Children's Rights

A Liberal Framework

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Abstract

This thesis investigates children's moral and political rights and, in particular, their rights to make decisions at various stages of development. Part I outlines and defends an empirically informed liberal framework for establishing children's rights to make decisions (i.e. their 'agency rights'). This framework is grounded within a respect- and autonomy-based approach to agency rights. It engages with empirical psychology, is attentive to the role of social structures in moulding children's psychology and in creating adult-child power hierarchies, and provides a cost-benefit mechanism for deciding how to recognise moral rights in law. In so doing, this framework provides a practical way of establishing moral and political rights, while being sensitive to the empirical reality of children's capabilities, including the ways those capabilities are socially constructed, all while keeping respect for children, and children's autonomy, at its centre. I conclude that children should generally have more agency rights than are currently recognised: their psychological abilities are often better than is generally assumed; we can help develop their psychological abilities; and where weaknesses remain, we can facilitate their decision-making through support, advice and dialogue. Part II applies the framework to voting, sexual consent, and age discrimination. First, I conclude that the voting age should be lowered to (at least) 16. Second, I argue that children have a right to extensive sex and relationship education and that policies and cultural images of childhood asexuality can make children vulnerable to exploitation. I also defend legal 'closeness-of-age' exemptions, which allow some individuals below the age of consent to engage in consensual sexual relationships with people of a similar age. Finally, I argue that everyone (including children) should be protected against age discrimination and I provide a framework for deciding whether an agency right should be allocated universally, with age-restrictions, or using competence tests.

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Dedication

For Rosie, who had a maturity, grace and good humour beyond her years.

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Chapter 1

Introduction

Introduction

Children are constantly coerced by their parents and by the state, yet we barely seem to notice. Parents coerce their children in obvious ways through punishment and physical chastisement. When parents shout at young children, it can inflict a terror we would never think acceptable to inflict on adults. But parents also coerce their children in less obvious ways: making them take up hobbies; taking them to church; giving or withholding medicine; and choosing their diet, friends, or routine. The state requires children to work for up to seven hours a day in the form of compulsory education until the age of 18, and it uses police to return runaway children to their parents. Children are legally disabled from making a range of choices, including decisions regarding medical treatment, sex, employment and property. Children cannot vote. Yet, from the age of 10 in England and Wales, the state holds children legally responsible and can coerce them through the criminal justice system. Similarly, in family law, English courts prioritise the 'best interests of the child' over the wishes of the child, sometimes well into adolescence.[1] Each of these actions involves physical interference with another human being. These denials of liberty, and the corresponding lack of rights, require justification.

There are perhaps three standard and immediate 'common sense' justifications that are unconvincing in their simplest forms. This list is not exhaustive, but it illustrates the inadequacy of our common-sense thinking. First is the argument from benevolence: that

[1] See for example *S (Children)* [2010] EWCA Civ 447; [2010] 2 FLR 1517.
A (Letter to a Young Person), Re (Rev 1) [2017] EWFC 48 (26 July 2017).

we may coerce children because it is for their own good. This argument is insufficient to justify coercion, since we do not generally coerce adults for their own good (at least, not in the same way). Second is the argument that children don't know enough to make life decisions.[2] But we do not generally make rights conditional on knowledge. Citizens don't have rights because they are knowledgeable. They have rights because they are citizens. Third is the argument that parents have the right to raise their children as they see fit, and that these rights are so extensive that they leave children with few rights to make choices. However, since we do not let parents coerce their adult children, this argument, absent an explanation of why children (but not adults) need to be raised, cannot justify children's lack of rights.

What these arguments lack, but seem to presuppose, is a theory of the ways children are different from adults such that arguments from beneficence, knowledge, or parenthood become relevant. Therefore, we need a descriptive and normative theory about children to help us understand children's rights. The question I seek to answer is: what decisions should children have the (moral and legal) right to make at different stages of their development?

To address this, Part I of my thesis defends a liberal framework for investigating children's agency rights, where 'agency rights' are rights to make decisions. This task involves interrogating the normative foundations of rights and the criteria for their possession. Then, the framework incorporates psychological data to see which criteria children meet at different stages of development, whilst being mindful about whether those (in)capabilities are socially constructed. Using these inputs, the framework can show what rights children possess at each stage of development. Part I therefore provides a method for answering questions of the form 'should children at age/development stage x have the

[2] See Freeman, (1997a),p.92

legal right to Φ?' Part II applies this framework to specific policy questions, namely, children's rights to vote and consent to sex, and their rights against discriminatory treatment. I have two points of clarification: first, I will primarily investigate children's agency rights (i.e. rights which protect choices) rather than their welfare rights (i.e. rights to have certain welfare interests met), as this is where the main gap in the literature lies. There is broad agreement that 12-year-olds have (welfare) rights to education, shelter, and healthcare; there is more disagreement (and less debate) about whether 12-year-olds may direct their own education, choose where to live, or consent to medical treatment. I am interested in children's moral agency rights, and then what legal or political agency rights they should be granted as a result.[3] Second, children, for the purposes of this framework, will be understood as those below the 'age of majority', or, more specifically, those who are denied legal rights to make certain choices because of their youth.[4] Perhaps the best philosophical/sociological/psychological account of childhood does not designate, say, 17-year-olds as children. But since 17-year-olds are subject to certain legal disabilities, we must investigate their moral and political status.

In this chapter, section I sketches out the history of philosophical thought on children's rights. Section II discusses the problems with the current children's rights literature. Section III outlines my framework and how it relates to the deficiencies in the current literature, and outlines my conclusions. Section IV discusses methodology, examining the relationship between facts and norms, and how to use empirical psychology. Section V outlines the structure of this thesis.

[3] There may be welfare reasons to grant individuals political agency rights even if they lack the underlying moral agency right. Such cases are not the focus of my thesis. I discuss them in chapters 11 and 12.
[4] For a discussion of defining childhood, see Archard, (2004),pp.31-36.

I.Historical Views

There have been, broadly, three philosophical schools of thought on the political position of children: one sees children as an extension, or property, of their parents; the second sees them as proto-adults; the third sees them as the full political equals of adults.[5]

In the first school, Aristotle likens a man's ownership of his slave to that of a father over his child: 'until it reaches a certain age and sets up for itself' the child is 'as it were, part of himself [the parent]'.[6] Hobbes argues that children are in 'absolute subjection' to their parents, who may sell them, 'pawn them for hostages, kill them for rebellion or sacrifice them for peace'.[7] More recently, Narveson and Rothbard have each argued for (constrained) parental property rights in their children. Rothbard concludes that, 'the purely free society will have a flourishing free market in children'.[8] Others see children as *extensions* of their parents. For example, Charles Fried argues that

> 'the right to form one's child's values, one's child's life plan and the right to lavish attention on that child are extensions of the basic right not to be interfered with in doing these things for oneself.'[9]

The view that parents have rights over children seems to hold strong sway over common sense opinions about children ('you can't tell me how to raise my kids'), perhaps because it 'locates parental rights in the natural fact of generation' and therefore taps into intuitions about owning the fruits of one's labour.[10] On this approach, parents' rights are fundamental and children are often not properly respected as separate beings with legitimate interests separate from their parents'.[11]

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[5] Archard and Macleod, (2002),p.2. There are many other sociological and historical theories of childhood; I discuss some in Chapter 2.
[6] Aristotle, (1980)5.6.1134[b]
[7] Hobbes, (1889),p.134
[8] Rothbard, (1998),Ch.14. Also Narveson, (1988),pp.272-4
[9] Fried, (1978),p.152
[10] Callan, (2002),p.2
[11] Brighouse and Swift, (2014),p.9

In the second school, children are seen as 'proto-adults'; as incomplete adults who are not yet persons proper. Children are viewed negatively for what they are *not* (or not yet) rather than for what they *are*.[12] This view was famously articulated by Locke: 'children, I confess, are not born in this full state of equality, though they are born to it'. A child's lack of rights therefore changes as they become more adult-like:

> 'the bonds of this subjection are like the swaddling clothes they are wrapt up in, and supported by, in the weakness of their infancy. Age and reason as they grow up loosen them, till at length they drop quite off, and leave a man at his own free disposal.'[13]

In *Some Thoughts Concerning Education*, Locke sees children only as future adults, ignoring the need to respect a child's (partial) autonomy now except insofar as this trains children for adulthood.[14] Many theorists have argued that the primary aim of parenting is to create future autonomous citizens, rather than to respect children as people.[15] This position was rejected by Rousseau who criticises those 'always looking for the man in the child, without considering what he is before he becomes a man'.[16] Most modern common-sense thinking on children's rights, however, tends to see children as proto-adults or as belonging to parents.

There is a more recent third camp, with less popular influence than the last two: child liberationism. Child liberationists believe that children and adults should have equal rights (sometimes with the qualification that very small children may be excluded[17]). They propose that

> 'the rights, privileges, duties of adult citizens be made available to any young person, of whatever age'.[18]

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[12] Arneil, (2002)
[13] Locke, (1988), Essay Two,§55.Compare Grotius, (1957)
[14] Locke, (1989)
[15] See Rawls, (1971),Chapter VIII; Coleman, (2002); Noggle, (2002); and Callan, (2002)
[16] Rousseau, (1921),p.1
[17] For example, Farson, (1974),p.172
[18] Holt, (1974),p.15

Child liberationism emerged during the 1970s. Typically, its advocates saw children as the next major oppressed group that needed emancipating (after women, ethnic and racial minorities, and the working classes).[19] They argued that any distinction drawn between adults and children was essentially arbitrary and that children should be granted full legal and political equality.[20]

These three camps delineate the main philosophical positions that historically have been taken towards children's rights.

II.Problems in the Current Literature

Parents Rights

Some writers address the justified coercion of children by starting with the rights that the *parent* has to raise their child. Parental discretion is taken as fundamental (although sometimes with some child-centred constraints), and children's choices cover whatever is left. For example, Brighouse and Swift reject the 'entirely child-centred view' that regards parental rights as merely fiduciary rights-in-trust to provide what is best for the child; they claim that parents have fundamental, non-fiduciary rights to exercise authority over their children. They argue that the parent-child relationship helps parents develop morally and that the relationship so unique and valuable to them, that it is a constituent of their human flourishing.[21] Since we have a fundamental interest in (the constituents of) flourishing, we

[19] Indeed, Firestone argued that the oppressions of women and children were 'intertwined and mutually reinforcing'. Firestone, (1971),p.73. See also Archard, (2004),p.45.
[20] Cohen, (1980); Farson, (1974); Holt, (1974).Some call for the abolition of childhood altogether; see Firestone, (1971),p.102.
[21] Brighouse and Swift, (2006).See also Schoeman, (1980)

have a fundamental interest in the parent-child relationship, and this interest is strong enough to ground a right to that relationship. Furthermore, parents need a wide range of associational rights to provide the space to build that relationship. Brighouse and Swift also permit parents to shape their children's values, including passing on their cultural heritage and their religion, since sharing certain interests in common is necessary for building an intimate relationship. Therefore, since parents have a right to a parent-child relationship, and since parental authority is necessary for that relationship, parents have a right to authority over their child. However, they argue, '[these] rights are conditional on their succeeding in protecting their children's interests up to a fairly high threshold'[22] and on protecting the child's right to develop the capacity for autonomy.[23] Therefore, on Brighouse and Swift's account, children's agency seems to be curtailed by the parental control necessary for the parent to develop a kind of intimate relationship with the child, provided the child's interests are protected to some level.

However, this argument – that the parents' interest in a relationship with their children grounds a right to force their children to have similar interests and values – looks strange when applied to adults. Brighouse and Swift argue that individuals have as strong an interest in romantic or sexual relationships:

> '[the parent-child] relationship is like that of a romantic sexual relationship. Most people are such that they could not flourish fully without it.'[24]

They also argue, when justifying parents' rights to shape their children's values, that 'two people [cannot] maintain intimacy without having some distinctive enthusiasms and interests in common'.[25] Putting these together, does this mean I may manipulate you into having certain interests and beliefs, if that improves/makes possible an intimate

[22] Brighouse and Swift, (2006),p.81
[23] Brighouse and Swift, (2014),p.116 and p.150
[24] Brighouse and Swift, (2006),p.100
[25] Ibid.,p.104

relationship between us? It is strange to think that a person can have a fundamental right to exercise authority over others because it contributes that person's flourishing. Political leadership no doubt provides opportunities for an individual to develop their moral and practical wisdom by making complex decisions and devoting large parts of their life to justice and to the benefit of others. Could that interest ground fundamental non-fiduciary rights for politicians to exercise political authority? Could they have that right even if they are suboptimal decision-makers? And could that interest allow them to make political decisions which are not in the best interests of the people they represent? Surely not. The problem here is that Brighouse and Swift justify A having authority over B because A has an interest in it. Brighouse and Swift themselves admit that

> 'liberalism has no other example…where rights over others are considered fundamental…by the interests of the right holder.'[26]

There's good reason for that – 'any rights justified in this way would be somewhat shocking'.[27] Swift and Brighouse therefore need to show that children are different from adults such that only children are subject to these kinds of authority rights. They need to show that a child is the kind of thing you may have authority over just because *you* have an interest in it.

Brighouse and Swift's answer to this challenge is that children need to be treated paternalistically for their interests to be met.[28] This reply highlights the fact that their arguments directly apply only to children that have not yet developed any capacity for autonomy and have no independent view of their own good.[29] Therefore, Brighouse and Swift's account allows parents to have a fundamental right to exercise authority over their children by claiming that children are the sorts of beings that may be treated

[26] Ibid.,p.82
[27] Hannan and Vernon, (2008),p.179
[28] Brighouse and Swift, (2014),p.70
[29] They do claim their arguments apply to teenagers because 'claims about children's competences' have been 'exaggerated'. Ibid.,p.69. That claim, however, needs empirical investigation, and is one I challenge.

paternalistically. But this claim needs to be investigated. To the extent that my project investigates the development of autonomy in children, it identifies the proper limits of Brighouse and Swift's account of parental rights. On that score, this thesis on children's rights can be seen as complementary to their project. But in addition, this thesis aims to show that parental rights are conditional not merely on protecting the child's interests and promoting the development of their autonomy but also on respecting the autonomy that the child does have. Therefore, Brighouse and Swift's family values argument requires an account of a child's developing autonomy, and an account of how to respect (and not merely promote) that autonomy.

More generally, this highlights that, although I do not investigate parental rights, my framework defines the limits of legitimate parental rights. Parents can only have rights in the terrain left over by children's rights. This position involves a rejection of certain strong conceptions of parental rights, such as those of Jan Narveson, Murray Rothbard or Charles Fried. Children are persons with an existence separate from their parents and, to the extent that they possess certain agency rights, others may not wield rights over them. Parental rights, under this framework, can only exist to the extent that children lack certain rights. My framework therefore defines the possible scope of parental rights. But it leaves open what rights, if any, parents have in the space that is left. I now examine the literature directly on children's rights.

Children's Rights

Most of the existing literature on children's rights includes a theory of the criteria needed to possess particular rights, an assertion that children fail to meet those criteria, and a conclusion that children fail to have certain rights. The literature contains three general

problems: first, it is uncritical in its assertions that children lack certain capacities, which is problematic given the truth of these claims is empirically dubious (particularly regarding older children); second, it is insensitive to different levels of child development; and third, by seeing children primarily as future adults, it neglects the need to respect children's autonomy and rights here and now. These are problems my framework seeks to avoid. Any good account of children's rights must include, amongst other things:

(i) grounding in the empirical literature;

(ii) empirical and normative sensitivity to phases of development across childhood;

(iii) an acceptance of, and response to, the fact that the empirical facts of childhood are, to some extent, socially determined;

(iv) an acknowledgement of the need to respect children now; and

(v) a method for balancing respect for children's current autonomy, and promotion of their welfare and future autonomy.

These are necessary for an adequate account of children's rights, but are often lacking in the current literature.[30]

The first two arguments for children's rights, by Clayton and Feinberg, focus on children's status as *future* rights-holders.

Clayton argues that, ideally, we would ask for a child's consent when we raise them. But since children are not properly autonomous, they cannot consent. Therefore, instead, 'children should be treated in accordance with norms that will command their retrospective consent'.[31] This builds on his broader argument that children should be raised in accordance with the requirements of public reason, and therefore should not be raised within any particular comprehensive doctrine.[32] Whatever the merits of the 'retrospective

[30] There are, of course, numerous other requirements for a fully adequate account of children's rights.
[31] Clayton, (2012),p.355
[32] Clayton, (2006)

consent' test, there remains a question about its appropriate scope. Clayton claims that a child 'lacks the capacity to make autonomous choices', but does not specify the ways in which children lack this capacity. He then asks only for the child's future retrospective consent, ignoring the need to respect their current autonomy. Clayton adds the caveat that his argument only applies to 'young children' who do lack capacity.[33] Regarding the youngest children, his empirical premise is plausible and there is indeed no current autonomy to respect. But if his argument only applies to children who completely lack capacity, then it is likely only to fully apply to children below the ages of three or four, when forms of independent reasoning emerge.[34] My framework can thus determine the scope of Clayton's approach, and can say how to treat children between infancy and adulthood.

Feinberg argues that the child has a right to an open future.[35] This means that parents cannot close off the child's future options, for example, by bringing them up strongly within a certain religious tradition. He argues that children are not currently autonomous since they act from 'immature and uninformed judgement', but they will become autonomous, and therefore we must protect their future choices and autonomy from their current choices. That said, Feinberg argues that 'any "mere child" beyond the stage of infancy is only a child in some respects, and already an adult in others', meaning we must respect children's decisions to the extent they are competent.[36] Indeed, he suggests that 'many or most of a child's…rights-in-trust have already become [adult] rights by the time he is ten or twelve', although 'respect for the child's future autonomy…often requires preventing his free choice now'.[37] Therefore, Feinberg does discuss the possibility of

[33] Clayton, (2012),p.354 fn.4
[34] See chapters 5-6
[35] Feinberg, (1992)
[36] Ibid.,p.95
[37] Ibid.,pp.95 and 78 respectively

children possessing 'adult' rights at younger ages, and, theoretically at least, allows for the need to respect children's agency rights. However, Feinberg specifies neither the ways children fail to be autonomous nor the normative relevance of those failings. Doing this is important for two reasons: first, it means we can specify children's rights at each stage of development (fulfilling desiderata (i) and (ii)); and second, it means we can recognise the need to balance respecting a child's autonomy *now* and promoting their *future* autonomy (fulfilling desiderata (iv-v)).

The next two arguments are made by Griffin and by Brighouse. Griffin takes a 'choice-based' approach to rights and Brighouse an 'interest-based' approach.

Griffin, answering the question 'do children have rights?', argues that the language of rights should be reserved for beings with agency. He then observes that 'infants are not agents' and concludes that infants don't have any rights properly understood (although they may have strong moral protections of other kinds). [38] Griffin includes only brief mention of children older than infants, simply remarking that 'children, as opposed to infants, *are* capable of agency…to some degree' and that the 'autonomy of children of only a few years has often to be respected.'[39] However, there is no account of the ways children or infants fail to be agents (as partial-agents, are there intermediate rights they may hold?) and there is no attempt to prove this empirical claim.

Brighouse, by contrast, claims that children do have some rights, just not the right to make decisions. He introduces a useful conceptual framework for thinking about children's rights, drawing a distinction between welfare and agency interests, and between immediate and future interests.[40] He argues that children have specific welfare rights by virtue of their vulnerability, and have *future* agency rights, that is, rights to develop into an

[38] Griffin, (2002),p.22
[39] Ibid.,p.28
[40] Brighouse, (2002),pp.37-39; Brighouse, (2003),p.701

autonomous adult. However, they lack current agency rights.[41] This is because, for Brighouse, you can only have an agency right when (i) you 'can choose with some level of competence' and when (ii) 'having choice [acts as] a powerful mechanism for inducing identification with the activity chosen'.[42] Children, however, have 'very limited information about their future particular interests' because they don't know what preferences they will have in the future; and they do not fully understand the consequences of their actions. Parents may therefore coerce their children because children are incompetent choosers. Parents must, however, protect children's welfare rights and future agency rights.

Brighouse disregards a child's choices because he claims the child doesn't fully know the consequences of their decisions or their future preferences. But not only may this be true of some decisions taken by adults (getting married, having children, voyaging to the New World), it also lacks proper empirical backing. Brighouse does admit that 'as children age…what I have said is ever less true of them'.[43] But there is no critical investigation of his descriptions of children's ability to understand information or to what extent they are accurate for children at different ages.[44] Furthermore, for slightly older children, his framework does not explain how to balance their current agency interests against their welfare interests and their future agency interests.[45] Indeed, he suggests that any (limited) choices we grant to children now should be 'determined by service to' the child's development of agency in the future.[46] Therefore, he only values a child's current wishes instrumentally for its contribution to future agency, and not because there is a need to respect the child's current (developing, partial) agency. Therefore, although Brighouse

[41] Brighouse, (2002),p.44
[42] Ibid.,p.39
[43] Ibid.,p.43
[44] This gap remains in Brighouse and Swift, (2014). There is some empirical discussion of the importance of care and affection for child development, but not of development in autonomy. Ibid.,pp.57-85, especially pp.58-59.
[45] He mentions balancing the wishes and welfare of children, but seems to suggest that welfare should always be prioritised.Brighouse, (2003),p.693; Brighouse, (2002),p.51.
[46] Brighouse, (2002),p.44

provides a useful conceptual account, it seems empirically and normatively ill-equipped to deal with all but the smallest children (thus failing to meet desiderata (i) and (ii)).

Coleman, when discussing compulsory civic education for adolescents, *does* provide an empirical account of adolescence. He takes the claim that basis of equal citizenship comes from Rawls's 'two moral powers' (i.e. the capacities for a sense of justice and a conception of the good) and the 'powers of reason' and then uses developmental psychology to investigate whether adolescents possess the two moral powers and the powers of reason. He argues that adults and adolescents are 'equally unlikely to have a sense of justice'. On their powers of reason, 'it is very difficult to clearly distinguish between adolescents and adults as gross populations'. Finally, he finds that '[an adolescent] and her parents are equally likely to fail to meet the strong capacity for a conception of the good'. Therefore, adults and adolescents are 'equally unlikely' to 'meet the standards upon which liberal, political respect rests'.[47] He concludes that we cannot appeal to the supposed incapacities of adolescents to justify a compulsory 'authority-centred' civic education for adolescents but not for adults. Instead, adolescents should have a democratic, 'participation-based approach' to civic education, where the students and teachers are treated as equals.

Coleman's approach is significant for using empirical analysis to apply normative criteria to children. That said, Coleman's use of psychological data does not take into account the ways children's psychologies are socially influenced and constructed (as per desideratum (iii) above), meaning he does not investigate whether the psychological facts about children could change. Coleman also seems unwilling to follow his logic through to the abolition of compulsory education – we don't force civic education on adults – and he

[47] Coleman, (2002),pp.168-9

leaves open how his analysis might apply to pre-adolescent children or to areas other than civic education. Therefore, I think Coleman's approach can be taken further.

III.My Project

This thesis aims to provide a liberal framework for seeing and respecting children as they are now, and not merely as beings to be prepared for adulthood. There are five things I intend to do which are missing from the current literature.

First, I will specify more precisely the normative conditions required for autonomy/agency so we can see exactly how children are, or fail to be, moral agents and see what this means for their rights. Some writers accept that rights are not all or nothing, but there is little discussion about intermediate rights; they simply assert that small children have no (agency) rights, but that, as they grow-up, their agency rights generally increase.[48]

Second, having specified these normative conditions, we can be more nuanced when empirically investigating different levels of child development. One current problem is that writers tend to discuss one kind of child (typically young infants) and then draw general conclusions about all children (though with caveats that things get more complicated for older children). These first two tasks help us meet desiderata (i) and (ii) of an adequate account of children's rights: they will provide an engagement with the empirical literature and a sensitivity to different phases of development.

Third, I will examine childhood historically and sociologically to show how childhood is socially constructed. I will also provide a method of critique to show whether

[48] E.g.Brighouse, (2002),p.31; Griffin, (2002),p.28

we can or should change social structures so as to change empirical features of children and childhood. This fulfils desideratum (iii).

Fourth, having specified a child's development of autonomy, we can discuss how to respect the child's current autonomy. Most of the literature assumes or asserts that children lack autonomy/agency, and therefore that there is no reason to respect a child's choices.[49] This, however, fails to recognise children for the people they are now. By examining the normative significance of individual cognitive abilities, we can designate the rights of children who have developed particular cognitive abilities to different levels. We can then provide a mechanism to balance respecting current autonomy and promoting future autonomy. This fulfils desiderata (iv-v).

Fifth, when investigating children's *legal* rights, we must take non-ideal concerns into consideration. Most importantly, we must take account of the huge power differential between parents and children. Granting children the 'choice' to go to school, for example, may in effect grant parents the power to take their children out of school and put them to work. Similar concerns apply to children's rights to work or to have sexual relations. We must therefore investigate the feasibility and desirability of removing, or mitigating, certain adult-child power hierarchies. And to the extent we cannot, or should not, remove certain power hierarchies, we must account for the possibility of a child's choices being manipulated. We need a method to balance the harms of: violating children's moral rights by denying them legal rights; enabling children to be manipulated by granting legal rights; and erroneously granting rights to those incapable of exercising them. Therefore, when moving from the moral to the political, we must take into account considerations of power and the balance of harms.

[49] Some argue that children should be given a range of free choices by parents for the sake of healthy development. See for example, Brighouse, (2003),p.705-6. See also fn3 above.

Finally, I will apply the insights of those previous four considerations to policy questions. I will show that within several policy areas, such as voting rights, sexual consent, age discrimination, and more generally, the voice of the child should be heard more strongly, the autonomy of the child recognised, and the choices of the child held in greater respect.

As a liberal framework for investigating agency rights, our approach to children's rights requires an account of autonomy and a derivation of rights from the value of autonomy. Our framework will also incorporate: empirical psychology (to avoid factual inadequacy and over-generalisation); social critique (to avoid the reification described below); and considerations of a balance of harms (to ensure our conclusions are sensitive to risks of manipulation, exploitation and harm).

Theory: A Liberal Framework

In doing these things, I design a liberal framework which provides a method for answering questions about whether children at particular levels of development have a particular set of moral rights, and whether they should have a particular set of legal rights.

For any individual/group, the framework would operate thus: we treat an empirical claim about that individual/group's psychological abilities as an input. Then, using a normative account of autonomy, we examine which component of autonomy corresponds to those psychological abilities, and hence (via a respect-based account of rights) which moral rights are generated by those abilities. Those moral rights are then the minimal set of rights possessed by that individual/group. But then we must apply a rigorous critique to those psychological (in)abilities; if we discover that those psychological abilities are being

held back by some set of social interactions, then we must *change* those social interactions (provided doing so is not unreasonably burdensome either on the child or those around them) and recognise the moral rights that are consistent with the new, higher set of psychological abilities. The process for identifying moral rights is represented by the flow chart in fig.1 below. Having established those moral rights, we can consider the balance of harms of granting a *legal* right, taking into account non-ideal considerations. After that we can see which choices should be protected by legal rights. Since this framework is liberal, it starts with a general presumption that adults generally have rights to liberty and against paternalistic interference. It then investigates the grounds of those rights, and applies those grounds to children. Readers who are more in favour of paternalism towards adults will in turn be in favour of more paternalism towards children. But the more general point is to avoid double-standards in how we treat adults and children: we avoid this problem by using our framework as a unified standard.

In Part I (chapters 2–8), I defend the process in fig.1 for establishing children's rights. In Part II, I apply this framework to voting, sexual consent, and age discrimination. I will now outline my arguments in each of those policy areas.

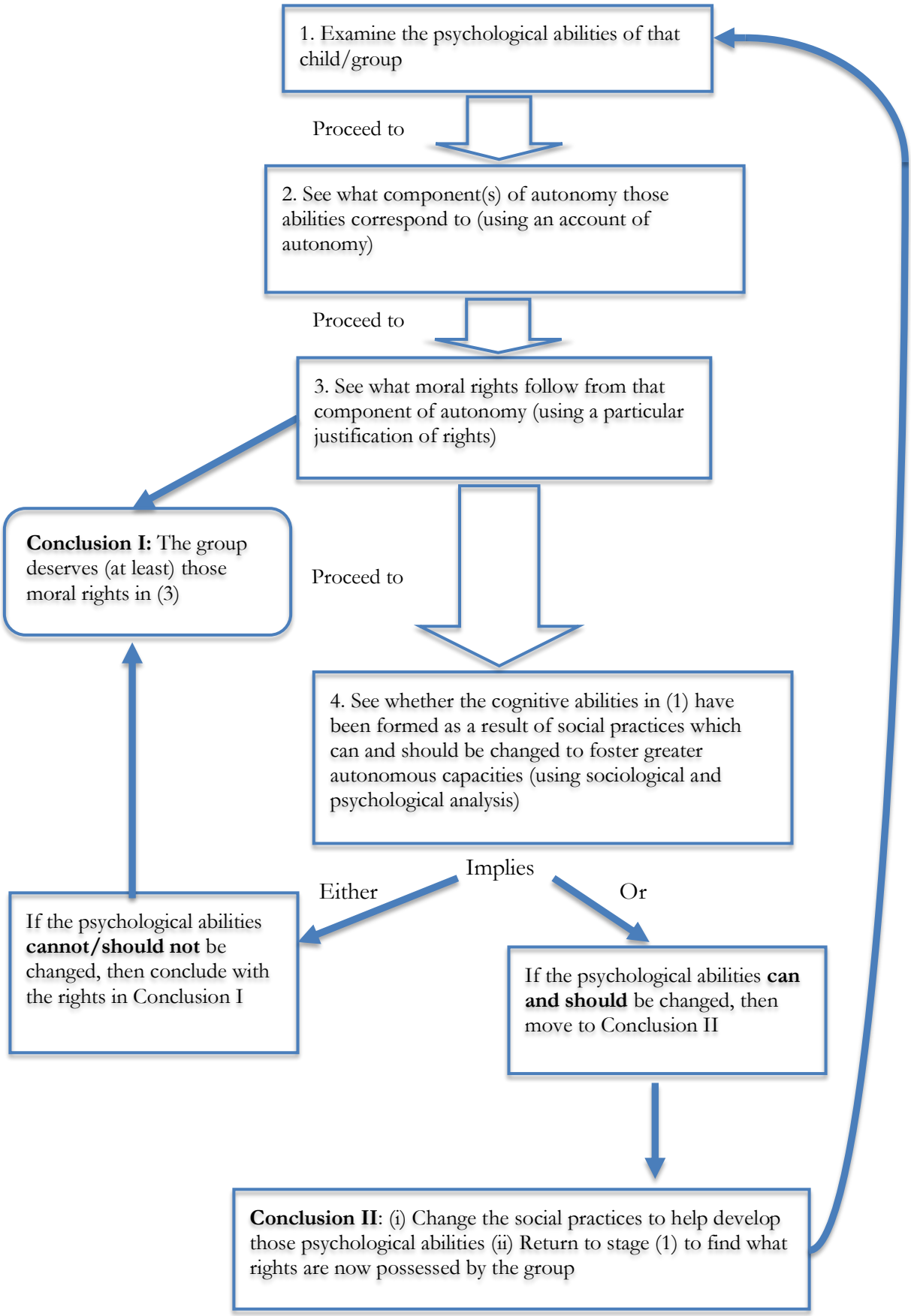


Figure 1: A Liberal Framework for Identifying Moral Rights

In chapter 9 I argue that the voting age should be lowered to at least 16.

First, chapters 5–7 on empirical psychology will show that 16–17-year-olds are, empirically, fully autonomous. Since they are autonomous, there is a presumption that they should be formally consulted in the state's political decisions via the right to vote. Consequently, anyone arguing that 16–17-year-olds should be denied the vote, but that adults should be granted the vote, must find a relevant difference between adults and 16–17-year-olds which is not grounded in autonomy.

Second, I assess Chan and Clayton's argument against lowering the voting age. They argue that 16–17-year-olds lack the 'political maturity' needed for the vote. They argue that maturity is composed of 'an ability and willingness to engage in democratic choice'. 'Ability' includes (I) knowledge about politics and (II) possession of 'political convictions that are consistent…and are not subject to whimsical revision'.[50] They then provide evidence showing that 16–17-year-olds in the UK have less political knowledge than their elders; are more likely to change their opinions over time; and rate themselves as less interested in politics than older citizens. Chan and Clayton conclude we should deny 16–17-year-olds the vote.

However, I challenge this conclusion. First, I show that the empirical features of 16–17-year-olds described by Chan and Clayton are created by on-going exclusionary social practices, and therefore that these features cannot be used to justify continued exclusion. Second, I evaluate evidence from Austria and Norway which suggests that 16–17-year-olds, when given the vote, are politically mature. Third, I show that, on a balance of harms, considering that some 16–17-year-olds are mature and some are not, we should lower the

[50] Chan and Clayton, (2006),p.542

voting age, since the harm of letting immature 16–17-year-olds vote is minimal, whereas the wrong of denying the vote to mature teenagers is significant. Therefore, the voting age should be lowered to (at least) 16.

Sexual Consent

In chapter 10 on sexual consent I defend three main policies.

First, we must re-examine and reconstruct cultural images of childhood innocence and passivity, and challenge many of the discourses and institutions of hierarchy between adults and children. This involves providing children with extensive sex education. Attempts to 'protect the innocence' of childhood reinforce the very naivety which makes children so vulnerable to abuse. Challenging children's powerlessness can more effectively protect them from abuse and can appropriately recognise their agency.

Second, I examine the radical view that advocates deconstructing all age-hierarchies.[51] Although I agree we should deconstruct many such hierarchies, some hierarchical relationships between adults and children are justified (say, between doctor and patient) and should not be deconstructed. For those remaining authority-relationships, we should protect children from the risk of exploitation and ban sexual relationships between children and those in positions of authority.[52]

Finally, I advocate age-span exemptions that legally permit partners within a certain age of each other to have intercourse below the age of consent. While lowering the age of consent may respect the autonomy of mature, unmanipulated teenagers, it risks harm to immature teenagers or teenagers who are manipulated by adults. As an alternative, age-span

[51] Kitzinger, (1997)
[52] See Archard, (2004),p.78

exemptions mitigate these risks, whilst (mostly) respecting the autonomy of mature teenagers.

Age Discrimination

In chapter 11, I discuss age discrimination in the allocation of rights and in the marketplace. I argue that age should be a protected characteristic. As such, age discrimination in the marketplace is normally unjust. It is wrong to prohibit young people from accessing services (such as restaurants or holiday homes) or to deny them employment on the basis of age. However, differential treatment may be permissible to protect individuals with particular vulnerabilities or to rectify certain inequalities. I also argue that there is a duty to redesign public environments to be accessible to people of all ages (e.g. not having steep staircases and heavy doors).

On the question of rights, I examine three general positions. The first is the liberationist position that children should have equal rights to adults.[53] The second is that legal rights should be granted using capacity tests.[54] The final position is that rights should be granted on the basis of age.[55]

I reject full-scale liberationism. Whether we should use capacity-tests or age-discrimination depends on the circumstances. Sometimes, capacity tests should be condemned for inaccuracy, negatively impacting self-esteem, and leading to discrimination on the basis of other characteristics, such as race, class or gender. In those latter cases, we might be forced to choose between age as a *de jure* proxy for capacity and

[53] Holt, (1980),pp.84-85; Cohen, (1980)
[54] Harris, (1982)
[55] Clayton, (2006),pp.186-187

race/gender/religion etc. as *de facto* proxies. In such circumstances, since it is sometimes less important to protect age than certain other characteristics (like race), we should sometimes prefer ageism to "capacity-testing". In other cases, however, capacity tests will be more accurate, less damaging to self-esteem, and less discriminatory. These considerations mean that in some cases (like driving) we should assess capacity; in others, (like voting) we should use age-limits or universal rights; and in still others (like medical consent), we should use a hybrid system, where we guarantee (or presume) the right for some age-groups, but directly test for capacity for other age-groups.

Why These Rights?

Obviously, I cannot apply my framework to every possible children's agency right in this thesis. Therefore, I have chosen to examine voting rights, sexual consent and age discrimination in depth (although I discuss other issues along the way, e.g. criminal responsibility, medical consent and rights to be heard in court). The three applications I have chosen to investigate are important and interesting in their own right, but there are more specific reasons why I choose them.

First, the right to vote is the most important political right possessed by individuals; it is a symbol of basic membership of the *polis*. An equal vote indicates one's equal standing as a citizen. Investigating children's rights to vote is therefore a way to investigate their basic equal political standing. In addition, discussions of voting rights can, more generally, show how this framework might apply to other civil and political rights.

The issue of sexual consent is difficult to investigate in a dispassionate academic way because it elicits strong emotional reactions, and is fraught with controversy. Despite this concern, it is important to tackle this difficult question. Without such a discussion,

sexual consent might be considered a *reductio ad absurdum* of any set of arguments pushing towards child liberationism. One response to (even moderate) liberationism is, 'but surely this means you would have to lower the age of consent; isn't that abhorrent?' It is incumbent on those advocating greater children's agency rights to show either why our position does not imply sexual liberationism (why the argument does not *reduct*) or why people should not be concerned about that conclusion (why the conclusion is not *absurdum*). This is the theoretical motivation for investigating the age of consent. Second, discussions of sexual consent usefully illustrate how this framework can apply to a range of other rights. The discussion of sexual consent requires balancing complex issues of psychological maturity, respect for autonomy, and protection from exploitation. This means sexual consent can stand in for a range of other important rights, such as rights to: give/withhold medical consent; work; leave education; and marry. The chapter on sexual consent shows how to balance consent and exploitation.

Finally, I discuss age discrimination because it helps to settle a question prior to the question of children's rights, namely, should those rights be allocated on the basis of age, on the basis of competency, or universally? In addition, it meets the question posed at the beginning of this chapter, and the challenge posed by the child liberationists: can we justly treat children unequally from adults?

Therefore, Part II covers civil and political rights; consent and exploitation; and equality. These are important for many children's rights. By discussing them, I hope to illustrate how my framework might apply to a broad range of children's rights.

IV.Methodology

Empirical Investigations

Within my thesis, empirical investigation plays two key roles. First, empirical investigation can tell us whether a certain principle actually applies in any given case. For example, within moral theory, before knowing whether the principle of utility applies to animals, we need to know whether animals can feel pleasure or pain. Within political theory, Rawlsian arguments about global justice often turn on whether current global interconnectedness is sufficient to qualify as a 'basic structure' to be regulated by Rawls's principles of justice.[56] The literature on children is replete with empirical assumptions about children's capabilities. But if theorists want to make empirical claims, they should examine the empirical literature.[57] This framework uses empirical analysis to determine whether those assumptions are correct and therefore whether certain principles about rights and liberty apply to children.

The second role of empirical investigation is to interrogate the empirical presuppositions behind normative claims. For example, the normative criteria for citizenship are often designed by describing the 'ideal case' of a competent adult citizen, choosing those natural features of adult citizens we think are normatively relevant, then naming those features as universal criteria for citizenship. The problem with this method is two-fold: first, without empirical investigation we might misunderstand those natural features we are universalising. This then leads to mistaken claims that contingent and morally problematic

[56] E.g. Beitz, (1999)
[57] Swift and White, (2008); Stears, (2005)

'natural' features are immovable or even desirable.[58] The second problem is that, even if we correctly identify the natural features of that ideal case, without properly evaluating marginal cases we may find that our 'universal' principles unfairly exclude those cases.[59] For example, Aristotle took the 'ideal case' of a citizen to be an Athenian citizen, and so surmised that citizens must be male, educated heads of households – thereby excluding women and the poor.[60] More directly relevant to us, the empirical investigations in chapters 5 and 6 show that most adults do not fully develop the two moral powers in the way Rawls supposes and in the way he requires for individuals to be given liberty. This means we have three inconsistent statements:

(1) Adults lack the two moral powers (empirical claim).

(2) To be given equal basic liberties one must possess the two moral powers (normative claim).

(3) Adults should be given equal basic liberties (applied normative claim).

Since these are jointly inconsistent, we must now decide which claim(s) to accept and which to reject or amend. If we assume (1), then we must either reject Rawls's liberal-democratic conclusions or, as I propose, change the normative criteria for citizenship/freedom. In this way, an empirical psychological belief can make us amend or reject normative beliefs. This is the method that I intend to use to amend the normative criteria for rights, autonomy, and citizenship, so we can apply those criteria to children. Thus, we should use empirical investigation to see how those principles apply to marginal cases; depending on the results, we may decide to reject or amend the original principles.[61]

[58] For example, see Cohen's critique of Rawls: he claims that Rawls has (mistakenly) assumed that selfishness is a fixed fact of human nature and so (mistakenly) built it into his principles of justice. Cohen, (2001)
[59] Mills, (2005),p.181
[60] Aristotle, (1996),Book III
[61] Thus, we use wider reflective equilibrium to make our judgements cohere with our 'background theories', Daniels, (1996),p.6.

This also highlights the need to compare children to real adults, and not merely to absolute normative standards constructed out of idealised notions of adulthood.

Therefore, empirical investigation helps us in three ways: first, to understand when to apply our normative principles; second, to ensure accurate descriptive characterisations of the 'ideal-type' on which we base those principles; and finally, to ensure our principles don't illegitimately exclude others. I will use this method to better understand the normative criteria for rights, and how those criteria, suitably formulated, apply to children.

Use of Psychology

There are several methodological observations to make when using psychology within political theory. First, I only engage moderately in intra-psychological debates: where there are entrenched scientific disagreements within psychology, I do not take sides. In Part I of the thesis I defend a framework rather than a set of substantive policy proposals. Therefore, my conclusions are conditional in form, e.g. 'if a child has faculty x, then they should have right y'. The basic framework uses empirical psychological claims as inputs. This means that the framework itself does not depend on any particular set of descriptions about child psychology. If the psychological facts change (or, more likely, psychologists' best estimation of the facts), then the conclusions generated by the framework change. But the framework itself remains the same. I discuss this issue more in Chapter 8.

Of course, our particular conclusions in Part II of the thesis on 'applications' depend on substantive claims about empirical psychology, and I do discuss empirical psychology in Part I. How can we, as political theorists, use empirical psychology? Are we not faced with uncertainty? Perhaps. But as Brewer puts it, 'the layman cannot rationally

refuse to defer to the views of the expert'.[62] Since we need to enact some kinds of policy (where 'do nothing' is still a policy), it is impossible to act without making some presumptions about the facts. More optimistically, one can have good reasons for believing a proposition if one has good reason to believe that *others* have good reasons to believe it.[63] In his seminal paper on the epistemologies of expert testimony and evidence, Avi Goldman uses a Bayesian approach to argue that there are various ways that a 'novice' might assess expert evidence. He suggests that novices can decide whether to accept a given piece of expert testimony by: assessing arguments provided by the expert; examining agreement from other experts; and investigating appraisals from 'meta-experts' on the experts' expertise.[64] All three options are available to us.

To establish psychologists' views on empirical descriptions of child development, I used a number of sources. The main sources I began with are the 6th and 7th editions of the *Handbook of Child Psychology*, published by Wiley press in 2006 and 2015 respectively. They each are composed of four long volumes, with around 200 contributors who are 'authors who were widely acknowledged to be among the leading experts in the areas of the field'.[65] Over the 85 years of its existence, the *Handbook* has become a touch-stone for scholars, graduate students, and practitioners. The *Handbook* represents 'a comprehensive and accurate picture of the current state of knowledge' in developmental psychology.[66] Beyond the *Handbook of Child Psychology*, I have used *The Wiley-Blackwell Handbook of Childhood Cognitive Development* and the most recent edition of the *Handbook of Moral Development*, which bring together respectively 49 and 44 of the top scholars in cognitive development and moral development, with the aim of summarising the state of current scholarship within each field. I also use studies endorsed by the American Psychological Association,

[62] Brewer, (1998),p.342
[63] Ibid.,p.336
[64] Goldman, (2001). See also Brewer, (1998).
[65] Lerner, (2006),p.xiv
[66] Ibid.,p.xiv

particularly when it has provided briefs to the US Supreme Court and thus is trying to be uncontroversial in describing the received knowledge about child development. Finally, to ensure full coverage, I have used a standard technique of meta-analyses, namely, running key search terms through PubMed, and my chapters on child psychology have been read by people with training or experience in child psychology. Working by broad academic consensus in this way might lead to my empirical conclusions being conservative. But it also leads to more certainty about their content.

Finally, when there is a lack of empirical evidence, when the experts disagree and we cannot rank their expertise, or when the experts are uncertain about the evidence, we must make policy decisions under conditions of risk and uncertainty. I discuss what to do in such circumstances when considering the 'balance of harms' element of the framework in chapter 8. This approach uses elements of decision-theory on how to make choices under conditions of risk. Thus, the framework provides a mechanism for drawing political conclusions even when the empirics are uncertain.

Limitations of Psychology

We should not use psychology to essentialise children and mistakenly conclude that psychological data represent children's inherent and fundamental nature. There are two reasons for this. First, a child's psychology may be partly determined by how we view and treat that child. This is because our identities are formed by how we view and understand ourselves. The individual

> 'makes himself, guided by an image of what he is, and what he believes he is thus contributes to what he is in fact'.[67]

[67] Cohen, (2001),p.2

As Cohen puts it,

> 'if a man thinks himself confident, he is half way to being so…supposing himself to be fragile, he is shaken by minor adversity'.[68]

But our image of ourselves is importantly determined by how *others* see us:

> 'our identity is partly shaped by…[the image] the people or society around [us] mirror back to [us]'.[69]

Therefore, the fact children have certain characteristics may well be because we tell them that they do and because we behave as if they do.[70] To exaggerate slightly: children might be infantile only because we infantilise them. Therefore, we must not overstate the innateness of children's psychology; our empirical conclusions may show we need to change the psychology of children rather than merely respond to it as a given constant. Thus, our framework will apply social critique when making psychological claims. This point will be discussed in chapter 2.

The second reason we must not overstate our psychological conclusions is that many of children's 'incapabilites' may be structural rather than inherent. The reason children cannot do certain things may be that we have designed institutions which are insensitive to children's differential needs and abilities. To ignore this would be to suppose that the reason wheelchair-users cannot use parts of the London Underground is that they have certain disabilities, when in fact it is because Transport for London have failed to build an accessible train system.[71] For example, Brighouse claims that children are incapable of waiving their rights or demanding their enforcement because they are vulnerable and dependent. Because the choice theory of rights claims that rights are protections of choice, agency rights (and perhaps all rights) require conceptually that rights-holders be able to

[68] Ibid.,p.2
[69] Taylor, (1994),p.25
[70] Richards, (1996),p.5
[71] See Wolff and De-Shalit, (2012)

waive or demand those rights. Thus, Brighouse claims that children lack agency rights.[72] But perhaps this incapability is because the institutions for individuals to demand the enforcement of their rights (the courts, the police) are designed almost entirely for adults, thus requiring children to speak the language of adults and use adult communication channels. This means the incapacity is structural rather than inherent.[73] Therefore, we must be critical in our use of psychological data, and not overstate its empirical importance.

V.Thesis Outline

To develop this liberal framework, I will elucidate and defend its different components in Part I, and illustrate it in Part II by applying it to voting rights, sexual consent and age discrimination. Part I establishes the theoretical framework. Chapter 2 defends a social constructionist account of childhood. It examines the history and sociology of childhood to show the ways in which childhood is socially constructed. It shows how our ideas about childhood are historically and socially contingent, and the ways in which children themselves are socially moulded and facts about them are socially contingent. This highlights the need for social critique when investigating children empirically. Chapter 3 defends a respect-based account of justifying (agency) rights, and establishes that respect for autonomy should the normative basis of our framework. It also discusses paternalism, and provides a way to balance respecting children's autonomy, promoting their future autonomy, and promoting their welfare. Chapter 4 establishes an account of autonomy which can provide the normative criteria for possessing moral agency rights. I conclude

[72] Brighouse, (2002),pp.36-37. Hart, (1955) uses this kind of argument to claim that infants have no rights.,pp.82-83
[73] For one child's difficulty talking the language of adults in a sexual abuse case, see Shure, (2014)

that our account of autonomy should incorporate the Rawlsian two moral powers (the capacity for a sense of justice, and the capacity for a conception of the good) plus a hierarchical control component (the ability to control one's thoughts and motivations). Together, chapters 3–4 establish the normative autonomy-respecting foundations of our framework. Chapters 5–7 investigate empirical psychology. Chapter 5 investigates various cognitive abilities. It discusses them theoretically, and explains their individual normative significance in light of our account of autonomy; this will help us understand what rights are generated by individual psychological abilities. It also examines empirically the development of those cognitive abilities across childhood. Chapter 6 does the same for development in moral reasoning. Chapter 7 examines the development of hierarchical self-control, which is composed of the abilities to control one's motivations and one's thought processes. It examines empirically how children develop self-control, and then analyses the normative significance of that development in light of our account of autonomy. Together, chapters 5–7 chart the development of autonomy across childhood. Although adolescents possess a full ability to reason as well as adults (and so possess the two moral powers as much as adults do), they have less self-control than adults. This means that adolescents' decisions may be regulated more than adults' decisions in order to ensure that those decisions are autonomous. Chapter 8 concludes Part I. It outlines the full framework; and explains how to use the balance of harms test to move from identifying moral rights to allocating legal rights.

Part II illustrates and applies the theoretical framework developed in Part I. Chapter 9 argues that the voting age should be lowered to at least 16. Chapter 10 discusses sexual consent, defending legal reform and the need to re-examine and reconstruct cultural images of childhood innocence. Chapter 11 investigates age discrimination and the age of majority,

concluding that age should be a protected characteristic. Chapter 12 concludes the thesis as a whole, and highlights avenues for future research.

I hope this framework will fill the child-sized gap within political theory; and that it will provide a novel approach by using developmental psychology to help us avoid false and unexamined assumptions about children. When applied, the framework will show that we must do much more to respect children as persons in themselves, and not merely as conduits for parental happiness or as raw materials for producing future citizens.

In the next chapter, I begin to lay out my framework. I explain how childhood is socially constructed; and show we must be critical of any particular static set facts set out about children. I also explain how to decide whether to change the social structures that create those facts.

Part I: Theory

Chapter 2

The Social Construction of Childhood

Introduction

This chapter examines the ways in which children and childhood are socially constructed, and why this is important for investigating children's rights. One possible way to establish what rights children have is to develop normative criteria for the possession of rights, and then investigate empirically whether children – here and now – meet those criteria. This chapter challenges that methodology. A static investigation of current psychology, which does not investigate how those psychological facts are created by social circumstance, ignores how that psychology and those facts could change. This chapter does not reject the importance of empirical investigation. It just says that we must be careful about interpreting those empirical facts and that it might be incumbent on us to change those empirical facts rather than take them as given. This chapter also provides a balance of harms framework for deciding whether to change a set of empirical facts about children or to leave them. This chapter establishes the 'social critique' element of our framework (stage 4 in fig.1, chapter 1).

In this chapter, section I explains why we should investigate the social construction of childhood and explains why it is relevant to policy-making and the construction of the normative criteria for possessing rights. Section II discusses more precisely what is meant by 'social construction'. Section III rejects biological and structural-functionalist accounts of childhood by examining: how the culturally created categories of 'child' and 'childhood'

relate to biology; the failure of biology to provide an objective or neutral definition of childhood; and how biological and psychological 'facts' about children are created by social interaction. Section IV examines how children are moulded and formed by social interactions. It examines the operations of juridical power and the way childhood emerges from adult-child segregation. I conclude that, when investigating the empirical features of childhood, and deciding whether children possess the features required for certain rights, we should be attentive to whether those empirical features of childhood can or should be changed.

I.Motivations for Investigating Social Construction

There are a number of reasons why we should be interested in the concept of childhood and how it is constructed.

First, by investigating the social origins of how we think about and treat children, we can start to displace the overwhelming claim made on childhood by common-sense reasoning. Such reasoning is nothing more than conventional, but it serves to naturalise contingent features of children.[1] 'Common sense' can hide the ways power is exercised over children and the ways their choices are restricted, capabilities formed, and violence enacted. Recognising the ideological origins of our understandings of childhood can help us recognise, and correct, the biases which make us misperceive children and their capabilities. Incorporating social critique into our framework will therefore help us avoid these biases and misperceptions.

[1] Jenks, (2009),p.94

Second, and more fundamentally, this kind of analysis can show that those facts about children which we might think justify differential treatment are in fact created by social practices. Those real (and seemingly natural) features of children can be created both by those very practices of differential treatment and also by broader social practices.[2] Since those social practices can change, so too can the 'natural' characteristics they constitute and create. This investigation can also problematize the 'immutability' of psychology and neurology, and shows we cannot uncritically use these biological facts to justify the differential treatment of children. Thus, we must investigate whether certain features of children (which may be objective and genuine) are created socially and, if so, whether policies should seek to change these features of children and childhood.

Third, we can see how childhood is constructed in opposition to adulthood. This is significant because we tell children that, to gain certain rights, they must meet certain standards of 'maturity'. But these standards are based on a mythical idea of adulthood. We create an ideal of adulthood, say that, to have rights, someone must be an 'adult' in that ideal sense, we point out that children fail to meet that ideal of adulthood, and then we deny them rights. Thus, we demand that children reach an unobtainable standard before treating them with respect. By seeing how cultural understandings of childhood and adulthood are created, and how they compare to the reality of adulthood, we can have more humility about our own capacities as adults, and can respect children more as they are.

Let's explore those last two motivations in more depth.

[2] E.g. in chapter 9 we show that teenagers' lower political knowledge than older citizens results from the fact teenagers are disenfranchised.

Why should a political theorist examine how certain empirical features of individuals are socially constructed? First, as discussed in chapter 1, empirical facts about individuals are relevant to how we treat those individuals. But we need to know whether these empirical facts have social causes. This is because we might be creating these biological/psychological features of individuals through our social interactions with them. If these empirical facts are morally relevant for how we treat individuals, and if those facts are caused by the choices of individuals or societies, then, since moral reasons apply to choices, moral considerations should apply to those prior social interactions. As such, political theorists who are interested in the morality of social choices should be interested in this investigation. We should not begin our moral deliberations with the choice of how to respond to certain biological features of individuals. We should begin with the prior social choices which create those biological features.

It seems that many people writing on children's rights who examine empirical facts about children and adolescents take those facts as given, and then decide on the appropriate treatment or policy from there. For example, when arguing against lowering the voting age, Richard Dawkins and R. Elizabeth Cornwell point out that 16-year-olds have less developed frontal lobes.[3] But this ignores how social structures can affect psychological development and, in turn, affect neurological development.[4] Chan and Clayton, also arguing against lowering the voting age, observe that British 16–17-year-olds have low levels of political interest and political knowledge. They take that fact as constant, and then argue that 16–17-year-olds are too politically immature to vote.[5] Coleman, discussing the legitimacy of compulsory civics education, argues that 15–16-year-olds

[3] Dawkins and Cornwell, (2003)
[4] Fine, (2011)
[5] Chan and Clayton, (2006)

possess the full psychological capacities of adults, whereas younger children do not. He concludes that, while older adolescents should have certain adult rights, younger adolescents should not.[6] Similarly, Freeman argues that child liberationism should be rejected because child liberationists ignore the fact that children below the age of 14 are less psychologically mature than adults.[7] Dawkins, Cornwell, Chan, Clayton, Coleman and Freeman observe current features of children/adolescents, take them as fixed, and then argue for policies designed in light of those features. But my argument is that there is a prior social choice which affects, and sometimes determines, those features. There are two components to my argument:

(a) Key facts and features of individuals (psychological, biological, neurological etc.) can be significantly shaped by social interactions

(b) Social interactions are subject to social choice

Most of the rest of the chapter will attempt to establish (a) and its extent, which is greater than usually assumed. However, establishing (a) on its own would be a purely sociological exercise. Without (b), we are in a structuralist world in which, although individuals are moulded by their social surroundings, those surroundings are not straightforwardly a product of social choice. But through (b), the sociological insight of (a) becomes politically relevant, since it establishes there is a practical question about what prior social choice to make. When making policy, we first choose between different social arrangements, which cause some set of empirical features of individuals to emerge. Then we choose how to treat those individuals in light of those empirical features. In the examples of Coleman and Freeman, it seems that (with some simplification) we as society can take four different sets of decisions. First, we can leave social relations as they are, taking a teenager's immaturity

[6] Coleman, (2002),p.167
[7] Freeman, (1983),p.4 and p.23

as given, or we can change social relations to make teenagers mature. And second, in response to their (im)maturity, we can treat them paternalistically or liberally. Perhaps Freeman is correct that paternalism is the best response to immaturity. But the best overall set of choices may be to develop an individual's maturity and grant liberty.

What should be taken into account in this decision? Answering this question will help us build up the 'balance-of-harms' component of our framework. The most obvious consideration is the value of combining a certain policy with a certain set of empirical facts about individuals, i.e. the utility or moral appropriateness of that policy-fact combination. For example, we must decide whether paternalism or liberty is the most appropriate response to the fact of immaturity. However, there are at least three other general components which weigh in the decision. First, there are the switching and maintenance costs of changing between different social arrangements. These would include the political, economic and social costs of, for example, breaking up traditional forms of child rearing to establish a state education system. More generally, it would include the social ruptures involved with fighting slavery, a corrupt dictator, or racist institutions. Second, there are the comparative values of the different social arrangements, separate from the further effects they have on the empirical facts they create about individuals. For example, we might compare the intrinsic value of the close affective family bonds that might emerge from children working, and being raised, within the family to the benefits of children spending most of their day in state-run schools. Finally, there are the comparative intrinsic values of the sets of individual features/traits we are constructing. For example, we might compare the value of being mature and autonomous to the value of childhood innocence. The above considerations show that, when evaluating sets of social relations and policy responses, we are comparing, *inter alia*:

(i) the value of the policy-fact combination;

(ii) the value of the set of social relations;

(iii) the value of the set of individual traits;

(iv) the switching and maintenance costs of changing a set of social relations and/or the policy/individual treatment.

There is one assumption within the above discussion I want to draw attention to: the assumed separation between the initial social interaction/set of social relations and the 'policy' or 'treatment'. One of the insights of the Foucauldian literature (discussed in section III) is that policy/treatment links back into those social interactions and hence into the empirical features of individuals. We might think that the way we treat individuals is a response to the reality of those individuals (created by biology or culture or whatever), when in fact our treatment of those individuals is creating the very reality we think we are responding to.[8] For example, it might be that by denying individuals the right to vote, they lack the chance to become politically mature; we therefore think that the laws are responding to the political immaturity of certain individuals, when in fact the law is creating that political immaturity by excluding people from politics. In such cases, policy makers might believe that biological features of an individual are fixed and that they are choosing between two different policies. For example, they may think they are choosing whether to grant the vote to people who are unavoidably immature. But in fact, the choice may be between (i) granting the vote to mature citizens and (ii) denying the vote to immature citizens. The 'option' of granting the vote to immature citizens may not exist because, by granting the vote, those citizens become politically mature. If we didn't perform this sociological analysis, we would mistakenly take the empirical facts about individuals to be biologically immutable and hence insensitive to the choice between policies/treatments. We would misunderstand the options, and then choose a sub-optimal policy. (In this

[8] See Foucault, (1981)

example, we erroneously disenfranchise people to avoid enfranchising the immature). It is therefore important to be aware of how policies generate the very facts they presuppose.

The above illustrates the importance of investigating the socially constructed nature of children and childhood. Empirical facts about children are relevant for deciding the content of children's rights. But investigating their social construction shows that we should not simply take biological features as given and respond to them as they are. Rather, we should consider whether to create a different set of facts. The social construction of childhood is therefore important for the politics of childhood: we may want to decide, using the considerations above, to construct childhood differently.

Social Construction of Adulthood

A different motivation for examining how childhood is constructed emerges from the observation that childhood is constructed opposite adulthood. To know what a child is, we must understand what an adult is and how children differ from adults. These kinds of constructed ideas link into arguments about how children should (not) be treated. For example, here is a common type of argument against treating children like adults in some way:

> P1: Children are immature with respect to feature *x*.
>
> P2: We should treat children in manner T_x if and only if children are mature with respect to *x*.
>
> Conclusion: We should not treat children in manner T_x.

Implicit within this argument is an account of maturity. This account depends on an account of adulthood – of what a fully-fledged human is – against which childhood is constructed and compared. The question, then, is: what is the content of this construction of adulthood? There are two kinds of responses to the anti-liberationist argument above:

(a) Reject P1: claim children do possess mature feature x.

(b) Reject P2: claim adults do not possess feature x, and therefore that the account of maturity behind P2 is flawed and should be rejected.

Strategy (a) has been a standard tactic of child liberationists: they often claim that children are mature in the relevant respects. Strategy (b), on the other hand, suggests that children's lack of feature x does not indicate an (unique) immaturity meaning it cannot justify differential treatment for children. This was a strategy that I illustrated in chapter 1, where I showed how empirical analysis could be used to relax the stringency of the Rawlsian criteria for basic political equality. Strategy (b) is the strategy used by H.Cohen and by Herring to argue in favour of rights for children: Herring argues that children and adults are similarly vulnerable; Cohen points out that both children and adults need expert advice to make important decisions.[9] This strategy involves debunking the constructed ideal of adulthood, showing that the ideal fails to match up to reality, and therefore that it is an inappropriate basis for apportioning rights. Strategies (a) and (b) both involve pointing out that our dominant social ideas about childhood or adulthood are misguided.

This motivation for, and method of, investigating social construction is distinct from the methods and motivations in the previous sub-section. Here, the point is not that social interactions create or fail to create feature *x*, but rather that we have socially constructed categories ('childhood' and 'adulthood') which are in some part imagined or idealised. The claims are:

[9] Cohen, (1980),pp.58-71; Herring, (2003),p.147

(1) Childhood is constructed in opposition to adulthood.

(2) The normative ideal of adulthood is illusory.

(3) These constructions are often used to deny rights or adult treatment to children.

By demonstrating (1) in this chapter, and demonstrating (2) in chapters 5–7, I show that it is an open question whether children should be denied certain rights by virtue of their incapabilities/vulnerabilities, and therefore that we must re-examine the empirical data and our normative standards.[10] Since we are interested in whether children meet a certain threshold to merit certain rights, we should empirically investigate adults at, or just above, the threshold. Methodologically, we should compare children not to an abstract and idealised (adult-derived) standard, nor even to adults with average capacities (who may be well above the threshold), but rather to the adults with the weakest capacities who nonetheless possess certain rights. When investigating whether a border village is in Scotland or England, we should compare its location not to Inverness, but to Gretna Green.

II.What is Social Construction?

Having motivated our interest in the socially constructed nature of children and childhood, we now turn to social construction itself. In saying that childhood is socially constructed, we mean that childhood is neither a natural nor a universal feature of human groups, but appears as a specific structural and cultural component of many societies.[11] Childhood is an

[10] Similar ideas are discussed in Mills, (2005).
[11] Jenks, (2009),p.93

interpretive frame for examining the early years of life. For sure, there are certain biological features of children; but the ways those features

> 'are understood is a fact of culture…childhood is both constructed and reconstructed both for and by children.'[12]

The concept of childhood, and our understandings of that concept, are formed by

> 'the complex interweaving of social structures, political and economic institutions, beliefs, cultural mores, laws, policies and the everyday actions of both adults and children'.[13]

'Childhood' comes from a series of social meanings and expectations. Contrast this to 'a child'. Whereas the notion of 'childhood' is general and abstract, the concept of 'child' concerns an actual individual defined as non-adult. 'Childhood' refers to the status ascribed by adults to people defined as non-adult.[14] How that status is conceived is entirely social. But that social understanding of childhood affects real children. The child is constituted socially as a person through a series of images, representations, codes and constructs.[15] Children's lives are profoundly shaped by social images and expectations about childhood, whether they conform to, resist, or reinvent those images and expectations. Their lives are shaped by the social and cultural expectations that adults and peers have of them. Ideas about childhood are central to notions of what children should and should not do, where childhood begins and ends, appropriate and inappropriate treatment of children.[16] This affects not only our image of childhood, but the behaviours, characteristics and psychologies of real children.

