also* James Toomey, *"Religion," Before Darwin*, 101 WASH. U. L. REV. 661, 697 (2024) ("[L]iberalism is a political philosophy that commits the government to agnosticism as to the truth of citizens' worldviews."); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 938 (1996) ("[L]iberal societies characteristically renounce the use of coercive state power to impose even reasonable conceptions of the good life on persons who adhere to other—but likewise reasonable—conceptions.").

[13] *See, e.g.*, Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2401 (1995) ("[I]n many respects, current law [of parents and children] fits comfortably within the fiduciary paradigm."); Lionel Smith, *Parenthood is a Fiduciary Relationship*, 70 U. TORONTO L. J. 395, 395 (2020) ("In a range of contexts, Canadian and US courts have held that parents stand in a fiduciary relationship with their minor children.").

[14] *See, e.g.*, James Toomey, *Fiduciary Standards*, 51 ACTEC L.J. (forthcoming 2026) (manuscript at 5) ("[A]ll fiduciary relationships involve one person deciding (in some sense) 'on behalf of' another, constrained by some standard . . . ."); LIONEL SMITH, THE LAW OF LOYALTY (2023) (theorizing about the set of legal relationships in which "a person has been authorized and empowered to carry out a mission, an assignment, a function, a task, or a charge for or on behalf of someone else").

ranging legal powers in the "best interests" their children.[15]

But parents and trustees act in the "best interests" of their "beneficiaries" in very different ways. Trust law tells us the standard by which the "best interests" of beneficiaries are to be assessed—roughly, their best *financial* interests, according to mainstream understandings of what those are.[16] A liberal legal regime could not do anything like that in the parent-child context—the law could not incorporate a normative standard according to which parents must assess the best interests of children without endorsing some particular, contested view of how life ought to be lived.[17] Instead, unlike in trust, the law leaves to parents the criteria by which they are to assess the welfare of their children—parents decide in the best interests of their children *as they, in good faith,* understand what those interests are.[18] Parents are, from this perspective, a distinctively *liberal* sort of trustee; "trustees" who, for reasons of liberalism, are left to decide *what* the "interests" of their "beneficiaries" *are*.

This understanding of the parent-child relationship is a descriptive one—an account of a stylized legal relationship, based in the paradigmatic case of a marital family, as the law-on-the-books has it.[19] To be sure, many children today are raised in families that do not resemble this paradigm; cases in which the law faces normative questions about (among other things) allocating the role of parenthood.[20] Moreover, scholars have argued—forcefully and persuasively—that the way the law of parenthood is implemented in minority communities looks little like a *liberal* trust, and that, more like the classical trust, the law in practice holds parents to a specific conception of the best interests of children—namely, that of white, mainstream society.[21] In the end,

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[15] *See, e.g.*, Jeffrey Shulman, *The Parent as (Mere) Educational Trustee: Whose Education Is It, Anyway?*, 89 NEB. L. REV. 290, 304 (2010) ("The notion of parenting as a trust was a longstanding principle of the common law."); Alicia Ouellette, *Shaping Parental Authority Over Children's Bodies*, 85 IND. L. J. 955, 958–59 (2010) ("I suggest a trust-based construct of the parent-child relationship . . . .").

[16] *See, infra* Part II.B; *see also* Toomey, *Fiduciary Standards*, *supra* note 14, at 24–26 (describing the standards governing the decision-making of trustees as in the "best interests," defined with reference to prevailing social understandings, of beneficiaries).

[17] *See infra* Part II.C.

[18] *See infra* Part III.A.

[19] *See infra* Part I.A.

[20] *See, e.g.*, Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 167 (2015) (noting that "more than four in ten" children are now born to unmarried parents).

[21] *See, e.g.*, Mariela Olivares, *The Unpragmatic Family Law of Marginalized Families*, 136 HARV. L. REV. F. 363, 364 (2023) ("[T]he law surrounding families of color, immigrant families, poor families, and families of other marginalized identities is not practically the same law that governs families who do not share these identity markers."); S. Lisa Washington, *Weaponizing Fear*, 132 YALE L. J. FORUM 163, 166–67 (2022) ("White, middle-class, heteronormative norms dictate the standard of child neglect."); Sarah H. Lorr,

it is a normative question whether the law *ought* to conceptualize parenthood as a liberal trust or along other lines—but the model offered here reveals that the law's prescription of a particular standard for parenting is at least inconsistent with its otherwise liberal goals.[22]

Moreover, this account is an inferential—of course the law does not *call* parents "liberal trustees" (nor trustees "illiberal parents"). And obviously there are important differences in the ways in which the law conceptualizes and implements the relationships of parenthood and trust.[23] To some extent, of course the parent-child relationship is *sui generis*; every distinct legal relationship is, and it would be surprising if one as obviously distinctive as that between parents and children weren't.[24] But setting aside procedural matters and verbal choices, the claim is that in *substance* there are important similarities in the way the law constitutes these different roles—sufficient at least to fruitfully analogize; shedding light on the content of the respective relationships and the normative choices around which they are organized.[25]

Indeed, although descriptive, the account helps make sense of the normative architecture of both private and family law. On this account, some exercises of parental power violate the logic of the parental relationship—for example, decisions that are not made for the welfare of the children on the parents' own terms.[26] And some of the specific rules we see governing parental behavior can be understood as crystallizations of the logic of the parental relationship, designed to efficiently police it—as in certain

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Disabling Families, 76 STAN. L. REV. 1255, 1255 (2024) ("The family regulation system is increasingly notorious for harming the very families that it ostensibly aims to protect. Under the guise of advancing child welfare, Black, Brown, Native, and poor families are disproportionately surveilled, judged, and separated."); *see also generally* DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD (2022) (describing the law of parenthood in minority communities)

[22] *Cf., e.g.*, James Toomey, *Property's Boundaries*, 109 VA. L. REV. 131, 151–52 (2023) (arguing that it is a descriptive question what the concept of ownership is, but a normative question whether the law ought to recognize private ownership); ADOLF REINACH, THE APRIORI FOUNDATIONS OF THE PRIVATE LAW 72 (John F. Crosby, ed., 1983) (same).

[23] *See, e.g.*, Elizabeth S. Scott & Ben Chen, *Fiduciary Principles in Family Law*, in EVAN J. CRIDDLE, PAUL B. MILLER & ROBERT H. SITKOFF, EDS., THE OXFORD HANDBOOK OF FIDUCIARY LAW 227, 227 (2019) (noting that enforcement of fiduciary duties in family law "(at least when family relationships are intact) is largely accomplished through informal bonding and monitoring mechanisms").

[24] *See, e.g.*, HANS KELSEN, GENERAL THEORY OF LAW AND STATE 374 (Andres Wedberg, trans., 1945) ("All quest for scientific knowledge is motivated by an endeavor to find a unity in the apparent multiplicity of phenomena.").

[25] *See, e.g.*, *infra* Part I.A; Scott & Scott, *supra* note 13, at 2453 (suggesting that the fiduciary model "explains the deep structure of legal regulation of the parent-child relationship" "to a considerable extent").

[26] *See infra* Part III.A.

prohibitions on abuse and neglect.[27] Moreover, there may be conduct the law wants to require or proscribe for reasons other than those that led it to organize the relationship the way it has in the first place—"external" constraints on parental conduct; which may be the best way to make sense of certain educational minima.[28] From trust to contract to property, private law relationships are ubiquitously designed in this way—with an internal logic, distilled into particularized rules, subject to external constraints.[29]

The argument proceeds in four Parts. In Part I, after a brief methodological justification for theorizing by way of stylized private law relationships, as I will throughout, I summarize the law of the parent-child relationship, and begin to make sense of it alongside others. Like property owners, parents have broad powers over their children; but unlike owners, their decision-making is subject to a standard. Fiduciary law, not property, is the better lens.

Part II lays out the theory of parents as liberal trustees of their children. Like ordinary trustees, parents have a legal duty to act in their children's best interests. But unlike trust law, the law of parenthood does not prescribe the criterion by which parents must understand the best interests of their children. Parents are, instead, to decide the welfare of their children as *they* understand their interests—a kind of *liberal* trust.

Part III discusses how this standard is operationalized in the law. On the one hand, the model accommodates a wide range of parental decisions. On the other, it rules out parental decision-making in bad faith and not in the best interests of the children by the parents' own lights. Moreover, the law has crystallized this logic into particular rules constraining parental behavior, while subjecting it to constraints external to the logic of the relationship; a dynamic seen throughout the law of legal relationships.

Finally, in Part IV, I discuss some of the implications of this account—clarifying, if not resolving, normative questions about allocating the role of parenthood, terminating it, and circumscribing its limits, while shedding light on the modular architecture of private law relationships in general.

I. Legal Relationships and Parental Powers

The relationship between parents and children is a *legal relationship*—that is, it is a relationship that the law defines as a particular bundle of legal powers, rights, and duties. It is a rather distinctive one—characterized by more non-consensual power than in any other relationship save property ownership; but unlike ownership, family law imposes *duties* on parents in the

[27] *See infra* Part III.B.
[28] *See infra* Part III.C.
[29] *See infra* Part III.D.

exercise of their powers. This Part surveys the (stylized) law of parenthood and situates it within the constellation of (similarly stylized) legal relationships that comprise private law.

First, a note on methodology. The content of the "parent-child relationship," as I'm theorizing about it, is a stylized, circumscribed bundle of legal powers, rights, and duties—as will be all of the relationships against which we'll compare it. Next, I discuss the particular set of rights, powers, and duties with which the law characterizes parenthood and note the ways in which it differs from others. As we'll see, parenthood fits most comfortably in the *fiduciary law* paradigm—the set of legal relationships in which one person is empowered to exercise legal powers "on behalf of" another, subject to some standard.

A. Private Law and Private Law Relationships

My project in this paper is to theorize the parent-child relationship as a *legal relationship*; a particular bundle of legal powers, rights, and duties held between persons that the law constitutes and allocates to achieve its normative goals.[30] From this perspective, parenthood is hardly the only legal relationship—indeed, "private law," the part of the law concerned with interactions between private persons, is in many ways the *law of legal relationships*.[31] Private law relationships, from contract to property, trust to agency, marriage to business organizations, are, just like parenthood, characterized as particular bundles of legal powers, rights, and duties; allocated in diverse ways.[32]

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[30] *See, e.g.*, Joshua Getzler, *Patterns of Fusion*, in PETER BIRKS, ED., THE CLASSIFICATION OF OBLIGATIONS (1997) (manuscript at 9) ("An obligation was most simply a personal tie, a binding together of persons at law; 'obligatio est iuris vinculum.'").

[31] *See, e.g.*, ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 1 (1995) ("The most striking feature of private law is that it directly connects two parties through the phenomenon of liability."); Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1397 (2016) ("The intrinsic value of private law lies in its construction of frameworks of respectful interaction—of just relationships—among genuinely free and equal individuals."); Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 WM. & MARY L. REV. 1873, 1887 (2011) ("The bilateral structure of private law . . . is central to private law decision making.").

[32] *See, e.g.*, JOHN GARDNER, FROM PERSONAL LIFE TO PRIVATE LAW 8 (2018) (noting that private law is organized around the "ordinary human concerns that also apply to you and me when we related to each other"); *see also* Jeffrey A. Pojanowski, *Private Law in the Gaps*, 82 FORDHAM L. REV. 1689, 1704 (2014) (distinguishing contract and tort as private law relationships circumscribed by different sets of legal powers, rights, duties, and obligations); Meredith M. Render, *The Concept of Property*, 78 U. PITT. L. REV. 437, 440 (2017) (defending property as a conceptually distinct area of law circumscribed by a particular set of legal powers).

From this perspective, one way to make sense of the legal relationship of parenthood is to situate it alongside *other* legal relationships—that is, theorize about how it is similar to and different from other relationships, and about what might account for these similarities and differences.[33] Such a project is partly taxonomic—at a minimum, it can give us a better picture of the range of legal relationships that make up private law.[34] At the same time, it is not merely an exercise in carving up the law for its own sake—as we'll see, getting a clearer picture of the content of the parent-child relationship can shed light on its *normative* structure; on the normative choices our law has made in constituting parenthood the way it has, and how it might be otherwise.[35]

In this endeavor, we'll be taking each distinct private law relationship in a highly stylized way. We'll be taking the parent-child relationship, for instance, as characterized by *broad* parental powers—as the law-on-the-books has it; but which many commentators have suggested the law in practice in some contexts does not.[36] We'll approach all of the legal relationships under discussion in a similarly stylized way—I'll suggest, for example, that property law is essentially organized around arbitrary control of owners,[37] aware, of course, that there are situations the law calls "ownership" in which it does not recognize, for instance, the arbitrary power to destroy or abandon.[38] In practice, legal relationships are diverse not only *across different* relationships, but *within* what the law (at least) *calls* each given relationship.[39]

But, of course, in physics masses don't really occupy points and air exerts

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[33] *See infra* Part I.D; Toomey, *Fiduciary Standards*, *supra* note 14, at 24–32 (taxonomizing different fiduciary relationships as governed by different duties).

[34] *See id.*, *see also infra* Part III.D.

[35] *See infra* Part IV.A.

[36] *See supra* note 21.

[37] *See infra* Part I.C.

[38] *See, e.g.*, EYERMAN V. MERCANTILE TRUST CO., N.A., 524 S.W. 2d 210 (Mo. Ct. App. 1975) (holding that an owner did not have the right to destroy real property posthumously); POCONO SPRINGS CIVIC ASS'N V. MACKENZIE, 667 A.2d 233 (Pa. Sup. Ct. 1995) (holding that owners do not have the right to abandon real property).

[39] *See, e.g.*, Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. CIN. L. REV. 57, 58 (2013) ("Seen as a bundle of rights, property is not monolithic but is composed of pieces (sometimes called 'sticks') that are combined together but can be disentangled."); Barry Hoffmaster, *Between the Sacred and Profane: Bodies, Property, and Patents in the Moore Case*, 7 INTELL. PROP. J. 115, 128–30 (1992) (arguing that there is no essence to the concept of property in law).

resistance.[40] All theorizing is stylization.[41] The question in any case is whether the theory *works*—that is, whether the perspective helps us make sense of the parent-child relationship in the law, its place among private law relationships, and the normative commitments its structure might presuppose.[42] I can only leave the ultimate verdict on these matters to the reader.[43] But it is worth noting that our goal here is to make sense of the *content* of the parent-child alongside the *content* of other legal relationships—not whether the law could get away with *calling* parenthood "property," or "contract," or anything else; our inquiry is into substance, not semantics.[44] It is indeed *ideal types* with which we are concerned.[45]

With these caveats of methodology in mind, then, let's turn to the law of the parent-child relationship.

B. The Law of Parents and Children

Our project is to theorize the parent-child relationship as a legal relationship comprised of a distinctive set of powers, rights, and duties. From that perspective, perhaps the most distinctive feature of parenthood is the *broad* suite of powers the law grants parents to make decisions over and for their children.[46] Indeed, it is not an exaggeration to say that parents are

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[40] *See, e.g.*, AXEL GELFERT, HOW TO DO SCIENCE WITH MODELS (2016) (discussing the role of theoretical simplification for the purpose of modeling in science); *see also* Roman Frigg & Stephan Hartmann, *Models in Science*, Edward N. Zalta & Uri Nodelman, eds., Stan. Encyc. Phil (2025), https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=models-science (same).

[41] *See, e.g.*, Demetris Portides, *Thinking about idealization, abstraction and scientific models: an introduction*, 198 SYNTHESE 5849, 5849 (2021) ("[A] model represents a physical system in an abstract and idealized way."); Michael Weisberg, *Three Kinds of Idealization*, 104 J. PHIL. 639, 639 (2007) ("Philosophers of science increasingly recognize the importance of *idealization*: the intentional introduction of distortion into scientific theories.").

[42] *See, e.g.*, Michael Strevens, *Permissible idealizations for the purpose of prediction*, 85 STUDS. HIST. & PHIL. OF SCI. PT. A 92, 92 (2021) (defending idealization in theory construction for the purpose of making predications and explaining phenomena).

[43] *See infra* Part IV.

[44] *Cf., e.g.*, Scott & Scott, *supra* note 13, at 2456 (distinguishing the "*rhetoric* of parental rights" from the substance of the legal relationship).

[45] *See supra* note 41; *cf. also* NOAM CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX 1 (50th Ann. Ed. 1965) ("Linguistic theory is concerned primarily with an ideal speaker-listener . . . .").

[46] *See, e.g.*, *supra* note 9; *see also* Emily Buss, *"Parental" Rights*, 88 VA. L. REV. 635, 656 (2002) (describing the "tremendous degree of control" the law grants parents over the rights of their children); Jessica Feinberg, *Parent Zero*, 55 U.C. DAVIS L. REV. 2271, 2274 (2022) ("[L]egal parents enjoy rights relating to important matters such as custody, visitation, and medical decision-making, as well as core obligations that relate to caring for and supporting the child."); *see also* Anne C. Dailey & Laura A. Rosenbury, *The New Parental*

empowered to act for their children in virtually any way that legal persons can act for *themselves*—parents select their children's medical care;[47] decide how and when to discipline them;[48] set the course of their education;[49] govern their social lives and decide with whom they may interact;[50] and more.[51] The set of legal powers that the law grants parents over their children, from this perspective, is more or less *plenary*.[52]

And in addition to its scope, parenthood is also notably *non-consensual*, at least from the child's perspective.[53] At the moment of a child's birth, the law assigns it at least one parent—instantaneously, by operation of law, and without asking anyone.[54] Parents can exit the relationship by putting their

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Rights, 71 DUKE L. J. 75, 99 (2011) ("The parent-child relationship is much more comprehensive than most other types of fiduciary relationships, such as trustee and beneficiary, and has intrinsic value in ways those other relationships do not."); STRAUSS, *supra* note 8, at 23 ("Parents claim extraordinarily broad moral authority over their children's lives.").

[47] *See, e.g.*, Elizabeth S. Scott, *Restating the Law in a Child Wellbeing Framework*, 91 U. CHI. L. REV. 279, 310 (2024) ("Parents have general authority to consent to medical treatment for their minor children . . . .").

[48] *See, e.g.*, Cynthia Godsoe, *Redrawing the Boundaries of Relational Crime*, 69 ALA. L. REV. 169, 183 (2017) ("Every state grants parents the right to physically punish their children.").

[49] *See, e.g.*, MEYER V. NEBRASKA, 262 U.S. 390 (1923) (holding that parents have a constitutional right to educate their children at private school in the language of their choice); RUNYON V. MCCRARY, 427 U.S. 160, 178 (1976) ("The Court has repeatedly stressed that . . . parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction . . . .").

[50] *See, e.g.*, Emily Buss, *Children's Associational Rights?: Why Less Is More*, 11 WM. & MARY BILL RTS. J. 1101, 1103 (2003) ("As a general matter, children's associations are heavily controlled by some combination of their parents and the state.").

[51] *See, e.g.*, Malinda L. Seymore, *Adopting Civil Damages: Wrongful Family Separation in Adoption*, 76 WASH. & LEE L. REV. 895, 957–58 (2019) ("The rights of parents vis-à-vis their children include the right to custody and visitation, the right to control education and training, the right to the earnings of the child, and the right to inherit from or through the child."); Kevin S. Smith, Note, *Religious Visitation Constraints on the Noncustodial Parent: The Need for National Application of a Uniform Compelling Interest Test*, 71 IND. L. J. 815, 816 (1996) ("Most states interpret the custodial parent's responsibilities to include determination of the children's religious upbringing." (and collecting sources)).

[52] *See supra* notes 46; *see also* STRAUSS, *supra* note 8, at 24 ("The closest analogues to parental authority are relations of political authority like citizenship.").

