CHILD LABOUR: THE PARTIAL FIDUCIARY ACCOUNTABILITY OF PARENTS

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Parents have open access to the family-focused labour of their infant children. We impose no fiduciary proscription on the appropriation of that labour. The social consensus is premised on the benefits that accrue to the child, the family and the community. In other respects, parental access is closed or limited. The labour cannot be unreasonable, or wrongly exploitive. Nor may parents take the external earnings of their children. The constraints reflect the consensus as to the proper scope of open parental access. Beyond their open access, the opportunistic impulses of parents are regulated by fiduciary accountability.


The parent/child relation is fiduciary in certain respects or dimensions. One is the sexual dimension. Parents have only a limited access to the sexual capacity of their children. Their access is limited to arranging for the proper maturation of sexuality. They have no right to personally exploit the sexual capacity of their children. Parents are also fiduciaries to their children whenever they assume the nominate roles that are conventionally designated as status fiduciary categories. Where, for example, they act as trustees (holding assets) or agents (negotiating contracts), parents are required to suppress their personal interest in the conventional way. There are, on the other hand, dimensions of the parent/child relation that are not fiduciary. The dimension examined here is the labour capacity of children. Parents have open access to the labour of their children within the scope of the family enterprise. They therefore commit no fiduciary offence when

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they personally benefit from the family-focused labour power of their children. That is the social consensus.

I will assert that social consensus. Our shared experience over time, not remote deontological principle, is the primal source of all legal regulation. Our social norms and laws are what we choose to make them given our experiences and our appreciation of expected consequences. A clear social consensus generates a clear legal position. Where the social consensus is unclear, or fractured, the legal position will tend to be vague or contested. In the parent/child context, the social consensus is reasonably clear in most respects. I will offer no empirical data to confirm my assertions. Instead I will rely on the sociological and legal knowledge of self-appointed social observers to suggest whether or not I have correctly understood the social consensus in each particular instance.

The Conventional Dimension

We begin with the axiom that all legal regulation is socially constructed. We impose fiduciary accountability because it serves the public good in a concrete pragmatic way, not because it is righteous moral insight revealed to us as natural order. There is an ecumenical social consensus that we not act opportunistically in arrangements where we have undertaken to pursue the interests of others. The conventional fiduciary classes assumed their fiduciary character because they were identified as limited access arrangements. The purpose of the access in each case was to serve another over the full scope of the defined access. A judge declared their fiduciary character as a matter of status, and that characterization held or survived because the limitation on access was undeniable. These conventional status fiduciary classes are unquestionably our own social and legal constructions. The social consensus on opportunism in limited access arrangements developed long ago through our collective experience with each other, and that consensus was then converted into formal legal code. The same process produced fiduciary liability for parents who sexually exploit their children. The parental function is to develop children (infants) into responsible adults. The unequivocal consensus is that sexual contact can play no part in the developmental function. The judges implemented that social consensus when they shaped the law to assign fiduciary liability to parents who chose to disregard it. They extended that accountability to all who act in a parental role towards children, whether as teachers, counsellors or child care workers.

Relations, or dimensions of relations, are designated as status obligations because the nominate undertaking, or some part of it, is a limited access arrangement for all purposes in all contexts. Directors, for
example, are required to pursue the interests of their corporations in all respects. And lawyers are required to pursue the interests of their clients in all respects. There is no circumstance, absent consent or statutory license, where directors or lawyers may act in their own interest. Certain other relations are only partially fiduciary, or fiduciary in specific dimensions. The deposit arrangement between a bank and a customer is one example. The bank’s access to the deposited amount is open. It rents the use of the money (or the money claim) for its own profit-generating purposes. Its access to the customer’s personal and financial information, however, is limited. It cannot, without consent, exploit that information. Its access to the information, short of state order, is limited for all purposes in all contexts. The parent/child relation is fiduciary in this partial sense. Parental access to the sexual capacity of children is limited for all purposes in all contexts. Similarly, where a parent acts in a conventional status capacity for a child (trustee, agent), the access is limited in all respects within the scope of the access. At the same time, there are dimensions of the parent/child relation where parents have open access. Specifically, parents may benefit from the labour capacity of their children, from errands and light household chores to heavy farm labour.