The claim 'childhood is socially constructed' means that the concept of childhood, and the status that attaches to individuals within that category, is created by culture, language and social interactions. The claim that 'children are socially constructed' means

[12] James and Prout, (1997),p.7
[13] James and James, (2004),p.13
[14] Gittins, (2009),p.37
[15] James and Prout, (1997),pp.8-9
[16] Wells, (2009),p.2

not only that the concept is created inter-subjectively, but also that real observable features of children are created by social structures, discourses and interactions. The claims that childhood and children are socially constructed thus guard against reductionist accounts of what children and childhood are 'really like'.[17]

One common misunderstanding is to think that the claim 'childhood is socially constructed' means that childhood is illusory or artificial, where those terms are the opposite of 'real' or 'authentic'.[18] But things which are socially constructed can really exist. A difference between (many) Jewish and Christian boys is that Jews are circumcised and Christians are not; these differences are real and genuine *and* have social causes. Similarly, the differences between adults and children can be real, and really exist, and those differences can have cultural causes. This observation has two important effects on how we might respond politically to the theory of identity construction. First, if we believed that the constructedness of childhood meant there were no differences between children and adults, then we might jump to full-scale child liberation and eliminate all differences in treatment between children and adults. But this could be terribly misconceived so long as relevant differences between adults and children continue to exist (regardless of the causes of those differences). Second, recognising that social construction creates actual differences between children might lead us to fight to change those social constructions. Some people think, mistakenly, that social construction is merely an issue with semantics, and that solving the problem is a matter of changing the terms we use. They are guilty of the charge sometimes levelled at 'political correctness', namely, that refusing to talk about (say) racial identities means failing to recognise those identities and failing to recognise the oppression created by social structures.[19] Social construction is about more than terminology; it is

[17] Woodhead, (2009),p.19
[18] Butler, (2006),p.45
[19] See Fanon, (2008),p.172

about discursive patterns and social interactions creating real identities and real differences between individuals.

III.Childhood and Biology

This section examines the relationship between culture and biology. I outline and then reject some views that maintain we should understand and conceptualise childhood purely, or primarily, biologically. First, I outline developmentalist and structural-functionalist views of childhood. Second, I argue biology needs to be interpreted by culture; third, I critique standard social constructionism by arguing that the concept of 'biological maturity' is inherently normative; fourth, I examine how science pushes norms onto individuals; and lastly, I show how social interactions create and shape biological facts.

Various traditional accounts of childhood take 'the notion of childhood as a given fact, particularly a biological one'; these are traditional biological determinist accounts, characterised by the positivism once dominant in sociology.[20] Social constructionism stands in opposition to many other forms of childhood studies, including biological essentialism, positivism, materialism, Marxism, and structuralism. Within these various schools,

> 'the biological facts of life, birth and infancy, were constantly used to explain the social facts of childhood with little account taken of any cultural component'.[21]

Two of the main traditional approaches to studying children are developmentalism and structural-functionalism.

[20] James and Prout, (1997),p.ix and p.viii; Jenks, (2009),p.105
[21] James and Prout, (1997),p.14

In the twentieth century, developmental psychology was 'the dominant paradigm for studying children'.[22] In this approach, childhood is defined biologically, where biological development is understood as necessary, natural and universal across time and cultures.[23] The approach of developmental psychology 'is wholly predicated on the notion of childhood's 'naturalness". Embedded within developmentalism is the notion of the 'necessity, normality and desirability of development and constructive change,'[24] with children passing through several different predetermined developmental stages.[25] Many of these ideas transferred from developmental psychology into sociology. Sociological versions of developmentalism, also known as the 'socially developing child view', do see children's psychological development as occurring within a certain social context. But both sociological and psychological developmentalism contain 'the obvious essentialism that their shared positivism brings to bear.'[26] Within social constructionism, by contrast, 'childhood is always produced as an object in relation to power'. Since power relations shift and change, 'there can be no timeless truth, sociological or psychological, about childhood.'[27]

The second dominant account of childhood is structural-functionalism. Within this approach, the child has:

> 'certain universal characteristics which are specifically related to the institutional structure of societies in general and are not simply subject to the changing nature of discourses about children nor the radical contingencies of the historical process.'[28]

On this view, children are moulded by social structures, but childhood is still a fixed and universal feature of societies because those social structures are fixed and universal. Underpinning the structural functionalist account is the socialization model of child

[22] Kehily, (2009),p.8
[23] James and Prout, (1997),p.11; Walkerdine, (2009),p.116
[24] Jenks, (2009),p.95
[25] James and Prout, (1997),p.11; See Inhelder and Piaget, (1958)
[26] Jenks, (2009),p.102
[27] Walkerdine, (2009),p.117
[28] Jenks, (2009),p.111

development. Socialization is the mechanism whereby social roles – defined and delimited by social structures – come to be replicated in successive generations. Children's social transformation is, on this model, essentially linked to their biological growth and development. Children are seen as 'immature, irrational, incompetent, asocial [and] acultural', with adults seen as 'mature, rational, competent, social and autonomous'.[29] Socialization is the process which (somehow) 'transforms one into the other'. Adults and children are therefore assumed to be fundamentally different: as James and Prout point out, 'for the model to work indeed this must be the case'.[30] If children and adults were not fundamentally different, there could be no place for socialization to do its transformative work. Although the socialization/structural functionalist models share with social constructionism the idea that children can be moulded by social structures, structural functionalism is premised on a reductive account of what children 'really are' as distinct from adults, where socialization is needed to mould them. The social constructionist claim is much stronger: it denies that there is such a pre-social 'real' child.

Both developmentalism and structural functionalism are grounded firmly in biology and in biological accounts of children and childhood. Social constructionism rejects this biological essentialism. But even drawing on 'common sense', there seem to be some obvious criticisms of social constructionism. Aren't there just some objective biological facts of the matter? Even if we accept that 'childhood' is socially constructed insofar as all language is, doesn't the term describe something real and 'out there'? Well, it is certainly true that there are some biological differences between adults and children. But 'the ways in which [these facts are] understood and made meaningful is a fact of culture.'[31] A baby is indeed a biological and material reality. And yet,

[29] James and Prout, (1997),p.13
[30] Ibid.,p.13
[31] James and Prout, (1997),p.7

> 'at the same time, every baby born is born into a social world, a linguistic world, a gendered world, an adult world full of discourse, with complex and contradictory meanings.'[32]

The human infant, without control or language, is given meaning by adults from the minute their parent(s) interact with them in the context of wider culture. And how societies understand these material facts is varied and various. What is biological childhood anyway? Is it natural, anatomical (and which bit(s) of anatomy?), hormonal, age-related, psychological? Each of these types of biological fact has, at some time, been used to categorise children as separate from adults.[33] We can see this through three case studies: Islamic legal traditions; Jewish religious traditions; and Medieval England. In each example, the understanding of adulthood is 'biological', but they generate different conclusions about what biological facts are relevant and who qualifies as adult.

First, under some historical versions of Islamic law, one was an adult when one reached sexual maturity. There were disagreements within this tradition about what constituted biological sexual maturity for girls – does it require menstruation (balaghat)? Or that the girl be 'physically fit to engage in sexual intercourse' (hatta tutiqa'l-rijal), regardless of the menses?[34] Thus, even within this particular paradigm of thought, the biological facts considered to be relevant are contested. But in general, within this paradigm, one was an adult when one could marry; and one could marry when one was sexually mature.[35] Therefore, you are an adult once it is a biological fact that you are sexually mature.

Within traditional Jewish law, one was an adult once one could understand religious law and take responsibility for adhering to that law. This, then, is a psychological understanding of maturity, which focuses on the cognitive ability to make moral decisions and take responsibility for those decisions. At this point of development, boys could take

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[32] Gittins, (2009),p.36
[33] Ibid.,pp.36-37
[34] Motzki, (2005),p.135; Levy, (2000),pp.106-107
[35] Motzki, (2005),p.129. Full maturity also requires *rushd*, i.e. the intellectual maturity to dispose of one's property, ibid.,p.135.

full part in religious ceremonies, be counted as part of a minyan (a sort of prayer quorum) and be called as a witness before the Beth Din (religious courts); and both boys and girls could own property, enter contracts, be married, and be held legally accountable.[36] Within this paradigm, one was an adult once one could have a full moral and spiritual relationship with God, and that came when one could understand and follow God's law. Therefore, you are an adult once it is a biological fact that you have the cognitive ability to reason morally.

As a final example, it seems that the age of majority may have been fixed (or heavily influenced) in Medieval Normandy and England by the capacity of boys to bear arms. As armour became heavier and more elaborate in the 10th–11th centuries, greater strength was needed to bear weapons; and as the use of horses in warfare increased in the 12th century, greater skill was required. Over the same period, the general common law age of majority gradually increased from 15 to 21.[37] It seems these two trends were causally linked for the age of majority amongst nobles 'in the profession of arms'. That trend amongst nobles subsequently influenced the general age of majority.[38] Within this paradigm, one was an adult once one could fight; and one could fight once one had the strength and coordination to wield the tools of war. Therefore, you are an adult once it is a biological fact that you possess certain kinds of muscular strength and coordination.

The above accounts are biological understandings of adulthood and childhood which can point to 'biological facts' about children – whether that be menstruation, or psychology, or physical strength. And so, within each of these paradigms, the distinction between children and adults could be said to be 'purely biological' and 'purely objective'. But they each generate different ideas of childhood and adulthood, and draw the lines

[36] Although Bar and Bat Mitzvot are still considered adults in the religious sense, they are not considered ready to marry or earn a living. *Pirkei Avot: Ethics of the Fathers*, 5:22.
[37] James, (1960),p.26-27
[38] Ibid.p.28; Pollock and Maitland, (2010),pp.459-460

between those groups in different places. Each paradigm has a socially constructed ideal of true, full development, and then looks for the biological indicators of that development. These examples show that there is no clear or stable biological distinction between adults and children; the biological distinction is culturally mediated and depends on cultural understandings and significations to have any stable or coherent meaning. Therefore, it cannot be a response to social constructionism that the category of childhood is merely an impartial recognition of objective biological facts.

A second response to biological accounts (such as developmentalism and structural functionalism) is that, even once we decide which biological facts are relevant, how we interpret them is inherently normative. This is a point the even the social constructionist literature has missed. The claim that 'it is biological fact that children are immature' gains wide endorsement within the social constructionist literature.[39] The following is a famous statement of social constructionism:

> 'the immaturity of children is a biological fact of life but the ways in which this immaturity is understood and made meaningful is a fact of culture.'[40]

And the first 'tenet' of social constructionism, as identified by James and Prout (two of the school's founders), includes the claim that:

> 'childhood, as distinct from biological immaturity, is neither a natural nor universal feature of human groups.'[41]

So even the main social constructionist writers claim that biological immaturity is a 'fact' in some kind of pre-discursive sense. But the concept of 'immaturity' is normative. It requires an idea of the 'ideal', 'complete' or 'flourishing' human, where facts are interpreted relative to that ideal. The concept of maturity cannot be reduced down to value-neutral biological

[39] Kehily, (2009),p.8; Woodhead, (2009),p.19; Wells, (2009),p.2; Jenks, (2009),p.93
[40] James and Prout, (1997),p.7
[41] Ibid.,p.8

facts about human chronology. After all, in old age many humans function cognitively somewhat differently from their youth. Does this mean that all humans are immature until they develop dementia or other neurological conditions? Is this not the pinnacle of a chronological biological 'maturity'? We reject that idea because we have a value-laden concept of biological development. We consider certain kinds of brain function ideal. Humans are then considered mature or immature depending on how they compare to that ideal. Thus, today children are branded 'immature' and the elderly 'senile'. These designations are not inevitable: there have been times when those we now deem to be 'mad' were considered to possess a wisdom unobtainable by others.[42] 'Biological maturity' is therefore not a neutral biological fact to be interpreted by culture, but rather is a category that has already been constituted and created by culture. Thus, the widespread claim by social constructionists that 'the immaturity of children is a biological fact' is false. For sure, there are biological differences between those identified as children and those identified as adults. But to designate them as 'biological' facts of (im)maturity is to ignore how the categories of maturity and immaturity are themselves socially constructed. It would make no sense, then, to define childhood as the cultural interpretation of objective biological immaturity if 'biological immaturity' is itself a culturally-constructed category. My argument about 'biological maturity' here follows quite closely some of Judith Butler's observations about 'biological sex': childhood should not be conceived merely as the cultural inscription of meaning on a pre-given biology. Social discourses also create the very conceptual scientific schema used to establish the biological facts. Discussion of 'childhood' is the discursive/cultural means by which the concept of 'childish/immature nature' is established as something that exists before and apart from culture, and as something upon which culture acts. The adult-child dichotomy is secured as an 'objective fact' by casting

[42] Foucault, (2001)

biological maturity/immaturity into that pre-discursive domain.[43] Talk about the 'maturity' of children, or their objective needs or vulnerabilities, reduces a normative task to an empirical one – it says that, to understand children, we simply need to understand the natural course of development.[44] This highlights that the statement 'biological immaturity is an objective fact' conceals those specific power relations by which the tropes of immaturity are produced.[45] The biology is of course *there* apart from language; but it is hard to describe those features of biology without reproducing the categories 'child' and 'adult'. The concept of 'immaturity' imposes an artificial unity on an otherwise discontinuous set of biological attributes.[46] On this Foucauldian analysis, the body does not possess a 'biological maturity' in any significant sense prior to its determination within a discourse through which it appears natural or essential. The body gains meanings only within discourse and within the context of normative ideals about what adult humans should be. Therefore, the biologies of children and adults do not provide a neutral surface upon which culture acts. The biological categories of 'child' and 'adult' are socially constructed all the way down.

Third, not only does talk of 'biological maturity' reflect norms about what humans are and should be, but, for all its claims to scientific objectivity, biological discussion involves the imposition of norms. To adapt Judith Butler again: of course there are some bodies that go to paediatricians or who require specific equipment for their medical treatment. Of course there are certain 'biological facts'. But the question is: to what extent does a body get defined by, say, its strength, vulnerability, or capacity for rational thought? Although children's bodies can be generally understood as weaker, more vulnerable or less mentally capable than adults, there are many children taller, stronger, more robust to illness or

[43] Butler, (2006),pp.10-11.
[44] Compare Woodhead, (1997),p.66
[45] Butler, (2006),p.125
[46] Ibid.,p.155

injury, or more mentally capable than many adults. Even for those who are not, facts of 'biological immaturity' are not necessarily the most salient features of their bodies. This renders problematic the ways biological immaturity or vulnerability are made central to the status of 'childhood'. Instead, this immaturity or vulnerability is in fact 'the imposition of a norm, not a neutral description of biological constraints'.[47] Child geniuses, or children who are 'mature for their age', struggle with norms that regulate their social status as a child. When confident young children are called 'precocious', 'bossy', or 'too clever by half', the child faces the enforcement of particular norms, where those norms are grounded in, and emerge from, understandings about adult-child biological differences. When people assert that there are certain clear biological differences between children and adults, they are often asserting that those particular biological differences are the most important ones for assigning the categories of 'child' or 'adult' and they thereby discursively enforce those 'biological facts' as a social norm. Indeed, any biological definition of childhood will enforce certain norms against adults too. To say 'children are vulnerable in this way' means that an adult who is vulnerable in that way is then failing to be an adequate adult. The imposition of such norms can cause feelings of failure, or loss, or impoverishment, or inadequacy in those adults as well as in children who are 'ahead' or 'behind' their expected development. Thus, talk about biology leads to the creation and reproduction of social norms which create and constitute the identity of the very subjects that biology takes itself to be impartially investigating.

Finally, there is no clear sense in which there are 'innate' or 'real' biological features which exist apart from social interactions. Instead, biological facts about ourselves are profoundly shaped by our social situation; thus, to understand children and childhood we must

[47] Butler et al., (1994),p.33

examine the social interactions the cause those biological features. All development is necessarily socially mediated and controlled, meaning we can never have a purely biological or innatist understanding of development. Just consider how much an infant would develop if they were not fed. Child development requires social provision and influence. Indeed, you cannot tell the nature of any thing just from the way it appears. After all,

> 'whenever something is observed it is in some environment or another, and the total phenomenon results not only from the nature of the thing under observation, but also from the environment it is in'.[48]

Therefore, statements about what something is 'naturally' are almost always a kind of hypothetical statement about what something is like under certain conditions. For example, iron is not 'naturally' a solid, or 'naturally' a liquid, but rather, solid at atmospheric pressure at temperatures below 1,538°C, and liquid at atmospheric pressure between 1,538°C and 2,862°C. Similarly, humans only exist within certain social conditions. Of course, someone might exist alone on a desert island, but that wouldn't tell us very much about their 'innate nature' either – it would just tell us what humans are like without ongoing social interaction. Further, there is no 'default' set of social conditions we could appeal to and say that whatever humans are like under that default is what humans are 'naturally' like. Similarly, there is no 'default' temperature we can use to investigate whether iron is 'naturally' solid. Social conditions affect biological facts in many ways:

Food and nutrition, for example, affect physical and mental growth. An interesting example of social conditions changing socially-relevant biological facts has been the effect of nutrition on puberty in girls. Over the last century, there has been a general decline in the menarche; this may well be linked to improved nutrition and health amongst girls, which in turn was made possible by economic development.[49] This has led to a decline in the age of technically permissible marriage within certain Islamic traditions.

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[48] Richards, (1980),p.54

[49] See Steingraber, (2007). For criticism, see Demerath et al., (2004)

Education can affect cognitive abilities and psycho-social maturity.[50] Children who are not provided with challenging levels of education, or who are infantilised, will end up less psychologically mature. Civic education and social education can make children more politically and socially mature.

Medical interventions can prevent debilitating diseases and neurological disorders which hinder psychological and physical development.

Social expectations can also affect biology. Benignly, expectations and laws which prevent children from consuming alcohol and tobacco prevent impairments of cognitive development and other health problems. But less benignly, if girls think that certain kinds of 'rough sports' are not for them, then they opt out of them, thus reinforcing any 'natural' strength differentials between girls and boys and between girls and adults. Psychologically, maturity in decision-making tends to develop when individuals are given the opportunity, or are forced, to make certain decisions. It may be a psychological fact that teenagers take risky decisions.[51] But since most decisions they make are trivial, with the costs underwritten by parents, teenagers are denied the opportunity to make risky decisions and develop mature decision-making abilities. In general, believing yourself to be 'childish' takes you most of the way towards actually being childish; and this belief is generated, in part, by the expectations of others. Psychological propensities and features are influenced by social expectations, self-understandings and social opportunities to develop those propensities and features.

Those are examples of biological facts being created, moulded and influenced by social, political and economic facts. Of course, there is some kind of underlying nature which imposes limits on the biological facts which can be realised. But this biology merely provides a possible range across which facts and features emerge within a given social

[50] Steinberg et al., (2009),p.587
[51] Ibid.,p.588; Steinberg et al., (2008),p.1765

reality: it does not uniquely designate a full set of human features. This has two practical implications. First, when investigating empirical facts about children, we should not assume that those facts are fixed. We should instead investigate whether and how they are socially created. And second, if we discover that a certain biological feature is socially created, we must consider whether and how to change society to generate different biological features.

IV.Constructing Children

Having shown why biological accounts of children and childhood are insufficient, we can now examine the mechanisms of the social construction of childhood more broadly. Children's development is a social and cultural process. Children learn to think, feel, communicate and act within social relationships in the context of particular cultural settings and practices. This is mediated by beliefs about how children should be treated and what it means to be a child, as well as beliefs about when childhood begins and ends.[52] In this sense, childhood is a social phenomenon whose contexts and social practices are socially constructed and suffused by power. After all, children grow up in environments designed for them by adults.[53] There are two mechanisms in particular I will discuss: the operation of juridical power and the performativity of childhood.

[52] See Woodhead et al., (1998)
[53] Woodhead, (2009),p.19. Also Maybin and Woodhead, (2003)

Juridical Power

Here I define juridical power; explain the scenarios in which juridical power operates; and explain some of the mechanisms of juridical power. This section provides the theoretical argument establishing the possibility of policies affecting the very empirical facts that policy-makers take themselves to be responding to.

Juridical power refers to the power of laws or of government institutions. Juridical systems of power operate in obvious ways through coercion, regulation and imposed incentives and, in so doing, they produce/mould the very subjects those laws represent and apply to. The subjects regulated by these structures of coercion and control are, by virtue of being subjected to them, formed, defined and reproduced in accordance with the requirements of those structures.[54] This can mean that childhood, children and children's vulnerabilities are created by the very political system that is designed to protect them. For example, a high age of sexual consent, censorship of explicit material for under-18s, minimal sex education, and taboos against discussing sex with children, when combined together, create a sexual naïveté and innocence in children which makes those children vulnerable and needing protection. In this way, the subjects of the laws (in this case naïve children) are 'produced through exclusionary practices that do not 'show' once the juridical structure of politics has been established'.[55] This construction of childhood proceeds with certain legitimating and exclusionary aims, but these political operations are concealed when we start our political analysis by examining children's features. For sexually protectionist policies, the law is justified by (i) appealing to certain features of children (their sexual innocence and naïveté); (ii) claiming a need to protect children by virtue of those features; and (iii) pointing to the

[54] Butler, (2006),p.3
[55] Ibid.,p.3

effectiveness of the laws that protect them. In this way, the law produces and then conceals the mechanisms by which it creates the subjects to which it applies. But the causal story in that justificatory argument is the wrong way around: we don't start with a fixed subject to which laws must apply; instead, laws and political practices create that kind of subject.

Juridical power could operate on subjects in three kinds of scenarios, the upshot being that we cannot infer from the current features of children that those features are inherent or fixed. First, the subject could possess a feature before the operation of juridical power, and then lose that feature because of the imposition of the juridical constraint. For example, perhaps children do, or did, possess a form of sexuality before society represses it (such was the contention of Freud, who claimed children are sexual and libidinous beings until their sexuality is repressed around the age of 6). Second, the subject could currently lack that feature but have the potential, under the right circumstances, to develop that feature. The operations of juridical power however prevent them from developing that feature. For example, if we provided children with sex education or exposed them to discussion of sexual relationships in the media, then they would become mature. And finally, it might be impossible for the subject to develop that feature under any circumstances. In this scenario, the juridical power is productively inert with respect to that feature. But under any given social arrangements, we cannot know *prima facie* whether we are in this scenario rather than (i) or (ii). Therefore, observing that children in our current society are, say, sexually naïve is not proof that they will be sexually naïve under any possible set of social arrangements. So we need social critique to assess the features of children described by psychological science before using the existence of those features to justify certain laws, policies or practices.

When juridical productive power affects children, it can operate through several mechanisms. First, laws can create or deny opportunities for children to exercise abilities in

certain ways. For example, child labour and sexual consent laws mean children rarely have the opportunity to make decisions about employment or intimate relationships. Consequently, they don't have the opportunity to gain the experience necessary to make those decisions maturely. This makes it more likely that children will appear poor at making romantic or work decisions and therefore seem to need protection from making those kinds of choices. But we shouldn't be surprised that individuals who have never made certain choices appear bad at making those choices. Second, laws and institutions can create (dis)incentives for children to act or develop in certain ways. For example, voting age laws don't prohibit children from discussing, researching, or becoming interested in politics. But one key incentive to get involved in politics is that your involvement might directly affect political outcomes: voting age laws remove that incentive for children. Consequently, teenagers know less about politics than adults.[56] This observed immaturity is then used to justify denying them the vote. Third, law has a communicative power to establish norms which are internalised by society and by children themselves. If laws bar children from certain practices, then it encourages adults and children to believe that those practices are 'not for children'. It has become socially inappropriate to share with children one's knowledge or experience of relationships, drink, work, and so on, meaning they miss invaluable education opportunities that could help them make mature or informed decisions in those areas. Moreover, these norms of prohibition are internalised by children themselves, making them guardians of their own ignorance. For example, telling children they are incapable, cannot solve certain problems, or cannot make certain decisions, means that children themselves voluntarily shy away from certain topics or actions.[57] This makes children look incapable and makes them hold back their own development in those areas.[58]

[56] See chapter 9
[57] Wigfield et al., (2006),p.925
[58] This is subject to the qualification that we might, unknowingly, be scenario in (iii) above.

Thus, law can, through these mechanisms, affect its subjects in a way which produces the very conditions used to justify that law.

This list of mechanisms is not exhaustive. But it does illustrate that sometimes laws create the conditions for their own justification. And, importantly for us, they create the condition of 'childhood', a status which is then used to justify separating children from adults, and denying children certain 'adult' rights. Therefore, when examining whether children of a particular age should be granted a particular right, we must be careful about empirical claims that children are too incapable or too immature to possess and exercise that right. We would need to examine whether those empirical features of children are generated by the fact that children do not currently possess that legal right, and therefore whether they will become mature in the relevant sense once granted that legal right.

Segregation and the Performativity of Childhood

In this section, I discuss the historical emergence of the segregation of children away from the adult sphere and the ways this has affected children's behaviour. The aim here is to provide another line of analysis showing how children's behaviour is partly caused by historically and socially contingent forms of interaction, and therefore why we should not take those features to be fixed and natural. First, I examine the historical emergence of separate spheres for children and adults. Second, I examine the modern ideal of childhood and the ways children are expected to perform in accordance with that ideal. Third, I discuss how these expectations and norms are enforced.

A separate sphere for childhood has only emerged within the West in the last 200 years. As Gillis observes, before the industrial revolution 'the lives of children and adults were inseparable', with both embedded in 'pre-industrial society's basic social and economic unit, the patriarchal household.'[59] Children's work and play were inseparable from that of other members of the household, particularly within agricultural and cottage industries. Children would help with work once they could make a contribution.[60] They would work, eat, sleep and drink with adults. Indeed, pre-19th century, numerical age was largely irrelevant, and few people marked their birthdays until the last years of their lives.[61] However, with the onset of industrialisation, the significance of the household as an economic and social unit diminished. Production was moved from the household to the factory and the office, thus creating a 'civil' sphere separate from the domestic sphere. These trends combined with the emergence of a romanticism about children, which can be traced through writers like Rousseau, Wordsworth and Blake. Romanticism sees the child as essentially innocent, and as close to God; it sees the child as embodying humanity in its pure form before it is corrupted by the world of adults. As such, childhood is to be celebrated and protected. This emerged in opposition to the Puritan ideas of childhood, which cast children as wicked, marked by original sin, and needing harsh discipline.[62] These ideological and economic factors led to the physical separation of adults and children. The introduction of compulsory schooling in the late 19th century was mainly motivated by a desire to discipline children and improve their behaviour.[63] By 1900, a whole new set of times and spaces for children were created, initially for disciplining them, and then eventually for protecting them and (importantly) their innocence. Such institutions included schools, borstals, orphanages and playgrounds. Laws were introduced to protect

[59] Gillis, (2011),p.115
[60] Cunningham, (2005),pp.81 and 84
[61] Gillis, (2011),p.116
[62] Cunningham, (2005),pp.66-69
[63] Ibid.,pp.157-161 and p.147

children from most workplaces, with the minimum age of labour rising in line with the age of compulsory education.[64] Children were also barred from many of the leisure places of adults, such as public houses, gambling houses and theatres.[65] Thus, children were separated from adults in the spheres of both production and consumption. Increased worries about child safety meant that children were less likely to be allowed out unaccompanied. Consequently, children and adolescents throughout the 19th and early 20th century spent less and less time with adults, 'except within the very narrow precincts of the domestic sphere.'[66] The emergence of mass media further reinforced modern notions of childhood, with children's books and magazines proliferating in the 19th century to protect children and their morals.[67] This market segmentation continued into the 20th century with the emergence of film, television and radio. These market mechanisms were reinforced by censorship laws and television regulations to prevent children from consuming certain kinds of media.[68] And now, in the digital age, market segmentation has continued apace: the proliferation of electronic devices enables children and adults to consume media separately; children's programming is accessible 24/7; and there are whole digital worlds designed for children. The rise of the internet does also give children a new, hard-to-regulate way of accessing 'adult' media.[69] But the fact this access is causing moral panic, and the fact parents and governments are attempting to prevent children from accessing this media, reveals and reinforces norms of childhood separation.[70] This discussion shows that we can trace the emergence of age-segregation from middle-class romantic ideals about childhood and from economic and social forces moving adults (spatially) away from children. There is nothing necessary or 'natural' about this separation.

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[64] Ibid.,p.182
[65] Gillis, (2011),pp.119-120; Cunningham, (2005),pp.161-163
[66] Gillis, (2011),p.119
[67] Drotner, (1988)
[68] Gillis, (2011),p.120
[69] See, Tories Promise to Enforce Age Limits on Online Pornography, (2015)
[70] Gillis, (2011),p.119. See also Drotner, (1999)

This separation of children from adults has led to a culturally pervasive image of the ideal child.[71] With the separation of the domestic and the economic spheres, and with child-adult segregation, families are not as tightly bound together as when all work and domestic time was spent with one's children. Unlike in those pre-modern times, family time is now planned, recorded and commemorated. We invest time in anticipation and commemoration of family time, and almost everything we consider 'family time' involves children either essentially or ideally. There now exist specifically designated places in which quality time with children takes place – museums, playgrounds, theme parks etc. – and specific holidays where quality time is concentrated, such as Christmas, summer holidays, and birthdays. Those are not the only places where quality interactions with children happen, but the existence of these specific times and places for children reveals a particularly modern celebration of childhood and reveals the general separation of children's and adults' spaces. These events (Christmas, birthdays etc.) have become the major milestones around which family history takes place and is remembered. Within these times and spaces, childhood becomes performative: children are expected to act like (ideal) children. Children are encouraged to play set scenes, like blowing out candles, or unwrapping presents. Children act out these scenes in front of an appreciative audience of adults, who record those events for posterity.[72] Although the expectations and pressures to perform are particularly intense within these moments, they construct an ideal which children are expected to live up to more generally.[73] Such practices contribute to an ideal image of childhood which pervades our media, adorns our walls, and shapes our views of childhood.

[71] Gillis, (2002)
[72] Gillis, (2011),pp.121-122
[73] Holland, (1992),p.16f

This ideal is then vigorously enforced by adults, who perceive deviations as threatening and who respond to deviations with anger and sometimes violence against the very children they are meant to protect.[74] For example, teenage couples who voluntarily share naked pictures of themselves with each other can be placed on the sex offenders register for creating, possessing and distributing child pornography, despite being children themselves.[75] Children who take drugs are treated harshly: since they are doing something only adults (should) do, they get placed into the category of 'adult'; their vulnerabilities as children tend to be ignored; and they have to take responsibility for themselves.[76] James Bulger's 10-year-old killers stood trial in an adult court and had their sentences increased by the Home Secretary after overwhelming public pressure.[77] If children are not the innocents they are meant to be, they lose the protections of childhood. A child's childhood is based around their innocence. But once their innocence has gone, so has their childhood. And once that happens they are treated more like adults, regardless of their age or understanding. They are no longer afforded special protection or special pleading.[78] These few examples show how the enforcement of these norms is as much to protect the ideal of childhood as to protect individual children. Thus, children lose autonomy as a result of this enforcement of ideals.

This discussion illustrates some of the ways that childhood, or at least some of its key attributes, is performative. The fact that it is perfectly coherent to describe an adult as being 'childish' or 'child-like' suggests that some features of being a child are performative. Furthermore, as illustrated above, children themselves take on this mode of performance

[74] Gillis, (2011),pp.123-124; Demos, (1986),p.31 and p.85
[75] Gayle, (2015); Teenagers Who Share 'Sexts' Could Face Prosecution, Police Warn, (2014)
[76] For example, Rovner, (2016) On transgressing the image of childhood, see Kehily, (2009),pp.3-5
[77] See Freeman, (1997b)
[78] Kehily, (2009),p.16

or repetition.[79] Indeed, children may exaggerate their childish traits if they fear retribution for appearing adult-like. Phrases like 'you're not dressed appropriately for your age', 'you should be outside playing' and 'she's 8 going on 18' – said with a particular tone of voice – enforce the performance of childhood. These acts, gestures, and desires then produce the effect of a stable identity (one's identity as a child), but produce it in a way that suggests that the identity is the cause of those acts, gestures and desires. These acts are performative to the extent that the essence or identity which they claim to express are fabrications which are manufactured and sustained through various discursive means.[80] To the extent that these attributes of childhood are performative, those attributes essentially constitute (rather than express/reveal) that identity.[81] Since those acts follow from the enforcement of social norms, and since those acts constitute the identity of childhood, we can say childhood is (to that extent) socially constructed. Therefore, we must ask whether the way we currently construct childhood is the right or best way to do it.

Conclusion

In this chapter, I have advanced a radical social constructionist position, while rejecting traditional developmentalism and structural-functionalism and critiquing the standard version of social constructionism. I have shown that children and childhood are socially constructed, and I have shown the mechanisms of that construction. What does this mean for our framework? After identifying a particular set of psychological capacities, we need to examine the extent to which they are created by social influences, and whether we can

[79] Compare Butler, (2006),p.43
[80] Ibid.,p.185
[81] Ibid.,p.192

change those capacities by changing social structures (stage 4 in fig.1). We could then decide whether to change those social influences to generate different facts, using the considerations in section I. This shows that the standard methodology of denying rights to children on the basis of certain psychological (in)capacities would be too simplistic, even when those (in)capacities are measured accurately and scientifically. And we need social critique to save us from the mistakes of that approach.

In the next two chapters, I lay out the normative foundations of our framework, first by defending a respect-based account of rights, and then by constructing a particular conceptual account of autonomy we can use to investigate children's developing autonomy.

Chapter 3

Rights, Respect, and Paternalism

Introduction

This chapter establishes the normative foundations of our framework by finding the best grounding and justification for agency rights, and by outlining and defending an account of paternalism. I defend an account of (agency) rights grounded in respect for autonomous capacities, and give an account of justified and legitimate paternalism, explaining how to balance respect for a child's partial autonomy now against their welfare and their future interests. I also explain that greater knowledge ("I know best") justifies paternalism only if the individual falls below some minimum threshold of knowledge; greater expertise cannot, on its own, permit experts to paternalistically interfere with novices.

Our framework for children's rights will therefore be grounded in respect for autonomy. In the next chapter, I investigate which account of autonomy to use as the basis for this account of rights. This means that, in later chapters, we can investigate how different psychological capacities match up to different components of autonomy and which rights are generated by respecting each component individually. This will then provide a way of thinking about the rights of children, who typically only possess certain elements of autonomy, or who possess them to a lower degree than adults.

I will primarily discuss agency rights (which are rights to make decisions) rather than welfare rights (which protect interests related to well-being)[1] because much of the

[1] Brighouse, (2002),p.38. See also Sen, (1985),pp.217-218

controversy over children's rights is about their agency rights rather than their welfare rights. For brevity, I usually use 'rights' to refer to 'agency-rights' in this chapter.

The first two sections investigate the best derivation of rights. Section I explores the notion of 'respect' and what, in general, the duty to respect involves. Section II shows how the respect-based approach generates agency rights from a respect for autonomy and it defends that account. The respect approach is a general account of rights which applies to both adults and children; we can then apply this account in later chapters to children's rights in particular. Section III discusses paternalism and how to balance respect for an individual's autonomy now, even if it is partially developed, against promoting the individual's welfare and future autonomy. Section IV discusses knowledge, and the circumstances under which greater knowledge can legitimate paternalistic interference.

To assess our account of rights, we can use two of James Griffin's requirements for an adequate account of rights. First, we need a clear and principled way of moving from the grounds of rights to their content; that is, we must be able to explain why the grounds of rights (autonomous capacities) ground the rights they do. Second, the rights should not cover 'all that is needed for a good or happy life' because 'then the language of rights would become redundant'.[2] Under such circumstances, 'rights' would fail to denote a normatively special domain. Each condition is necessary. If we cannot explain why respect for autonomy grounds agency rights, or if the duty of respect for autonomy suggests positive duties to ensure people are successful in all their autonomous pursuits, then the respect account would fail. I contend that the respect account avoids these problems.

[2] Griffin, (2010),pp.14-19, p.34

I.What is Respect?

Before explaining in the next section how respect for autonomy can generate agency rights, I examine what we mean by 'respect'. First, I examine Darwall's distinction between appraisal-respect and recognition-respect. We are interested in recognition-respect. Second, I draw a distinction between moral respect, and respect-as-politeness and respect-as-deference. Third, I outline what a moral duty of respect requires by contrasting it to duties to promote and duties to protect. Finally, I show that we are morally bound to respect autonomy (rather than promote it) whether we are deontologists or consequentialists. In the next section I examine how respect for autonomy can generate agency rights whilst meeting our requirements for an adequate account of rights.

Stephen Darwall proposed a famous basic distinction between two kinds of respect: appraisal-respect, and recognition-respect. Appraisal respect has as its exclusive objects,

> 'persons or features which are held to manifest their excellence as persons or as engaged in some specific pursuit.'[3]

For example, you may have respect 'for someone's integrity, for someone's good qualities on the whole, or for someone as a musician'.[4] This is the kind of respect used in the sentence 'Paul McCartney is a well-respected musician'. Appraisal-respect is attitudinal, rather than practical. By contrast, recognition respect is

> 'a disposition to weigh appropriately in one's deliberations some feature of the thing in question and to act accordingly.'[5]

For example, if you respect the law then you are acting in a way which gives appropriate weight to the fact that certain actions are illegal. If you respect the environment, then you

[3] Darwall, (1977),p.38
[4] Ibid.,p.38
[5] Ibid.,p.38

adjust your actions in light of the fact the environment has value, perhaps by recycling more. Similarly, if you are told to 'respect the sea' or 'respect the fire', then you are being told to take account of dangers posed by the sea or the fire. In these examples, some considerations are moral, and some prudential. But for either kind of consideration, recognition respect

> 'consists in being disposed to take certain considerations seriously as reasons for acting or forbearing to act."[6]

We are interested in recognition-respect since we are investigating how to weigh autonomy in our moral and political deliberations.

Second, we are interested in a kind of moral respect for persons, as distinct from respect-as-deference and respect-as-politeness.

Respect-as-deference presupposes some kind of hierarchy, where the respect involves acknowledging a person as someone who is to be looked up to, or as someone who is better or worthier in some way. This kind of respect would be shown, for instance, by not contradicting someone who is an expert in an area about which you know nothing.[7] Similarly, suppose a member of an organization was not consulted before a major decision despite her seniority and experience meaning she could have made a serious contribution to the organization's decision-making. She might well complain that she had not been treated with the respect she was due. The kind of respect she was denied is respect-as-deference. On the principle of respect for persons, by contrast, *everyone* is a source of claims against another person, and anyone may properly resent having their wishes overlooked without good reason. This more general respect for persons has a similar character to

[6] Ibid.,p.48
[7] Benn, (1988),p.104

hierarchical respect, but the grounds are different: respect-as-deference is grounded in expertise, qualification, or social position; respect-for-persons is grounded in autonomy.

The slogan 'respect for persons' masks another distinction: between respect-as-politeness, and moral respect for autonomy. Respect-as-politeness covers cases in which a cheeky nephew might be met with the retort, 'you should show me more respect'. It also covers the respect shown by removing your hat in a church, and donning one in a synagogue. This respect is a matter of etiquette. In these examples, you could fail to show 'respect for persons', but it is not the moral disrespect for their autonomy that we are interested in.[8] It is possible to disrespect someone's autonomy in the politeness sense; if someone insults your religious beliefs, they are being rude about your capacity for autonomy. But it is not disrespectful in the moral sense of that term.[9]

What kind of duty is the moral duty to respect? One way to understand it is to contrast it with the duties to promote (of which 'the duty to maximise' is a special case) and duties to conserve/protect. These duties (respect, promotion, protection) are all ways of responding to value. Suppose, for example, that we take friendship to be valuable. How should we respond to that value? We could protect and conserve that value wherever we see it, perhaps by ensuring that existing friendships continue. We could try to promote as much friendship as possible, devoting ourselves to personal friendships only if that promotes the overall enjoyment of personal loyalties, and putting our personal friendships under strain if the general project requires it. Or perhaps we should respect that value in our own lives, devoting ourselves to developing our own bonds of friendship.[10]

[8] Compare Raz, (1986),p.191
[9] The lines between morality and social convention do blur here; it might be morally disrespectful to deny someone certain kinds of social respect.
[10] Compare Pettit, (2013),p.339. I use the term 'respect' where Pettit uses the term 'honour'.

Take the value of life, as another example. If the high value of human life demands strict respect, then we should accept the rule 'do not deliberately kill the innocent'. The strictness of the respect means that any exception to the rule requires a particularly strong justification. The fact we would require strong justifications to break that rule means that the rule does not gain its force straightforwardly from good consequences. *Promoting* human life however would mean bringing about its preservation (and perhaps trying to raise overall population levels), even if this involves taking an innocent life oneself.[11]

This intuitive sketch illustrates what, in general, a duty of respect means. More precisely, the duty to promote a value is the duty to choose the option which consequentially leads to the best realisation of those values (where 'best realisation' could mean *inter alia* 'maximum level' or 'satisficing level'). The duty to protect a value is the duty to choose the option which best ensures that, where the value exists, it continues to exist. The duty to respect a value is the duty to exemplify that value in your own actions and to honour the particular instance of the value that appears in front of you, even if exemplifying that value does not promote it.[12] The moral duty of respect imposes a particular and immediate constraint on action separate from the overall consequences produced.[13] In the next section I examine respect for autonomy in particular. But broadly, respect for autonomy entails a certain non-interference with that autonomy, and entails giving people equal consideration with others, even if those actions do not promote overall autonomy.

The duty to respect autonomy does not depend specifically on consequentialist premises or deontological premises. The duty to respect autonomy can be derived from either normative position. Of course, the duty to respect autonomy often takes a deontological

[11] Griffin, (2010),p.74
[12] Pettit, (1989),p.125
[13] See ibid.,p.117

flavour: according to the Kantian tradition, we must respect an individual's autonomy even if one instance of disrespect would produce more autonomy or would increase overall respect.[14] However, our respect account does not require this strong deontological position. This is because, although our first-order response to the value of autonomy is to respect it, we could nonetheless have a consequentialist second-order moral goal of maximising, or promoting, autonomy. A consequentialist who wants to promote overall autonomy would still have strong reasons to respect autonomy as a first-order response. This is Philip Pettit's position. Such a consequentialist must respect autonomy because an individual:

> 'retains dignity in his treatment by another only if he preserves a certain dominion over how he fares at the other's hands…[and] only if that other agent is not free to do to him whatever he wills, or even whatever some beneficent plan requires'.[15]

The individual, in order to have this dominion, must be able to block certain sorts of behaviour against them. The value of autonomy can only exist if, for certain sorts of choice, the individual is generally free from interference and has a basis for believing that they reliably enjoy this freedom. If individuals know that the government, or some other agent, is acting in a way to promote overall autonomy, they must realise that they do not enjoy dominion and autonomy in relation to that agent. This is because '[t]hey will have to recognise that they are pawns in the consequentialist's beneficent scheme'. The only way to promote the value of autonomy, then, is to respect it and, furthermore, to make clear that in 'normal times' (defined clearly and publicly) government and individuals completely eschew consequentialist calculations regarding autonomy. Thus, even the consequentialist who accepts the value of autonomy must respect autonomy. What this argument shows is that the value of autonomy – which is underpinned by notions of dominion and dignity –

[14] Nozick, (1974),pp.28-30; Benn, (1988),p.111; Hill Jr., (2007),p.489; Kant and Paton, (1991),p.82[437]
[15] Pettit, (1988),p.52

can only be realised if the value is respected. Therefore, whether the highest order duty is deontological respect for autonomy or consequentialist promotion of autonomy, the first-order duty is to respect it.

II.The Respect Account

Now we know what we mean by respect, and why respect relates to autonomy, we can discuss our respect account of rights. First, I explain how respect for autonomy generates a range of rights, and show it meets our adequacy conditions. Second, I discuss objections to the respect account and show that, by qualifying the respect account, it can resist those objections. Therefore, our account of rights should be based on the duty to respect and protect rational capacities. We must be careful in our language here: rights are themselves protections (e.g. to make certain choices), and the respect-approach is not a revision of that conceptual truth. Rather, it says that the duties which underpin and lead to those protections are in the first instance duties to respect and protect autonomy. Thus, the reason we protect people's choices is because of the duty to respect and protect their autonomous capacities.

The respect approach can base the possession of agency rights narrowly on rational capacities and generate expansive rights to liberty without also grounding general positive rights to success in one's endeavours. Thus, it avoids excessive expansiveness. We can move from the grounds of rights, the bare capacity for autonomy, to the right to exercise those capacities by noting that, if you deny an individual the opportunity to exercise their capacities for autonomy, then you are failing to respect those capacities. I am not respecting your capacity to reason if I systematically prevent you from using that capacity.

Therefore, respecting someone's autonomous capacities means letting them exercise those capacities. Similarly, we disrespect someone's ability to pursue their own good if we systematically interfere with their pursuit of that good. Claims that 'I respect you as a chooser but will deny you any choice' would be disingenuous. To respect someone as a chooser is to recognise that you may not make choices for them by foreclosing their options or denying them access to certain goods.[16] There are obvious exceptions: if someone freely contracts out of certain options, respecting their autonomy might mean interfering with their future choices.[17] Similarly, retributive punishment could be consistent with respect for autonomous capacities, since we are treating individuals in accordance with their autonomously chosen behaviour.[18] Nonetheless, for the reasons above, respecting someone's rational capacities is (excluding waiver and forfeiture) generally incompatible with foreclosing their options or making decisions for them. Keeping someone as a slave, for example, is to make their choices for them and thus to fail to respect them as a chooser.

Furthermore, respect for autonomy requires a respect for how individuals identify and pursue their own interests. If your mother were devoted to your interests, but nevertheless ignored how you perceive those interests, she would be lacking in respect for you or, more specifically, for your autonomous ability to define and identify your own interests. This would be true even if your judgement of your real interests turned out to be mistaken and hers correct. To respect someone as a person is to take their own view of themselves seriously. As Stanley Benn puts it, you would have:

> 'every reason to resent the indulgent dismissal of [your] point of view, "Yes, dear, but Mummy knows best," even in the case that Mummy does'.[19]

[16] This raises questions about property rights, which I cannot resolve here. E.g., if you prevent me from using your property, are you disrespecting me and illegitimately foreclosing my options?
[17] Steiner, (1994),pp.231-33
[18] Hegel, (1991),§§227-29; Kant, (1996),pp.104-9
[19] Benn, (1988),p.105

Similarly, you may think that someone else's project is worthless; but their project's claim to respect rests not on its being valuable in itself or being directly worthy of your concern, but rather on its being the project of an autonomous individual. If John prevents Jeremy from playing pushpin because he believes Jeremy could be doing something more worthwhile (like reading poetry), he is not treating Jeremy with respect. This is because he disregards Jeremy's own judgement about pushpin and substitutes it with his own.[20] It is disrespectful even if poetry is indeed more worthwhile than pushpin. To be clear, John may make evaluative judgements about Jeremy's life: disagreement is not the same as disrespect. And if John had some special reason to have regard only for Jeremy's interests and not his autonomy (perhaps because of Jeremy's prior consent or because Jeremy is suffering from some defect of reason) then John's judgement would be a reason to set Jeremy's judgement aside. Absent such reasons, respect for autonomy requires John to recognise that Jeremy's plans are for Jeremy to choose.[21] Significantly, this means that we should respect the possession of those capacities, rather than the successful exercise of autonomous capacities. An individual does not need to make 'good' decisions to deserve respect: if they did, then we would no longer be respecting their autonomy, because we would no longer be respecting their autonomous judgement about what the best decision is.

Therefore, since limiting someone's choices fails to respect them as a chooser, a respect for someone's capacities as a chooser grounds a general right to liberty. This also explains a range of rights: liberty, religious freedom, freedom of conscience, free speech, and political rights. To deny these is to disrespect an individual's capacities to make up their own minds and make their own decisions.

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[20] See ibid.,p.107

[21] Compare Dworkin, (1986),p.205. He argues that for the individual to accept paternalistic/moralistic interference would be inconsistent with self-respect.

This discussion has also shown how the respect account meets our adequacy conditions. The above illustrates how a respect-based view can, in a non-arbitrary way, move from the grounds of rights – the capacity for autonomy – to a more extensive range of rights, including the right to liberty. Significantly, it can move from the grounds of rights to the right to liberty without also grounding extensive rights to success in one's pursuits. Me respecting your ability to deliberate and act does not mean accepting that your goals are good or that I must ensure success in all your goals; it simply means respecting your *choice* and *pursuit* of those goals, and refraining from making those choices for you. Obviously, there are still duties of beneficence to help people achieve their goals. But a respect for people's ability to reason and choose does not entail rights to beneficence. This is not to say that all agency rights are negative. Rights to have one's autonomy protected and respected, and a child's interest in future autonomy, would grant rights to education, to be kept alive, and to some minimum level of resources. However, these are rights to the necessary preconditions for autonomous action; they are not rights to success in all exercises of autonomy. The respect approach thus meets the requirements to (i) show how autonomy grounds rights; and (ii) avoid over-expansiveness.

What does this mean for our framework? Using the respect-approach means that when we break down rational capacities into their different components, each component should individually be respected, and that this respect might well generate certain rights which can be held independently of other rights. This will be important for children, for whom different capacities emerge at different times and to different degrees. Next, I discuss and dismiss an objection to the respect-account.

Does this principle of respect yield an absolute principle that individuals should have the widest possible range of liberty? At first glance, it may seem so. Every action I take does, in some sense, flow from my capacity to make decisions and hence flows from my autonomy. If we must respect autonomy, and if every action flows from autonomy, it seems any interference with another's actions is a violation of respect. And if respect is an absolute duty, then there is an absolute duty never to interfere with another person. The respect account would thus generate an absolute right to the widest possible range of liberty. However, a generalised right to liberty is beset by all sorts of famous problems. Absolute rights to maximum liberty rule out traffic lights and one-way streets (and maybe even laws against murder since such laws fail to respect murderers).[22] If the respect-account had such implications, then it should be rejected. However, this respect account of rights does not generate such wide-ranging, absolute principles.

First, the respect-account is limited by a significant internal constraint, namely, that the ground for my liberty is a ground for your equal liberty.[23] This generates a general requirement that each person's liberty must be compatible with the same (scheme of) liberty for all.[24] Therefore, laws against murder, far from being ruled out by this account, are required. To permit murder and torture is to permit some to have more liberty than others. And that violates equal respect.

Second, the respect account only justifies rights to those liberties which are important for the exercise and development of the capacities of autonomy.[25] According to the respect account, what makes liberty an important value demanding special protection is

[22] See Dworkin, (1978),pp.235-236
[23] Griffin, (2010),p.58; Dworkin, (1978),pp.235-242
[24] Rawls, (2001),p.42.
[25] Ibid.,p.45

its being necessary for the exercise of a constituent of our personhood.[26] As such, the respect account generates liberties like freedom of thought to enable individuals to develop and exercise their powers of judgement and evaluation; and it generates liberty of conscience and association to enable individuals to form, revise and rationally pursue, individually or collectively, their conceptions of the good.[27] However, gratifying a passing whim, like driving the wrong way down a street, does not seem to be (in ordinary cases) an essential exercise of autonomy, a means of developing autonomy, nor a constituent of our personhood. As Griffin observes when defending an agency-based account of rights:

> 'my apparent human right to drive the wrong way down a one-way street does not conflict with your apparent human right to efficiently regulated traffic. Neither is a human right.'[28]

Third, the objection that a respect-account generates absolute principles rests on the assumption that duties of respect are absolute. But nothing said so far in our-respect based account commits us to either absolutism or non-absolutism. We have not yet set out the situations (if any) under which liberty may be infringed. The next section discusses how to trade-off forms of autonomy and how to balance autonomy and welfare, which goes some way to answer this question. A full philosophical theory of moral rights requires explanation of when, if ever, the duty of respect-for-autonomy may justifiably be infringed. But there is nothing in the arguments above to suggest the duty of respect is absolute. Indeed, the duty to respect does not in general have this absolute character. For example, if you give me advice, I can respect your opinion whilst acting contrary to that advice. To be consistent with respect, I need some specific reasons, sensitive to the reasoning of your opinion, to set it aside. If I completely ignored your advice, neither considering nor responding to it, then acting contrary to your advice would be inconsistent with respecting your opinion. But setting aside your opinion does not necessarily disrespect your opinion.

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[26] Griffin, (2010),p.58
[27] Rawls, (2001),p.45
[28] Griffin, (2010),p.58

Given respect is not absolute, we have no reason to suppose that the duty to respect autonomy requires strict non-interference in every case. Perhaps duties of respect may be infringed to protect sufficiently great liberty elsewhere, or to avoid sufficiently grave harms. Absent reasons to think that autonomy is of absolute value, we lack reasons to think the liberties it generates are absolute. Therefore, it would be unwarranted, at this stage, to conclude that the principle of respect should be rejected for being too strong.

Therefore, the respect account does not justify overly extensive or overly strict rights, and so should not be rejected on that basis. This means we have now established our respect-based account of rights, and can start to apply it to questions of children's rights and paternalism.

III.Paternalism and Trading-Off Autonomy

In this section, I discuss how to balance an individual's current autonomy against their future autonomy and against their welfare, thus filling one of the theoretical gaps in the children's rights literature. First, I discuss the Rawlsian model of paternalism, in which we ask what kind of interference an individual would agree to in the original position. This test provides a useful heuristic, but needs to be fleshed out with substantive arguments about the values at stake in certain decisions. Second, I discuss the trade-off between current autonomy and future autonomy when respecting an individual's current partial autonomy means a diminution of their future autonomy. Third, I outline the circumstances in which we should respond to that current-autonomy/future-autonomy trade-off by dissolving that dilemma, either by facilitating the individual's current decision-making to render it fully autonomous, or by ensuring a certain choice now does not reduce future autonomy. Finally, I discuss how to balance autonomy and welfare.

One quick note of clarification (or, perhaps, obfuscation): in general, I talk about 'us' intervening paternalistically. I generally leave it ambiguous who exactly 'we' are, whether parents, the community, or agents of the state. There are two separate questions involved in questions of paternalism: (i) when is interference legitimate and justified? and (ii) Who may intervene? I hope to avoid this second question for now.

On paternalism, Rawls argues that in the original position,

> '[parties] will want to insure themselves against the possibility that…they cannot rationally advance their own interests.'[29]

In those cases,

> 'the parties adopt principles stipulating when others are authorised to act on their behalf and to override their present wishes.'[30]

Ideally, paternalistic decisions should mimic what the individual would choose were they rational; those decisions should be guided by an individual's settled preferences, provided they are not irrational. And if those preferences *are* irrational, then we should instead appeal to a theory of primary goods to define their interests. The idea is that,

> 'as we know less and less about a person, we act for [them] as we would act for ourselves from the standpoint of the original position'.[31]

On the respect account, we must respect whichever parts of an individual's autonomy are functioning, and then try to correct for those which are not functioning in light of the parts which are. If someone cannot 'rationally pursue' their goals, then we must paternalistically help them to achieve their goals. If someone cannot form rational goals, then we must paternalistically provide them with something like primary goods or presumptively beneficial goods – all-purpose goods which we can assume that someone wants (or, at worst, is indifferent to) whatever else they may want.[32]

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[29] Rawls, (1971),p.249
[30] Ibid.,p.249
[31] Ibid.,p.249
[32] On those who cannot form rational goals, see Clayton, (2006) and Clayton, (2012)

Imagine a 10-year-old boy who is perfectly capable of choosing his life goals, but cannot formulate plans to achieve those goals or commit to long-term plans. Suppose he wants to become a physicist. It would be illegitimate to send him to a religious seminary to train as a priest, since that would fail to respect his judgement about his goals. However, it may be legitimate to pressure him into doing maths homework. In this example, because the child has no capacity to reason about his plans, there is no need to respect the child's plan-making. Interference with his means-ends planning is therefore legitimate. And this particular interference is justified with reference to the boy's own goals: studying maths is an important means to becoming a physicist. This illustrates how paternalism can be legitimate and justified when an individual lacks only part of their capacities for autonomy. This Rawlsian contractualist image in which we ask what people would want, taking into account what we know about their plans, goals and preferences, is a useful heuristic for mediating calls for paternalism.

However, the heuristic works less well when we know nothing about the individual's life plans or goals and we use the full device of the original position. In such cases, whatever explains why an individual would allow a particular choice on their behalf itself justifies that choice without the hypothetical agreement adding anything.[33] If the explanation for why an individual would hypothetically choose y over x is that 'y is more valuable than x', then it seems the argument really begins and ends with the claim that 'y is more valuable than x'. What justifies the paternalism are the very properties that mean an individual would consent to that interference. That means, in order to flesh out what to prioritise when acting paternalistically, we must engage substantively with the values at stake and weigh-up which are more important.[34] How to do that weighing is the topic of the rest of this section. Nonetheless, Rawlsian hypothetical consent is a useful starting

[33] Compare, Dworkin, (1975),p.18
[34] See Griffin, (2010),pp.78-79

point, particularly when we can answer the question 'what would they hypothetically consent to?' in terms of the individual's own values rather than objective value.

Next, I discuss the current vs future autonomy trade-off.

Current vs Future Autonomy

What do we do about children who have developed partial autonomy? There are two senses in which an individual might be partially autonomous: they could have fully developed along some dimension(s) of autonomy, but not all; or they could have developed a particular dimension of autonomy only partially. When the child has fully developed all the components of autonomy relevant to some decision, we should treat them, in that decision, in the same way as an adult, and fully respect their decision. What if the individual is exercising only a half-formed capacity for autonomy in that decision? In general, we must respect that capacity for autonomy in accordance with how developed that capacity is. Autonomy is not all-or-nothing, and neither is its value. The value underlying a less developed capacity is perhaps less than that of a fully formed capacity, but it is of value nonetheless. There is therefore some duty to respect that partial autonomy. And when there is no significant trade-off between respecting an individual's current autonomy and promoting their future autonomy or welfare, the need to respect the individual's partial autonomy is decisive.

What if an individual with partially developed autonomy is making a choice which will reduce their future autonomy? Here, we must choose between respecting their current autonomy and promoting their future autonomy. We do not usually conduct autonomy trade-offs on behalf of individuals because, provided they are fully autonomous, they can make that trade-off for themselves. We must respect their (second-order) autonomous

ability to weigh and trade-off different forms of their own autonomy. Respect is inconsistent with substituting our judgement for theirs on this question. But if they lack that capacity for autonomy, the individual may be unable to weigh their current and future autonomy. In such circumstances, we must decide how to balance those things for them. And we do that by comparing the value of the autonomies at stake. Such a balancing is no weirder than trading-off autonomy across different people when we choose between restricting some particular liberty (perhaps the liberty to bear arms) in order to promote the autonomy of others (by ensuring their autonomy is not extinguished along with their lives in a gun attack).[35] We can balance two forms of autonomy by examining the overall loss/gain in autonomy of respecting their current autonomy versus promoting their future autonomy, which we can do by examining how core/important those aspects of current and future autonomy are. In general, there are minor liberties and major ones, minor exercises of autonomy and major ones. We can draw out the differences by investigating their degree of centrality to our agency and our status as agents, and how long the deprivation of that autonomy lasts for.[36] If the current exercise of autonomy is not particularly important, but the future autonomy in danger of being shut off *is*, then the need to protect that future autonomy might override a duty to respect the current autonomy. Suppose that a 6-year-old can make perfectly sensible decisions about what they do and don't like to eat: they have preferences about food, they know what foods are tasty, etc. In such circumstances, they can make a decision regarding what to eat for pleasure. For their birthday meal, we could let them make the decision themselves. Such a decision is one-off, orients around what they would enjoy, and is unlikely to have long term consequences. Therefore, respecting their (partial) autonomy requires respecting that decision. However, suppose they cannot reason far into the future and struggle to

[35] And, of course, we do not need to worry about the separateness of persons when deciding on behalf of one individual.
[36] Griffin, (2010),p.67. On major and minor infractions of liberty, see Dworkin, (1978),pp.236-237

understand medical concepts which are described to them. Suppose the 6-year-old needs to take some medicine to cure an otherwise fatal illness, but which they refuse to take because of its sour flavour. Here, unlike the birthday dinner, we can override their partially formed autonomy, because their continued existence as a person is a more core/essential aspect of their autonomy than the capacity to choose tasty food. Nonetheless, we must recognise that there is this trade-off between respecting the child's current autonomy and promoting their future autonomy.

Does this argument also imply that we should force adults to take their medicine? I do not think it does in general. The aspect of the 6-year-old's autonomy overridden in the example above is the capacity to form and act on preferences over food. This is a relatively trivial capacity, and is being overridden fleetingly. For an adult who is fully autonomous, refusing medical treatment involves exercising bodily autonomy, taking your life into your hands, and determining your ultimate fate. These are truly core elements of autonomy. Given this observation, there are three arguments in favour of letting adults refuse medical treatment: (1) deciding your ultimate fate and exercising bodily autonomy are more important parts of autonomy than autonomy's continued existence; or (2) that they are roughly comparable, but since the duty to respect is more stringent than the duty to promote, we must respect their decision; or (3) the adult can themselves weigh the relative importance of the two, and therefore should be allowed to do that balancing for themselves. Given the existence of philosophical opposition to euthanasia, one could disagree with those claims. But they illustrate the framework under which such decisions should be made. It is not a framework which lends itself easily to widespread paternalistic interference.

This balancing act will sometimes require that we respect some exercise of partially developed autonomy now, even at the cost of future autonomy. For example, take an individual whose religious practices might reduce their access to trivial options or reduce

trivial autonomous capacities in the future. Suppose an 8-year-old refrains from eating pork because they believe pork is ritually unclean, and because refraining from eating pork is an important feature of their family- and community-life. However, refusing to eat pork now could generate an aversion to pork in the future, an aversion which may well remain even if they later become an atheist and no longer see dietary rules as key to their identity. Letting the 8-year-old avoid pork will therefore reduce their future choices and exercise of autonomy. May schools insist on feeding pork to their pupils in the name of protecting the child's future autonomy?[37] In this example, although the child's capacity to make decisions about religion and identity is not fully developed, that exercise of autonomy is a core use of autonomy. The ability to shape one's food preferences is trivial in comparison. It seems plausible that a core but partially formed element of autonomy trumps the protection of a future trivial exercise of autonomy. However, those (such as Feinberg) who defend the child's right to an open future, or who say we should promote future autonomy at every stage of childhood, might ignore even this relatively core use of current autonomy to promote merely trivial aspects of future autonomy.

When deciding whether to interfere with current autonomy to protect or promote future autonomy, we must take the following into account:

(1) How developed is the aspect of autonomy being used in this decision?

(2) How core/valuable is the aspect of autonomy being used in this decision?

(3) How core/valuable is the future autonomy being promoted?

Two further considerations tell in favour of respecting current autonomy over promoting future autonomy. First, given the considerations in section I about how (first-order) attempts to promote autonomy can extinguish its value, the duty to respect autonomy now

[37] Of course, feeding children pork means they might develop a taste for it, making it harder for them to become religious/vegetarian later in life. In certain cases, we cannot help but make certain future decisions harder. When there is radical uncertainty about the child's future wishes, we should respect the child's current wishes.

is stricter than the duty to promote it. Second, whenever deciding whether to interfere with autonomy, we must adopt an openly conservative policy; while interference now certainly violates the individual's autonomy, the benefits to future autonomy are uncertain, and we should be risk-averse.[38] Both considerations help tip the scales towards respecting current autonomy, though not always decisively. This discussion describes how to balance current and future autonomy and shows that the duty to promote future autonomy does not dominate in every instance.

Dissolving the Trade-Off

The above provided a discussion of what to do when faced with a *bona fide* clash between respecting partial-autonomy and promoting future autonomy. However, sometimes the correct way of responding to a trade-off is to dissolve it. There are two such possibilities I will mention here.

First, sometimes, although the individual of concern is not fully autonomous, it might be possible, via some intervention, to facilitate their decision-making such that their decision is fully autonomous. Once the individual then makes a fully autonomous decision, it can be fully respected, and the worry about what to do with partial-autonomy disappears. This could be relevant in cases of extreme emotionality. Perhaps in a hospital an individual is so completely overcome with grief, fear or panic that they are not in full rational in control. Suppose the patient makes some demands of their doctors which could cause them long-term damage. The doctor could use the framework above to balance the patient's partially-rational decision against their future autonomy and welfare. But there

[38] See Chapter 11,pp.334-335

might be another option: the doctor could calm the patient down. The doctor could provide space and time for the patient to regain rational control. The doctor could provide information and advice. In such circumstances, the individual's decision can become fully autonomous and therefore merit respect. Therefore, one way of responding to partial-autonomy is to facilitate and then respect autonomy, rather than override it.

Second, one could respect the current decision while arranging things in such a way that the choice does not result in a loss of future autonomy. To see this, we should first note that there are two ways a choice can reduce the openness of someone's future: (i) by reducing the capacities for autonomy themselves, for example by damaging psychological or cognitive development, by cultivating preferences or beliefs that cannot be revised etc.; (ii) by reducing future external options. To illustrate: cultivating unrevisable religious beliefs reduces future openness by reducing the capacity for autonomy; signing a binding contract committing oneself to a religious commune reduces future openness by reducing future options. Some choices might only reduce further options contingently; this means we could protect those future options some other way. For example, one defence of compulsory education is that education is necessary to keep open an individual's future options. Leaving school at 16 might rule out certain careers, therefore limiting future exercises of autonomy. It seems we must balance the value of that future autonomy against respecting the 16-year-old's current decisions. But the only reason that the 16-year-old faces this trade-off is that secondary education is almost exclusively offered to adolescents. States rarely provide adults the possibility of going back to school and studying for GCSEs or A levels. Where such policies do exist, there is stigma attached to adults completing high school education; and the state rarely provides financial support to individuals pursuing such studies, whereas it usually does for children (albeit often via their parents). As such, society has set up a structure whereby children face a now-or-never choice in pursuing secondary education. The state therefore has forced a trade-off between teenagers doing

what they want and having an open future, and it then appeals to the importance of that open future to justify curtailing teenagers' freedom. However, if we dissolve that trade-off by increasing the meaningful opportunities for adult education, then perhaps we could allow 16-year-olds to leave school without significantly reducing their future options. This observation may have practical application in a range of scenarios. Children may choose something now which could potentially foreclose certain future options, but where we can arrange things such that we can respect the child's current choice without reducing their future autonomy. Perhaps we can ensure they can undo the decision later.[39] It will therefore sometimes be possible to respect an individual's choice now whilst protecting their future autonomy.

