

**RIGHTS, PARENTS, CHILDREN, AND COMMUNITIES: SOME EDUCATIONAL
IMPLICATIONS**

being a Thesis submitted for the Degree of

Doctor of Philosophy

in the University of Hull

by

Frank M. Flanagan

B.A. (National University of Ireland, 1969), M.Ed. (Dublin University, 1972)

April, 1998

**In memory of Frank and Marie,
my first teachers.**

ACKNOWLEDGEMENTS

Many people have helped me in the completion of this work, sometimes unwittingly. Mr. Pat O'Connell, Librarian, University College, Cork and the staff of the libraries of Mary Immaculate College (in particular Phyllis Conran) and the University of Limerick were unstinting in their help and support. My academic colleagues in Mary Immaculate College were always supportive and encouraging and while it would be invidious to single out particular individuals I owe a special debt of gratitude to Mr. Tony Bonfield who read the entire text and offered constructive criticism. Likewise, Dr. Gerry Gaden of University College, Dublin read drafts of most of the chapters and unerringly identified weaknesses and omissions and made constructive suggestions regarding style and substance. My supervisor, Professor Alan McClelland was invariably positive and encouraging and I am grateful to him not only for his continuing interest and support but for the opportunity to undertake the project in the first instance. It is important to emphasise that the many imperfections in the work are my responsibility alone.

Finally I wish to record a deep debt of gratitude to my family who, individually and collectively, endured my preoccupation over five years without complaint. Without the unflagging support and encouragement, love and devotion of my wife Moira I would never have begun, much less completed, this work: to her I owe more than I can express.

CONTENTS

Introduction	
Methodology	i
Exclusion	iv
Inclusion	xi
Plan of work	xviii
PART 1: RIGHTS	
Chapter 1: The Meaning Of Rights	
Moral and legal rights	1
Are rights necessary?	3
The function of rights	8
Human rights	11
Justifying rights: a case study	13
A foundational principle?	18
The historicist thesis	21
Summary	25
Chapter 2: Rights and Children	
The will or power theory of rights	27
The interest theory of rights	30
Which theory?	31
Option-rights	33
Welfare Rights	35
Rights, duties, and obligations	40
What rights should children have?	43
Summary	45
Chapter 3: Rights and Human Being	
The good life	47
Project pursuit	50
Needs and well-being	52
Interests	56
Human nature	57
Maslow's theory of needs	59
Rights and Needs	61
Do rights follow needs?	67
Rights conflict	71

Summary	73
PART 2: PARENTS	
Chapter 4: Begetting and Bearing	
The right to have children - the negative programme	75
The right to have children - the positive programme	86
Summary	89
Chapter 5: Children as property	
The 'proprietary' argument	91
The trust model	98
Summary	100
Chapter 6: The Right to Rear	
Who should have the right to rear children?	102
The 'blood ties' argument	102
The interest argument	106
The least detrimental argument	109
The State	111
Summary	116
PART 3: CHILDREN	
Chapter 7: Re-defining Child/Adult	118
Institutionalised and Normative Conceptions of Childhood	122
Chronological age	124
Competence	126
The contextualist view	130
Erik Erikson: the needs of the child	135
Adolescence	142
Freedom and Responsibility	146
Should we liberate children?	151
Summary	155
Chapter 8: Paternalism	159
Parentalism	160
Literal and metaphorical paternalism	161
'Sincerely co-operative' and 'conflictful' paternalism	163
Paternalism in relation to children	164
Rationality, knowledge, and understanding	165
Mistakes, self-sufficiency, and maturity	167

Future oriented consent	171
Well-being	172
Rationality	174
Rational and reasonable	177
What is to count as paternalism	181
Is the paternalist dilemma irresolvable?	185
Summary	189

Chapter 9: Children's Right to Vote

Exclusion	191
What is required to vote?	196
What kind of politics?	198
Development, experience, and insult	200
Persons	201
Summary	209

PART 4: COMMUNITIES

Chapter 10: The Communal Context Of Rights

The 'atomistic' individual	211
Science	217
The communitarian alternative	218
Calling	222
Rights and community	227
Summary	232

Chapter 11: Conclusion

Rights	235
Schools	237
Political formation	242
Values	246

Bibliography	252
---------------------	------------

Introduction

Methodology

In this work I wish to address some philosophical difficulties regarding the extension of rights to children. In particular I wish to draw attention to the difference between the freedom rights which are traditionally assigned to rational, autonomous persons and the welfare rights children need if they are to *become* rational, autonomous persons. These reservations include reservations about the centrality of rationality and autonomy to possession of rights. My thesis is that insofar as various versions of rights apply to children they apply with specific qualifications which derive from the differences between children and adults.