[53] *See, e.g.*, Sean Hannon Williams, *Divorcing Your Parents*, 57 U.C. DAVIS L. REV. 665, 665 (2023) (describing the "conscriptive family law regime that assigns [parents] a legal status-relationship at birth").

[54] *See, e.g.*, Uniform Parentage Act § 809(a) ("[O]n birth of a child . . . each intended parent is, by operation of law, a parent of the child."); Carter Dillard, *Child Welfare and Future Persons*, 43 GA. L. REV. 367, 381 (2009) ("[T]he parent is not elected, restrained through a series of checks and balances, or obligated to be transparent in its dealings and rationales.").

child up for adoption, but children have no say in the matter; their legal parents are their legal parents, whatever they think about it.[55]

Of course, while parents have broad powers over their children, in most cases exercised without judicial oversight, it is not that parents can do *whatever* they want with their children.[56] For starters, there are a variety of specific things the law requires or prohibits of parents—in all states, for example, parents are required give their children a minimal education and obtain specified vaccines; and there are particular things parents categorically cannot do, like engage in the ritual genital cutting of their daughters.[57] Beyond these specific criteria, however, parents must generally exercise their powers in the "*best interests*" of their children; to promote their "*welfare*."[58] Indeed, the law grants parents broad powers *because* of its assumption that they will use those powers in the interests of their children; a deferential legal

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[55] *See supra* notes 46–52.

[56] *See, e.g.*, Clare Huntington, *Familial Norms and Normality*, 59 EMORY L. J. 1103, 1139–40 (2010) ("The legal principle of family autonomy largely shields intact families from direct legal intervention disrupting parental choices."); Buss, *supra* note 46, at 656 (noting that family law is organized around parental powers justified by reference to "the benefits to children").

[57] *See, e.g.*, National Center for Education Statistics, *State Education Practices*, https://nces.ed.gov/programs/statereform/tab5_1.asp (summarizing compulsory attendance laws across states); Samantha Vanderslott & Tatjana Marks, *Charting mandatory childhood vaccination policies worldwide*, 39 VACCINE 4054, 4054 (2021) (surveying mandatory childhood vaccination schemes); 18 U.S.C. § 116 (prohibiting female genital mutilation federally).

[58] *See, e.g.*, DOUGLAS E. ABRAMS, NAOMI R. CAHN, CATHERINE J. ROSS & LINDA C. MCCLAIN, CONTEMPORARY FAMILY LAW 795-96 (5th ed. 2019) (summarizing the historical prominence of the best interest of the children principle in American family law); Scott, *supra* note 47, at 283 ("The Restatement highlights that, under contemporary law, an essential rationale for robust parental rights is that strong protection of parental authority promotes the well-being of children."); Pamela Laufer-Ukeles, *The Relational Rights of Children*, 48 CONN. L. REV. 741, 745 (2016) ("The parent-centered model is based on a fundamental belief that parents should be given leeway to act on behalf of children, either because they are best situated to determine what is best for their own children, or because of the value of promoting diversity in child upbringing."); Amy Gutmann, *Children, Paternalism and Education: A Liberal Argument*, 9 PHIL. & PUB. AFFS. 338, 343 (1980) ("[A]attached to these duties is also a right of paternalistic agency—a right held against other adults not to interfere with our actions so long as we fulfill our paternalistic duties toward children."); Scott & Scott, *supra* note 13, at 2415 ("[T]he social goal at stake in the regulation of the parent-child relationship is to ensure children the care necessary for their development into healthy, productive adults."); Gilles, *supra* note 12, at 951 ("The solution to the quandary derives from the familiar liberal proposition that educational authority must be justified primarily in terms of the child's best interest."); Dailey & Rosenbury, *Law of the Child*, *supra* note 8, at 1458 ("Parental control was no longer an absolute God-given right, but instead became a more limited, state-controlled entitlement grounded in public concerns and the children's 'best interests.'").

presumption underwritten by empirical intuition.[59]

And this presumption is, as a legal matter, rebuttable. All states reserve the right to terminate a parent-child relationship for egregious failure to act in the child's interests—where a parent has been found "unfit;" which triggers reallocation of parental authority to someone the law thinks more likely to promote the child's interests.[60] Similarly, while the law ordinarily presumes that parental decision-making is in the best interests of children without litigating the question, whenever doing so does not, practically, work—where parents are unable to set aside their personal differences for the benefit of their children, or the law must decide which of competing claimants ought to be allocated custody, for instance—the law intervenes explicitly to promote the children's welfare; directly adjudicating the "best interests" of the children.[61]

Let's take this, then, as the basic content of the legal relationship about which we are trying to theorize—the parent-child relationship characterized by plenary parental powers over children, allocated non-consensually, subject to the overriding duty on parents to use their powers for the benefit of their children.

C. Parenthood and Other Legal Relations

Parenthood is a peculiar legal relationship. At the outset, it certainly isn't anything like contract. Contract is *essentially* voluntary—it is organized around enforcing privately-entered, consensual agreements; that is, contract is a relationship in which the duties of both parties are generated by the content to which they voluntarily agreed.[62] Parenthood is not only non-

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[59] *See, e.g.*, Huntington, *supra* note 56, at 1139–40 ("The legal principle of family autonomy largely shields intact families from direct legal intervention disrupting parental choices."); Gregg Strauss, *What Role Remains for De Facto Parenthood?*, 46 FLA. ST. U. L. REV. 909, 971 (2019) ("The law defers to parental authority because parents tend to make decisions that promote child welfare."); Elaine M. Chiu, *The Culture Differential in Parental Autonomy*, 41 U.C. DAVIS L. REV. 1773, 1790 (2008) ("The final objective of society and its laws is not to respect individual parents, but instead to ensure the welfare of children. The law views the right of parental autonomy as a means toward that end.").

[60] *See, e.g.*, Huntington, *supra* note 56, at 1139–40 ("[P]arents who fail to provide adequate care for their children risk involvement with the child welfare system."); 22 A.L.R. 4th 774 (observing that every state has a statute allowing for the termination of parental rights in the interests of children).

[61] *See, e.g.*, Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 846 (2007) ("[T]he state may intervene, in order to protect the welfare of children, when parents fail to perform their childrearing responsibilities or cannot resolve disputes with a co-parent.").

[62] *See, e.g.*, James Toomey, *Privately-Crafted Obligations*, 78 FLA. L. REV. (forthcoming 2026) (manuscript at 8) ("Contracts, in short, generate legal obligations of a

consensual, it is to some extent *necessarily* so—young children *cannot* agree to any particular set of mutual duties; whatever the content of any plausible legal relationship of parenthood, it must be imposed non-consensually, and its content cannot be tailored by the parties.[63] Moreover, the *scope* of parental powers is broader than contract—capacitated adults simply cannot contract away a *plenary* suite of their legal powers, as parents are granted by law over their children.[64]

Both of these characteristics—parenthood's fundamentally non-consensual nature and the scope of the powers it involves—sets it apart from most other relationships of private law.[65] For instance, the vast majority of legal relationships—from marriage to commercial partnership—are, like contract, essentially consensual; they are relations entered into intentionally by legal adults.[66] And each of these involves a much narrower suite of powers than that at play in the parent-child relationship—at the end of the day, the legal powers that parents exercise over their children are broader than those recognized in any other legal relationship between persons.[67]

At first glance, the parent-child relationship might seem most analogous to that between guardians and adults who have been adjudicated incapacitated—but the differences are perhaps more illuminating than the

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special kind—*voluntary, privately-crafted* legal obligations."); Aditi Bagchi, *Unequal Promises*, 72 U. PITT. L. REV. 467, 476 (2011) ("[W]hat a promisor promises to do[] is within her control.").

[63] *See, e.g.*, Hartley, *supra* note 12, at 1106–07 ("Certainly, how children come about is important to any sensible account of parental rights and obligations, as children do not spring from the ground like mushrooms."); Gilles, *supra* note 12, at 946 ("The root difficulty is that human beings are not born into the world as self-governing, reasoning individuals."); *see also* STRAUSS, *supra* note 8, at 59 ("[A]dults cannot choose the content of their parental duties.").

[64] *See, e.g.*, Lawrence A. Frolik & Mary F. Radford, *"Sufficient" Capacity: The Contrasting Capacity Requirements for Different Documents*, 2 NAELA J. 303, 313 (2006) ("A power of attorney can be amended or revoked as long as the principal has capacity.").

[65] *See, e.g.*, Sabine Hohl, *Is it Morally Permissible for Parents to Attempt to Convince Their Children of their Comprehensive Views*, 30 J. ETHICS & SOC. PHIL. 54, 68 (2025) ("The parent-child relationship is coercive, nonvoluntary, and has a massive impact on children's lives.").

[66] *See, e.g.*, Sidney W. DeLong, *What Is a Contract?*, 67 S.C. L. REV. 99, 103–104 (2015) (describing the broad range of voluntary legal relationships that liberal legal systems recognize).

[67] *See, e.g.*, Anne C. Dailey, *In Loco Reipublicae*, 133 YALE L. J. 419, 439 (2023) ("Parental rights are unique in modern constitutional law: they are rights of control over other individuals."); Carl E. Schneider, *On the Duties and Rights of Parents*, 81 VA. L. REV. 2477, 2481 (1995) ("[T]he fiduciary's relationship with the benefitted party is commonly of limited scope, while the relationship between the parent and child involves broad swaths of both of their lives."); Dillard, *supra* note 54, at 381 ("Any power the state holds over its citizens pales in comparison with the power prospective parents hold over their children.").

similarities.[68] To be sure, like parents, guardians exercise more or less plenary, non-consensual legal power over a person subject to a guardianship.[69] But parents wield *greater* legal power over their children than guardians over persons subject to guardianship; guardians, unlike parents, are subject to ongoing court supervision for the duration of the guardianship.[70]

More capacious even than guardianship, then, the powers of parents over their children might even resemble that paradigm of unconstrained power in private law—the relationship between owners and their property.[71] Indeed, like parenthood, property law recognizes broad powers in owners to make decisions about and concerning that which they own—powers that arise by virtue of ownership and are exercised (broadly) free of judicial supervision.[72] And, indeed, legal systems have at various times overtly characterized children as property of their parents (typically their fathers);[73] a handful of scholars press the analogy today.[74]

But, once again, the differences here are more illuminating than the similarities—the contemporary structure of the parent-child relationship simply is not ownership (not to mention that most contemporary courts,

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[68] *See, e.g.*, Altman, *supra* note 9, at 417 ("[S]ome guardians for incompetent adults resemble parents in key respects").

[69] *See, e.g.*, Michael E. Bloom, *Asperger's Disorder, High-Functioning Autism, and Guardianship in Ohio*, 42 AKRON L. REV. 995, 961 (2009) (noting that plenary guardianship grants "the authority to make all day-to-day decisions of a more personal nature on behalf of the ward" as well as "the authority to make all financial decisions for the ward"); Herbert M. Kritzer, Helen Marks Dicks & Betsy J. Abramson, *Adult Guardianships in Wisconsin: How is the System Working?*, 76 MARQ. L. REV. 549, 550–51 (1993) (describing procedures by which guardianships are awarded).

[70] *See, e.g.*, Mary Joy Quinne & Howard S. Krooks, *The Relationship Between the Guardian and the Court*, 2012 UTAH L. REV. 1611, 1649 ("Court monitoring of a guardianship begins at the hearing when the guardian is appointed," and summarizing procedures across states).

[71] *See, e.g.*, 2 William Blackstone, Commentaries *2 (defining "property" as "that sole and despotic dominion which one man claims over the external things of the world, in total exclusion of the right of any other individual in the universe"); Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 283 (1998) (describing the "intuitive image" of property as "absoluteness").

[72] *See, e.g.*, Scott, *supra* note 47, at 280 (observing that "parental rights . . . were property-like before the Progressive era").

[73] *See, e.g.*, Kevin Noble Maillard, *Rethinking Children as Property: The Transitive Family*, 32 CARDOZO L. REV. 101, 113 (2010) ("At common law, children were treated as chattel."); *see also* MASON, *supra* note 9, at 6–7 (contesting the property frame as describing the common law's treatment of children but acknowledging that it describes Roman law).

[74] *See, e.g.*, Maillard, *supra* note 73, at 103 ("Judges, lawyers, and litigants employ the language of property when adjudicating legal parenthood. . . ."); Samantha Godwin, *Against Parental Rights*, 47 COLUM. HUMAN RIGHTS L. REV. 1, 4 (2015) ("I argue that parental legal rights are best understood as property interests.").

lawyers, and scholars recoil at calling children the property of their parents).[75] It is characteristic of property that owners can exercise their powers *arbitrarily*—for any or no reason.[76] You can renovate your house as you want, when you want to, even if the state thinks it would have been better if you had made different choices; you can sell it, abandon it, destroy it (again, within broad parameters, paradigmatically).[77] You don't owe anyone—much less the law—explanation in doing any of these things.[78]

Parents cannot exercise their powers arbitrarily—they are *subject to duties*.[79] Parents cannot *sell* their children; are guilty of murder for destroying them; neglect for abandoning them.[80] When co-parenting relationships break down, the law intervenes to promote the best interests of the children; when co-*ownership* relationships break down, courts divide the property based on the parties' respective ownership, they don't ask what is best for the

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[75] *See, e.g.*, Dailey & Rosenbury, *Law of the Child*, *supra* note 8, at 1460 ("Children are no longer considered property . . . ."); Hartley, *supra* note 12, at 1105 ("Children are not the property of their parents . . . ."); Scott & Scott, *supra* note 13, at 2408 (noting that "modern courts vigorously reject the characterization of children as the property of their parents"); Buss, *supra* note 46, at 656 ("Today, the proprietary conception of parental rights is roundly condemned.").

[76] *See, e.g.*, Restatement (Third) of Property: Wills and Other Donative Transfers § 10.1 cmt. c ("American law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor's decisions about how to allocate his or her property.").

[77] *See, e.g.*, Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970, 971 (1985) ("As a first approximation it appears that any restrain upon the power of an owner to alienate his own property should be regarded as impermissible."); Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L. J. 781, 783 (2005) ("[T]he right to destroy one's own property seems firmly entrenched."); John G. Sprankling, Understanding Property Law § 4.03[B][1] (2000) (describing the law governing abandonment of chattels). Of course, contemporary law imposes a variety of external constraints on arbitrary exercise of ownership powers in this context. *See infra* 250–254 & accompanying text.

[78] *See, e.g.*, Laurent Sacharoff, *Trespass and Deception*, 2015 B.Y.U.L. REV. 359, 392 (2015) (noting that the law of trespass protects the right to exclude for any or no reason); Becky Lundberg Witt, *Urban Agriculture and Local Government Law: Promises, Realities, and Solutions*, 16 U. PA. J. L. & SOC. CHANGE 221, 225–26 (2013) ("Under a license agreement, if the landowner wants the land back at any time, for any or no reason, the owner may cancel the agreement.").

[79] *See supra* notes 56–59 & accompanying text; *see also* Smith, *supra* note 13, at 423 ("Nor [do parents] have rights *over* their children in the same way that the owner of a car has rights over that car . . . .").

[80] *See, e.g.*, Margaret Jane Radin, *What, If Anything, Is Wrong With Baby Selling?*, 26 PAC. L. J. 135, 135 (1995) ("Every state has a law against exchanging consideration for obtaining a child."); Haley Moss, *A Life Worth Living: Fighting Filicide Against Children With Disabilities*, 14 FLA. A&M U. L. REV. 57, 76 (2021) (noting that parental murder of their children is murder); 23 Am. Jur. 2d Desertion and Nonsupport § 30 (summarizing the crime of child abandonment).

property.[81]

This, then, is what makes the parent-child relationship particularly distinctive among legal relationships—it is non-consensual and plenary, unlike contract (and marriage, business relationships, and most other legal relationships); it is not actively monitored by courts, like guardianship; but its powers are not, unlike property, to be exercised arbitrarily. Parenthood is a broad suite of powers, the exercise of which is constrained by duties on their exercise—a *fiduciary* relationship.

D. Parents as Fiduciaries

As we've seen, parental decision-making involves the exercise of legal powers on behalf of children, constrained by a particular set of duties—specifically, the directive to use those powers to promote the "best interests" of their children.[82] This way of looking at parenthood situates it among the class of *fiduciary* relationships—the set of legal relationships, from that between trustees and beneficiaries, to agents and principals, healthcare proxies and patients, corporate directors and shareholders, and many more, in which one person exercises legal powers on behalf of another, subject to some standard.[83]

A trust, for example, is a property management tool in which a property owner (called a "settlor") conveys property to a "trustee" with instructions to manage the property on behalf of a "beneficiary."[84] The relationship between trustees and beneficiaries is fiduciary—the trustee has legal powers to make management decisions over the property in the trust, subject to the standard that they do so in the best interests of the beneficiaries.[85] In contrast, common

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[81] *See, e.g.*, *supra* notes 56–58 & accompanying text; Yun-Chien Chang & Lee Anne Fennell, *Partition and Revelation*, 81 U. CHI. L. REV. 27, 27 (2014) (surveying the law of partition).

[82] *See, e.g.*, Scott & Scott, *supra* note 13, at 2419 (describing the duties that parents are subject to in the exercise of their powers).

[83] *See, e.g.*, Paul B. Miller, *The Fiduciary Relationship*, in ANDREW S. GOLD & PAUL B. MILLER, EDS., PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 69 (2014) ("A fiduciary relationship is one in which one party (the fiduciary) exercises discretionary power over the significant practical interests of another (the beneficiary)."); J.C. Shepherd, *Towards a Unified Concept of Fiduciary Relationships*, 97 L. Q. REV. 51, 75 (1981) ("A fiduciary relationship exists whenever any person receives a power of any type on condition that he also receive with it a duty to utilize that power in the best interests of another, and the recipient of the power uses that power.").

[84] *See, e.g.*, ROBERT H. SITKOFF & DUKEMINIER, WILLS, TRUSTS, AND ESTATES 375 (11th ed. 2022) (describing the structure of trusts); Restatement (Third) of Trusts § 2 (same).

[85] *See, e.g.*, Restatement (Third) of Trusts § 78 (observing that trustees are to make the financial management decisions they are empowered to make "solely in the interests of the beneficiaries").

law agents have the legal power to make decisions authorized by their "principal," subject to the standard that they do as the principal would have, if present.[86] And healthcare proxies make medical decisions on behalf of incapacitated patients, guided by the standard to do what the patient would have wanted if capacitated; to act in the patient's objective best interests if they can't.[87]

As these examples indicate, each distinct fiduciary relationship is characterized by a distinct set of legal powers and distinct standard.[88] Moreover, while many fiduciary relationships paradigmatically arise by agreement, not all do—the fiduciary relationship between trustees and beneficiaries, for example, arises by agreement between *settlor* and trustee, regardless of what the beneficiary has to say about it (indeed, the beneficiary may be a child, or not exist).[89] In this light, the parent-child relationship fits comfortably within the fiduciary paradigm—characterized as it is by the broad suite of parental powers to be exercised on behalf of their children, subject to the standard to use those powers in their welfare.[90]

To be sure, the notion of parents as fiduciaries is not new.[91] Indeed, Elizabeth and Robert Scott argued as much thirty years ago.[92] But fiduciary

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[86] *See, e.g.*, Rob Atkinson, *Obedience as the Foundation of Fiduciary Duty*, J. CORP. L. 43, 47–48 (2008) (summarizing agent's distinctive "duty of obedience" to principals).

[87] *See, e.g.*, James Toomey, *Love, Liberalism, Substituted Judgment*, 99 IND. L. J. 1289, 1299 (2024) (summarizing the standards by which healthcare decision-makers are directed to decide on behalf of incapacitated patients).