However, there are some limitations to this policy option. Sometimes this policy is technically unavailable: one choice will, because of the laws of nature or sociology or whatever, lead to some reduction in future options. And sometimes preserving future options is morally unavailable because it involves disrespecting current autonomy, meaning such a policy does not dissolve the future-autonomy/current-autonomy trade-off. If it is key to an individual's choice that they reduce their future autonomy, then interfering to preserve their future autonomy would be to frustrate the choice itself. For example, an individual who chooses to give up their property and become a hermit is deliberately reducing their future choices in order to pre-commit to a nonmaterialistic life. An intervention to ensure that their future options are kept open might involve putting money in trust for the hermit and letting them know they can always access it. But this would, in fact, undermine the would-be-hermit's decision. The ideal nonmaterialistic life involves complete immersion, and not spending one's time grappling with the temptation to leave. In this case, the pre-commitment is internal to the decision, not an incidental side-effect,

[39] Compare Feinberg, (1986),pp.71-72

and therefore promoting the individual's future options is just another form of disrespect. As such, the scenario collapses back into a *bona fide* trade-off between current and future autonomy, which should be decided using the earlier framework.

Autonomy vs Welfare

There is one final scenario to discuss: autonomy-welfare trade-offs. Sometimes, an individual's choice now, while not affecting their future autonomy, might harm their welfare. If an individual possesses full autonomy, interference to promote their welfare is generally impermissible. They can make welfare decisions for themselves. And if an individual possesses no autonomy, then the only question is their best interests and future autonomy. However, if an individual possesses partial autonomy and their proposed decision will reduce their welfare, either now or in the future, then we have a conflict that needs to be mediated. There are three comments to make here. First, if the loss in welfare is sufficiently extreme, then it may harm autonomy. For example, extreme pain or hunger prevents thought about anything else; and certain disabilities can reduce an individual's options and agency. In those cases, we can balance respecting current autonomy and protecting future autonomy using the framework above. Second, in cases of autonomy-welfare trade-offs, the Rawlsian heuristic is a powerful tool when we know an individual's goals and values. Even when we do not know the individual's goals and values, we can still assess how we would prudentially trade-off various types of welfare for ourselves. We can then paternalistically apply this decision. However, the Rawlsian heuristic becomes less determinate when we know little about the individual. Thus, we come to our third comment that, ultimately, we must decide whether the welfare that would be lost by respecting this decision is more valuable or weighty than the autonomy which is being

overridden. As discussed above, we should weight the aspect of autonomy according to its development and its centrality/value, and balance it against the value of the welfare to be promoted. When balancing autonomy and welfare, we must bear in mind that, in general, autonomy has a greater moral weight than welfare: we are less willing to violate one individual's autonomy to promote general welfare than we are to violate one individual's autonomy to protect the autonomy of others. But as Griffin points out, to make these comparisons properly, we need a 'bridging concept' which can act as the scales on which to balance the two values. He suggests comparing the contribution of each value based on their 'importance to life', broadly understood.[40] Fully addressing this issue would take us on a long detour into normative ethics and theories of value. But this illustrates the basic idea of how this balancing could be done.

Therefore, for autonomy-welfare trade-offs we must, where possible, use the individual's own understanding of their welfare and autonomy, and, where that is not possible, balance more objectively the autonomy being infringed against the welfare being promoted.

IV.Paternalism and Knowledge

So far, I have discussed autonomous capacity as grounding the duty of respect, and hence grounding rights to liberty. But is mere capacity the only thing which matters? Might knowledge be important as well? What if adults know more than children about certain decisions? Suppose an adolescent has a general capacity to reason, and decides that they want to drop out of school and pursue a musical career. Their parents know this is unlikely

[40] Griffin, (2010),p.69

to succeed, and that the adolescent could just as easily pursue a musical career after completing their A Levels. Could the parent use that knowledge to force the adolescent to complete their A levels? In general, knowledge differentials are insufficient to justify paternalism. Doctors typically know far more about medicine that their patients, but doctors may not force treatment on nonconsenting patients. Similarly, experienced financial advisors may not seize their (lay) client's money and invest it without permission. Regardless of knowledge or experience, one person may not substitute their judgement for someone else's, since this disrespects their autonomous capacities. There might be an outcomes-based justification for doing so. And the larger the knowledge differential, the stronger the justification. But such paternalistic interference would nonetheless be illegitimate.

However, if someone's knowledge about a scenario is below some critical threshold, then paternalistic interference may be legitimate. Take J.S. Mill's example of the dangerous bridge:

> 'If either a public officer or any one else saw a person attempting to cross a bridge which had been ascertained to be unsafe, and there were no time to warn him of his danger, they might seize him and turn him back, without any real infringement of his liberty; for…he does not desire to fall into the river.'[41]

The person crossing the bridge does not act properly autonomously because he does not understand the nature of the action he is taking. It is for this reason that we take informed consent to be so important in autonomous action; someone who consents to medical treatment without understanding the nature and risks of that treatment has not made a truly autonomous decision. This information requirement also helps explain why fraud and deceit are autonomy violating, and thus why fraudulently obtained money should be returned. However, the solution is to provide the individual sufficient information to

[41] Mill, (1977),p.294

make the decision autonomously, and only 'were [there] no time to warn him of his danger' is paternalism legitimate. What does this mean for children? Suppose a young child wants to drink some creamy-looking bleach and they cannot be brought to understand that bleach is dangerous. In this scenario, the child is in the situation of the man as he first attempts to cross the bridge; we cannot bring the child to the requisite minimum threshold of knowledge. At that point, paternalism is legitimate (and, I would suggest, justified).[42]

Therefore, possession of bare autonomous capacities is insufficient to render paternalism illegitimate. The individual must also possess information up to some minimum level.[43] Beyond that minimum level, though there may be large knowledge differentials between the individual and others, paternalism is illegitimate. Informed others may provide further information, remonstrate, or try to convince you to make a different decision. But if you possess the minimum information and the necessary capacities, paternalism remains illegitimate. There remains a question about it means for the individual to 'possess' that information. At the very least, the individual must understand the information being provided. But what if they do not believe the information? Suppose you, a financial advisor, have access to information that shows that your friend's proposed investment plan would harm their finances. Suppose you provide evidence to your friend, who turns out to have an advanced degree in financial economics, and you put the argument vigorously and effectively, but they still reject your conclusions. In such circumstances, it would be *pro tanto* wrong to seize their money and invest it contrary to their wishes.[44] Your friend has the same reasoning abilities as you, and the same abstract ability to assess that information and evidence. To interfere with their actions is to fail to respect that reasoning ability. You might think that such disrespect, while illegitimate, is

[42] See Lipson and Vallentyne, (2008)
[43] Compare to Griffin's 'minimum provision', Griffin, (2010),p.33.
[44] On informed consent, compare Beauchamp and Childress, (2013),pp.131-137

justified. But the point is that, even if there are great knowledge differentials, paternalism is illegitimate and disrespectful so long as an individual possesses the minimum level of information, where 'possesses' does not entail 'believes'.

Conclusion

In this chapter, we have fleshed out the second stage of our framework for children's rights, namely, which substantive justification for agency rights to use. We have set up the respect account as a plausible theory of agency rights which explains how capacities for autonomy grounds agency rights. We have also discussed how to balance respecting current autonomy against promoting future autonomy; when and how to balance current autonomy against welfare; and when to dissolve these trade-offs. The Rawlsian account provides a useful heuristic for this, but it must be supplemented by a weighing of the substantive values at stake. This helps fill the theoretical gap in the children's rights literature regarding the need to respect children's partially developed autonomy.

Of course, there is still much more needed to work out the full normative underpinnings of the respect account of rights. We would need a more determinate test for what counts as core and peripheral aspects of autonomy. We would also need to choose between achievement and independence views of autonomy and therefore whether there are autonomy-centred constraints on paternalistic interference even when that interference frustrates neither the exercise or development of autonomy.[45] Ultimately, it would be useful to connect the respect account, as a theory of agency rights, to a theory of welfare rights.

[45] Clayton, (2012)

There also remain further questions about paternalism. The account here has outlined an answer to the first-order questions of paternalism, that is, under what circumstances is paternalism justified or legitimate? But there are two further, second-order sets of questions: (i) who has the right to interfere paternalistically? Parents? The state? Experts? (ii) Who is to determine whether an individual has sufficient knowledge or capacity to make a decision? And on what basis do they decide? Some of these issues will be discussed as we go along. But hopefully the arguments of this chapter are enough to establish the respect-account's initial plausibility and usefulness.

Having given content to the rights-justification part of our framework, we must now outline a conceptual account of autonomy to be used in our framework. Once we have an account of autonomy, we can use psychology (bearing in the mind the lessons of social constructionism) to tell us which kinds of autonomy emerge in what ways and at what times. Then, in light of our respect-based approach to rights, we can show what rights are generated by particular psychological capacities, and what kinds of paternalistic interference are justified by a lack of that capacity. That is the task of the next four chapters.

Chapter 4

Autonomy

Introduction

In this chapter, I establish an account of autonomy to use in our framework as a metric to determine which individuals have agency rights. At the abstract level, the term 'autonomy' derives from the Greek *auto* (self) and *nomos* (rule or law). 'Autonomy' therefore means literally 'the having or making of one's own laws'.[1] It can be rendered approximately by such terms as 'self-rule', 'self-determination', 'self-government' and 'independence.'[2] However, we need to tie down a particular conception of this term. For our framework, that conception must complete the sentence, 'to know whether children have agency rights, we must investigate whether they possess…'. Once we can complete that sentence, we can begin an empirical analysis to see whether children possess that feature. Section I establishes the adequacy conditions for our conception of autonomy. Section II draws distinctions between different uses of the term 'autonomy' and, using our theoretical desiderata, clarifies that we are interested in autonomy as the capacity of persons to self-rule. Section III uses these theoretical constraints to compare Griffin, Rawls, Raz and G.Dworkin's accounts of autonomy. Ultimately, we take elements of each to form our own account of autonomy in section IV.

[1] Dworkin, (1988),pp.12-13
[2] Feinberg, (1986),p.27

I. Theoretical Desiderata

To begin a theoretical analysis of autonomy, we must define the adequacy conditions for a conception of autonomy. Some of these are conditions which might apply to any good conceptual analysis, but others are specific to our theoretical purposes. Since we need our conception of autonomy to do certain theoretical work within our framework, what counts as an adequate conception of autonomy for us must be able to do this work. The conditions I discuss are: fit with linguistic practice; plausible ability to play its expected normative role; normative usefulness and precision; plausibility as an empirical feature of individuals; empirical usefulness; and logical consistency. Some conditions (such as logical consistency) are binding, that is, they are necessary for adequacy. For others (such as empirical usefulness or linguistic fit), 'more is better'; for example, comparing two conceptions of autonomy, the one with more fit with ordinary language is better *ceteris paribus*. Naturally there may well be trade-offs between the different conditions – perhaps having better fit with ordinary language means leaving the conception vaguer, thus compromising on definitional precision. Choosing a conception of autonomy will therefore be a matter of finding a best fit with these different adequacy conditions.[3] Let's take each condition in turn.

First, a conception must accord with linguistic practice. This is the most basic starting point when analysing a concept; it's ensures we are all talking about the same thing. Of course, the term 'autonomy' is used in many different, sometimes incompatible, ways. As such, any exposition of the term will be in tension with certain elements of linguistic practice. But certain core elements of a concept are important for a term to be part of the conceptual family, whereas more peripheral elements incur a lower linguistic cost if

[3] See Dworkin, (1988),pp.7-12

dropped. Some key components of 'autonomy' might be: that motivations stemming from unendorsed pathological fears or addictions are not autonomous; that paternalism is generally opposed to autonomy; or that people can be partially autonomous. For this adequacy condition, one account of autonomy is better than another to the extent that it better fits common usage, and particularly core aspects of that usage. However, given the broad set of common meanings ascribed to the word 'autonomy', we must choose between those meanings; and given we need autonomy to play a particular role within our framework, we should choose a conception of autonomy appropriate for that role. Therefore, we cannot derive our account of autonomy purely from an investigation into linguistic practice.

Second, our conception should plausibly be able to play its expected normative role. In particular, the conception of autonomy should (plausibly) be valuable and should (plausibly) be able to ground agency rights. That is, our conception of autonomy should be able to explain why people think autonomy should be protected and respected, and should explain how autonomy might be marshalled in arguments to justify liberty, freedom of conscience, free choice, etc. I use the word 'plausibly' and 'might' in the previous sentences because it could turn out on further inspection that autonomy cannot do the normative heavy lifting that liberals have expected. To say that an adequate of conception of autonomy 'must' be valuable and 'does' ground agency rights would beg the question against those who are sceptical about the normative significance of autonomy. We should not rule out such positions conceptually. Nonetheless, we need an account of autonomy that could plausibly be used within a framework which justifies and explains certain agency rights.

Third, our conception of autonomy must be normatively usable in our framework. This means, first, that it must include scalar (rather than categorical) properties so we can

track differences in the degree of autonomy and development in children at different ages.[4] Second, it means that our account of autonomy should be fine-grained. This is because our overall framework needs to answer questions about whether children at particular ages, or of particular abilities, should have certain rights. To do this we need to explain why individuals possess those particular individual rights. Given autonomy is at the base of our account of rights, we need to know how each component of autonomy relates to individual rights, rather than merely how full autonomy relates to an overall scheme of liberty. Therefore, a conception of autonomy is to be preferred for our purposes if, *ceteris paribus*, it is more fine-grained in defining the different components of autonomy, since we can then explain how those different components relate to specific rights. There are some caveats to this. First, the fine-granularity of a theory of autonomy is only useful when the different components distinguished within it contribute to different rights or liberties, or contribute differently. If a theory draws a distinction between *x* and *y* components of autonomy, but there is no difference in the appropriate moral treatment between people who possesses only *x*, only *y*, or both *x* and *y*, then the distinction between *x* and *y* is normatively redundant. Any such distinction is pointless for the purposes of our framework. And since brevity is a virtue of theories, such distinctions are costly. Second, we should not expect, or even necessarily aim, to flesh out all of the different possible components of autonomy at this point. As we investigate specific rights later, we may realise that they presuppose certain pieces of autonomy that we ignored when examining autonomy conceptually/theoretically. That's fine, so long as our account of autonomy can cope with those subsequent additions and revisions. We can thus construct an adequate account of autonomy 'from both ends', that is, from examining autonomy theoretically, and from examining practical rights applications. Like building a tunnel under the English Channel

[4] There may nonetheless be some discontinuities between the development of autonomy and its moral implications.

from both sides, we would hope that each end meets in the middle. We need not prioritise the theoretical end exclusively. To summarise, our account must be normatively useful, in the sense that it makes normatively-relevant fine-grained distinctions between components of autonomy which can link up with a range of specific individual rights.

Fourth, our version of autonomy must (plausibly) be an empirical feature of individuals.[5] Autonomy should be something which, *prima facie*, humans could possess; as such, we should be willing to adjust our account of autonomy in light of empirical findings about humans. However, we should not assume definitionally that humans are autonomous. We should not rule out the possibility that, on further inspection, humans are nonautonomous. To do otherwise would be to beg the question against people like B.F. Skinner who deny the existence of individual autonomy.[6] Instead, this condition is asking only that our account be plausibly something which humans could possess. This constraint would rule out, for example, theories of autonomy that require an extreme understanding of moral independence, in which our values are never influenced by or drawn from other people. But remember that this empirical plausibility constraint acts together with our other constraints. We cannot meet this condition by so distorting our conception of autonomy as to severely compromise the other conditions, e.g. by dropping its moral value, or its consistency with linguistic practice. If we did so, then that new empirically possible account of autonomy would be theoretically inadequate. As Dworkin puts it, if we repeatedly fail to construct an adequate notion of autonomy that is empirically possible, then Skinner and co may well be correct.[7]

Fifth, the account of autonomy should be empirically usable. The account should be something we can empirically investigate and operationalise in practice. Since we are establishing children's rights via investigating their autonomy, we must have an account of

[5] Dworkin, (1988),p.7
[6] Skinner, (2002)
[7] Dworkin, (1988),p.8

autonomy which can be recognised and measured by psychology, and acted upon by policy-makers. If it were impossible to know whether someone is autonomous on a particular account of autonomy, then that account would be useless for our framework. Relatedly, the account should be fine-grained enough to identify individual components of autonomy which match individual cognitive abilities which are, or could be, recognised by the scientific literature. As with the normative usefulness condition above, not all distinctions between cognitive abilities are useful. If a distinction between abilities *x* and *y* is not normatively useful, then we are not interested in that distinction, even if it can be empirically measured. Similarly, if a distinction between *x* and *y* cannot be measured empirically, then it is useless for our purposes even if it is a normatively relevant distinction.

The final condition is logical consistency. Our conception should not be internally inconsistent, nor should it entail positions or conceptions which are themselves logically inconsistent.[8]

In the next section, we examine different uses of the word 'autonomy' and, using the conditions listed above, we can choose which best serves the purposes of our framework. Once we know what type of autonomy we need, we can compare substantive accounts of autonomy in the subsequent section.

[8] Ibid.,p.7

II.Types of Autonomy

'Autonomy' is used in a broad range of contexts with a range of different meanings. It can be used variously to refer to positive liberty, negative liberty, self-rule, sovereignty, personhood, dignity, free will, individuality, integrity, moral/social/economic/political independence, agent responsibility or self-discipline. Sometimes it is identified with qualities like self-assertion, critical reflection, and freedom from obligation.[9] We should distinguish between different general uses of the concept of autonomy and clarify which we are interested in. Feinberg identifies three uses of the term 'autonomy' when applied to individuals. It can refer to the capacity to govern oneself; the actual condition of self-government and its 'associated virtues'; and the sovereign authority to govern oneself.[10] Ultimately, we are interested in the capacities for autonomy, since this is the one relevant to whether individuals possess moral agency rights.

First, there is 'autonomy as capacity'. This corresponds to what Raz calls the 'secondary sense' of autonomy and what Sneddon calls the 'competency conditions' of autonomy.[11] These terms refer to the capacities needed to live autonomously.[12] Autonomy as capacity encompasses the mental capacities that form the mechanisms of self-rule and self-control, and so it includes some ability to control thoughts, desires and actions. To describe how 'autonomy as capacity' relates to the other senses of autonomy: it might be possible to possess the capacity for autonomy but fall short of the actual condition of being autonomous; and it might be possible to have the capacity and condition of autonomy without the right to self-determination. But

[9] Ibid.,p.6
[10] Feinberg identifies a fourth meaning, which refers to an ideal of character. I will consider this a part of 'autonomy-as-condition'.
[11] Raz, (1986),p.369; Sneddon, (2013),p.26
[12] Sneddon, (2013),p.26

> 'it does not seem possible either to achieve the condition or to possess the [moral] right while lacking (totally lacking) the capacity.'[13]

Thus, those who advocate the right to self-government argue that persons have that right if and only if they have the capacity for self-government. As such, this is the type of autonomy relevant for investigating whether children 'possess autonomy'.

Second is 'autonomy as condition', which corresponds to Raz's 'primary sense' of autonomy. Someone possesses autonomy-as-condition if they actually govern themselves in a certain way. Sometimes the term also covers an ideal of character, covering traits like self-discipline, critical reflection and integrity. Autonomy-as-condition is distinct from the other two kinds of autonomy: a person with the capacity for, and right to, self-government may be a slave to another, or they may be unwilling to exercise their capacities and rights. Such individuals lack the condition of autonomy despite possessing the capacity and the right. Individuals' rights do not derive from their actual condition of being autonomous, but from their capacity to be autonomous. This is because the requirement that one already possess the condition of autonomy to possess rights would lead to the counterintuitive implication that slaves, and others denied *de facto* autonomy, thereby lack rights to freedom. Therefore, insofar as we are establishing what rights children should have, we are not interested in whether children possess the condition of autonomy. Of course, conceptions of 'autonomy as capacity' may well be derivative of a conception of 'autonomy as condition'. But what we ultimately need as an input into our framework is a version of 'autonomy as capacity' (even if we need to examine 'autonomy as condition' along the way).

Third is 'autonomy as right', which corresponds to what J.S. Mill termed 'sovereignty'.[14] An individual or nation-state is 'autonomous' in this sense if they have the

[13] Feinberg, (1986),p.28
[14] Mill, (1977),p.224

sovereign right of self-determination.[15] The ultimate question of our investigation, and which our framework hopes to solve, is whether children at various stages of their development, with respect to particular choices, possess autonomy-as-right, or, as we are phrasing it, whether they (should) possess certain agency rights. To answer that question, we must understand the normative foundations of 'autonomy-as-right'; and those foundations are provided by 'autonomy-as-capacity'.

Therefore, we are interested in 'autonomy-as-capacity' as a component of a framework to determine the existence conditions for 'autonomy-as-right' with respect to children. For clarity, I will use the term 'agency rights' rather than 'autonomy' to refer to moral or political claims to make choices.

Next, we use our theoretical desiderata to compare different accounts of the capacity for autonomy.

III.Comparison of Accounts of Autonomy

In this section, we use the desiderata and distinctions drawn above to compare different leading accounts of autonomy. First, I compare Griffin and Rawls's accounts of moral personhood, and ultimately conclude that a Rawlsian account based on the two moral powers provides a better baseline for our core account of autonomy. Second, I examine hierarchical accounts of autonomy, as defended by Frankfurt and G.Dworkin, which claim that autonomy includes an ability to control one's will and bring lower-order desires in line with higher-order values and desires. I conclude that our account of autonomy should

[15] Feinberg, (1986),p.48

contain a hierarchical control condition. Finally, I examine Raz's account of autonomy. Although he does not focus on the sort of autonomy that we are interested in, he does provide useful additional detail on the capacities needed to make plans, which can flesh out the Rawlsian moral powers. Raz also provides extra detail for hierarchical control condition, most importantly bringing in an emotional control condition. I conclude with a full statement of the account of autonomy we will use in our framework for children's rights.

Autonomy as Personhood

First, I examine Griffin's account of personhood and then compare it to Rawls's account of the two moral powers. Griffin's account faces two deficiencies compared to Rawls's: first, although Griffin's account of autonomy is substantively similar to Rawls's second moral power, the Rawlsian second moral power is more precise, meaning it is more empirically and normatively usable; second, by incorporating the first moral power, the Rawlsian account can better explain notions of political autonomy and moral responsibility, meaning it fares better on the linguistic practice and 'normative role' criteria. Therefore, a Rawlsian account is preferable.

We are interested in the capacities for autonomy insofar as they give birth to rights; therefore, we should focus on those accounts of autonomy which are designed for that normative purpose. James Griffin's *On Human Rights* is the most significant recent work on natural and human rights; his 'personhood account' grounds those rights firmly in an

account of 'normative agency' and what we are calling 'autonomy'.[16] Talking generally, Griffin characterises a 'human existence' as involving reflection and assessment. We 'form pictures of what a good life would be [and]…we try to realise these pictures'.[17] He concludes that,

> 'what…[gives] dignity to human life is our capacity to choose and to pursue our conception of a worthwhile life'.[18]

For Griffin, having a 'conception of a worthwhile life' involves a 'capacity to identify the good' and having ideas 'about what makes a life better or worse.'[19] Putting this together, we can infer that for Griffin autonomy consists in two things (i) a capacity to deliberate and make judgements about the good; (ii) the ability to pursue that judgement about the good. Griffin then argues that this conception of autonomy can generate a full list of rights, including, amongst others, liberty, free speech, freedom of religion and conscience, and a right to a basic education. The Rawlsian account, by comparison, is based on the two moral powers:

(i) *A capacity for a sense of justice*: 'the capacity to understand, to apply, and to act from (and not merely in accordance with) the principles of political justice that specify the fair terms of social cooperation';

(ii) *A capacity for a conception of the good*: 'the capacity to have, to revise, and rationally to pursue a conception of the good'.[20]

To compare the accounts, let's first compare Rawls's second moral power to Griffin's account.[21] All major accounts of autonomy encompass something like this: a self-imposed authentic standard of excellence (J.S. Mill), a conception of what gives value to life (R.

[16] Griffin, (2010) See also Crisp, (2014)
[17] Griffin, (2010),p.32
[18] Ibid.,p.44
[19] Ibid.,p.46
[20] Rawls, (2001),pp.18-19
[21] In the Rawlsian framework, the two moral powers are the basis of moral personhood/citizenship rather than components of 'autonomy'. However, their role is similar role that of autonomy in our framework. See Audard, (2015a) and Audard, (2015b)

Dworkin), projects and goals (Raz). The basic idea is that, to be autonomous, you must be, amongst other things, self-determining your life. And to do this, you must be determining your life according to some self-imposed standard or set of goals. Put differently, you must be part-author of your life. And to be part-author of your own life, you must have a (partial) script. The 'conception of the good' is that script (even if that script is constantly revised, edited and rewritten). This is the ideal covered by the second moral power and by Griffin's account. Including this element in our account of autonomy will help it fulfil its linguistic and normative role, because self-determination and giving value to your life are core to ordinary and philosophical usage of the term 'autonomy'. So, how should we choose between the two? While Rawls's 'second moral power' is substantively similar to Griffin's account, it is more detailed: it splits the power into different component abilities. First, what Griffin terms 'choosing' and 'pursuing' a 'conception of a worthwhile life', Rawls breaks down into 'the capacity to have, to revise, and rationally to pursue a conception of the good'. Second, Rawls gives a more precise definition of 'conception of the good', saying it is:

> 'an ordered family of final ends and aims which specifies a person's conception of what is of value in human life or, alternatively, of what is regarded as a fully worthwhile life'.[22]

Therefore, we can more easily use the Rawlsian account as the basis of an empirical psychological investigation. We need precision in the components of autonomy because those different components may emerge in children at different times and to different degrees. We therefore need to identify the normative significance of individual psychological abilities.

It is worth clarifying a few things about the second moral power. This 'plan of life' or 'conception of the good' does not need to be good in an objective sense. Indeed, some

[22] Rawls, (2001),pp.18-19; also Murray, (2015)

people's lifestyle and life goals may seem objectively objectionable. But the whole point of self-authorship is that we can decide and construct for ourselves what is good for us. Any dream will do (although we may restrict how you pursue that dream).[23] This may sound rather grand, but it need not be. Ronald Dworkin provides the following image:

> 'Each person follows a more or less articulate conception of what gives value to life. The scholar who values a life of contemplation has such a conception; so does the television-watching, beer-drinking citizen who is fond of saying "This is the life", though of course he has thought less about the issue and is less able to describe or defend his conception.'[24]

One's life need not have a unity, or a single rigid plan (though it may do). The ideal of autonomy is about being able to fashion one's life through one's own goals and decisions, even as those goals shift and change.[25] To the extent you have formed goals and plans, or assessed what you want to do in a given situation, you have been (to various degrees of sophistication, and with various degrees of explicitness) reasoning about 'the good'. Like Monsieur Jourdian in Molière's *The Bourgeois Gentleman* who discovers that 'these forty years now I've been speaking in prose without knowing it!', we are using fancy concepts used to describe something which, at its heart, can be very familiar.

Second, we should prefer the Rawlsian account because it includes the first moral power, which covers the ability to reason about justice, apply principles of justice and, as I would add to it, reason about and apply principles of morality more generally. But why include the first moral power? Two reasons. First, it helps us to make sense of the idea of moral autonomy. Self-government encompasses the ability to decide not only how you would like to live your life, but also how you ought to live your life. The capacity to reason about justice and morality captures the idea that to be truly morally self-governing we must be able to impose moral laws on ourselves. This ideal is Kantian in flavour: for a rational (and

[23] You may not, for example, sell your brother into slavery to pursue your dream.
[24] Dworkin, (1986),p.191
[25] Raz, (1986),pp.370-371

autonomous) being to qualify as such, it must be able to construct, recognise, and follow moral laws. This capacity also helps autonomy play its expected normative role in relation to moral responsibility. We can only hold someone morally responsible for their actions if they possess the capacity to reason about morality: this idea lies behind the statement of blame that someone 'should have known better'. Animals, young children, and the insane cannot be considered morally (or criminally) responsible because they are incapable of reasoning morally and understanding that their actions are wrong. Even if they are punished out of deterrence, they cannot truly be said to *deserve* punishment. Holding someone morally or criminally responsible presupposes that they are morally autonomous. And to play this expected normative role, the notion of autonomy must encompass the capacity to reason about morality and justice.

Second, the first moral power helps make sense of 'political autonomy'. This is the idea that humans are fundamentally politically free. The ideal of political autonomy is what makes liberals concerned about state legitimacy and state coercion: some liberals solve this problem through consent; or by granting voting rights; or by demanding the state act in ways it can (reasonably) justify to those it governs. The problem of legitimacy and its solutions thus generates certain political rights. But how does political autonomy give rise to the problem of legitimacy? Political autonomy is the idea that we, as individuals, are politically self-governing. Individuals can deliberate on, construct, and self-impose rules of political morality. Respecting that ability to politically self-govern means recognising individuals' political freedom. This gives rise to the problem of legitimacy: if individuals are fundamentally politically self-governing, then why may a coercive institution, such as the state, govern them politically? Therefore, if we include the first moral power as a component of autonomy, we can make sense of political autonomy and can explain how autonomy relates to the problem of legitimacy. Furthermore, the first moral power, via the notion of political autonomy, helps to ground certain social and political rights, including

rights to vote, engage political speech, and freedom of political association. These rights presuppose not merely an ability to reason about what we want individually, but to reason about the right and the good more generally.

Therefore, our account of autonomy should include the first and the second moral powers. However, I will amend Rawls's justice-focused version to include moral reasoning more generally (to incorporate the ideas of moral responsibility and moral autonomy), and will drop the requirement that principles of political justice 'specify fair terms of social cooperation', since this embodies a specifically Rawlsian view of justice that we do not need to commit to.

Hierarchical Autonomy

Another set of accounts of autonomy see autonomy's defining features as being the possession of second-order preferences and the ability to bring first-order preferences into line with those second-order preferences. These are termed 'hierarchical' accounts because they portray autonomy as consisting in relations between hierarchically ordered thoughts.[26] Frankfurt's famous article on personhood laid out such an account:

> 'a person's will is free only if he is free to have the will he wants. This means that, with regard to any of his first-order desires, he is free either to make that desire his will or to make some other first-order desire his will instead',[27]

where an individual's 'will' is an *effective* first-order desire.[28] This is quite a thin account of autonomy (Frankfurt intended it as an account of 'personhood' rather than autonomy). G.Dworkin develops this account, arguing that autonomy is:

[26] Taylor, (2005),p.1
[27] Frankfurt, (1989),p.73
[28] Ibid.,p.65

> 'a second-order capacity of persons to reflect critically upon their first-order preferences, desires, wishes, and so forth and the capacity to accept or attempt to change these in light of high-order preferences and values.'[29]

Further, 'by exercising such a capacity, persons define their nature, give meaning and coherence to their lives, and take responsibility for the kind of person they are.'[30] Significantly, on this account, autonomy is not merely reflective, but includes:

> 'some ability both to alter one's preferences and to make them effective in one's actions…indeed, it is to make them effective because one has reflected upon them and adopted them as one's own.'[31]

The key parts of G.Dworkin's account of autonomy are the abilities to (i) reflect on preferences; (ii) change those preferences in light of those reflections; (iii) make them effective in one's actions; and (iv) give coherence to one's life through those reflections. The ideas of reflection and giving coherence to one's life are similar to the Griffin and Rawls accounts. However, the hierarchical part of Dworkin's account is new and important – namely, the idea that higher order preferences can be used to change lower order preferences and then make those lower order preferences effective in action.[32] These components of autonomy seem to be presupposed by the Rawlsian account. For example, the second moral power includes the capacity 'rationally to pursue a conception of the good'. Presumably, in order 'rationally to pursue' your conception of the good you must be able to bring your first order preferences and actions in line with that conception – in short, to bring your will in line with your values. However, it is worth rendering these hierarchical elements explicit within our account of autonomy, for three reasons.

First, it improves the detail of our account. The 'rational pursuit' component of autonomy primarily refers to 'taking the best means to your ends' but also

[29] Dworkin, (1988),p.20
[30] Ibid.p.20
[31] Ibid.,p.17
[32] Compare Taylor, (2006),p.152

includes/presupposes 'making your ends your will'. For the sake of precision, we should separate out and render explicit that hierarchical component of autonomy, leaving 'rational pursuit' to refer exclusively to means-ends rationality.[33] This is not only a theoretical distinction, but also an empirical distinction: there is 'virtually no evidence for a substantial relationship between [the ability to control one's will] and general intelligence', where 'general intelligence' would cover the ability to make sound means-ends judgments.[34] Means-ends reasoning and volitional control are therefore empirically independent. However, as discussed above, we should not introduce distinctions for the sake of it; there must be further reasons to include the hierarchical component.

Second, the hierarchical component accords with, and helps explain, certain linguistic intuitions about autonomy, namely, that people with addictions may fail to be autonomous. Imagine a heroin addict who makes the considered decision to quit, believing heroin use to be incompatible with their settled life goals. After quitting, the individual suffers severe withdrawal symptoms. The fever, emotional instability and loss of control induced by the withdrawal combine into a compulsion to relapse, something which they subsequently bitterly regret. Intuitively, this person fails to be autonomous with respect to heroin consumption. The hierarchical account designates this individual as non-autonomous with respect to heroin, and thus it accords with our linguistic intuitions. The reason the addict lacks autonomy on the hierarchical account is that they lack control over their will; they cannot use their higher-order desire to change, or render ineffective, their first order desire to take heroin. The phrase 'rational pursuit' fails to distinguish between the addict who fails to be autonomous because of a lack of control, and the person who lacks the ability to reason in a means-ends way. Suppose a second person is unable to understand that their desire to be healthy is compromised by taking heroin, and so, despite wanting to be

[33] See Railton, (2007)
[34] Heckhausen and Dweck, (1998),p.43

healthy, keeps taking heroin. This person also lacks autonomy. But these two people lack autonomy in different ways, which might lead to different appropriate responses. Only an account which distinguishes between hierarchical control and means-ends reasoning – rather than collapsing them together – can distinguish these cases.

Third, the hierarchy condition helps us make sense of paternalism justified on the basis of facilitating autonomy via facilitating self-control. Suppose somebody asks you not to let them buy or smoke any cigarettes when they are drunk, and then later, when drunk – and hence with diminished hierarchical self-control – they attempt to smoke. If you take away their cigarettes, you may well say, 'you don't *really* want to smoke'. This is an appeal to protecting their autonomy via interference. More specifically, it appeals to helping their autonomy by bringing their actions in line with their higher order goals in order to correct for their lack of ability to control their lower-order desires. We can best make sense of the role autonomy plays in this normative argument by appealing to a hierarchical account of autonomy. Of course, we may think such interventions, by individuals or states, are ultimately unjustified, perhaps because we are never in an epistemic position to know what someone 'really' wants, or because, like Isaiah Berlin, we worry such a position could strengthen 'totalitarian creeds', or because it's not ultimately possible to protect autonomy via interference, etc. But rehabilitation programmes, education and discipline, when intended to foster self-control, are often justified as ways to improve people's autonomy. It is therefore a virtue of a theory of autonomy if it can account for why autonomy might play a role in those normative arguments, even if those arguments are ultimately misguided. Since the hierarchical condition can explain autonomy's role in these kinds of normative arguments, we should include it in our account of autonomy.

The hierarchy condition of autonomy makes our account more fine-grained; can better explain our intuitions about certain cases where individuals lack autonomy; and helps autonomy play an expected normative role. Therefore, our account of autonomy should, in

addition to the baseline Rawlsian account, include a separate hierarchical control condition, namely, that autonomy involves: (i) the ability to think about our thoughts;[35] (ii) the capacity to accept or change preferences, desires, wishes etc. in light of high-order preferences and values';[36] and (iii) the capacity to make higher-order preferences and values effective in one's actions'.[37] I retain the 'rational pursuit' condition within the second moral power, but will use it to refer narrowly to the ability to reason about the best means to one's ends.

Raz's Conception

Finally, I examine Raz's account. For Raz, living autonomously 'consists in an agent's successful pursuit of willingly embraced, valuable options' where 'the autonomous person is part author of his life.'[38] Raz's famous account is that

> 'to be autonomous, agents have to meet three conditions: they must possess certain mental capacities, they must have an adequate range of valuable options, and they must enjoy independence from coercion and manipulation.'[39]

However, this defines autonomy (in Raz's terms) in the 'primary sense', that is, autonomy as condition of living. But we are first interested in autonomy as capacity, that is, the mental capacities required for autonomy, not the further conditions required for an autonomous life. One can be autonomous in our sense even if one's liberty is severely curtailed. Regarding mental capacity, Raz claims:

[35] Sneddon, (2013),p.23
[36] Dworkin, (1988),p.20
[37] Ibid.,p.17.
[38] Raz, (1986),pp.369-370
[39] Ibid.,p.369

> '[T]he autonomous person must be aware of his life as stretching over time. He must be capable of understanding how various choices will have considerable and lasting impact on his life.'[40]

An individual must also have 'the mental abilities to form intentions of a sufficiently complex kind, and plan their execution'. This includes 'the ability to comprehend the means required to realize his goals, the mental faculties necessary to plan actions, etc.'[41] Finally, individuals need:

> 'cognitive capacities, such as the power to absorb, remember and use information, reasoning abilities,… emotional and imaginative [abilities,]… [and] character traits essential or helpful for a life of autonomy [such as] stability, loyalty and the ability to form personal attachments.'[42]

Some of these capacities have already been covered by the Rawlsian moral powers, in particular the requirements about forming intentions and complex plans. The conditions relating to the 'character traits' that help 'a life of autonomy' are not relevant to our account of autonomy; as discussed in the previous section, we are interested in autonomy as capacity, not autonomy as an ideal of character. But the need to understand the (long-term) effects of choices on our life, and the power to absorb and use information to reason in a means-ends way, are useful details in fleshing out exactly what is required 'rationally to pursue' our ends. They therefore provide useful extra detail on the second moral power.

There is one more capacity, which Raz only mentions in passing, but is worth commenting upon; this is 'emotional' make-up.[43] Emotional control, that is, the ability to regulate one's own emotions and to have control over what cognitive processes we engage, is important to the ability to live autonomously. It is an important component of self-control and the ability to decide for yourself. Emotions can affect our motivations, and our ability to

[40] Ibid.,p.371
[41] Ibid.,pp.371-373
[42] Ibid.,p.408
[43] Ibid.,p.19

reason effectively: therefore, our account of autonomy must include motivational control, thought control, and emotional control. First, emotions can create powerful first-order preferences. Emotions could interfere with our moral powers by preventing our higher-order values from becoming effective, e.g. lust can override the higher-order desire to be faithful; anger, the desire to maintain good relations; depression, the desire to follow through on plans. The ability to control the desires generated by emotions is an element of hierarchical control. Second, emotions can interfere with cognitive mental processes as well as conative ones. Emotions can make us fail to see certain facts and lead us to self-deceive. Desperation and hope can lead to the denial of realities. Emotions can hinder the engagement of certain types of cognitive reasoning, leading us to make false inferences and draw unwarranted conclusions: anger can make us leap to conclusions that others are being deliberately malicious; anxiety and panic can make us perceive threats that do not exist. In general, we require meta-cognitive abilities, that is, the ability to decide what kinds of thought processes we want to use, whether they are higher-level cognitive processes or intuition. This condition makes sense of the intuition that people at the extremes of emotional instability are not considered fully autonomous, and should have certain decisions taken out of their hands. Of course, we do not demand that people have complete control over their emotions and thought-processes to be considered autonomous; rather, there is some minimum level of control required. In chapter 7, I discuss this further, as emotion control is one of the major elements in the development of self-control. But this rough sketch illustrates how emotional control is relevant to the capacities for autonomy. The fact emotions can interfere with autonomy by interfering with our thought processes shows that our hierarchical control condition should include 'cognitive control' (the ability to control our thought processes).

Do we need to include cognitive control as a separate component in our hierarchical control condition? There is a sense in which cognitive control is presupposed

by the account of autonomy as we have already laid it out (after all, without cognitive control, you cannot operate the other moral powers). However, it is worth making the presupposition of cognitive control explicit within our account, since lacking cognitive control is a particular way in which someone could lack autonomy and one which implies a particular kind of moral response. For example, there are two different ways someone could fail the 'rational pursuit' condition of the second moral power. First, someone could lack outright the cognitive abilities to reason empirically about means and ends. Second, they could possess the first-order ability to reason empirically in that way, and successfully use that ability in moments of calm, but fail the 'rational pursuit' condition because their emotions interfere with the exercise of those cognitive abilities and they lack the second-order rational ability to control those emotions. In the former case, we might paternalistically interfere in every choice they make; in the latter, we might just prevent them from making decisions when emotionally distressed. In the former case, we might teach the person how to think empirically; in the latter, we might provide emotional support and 'bring them to their senses'. Introducing emotion and cognitive control as explicit components of the 'hierarchical control' condition therefore provides an informative and useful addition to our understanding of what it is to be autonomous, and (as discussed in chapter 7) one which is relevant to the empirical realities of psychological development in children.

This discussion of emotions has shown us two things: first, that our account must include the ability to control thoughts, as well as the ability to control motivations; and second, that our account must include the ability to regulate emotions, which can be a confounding factor in controlling thoughts and motivations.

IV. The Baseline Account

Now I bring together all the foregoing discussion. In total, an individual is autonomous if they possess to a certain minimum level:

(1) *The first moral power*: the capacity to understand, to apply, and to act from moral principles and principles of political justice.

(2) *The second moral power*: the capacity to have, to revise, and rationally to pursue a conception of the good, where

   a. a *conception of the good* is an ordered family of final ends and aims which specifies a person's conception of what is of value in human life or, alternatively, of what is regarded as a worthwhile life; and where

   b. *rational pursuit* involves the power to absorb, remember and use information along with reasoning abilities to form (long-term and short-term) plans as a part of means-ends reasoning.

(3) *Hierarchical control*: the ability to think about and control one's thoughts and motivations, and to regulate and control confounding internal factors, such as emotions, which can interfere with those mental processes needed for thought and action. In particular, it means possessing

   a. *Motivational Control:* The capacity to accept or change one's preferences, desires, wishes etc. in light of higher-order preferences and values and to make higher-order preferences and values effective in one's actions;

   b. *Cognitive Control*: The capacity to regulate and control the mental processes needed for the exercise of the two moral powers.

Here I want to make a brief comment on the relationship between the hierarchical control condition and the two moral powers.

The two moral powers constitute 'core autonomy', which is the basis of equal respect. Core autonomy is the aspect of autonomy which means that individuals can form plans, goals and judgements. It grounds the right to have those plans, goals, and judgements respected. Hierarchical control constitutes the internal resources required for an individual to implement those plans, goals, and judgements. Hierarchical control therefore facilitates core autonomy. If an individual possesses core autonomy, we must fully respect their considered plans, goals and judgements. If they also lack hierarchical control, we may sometimes need to help facilitate their core autonomy by helping them reflect on and pursue their goals. But we still must respect their own considered life plans and moral judgements. If instead they possess hierarchical control, but lack core autonomy, then, while respecting their hierarchical control may be a way of protecting their integrity, their plans, goals and judgements do not themselves merit respect. Since constructing a vision of your own life, forming plans to pursue them, and making judgements about the right and the good are all at the core of moral agency, the two moral powers constitute core autonomy. Therefore, those who possess core autonomy deserve full respect for their political and moral judgements and their plans (even if they may need help implementing them).

Conclusion

In this chapter, we have used the desiderata for an adequate account of autonomy to compare several of the leading accounts of autonomy. Ultimately, we have developed an account of autonomy which adapts elements of Griffin's notion of personhood, the Rawlsian moral powers, Dworkinian hierarchical control, and Razian mental capacities.[44] This account is the baseline account of autonomy used in our framework. Testing which of these capabilities children possess at different stages of development will show the ways in which children are autonomous. Seeing how particular components of autonomy link to particular agency-rights will then answer the question of whether a child with a particular ability possesses a particular moral right. I describe this as the 'baseline' of our account, since, as we turn to the literature from empirical psychology, we will develop many of the components of this account. But it provides the starting point for our investigation of empirical psychology.

[44] Rawls, (2001),pp.18-19; Raz, (1986),p.408; Dworkin, (1988),pp.17-20

Chapter 5

Cognitive Development and Rationality

Introduction

The next three chapters demonstrate the role of empirical psychology within our framework, and show how it can be used to assess children's capacities for autonomy. I provide an empirical outline of child development through the normative lens of the accounts of autonomy and rights outlined in chapters 3–4. In fact, developmental psychologists are clear that adolescents (from 14/15 at the latest) are almost indistinguishable from adults in their cognitive abilities.[1] Therefore, all rights granted to adults on the basis of their cognitive abilities should be granted to adolescents. The following chapters are also intended as an illustration of how empirical psychology functions as an input to the broader framework for investigating children's rights. By identifying the psychological capacities relevant for some particular right, and by examining their individual normative significance in light of the previous chapters, one can vary the empirical inputs into this framework in order to make assessments about rights at different stages of development. To that end, the chapter also explains the normative significance of individual cognitive abilities so that the framework can be used to explain what rights are generated by only one (or some) of those cognitive abilities. By doing this, these chapters provide a framework to determine what rights children should have if and when the facts change. When I invoke empirical psychology in these chapters, I am not saying that the psychological abilities currently possessed by children are fixed, nor am I committing to

[1] Coleman, (2002),p.168.Also Moshman, (1999),p.40; Freeman, (1997a),p.28

particular theories of what drives development: the social constructionism of chapter 2 still stands. Here, I am simply exploring children's autonomous capacities under current social conditions. These capacities will determine which moral agency rights children possess now. But when the facts change, so too do the framework's conclusions.

Chapter Outline

In Sections I-IV, I examine each of the four normatively relevant components of (non-moral) cognitive thinking: logical reasoning, empirical reasoning, decision-making, and argumentation. For each, I (i) define them theoretically and identify their sub-components; (ii) discuss their normative relevance in light of our account of autonomy and rights; and (iii) provide an empirical account of their development throughout childhood and an empirical comparison of adolescents and adults. By examining these cognitive abilities separately, and discussing their individual normative significance, we will set up the psychological element of our framework. This element enables us to investigate the rights of children who are partially autonomous, for whom different cognitive abilities emerge separately, to different degrees, at different times. In Section VI, I discuss which rights are *not* generated by the cognitive capacities discussed in this chapter.

In the next chapter (chapter 6), I continue this psychological analysis by investigating moral reasoning. Together, chapters 5–6, show that older adolescents (14–16) and adults possess the two moral powers equally, and that younger adolescents (11–13) fail to match adults only slightly. Chapter 7 investigates development in hierarchical control. Then we will be able to see the overall level of autonomy attained by children at different stages of

development. This provides a baseline for assessing which moral agency rights they have and which legal agency rights they should have.

First, I examine the four normatively important components of cognitive reasoning: logical/syllogistic reasoning; empirical reasoning; decision-making; and argumentation.

I.Logical Reasoning

Definition

Logical reasoning includes three core abilities: (1) to understand the rules of logic and inference; (2) to understand the concept of 'validity' as distinct from 'truth', and to follow deductive arguments and assess their validity. And the ability, not only to understand and follow given logical inferences, but (3) to draw inferences oneself from given premises. This includes being able to solve both determinate and indeterminate syllogisms.[2] Determinate syllogisms are syllogisms in which the conclusion follows from the premises with logical necessity. Indeterminate syllogisms, by contrast, involve conclusions which are perhaps suggested by the premises, but do not follow as a matter of necessity, e.g. arguments that affirm the consequent or deny the antecedent. Logical reasoning, therefore, covers the ability to understand and apply the rules of logic.

[2] Klaczynski et al., (2004),p.559

Logical reasoning abilities are at the heart of philosophical accounts of humans as rational beings. Logical reasoning is important for forming beliefs, making evaluative judgements, undertaking means-ends reasoning, justifying one's beliefs, and forming and following arguments and counterarguments. Indeed, logical reasoning is a prerequisite for all the accounts of autonomy in chapter 4. For example, someone unable to reason logically cannot have a 'rational' plan of life properly speaking, since their plans do not flow from the exercise of reason.[3] Similarly, they cannot reason morally, form practical syllogisms to make rational decisions, form consistent preferences, or assess evidence. Logical/syllogistic reasoning is therefore a major component of rationality, and is a prerequisite for all other components of rationality.

Second, logical reasoning abilities protect individuals (morally) from certain kinds of paternalistic interference. Respect for an individual's ability to reason means not interfering with the decisions the individual makes on the basis of that ability. Interference would be illegitimate. However, if they lack that ability, then we no longer have the same reason to respect their decisions. Lacking this ability both removes a normative barrier to paternalistic intervention and also often justifies that intervention. Individuals lacking an ability to reason logically could do great damage to themselves. This can either be because they cannot reason about their own good/interests, or because they do things which cause great harm without realising their harmful consequences. This is a paradigm case of legitimate paternalism, with the individual unable to 'rationally advance their own interests' and where 'others are authorised to act on their behalf and to override their present wishes'.[4] The flip-side of this is that possessing an ability to reason logically provides

[3] Though they may, by chance, have the appearance of rationality.
[4] Rawls, (1971),p.248

normative protection against paternalistic interference, rendering interference illegitimate and usually unjustified.

Empirical Findings

When it comes to logical reasoning abilities, there is no difference between adults and older adolescents, and only a slight difference between adults and young adolescents. Bigger differences exist for younger children. In broad terms, logical reasoning develops along the following pattern: while preschool children may act in accord with logical norms (e.g. in deducing the conclusion of a transitive argument), they do not grasp the concept of logical necessity. From around 6-years-old, children develop the ability to distinguish conclusions that are logically necessary from those that are merely empirically likely or conventionally accepted; they also possess the beginnings of an explicit understanding of inference.[5] But reasoning at this stage of development is always within the context of premises the child accepts as true or reasonable: the concept of content-independent validity is only implicit in their thinking. From about 10-years-old, children can distinguish valid from invalid arguments and can think explicitly about the form of an argument. They can clearly differentiate logical validity from empirical truth and falsity.[6] Let's examine in more detail understandings of the distinction between validity and truth. Take the following problem:

All wrestlers are police officers.
All police officers are women.
Assume the two previous statements are true; is the following statement true or false?
'All wrestlers are women'.

[5] Moshman and Franks, (1986),p.154. See also Ricco, (2015),pp.534-535
[6] Moshman and Franks, (1986),pp.153-4. See also Goswami, (2010),p.411

Children aged 8 and under can rarely judge such conclusions as valid deductions when they know the premises and conclusion to be false.[7] That said, younger children can exercise their imaginative capabilities in creative ways to help suspend their empirical beliefs and follow the logical form of an argument. For example, they perform better on counterfactual deductive tasks when asked to 'imagine a world in which…', and simple counterfactuals form a routine part of the school curriculum (e.g. 'suppose you had 9 marbles and gave away 3 …'). Even 4–5-year-olds do relatively well with fantasy premises ('Pogs wear blue boots. Tom is a pog. Does Tom wear blue boots?'). It seems therefore that younger children are capable of deductive reasoning, even about counterfactual premises.[8] But as deductive operations get more complex, as in the police/wrestler example, a mental conflict arises between trusting the deductive operations and trusting their own knowledge. Pre-adolescent children struggle to mediate that clash.[9] Such children can usually only reason deductively when the conclusions seem reasonable given their prior beliefs.[10]

Regarding older children, Moshman and Franks (1986) investigated whether participants aged 9+ could recognise validity as distinct from truth. In their initial experiments, no 9–10-year-olds used validity as a basis for distinguishing different arguments, whereas 45% of 12–13-year-olds and 85% of college students did so. In later experiments, the experimenters explained the concept of validity to the participants. 9–10-year-old performance remained poor, but 12–13-year-olds could then understand and apply the concept of validity just as well as college students; indeed, their results were almost

[7] Moshman and Franks, (1986)
[8] Goswami, (2010),pp.411-12; also Markovits and Vachon, (1989)
[9] Kuhn and Siegler, (2006),pp.962-963
[10] Goswami, (2010),pp.415-16

indistinguishable.[11] Nonetheless, adolescents and adults continue to make errors in deductive reasoning when the premises are counterfactual.[12]

The ability to distinguish validity from truth is significant for making complex decisions. It means one can deduce conclusions from previously given premises regardless of their truth. And that means one can project one's thinking beyond the concrete world and grapple with ideas of the possible, the probable and the ideal.[13] When you can reason purely logically, you can reason hypothetically about the various possible long-term outcomes of different potential choices. Conversely, when your reasoning is restricted to familiar areas, you cannot work out options in stranger or longer-term scenarios. As such, paternalism may be illegitimate for younger children when they make decisions in immediate and familiar scenarios, but legitimate for longer-term and unfamiliar scenarios. I discuss the ability to make long-term plans further in chapter 7.

Second, let's examine the ability to draw logical inferences from given premises. 4–6-year-old children can often make invited, determinate inferences on *modus ponens* and *modus tollens* problems.[14] Children are also more likely to make inferential mistakes, as above, when the premises conflict with their prior belief. Nonetheless, when solving problems involving the most common determinate syllogisms (e.g. *modus ponens*, *modus tollens*), performance is very good by middle-to-late childhood at 75% accuracy, and is near ceiling level by adolescence.[15] For the most difficult determinate syllogisms, there is 'no clear developmental change' from the age of 8 onwards, with performance 'remaining poor

[11] Moshman and Franks, (1986); Moshman, (1999),p.15
[12] Markovits and Vachon, (1989); Kuhn and Siegler, (2006),p.962
[13] Danner, (1989),p.55; Keenan and Evans, (2009),p.168
[14] Klaczynski et al., (2004),p.560
[15] Kuhn and Siegler, (2006),p.961.Also Klaczynski et al., (2004)

through adulthood'.[16] Therefore, there is no difference in the inferential abilities of adults and adolescents in solving determinate syllogisms.

In studies investigating the ability to solve indeterminate syllogisms, individuals are provided with premises that involve denying the antecedent or affirming the consequent. They are then asked whether they can infer a definite conclusion.[17] An argument that *affirms the consequent* provides the premises:

if *p* then *q*

q

This argument 'invites' us (invalidly) to infer *p* as a conclusion. An argument that *denies the antecedent* provides the premises:

if *p* then *q*

not *p*

This argument 'invites' us to conclude (invalidly) that 'not *q*'. The correct answer is that we cannot infer a definite conclusion from either syllogism.[18] When solving these indeterminate syllogisms there is 'a low level of correctness in childhood', and only a 'modest' increase in ability between early adolescence and late adolescence/adulthood.[19] That said, a majority of 3–4-year-olds could solve indeterminate syllogisms when asked to select pictures that depicted a breach of rules of the form 'if p then q'. For example, children are told the rule 'if Sally goes outside, then she must wear a coat'; they are shown pictures of Sally inside with her coat on; and they are asked whether Sally is breaking that rule.[20] 3–4-year-olds can realise that certain premises are indeterminate with regards to behavioural rules. Similarly, Light et al. (1989) found that 6–8-year-olds could detect rule violations and non-violations for behavioural rules. However, they struggle with such

[16] Kuhn and Siegler, (2006),p.961; Klaczynski et al., (2004)
[17] Ricco, (2015),pp.525-526
[18] Ibid.,pp.525-527
[19] Kuhn and Siegler, (2006),pp.961-962
[20] Goswami, (2010),p413

inferences when the rules/premises are causal, more general or contain more arbitrary content.[21] It seems, therefore, that younger children can solve certain indeterminate syllogisms only when presented in a context with which they are very familiar (e.g. when the syllogisms are about behavioural rules).

However, in general, mistakes in solving indeterminate syllogisms decrease with age. In their landmark study, Klaczynski et al. (2004) found that 8-year-olds made significantly more (incorrect) determinate inferences than all older age groups.[22] On some measures, 10-year-olds, 12-year-olds and 14-year-olds did not differ significantly from each other, but they made more incorrect inferences than college students. Correct indeterminate inferences were apparent only in the adolescent (12–14) and adult groups.[23]

To summarise: young adolescents (12–14) are equivalent to adults in their understandings of validity and their ability to solve determinate syllogisms, but are slightly behind adults in their ability to solve indeterminate syllogisms. Older adolescents (15–16) have the same logical abilities as adults.[24] Pre-adolescent children can make certain logical inferences in familiar scenarios and when they judge the premises to be reasonable; however, they struggle with more complicated syllogisms, unfamiliar scenarios, and arguments whose premises strongly conflict with their prior beliefs.

[21] Light et al., (1989); Klaczynski et al., (2004); and Goswami, (2010),p.413
[22] Klaczynski et al., (2004). See also Ricco, (2015),p.533
[23] Klaczynski et al., (2004),p.566
[24] Moshman, (1999),p.40

II.Empirical Reasoning

Definition

Under 'empirical reasoning' I have classed together the technically separate cognitive abilities of inductive/causal reasoning and scientific reasoning/hypothesis testing.

Inductive/causal reasoning consists of three key components. (1) The ability to identify (potential) causes in multivariable contexts and understand the importance of isolating variables when making causal inferences. (2) The ability to coordinate prior expectations with new information. People who lack sufficient control over the interaction of theory and evidence in their thinking might: ignore the new evidence and base inferences on their prior theory; distort evidence; or selectively recognise only the data that fits their theory.[25] Finally, it includes (3) the ability to make justified inductive inferences.

Scientific thinking is the ability to form basic experiments to test one's hypotheses.[26] It involves the ability to solve problems across four phases: (i) the *inquiry* phase, where 'the goals of the activity are formulated' and 'the questions to be asked are identified'.[27] The various possible investigative strategies formed in the inquiry phase include, in increasing order of sophistication: just generate experimental outcomes; see what makes a difference in outcomes; investigate the effect of specific variables on outcomes. (ii) *Analysis*: one selects the evidence one thinks is relevant and analyses it.[28] (iii) *Inference* strategies involve applying mental operations to the evidence to derive conclusions from that evidence.[29] Inferential strategies range in adequacy from making unsupported

[25] Kuhn and Siegler, (2006),p.965; Kuhn, (1989); Ricco, (2015),p.556
[26] Kuhn, (2010); Inhelder and Piaget, (1958)
[27] Kuhn, (2010),p.505
[28] Ibid.,p.506
[29] Ibid.,p.506; Kuhn and Siegler, (2006),p.973

claims without processing the evidence, to skilled coordination of theory and evidence.[30] (iv) *Argument*, which I discuss in section IV, involves the ability to construct arguments for certain conclusions and to deal with counterarguments. With argumentation abilities, one can explain and justify the claims produced by the earlier phases of scientific thinking. Hypothesis testing/scientific thinking, in sum, refers to the ability to form relevant, testable hypotheses; understand logically how to test those hypotheses; run valid tests to get relevant data; and draw valid inferences from that data.

Normative Significance

Normatively, empirical reasoning is important for any rights which presuppose an ability to make judgements about the world. Most significantly, it allows individuals to apply means-ends reasoning.

Theoretically, empirical reasoning forms a part of both moral powers. For the second moral power – the capacity to have, to revise, and rationally to pursue a conception of the good – it provides the ability 'rationally to pursue' that conception of the good. This is because 'rational pursuit' involves taking the best means to your ends, and means-ends reasoning requires empirical judgements. Empirical reasoning also facilitates the formation of a conception of the good, understood as a family of ordered final ends, because it helps the individual to learn what ends are technically compatible and incompatible. Thus, it facilitates an individual's thought on how to trade-off different goods. For the first moral power, empirical reasoning is required for the means-ends reasoning needed to 'apply'

[30] Kuhn, (2010),p.507

principles of justice. Empirical reasoning, therefore, is a key component of each moral power.

On the practical level, there are three groups of rights grounded by empirical reasoning.

First, empirical reasoning is necessary for general liberty of action: if you cannot reason empirically, you cannot conduct means-ends reasoning. This leaves space for paternalistic interference since, even though you may be able to define your own interests, you cannot judge how best to pursue them. For example, suppose you cannot understand covariation evidence, and therefore want to put your hand in a fireplace despite having been burnt doing so before and despite disliking being burnt. You may legitimately be prevented from putting your hand in the fire. But for those who *do* possess a sufficient ability to reason (and possess the minimum necessary level of information), we must respect those decisions, even if we think they have made a mistaken means-ends judgement. However, empirical reasoning is an insufficient condition for full freedom of action; although it means individuals can decide and act upon the best means to their ends, without the ability to reason about the good they cannot decide which ends to pursue. Full liberty, then, depends on one's ability to reason normatively.

Second, means-ends reasoning is a prerequisite for the franchise on most accounts of voting, since most accounts require voters to understand/critique/propose practical policies. Means-ends reasoning may be unnecessary for the franchise under some theories: certain economistic theories of voting, for example, only ask voters to reveal their ultimate preferences when voting;[31] other theories ask voters to reason exclusively on the moral plane, leaving means-ends judgements to technocrats.[32] But in the real world, politics demands that voters assess practical policies and their likely effects. Since we must assess

[31] E.g. Schumpeter, (2012); Mill, (1992); Arrow, (2012)
[32] Weber, (2009a); Weber, (2009b)

policies when voting, and since assessing policies requires reasoning empirically about their effects, empirical reasoning is necessary for voting.

Finally, scientific reasoning is sufficient for freedom of conscience in empirical beliefs. I discuss further how rational faculties generate rights to free conscience in section IV; but in short, if someone has the ability to make a judgement, we must respect that judgement. This includes allowing dissent from scientific orthodoxy and religious orthodoxy, at least when it occurs on the empirical/scientific plane (so it would be wrong to stop people denying evolution). However, scientific reasoning abilities may be insufficient to protect certain philosophical beliefs (e.g. about morality) since scientific reasoning abilities do not entail a full ability to reason on a philosophical or abstract plane.

To summarise: empirical reasoning is necessary for freedom of action and the franchise; it precludes paternalistic intervention justified by reference to an individual's 'faulty' means-ends judgements; and it is sufficient for freedom of conscience in empirical matters.

Empirical Findings

Let's first examine development in scientific reasoning, and then we can examine development in inductive reasoning.