Arguing a case in favour or against children's rights is no longer appropriate. Children *have* rights. The Convention promulgated by the UN in 1989¹ is not an aspirational case for children to have rights but a forthright statement of the rights they must, from now on, be presumed to have. It is a legally binding agreement on the States Parties which have ratified it (as Ireland did in 1992).

In a philosophical approach one is not attempting to establish a causal connection, or a scientific result. One is trying to argue a case, to prove a point, to *persuade* others that a certain perception of the way things are or might be is preferable to other perceptions. In an empirical study one can declare that such and such a causal theory is right or wrong: empirical evidence (measurement, counting, demonstration) can be adduced to prove a position independently of the wishes or pre-conceptions of the proposer. It may well happen (in principle it can happen) that the researcher, whatever his or her preconceptions, can be surprised, delighted, or dismayed by the results. But the results stand. Philosophical research is different.

Positivist or empirical research is the dominant paradigm for educational research at present.² There is a consequent danger that the need to question fundamentals will be passed over in favour of a concentration on technique and measurable findings. The latter approach takes the world as given and concentrates on measuring the interactive causalities within the natural or human environment. But the questions we ask, and the answers we accept, depend on the meanings we assign to words and concepts in the first place.

For example, there are a number of ways in which one might address the question of rights for children. We could concentrate, say, on the extent of the implementation of the

¹ U.N. General Assembly, Convention on the Rights of the Child, Document A/RES/44/25, 12 December, 1989.

² See, for example, Cohen, L., Manion, L., Research Methods in Education, London, Routledge, 1994.

Convention in a particular State (or, comparatively in a number of States Parties to the Convention); the effects of such implementation on the laws, welfare provisions, and social practices of the States Parties; the measurable effects of such *mediating* processes on the condition of children and their families.

These approaches would require some form of empirical measurement. But any such approach requires a theory of rights, a theory of parental prerogatives, a theory of childhood and of child/parent relations, a theory of family/community, family/state, individual/state relations. We can only operate on such theories by default if we do not challenge and engage with the conceptual bases and the prevailing understandings.

The idea of rights for children, for example, faces us with three possible interpretations:³

The first is that rights are children's protection against abuse or neglect by the adults who are supposed to care for them. Rights in this interpretation *belong* to the child as a separable individual and it is the role of the State to act as guarantor. In other words the State, on the basis of rights ascribed to the child, must intervene to protect the child against others including parents and other adult carers.

On an alternative interpretation children's rights serve to protect children from State power by reinforcing the privacy and primacy of the family. This conception joins the child with the parent (i.e. the child is not deemed to be a separable individual), in opposition to an intrusively threatening State.

A third possibility is that it is the children themselves who should assert their rights against *both* parent and state. A case in point would be schooling. At present children are obliged to attend school by their parents in the first instance and by the state in the event of parental failure. Ascribing rights of choice to children would leave the determination to the child. This might appear a very extreme interpretation but it is more consistent with the nature of rights as conventionally conceived than either of the other two. It is after all because of their status as rights bearers that adults claim the freedom to make their own choices.

This division of the *meaning* of children's rights (which view is to prevail when decisions are being taken which affect children) has major consequences for social and legal practice.

My approach to the issues of children's rights is interpretivist.

The constructivist or interpretivist believes that to understand (the) world of meaning one must interpret it. The enquirer must elucidate the process of

³ See Minow, Martha, 'Rights for the Next Generation: a Feminist Approach to Children Rights', in Ladd, Rosalind Ekman, ed., Children's Rights Re-visioned: Philosophical Readings, London, Wadsworth Publishing Company, 1996, 52/3.

meaning construction and clarify what and how meanings are embodied in the language and actions of social actors. To prepare an interpretation is itself to construct a reading of these meanings; it is to offer the inquirer's construction of the constructions of the actors one studies.⁴