[88] *See, e.g.*, Andrew S. Gold, *The Loyalties of Fiduciary Law*, in ANDREW S. GOLD & PAUL B. MILLER, EDS., PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 176, 190 (2014) (describing the diverse range of duties different fiduciaries owe beneficiaries); Ethan J. Leib, *Fiduciary Parenting of Transgender Youth*, 76 U. TORONTO L.J. (forthcoming 2026) (manuscript at 11) ("[P]ermissions and powers are baked into the relationship and help explain some of why the duties arise in the first place and help to sustain the trust the relationship must evince. Fiduciarity is power-granting and power-constraining simultaneously."); Altman, *supra* note 9, at 414 (noting "uncertainty" due to "the variety of legal relationships called fiduciary and the different rules applied to each").

[89] *See, e.g.*, Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L. J. 969, 982 (2013) ("Fiduciary relationships may alternatively be established by non-contractual agreement, by unilateral undertaking, or by legislative or judicial decree.").

[90] *See supra* Part I.B; Kolakowski, *supra* note 12, at 6 ("[I]t must be recognized, in accord with common sense and secular tradition, that parents are responsible and must make decisions on behalf of their children, and that children are not things but that they depend on the decisions of others.").

[91] *See, e.g.*, Scott & Chen, *supra* note 23, at 227 ("The relationship between parents and minor children intrinsically into a fiduciary framework."); Miller, *Fiduciary Duties*, *supra* note 89, at 971 ("Parents and guardians are fiduciaries of their children and wards."); *see also* STRAUSS, *supra* note 8, at 7 ("[M]ost ethicists accept a broadly fiduciary theory of parental rights.").

[92] *See* Scott & Scott, *supra* note 13, at 2401 (arguing that the parent-child relationship fits into the fiduciary framework).

theory has come a long way in that time—and there is much more work to do on what it means to say that parenthood is a fiduciary relationship, and how it fits alongside others.[93] Similarly, while Lionel Smith and others have recently reprised the argument, and scholars have drawn persuasive insights from the analogy, there has been less work on characterizing the parent-child relationship *as* a fiduciary relationship alongside others.[94]

Neither, it is worth noting, is the characterization of parents as fiduciaries without controversy. For one thing, the way in which the law *enforces* parental duties is quite different than traditional trust and agency law—when the enforcement of parental duties happens at all it is often by state agency, not private lawsuit (or in the course of an action that is ostensibly about something else, like divorce).[95] But this dynamic can be seen elsewhere in fiduciary law—the duties of charitable trustees are, for example, enforced by the state rather than private lawsuit.[96] And in any event it is possible to bracket the mode of enforcement and theorize the content of the relationship.[97]

Moreover, today most trustees are compensated for their service, while parenthood imposes substantial financial *obligations* on parents, but compensation (or lack thereof) is not a conceptual feature of fiduciary relationships—many trustees and agents serve gratuitously.[98] Indeed,

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[93] *See generally, e.g.*, EVAN J. CRIDDLE, PAUL B. MILLER & ROBERT H. SITKOFF, EDS., THE OXFORD HANDBOOK OF FIDUCIARY LAW (2019); ANDREW S. GOLD & PAUL B. MILLER, EDS., PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW (2014).

[94] *See, e.g.*, Smith, *supra* note 13, at 395 (noting the courts that have held parents are fiduciaries and endorsing this holding from the perspective of fiduciary theory); *see also* Ouellette, *supra* note 15, at 958–59 (endorsing a fiduciary model of the parental role and drawing conclusions about the role of parents as healthcare decision-makers for their children); Leib, *supra* note 88, at 11 ("Another quite common framing is much more promising . . . that children and their parents are in a fiduciary relationship governed by fiduciary norms.").

[95] *See, e.g.*, Scott & Chen, *supra* note 23, at 227 (distinguishing enforcement of parental duties from that of other fiduciary duties).

[96] *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 84, at 790 (summarizing the public enforcement of the duties of charitable trustees under traditional law).

[97] *See, e.g.*, Toomey, *Fiduciary Standards*, *supra* note 14, at 16 n. 103 (setting aside questions of enforcement to theorize about the content of fiduciary standards); Leib, *supra* note 88, at 10 ("What moral traction we get from thinking parents as fiduciaries in trying to ascertain how they should interface with their children's demands, however, is ultimately different from the policy question about how the state might implement or recognize the fiduciary relationship as a legal one.").

[98] *See, e.g.*, Bogert's The Law of Trusts and Trustees § 975 ("In the early English law the trustee was supposed to serve without compensation . . . ."); Jeffrey A. Parness & Matthew Timko, *De Facto Parent and Nonparent Child Support Orders*, 67 AM. U. L. REV. 769, 771–72 (2018) ("When a childcare order is secured, whether by a de facto parent or a nonparent, some financial and nonfinancial child support is inevitably assumed.").

fiduciary compensation is a matter of private contract distinct from the fiduciary characteristics of the relationship—nothing in fiduciary law is inconsistent with a principal and agent agreeing that the agent will internalize their own travel expenses, for instance.[99] The law *could* compensate parents for their fiduciary services; the basic structure of the relationship would remain the same.[100]

Similarly, while perhaps the archetype of the trustee-beneficiary relationship is binary, and families often feature more than one parent and child, co-trustees can share fiduciary responsibilities, and having more than one beneficiary is, in fact, typical—each owed "due regard," not necessarily equal treatment, as with parental duties.[101] And, to be sure, while the law asks trustees to decide in the "sole interest" of beneficiaries, and parents can consider their own interests in deciding whether to, say, take a job in a new city, no one thinks that trustees have to think of beneficiaries when managing their *own* money[102]—all fiduciary relationships distinguish between the exercise of legal powers on behalf of another, subject to fiduciary standards, and the fiduciary's personal legal decision-making, which is not.[103] And,

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[99] *See, e.g.*, Bogert's The Law of Trusts and Trustees § 975 ("The amount of the compensation is fixed either by the terms of the trust instrument, by contract between settler and trustee, by statute, or by court action."); Restatement (Third) of Agency § 8.13 Duty Created by Contract cmt. d ("An agreement that an agent will not have a right to compensation for services provided may be implied from the agent's relationship to the principal or from the trivial nature of the services requested.").

[100] *See, e.g.*, Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13, 18 (1999) ("[C]aretaking work creates a collective or societal debt."); Scott & Scott, *supra* note 13, at 2474 ("The contract metaphor makes explicit what is implicit in social norms: parental 'rights' are granted as compensation for the satisfactory performance of voluntarily assumed responsibilities to provide for the children's interests.").

[101] *See, e.g.*, Restatement (Third) of Trusts § 79(1) (providing that trustees "must act impartially and with due regard for the diverse beneficial interests created by the terms of the trust"); Smith, *supra* note 13, at 450 ("The individual relationship between a parent and a child cannot be isolated from the reality that both are part of a family unit, whether there is one parent and one child or multiple children and parents.").

[102] *See, e.g.*, Smith, *supra* note 13, at 398 ("If a fiduciary relationship requires 'absolute loyalty,' some people might say that the parent-child relationship cannot fit the bill."); Dailey & Rosenbury, *Parental Rights*, *supra* note 46, at 99 ("[P]arents are often self-interested in ways that would otherwise disqualify them from serving as fiduciaries.").

[103] *See, e.g.*, Laufer-Ukeles, *supra* note 58, at 773 ("There are also parental choices that are not related to how to raise children, but rather are more about parents' 'selfish' desires."); *see also* Joshua Getzler, *Transplantation and Mutation in Anglo-American Trust Law*, 10 THEORETICAL INQUIRIES L. 355, 365 (2009) ("Hence the trust fund cannot be attached for the trustee's gambling debts or negligent driving."); Leib, *supra* note 88, at 14 ("There will be many decisions parents make in the ordinary course of life—just like there are many decisions ordinary fiduciaries like doctors and lawyers make outside the scope of their interactions with their charges—that will not reasonably trigger a fiduciary decision

anyway, some fiduciaries—such as guardians or healthcare proxies for incapacitated adults—*can* take into account their own interests in acting as the individual would have.[104]

None of this is to deny, of course, that the parent-child relationship is different in many ways from other fiduciary relationships—of course it is, that is what *makes* it a distinctive fiduciary relationship (not *just*, for instance, a trust), defined by its own set of powers, a distinctive standard, enforced in a particular way.[105] The point is simply that none of these differences are so discontinuous with the rest of fiduciary law as to preclude thinking of parenthood alongside other fiduciary relationships. Indeed, parenthood fits closely in the fiduciary paradigm—a legal relationship in which one party is authorized to decide on behalf of another, subject to some standard.[106]

Starting from the premise that parenthood is a fiduciary relationship, though, is hardly a complete theory of its content. For that, we'll need an account of the distinctive standards to which parental decision-making is held; the standards that make it a *distinctive* fiduciary relationship. This is the project to which we now turn.

II. PARENTS AS LIBERAL TRUSTEES

As we've seen, the parent-child relationship shares important structural features with other fiduciary relationships—one legal person making decisions on behalf of another, subject to some standard. This Part offers a theory of that standard. First, I observe that, among fiduciary relationships, the way in which parents are to make decisions for their children most closely resembles those of trustees—both parents and trustees are to decide, in some sense, in the "best interests" of their "beneficiaries."

But, unlike trust law, which endorses a particular criterion by which trustees assess beneficiaries' "best interests," the law—for reasons of liberalism—leaves to parents to decide for themselves how to assess the best

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procedures . . . . Exactly what that trigger is for being required to undertake the fiduciary procedure is beyond the scope of this paper, though it is a fair and hard question.")..

[104] *See, e.g.*, Ben Chen, *Elder Financial Abuse: Fiduciary Law and Economics*, 34 NOTRE DAME J. L. ETHICS & PUB. POL'Y 6 (2020) ("[F]iduciary law ought to permit those conflicts of interest that an elderly incapable individual would have authorized if she was mentally-capable."); Nina A. Kohn, *Fiduciary Principles in Surrogate Decision-Making*, in EVAN J. CRIDDLE, PAUL B. MILLER & ROBERT H. SITKOFF, EDS., THE OXFORD HANDBOOK OF FIDUCIARY LAW 249, at 256–57 (2019) (noting that a "notable characteristic of the duty of loyalty in the context of surrogate decision-making is that it is not necessarily inconsistent with substantial self-dealing" because "surrogates are to act according to the principal's wishes or directions, and the principal may wish to benefit the surrogate").

[105] *See supra* notes 88–90 & accompanying text.

[106] *See supra* note 83.

interests of their children. From this perspective, the law treats parents as distinctively *liberal* trustees—parents are to decide in the best interests of their children, as *they* understand them.

A. Parents as Trustees

As we've seen, the standards according to which different fiduciaries exercise their powers, like the relationships themselves, are diverse.[107] But we might organize them around two paradigmatic poles.[108] In some fiduciary relationships—like that between agent and principal—the fiduciary is to do what the beneficiary *would have done*; agents are to exercise their legal powers as the principal would have.[109] In other fiduciary relationships—paradigmatically, that between trustee and beneficiary—the fiduciary is to decide based on the fiduciary's own view of the beneficiary's *best interests*; trustees are to act based on what they think is good for the beneficiary, regardless of what the beneficiary thinks.[110]

From this perspective, parental decision-making standards look more like trustees' than agents'.[111] Indeed, we can see this just by taking the language of family law seriously—parental powers are constrained by promoting the "*best interests*" or the "*interests*" or the "*welfare*" of children; not acting as their children would have.[112] Indeed, substantively, the law validates parental decision-making based on *parents'* views of what is best for children.[113] If

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[107] *See supra* notes 86–88 & accompanying text.

[108] *See, e.g.*, Toomey, *Fiduciary Standards*, *supra* note 14 (arguing that "*all*—or at least most—fiduciary standards . . . can be fruitfully thought of in terms of best interests and substituted judgment").

[109] *See, e.g.*, Deborah A. DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions*, in ANDREW S. GOLD & PAUL B. MILLER, EDS., PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW (2014) (manuscript at 2) ("The fiduciary benchmark requires the agent to interpret instructions in light of the principal's wishes as the agent understands them when the agent must decide what action to take . . . .").

[110] *See, e.g.*, Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 2 WM. & MARY L. REV. 513, 559 (2015) ("A paternalistic form of fiduciary loyalty is arguably prominent in trust law, in which trustees have independent discretion to make choices that beneficiaries may disagree with.").

[111] *See, e.g.*, *supra* note 110; CHRISTOPHER G. TIEDMAN, A TREATISE ON THE LIMITATIONS OF THE POLICE POWER IN THE UNITED STATES 553 (1886) (noting that parenthood has always been "in the nature of a trust, reposed in [the parent] by the state").

[112] *See supra* Part I.B; Ouellette, *supra* note 15, at 968 ("In most cases, the child's wishes are essentially irrelevant.").

[113] *See, e.g.*, Godwin, *supra* note 74, at 13 (noting that parents have no legal obligation to take into account the desires of their children in making child-rearing decisions); *see also* John H. Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321, 324 (1979) ("A twelve-year-old who wants to watch the Phillies play a night game may be made to go to bed instead, not because his parents would be happier if he did, but because they think he would

we take trust and agency as distinctive paradigms of fiduciary standards, then, parental duties are more like trust.

This structural analogy is, indeed, deeper than an observation about our positive law—at least with respect to young children, parents *could not* meaningfully act as agents.[114] This is ultimately a fact of human biology—young children do not have preferences (at least not meaningful, coherent ones of the sort a legal regime has reason to recognize)[115] about how their legal powers are to be used, and so it is impossible for the law to require of parents that they exercise their powers "as their children would have."[116] Agency *delegates* legal powers, it does not *create* them—and to the extent that children cannot meaningfully have legal powers because they cannot meaningfully have preferences, a law of parenthood constructed on agency lines is *physically* impossible.[117]

This biological fact—the long period of human maturation—is worth emphasizing, because it plays a necessary role in how the law of parenthood is, and conceivably could be, constituted.[118] If humans were built differently—ready to run within hours of birth, like the blue wildebeest—we could have a law of parenthood very different from the one we do.[119] Being

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be better off doing so.").

[114] *See, e.g.*, Gutmann, *supra* note 58, at 338 ("[I]t would be absurd to apply a principle of equal freedom to children."); Scott & Scott, *supra* note 13, at 2402 ("[C]hildren . . . are not in a position to direct or control [parental] performance.").

[115] *See, e.g.*, STRAUSS, *supra* note 8, at 41 ("Young children lack the cognitive ability to judge ends or means. A toddler's choices do not reflect value judgments in any meaningful sense.").

[116] *See, e.g.*, Altman, *supra* note 9, at 419 ("It seems sensible that parents' fiduciary duties arise when they exercise powers granted to them because children cannot make decisions or care for themselves."); *see also* Allen E. Buchanan, *The Limits of Proxy Decisionmaking for Incompetents*, 29 U.C.L.A. L. REV. 386, 396–97 (1981) (ridiculing as "nonsensical" the aspiration of applying substituted judgment to those who have never had legal capacity); *see also* Steven J. Baumrucker, Joanne E. Sheldon, Matt Stolick, Gerald M. Morris, Gregg VendeKieft & Dianne Harrington, 25 AM. J. HOSPICE & PALLIATIVE MED. 56, 57 (2008) (noting that in cases where a decision must be made for another who "has no narrative, no perspective, and no personhood" there is "nothing for which to substitute a judgment").

[117] *See, e.g.*, DeMott, *Fiduciary Character*, *supra* note 109, at 30 ("[A]n agency relationship [is] an extension of the principal throughout its duration."); CARL WELLMAN, REAL RIGHTS 114 (1994) (arguing that in agency relationship "the agent is representing the agency of the principal," presupposing that the principal has agency).

[118] *See, e.g.*, Ann Gibbons, *Why do humans mature so slowly? An ancient youth offers clues*, SCIENCE (Nov. 13, 2024) https://www.science.org/content/article/why-do-humans-mature-so-slowly-ancient-youth-offers-clues ("As the parent of any teenager knows, humans need a long time to grow up: We take about twice as long as chimpanzees to reach adulthood.").

[119] *See, e.g.*, A.R.E. Sinclair, Simon A.R. Mduma & Peter Arcese, *What Determines Phenology and Synchrony of Ungulate Breeding in Serengeti*, 81 ECOLOGY 2100 (2000)

the sorts of creatures we are, however, means that *someone* has to take care of us for the *many* years it will take until we can do so ourselves.[120] And insofar as the law is going to subject the decision-making of whoever that person to *some* standard, it *must* be something like that of trust—which can coherently be applied on behalf of an entity that does not have its own preferences—rather than agency, which cannot be.[121]

B. Trust Law and "Objective" Best Interests

It is one thing to say that both parents and trustees make decisions in the "best interests" of someone else—it is quite another figure out what exactly that means.[122] After all—unlike the preferences that create the duties of agents—what an entity's *interests* are is not a descriptive fact.[123] To reason about interests is an irreducibly normative project—of course it is a descriptive fact that, say, animals need to eat to stay alive, but to conclude that it is in animals' *interests* to eat requires supposing that it is *good* for them to stay alive; a normative claim.[124] To assess the interests of some entity,

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(describing the rapid maturation of the blue wildebeest).

[120] *See, e.g.*, Gutmann, *supra* note 58, at 338 ("Children must be educated by someone to become adults capable of exercising their future freedoms."); Baker, *Equality*, *supra* note 7, at 437 ("Children cannot teach themselves what they need to know to thrive, and parents are better suited than anyone else to do so."); Evan Fox-Decent, *Fiduciary Authority and the Service Conception*, in ANDREW S. GOLD & PAUL B. MILLER, EDS., PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 363, 374 (2014) ("[T]he law must authorize *someone* to possess parental power over the child and her affairs . . . . ").

[121] *See, e.g.*, Toomey, *Fiduciary Standards*, *supra* note 14, at 38–39 (arguing that it is possible to be a trustee, but not an agent, for a raccoon); Richard R.W. Brooks, *Knowledge in Fiduciary Relationships*, in ANDREW S. GOLD & PAUL B. MILLER, EDS., PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 227, 227 (2014) (noting that some beneficiaries of trusts "are not rational").

[122] *See, e.g.*, John Coggon & Camillia Kong, *From Best Interests to Better Interests? Values, Unwisdom and Objectivity in Mental Capacity Law*, 80 CAMBRIDGE L. J. 245, 256 (2021) (noting that the best interests standard requires "substantive content" to "give it meaning").

[123] *See, e.g.*, Meir Katz, *When is Medical Care "Futile"? The Institutional Competence of the Medical Profession Regarding the Provision of Life-Sustaining Medical Care*, 90 NEB. L. REV. 1, 38 (2011) (noting that the [t]he best interests of the infant are complex and certainly involve questions that are non-physiological").