From their 'earliest years, children construct implicit theories that enable them to make sense of and organize their experiences.'[33] They can then revise these theories as new and relevant evidence is encountered.[34] However, unlike proper scientific and inductive reasoning, early theory revision 'occurs implicitly…with little indication of conscious

[33] Kuhn, (2010),p.498
[34] Kuhn and Siegler, (2006),p.972. See also Lehrer and Schauble, (2015),p.692

awareness or intent'.[35] In short, 'young children think *with* their theories, rather than about them.'[36] By age three, children start to

> 'show some awareness of their own thinking processes and distinguish thinking about an object from perceiving it.'[37]

Not until about 4 years, however, does a child underststand that mental representations, as products of the mind, do not necessarily duplicate external reality. Before this point in development, children think it is impossible to have false beliefs. Consequently, smaller children cannot evaluate, examine or attempt to falsify their beliefs, something which is necessary for scientific thought.[38] Despite their development away from this mode of thinking, the complexity of claims that 4-year-olds can evaluate is very limited. A child of this age is capable 'of little more…[than] determining whether a claim…does or does not correspond to a reality the child can directly observe.'[39] Kuhn & Pearsall (2000) investigated whether 4–6-year-olds could distinguish evidence that supports the truth of a claim from the theory that enhances plausibility of the claim. In one such test, children were shown some pictures of runners in a race. In the first picture, there were some cues suggesting a *theory* for why one of them will win, for example, one has fancy running shoes. The final picture provides *evidence* of the outcome – one runner is holding a trophy and grinning. When asked to indicate the outcome and to justify their answer, 4-year-olds show a fragile distinction between the two kinds of justification "How do you know?" and "Why is it so?" The evidence for the claim and the explanation for the claim tend to merge into a single answer. Even at 6, confusions between theory and evidence still occurred, although 6–year-olds were correct a majority of the time. A group of adults, however, made no

[35] Kuhn, (2010),p.499; Kuhn and Siegler, (2006),p.972
[36] Kuhn, (2010),p.499; Kuhn and Siegler, (2006),p.972
[37] Kuhn, (2010),p.500
[38] Ibid.,p.500
[39] Ibid.,p.501

errors. This suggests that in early chlidhood there is only limited ability to think scientifically.[40]

As we examine development from middle-childhood to adulthood, let's take each phase of scientific reasoning in turn. In the *inquiry* phase of investigation, preadolescent children tend to apply less sophisticated strategies than adults and adolescents. The most sophisticated investigation strategy is the 'falsification strategy' in which one formulates a hypothesis and attempts to disprove it. But preadolescents tend just to generate outcomes, or merely "try different stuff and see what happens", rather than having a specific future analysis in mind to shape their investigations.[41] For children in early to mid-childhood, there is generally a lack of recognition that, during the inquiry phase, there is an opportunity to access information that has a bearing on their theories. That said, 7–9-year-olds are 'successful…in using the control of variables strategy to design tests'.[42] And in fact, most adults and most adolescents fail to apply the falsification strategy.[43]

With respect to *analysis* and *inference*, people in middle-childhood (8–11) sometimes appear quite ready to interpret multiple variables as causing an outcome based on a single co-occurrence of the variable and the outcome.[44] Typically, the single-instance inferences are 'theory-laden': the empirical observation is used more as an illustration of the theory than a test of it.[45] Despite these weaknesses, there is only modest improvement between middle-childhood (8–11) and early adulthood, with 'far from ideal' performance by adults. Among 11–12-year-olds, the proportion of beliefs in a test scenario based on evidence-based inferences (rather than erroneous theory-based inferences) was about 25%, compared to roughly 50% for noncollege young adults. Following an evidence-focus probe

[40] Kuhn and Pearsall, (2000); Kuhn, (2010),p.502
[41] Kuhn, (2010),p.505
[42] Ricco, (2015),p.556
[43] Moshman, (1999),p.17; Evans, (1989). Also Kuhn et al., (1995)
[44] Kuhn, (2010)
[45] Ibid.,p.508

('do these results tell you anything about whether X has an effect?') these percentages increased to 60% and 80% respectively.[46] When interpreting some kinds of evidence, adults are just as likely to exhibit certain kinds of bias as 11–12-year-olds.[47] Kuhn et al. (1995) conclude that, regarding scientific reasoning, there is only 'some improvement in the years between middle childhood and early adulthood': individual variance is high and age related improvements are small.[48] From this we can infer that there is likely to be only a minimal difference between older adolescents and adults in scientific reasoning.

Turning now from scientific to inductive reasoning, 'a wealth of evidence exists that even young infants make causal inferences.'[49] They can, for example, recognise an association 'between one of their own actions (e.g. moving an arm) and an external event.'[50] Even in multivariable contexts (in which many potential causes co-occur with an outcome), 4-year-olds can isolate causes. Schulz and Gopnik (2004) conducted an experiment in which children observed a monkey hand-puppet sniff varying sets of three flowers: red, yellow and blue. They observed the monkey sneeze after sniffing the combinations of red & blue and yellow & blue flowers, but not after sniffing the red & yellow combination. When asked to identify the 'flower that makes the monkey sneeze,' 79% of 4-year-olds correctly chose the blue flower.[51] Thus, even young children can isolate causes in a multivariable context.[52] Like for deductive reasoning, 'as long as children are reasoning in familiar domains, they are capable of inductive reasoning'.[53]

[46] Kuhn and Siegler, (2006),p.966
[47] Ibid.,p.966
[48] Ibid.,p.966
[49] Ibid.,p.964
[50] Ibid.,p.964
[51] Schulz and Gopnik, (2004); Kuhn and Siegler, (2006),p.965. See also Ricco, (2015),pp.552-555
[52] See also Ricco, (2015),p.550
[53] Goswami, (2010),p.415

Now turning to adolescence, we investigate the three components of inductive/causal reasoning separately. (i) *Inductive inference*: we have already shown, as part of scientific thinking, that adolescents and adults have roughly the same ability to make inductive inferences. (ii) Regarding the ability to *identify* and *isolate variables* in experiments, and understand why doing so is important, we have already shown above that adolescents fully possess this ability. For the avoidance of doubt:

> 'adolescents have the ability to form hypotheses in advance and to perform experiments that isolate variables'.[54]

(iii) *Coordinating theory and evidence*: individuals are considered incapable of adequate coordination if they are more likely to interpret evidence as valid when it is consistent with their previously held theories, and/or if they interpret identical evidence differently as a function of its consistency with their prior theory. In fact, people of all ages ignore and distort evidence that is discrepant with their prior beliefs.[55] And by adolescence, the rates of bias are identical to those of adults.[56] Indeed, as aggregate groups, adults have abilities equivalent, not only to adolescents, but also to people towards the end of middle childhood.[57]

To summarise, there is no significant difference between adults and adolescents in their cognitive capabilities for causal/inductive reasoning or scientific reasoning. This means we must respect adolescents' empirical beliefs and refrain from interfering with their actions when done because of differing empirical beliefs. Children in middle childhood, when given evidence-based probes, can reason almost as well as young adults, suggesting that, for some decisions, they could be helped to reason competently for themselves. Younger children can reason inductively in familiar domains only, and generally lack the ability to

[54] Danner, (1989).Also Moshman, (1999),fn38.
[55] Lehrer and Schauble, (2015),p.694
[56] Kuhn and Siegler, (2006),p.971. See also Ricco, (2015),p.536
[57] Kuhn and Siegler, (2006),p.966

reason scientifically. However, there is not 'an orderly age-related progression in the development of scientific thinking skills'; on the contrary, 'the norm is wide inter-individual variability'.[58] Indeed, the range and variability of scientific thinking skills across adults is striking, with adults often reasoning at a level more typical of middle-childhood, and with high-performing children doing better than some adults.[59] As such, the discussion here indicates merely the broad outline of development in empirical reasoning. But these results do indicate that, since many adults routinely fall below the levels of empirical reasoning ability of many children, and since we nonetheless respect adults' ability to reason empirically, many children must reach the threshold level for respect. When large numbers of adults reason at the level of middle-childhood, we cannot simply claim that those adults are all below the threshold for moral agency. Thus, the threshold level of capacity to ground moral agency-rights is low. Indeed, it must be such that, regarding empirical reasoning, adolescents generally meet the threshold of full respect, with many in middle-childhood also meeting that threshold.

III.Decision Making

Definition

Decision-making rationality has two main components: the ability to make sound preference-judgements and the ability to make sound decision-judgements. *Preference-judgements* involve the abilities to (i) render one's preferences consistent;[60] and, (ii) select

[58] Kuhn, (2010),p.512. Also Lehrer and Schauble, (2015),p.695
[59] Kuhn et al., (1995); Lehrer and Schauble, (2015),p.695
[60] See Von Neumann and Morgenstern, (2004)

appropriate choice strategies when applying preferences to concrete choices (e.g. deciding how to weight different preferences).[61] *Decision judgements* consist in making decisions in accordance with sound decision-making principles and avoiding decision fallacies, such as hindsight bias;[62] contingency bias;[63] outcome bias;[64] the gamblers' fallacy; and the sunk-cost fallacy.

Normative Significance

Let's examine the theoretical importance of decision-making rationality for the two moral powers, and then examine its practical importance.

Theoretically, decision-judgements and preference-judgements are each important for the two moral powers. Preference-judgements are important for possessing a 'conception of the good'. A conception of the good specifies 'an ordered family of final ends and aims'. Since our preferences constitute some of our final ends and aims, and since preference-judgements are necessary to 'order' those final ends, the ability to make preference-judgements is necessary for the second moral power. However, the ability to make preference judgements is not sufficient for the individual to be able to reason about their preferences in a normatively thick way. Therefore, decision-making rationality does not entail a full-blown ability to hold, form and revise a conception of the good, although it is necessary for those abilities.

Second, decision-judgements are important for the ability 'rationally to pursue' a conception of the good. 'Rational pursuit' of a goal involves both choosing the best means

[61] Bereby-Meyer et al., (2004),pp.127-146
[62] Kahneman and Tversky, (1996)
[63] Thompson, (1999),pp.187-190
[64] Gino et al., (2009)

to your ends and actually applying that reasoning in a decision. After all, what's the use of means-ends reasoning if you cannot apply it to any concrete decision? Decision-making fallacies confound this application and leads us to make irrational and suboptimal decisions. Decision-making rationality enables us 'rationally to pursue' our conceptions of the good by helping us avoid those decision-making fallacies when applying means-ends judgements to decisions. By the same reasoning, decision-making rationality is necessary to apply moral principles in our decisions and is therefore necessary for the first moral power.

Practically, the ability to make decision-judgements, and hence act in accordance with your own judgements while avoiding decision-making fallacies, immunises you against paternalistic intervention aiming to make you act better in accordance with reasons that you already have. For those who *do* fall foul of such decision-making errors, it remains an open question whether this provides grounds for paternalistic intervention: see the on-going debate within nudge-theory about the legitimacy of 'libertarian paternalism'.[65] But if one *does* possess the ability to avoid decision-making fallacies, then this forecloses the nudge-theorist's grounds for paternalistic intervention.

Preference-judgements are also important for some economic decisions and for voting: someone who cannot render their preferences rational cannot have their preferences taken into account. When someone completely lacks the ability to render their preferences rational – even when their irrationality is pointed out to them – there isn't even a *prima facie* reason to take their declared preferences into account. It is not clear what such a person is really expressing when declaring inconsistent/irrational 'preferences'. It's unclear whether such a person really has any preferences; and, even if they do, they seem unable to express or represent those underlying preferences. Decision-making rationality is

[65] Thaler and Sunstein, (2009); Sunstein, (2015); Waldron, (2014)

therefore important for any right which presupposes that someone knows, and can express, their preferences.

Therefore, decision-making ability is important because: (i) it forecloses certain paternalistic interventions; (ii) it is a prerequisite for rights that require having and expressing at least minimally coherent preferences; (iii) preference-judgements are important for holding a conception of the good; (iv) decision-making judgements are important for the moral powers, since such judgements enable us to apply our principles and our conception of the good in a rational way.

Empirical Findings

When investigating preference judgements, researchers have mainly examined the ability to coordinate different preferences when making a decision. Capon and Kuhn (1980) compared adults to four age levels (kindergarten, fourth grade, eighth grade, and college). Subjects rated a product along different dimensions and said how important those different dimensions were. Subjects of all ages were likely to possess and express preferences along each individual dimension. The researchers then asked them to rank the products. It was not until adolescence that subjects could integrate their preferences from two or more dimensions; younger children tended to make product judgments on the basis of a single, constant dimension, ignoring other dimensions over which they had expressed preferences. This shows that, although preadolescent children can possess preferences over multiple dimensions, they struggle to coordinate them and integrate them in one overall judgment. Similarly, Bereby-Meyer et al. (2004) investigated the choice strategies participants employed when applying their preferences to a specific decision to choose a product. 4–6-

year-olds base their choices mainly on the perceptual features of a product. 8–9-year-olds could form more complex preferences. But when applying them to choices, they tended to use a lexicographic strategy, that is, they only take the single most important attribute into consideration in their ranking, regardless of how many dimensions they express preferences over. 8–13-year-olds could choose correctly between two alternatives (each with three attributes) by using the lexicographic and equal-weighting strategies flexibly. However, 'in complex situations such as those with four alternatives, most children apply the lexicographic strategy regardless' of the number of dimensions over which they express preferences and regardless of how strong those expressed preferences are.[66] That said,

> 'even 8-year-olds, when presented with a low cognitive load…managed to apply the lexicographic and equal-weighing strategies'.[67]

12–13-year-olds can make preference judgements as well as adults, and in simpler decisions so can children aged 8+. For more complex decisions, although such children can express a set of complex preferences, they often cannot integrate those preferences when applying them to a decision. At the moment for some complex decisions, we paternalistically make such decisions on behalf of such children. But these results suggest that, instead, we could seek and apply the child's preferences for them.

Regarding decision-making abilities, there is unfortunately a lack of research evidence for preadolescent children. To date, research mainly involves putting children in decision scenarios in which adults have already been found, in previous research, to violate sound decision-making principles. The unsurprising result has therefore been that children and adults both fail to follow sound decision-making principles in such scenarios.[68] It is hard to tell, therefore, how much worse preadolescent children really are at avoiding decision-

[66] Bereby-Meyer et al., (2004),p.142
[67] Ibid.,p.142
[68] Kuhn and Siegler, (2006),p.975

making fallacies. Comparisons are easier with adolescents, where there are more data.[69] When making decisions,

> 'adolescents do not differ from adults in their competence, whether determined by their understanding of alternatives, the rationality of their reasoning, or the reasonableness of their choices.'[70]

In studies testing decision-making fallacies, 'older teens did not perform substantially worse, if at all inferior, to adults.'[71] And in general, the picture is of 'modest improvement' through the teen years, with adults only reaching a 'very modest' level of decision-making rationality, with the average adult at least as likely (and often much more likely) to make incorrect judgements as correct ones in the test scenarios.[72] Therefore, since 12–16-year-olds are about as likely to avoid decision-making errors as adults, we cannot treat adolescents differently on the basis of their decision-making rationality.

IV.Argumentation

Definition

Skills of argumentation (which form the last phase of 'scientific reasoning' discussed above) include 'generating, evaluating, and engaging collaboratively in reasoned argument'.[73] The *generation* of arguments involves (i) offering valid supporting arguments for one's opinions; and (ii) envisioning counterarguments to those opinions. The *evaluation* of arguments involves assessing the strength or soundness of arguments and counterarguments, and,

[69] See Klaczynski, (2001a) and Klaczynski, (2001b)
[70] Melton, (1989),p.282. See also Koocher et al., (1983)
[71] Kuhn and Siegler, (2006),p.977
[72] Ibid.,p.977
[73] Ibid.,p. 978. For discussion of different frameworks, see Lehrer and Schauble, (2015),pp.700-704

importantly, being able to do this regardless of whether you independently disagree with the conclusion.

Normative Significance

There are three main normative implications of being capable of engaging in argumentation.

First, the ability to justify one's opinions entails an ability to have and articulate justified beliefs. This grounds rights to speech and thought. It does this whether we take the fallibilist or respect-based justification for those rights. For the 'fallibilist' so long as individuals have a sufficiently good ability to reason, there is some significant probability that their opinion is correct. Thus, we must allow those individuals to hold and discuss their views because, through rational discussion and argument, we might uncover the truth.[74] The respect-based approach, by contrast, doesn't rely on shrugging your shoulders in the face of disagreement and saying to your opponent, 'well, you *might* be right'. Rather, it is premised on a respect for their equal ability to reason; because we respect their ability to form and understand arguments, we must respect them in holding the conclusions they have come to. This is not based on a respect for the conclusions themselves as potentially true, but rather is based on a respect for the person *qua* rational thinker who holds those beliefs. Either way, individuals with this capacity possess rights to free expression and conscience.

Second, skills of argumentation imply an ability to engage in political discourse. For deliberative democrats, this ability is a prerequisite for membership of the *polis*, for the right

[74] Mill, (1977),pp.228-259. Also Popper, (2002)

to vote, and the right to engage in political institutions. For example, to participate in Habermas's ideal speech situation, one must be able to provide arguments in favour of one's position, be open to opposition and be able to assess those opposing arguments.[75] Therefore, on deliberative accounts, argumentation grounds the right to political participation.

Finally, argumentative ability is important for individuals to make decisions in scenarios where they rely on expert advice. When we cannot make means-ends judgements ourselves, we must rely on the judgements of others. But to understand those judgements fully, and to weigh up the reasons given for and against various options, we must have the ability to evaluate those expert judgements and opposing arguments. Such abilities facilitate the informed consent required to preserve autonomy. The argument for the normative importance of argumentative abilities in this sphere runs as follows:

(i) To be fully autonomous, we must understand (the reasons for and against) the decisions we make (i.e. our decisions must be based on informed consent).

(ii) Many decisions require specialised knowledge to understand the options, and this knowledge is (ordinarily) only accessible via expert advice.

(iii) For that advice to help us understand certain options, we must be able to understand and assess the reasons for/against those options (i.e. have argumentative capabilities).

Therefore:

(iv) To be fully autonomous when making specialised decisions, individuals require argumentative capabilities.

[75] Habermas, (1990). Also Cohen, (1989)

Premise (i) is true since, to make an autonomous decision, 'one's choice must be real; [thus] one must have at least a certain minimum education and information'.[76] If one lacks key information, then this acts as a hindrance to meaningful choice.[77] We do, for example, take (un-wilful, non-negligent) ignorance as a defence to many crimes;[78] and doctors are required to provide patients with information for the patient to make a decision.[79] Premise (ii) is empirically true both of the decisions we make in the political sphere (which depend on policy expertise) and of many personal decisions, such as medical or legal decisions. I also take (iii) to be true. When giving advice, experts usually provide us with certain options (even if one option is 'do nothing') and give reasons for and against each option; thus, giving advice involves providing reasons for options. Argumentative ability includes the ability to follow and critique those reasons. Therefore, to understand the advice of experts, we need argumentative abilities. From (i)-(iii) it follows that, to be fully autonomous when making specialised decisions, individuals must be able to understand, follow and evaluate the advice (arguments) of others, and hence require some level of argumentation ability.

If an individual lacks argumentative capabilities, and therefore cannot comprehend or assess the advice they are being given, then we would doubt their ability to make an informed decision. Indeed, that could provide grounds for paternalistic interference; for example, we might let doctors/parents make medical decisions on behalf of patients who cannot understand (the reasons for) the options before them. This *doesn't* mean that doctors may disregard the individual's preferences and values; if a patient is a Jehovah's Witness, the doctor should take into account their opposition to blood transfusions. But it *does* mean that the experts could have license to make decisions on behalf of that individual

[76] Griffin, (2010),p.33
[77] Beauchamp and Childress, (2013),pp.120-121
[78] E.g. *R v G & R* [2003] 3 WLR House of Lords
[79] Herring, (2014),pp.165-172

to achieve that individual's goals. Having argumentative capabilities is therefore key to the right to make specialised decisions.

Therefore, argumentation grounds freedom of expression and the right to political participation; and it is important for freedom of action, especially when expert advice is required.

Empirical Findings

Even young children show some competence in producing arguments in support of a claim and in understanding the structure of an argument.[80] Although the complexity of interpersonal discourse increases with age, by 3-years-old children have already begun to display socially adaptive, conversational behaviour.[81] When it comes to conflicts over requests, children at this age do more than simply assert desires and demands. To test this, Eisenberg and Garvey (1981) studied children's behaviour in 'adversative scenarios', where one child demands something of another child who then could respond to that opposition in a number of ways (e.g. ignoring it, becoming violent, etc.). In 33% of cases, the child gave reasons to convince and in 12% of cases would either compromise or make a counter-proposal or a counter-offer.[82] Thus, rebuttal and argumentative responsiveness can be identified in the discourse of young children. However, this inchoate form of argumentative discourse only applies to simple conflict scenarios and straightforward empirical disputes where the participants accept the dispute is resolvable by resort to

[80] Kuhn and Udell, (2003),p.1246
[81] Eisenberg and Garvey, (1981),p.149
[82] Ibid.,p.163

empirical verification ('my tower is taller', 'no mine is'). By contrast, arguments about complex social issues, such as capital punishment, involve opposing claims which can only be evaluated in a framework of argument and evidence, something which is beyond young children.[83]

Regarding middle childhood, Pontecorvo and Girardet (1993) found that the large majority (81%) of utterances by small groups of 9-year-olds asked to reach agreement about a historical claim were devoted to providing their own claims (42%) and justifying them (39%). Thus, 9-year-olds can understand the function and basic requirements of argument and justification. However, 'opposition moves' only made up 11% of their utterances: although they can justify their own positions, they are less likely to see the need to rebut opposing arguments.[84]

For 9–10-year-olds, arguments are usually expressed in vague terms, but there is often a deep underlying logical structure to their arguments. Anderson et al. (1997) found it is possible to give a coherent logical account of children's arguments.[85] As reconstructed, *modus ponens* was at the core of 35 of the 40 arguments subjected to detailed analysis in that study, while *modus tollens* 'was rare' (embodied in just 4 of the 40 arguments).[86] That said, 9–10-year-olds seldom back their arguments by appealing to general principles, except when the foundation for the argument is disputed or seems confusing. Consequently, the intended scope of the (implicit) warrants in their arguments were left vague and argumentatively problematic. Although the utterances of 9-year-olds may seem vague and confusing, with only light re-rendering they can be logically valid, if occasionally lacking nuance in the general principles used. Anderson et al. conclude that

[83] Kuhn and Udell, (2003),p.1257
[84] Pontecorvo and Girardet, (1993),pp.374-375
[85] Anderson et al., (1997),p.136
[86] Ibid.,p.153

> 'there are not compelling grounds for concluding that the arguments are "in any way logically *less correct* or less exact or *more confused*" than arguments expressed in a formal notation.'[87]

Clark and Delia (1976) investigated the development of persuasive skills by asking respondents in a role-play scenario to try to persuade the interviewer to do something. For example, in one scenario the respondent was asked to persuade their 'mother' (played by the interviewer) to let them have a late-night birthday party, in another to persuade a 'neighbour' to look after a lost puppy. The different strategies for phrasing the request and for supporting that request were coded and then scored. Table 1 below indicates the percentage of children at each grade using each strategy. Generally, persuasive skills involve the ability to construct coherent arguments, and consider and evaluate counterarguments.

PERCENTAGE OF CHILDREN USING EACH STRATEGY

STRATEGY	GRADE LEVEL		
	2d and 3d $N = 12$	4th, 5th, and 6th $N = 28$	7th, 8th, and 9th $N = 18$
Form of request:			
0.	.00	.00	.00
1. Statement of desire and unelaborated requests	1.00	.96	.94
2. Request phrased to forestall counterarguments	.33	.71	.72
3. Request phrased to acknowledge desires of persuadee	.16	.43	.50
Form of support:			
0.	.42	.04	.00
1. Demonstration of need for request	.58	1.00	.83
2. Dealing with counterarguments	.25	.54	.94
3. Supplying advantage to persuadee	.25	.32	.61

Table 1
(Clark and Delia, 1976)

Level 0 indicates failure to make a specific statement of desire or request and failure to offer any support. This level only characterises very young children (not shown in this table). Level 1 encompasses: simple statements of desire or unelaborated requests; and support which focuses on the need for the request. At this level, the child is still so embedded in their own view that the focus of their persuasive efforts is still assertions of

[87] Ibid.,p.166.

their own need. Level 2 is defined by strategies to deal with counterarguments, either in the statement of the request or the form of support. They start to consider what would consistute reasonable answers to objections from the persuadees viewpoint.[88] This is a key point in development at which an individual can adequately assess and comprehend arguments given by another, and thus can start to evaluate advice given by others. Some 7–9-year-olds (2nd–3rd graders) have reached this level, as have a majority of 9–12 year-olds (4th–6th graders). At level 3, the individual focuses on advantage to the persuadee; this approach indicates a recognition of the interests and values of the other, and the need to adapt to them. As children age, they use more sophisticated persuasive strategies, and use a wider range of strategies. That said, there are quite marked individual differences in persuasive skills; age is thus not a particulalry effective proxy at measuring development in persuasive and perspective-taking abilities.[89]

Let's turn now to examine adolescents in comparison to adults. Argumentation, as explained above, is composed of (i) argument generation, which includes generating supporting arguments and considering counter-arguments; and (ii) argument evaluation. I examine each in turn.

(1) Generation of supporting arguments. There is some slight difference between younger teenagers and adults. '[O]n average about one-third of a teen sample' could offer 'a valid supporting argument for their claim[s]…a percentage that increased only very modestly to near one half among adults'.[90] Therefore, there is some small difference between adults and young adolescents in generating supporting arguments. However, this

[88] Clark and Delia, (1976),p.1010
[89] Ibid.,p.1013
[90] Kuhn and Siegler, (2006),p.979

difference in ability is eliminated by later adolescence, and, in any case, chronological age between 12 and 60 is not a strong predictor of this skill.[91]

(2) Consideration of counterarguments. In early studies on the topic, it was found that young adolescents concentrate their efforts on exposition of their own claims to the neglect of attending to their opponent's claims. That said, they can 'attend to the other's argument…when explicitly instructed to do so.'[92] Thus, adolescents can consider counterarguments, even if, as matter of strategic judgement, they often do not. And indeed, Kuhn and Siegler (2006) find that young teens (12–14) and adults are equally likely to address both side of the argument in an argumentive scenario.[93] Taking (1) and (2) together, overall:

> 'the available research indicates only slight improvement during the adolescent years [from age 12] in the ability to produce sound arguments.'[94]

(3) Argument evaluation. For this, psychologists measure the bias towards those arguments whose conclusions you already agree with by measuring your tendency to miss deliberately planted mistakes in those arguments. Both adolescents and adults, 'exhibited a positive bias towards studies that portrayed their group favourably' and 'the extent of this bias did not diminish with age'. Indeed, 'on one indicator it in fact increased' with age![95] Thus, adolescents do not lag behind adults in their ability to evaluate arguments.[96]

There is no difference in the argumentation abilities of adults and older adolescents (14–16), and young adolescents (11–13) lag slightly behind adults only in argumentative strategy. It also seems that such skills can be improved through education and training.[97]

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[91] Ibid.,p.979
[92] Kuhn et al., (2008),p.1311. Also Kuhn and Udell, (2007)
[93] Kuhn and Siegler, (2006),p.979. See also Kuhn et al., (1997); Felton and Kuhn, (2001)
[94] Kuhn and Siegler, (2006),p.979
[95] Ibid.,p.980
[96] See also Kuhn, (2001),p.5
[97] Kuhn, (2010),p.512; Kuhn and Siegler, (2006),pp.981-982; Goldstein et al., (2010)

Therefore, we cannot appeal to argumentative abilities as a basis for granting different rights to older adolescents (14–16) and adults. From around 9-years-old, children can understand and assess the advice of (friendly) others. Below that age, although children employ argumentative strategies that are better than mere assertion and counter-assertion, there is still a lack of sophisticated argument or counterargument, which is significant for their ability to take advice.

V.The Normative Limitations of Cognitive Ability

The abilities to argue, to reason logically and empirically, and to make rational decisions, do not on their own generate a full set of agency rights. This is because cognitive operational abilities do not guarantee an ability to reason normatively about the good. True, general cognitive abilities are necessary for such reasoning – how could we reason about ultimate ends without grasping the rules of inference and deduction? However, nothing said so far shows that adolescents can make value judgements and act on the basis of moral reasons; therefore, we have not shown that adolescents and children can make second-order judgements to evaluate their first-order motivations and desires.

Why does this matter? Theoretically, it means I have not yet demonstrated that adolescents have a sense of justice or a complete capacity for a conception of the good. The first moral power obviously requires moral reasoning abilities because it involves the capacity to understand and apply principles of morality and justice. The second moral power includes the capacity to have, revise and rationally pursue a conception of the good. 'Having' a conception of the good, and possessing a full ability to construct and revise that conception, depends on the ability to reason morally and make evaluative judgements. And without an ability to form those higher-order preferences and value judgements, there is no

question of hierarchically controlling one's motivations in light of those values. Theoretically, then, the ability to reason normatively also matters.

Practically, the ability to make normative judgements is necessary for certain rights, such as the right to vote, and certain self-regarding acts which involve deciding one's own best interests and acting in accordance with one's normative philosophical beliefs. For example: without demonstrating an ability to reason about ends, there might yet be scope to justify paternalistic treatment towards adolescents when we think they misunderstand their own interests. If a parent and an adolescent agree about a certain interest that the adolescent has (having an enjoyable job) but they disagree about how to achieve that goal (studying for A levels or going to a music college), then the parent normally has no grounds for paternalistic intervention. This is because they have equal abilities to reason about means and to make decisions in accordance with their preferences; the parent has no normatively significant greater ability in this area from which to justify their paternalistic actions.[98] As discussed in chapter 3, the parent could legitimately override the decisions of the adolescent is if the adolescent lacks information up to the minimum threshold (as in the dangerous bridge scenario).[99] But so long as information can be provided to the adolescent, the adolescent is just as capable of understanding that information as the adult. Adults can, and should, provide information to the adolescent, and they can remonstrate with them. But once the adolescent possesses the basic information, any paternalistic interference would be an illegitimate violation of the adolescent's right, in virtue of their equal cognitive abilities, to decide how to pursue their own interests. However, if the adolescent and their parent disagree about what a good life consists in (money-making or musical excellence), the fact the adolescent has the same general cognitive abilities as their parent cannot protect them from paternalistic interference. Unless we can show that the

[98] I discuss the ability to make and implement long-term plans in chapter 7.
[99] As discussed in chapter 3, this leaves open the question of how to determine whether an individual possesses the requisite knowledge.

adolescent can reason normatively and make evaluative judgements, then the parent/the state might be allowed to prevent adolescents from making decisions when the adolescent is mistaken about their own interests. We shall examine this ability to make normative and moral judgements in the next chapter.

VI.Conclusion

From the foregoing evidence, it seems there is little discernible difference in cognitive ability between adolescents and adults. Examining their cognitive abilities as groups, it can be difficult to distinguish adolescents from adults.[100] Indeed,

> 'cognitive differences among adolescents and adults are not related strongly to age… [most adults] never proceed beyond the level of an average adolescent – and many adolescents function more rationally than an average adult'.[101]

It is hard to point to differences in cognitive reasoning between the two groups, and hence hard for such differences to justify differential treatment, or differential rights. Generally, in this chapter we have shown that:

(1) Older adolescents (~14–16-year-olds) and adults have no difference in (non-moral) cognitive abilities. Therefore, no differences in treatment can be justified with reference to (non-moral) cognitive abilities;

(2) Younger adolescents (~11–13-year-olds) and adults have almost no difference in cognitive abilities, but those small differences in specific abilities might justify some differential treatment;

[100] Moshman, (1999),p.6
[101] Ibid.,p.40

(3) Children in middle childhood (~7–10-year-olds) can generally think in a logical and reasoned way, and up to a high level when the problems are familiar or if they are prompted and encouraged to think problems through. However, they struggle with complex or unfamiliar problems;

(4) Younger children can, from 3-years-old, reason in a recognisably rational way, but only for simple problems and familiar topics.

This can only be taken as a crude summary of our results, of course, since it has divided children imperfectly into discrete age categories, it gives the impression that abilities are strongly linked to age, and it has collapsed together various cognitive abilities. It should therefore not be taken to have a meaning independent from the foregoing discussion in this chapter.

Next, we must turn to moral and normative reasoning, which will show whether individuals can evaluate their preferences using higher order goals and desires, and whether they can recognise and follow moral rules. Having done that, we will have completed our examination of the two moral powers. Then we can turn to hierarchical control, which covers the abilities to control one's reasoning abilities and to render motivationally effective the second-order judgements generated by the two moral powers.

Chapter 6

Moral Reasoning

Introduction

This chapter continues the task of identifying the psychological capacities relevant to autonomy and of discussing their individual normative relevance. This enables framework to designate which rights children have at different stages of development. Section I outlines Lawrence Kohlberg's theory of moral development, which is the foundational theory of cognitive moral reasoning. Kohlberg's theory focuses primarily on reasoning about justice and law. Section II examines prosocial moral reasoning, which is reasoning about moral dilemmas in which one person's needs or desires conflicts with those of others, but where 'authorities' dictates and formal obligations [are] minimal'.[1] Thus section II investigates moral reasoning in contexts other than those about justice and law. Section III examines complex moral reasoning, and development in the ability to apply prosocial modes of moral reasoning in complex scenarios with multiple facets which are morally and socially salient. While section II examines increased sophistication in modes of moral reasoning, section III examines the ability to apply those modes to increasingly complex scenarios. Section IV investigates development in domain reasoning, that is, development in the ability to recognise whether a decision scenario requires moral reasoning, social reasoning or prudential/personal reasoning. This is a second-order ability to recognise when moral reasoning is appropriate, rather than a first-order ability to reason with moral concepts. Section V discusses the normative significance of moral reasoning, showing what

[1] Eisenberg et al., (1995),p.1179

kinds of rights are generated by the ability to reason normatively. Section V also explains why the ability to reason morally is relevant to the capacity to hold and revise a conception of the good. After all, moral reasoning seems to be about moral dilemmas rather than one's interests and goals. I will explain why the ability to reason morally implies general normative reasoning abilities to reason about one's goals and interests. Section VI ties together all the psychology discussions in this chapter and the previous chapter, and relates them to the two moral powers, showing that older adolescents have the same moral standing as adults. Section VII provides a 'balance of harms' analysis to discuss how to allocate rights to groups containing a mixture of capable and incapable members.

I. Lawrence Kohlberg's Theory of Moral Development

Lawrence Kohlberg's model of development in moral reasoning traces how individuals justify behaviour and moral principles. Kohlberg presents test subjects with certain moral dilemmas and asks them what ought to be done in those scenarios. He does not judge the correctness of someone's stated moral principles, but rather the structure of their response. One of the most famous dilemmas he posed to test subjects was the Heinz dilemma: Heinz's wife is near death, but there is one drug which will save her. The pharmacist who owns the drug is charging many times the production costs. Heinz raises all the money he can, but still cannot afford the drug. The pharmacist refuses to lower the price. In desperation, Heinz breaks in and steals the drug. The question is: should Heinz have stolen the drug? Why/why not? This and other dilemmas posed by Kohlberg contain decisions about law and authority, and are fundamentally about justice. By analysing people's answers at different ages, and the types of reason provided for those answers, Kohlberg identifies three levels of moral development, each of which breaks down into two stages. There are

therefore six stages of moral development.[2] I outline each level, and their component stages, in turn.

The first level is the *Pre-Conventional Level* of thinking. It is especially common in young children, although adults can also exhibit this level of reasoning.[3] At this level, individuals judge the morality of an action egocentrically in terms of direct consequences to them. An individual with pre-conventional morality has not yet adopted or internalised social conventions about right and wrong; instead, moral rules and norms are seen as external to the individual and imposed from the outside by authority figures.[4] This level splits into two stages.

Stage 1 is Obedience and Punishment Driven. Reasoning about right and wrong at this stage is couched entirely in terms of punishment, i.e., an action is seen as wrong simply because the perpetrator will be punished. The worse the punishment for an act, the worse the individual understands the act to be. The individual cannot understand that others may have different points of view from them and they take the moral rules given by authority figures to be absolute.

Stage 2 is Self-Interest Driven. In this stage, the individual can recognise that there is not just one right view handed down by authority, but instead identifies morality with self-interest. They can now understand that other people have different needs and different views. This understanding allows the individual to take some interest in the needs and desires of others, but only insofar as it advances the individual's own goals. Any concern for others, or for reciprocity or fairness, only comes in the form 'you scratch my back, I'll scratch yours'.[5]

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[2] Keenan and Evans, (2009),p.302
[3] Colby and Kohlberg, (1987)
[4] Lapsley, (1996),p.68
[5] Kohlberg and Gilligan, (1971),p.1067

The second level is the *Conventional Level*. This level is typical of adolescents and adults.[6] At this level, individuals have internalised society's views of morality and the expectations of authority, meaning they follow moral rules even when there is no consequences to them of obedience or disobedience.[7] At this level, the individual judges the morality of actions by comparing them to social norms. Social norms are rarely questioned by the individual. Individuals understand that others have different viewpoints from themselves, and take other people's welfare directly into account in moral reasoning. This level splits into two stages.

Stage 3 is Interpersonal and Conformity Driven, also known as 'good-boy/good-girl' morality. Individuals do good out of a desire for approval rather than a fear of power or a desire to have one's interests met. Relationships, and performing one's role well (e.g. 'being a good husband'), are seen as having intrinsic value at this stage. Individuals might start talking about respect, loyalty, gratitude and the golden rule.

Stage 4 is Authority and Social Order Driven. Individuals at this stage think at the societal level; the kinds of reasons given to justify certain actions include needing to obey the law and to obey social conventions and fixed rules. Those rules are seen as significant for their importance in maintaining a functioning society. There is concern not only with conforming to the social order, but also in maintaining, supporting, and justifying this order.[8]

The third and final level is the *Post-Conventional Level.* Post-conventional reasoning is:

> 'characterised by a major thrust toward autonomous moral principles which have validity and application apart from the authority of the groups or persons who hold them.'[9]

[6] Colby and Kohlberg, (1987)
[7] Lapsley, (1996),pp.68-71
[8] Kohlberg and Gilligan, (1971),p.1066.Also,Lapsley, (1996),p.73
[9] Kohlberg and Gilligan, (1971),pp.1066-7

Stage 5 is Social Contract Driven.[10] Individuals believe the values and opinions of others must be respected if society is to be preserved. Laws are seen as the outcome of negotiations within society, or as a social contract, and no longer as rigid requirements; as such, laws may and should be changed if they violate rights or harm the welfare of individuals (unlike in stage 4, where laws are frozen). Thinking in this stage often has legalistic or utilitarian overtones. Right action is defined in terms of general rights and in terms of standards agreed by society.[11]

Stage 6 is Universal Ethical Principles Driven. Moral reasoning in this stage is based on abstract reasoning using universal ethical principles. Laws are valid only insofar as they are grounded in justice. Unlike in the previous stages, an individual acts because it is right according to universally valid and individually examined ethical principles, not because it (in each stage respectively) avoids punishment/is in their best interests/is socially expected/is legal/is previously socially agreed upon. Thinking in this stage appeals to logical comprehensiveness, universality and consistency, and the principles invoked are usually abstract (like the categorical imperative) rather than concrete (like the Ten Commandments).[12] Right action is identified with universally valid, abstract principles.[13]

This is the theory behind cognitive moral development.[14] Next, I present data on the existence and development of those stages.

[10] There is also a stage between 4 and 5, but I ignore this complication since it doesn't affect our conclusions. See ibid., and Lapsley, (1996),pp.65-7
[11] Kohlberg and Gilligan, (1971),p.1067
[12] Ibid.,p.1068
[13] There is a philosophical question about whether Stage 6 is truly higher than Stage 5, and whether level 3 is higher than level 2. Nothing turns on this question, however, given few people reach Level 3.
[14] Lapsley, (1996),p.81. Also Rest, (1986),p.464

In the main longitudinal study examining Kohlbergian moral development, there is a clear relationship between age and development. The mean moral maturity score increases monotonically from stage 2 at age 10 to stage 4 at age 36. As can be seen in fig.2 the frequency of usage of reasoning at stages 1 and 2 decreases from 10 onwards. Use of stage 3 reasoning increases up to age 16–18, decreasing thereafter, and use of stage 4 reasoning increases monotonically from 10 until 36, at which point 62% of individuals use stage 4 reasoning.[15]

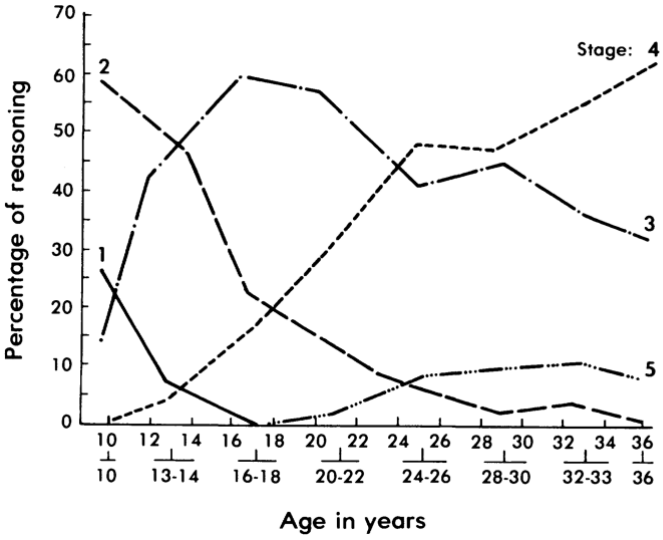


Figure 2: Mean percentage of moral reasoning at each stage for each age group
(Source: Colby et al. 1983)

Few people truly reach the third, post-conventional, level of moral reasoning. In fact, stage 6 is basically unknown in the data, and is really just a hypothetical end-point of development.[16] Even the fifth stage of moral reasoning is rare in extant longitudinal studies.[17] Snarey, who examined 45 studies across 27 countries, found that stages 1–4 are in evidence 'virtually universally' – regardless of education or culture – but that stage 5 was

[15] Colby et al., (1983),p.46
[16] Lapsley, (1996),p.64
[17] Lapsley, (2006),p.49; Lapsley, (1996),p.78

'extremely rare' in all samples.[18] In fact, stage 5 seems only 'to describe an elite set of individuals who have had a formal training in ethics'.[19] Since adults almost universally operate within Level 2 moral reasoning (and, within that, many of them at Stage 3), the question regarding adolescents is whether they too have reached the conventional level of moral reasoning. And as can be seen from fig.2 the answer to that is yes.

The transition from preconventional to conventional morality generally occurs during the late elementary years, and has occurred for most people, if not nearly everyone, by 13.[20] Indeed, conventional reasoning is typical of both adults and adolescents.[21] The point is put clearly by Melton, who, in his review, concludes that:

> 'the evidence is overwhelming that in fact most adolescents do have the capability to act as citizens of the moral community.'[22]

Children below the age of 11–12, on Kohlberg's schema, are mostly (but not exclusively) confined to the Pre-conventional Level of moral reasoning. Some adults reason exclusively at this level, but they are a minority. However, as we will see in the next two sections, by focusing on complex moral scenarios, Kohlberg underestimated the abilities of preadolescent children.

II.Prosocial Reasoning

Prosocial moral reasoning is:

> 'reasoning about moral dilemmas in which one person's needs or desires conflict with those of others in a context in which the role of prohibitions, authorities' dictates, and formal obligations is minimal.'[23]

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[18] Snarey, (1985), quoted in Lapsley, (1996),p.81
[19] Lapsley, (1996),p.65
[20] Kohlberg and Gilligan, (1971)
[21] There are however some adults who never move beyond preconventional reasoning. Moshman, (1999),pp.48-49; Power et al., (1989),p.29-30; Kohlberg and Gilligan, (1971)
[22] Melton, (1989),p.282
[23] Eisenberg et al., (1995),p.1179

In this section, we investigate developments in different kinds of prosocial moral reasoning. In the next section we investigate the ability to apply that reasoning to moral scenarios of differing complexity. We need to examine prosocial moral reasoning in addition to Kohlberg's schema because Kohlberg's schema underestimates the moral reasoning ability of younger children in two key ways. First, because it examines scenarios in which laws, authority and definite rules apply, it masks the ability of children to reason morally when they are not directed by such rules.[24] And second, the moral dilemmas Kohlberg used in his interviews were particularly complex, meaning that middle and younger children struggled with them.[25] Kohlberg thought this meant children below the age of 10 were incapable of moral reasoning. In fact, they can reason morally; they just struggle with high levels of complexity. For reference, the different types of prosocial moral reasoning are listed in table 2 below.

Category of Reasoning	**Orientation**
Hedonistic	Gain for oneself
Direct reciprocity	Personal gain because of direct reciprocity from the recipient of an act
Affectional relationship	Individual's identification with another
Pragmatic	Practical concerns that are unrelated to selfish considerations
Needs-oriented	Physical, material, or psychological needs of the other person, e.g. 'He needs blood', 'she's sad'.
Stereotypic	Stereotyped images of a good or bad person
Approval and interpersonal	Others' approval and acceptance

[24] Turiel, (2006),p.800
[25] Ibid.,p.824

Self-reflective empathic orientation (a) Sympathetic (b) Role-taking (c) Internalized positive/negative affect	(a) Sympathetic concern and caring for others (b) Individual explicitly takes the perspective of the other (c) Orientation to internal positive/negative affect of consequences of an action
Internalized affect	Feeling good about living up to internalized values and feeling bad about failing to live up to them
Internalized law, norm and value	Internalized responsibility/duty to uphold laws, norms and values
Other abstract and/or internalized types of reasoning (a) Generalized reciprocity (b) Condition of society (c) Individual rights (d) Equality of people	(a) Indirect reciprocity in a society exchange that is not one-to-one, but that benefits all (b) Improving society as a whole (c) Preventing rights violations (d) Principle of equal value

Table 2: Compiled using information from Eisenberg et al. (1995)

Empirical Findings

Children from a very young age engage in acts of sharing and altruism.[26] Children below the age of 2 share possessions, help parents with household tasks, cooperate in games, and respond to the emotional distress of others. Clear reactions of empathy emerge by the age of 3.[27] And among 3-year-olds, 'equity judgements become more apparent': 3-year-olds distribute 'shared rewards according to the extent of each recipient's contribution,' and intentionality figures in their moral judgements about others' actions.[28] This is not mere unreflective intuition: by 3, children can provide justifications for their positions in disputes

[26] Lapsley and Carlo, (2014),p.3
[27] Turiel, (2006),p.800. See also Eisenberg et al., (2015),pp.613-614; Zahn-Waxler et al., (1992),p.133
[28] Thompson, (2014),p.76; also Baumard et al., (2012); Vaish et al., (2010); Killen and Smetana, (2015),pp.712-714

with parents and siblings over the rights and needs of persons and over manners and etiquette.[29] Young school-age children tend to use primarily hedonistic reasoning or needs-oriented (primitive empathic) prosocial reasoning. In elementary school, children's reasoning begins to reflect concern with approval and enhancing interpersonal relationships and reflects the desire to behave in stereotypically good ways (this mode of reasoning decreases through high school). Direct reciprocity reasoning ('you scratch my back…') also increases in elementary school.[30] Under-7s do not yet understand fairness as reciprocity, meaning they struggle to make moral judgements when the needs of more than one person are at stake.[31] But beginning in late elementary school, children begin to express reasoning which reflects abstract principles, self-reflective sympathy, and perspective taking.

Table 3 below shows the frequency with which different types of prosocial reasoning are used between the ages of 6 and 20, using results from a long-running longitudinal study. Participants are presented with 4 moral scenarios, with their responses scored to show the frequency with which they used each type of pro-social moral reasoning listed in table 2 (0 = no use; 1 = vague, questionable use; 2 = clear use of a mode of reasoning; 3 = a major type of reasoning used).[32] For each participant, their scores for each category were summed across the four stories. Scores can range between 0 (which indicates the mode of reasoning was not used in response to any story) and 12 (which indicates the mode of reasoning was a major type of reasoning used in response to all four stories). The mean score for each age group is presented in table 3. The *F*s for the linear, quadratic and cubic effects of time are shown in Table 4 at the end of the chapter.[i]

[29] Turiel, (2006),p.804
[30] Eisenberg et al., (1995),p.1179
[31] Nucci and Turiel, (2009),p.153
[32] As with the Kohlberg interviews, the mode of reasoning rather than the final answer is object of the study.

	Age at Time of Assessment (Years)								
Reasoning Category	**4 - 5**	**5½ - 6½**	**7 - 8**	**9 - 10**	**11 - 12**	**13 - 14**	**15 - 16**	**17 - 18**	**19 - 20**
Hedonistic	8.11	4.89	2.46	1.39	0.57	0.86	1.32	0.75	1.43
Direct reciprocity	0.00	0.07	0.11	0.25	1.32	1.71	0.89	1.29	1.50
Affectional relationship	0.04	0.43	0.00	0.18	0.21	0.11	0.61	0.36	0.18
Pragmatic	0.07	0.11	0.18	0.86	1.36	2.00	2.46	1.75	2.50
Needs-oriented	4.46	7.39	9.64	9.32	9.61	8.14	7.89	8.00	6.57
Stereotypic	0.57	0.36	0.68	1.14	1.71	2.79	2.46	2.43	2.25
Approval/interpersonal	0.00	0.07	0.21	0.36	0.82	0.96	1.00	0.61	1.00
Sympathetic	0.00	0.03	0.00	0.21	0.39	0.07	0.14	0.04	0.32
Role taking	0.00	0.00	0.07	0.68	0.68	1.14	2.00	1.57	2.07
Positive affect/simple or related to consequences	0.00	0.00	0.11	0.57	0.79	1.21	1.39	0.79	2.04
Negative affect/simple or related to consequences	0.00	0.00	0.00	0.18	0.21	0.11	0.29	0.61	0.68
Positive affect/values and self-respect	0.00	0.00	0.11	0.04	0.00	0.14	0.25	0.68	0.39
Negative affect/values and self-respect	0.00	0.00	0.00	0.07	0.00	0.07	0.07	0.07	0.29
Internalized law, norm, or value orientation	0.00	0.00	0.04	0.00	0.00	0.18	0.39	0.46	0.86
Generalized reciprocity	0.00	0.00	0.00	0.00	0.00	0.04	0.29	0.18	0.25
Condition of society	0.00	0.00	0.00	0.00	0.00	0.04	0.18	0.14	0.14
Individual rights	0.00	0.00	0.00	0.00	0.14	0.14	0.04	0.11	0.14
Equality of individuals	0.00	0.00	0.00	0.00	0.04	0.00	0.07	0.00	0.00

Table 3: Mean Use of Moral Reasoning Categories
(Eisenberg et al., 1995, p.1187)

These results indicate a general decrease in hedonistic reasoning with age. Needs oriented reasoning increased with age until 7–8 years, was relatively stable from 7–8 to 11–12 years, and declined considerably in adolescence. Direct reciprocity reasoning was seldom used until age 9–10, increased in use until 13–14, declined slightly in mid-adolescence, then (interestingly) increased significantly in late adolescence. Stereotypic reasoning was used infrequently until mid- to late elementary school, at which point it increased in use until 13–14. It then decreased in use until 19–20. Approval oriented reasoning increased linearly until age 15–16, dropped slightly at 17–18, then rose slightly again at 19–20. This result suggests that, in early adulthood, individuals become more concerned with social perceptions and social success relative to other moral concerns than at younger ages.

Pragmatic reasoning increased linearly with age.[33] In adolescence and early adulthood, some reflective and internalised modes of moral reasoning increased in use, whereas stereotypic and needs-oriented reasoning both decreased. Interestingly, hedonistic, direct-reciprocity and approval-oriented reasoning, all of which declined through adolescence, stopped declining, and even increased slightly, in early adulthood. Overall, the results suggest those in early adulthood are more self-regarding and more concerned about social status than are adolescents.[34] These results also show that younger and middle children are capable of nuanced normative reasoning, which becomes more complex across their childhood.[35] Therefore, younger and middle children deserve some respect for their normative reasoning and hence, as described later, for their goals and ambitions.

III.Development in Complex Reasoning

The previous section described development in different modes of moral reasoning. Something else which develops across childhood is the ability to deal with more complex moral scenarios by coordinating the various morally and socially salient aspects of those scenarios. Part of the reason Kohlberg underestimated younger children is that he did not distinguish developments in modes of reasoning from the ability to deal with multifaceted dilemmas: young children, when faced with very complex dilemmas which call for multiple modes for reasoning, often resort to the hedonistic mode of reasoning. Kohlberg mistakenly thought this meant younger children could not reason morally, when in fact they were simply struggling to coordinate their moral reasoning in such complex scenarios.

[33] Eisenberg et al., (1995),p.1188.
[34] Ibid.
[35] See also Eisenberg et al., (2015),pp.612-617

Nucci and Turiel (2009) investigated development in contextual moral decision-making and in how people coordinated different elements of moral decisions. They presented participants with three basic types of scenarios: direct harm (whether to hit another child); indirect harm (whether to return money to a child who unknowingly dropped it); and helping someone in need (whether to seek help for a child who falls and is injured). In each scenario, the researchers varied the cost of the moral action (whether it conflicted with the desires of the protagonist or was 'unconflicted') and the characteristics of the other child (whether they were simply a 'girl' or 'boy'; someone who had bullied the protagonist previously; or a vulnerable child). The study was conducted on 7–17-year-olds.[36]

All participants agreed that hitting another child unprovoked would be wrong. In scenarios where the other child hits the protagonist first, about half of children at each age thought that the protagonist had the 'right' to self-defence, though the percentage of 10–14-year-olds claiming this right was higher than for 8- and 16-year-olds.

In the indirect harm scenario, someone unknowingly drops some money and the protagonist must decide whether to return or keep the money. The participants were asked whether the protagonist had a 'right' to keep the money, or had an obligation to return it. The results are shown in fig.3. For 8-year-olds the situation poses little ambiguity: to keep the money is the same as stealing the money from the passenger's pocket. For the 14-year-old, however, the situation is more complex. Typical answers include:

> 'he's not necessarily doing something wrong [in keeping the money], but the right thing to do would be to give it back…[it's] not in the kid's house or anything'.

For the 14-year-old, the ambiguity of the situation suggests that keeping or returning the money is a matter of personal prerogative. This mode of reasoning is more nuanced and sensitive to the facts of the situation than the 8-year-old's. By 16, most adolescents

[36] Nucci and Turiel, (2009),p.153.

resolved the ambiguity, seeing the situation as entailing a certain form of theft. They consider the indirectness of the theft to make it different from the act of intentional stealing; but they consider the protagonist's knowledge that the money originally belonged to someone else to place moral constraints on them. When the moral salience of the situation is upped, and the child dropping the money is described as vulnerable or disabled, nearly all the participants said the money should be returned.

In the helping scenario, a child falls and is injured. Nearly all participants thought it would be wrong not to help. However, in scenarios where providing help conflicts with the protagonist's goals, or where the injured child had previously bullied the protagonist, 14-year-olds were less than half as likely as 8- and 16-year-olds to say the protagonist has an obligation to help. As with the other scenarios, the age-related pattern disappeared when the injured child was described as vulnerable. The results from the indirect harm and helping scenarios are represented in fig.3:

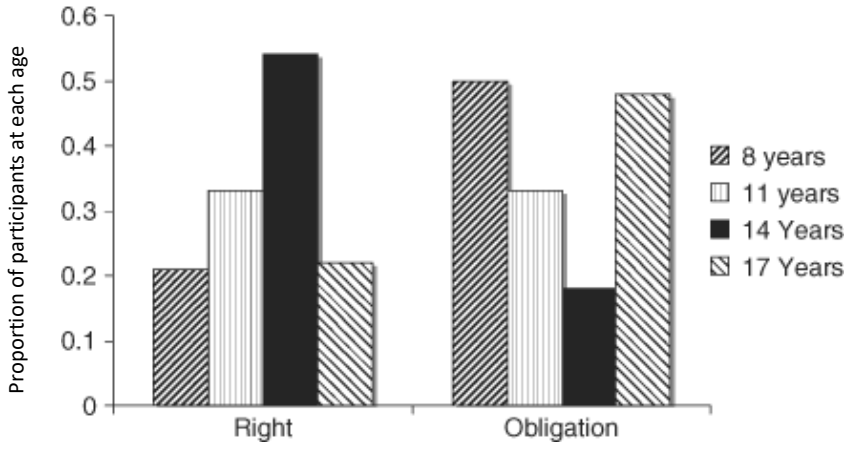


Figure 3: Right to keep money and obligation to help by age
(Nucci and Turiel, 2009, p.154)

This study shows that children and adolescents move from an early childhood set of judgements about unprovoked harm to notions of fairness and just reciprocity. Moreover, children become more able to incorporate multiple facets of moral situations; this then

leads to periods of transition in which the expanded capacity to consider various aspects of moral situations leads to more variations in moral judgements. This is why we see the U-shaped patterns in the development of substantive answers to moral questions. Young children tend to focus on blunt moral aspects of the acts, and are less likely to incorporate situational and nonmoral features of the acts. The increased social and moral understandings of older children create more of a grey area in their minds, and hence a greater variability of answers. Older adolescents outperform their younger counterparts: early adolescents can spot and incorporate situational information; older adolescents can coordinate that information in ways that 'afforded a moral resolution while acknowledging competing nonmoral interests'.[37] There is no age-related change in the responses to situations in which morality does not conflict with personal interests, or situations in which the 'moral salience of the situation was heightened', such as when the child in the vignette is vulnerable. This is significant for two reasons: first, it means (contra Kohlberg) there is no point in moral development in which children's moral reasoning can be defined solely in terms of self-interest. Second, the kinds of decisions we let children make must be sensitive to the level of complexity they can incorporate and coordinate within their thought.

The political implications of these results depend on the policy question. But the results do show that adolescents can reason morally to very high levels; and that younger children can understand their own interests and the interests of others, and can take the interests of others into account, even without rules or sanctions forcing them to. Thus, children out of infancy can reason about the good, meaning that we cannot disregard completely their moral and self-regarding deliberations. Finally, it is possible, with prompting, to help

[37] Ibid.,p.156

children coordinate elements of some complex decisions; this could facilitate their moral reasoning without overriding it.

IV.Domain Reasoning

Another aspect of moral development is the ability to recognise when to use different modes of moral reasoning. In general, there are three domains of judgement: conventional, moral and personal. The conventional domain is the domain of judgements about social systems, social organisation and conventions that coordinate social interactions. Those conventions derive force from socially constructed meanings, are context-dependent, and are socially contingent. The moral domain also applies to social systems, but it is not defined by existing social arrangements in the way the conventional domain is. The prescriptions of morality are seen as obligatory, generalizable, and impersonal. The 'personal' domain pertains to 'actions considered outside the jurisdiction of moral concern or social regulation and legitimately in the jurisdiction of personal choice.'[38] Conventional issues pertain to things like modes of dress, forms of address and greeting, and table manners. Moral actions pertain to things like harm, fairness and justice. Personal issues are those which are neither moral nor conventional and, in Western culture, might include choices of friends and recreational activities. Conventional transgressions are considered to violate standards or norms, or to be impolite or deviant; moral transgressions are considered unfair, unjust, or wrong.[39] The fact that people across cultures recognise these as distinct categories, and apply different modes of reasoning to them, enjoys significant empirical robustness. Children and adolescents around the world make judgements about

[38] Turiel, (2006),p.829; Nucci, (2001)
[39] Smetana, (1983),p.132. Killen and Smetana, (2015),pp.706-707

welfare and justice that differ from their judgements about social convention (though the content of such judgements may differ across cultures).[40] Therefore, in addition to the first-order moral reasoning abilities discussed in previous sections, there is also the second-order ability to distinguish and coordinate between different domains and hence to recognise when to apply social, moral and personal schema. Thus, to understand developmental changes, we must analyse two levels of change:

(i) Judgements within domains (which we have examined above);

(ii) How the domains are recognised and coordinated.

This distinction allows for the possibility that an individual can reason morally in a way relevant to a certain situation, but cannot recognise the need to engage that sort of reasoning. If an individual cannot recognise when to apply forms of moral reasoning and cannot apply moral schema correctly in certain situations, then, in those situations, they may be functionally equivalent to someone who cannot reason morally. However, if that individual can understand moral explanations, we can use suggestion and dialogue to help them think through a scenario.[41] This will encourage them to engage the most appropriate scheme of reasoning (e.g. moral instead of social). This strategy, which would facilitate moral reasoning, could be an alternative to making a decision on behalf of that individual. The possibility of this response to a second-order reasoning mistake shows the importance of investigating development in domain reasoning. If we had only examined first-order moral reasoning, we might have mistakenly concluded that the individual described above is incapable of moral reasoning and that their wishes could therefore be overridden. Recognising the possibility of second-order reasoning errors in children can allow for a more nuanced response to certain failures of reasoning capacity. This observation implies

[40] Turiel, (2006),p.828-9. For reviews of the evidence, see Nucci, (2001)
[41] Smetana, (1983),p.138.

that there are two general cases in which paternalism might be legitimate in response to failures in the capacity to reason normatively:

1) The child cannot reason normatively in the relevant way; intervention may be required to enforce the correct decision.
2) The child can reason normatively in the relevant way, but cannot recognise that the situation requires that normative reasoning. This suggests one of two responses
    a. If the child cannot be brought to recognise a situation as requiring normative reasoning, then paternalism of type (1) is legitimate;
    b. If the child can be brought to recognise the situation as requiring normative reasoning, then paternalism is justified only to bring that recognition.

Empirical Results

2-year-olds do not distinguish the domains. During their 3rd year children start to judge moral transgressions to be generally wrong to a greater extent than conventional transgressions, and by the end of their 3rd year, children judge moral transgressions independently of rules or authority.[42] A distinction between moral and conventional transgressions becomes more consistent and focused by about 4 or 5 years. At 6 or 7, children generally distinguish between several dimensions and they can apply those distinctions readily to familiar issues, but not unfamiliar ones.[43] This could suggest that 6–7-year-olds should be allowed to make decisions about familiar issues, but not unfamiliar ones. By 9 or 10, children apply the distinction to both familiar and unfamiliar issues. Thus, from 10-years-old, children generally can make these second-order domain judgements and

[42] Turiel, (2006),p.829. Also Killen and Smetana, (2015),p.711
[43] Turiel, (2006),p.829

from 8-years-old, when children err, it is nonetheless possible to facilitate their domain reasoning.[44]

IV. The Normative Significance of Moral Reasoning

Here I examine the normative importance (and normative limitations) of the ability to reason morally. I connect moral reasoning to each moral power and then explain the practical significance of normative reasoning.

Moral reasoning is important for the two moral powers. The ability to reason in moral terms, and be motivated by that reasoning, implies and constitutes the first moral power. The first moral power is the capacity to understand, to apply, and to act from moral principles and principles of justice. Rawls himself used the Kohlbergian schema to index development of the first moral power, and thought that only Stage 6 exhibits the fully developed sense of justice. It seems Rawls only thought this because Stage 6 is the 'end-point' of moral cognitive development.[45] However, the sense of justice is more plausibly achieved at Kohlberg's *second* level of moral development since this level describes an ability to think at the social level, to understand moral norms and principles, and to be motivated by those norms/principles even in the absence of external constraint or incentive. True, the second level does not by itself imply a full ability to construct entirely new abstract principles; but all that is required for the first moral power is an ability to 'understand, apply and act from' principles. A further reason to prefer the second level as corresponding to the first moral power is that, as discussed in section I, no-one reaches Stage 6 moral reasoning in the experimental data; thus, if we want to retain liberal rights (something we

[44] See also Smetana, (1983),p.137-9
[45] Rawls, (1971),§72

are assuming), we should reject Rawls's impossibly high reading of the threshold.[46] Therefore, to the extent we are using the Kohlbergian schema, the first moral power corresponds to the Conventional Level of moral reasoning. In any case, the Kolbergian schema only measures a narrow set of cognitive abilities that apply to certain complex dilemmas about justice in which questions of law and authority are relevant. For a fully developed first moral power, individuals must have developed elements of prosocial moral reasoning (so they can reason morally in scenarios where notions of authority and law do not apply); complex reasoning (so they can accommodate and integrate different moral principles within a single decision); and domain reasoning (so they can appropriately engage and coordinate forms of moral, social and personal reasoning). With those other modes of reasoning, one can generate, understand and reason about substantive moral principles, even if one is considered to be at the 'conventional' level of reasoning in Kohlbergian decision-scenarios.

Regarding the second moral power, the ability to reason morally also implies an ability to reason about the good. This can supply the last few pieces of the second moral power (the capacity for a conception of the good) which the cognitive abilities in the last chapter could not provide, namely, it supplies the ability to 'have' a conception of the good and a full ability to 'revise' it. The ability to *have* a conception of the good requires the ability to understand and internalise norms and principles about the good. An ability to *revise* a conception of the good requires the ability to reason in evaluative and normative terms. These abilities enable individuals to form higher-order values and desires and to evaluate their first-order desires.

[46] See Coleman, (2002),pp.170-173

We may worry here that showing an ability to reason about certain moral dilemmas, or about the right thing to do in certain moral scenarios, does not show an ability to hold and revise a conception of the good. This is because reasoning about conceptions of the good requires you to reason normatively about your own goals and interests, and assess whether they are valuable or worth pursuing. Reasoning about your own good is slightly different from reasoning about the right thing to do. Therefore, experiments investigating moral reasoning do not quite establish an ability to reason about your own goals. However, we can use data on development in moral reasoning to index an ability to reason about the good, for four reasons. First, moral reasoning about justice and the good is a constituent of character and so overlaps with the personal good. The ability to reason morally means you can decide what kind of moral character you want, what kind of person you want to be, and what kind of virtues to cultivate. It means you can weight your own interests and the interests of those around you when determining your overall goals and plans. Do you want an ethical career? Do you want a work-life balance that lets you see your children, or a job close to your parents? The ability to reason morally is a large constituent of the ability to reason about one's goals. Second, moral reasoning, as measured in the above experiments, presupposes an ability to reason about your own interests and the interests of others. This is because all these experiments involve a conflict of interests and an examination of how participants resolve that conflict. Consequently, individuals who reason morally are reasoning about the value of certain goals and interests. Third, development in moral reasoning is a good proxy for development in reasoning about one's own good. This is because both moral reasoning and reasoning about one's own good require cognitive abilities to reason normatively and reason about the good in general. Measures of moral development are proxies for normative reasoning applied to the moral domain, whereas here we are interested, in part, in the application of that reasoning to the personal domain. It seems likely (though is a question for further investigation) that if individuals can reason

normatively in the moral domain then they can reason normatively in the personal domain. Fourth, and most significant, is that development in self-understanding is tightly linked to development in moral reasoning. Self-understanding is a conceptual system that focuses on 'the totality of characteristics that define the self and distinguish the self from others'.[47] This includes four schemes that define the self: the physical self (bodily and material possessions); the active self (activities and abilities); the social self (social personality and characteristics); and psychological self (emotions, thoughts, cognitive processes). In each dimension of this development, 'progress in self-understanding, no matter the domain, leads one to morality'.[48] Mature self-understanding, at the highest level of developmental complexity, involves reflection on the moral implications of selfhood. For example, an understanding of the 'psychological self' ultimately develops to the point where we identify our psychological self with belief systems that reflect a personal philosophy. An understanding of 'social self' develops to the point where the social self is understood by moral choices concerning social relations or social personality-characteristics ("I try to not to hurt my friends because you should treat people with respect"). And so-on with the other aspects of selfhood. This suggests that 'the formation of the moral self is the clear goal of self-development'.[49] Moral reasoning is thus tightly linked to the development of identity.[50] Within the literature on identity formation, morality and identity stand in a mutually supportive relation.[51] Therefore, empirically, moral reasoning is linked to increases in self-understanding and identity, both of which form part of having a conception of one's own good. Because moral reasoning overlaps with, presupposes, correlates with, and constitutes development of evaluative reasoning about one's self and one's interests, measures of moral development provide an proxy for the second moral power.