Any research approach may be characterised in terms of its ontology (the nature of the phenomena being studied), of its epistemology (how we know about the phenomena being studied), and its methodology (how the research is conducted).⁵ The ontology of rights is relativist: that is, there is no such thing as a right *out there* waiting to be discovered. Rights exist and are important only relative to certain social, i.e. interpersonal, situations. The epistemology of rights is transactional: that is we come to know the meanings of rights only in the course of experiencing rights with others. (They are not known through introspection, for example). The methodology is dialectical, dialogical, hermeneutic. (We talk, we discuss, we critically interrogate texts.) The inquiry aims of an interpretivist project 'are oriented to the production of reconstructed understandings, wherein the traditional positivist criteria of internal and external validity are replaced by the terms *trustworthiness* and *authenticity*.⁶ The focus is the point of view of the interacting individual rather than the point of view of the 'detached, objective' observer or measurer. The findings must be defensible, but it makes no sense to say that they must be repeatable. The findings in the interpretivist paradigm are the considered contribution of the researcher him or her self to the ongoing dialogue in the field. It should be noted also that within the field of rights there is not a single paradigm of rights-talk but a series of ongoing conversations regarding the nature, extent, application and value of rights. This conversation is frequently between holders of mutually exclusive points of view.

The meaning of rights is not objectively there to be 'discovered' or 'found'. The process of elucidating meaning is (re)creating it. There is no independent verification procedure. We judge success by invoking 'criteria such as thoroughness, coherence, comprehensiveness, and so forth, and ask whether the interpretation is useful, worthy of adoption, and so on'.⁷ We might also, in the long run, use the criterion of *persuasiveness*. To what extent will the proffered interpretation be perceived to contribute to 'improvements' in the world, in bringing about desirable states of affairs at the level of experience and action.

Inquirers in this field do not have a value-free stance from which they can critique the process of meaning construction and negotiation: 'they participate in the very production of

⁴ Schwandt, Thomas, A., 'Constructivist, Interpretivist Approaches to Human Inquiry', in Denzin, Norman K., Lincoln, Yvonna S., Handbook of Qualitative Research, London, Sage, 1994, 118.

⁵ Guba, Egon G., Lincoln, Yvonna S., 'Competing Paradigms in Qualitative Research', in Denzin, Lincoln, Handbook, esp. 108.

⁶ *Ibid.*, 100.

⁷ *Ibid.*, 122.

meaning via participation in the circle of meanings or interpretations'.⁸ This is not just a methodological but a logical requirement. It is illogical to expect an enquiry into our fundamental beliefs to uncover beliefs which were not part of our faith in the inquiry itself. For any kind of research there is an initial position in relation to the field which is not neutral - even in the most rigorous empirical research: the choice of topic, the choice of method, the choice of samples etc. all belie the claim to absolute objectivity.⁹ This is especially true in relation to interpretative research.

Throughout this work I will maintain a consistent communitarian position which embraces a developmental theory of childhood and of children's rights which is rooted in a social context. If we are to build a defensible thesis for a democratic society then we must begin with an inter-subjective account of the development of autonomy in the young.¹⁰ Although children are not born *with* autonomy they are, to paraphrase Locke, born *to* autonomy. Childhood is a process of developing this autonomy from the toddler's first tentative exploratory steps to the adolescent's radical assertion of independence. This development occurs within a sustaining community and conforms to the parameters set by the community's conception of childhood and development. In societies like ours the reactions of individual adults (whether parents or teachers) to this developing assertion of independence can range from repression to radical permissiveness. Each of these extreme reactions fail the needs of the growing child. The repressive reaction because it fears the child's independence, the permissive reaction because of lack of courage to exercise the adult's formative authority.

It may be instructive to begin with a review of the relationship between children, parents, rights, and communities through the relevant work of Hobbes, Locke, Rousseau, Mill, and Spencer. This review will reveal two contrasting traditions in the theory of children's rights, an exclusionary tradition and an inclusionary tradition. Hobbes, Locke, and Mill excluded children from the realm of rights while Rousseau and Spencer, in different ways and in the context of significantly different discourses, argued for their inclusion. These traditions persist. The review will identify a number of crucial questions in relation to children and rights which will be addressed fully as the argument progresses.

⁸ Schwandt, 'Constructivist, Interpretivist Approaches', 121.

⁹ See Polanyi, M., Personal Knowledge: Towards a Post-Critical Philosophy, 2nd. edition, London, 1962 and also chapter 10 below.

¹⁰ Jonathan, R., 'Liberal Philosophy of Education: a Paradigm Under Strain', Journal of Philosophy of Education, 29, 1, 1995, 106.