Before turning to examine labour capacity, it is useful to consider some of the other benefits that children supply to their parents on an open access basis. Consider the reasons that motivate individuals to have children. All of these reasons, without exception, are self-interested. In no particular order, individuals may believe that having children will signal their own personal autonomy, that children will strengthen or enrich their union with another, that children will be a source of love and respect and a receptacle for devotion and care, that children will maintain the family line or the social pre-eminence or power of the family, that children will elevate their parents vicariously through their achievement or celebrity, that children will satisfy our need to be needed, including psychic need, the need for intellectual dominion and the general need for social acceptance in a community of families, that children can be moulded in one’s image or to one’s specifications, that children will bond with us like no other, or that children will protect us, care for us as we age and remember us after we pass away. These ostensible benefits may or may not materialize. To the extent and for the time they do, they raise no fiduciary concern. The social consensus is that we have open access to this capacity for emotion production and other tangible or intangible capacities. We are not required to hold or experience these benefits for our children. They are our benefits.

Parents also have open access, to an extent, to images of their children. They are free to create images (photographs, videos) and to take personal benefit from them, including their distribution to others. There are,
however, limits. Parents have open access only to a point. As we will see, parents do not have open access to external gains produced by the labour of their children. Similarly, parents do not have open access to external gains earned from images of their children. The capacity to generate or constitute an image is merely one manifestation or element of the labour capacity of a child. The external value of the images of children, like the value of their labour capacity, is regarded as their personal entitlement. In the most offensive cases, parents are plainly not free to create or disseminate sexual images of their children. More generally, they are not free to commercialize the persona of their children for their own parental gain. That would be a fiduciary breach. They may engage in commercial exploitation of the images, but only on the basis that it is on behalf of, and in the interest of, their children.

It is also useful at this point to consider the interest of the state in the production of children. The state cannot make parenthood excessively burdensome because fewer children will diminish the benefits it realizes from their existence. The state requires a minimal level of procreation in order to maintain itself as an entity. Declining populations expose states to economic contraction (reduced consumption, reduced tax revenues) and to the possibility of political or military subjugation. More positively, states require human capital, preferably with a diversity of skills, talents and dispositions, to work the economy. Most states leave the production of human capital in the hands of the previous generations of human capital. The state has concluded that leaving the development of children to the discretion of their parents encourages procreation, nurtures attachment, ensures diversity and relieves the state of massive costs (that likely would include substantial enforcement costs required to impose that level of state intervention). Further, and significantly, the state appreciates that children are an instrument of social pacification or control. To protect their children from external threats, parents believe they must subscribe to the dominating order of the state. They feel they must affirm, and even invite, state power in order to have safe communities and, generally, enforceable norms of acceptable behaviour. Without children, individuals may be less compliant overall with state regulation, at least where that regulation reflects the rather different concerns and expectations of families, or the preferences of influential elites. Thus, because the state requires able civic-minded citizens, it characterizes (we characterize) access to certain capacities of our children as properly self-interested, or open, and therefore not constrained by fiduciary accountability. The state does of course directly and indirectly regulate the parent/child relation in many ways, usually on the state-determined and state-regarding standard of the best interests of the child, but not in a fiduciary way for every dimension. That is the case for the labour dimension.
Lastly, it is necessary to bear in mind the temporal variation that characterizes the parent/child relation. The fiduciary dimensions shift as the relation progresses. It begins as unilateral obligation on the part of the parent. Only parents initially serve in nominate roles that attract fiduciary accountability. Only parents are in a position to exploit sexual capacity. That changes over time. Children begin performing limited access functions for their parents. They serve as agents, advisors and trustees. Eventually the parent/child relation reverses as parental health deteriorates. The parents become dependent. Children often take on the nominate role of caregiver, with its associated fiduciary accountability. It is this temporal variation, and the partial fiduciary quality of the relation in infancy, that leads to the necessary qualification that the parent/child relation is, on a status basis, only partially fiduciary.

**Infancy as Servitude**

The social consensus is that parents are entitled to the internal or family-focused labour capacity of their children. Phrased in base terms, infancy is servitude. We protect children from parental molestation, but we do not excuse children from contributing labour to the family enterprise. Their labour capacity, like other aspects of infancy, lacks autonomy. We have adopted that view because it serves communal ends. The labour of children on family farms is illustrative. Those children are expected to contribute throughout their infancy to the farm undertaking, often in ways that meet or exceed the expectations that others would have of ordinary employees. Parents expect that contribution, and so does the community. In some instances it is a matter of survival. More broadly, it is a recognition that parental open access promotes family and community directly and indirectly, and simultaneously promotes the development of children. Parental benefit is permitted because it is the product of, and a factor in, the reciprocating processes through which we “grow” children, families and communities.