[47] Lapsley, (2006),p.59
[48] Ibid.,p.60
[49] Ibid.,p.60
[50] Lapsley and Lasky, (2001),p.358
[51] Ibid.,p.358. Also Erikson, (1968),p.39

Therefore, the ability to reason morally provides the remaining components of a capacity for a conception of the good and of the capacity to understand and apply principles of justice and morality.

What does this mean in practice? Using our respect-based approach, if someone can reason normatively, they must be left free to define their own interests. This is because we must respect another's ability to define their own interests. And respecting that ability entails a respect for self-regarding choices flowing from that ability. Therefore, since normative reasoning provides the ability to define one's interests, and since that ability provides reason to have those interests respected, normative reasoning grounds the right to define one's own interests. While the ability to reason morally would give someone the right to set their own goals and aims, on its own it would not give them the right to *pursue* those goals and aims in whatever way they chose. Having purely normative reasoning ability is not sufficient to grant freedom of action. This is because someone may be unable to reason empirically, or be unable to avoid decision making fallacies etc. Someone who can set their own ends, but not act according to those ends, must have those ends respected, even if we may force them to act in a way that better promotes their own goals.[52] This respect for people's power to set their own ends explains why we (should) ask 'what would they want?' when we have to make decisions on behalf of other people.[53] And respect for people's ability to think about justice and morality means we must respect their political views.

To summarise the normative relevance of being able to reason morally: theoretically, it provides components of the first and second moral powers and enables the formation of higher-order values and desires. Practically, it generates rights to have our goals and aims

[52] See the section IV on argumentation in chapter 5.
[53] Rawls, (1971),§39

respected. Therefore, it grounds rights to have our goals and ends taken into account, both in self-regarding decisions and in political decisions. But it does not generate rights to pursue those goals ourselves, or to determine how those goals should be pursued.

VI. Connecting Psychology to the Two Moral Powers

The discussion in this chapter and the last involved quite a detailed examination of many different psychological abilities possessed by adults and by children. Here I summarise and tie together all the different psychological capabilities we have discussed. To do that, I show that each component of the two moral powers has been covered in the forgoing discussion. This section provides us with the final statement of how to investigate different cognitive psychological capacities from within our liberal framework. I also show that we have demonstrated that each component is possessed equally by adolescents and adults, and therefore that adolescents (or, at least, older adolescents) fully possess the two moral powers.

The second moral power is the capacity to have, to revise, and rationally to pursue a conception of the good, which specifies an ordered family of final ends and aims.

The full ability to *have* a conception of the good requires conventional moral reasoning, since it is at the Conventional Level that one first internalises moral beliefs. Once you have internalised normative beliefs, you can be said to 'have' a theory of the good. How moral reasoning more generally links to the ability to have a conception of the good has already been discussed in more detail in the previous section.

The capacity to *revise* a conception of the good is provided by a combination of logical/syllogistic reasoning, moral reasoning, and argumentative ability. To revise a

conception of the good, you must understand the rules of logic in order to make rational and reasonable inferences; you must be able to reason in moral terms to assess the contents of your conception of the good; finally, you must possess abilities of argumentation to generate and critique arguments and counterarguments so you can judge whether to revise your views about the good. Since adolescents have all those abilities, they can therefore *revise* their conception of the good.

The ability *rationally to pursue* that conception of the good is provided by empirical reasoning, argumentation, and decision-making rationality. Empirical reasoning is necessary to assess for yourself the best means to your ends and argumentation is necessary to assess the advice of others. Decision-making rationality is necessary 'rationally to pursue' your conception of the good, since individuals need it to avoid decision-making fallacies which could otherwise frustrate their actions. By having the same abilities of empirical reasoning, argumentation, and decision-making as adults, adolescents have an equal ability rationally to pursue their conception of the good. These cognitive abilities do entail the general ability to make means-ends judgements about the long-term as well as the short term; but I discuss the more specific ability to project motivations and plans long into the future further in chapter 7.

Finally, individuals need the capacity to specify 'an ordered family of final ends and aims'.[54] The ability to order, weigh-up and trade-off different goals and values requires the ability to make 'preference-judgements' – which consists in weighing-up and trading-off different preferences. However, since it is not merely preferences which must be weighed in a conception of the good but also normative values, weighing ends also requires an ability to reason morally. Complex moral reasoning is important so that individuals can coordinate different normative values within their own thinking. Domain reasoning is also

[54] Rawls, (2001),p.19

important so that individuals can weigh up moral, social and personal goals. And as discussed above, adolescents and adults have the same levels of moral reasoning and decision-making abilities.

The first moral power, as we are understanding it, is the capacity to understand, apply, and act from moral principles and principles of justice. The ability to understand those moral principles, and principles of justice in particular, is given by: Kohlberg's second level of moral reasoning; a level of development in prosocial moral reasoning at least beyond hedonistic and direct reciprocity reasoning; and, for complex dilemmas, development in complex moral reasoning. The ability to apply and act from those moral principles requires development across those three areas, plus development in domain reasoning (so you know when to apply, and reason with, your moral principles), and the other abilities required for 'rational pursuit' described in the above discussion of the second moral power (empirical reasoning, decision-making etc.).

To compare adults and adolescents: both empirical reasoning and conventional (level 2) moral reasoning are possessed by all adolescents. Adolescents and adults possessing equivalent levels of general moral reasoning abilities and decision-making rationality.

The above provides a quick summary of how each of component of the two moral powers corresponds to various aspects of cognitive psychology. It therefore shows the empirical relevance of the different components of the two moral powers, and the normative relevance of different aspects of cognitive psychology, as well as showing we have provided full psychological coverage of the two moral powers. Finally, it highlights that, empirically, for each component of the two moral powers, adolescents have the requisite psychological powers to the same degree as adults.

VII.Balance of Harms

Although there is no difference between adults and older adolescents (14+), there is some slight difference between young adolescents and adults in providing arguments and solving indeterminate syllogisms. These differences seem far too small to matter. However, although *on average*, there is only a very small difference between young adolescents and adults, statistically this means that there are likely to be some young adolescents who are far behind average adults cognitively speaking.

The reasons for this are as follows: cognitive abilities within a group tend to follow a normal distribution or 'bell curve'. In fig.4 below there are two bell curves, the red for young adolescents and green for adults. The X-axis indicates cognitive ability, and the Y-axis the proportion of people who have that ability. One feature of two overlapping normal distributions is that, even when there is only a small difference in the *means* of the two distributions (as for young adolescents and adults), the more extreme a score, the greater the disparity between the two groups.[55] You can see this more clearly if you zoom into the tail of the distribution in fig.5 where, out at the extremes, the difference between the two curves gets larger and larger. This means that there will be a significantly larger group of cognitively very weak young adolescents than cognitively very weak adults.[56]

[55] Mathematically, this is because the normal distribution falls away according to the negative exponential of the *square* of the distance from the mean.
[56] Statistical discussion adapted from Pinker, (2005)

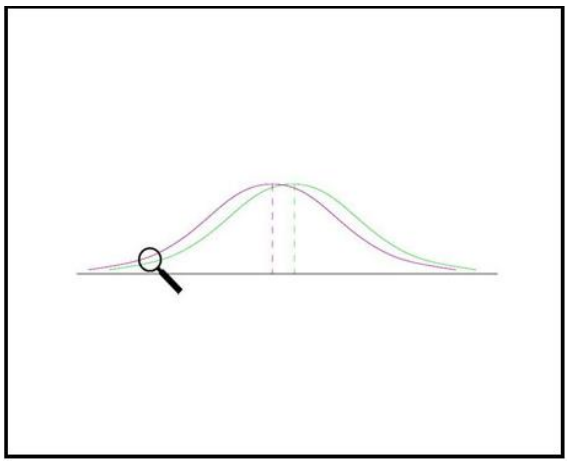


Figure 4: Pinker (2005)

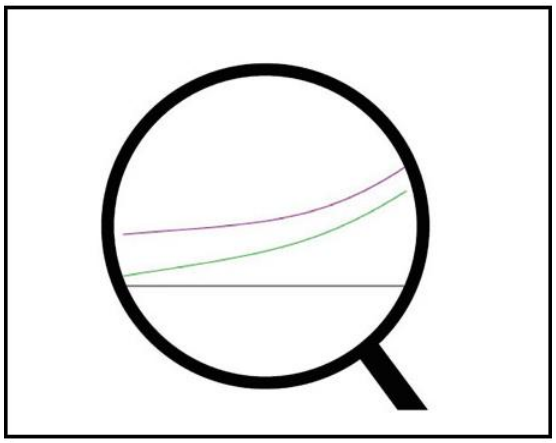


Figure 5: Pinker (2005)

This small group of young adolescents is far behind most adults in their cognitive development, and may be sufficiently under-developed that they lack the ability required to ground the same moral rights as held by adults. This means that, to the extent that we grant *legal* rights to young adolescents on the basis of age, we must be mindful that there may be some young adolescents incapable of properly exercising those rights. Therefore, we must introduce the 'balance of harms' part of our framework for such cases. We must balance the harm of granting this right to under-developed young adolescents against the wrong of violating the autonomy of the mature majority of young adolescents by denying them legal rights. The precise outcome of that balancing process depends on which right we are granting; how wrong it would be to deny that right to those who deserve it; how badly

harmed an immature young adolescent (or a third party) might be if they misuse that right; how many young adolescents are likely to harm themselves in exercising that right; and, finally, how risk averse we are.[57] We can do this using some of the normative concepts from chapter 3. All this assumes, of course, that we cannot easily or permissibly observe cognitive abilities directly on an individual basis, an assumption discussed in chapter 11. I discuss the balance of harms further in chapter 9 when I apply it to the case of voting rights. But in general, a balance of harms analysis may show that, even if a group of children have average abilities similar to adults, under certain conditions it may still be justified to withhold legal rights from that group.

Conclusion

These two chapters have built up the cognitive psychological component of our framework, showing how our framework can deal with empirical claims about cognitive abilities by classing them into one of our five categories – logical reasoning, empirical reasoning, decision-making, argumentation, and moral reasoning – and matching them up with specific components of our account of autonomy. This then generates substantive claims about rights using our respect-based approach to rights.

Empirically, these two chapters have shown that older adolescents (14+) possess the natural features required for core autonomy and core moral agency, and meet the bar for basic equal respect. Younger adolescents (11–13) mostly meet the bar for equal respect, although there are some younger adolescents who, in certain areas (logical inference and argument generation), are not quite as capable as adults, and who may be permissibly

[57] Compare Griffin, (2010),pp.57-82

denied equal rights when those specific deficiencies are problematic for the exercise of those rights. For those in middle childhood (8–10), we have established that they can form their own goals, but that for morally and socially complex decisions, and for unfamiliar scenarios, we may need to help facilitate their thinking and decision-making. Younger children can have an immediate understanding of what is fair or moral, but struggle with unfamiliar scenarios. But since middle and younger children can reason well in familiar scenarios, we should not take as fixed their lack of capacity in unfamiliar scenarios: we can improve their autonomy by making more scenarios familiar to them, by exposing them to a variety of experiences, and by letting them take decisions themselves.

The empirical question remaining is whether children and adolescents can make that core autonomy effective in their actions and thinking by using capacities for hierarchical control to bring their motivations and thoughts in line with their goals and plans. That is the subject of the next chapter.

[i] The *F*s for the linear, quadratic and cubic effects of time for Table 3

TREND ANALYSES FOR THE INDIVIDUAL MORAL REASONING CATEGORIES: UNIVARIATE EFFECTS

MORAL CATEGORY	TREND		
	Linear	Quadratic	Cubic
Hedonistic	63.13****	85.03****	10.72**
Direct reciprocity	49.84****	2.60	1.75
Affectional relationship	8.98**	.40	2.61
Pragmatic	64.36****	4.12+	3.30+
Needs-oriented	1.69	51.97****	17.76***
Stereotypic	35.96****	3.52+	7.17*
Approval	22.21****	2.71	.31
Sympathetic	.48	.01	. . .[a]
Role taking	17.26**	.57	. . .
Positive affect/simple or related to consequences	41.20****	.12	. . .
Negative affect/simple or related to consequences	8.98**	1.35	. . .
Positive affect/values and self-respect	10.59**	.88	. . .
Negative affect/values and self-respect	2.08	.51	. . .
Internalized law, norm, or value orientation	19.36	2.68	. . .
Generalized reciprocity	3.82+	. . .	. . .
Condition of society	2.66	. . .	. . .
Individual rights	.01	. . .	. . .
Equality of individuals	.86	. . .	. . .

[a] Indicate that an analysis was not computed (see text).
+ $p < .10$.
* $p < .05$.
** $p < .01$.
*** $p < .001$.
**** $p < .0001$.

Table 4

(Eisenberg, 1995, p.1187)

Chapter 7

Self-Control and Executive Functions

"Youth…are hot-tempered, and quick-tempered, and apt to give way to their anger"

Aristotle, 350 B.C

Introduction

In the previous chapter we examined the two moral powers, and showed that older adolescents fully possess that core autonomy. In this chapter, I investigate the final component of autonomy: hierarchical control. To recap, an individual possesses hierarchical control if they possess, to some minimum degree:

> The ability to think about and control their thoughts and motivations, and to regulate and control confounding internal factors, such as emotions, which can interfere with those mental processes needed for thought and action. In particular, it means possessing
>
> c. *Motivational Control:* The capacity to accept or change their preferences, desires, wishes etc. in light of higher-order preferences and values and to make higher-order preferences and values effective in their actions;
> d. *Cognitive Control*: The capacity to regulate and control the mental processes needed for the exercise of the two moral powers.

This discussion of the psychology of hierarchical control is split into four sections. First, I examine metacognition and executive function, which are the cognitive abilities to think about and control one's thoughts. Second, I examine future orientation, and the executive ability to form long-term goals and plans. Third, I examine the ability to self-regulate and control one's emotional responses so they do not overwhelm or interfere with cognitive processes and motivations. Fourth, I investigate motivation and impulse control. Admittedly, the distinction between these sections is somewhat arbitrary. Executive functions are required for emotion control. Similarly, emotion control and executive functions together involve and entail the ability to control motivational impulses. And all of these are important for the ability to make and implement long-term plans. However, it is worth separating those discussions, interlinked as they are, to illustrate and emphasise different aspects of hierarchical control. Taken together, when an individual has greater metacognitive ability, executive control, emotion control, and motivation and impulse control, they have more hierarchical control and they are, to that extent, more autonomous. In the final section I outline the normative significance of those psychological components of hierarchical control and discuss what to do when an individual lacks hierarchical control.

I.Metacognition and Executive Function

Metacognition is knowledge about and control over cognition. It covers any knowledge or cognitive activity that has as its object an aspect of cognitive activity.[1] Metacognition includes knowledge about your information processing skills; monitoring your cognitive

[1] Goswami, (2008),p.295

performance; regulation of your cognitive strategies; theory of mind; and executive function.[2] *Executive Function* refers to

> 'cognitive processes that are required for the conscious, top-down control of action, thought and emotions' and involves the 'monitoring and self-regulation of thought and action, the ability to plan behaviour and inhibit inappropriate responses'.[3]

Executive function is an umbrella term which 'encompasses the higher order processes…that govern goal-directed action and adaptive responses to novel or complex situations' as well as the ability to control one's motivations.[4] It should be clear that metacognition and executive function are the direct psychological analogues to hierarchical control: they both relate to the ability to control thought and action. The development of self-regulation is intimately related to the development of executive function.[5] Therefore, since hierarchical control is itself a form of self-regulation, the development of executive function corresponds to the development of hierarchical control.

To illustrate the importance of executive function to hierarchical control, there is a famous card-sorting game which is useful for testing executive function and, in particular, inhibitory control. *Inhibitory control* covers 'the ability to inhibit responses to irrelevant stimuli while pursuing a cognitively represented goal'.[6] Inhibitory control is important for individuals' ability to follow certain rules, pursue accepted goals, and to delay gratification. In the Wisconsin Card Sorting Task patients are first asked to sort a pack of cards according to some rule (e.g. colour) and then are asked to sort the cards according to a different rule (e.g. shape). Patients who have suffered damage to their prefrontal cortex (the part of the brain associated with executive function) find it very difficult to change their sorting rule, and instead continue to sort the cards according to the original rule. Yet,

[2] Ibid.,p.295. See also Ricco, (2015),p.523
[3] Respectively Müller and Kerns, (2015),p.571 and Goswami, (2008),p.295
[4] Hughes, (2011),pp.251-252, p.259
[5] Goswami, (2008),p.332
[6] Ibid.,p.305

despite making consistent sorting errors, the patients can 'tell you the new rule as they continue to sort the cards incorrectly' telling the experimenter, 'this is wrong, and this is wrong…'.[7] Here, the patient's behaviour is under the control of their previous action, rather than under their conscious control; the patient is unable to inhibit what is called the 'prepotent' tendency to sort by the old rule.[8] Executive errors of this kind occur when behaviour is controlled by alien features of the environment, such as prior actions, rather than by an appropriate rule held in the mind.[9] The results of this experiment provide a clear example of people who have general cognitive and reasoning abilities and can form goals, but who lack a certain kind of hierarchical control such that, although they understand the goal, and understand how to achieve the goal, they cannot follow through with the correct actions. Executive function corresponds to our normative account of hierarchical control. Therefore, to investigate the development of hierarchical control, we must now examine the general development of executive function.

Empirical Results

This section provides a general description of the development of executive function across childhood; I examine later in more depth (i) inhibitory control and (ii) the specific abilities to make future plans. Young children usually have poor executive function. They are typically poor at inhibiting task-inappropriate behaviours and, generally, have inadequate strategic control over their mental processes. As children age, they gain metaknowledge about their mental process and their strategic control improves, which

[7] Diamond, (1990),p.662
[8] Goswami, (2008),p.305
[9] Ibid.,p.305; Pennington and Haith, (1994)

improves their conscious control over thought, emotion and action.[10] Let's examine the development of executive function chronologically.

Infants clearly exhibit a rudimentary ability to inhibit prepotent responses by 7–12 months. 3–4-year-olds experience 'considerable difficulty' in rule-shifting tasks, like the Wisconsin Card Sorting Task, and typically behave like adult patients who have damage to their prefrontal cortex.[11] While 3–4-year-olds experience difficulty in their sorting strategy, 5-year-olds could switch sorting rule.[12]

5–6-year-olds did not show the same kinds of executive failures characteristic of younger children. Interestingly, in card-task trials, 89% of the 3-year-olds who failed to use the new rule could verbally report the new rule.[13] This suggests that the problem young children faced was not a lack of understanding but a lack of hierarchical control, i.e. a lack of ability to control their actions and motivation. The ability to exercise inhibitory control over certain prepotent responses improves between the ages of 3 and 6, with ceiling performance by the age of 7 years.[14] Thus, by middle childhood, individuals can typically follow rules held in the mind. Pre-schoolers are, however, still poor at delaying gratification (and hence at controlling their longer-term motivations).[15]

For 8-year-olds, several studies report improvements in mental flexibility, whereas planning, organising and strategic thinking (all components of executive function) typically emerge later and improve through early adolescence.[16] This finding suggests that children in middle childhood cannot easily make long-term plans, opening the possibility of legitimate paternalism for long-term decisions. When solving difficult planning tasks in the lab, adults typically slowed down to preserve accuracy. By contrast, school-age pre-

[10] Goswami, (2008),p.305
[11] Zelazo et al., (2003)
[12] Frye et al., (1995) See also Müller and Kerns, (2015),pp.590-591
[13] Goswami, (2008),p.311.
[14] Diamond and Taylor, (1996)p.330. But also Müller and Kerns, (2015),p.591
[15] Kochanska and et al., (1996); Müller and Kerns, (2015),p.597
[16] Hughes, (2011),p.260

adolescent children were more impulsive, leading to more errors on the more difficult tasks.

Adolescents show significant development in executive function, particularly just after puberty. This matches age-related improvements in inhibitory control and decision-making.[17] There is clear improvement in future planning tasks from the age of 11 or 12.[18] In general, the development of executive function across adolescence implies an ability to plan for the future.[19] However, unlike developments in cognitive abilities and moral reasoning, which typically reach ceiling levels by early adolescence, developments in executive function and strategic thinking continue well into the mid-20s.[20]

To summarise, young children have low levels of inhibitory control, and are typically unable to delay gratification or inhibit pre-potent responses. This means they struggle to make long-term decisions, and to apply rules or goals to their decisions. By middle childhood, they can generally inhibit prepotent responses and follow complex rules, although they find strategic thinking and long-term planning more difficult and tend to be impulsive. By adolescence, individuals can think flexibly and plan for the future, but strategic thinking and inhibitory control continue to develop throughout adolescence.

II.Long-Term Planning

One important component of executive functions is 'future orientation'.[21] Future orientation refers to the ability to form long-term motivations and goals (and to project goals/motivations into the future) and to make and implement plans for those future

[17] Ibid.,pp.260-261
[18] Ibid.,p.260
[19] Goswami, (2008),p.295; Steinberg et al., (2008),p.1765
[20] Hughes, (2011),p.260**.** Steinberg et al., (2008),p.1772. Also Müller and Kerns, (2015)
[21] For general work, see Haith, (1994)

goals.[22] This is necessary for making autonomous long-term decisions. If an individual possesses the two moral powers, then they can form higher-order desires. But if they lack the cognitive hierarchical control to project their plans into the long-term future, or lack the motivational hierarchical control to implement long-term plans, then the individual might be liable to paternalistic intervention.

Generally speaking, individuals become more future-oriented across childhood and adolescence, with important gains happening towards the end of childhood and the beginning of adolescence.[23] Oppenheimer and Van der Wilk (1987) found that changes in interest from imaginary heroes and power and fame to more realistic orientations take place between the ages of 8 and 11 (although this is unlikely to be a fixed feature of middle childhood).[24] And by the age of 10–11 at the latest, children have acquired basic planning skills,[25] although development continues well into the 20s.[26] Across childhood, the change in temporal perspective is characterized by an 'orientational shift from the immediacy of the present…to greater concern for future roles and experience.'[27] Adolescents, compared to younger children: (i) demonstrate greater depth and extension of temporal perspective; (ii) project a more complex and differentiated set of future expectations; and (iii) describe future aspirations with greater planfulness, organization and realism.[28]

How far into the future do adolescents think? Many studies show that young people, whatever their age and cultural background, tend to extend thinking about their goals into the second and third decades of life.[29] Young adolescents across cultures tend to

[22] Nurmi, (1991),p.4
[23] Steinberg and Cauffman, (1996),p.266
[24] Oppenheimer and van der Wilk, (1987) quoted in Nurmi, (1991),p.28.
[25] Nurmi, (1991),p.38
[26] Steinberg and Cauffman, (1996); Scott et al., (1995),p.231;Nurmi, (1991),p.28
[27] Greene, (1986),p.100
[28] Ibid.,p.100
[29] For a review, see Nurmi, (1991),p.27

make future plans for when they are 18- to 22-years-old, because most of their interests and goals are about education, occupation and family, most of which are actualised at around that age.[30] Only some 11–15-year-olds expressed hopes which they expected to be realized beyond 30.[31]

In general, it seems that people's future-oriented goals and interests reflect the 'cultural prototype' of anticipated life-span development. That is, their culture and social surroundings give them expectations about what their life-span should look like, and their future time horizon is determined by whatever the next big anticipated life-time event is. For adolescents, those events are finishing education and starting a career. As such, the dominant time horizon for people in their teenage years stretches until their early 20s. In early adulthood, interests in further education and family decrease, with longer-term goals structured more by work and property; in middle age, people are increasingly interested in their children's next life-time event; and in old age, health is a primary long-term preoccupation.[32] It seems, therefore, that adolescents and adults make long-term plans using the same 'next anticipated life-cycle event' mental heuristic. Interestingly, younger adolescents extend their planning further into the future than older adolescents.[33] This is consistent with the life-event model: both younger and older adolescents have the same major goal of completing education and starting a career, but for older adolescents that milestone is sooner than for younger adolescents. Generally, how far into the future individuals plan depends on when the next major event will happen.[34] Therefore, given these effects of culture and context on long-term planning, it seems that if society encourages adolescents to consider more distant life-goals, their future planfulness will

[30] Ibid.,p.27
[31] Ibid.,p.27; Nurmi, (1989)
[32] Nurmi, (1991),p.48
[33] Ibid.,p.28
[34] Ibid.,p.46

change accordingly.[35] Therefore, any differences between adolescents and adults in projecting their goals into the future would not be indicative of a different ability to project their thoughts and goals into the future, but rather, different social expectations.

In fact, adolescents to tend project into the future as much as young adults. In one major study, adolescents and college students were asked open-ended questions about the things that may happen in their future. Answers were spontaneous, without suggestions or prompts by the tester. This means their answers reflect their own independent ability to think into the future. Subjects were then asked to identify the age at which each event was most likely to occur.[36] The average oldest age for future life events given by 14–15-year-olds was 50.70 compared to 57.20 for college students. The median age of those future life events was, on average, 25.25 for 14–15-year-olds and 29.75 for college students. This suggests that, roughly speaking, college students tend to think and project as many years into the future as adolescents. Therefore, adolescents, like adults, can and do think many decades into the future.

Finally, we can examine how young people discount the future in their decisions. People who discount the future more live more in the moment and weigh future consequences less. In fact, when it comes to future discounting:

> 'there are no significant age differences…among individuals aged 16 and older, and no differences between the 10- and 11-year-olds and the 12- and 13-year-olds.'[37]

That is to say, there are no significant age differences in individuals' discount rates after age 16. Individuals aged 14 and 15 'fell between the two extremes [of 10–13-year-olds and over-16s] and did not differ from younger or older individuals.'[38] While 10–13-year-olds

[35] Ibid.,p.50
[36] Greene, (1986),p.103
[37] Steinberg et al., (2009),p.37
[38] Ibid.,p.37

discount the future slightly more than individuals aged over 14, there is no qualitative difference in the way they discount the future compared to those over 14.[39] So from 14–16 onwards, adolescents discount the future as much as adults, whereas younger adolescents discount the future more. Does that mean younger adolescents are less autonomous? Probably not. First, as already established, younger adolescents think as far into the future as older adolescents and can make long-term plans and decisions: they just make those decisions differently. Since it is their capacities which ground respect, not the ('sensible') content of their decisions, younger adolescents deserve equal respect. Second, discounting the future is a rational response when the future is uncertain. And indeed, much adolescent future discounting can be explained by the fact that young people feel uncertain about their futures.[40] Finally, choosing whether to emphasise the present relative to the future requires a value judgement; one can autonomously value the present more than the future. The slightly greater discounting of younger adolescents does not seem to be irrational or even unreasonable. Therefore, the tendency of younger adolescents to weight the future less than adults does not undermine their right to have their longer-term decisions respected.

To conclude: college students, compared to 14-year-olds, 'were no more able…to project a greater number, or a more extended or consistent set of future events.'[41] Compared to younger adolescents, there is only very weak support for the claim that college students would project a greater number, or a more extended or consistent set of future events.[42] From 14–16-years-old, individuals discount the future to the same extent as adults, and from 10 they discount the future in a qualitatively equivalent way. Therefore, by early-mid adolescence, individuals have the hierarchical control to project their cognitive thought,

[39] Ibid.,p.38
[40] Scott et al., (1995),p.213
[41] Greene, (1986),p.105
[42] Ibid.,p.105

goals and sense of self into the long-term. They deserve respect for their ability to make decisions with long-term consequences. Middle-childhood presents a more complicated picture; they may sometimes face legitimate paternalistic interference to promote their long-term interests. Younger children routinely struggle to reason into the longer term in a realistic way.

III.Emotion Regulation and Self-Control

In this section, I define emotions and emotion regulation; explain why they are relevant; and explain the mechanisms by which emotions are regulated.

Emotions are 'integrative systems that order feeling, thought and action'.[43] Therefore, an ability to regulate/control one's emotions entails some ability to regulate/control one's feelings, thoughts and actions. More formally, emotion is

> 'the person's attempt or readiness to establish, maintain, or change the relation between the person and [their] changing circumstances, on matters of significance to that person'.[44]

This definition encompasses action, preparation for action, and appraisal of circumstances. Emotions profoundly affect and order cognitive, perceptual, and social processes.[45] They can therefore form part of, and interfere with, autonomous capacities. To control those capacities, therefore, one must have at least some minimum ability to regulate/control one's emotions. *Emotion regulation* is the relative capacity to manage one's emotional reactivity, including intensity and duration of arousal.[46] Optimal emotion regulation should facilitate constructive problem-solving strategies and appropriate appraisal of social

[43] Rothbart and Bates, (2006),p.107
[44] Saarni et al., (2006),p.227
[45] Ibid.,p.226
[46] Ibid.,p.271

contexts. It includes regulation of one's emotional arousal; an adequate appraisal of the situation causing the emotions, and of what is realistically under one's control; and a resolution that yields a sense of mastery and/or resilience. Emotions, if uncontrolled, can affect behaviour and the ability to reason. Thus, by controlling emotions, you exercise some hierarchical control over your motivations and thought processes.[47]

We must be careful here. The key point is that, to be autonomous, individuals need a general ability to control emotions; they do not need to exercise that ability, nor must they be able to in any given moment. Emotions provide important ways to perceive, interpret and understand situations, and to react appropriately to them. Emotions are therefore an important component of our reasoning and acting autonomously. To the extent that emotions are integrated in our autonomous reasoning, they are not 'confounding internal factors' to be inhibited. One does not necessarily live a more autonomous life by inhibiting emotion as much as possible. Indeed, one could autonomously decide that that excessive use of self-control and excessive inhibition of emotions lead to rigidity, a lack of adaptability, and a lack of spontaneity.[48] Whatever individuals judge to be their personally optimal level of self-regulation, since our framework respects autonomy-as-capacity rather than autonomy-as-exercise, it is not only self-disciplined and emotionless people who are autonomous and deserving respect. It is when you lack the capacity for emotion regulation, not when you are unwilling to exercise that capacity, that you lack hierarchical control. And anyway, being unable to inhibit an emotion does not imply that you are non-autonomous. First, emotions and emotional reactions are autonomous if they are endorsed by higher-order goals and values. Second, autonomy is grounded in a generalised ability to control emotions, with a low threshold for

[47] It is, however, possible to lack hierarchical control for reasons other than emotionality.
[48] Rothbart and Bates, (2006),p.131

respect. Therefore, people can be autonomous even if, in a given moment, they cannot, or do not, inhibit a particular emotion.

The main emotion control system we are interested in is *effortful control* (or 'ego-resiliency'). This system is a higher-order temperamental trait which is completely self-regulatory and involves both attentional control and the ability to inhibit prepotent responses.[49] Effortful control is conscious and voluntary; it is a form of hierarchical control. This ability includes the abilities to: inhibit a dominant emotional response; activate a subdominant response; make plans to adjust to the emotional situation; and to detect reasoning errors in those plans. Effortful control is also key to making (long-term) plans.[50] These abilities help individuals to cope with distress and to disengage from distressing situations. Individuals less able to control their attention, and thus less able to disengage their attention, are more likely to 'go to pieces' under stress.[51]

For the purposes of investigating hierarchical control, we are interested in: self-regulatory strategies to lessen the intensity or duration of emotional states; the capacity for 'emotional self-efficacy', which is the capacity to view yourself as feeling, overall, the way you want to feel; and 'effortful control', which it involves the ability to direct and control your motivations.[52] These skills involve controlling the main confounding factors in the exercise of thought and motivation.

[49] Müller and Kerns, (2015),p.572; Saarni et al., (2006),p.248.
[50] Rothbart and Bates, (2006),p.129
[51] Ibid.,p.130
[52] Müller and Kerns, (2015),p.572

The general pattern of development across childhood is of decreasing emotional intensity and increasing regulation. Across childhood, the older the child when faced with serious distress, the more the child can control their emotions either directly by using mental strategies or indirectly by resolving the stressful situation.[53]

During infancy and early childhood, the regulation of emotion and behaviour is initially centred around external sources, with children needing parents or other adults to sooth them. Over this period, the regulation of emotion and behaviour starts to move towards self-initiated, internal resources.[54] Moving out of infancy, with the development of the executive functions described in section I, there is a development in mentalistic strategies for regulating emotions, such as cognitive avoidance, and shifting and focusing attention. Development between 2 and 7 years is marked by increases in the ability to deal with conflicting emotional responses to situations, to detect errors in reasoning and perception, and slow subsequent responses.[55] Nonetheless, young children rely on adults to provide a safe environment such that their ability to cope is not overwhelmed. When it comes to secondary emotional control strategies (i.e. dealing with the situation in front of you to make it less emotionally stimulating), young children's strategies are more about escaping – e.g. hiding under the bed to avoid an unpleasant event – than tackling the problem itself.[56]

As individuals mature into middle childhood, they develop a greater capacity to 'modulate the course of their physiological and emotional arousal'.[57] Consequently, between 8 and 12, children's emotionality becomes more regulated, less intense, and less

[53] Saarni et al., (2006),p.279
[54] Chen and Schmidt, (2015),pp.171-172
[55] Rothbart and Bates, (2006),p.113
[56] Saarni et al., (2006),p.276
[57] Eisenberg, (2006),p.10

reactive.[58] In longitudinal surveys, the pattern of findings indicates that, between 8 and 10, it is mostly the intensity of emotionality that changes, not its frequency. [59] Regarding emotional problem-solving, children in middle childhood become more likely to be able to distinguish between controllable and uncontrollable stressors and, for controllable stressors, to attempt to tackle the stressor itself. In uncontrollable situations, 8–10-year-olds are more likely to use coping strategies, which include reframing, distraction, and avoidance through anticipatory planfulness (unlike younger children who rely on adults or hide).[60] Meerum Terwogt and Olthof's (1989) review found that in middle childhood, emotional intensity, impulsiveness and lack of control starts to fall away, and they can behave like adolescents.[61] However, Harris and Lipian (1989) found 'cognitive slippage' in school-age children when dealing with immediate and acute stress caused by hospitalisation. Compared with unstressed children, they seemed to regress to less mature ways of thinking.[62] Extremes of emotionality seem to affect children in middle childhood much more than adults or adolescents.

By late childhood or early adolescence,

> 'children who have enjoyed secure attachment in their supportive families and escaped severe trauma should generally be capable of emotionally competent coping'.[63]

Emotional self-efficacy, which is a more complete control over the way one feels, 'is probably not achieved until adolescence,' although it is a very under-investigated construct.[64] While individuals use situation-oriented problem solving throughout childhood, in adolescence it becomes more targeted to the specific problem at hand, and

[58] Murphy et al., (1999),p.418 and p.436
[59] Ibid.,p.437
[60] Saarni et al., (2006),p.276.
[61] Meerum Terwogt and Olthof, (1989), quoted in Saarni et al., (2006),p.277
[62] Harris and Lipian, (1989), quoted in Saarni et al., (2006),p.277
[63] Saarni et al., (2006),p.279. This indicates the importance of social context in the development of autonomy.
[64] Ibid.,p.282

children's repertoire of problem-solving strategies broadens with age.[65] Consequently, adolescents can cope with stressful situations and negative emotions much better than younger children. With the exception of impulsivity, which is described below, it seems that adolescents broadly have the ability to self-regulate their emotions.[66]

To summarise: young children struggle to regulate emotions internally, and so avoid emotional situations or rely on others to regulate their emotions. Children in middle childhood can generally regulate their emotions, and can normally reduce the intensity of their emotions, although they struggle in more stressful/upsetting situations. A more complete form of emotional control develops across adolescence.

IV.Volition Control and Impulsiveness

Building on the discussion so far, we can examine motivation control more directly. Unfortunately, 'a direct empirical investigation into children's ability to form second-order desires so far does not exist', although some psychologists are now calling for such research.[67] There is, however, work on the ability to control one's motivations. First, I examine inhibitory control, explain its relevance to motivational hierarchical control, and describe its development across childhood. Second, I examine impulsiveness, and the ability to control one's impulses, which forms a significant part of motivational control. I describe the development of impulse control from middle childhood into early adulthood, and then examine the development of motivational control in general across childhood.

[65] Ibid.,p.276
[66] Ibid.; Murphy et al., (1999)
[67] Krettenauer, (2013),p.127

Inhibitory Control

Here, I return to 'inhibitory control', discussed in section 1, which entails an ability to control one's motivations. Inhibitory control involves:

> 'being able to control one's attention, behaviour, thoughts, and/or emotions to override a strong internal predisposition or external lure, and instead do what's more appropriate or needed.'[68]

Inhibitory control, 'makes it possible… to choose how we react and how we behave.'[69] The construct of 'self-control' is the component of inhibitory control 'that involves control over one's behavior'.[70] It is about 'resisting temptations and not acting impulsively' and involves 'the abilities to set goals and keep focused on the goal, ignoring distractions'.[71] Increases in inhibitory control help explain children's increasing ability to resist temptation.[72] Inhibitory control and self-control involve the ability to prevent ourselves from acting on impulses and motivations that we do not endorse, meaning we can act on those motivations and impulses that we do endorse. Therefore, we must examine self-control and inhibitory control to examine hierarchical motivational control.

Now, I turn to empirical investigations into the ability to control one's will via inhibitory control.[73] In general,

> '[q]ualitative changes in different aspects of inhibition over the first 6 years of life are followed by more gradual changes that, at least on some measures of inhibition, extend into adolescence and adulthood.'[74]

[68] Diamond, (2013),p.137
[69] Ibid.,p.137
[70] Ibid.,p.137
[71] Ibid.,p.138 and Blasi, (2005),p.75
[72] Müller and Kerns, (2015),p.575
[73] For general discussion, Heckhausen and Dweck, (1998)
[74] Müller and Kerns, (2015),p.575

First, I describe the development of the ability to act on moral principles and inhibit non-moral desires.[75] The 'emergence of a volitional self' regarding moral motivation happens around age 4.[76] However, 4–7-year-olds struggle to act on moral rules when those rules conflict with other desires. At around 7 or 8 it becomes possible to suppress a temporarily stronger immoral impulse to act on a moral desire.[77] Finally, the phenomenon whereby individuals incorporate moral goals into their personal goals 'might emerge well before middle adolescence, that is, in late childhood or the early teenage years.'[78]

Second, I examine results of studies on the Iowa Gambling Task (IGT), which is sometimes taken as a test of self-control or inhibitory control.[79] The IGT is a kind of card game in which participants choose cards from four different decks, with some cards yielding rewards and others punishments. Initially, all the decks yield rewards, with some yielding higher rewards than others. However, when the punishment cards start to appear, the decks are organised such that the initially advantageous decks become net-disadvantageous, whereas the decks that yield lower rewards are, in the long-run, more advantageous. Healthy adults tend to choose from the more disadvantageous decks at the beginning, then gradually shift their choices to the lower reward but more net-advantageous decks as the punishment cards start to appear. Shifting from one deck to another requires inhibiting the prepotent desire to keep selecting from the initially-rewarding but now-disadvantageous decks. To perform well, participants need high response inhibition. Research with child-friendly versions of the IGT has shown that advantageous choices increase significantly in the preschool years, and continue to improve throughout adolescence.[80] Hooper et al. examined three groups: 9–10-year-olds, 11–13-

[75] For general discussion, Blasi, (2005) and Blasi, (1983)
[76] Krettenauer, (2013),p.132; Sokol et al., (2015)
[77] Krettenauer, (2013),p.128
[78] Ibid.,p.132
[79] Though the utility of the IGT is contested. Hooper et al., (2004),p.1154
[80] Müller and Kerns, (2015),p.597

year-olds, and 14–17-year-olds, with the game repeated in five 'blocks'. 14–17-year-olds shift 'toward the advantageous decks earlier in the task than the younger participants, specifically by Block 4 of the task'. The 11–13-year-olds

> 'start choosing similarly to the 14–17-year-olds in Block 5…but the 9–10-year-olds continue to choose fewer advantageous cards than the 14–17-year-olds even in the last block of the task'.[81]

Ernst et al. compared healthy 12–14-year-olds to healthy adults and found no significant performance differences between them.[82] That said, on the 'Hungry Donkey Task' (which is similar to the IGT), the group aged 18–25 did make more advantageous choices than the group aged 12–17.[83]

Finally, there are the results from go/no-go tasks. These are another set of tasks which index the development of inhibitory control, and hence the ability to control one's motivations. In these tasks, participants have to 'go' (e.g. press a button, or drive a computerised car) in response to a majority of stimuli, and refrain ('not go') in response to different, infrequent stimuli. To succeed, and bring their first-order desires in line with the higher-order desire to obey the rules of the task, participants must inhibit the prepotent desire to 'go'. Hooper et al. studied 9–17-year-olds, splitting them into three groups: 9–10-year-olds, 11–13-year-olds, and 14–17-year-olds. Participants were asked to press a space bar whenever they saw a letter appear on screen, unless the letter was an X, with Xs appearing 20% of the time. The false alarm rate of 'each age group was significantly different from that of the others': 9–10-year-olds have the highest false alarm rate' and 14–17-year-olds the lowest. This indicates that inhibitory control increases from 9 to 17.[84]

[81] Hooper et al., (2004),p.1152
[82] Ernst et al., (2003); Hooper et al., (2004),p.1149
[83] Hooper et al., (2004),p.1149
[84] Ibid.,p.1153

Taking this together, it seems that, unlike cognitive and moral reasoning abilities, the ability to control one's will (self-control and inhibitory control) continues to develop throughout adolescence and young adulthood. On some measures, older adolescents are equivalent to young adults. But on others, such as impulsivity, they have slightly less control. I investigate impulse control further now.

Impulse Control

Impulse control is relevant to the capacity to make one's higher-order preferences and values effective in one's actions. To the extent someone lacks control over their impulses, they lack that hierarchical capacity to pursue self-chosen goals and values. More precisely, *impulsivity* 'refers to a lack of self-control or deficiencies in response inhibition'[85] and 'the extent to which one acts without thinking [and] has difficulty controlling impulses'.[86] Impulsivity leads to hasty, unplanned behaviour. It is therefore also relevant to cognitive control, since impulsivity can disrupt proper evaluations of the situation at hand. In general, the ability to control the effect of impulses and feelings on behaviour requires inhibitory control (discussed above in sections I and III) and self-regulation and ego control (discussed above as a part of emotion regulation in section III).[87] Thus, impulse control emerges from the forms of development already discussed: it is a particular, and particularly important, instantiation of emotional control and executive function as they relate to motivational control.

[85] Steinberg et al., (2008),p.1765
[86] Steinberg et al., (2009),p.588
[87] Eisenberg, (2006),p.10

In one of the key studies on impulsivity, Steinberg et al. find that impulsivity declines steadily and linearly from age 10 onwards. This study used both self-reporting and lab experiments to test overall levels of impulsivity for participants aged 10–30. In the self-report measures, respondents answered questions about three scales: Motor Impulsivity, Inability to Delay Gratification, and Lack of Perseverance, with each scale containing 6 items. For each item, individuals were asked whether certain statements describe their behaviour (e.g. 'I act on the spur of the moment', 'I spend more money than I should'), with a four-point scale (rarely/never, occasionally, often, almost always/always). Subscales were averaged to form a total impulsivity score, ranging from 6 to 24. The results are shown in fig.6:

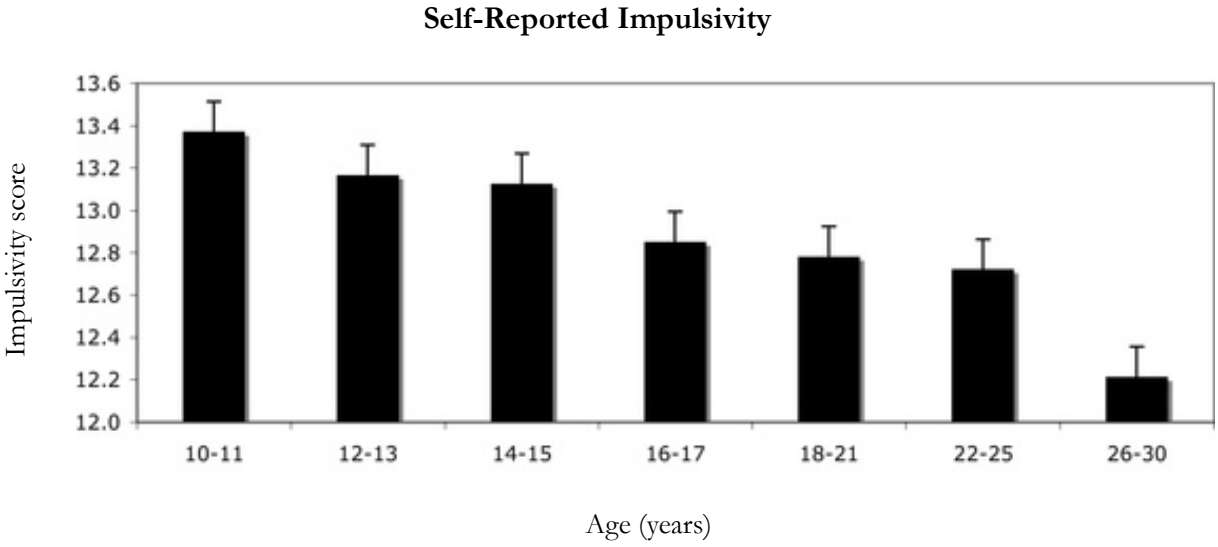


Figure 6: Steinberg et al. (2008)

The results indicate a significant linear effect of age on impulsivity. The graph shows that self-reported impulsivity declines or remains steady over the entire 20-year period, with particular declines after middle adolescence.[88]

[88] Steinberg et al., (2008),p.1771

The researchers then used lab experiments to measure impulsivity. They used the classic Tower of London task, a problem-solving task where participants move beads or balls from a starting arrangement into a different specified arrangement using as few moves as possible. Steinberg et al. measured how long it took for participants to make their first move. The longer the participant took, the less impulsive they were considered to be. Data from the lab experiment reveal a pattern of age differences consistent with the hypothesis that the development of impulse control happens mainly in late adolescence and early adulthood. The 16–17-year-olds and the 18–21-year-olds waited significantly longer than the three youngest age groups before making their first move on the task, but they waited significantly less than the 22–25-year-olds or the 26–30-year-olds (all significant at $p<0.05$). There are no significant differences between the three youngest groups. The experimental results point 'to significant declines in impulsivity from age 16 on, but not before, and continuing well into the mid-20s.'[89] Both the self-report and experimental measures of impulsivity indicate a linear decline in impulsivity between 10 and 30.[90] These results on the development of impulse control are also found in other studies that use various different scales of impulsivity, or of psycho-social maturity more broadly.[91]

Regarding younger children and infants, there is not much work on impulsivity, although there is research on motivational control as a whole. Generally, self-regulation and motivational control require 'relatively sophisticated cognitive processes' which 'can be problematic for young children'.[92] Children's ability to self-regulate increases dramatically over the toddler period. However, at this stage, adults are essential for how children

[89] Ibid.,p.1772.
[90] Ibid.,p.1774
[91] See Galvan et al., (2007) on 7–29-year-olds, and Leshem and Glicksohn, (2007) on 14–22-year-olds. Also Steinberg et al., (2009).
[92] Wigfield et al., (2006),p.959

regulate their own behaviour.[93] For older children (8–10 years) the data are not clear. So far, investigations have not disentangled the distinction between ability and performance with regards to self-regulation for pre-adolescent children.[94] It may be that they know how to regulate their behaviour and motivation, but they often do not. There is, however, some developmental work on volitional strategies. Volitional strategies are ways individuals engage or persist in activities in the face of distractions and other opportunities: these include cognitive, emotional, motivational and environmental control strategies. They can include things like: modifying activities to make them more interesting; engaging in goal-oriented self-talk (reminding yourself why you are doing something); and creating consequences for your behaviour (e.g. 'when I finish my homework I can watch TV').[95] Kuhl and Kraska found increases between the ages 6 and 10 in the ability to use all of the strategies (including motivation and attention control) except one (emotion control).[96] Therefore, it seems, barring emotion regulation, individuals in middle to late childhood can, broadly speaking, control their wills.

To summarise, rates of impulsivity start to decline in children from sometime between the ages of 10 and 15, and they decline steadily right through adolescence and early adulthood. Thus, unlike our results from previous chapters, on this measure, adolescents are not as autonomous as adults. Interestingly though, it seems that, on this measure, individuals in their 20s are also not as autonomous as adults aged over 30. For younger children, toddlerhood is the period during which self-control develops, and it seems that individuals in middle-childhood can control their desires except insofar as they struggle to control their emotions in general.

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[93] Ibid.,p.959
[94] Ibid.,p.959
[95] Wigfield et al., (2015),pp.664-670; Wigfield et al., (2006),p.949.
[96] Kuhl and Kraska, (1989),p.360 and p.365. For a recent update, see Wigfield et al., (2015)

V.Normative Significance of Hierarchical-Control

Here, I examine what our framework says normatively about hierarchical control. First, I show that our framework implies that those lacking hierarchical control lack certain moral agency-rights. Second, I examine what our framework suggests morally about what to do when hierarchical control is completely lacking, and when it is partly lacking. Third, moving from moral to political considerations, I examine the state's appropriate response to individuals with limited hierarchical control. Finally, I combine those general normative considerations with our empirical results above to make some preliminary suggestions about how to treat children in light of their lower hierarchical control.

Before moving on, it is important to remember that hierarchical control is a capacity. Individuals can possess that capacity without exercising it. As such, the fact that an individual makes an emotional or spontaneous decision is not by itself proof that the decision was made without hierarchical control. The individual may have not used their capacity, or may have endorsed the emotional or spontaneous action. Under our framework, as discussed in chapter 4, we respect autonomy-as-capacity, rather than autonomy-as-exercised. Therefore, we are only interested in decisions where hierarchical control (as capacity) is absent.

To the extent that an individual lacks hierarchical control, they lack certain moral rights. This is because lacking hierarchical self-control means lacking a key component of autonomy. Since rights derive from autonomy, lacking a component of autonomy can imply a lack of certain kinds of moral rights. Therefore, to the extent that children lack hierarchical control (via impulsivity, emotionality etc.), children lack certain kinds of moral agency-rights. This is not a strange conclusion, nor one which is unique to children or individuals with specific neuro-psychological disorders. It also applies to adults more

generally. Within current legal and political practice, we accept that a lack of hierarchical control implies a certain lack of autonomy. Impulsivity and emotionality reflect a vulnerability in adults which marks the limits of a certain kind of hard-edged liberalism. For example, consumer protections give consumers a 'cooling off' period in which they can change their minds without consequence following certain kinds of purchase. This recognises the possibility of emotion or impulse interfering with autonomous control. In English criminal law, partial defences to murder include (i) 'diminished responsibility', which covers cases where the individual cannot 'exercise self-control'; and (ii) 'loss of control' where the defendant's actions 'resulted from [the defendant's] loss of self-control' and 'the loss of self-control had a qualifying trigger'.[97] These laws recognise that impulsivity and lack of hierarchical control implies a reduced level of autonomy, and therefore a reduced level of responsibility. Emotionality is also recognised as limiting autonomy. For example, in surrogacy agreements, for courts to make a parental order (which transfers parentage from the birth mother to the commissioning couple) the birth mother must have 'freely, and with full understanding of what is involved, agreed unconditionally to the making of the order' and, significantly, 'the agreement of the woman who carried the child is ineffective…if given by her less than six weeks after the child's birth'.[98] This provision recognises that childbirth and its aftermath are emotional and exhausting, and that to insist on strictly enforcing an agreement made immediately after birth could lead to deep wrongs where mothers 'consent' to give up their babies without really wanting to.[99] This law recognises that emotionality can hinder autonomy in a way that limits the possibility of meaningful consent. These examples show we already recognise that emotionality and impulsivity reduce an individual's autonomy and affect how we respect and respond to their choices.

[97] *Coroner's and Justice Act* (2009), s52 and s54
[98] *Human Fertilisation and Embryology Act* (2008), s54
[99] This seems to have been one of the many wrongs committed in the Magdalene Laundries in Ireland.

This illustrates a few things. First, that recognising this specific vulnerability in children would not introduce a radical or new way of treating individuals. Second, that recognising that children are vulnerable to emotionality and impulsivity, or lack of control more generally, does not mean treating them qualitatively differently from adults, since we already recognise this vulnerability in adults. Third, it shows how rights limitations based on a lack of hierarchical control can work in practice.

Next, I investigate more precisely what our autonomy-based, respect-based approach to rights suggests about dealing with a lack of hierarchical control. Let's call decisions made without hierarchical control 'uncontrolled decisions'. If we know that a particular decision for a particular individual is, or will be, uncontrolled, then there are several possible responses:

(i) Allow the individual to make the decision with its full consequences;

(ii) Prevent the individual from making that decision. For example, laws against taking heroin are there, amongst other things, to prevent individuals from making impulsive decisions which are not line with their considered goals;

(iii) Permit the individual to make the decision, but allow them to reverse that decision later. For example, cooling off periods to allow decisions to be reversed. Similarly, letting children leave school at the age of 14 might be less damaging if we made it easier for older children and adults to return to education later;

(iv) Provide external help, perhaps from experts or psychologists, to facilitate cool reflection so their decision reflects their higher-order goals. For example, abortion and euthanasia laws usually require patients to speak to several clinicians before finalizing the decision. These requirements help ensure,

amongst other things, that a decision which can be emotionally charged is nonetheless autonomous.

Each option can involve respect for autonomy, since they either lead to the decisions that would be made if hierarchical control were in place, or facilitate hierarchical control. Options (iii) or (iv) attempt to facilitate hierarchical control, either directly by providing external help (option (iv)), or indirectly by allowing the individual to change their mind if and when they gain more control later (option (iii)). These facilitative options involve a respect for full autonomy in the sense that we allow/help all the components of autonomy to operate, and then respect whatever decision results from that, meaning that we respect every component of the individual's autonomy. Alternatively, we can apply a counterfactual test: what would the individual decide if they possessed full hierarchical control? Once we have an answer to that question, we can ensure the individual does what they would have done were they fully autonomous by choosing between options (i) and (ii). This is not paternalism done out of an externally imposed judgement of what is good for the individual or of how best to achieve that good: it still lets the individual define their own good and define how best to pursue it. The options that enforce this counterfactual test involve interference justified out of a respect for the two moral powers, and therefore a respect for the individual's partial autonomy. But respecting those autonomous judgements requires ignoring the particular non-autonomous decision which the individual is making in spite of their own autonomous goals and beliefs. Holding people to choices, beliefs and actions that were made when they lacked hierarchical control is not autonomy-respecting because those actions are not reflections of their core autonomy. Since allowing uncontrolled decisions is not in itself a way of respecting autonomy, the normal autonomy-based barrier to paternalistic intervention is lowered. Therefore, applying the counterfactual test (to choose between (i) and (ii)) at least respects the autonomy that is present in the

individual because it involves an interference which respects core autonomy, i.e., the two moral powers. Therefore, all the four options above, whether facilitative or applications of the counterfactual test, are autonomy-respecting ways of responding to a lack of hierarchical control.

Which option is most appropriate depends on the case at hand. Amongst other things, it depends on: the right in question; the circumstances under which it is exercised; the possibility of undoing the decision later; the costs of undoing the decision later, or of making it possible to undo the decision later; the possibility of providing help to neutralize emotionality/impulsivity; and what the individual would do if they were perfectly in control. Once those questions have been answered, we should choose the option which most respects autonomy. The choice between (i) and (ii) depends on what, counterfactually, the individual would have chosen had they possessed full hierarchical control: if they would make the same decision, then let them make it; if they wouldn't, then stop them. Generally, the facilitative options (iii) and (iv) are preferable to the counterfactual test, because they ultimately respect more components of the individual's autonomy. Since (iii) and (iv) facilitate the use of hierarchical control, they allow us to respect the individual's two moral powers *and* their hierarchical control, whereas the counterfactual test respects only the two moral powers. This means we should generally prefer facilitation.

There is an additional wrinkle here: it is quite rare for individuals to completely lose hierarchical control (even in a given moment or with respect to a particular choice) and examples are probably confined to impulse control disorders, addiction, and extremes of emotionality. Usually, it becomes difficult for the individual to exercise self-control, but not impossible. As such, individuals usually possess at least partial hierarchical control. This means that there may well be a conflict between respecting someone's partial hierarchical control – which would suggest option (i) of allowing their current decision – and respecting

only their two moral powers by applying the counterfactual test. Of course, it is still better to facilitate full hierarchical control and then respect the full autonomy of the individual. But if those options are not available, then we are faced with a decision between allowing the choice, thereby respecting the partial hierarchical control, and applying the counterfactual test, thereby respecting the two moral powers. Those two options might amount to the same thing, of course, if the impulsive decision is the same as what their fully controlled decision would have been. But if not, we face a dilemma. In general, though, it seems that we tend to lean towards respecting partial hierarchical control; the limits we tend to impose on rights as a result of a lack of self-control are somewhat restricted. For example, the principle of informed consent is central within medical ethics, even though some decisions, particularly emergency ones, are made in scenarios of high stress and emotion. The fact emotions are running high does not mean that decisions are completely uncontrolled, and what control there is still deserves respect. Given we generally allow people who are angry, or depressed, or in stressful situations to make decisions, it seems that the threshold level of hierarchical control needed to make an autonomous decision is in fact quite low. Bearing this in mind, when deciding whether a young person's emotionality or impulsiveness falls below that threshold, we should ask whether we would restrict the choice made by adults in a similar scenario. Alternatively, we could use the Rawlsian heuristic from chapter 3 and ask whether we would want our choices coercively restricted when we lack control in that way. If we would not restrict adults' choices when they are, say, especially angry, or would not want our own choices so restricted, then we should not restrict the child's choice just for that reason. This is because the only normatively relevant potential difference between the child and the adult when thinking about hierarchical control is precisely their level of impulsiveness or emotionality; if the impulsiveness or emotionality does not itself provide a reason to treat children differently from adults in such a scenario, then an appeal to hierarchical control cannot

justify coercive interference against children. Neither their age, nor the fact that we currently coerce children more than adults, provides a normatively relevant difference.[100] These kinds of considerations can help us determine whether, in a given scenario, we should respect an individual's partial hierarchical control and permit the individual's decision, or whether we should override their partial hierarchical control and apply the counterfactual test.

The above comments indicate the kinds questions one must ask to establish morally whether a certain incidence of childhood or adolescence emotionality/impulsiveness merits intervention, and which form of intervention is most appropriate.

The discussion so far has focused on the question of moral rights. As we move from the moral to the political, other difficulties creep in which tell more strongly against intervention. The above discussion has assumed that we know the individual lacks hierarchical control, and that we know what the individual would have chosen had they possessed hierarchical control. But we face information constraints. There is uncertainty about whether an individual's decision is autonomous: as discussed in the last chapter, we must balance the risks of overriding the individual's autonomy if they are fully autonomous, and the risks of failing to aid the exercise of their two moral powers if they lack hierarchical control. And even if the state knows that an individual lacks self-control, the state typically has no access to the individual's reasoning regarding their own good and their own interests. This places an informational barrier to performing the counterfactual test. Therefore, allowing partial hierarchical control to operate is more likely to result in the

[100] There may be a policy difference in how we respond to individuals who are generally above the threshold but sometimes below it, and individuals who are generally below the threshold but sometimes above it. It could make a difference to whom we presume has capacity, and to the burdens of proof to demonstrate otherwise. See Chapter 11, section V.

individual making decisions in accordance with their two moral powers than if the state interferes and makes a guess. There may well be exceptions to this: individuals might give advanced medical directives, for example. But typically, a state's respect for an individual's autonomy requires non-interference; this is because non-interference respects the partial hierarchical control of the individual for sure, and is probabilistically the best way to respect the individual's two moral powers. Finally, state interference normally comes in the form of laws which are very general, having been written in advance to deal with a broad range of cases. That means almost any law regulating certain decisions on the grounds that those decisions are sometimes uncontrolled will also affect decisions which *are* controlled (and hence autonomous). When writing such laws, we must balance protecting some people from uncontrolled decisions and respecting the (full or partial) autonomy of others. The need to respect those people with autonomy acts as a counterbalance to arguments in favour of paternalistic laws. In general, therefore, our framework tells against state intervention justified on the basis of individuals lacking hierarchical control. This is because of: the low threshold of hierarchical control needed to merit respect; the uncertainty about when a given individual possesses hierarchical control; the need to respect partial hierarchical control; the uncertainty about what an individual with partial hierarchical control would choose with full hierarchical control; and, given the bluntness of the law, the need respect those who possess full hierarchical control who would be affected by that law.

Finally, it is worth observing that the two limitations of empirical psychology discussed in chapter 1 apply here: namely, that psychological incapacities may be socially formed, and second that they may be structural.

First, we should not take the lack of hierarchical control, particularly for adolescents, to be fixed. Indeed, hierarchical control is probably one of the most plastic elements of autonomy that we have examined. As discussed in chapter 2 and earlier in this

chapter, adolescents seem to take impulsive risks because their futures are uncertain and because, at least as young adolescents, they tend not to bear the costs of their actions. If you allow children to make decisions and bear the consequences, then they may become less impulsive. Similarly, as discussed in section II, long-term planning depends on the cultural context of how far into the future we make them plan. And emotional stability, as discussed in section III, is a function of a supportive and stable upbringing, and avoiding childhood trauma.[101] Opportunities for play in earlier childhood also seem important for the development of self-control.[102] And even executive functions, which is the overarching ability to exercise self-control, can be developed through training (although the resulting transfer of improvements to untrained functions have been difficult to demonstrate).[103] It therefore seems that adolescents, and possibly younger children, can, in principle, have the same hierarchical control as adults.

Second, to the extent that lack of hierarchical control is a problem, this is often structural: we do not provide adolescents with the support they need to make decisions in a cool manner, and we often hold people to the consequences of their decisions when we could instead allow those decisions to be altered. Once we alter these structures, there may be little reason to deny adolescents rights afforded to adults.

In these ways, the weaknesses in hierarchical control that some adolescents currently possess do not need to be a barrier to their possession of equal moral or political rights.

[101] Saarni et al., (2006),p.279.
[102] Savina, (2014)
[103] Thorell et al., (2009)

Conclusions

Combined with these general normative considerations, what do our empirical results mean then for the treatment of children and adolescents?

First, we should not overemphasise the difference between adolescents and adults. Although adolescents have not yet reached ceiling levels of impulse control, that is also true for adults in their 20s. Unless we think that the age of majority should be raised to the age of 30, we must be committed to the view that the threshold for the level of self-control needed for full autonomy must be below ceiling level. Therefore, the fact that adolescents have higher degrees of impulsiveness than older individuals does not itself justify denying them the rights possessed by adults. The differences between adolescents and adults is a matter of degree rather than of type. Therefore, although we may need to make certain allowances for adolescents, this is not fundamentally different to the way we ought to, and do, respond to the same vulnerabilities in adults. But we may need to make such allowances more frequently. This could mean allowing adolescents to make certain decisions only when there is the possibility of being measured and calm; providing them more help in making decisions than we would for adults; and restricting decisions which are unavoidably emotional or uncontrolled, or holding them less responsible when they do make such decisions. Two examples of how this might look in practice are medical consent and criminal responsibility. Regarding medical consent, doctors can sometimes: help an adolescent through the decision-making process; assess their mental state when consent is given or withheld; and check whether their decision reflects their settled will. In this way, adolescents can be free to make medical decisions, just as adults are. On the other hand, we should perhaps be more lenient in criminal trials where there is evidence that the defendant has a high degree of impulsivity. High impulsivity might suggest that the crime was not fully autonomous, meaning retributive punishment is less morally appropriate. Therefore,

an examination of hierarchical control might suggest that adolescents should not always be held fully criminally responsible, even if they possess full cognitive capacities.[104]

Second, for preadolescent children, who often depend on external emotion regulation, it means providing that soothing calm, and preventing them from harming themselves, or from acting in ways they might come to regret in a calm moment. Although adults and adolescents may make emotional or spontaneous decisions which they later come to regret, the fact they are capable of controlling those emotions to some minimum degree – even if they sometimes fail to control them or choose not to – means that we typically may not coercively interfere with those decisions of adults or adolescents. But for younger children who lack that internal capability, we may interfere when they are emotional or impulsive. Take, for example, the boy in chapter 3 who wants to be a physicist, but, through a lack of hierarchical control, struggles to make long-term plans, and impulsively refuses to go to school or do homework. It is legitimate to paternalistically require him to attend school or do homework.[105]

These comments on the normative significance of hierarchical control are necessarily quite broad since the appropriate responses to uncontrolled choice are so fact-sensitive. However, this chapter explains generally how our framework applies to questions of self-control. In the later applied chapters, particularly on sexual consent, we will see how it works in practice.