Exclusion

Hobbes denied that children, in common with 'fools and madmen', have the right to initiate and take responsibility for their own actions¹¹ and set a pattern of excluding children from the centre of rights-talk on the basis of a 'competence argument' that would remain unchallenged for more than two centuries. According to the Hobbesian view children have no natural rights and cannot have rights by social contract because they are not competent to make covenants with others or to understand the consequences of such contracts. This exclusion undergirds a model of parental power which gives parents (or one of them) absolute authority over their children. It is only when they become adults themselves that children acquire freedoms and rights.¹²

Hobbes argued that, since there were two parties to the begetting of the child, it would appear that the dominion over the child should, in a state of nature at least, belong to both of the parents. But this could not be since 'no man can obey two masters'.¹³ Hobbes continues that, '(i)n this condition of mere nature, either the parents between themselves dispose of the dominion over the child by contract ... (but) if there be no contract, the dominion is in the mother'¹⁴ because only the mother can declare who the father is and so the dominion over the child depends on her will 'and is consequently hers'. In any case the child owes its continued existence to the mother 'and is therefore obliged to obey her'. If the mother is subject to the child's father then it is the father who has ultimate dominion over the child. If the mother abandons the child dominion passes to whomever finds and nourishes the child. For the child

ought to obey him by whom it is preserved; because preservation of life being the end, for which one man becomes subject to another, every man is supposed to promise obedience to him in whose power it is to save or destroy him.¹⁵

It is not clear however how a child, who is considered unable to make or understand contracts, will nonetheless be able to 'promise obedience' instead of merely submitting to greater force.

Locke argued that analogies between divine, regal, and paternal authority (which were used to bolster the notion that kings, being above the law, could do no wrong) were illicit and that

¹¹ Hobbes, Leviathan, Ch. XX, in Stephen M. Cahn, ed., Classics of Western Philosophy, Indianapolis, Hackett Publishing Co., 1977, 392-397.

¹² See Worsfold, Victor, 'A Philosophical Justification for Children's Rights', Harvard Educational Review, 44, 1, 1974, 142-157.

¹³ Hobbes, Leviathan.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

the authority of fathers was far from unlimited since it extended only until such time as the child was capable of taking responsibility for his own actions.

In a detailed analysis of the fathers' authority over their children Locke disputed the widely held view that the mother's relationship with the child was any way inferior: on the contrary, 'if we consult Reason or Revelation,

we shall find she hath an equal title. This may give one reason to ask, whether this might not be more properly called *Parental Power*. For whatever obligation Nature and the right of generation lays on children, it must certainly bind them equal to both the concurrent causes of it. And accordingly we see the positive Law of God everywhere joins them together, without distinction, when it commands the obedience of children.¹⁶

Any analogy with the absolute authority of a single monarch is illicit because the reality of the familial situation is *not* the absolute authority of a father but the shared authority of *both* parents: it is not a question of *Paternal* power but of *Parental* power.

The parental authority is neither discretionary ('nothing can absolve them from taking care of it'¹⁷), absolute, nor permanent: it is contingent on the child's need for restraint and education and is strictly circumscribed by the child's ability to take rational control of his own freedom.

God hath made it (the parents') business to employ this care on their offspring, and hath placed in them suitable inclinations of tenderness and concern to temper this power, to apply it as his wisdom designed it, to the children's good, *as long as they should need to be under it*.¹⁸

So, when does this temporary parental authority over the child come to an end? As with Hobbes the criterion is competence. Childhood is an imperfect state: the child is born in *possession* of freedom and rationality but he must learn the exercise of both. Locke's conception of childhood appears to be developmental: although born with the *capacity* for knowledge and reason the child must grow into the exercise of these.

The bonds of this subjection (to parents) are like the Swaddling Cloths they are rapt 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.¹⁹

Dependency ends when the child's understanding is equal to the task of controlling his will: that is, when the individual has arrived at the requisite state of knowledge and reason to

¹⁶ All quotations from Locke's Treatises are from 'Paternal Power', in O'Neill, O., Ruddick, W., (eds.), Having Children: Philosophical and Legal Reflections on Parenthood, Oxford University Press, 1979, 240-246, 241.

¹⁷ *Ibid.*, 243.

¹⁸ *Ibid.*, 242 (emphasis added).

¹⁹ *Ibid.*, 243. Locke also refers to 'the improvement of growth and age'.

exercise control over his own affairs. Parental power, then, does not rest on the same foundations as legitimate civil power. The latter is properly exercised only with the consent of the governed and lasts only so long as that consent is forthcoming.²⁰ The former is contingent, not on consent, but on a developmental fitness to rule oneself.