We might regard the labour of our children as our own personal birthright. Because we choose to assume the consequences of conception, we may feel entitled to every fruit of that decision. That would imply a license to exploit the labour of our children without restriction. Such a notion, however, cannot be tolerated. The state (the community) rightly claims power to protect its immature citizens from oppressive labour. We are not free to consume our children. Rejecting that notion, however, does not imply that we have no claim to the labour of our children. The social consensus is that we do have a certain measure of open access to that labour. We recognise that the maintenance of a family requires enormous continuing labour contributions. We have concluded as a matter of public
policy that parents are entitled to expect contributions from their children, and to coordinate and direct that labour. Our justification is family stability and social productivity, and the consequent advancement of family and community. Additionally, children benefit indirectly from that advancement because their families and their communities are their environments. The result is that, because our access to the family-focused labour of our children is open rather than limited, there can be no fiduciary liability for receiving the benefits produced by that labour.

The parallel justification for the communal decision that parental access is open is that such access directly benefits the child, with distinct incidental positive consequences for family and community. The labour dimension of the parent/child relation is where parents do most of the growing of their children. Through the imposition of labour burdens on children, we develop or deepen the virtues of personal discipline, confidence, cooperation, initiative, patience and flexibility. We push back the self-absorption we fostered in them from their birth. They acquire knowledge and skills. They learn to set priorities. They sense the productive and unproductive elements of hierarchy. They begin to gauge the effort cost of ambition. Eventually, with luck, they become responsible individuals able to engage in productive undertakings with others. These are considerable benefits. Because they are valuable in themselves and to the wider community, our communal decision is to support the production of these benefits by allowing parents to personally absorb the immediate value. Accordingly, once again, there can be no fiduciary liability for benefiting from the reasonable labour that our communities encourage us to expect from our children.

There is one sense in which our access is closed. We cannot in our parental capacity require more than a reasonable degree or kind of labour. In other words, as is the case with images of our children, we have open access only to a point. Our access does not extend to undue or inappropriate labour.

**External Gains from Labour**

There is a distinction to be made between labour contributions to the family undertaking and labour tendered for third party consumption. The returns generated by the latter form of labour cannot be freely appropriated by parents. The labour itself, to the extent it produces emotional and indirect financial benefits, and grows responsible adults, can be enjoyed by parents. Parents are not entitled, however, to the wages, fees, prizes or other amounts offered by third parties who seek performance of the labour. Children with manual, intellectual, artistic or athletic skills may be
externally productive at an early age. The labour expended by these children in learning and refining their skills often has no initial financial benefit for the family undertaking. Often it draws on family resources. That expenditure of family resources, however, does not justify parental confiscation of any eventual external gains from the labour. The parents are only fulfilling their nominate duty to aid their children in developing personal capital to put to use as productive members of the community. When it comes to third party revenues, the prevailing consensus (the default position) is that the receipts belong to the child. We do not wish to create what may in practice be a perverse incentive for parents to personally enrich themselves by exploiting their authority over their children and steering them into potentially premature or inappropriate employment. It may be possible for there to be an explicit contractual arrangement whereby parents recover some of their sunk costs, or earn a fee for ongoing tasks (agent), but short of that, for fiduciary purposes, children keep what they earn from their labour outside the family undertaking. Parents may only restrain the expenditure or investment of those earnings, pursuant to their duty to assure the best interests of their children.

There is one discernible qualification to that consensus, albeit one that may have little application in jurisdictions that supplement income. The more nuanced description of the social consensus is that it reverses where the earnings are necessary to sustain the family at a subsistence level. Both parent and child may, without much thought, regard the earnings of the child as family income. Analytically, however, the transfer could be characterised as a gift, or as compensation for “parenting” services provided to the child that would not be forthcoming if the family unit could not survive. Normally parents have no right to expropriate the external income of their children. Rather, parents are legally obligated to support their children, and that duty presumably does not authorize them to require one child to support their other children. The reality, however, is that parents who cannot alone support their family will do whatever is necessary to make provision, and the social consensus accommodates that. If the purpose of the labour is immediate family subsistence, that trumps the income rights of individual children, most clearly where the child remains dependent for its own survival on a viable family, and probably up to the point where the child acquires a sufficient measure of autonomy. At that latter point, children may choose to sustain their family, but they cannot be required to do so.

Apart from that qualification, it is clear that parents may properly indirectly realize financial benefits from the external labour of their children. They may, for example, publish books or articles describing how
their own labour contributed to the notoriety or celebrity of their children. Or they might describe their family genealogy, or family demons. Parents might instead offer their consulting services to the public. They may offer seminars on achievement or the management of achievement. They may earn appearance fees for their own attendance at events. These are instances where parents are exploiting their own assets: their own personality, knowledge, time or skills. The market value of those assets is enhanced by the labour of their children, but only in the same elliptical way as would the labour of third parties who were associated in notoriety in some way with the parents.