[124] *See, e.g.*, CHRISTINE M. KORSGAARD, THE SOURCES OF NORMATIVITY (1996) ("And then the question—*why?*—will press, and rightly so."); Chong-Meng Lim, Michael C. Dunn & Jacqueline J. Chin, *Clarifying the best interests standard: the elaborative and enumerative strategies in public policy-making*, 42 J. MED. ETHICS 524, 543 (2016) (noting that assessing the best interests of some entity requires "establishing the normative weight of one (or more of the myriad considerations, over all others"); Sadah A. Sayeed, *The Marginally Viable Newborn: Legal Challenges, Conceptual Inadequacies, and Reasonableness*, 34 J.L. MED. & ETHICS 600, 606–07 (2006) (noting that determining "best interests" is irreducibly

then, or to act to promote their welfare, requires a *normative framework*—some criterion that tells us what is good for it, what its interests relative to those ends are, and how to weigh competing interests.[125] In other words, when the law asks someone to decide in the best interests of someone or something else, it is only relative to a normative framework that they can do so.[126]

Trust law gives trustees the normative framework according to which they are to assess the interests of beneficiaries. Generally speaking, trustees are to make decisions in beneficiaries' best *financial* interests—they must exercise their powers (roughly) so as to maximize the value and longevity of the property in the trust.[127] Indeed, trust law has prescribed specific rules governing trustee behavior justified by their tendency to promote the value and longevity of the corpus—rules requiring diversification and prohibiting conflicts of interests, for example.[128] From this perspective, it is no defense to a claim of fiduciary breach that a trustee gave the corpus to charity in the honest, good faith belief that money corrupts the soul, or that the way to live is disconnected from the market economy, or that promoting the best interests of persons involves making sure they help others.[129]

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normative, and requires weighing the moral value of different kinds of lives).

[125] *See, e.g.*, Helen J. Taylor, *What are "Best Interests"? A Critical Evaluation of "Best Interests" Decision-Making in Clinical Practice*, 24 MED. L. REV. 176, 176 (2016) (distinguishing between "best interests," an all-things-considered normative conclusion, and "best *medical* interests," a conclusion *within* a specified normative framework); Lynn D. Wardle, *Form and Substance in Parentage Law*, 15 WM. & MARY BILL RTS. J. 203, 210 (2006) ("What is 'best' largely depends upon what normative criteria are used to make that determination."); *see also* STRAUSS, *supra* note 8, at 43 ("A person's interests are fixed relative to their values or ends.").

[126] *See, e.g.*, Larry Alexander & Frederick Schauer, *Law's Limited Domain Confronts Morality's Universal Empire*, 48 WM. & MARY L. REV. 1579, 1599 (2007) (noting that the law's invocation of "best interests" must reference some normative criterion to be coherent); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 260 (1975) (arguing that determination of children's "best interests" is irreducibly normative).

[127] *See, e.g.*, Toomey, *Fiduciary Standards*, *supra* note 14, at 25 (noting trustees' duty to pursue the best financial interests of beneficiaries); Yun-chien Chang & Henry E. Smith, *An Economic Analysis of Civil Versus Common Law Property*, 88 NOTRE DAME L. REV. 1, 37 (2012) (same).

[128] *See, e.g.*, Uniform Prudent Investor Act § 2 (requiring trustees to diversify trust assets); Peter J. Wiedenbeck, *Untrustworthy: ERISA's Eroded Fiduciary Law*, 59 WM. & MARY L. REV. 1007, 1071 (2018) (noting that trust law has adopted rules "designed to counter-balance the potential for misappropriation").

[129] *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 84, at 644 (describing ESG investing as potentially a breach of the trustee's duties, if the trustee's motivation was to further some alternative conception of the beneficiary's best interests other than their financial interests); *see also* Altman, *supra* note 9, at 416 ("Typical fiduciaries exercise discretion over the means of achieving pre-determined goals, advancing another person's interests, with limited

Of course, such a trustee could well be *right* about what is in the beneficiaries' true, all-things-considered "best interests"—maybe most of us think that, all else equal, one's financial best interests are usually good for them; but it *might be* that money corrupts the soul, or that buying indulgences is a genuine shortcut to salvation.[130] A trustee's doing these things nevertheless breaches their fiduciary duties—because trust law does not ask trustees to act in the "best interests of beneficiaries" *simpliciter*; nor according to the trustee's own understanding of what those interests are.[131] Trust law directs trustees to act in the "best interests" of beneficiaries *according to the normative framework it prescribes*—namely, the *financial* best interests of beneficiaries.[132]

What goes for trustees in this regard—that the law both directs a fiduciary to decide in the "best interests" of someone relative to a normative framework it prescribes—appears elsewhere in fiduciary law. In health law, for instance, surrogate decision-makers for incapacitated patients are sometimes required to decide in the "best interests" of the patient.[133] In these instances, the law emphasizes that the surrogate is to decide in the *objective* best interests of the patient—according to some widely accepted normative framework that takes, for instance, life to generally be good and pain to generally be bad.[134] Indeed, in many states the law prescribes specific considerations the surrogate must take into account, reflecting the law's fairly well-defined view of what the best interests of patients "objectively" are.[135] In health law, too, then, the law

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discretion to define them. They cannot pursue idiosyncratic aims without securing appropriate authorization.").

[130] *See, e.g.*, KARL MARX, EARLY WRITINGS 277–400 (Rodney Livingstone & Gregory Benton, eds., 1992) (describing money as the means of alienating workers from their labor, a moral harm)

[131] *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 84, at 644 ("The question in each case would be whether the trustee reasonably concluded that the particular ESG investment program would improve returns net of costs, satisfying the prudent investor rule, and whether the trustee's motive was to obtain those returns for the beneficiaries, satisfying the duty of loyalty."); *see also* John H. Langbein & Richard A. Posner, *Social Investing and the Law of Trusts*, 79 MICH. L. REV. 72, 72 (1980) (reaching the same conclusion).

[132] *See supra* note 127.

[133] *See, e.g.*, Megan S. Wright, *Dementia, Healthcare Decision Making, and Disability Law*, 47 J.L. MED & ETHICS 25, 26 (2019) (describing the role of "best interests" decision-making on behalf of incapacitated patients in healthcare).

[134] *See, e.g.*, Steward G. Pollack, *Life and Death Decisions: Who Makes Them and By What Standards?*, 41 RUTGERS L. REV. 505, 524 (1989) (observing that the best interest test "[m]easures by a standard of objective reasonableness . . . as viewed by a reasonable person").

[135] *See, e.g.*, Am. Med. Ass'n, Council on Ethical and Judicial Aff., Code of Medical Ethics of the American Medical Association 252 (2008) (noting factors to be considered determining the best interests of incapacitated patients); BARTS HEALTH NHS TR. V. HOLLIE DANCE, PAUL BATTERSBEE, AND ARCHIE BATTERSBEE, [2022] EWHC 1435, [138], [147]

has directed some kinds of fiduciaries to decide in the best interests of their beneficiary *and* told them how to do so.

C. Liberalism and Parental Decision-Making

And that is where the parent-child relationship stands apart. Both trustees and parents make decisions in some sense in the "best interests" of another person. But trustees can't evade liability by acting on the good faith belief that the beneficiary's true best interests (say, the salvation of the soul) are not what most of society takes them to be (all else equal, temporal wealth).[136] Parents *can*—parents do not breach their duties when they act in what their own good faith beliefs tell them are the best interests of their children, regardless (within broad parameters)[137] of what other people think about it.[138] Parents can send their children to a school that teaches the evils of money or celebrates capitalism, or homeschool them if they can't find one; parents need not buy their children any toys even if they can afford it; can raise their children in a home that lacks modern amenities; and so on.[139]

In trust law, the law directs trustees to decide in the best interests of beneficiaries *and* endorses a normative standard by which to assess those interests.[140] In family law, the law directs parents to decide in the best interests of children and leaves up to them the normative framework by which to make sense of those interests.[141] Trustees decide in the financial best

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(Eng.) (outlining factors for determining the "best interests" of an incapacitated patient).

[136] *See supra* Part II.B.

[137] *See supra* note 57.

[138] *See, e.g.*, David D. Meyer, *The Geography of Family Privacy*, 156 U. PA. L. REV. PENNumbra 136, 145 (2007) (noting that "the task of pluralizing childrearing is entrusted to parents . . . for good reason"); IN RE J.P., 648 P.2d 1364, 1376 (Utah 1982) ("The family is a principal conservator and transmitter of cherished values and traditions."); Lisa V. Martin, *Modernizing Capacity Doctrine*, 73 FLA. L. REV. 821, 862 (2021) ("Vesting parents with primary decision-making authority regarding their children protects children from their own immaturity and state overreach, fosters pluralism of thought and values, ensuring that children do not become 'mere creatures of the state,' and reserves important decisions about children to those who know them best.").

[139] *See supra* note 9, *see also, e.g.*, Aaron Jay Saiger, *School Choice and States' Duty to Support "Public" Schools*, 48 B.C. L. REV. 909, 944 (2007) (describing parental right to choose where to live and how to educate their children); Jeffrey R. Henig & Stephan D. Sugarman, *The Nature and Extent of School Choice*, in STEPHEN D. SUGARMAN & FRANK R. KEMERER, EDS., SCHOOL CHOICE AND SOCIAL CONTROVERSY 13, 14 (1999) (noting that parents have the legal right to choose where to live, with profound implications for their children's upbringing and education).

[140] *See supra* Part II.B.

[141] *See, e.g.*, Joseph P. Viteritti, *Reading Zelman: The Triumph of Pluralism, and its Effects on Liberty, Equality, and Choice*, 76 S. CAL. L. REV. 1105, 1145 (2003) (noting the "constitutionally protected right of parents to have their children educated in schools that

interests of beneficiaries; parents decide in the best interests of their children according to normative framework *they take to be true*.[142]

The reasons for this distinction sound in liberalism. Liberalism is the political philosophy committed to the principle that the law should be agnostic on questions of how life ought to be lived and why, leaving these ultimate moral and metaphysical questions—of the existence and character of a god or gods, the nature of morality, what is good for persons, and so on—to individuals rather than the state or its legal system.[143] As many have observed, American private law is broadly—and to some extent distinctively—committed to liberalism in this sense; it is designed to *facilitate* individuals' living the lives they choose according to the worldviews they take to be true, rather than prescribe a way in which law and state thinks life ought to be lived.[144]

Trusts are a private, voluntary, device for money management.[145] They arise by the specific intent to create sort of relationship the law calls trust.[146] Trusts are, in other words, a tool that the law makes available for people to use if they want to—but they have to opt in; and if they don't, they can keep living their lives as they otherwise would have.[147] In this context, a liberal

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reflected their own values . . . ."); Martin Guggenheim, *State-Supported Foster Care: The Interplay Between the Prohibition of Establishing Religion and the Free Exercise Rights of Parents and Children:* Wilder v. Bergstein, 56 BROOK. L. REV. 603, 617 (1990) ("[P]arents have free exercise and many other rights to raise their children as they see fit and to inculcate them with the parents' own values.").

[142] *See, e.g.*, Jamie R. Abrams, *The Polarization of Reproductive and Parental Decision-Making*, 44 FLA. ST. U. L. REV. 1281, 1295 (2017) (noting that the "state's normative goals for parenting behaviors" is the best interests of children, but that it leaves to parents broad discretion in determining how to pursue that); Laufer-Ukeles, *supra* note 58, at 753 ("[F]iguring out how to pursue children's interests has enjoyed much less consensus than the goal itself.").

[143] *See supra* note 12; *see also, e.g.*, JOHN RAWLS, POLITICAL LIBERALISM xix (2005) (noting that liberalism "has to be impartial . . . between the points of view of reasonable comprehensive doctrines"); RONALD DWORKIN, *Liberalism*, in A MATTER OF PRINCIPLE 181, 191 (1985) (defining liberalism as the principle that "government must be neutral on what might be called the question of the good life"); William A. Galston, *Two Concepts of Liberalism*, 105 ETHICS 516, 524 (1995) ("The heart of the tolerance a liberal society needs is the refusal to use state power to impose one's own way of life on others.").

[144] *See, e.g.*, Toomey, *Substituted Judgment*, *supra* note 87, at 1327 ("Anglo-American private law is distinctively liberal . . . ."); *see also generally* Dagan & Dorfman, *supra* note 31, at 1395 (outlining a liberal theory of private law); Restatement (Third) of Property § 10.1 cmt. a ("American law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor's decisions about how to allocate his or her property. The main function of the law in this field is to facilitate rather than regulate.").

[145] *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 84, at 395 (discussing the structure of trusts).

[146] *See, e.g.*, *id.* at 411 (discussing the requirement of settlor intent to create a trust).

[147] *See, e.g.*, Mona Chalabi, *Dear Mona, How Many Kids Have Trust Funds?*,

legal regime can prescribe a normative framework according to which trustees are to assess the "best interests" of beneficiaries while remaining liberal—if you don't agree that your family's best interests have something to do with their financial interests, feel free to do something else with your money.[148]

Parenthood is different. A liberal legal system *could not* prescribe a normative framework according to which parents are to decide what their children's best interests are—not without contravening its most basic commitment to agnosticism about the core questions of how life ought to be lived.[149] For starters, the *kinds* of decisions that parents make are profoundly different, and go much closer to the heart of liberalism's commitments, than anything trustees ever have to decide.[150] After all, trustees make *money management* decisions on behalf of beneficiaries—sure, not *entirely* unrelated to the core questions of what it means to live a good life.[151] But the contrast with the decisions parents are empowered to make—*must* make—for and on behalf of their children speaks for itself.[152]

Decisions about how to raise children *just are* questions about how life ought to be lived—decisions about what to tell them is right and wrong, about the world and of what it is made, decisions about when to punish and when

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FiveThirtyEight (Aug. 21, 2014), https://fivethirtyeight.com/features/dear-mona-how-many-kids-have-trust-funds/ (citing data that only around 1.3% of Americans inherit under through a trust).

[148] And, to some extent, trust law's emphasis on promoting the value and longevity of the corpus is only a default rule—before getting into their discretionary role of money management decisions, trustees have a duty to follow the instructions in the trust instrument, and a settlor could write in goals or standards orthogonal to the financial interests of the beneficiaries. *See, e.g.*, Uniform Trust Code § 105 (b) ("The terms of a trust prevail over any provision of this [Code]. . . ."). This point should, however, perhaps not be pushed too far, because there is a great deal of controversy over the extent to which settlors could require trustees to act against the financial best interests of beneficiaries. *See, e.g.*, Mary P. O'Reilly & Lee-ford Tritt, *Benefit-of-the-Beneficiary Rule*, 34 PROBATE & PROPERTY 24, 25 (2020) (summarizing the Uniform Trust Code's controversial recent introduction of a mandatory rule that a "trust and its terms be for the benefit of its beneficiaries").

[149] *See supra* note 143.

[150] *See, e.g.*, Kyla Ebels-Duggan, *Moral Education in the Liberal State*, 1 J. PRACTICAL ETHICS 34, 61 (2013) ("It is impossible to raise a child without taking substantive stands on controversial matters of value."); Chiu, *supra* note 59, at 1783 ("[P]arents make countless decisions for their children that range from mundane to fundamental in nature."); Ouellette, *supra* note 15, at 981–82 ("Parents make all kinds of decisions that shape their children.").

[151] *See supra* Part II.B.

[152] *See, e.g.*, Noa Ben-Asher, *The Lawmaking Family*, 90 WASH. U. L. REV. 363, 401 (2012) ("Our religious, ethical, and moral convictions are central to our existence and our understanding of who we are, in ways that preferences and habits are not."); Philip A. Hamburger, *Education Is Speech: Parental Free Speech in Education*, 101 TEX. L. REV. 415, 434 (2022) ("Imposing official political, racial, sexual, and antireligious speech on children can be equally coercive.").

to encourage, how to show them what makes a life well-lived.[153] A liberal legal regime could not prescribe answers to *these* questions—they are precisely the sorts of questions liberalism is *about*.[154] It is, from this perspective, one thing for a liberal legal regime to endorse Modern Portfolio Theory in an optional money management tool;[155] another entirely for the state to hold parents to the dictates of Free-Range Parenting (or anything else) in its conception of the parent-child relationship.[156]

Of course, there is a sense in which parenthood is "optional," as is being a trustee. But surely the sense in which this is so is radically different—the vast majority of Americans have never set up a trust, been a trustee, or a trust beneficiary;[157] every human being in history has been someone's child, and the vast majority are at some point a parent.[158] Not to mention, of course, that while we could clearly get on well enough without trust law (a nineteenth century equitable invention often thought unique to the common law world), *someone*'s got to parent if we are going to have a civilization.[159] Pretending to liberalism while prescribing a comprehensive account of how *children ought to be raised*—notwithstanding a sense in which parenthood, like trust, is something you opt into—would be rather a farce.[160] (Compare to marriage—because of its ubiquitous cultural role, the fact that marriage is

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[153] *See, e.g.*, Gilles, *supra* note 12, at 967 ("[W]hen we come to teach our children the meaning of justice, is to teach them justice as we conceive it to be."); *see also* Ben-Asher, *supra* note 152, at 404 ("Individuals and family members suffer a special kind of injury when religious, moral, or ethical convictions are disregarded by the state."); STRAUSS, *supra* note 8, at 44 ("Raising a child requires selecting among theories of the good life.").

[154] *See, e.g.*, Ebels-Duggan, *supra* note 150, at 49 ("[I]n formative educational contexts, it is extremely difficult to present normative positions without explicitly or implicitly taking *some* position on their permissibility, value, or truth."); Gutmann, *supra* note 58, at 351 ("Some values must be imposed in any case.").

[155] *See, e.g.*, Max M. Schanzenbach & Robert H. Sitkoff, *The Prudent Investor Rule and Market Risk: An Empirical Analysis*, 14 J. EMPIRICAL LEGAL STUDS. 129 (2017) (observing that the duty to diversify in contemporary trust law arises from acceptance of "Modern Portfolio Theory").

[156] *Cf., e.g.*, Hamburger, *supra* note 152, at 465 ("[T]he contemporary establishment of public schools has at least some substantive overlap with the old establishment of religion.").

[157] *See supra* note 147.

[158] *See, e.g.*, Eva Feder Kittay, *When Caring is Just and Justice is Caring*, 13 PUBLIC CULTURE 557, 570 (2001) ("[A]s individuals our dependence relations are constitutive of who we are").

[159] *See, e.g.*, Fineman, *supra* note 100, at 19 ("Without aggregate caretaking, there could be no society, so we might say that it is caretaking labor that produce and reproduces society.").

[160] *See, e.g.*, Robin West, *The Right to Care*, in EVA FEDER KITTAY & ELLEN F. FEDER EDS., THE SUBJECT OF CARE: FEMINIST PERSPECTIVES ON DEPENDENCE 93, 89 (2002) ("Caregiving labor (and its fruits) is the central adventure of a lifetime; it is what gives life its point, provides it with meaning, and returns to those who give it some measure of security and emotional sustenance.").

optional would not let a liberal legal regime endorse particularly contestable views of who gets to be in it.[161])

A liberal legal regime, then, could not have done in the law of parenting what it has in trust law—prescribe both that a decision-maker must decide in the best interests of some other person, and tell them how to measure that person's best interests.[162] Indeed, nor could a liberal legal system do so in the same way as in health law. In contemporary health law, surrogates are directed to decide in the "best interests" of incapacitated patients only as a fallback where they *can't* do what the patient would have wanted.[163] From this perspective, deciding in the "objective best interests" of incapacitated patients is justified as *intent approximating*—the law *wants* to do what the patient would have wanted, and surrogates are supposed to do that if they can, but if we don't know what that is, our best guess is to act in their "*objective*" best interests; their interests as people generally understand them.[164]

Parenthood, unlike health law, isn't organized around the aspiration of doing what children would have wanted—it is organized around promoting the best interests of children in the first instance.[165] It couldn't be otherwise—young children don't have genuine preferences, it is meaningless to "approximate" them.[166] The role of the best interests standard in family law,

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[161] *See, e.g.*, OBERGEFELL V. HODGES, 576 U.S. 644 (2015) (holding that the Due Process and Equal Protection Clauses require states to recognize same-sex marriage); *see also generally* STEPHEN MACEDO, JUST MARRIED: SAME-SEX COUPLES, MONOGAMY, AND THE FUTURE OF MARRIAGE (2015) (defending marriage equality from the perspective of political liberalism). *But see* Gregg Strauss, *What's Wrong with Obergefell*, 40 CARDOZO L. REV. 631, 631 (2018) (arguing that the celebration of marriage as a distinctive institution in *Obergefell* is illiberal relative to non-marital families).