More broadly, the last three chapters have demonstrated the role of empirical psychology within our framework. We have defined the range of normatively relevant psychological capacities and explained their individual normative significance. This means that our framework can take any given set of empirical findings about the psychological features of

[104] Steinberg et al., (2009)
[105] Whether it is also justified depends on the effectiveness and consequences of such interference.

a child or a group of children, and show what rights are generated by those features. Now we have all the components of our framework, we can bring together all those components and lay out the framework in full.

Chapter 8

Part I Conclusion

Introduction

In Part I of this thesis I have outlined and defended a liberal framework for investigating and establishing children's agency rights. In this chapter I bring together the different elements of this framework. Section I provides an outline of the framework. Section II tackles objections. Section III shows how this framework avoids problems with the current children's rights literature.

I.The Framework

The framework developed in this thesis contains five features: (i) An account of autonomy; (ii) an account of how rights are derived from autonomy; (iii) a set of theoretical psychological concepts and how they relate to autonomy; (iv) a method for critiquing claims made by empirical psychology; (v) a method to balance the harms and wrongs of granting legal rights to a group. For determining moral rights, the input into the framework is a set of empirical psychological claims. Those psychological claims are then critiqued; matched up to the account of autonomy; and a set of rights is derived from those psychological features. When investigating moral rights, therefore, we go through the following process with the first four components of our framework:

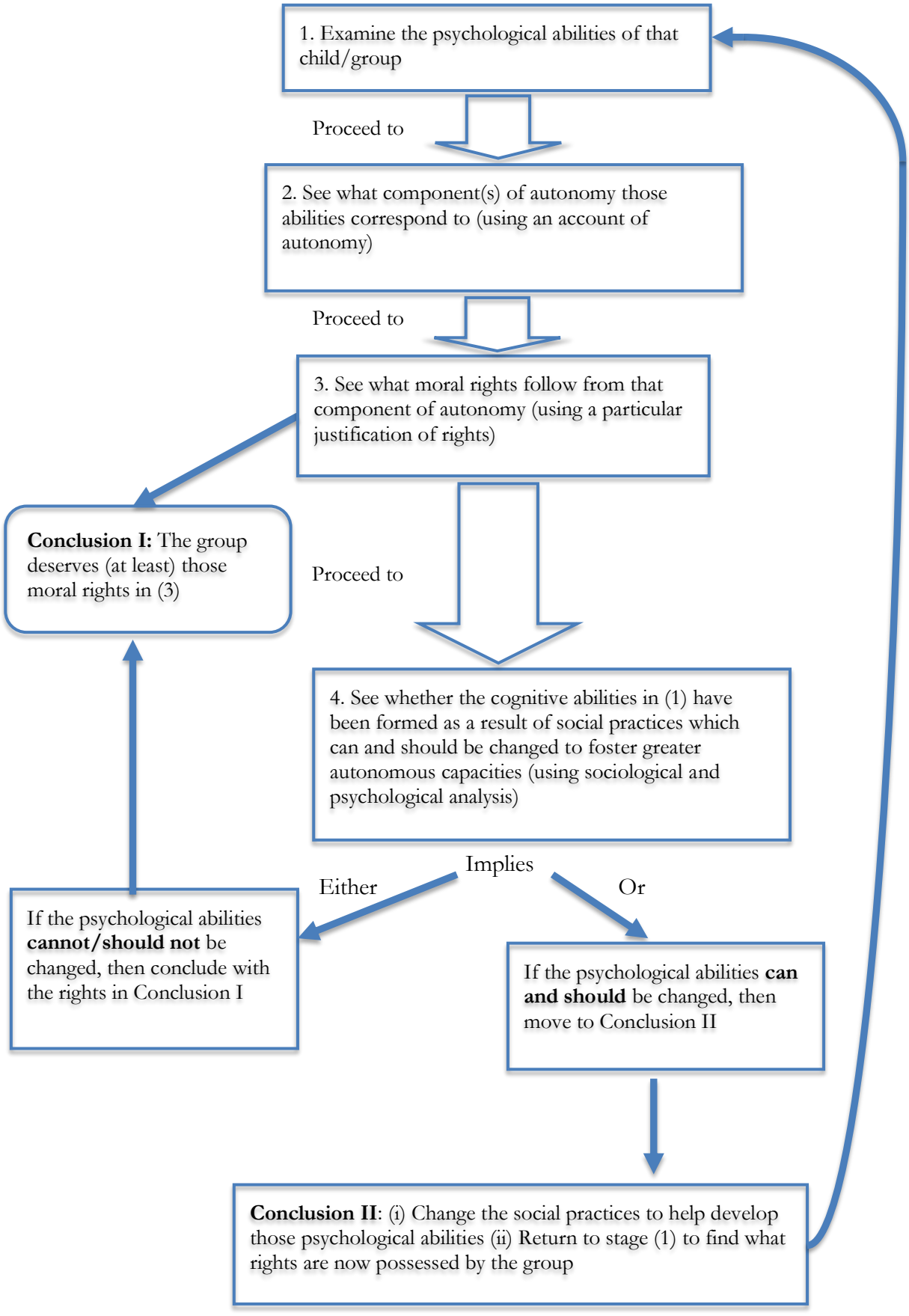


Figure 1: A Liberal Framework for Identifying Moral Rights

Following this process, we end up with a set of moral rights possess by an individual/group. The substantive content of each stage is the following:

Stage of Framework	**Substantive Content**
1.Examining psychological abilities	Empirical findings are taken from the scientific literature and organised under the types of psychological capacity identified in chapters 5–7: (i) Logical Reasoning; (ii) Empirical Reasoning; (iii) Decision-Making; (iv) Argumentation; (v) Moral reasoning; (vi) Cognitive Control; (vii) Motivational Control.
2. Connecting the psychological abilities to autonomy	Our conception of autonomy, as argued in chapter 4, consists in the two moral powers and hierarchical control.
3. Deriving rights	A respect-based approach, as outlined in chapter 3.
4. Analysing the social contingency of those psychological capacities	Social critique, as outlined in chapter 2.

Table 5

Fig.1 shows the bare bones of the framework, and the table shows the substantive 'inputs' into that framework.

When examining whether a particular child or group of children should possess a particular *legal* right we must also investigate the balance of harms. To do this we must recognise that a group contains some who possess the moral right, and some who lack the capacity and, if deciding for a single individual, there is some chance the individual lacks the underlying moral right. We must choose between:

(I) Giving rights to the group/individual, thus protecting the moral rights of capable individuals, but potentially harming incapable individuals; or

(II) Denying rights to the group/individual, thus protecting the incapable, but violating the rights of the capable.

The decision must (in addition to practical considerations) be sensitive to:

(a) the expected proportions of each type of person in any given group (or the probability of a given person being each type);

(b) how wrong it is to violate that moral right; and,

(c) how damaging it is to give that legal right to someone who is incapable.

We need various empirical psychological and social scientific inputs to determine the proportions of each type of person within a given group, and to determine the magnitude and risk of various harms occurring. We also need the normative considerations outlined in chapter 3 to balance respecting autonomy, promoting autonomy, and promoting welfare.

When deciding on the balance of harms whether to maintain or change a set of social relations which create a certain set of empirical psychological facts, we would need to examine the list of considerations laid out in chapter 2:

(i) the value of the policy-fact combination;

(ii) the value of the set of social relations;

(iii) the value of the set of empirical individual traits;

(iv) the switching and maintenance costs of changing a certain set of social relations and/or the individual treatment.

Finally, we may need to use of some kind of precautionary principle. Perhaps, for prioritarian-type reasons, we should not aim to maximise the expected value of the policy-decision, but should give extra weight to the harms to the (potentially) worst off. A precautionary approach does not necessarily entail a presumption against granting rights to children because of worries about potential harms. To be risk-averse, we must already know what, in a particular case, would be worse: the harm that comes from granting a right

to an immature child, or the wrong that comes with violating autonomy. Once that question has been answered, we can ask whether risk-aversion entails denying the right to the entire group on the grounds that harm to immature members would be disastrous, or whether it entails granting rights to the entire group on the grounds that violating their autonomy would be disastrous. Therefore, a formal principle of precaution cannot, on its own, tell us whether to err on the side of liberation or of protection.

The 'balance of harms' is necessary for our framework because it is impossible to observe psychological capacities directly.[1] Even using psychological tests, there is some chance we have the wrong result. Therefore, when granting a legal right on the basis of some proxy for a normatively-relevant capacity, there will be some people granted the right who lack the requisite capacity. And we must account for this risk.

The above, then, outlines our framework for thinking about children's rights. Next, I examine objections to that framework.

II.Objections

Here I examine two objections to this framework, namely:

(1) Empirical psychology is too uncertain a basis for a political theoretical framework; and

(2) The framework ignores the importance of power.

[1] See Clayton, (2006),pp.181-191

One might worry about the use of psychology. How can we as political theorists really know about empirical psychology? And are psychologists not always revising their theories and changing their empirical conclusions? If we as political theorists cannot reliably use empirical psychology, or if empirical psychologists are too liable to change their minds, then we have built our framework on shifting and uncertain sands. If this characterisation were correct, then it would perhaps suggest abandoning our framework.

However, this objection just highlights the importance of defending a framework rather than a specific set of conclusions. If psychologists changed their descriptions of childhood rationality, then my framework would remain intact. One would simply need to update the empirical statements made in Stage 1 of the flow chart in fig.1. As a framework, it will not itself go out of date when the empirical descriptions change. For example, had this framework been applied 60 years ago, when Piaget was dominant in developmental psychology, it may have concluded that individuals from 10/11-years-old should be given full adult rights on the grounds that they had reached the 'formal operational' stage of thinking, the highest and final stage of cognitive development in the Piagetian schema. However, before the age of 10/11, children were considered to be in the 'concrete operational' stage, a qualitatively different mode of reasoning, in which individuals cannot reason deductively, abstractly, or in hypothetical ways, and struggle to reason about the long-term. Piaget's work has since been found to underestimate younger children's abilities significantly and to overestimate adults' abilities.[2] Hence, an application of my framework in the Piagetian era may have granted fewer rights to middle- and younger children than it would now, and it may have granted more rights to those in early adolescence. This

[2] Keenan and Evans, (2009),pp.168-171; Harris and Butterworth, (2002),pp.238-244; Moshman, (1999),pp.14-17; Danner, (1989),p.54 and p.58.

illustrates that the framework can withstand changes in empirical psychology: if the facts change, then so do the conclusions generated by the framework.

But there remains a further question: what normative conclusions can we draw under conditions of empirical uncertainty? A proper answer to this question would require a full discussion of the ethics of risk, but the answer involves the 'balance of harms' stage of the framework. When examining empirical features under conditions of risk, we should examine the probability distributions for each capability on each proxy. For example, suppose there is a 5% chance we are wrong about an individual's/group's capabilities. The decision-making procedure is similar to making a judgment about a group when we know that 5% of that group lack the relevant capacity. We need to weigh the harms of granting the right in the world in which we are wrong, scale that harm by the 5% chance of those harms occurring and perhaps then scale it further using a precautionary principle. As with criminal law systems, we might be more worried about violating the autonomy of the one who possesses capacity than granting rights to 10 others who lack it. That would be a precautionary principle that tells in favour of liberty. But if granting a right to someone who does not deserve it could have catastrophic consequences, then perhaps precaution would suggest denying liberty when we do not know who does and does not merit a right. For the precautionary principle to operate, we must use the kind of moral reasoning described in chapter 3 to calculate the various moral pay-offs of each decision; only then can we know which outcomes the precautionary principle would have us weigh more heavily in our reasoning. As we become less certain about our empirical beliefs, the probability distribution will have a greater variance. At the limit, we'll be unable to apportion probabilities to any particular outcome. We then have a choice made under 'uncertainty' rather than 'risk'. This situation is more a hypothetical end-point than actual reality (how often will we have absolutely no idea about someone's psychological abilities?), though if you were sceptical of an entire scientific paradigm you may consider these policy

decisions to be made under uncertainty. In such cases, we must make a judgement about the most rational decision which, quite plausibly, would require a maximin principle.[3] If so, we must allocate rights to avoid the worst-case scenario. Therefore, it is still possible to use the framework even under empirical uncertainty.

Therefore, the framework survives empirical change and empirical uncertainty. It survives potential changes in empirical psychology because it uses empirics as an input rather than a building block. And the framework can directly incorporate concerns about risk and uncertainty by making 'balance of harm' judgements.

Power

A second objection is that our approach focuses too narrowly on rationality, when we should (also) be concerned about power. For example, we have concluded that adolescents and adults have almost identical cognitive abilities; this might suggest that we need to lower the age of consent to around 12-years. On a minimalist cognitive account of capacity, once one can understand intercourse and its physical effects, and can reason about one's preferences, then one should have the right to consent to sexual acts. This permissive account might suggest an even younger age of consent. Many would find such a conclusion troubling. One reason is that adults can exercise power over children; if we let children make sexual decisions, then some adults could manipulate those children into making a 'choice' which leaves the child with psychological and physical harm. Concerns about power also explain why teachers and doctors may not have sexual relations with pupils/patients even when the pupil/patient reaches the age of consent: although the

[3] E.g. Rawls, (2001),pp.97-100

pupil/patient can ordinarily make a rational choice about intercourse, when the power imbalance is sufficiently great we must protect individuals from manipulation. Similar arguments were used to ban child labour and make schooling compulsory: such policies removed the choice from children so they could not be pressured/manipulated into leaving education to work and bolster family income.[4] Therefore, we must consider the effects of power imbalances when making decisions about rights. And if our framework cannot incorporate such concerns, that framework should be rejected.

However, our account can accommodate concerns about power and manipulation because those concerns stem directly from valuing autonomy. As such, our autonomy-based framework can help us understand the values at stake in cases of manipulation and can incorporate such worries in the 'balance of harms'. The worry about power imbalances is that, even if children have rational capabilities, granting them the right to make certain choices leaves children open to exploitation. However, this is not a problem for our framework: manipulation is wrong because it disrespects autonomy; therefore, these concerns are built into the framework. Manipulation 'perverts the way that person reaches decisions, forms preferences or adopts goals'.[5] This violates autonomy by distorting the process of deliberation such that it is not really 'autonomous' in the sense of being 'independent'. Manipulation is wrong, therefore, for similar reasons as coercively reducing someone's options: it is inconsistent with respecting someone's ability to deliberate for us to affect the outcomes of their choices by making them subject to our will. Our framework can therefore justify a right against coercive interference *and* a right against manipulation (e.g. through advertising regulations). Therefore, if granting a choice to children may lead those with power to manipulate those children, we should try to dismantle those power relations, meaning we can respect autonomy both by letting children make choices and by

[4] Cunningham, (2005),pp.142-43, pp89-90, pp.180-181
[5] Raz, (1986),pp.377-378

preventing others from manipulating/exploiting them. When the power relations between adults and children are legally constructed, we could dismantle those legal relations. When the power relations are linked to strength, intelligence or social status, we could pass laws or enact policies which mitigate or correct for that power imbalance. Our framework considers manipulation and exploitation, along with coercion, to violate autonomy.

What if we cannot abolish the power relationships that leave a child open to manipulation or exploitation? In these cases, we might deny an individual the right to make certain choices so as to protect them from being exploited in those choices. For example, health and safety and minimum-wage regulations prevent individuals and companies from contracting out of those obligations in employment contracts; this is to protect workers from certain kinds of structural oppression. The theory here is that to let individuals contract below the minimum wage would be to let individuals be manipulated and pressured into 'choosing' that contract. In such cases, the government must find the best way to respect autonomy given that circumstances force them to choose between respecting autonomy by protecting *options of choice* and protecting *independence of decision-making*. We cannot provide one universal solution to such messy, non-ideal dilemmas. But our framework can help us identify the values at stake and facilitate a solution. For example, regarding sexual consent, the first desideratum is generally accepted, namely that (i) it is harmful for children to experience sexual exploitation and manipulation. But our framework also highlights that (ii) children's autonomy is violated by denying certain choices (a point mostly ignored in contemporary debates about children); and (iii) manipulation also violates their autonomy. Not only does the framework highlight the values at stake when there is the potential for manipulation, but it incorporates and weighs those values in the 'balance of harms' stage.

Therefore, our liberal framework can incorporate concerns about power because (I) it identifies key values involved in debates about power; and (II) it incorporates such

considerations into the balance of harms. Since our framework can incorporate and explain concerns about power imbalances, we cannot reject the liberal framework on the grounds that it is insensitive to considerations of power.

Therefore, the framework outlined and applied in this thesis is, I think, safe from the major criticisms that can be levied against it.[6] Next, I discuss how it avoids the problems faced by the current literature on children's rights.

III.Problems with the Current Literature Revisited

This framework avoids many of the problems with the current literature on children's rights identified in chapter 1. The three main problems are: (i) uncritical descriptive assertions about children; (ii) imprecision about different stages of childhood; and (iii) failure to appreciate the need to respect children's autonomy now. Here I examine how our framework avoids each problem.

Uncritical Descriptive Assertions

First, the current literature (with the main exception of Coleman) rarely investigates children empirically when making claims about their capabilities. Hannan and Vernon assert that 'children lack the capacity to assess the impact of their present choices on their range of future opportunities'; Brighouse claims that children cannot choose with an

[6] A further criticism, that I overstate the importance of children's rights given they will one day get adult rights, is discussed in chapter 11.

adequate 'level of competence'; and Feinberg claims that children act from 'immature and uninformed judgement'.[7] These 'observations' about children are blunt assertions, used to argue that children have no agency rights. But these claims are all empirical. They should, therefore, be based on empirical investigation.[8] Otherwise, such assertions could well be (and often are) false. Not only this, but when philosophers rely on 'intuition' or 'common sense' to make empirical claims, their claims may reflect their prejudices and end-up reifying and justifying an (often unjust) status quo.[9]

Our framework avoids these problems in two ways. First, it incorporates empirical psychology. Indeed, by using empirical psychology in chapters 5-7 we showed that adolescents are more cognitively developed than perhaps 'common sense' suggests and that middle children can be helped to make competent decisions. These examples illustrate why empirical investigation is so important. To be fair, Coleman engages with empirical psychology, and others, such as Freeman, reference psychological literature.[10] But they don't include the second important empirical component of our framework: social critique. Critique ensures that the empirical psychology does not simply reflect society's biases, and helps us see how children's capacities are determined by social practices and how those practices might be changed. Historically, this analysis has been important for other marginalised groups. For example, women's liberation movements pointed out that, though empirical investigations may once have shown that women were less capable than men, these 'lower capabilities' were produced by oppressive social practices.[11] We need both empirical investigation and critique when applying normative principles to real cases

[7] Hannan and Vernon, (2008),p.188; Brighouse, (2002),p.39; Feinberg, (1992),p.89. Also Clayton, (2012),p.360
[8] See, Swift and White, (2008)
[9] McNay, (2013),p.139
[10] Coleman, (2002); Freeman, (1997a),p.28
[11] See, for example, Wollstonecraft, (1989) and Mill, (1984)

to ensure our claims are (i) accurate and (ii) not reifications of social contingencies. Our framework therefore avoids this first major problem with the current literature.

Imprecision

The second major problem with the current literature (linked to the first) is that it is not sensitive to different stages of childhood. Writers often talk about 'children' in general, using intuitions usually developed when imagining infants. There are some concessions in the literature: Feinberg does say

> 'any "mere child" beyond the stage of infancy is only a child in some respects, and already an adult in others'.[12]

But when writers acknowledge that their conclusions do not apply to all minors, they provide little guidance for the fuzzy cases between infancy and adulthood. Therefore, the current literature either applies its conclusions uniformly across all minors, or gives little guidance for determining rights across different levels of development.

Our framework avoids this problem in two ways. First, the first stage of our framework is explicitly empirical, meaning we can acknowledge different levels of development amongst different children. And secondly, by separating out different cognitive abilities, linking them up to autonomy, and explaining their individual normative significance, we can make judgements about children's rights at different levels of development.

[12] Feinberg, (1992),p.95

Third, the current literature ignores the need to respect children's current autonomy. Current writers are often concerned about protecting children's *future* autonomy: Feinberg advocates protecting a child's right to an open future; Clayton, regarding decisions made on behalf of children, worries about children's future 'retrospective consent'; and Brighouse advocates balancing current welfare against future autonomy.[13] But many parental decisions (and many of the decisions described by those writers) are about whether to override a child's wishes. The current literature seems to assume that there is no reason to respect a child's wishes as such. Similarly, English courts, in decisions regarding a child's upbringing, only take a child's wishes into account insofar as doing so is good for the child's welfare, and not out of respect for their views.[14] This assumption ignores the trade-offs between current autonomy, future autonomy and welfare. This means many writers (i) provide little guidance in such scenarios; and (ii) routinely, and perhaps wrongly, ignore children's wishes.

Our framework avoids this problem because it is based on the need, at every stage, to respect the decisions that a child can make and (importantly) because it gives us a way to determine which decisions children can make at every stage of development. For example, children who can make logical short-term decisions should have those short-term decisions respected. However, when that child's 'short-term' decision might do long-term damage to their autonomy, we should use the normative framework in chapter 3 to balance respecting current autonomy, promoting future autonomy and promoting welfare. True, there is some fuzziness in the method of balancing. But our framework is preferable to current ways of thinking because it acknowledges the *pro tanto* need to respect children's current autonomy

[13] Ibid.; Clayton, (2012); Brighouse, (2002)
[14] *Children Act* (1989), s1.

and so realises that, even if we override a child's current will, there has been some wrong done. Furthermore, it helps us understand and measure the normative weight of autonomy in certain decisions by examining the degree of development in autonomous capacities. Therefore, our framework recognises the importance of a child's current autonomy.

Therefore, the framework developed in this thesis can, because of its precision, avoid the major problems of the current literature.

IV.Empirical Results and Normative Implications

Here, I provide a rough summary of the results of Part I. In broad terms:

Adolescents (14+) should generally have their freedom and decisions respected and, to the extent they possess less hierarchical control that adults, this can be mitigated by changing decision-making structures and altering social and cultural influences.

Younger adolescents (~11-13) mostly meet the bar for equal respect, although certain small differences in average cognitive abilities between adults and adolescents might sometimes mean that they may be denied certain rights.

Those in middle-childhood (~7-10) can form their own goals, but they struggle in morally and socially complex decisions, unfamiliar scenarios, and scenarios with high levels of emotionality. But, in the right circumstances, or if helped to reason through a problem and helped to regulate their emotions, they can reason to a very high level and make fully autonomous decisions. Therefore, where possible we should facilitate and respect their autonomy, and, where that is not possible, we should take their preferences into account, even if we ultimately override them. Their moral reasoning is behind that of adults and adolescents, which might undermine their claims to certain political and social rights.

Children even younger than that (~3-6) can form preferences and make basic decisions. Their difficulties may be in understanding the decision before them and, having formed (sometimes sophisticated) preferences, they struggle to apply those preferences to a decision. But we can, through dialogue and age-appropriate language, explain a decision to them and elicit their preferences, even if we have to apply those preferences to the decision for them.

I have less to say about infants, who have typically not formed independent forms of reasoning. My framework grants them future agency rights and welfare rights; but it remains an open question whether there are any further constraints on how one may treat them, for example, whether parents may baptise or circumcise children who lack autonomy.

Generally, we should respect autonomy wherever it is, and to whatever extent it has developed. Those who see autonomy in binary terms (either you have it or you don't) see children as lacking full autonomy and therefore lacking any claims to have their wishes taken into account. But this, on our account, is wrong. We must respect and permit children's decisions in accordance with the development of their autonomy. And if we do override their partially-autonomous wishes, then we must do so in a way consistent with respect. As discussed in chapter 3, we can respect someone's viewpoint while still setting it aside, so long as we have a strong enough reason, and provide those reasons. We owe it to someone who is partially autonomous, when overriding their wishes, to explain why. The strength of the duty to explain oneself, and the weight of the reasons needed to outweigh the individual's wishes, depends on the development of the individual's autonomy and understanding. But such an approach (scaled properly) can work for older and younger children.[15]

[15] See, for example, the judge who addressed his custody decision to the 14-year-old boy whose wishes he was overriding: *A (Letter to a Young Person)*, Re (Rev 1) [2017] EWFC 48 (26 July 2017).

Conclusions

In Part I of this thesis, I have outlined and defended a liberal framework for establishing children's rights; showed how it avoids the problems with the current literature; and, using empirical psychology, have established some general conclusions about children's rights at different ages. This framework can be applied to a wide range of policy questions about children, such as rights to religious freedom, to (or against) compulsory education, to work, own property and enter contracts, consent (or withhold consent) to medical treatment, and so on. These questions require explorations into their attendant theoretical literatures to establish which capabilities are necessary for those specific rights and how those rights derive from those capabilities. But the basic framework remains: psychology->autonomy->moral rights ->critique ->balance of harms. Hopefully, this framework can be a starting point for liberal thinking about children, and for those who want to take children, and children's rights, seriously.

In Part 2, I apply this framework to the right to vote, sexual consent and age discrimination. By applying the framework, I demonstrate how its components operate and apply in practice.

Part II: Applications

Chapter 9

The Right to Vote

Introduction[1]

Within a democratic system, the right to vote is the most basic component of membership of the polis. The question of the correct minimum voting age has re-entered the public political debate in Europe in the last few years: a number of German Länder have lowered their voting age to 16; the British Crown Dependencies have a voting age of 16; Scotland allowed 16–17-year-olds to vote in its independence referendum in 2014; and Scotland has let 16-year-olds vote Scottish Parliamentary elections from 2016. In the UK, lowering the voting age to 16 for all elections has been a manifesto pledge for all of the main political parties, except for the Conservatives and the DUP, since at least 2015, and there were many debates about whether the voting age should be lowered to 16 for the UK's EU referendum.[2] However, in general, Europe has been reticent to lower the voting age: Austria is so far the only country in Europe to lower the voting age to 16 for all elections, including general elections, doing so in 2007.

The question of votes at 16 is a live issue that has not yet been settled. However, there is only one recent political theoretic work which addresses the question of the age of suffrage.[3] In this chapter, I argue that the franchise should be extended to (at least) 16–17-

[1] Based on my article, Peto, (2017) Copyright © 2017 SAGE Publications. Reprinted by permission of SAGE Publications. https://doi.org/10.1177/1470594X17705651
[2] Labour Party Manifesto, (2015); Liberal Democrat Party Manifesto, (2015); SNP 2015 Manifesto, (2015); The Green Party 2015 Manifesto, (2015); Plaid Cymru 2015 Manifesto, (2015) Dathan, (2015); BBC, (2015)
[3] Chan and Clayton, (2006)

year-olds. I do this by using Chan and Clayton's approach for answering this question. Their framework contains two components: (1) a normative account of political maturity; and, (2) an empirical account of the political maturity of 16–17-year-olds. They argue against lowering the voting age, claiming that teenagers are not politically mature enough to vote. However, by examining their empirical claims, by using a balance of harms analysis, and by using more recent empirical data on 16–17-year-olds' voting habits in Austria, I show that, even using Chan and Clayton's normative account of political maturity, the franchise should be extended.

In section I, I outline Chan and Clayton's objections to lowering the voting age. In section II, I examine the claim that adolescents have insufficient political knowledge to vote, and show that this lack of knowledge is the product of a system that excludes adolescents, and therefore that it cannot be used to justify that system of exclusion. I also show that in Austria, when the voting age was lowered, the difference in political knowledge between 16–17-year-olds and other young voters disappeared. In section III, I examine the claim that adolescents are too 'whimsical' in their political preferences and show that, not only does the data fail to show that 16–17-year-olds are politically whimsical, but that their preferences are a product of a system which denies them the vote, and that young people would have more concrete preferences if they were given the vote. Section IV challenges the claim that adolescents are too apathetic to have the vote. I then provide a 'balance of harms' analysis to show that the problems associated with letting immature adolescents vote do not justify denying the vote to the many adolescents who are mature. I therefore conclude that, because 16–17-year-olds meet the requirements for political maturity, they should be given the vote. In the final section, I briefly discuss the implications of my argument for whether the voting age should be younger than 16. I conclude that it

probably should be younger, but that there is currently a lack of evidence from which to make a clear judgement.

Perhaps if political maturity is the key criterion by which we decide whether citizens should be allowed to vote, we should abandon the use of age as a qualifying condition for the vote and instead replace it with assessments of competence.[4] I leave a defence of using age as the most appropriate proxy for granting the franchise until chapter 11; here I take as given that age is to be the legal qualification for the vote. If it turns out that we should indeed replace age-requirements with some direct test of maturity or competence, then this chapter can be taken as a prediction that most 16-year-olds would gain the franchise as a result.

One further point worth clarifying is that my investigation into the voting age is not an investigation into what Dahl calls the 'problem of the unit' or the 'boundary problem'.[5] The problem of the unit is: what persons have a rightful claim to be included in the demos? When we say an aggregation of individuals, or 'the people', have a right to rule themselves democratically, who is included in 'the people'? This is distinct from, the qualification question: which members of that people/association/unit should be permitted to vote? Whether the problem of the unit is solved by the 'all affected' principle, the 'all subjected' principle, an appeal to historic boundaries, or national identity and self-determination, there remains the question of who within that unit is qualified to vote. Therefore, determining whether an individual has the right to vote within a particular state/association is a two-step process: (i) are they a member of the relevant group? (ii) are they the kind of individual who in general merits the right to vote? This chapter speaks only to the second question. My argument is that 16-year-olds should, in general, be allowed to vote. It is a separate question whether, for UK elections, it is those 16-year-olds who affected/coerced

[4] See Harris, (1982)
[5] Dahl, (1989),p.193, p.119 and pp.146-147. It is also equivalent to Goodin's 'problem of "constituting the demos"', Goodin, (2007)

by the policies of the UK government, who are resident within the UK or who are ethnically British who should be allowed to vote.

Finally, recall that there is no significant difference between the cognitive abilities of 16-year-olds and adults. 16-year-olds have reached the same level of moral reasoning as most adults; have logical reasoning abilities which are indistinguishable from adults'; can engage in scientific/means-ends reasoning at the same level as adults; and are able to engage in decision-making as competently as adults. Since adolescents can therefore reason normatively about their goals and pursue those goals in a rational manner – and can do both to the same degree as adults – adolescents possess the two moral powers. A discussed in chapters 5–6, adolescents possess all the cognitive prerequisites for the right to vote as understood by various theories of democracy (economistic, Weberian etc.). Therefore, adolescents should, in general, be treated as full political equals to adults.[6] Since they are the rational equals of adults, *prima facie* they deserve an equal right to have a say in political decisions. Respecting their capacity for a sense of justice means allowing them an equal right to engage in, think about and discuss the making of (just) government policy. Taking the powers together, adolescents are autonomous; state decisions curtail that autonomy and, therefore, the duty of respect requires the state to include adolescents in those political decisions. Therefore, there should be a presumption in favour of lowering the voting age, unless there is a normatively relevant difference between adults and adolescents to rebut that presumption. And according to many, that normatively relevant difference is political immaturity.

[6] Coleman, (2002); Melton, (1989)

I.Chan and Clayton

Chan and Clayton provide the main recent theoretical argument against lowering the voting age. They argue that 'political maturity is the pivotal issue in the debate over the voting age', and say that maturity is made up of 'an ability and willingness to engage in democratic choice'. 'Ability' is composed of (I) 'knowledge of the political system [and] issues that are the subject of public and political debate' and (II) possession of 'political convictions that are consistent…and are not subject to whimsical revision'. They understand 'willingness' to engage in democratic choices in terms of 'the level of interest in politics'.[7] Chan and Clayton's understanding of the moral basis of the right to vote is therefore different from other mainstream accounts in democratic theory, which emphasise autonomy and rationality rather than knowledge and interestedness.[8] That said, their understanding of political maturity is popular within the political science literature, and has informed much subsequent empirical research.[9] Therefore, I will not challenge their understanding of political maturity. Instead, by examining their empirical claims, applying social critique to them, and using the balance of harms test, we can conclude that, even accepting Chan and Clayton's definition of 'maturity', the voting age should be lowered to include adolescents.

Perhaps there is a way of reflecting adolescents' intermediate political maturity by granting them the right to vote in some elections but not others. Schrag argues:

> 'given the fact that results of decisions at the local level may be more visible to citizens than the results of decisions at the national level, and given the fact that some of the areas under local jurisdiction are particularly pertinent to the interests of the young, especially education, why could not young people be enfranchised at the age of 15 to vote in school board elections, school bond referenda, and similar matters which directly affect their lives?'[10]

[7] Chan and Clayton, (2006),p.542
[8] Estlund, (2008),pp.206-222; Dworkin, (2011); Waldron, (1999); Rawls, (1971)
[9] See, for example, Zeglovits and Aichholzer, (2014),pp.351–61; Zeglovits and Zandonella, (2013); Zeglovits, (2013); Bergh, (2013); Wagner et al., (2012); Hart and Atkins, (2011)
[10] Schrag, (1975),p.456

It does seem plausible that one could have a maturity sufficient for the right to vote in certain elections but not others, where maturity is a function of knowledge about, and interest in, the relevant institution. However, it is not clear that having an intermediate status means one deserves to vote in local elections but not in national elections, as in Germany or Scotland. First, it is not clear that local issues being more 'visible' makes them easier to understand than national issues. Second, the evidence is that younger people care more about issues of national and international significance than local issues, meaning that this partial right to vote could plausibly lead to granting votes in national elections before local elections.[11] However, since I show that 16–17-year-olds are as politically mature as adults, we need not consider such partial voting rights in detail. Instead, 16–17-year-olds deserve the full voting rights of adults. Such considerations may, however, be relevant for under-16s.

Let's take knowledge, stable preferences and political apathy in turn.

II.Knowledge

Chan and Clayton argue that 'knowledge of the main political issues, policies and their implications are, no doubt, crucial' as a part of political maturity.[12] J.S. Mill claims knowledge is important for the vote, arguing,

> 'I regard it as wholly inadmissible that any person should participate in the suffrage without being able to read, write, and, I will add, perform the common operations of arithmetic'.[13]

[11] Cohen, (1975),p.462
[12] Chan and Clayton, (2006),p.547
[13] Mill, (1977),p.470

Indeed, a lack of knowledge is often cited by voters as a reason for barring children, but not adults, from the franchise.[14] Knowledge is also commonly considered to be a feature of 'political maturity' by the political science literature (see note 5), and is shared by some theorists.[15] Chan and Clayton take the relevant kind of knowledge to be propositional knowledge of the political system, of what voting means, and how voting works, as well as social scientific knowledge and knowledge of current affairs. Chan and Clayton then take data from the 1997 British Election Studies (BES) which included items on factual political knowledge. However, the BES sample individuals aged 18 and over, meaning that, to compare 16 and 17-year-olds to older citizens, Chan and Clayton turn to the Young People module of the 1998 British Social Attitudes Survey (YBSA). This survey, which samples people aged 12–19, also included questions to test factual political knowledge, three of which are identical to questions in the BES, and one of which is 'substantively similar'.[16] In three out of the four questions, Chan and Clayton find a 'clear age gradient' in which the proportion of respondents giving the correct answers roughly increases with age, until about age 50 when the increase levels off. From the age of 50, about 70–80% of adults answer all the questions correctly, whereas about 40% of 16–17-year-olds answer all the questions correctly. As a result, they conclude that 16–17-year-olds have less political knowledge than their elders and, because knowledge is normatively relevant for political maturity, they conclude that 16–17-year-olds are too politically immature to vote.

[14] Blacklock, (2012) For an opposition to knowledge-requirements, see Estlund, (2008),pp.206-222.
[15] E.g. Dahl, (1989),pp.57-58
[16] Chan and Clayton, (2006),p.548

The duty to educate

I return to the accuracy of Chan and Clayton's empirical results later. In this and the following section, I show that even if we accept both the knowledge criterion and Chan and Clayton's empirical account of the political knowledge of teenagers, the voting age should still be lowered. This is because any reasonable level of knowledge for the knowledge requirement is either already possessed by teenagers or can easily be given to them via the education system. If factual knowledge about political systems and political affairs really is required for the vote, we ought to provide that knowledge to children via education and allow them to vote rather than deny them that education and prevent them from voting. When responding to the possibility that 16-year-olds may lack political knowledge, there are at least four options facing us:

1. Do not provide a political education, but give 16-year-olds the vote;
2. Do not provide a political education and deny 16-year-olds the vote;
3. Provide a political education and give 16-year-olds the vote;
4. Provide a political education, but deny 16-year-olds the vote.

Opponents of lowering the voting age reject option (1). Chan and Clayton, for example, reject (1) on the grounds that if 16-year-olds were given the vote, 'too many of them would vote and do so incompetently, in a way that would be detrimental to our democracy'.[17] After rejecting option (1), opponents of lowering the voting age then move directly to option (2), thus denying 16-year-olds the franchise and failing to provide them an adequate education in political knowledge. But this is too quick: we need to be given some reason to prefer option (2) to option (3). I take it that option (3) is preferable to option (2) and

[17] Ibid.,p.538

therefore that, even if you believe it is unacceptable to let ignorant people vote, it still does not follow that a group should be denied the vote on that basis. Option (3) is preferable because option (2) incurs certain moral costs which can be avoided if we choose option (3) to educate and to grant the vote. This is because, even if the state does not provide a political education to teenagers, there will still be a certain number of 16–17-year-olds who are politically mature, and therefore who already deserve the moral right to vote. To deny them the vote (as in option (2)) is to commit a moral wrong - it infringes that moral right to vote. This moral wrong can only be justified if it is necessary to avoid some greater moral wrong or harm. Those who oppose lowering the voting age on the ground that too many 16–17-year-olds are too immature are implicitly suggesting that we should move from option (1) to option (2) because this helps us avoid the harms of allowing immature individuals to vote, and that these harms outweigh the moral wrong of infringing mature citizens' rights to vote. But even if we accept that the harm of having immature voters is so great that it outweighs the wrong of this rights infringement, it still does not follow that we should deny education and deny the vote to 16–17-year-olds. This is because denying the vote to all 16–17-year-olds is not *necessary* to avoid the harms of having a large proportion of immature younger voters. A political education can give teenagers the level of knowledge required to make them competent voters; hence, providing a political education is an alternative way to avoid the harm of having immature voters. Thus, by choosing option (3) to provide a political education and lower the voting age, we can avoid the harms of having incompetent voters *and* avoid bearing the moral costs of denying the vote to mature (but young) citizens. Since a policy of education and enfranchisement avoids the moral costs of disenfranchising the entire age-group, we should prefer option (3) to option (2). These same reasons also explain why we should prefer (3) to (4): scenario (4) incurs the moral cost of denying the vote to many mature 16–17-year-olds, where that cost can be avoided with option (3). Therefore, even if we accept the knowledge requirement and

believe that 16-year-olds fail to meet it, we should still let 16-year-olds vote, but also be willing to provide them with a political education.

Reasonable knowledge requirements

There is a possible snag here. If it is impossible to provide children with the requisite level of knowledge, then, provided we accept the knowledge-requirement, we should deny children the vote regardless of whether we provide them with a political education. However, in fact, any knowledge requirement which grants the vote to most adults must also be within the grasp of most teenagers. It does seem unlikely that there are elements of political knowledge possessed by most adults which it is simply impossible for 16-year-olds to learn, particularly given the low levels of political engagement amongst the adult population as a whole,[18] and given that teenagers and adults have the same cognitive abilities.[19] In fact, in order to accommodate most adults, the knowledge requirement would have to be *very* low. According to the National Household Education survey in the US: 44% of Americans over the age of 18 did not know whether Congress, the President, or the Supreme Court determines if a law is constitutional; 36% did not know which party had a majority in the House of Representatives; and, most surprisingly, 49% did not know whether the Republicans or the Democrats were more conservative at the national level.[20] Chan and Clayton find similar sorts of results in the UK.[21] If the state is to continue letting adults vote, but wants to have a knowledge requirement for the vote, the state cannot require people to know how the political system works, or even what the political options

[18] Ibid.,pp.542-544; Rogers and Burn-Murdoch, (2012)
[19] Chapters 5–6
[20] Nolin and Chapman, (1997)
[21] Chan and Clayton, (2006),p.549

are. But this kind of basic knowledge is well within the possible grasp of teenagers. A knowledge requirement that falls below this basic level will be completely unable to rule out an extension of the franchise to 16-year-olds once we provide them with political education.

Indeed, school civics programmes have been shown to be effective at bringing up teenagers' political awareness.[22] Student Voices, for example, is a programme in the US which uses the excitement around upcoming elections to start political discussions in the classroom. This programme was shown to have a 'strong, positive influence on students' self-reported confidence in their ability to cast an informed vote'.[23] Similar civics programmes were incorporated into the national curriculum in Austria as part of the move to lower the voting age to 16. The curriculum involves mock elections in schools, school visits by politicians and information and awareness-raising campaigns; and this programme has been very successful insofar as it 'enabled [adolescents] to make an informed [political] choice'.[24] Within the UK, although 'citizenship education' (CE) is currently part of the national curriculum, that education mainly focuses on civic and community involvement rather than electoral politics.[25] It does not currently focus on providing political knowledge (which is what we are interested in here) and only about 24% of children receive a level of citizenship education that has a noticeable impact, that is, only 24% of children receive one or more of: a 45-minute slot for citizenship education per week; a dedicated citizenship teacher; or the requirement to sit citizenship exams.[26] A result of limited civics education provision, and a lack of electoral focus within that education, is that the current education

[22] Schwarzer and Zeglovits, (2013); see also Franklin, (2004),pp.213
[23] Syvertsen et al., (2009),p.53
[24] Schwarzer and Zeglovits, (2013),p.85
[25] Keating et al., (2010),p.ix
[26] Ibid.,p.45 and pp.50-57. There was often little difference in the citizenship outcomes among respondents who reported receiving 'a little' citizenship education and those receiving 'none', meaning that 'a lot' of CE is the only level with a significant impact on outcomes (see Ibid.p.45). The complication here is that these are measures of subjectively assessed 'received citizenship': the response 'a lot' correlates with, but is not coterminous with, the types of education listed above.

system fails to make 16–17-year-olds politically mature on our metric. A major Department of Education (DfE) report reviewing the successes and failings of citizenship education in England and Wales does however identify six major ways of making current civics education in the UK more effective. The most significant for us is the suggested incorporation of 'political literacy' (which includes political knowledge) into CE and the provision of dedicated 45-minute civics lessons each week to all pupils, instead of the current practice of incorporating it sporadically into other subjects.[27] This shows that the changes needed to improve political maturity are technically feasible. Thus, the Austrian and US examples show us the effectiveness of civics education in improving political knowledge in general; and the DfE report indicates the feasibility and potential effectiveness of civics education in the UK in particular.

Therefore, since teenagers can be raised to the level of knowledge possessed by adults, it follows that any level of knowledge that *cannot* be taught to teenagers *must* be knowledge which most adults are lacking. It would therefore be unreasonable to require teenagers (but not adults) to reach that level of knowledge. Any such knowledge requirement should be rejected. Therefore, for any reasonable level of political knowledge, it must be possible to provide that knowledge to teenagers via the education system. Indeed, in Austria, more recent studies have shown contra Chan and Clayton that when the voting age is lowered, and this is accompanied by civics classes in schools, 'there is no knowledge gap…between 16–17-year-olds and older first-time voters, whether in knowledge of the political system or in knowledge of political actors'.[28]

Thus, even assuming there should be a knowledge requirement for the vote, we have demonstrated that:

(1) If possible, we should provide an education and give teenagers the right to vote

[27] Ibid.,pp.vii-viii
[28] Zeglovits, (2013),p.251; Glantschnigg et al., (2013)

(2) It is possible to teach any reasonable knowledge requirement (i.e. one that does not bar most adults from the franchise) to teenagers

Therefore

(3) On any reasonable knowledge requirement, we should provide an education and give teenagers the right to vote.

Therefore, by investigating the structural explanations for teenagers' lack of knowledge, we've shown the knowledge requirement fails to establish that we should deny the franchise to teenagers.

Empirical results

The above shows that, even if we assume Chan and Clayton's empirical results to be correct, they have failed to show that the knowledge requirement means teenagers should be disenfranchised. However, we should not accept the empirical claim that 16–17-year-olds are significantly less politically aware than older citizens. There are some problems with Chan and Clayton's data which stem from the fact that, when comparing the knowledge of 16–17-year-olds with older adults, they are using the results of two different surveys. To assess this comparison, we can examine the results for 18–19-year-olds, the only age range to be included in both surveys. In fact, the proportion of 18–19-year-olds who respond correctly to each political knowledge question is significantly lower in the YBSA survey (the one investigating teenagers) than it is in the BES survey (the one investigating adults); indeed, on one question the difference is 20 percentage points. It seems, therefore, that the YBSA survey yields participants with systematically lower political knowledge than the BES, even when controlling for age. This could be because of

differences in the sampling procedures of the two surveys; differing response rates; or 'context effects', that is, the problem arising when the order the questions is asked alters the responses to those questions. Whatever the explanation, it is clear that we cannot meaningfully compare the results of the YBSA survey and the BES, and therefore cannot use such a comparison to conclude that 16–17-year-olds have significantly less political knowledge than their elders.

Unfortunately, there is little UK data that does compare the political knowledge of adolescents and adults directly. However, turning to a US survey (the National Household Education Survey) which investigated the political knowledge of both teenagers and adults, and therefore isn't fraught with the difficulties associated with cross-survey comparisons, we find that 'civic knowledge increases between ages 14 and 16 and then changes relatively little thereafter'. Most significantly, 'the average score for 16-year-olds is slightly higher than the averages for civic knowledge for 19-, 21-, and 23-year-olds',[29] a result which is replicated in the YBSA survey.[30] Therefore, once we avoid the methodological problems faced by Chan and Clayton, the 'clear age gradient' in knowledge possessed by 16–17-year-olds seems to nearly disappear.

Therefore, it seems that Chan and Clayton have misdescribed the relative political knowledge of 16–17-year-olds in the status quo; and even if they have accurately described the state of political knowledge of 16–17-year-olds in the status quo, it seems that when the voting age is lowered and education is improved, the knowledge gap disappears.[31] Thus, Chan and Clayton's worry that lowering the voting age will lead to an increase in the proportion of ignorant voters is unwarranted. Therefore, the knowledge requirement fails to show we should deny the vote to 16–17-year-olds.

[29] Hart and Atkins, (2011),p.208
[30] Chan and Clayton, (2006),p.549
[31] Zeglovits, (2013),p.251; Glantschnigg et al., (2013)

III.Whimsical preferences

Next, Chan and Clayton claim that teenagers have whimsical political preferences, and should therefore be denied the vote. However, their argument seems to be based on mistaken inferences from the data and, in any case, adolescents' preferences are created by the system which excludes them. Therefore, since those preferences would change in a more inclusive system, they cannot be used to justify that exclusionary system.

Chan and Clayton argue that one of the reasons that teenagers should not be given the vote is that their preferences are not stable over time. They argue that having preferences which are 'not subject to whimsical revision' is an important part of the 'ability' component of political maturity. They then provide evidence that teenagers have preferences which are not stable over time and that they are particularly non-partisan. They infer from those two observations that teenagers' preferences are subject to whimsical revision.

Chan and Clayton examine survey data collected in the British Household Panel Survey (BHPS), and check for attitudinal consistency in 16–17-year-olds. Ultimately, they find that 'the attitudes of young people between the age of sixteen and the mid-20s are noticeably less stable than those of older people'.[32] Second, they find, using the same survey, that those aged 16–18 are much more likely to be non-partisan than older groups. Chan and Clayton argue that this indicates that teenagers are 'politically disengaged'.[33] Thus, Chan and Clayton argue that 16–18-year-olds have significantly unstable or undefined preferences and that, therefore, their preferences are subject to whimsical revision, they are not politically mature, and they should not be granted the right to vote.

[32] Chan and Clayton, (2006),p.552
[33] Ibid.,p.553

Suppose we accept that avoiding whimsical preference changes is an important component of political maturity, and suppose we accept their empirical observations that teenagers are particularly non-partisan and unstable in their preferences; it still does not follow that we should withhold the vote from adolescents.[34] This is for two reasons.

The first reason Chan and Clayton's empirical findings do not suggest we should withhold the vote from teenagers is that data from Austria suggest these 'faults' in teenage political opinions are, at least partly, a product of a system which excludes children politically. This will be discussed in more depth below in the section on 'social critique and structural barriers'. Chan and Clayton demonstrate that stability of preferences and rates of partisanship increase markedly after a person turns 18. Chan and Clayton want to claim that this indicates teenagers are simply unable to be politically mature. But, as has already been mentioned, teenagers have the same general cognitive abilities as adults: absent further investigation, it is much more likely that this observed change is explained by the fact that teenagers take politics more seriously upon gaining the vote aged 18. After all, people are much less likely to form party affiliations when nothing of significance hangs on those opinions and when politicians are not directly courting their votes. Indeed, in Austria 16–17-year-olds become more engaged and opinionated when given the vote.[35] Although the Austrian data do not measure partisanship directly, Chan and Clayton only take non-partisanship to be a problem insofar as it indicates a lack of engagement with the political system; if lowering the voting age increases political engagement then, regardless of whether partisanship happens to change, the underlying problem is removed. In fact, political engagement and voter competence in general increased markedly in Austria, such that the quality of 16–17-year-olds' choices became similar to that of older voters, and

[34] We do not have to accept their empirical observations that teenagers are particularly non-partisan and unstable in their preferences. It is not clear, for example, Chan and Clayton have successfully separated out life-cycle effects from cohort effects and period effects. Ibid.,pp.542-3
[35] Wagner and Zeglovits, (2014)

there is 'no convincing evidence that the voting decisions of voters under 18 are in any way of lesser quality…than that of older groups of voters'.[36] This suggests that any current disengagement of 16–17-year-olds in the UK and other countries is a result of being systematically excluded from the political sphere. Perhaps it is too soon to draw strong conclusions from the Austrian example, at least until we have more longer-term data; at the moment, we cannot separate age effects from cohort effects, and there may certainly be a novelty effect from the voting age having only been lowered in 2007. But at the very least, the empirical significance of UK rates of non-partisanship and preference-instability should not be exaggerated since these preferences are at least partly generated by the very system of exclusion itself (as discussed below).

Second, we might doubt that Chan and Clayton's evidence about unstable preferences and non-partisanship really does ground the conclusion that adolescents are politically whimsical. It is not clear, for example, that lower rates of partisanship really indicate that individuals take politics less seriously. Indeed, it is possible that older people, who are more partisan, have stopped being as critical in their beliefs and are instead falling back onto political habit. If so, the non-partisanship of young people may instead suggest a *more* critical attitude than their elders, something more to be praised than denounced. Indeed, any franchise-requirement insisting on partisanship would discriminate against the critical, the borderline and the cautious. Thus, we cannot infer from non-partisanship that young people's thinking about politics is deficient, or subject to whimsical revision. In fact, in Austria

> 'the youngest citizens' willingness to participate in non-electoral politics is relatively high…[and] citizens under 18 are just as motivated to take part in political life as older age groups'.[37]

[36] Wagner et al., (2012),p.380. Quality of voter choice is understood as the level of ideological congruence between the voters and the party they want to vote for.
[37] Ibid.,p.376

It therefore seems that those under the age of 18 do engage in political life, just not in electoral political life. Chan and Clayton's inference from 'non-partisan' to 'non-caring' is therefore invalid. Similarly, we cannot infer from unstable preferences that those preferences are subject to 'whimsical revision'. The variability of preferences could well be because young people these days are subject to various significant life changes – leaving home, going into higher education, changing jobs more rapidly than their elders etc. Having such a varied lifestyle could itself contribute to changes in opinion in a way that is non-whimsical (i.e. in a way that is based on weighty reasons). Perhaps adults who live more varied lifestyles will find their opinions become far less stable. Absent data which controls for 'variety of lifestyle' we cannot know whether this – rather than whimsicalness – explains the instability of preferences. However, given the cognitive maturity of adolescents, the burden of proof lies on opponents to show that adolescents should be denied the vote. Since Chan and Clayton's data is consistent with adolescents being politically mature on their definition, their data fails to refute the hypothesis that adolescents are politically mature.

Therefore, Chan and Clayton fail to demonstrate that adolescents are too 'whimsical' to be permitted the vote. And even if they have demonstrated it, this whimsicalness is likely to be a product of the system of exclusion and thus cannot be used to justify that exclusion.

IV.Political Apathy

The final component of the standard account of political maturity is willingness to vote, where 'willingness' is measured in terms of political interest. Thus, if adolescents are uninterested in politics, this means they are unwilling to vote; and if they are unwilling to vote, then they are too immature and should be denied the vote. Chan and Clayton provide survey data from the British Household Panel Survey (BHPS) from 1991 and 2001 to show that: 16–17-year-olds were 'disproportionately uninterested in politics'.[38] They conclude that, since 16–17-year-olds are less interested in politics than older people, they are below the requisite threshold of interestedness to be considered politically mature, and therefore should be denied the vote.

However, it is untrue that all adolescents are uninterested in politics and do not want the vote. Using a 'balance of harms' analysis, we can show that we should still provide the vote to adolescents, even if adolescents as a group are almost entirely politically apathetic. And second, to the extent that it *is* true that children are uninterested in politics, this is at least in part because they lack the vote.

Political interest and the balance of harms

The need for the 'balance of harms' analysis comes from the fact that there is no feature for which there is a clear cut-off between the ages of 17 and 18; there is no feature or characteristic (except age itself) which all people have from 18 but which no-one has under

[38] Chan and Clayton, (2006),p.544

18. Thus, we must contend with the fact that there may be some people below 18 who do meet the criteria for voting, and some people above who do not. We must investigate whether it is worse to permit incapable teenagers to vote than it is wrong to prevent capable teenagers from voting.

Not all teenagers are apathetic. Plenty of children get involved in political campaigning in general, and campaigning for the franchise in particular. In 2014 865,000 11-18 year-olds voted in the UK Youth Parliament elections and many join the youth wings of UK political parties; 15,000 A Level students took Politics at A2 Level in 2011 (a subject signed up for aged 15/16); and the Votes at 16 campaign demonstrates teenagers' interest in gaining the franchise.[39] Indeed, some evidence suggests that the voting age is one of the top political priorities amongst young people.[40] In fact, it seems that 16–17-year olds are *more* interested in politics than those aged 18–21.[41] Therefore, we can infer that there are large numbers of young people who *are* politically engaged and who, on this account, should therefore be granted the vote. Moreover, it would be very simple to separate the interested from the uninterested without preventing young people from voting: we could simply see who actually registers to vote and then who actually turns up to the polling station to vote. After all, if you were not interested in voting, why would you bother registering and turning up? If 'being interested' is a criterion of having the vote, then we can screen for it by permitting individuals to choose whether to vote.

Even if we still think the apathetic should be denied the option to vote, it still does not follow that we should deny the vote to everyone below the age of 18. This is because, as

[39] McGowan, (2014); Rogers, (2011)
[40] McGowan, (2014)
[41] Wagner et al., (2012),p.376

demonstrated above, there are at least some under-18s who are interested in politics and therefore (on this account) do deserve the vote.

If we accept democratic principles, then it must be wrong to deny the vote to any competent individual who is a citizen/member of the relevant group. It must therefore also be wrong to deny the vote to competent citizens who happen to be 16 or 17. Perhaps that denial is all things considered justified: perhaps, given information constraints about competence, we must use age as a proxy, and perhaps the danger of allowing incompetent 17-year-olds to vote is too great to risk. But there is nonetheless a *pro tanto* wrong in preventing competent citizens from voting. Why exactly it is wrong to deny a citizen the right to vote will depend on what justification of democracy you are using. We will briefly examine two main categories for defences of democracy – consequentialist defences and respect-based defences.

First, utilitarian democrats justify universal suffrage by appealing to the need to aggregate preferences and interests, and balance everyone's preferences/interests equally. To deny an individual the vote is wrong because it risks weighting their preferences below everyone else, thus violating the fundamental utilitarian principle of equality. Not to grant the vote to 16–17-year-olds who are able and willing to reveal their preferences would therefore be wrong. Moreover, if a group of citizens

> 'with distinctive preferences were to be deprived of the franchise, it is more likely that their preferences would be ignored, and…exclusion of the group would likely result in a net lowering of utility.'[42]

It does indeed seem as if 16–17-year-olds have 'distinctive preferences' that are liable to be ignored if they lack the vote. Take the 2008 decision to raise the age of compulsory education in England and Wales from 16 to 18: it is very likely that 16 and 17-year-olds had intense preferences over that policy, as well as a clear perspective of the immediate effects

[42] Schrag, (2004),p.368

of the policy on themselves. In general, there are a number of issues that seem to pitch the old against the young: differential minimum wages based on age; allocation of government spending between employment, pensions and health; policies encouraging house-prices to fall or to rise etc. Denying the right to vote to competent individuals who have distinct preferences further increases the risk of undervaluing their welfare. Another consequence of 16–17-year-olds having their own preferences and perspectives is that allowing them to vote would contribute to the overall 'cognitive diversity' of the polis in such a way that would increase the epistemic value of democracy as a decision-procedure. This is because cognitive diversity (roughly, the existence of a variety of ways of seeing the world) increases the likelihood of voter mistakes cancelling out; indeed, when it comes to a group's accuracy in predicting outcomes, cognitive diversity amongst voters matters just as much as the individual abilities of those voters.[43] Thus, it is bad to exclude competent 16–17-year-olds because ignoring them reduces the overall quality of democratic decisions (which is bad in general) and underweights their preferences (which wrongs them in particular).

Second, one can take democracy to be implied by basic values of respect or fairness.[44] This account says that all competent individuals possess the right to direct their own lives autonomously. This implies that they deserve a say in those decisions that regulate their lives, and/or deserve to have decisions made about them justified to them in some way. Principles of fairness then imply that one individual's voice should have the same weighting as anyone else's. Therefore, denying a competent citizen the right to vote does two wrongs to them: (i) it violates their equal standing as a citizen; (ii) it fails to respect that citizen as an autonomous decision-maker. These two effects can be wrong either derivatively for recognition-type reasons, or intrinsically as a violation of basic principles. In either case, mature/competent voters deserve consultation and equal

[43] Landemore, (2013),pp.160-161 and pp.102-108
[44] Schrag, (2004),p.366

standing, and it is wrong to deny those things to them. This is true regardless of whether those individuals also happen to share an independent characteristic (like age) with other people who perhaps do not deserve equal standing. Thus, there is a rights violation, a *pro tanto* wrong, when we deny the vote to competent people, and *a fortiori* there is a *pro tanto* wrong when we deny the right to vote to competent 16–17-year-olds.

Therefore, it is wrong to deny the vote to mature 16 and 17-year-olds because it entails: a failure properly to account for their distinctive views, preferences and interests; a failure to respect them as decision makers; and a violation of their equal standing as citizens. And these are only the immediate wrongs of denying competent teenagers the vote; there are also the indirect lost benefits of including them in the democratic process. One of the main contentions of this chapter is that including teenagers in the democratic process can improve their overall political knowledge (as above) and interest (see below). By denying them the vote we deny them this opportunity to develop as citizens.

Therefore, when deciding whether to deny the franchise to 16–17-year-olds as a group, we must balance the harms of denying the vote to those who deserve it and of granting the vote to those who do not. If we undertake this exercise, it becomes hard to see the harm of granting the vote to the apathetic, particularly given they won't bother interfering in the democratic process. But to justify denying the vote to those who deserve it, there would need to be demonstration of some substantive harm. What could that harm be? Apathetic people who vote are a peculiar demographic since they (i) want to vote, but (ii) are completely uninterested in politics. This suggests that this group is likely to be small.[45] Indeed, this is borne out by Pew Research Center (PRC) data on the effectiveness of two measures of apathy as predictors of individual likelihood to vote. First, they investigated

[45] Cohen, (1980),p.109

measures of engagement in the upcoming election, and asked voters how much they had 'thought about the election', where the possible answers were 'quite a lot', 'some', 'only a little', or 'none'. Those who said they had thought about the election 'none' but who nonetheless went on to cast a vote in that election made up about 3% of the total electorate, and around 4% of the total votes cast. Second, the PRC investigated a measure of a more general interest in politics, asking respondents how often they follow government and public affairs. Those who said they followed government and public affairs 'hardly at all' but who nonetheless voted in the subsequent election made up around 2% of the total electorate and around 4% of total votes cast.[46] Thus, for each measure of apathy, the groups who are apathetic but vote are very small.

Moreover, given this group is apathetic, they are likely to vote in a more-or-less random way. Consequently, this group's voting patterns are likely (on the whole) to be unsystematic. Given the fact this group of immature voters is likely to be both small and voting unsystematically, it is unlikely that they'll have much of an effect on policy.[47] Indeed, it is for this reason that pollsters typically ignore respondents who self-identify as being uninterested in politics or not as having thought about the election. But to deny adolescents the vote on the basis of apathy, not only would immature voters need to have an effect on policy, but this effect on policy would need to be so severe that the avoidance of it can justify violating the rights of other, non-apathetic citizens. However, it seems that truly apathetic voters do not have much of effect on policy at all, let alone a catastrophic effect. Therefore, even if we accept that there will be more apathetic people who actually vote as a result of reducing the voting age, this does not justify denying the vote to teenagers, since the harm of apathetic voting is too small to justify violating the rights of mature teenagers.

[46] Pew Research Center, (2016),p.27
[47] A related point is made by Goodin and Lau, (2011),pp.154-166

Since there is little drawback to granting the vote to apathetic teenagers, and since it is a wrong to withhold it from mature teenagers, it follows that we cannot appeal to the apathy of *some* young people to show that *no* young people should be given the vote. Therefore, even if we accept Chan and Clayton's normative account of political maturity, and even if we accept their empirical claims about adolescent apathy, an analysis of the balance of harms shows that adolescents should still have the vote.