When he has acquired that state he is presumed to know how far that law is to be his guide, and how far he may make use of his freedom, and so comes to have it; till then, some Body else must guide him, who is presumed to know how far the Law allows a liberty.²¹

Locke's refusal to consider the child the equal of the adult in respect of knowledge and rationality appears to be due to his belief that both knowledge and rationality are incremental.²² The adult is not significantly different from the child with respect to basic cognitive abilities. It is just that the adult has had more time to reflect and more experience upon which to reflect. However Locke advocates that the treatment of children as rational beings should be relative to the child's particular capacities which increase with age. Children's ability to reason grows as they mature. Since Locke thought that parental authority was grounded in the child's inability to reason 'it follows', in Archard's words, 'that the exercise of the former should be proportionate to the degree of the latter'.²³ This appears to endorse a gradual growth of freedom from parental power and the concomitant exercise of autonomy which such freedom would entail. That he considers the growth of knowledge and rationality to be developmental is illustrated by Locke's swaddling cloth metaphor quoted earlier. The removal of the supports is gradual and ends in a man being 'at his own free disposal'. Yet the end of the parental obligation, when the child achieves the state of maturity sufficient to enable him to know the law of Nature so that he may act in accordance with it, appears to be a once-for-all matter. If there is an emergent freedom it has no social significance.

If we accept Locke's general stance there is no necessary difference with respect to legal freedom and responsibility between a one-year old and an seventeen year-old, despite observable developmental differences. Childhood, as a period of subjection to parental power, and absence of legal power, is integral. None of the developmental changes

²⁰ Leites, Edmund, 'Locke's Liberal Theory of Parenthood', in O'Neill, Ruddick, Having Children, 316-7.

²¹ Locke, 'Paternal Power', 244.

²² Archard, D., Children: Rights and Childhood, London, Routledge, 1993, 2-6.

²³ *Ibid.*, 4. It is worth noting in passing that Archard commends Locke for not subscribing to 'any naive belief in the innocence or goodness of the child. His comments on the readily observable cruelty of young people are down to earth and perceptive'. (4) Apparently Archard does not consider the possibility that the propensity for cruelty (does 'readily observable' mean universal?) may be acquired and may in fact be one of the ways in which childhood 'degenerates once it gets into the hands of Man' to use Rousseau's memorable phrase.

requires a differentiation. Nowhere does Locke explain why we should accept a particular age²⁴ as the definitive age of transition between childhood and adulthood.

Locke is clear however that the parental right to rear and control the child until the age of majority derives from the child's interests and not the parents'. The parental prerogatives will continue only until the child becomes capable of pursuing these interests for himself.

The power, then, that parents have over their children, arises from that duty which is incumbent on them, to take care of their off-spring, during the imperfect state of childhood. To inform the mind and govern the actions of their yet ignorant nonage, till reason shall take its place, and ease them of that trouble, is what the children want, and the parents are bound to.²⁵

Parental power persists only until such time as children come to the use of reason or reach a state of knowledge adequate to understand the natural or civil law. Until the child achieves the age set by law he is to have no will of his own: he is subject to the will and understanding of his parents. Although both parents and children possess natural rights, because Locke attributes rights to individuals as though these rights were intrinsic properties of individuals, he does not envisage conflict between the rights of parents and those of their children because he presumes an identity of interests. Parental benevolence is sufficient to ensure the fulfilment of the child's rights.

In sum then Locke argues that power over the child is equally shared between the parents: it is *parental* not *paternal* power; the duty of parental care is neither discretionary nor absolute; childhood is developmental: the parental obligation ends when the child is capable of acting in accordance with the law, natural and civil; the parental right to rear and control the child derives from the child's interests and not the parents'.

Both Hobbes and Locke agree that children are not competent to make claims of their own although Locke acknowledges a developmental growth of competence throughout childhood. Yet once the general perception of children as lacking competence is accepted society is hindered from seeing them as 'worthy of respect as individuals'.²⁶

In On Liberty Mill deals with 'the nature and limits of the power which can be legitimately exercised by society over the individual'.²⁷ Law and custom (opinion) are needed to place restraints on the activity of others because 'all that makes existence valuable to anyone'

²⁴ Whether the age of majority is 21 or 18. Neither age appears to be premised on a rational understanding of a qualitative difference between childhood and adulthood. The UN Convention declares that childhood ends at 18 'unless, under the law applicable to the child, majority is attained earlier'. (Article 1) The Convention does not provide a justification for this age.

²⁵ Locke, 'Paternal Power', 244.

²⁶ Worsfold, 'A Philosophical Justification', 145.