[162] *See supra* Part II.B; Ben-Asher, *supra* note 152, at 383 ("[L]iberal democracies protect parents from policies that attempt to shape children in a uniform way.").

[163] *See supra* note 133.

[164] *See, e.g.*, Robert M. Veatch, *Forgoing Life-Sustaining Treatment: Limits to the Consensus*, 3 KENNEDY INST. OF ETHICS J. 1, 11 (1993) ("The surrogate's role is, first, to see that the patient's actual choice, if known, is followed, next to make a substituted judgment based on what is believed the patient would have wanted to the extent that can be known, and finally, to pursue what is believed to be in the patient's best interests of actual or substituted judgment is not definitive."); MATTER OF CONROY, 486 A.2d 1209, 1229 (N.J. 1985) ("[T]he goal of decision-making for incompetent patients should be to determine and effectuate, insofar as possible, the decision that the patient would have made if competent.").

Compare, from this perspective to the law of intestacy—a *mandatory* inheritance scheme is illiberal, but a *default*, justified by reference to what most people probably would want if they haven't told us otherwise, is not; and that is what we have. Danaya C. Wright & Beth Sterner, *Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family*, 42 ACTEC L.J. 341 (2017) (noting the goal of intestacy as intent-approximating and studying the extent to which contemporary intestacy law is consistent with that goal).

[165] *See supra* Part II.A.

[166] *See supra* note 116.

in other words, is very different than in health law. In short, a liberal legal system could not prescribe its own normative framework for the reasons it can do so in *either* trust and health law.

And our legal system, indeed, has not adopted a particular normative framework for understanding the interests of children—as much as family law aspires to promote the best interests of children, the law broadly leaves up to parents to determine the framework through which to make sense of what their children's interests are.[167] The interests of children, what *counts* as their "welfare," looks very different under Islam and Deep Ecology, contemporary mainstream liberalism and the worldview of the Amish—and the law permits adherents of all of these views to raise their children accordingly; to make decisions in their best interests according to their own view of the world, to teach their children right and wrong as they see it.[168] In a legal system committed to liberalism, it couldn't be otherwise—otherwise, something we might rather call theocracy or totalitarianism.[169]

Of course, there *are* instances in which the state adjudicates children's interests according to its own standard—when making custody determinations most prominently, and in other situations where the paradigmatic marital parental model does not apply.[170] But these are the exceptions that prove the rule—the state only adjudicates the interests of children for itself, according to its own (notoriously undertheorized) standard when it *has to* because the law's usual strategy of deferring to parental views *can't* work—where the law must decide between deadlocked co-parents, or resolve competing claims of the allocation of parenthood, and so on.[171] And, by all accounts, courts are reluctant to do this, do so according judges' own

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[167] *See supra* notes 140–142 & accompanying text; Hohl, *supra* note 65, at 54–55 ("Many parents believe that they have a moral right to shape their children's conception of the good—maybe even a moral duty to do so (i.e., a duty to teach their children what are, in their view, the *correct* views and values."); Gilles, *supra* note 12, at 1015–1020 (defending constitutional law granting parents broad powers over raising their children).

[168] *See supra* notes 140–142 & accompanying text; *see also* Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U.C. DAVIS L. REV. 1221, 1267 (2011) ("Diverse concepts of parenting endorse different values and embody different advantages for child rearing.").

[169] *See supra* note 143 & accompanying text; *see also, e.g.*, Hamburger, *supra* note 152, at 465 (criticizing mandatory educational laws prescribing particular content as an "educational establishment" akin to religious establishments); STRAUSS, *supra* note 8, at 105 ("If public officials raised children, they would still have to judge which comprehensive values would guide the child's life.").

[170] *See supra* notes 60–61 & accompanying text; *see* Dillard, *supra* note 54, at 379 ("[A]s a legal matter, there are objective statutory criteria defining which parents are fit to maintain custody of children . . . .").

[171] *See, e.g.*, Strauss, *De Facto Parentage*, *supra* note 59, at 910 (noting that the state largely only applies its own conception of the "best interests of the child" standard when awarding parental rights in the first place in some way).

sketchy views of the interests of children, and end up all over the map.[172]

In other words, the state's sometime role in adjudicating the interests of children illustrates both that determining children's interests can only coherently take place relative to some normative framework; *and* that the law *hasn't* endorsed one.[173] If it had, adjudicating the interests of the children in custody and welfare cases would be a lot easier—in classical trust law, courts have a pretty clear sense of how trustees are generally supposed to be behaving.[174] Instead, the law puts courts in a very difficult, highly discretionary place when they *must* determine children's best interests because no one else can.[175] And while states have prescribed factors for courts to consider in making this decision, the contrast with health law is once again instructive—best interests of the children factors are meant to guide *courts* in adjudicating children's best interests; *parents* are not held to them.[176]

In sum, the law expects both trustees and parents to decide, in some sense, in the best interests of another person. In trust, the law has provided—in its understanding of what a trust is—the normative framework according to which trustees are to assess beneficiaries' best interests. With respect to parents, the law leaves the question of the normative framework through which to understand their children's interests up to individual parents, for reasons of liberalism. Parenthood is, from this perspective, a kind of *liberal*

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[172] *See, e.g.*, Dailey & Rosenbury, *Law of the Child*, *supra* note 8, at 1452 (noting that the "best interests of the child" as a judicial standard "has largely operated as cover for the exercise of unprincipled judicial discretion based on poorly thought-out factors focused on children's dependency."); Baker, *Equality*, *supra* note 7, at 441 (2022) ("There is little consistency between child welfare judges when making best interest determinations.").

[173] *See, e.g.*, Katherine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 675 (2008) ("[F]ew people think courts are particularly good at [adjudicating children's best interests] and courts themselves resist it."); Laufer-Ukeles, *supra* note 58, at 761 ("[T]he best interests analysis is so broad and malleable it is open to bias and varying interpretations.").

[174] *See, e.g.*, Donald T. Bogan & Benjamin Fu, *ERISA: No Further Inquiry Into Conflicted Plan Administrator Claim Denials*, 58 OKLA. L. REV. 637, 649 (2005) ("One of the advantages gained by the application of the trust law no-further-inquiry rule in plan administrator conflict of interest cases is a simple, uniform, and familiar standard of review that would relieve courts from the near-impossible undertaking of trying to consistently apply an unarticulated, less deferential, yet still somewhat deferential standard of review.").

[175] *See, e.g.*, Laufer-Ukeles, *supra* note 58, at 762 ("Often manipulated and abused, it is more of a goal rather than a legally relevant standard, and has resulted in overly expensive custody disputes and highly controversial decisions."); Baker, *Equality*, *supra* note 7, at 432 ("How could anyone criticize a standard that tries to do what is best for children? But when forced to take that standard seriously, judges often confessed that they had no idea what they were doing.").

[176] *See, e.g.*, *supra* notes 60–61 & accompanying text; *see also* Mo. Ann. Stat. § 452.375 ("[T]he court shall consider all relevant factors . . . including, but not limited to, the following:"); Cal. Ann. Stat. § 3011 ("In making a determination of the best interests of the child . . . the court shall, among other factors . . . consider all of the following:").

trust.

III. IMPLEMENTING LIBERAL TRUST

Thus far, we have sought to make sense of the law's construction of the parent-child relationship as a distinctively liberal variation on the trust. Parents are, on this account, empowered to make a broad range of decisions on behalf of their minor children, under a duty to do so in the children's best interests, as the parents understand them. To flesh out the character of parental decision-making, this Part discusses the way in which the unique fiduciary standard to which parents are held is operationalized, and how it fits alongside other legal relationships.

First, I discuss the constraints—at once both limited and genuine—that this standard imposes on parental decision-making on its own terms. Next, I discuss the way in which the law has distilled some specific rules governing certain factual circumstances out of its general standard, and, beyond that, the way in which it might impose additional constraints on parental behavior, extrinsic to the normative logic of the relationship. Finally, I note the way in which this understanding of parenthood is mirrored throughout the structure of legal relationships.

A. The Logic of Parenthood

There's probably a reason that the that the law doesn't direct traditional trustees to pursue the best interests of beneficiaries, however the trustee defines them—trust law would be less popular.[177] With trustees held to an "objective," widely mainstream standard for what counts as the best interests of beneficiaries, prospective settlors know what they are getting out of a trust—professional money management—without having to find a trustee who shares their values or contract one to a particular standard.[178] At the same time, the "objective" nature of trust's standard makes policing its fiduciary duties relatively straightforward—judges can hold trustees to breach for managing money in non-mainstream ways without too deeply probing what

[177] *See, e.g.*, John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L. J. 625, 638 (1995) ("[T]he prototypical modern trustee is the fee-paid professional, whose business is to enter into and carry out trust agreements."); Gregory S. Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767, 775 (2000) ("Today, the vast majority of trusts are administered by large financial institutions, such as trust companies and trust developments of commercial banks.").

[178] *See, e.g.*, John H. Langbein, *Rise of the Management Trust*, TRUSTS & ESTATES 52 (2004) (describing the rise of the use of the trust mechanism for long-term money management).

was going through their mind.[179]

In contrast, a legal standard directing parents to act in the interests of their children however they understand them may seem difficult to implement—we might worry that *any* decision could be construed as in the best interests of children under *some* standard; perhaps a rhetorical constraint on parental decision-making, but hardly short of absolute discretion in substance. From one perspective, this is as it should be—parents *do* have extraordinary powers over their children, far broader than trustees (perhaps, indeed, broader than any other fiduciary relationship), subject to far less judicial review—trustees are routinely held liable for breaches as banal as leasing land to themselves at market rate;[180] parents can refuse to educate their children past eighth grade.[181] A theory that fails to account for this distinction is a non-starter. And let's not ignore the expressive function of fiduciary rhetoric, even where its duties are not vigorously enforced.[182]

On the other hand, a theory of parenthood that took it to be governed by an *empty* standard couldn't be right either. That's ownership—and parenthood isn't.[183] Insofar as the fiduciary paradigm is on the right track, it must be because parental powers are guided and constrained by some standard.[184] And, of course, as we've seen, parental decision-making *is* subject to standards—however deferential they may be, at some point the

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[179] *See, e.g.*, Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 633–34 (2004) ("The default rules governing trust investment now require something of a total return investment strategy consistent with modern portfolio theory."); SMITH, *supra* note 14, at 34 ("[W]hen the rules about conflicts apply, a decision is reviewable without inquiry into the subjective decision-making process."); *see also* MAGRUDER V. DRURY, 235 U.S. 106, 119 (1914) ("The intention is to provide against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty which is owing in a fiduciary capacity.").

[180] *See, e.g.*, IN RE GLEESON'S WILL, 124 N.E. 2d 624 (Ill. App. 1955) (holding trustee liable for renewing lease of agricultural land to himself without public auction where settlor died two weeks before the growing season).

[181] *See* WISCONSIN V. YODER, 406 U.S. 205 (1972).

[182] *See, e.g.*, Joseph W. Yockey, *The Fiduciary Duty of Dissent*, 69 VILL. L. REV. 157, 161 (2024) ("[A] key function of fiduciary duties is to express and reinforce the values and ideals that society thinks should govern how people in fiduciary relationships interact."); Julian Velasco, *A Defense of the Corporate Law Duty of Care*, 40 J. CORP. L. 647, 692 (2015) ("[J]udicial opinions can influence [fiduciary] behavior, even without a formal legal sanction, simply by letting [fiduciaries] know what they might have done differently.").

[183] *See supra* Part I.C; *see also* Robert H. Sitkoff, *An Economic Theory of Fiduciary Law*, in ANDREW S. GOLD & PAUL B. MILLER, EDS., PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 197, 205 (2014) ("A person may give property to another person and authorize the person to act whimsically with respect to the property. But this mode of transfer is an absolute gift, and this mode of holding property is fee simple.").

[184] *See supra* Part I.D.

state *will* intervene.[185] A theory of the parent-child relationship must make sense of these boundaries too—the fact that the parental exercise of power is not unlimited, and is subject to a genuine, substantive standard; if a deferential one, presumptively met.[186]

From this perspective, a standard that requires parents to decide in the best interests of their children, under some theory of what the parents believe, in good faith, those interests to be, is capacious, deferential, and liberal, but not *empty*. By its own logic, it rules out certain kinds of decisions that parents would otherwise be able to make, and that property owners can.[187] Two categories are exemplary—those made in bad faith, in which the parent does not genuinely believe that the decision was in the child's best interests at the time it was made, and those made following a worldview that has led the parent to act in some way other than in the *child's* best interests, by the framework's own terms.

We can certainly imagine (little, no doubt, as we want to) normative frameworks under which egregious physical abuse or gross neglect of children is somehow good for them. There may even be people out there who believe such things. But, under the model of parents as liberal trustees, when the state intervenes alleging breach of parental duty, that is not the question—the question is not whether the parent can *come up* with *some* normative framework that could possibly make sense of their behavior as in the best interests of their children.[188] The question is whether *this parent*, acting in the contested way, *in fact* believed, in good faith, that what they did was in the child's best interests at the time they acted.[189] That is a very different question. And while a liberal trust model of parental powers is necessarily committed to taking seriously a broad range of controversial normative frameworks sincerely held in good faith, it is not committed to recognizing disingenuous, post-facto, bad faith rationalization for decision-making that perhaps could have been true, but wasn't.[190] This is, indeed, characteristic of

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[185] *See supra* notes 60–61 & accompanying text.

[186] *See supra* Part II.B.

[187] *See supra* note Part II.C; *see also, e.g.*, Scott, *supra* note 47, at 283 ("[U]nlike the traditional libertarian justification for parental rights, the modern rationale is self-limiting.").

[188] *See, e.g.*, Stephen R. Galoob & Ethan J. Leib, *Fiduciary Loyalty, Inside and Out*, 92 S. CAL. L. REV. 69, 104 (2018) ("[F]iduciary loyalty can also implicate the fiduciary's motivations."); Lionel Smith, *The Motive, Not the Deed*, in JOSHUA GETZLER, ED., RATIONALIZING PROPERTY, EQUITY, AND TRUSTS: ESSAYS IN HONOUR OF EDWARD BURN 53, 53 (2003) (arguing that fiduciary law requires that fiduciary's act with the appropriate motivation).

[189] *See* SMITH, *supra* note 14, at 97 ("Quite different is the case of trustees who subjectively believe that some investment policy is in the best interests—perhaps the best long-term interests—of beneficiaries.").

[190] *See, e.g.*, Smith, *supra* note 13, at 432 ("[I]f it was shown that the parent was not acting in what she perceived to be the best interests of the child, such a challenge would

the enforcement of all fiduciary relationships—which care about the fiduciary's *actual motivation at the time of the decision*.[191]

I am, to be sure, no expert on the median psychology of people who hurt children—but I have to imagine that this characteristic of the structure of the liberal trust model makes sense of the overwhelming majority of (justified) state intervention in child abuse and neglect cases.[192] The state's intervention in parental relationships is subject to a high substantive and evidentiary bar—I have to assume that most parents at risk of losing parental rights for, say, failing to feed their child, or sexually assaulting them, or what have you, did not genuinely believe that what they did was in the best interests of their child when they did it.[193] And, indeed, the vast majority of state intervention in abuse and termination cases proceeds without the parents raising some sort of religious, moral, or cultural objection—presumably at least in part because of its factual implausibility.[194]

Second, like any legal regime grounded in liberalism, the liberal trust model—while committed to accommodating a broad range of worldviews—is not *entirely* agnostic on questions of value.[195] One proposition, in principle contestable, to which liberalism is necessarily committed is to the foundational, organizing value of the human individual—liberalism's commitment is to *each person's* prerogative to decide for themselves how life ought to be lived, and a model based on it is to that extent necessarily

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succeed."); Chiu, *supra* note 59, at 1776 (noting that parents make a broad range of decisions in the good faith belief that what they are doing is best for children).

[191] *See supra* note 188.

[192] *See, e.g.*, Smith, *supra* note 13, at 451 ("The nature, function, and purpose of the legal powers that we call parental authority are such that parents must exercise them in good faith, in what they perceive to be the best interests of their children, as those interests are affected by the interests of the other members of the family. And this is what I think most parents do."); Huntington, *supra* note 56, at 1164–65 ("Nightly news programs tend to focus on the horrific cases of child abuse and neglect, but even in these cases, the underlying stories tend to be more complicated than the television reporter would have us believe.").

[193] *See, e.g.*, Mary J. Cavins, *Sexual abuse of child by parent as ground for termination of parent's right to child*, 58 A.L.R. 3d 1074 ("Parents have an inherent right to control and care for their children, and this right will not be disturbed except for the strongest reasons and upon a clear showing of gross misconduct or unfitness, or of other extraordinary circumstances affecting the welfare of children."); ALSAGER V. DISTRICT COURT, 406 F. Supp. 10 (S.D. Iowa 1975) *aff'd per curiam*, 545 F.2d 1137 (8th Cir. 1976) (holding that statutes authorizing termination of parental rights must be supported by a compelling state interest to overcome strict scrutiny).

[194] *See, e.g.*, Roger J.R. Levesque, *Cultural Evidence, Child Maltreatment, and the Law*, 5 CHILD MALTREATMENT 146, 52–53 (2000) (noting that, while it is difficult to find exact figures, invoking cultural or religious defenses in child abuse cases appears to be rare—with only two published cases in the country and a handful of media reports).

[195] *See, e.g.*, Galston, *supra* note 143, at 524 ("I have spent the past decade arguing against all understandings of the liberal state as comprehensively neutral.").

committed to the notion that each individual is valuable.[196] In the liberal trust model of parenthood, this commitment is borne out in the law's injunction that parents act in their view of the best interests *of their children*, not their view of the best interests of, for instance, society or the world writ large.[197] The law is agnostic about *how* parents think about promoting the welfare of their children, but it is not agnostic *that* they do—parenthood, on the view outlined here, is at bottom a relationship organized around promoting the welfare *of children*.[198]

This characteristic of the liberal trust model, too, has bite.[199] Indeed, one of the great suspicions of the behavior of other parents—one of the grounds of skepticism for broad parental rights—is the worry that other parents are *using* their children to advance *their own* interests.[200] Presumably in many cases, that worry isn't true—and parents want their children to succeed in the spelling bee, learn the piano, or go out for football because they believe it is good for them, as opposed to what psychologists have called "achievement by proxy."[201] But if parents *are* giving their children cosmetic surgery

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[196] *See, e.g.*, Toomey, *Substituted Judgment*, *supra* note 87, at 1317 ("[P]rivate law is not *entirely* agnostic to essential questions of value."); Ebels-Duggan, *supra* note 150, at 35 ("Respect is the foundational value of political liberalism."); Gerald F. Gaus, *The Moral Foundations of Liberal Neutrality*, in THOMAS CHRISTIANO & JOHN CHRISTMAN, EDS., CONTEMPORARY DEBATES IN POLITICAL PHILOSOPHY 83 (2009) ("Liberalism, I shall argue, is neutral between *persons* . . . .").

[197] *See supra* Part II.C.

[198] *See, e.g.*, Vivian E. Hamilton, *Immature Citizens and the States*, 2010 B.Y.U. L. REV. 1055, 1058 ("Children are born, but they are also made."); Riccardo Spotorno, *Liberalism and the family*, in DUNCAN IVISON, ED., RESEARCH HANDBOOK ON LIBERALISM 119, 129 (2024) ("[A]lthough parents might not have a duty to respect children's present autonomy, they should ensure that their children will develop into fully autonomous adults . . . .").