This understanding of the modern social consensus with respect to external earnings may appear to differ from the consensus in England and the United States in the eighteenth and nineteenth centuries. A father then was entitled to the service of his children, and that included taking their earnings from external work. That rule, however, was qualified. It did not apply to children who were emancipated, including those who remained in the family home. There was also a variation based on whether the father or the child contracted with a third party. Where a child contracted in his or her own name, the presumption was that the earnings were the property of the child. Those qualifications covered, even at that point in time, a good number of the instances where children worked in external undertakings. Today those qualifications would have a broad application, as children earning significant income now invariably contract in their own names (directly or by their agent/trustee parent) or otherwise are considered emancipated by their parents for the particular work purpose. Essentially the qualifications have now displaced the rule, reflecting the evolution in the social consensus. Beyond that, there is both express and implied support in modern legal and social principles of child protection and child development for the view that parents do not have the right to expropriate third party payments. The better view would seem to be that the ancient position of fatherly entitlement to external earnings has, as a practical matter, been left behind.

**The Termination of Open Access**

The open access of parents ultimately dissolves into closed or no access. Servitude is dissolved by the acceptance (by parents) or assertion (by children) of autonomy. Parents initially dominate the labour capacity of their children because they must. The immediate concern is the health and safety of the children. The cohesion and advancement of the family are long term objectives. The community accepts that reality. Everyone, including the children (in their way), appreciates what is at stake. Over time, however, that domination may come to feel oppressive. Parents either begin to spool out
autonomy, or their children will literally take it. That continuous process constitutes a large part of the development of children. The give and take, or tug-of-war, over autonomy is the emotional and intellectual crucible in which the adult is formed. Many transitions occur throughout this time. Children leave behind rudimentary behaviours to become relatively skilled negotiators on questions of their autonomy. They come to appreciate the significance of a quid pro quo. They increasingly assume responsibility for their own social and economic welfare. They physically mature. A stage is reached where parents have effectively surrendered the bulk of their dominion or control. At that point, even if short of the age of majority, it cannot be said that parents retain open access to the labour capacity of their children based on the parallel justifications of (1) benefit to the family and community and (2) benefit to the child. The elevation to maturity or autonomy has ended the application of those rationales. It is for the young adult to assess the utility of the benefits, and whether or not to confer or embrace them.

There is no singular criterion that marks the real or actual closure of parental access. The age of majority is obviously a blunt formal proxy for actual autonomy. The onset of autonomy for any given purpose will often be controversial. There is no specific or sharp ascent into adulthood. That is why communities necessarily resort to a formal age signal to establish an arbitrary boundary between dependence and autonomy. Once that point is reached, parents can no longer claim the support or protection of the social consensus when they take benefits from the labour of their now legally adult children. Any benefits must be negotiated, not directed. Most parents adopt that approach well before the age of majority. They do so because it is a constructive technique or step in the developmental process. However, if that does not happen, if parents continue to insist on the production of internal benefits, there is no fiduciary consequence. At no point have the parents assumed a limited access relation to the family-focused labour. They are insisting on an open access that now, as a matter of social policy, they are no longer free to enjoy. They are denying the closure of access, not limited access. Their conduct (the appropriation of labour) may be actionable in some way, but not as a fiduciary breach. Ultimately, in most every case, the autonomy of the child will eventually be recognized, or the child will prevail despite the refusal of recognition. The only open access that parents will then properly have is whatever they are able to purchase, with affection, guilt or dollars, from their adult children.

Fact-based Liability

To this point the analysis has addressed the status fiduciary character of the parent/child relation. Fiduciary responsibility may also arise on a factual
basis outside the status range if parent and child find themselves in a limited access arrangement. While the default position is that parents have open access to the family-focused labour capacity of their children, that may be altered by the actual circumstances of those involved. It may be, for example, that parents encouraged their young child to sketch and paint in order to develop motor skills, patience and art appreciation. There was no contemplation of commercial exploitation by either the parents or the child. The art produced by the child did not appear at the time to be special or unique, but the parents nevertheless kept everything that was discarded by the child with the communicated intention of returning it to the child as an adult (a fact documented in letters to relatives). However, as an adolescent, the child rejected both parents and art, and moved out of the family home. Many years later, the child took up sketching again and become famous for producing heroic figures. That made the artwork held by the parents very valuable, and they sold it all to a dealer. On these facts, the child may rightfully claim the proceeds of the sale. The arrangement was one of limited access. There was no gift of labour capacity by the child. The parents undertook to hold the work for the benefit of their child.