²⁷ Mill, J.S., On Liberty, in H.B. Acton, ed., Utilitarianism, Liberty, Representative Government, London, J.M. Dent & Sons Ltd., 1972, 65.

depends on such restraints.²⁸ However, since there is 'no recognised principle by which the propriety or impropriety of government interference is customarily tested' Mill proposes the principle '(T)hat the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection'.²⁹

The only purpose for which power can be exercised over any member of a civilized community, against his will, is to prevent harm to others. His own physical or moral good, or happiness, is not a sufficient warrant. Nor is it sufficient that in the opinion of others it would be wise or right to interfere with his freedom. We may remonstrate, or reason, attempt to persuade, or entreat, but we may not compel or coerce.

The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.³⁰

Society is not justified in intervening in the affairs of an individual where these affairs concern only himself or, if there are others affected, if they have freely, voluntarily and without deception participated.³¹

The liberty that Mill envisages comprises three elements: freedom of thought and opinion, freedom of tastes or pursuits ('of framing the plan of our life to suit our own character'), and freedom of association with others.

The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual.³²

Mill intends that his principle of liberty is meant to apply 'only to human beings in the maturity of their faculties'. It is not intended to apply to children or to

young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury ...³³

The exclusion of children up to 'the age which the law may fix as that of manhood or womanhood' is justified on the grounds that children must be 'protected against their own

²⁸ *Ibid.*, 69. Mill acknowledges that 'opinion' often has its source in the interests of a dominant class: 'Wherever there is an ascendant class, a large portion of the morality of the country emanates from its class interests, and its feelings of class superiority.' (70) This would equally apply to the ascendancy of adults as a class over children.

²⁹ *Ibid.*, 72.

³⁰ *Ibid.*, 73.

³¹ *Ibid.*, 75.

³² *Ibid.*, 75/6.

³³ *Ibid.*, 73.

actions as well as against external injury' and on grounds of the general utility of the community.³⁴ Unlike Locke, Mill does not consider rights to be something *intrinsic* to human beings, they are a function of utility. One may claim a right not because one is human but because the exercise of the right is useful to one's own and others' pursuit of happiness.³⁵ 'Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.'³⁶

In specifying 'children, or ... young persons below the age which the law may fix as that of manhood or womanhood' Mill clearly acknowledges a difference between children and young people who as yet have not attained their majority, but he is content to treat them similarly in the matter of exclusion from the principle of liberty. He also leaves open the possibility that other categories may be excluded: adults who share with 'children and young people' the incapacity to care for or protect themselves adequately. A different category of exclusion refers to states, '(t)hose backward states of society in which the race itself may be considered as in its nonage',³⁷ not to individuals as such. Despotism is justified in states in which the population has not reached a stage of being 'capable of being improved by free and equal discussion'.³⁸ This point illustrates Mill's view of rights as the means to the promotion of utilitarian happiness, not as characteristics of individuals. For if rights *were* the possession of individuals then there could be no question of their being over-ruled by a despotic leader in the name of the public good. If it is possible - even laudable³⁹ - to over-rule the principle of liberty then it is clear that the warrant for such liberty is not anything pertaining to the individual human being but to the welfare of the community as a whole. Childhood is analogous to a state in this regard. Children too must be governed in such a way that their development as 'progressive beings' is promoted.⁴⁰

Mill's views present many difficulties. In the first place there is the problem of what 'maturity of faculties' might mean. We know what it means negatively: where the individual is not 'in the maturity of his faculties' we are entitled to intervene because such an individual is both incompetent to judge what is in his own interest and incapable of promoting the happiness of the community. But such intervention must always have an educational objective involving the 'permanent interests of a man (or woman) as a progressive being'.

³⁴ Mill, *On Liberty*, 73.

³⁵ See Kim, Ki Su, 'Mill's Concept of Maturity as the Criterion in Determining Children's Eligibility for Rights', *Journal of Philosophy of Education*, 24, 2, 1990, 235-244, 237.

³⁶ Mill, *On Liberty*, 76.

³⁷ *Ibid.*, 73.

³⁸ *Ibid.*

³⁹ 'Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by actually affecting that end'. *Ibid.*, 73.

⁴⁰ What Mill means by 'maturity of faculties' in relation to children is discussed by Kim, 'Mill's Concept'.