[199] *See, e.g.*, Ouellette, *supra* note 15, at 970–71 (describing a hypothetical case as abusive where a father wants to give his child surgery so they look the same); *see also* Leib, *supra* note 88, at 26 ("As long as parents' focus is, however, on the *child's* ultimate welfare rather than someone else's (particularly their own but also co-religionists, community members, school officials, their own parents), a parent is not in default of fiduciary norms.").

[200] *See, e.g.*, Martina M. Cartwright, *Princess by Proxy: What Child Beauty Pageants Teach Girls About Self-Worth and What We Can Do About It*, 51 J. AM. ACAD. CHILD & ADOLESCENT PSYCH. (2012) (arguing that many parents who put their children in beauty pageants are motivated by "achievement by proxy" or "princess by proxy"); Stacey B. Steinberg, *Sharenting: Children's Privacy in the Age of Social Media*, 66 EMORY L. J. 839, 839 (2017) (surveying cases in which parents are perceived to be using pictures of their children for their own benefit on social media).

[201] *See, e.g.*, Ian R. Rofler, Penelope Krener Knapp & Michael T. Lardon, *Achievement by Proxy Distortion in Sports: A Distorted Mentoring of High-Achieving Youth. Historical Perspectives and Clinical Intervention with Children, Adolescents and their Families*, 24 CLINICS IN SPORTS MED. 805 (2005) (discussing the "achievement by proxy" phenomenon in youth sports); *see also* Dailey & Rosenbury, *Parental Rights*, *supra* note 46, at 98 ("In some circumstances, children may be treated as extensions of parental egos or used to satisfy

because they prefer looking them this way, or conscripting them for their revolutionary militia, they are, on this account, breaching their parental duties.[202]

B. "Best Interests" and Crystallized Rules

The logic of the legal relationship of parenthood, understood on the liberal trust model, at a minimum takes parental conduct in bad faith or not in the interests of the children by the parents' own light to breach their duties. This, however, hardly explains all of the constraints on parents' behavior that we see in the law.[203] Of course, we've already seen that in classical trust law, too, trustees' conduct is not *only* governed by the open-ended directive to act in the best financial interests of the beneficiary—there are number of *particular* things that the law requires of trustees.[204] The same goes for parents—who must, for instance, provide their children a minimum of education, vaccinate them, and forego certain cultural practices like ritual genital cutting.[205]

In the traditional trust context, many of the specific rules that govern trustee conduct are thought to be crystallizations of rules of thumb to maximize the financial interests of the beneficiaries; making conduct that is overwhelmingly likely not to be consistent with that standard easier to police.[206] So, for instance, trustees are flatly prohibited from engaging in self-interested transactions without prior court approval—*even if* a particular self-interested transaction could later be shown to have been in the best financial interests of the beneficiaries, the law presumes that this is *so rarely the case* it is worth policing with a clear *ex ante* rule.[207] In cases like these, the relevant

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parental needs or desires.").

[202] *See generally* ONE BATTLE AFTER ANOTHER (Warner Bros. Pictures – 2025); *see also* STRAUSS, *supra* note 8, at 263 ("Parents would violate this imperative if, for example, they procreate because they want a living doll for their amusement."); Leib, *supra* note 88, at 13 ("If a parent deliberated about the interests of her child with her objective principally focused on getting herself—the parent—into the Kingdom of Heaven, that would be failing to live up to the fiduciary obligations because it is the wrong deliberative orientation in pursuing the *child's* best interests . . . .").

[203] *See, e.g.*, Smith, *supra* note 13, at 436 ("Parental authority is also subject to objective limitations."); Baker, *Equality*, *supra* note 7, at 449 ("[T]he law must set outside boundaries for abuse . . . .").

[204] *See supra* note 128 & accompanying text.

[205] *See supra* note 57.

[206] *See, e.g.*, SMITH, *supra* note 14, at 34 ("Conflicts of interest create a universal danger when judgment must be exercised unselfishly, because power can be improperly used entirely unconsciously.").

[207] *See, e.g.*, Deborah S. Gordon, *Trusting Trust*, 63 U. KAN. L. REV. 497, 507–08 (2015) (describing the no-further-inquiry rule barring trustees from engaging in conflicted

rules are consistent with, and, indeed, emerge from, the internal logic of the trust relationship—they are particularized rules distilled from regular application of the standard to routinely encountered factual circumstances.[208]

Many of the particularized rules governing parental conduct can be explained in a similar way. In the liberal trust model of parenthood, the law can distill specific rules to police its basic logic in at least two interrelated ways. First, as we've seen, certain kinds of parental conduct violate the logic of the parent-child relationship—at least, decisions made in bad faith, and those not in the best interests of the children on parents' own terms.[209] Some particularized rules governing parental behavior are plausibly justified as capturing intuitions about behavior that is *extremely likely* to violate the logic of the parental relationship in precisely these ways.[210] Parents are, for instance, flatly prohibited from murdering their children *even if* the parents acted on the good faith belief that doing so was in their best interests (because, say, they thought it was necessary to guarantee their child's salvation) because it is *far more likely* that parents doing so were acting for interests other than their child's; and adopting the rule efficiently polices what might otherwise be difficult-to-ascertain states of mind.[211]

As already suggested, similar logic can explain many of the concrete prohibitions of specified kinds of abusive or neglectful behavior we see in the law—such as the federal prohibition on the ritual genital cutting of girls.[212] According to the anthropological literature, while many such parents believe that cutting is in the best interests of their daughters,[213] in at least some communities parents justify the practice as for the benefit of *men*.[214] If we

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transactions as a "strong prophylactic rule designed to counter-balance the potential for misappropriation"); Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor Langbein*, 47 WM. & MARY L. REV. 541, 541 (2005) (arguing that self-dealing transactions are consistently enough not in the best financial interests of beneficiaries that they ought to be prohibited).

[208] *See supra* note 128 & accompanying text.

[209] *See supra* Part III.A.

[210] *See supra* Part III.A.

[211] *See supra* Part III.A.

[212] *See supra* 57 & accompanying text.

[213] *See, e.g.*, American Academy of Pediatrics, *Ritual Genital Cutting of Female Minors*, 125 PEDIATRICS 1088 (2010) ("When parents request a ritual genital procedure for their daughter, they believe that it will promote their daughter's integration into their culture, protect her virginity, and, thereby, guarantee her desirability as a marriage partner.").

[214] *See, e.g.*, LA. Briggs, *Male and Female Viewpoints on Female Circumcision in Ekpeye, Rivers State, Nigeria*, 6 AFRICAN J. REPRODUCTIVE HEALTH 44, 49 (2002) (finding a majority of men in a particular African community would not marry an uncircumcised woman, and wanted their own daughters circumcised to reduce sexual desire); *see also* Hugh P. Young, *Informed consent*, Response to American Academy of Pediatrics, *Ritual Genital Cutting of Female Minors*, 125 PEDIATRICS 1088 (2010) ("All of this just underlines that all non-therapeutic genital cutting is done to benefit, not the child, but the parents.").

think that the latter is common enough that claims of the former are overwhelmingly likely to be disingenuous, the law could adopt a blanket prohibition on the practice justified as a straightforward crystallization of the internal logic of the parent-child relationship.

Second, we've seen that the basic structure of the parent-child relationship is justified with reference to liberalism—a *general* commitment to leaving contested questions of worldview to individuals; but not *anarchy*.[215] Any particular theory of liberalism must contain an explanation of when the law is justified in—and perhaps even *required* to—prohibit conduct even though it arises from the practice of some worldview or another; usually circumscribed by preventing "harm" to others; or accommodating the boundaries of only "reasonable" worldviews.[216] Indeed, as we've already seen, liberalism *is* committed, at least, to the contestable normative claim that *each* individual person is morally significant and to that extent liberal legal regimes *must* proscribe conduct that is harmful (in some sense) to others, or it risks vitiating the essential reasons for which one might commit to liberalism in the first place.[217]

We've seen this, moreover, in the law's understanding of parents as liberal *trustees*—parents must exercise their powers *for the welfare of their children*, *in some sense*.[218] Given this, a legal relationship built on solicitude for liberal commitments might prescribe particularized rules thought to preclude behavior that it is *confident enough* (past the threshold of the particular account of liberalism on which the law is based) is not in the best interests of children—and is, indeed, rather "harmful," or "unreasonable."[219] Without here adjudicating the details among particular theories of liberalism, logic along these lines can explain many of the specific restrictions on parental behavior in the law. For instance, *even if* most parents who pursue

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[215] *See supra* note 143.

[216] *See, e.g.*, JOHN STUART MILL, ON LIBERTY 13 (1965) (arguing that the liberal legal systems are only justified in prohibiting conduct that causes harm to others); RAWLS, *supra* note 143, at 58–66 (distinguishing between the "reasonable" comprehensive doctrines liberalism is committed to accommodating and "unreasonable" ones, that it isn't); *see also* Ben-Asher, *supra* note 152, at 408 ("A family law that supports violence against others should not trigger a family's liberty to opt out.").

[217] *See, e.g.*, Piers Norris Turner, *"Harm" and Mill's Harm Principle*, 124 ETHICS 231, 231 (2014) ("A central problem for John Stuart Mill's liberalism is specification of 'harm' in his famous harm principle."); Martha Nussbaum, *Rawl's* Political Liberalism. *A Reassessment*, 24 RATIO JURIS 1, 6 (2011) (discussing Rawl's view on when the law must proscribe the conduct of unreasonable worldviews).

[218] *See supra* Part III.A.

[219] *See, e.g.*, Hohl, *supra* note 65, at 66 ("Views that are objectively harmful to children are not reasonable and can be excluded on those grounds."); STRAUSS, *supra* note 8, at 52 ("[T]he community has a duty to ensure parental adequacy, which it can fulfill only if it has authority to define and enforce limits on parental conduct.").

genital cutting believe in good faith it is in the best interests of their daughters, the rest of us might be *confident enough* they are wrong to proscribe it.[220] Ditto for (most) mandatory vaccination schemes—anti-vax parents by all accounts genuinely believe vaccination is harmful to children,[221] but they are wrong.[222]

Similar logic, finally, can get us to at least some of the baseline educational requirements in the law. There are, to be sure, people who think that not educating their children (or, at least, some of their children) is in those children's best interests.[223] But the law is sufficiently confident that they are harming them that a model of parenthood can justifiably demand some sort of education.[224] At the same time, while I take it that the law is sufficiently confident that *not* educating children is harmful to require *some* education, there is enough good faith disagreement beyond that about *what kind* that the law—for liberal reasons—lets parents educate their children as they see fit, within very broad parameters.[225] *Both* of these characteristics of

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[220] *See, e.g.*, Rigmor C. Berg, Vigdis Underland, Jan Odgaard-Jensen, Atle Fretheim & Gunn E. Vist, *Effects of female genital cutting on physical health outcomes: a systematic review and meta-analysis*, 4 BMJ OPEN 1, 1 (2014) ("Based on the studies of this systematic review, there is clear evidence that female genital mutilation/cutting . . . entails harm to women's physical health throughout their life, from the moment of the cutting as an infant or child, to sexuality and childbirth in adulthood.").

[221] *See, e.g.*, Gregory A. Poland & Robert M. Jacobson, *Understanding those who do not understand: a brief review of the anti-vaccine movement*, 19 VACCINE 2440, 2441 (2001) (observing that anti-vaccine advocates honestly believe that they cause health problems); Adam Ratner, *How physicians should talk to parents of unvaccinated children who have contracted measles*, STATNEWS (Mar. 8, 2025), https://www.statnews.com/2025/03/08/unvaccinated-children-measles-parents-conversations-doctors-texas/ ("Vaccine-hesitant parents love and want to protect their children, like all parents do.").

[222] *See, e.g.*, Christine S. Benn & Peter Aaby, *Measles vaccination and reduced child mortality: Prevention of immune amnesia or beneficial non-specific effects of measles vaccine?*, 87 J. INFECTION 295, 295 (2023) (noting that dramatic decrease in childhood mortality associated with measles vaccination).

[223] The Taliban, for instance, notoriously bans girls from schools. *See, e.g.*, Abdul Qadim Mohammadi, Ahmad Neyazi, Diva Habibi, Qasim Mehmood, Mehrab Neyazi & Mark D. Griffiths, *Female education ban by the Taliban: A descriptive survey study on suicidal ideation, mental health, and health-related qualify of life among girls in Afghanistan*, 46 J. PUB. HEALTH e439, e439 (2024).

[224] *See, e.g.*, Maxine Eichner, *Who Should Control Children's Education?: Parents, Children, and the State*, 75 U. CINN. L. REV. 1339, 1347 (2006) ("While belief in the value of individuals being able to choose their own path in life is a hallmark of liberalism, it is deeply opposed to the beliefs of the Amish community."); Gilles, *supra* note 12, at 951 ("We can all agree that children need an education . . . ."); Gutmann, *supra* note 58, at 347 ("Parents' rights are seriously constrained by the rights of their children, which are in turn dependent upon the nature of the society within which children are to be raised.").

[225] *See, e.g.*, Gilles, *supra* note 12, at 951 ("But the fact of ineradicable pluralism must be reckoned with. We cannot agree on the good life, and consequently we cannot agree on

the law of parental decision-making—crystallized as they are in particularized legal rules—are consistent with, and, indeed, can be understood to arise, from the internal logic of parenthood as a liberal trust.

C. Parents as Liberal Trustees and External Constraints

But we still might wonder whether *all* the specific restrictions on parental decision-making can be explained on these grounds. Consider mandatory vaccination for chickenpox—far more dangerous to *adults* in the community than children themselves; arguably not in the best interests of the *children* in any sense.[226] And perhaps preventing harm *to children* does not plausibly explain *all* the mandatory content of education in the United States—it might be that some aspects of what is required out of parents on this score is justified as in *society's* interests rather than those of children.[227]

These sorts of rules could not be explained as arising from the internal logic of the parent-child relationship—but that does mean that they don't (or shouldn't) exist. It simply means that they must come from *outside* the logic of the parent-child relationship as a liberal trust; they are *external* constraints on parental behavior. Let's compare once again to trust law. A trustee might believe in good faith that engaging in tax evasion is in the best financial interests of their beneficiary. Indeed, it might actually *be* that trustees generally promote the best financial interests of their beneficiaries when they engage in tax evasion. But it is still a crime.[228] The law prohibits trustees from engaging in tax evasion not because it doesn't think tax evasion is in the best financial interests of beneficiaries, but because it thinks that tax evasion is *bad*; that is, for normative reasons distinct from those that led to the law's constructing the trust-beneficiary relationship as a legal relationship based on the best financial interests of beneficiaries in the first place.[229]

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the good education."); *see also* Hamburger, *supra* note 152, at 438 ("[D]iversity of views is inevitable in an expansive and diverse nation.").

[226] *See, e.g.*, A.J. Tunbridge, J. Bruer & K.J.M. Jeffery, *Chickenpox in adults—Clinical Management*, 57 J. INFECTION 95, 95 (2008) (observing that chickenpox is far more dangerous in adults than children).

[227] *See, e.g.*, Eichner, *supra* note 224, at 1379 (arguing that the state must ensure all children receive a basic education).

[228] *See, e.g.*, Restatement (Third) of Trusts § 76 ("The trustee has a duty to administer the trust, diligently and in good faith, in accordance with the terms of the trust and applicable law."); Smith, *supra* note 13, at 405 ("[P]arties cannot enforce illegal contracts or trusts . . . .").

[229] *See, e.g.*, STUART P. GREEN, LYING, CHEATING, AND STEALING: A MORAL THEORY OF WHITE COLLAR CRIME 246–48 (2006) (arguing that the law prohibits tax evasion as a kind of cheating); MARTIN T. CROWE, THE MORAL OBLIGATION OF PAYING JUST TAXES 42 (1944) (describing tax evasion as morally equivalent to stealing).

And so too in parenthood.[230] Parents—like everyone else—must follow duly-enacted laws, *whatever* their normative justification.[231] So it may be that the normative justification for mandatory chickenpox vaccination is extrinsic to the logic of the parent-child relationship, justified by a distinct set of normative reasons from those leading the law to construct the relationship the way it has—it might, for instance, be justified by preventing harm to third-party adults in the community; while the parent-child relationship itself is organized around liberalism and the interests of children.[232] All of these are clearly legitimate normative interests; and surely neither liberalism nor the best interests of children are our law's *only* normative commitments.[233]

And, indeed, it may be that some aspects of mandatory educational schemes are justified more by reference to the society we want to build than the benefit of particular children.[234] Indeed, some mandatory education might not emerge from—or perhaps even be consistent with—the liberal commitments according to which the law organized parenthood along the lines of a liberal trust in the first place.[235] Regardless, it is hard to imagine that in a pluralistic democracy all law could be derivable from a single cohesive set of moral or philosophical commitments.[236] It might be that liberalism is *one* foundational value of our legal system—significant enough

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[230] *See, e.g.*, Shulman, *supra* note 15, at 303 ("The state has always claimed that the parent-child relation is subject to ordinary municipal relations.").

[231] *See, e.g.*, William A. Galston, *The Limits of Privacy: Culture, Law, and Public Office*, 67 GEO. WASH. L. REV. 1197, 1200 (1999) (noting the general duty of citizens to follow duly enacted statutory law).

[232] *See supra* Part II.C.

[233] *See, e.g.*, GARDNER, *supra* note 32, at 12 ("[E]ndless values are in play in private law."); Stephen Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 STAN. L. REV. 385, 406 (1996) ("In a significant sense, the fact of reasonable pluralism is the natural and intended consequence of liberalism."); *see also* RAWLS, *supra* note 143, at xxiv ("[P]olitical liberalism assumes the fact of reasonable pluralism as a pluralism of comprehensive doctrines, including both religious and nonreligious doctrines.").

[234] *See, e.g.*, Schneider, *supra* note 67, at 2484 (noting that in some contexts "it might be franker and more realistic to say that the state imposes rules in order to prevent parents from harming their children, not because they and the state have reached some kind of hypothetical contract"); Hamilton, *Immature Citizens*, *supra* note 198, at 1081 ("The state may thus legitimately restrain or constrain parents' liberties in order to guarantee the later basic liberties of the future mature citizen.").

[235] *See supra* 230–34 & accompanying text; *see also* Hamburger, *supra* note 152, at 467 ("Although the educational establishment is now more secular than religious, it is a government establishment . . . .").

[236] *See, e.g.*, John David Ohlendorf, *Against Coherence in Statutory Interpretation*, 90 NOTRE DAME L. REV. 735, 738 (2014) (noting that the law is comprised of legislative compromise that cut against the general coherence of the legal system); Andrei Marmor, *Should We Value Legislative Integrity?*, in LAW IN THE AGE OF PLURALISM 39, 39 (2007) (arguing that some normative incoherence in the law arises from a genuine commitment to pluralism and democracy and ought to be celebrated).

to construct certain private law relationships around.[237] But not the only one, and there may be external constraints on parental behavior arising from different normative concerns.