Social critique and structural barriers

Empirically, even though many young people may be apathetic, this is at least partly because children are systematically excluded from politics. There are several reasons why the current voting age breeds political apathy, ignorance and low partisanship amongst adolescents. First, people are much less likely to take an interest in things that they are excluded from. As J.S. Mill correctly observed when describing the 'mental passivity' of those without the franchise,

> 'a person must have a very unusual taste for intellectual exercise in and for itself who will put himself to the trouble of thought when it is to have no outward effect…[or to] qualify himself for functions which he has no chance of being allowed to exercise'.[48]

This intuitive result can also be seen by qualitative research which shows that 16–17-year-olds, when given the vote, felt they had a duty to inform themselves;[49] and by the large measured increase in political interest in Norway and Austria after the voting age was lowered.[50] Second, politicians do not bother reaching out to adolescents or gaining their

[48] Mill, (1977),p.400
[49] Schwarzer and Zeglovits, (2013),p.84
[50] Zeglovits and Zandonella, (2013),p.1094. They find that the proportion of 16–17-year-olds reporting an interest in politics increased by 30 percentage points after the voting age was lowered. This may just be a novelty effect, however.

interest; this is because it is not in the politicians' interests to spend time and resources on groups who can make only a minimal difference to their electoral success, if any at all. True, today's children are the voters of the future. But given the short-term incentives faced by politicians – who usually campaign in the immediate run-up to elections and so with only the next few months in mind – they rarely act on this longer-term incentive. Politicians are perhaps also held back by a social taboo against targeting children directly in political campaigning. These factors are significant because Rubenson et al. find that at least part of the lower turnout figures for citizens below the age of 30 can be accounted for by the fact that they are less likely to be contacted during a political campaign.[51] Indeed, being contacted by a political party nearly doubles the chances of a person turning out to vote.[52] It seems that, as Verba et al. put it, one reason that many people do not participate in politics is that they are never asked.[53] Therefore, the fact that politicians do not reach out to children has a significant impact on their interest in politics. Third, civil society political campaigns rarely reach out to children, for much the same reason: adolescents cannot provide votes for politicians in favour of their campaign, and so cannot provide the electoral muscle that campaigns want behind them. If a campaign only had children turning up to their meetings, it is unlikely that politicians would pay much attention. Therefore, political campaigns, on the whole, are unlikely to appeal to children and gain their interest. Fourthly, political articles are not usually written for adolescents as an audience, since 'serious' publications would much rather write opinion pieces aimed at those who actually have an effect on politics; this is also part of the general paradigm of thought that says children have no place in politics. Fifthly, civic education in schools is very poor, and often only focuses on voting, if at all, in the period immediately before pupils gain the vote.[54]

[51] Rubenson et al., (2004)
[52] Ibid.,p.414; see also Rosenstone and Hansen, (1993); Gerber and Green, (2000)
[53] Verba et al., (1995),p.15
[54] Cowley and Denver, (2004),p.60

This means that the education system only tries to interest people in politics when they are older. And yet the more civic activities there are in school, and the higher the frequency of political discussions with friends in school, the higher the probability of political participation.[55] There is no reason in principle why this kind of education cannot happen at a younger age.[56] Finally, there are structural barriers to children entering into party politics. Party conferences are not organised to accommodate teenagers; it is difficult for them to join political parties since doing so usually requires a bank account; and the dominant language of politics is often inaccessible to teenagers. When teenagers try to speak that language, they are liable to be ignored because of their lack of socio-linguistic competence. This last barrier is also a problem for women, ethnic minorities, and people from certain class backgrounds; even if they can overcome all the other structural barriers and engage in a dialogue, there are 'significant forms of power and inequality that operate below' the level of rational argument.[57] Indeed, 'ways of looking, sitting, standing, keeping silent, or even of speaking…are full of injunctions that are powerful and hard to resist precisely because they are silent, insidious, insistent and insinuating'.[58] This problem of being ignored, or not taken seriously, is accentuated for children because (i) it is generally and openly acceptable to put less weight on the opinions of children, and (ii) children's self-esteem is likely to be lower than it is for those adults meaning they are much less likely to push for their opinions to be heard if they are routinely belittled or ignored.[59] These structural barriers may or may not be linked strictly to children not having the franchise; but they are certainly linked to the general paradigm of thought which says that children have no place in politics. This paradigm may well be changed, or at least challenged, by an extension of the vote. Young people would have more reason to get involved in politics; politicians would

[55] Schwarzer and Zeglovits, (2009),p.333
[56] Schwarzer and Zeglovits, (2013); Franklin, (2004),p.213
[57] McNay, (2008),p.97
[58] Bourdieu, (1991),p.51
[59] On self-esteem, see Robins and Trzesniewski, (2005)

start courting their votes; media outlets would start producing political stories oriented at the young; political campaigns might be more willing to reach out to younger people; schools might start to teach about contemporary politics at an earlier age; and the structural barriers that prevent children from actively getting involved in politics might loosen.

Indeed, the early data from Austria and Norway do suggest that political interest increased dramatically after lowering the voting age, and that 16–17-year-olds do not have a turnout significantly lower than the average. In Austria, turnout for 16–17-year-olds is roughly the same as it is for the electorate as a whole.[60] And, significantly, 16–17-year-olds are much more likely than any other first-time voters to turn out to vote: 'the older the first time voter, the lower the turnout'.[61] Similar results were observed in Norway.[62] The turnout gap between 16–17-year-olds and older first-time voters was fairly large: 8–10 percentage points in Austria and 12 percentage points in Norway.[63] This seems to be because 16–17-year-olds are more socially embedded – for example, in schools and families – than 18–23 year-olds.[64]

If this is correct then, given the importance of habit formation to future voting turnout, and given the importance of an individual's first election to that habit formation,[65] lowering the voting age may well be a successful strategy for *increasing* long-run turnout.[66] Therefore, the preliminary data from Austrian general elections and from the trial local elections in Norway suggest that when given the vote, far from being the least engaged voters, 16–17-year-olds are just as engaged as the majority, and are more engaged than

[60] Zeglovits and Aichholzer, (2014),p.356
[61] Ibid.,p.356
[62] Bergh, (2013)
[63] Zeglovits, (2013),p.252
[64] Zeglovits and Aichholzer, (2014),p.352. For further discussion of the importance of social embeddedness to voter turnout, see Strate et al., (1989), Highton and Wolfinger, (2001); and Franklin, (2004).
[65] Dinas, (2012)
[66] Zeglovits, (2013),p.252

other young adults. Thus, Chan and Clayton's argument that 16–17-year-olds are too apathetic to vote is not borne out by the data.

All of this means that the political apathy amongst the young is in fact a product of the very system that we are trying to rectify. If apathy and lack of knowledge are problems, as Chan and Clayton point out

> 'it needs to be addressed by politicians and political parties changing their behaviour and relationship to the electorate, not by changing the electorate'.[67]

We therefore cannot point to apathy in the UK (a product of the UK's current system) to justify that system.

V.Lower than 16?

This chapter has primarily discussed the question of lowering the voting age to 16. But my arguments could well suggest a younger voting age. Since most people become fully cognitively mature between 12 and 14, it seems that we could lower the voting age to 12 or 14. After all, denying mature 12–14-year-olds the vote is a *pro tanto* wrong in the same way it is for people aged 16+. Furthermore, I claim that there is little harm to granting the vote to immature citizens, but that there is a serious wrong done when we disenfranchise, and coercively rule, those who are mature. This claim suggests, in general, we should err on the side of caution and overextend the franchise – even to those we suspect of lacking the underlying moral right – because the moral costs of getting that judgement wrong are so high. Given that some children develop much earlier than the average, and given the

[67] Chan and Clayton, (2006),p.537

possibility of political education for younger adolescents and children, my arguments push towards a much younger voting age, or even possibly the abolition of age requirements for voting.

The difference with 16–17-year-olds is that we have clear data on their political maturity because there are parts of the world where they have exercised, and continue to exercise, their right to vote. This means balance of harms analysis rests on relatively little speculation or uncertainty. Discussions about the effects of a more truly universal suffrage, by contrast, would rest on a higher degree of speculation about the changes to political discourse and political practice of enfranchising millions of much younger children. Although I do believe, for the reasons given, that my arguments suggest a much lower voting age, this relies on some empirical speculation about the potential costs of doing so. But I can say with more certainty that the voting age should be lowered to 16.

Conclusion

In this chapter, we have examined the standard account of political maturity in the voting age literature and applied it to 16–17-year-olds. The evidence suggests that when the voting age is lowered in general elections, 16–17-year-olds have higher turnout rates than other first-time voters; they are just as politically interested as older voters; they know as much as older voters; and they vote just as competently. Thus, on each measure of political maturity – knowledge, interest and stability of preferences – 16–17-year-olds are either already mature, or, to the extent they are immature, this immaturity is a product of a system which excludes them, and the immaturity will fade if the voting age is lowered (perhaps when combined with other policies such as increased political education). And further, to the extent that some 16–17-year-olds are immature and will remain so, the negligible harm of

letting immature teenagers vote fails to outweigh the serious wrong of denying that right to mature teenagers. Therefore, since 16–17-year-olds are members of the demos whose interests are affected by state action, maturity is the only grounds on which 16-year-olds might be denied the vote. But 16–17-year-olds are, and can be, politically mature. And that is why the voting age should be lowered to (at least) 16.

In a general sense, this chapter has also helped illustrate how our framework operates in practice. The autonomy, rights and psychological components of our framework suggest that equal respect is due to adolescents and adults, and therefore that adolescents have a *pro tanto* right to vote. The social critique part of our framework showed that that adolescent political immaturity is a consequence of their disenfranchisement, and the 'balance of harms' component showed that, even if many adolescents are immature, this should not be an obstacle to lowering the voting age.

Chapter 10

Consent

Paul Onesi immigrated to the US from Italy when he was 15. He met Mary while renting a room from her older sister. It was her sister who did the matchmaking. When the 21-year-old Paul married Mary, she was 13. They went on to have six children and 28 grandchildren. In 1995 they were honoured on World Marriage Day as the longest-married couple in America. They were married for over 80 years. They became one of the most celebrated married couples in the US.[1]

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In 1996 Wendy Whitaker was a 17-year-old high-school student in Georgia, USA. In one class, when the lights dimmed for a video, the boy next to her suggested she perform oral sex on him. She obliged. The boy was three weeks shy of 16. Whitaker was arrested and charged with 'sodomy'. She spent a year in prison, five on probation, and was placed on a publicly accessible sex offenders register. She was barred from living within 1,000 feet of anywhere children may congregate and from working within 1,000 feet of a school or childcare centre.[2]

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[1] Epstein, (2007),pp.203-04
[2] Sex Laws: Unjust and Ineffective, (2009)

Introduction

The right to determine how to use one's body, to engage or refrain from sexual contact, is one of the most intimate and personal of our rights. The relationship between consent and the right to sexual choice is not straightforward, however. Each party must have a right to engage in sex, and the relations must be consensual on all sides. There is no right to engage in sex with someone who does not themselves have the right to engage in sex, regardless of whether they consent. An individual below the age of sexual majority is considered incapable of morally meaningful consent. But the law is odd. In many jurisdictions, if a 15-year-old boy has intercourse with a non-consenting 30-year-old woman, he can be convicted of rape. If, however, they both consent, then the 30-year-old can be convicted of an offence. When the woman is nonconsenting, the boy is considered fully responsible for his actions. When the woman is consenting, the boy is considered incapable of consent and hence to be the victim of sexual abuse.[3] Our thinking seems muddled. Part of the rationale for age of consent laws is to protect individuals from abuse and exploitation. Yet these laws also inhibit the freedom of those below the age of consent to engage sexually with anyone; doing so opens them or their partner to punishment.[4] We therefore need to balance the rights of mature individuals against the possible harms to immature or vulnerable individuals. Different countries, in balancing these considerations, have applied different policies. During the last 15 years, sexual intercourse with 14-year-olds has been legal in 51% of European states, and with 15-year-olds in 72%.[5] Across US states, the age of consent varies from 16 to 18; in the 1980s some had an age of 11.[6] Despite the range of existing policy answers, this question immediately implicates deep-lying and powerful

[3] Stainton Rogers and Stainton Rogers, (1999),p.136
[4] Archard, (1998),p.120
[5] Graupner, (2000)
[6] Kourany et al., (1986),p.171

sentiments about abuse and childhood innocence.[7] In the face of this general uncertainty, and the emotions raised by this topic, I apply my framework to mediate claims about maturity, harm, and exploitation.

Section I discusses the history of age of consent laws, showing they were not constructed with issues of consent or maturity in mind, but to protect childhood innocence and fathers' rights over their daughters' chastity. In showing our laws are a product of 19th century biases and 20th century policy compromises, I aim to challenge the fixity of our intuitions in favour of current laws. Section II examines maturity. I conclude that 14-year-olds typically possess the psychological capacity to consent, and that from the age of 11–12 some individuals generally possess the psychological capacity to consent, and many sometimes possess that capacity. Section III examines sexual exploitation. One concern about lowering the age of consent is that it leaves vulnerable individuals open to manipulation and abuse. I show that adult-child power differentials mean adults can exert pressure on children to have sex, where that pressure violates children's autonomy. We should protect children from such exploitation. Sections II-III establish the position that all consensual non-exploitative sex should be allowed, no exploitative sex should be allowed, and, for those incapable of consenting, harmful sex should be banned, while benign or beneficial sex can be permitted.

The final two sections apply and balance those goals. Section IV discusses the radical position that the only way to both recognise children's agency and prevent exploitation/abuse is to deconstruct ideologies of children's innocence and dismantle all power hierarchies between children and adults. I accept the radical's conclusions on the needs to: re-examine and rethink cultural images of childhood innocence; provide more

[7] Archard, (1998),p.119

extensive sexual education; and empower children. However, contra the radical, we should preserve certain hierarchies between adults and children, such as between doctors and child-patients or teachers and pupils. Given that, we should protect children from the power imbalances inherent in such relationships and ban sexual relationships between children and those in positions of authority. Section V discusses age of consent laws. Since the optimum age of consent policy depends heavily on the facts, and will vary by country and context, I do not propose one specific policy or age. But I do defend the use of closeness-of-age defences (or 'age-span exemptions') as a way of respecting the autonomy of young people, whilst protecting them from certain kinds of exploitation and manipulation.

I.History of Age of Consent Laws

We are horrified by child abuse. We do everything we can to prevent it, and we are contemptuous of anything that attempts to justify or excuse it. However, as Archard points out, 'such strong emotions make it difficult rationally to discuss childhood sexuality and the sexual activity of children'.[8] Any reference to childhood sexuality seems automatically and immediately to connote abuse.[9] Here I examine the history of sexual consent laws. The current European and North American laws do not map onto maturity or autonomy, nor were they designed with those issues in mind. They emerged more out of a desire to protect chastity and innocence than to protect children and, for girls, they were designed to protect fathers' rights over their daughters. In demonstrating this, I hope to challenge the fixity of the intuitions that, below the current age of consent, any sexual experiences are

[8] Ibid.,p.118
[9] Stainton Rogers and Stainton Rogers, (1999),pp.137-138; Archard, (1998),p.118

wrong. We can then reassess childhood sexual consent using our liberal framework. I examine the 19th century introduction of these laws, and then the 20th century reforms.

The current age of consent in the UK is broadly a legacy of 19th century attitudes towards gender and childhood, buttressed in the 20th century with flawed appeals to biomedical knowledge. In the late 19th century, the age of consent for girls was raised to 16 in the UK and parts of the US in response to public morality campaigns. But as Matthew Waites demonstrates:

> '[t]he age of 16 was not equated with attainment of…competence in decision-making… rather, it was understood to reflect bodily vulnerability.'[10]

The catalyst for introducing this minimum age was a child prostitution scandal; in 1885 the *Pall Mall Gazette* wrote a series of articles entitled 'The Maiden Tribute of Modern Babylon' which claimed to expose a hidden traffic in young virgins being sold into 'white slavery' in London.[11] These claims led to a moral panic which spread across the UK and to the USA. Following public demonstrations and impassioned speeches in Parliament, the *Criminal Law Amendment Act* (1885) raised the age of consent to sexual intercourse for girls to 16.[12] However, all males were deemed capable of intercourse, and those over 14 could be held criminally liable for sexual offences. Instead of tracking maturity, these laws were intended to preserve the purity of middleclass childhood and girlhood, and to protect working class girls from evil men.[13] In his speech proposing the bill, Home Secretary R.A. Cross argued the law was for men 'to maintain…the purity of their own households… and the honour of their daughters.'[14] Like women, children were considered 'purer' than adult men.[15] But to

[10] Waites, (2005),p.209
[11] Ibid.,p.69; Walkowitz, (1992),pp.81-134; Ennew, (1986),p.33
[12] Waites, (2005),p.68
[13] Ibid.,pp.70-73; Bland, (1992),p.48. See also Walkowitz, (1992),p.133 and pp.99-100
[14] Hansard, HC 30 July 1885, col. 582, quoted in Waites, (2005),p.70
[15] Ennew, (1986),p.15

preserve their purity, children needed to be shielded from sex. Thus, these laws were as much about protecting childhood innocence as protecting children. Indeed, for most of the history of such laws, it was a defence to a charge of indecency to show the underage girl was unchaste. Canadian law made the 'seduction' of a girl aged 12–16 a criminal offence provided she was 'of previously chaste character'.[16] Similarly, in the US in the 19th and early 20th Century, if the girl was unchaste, the defendant was exonerated.[17] These laws protected childhood. Not children. Children who had 'lost' their childhood were not protected and were sometimes punished. In Britain and Ireland, unchaste girls were forcibly incarcerated in industrial schools or reformatories.[18] As Carol Smart observes, these reforms embodied an approach whose

> 'aim was to maintain the ideal of purity and innocence in childhood [while] the defiled and 'knowing' child became an anathema and an embarrassment.'[19]

As such, biological or psychological development were not key factors in determining those 19th century laws. Judith Walkowitz's research showed that:

> 'For reformers, 'girlhood' was a stage in life marked by dependency, but not by any specific psychosexual development. Accordingly, debates over the age of consent rarely included reference to…actual sexual development.'[20]

Indeed, this lack of scientific or empirical basis meant the age law-makers selected was arbitrary, with some reformers arguing advocating 18 or 21. There was no particular significance to the age of 16.

The 1970s and 1980s saw a wave of reappraisals of sexual offences laws across Europe and North America. In the UK, a Home Office Policy Advisory Committee (PAC) led a

[16] Barnett et al., (2007),p.14
[17] Fischel, (2010),p.287
[18] Smart, (1989),p.51
[19] Ibid.,p.51. See also Waites, (2005),p.79
[20] Walkowitz, (1992),p.284

comprehensive review of the UK's sexual offences laws. In its report, an age of consent of 16 was rationalised on the grounds that lowering the age would encourage earlier sexual activity, which might be harmful.[21] They did *not* argue that under-16s were incapable of mature decision-making. Instead, law-makers believed the biological risks faced by girls trumped their agency.[22] Developmental psychology was referenced in the report only to find a scientific rationale to legitimise a higher age of consent for gay men.[23] But the PAC's use of psychology was patchy. They ignored the submitted evidence of the Royal College of Psychiatrists who advocated a lower age of consent; and they did not call for evidence from the British Psychological Society.[24] Instead, the PAC made vague appeals to men's slower rate of psychological development to argue for a higher age of consent for homosexual sex. However, the PAC declined to follow through the logic of their argument: if boys mature later than girls, then surely there should be a higher age of consent for boys for all sex, heterosexual or homosexual. Furthermore, developmental psychology was not invoked to justify an age of consent of 16 for heterosexual sex.[25] These observations betray the fact that maturity was not at issue, or an underlying motivation, for the age of consent, homosexual or heterosexual. Instead, for homosexual sex, the concern was to prevent an 'increase in the number of homosexuals in our society' by setting the age after an individual's orientation was thought to be fixed and so after the age where individuals could be 'turned' homosexual.[26] Therefore, in neither the 19th nor 20th century was capacity/maturity an issue in determining the age of consent.[27]

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[21] Waites, (2005),p.209
[22] Ibid.,p.143 and p.209
[23] Ibid.,p.144
[24] Ibid.,p.144
[25] Ibid.,p.144
[26] Policy Advisory Committee, (1981),p.20, quoted in Waites, (2005),p.154. See also Committee on Homosexual Offences and Prostitution, (1957)
[27] Waites, (2005),p.156

Finally, the term 'age of consent' was, and is, a misnomer. One might feel an intuitive pull towards the status quo because it sounds like it reflects developmental maturity. But the 'age of consent' had little to with consent. It did not mark the age (i) below which people could not consent to sex, and (ii) above which consent (alone) legitimated sex. Below that age, children have been able to consent. When the 'age of consent' was first introduced, it only applied to unmarried girls. Boys below that age could consent to sex; and girls below that age could consent to sex within marriage.[28] Above that age, consent was neither necessary nor sufficient to legitimate sexual contact. Consent was unnecessary for legal sex within marriage: the marital rape exemption was only abolished in the UK in 1991 and across the entire US in 1993. In the 20th century, non-consensual intercourse outside marriage was often considered 'rape' only when accompanied by (threat of) force; thus, non-consensual sex could be legal.[29] Nor was consent sufficient to legitimate sex: homosexual sex was illegal, and in the UK consensual sado-masochism is still illegal.[30] Thus, age of consent laws emerged in a context where consent was not a general requirement for sexual behaviour.[31] Given consent could happen below this age, and given consent above it was often an irrelevance, it is not surprising the 'age of consent' has little to do with capacity to consent.

The age of consent was 'conceived without an emphasis upon the necessity for competence.'[32] There is no reason to think current laws track maturity. Thus, although our intuitions are anchored to the status quo, we should not consider them authoritative. Instead, we should rebuild from the ground up, examining first maturity and consent.

[28] Fischel, (2010),p.287; Waites, (2005),p.63
[29] Temkin, (2002),pp.90-91
[30] *R v Brown* [1993] UKHL 19, 1 AC 212 (11 March 1993), House of Lords (UK).
[31] Waites, (2005),p.67
[32] Ibid.,p.153

II.Maturity

Normative Investigations

To establish who has a moral right to engage in sexual relations, we must establish the elements of autonomy relevant for sexual consent. The relevant maturity is psychological maturity, not biological sexual maturity. The capacity to consent to sex involves the abilities to understand the relevant facts; reason evaluatively about the decision; and act on those considerations and evaluations.

What are the relevant facts? Minimally, these include the physical facts of sexual intercourse and its common consequences. If you do not understand what 'sex' means, then, when you say 'yes' to 'sex', whatever you are consenting to, you cannot be consenting to sex. However, the relevant facts include more than the basic mechanics. To give properly informed consent, one must understand the foreseeable consequences of intercourse. In addition to the biological consequences of sex, this includes the emotional and social consequences on yourself and your partner(s). A number of authors emphasise emotional development as a component of capacity. Herring and Wall argue that, 'capacity is not simply a matter of comprehension, but is a matter of judgement and emotion'.[33] The psychologists Stainton Rogers and Stainton Rogers agree, pointing out sex rarely involves a 'cool evaluation…[a] cerebral cost-benefit analysis of the options to give or withhold consent'.[34] In fact, emotional development is important to maturity in two distinct ways. First, emotions are objects to be considered within the decision. You must understand and consider the potential emotional effects of sexual interactions to make an informed

[33] Herring and Wall, (2014),p.626
[34] Stainton Rogers and Stainton Rogers, (1999),p.147. See also Foucault, (1988),p.285; Archard, (1998),p.124; Fischel, (2010),p.82

decision. Second, emotion is part of the deliberative process: emotions can enhance or hinder one's ability to reason, and they can be manipulated. Since decisions about sex are often made with passions running high, it is important that an individual can control or reflect on those emotions when acting on them.

Therefore, the capacity to consent to sex in a morally meaningful way requires the capacities to: (i) understand basic facts about sex and its foreseeable consequences (biological, emotional and social); (ii) reason about those facts; (iii) evaluate those facts in light of one's goals and values; and (iv) control the relevant emotions.

Empirical Investigations

Next, I examine whether children of different ages meet this normative standard. It is always difficult to determine exactly where the threshold for capacity lies. But this threshold will not be high. The question is not whether teenagers are as competent as the most capable adults, nor even as average adults. Adults after a glass or two of wine, who are exhausted or emotional, or with some learning disabilities, are still considered capable of consenting to sex.[35] And in *An NHS Trust v DE*, an adult couple with severe learning difficulties, one of whom had a mental age of 6–9, were considered able to consent to sex.[36] If these adults are capable of consent, then teenagers who meet such a level must also be capable. First, I examine older adolescence (14–16), then early adolescence (12–14), and, finally, 9–11-year-olds.

[35] See Wertheimer, (2003),p.216; Fischel, (2010),p.312
[36] Herring and Wall, (2014),p.627

As discussed in chapters 5–6, older adolescents (14+) possess the cognitive features required for the two moral powers and, to that extent, meet the bar for equal concern and respect. To respect their cognitive abilities, then, it seems we should respect their decisions to consent to sex. Regarding hierarchical control, recall it has two components: (i) motivational control: the capacity to bring motivations in line with our higher order preferences/values; and (ii) cognitive control: the capacity to regulate and control the mental processes required for the two moral powers. As shown in chapter 7, cognitive control is mainly achieved by early adolescence, with 14- and 15-year-olds no worse than adults at reasoning in emotional situations.[37] Regarding the second condition, according to the APA, there are no statistically significant differences in psycho-social maturity between 14–15-year-olds and 16–17-year-olds.[38] If 16–17-year-olds have the emotional ability to consent to sexual relations, so do 14–15-year-olds. Indeed, 25% of 14–15-year-olds have a level of psycho-social maturity above the mean for 26–30-year-olds.[39] That said, on some measures of impulsivity, 14–15-year-olds are slightly more impulsive than 16-year-olds. For self-reported measures of impulsivity, there is little difference between the two groups. But on experimental measures, the developmental decline in impulsivity mainly begins at 15-16. How significant is this? This seems unlikely to be a normative deal-breaker for maturity to consent: only one measure (the experimental measure) of one sub-component (impulsivity) of one component (motivational control) of one element of autonomy (hierarchical control) is slightly lower for 14–15-year-olds. On most measures of motivational control there is no difference. And in any case, we must remember that impulsivity on its own does not entail non-autonomy to the point of losing the (moral or legal) agency right. The reasons for this were discussed in detail in chapter 7 (the low threshold for respect; the need to respect partial-hierarchical control; information constraints about what the

[37] See Saarni et al., (2006),p.282 and p.276.
[38] Steinberg et al., (2009),p.591
[39] Ibid.,p.591

individual would choose if the decision were fully controlled; and the need to respect those members of the age-group who are fully autonomous). And it is worth noting that adults can engage in sex even when exhausted, emotional, or tipsy. Impulsivity increases after even small amounts of alcohol.[40] Since a glass or two of wine does not invalidate an adult's consent, the potential impulsivity of mid-adolescence seems insufficient to invalidate their consent.

Therefore, 14-year-olds possess the two moral powers, cognitive control and (on most measures) motivational control to the same level as adults. Although on some measures they possess motivational control to a lesser degree than adults, they do possess it to the same level as 16–17-year-olds who are considered to possess the capacity to consent. Therefore, since they possess the autonomous capacity to consent to sex, it seems they have a moral right to pursue consensual sexual relations.

Individuals in early adolescence (12–14) mostly meet the bar for equal respect, although some do not possess the full adult capacity to make logical inferences and generate arguments. Despite small differences on average, some proportion of this group is significantly behind adults cognitively. Emotionally, there are statistically significant differences in emotion control between 12–13-year-olds and 14–15-year-olds, although there are no significant differences in impulsivity. This weakens their claim to possess the capacity to consent to sex to the same level as over-14s.

Turning to middle childhood, 9–11-year-olds can generally think in logical and reasoned ways, and to a high level if prompted and encouraged; however, they struggle with complex or unfamiliar problems. In safe and controlled scenarios, they can form their own goals and apply them to decisions. But for morally and socially complex decisions, and

[40] Wallner et al., (2003); Tikkanen et al., (2015)

for unfamiliar scenarios, they struggle to apply those goals without help. On a minimalist cognitive account of sexual maturity – which requires merely the ability to comprehend and reason about the basic facts of sex – middle-children are mature. But when managing emotions and emotionally complicated situations, they struggle. Since the capacity to consent to sex often requires an independent ability to manage complex emotions, middle-children often do not possess that capacity.

Younger children, as discussed in chapters 5-7, lack the emotional and cognitive development for the capacity to consent to sex. Self-regulation and motivational processes require a level executive function and metacognition which most individuals do not develop until middle-childhood/early-adolescence. Therefore, younger children lack a moral agency right to consent to sex.

Therefore, from 14 individuals have the psychological capacity (and hence moral right) to make decisions about sex. Between 12 and 14, many (but not all) have that psychological capacity. 10–12-year-olds may possess the psychological capacity in specific contexts, but do not have a generalised capacity to consent to sex. And under-10s are unlikely to possess that capacity.

III.Exploitation

Legally permitting individuals to consent to sex risks enabling others to pressure them into giving that consent unwillingly. This concern is not a worry that the individual is generally incapable of consent; instead, it reflects the fact that individuals are only capable of giving meaningful consent under certain conditions. No-one properly consents who is unduly

influenced.[41] But pressure, a kind of undue influence, is not composed of the coercion or violence which are illegal under rape laws. Rather, this influence can cause someone to 'consent' to sex thereby legally protecting the perpetrator from prosecution, even though that acquiescence does not morally legitimate the sexual contact. This pressure is therefore problematic and merits investigation.

First, I outline an account of sexual exploitation. I explain how pressure can constitute exploitation and why it is wrong. Second, I examine children's vulnerability to adult pressure. Third, I show that, since this pressure does not constitute coercion (as standardly recognised by law), it is hard to regulate directly.

Sexual Exploitation

For a conceptual account of sexual exploitation, I shall adapt Vrousalis's account of economic exploitation: A sexually exploits B if and only if (a) A instrumentalizes (b) B's vulnerability (c) to extract a benefit from B (d) through a sexual act.[42] Condition (a) reflects that 'exploiting' is a kind of inappropriate using. Condition (a) only applies to the instrumentalization of certain features of an individual. As Goodin points out, exploitation of a *person* occurs only when the feature being instrumentalized is a 'sufficiently salient attribute' of an individual: exploiting an opposition footballer's poor dribbling, for example, does not amount to exploiting the player.[43] For (b), we are interested in B's vulnerability to A, i.e. A's power to make B do something B might not otherwise do. Parts (a) and (b) are together insufficient for exploitation: it is not always exploitative to

[41] Archard, (1993),p.80
[42] Vrousalis, (2013),p.132
[43] Ibid.,p,132; Goodin, (1987),p.171

instrumentalize an individual's vulnerability to make them act. Teachers pressure pupils to work. This might be a problematic use of power, but it is not exploitative, because teachers do not (typically) use pressure for their own good, but for the good of their pupil. It's only when the teacher instrumentalizes pupils' vulnerability for the teacher's own benefit that the pressure could be exploitative. Hence condition (c). And for sexual exploitation, the action must be sexual – hence (d). Next, I examine the adult-child power structures that render children vulnerable to adult demands for sex.

Power Hierarchies

Children are vulnerable to pressure from adults. As discussed in chapter 2, children exist within definite power relations with adults. I discuss institutional hierarchies (teachers, doctors, etc.) in section IV; here I discuss general social hierarchies. Although some writers have defended consensual paedophilia on the grounds that children can fully communicate their willingness to participate in sexual activity, they ignore the:

> 'disparity of experience, needs, desires, physical potentialities, emotional resources, sense of responsibility, awareness of consequences of one's actions, and, above all, power between adults and children'.[44]

Here, I examine some sources of adult power over children which enables adults to pressure children into to sex. Sometimes these are powers which give adults the ability to make (explicit or implicit) threats or offers; sometimes these are powers which give adults sheer authority over children, regardless of whether threats or offers are made.

First, children (particularly young children) are physically vulnerable to adults, being typically smaller and weaker. That said, focusing on physical vulnerabilities distracts us

[44] Archard, (1998),p.127. Farson, (1974),pp.147-148

from (more severe) socially constructed vulnerabilities, and leads to incredulity of older (especially male) teenage victims of sexual abuse who may be physically developed, but are nonetheless vulnerable.

Second, children are taught to be subservient to adults, making it hard for them to reject adults' advances or demands. Ageism pervades the way we teach children: adults are to be respected and obeyed; their experience to be acknowledged. Adults routinely exercise their power over children and express their superiority over them, meaning children internalise feelings of inferiority and subordination. Demanding unquestioning obedience from children ('do as you're told', 'because I say so') makes them vulnerable to adults' sexual demands. Children are taught that adults have a right to access their bodies, with parents often requiring their children to accept all forms of physical affection from relatives and friends, such as being picked up, hugged, kissed or tickled.[45] Archard observes:

> 'it is a tragic irony that the very habit of obedience to elders which support parental instructions to avoid strangers make it easier for adults to exploit children sexually'.[46]

Indeed, it is the child who is the most 'well-behaved' and eager-to-please, 'the compliant, conforming child' who is most at risk.[47] Survivors of child sexual abuse often report that they submitted to the assaults because they had been taught to respect and defer to adults.[48] These discourses of authority enable adults to extract acquiescence from unwilling children without coercion or force.

Third, a child's trust in, love of, and reliance upon someone can easily be exploited. Relations or family friends are statistically most likely to be a child's abuser.[49] Victims may well hate the abuse, not the abuser. Children may fear their abusers being punished, making

[45] Farson, (1974),p.147
[46] Archard, (1993),p.78
[47] Kitzinger, (1997),p.173
[48] Archard, (1993),p.78; Kitzinger, (1997),p.176.
[49] ONS, (2016)

victims reluctant to report the abuse.[50] Indeed, children abused by family members often feel strong conflicted loyalties. Judith Ennew reports the case of a 14-year-old girl who fell pregnant by her father. Her father had been having intercourse with her for a year, having manipulated her following her mother's death. Although she was petrified, she did not want her father to go to prison. The case doctor wrote:

> 'Whatever we think of [the father], in her eyes he is her provider, and also her lover'.[51]

This risk also highlights the importance of emotional development for the capacity to consent to sex; if you struggle to understand or control your emotions, you are more vulnerable to manipulation.

Fourthly, adolescents are made vulnerable through gendered identities and socially-constructed needs for validation. First, girls are expected to be passive and compliant recipients of male sexual attention. Self-doubt and insecurity are typical of early adolescence, particularly in girls, and particularly in their interactions with older men. At this age, girls' willingness to speak out declines sharply. They see niceness as central to femininity and they link niceness to compliance. So they often endure assault silently.[52] Second, at a certain age self-worth is bound up with becoming an adult, with not being a child. And since sex is an 'adult' act taboo for children, adolescents feel pressure to have sex to receive recognition as an adult. Indeed, phrases such as 'becoming a man' can be synonymous with 'losing virginity'. These general pressures, combined with adolescents' low resistance to peer pressure, provide the background to sexual encounters.[53] And they may lead teenagers to acquiesce to sex unwillingly.[54]

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[50] Archard, (1993),p.158
[51] Ennew, (1986),p.45
[52] Or without vigorous enough protest. Oberman, (2001),pp.819-820; Oberman, (2000),pp.725-726
[53] On resistance to peer pressure, see Steinberg et al., (2009).
[54] Oberman, (2000), especially p.709

Fifthly, adults can manipulate children using differences in sexual knowledge and experience between them.[55] Since young people are kept sexually ignorant, they often lack a 'sexual script'. Acquiring a 'sexual script' requires learning that certain things in certain contexts are 'meant to be sexual before they become sexual'; that certain actions/words are signals of sexual intent; and that certain actions can indicate a lack of interest or refusal of consent.[56] When people lack a complete "'script" for sexual behaviour, such persons are more likely to be unable to refuse consent'.[57] A knowing partner can exploit gaps in the knowledge of someone lacking a sexual script. Adults can therefore exploit children because of 'a substantial difference in sexual knowledge'.[58]

Sixthly, children are materially dependent on adults.[59] Children rarely have independent access to financial resources; cannot easily own or access bank accounts; and (in the West) have few legitimate employment opportunities outside the family. This leaves them dependent on adults, and usually on those most likely to initiate sexual contact with them. Children's financial dependence means adults can make credible material threats or offers. Parents/guardians frequently make these threats/offers in other areas ('no iPad until you've tidied-up'). Such threats or offers, explicit or implicit, can be used to pressure children into sex, and the common use of threats lends credibility to more extreme threats to withhold food or shelter. Furthermore, this material dependence effectively prevents young people from leaving home, even temporarily, to escape abuse. Therefore, children might acquiesce to sex in cases where adults would not.

These factors explain how adults stand in hierarchies of power over children and why children are vulnerable to adults. Children are sexually exploited when these vulnerabilities are instrumentalized by adults in a sexual way. This exploitation does not, however,

[55] Fischel, (2010),p.84
[56] Doyle, (2010),p.116
[57] Ibid.,p.116;Herring and Wall, (2014),p.627
[58]Archard, (1998),p.126
[59] Waites, (2005),p.233

necessarily legally constitute rape, where rape involves coercion or non-consent. Adults can instrumentalize children's vulnerabilities to elicit consent/acquiescence without coercive threats. In *State v Lester* (1984), a father committed incest with his daughter: the victim 'initially refused' her father's demand to take her clothes off and have sex, but she

> 'complied with a second request because she "could tell on his face that he was getting angrier."'[60]

The court convicted the father of incest, but not rape, because there was 'no evidence…[of] actual or constructive force to accomplish the acts.'[61] The sheer authority of the father meant the 15-year-old girl complied. Suppose a man holding a gun approaches and asks for money; your handing over money may not be truly voluntary, even if he never raises his weapon. The simple fact he is armed may be sufficiently threatening to elicit compliance. Similarly, adults routinely use power over children, and have recourse to this power when making sexual demands. They need not issue threats. As one survivor wrote: '[adults] can threaten without any words at all'.[62] Indeed, adults hold a kind of discursive power that gives them sheer authority over children: their demands are to-be-obeyed even if there is no background threat. Thus, in a context of power, it is possible for pressure and demands – even absent threats and coercion – to force someone to engage in exploitative and unwanted sex which is nonetheless legally consensual.[63]

Therefore, lowering the age of consent without addressing these power inequalities opens children to sexual exploitation. This is because exploitation using authority and pressure rather than force and coercion would often not break rape laws. Hence, adults currently deterred from engaging in sexual activity with under-16s because of its illegality might try to engage in exploitative sex with under-16s. Therefore, we must respect the autonomy and

[60] *State v Lester*, 321, S.E.2d 166 (N.C. App. 1984)
[61] Conly, (2004),p.99
[62] Kitzinger, (1997),p.176
[63] For various examples of this kind, see Oberman, (2000) and Oberman, (2001)

rights of mature individuals to make decisions about their bodies, whilst also protecting them from sexual exploitation.

IV. Radicalism

The radical's solution is to deconstruct the power hierarchies making children vulnerable to exploitation. This involves: deconstructing ideals of childhood innocence; abolishing adult-child power hierarchies; and abolishing laws restricting childhood sexual freedom. As discussed in chapter 2, social and legal rules against teenage sex render teenagers vulnerable. It makes them sexually naïve. Teaching children they need protection from adults makes children fear adults, which reinforces and gives credibility to adults' threats. Then, observing these vulnerabilities, society finds the justification to protect children. This is an operation of juridical productive power: the law creates the very subjects it presupposes. The radical approach is, instead of 'protecting' children, to deconstruct the age-hierarchy and thereby deconstruct children's sexual vulnerability, and remove most prohibitions on childhood sexuality. In so doing we empower children and leave them less liable to abuse.

First, I explore the radical critiques of childhood innocence and conclude that we should deconstruct cultural images of childhood sexual innocence. Second, I examine whether we should deconstruct all adult-child power hierarchies. Although we should empower children more, I reject the radical's overall project as unrealistic. Finally, I defend the existence of at least some adult-child hierarchies and conclude that we should protect children from the risks inherent in such hierarchies.

Childhood Innocence

Here, I discuss the radical critique of childhood innocence. We discussed ideological images of childhood chapter 2, but we can recap briefly. The idea of childhood innocence rests on a sense of what childhood really is or should be. An 'authentic' or 'true' childhood is meant to be a carefree time of play, devoid of 'adult' experiences, and asexual. Childhood sexual experiences are a violation of that childhood. Indeed, the phrase 'robbing children of their innocence' has become a euphemism for sexual abuse.[64] Consequently, we forbid actions endangering children's innocence. Not only do we make erotic or sensual child-adult relationships illegal (whether in images or otherwise), we also construct 'a particular category of the pervert…monsters whose aim in life is to practice sex with children.'[65] As Foucault argues, we have therefore developed the idea (i) of a childhood which by its nature is in danger and needing protection; and (ii) of dangerous individuals who are constitutionally set up to threaten that childhood.[66] Sexuality then appears like a kind of roaming danger to childhood. Consequently, there is a powerful social and political drive to supervise, regulate and suppress all childhood sexuality. However, constructing children as sexually innocent renders them vulnerable to exploitation. By challenging this discourse of innocence, we can reduce childhood sexual exploitation. Discourses of childhood innocence contribute to childhood vulnerability in four key ways.

First, keeping children sexually innocent keeps them sexually ignorant. Children run into a catch-22: they are not mature enough for sex until they know what it involves; and they are not ready to know about sex until they are mature enough for sex.[67] And because children

[64] Kitzinger, (1997),pp.163-164
[65] Foucault, (1988),p.277
[66] Ibid.,pp.279-281
[67] Archard, (1993),p.75

are meant to be sexually innocent, any premature knowledge of sex is considered harmful or corrupting. Innocence is thus used as a justification for maintaining ignorance.[68] Indeed, it is in the name of innocence that adults try to regulate and prevent expressions of childhood sexuality, and keep children away from 'corrupting influences' that might teach them about sexuality.[69] Therefore, children lack a sexual script; cannot give informed sexual consent; might not understand the risks of sex; and might not understand the nature or seriousness of an adult abuser's actions, and so do not speak out. As Farson puts it:

> 'We keep children ignorant and then worry that they are vulnerable to sexual advances.'[70]

The solution is education.[71] This has long been a demand by practitioners working with young victims of sexual abuse: Denslow Lewis wrote in 1900 that:

> 'Unquestionably children should be taught, not necessarily in a brutal way, regarding sexual intercourse …while their modesty may be shocked their virtue will be saved.'[72]

This education must cover more than the mechanics of sex and safe sex. It must cover healthy sexual relationships – so individuals can recognise and resist abuse and exploitation – and how to avoid unwanted sexual encounters. Many survivors are made to believe that their abuse is 'normal', or 'what loving partners do'. We mustn't let children become victims of naïveté or ignorance.

Second, because of their 'innocence', children lack political or institutional power. Thus, they are less able and less free than adults to refuse sexual relationships.[73]

Children rarely have the confidence to speak to the authorities. Cultural ideals of childhood innocence and asexuality make children ashamed of talking about sexual

[68] Kitzinger, (1997),p.165
[69] Ibid.,p.165
[70] Farson, (1974),p.147
[71] Ennew, (1986),p.62
[72] Lewis, (1983),p.227
[73] Ennew, (1986),p.62

experiences. Children wanting to complain about someone in an institutional setting (e.g. a school) may fear punishment. Teachers – figures of authority and discipline – are often not seen as allies. This factor often takes on a class or racialized dimension: black children whose older brothers are beaten by the police, or Latinx children whose grandparents are undocumented migrants, are unlikely to see authority figures as friendly. Indeed, attempts to encourage children to seek help from policemen, 'received a decidedly sceptical response from…children in a Welsh pit village soon after a year-long miners' strike'.[74] Children from such minorities are thus particularly vulnerable.

There are also inadequate institutional mechanisms for children to discuss or seek help with sex and sexuality, because society fears sexualising, and therefore damaging, children. Sometimes legal barriers prevent children from accessing institutional help: Foucault discusses the case of a teacher tried for 'inciting minors to immoral acts' for supplying contraceptives to pupils. The law was used to repress teachers and social workers for 'not carrying out their task of social control' which was to control children's sexuality.[75] Even without legal barriers, strong social taboos hinder teachers from discussing sex with children, except within the narrow confines of what is prescribed in sex education lessons. Either way, children are unable to access adequate institutional support.

Even when children do disclose instances of unwanted sexual contact, they are often disbelieved. Because children are considered 'incapable of sexuality…they are not thought to be capable of speaking about it'.[76] Children's disclosures are dismissed as lies or fantasies, their anger and grief as 'tantrums' or 'whining'. So long as we believe children should be silent about sex, their silence protects the abuser.[77] The experience of being

[74] Kitzinger, (1997)
[75] Foucault, (1988),p.275
[76] Ibid.,p.284
[77] Kitzinger, (1997),p.172

disbelieved is common to many survivors, and has occurred systematically throughout many major institutions.[78]

Discourses of childhood innocence thus render children unwilling and unable to access certain forms of institutional support which, in turn, renders them vulnerable.

Third, the image of childhood sexual innocence can make children targets for certain kinds of paedophile. In general, much sexual emphasis is placed on innocence, hence the focus on virginity in erotica and pornography. Even in fashion, some female adult models are depicted as innocent or child-like.[79] And, according to some sex offenders, a child's innocence, like the purity of the virgin, is attractive for being not yet 'corrupted'.[80] There is evidence to suggest that if society stopped coding children as uniquely and purely innocent, they would be less titillating to such people.[81] This provides some reason to be concerned about cultural images of childhood innocence.

Finally, discourses of innocence lead to a failure to protect children not considered innocent. As discussed above and in chapter 2, children who are not 'innocent' are not seen as deserving protection. To illustrate: one abuser, 'defend[ed] himself on the grounds that his victim was "no angel"', citing as evidence that 'the girl drinks [and] smokes'.[82] As Kitzinger puts it:

> '[w]ithout her innocence the child has lost the magic cloak supposed to make her impervious to harm'.[83]

[78] See the Independent Inquiry: Child Sexual Abuse, (2017)
[79] Kitzinger, (1997),p.164.
[80] Ibid.,p.164; Archard, (1998),pp.118-119
[81] Ennew, (1986),pp.51-58. Kitzinger, (1997),p.164
[82] Kitzinger, (1997),p.164
[83] Ibid.,p.164

Victims of abuse become vulnerable to further abuse, since they are viewed not as a child deserving the protections of childhood, but as 'damaged goods'.[84] Discourses of innocence render vulnerable those children not deemed innocent.[85]

The image of childhood innocence is thus at the root of many childhood sexual vulnerabilities. Legal and institutional measures protecting 'innocence' render children vulnerable to sexual abuse.[86] Thus, deconstructing this 'ideal' of innocence would help challenge, transform and remove these vulnerabilities. This could involve: extensive sex education; open conversations about sex and sexuality; and institutional mechanisms to advise on and help (rather than prevent) explorations of, and feeling comfortable in, one's sexuality.

Radicalism

Challenging discourses of children's innocence is not enough. Much of the risk of child exploitation comes from adult-child power differentials. Child abuse is not an anomaly. It is part of the structural oppression of children.[87] Child abuse is an abuse of power; the fundamental problem, therefore, is power. To the extent that childhood is a state of powerlessness, exploitation and abuse are endemic to it. Thus, we cannot truly tackle exploitation without tackling adult-child inequality. All the inequalities discussed in section III (except physical weakness) are examples of social or institutional inequalities (and even physical weakness can be mitigated). The radical insists that we dismantle these inequalities.

[84] Sgroi, (1982),p.114
[85] Compare Epstein et al., (2017)
[86] See Levine, (2002)
[87] Kitzinger, (1997),p.179

First, I outline the radical critique of protectionism, and second, I discuss the limitations of radicalism.

The radical criticises protectionism. The protectionist observes power inequalities, takes them as a fixed constraint, and then tries to protect children from them. Protectionist policies include a high age of consent (sometimes up to 21), age restrictions on explicit material, restrictions on teachers discussing sex with pupils, etc. However, recognising in law a child's place within these hierarchical relationships at best condones that hierarchy, and, at worst, reinforces and recreates it.

Instead, the radicals seek to abolish protectionist practices, which, they claim, make children naïve, dependent and vulnerable. For example, the 'lock up your children' mentality means children are often isolated and confined to institutions or the home. This makes children critically dependent on those in positions of authority which, in a cruel irony, makes them more vulnerable to abuse than before. When we focus on children's weakness and incapacity instead of the power of abusers, the call is for increased surveillance. But locking children away merely confines them and leaves victims feeling trapped. As one survivor reports:

> 'I used to sit at the window…and think – one day I'll be out there. When I'm grown up I can get my own place, I can close the door, go to bed when I want…[and] IT won't happen any more.'[88]

'Protecting' children through confinement, isolation and surveillance makes them vulnerable to their overseers. If the overseer tries to exploit the child, that child then has few outside options, means of escape, or means of getting outside help. A cage is safe so long as you are not locked in with a lion. This 'protection' is therefore not a solution to the problems of childhood vulnerability. If we can change these power structures, we can

[88] Ibid.,p.171. Kitzinger contrasts the images of play-pen bars symbolising safety in protectionist literature with the prison-like bars drawn by abuse survivors.

recognise and enable children's agency without the risks that protectionists worry about. One way of building up children's agency is through empowerment programmes. They build children's confidence to report abuse and teach children to become streetwise. Examples include the 'Kids Can Say No' campaign and the Schools Consent Project which teach children about consent and their rights to determine what happens to their bodies. The radical overturns the power disparity between adults and children, and empowers children to assert their rights.

Although we should accept the broad thrust of the radical's critique of power hierarchies and childhood innocence, radicalism has some limitations. It is, in some ways, all-or-nothing. As the radicals themselves argue, it would be inadequate to abolish the age of consent unless age-structures and hierarchies are abolished. The abolition of the age of consent, even when conjoined with better sex education, is likely to leave children too vulnerable to exploitation. And to the extent radicals intend to completely abolish structural ageism and give children equal power, they run into medium-run problems of feasibility. So, at the very least, there is an interim question of what to do while age-structures are pervasive. Even as an ultimate goal, however, radicalism should not be accepted in its entirety. I turn to that question now.

Hierarchies

Should we abolish all hierarchies? Institutional adult-child hierarchies could feasibly be abolished. These roles include teachers, doctors, coaches, and religious leaders. Such people have power both discursively and through formalised structures. Discursively, children are taught to trust and obey such adults, and to see them as experts. Institutionally,

these adults can make threats and offers, e.g. higher/lower grades, places on a sports team, or even God's (dis)pleasure. These features make children vulnerable to adults in such positions. The protectionist supports strict laws prohibiting sexual contact within such institutional relationships, background checks, and child offender registers. The radical, however, permits sexual contact and deconstructs the power relation by abolishing the institutional hierarchy.

To abolish the power hierarchies surrounding certain roles is, effectively, to abolish the roles themselves. But some roles are so important that they should not be abolished. Therefore, we should preserve certain institutional hierarchies and respond to their consequences. For example, educators must be recognised as experts, and must be trusted to impart knowledge and advice honestly. Just so for Doctors. If their expertise were not recognised and they were not trusted, their social utility would be unclear; indeed, it would be unclear what their roles really were ('he's the local doctor, but he knows nothing about medicine and can't be trusted to give advice'). Recognition and trust enables teachers and doctors to perform their functions. But it also gives them power. The risks of exploitation are therefore endemic to these roles. We can deconstruct large elements of the institutional and discursive power held by people occupying these roles. But to deconstruct the hierarchy completely is to deconstruct the role. We must therefore choose between preserving these hierarchical roles (and the risk of exploitation) in some reformed form, and removing the role. The value of education and healthcare is so great that deconstructing these hierarchical roles is too costly. Therefore, contra the radical, we should preserve certain crucial institutional hierarchies.

If we preserve institutional hierarchies, permitting sexual relationships within those hierarchies would generate an intolerable risk of child exploitation.[89] Therefore, we must embrace some forms of protectionism. We can still deconstruct elements of hierarchical power; we can make it clear your teacher and doctor should not be considered trustworthy as sexual partners. We can limit their powers and make clear the limits of their rights. For example, we could limit the ability of a teacher to determine grades or punishment on their own; we could even institute the Summerhill School model of democratic education in which teachers and pupils collectively vote on school rules and punishments, thus limiting the punishment-power of any one teacher.[90] And we can provide institutional mechanisms for children to report sexual advances by teachers and doctors. But the power differential remains. Therefore, we should ban sexual contact between children and those in positions of authority over them, such as teachers, doctors, or family members. This motivates laws against child incest and against abusing a position of trust.

Radicalism Summary

The radical is correct that we should challenge ideologies of childhood innocence and child-adult power-hierarchies. We should provide sex education, and empower children against adults, and deconstruct adults' power. We can abolish many hierarchies, and reform others. But we cannot accept radicalism wholesale; it seeks to abolish institutions we ought not abolish. For those, we should embrace a moderate protectionism, and ban sexual relationships within them.

[89] Home Office, (2000a),p.66, pp.77-78, pp.90-94.; Home Office, (2000b),pp.91-93 and p.148
[90] Summerhill, (2017)

V. The Age of Consent

So far, we have established that: all consensual, non-exploitative sex is to be allowed; all non-consensual sex and all exploitative sex should be prevented. For those unable to consent autonomously to sex, the question is welfarist: harmful sexual activity should be banned, and harmless sexual activity can be permitted. These lines are set out by our moral theorising. Some countries do try to account for some of these considerations directly in their laws. Austria, for example, tries to take maturity into account directly by permitting sexual acts with people down to two years below the general age of consent so long as they are 'mature enough to understand the significance of the act'.[91] Some European countries try to account for pressure and the operations of power by having 'seduction' provisions in their legal codes.[92] And in Slovenia, to reduce the possibility of manipulation, sex with those under the general age of consent is only illegal if there is a 'marked discrepancy between the maturity of the perpetrator and…the victim'.[93] Finland has similar laws. If workable, such laws might be endorsed by our framework. However, it is hard to draw these lines legally. In particular, it is hard draw them clearly enough to deter the acts we want to prevent. Given the hidden ways that power can operate to manufacture consent, it is difficult to write laws which are action-guiding *ex ante* and actionable *ex post*. Suppose there is a law permitting consensual sexual relations with all those possessing the relevant cognitive competence. Such laws pose practical problems: how can a 17-year-old at a party assess the cognitive competence of the 15-year-old they're flirting with? And if the operations of power are hidden, how can a court assess whether consent was genuine or manufactured by circumstance, and further, whether the defendant knew whether the

[91] Strafgesetzbuch §207b: sexueller Missbrauch von Jugendlichen (2015)
[92] Graupner, (2000),pp.433-440
[93] *Criminal Offences Against Sexual Integrity,* Art.183 s(1)

consent was genuine? Whenever the courts are given leeway with rebuttable presumptions of consent, or police are given discretion whether to investigate sexual acts, those laws are enforced in discriminatory ways, targeting racial and sexual minorities.[94] Given these difficulties, we may have to embrace age as a proxy for competence and vulnerability. When setting the age, we must balance the risks of violating the moral rights of those who are autonomous as against the harms of exploitation and abuse. In this section, I discuss the considerations for setting the age of consent, and defend the use of age-span exemptions as a way of respecting individual freedom, whilst recognising the need to protect young people from exploitation. I do not come to any specific conclusions about the correct age of consent because that decision is context- and fact-dependent, and not one it is possible to make universal statements about.

The general age of consent is 14 in Germany, Austria, Italy and 27 other countries around the world. Can such laws be supported by our framework? As discussed in section II, 14-year-olds have the same cognitive competence as adults, and have the degree of emotional maturity required for mature decisions. Although countries (such as the UK or the US) with an age of consent above 14 defend those laws on the grounds that 14-year-olds are sexually naive, this naiveté is created by the law and by a denial of educational and institutional support.[95] Indeed, in countries such as in Scandinavia, where children are provided with earlier and more comprehensive sex education than in the UK, the age of first experience of intercourse is higher, and rates of teenage pregnancy and abortion are lower.[96] And, as discussed, 14-year-olds are psychologically capable of making sexual decisions. In the UK, around 30% of those currently aged 16–24 had sexual intercourse before turning 16 (and some government estimates suggest a third of teenagers in the UK

[94] Fischel, (2010),p.301
[95] Archard, (1993),p.79
[96] Archard, (1998), p.125. Disentangling causation in these cases is difficult, however.

have sex before their 16th birthday).[97] Provided that sexual relationships between 14-year-olds and those in a position of authority or trust are banned, and provided that there is more extensive sex education and institutional support, laws permitting 14-year-olds to engage in sexual activity could respect 14–15-year-olds' full cognitive autonomy without necessarily risking unacceptable rates of exploitation.[98] There is also a welfarist case for this policy. Given so many 14- and 15-year-olds are sexually active (~30–33% in the UK), they need help, support, and advice to practice safe sex. Lowering the age of consent could facilitate more effective support from health and education services. As a sexually active teenager, talking to teachers or parents would no longer risk punishment for you or your partner. Such a move, combined with improving education and healthcare, would likely reduce rates of STIs and unwanted pregnancy.[99]

However, if, in a particular context, significant numbers of 14-year-olds are (or would be) sexually exploited by adults if the age of consent were 14, then our framework could endorse the use of age-span (or 'closeness-of-age') defences. Canada, New Jersey and Delaware, for example, allow 14–15-year-olds to have sex with people no more than (variously) 2–5 years older. Under a two-year age-span exemption from 14, 14-year-olds could legally engage in sexual contact with 14–16-year-olds, 15-year-olds with 14–17-year-olds, and 16-year-olds with anyone aged 14 or above. This policy comes with similar welfarist benefits as a general age of consent at 14, and does recognise the autonomy of those young people who have sexual relationships with people of a similar age. It would mean, for example, that a 15-year-old couple who engage in mutually consensual sexual relations would not be guilty of a crime.[100] But an age-span exemption can also protect young people from exploitation and manipulation. Such a policy recognises that almost all

[97] Mercer et al., (2013). See also Dugan, (2013). Compare Oberman, (2000),p.703
[98] Although there is no particular evidence suggesting that sexually active 14-year-olds in such countries are being exploited, this is partly because of a lack of reliable evidence on child sexual abuse.
[99] See Waites, (2005),pp.213-214
[100] Archard, (1998),p.126

the power differentials described in section III are between adults and children, not between young people with mere age differences. 14-year-olds are not taught to defer to 16-year-olds; 16-year-olds are not usually the object of 14-year-olds' ultimate trust and emotional dependence; 14-year-olds are not financially or materially dependent on them; there is unlikely to be a significant difference in emotional development that 16-year-olds can leverage over 14-year-olds; and there is unlikely to be a significant difference in sexual and emotional knowledge and experience which would allow 16-year-olds to manipulate 14-year-olds. Obviously, some of these are a matter of degree when compared to adults. But few would consider a relationship between a 14- and a 16-year-old to be problematic in the way they might consider a relationship between a 14-year-old and a 40-year-old. Such a policy – combined with policies empowering young people to make confident and safe sexual decisions, such as improved sex and relationship education, sexual health provision, and institutional support – can protect young people from manipulation and exploitation, thereby protecting their agency. However, a cost of age-span exemptions is a violation of the autonomy of those young people who want to pursue sexual relationships with people outside the exempt age range. This is a cost not incurred by a policy of 14 as a general age of consent. How do we balance these concerns? Remember we are supposing we are in scenario where a general age of consent of 14 would lead to significant numbers of 14–15-year-olds being manipulated by adults. Given that the average age gap between partners at their first sexual experience is one year in the UK, a 2-year age-span exemption might not in practice violate the autonomy of many young people. Given this, given that the autonomy of 14-year-olds is only violated for two years, and given that the harms of abuse to vulnerable 14-year-olds are severe and can be lifelong, the balance of harms in such a scenario seems to weigh against a general age of 14 in favour of a closeness-of-age

defence.[101] Therefore, a closeness-of-age defence could, in such circumstances, generally respect the autonomy of 14–15-year-olds, whilst protecting them from manipulation and exploitation.

Finally, in certain scenarios, it might be justified to have a blanket ban on under-16s engaging in sexual activity. Suppose the vast majority of sexually active 14-year-olds were being coerced/exploited, both by adults and by people of similar ages, with few engaging in sex voluntarily. Suppose the state lacked capabilities to investigate consent and exploitation, but could investigate the ages of those having sex. In such circumstances, the facts might suggest banning all sexual relationships involving 14–15-year-olds as a way of preventing rape and exploitation without violating the autonomy of many teenagers. Such laws would need to be carefully written such that, in relationships where both members are underage, the victims do not face prosecution, and that the police and courts' designation of who is the 'victim' does not merely rest on sexist and racist assumptions. The need to avoid such problems can suggest the use of age-span exemptions instead. But if such problems can be avoided, a blanket age of consent of 16 could, in these non-ideal circumstances, be justified.[102]

Whether there should be a 4-year age span exemption from 12 (as in the Netherlands), general age of consent of 14 (as in Germany), a 4–year age-span exemption from 14 (as in Delaware), a 2-year age-span exemption from 14 (as in Canada) or a strict age of consent at 16 (as in the UK) depends on various contextual factors. Absent further detailed legal, sociological and public health investigation of those countries, we cannot determine here whether their laws are correct. The answer depends on: the ability of state institutions to enforce fine-grained laws; the prevalence and likelihood of adult exploitation of children; and the current behaviour and practices of young people. And ultimately, this

[101] For the welfare effects of childhood sexual experiences,see Ennew, (1986),pp.41-60.; Santrock, (2016),p.385; Stainton Rogers and Stainton Rogers, (1999); Rind, (2001).
[102] An attempt to mediate some of these problems is proposed by Oberman, (2000), especially pp.775-784

balancing is an intuitionist exercise. But the foregoing discussion shows how to apply the considerations in this chapter to different contexts, and has outlined how age-span exemptions can be an effective way of balancing the need to respect their autonomy against the need to protect them from exploitation.

Age-Span Exemptions: Objections and Clarifications

The first question/objection to age-span exemptions is whether age is an adequate proxy for power differentials. Not all intergenerational relationships are irretrievably tainted by power, and not all similar-age relationships are free from power. Wertheimer argues that, since age differences may not accurately index sexual coercion, we should reject age-span defences in favour of a single age of consent.[103] However, this argument, by focusing on coercion, ignores the broader effects of power. Perhaps 16-year-olds are no more likely to issue violent threats than 30-year-olds. But 30-year-olds, as per section III, have a broader range of powers to draw upon when pressuring a child. Therefore, age can be an adequate proxy for the ability to sexually exploit another, even if it's a poor proxy for coercion. Since it is not a perfect proxy, we must balance the likelihoods of an intergenerational relationship being autonomous and them being exploitative. But just because age is an imperfect proxy for power does not mean age-differentials should be ignored.

What about other proxies for power differentials? Age tracks certain hierarchies and power differentials, but so do gender, race, class and sexuality. Perhaps the argument about power differentials suggests a higher age of consent for girls, working class teenagers, and certain racial or ethnic groups, since those groups are at greater risk of manipulation

[103] Wertheimer, (2003),pp.116-122

and exploitation. I discuss this kind of suggestion in chapter 11. Generally, this policy would problematically reproduce and reinforce the very narratives that render those groups vulnerable. Not only would such laws make them more vulnerable to sexual exploitation, they would reinforce general social inequality. A higher legal age of consent for girls would cause girls and the rest of society to internalise notions of female inferiority or incapacity. As such, although other proxies may index power, recognising them in law would be more damaging than using age alone.[104]

A final question is: why seek to prevent sex in conditions of dependency or vulnerability given almost any sexual episode is (at least somewhat) characterised by these features? There are surely some power differentials in any relationship. Given that, and given we think most adult consensual sexual relationships are nonetheless morally legitimate, surely power differentials cannot be a 'deal breaker' for the legitimacy of sex? The response is that adult-child power differentials are greater than in typical adult relationships. In circumstances of unchosen material and emotional dependency within authoritative hierarchical relationships, requests for sex can be abusive, or equivalent to coercion, without the issuance of a threat.[105] Consent may simply be a concession to pre-empt a future penalty (where penalties can range broadly from violence to a withholding of affection).[106] The problem therefore is not that there exists a power differential (something almost ubiquitous in sexual relationships), but rather that some relations of dependence and vulnerability are so great it's almost impossible to distinguish between forced submission and consent.[107] This argument is not unique to children: it also explains professional restrictions on relationships between doctors and patients, guards and convicts, academics and students. Power can be hard to measure, and it can be hard to

[104] With an exception for adults lacking mental capacity.
[105] Stinchcombe and Nielsen, (2009)
[106] Fischel, (2010),p.319
[107] Ibid.,p.319; Mackinnon, (1983),pp.646-647

determine when power merits legal intervention; but we should not ignore all non-coercive operations of power.

Conclusions

In this chapter, I have defended and explained the moral position that all consensual non-exploitative sex should be allowed, no exploitative sex should be allowed, and (for those incapable of consent) harmful sex should be banned. Politically, I have defended a cluster of policies to be enacted together, namely:

(i) extensive sexual education and empowerment programmes;

(ii) the need to challenge discourses of children innocence and to include children in frank discussions about healthy sexual relationships;

(iii) the need to transform structures of authority, vulnerability and dependence between children and adults, whilst preserving certain necessary hierarchies;

(iv) a ban on sexual relations between children and those holding (institutional or familial) positions of authority over them;

(v) the use of age-span exemptions in certain circumstances to balance respect for autonomy with worries about exploitation.

Chapter 11

Age Discrimination

Introduction

Children face many double-standards based on their age.[1] They, but not adults, may be subjected to legal curfews or 'corrective' violence in the form of corporal punishment.[2] Police may disperse gatherings of youths and children, but not older groups. Age is used to deny rights to marry, drink, drive, or express oneself or consume media freely. There are restaurants refusing entry to children, shops saying 'no more than one schoolchild at a time', holiday homes advertising for 'adults only', and pubs demanding 'no under 21s'.[3] Businesses install high-pitched 'Mosquito' devices to deter youths from congregating. Buildings are designed such that they are often inaccessible to children. These practices involve (direct or indirect) age discrimination. But is such discrimination permissible? Age has only limited protection in UK and US discrimination law: only over-40s are protected in the US, and only over-18s in UK. Direct age discrimination can be legally permissible when direct discrimination based on other protected characteristics would not be.[4] Should age discrimination be considered permissible, when race and sex discrimination are not?

Before examining age discrimination in particular, I'll set out an account of generic discrimination. An agent, X, (generically) discriminates against someone, Y, in relation to another, Z, if and only if:

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[1] Freeman, (1997a),p.36
[2] Ibid.,p.3. Federle, (1995)
[3] Street-Porter, (2015); Government Equalities Office (2012); Ainge Roy (2016); UK Business Forums (2011)
[4] *Equality Act* (2010) s13(1) and (2)

(i) (X believes that) Y has some property, P, and (X believes that) Z does not have P;

(ii) X treats Y worse than they treat/would treat Z; and,

(iii) It is because (X believes that) Y, but not Z, has P that X treats Y worse than Z.[5]

This account does not, on its own, define wrongful discrimination. Employers hiring qualified applicants and rejecting the unqualified are generically discrimination but are not, purely for that reason, acting wrongfully. The question is, what kind of properties P are impermissible grounds for discrimination? And is age such a property? Those questions, and their implications, are the subject of this chapter.