In summary, with respect to the status of children, Mill argues that the denial of rights and intervention are justified not only on the basis of the collective utility of a community but also of the proper development of the child 'as a progressive being'.⁴¹

How, in any case, is the gap between adult and child in relation to rights to be bridged? One possibility is that achieving 'maturity of faculties' implies that adult rights descend upon the individual in a once-for-all manner (as is the case with Locke). Another is that maturity is gradual and developmental and that the acquisition of rights mirrors this gradualism. We can, that is to say, consider maturity as an all-or-nothing end state or as a process (maturing) which is developmental and ongoing.⁴²

In summary, Mill's ascription of the right to liberty from interference requires that the individual possess maturity of faculties, not be in a state to require being taken care of by others, and be capable of being improved by free and equal discussion. The first requirement is so general and vague as to be of little value. The second raises critical questions regarding the rights of adults who are infirm or handicapped. The last is more promising since '(t)he child, lacking the capacities necessary to being a self-governing moral agent, can improve only as a result of chance or the intervention of others'.⁴³ Here is a recognition of the developmental nature of childhood and of the necessity for adult intervention to protect and direct the development. Like Locke, however, Mill does not leave us with an open-ended criterion. Irrespective of the developmental maturity of any individual it appears as if the legal, institutional definition of 'manhood or womanhood' will be the ultimate test for inclusion in the realm of liberty.

Inclusion

Rousseau's Émile⁴⁴ details the upbringing of a boy from infancy to adulthood. It proposes well developed theoretical principles of education and nurturing to meet the two conflicting aims of education: the natural development of the child, and preparation for life in society. The keynote is the liberty allowed to the growing Émile to pursue his own interests and to grow in accordance with his human nature. While the book is not couched in the language and rhetoric of rights it is clear that the liberty afforded to Émile is in stark contrast to the formation of a child seen simply as an 'imperfect' adult temporarily excluded from the universe of rights.

Rousseau describes the role of Émile's tutor as subtly establishing limits which organise the boy's capacity to relate to his environment. It is only when he has learned to restrain his

⁴¹ *Ibid.*, 237.

⁴² As we will see, for Rousseau there was no conceptual contradiction in the phrase 'maturity of childhood'.

⁴³ Kleinig, J., 'Mill, Children and Rights', Educational Philosophy and Theory, 8, 1, 1976, 1-16, 6.

⁴⁴ Rousseau, J-J., Émile, trans., Alan Bloom, Harmondsworth, Penguin, 1991.

desires that he can experience and exercise freedom i.e. govern himself. It is only then that he is deemed capable of encountering the life of society. This is similar to Locke's position though couched in the terms of a different discourse. In both Rousseau and Locke the growing child must await what might be called a certain maturational attainment before he can exercise freedom as an autonomous adult and active citizen. Until then he must be subject to the rule or guidance of an adult. For Rousseau, whatever misconceptions might have been engendered in the popular mind through confusion between the Noble Savage and the bucolic setting for Émile's education, is in no doubt that the growing Émile is under the control as well as the tutelage of the adult.⁴⁵

At the age of twelve Émile has attained the limit of boyhood. Rousseau's rhapsodic description of what Émile, the ideal child, is like at this age concludes: 'He has come to the maturity of childhood. He has lived a child's life. He has not purchased his perfection at the expense of his happiness'.⁴⁶ It is the use of the phrase 'the maturity of childhood' that is significant. Rousseau means that each stage of human being has its own proper excellence: it is not simply a preparation for another stage culminating in the *maturity of adulthood*. In this view we can see each stage (up to and including old age) as valuable in itself and with its own proper and unique excellence.⁴⁷ Rather than raise questions about the conventional view of rights Rousseau establishes a different context, a different discourse. It is no longer sufficient to perceive childhood in terms of something *lacking*, deficiencies defined by some idealised notion of adulthood. In this context it is possible to ask, not whether the child is entitled to the putative rights of adulthood but whether there are rights which the child has as a child independently of his/her relation to a future stage of development.

The first specific opposition to the exclusion of children from the realm of rights came nine years before the publication of On Liberty in a section entitled 'Children's Rights' in Herbert Spencer's Social Statics.⁴⁸ Spencer was the first child 'liberationist'. The issues which he raised have continued to occupy a prominent place on the agenda of philosophy of children's rights ever since.

⁴⁵ *Ibid.*, 51/2.

⁴⁶ *Ibid.*, 162.

⁴⁷ There is a *reprise* of this view in the Writing of Janusz Korczak. See Berding, J.W.A., 'Meaningful Encounter and Creative Dialogue: The Pedagogy of Janusz Korczak', *Journal of Thought*, 30, 4, 1995. Erikson, E., *Identity and the Life Cycle*, Norton, 1980, charts the successive stages of development through the full life-cycle of the individual. This is further developed in Erikson, E., *Childhood and Society*, London, Vintage, 1995, especially chapter 7, 'Eight Ages of Man'.