D. Parenthood and Other Legal Relationships

Here is the picture of the legal relationship of parenthood as we've seen it. The law has recognized a certain relationship, comprised of specified powers and duties—in this case, the relationship we call "parenthood," granting to "parents" the power to decide on behalf of their children, guided by a duty to do so in their best interests, as understood by the parent.[238] Some kinds of legal behavior are inconsistent with the content of this relationship on its own terms—for example, purely selfish parental conduct.[239] And the law has crystallized a number of specific rules, emerging from (or at least consistent with) this logic—that is, thought to efficiently ensure that parents act in the best interests of their children; such as rules prohibiting female genital cutting.[240] At the same time, there may be kinds of behavior that *would* be consistent with the internal logic of the relationship that the law nevertheless wants to prohibit—perhaps at play in certain kinds of mandatory vaccination and education schemes.[241]

Seen in this light, the structure of legal parenthood is not at all idiosyncratic among private law relationships—this is their *ubiquitous* structure. We've already seen this in trust. The legal relationship between trustee and beneficiary is conceptualized as a particular set of powers and duties—trustees have property management powers, to be exercised in the best financial interests of the beneficiaries.[242] Some things a trustee might do violate the logic of this relationship—if, for instance, the trustee exercises powers in some way other than for the best financial interests of the beneficiary.[243] Some things violate the logic of this relationship consistently enough to be prohibited by crystallized rule—conflicts of interest.[244] And there are certain things that don't violate trustees' duties *as trustees*, but which trustees nevertheless can't do—like tax evasion.[245]

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[237] *See supra* note 143.
[238] *See supra* Part I.B.
[239] *See supra* Part III.A.
[240] *See supra* Part III.B.
[241] *See supra* Part III.C.
[242] *See supra* Part II.B.
[243] *See, e.g.*, Restatement (Third) of Trusts § 70 (stating that trustees have the powers of an owner of property except as limited by the terms of the trust, and must comply with fiduciary duties in exercising those powers).
[244] *See supra* note 128.
[245] *See supra* note 228 & accompanying text.

This dynamic is, moreover, not some quirk of trust-like legal relationships. Contract partners owe each other the duties specified in the contract—that is the logic of contract law.[246] This makes sense of *much* of contract doctrine—it's not, for instance, a real agreement if the parties used the same word ("*Peerless*") but meant different things.[247] And the law has crystallized rules out of this logic—it might well be that some 17-year-olds *can* agree with the kind of genuine autonomy that contract law cares about; but the law thinks that they cannot *consistently enough* to take such "agreements" as voidable.[248] And yet nothing internal to contract's logic would void freely agreed murder-for-hire agreements—the law does so for reasons external to the logic of the relationship.[249]

Property law might be even more analogous. The legal relation of ownership itself imposes *no* duties on owners.[250] But just as the liberal trust model of parenthood is based on a commitment to the foundational moral significance of *each* child, the institution of private property recognizes that *each owner* can behave as they like with their property—conduct by one owner that inhibits another's ability to do so violates the normative reasons for a regime of private property in the first place; that's nuisance law.[251] Prohibitions on pollution justified by its tendency to inhibit the ownership prerogative of other owners might be seen as crystallizations of this basic logic.[252] But that doesn't explain all of the restrictions on the powers of

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[246] *See, e.g.*, Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 PHIL. REV. 481, 485 (2008) ("[T]he power to make binding promises, as well as to forge a variety of other related forms of commitment, is an integral part of the ability to engage in special relationships in a morally good way, under conditions of equal respect."); Abraham Sesshu Roth, *Intention, Expectation, and Promissory Obligation*, 127 ETHICS 88, 90 (2016) ("[C]onsiderations of autonomy—of having some control over one's relationships—also point to the importance of acceptance for promissory obligation.").

[247] *See, e.g.*, RAFFLES V. WICHELHAUS, [1864] EWHC Exch J19 (holding that where parties purportedly "agreed" to a transaction involving the ship "Peerless," but intended to refer to different ships, had not really agreed on anything).

[248] *See, e.g.*, Restatement (Second) of Contracts § 14 ("Unless a statute provides otherwise, a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person's eighteenth birthday.").

[249] *See, e.g.*, Restatement (Second) of Contracts § 178 ("A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.").

[250] *See, e.g.*, REINACH, *supra* note 22, at 55 ("Whatever ways of acting one can think up, whatever combinations of them one may devise—the owner always has the right to perform them.").

[251] *See, e.g.*, John C.P. Goldberg, *On Being a Nuisance*, 99 N.Y.U. L. REV. 864, 887 (2024) (noting the role of private nuisance as protecting the prerogatives of other owners).

[252] *See, e.g.*, 40 C.F.R. § 268.50 (outlining federal environmental restrictions on the disposal of toxic waste on private property).

ownership in law—one owner hardly prevents another from doing what they want with their property by erecting a modernist monstrosity; not to mention the parts of environmental law justified on aesthetic grounds.[253] These are *external* constraints—justified by *different* normative reasons than those that make sense of the law's understanding of the relationship of property ownership in the first place.[254]

From this perspective, the account offered here of the law of parenthood—as a private law relationship constituted by certain powers and duties; giving rise to crystallized, specific prohibitions enforcing the logic of those duties; and subject to constraints on their exercise external to the logic of the relationship—is not at all idiosyncratic. This is, indeed, how private law *works*—and how the legal relationships that comprise it ubiquitously are structured.

IV. IMPLICATIONS

The account of the parent-child relationship offered here is a descriptive one—a theory about what is distinctive about a particular set of powers and duties that the law recognizes. A theory of this sort cannot tell us how the law *ought* to be structured. But it can shed light on the normative architecture of the law of parents and children—on the kinds of questions legal regimes must answer in this context, and the ways in which our legal system has answered them. This Part explains how an account like the one offered can help make sense of these broader normative questions, and how it helps make sense of the structure of private law.

First, I show that the model emphasizes that legal regimes face at least five distinct normative questions in designing the law of parents and children—questions about how to *constitute* the parent-child relationship, what *crystallized rules* to adopt to police its content, subject to what *external constraints*; whom to *allocate* it, and when to *terminate* it. Next, I show what the account reveals about the modular structure of private law relationships.

A. Five Normative Questions in the Law of Parenthood

Throughout our descriptive account of the parent-child we have come

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[253] *See, e.g.*, Raymond Robert Coletta, *The Case for Aesthetic Nuisance: Rethinking Traditional Judicial Attitudes*, 48 OHIO ST. L. J. 141, 141 (1987) (noting "historical reluctance" of nuisance law to countenance "actions based on aesthetics"); Nancy Perkins Spyke, *The Instrumental Value of Beauty in the Pursuit of Justice*, 40 U.S.F. L. REV. 451, 472 (2006) (noting that many environmental laws "seek to protect aesthetics" and citing examples).

[254] *See, e.g.* REINACH, *supra* note 22, at 55 ("Of course these rights can be limited by obligations of right and by moral duties deriving from other facts.")

upon a number of places in which the law of parents and children could be otherwise—where the law is the way it is because of normative choices it has made. Indeed, the basic structure of the parental relationship as a liberal trust is a normative choice—liberalism is a normative commitment.[255] And it is the hope of a descriptive account like this one that it can shed light on the structure of these choices.

Indeed, I suggest that the account reveals *five* different sets of choices faced by legal systems in designing the law of parents and children. The law must, in the first case, determine how it is going to design the *basic structure* of its relationship of parenthood. It might, then, choose to distill *particularized rules* out of that structure. Or subject the content of the relationship to *external restraints*. All that aside, the law must decide how it is going to *allocate* the relationship of parenthood, and how it might *terminate* it. Each of these projects is, in principle, distinct from the others.

1. Constituting the Legal Relationship

The first step in constructing a law of parents and children is the foundational normative question of *how to constitute* the parent-child relationship—the law must determine what the constitutive set of powers, rights, and duties, it will allocate parents vis-à-vis children. The liberal trust model is *one way* to answer this question. It is the path our law has taken.[256] But there is nothing *inevitable* about this choice. Our law chose it because of its *normative* commitment to liberalism.[257] If we were not so committed, the parent-child relationship could be constituted differently.[258]

And, indeed, we've already seen a number of alternative ways in which the relationship could be constituted. Historical legal systems, for instance, *have* characterized parenthood as a kind of ownership.[259] Similarly, we've

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[255] *See, e.g.*, Hohl, *supra* note 65, at 66 ("[R]espect for children's independence is connected to a broadly liberal outlook."); Hartley, *supra* note 12, at 1104 ("Children are citizens, too.").

[256] *See supra* Part II.C

[257] *See supra* note 143 & accompanying text.

[258] *See, e.g.*, Charles Larmore, *The Moral Basis of Political Liberalism*, 96 J. PHIL. 599, 602 (1999) ("This commitment forms the moral core of liberal thought, and it embodies a principle of respect for persons."); Raymond Geuss, *Liberalism and Its Discontents*, 30 POLITICAL THEORY 320, 326 (2002) ("[T]he multiple forms of life which liberalism recognizes are always assumed to be embedded in an overriding consensus that has a latent moral significance.").

[259] *See supra* note 74 & accompanying text; Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. & FAM. STUD. 337, 340 (2008) ("Roman law placed children under the authority of both parents and country, in the ownership of their father."); Charles Henry Huberich, *The Paternal Power in Japanese Law*, 12 YALE L. J. 26, 27 (1902) (observing that the legal

seen that many scholars have argued that, in practice, the law in minority communities holds parents to decide not in the best interests of children as *they* understand them, but as *mainstream society* does—more like a *classical trust* model of parenthood than a liberal one.[260] And so on—the range of ways in which the law might arrange the set of powers and duties it takes to constitute the basic relationship of parenthood is literally infinite.[261]

Indeed, it might be that we want the content of the legal relationship of parenthood to change as children grow up. Throughout, we have largely focused on the relationship of parents and their *young* children—young children do not have meaningful actual preferences; to the extent parenthood is going to be a fiduciary relationship, it must be something like trust.[262] But, of course, these facts change as children grow up, and we might want the content of the relationship of parenthood to change with it—perhaps the law ought to integrate aspects of the agency standard—do what the child would want—into parental decision-making as children age.[263] After all, the standards by which healthcare fiduciaries decide look more like agency or trust depending on the availability of evidence of the patient's intent; standards for parents could evolve with the child's age or developing autonomy.[264]

None of these options *must be* adopted by a legal system—that is, they *are* choices.[265] Indeed, even if you could show that some set of *moral* powers and duties inhere in, say, the biological or social relationship of parenthood, nothing would necessarily follow for the *law*.[266] The law necessarily still

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powers of a father over the family in traditional Japanese law approached ownership); MASON, *supra* note 9, at 7 ("Mutuality was contrary to Roman law, where the father enjoyed absolute power, and in the early Roman republic, according to the historian Dionysius, 'the atrocious power of putting his children to death, and selling them three times in an open market, was vested in the father.").

[260] *See supra* note 21.

[261] *See, e.g.*, D. Kelly Weisberg, *Evolution of the Concept of the Rights of the Child in the Western World*, 21 I.C.J. REV. 43, 44 (1978) (summarizing some alternative ways legal systems have conceptualized the parent-child relationship since Babylonian times); *see also generally* SHAZIA CHOUDHRY & JONATHAN HERRING, EDS., THE CAMBRIDGE COMPANION TO COMPARATIVE FAMILY LAW (2019) (surveying ways in which the parent-child relationship is constituted in different contemporary legal regimes).

[262] *See supra* note 116 & accompanying text.

[263] *See, e.g.*, Ouellette, *supra* note 15, at 993 ("[O]ne could easily develop the trust-based model to give children increasing rights as they mature.").

[264] *See, e.g.*, Clare Huntington, *Early Childhood Development and the Law*, 90 S. CAL. L. REV. 755, 758 (2017) (noting and criticizing the fact that "[m]ost core family law rules . . . are not age-sensitive.").

[265] *See, e.g.*, DORI KIMEL, FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT (2003) (arguing that the law's choice to enforce contracts is a choice in principle distinct from any true moral effects of promise).

[266] *See, e.g.*, REINACH, *supra* note 22, at 5 ("The positive law can deviate as it likes from

faces choices about how *it* wants to conceptualize the relationship—a project that may or may not answer to the same considerations as characterizing the *moral* relationship of parenthood.[267] This is, indeed, a dynamic seen throughout private law—it is one question what the true moral effects of agreements or promises are, another whether the law ought to enforce them; one question what the moral status of ownership is, another how the law ought to think about it.[268]

From this perspective, selecting among the alternative ways in which the law might conceptualize the parent-child relationship is—and only could be—a normative project.[269] If we think that the liberal trust model is *better* than either ownership of children or the law's prescribing some particular theory according to which children must be raised, it can only be on normative grounds.[270] If we think the way the law in practice conceptualizes the parent-child relationship in minority communities is objectionable, it is *normatively* so.[271] Liberalism, I've suggested, makes sense of the particular normative intuitions that would lead to these conclusions—and explains why a legal system committed to it would choose the liberal trust model over its alternatives.[272] But it is a normative question whether we ought to have a liberal private law.

2. Crystallizing Rules

Having decided on the basic logic—a package of powers and duties—of

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the essential necessities which hold for legal entities and structures . . . ."); *see also* Gregory Klass, *To Perform of Pay Damages*, 98 VA. L. REV. 143, 152 (2012) ("Confusing contract law with the morality of promises causes false predictions . . . .").

[267] *See, e.g.*, Sandy Steel, *Private Law beyond the law*, in MARIETTA AUER, PAUL B. MILLER, HENRY E. SMITH & JAMES TOOMEY, EDS., REINACH AND THE FOUNDATIONS OF PRIVATE LAW 150, 159 (2025) (noting that it is a normative legal question whether the law ought to incorporate the metaphysically best account of causation); Michael G. Pratt, *Contract: Not Promise*, 35 FLA. ST. U. L. REV. 801, 803 (2008) ("That the law invokes promises as the exclusive means of contract formation does not necessarily bespeak a concern with their moral significance.").

[268] *See, e.g.*, Aditi Bagchi, *Separating Contract and Promise*, 38 FLA. ST. U. L. REV. 707, 708 (2011) (distinguishing between the kinds of promises with which the law ought to be concerned and "everyday" promises).

[269] *See, e.g.*, RUTH CHANG, MAKING COMPARISONS COUNT 44 (2002) (describing that choices are irreducibly normative—they can be made well or badly); JOSEPH RAZ, THE MORALITY OF FREEDOM 339 (1986) (arguing that choices answer to normative reasons).

[270] *See, e.g.*, Ouellette, *supra* note 15, at 974 ("[T]he notion that a parent has a *right* to alter a child's body is inconsistent with principles deeply embedded in law and moral theory—that people are not property; that people are entitled to respect and dignity; and that no person has a right to exercise complete dominion over the body of another.").

[271] *See supra* note 21.

[272] *See supra* Part II.C.

the parent-child relationship, a legal system might choose to distill some of that logic into particularized rules. We have seen that ours has—prohibitions on genital cutting, certain mandatory vaccination schemes and educational minima.[273] And we've seen the same across private law relationships—from the blanket prohibition on conflicted transactions in trust to the age of majority in contract.[274]

Which such rules a legal system chooses to crystallize is a normative question. Indeed, the law might not settle any; and rely, in some legal relationships, only on the internal logic of the standard—agency law, for example, doesn't contain much more particularized than the general directive to do as the principal would have.[275] It might be that the law of parenthood ought to incorporate more, or fewer. Moreover, as we've seen, we may need to settle the *particular* account of liberalism around which we want to organize parenthood in order to make sense of which kinds of conduct might be beyond the limits of its tolerance.[276]

The normative question of what particularized rules the law ought to distill out of the decision-making standard of a particular legal relationship is, in principle, distinct from questions involved in constituting the relationship in the first place. Of course, they are not unrelated—if the law wanted to conceptualize the parent-child relationship as more like ownership, for instance, that would open up a different set of rules (perhaps only those to protect other people's children) than if it thought of the relationship as a classical trust (with perhaps even more particularized rules than we have), just as the rules a legal system might crystallize out of the internal logic of ownership differ from those it might apply to trust.[277]

But the question of which set of particularized rules a legal system might crystallize from the decision-standard of a particular relationship answers more directly to those distinctively legal normative considerations of administrability, institutional competence, and so forth, than does constituting the relationship in the first place.[278] Indeed, the whole *point* of adopting particularized rules is to efficiently administer the relationship's logic—of course considerations of efficiency apply.[279] From this perspective,

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[273] *See supra* note 57.

[274] *See supra* Part III.D.

[275] *See, e.g.*, DeMott, *Fiduciary Character*, *supra* note 109, at 4–5 (describing the standard governing the decision-making of agents).

[276] *See supra* notes 215–17 & accompanying text.

[277] *See supra* Part III.D.

[278] *See, e.g.*, Toomey, *Privately-Crafted Obligations*, *supra* note 62, at 45–46 ("Like any body of law, contract law is answerable to a variety of normative considerations some of which—administrability, evidentiary difficulties, concerns about the misuse of power—are more or less unique to the law as a normative system . . . .").

[279] *See supra* Part III.B.

considerations of administrability and institutional competence are relevant to the design of any scheme of mandatory vaccination—including decisions about which vaccines, on which schedule, subject to what exceptions—in a way they are less so to whether the parent-child relationship ought to be characterized as, say, a liberal or classical trust.[280]

At the same time, there may be normative considerations particularly relevant to designing the legal relationship than to crystallizing specific rules out of it—considerations of the expressive function of law perhaps most prominently.[281] Many commentators have noted, indeed, the expressive value of fiduciary law's insisting on a particular standard of conduct in the background of the specific rules it prescribes.[282] From this perspective, we might be more attuned to expressive concerns in insisting that the basic logic of parenthood requires parents to act in the interests of their children than we are in the design of, say, any particular criteria for a minimum of education.

3. External Constraints

Next, it might be that the law wants to constrain the behavior of parents with rules external to the logic of the relationship as it has constituted it—justified on different normative grounds. We have seen the law of parenthood do this in certain aspects of mandatory vaccination and education schemes, perhaps better thought of as *exceptions* to the commitment to liberalism that organizes the relationship.[283] Whether the law ought to do this, and what particular rules it ought to adopt, are normative questions that answer to a broad range of considerations—those based on which the law chose to constitute the parent-child relationship the way it has; the strength of alternative normative grounds; the way in which it might think of the boundaries and relationships between these normative frames; and the

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[280] *See supra* Part IV.A.1; Katie Attwell, Mark C. Navin, Pier Luigi Lopalco, Christine Jestin, Sabine Reiter & Saad B. Omer, *Recent vaccine mandates in the United States, Europe and Australia: A comparative study*, 36 VACCINE 7377, 7377 (2018) ("While all [recent reforms in high-income countries] make it more difficult for parents to refuse vaccines, the nature and scope of 'mandatory vaccination' is heterogenous . . . .").

[281] *See supra* note 182; Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2021 (1996) ("Actions are expressive; they carry meanings.").

[282] *See supra* note 182; *see also* Elizabeth Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504 (2000) ("[E]xpressive theories tell . . . individuals to act in ways that express appropriate attitudes toward various substantive values.").

[283] *See supra* Part III.C; *see also* Christopher Robertson, *What the harm principle says about vaccination and healthcare rationing*, 9 J. L. & BIOSCIENCES 1, 10 (2022) ("[T]he liberal rationale for a mandate is that vaccination protects *other people*."); Ruth Jonathan, *Liberalism and Education*, 31 J. PHIL. EDUC. 181, 184 (1997) (suggesting that mandatory educational regimes are a sort of "exception" to general theories of liberalism).

ordinary legal concerns of administrability and institutional capacity.[284]

Determining these constraints is, too, a normative question distinct from both settling the content of the relationship and distilling rules from it—indeed, perhaps more obviously so; nothing follows from the internal content of the legal relationship of parenthood what *external* limits might be placed on the behavior of parents (that is, indeed, what *makes* them external limits).[285] And, once again, a distinctive set of normative considerations apply—all of those above, and, in addition, considerations at the margins about the normative coherence of the law; while no one thinks that, in a pluralistic democracy, all law must emerge from a single normative framework, if we want the law to hang together in some coherent way, surely there are limits.[286]

From this perspective, legal regimes face three distinct normative considerations in designing the legal relationship of parenthood—indeed, any legal relationship—questions of designing the relationship, crystallizing rules out of its internal logic, and subjecting conduct within it to external constraints.