Chapter Outline

First, I examine what makes a characteristic morally protected from discrimination. On the common theories – immutability and arbitrariness/irrelevance – I show age should be protected. I then argue that all socially salient characteristics should be protected. Second, I show that age is socially salient and so merits protection. Third, I examine and reject three objections to protecting age from discrimination, namely, that any given age(-range) is only a temporary characteristic; that everyone experiences a full range of ages across a normal life; and that children are not owed equality. Fourth, I argue that marketplace age discrimination is wrong, except when protecting vulnerable individuals or rectifying other unfairness/inequalities. This rules out discriminatory wage-rates and (most) age-based

[5] Lippert-Rasmussen, (2014),p.15

denials of service. Further, public places/buildings must make adjustments to become accessible to people of all ages. Finally, I examine age discrimination in the allocation of rights. I compare child liberationism (where rights are possessed by all regardless of age); age-requirements (where rights are allocated based on age); and capacity-testing (where rights are allocated on the basis of assessed capacity). I argue that full-scale liberationism ignores the morally relevant developmental differences between younger children and adults; and age-requirements involve wrongful discrimination. Therefore, capacity tests are often preferable. For example, the right to drive could be given to anyone of any age who passes the tests. However, when capacity tests lead to discrimination based on other protected characteristics such as race or sex, then age discrimination might be preferable. Ultimately, the correct choice depends on a range of contextual factors.

It is notable that age discrimination against the elderly is commonly taken to be wrong, while youth discrimination is generally ignored. I will mostly focus on youth discrimination. But in demonstrating that age should be a protected characteristic, I demonstrate it should be protected for the elderly too.

I.Age as a Protected Characteristic

The Popular Accounts

There are two generally popular theories of protected characteristics: arbitrariness/irrelevance theory and immutability/choice theory. I show that age counts as a protected characteristic under each. I then argue in favour of social-salience and caste-based accounts of protected characteristics.

Arbitrariness/irrelevance theory maintains that discrimination is wrong because it bases differential treatment on arbitrary/irrelevant characteristics. This view is common. Rawls argues that life outcomes should not be determined by factors 'arbitrary from a moral point of view'.[6] Cotter argues that discrimination treats people unequally 'without rational justification.'[7] Kekes argues that race discrimination is wrong because race is 'arbitrary'; and Flew calls racism unjust because race is 'properly irrelevant to…almost all questions of social status and employability'.[8] Frankfurt argues wrongful discrimination fails to treat individuals exclusively on the basis of traits 'that are actually relevant' and involves 'arbitrariness'.[9] Moreau's recent and influential version of this view argues that discrimination injures our ability 'to live insulated from the effects of *normatively extraneous* features of us.'[10] The arbitrariness/irrelevance account seems to underpin the view that it is wrong to pay women less than men for equal work: the sex/gender of a worker is arbitrary and is irrelevant to what they should be paid. Thus, on this account, the grounds, P, of a (generic) discriminatory decision are improper if they are arbitrary/irrelevant. What characteristics are improper on this account? Race, sex, sexuality and class are irrelevant to allocating rights, resources and (most) jobs. What about age? On the arbitrariness/irrelevance account, age discrimination is condemned along with these other forms of discrimination. For jobs, it is not age which is of fundamental importance, but skills and experience. For wages, it is not age which is important, but productivity. For rights, it is not age, but possession of the relevant interests, vulnerabilities or capacities. As Cohen points out:

> 'no-one can seriously believe that there is a real distinction (in powers, competence etc.) between someone of 18 years and a day and someone of 17 years and 364 days.'[11]

[6] Rawls, (1971),p.15
[7] Cotter, (2006),p.10
[8] Flew, (1993),p.101
[9] Frankfurt, (1999),p.150
[10] Moreau, (2010),p.147. Emphasis added.
[11] Cohen, (1980),p.49

Ultimately, the line is arbitrary. Age requirements for jobs, wages, or rights arbitrarily discriminate against younger people who possess the relevant capacities to an equivalent, or greater, degree than some older people (and vice versa for old-age discrimination). Mandating retirement at 65, rejecting job applicants for being over 60, or paying less because a worker is 21, involve decisions based on arbitrary and irrelevant characteristics. Therefore, on the arbitrariness/irrelevance account, age discrimination is wrong.

A second popular account of wrongful discrimination is immutability/choice theory. This holds that it is wrong to discriminate against someone based on immutable/unchosen characteristics. Kahlenberg, for example, claims that racial discrimination is unjust because race is immutable.[12] Similarly, Singer argues

> 'The person who is denied advantages because of his race is totally unable to alter this particular circumstance of his existence and so may feel with added sharpness that his life is clouded…because of something over which he has no control at all.'[13]

This account captures the intuition that discriminating based on properties one cannot control, such as race, is worse than discriminating because of properties one does control, e.g. whether one smokes.[14] Immutability/choice must accommodate the arbitrariness account to some extent; after all, some immutable characteristics provide good grounds for differential treatment. For example, it would be acceptable to provide specialised healthcare to the disabled but not the able-bodied. It is discrimination based on irrelevant, immutable characteristics that is problematic. But even a hybrid irrelevance-immutability theory faces problems. There are features of individuals which we take to be protected characteristics, but which are chosen or mutable. Religious practice, marital status, and sexual practice are all a matter of choice (even if belief, love and orientation are not). Nonetheless,

[12] Kahlenberg, (1996),pp.54-55
[13] Singer, (1983),p.317
[14] Lippert-Rasmussen, (2014),p.107

discrimination based on religion, marital status, or sexual practice is wrong. Similarly, we would not expect members of racial minorities to undergo 'racial alteration surgery' to avoid discrimination, even if such surgery were cheap or paid for by the state. We would not claim that, where such surgery is possible, race discrimination is permissible. That said, irrelevance-and-immutability may be jointly-sufficient conditions for a characteristic to be protected. Certainly, it captures something about some kinds of discrimination we think are particularly egregious, and the kinds of characteristics that need special protection. On this alternative account, immutability is an aggravating factor in cases of discrimination. What does this theory imply for age? Age is an individual characteristic not subject to individual choice. Although constantly changing, at any particular moment it cannot be altered. As recognised by Bastarache J. of the Canadian Supreme Court:

> 'Age falls squarely within the concern of the equality provision that people should not be penalized for characteristics they either cannot change or cannot be asked to change'.[15]

Therefore, on the immutability/choice account (and the hybrid irrelevance-immutability account) of discrimination, age discrimination is (especially) wrong.

Therefore, on the two standard, popular accounts of discrimination, age discrimination is impermissible. Although these accounts have come under criticism for incompleteness, it is illustrative to show that age discrimination counts as wrong under both such theories. It shows that age discrimination is a core instance of a wrongful discrimination and not merely a curiosity that drops out of philosophically elaborate accounts of discrimination.

Next, I motivate the need for a more sophisticated account of discrimination by criticising the arbitrariness/irrelevance and immutability accounts. I then provide the 'social salience'

[15] *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84

account of protected characteristics, before showing in the next section that age meets the criteria for the status of 'protected characteristic'.

The problem with the arbitrariness/irrelevance view (and, by extension, the hybrid immutability-irrelevance view) is that arbitrariness/irrelevance is neither necessary nor sufficient for wrongful discrimination. First, even when the race or sex of a potential employee is relevant to the hiring decision, we take race/sex discrimination to be wrong. Suppose the racist clientele of a restaurant will not patronise an establishment with black waiters. The race of potential waiters then becomes economically relevant to the hiring decision. It is economically rational for the proprietor to hire a white applicant over an otherwise more qualified black applicant. This is so even if the proprietor abhors the racism of his clients. Despite the relevance of the applicant's race, this is still commonly taken to be wrongful discrimination. Second, arbitrariness is insufficient to pick out cases of wrongful discrimination. Individuals possess many characteristics irrelevant to certain decisions, and yet discrimination on the basis of those characteristics is not wrong. Suppose lots of people apply for a job so simple that all the applicants could easily perform it, say, pulling a lever on a machine every hour. Because all applicants can perform the task, it is not possible to allocate the job based on merit. The company only needs one person to do the job, and so you, as the interviewer, need to whittle down the candidates. You could ask people to recite a catalogue from memory. You could run a lottery, or give the job on a first-come first-served basis. Or you could allocate the job by race or sex. These methods all base selection on arbitrary characteristics irrelevant to the job. And yet the first three cases (memory, lottery, first-come-first-served) are morally unremarkable, whereas the final possibilities (race, sex) are serious wrongs.[16]

[16] Edmonds, (2006),p.37

Therefore, the arbitrariness/irrelevance account is both underinclusive (permitting race and sex discrimination where race, sex etc. are relevant) and overinclusive (proscribing discrimination based on unremarkable characteristics). Instead, we need an account which explains why eye-colour discrimination is idiosyncratic and race discrimination is unjust. Once we have done that, we can see whether age should be protected.

Social Salience

To qualify as a protected characteristic, a group characteristic must be in some sense socially significant, where that significance is historical, cultural or sociological. Why are employment decisions based on eye-colour or nail-length not discriminatory? The 'victims' do not identify themselves, nor are they identified by others, as members of a group in any socially significant sense. First, I examine Edmonds' and Lippert-Rasmussen's 'socially salient group' accounts, and then Sunstein's anticaste principle.

Edmonds and Lippert-Rasmussen provide caste-based views of protected characteristics. According to Lippert-Rasmussen, 'group discrimination' occurs when an agent (generically) discriminates against someone for being a member of a 'socially salient group'.[17] A group is socially salient if 'perceived membership of it is important to the structure of social interactions across a wide range of social contexts.'[18] Socially salient properties include those traits people take to 'predict and explain beliefs, character traits, tastes or other socially significant psychological characteristics.'[19] Social salience is a matter of degree: it

[17] Lippert-Rasmussen, (2014),p.26
[18] Ibid.,p.30
[19] Baber, (2001),p.53

may be important in more or fewer social contexts and it may be slightly important or completely dominant within a certain social interaction.[20] Edmonds' account is similar – he defines a caste as:

> 'a group of people who have a characteristic in common that affects their lives in important ways, and where this characteristic constitutes an important part of their identity.'[21]

Edmonds and Lippert-Rasmussen disagree on whether caste constitutes an important part of one's identity by definition, or whether that is a common but unnecessary feature of caste.[22] Given I argue below that age merits the status of protected characteristic on either interpretation, I will not adjudicate that debate here. Either way, these 'social salience' accounts explain why discrimination based on nail-length or hair-colour is not problematic: having short nails, or blond hair, is irrelevant to almost any kind of social interaction. Therefore, those characteristics are not socially salient. Race, gender and religion, on the other hand, are socially relevant across a wide range of social contexts. This account avoids the problems of the arbitrariness and immutability accounts: on the social salience account, discrimination based on socially irrelevant but arbitrary characteristics (like hair colour or the ability to recite a catalogue) is not wrong, and discrimination based on socially salient but mutable or chosen characteristics (like religion, marital status or sexual practice) is wrong. Even if group membership is not obvious, it can be socially salient so long as perceived membership has an important influence on social interactions in a wide range of contexts.[23] Being (perceived as) LGBT in a homophobic society will structure a wide range of social interactions, including in the workplace, on the street, and in the family. Even for LGBT people in the closet, whole elements of their ways of being and acting are structured by the need to avoid a discriminatory backlash from others, therefore making their identity

[20] Ibid.,p.53; Lippert-Rasmussen, (2014),p.31
[21] Edmonds, (2006),p.124
[22] See ibid.,p.40 and Lippert-Rasmussen, (2014),pp.32-33
[23] Lippert-Rasmussen, (2014),pp.31-32

salient across many of their social interactions. In this way, even invisible and hidden group membership can be socially salient.

In general, almost all traits considered to be protected characteristics constitute membership of socially salient groups: women, disabled people, African-Americans, the elderly, and so on. The social salience account fits our legal practices and moral intuitions. Therefore, if age meets the criteria of 'social salience' or 'caste', we should consider it a protected characteristic.

Cass Sunstein provides a version of this account with his 'anticaste principle'. He argues that violations of this principle constitute especially severe cases of discrimination.[24] The anticaste principle,

> 'forbids social and legal practices from translating highly visible and morally irrelevant differences into systemic social disadvantage, unless there is a very good reason for society to do so'.[25]

A law or practice is objectionable if it contributes to a caste system where some groups suffer 'systematic social disadvantages'.[26] These are disadvantages which operate along standard and predictable lines in multiple and important spheres of life as a citizen. Sunstein's provisional list of those 'spheres of life' includes education, freedom from violence, income and wealth, political representation, health, and political influence.[27] On this account, African-Americans are a 'caste' because social and legal practices have translated 'highly visible' and 'morally irrelevant' differences into disadvantages in all those listed spheres. Any legal and social practices which contribute to or reinforce that status as second-class citizens violate the anticaste principle, and are severe forms of discrimination. Discrimination against men, however, would not violate this stronger principle since

[24] Sunstein, (1994),p.2444
[25] Ibid.,p.2411
[26] Ibid.,p.2429
[27] Ibid.,p.2429

discrimination against men *qua* men does not (in most societies) render them second-class citizens.[28] Sunstein's anticaste principle can supplement the Edmonds and Lippert-Rasmussen accounts by highlighting the most egregious cases of wrongful discrimination. If age meets the criteria of caste in Sunstein's sense, then age should be given special protection.

It is worth making two further observations about social salience/caste accounts of discrimination. First, the social salience of an identity does not need to exist independently of the discrimination against that identity.[29] As Sartre observes, exaggerating slightly, 'it is the Anti-Semite who creates the Jew.'[30] Some discriminatory policies, such as requiring Jews to wear yellow stars, serve to heighten the social salience of the very identities they pick out.[31] Second, social salience accounts are sensitive to historical and social facts. The accounts designate race, but not hair-colour, a protected characteristic only because of contingent facts that make race, but not hair-colour, socially salient. There is nothing inherent in race or hair-colour that makes one socially salient but not the other. If society started discriminating based on hair-colour such that it made people with certain hair-types second-class citizens, then individual instances of discrimination based on hair would violate these anticaste and antidiscrimination principles. Think, for example, of the 'pencil test' used in Apartheid South Africa to determine whether someone's hair-type was such that they should be classified as white, coloured or black. In that social and historical context, hair became socially salient. To investigate whether age merits protection, therefore, we must investigate its historical and social significance. I turn to that investigation now.

[28] Ibid.,pp.2443-2444
[29] Lippert-Rasmussen, (2014)
[30] Sartre, (1995),p.110
[31] See the discussion of productive power in chapter 2.

II.The Social Significance of Age

In this section, I argue that age meets the criteria for 'caste' and 'social salience' and therefore that age should be granted the status of 'protected characteristic'. Chapter 2 contains extensive discussion of the social construction of childhood as a significant social role and identity, with age defining areas of recreation and work, modes of consumption, social interactions, and behaviours considered appropriate or inappropriate. That analysis demonstrates the pervasive social significance of one's status as a child or adult. I will not repeat that analysis here. Instead, I will examine numerical age as an important marker of group membership and group identity. First, I examine how age structures our interactions with each other. Second, I discuss how age became a socially significant marker of development, and therefore a significant factor in interactions between young people and institutions. Third, I explain how age forms an important constituent of our identity. Therefore, since age is a socially salient part of our identity, age discrimination is wrong, and age should be a protected characteristic.

Age is one of the most significant ways that we think about and understand childhood. Age is encoded in everyday talk about milestones. 'How old are you?' is often one of the first questions adults in the West ask children when they first meet them, knowing that the answer

> 'is an important way to position them in relation to expectations about their competences, and their progress through childhood stages.'[32]

Age structures who is likely to socialise with whom and on what terms: unrelated teenagers and retirees, for example, rarely socialise together. Not only is age important to individual social interactions, it has also been institutionalised in schools. School cohorts are

[32] Woodhead, (2009),p.21

organised around birth-dates, and progress is tracked according to predefined stages. Many legal rights and responsibilities are age linked, with rights to vote, sign contracts, marry and consent to sexual relations all granted or denied based on age. This makes age one of the most significant ways we think about childhood legally and politically. It also makes age socially salient in interpersonal interactions: for people at or around the key ages for acquiring legal rights, age is key to how others see them and how they relate to others. Among people around the drinking age, for example, many are keenly aware of which of their friends can legally drink, with age structuring how they socialise or interact with authorities. Teenagers are aware of which friends can vote, drive, or watch restricted films at the cinema. 16th, 18th and 21st birthdays are experienced as significant milestones in people's lives. The fact age is a basis of legal discrimination makes age not merely legally salient, but socially salient.

The social significance of age is so pervasive that it is often hard to notice how much it structures our social world. Yet its importance is culturally and historically contingent. In parts of rural Bangladesh, for example, children are very unlikely to know their age. Thérèse Blanchet found that fathers are uninterested in, and almost never know, their child's age. Mothers, 'when pressed to give the age of their children…commonly reply by giving a range'.[33] Age is almost never officially recorded. Indeed, Jitka Kotalová argued in her ethnography that this lack of interest in age is reflected in the fact that 'there is no standardisation of the age at which a child should enter specific roles.'[34] Instead of numerical age, the key concepts about growing up are understanding/not understanding (buhj/objujh or buddhi hoetse/buddhi hoi nai).[35] Expectations about which life stage a child has/should have reached are tightly tied to life circumstances: orphans are expected to develop rapidly, regardless of age; middle-class children are expected to remain sexually

[33] Blanchet, (1996),p.41
[34] Ibid.,p.44
[35] Ibid.,p.47

innocent/ignorant for longer. Indeed, according to Kotalová, 'mothers never direct the pace of a child's development…because age is not an issue in the capacity to act maturely.'[36] Numerical age is therefore recognised neither as individually important nor socially significant. Even in the West the significance given to numerical age is relatively recent: before the 19th century, numerical age was largely irrelevant (children would work, eat, sleep and drink with adults), and few people marked their birthdays until the last years of their lives.[37] These examples help us understand what it would mean for age *per se* to lack social significance. Noticing how strange this seems to contemporary Western eyes helps us realise how far we are from that world, and how important age is to us.

Second, age has become significant as a marker of development since society started to presume age to be a useful proxy for development. Age has become more socially salient as the state has grown larger and become directly involved in enforcing and granting children's rights. The state – unlike pre-industrial authority figures such parents or local community leaders – was unable or unwilling to take an informed view about the maturity and needs of each individual child. So it used age as a proxy for development. Developmental psychology was then facilitated by the widespread emergence of the school, which put children into neatly pre-arranged age cohorts.[38] This provided a source of comparable information on a large number of subjects. The collection and analysis of this information established developmental norms and expectations which were linked to the main variable by which those children are arranged: age.[39] And teachers, faced with classes of children whose common characteristic was age, wanted to know what was 'normal' for children of that age. These two factors – that test-subjects were arranged by age and

[36] Kotalová, (1993),p.69
[37] Gillis, (2011),p.116
[38] Cunningham, (2005),p.175
[39] Rose, (1999),pp.142-143

educators were demanding age-based information – meant psychologists grounded developmental norms in the average abilities of children at certain ages.[40] Such theories allow children to be compared to age-based norms, and allow those norms to be enforced.[41] Children who fall behind are shamed by parents, teachers and peers, and are given extra help with work. More generally, once schools organise children into classes based on age, with those classes moving at roughly the same speed covering roughly the same curriculum, schools homogenise the children's abilities, thereby making age a genuine proxy for development. There is, therefore, a mutually-reinforcing cycle between theory and practice: the more we think age significant, the more significant it becomes. Consequently, age has become the most significant way that institutions (and individuals) interact with young people. And since children spend many of their waking hours in these institutions, and have much of their leisure time structured by such institutions, their age has become the most salient social fact about them.

Finally, age forms a significant part of our identity; it is 'part of who we are'.[42] Age is important for defining (i) our stage in the life-cycle, and (ii) our generational-identity.

Regarding life-cycle, our self-conception is importantly shaped by whether we see ourselves as a child, youth, middle-aged, senior etc. It defines our status in relation to others, our social responsibilities, and what behaviour is taken to be appropriate. It can be used to predict our experiences and beliefs. Our lives are marked with rituals that recognise (and create) the personal importance of our age. Bar/bat mitzvah ceremonies, confirmation, sweet sixteen, prom, and Rumspringa are all age-based rites of passage which mark and create significant changes in identity and social status. If age were unimportant to our identity, these rites of passage would lack emotional and social significance. Indeed,

[40] For example Inhelder and Piaget, (1958)
[41] Rose, (1999),p.142. See also Jenks, (2009),pp.98-99
[42] Thompson, (2005),p.57

birthdays are given such social significance that young children believe them to be the cause of ageing.[43] Our age is significantly bound up with group-identity; we take ourselves to have a common set of life experiences determined by our place in the life-cycle.

Second, generational group is often an important part of identity. A 'generation' here is understood as a broad birth cohort of people across a society. In the West, this would include groups such as the Baby Boomers, Gen X and Millennials. There is a sense of group solidarity and identity within these generations as individuals have a common set of experiences and cultural/social references (the war, 1960s counterculture, etc.); similar political/economic interests; and similar values.[44] Politically, generation and life-cycle effects are significant, with age now a better predictor of voting behaviour in the UK than class or gender.[45] This age-based social cleavage is also reflected in articles and memes about the culture clash between Baby Boomers and Millennials.[46] Of course, we should not overstate these common identities, interests and values, but nor should we overstate the commonality within gender- or racial groups.[47] The point is simply that age, both as life-cycle position and generation, forms a group identity.

Therefore, age meets the various criteria for the status of protected characteristic. Age *per se* is morally arbitrary and irrelevant to questions of rights or economics. It is socially salient: it structures people's interactions with others and with institutions throughout their lives; and it is a significant element of their identity. It even meets the aggravating conditions of constituting a caste in Sunstein's sense. It is highly visible, and children fall behind significantly in almost all Sunstein's 'important spheres of life', including freedom from violence, income and wealth, and political representation and influence. And (as discussed

[43] Woolley and Rhoads, (2017)
[44] See, for example, Duffy et al., (2017) and Taylor and Keeter, (2010)
[45] Curtis, (2017)
[46] Whitehead, (2016); O'Neill, (2017)
[47] Duffy et al., (2017)

in chapter 2) age forms an axis of (current and historical) social disadvantage and segregation. Age is immutable and unchosen. Therefore, age should be a protected characteristic, and age discrimination, without strong justification, is wrong.

III.Objections

Is Age Different?

There are two main reasons to think age should not be protected against discrimination: (i) any given age is temporary; (ii) most people will experience a range of ages encompassing childhood and adulthood. As Onora O'Neill puts it, the child's 'main remedy is to grow up.'[48] The significance of these observations depends slightly on why one thinks that discrimination is wrong.

Using a harm-based account of the wrong of discrimination, it might seem that age-discrimination causes less harm than discrimination based on permanent features, for two reasons. First, perhaps the young don't take age discrimination personally, since they know that, in time, they will be treated equally (and perhaps the elderly can take solace in knowing they have had their turn). Clayton argues that '[o]ne's standing as an equal citizen is secured by one's understanding that one will enjoy [equal rights]'.[49] This might limit the direct harm done to an individual. And young victims of age discrimination can take solace in the knowledge that the discrimination will stop, something not usually open to those discriminated against on the basis of permanent traits (nor to victims of old age

[48] O'Neill, (1992),p.39
[49] Clayton, (2006),p.191

discrimination). Second, to the extent there are any harms, these are perhaps time-limited.[50] The feelings of shame, inferiority or unfairness may fade once you are treated as a full equal to others.

Emphasising the comparative unfairness of wrongful discrimination, age discrimination may seem benign because it applies to different people equally across their lives. There is no comparative unfairness between a 17-year-old and a 40-year-old because the 40-year-old once faced the burdens of being 17 and the 17-year-old will one day gain the advantages of being 40. Taking their lives as a whole, there is no comparative unfairness between the two, and therefore there is no discrimination.[51]

Therefore, age's transience and the fact that people standardly experience a range of ages may lead us to think that age discrimination (against children or the elderly) should not be considered wrongful discrimination.

However, there are multiple problems with these objections. First, requiring all protected characteristics to be permanent would rule out many other currently-recognised protected characteristics. Marital status, for example, is temporary. Pregnancy too is temporary, meaning, if the above objections are correct, discrimination against the pregnant is not wrong. Many disabilities are temporary. But it would be unacceptable for a restaurant to refuse service to, or remove a ramp for, someone using a wheelchair who is expected to recover in the next year or two. Indeed, the correct analogy would be a denial of service to someone who is only expected to recover within the next two decades. After all, a person's childhood lasts for a long time – almost an entire generation. It's a very long time to wait.[52] It therefore seems, since temporariness does not disqualify disability, pregnancy or marital status as protected characteristics, it cannot disqualify age.

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[50] Ibid.,p.189
[51] Such treatment passes the 'envy test'. Ibid.,p.189
[52] Farson, (1974),p.82

Second, that age is temporary does not imply that age discrimination only has temporary harms. Discrimination based on age is contrasted with discrimination based on sex and race which, as more permanent features of an individual, might have more permanent effects.[53] But people who are disrespected, belittled, or ignored during their childhood often grow up with social or emotional difficulties: temporary treatment can have long-run effects.[54] It seems that

> '[A] child deprived of the sort of rights accorded by the U.N. Convention [on the Rights of the Child] will grow up very differently from one to whom such rights are granted.'[55]

Therefore, the temporariness of the discrimination does not mean a temporariness of the harms. Nor is it clear that a temporariness of harms would render harmful actions permissible. Therefore, temporariness does not, via a harm argument, imply that age should lack protection.

Third, the temporariness argument – that age is unlike race and gender so needs no protection – ignores the intersectionality of identity and discrimination. The correct question is perhaps not to what extent age discrimination is like other forms of discrimination, but, 'to what extent age is intertwined with other forms of discrimination?'[56] Vulnerable groups experience specific forms of discrimination and maltreatment differently depending on age. African-American school-children are more likely to be bullied, neglected by teachers, or told they are academically incapable.[57] Young African-American adults are more likely to be victims of violent crime or police brutality. Elderly African-

[53] Clayton, (2006),p.189
[54] Marks et al., (2015),pp.335-349
[55] Freeman, (1997a),p.28
[56] Sargeant, (2016),p.17
[57] Thompson, (2005),p.65. See also Epstein et al., (2017)

Americans are more likely to live in poverty.[58] Similarly, gender is performed differently at different ages.[59] Girls are expected to be 'well-behaved' and subservient. Young women are expected to be attractive, and then homemakers and mothers. Older women are expected to be carers for partners or grandchildren.[60] Women are expected to 'dress appropriately' for their age. Age also interacts with discrimination based on class, sexual orientation, and disability.[61] We can only truly understand and prevent that discrimination if we grasp its interaction with age. Suppose a company hires many elderly white workers (with older workers hired in proportion to younger workers), and hires many young black workers (with black workers hired in proportion to white workers), but refuses to hire elderly black applicants. The company is not discriminating on the basis of race: they are hiring plenty of (young) black applicants. Nor is the company discriminating on the basis of age: they are hiring plenty of elderly (white) applicants. Rather, the company is discriminating on the basis of the conjunction of race and age. Only if we protect age, and age in conjunction with other protected characteristics, can we truly protect people from discrimination on the basis of race, sex etc. Therefore, as a matter of policy, to truly protect sex and race against discriminatory treatment we also need legally to protect age as a characteristic that significantly interacts with them.[62] Therefore, age merits protection regardless of its temporariness.

Fourthly, as Rousseau pointed out, not all children live into adulthood, and not all adults live into old age, meaning the unfairness of discrimination does not all balance out:

> 'What is to be thought, therefore, of that cruel education which sacrifices the present to an uncertain future, that burdens a child with all sorts of

[58] Thompson, (2005),p.65
[59] Ibid.,p.64. See also Samakow and Noble, (2015)
[60] Thompson, (2005),p.62. See also Arber and Ginn, (1995)
[61] Thompson, (2005),pp.57-73. Phillipson, (1982); Beresford, (2002); Bevan and Thompson, (2003)
[62] See also Sargeant, (2016),p.17

> restrictions and begins by making him miserable, in order to prepare him for some far-off happiness which he may never enjoy?'[63]

Many children never see adulthood. Globally, in 2016, the mortality rate of under-5s was 40.8 per 1000 live births (rising to 130 per 1000 in some countries). The probability of a 5-year-old dying before their 15th birthday was 7.4 per 1000, reaching 57.9 per 1000 in some countries.[64] In the UK, around 5,000 people aged 18 or under died each year from 2012-2016.[65] Clayton argues that age discrimination is not unfair because such treatment passes the egalitarian 'envy test', which requires that no-one else should prefer to have what someone else has.[66] But for these children, the 'envy-test' is not passed. They can be envious of adults because they will never receive the rights or benefits of adulthood. Discrimination against the young cannot be justified on the grounds that they will be compensated when they are older, because they may never receive that compensation. For such children, discrimination leads to a comparative unfairness between them and adults. Similarly, a middle-aged person cannot justify discriminating against the old on the grounds that they too will one day experience the burdens of old age: they may not. Given we do not know who will live a full life, we should, as Rousseau suggests, be risk-averse about discriminating now on the hope that distant future benefits/burdens will render that differential treatment fair.

Finally, regarding age discrimination in the allocation of rights (as opposed to fair distribution of benefits and burdens), two distinct wrongs can be committed. One is the wrong of discrimination, of treating one group comparatively worse than another. The other is the wrong of denying someone a right that they morally deserve. This second

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[63] Rousseau, (1921),p.41
[64] UN Inter-Agency Group for Child Mortality Estimation, (2017a); UN Inter-Agency Group for Child Mortality Estimation, (2017b)
[65] Author's calculation, from ONS, (2017)
[66] Clayton, (2006),p.189

wrong is non-comparative.[67] If the Confederate States had enslaved all its citizens, then they would no longer have committed the wrong of racial discrimination, but they would have continued to commit the serious (non-comparative) wrong of violating liberty. The problem with age discrimination, then, when it denies legal rights to those mature enough to exercise them is that it violates their moral rights. This distinction helps illustrate the deficiencies of O'Neill's response to children's rights that the 'child's main remedy is to grow up'. It ignores the fact that if we deny, say, the right to vote to a competent 16-year-old, we are violating their moral rights, and this is wrong regardless of whether there is a comparative unfairness and regardless of the temporariness of the wrong.[68] The fact they can grow up is neither here nor there: their right is still being violated. True, the violation of their rights is time-limited, but it is no less a violation for that fact. If the government arbitrarily imprisons you for two years, it violates your rights, even if you know you will regain your liberty after two years. It is neither personally reassuring, nor a moral justification of that treatment, to be told that your 'remedy' is to wait two years. For sure, denying rights for the entirety of someone's life is worse than doing it temporarily. But since claim rights correlate with moral duties, each individual violation is wrong. Therefore, age discrimination can non-comparatively wrong an individual to the extent that it denies what is due to them. Age discrimination can therefore be wrong despite its temporariness and despite everyone experiencing it.

I have rejected the temporariness and no-unfairness objections to protecting age against discrimination. The temporariness objection fails because: it rules out protections for many other protected characteristics, including many disabilities; temporary discrimination can still lead to permanent harms; and protecting age will protect against other forms of

[67] Griffin, (2010),pp.39-44
[68] Freeman, (1997a),p.28

discrimination with which it is intertwined. The no-unfairness objection fails because some people never experience the full range of ages, meaning age discrimination still leads to interpersonal unfairness. And in the allocation of rights, both objections fail because a rights violation is a rights violation regardless of whether it is temporary and not comparatively unfair. Since the objections fail, age should be a protected characteristic.

Are Children Owed Equality?

Although age generally merits protection against discrimination, perhaps children are not the kind of beings to whom equality is owed. If so, then age discrimination does not wrong children. This thinking is reflected in UK equality law, where age is only a protected characteristic for over-18s.[69] One reason you might think adults, but not children, are owed equal respect/non-discrimination is that only adults possess full human dignity/full autonomous capacities.[70] The argument runs thus: it is in virtue of their full human status/dignity/autonomy that we respect adults. Drawing distinctions between adults based on things like race and sex disrespects them. Therefore, such discrimination is wrong. Children lack full human status/dignity/autonomy. Therefore, it is not wrong to discriminate against children. Age may therefore be a protected characteristic for adults, but not for children.

However, this argument misidentifies the wrongness of discrimination as being a lack of respect for full autonomous capacities. Suppose we set up racially segregated primary schools for children below the age of 10 (who lack full adult autonomy) or we refused to teach young girls science. This would be unacceptable race and gender

[69] *Equality Act* (2010), s28(1)(a), s84(a), s93(9) and s141(6)(a)
[70] Freeman, (1997a),p.36; Lippert-Rasmussen, (2014),p.116

discrimination. But on an account of discrimination which denies that children have the relevant status, this segregation and sexism would not straightforwardly be wrong. How could the autonomy view account for the wrongness of such discriminatory treatment against children? It could say that treating children like this somehow disrespects adults of the relevant sex or race. That might be so, but we still think it is the *child* who is wronged. Take the case of *Brown v Board* where 7-year-old Linda Brown had to walk six blocks and take a bus to a distant segregated school, rather than walk to a nearby white school. The person primarily being wronged was surely not her father, or members of her wider community. It is Linda Brown who we think has been wronged and whose rights have been violated. Indeed, it would be wrong to discriminate against her even if no adults found out about it. This suggests that it is not the possession of full autonomous capacities which makes one morally immune to discrimination.

Another way to argue that school segregation is wrong without wronging the child is to posit that it causes harms which are carried forward into adulthood. Thus, discrimination against children is wrong because it harms their future adult selves (e.g. through internalised inferiority). However, there are two problems with this adult-centred view of discrimination. First, racial segregation in a children's hospice would be appalling, even though those harms would not carry forward into adulthood. This suggests discrimination against children is wrong regardless of effects on their future adult selves. Second, the harms of discrimination which are carried forward into adulthood are also direct harms to the child, and we must care about those direct harms on pain of denying the basic moral equality of children's interests. Part of the direct harm to the child is that burning sense of unfairness and injustice, and what Martin Luther King called the 'clouds of inferiority' forming in a child's 'mental sky'.[71] If we care about these harms to adults, we

[71] King, (2010),p.92

should care about those harms to children too. Therefore, insofar as discrimination causes these harms, discriminating against children is wrong.

Therefore, because it is wrong to racially or sexually discriminate against children, children are the kinds of beings who are owed duties of non-discrimination. It is therefore also wrong to discriminate against them on the basis of other protected characteristics. And one such characteristic is age.

IV.Markets, Employment and Discrimination

Recognising age as a protected characteristic means a whole range of common market practices are wrong. I examine some implications for the provision of services, for employment, and for the need to make adjustments for children and the elderly.

As described in the introduction to this chapter, there are a variety of common ageist practices which bar people from access to restaurants, shops, holiday homes etc. All such practices which bar the provision of services to certain people purely because of their age are forms of illegitimate age discrimination. Shopkeepers sometimes defend restrictions on school children entering their shops by arguing that young people are more likely to shoplift.[72] But such justifications would be illegitimate when ethnic/racial groups are perceived to commit more crimes. Such justifications are illegitimate because ethnicity and race mark membership of socially salient groups which merit protection; since age too marks a socially salient group, it too merits such protection. Other businesses justify their exclusionary practices on the grounds that children are a distraction or a nuisance to them

[72] UK Business Forums, (2011)

or their customers. But such justifications would be illegitimate in the case of people with disabilities which cause a 'nuisance' to businesses or which are 'distracting' to other customers.[73] Just so with age. Therefore, in general, age discrimination in provision of goods and services is wrong without a strong reason.

Similarly, labour market age discrimination is *pro tanto* wrong. There are many different facets of this, and lots of complexities involving pension ages, indirect discrimination and various exemptions.[74] But here are some practices that would be ruled out:

- Forcing people to stop work when they reach a certain age, or permitting employers to fire someone merely because they have reached retirement age;[75]
- Rejecting a job applicant for being too young;
- Using euphemisms for age, like 'mature personality', 'needs life experience' or 'high energy' in job adverts as a means of discriminating.[76]

There should also be equal pay for equal work. In the US, age below 40 years is not a protected characteristic, meaning it is legal to pay younger workers less. In the UK, there are different minimum wages for people aged 16-25 and 25+, with lower rates of pay the younger you are and no minimum wage for under-16s.[77] This lower rate of pay discriminates purely on the basis of an arbitrary characteristic which merits special protection: people are paid less because they are younger, even if they are more productive than older workers. The justification for the current law is that paying less based on age assists younger people into work, since younger people tend to have lower rates of

[73] Dwyer, (2011),p.22
[74] See O'Dempsey et al., (2006); Sargeant, (2016)
[75] *Equality Act* (2010), sch9 s8(1); O'Dempsey et al., (2006),p.4 and p.9; Sargeant, (2016),p.246 and p.250.
[76] Sargeant, (2016),pp.193-195
[77] *Equality Act* (2010), sch9 ss11-12; Low Pay Commission, (2018)

employment, and perhaps lower productivity.[78] Maybe this economic observation does provide a decisive argument against the minimum wage and equal pay. But this argument has also been used by free-market advocates to advocate lower minimum wages for African-Americans, women, and disabled people.[79] Indeed, in the UK in July–September 2017 while the unemployment rate was 11.9% for 16–24-year-olds, for people of a Bangladeshi background it was 13% (compared to a national average of 5%).[80] Should there be an exception to the Race Relations Act to allow employers to pay people of Bangladeshi background a lower rate than white people to 'encourage their employment?'[81] If not, then why should the economic argument render age discrimination legally permissible? Either the free-market argument holds, and we should abolish the minimum wage and equal pay provisions for all; or it fails, and we should implement an equal minimum wage and equal pay for all. Since age should be considered a protected characteristic, it should not be age alone which is ignored in face of the economic argument. Since age should be regarded as a protected characteristic, age discrimination should not be permitted in the labour market.

Finally, I discuss what Farson calls the 'right to responsive design'.[82] This is the right to have certain environments (re)designed to take account of people's particular physiologies and capabilities at different ages to enable better access. This corresponds to the right that disabled people have in UK that 'reasonable adjustments' be made to accommodate them. This right places employers and service-providers under a 'positive and proactive duty' to take steps to remove, reduce or prevent obstacles faced by disabled workers or customers,

[78] Sargeant, (2016),pp.200-201; Low Pay Commission, (2004),pp.ix-x and pp.65-66
[79] Friedman, (1966); Friedman, (2010); Monckton, (2017)
[80] Brown, (2017)
[81] Sargeant, (2016),p.203
[82] Farson, (1974),p.63

for example, by providing ramps or lifts for wheelchair users.[83] Once we recognise age as a protected characteristic, it might be necessary to make similar changes to accommodate children and the elderly, who often face physical and social barriers to participating in wider society. Kate Wiggin wrote in 1892:

> 'The child has a right to…surroundings which have some relation to his sizes, his desires, his capabilities. How should we like to live, half the time, in a place where the piano was twelve feet tall, the doorknobs at an impossible height, and the mantle a shelf in the sky?'[84]

Making places responsive to children is often reasonable and possible: primary schools have small tables and chairs, and low shelves and cupboards. But such adaptations exist almost nowhere else. Even in places one might expect to find children, such as shops, libraries, zoos and cinemas, there is little responsive design for children. Counters and shelves are often too high to reach, and a child's view is impaired by high-backed seats in cinemas and by fences and railings in zoos.[85] Even in 'family restaurants', children must choose between a highchair built for babies and a low chair built for adults. Toilets are too large, urinals and sinks too high.[86] Public transportation is difficult for pre-teens to use without adult help: ticket barriers and turnstiles are at face level; escalator handrails are at shoulder- or head-height; and train platforms and roads can be dangerous for children. These barriers severely restrict children's access to certain places, goods and services, and greatly restrict their independence. Responsive design could make an immeasurable difference to children's lives. Such changes would also have advantages for people in wheelchairs and adults with restricted growth, as well as for parents who often share their children's burdens in overcoming unresponsive design. These problems of unresponsive design are then severely exacerbated for disabled children.[87] Without making such changes,

[83] Employing People: Workplace Adjustments, (2016); *Equality Act* (2010), ss20-22.
[84] Wiggin, (1892),p.15
[85] Farson, (1974),pp.69-70
[86] Ibid.,p.64
[87] For example, Chakelian, (2017)

we risk denying a substantive form of equal consideration to children (and groups with similar needs). Even with formal equality of access, if restaurants have heavy doors, steep steps and high tables, they effectively bar children, the elderly and some disabled people.[88] We should change practices or arrangements that unreasonably disadvantage members of the socially salient groups 'disabled people' or 'women'.[89] Similarly, we should change practices or arrangements that unreasonably disadvantage members of the socially salient group 'children' or 'elderly', unless there are strong countervailing reasons.

It is worth adding some caveats here. Treatment as equals does not require equal treatment.[90] People's different needs and requirements, which correlate with age, can still be provided for differently. For example, to the extent that children are vulnerable, we might create safe spaces for them (e.g. playgrounds).[91] In the same way that bars or gyms might have 'women only' nights, services could be provided specifically for children. We have women-only wards in hospitals; similarly, it might be appropriate to have child-only wards. But provision of those services need not be closely age-linked: it seems strange that someone in a children's mental health unit should suddenly, on their 18th birthday, be moved to an adult ward, despite (presumably) having the same vulnerabilities as before. Restrictions which recognise children's particular vulnerabilities might be appropriate: placing medicine cabinets out of reach of small children, for example, is an appropriate response to a particular kind of vulnerability. Similarly, we can also allow for special treatment for children to overcome elements of their second-class standing just as we do for other disadvantaged groups. To the extent that affirmative action policies and targeted scholarships help redress social inequality for women and for ethnic minorities, we can

[88] Compare Mackinnon, (1998)
[89] Kymlicka, (2002),pp.379-380
[90] Dworkin, (1978),p.227
[91] This comes with all the caveats about protectionism described in chapter 10.

specifically provide certain goods and services for children. Reduced fares for trains and museums for the young and the elderly, for example, recognise and redress those groups' barriers to economic success. The exhortation to equality should not be misunderstood as austerely requiring identical treatment. Differential treatment based on age can be justified, but must meet the same justificatory hurdles as differential treatment based on other protected characteristics. Next, I discuss age discrimination in the allocation of rights.

V.Rights: Liberation, Age, and Competency

There are three positions on allocating rights. Children liberationism maintains that children should be given all the rights available to adults: anything else is wrongful discrimination against children. Second, we could allocate based on assessments of competence, where only those children deemed to have the requisite maturity are given those legal rights. Third, we could allocate rights by age, where age is used as a proxy for competence and development. Alternatively, we could combine these approaches by applying each system to different rights. I examine each position in turn.

The problem with child liberationism is that it does not appreciate the normative grounding for agency rights. As chapters 5–7 have shown, children (particularly younger children) possess autonomy to a different degree than adults. Since autonomy alone grounds moral agency rights, these psychological differences mark morally relevant differences between adults and children which can justify differential treatment. Adults deserve legal agency rights because they possess moral agency rights in virtue of their autonomy. Younger children lack that autonomy, and therefore we are not bound to provide them with full legal and political rights as a mark of respect. Moral equality does

not mean the same treatment: it means treating like cases alike and (relevantly) different cases (relevantly) differently. Even some child liberationists accept this, at least for very young children.[92] But given the arguments of the chapters 5–7, it seems that the age at which the relevant capacities emerge is higher than the liberationists have supposed. Should children be given a legal and political agency right even though they lack the moral agency right? The liberationists think so. Cohen and Holt think that all rights 'should be made *available* to any young person, of whatever age, who wants to make use of them.'[93] This position seems to assume there are no risks to granting full adult rights to immature children. But granting young children the right to refuse life-saving treatment when they cannot understand their illness, the treatment, or what it means to refuse treatment, has huge downside costs. Similarly, chapter 10 showed how children's choices can be exploited by adults. Therefore, if autonomy does not require us to give children a right, we must conduct a welfarist calculation to decide whether to allocate the right. Child liberationists argue that it is always better for the child to be granted freedom. For the reasons just given, I suspect that this is not true. In addition to welfare rights, children have the right to develop future agency. There is a long-standing educational school of thought that this interest is best served by giving children experience of decision-making and independence before they have developed the full capacities of autonomy.[94] I am sympathetic to this position, but it goes beyond the scope of this thesis to establish that point. What we can say, however, is that, even if it is in a child's best (welfare and developmental) interests to have the same rights and freedoms as adults, adults' and children's rights would have a different moral grounding. Adults' political and legal agency rights are fundamentally grounded in their moral agency rights, which are derived from autonomy. (Young) children's political and legal agency rights would not be grounded in moral agency rights

[92] Cohen, (1980),p.60
[93] Holt, (1980),pp.84-85
[94] Dewey, (1997); Furedi, (2001)

and autonomy, but rather in their welfare and future agency. Depending on the importance of that welfare, their legal agency rights may be more vulnerable to trade-offs and infringements than adults' legal agency rights. Given this, it may be sometimes legitimate to deny younger children the full rights of adults, even if it is, contingently, beneficial to grant them those rights.

Since younger children lack full autonomy, they lack full moral agency rights. Therefore, they are liable to paternalistic welfare calculations. And since it is plausible that some paternalistic interferences enhance a child's welfare, we are not forced to accept full liberationism.

So how do we allocate and withhold children's rights? Clayton argues that rights should be allocated by age, where age acts as a proxy for competence. He argues that, however we allocate rights or goods, it must be based on some proxy. This is because it is rarely possible to observe directly what is of fundamental importance, whether that's skill, productivity, or psychological maturity. When selecting for university places, for example, admissions tutors aim *ceteris paribus* to select those who will succeed on the course. The qualifications already achieved by an applicant do not matter fundamentally, but they might be a good indicator of, or proxy for, academic potential.[95] Similarly, when allocating agency rights, we cannot observe maturity directly. We might use expert assessments and psychological tests, but the results of those tests are (like age) merely proxies for maturity. The question is, which proxy should we choose? Clayton observes that 'it might be too costly' to make accurate maturity tests, and that when using age as a proxy 'the costs to the excluded who are competent' do not outweigh the costs of administering maturity tests.[96]

[95] Clayton, (2006),p.186
[96] Ibid.,p.187

Furthermore, he argues that competence tests might negatively affect self-esteem, whereas age-rules do not.[97] Clayton concludes that we should allocate rights by age.

Clayton's account rests on age being one proxy amongst others, with Clayton weighing the utility of competence tests and age. But age is not a proxy like any other. There is a moral cost to using age as a proxy which is not taken into account when merely investigating the practical costs of competence tests. We would not accept employers allocating jobs based on race, even if race were an accurate and cost-effective proxy for education level. This is because race is a protected characteristic. Similarly, since age should be a protected characteristic, we cannot simply assess its utility as a proxy amongst others. Therefore, *prima facie* we should not allocate rights by age, since that treats some people worse than others on the grounds of a morally irrelevant, immutable, socially salient characteristic.

By process of elimination, it seems we must allocate rights based on competence tests. But this is too hasty. Supposing competence tests were perfect, this would usually be the correct way to allocate rights (with a caveat below). Rights would be granted to all and only those for whom it is morally required. In fact, even if individualised competence tests were less accurate a proxy than age, we might be willing to take some reduction in accuracy (and misallocate some rights) to avoid the wrong of direct discrimination, just as those who support age proxies are willing to misallocate some rights to avoid the bureaucratic costs of competence tests. However, there may be practical difficulties in applying competence tests such that we incur not only significant economic and bureaucratic costs, but other moral costs. In particular, the administration of competence tests could lead to discrimination

[97] Ibid.,p.187

based on other characteristics, where that discrimination could be explicit, implicit/subconscious or structural. I examine each possibility in turn.

First, competence tests can provide cover for direct (individual or institutional) discrimination. This is the worst-case scenario, where Jim Crow-style assessments of political competence involve an official with (*de jure* or *de facto*) discretion to declare someone incompetent. Racist officials could then, as in the 1950s, declare African-Americans ineligible to vote regardless of performance.

Second, competence tests may involve implicit/subconscious individual bias. Here assessors are not explicitly making decisions based on race, but their subconscious biases lead them to skew decisions along racial, gender, or class lines. For example, in the UK, detaining someone under the Mental Health Act requires two medical practitioners to certify that the patient's illness warrants detention.[98] Although this is an individualised assessment of mental capacity by qualified professionals, black adults are more likely than other group to be detained, with young black men six times more likely to be detained than young white men. A disparity remains even when the data is adjusted for differential rates of mental illness across ethnic groups.[99] This suggests a degree of subconscious bias in the assessments. Thus, competence tests could replace direct age discrimination with implicit discrimination based on other protected characteristics.

Third, there may be structural biases in competence tests. Such tests are sometimes designed with people from certain cultural and educational backgrounds in mind, meaning individuals from other groups are inaccurately measured. Take, for example, assessments of teenager criminal responsibility in criminal trials. In South Africa, for example, expert knowledge on child development is mostly confined to urban-based experts who speak only one or two languages, and who are experienced only with the children of the

[98] *Mental Health Act* (1983), s2(2)(a)
[99] Race Disparity Audit, (2017),§2.24 and §9.15; Home Affairs Select Committee, (2012); Bradford District Care Trust, (2016),p.2

wealthy.[100] And pre-1998 when English courts used to assess the criminal responsibility of 10–15-year-old defendants, they would sometimes investigate the child's home life. Lord Parker C.J. established this practice, asking, 'in a rotten home, what is more likely than that a child is brought up without knowledge of right and wrong?'[101] Consequently, decisions often followed class lines.[102] Therefore, capacity tests are sometimes structured such that they are indirectly discriminatory.

Finally, sometimes, because of broader structural features of society, the capacity to perform certain tasks is disproportionately present in some privileged groups and disproportionately absent in marginalized groups. Remember the lessons of social constructionism: we should not take capacity as fixed when allocating rights. Even a perfectly accurate capacity test may reflect and entrench existing prejudice.

Competence tests therefore risk collapsing into various forms of discrimination. And so we must decide whether direct age discrimination incurs a lower moral cost than direct or indirect discrimination based on other characteristics. The correct decision depends on context. In general, age discrimination is probably less bad than discrimination based on many other protected characteristics, given age is temporary. As discussed above, this does not render age discrimination permissible. But there may be a difference in the harms caused. If someone is discriminated against because of a characteristic which never changes, then the internalised negative self-image may persist longer into the future than when someone has shaken off that characteristic. This might mean that, if circumstances force us to choose between age discrimination and race or sex discrimination, we have a reason to choose age discrimination as the lesser of two evils. There are a few caveats here. First, this argument does not pick out age as always the least important of all the protected

[100] Sloth-Nielsen, (2000),p.399
[101] *F. v. Padwick*, QBD [1959] Crim. L.R. 439
[102] *C. (A Minor) v. Director of Public Prosecutions*, QBD [1994] 3 W.L.R. 888

characteristics. It is an empirical question which kinds of discrimination are the most harmful in various contexts. Second, while the choice between direct age discrimination and direct race discrimination may be clear, when choosing between direct age discrimination and indirect race discrimination where the disparate impact is diffuse and slight, perhaps we should avoid the age discrimination.

When deciding whether to allocate a right based on a competence test or age, there are several things to consider: (i) *Comparative accuracy*: we must investigate whether age requirements or competence tests are more accurate proxies of autonomy. This is to minimise the wrong of denying rights to those who deserve them, and the harm of granting rights to those who do not.[103] (ii) *Comparative discrimination*: we must minimise wrongful discrimination and therefore must balance the wrongfulness of direct age discrimination against the wrongfulness of potential (explicit/implicit/structural) discrimination in individualised assessments. (iii) *Comparative Esteem Effects*: we must balance the effects to one's self-esteem of being judged unworthy of a certain right because of a protected characteristic, such as age or race, or because of a competence test (while bearing in mind that, by altering social expectations and attitudes, esteem effects of policies may be somewhat changeable).[104] (iv) *Feasibility*: we must weigh the costs of individualized assessments, although we should not violate rights or wrongfully discriminate just to avoid some slight cost. These are the main considerations when deciding whether some right should be allocated by age or using competence tests.

Therefore, we cannot conclude generally in favour of age-requirements or competence tests. It depends. Where competence tests are feasible, accurate and do not

[103] Age qualifications could be more accurate than competence tests if individualised tests have a high degree of variance or error, but where those errors cancel out at the aggregate level of overall age groups.
[104] For example, is it worse to be told you cannot join the marines because you are a woman (and therefore probably lack the necessary physical abilities) or because you failed the fitness test (and therefore very likely to lack the necessary physical abilities)? Is it worse to be told you must leave your job because you are old (and therefore probably lack the ability to work effectively) or because you have failed a performance review (and therefore very likely to lack the ability)?

wrongfully discriminate, we should use them. Where competence tests are inaccurate and directly discriminate based on another protected characteristic, then we should choose age requirements as the lesser of two evils. There are a multitude of options between these extremes, and we must examine the facts before deciding. But in general, where possible, competence tests should be preferred to age-discrimination. In the next section, I apply these considerations to a few different rights.

Applying the Framework

For some rights, capacity tests are inappropriate. For voting rights, there are huge political incentives to use such tests for voter suppression. The lessons of history weigh heavily. Age discrimination is surely a lesser evil. That and the fact that, in the West at least, the vote is seen as an important symbol of one's equal standing and fundamental moral worth. Denying someone's vote is a stark declaration of their inferiority. Given, as argued in chapter 9, there is a low cost to letting politically immature people vote, there is little need to use tests to bar them from voting. Therefore, either universal suffrage or low age-restrictions are preferable to capacity tests.

For other rights, replacing age limits with competence tests seems possible, especially when organs of the state already examine the individual before them. We could, for example, abolish the minimum age to take a driving test. Since people must pass a test to be allowed to drive, then, assuming the tests accurately screen for ability, the age-requirement is redundant. Perhaps there are worries that children are dangerous on the roads while learning. But then we could have individuals learn on simulators, driving tracks, or in carparks, until their instructor considers them safe to learn on roads. And we could include

a psychological maturity component to the standard theory and hazard perception tests. Driving tests are reasonably objective and are already individualised, making the abolition of the age requirement straightforward. Realistically, it seems unlikely that younger children would pass these tests, and they may prove themselves to be dangerous drivers. But if they prove themselves to be safe, why should their age stop them?

Another right which can be based on an individualised assessment is the child's right to have their wishes respected in court decisions regarding their upbringing. Currently, when an English court determines questions about a child's upbringing, 'the child's welfare shall be the court's paramount consideration'.[105] Children's wishes are only relevant insofar as they bear on the question of their welfare, and often only insofar as frustrating their wishes may upset them; their wishes (and autonomy) are not respected in themselves.[106] We do not need to use age to determine the weight of a child's voice. Since the child is already examined by social workers, the court system could include, as a matter of course, maturity assessments of the child (guided by the normative and empirical considerations in Part I) to determine their ability to make decisions about their upbringing. Such decisions include which parent/guardian they want to live with, and the degree of contact with other parents/guardians. Currently, the child's voice is barely heard, and, when it is sought, it is not respected. Their right to have their wishes followed flows from the degree of their maturity; and their maturity can and should be assessed in such trials.

Finally, we could use a hybrid-system between capacity tests and age-requirements. A 'hard' hybrid system guarantees a right for all above a certain age, and uses assessments below that age. A 'soft' hybrid system presumes people above a certain age to possess capacity

[105] *Children Act* (1989), s1(1)
[106] *Children Act* (1989), s1(3)

unless there are good grounds for thinking otherwise, and presumes people below a certain age to lack capacity unless there are good grounds for thinking otherwise. The soft hybrid system is, roughly speaking, the model used for medical consent. Adults are considered capable of making medical decisions. But if they show signs of lacking mental capacity, the doctor can refer them for formal assessment.[107] But doctors do not routinely conduct assessments of adults. For individuals below the age of 16, the doctors assess their capacity to make medical decisions. Since doctors are already providing an individualised assessment of the patient in front of them, they do not need to rely on the kinds of bureaucratic heuristics necessary when rules are determined for society as a whole. They can assess the capacity of the individual patient.[108] Similar systems can be put in place to assess criminal responsibility in criminal trials. Courts can presume that adults are criminally responsible unless the defence prove otherwise. Individuals below the age of (say) 16 could be presumed incapable of criminal responsibility unless the prosecution can prove otherwise. Hybrid systems do involve some age discrimination. But that discrimination does not fully determine the individual's rights. Since the system is supplemented by individualised assessments, it does not involve the same degree of wrong as straightforward age-requirements. It also reduces the possibility of wrongly denying rights, since there is no government official with straightforward discretion to remove an adult's rights. Therefore, hybrid systems can in some circumstances minimise the twin wrongs of age discrimination and wrongful rights denials.

[107] For the UK, see *Mental Capacity Act* (2005), ss2-5.
[108] With caveats here about the biases of doctors.

Conclusion

In this chapter I have argued that age is an immutable, unchosen, morally irrelevant, arbitrary, socially salient characteristic, which is a constituent of people's identity, and which marks out a group/caste which is – and has historically been – denied access to certain socially important goods. Therefore, age should be a protected characteristic. This is despite the facts that: age is temporary; most people experience a wide range of ages; and children lack full autonomy. Therefore, marketplace age discrimination is wrong – except to protect vulnerable individuals or rectify inequalities – and public environments should be accessible to people of all ages. Finally, age discrimination in the allocation of rights is generally wrong, with competence tests preferable where possible. But such age discrimination can be justified when the moral (or bureaucratic) costs of competence tests are too high. Depending on the facts, agency rights can be allocated based on age, competence, a hybrid system, or universally.

Chapter 12

Part II Conclusion

I.Summary

In this thesis I have defended a liberal framework for investigating and establishing children's moral and political agency rights. This framework is grounded within a respect- and autonomy-based approach to agency rights; engages with empirical psychology; is attentive to the effects of social structures and discourse on childhood and on power hierarchies; and provides a mechanism for how to transpose moral rights into political rights. In so doing, this framework provides a practical way of establishing moral and political rights, while being sensitive to the empirical reality of children's capabilities, including the ways those capabilities are socially constructed, all while keeping respect for children, and children's autonomy, at its centre. As a rough summary of the empirical results in Part I of the thesis: older adolescents fully possess the cognitive abilities of adults, and, to the extent they possess less hierarchical control than adults, this can be mitigated by changing decision-making structures and altering social and cultural influences. Therefore, older adolescents should be given respect equal to adults. Younger adolescents mostly meet the bar for equal respect, although certain small differences in average cognitive abilities between adults and adolescents might sometimes mean that they may be denied certain rights. Those in middle childhood can form their own goals, but for morally and socially complex decisions, for unfamiliar scenarios, and for scenarios with high levels of emotionality, we may need to help facilitate their thinking and decision making. Younger children can often only reason about familiar, short-term or immediate scenarios, but rely

on others for emotional regulation and hierarchical control. Both those younger groups may need to have their preferences applied to decisions for them. Part II applied this framework, and those empirical results, to voting rights, sexual consent, and age discrimination. First, it argued that the voting age should be lowered to at least 16. Second, it argued that children have a right to sexual education and that cultural images of child asexuality and protectionist policies make children vulnerable to sexual exploitation. It also explained how to set the age of consent and argued that age-span defences can support young people's agency without opening them up to exploitation. Third, it argued that age should be a protected characteristic and that people should generally be protected from age discrimination in the marketplace. And it provided a framework for deciding when rights should be allocated universally, with age-restrictions, using competence tests, or using a hybrid system.

I have already summarised and brought together the various elements of the framework in the concluding chapter to Part I of this thesis, and I will not recap that summary here. In this final chapter, I identify some issues ignored by this framework, and sketch out avenues for potential future research. First, I outline remaining questions about parents' rights and paternalism; second, the possibility of incorporating welfare rights more fully into the framework; and finally, the framework's future possible applications.

II.Parents and Paternalism

The main issue omitted from this thesis is the question of parental rights. This thesis tackles the question of the moral and political rights of children. Although chapter 3 discussed the conditions under which paternalism is justified and legitimate, it does not say who should have the (epistemic) rights to decide whether those conditions are met, nor

who should be permitted to engage in that interference, with what rights of privacy, or with what accountability. If parents hold these rights, questions remain: how far do these rights extend? Are their rights merely care-taker rights-in-trust held on the behalf of the child? May parents raise (non-autonomous) children with a religion, or must they raise them neutrally? Against whom do they hold these rights?[1] In a sense, these are the questions left over from my thesis. But my framework entails a rejection of certain strong conceptions of parental rights, such as those advocated by Narveson, Rothbard or Fried. Children are persons with an existence separate from their parents, and to the extent that children possess certain agency rights, others may not wield rights over them. Those rights cannot be trumped by the claims of others to authority. Parents' rights can only exist under this framework to the extent that children lack certain rights. My framework defines the possible scope for parental rights. But it leaves open what rights parents may have in the space that is left over by children's rights.

A related, but slightly separate, question is the question of parenting ethics. This framework does not say much about the ethics of interpersonal relationships between parents and children. Rights are present within these relationships, of course, and it would be wrong for parents to violate the rights of their children. A general guiding principle suggested by my framework is that, to the extent that a child has the right to make a certain decision, forms of pressure it would be illegitimate to use on a spouse or a friend would be illegitimate to use on the child. It would be unacceptably controlling to withhold electronic devices from a partner or flatmate for failing to clean their room. Just so for a teenager who possesses full adult rights. But in healthy relationships, these rights rarely exist in the foreground. Indeed, constantly thinking in terms of these rights would make for

[1] See Brighouse and Swift, (2014); Hannan and Vernon, (2008); Clayton, (2006)

unattractive family relationships.[2] Although rights are an urgent kind of moral claim, that does not make them the most salient within our day-to-day social relationships. There is therefore much more to be said about the ethics of parenting and the family.[3]

III.Welfare Rights

In addition to agency rights, which have been the focus of this thesis, children's welfare rights are important. Welfare was discussed briefly in chapter 3, but a future avenue for research would be to incorporate welfare rights more fully into this framework. There could be various ways of doing this. An interest-based approach to rights could say that any sufficiently important interest held by children grounds a right, and that moral agency rights stem from the specific interest in exercising autonomy. Alternatively, welfare rights could be incorporated via a capabilities approach, in which agency rights come from the specific capabilities to exercise autonomy. Both capabilities-based and interest-based approaches take a unifying approach to agency and welfare rights, with both deriving their value from a single overarching concept such as 'human flourishing' or an 'adequate' or 'minimally decent human life'.[4] We could also take an approach which sees a discontinuity between agency rights and welfare rights, where autonomy and welfare gain their values from distinct sources. Whichever theoretical route is chosen, the rest of the framework remains. The empirical element still applies: do children possess the features to merit this interest/exercise this capability? And so too does social critique: why do children possess/lack this particular interest/capability, and should we change whether they

[2] Sandel, (1998),pp.32-34; Freeman, (1983),p.49
[3] O'Neill, (1992),pp.28-29 and pp.34-35.
[4] On children's rights and capabilities, see Dixon and Nussbaum, (2012). For a need-based approach that derives rights from an 'adequate human life', see Miller, (2012). See also chapter 3.

possess/lack it? And the balance of harms still applies. Incorporating welfare rights would form a straightforward theoretical extension of the framework.

Linked to the question of welfare rights is the question of political agency rights grounded in welfare. For this thesis we have been examining moral agency rights and their implications for political agency rights. But, as discussed in chapter 11, there might be welfare reasons for granting an individual a political/legal agency right. There are utilitarian reasons for thinking that individuals know best how to satisfy their own preferences and that letting individuals make their own decisions leads them to identify with their own choices, and develop a sense of self, which contributes to their welfare. Similarly, children's interest in developing future autonomy might mean children should be given freedom and responsibility that stretches beyond their current capacities.[5] Since all but the youngest children possess some autonomy, there should be a first gentle, then stronger, presumption against interference, with the burden on those who would interfere to show that they have a welfarist or developmental justification. But such questions require further investigation.

IV.Applying the Framework

Finally, this framework can be applied to a range of other children's rights, such as:

- to determine one's education and leave school;
- religious education, and rights to/against religious upbringing;
- against certain kinds of punishment;
- to give or withhold medical consent;

[5] See for example, Brighouse, (2003),p.705. On potentiality and future interests, see Tooley, (1972)

- to work;
- to leave home;
- against censorship.

My framework can investigate these rights using the process outlined in fig.1 and establish the moral criteria for possessing those rights; whether children meet those criteria, or could meet them under feasible alternative arrangements; and whether, on the balance of harms, children should, at various stages of development, be granted those rights. In this way we can ensure that children's decisions, and children's voices, are given the respect they deserve. Ultimately, this thesis has been motivated by a desire to protect children's rights and liberties, and by a concern that current theoretical and practical approaches to children treat them merely as objects of concern, and not as agents worthy of respect. Hopefully, this thesis can provide a framework for liberal thinking about children, and for those willing to take children, and children's rights, seriously.

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