Other examples of fact-based accountability in infancy can be imagined. Equally significant are the limited access arrangements that may arise between parents and their adult children, where either the parents or the child may have the limited access. Parents, for example, may find themselves in a position to influence the deployment of the labour capacity of their children. Adult children may be accustomed to ceding significant labour decisions to a parent. They may do so because they are less knowledgeable than the parent, or because the parent has encouraged their dependence. The access of the parent is intended and understood to be for the benefit of the child. The parent exploits that access, however, by advising the child to enter into labour arrangements (professional sport contracts, entertainment industry contracts) that produce undisclosed collateral financial or other benefits for the parent. That would be a standard fiduciary breach. There are potentially countless other instances of factual limited access. It will be appreciated that many of those arrangements will be unobjectionable from a fiduciary perspective because the adult child consented to the parental benefit. But without that consent, the benefit would be tainted.

It should be evident that this fact-based accountability, whether arising during or after infancy, does not emanate from the parent/child relation per se. Fact-based accountability arises where there is limited access, and it does so quite independently of the status relation between a parent and child. It is the same for all relations. Directors, for example, are not status fiduciaries to shareholders, but they will assume fiduciary accountability if
they enter into a limited access arrangement with particular shareholders or even whole shareholder classes. Their status (as directors) has no legal significance for the determination of fact-based accountability. The fact of limited access is sufficient. Similarly, the fact that two individuals are parent and child is formally irrelevant to any fact-based liability that may arise between them, in either direction.

That leads to a general observation about the utility of status fiduciary accountability. The parent/child relation illustrates the point nicely. Status accountability can be misleading. If judges refer to the parent/child relation as a fiduciary one without adding the necessary qualification about its partial scope, others will assume that the relation is fiduciary in all of its dimensions. In the director example, the assertion that directors are fiduciaries may lead others to conclude that directors have status fiduciary obligations to shareholders, other directors, employees, creditors or to the local community. Those are avoidable confusions, but they will arise, perhaps frequently, if judges have only a shallow appreciation of the nature of fiduciary accountability. Might it be preferable to discard status fiduciary designations altogether and decide all issues of fiduciary accountability using the fact-based approach? An opposing view is that, suitably qualified, a status designation of the conventional variety is a justifiable accommodation for beneficiaries who otherwise would be required to redundantly prove on every occasion what has been continuously recognized in the past as a limited access arrangement in some or all of its dimensions. Arguably, in the end, status accountability for certain established relations is acceptable as an evidential and taxonomic convenience. The fact-based limited access test will continue to develop separately as the more general and more precise basis for fiduciary accountability.

Conclusion

There is a strong social current of care and protection for children. While understandable, that solicitude might lead uninformed observers to wrongly approximate the breadth of fiduciary accountability in the parent/child relation. Our visceral regard for the welfare of our children should not obscure the accepted variation in the social consensus on the nature of our access to their labour capacity. As a community, we do allow parents to “profit” from their children. There is nothing inherently pernicious about that profit. Rather, our open access is premised entirely on the benefits that such access is expected to produce for the children themselves, their families and their communities. We do, at the same time, draw boundaries around that open access. We recognize that children must come to understand and respect entitlement, and we therefore respect their
own entitlement to the external gains they produce from their labour capacity. Also, although initially open, we do close parental access once that access is assumed to have led to the development of an autonomous adult. Once children secure their autonomy, the parent/child relation ceases to have any status fiduciary content beyond the conventional status characterizations that apply to everyone. Both parent and child do remain exposed to fact-based fiduciary liability, but not because of their parent/child relation per se. They are accountable as fiduciaries, as are all other actors, when their circumstances place them in a limited access arrangement relative to each other. Accordingly, the parent/child relation is partially regulated by status-based fiduciary accountability, and wholly regulated by fact-based accountability. In the specific case of the labour dimension, there are elements of both open and limited access, with qualitative and temporal limitations.

A final observation. The parent/child relation demonstrates the interplay of regard for self and regard for others in the social consensus that animates fiduciary accountability. There is no fundamental dissonance between the two impulses. Our regard for others is firmly rooted in our regard for self, and our collective selves. We enforce regard for others because there are personal and social benefits to be realized. Pure altruism is illusion or pretense. Every ostensibly altruistic act can be traced to self-interest. That, however, is no cause for regret. On the contrary, we survive and thrive as individuals and communities because we harness our self-interest in the service of others. Fiduciary accountability supports our self-interested regard for others by controlling the infection of opportunism. Fiduciaries cannot unilaterally reassert the self-regard they purport to disengage, for self-interested reasons, for the duration of their limited access. Such is the social consensus.