4. Allocating Parenthood

Having settled the content of its relationship of parenthood (and its implementing rules, and any rules external to its logic), the law must also decide how to *allocate* the parent-child relationship—*who* it will take to be in a parent-child relationship *with whom*.[287] This, too, is a normative question.[288] Indeed, it is a normative question distinct from conceptual question of who counts as a "parent" to whom in ordinary life, and the moral question of who ought to so be considered.[289] You might think, for instance, that the English word "parent" is only appropriately used to describe an adult

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[284] *See supra* note 278.

[285] *See supra* Part III.D.

[286] *See supra* note 236; BURNS V. PALM BEACH, 999 F.3d 1317 (11th Cir. 2021) (Marcus, J., dissenting) (reasoning from the "aspiration of an intelligible jurisprudence"); Francesca Poggi, *The Myth of Literal Meaning in Legal Interpretation*, *Analisis e diritto* 313 (2013) (manuscript at 3) (defending this intuition); Felipe Jiménez, *Minimalist Textualism*, 55 SETON HALL L. REV. 1, 22 (2024) (same).

[287] *See, e.g.*, Buss, *supra* note 46, at 647–654 (distinguishing between theories of parental "authority" and "identity"); Gutmann, *supra* note 58, at 343 (distinguishing between theories of the content of parental rights and duties and "ask[ing] who ought to possess this right with regard to children").

[288] *See, e.g.*, Gregg Strauss, *Parentage Agreements Are Not Contracts*, 90 FORDHAM L. REV. 2645, 2672 (2022) ("[H]ow may one person obtain private authority over a child?").

[289] *See, e.g.*, Baker, *Bionormativity*, *supra* note 173, at 656–667 (surveying different biological and social conceptions of parenthood across cultures and time); *see also* STRAUSS, *supra* note 8, at 6 ("Parentage disputes cannot be resolved without normative principles.").

who stands in a certain genetic relationship with a child (or not); but it is a choice, answerable to normative considerations, whether the *law* ought to hold that person, or someone else, to be in a parent-child relationship with a particular child.[290] The legal allocation of parenthood, in other words, need not track any extra-legal social or moral conception—the law can allocate parenthood to whomever it would like, however it would like, based on its own normative considerations (including, again, considerations of administrability, efficiency, and institutional capacity that might apply only to it).[291]

Of course, many people *do* think that the law ought to allocate parenthood on genetic grounds—perhaps because of the moral significance of genetic connections, maybe on the empirical presumption that doing so is best for children.[292] But these are normative considerations, and they are contested on normative grounds, with many scholars arguing that parenthood ought to be allocated based more on intent.[293] Similarly, the law has long presumed that two is the right number of parents—but legal parenthood, as a specified set of powers and duties, could be allocated instead to one person or seven.[294] As reproductive technology has advanced, normative questions about the allocation of parenthood have become ever more pressing and controversial.[295]

5. Terminating Parenthood

Some legal relationships may be designed to last forever; at least to death.

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[290] *See, e.g.*, Hartley, *supra* note 12, at 1110 ("[T]he justification for recognizing and supporting certain relationships has to do with the needs of persons as citizens . . . .").

[291] *See supra* note 287.

[292] *See, e.g.*, Niko Kolodny, *Which Relationships Justify Partiality? The Case of Parents and Children*, 38 PHIL. & PUB. AFFS. 37, 62 (2010) ("Deep and powerful reactions suggest that genetic ties matter."); James Lindemann Nelson, *Genetic narratives: biology, stories, and the definition of the family*, 2 HEALTH MATRIX 71, 78 (1992) (pointing to "a great deal of evidence that suggests that *genetic* ties are of immense importance to family life.").

[293] *See, e.g.*, Tina Rulli, *Preferring a Genetically Related Child*, 13 J. MORAL PHIL. 669, 669 (2014) (rejecting moral arguments for preferring genetic connections to children); Majorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 323 (arguing for an intent-based parenthood allocation scheme).

[294] *See, e.g.*, Baker, *Equality*, *supra* note 7, at 461 ("[M]ost courts just assume that two is the right number."); *see also* Strauss, *Parentage Agreements*, *supra* note 288, at 2657 (noting that some people have attempted, by parenthood agreement, to create relationships with more than two parents).

[295] *See, e.g.*, Courtney G. Joslin, *(Not) Just Surrogacy*, 109 CAL. L. REV. 401, 464–473 (2021) (summarizing law's assigning parenthood in surrogacy across states); *see also* Strauss, *Parentage Agreements*, *supra* note 288, at 2654 (discussing divergence among states on the enforceability of surrogacy contracts transferring parentage).

The durable power of attorney, for instance, is meant to create an agency relationship that endures from the principal's incapacity to their death; property ownership endures as long as owner or property.[296] The purpose of the parent-child relationship is not like that—it is a device for *raising children*; by its logic, it is meant to terminate when they are raised.[297] To the extent that liberalism is the organizing normative principle of the law of parenthood, liberalism itself requires the end of the parent-child relationship—it cares equally about the prerogative of the adults children become to set their own path in life as it does their parents'.[298]

We call the mechanism by which the law terminates the parent-child relationship the "age of majority"—and it can be structured in a variety of ways; a normative question, distinct from the content of the relationship, and one that answers to a range of values and views on the descriptive facts of human biology.[299] The liberal perspective on these matters is that the age of majority ought to reflect the point at which children *can* make their own decisions with the kind of genuine, reflective autonomy that liberalism cares about.[300] As it turns out, there is a great deal of contemporary empirical and normative controversy over the extent to which teenagers are capable of setting the course of their own lives—on the one hand, it is obviously true that they can, in some sense, make a wide range of decisions, but it is both descriptively and normatively controversial whether they do so with genuine reflective autonomy.[301] If it turns out that teenagers can make such decisions,

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[296] *See, e.g.*, Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1, 12 (2001) (describing the development of durable powers of attorney as a tool for planning for indefinite incapacity."); D. Benjamin Barros, *Toward a Model Law of Estates and Future Interests*, 66 WASH. & LEE L. REV. 3, 9 (2009) ("The *fee simple absolute* is unlimited in duration and is the closest thing that the American legal system has to absolute ownership of land.").

[297] *See, e.g.*, Scott & Scott, *supra* note 13, at 2431 ("[W]e assume that the overarching purpose of the state is to protect the interests of children in receiving from their parents the care and nurture necessary to enable them to develop into healthy adults."); Leib, *supra* note 88, at 19 (noting that "[c]hildren's decisional autonomy and ultimate self-authorship" is the "end goal of the protective space of childhood").

[298] *See supra* note 12.

[299] *See, e.g.*, Katharine Silbaugh, *More than the Vote: 16-Year-Old Voting and the Risks of Legal Adulthood*, 100 B.U. L. REV. 1689, 1695 (2020) ("Once a person turns 18, reaching the age of majority, they occupy the legal status of an adult.").

[300] *See, e.g.*, Margaret Irwin, Derek R. Soled & Christy L. Cummings, *Lowering the Age of Consent for Vaccination to Promote Pediatric Vaccination: It's Worth a Shot*, 52 J.L. MED. & ETHICS 52, 57 (2024) (noting that, in the law's view, "decisions can be made autonomously at the arbitrary age of majority"); Deborah L. Brake & Joanna L. Grossman, *Reproducing Inequality Under Title IX*, 43 HARV. J. L. & GENDER 171, 215 (2020) ("In fact and in law, minors are constrained in their agency; they have only limited autonomy.").

[301] *See, e.g.*, Dailey & Rosenbury, *Parental Rights*, *supra* note 46, at 100 (arguing that thinking of parenthood as a fiduciary relationship "rest[s] on and reinforce[s] the view that

that would be an argument for a liberal legal regime to lower the age of majority.[302]

But the broader point is that the age of majority can be structured in a variety of different ways. If we think, for instance, that *some* children can exercise meaningful autonomy, perhaps we ought to individually adjudicate majority rather than use the proxy of age.[303] Obviously, this would have substantial administrative costs, but this is, after all, how the law approaches adult guardianships and permits the emancipation of certain minors.[304] Likewise, it might be that we think that adolescents ought to be permitted *some* prerogative to set their own course in life, subject to parental guidance.[305] The law could have different ages of majority for different kinds of decisions—and already does, with different ages for contracting, marriage, buying alcohol, and (in many places) getting an abortion.[306] Designing a set

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children are more passive and dependent on their parents than they actually are."); Laufer-Ukeles, *supra* note 58, at 753 (noting that the "extent of [adolescents'] incapacity is debated"); *see also* ."); STRAUSS, *supra* note 8, at 41 ("A person is entitled to liberal rights so long as they have two capacities: to judge what is valuable and to act on their value judgments.").

[302] *Compare, e.g.*, Larry A. DiMatteo, *Deconstructing the Myth of the "Infancy Law Doctrine": From Incapacity to Accountability*, 21 OHIO N.U. L. REV. 481, 511 (1994) ("One way of recognizing the increased maturity of minors is to reduce the age of majority.") *with* Wayne R. Barnes, *Arrested Development: Rethinking the Contract Age of Majority for the Twenty-First Century Adolescent*, 76 MD. L. REV. 405, 405–06 (2017) ("This confluence of evidence suggests that the contract age of majority was always appropriately set at age twenty-one . . . .").

[303] *See, e.g.*, Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 TULANE L. REV. 55, 58 (2016) ("*[N]o* categorical age of majority can reliably capture the context-specific acquisition of various capacities."); *see also* Melinda T. Derish & Kathleen Vanden Heuvel, *Mature Minors Should Have the Right to Refuse Life-Sustaining Medical Treatment*, 28 J.L. MED. & ETHICS 109, 115 (2000) (noting "growing consensus in law and medicine that some minors possess actual capacity to make informed medical decisions").

[304] *See, e.g.*, Scott J. Shackelford & Lawrence M. Friedman, *Legally Incompetent: A Research Note*, 49 AM. J. LEGAL HIST. 321, 322 (2007) (describing procedures of guardianship adjudication); 17 Ill. Prac. Estate Planning & Admin § 30.11 (4th ed.) (summarizing procedures for emancipation of a minor in Illinois).

[305] *See, e.g.*, Dailey & Rosenbury, *Law of the Child*, *supra* note 8, at 1463 (outlining an account along these lines); *see also* Hohl, *supra* note 65, at 64 ("[C]hildren develop their cognitive capacities *gradually*, before finally (hopefully) becoming fully autonomous, and they are necessarily already reflecting on values before reaching this point."); Leib, *supra* note 88, at 21 ("As the child reaches the age of deliberative competence in the teenage years especially, the parents' fiduciary obligation seems to encompass more than just independently evaluating interests . . . .").

[306] *See, e.g.*, Massachusetts General Laws Part I, Title XVI, Chap. 112 Sec. 12R (providing that 16 and 17 year olds can provide informed consent to an abortion without parental notification); Neb. Rev. Stat. 43-2101 (providing that all persons under 19 cannot marry without parental consent); 23 U.S.C. § 158 (reducing federal highway funding to any state that did not set its minimum drinking age to 21).

of rules to terminate the parent-child relationship is, in short, a normative question—and one distinct from questions about how to constitute the relationship, regulate it, and allocate it.

B. Modularity and Private Law

Zooming out, it is worth closing with some reflections on what this account of the parent-child relationship might reveal about the structure of legal relationships generally—indeed, part of the value of an account like this one is the way in which it can make sense of parenthood *as* a private law relationship, situated alongside others. What is perhaps most remarkable from perspective is the extent to which this account reveals a *modular structure* of legal relationships.

As Henry Smith and others have recently emphasized, modularity is a characteristic of the design of a wide range of complex systems—biology, language, cars, computer programs, and, yes, law.[307] Modular systems are characteristically organized around *modules*—subsidiary components that serve distinct functions, combined with one another to produce *emergent* outcomes of the system as a whole.[308] And the reason modular design appears in many complex systems is that modularity offers a range of characteristic benefits—permitting modification to certain modules without upsetting with what's working elsewhere; borrowing modules that work in some subdomain elsewhere in the system; and so on.[309] Lease law, for instance, can borrow some aspects of contract and some aspects of property to accomplish the normative goals of that particular relationship, if property and contract are

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[307] *See, e.g.*, Henry E. Smith, *Modularity and Morality in the Law of Torts*, 4 J. TORT L. 1, 2 (2011) ("Both property and torts solve the information cost problem with in rem rights in similar ways, but chopping up the world of interactions between parties into manageable chunks—module—that are semi-autonomous."); *see also* Shrutarshi Basu, Nate Foster, James Grimmelmann, Shan Parikh & Ryan Richardson, *A Programming Language for Future Interests*, 24 YALE J. L. & TECH. 75, 83 (2022) (noting "[a] line of scholarship, associated with Thomas Merrill and Henry Smith and with the New Private Law movement, that emphasizes the modular and standardized elements in property's conceptual structure").

[308] *See, e.g.*, Andrew S. Gold & Henry E. Smith, *Sizing up Private Law*, 70 U. TORONTO L. J. 489, 500 (2020) ("Complex systems often function better, in terms of ease of use, evolvability, and understandability, if they are modular."); Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1701 (2012) (describing the structure and function of modular systems).

[309] *See, e.g.*, Tal Kastner, *System Risk of Contract*, 47 B.Y.U. L. REV. 451, 458–59 (2022) ("Modular design has been recognized to confer benefits in myriad aspects of our world, from organization design to engineering to psychology—and, of late, to law."); *see also* JERRY A. FODOR, MODULARITY OF MIND: AN ESSAY ON FACULTY PSYCHOLOGY (1983) (arguing that the mind has a modular structure with a variety of benefits for emergent cognition).

distinct modules characterized by certain content.[310]

From this perspective, the picture of private law relationships on offer is a distinctively modular one. The law of parenthood, we've seen, "borrows" from trust the general frame of deciding in the best interests of others (or trust "borrows" it from parenthood—I have no view on which, if either, is primitive). But in the place of the particular module by which trust law *determines* what best interests are (the financial best interests of the beneficiaries), it relies on an alternative (the best interests of the children according to the parents' views of what those interests are). The law of parenthood, on the account offered here, is something like the trust module plus the liberalism module.[311] And we've seen the way in which this kind of modularity applies throughout the private law of legal relationships—each relationship is itself a module, composed of some sub-modules it shares with others, and others that are its own, and subject to specified external constraints on outcome.[312]

We've also seen that this picture of private law relationships proceeds by way of stylization—not all parental relationships in fact let parents pursue their own conception of children's best interests; not all decision-making by owners can be arbitrary.[313] I've suggested that the test of whether the stylization is worth it is whether it works—and that is the question; whether the modular picture of private law relationships on offer illuminates more than it obscures.[314] But if it *does* work, this would tell us something important about the general structure of private law, and that out of which it is made.

To those who embrace the thoroughgoing reductionist nominalism about legal concepts of Legal Realism and its sequelae—the notion that legal abstractions like "property" and "equitable ownership" do no work beyond the factual situations they are used to describe—there is, no doubt, something suspect in the kind of stylization of legal concepts on which the account above proceeds; conjuring, as it does, the specter of the "discredited" methodologies of "formalism" or "conceptualism."[315] On these views, thinking of

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[310] *See, e.g.*, Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1189 (2006) ("Leases are particularly interesting, perched as they are at the interface between more modular property and less modular contract.").

[311] *See supra* Part II.C.

[312] *See supra* Part III.D.

[313] *See supra* notes 252–54 & accompanying text.

[314] *See supra* Part I.A.

[315] *See, e.g.*, Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 608 (1908) (deriding "mechanical jurisprudence"); Richard A. Posner, *What Has Pragmatism Got to Offer Law?* 63 S. CAL. L. REV. 1653, 1656 (1990) (critiquing formalism); *see also* Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of the Law*, 97 YALE L. J. 949, 950 (1988) ("Formalism is like a heresy driven underground, whose tenets must be surmised from the derogatory comments of its detractors.").

parenthood as a discrete legal relationship defined by a particular logic, situated alongside other legal relationships, is the wrong way to look at the law—rather, we might just take the perspective of the "bad parent," and ask whether any particular behavior is or ought to be required.[316]

But if the account here works—if it plausibly reveals a modular structure of the pantheon of private law relationships, and sheds light on their normative architecture—this suggests that the thoroughly nominalist way of thinking about legal concepts is incomplete; or at least not very helpful.[317] Modularity presupposes modules; modules with their own distinct, definable content—it makes no sense to talk about the modular interface between contract and property, for instance, if neither of those words refers to any discrete, distinctively structured kind of doctrine.[318] If thinking of parenthood as a kind of liberal trust works, in other words, it would offer another reason to think that the reductionist nominalism of Legal Realism is not the only, and not even the most helpful, way of thinking about private law—and that, as scholars in private law theory have increasingly argued in the past few decades for many reasons, taking the conceptual language of private law seriously can help more fruitfully make sense of its structure.[319]

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[316] *See, e.g.*, Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for material consequences which such knowledge enables him to predict . . . ."); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 37, 37–38 (1935) (arguing that rather than trying to reason from the content of legal concepts we ought to ask squarely what we legally ought to do in particular circumstances).

[317] *See, e.g.*, Paul B. Miller, *The New Formalism in Private Law*, 66 AM. J. JURISPRUDENCE 175, 175 (2021) ("New Private Lawyers have emphasized our common commitment to the scholarly interest and practical importance held by legal concepts . . . .").

[318] *See, e.g.*, Gold & Smith, *supra* note 308, at 501 ("Organizing the world into (legal) persons and things permits legal relations to interact in more stylized ways than would be the case in a fully interconnected system."); Christina Mulligan, *Licenses and the Property/Contract Interface*, 93 IND. L. J. 1073, 1077–78 (2018) (defending an approach taking seriously the distinctive formal content of "contract" and "property" for theorizing licenses at their interface); *see also* Andrew Verstein, *Enterprise Without Entities*, 116 MICH. L. REV. 247, 298 (2017) ("Rather than trying to maximize some desired end (such as utility or justice), the legal system proceeds by constructing and sustaining psychologically and morally tractable concepts, which generally conduce to the underlying features to be maximized.").

[319] *See generally, e.g.*, ANDREW S. GOLD, DANIEL B. KELLY, JOHN C.P. GOLDBERG, EMILY L. SHERWIN & HENRY E. SMITH, EDS., THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW (2020) (exploring a contemporary turn towards taking legal concepts seriously in private law theory); *see also* Henry E. Smith, *The Persistence of System in Property Law*, 163 U. PA. L. REV. 2055, 2067 (2015) (contrasting a modular view of property law with "the completely articulated hyper-realist version of the bundle of rights;" "as much of a non-starter as ever").

CONCLUSION

Although few relationships are as familiar in ordinary life as that between parents and children, the law's understanding of the parent-child relationship has long proven difficult for legal theory—with powers nearly as broad as those of ownership, to be used for the welfare of children, constrained somehow by the aspirations of liberalism. It is a fiduciary relationship, surely, but a unique one.

This Article has offered a novel theory of the content of the legal relationship of parenthood as a kind of "liberal trust." On this picture, both traditional trustees and parents exercise broad legal powers in the best interests of another person. But unlike trust law, which prescribes the normative framework by which trustees are to determine the best interests of beneficiaries, the law leaves that question—nothing short of how life ought to be lived—to parents themselves.

In this way, our law has constructed a relationship of parents and children consistent with its liberal commitments while cognizant of the biological reality of human minority. At once, our law of parenthood recognizes the organizing value of the human individual—with the directive to act in the best interests of the children—while not prescribing a theory of how life ought to be lived; leaving to each parent (or parents together) to figure out for themselves what they think that means.