⁴⁸ Social Statics Or The Conditions Essential to Human Happiness Specified, and the First of Them Developed, London, Williams and Norgate, 1868 (1st published 1850).

Spencer's derivation of rights follows a fairly straightforward syllogistic structure which leads from Divine will to the law of equal freedom:

God wills man's happiness. Man's happiness can only be produced by the exercise of his faculties. Then God wills that he should exercise his faculties. But to exercise his faculties he must have liberty to do all that his faculties naturally impel him to do. Then God intends that he should have that liberty. Therefore he has a right to that liberty.⁴⁹

From this simple argument Spencer derives a principle of liberty very similar to that of Mill's: 'Every man has freedom to do all that he wills, provided he infringes not the equal freedom of any other man'.⁵⁰

It is not my purpose or intention here to examine the process of derivation or the principle that it leads to. No doubt searching questions could be asked with regard to both. The significant aspect of Spencer's work for present purposes is the *inclusion* of children under the application of his principle of liberty. Spencer is satisfied that his principle applies equally to children:

(A) true rule has no exceptions. When therefore that first principle from which the rights of adults are derived, turns out to be a source from which we may derive the rights of children, and when the two processes of deduction prove to be identical, we have no choice but to abide by the result.⁵¹

Spencer argues that the process of derivation applies equally to children as to adults since

The child's happiness, too, is willed by the Deity; the child, too, has faculties to be exercised; the child, too, needs scope for the exercise of those faculties; the child therefore has claims to freedom - rights as we call them - coextensive with those of the adult. We cannot avoid this conclusion, if we would. Either we must reject the law altogether, or we must include under it both sexes and all ages.⁵²

In effect Spencer changes the ground rules of the debate. Hobbes, Locke, or Mill did not really subject to anything approaching rigorous scrutiny what amounted to a presumption of *exclusion* of children. Spencer begins with a presumption of *inclusion* which he acknowledges to be 'a proposition at war with the convictions of almost all'.⁵³ The burden of justification is now shifted onto whoever would *exclude* children from the realm of rights. Spencer anticipates the kinds of difficulties such justification would have to overcome.

⁴⁹ Spencer, Social Statics, 93.

⁵⁰ *Ibid.*, 121.

⁵¹ *Ibid.*, 191.

⁵² *Ibid.*, 192.

⁵³ *Ibid.*, 195.

The first of these difficulties is: when does a child become an adult? 'When does the child become a man? at what period does the human being pass out of the condition of having no rights, into the condition of having rights?' ⁵⁴ Spencer will not be satisfied with appeals to 'the arbitrary dictum of the statute book'.⁵⁵ The law simply articulates a consensual view. What Spencer seeks is the moral justification for such a consensus.

The difficulty is that any characteristic ('an attribute of manhood'⁵⁶) that we might choose as the distinguishing characteristic between adult and child will exclude people generally considered adult as it will include people generally considered children.

And who can answer the objection, that whichever qualification is chosen, will class many as men who are not at present considered such; whilst it will reject from the list, others who are now by universal consent included in it?⁵⁷

Even if we could find a universally agreed criterion to discriminate between adulthood and childhood where would this leave those excluded - the minors (children) with regard to rights? Are we to understand that they have no rights at all? Not even rights of protection? Can they be killed, robbed, enslaved? If they *have* such rights (what Spencer calls 'primary rights', the right to life, to possess property, to liberty in the sense of not being enslaved) then why only these rights and no others? For their acknowledged possession of such rights means that being children does not preclude them from being rights holders. The issue now becomes a criterion of demarcation between rights that children may have and those they may not, which in turn resolves into the problem of finding a principle of discriminating between adults and children.

Those who

maintain that whilst children have certain rights, their rights are not equal with those of men, are called upon to draw the line, to explain, to define. They must say what rights are common to children and adults and why. They must say where the rights of adults exceed those of children, and why.⁵⁸

So even if we admit some common rights we are left with the problem of drawing a line of demarcation between the common rights and those exclusively held by adults: for any right we may attribute to adults we can legitimately ask why children are not entitled to the same right. This inevitably leads back to the matter of specifying and justifying *relevant* differences between children and adults. Spencer will only be satisfied with answers which

⁵⁴ *Ibid.*, 192.

⁵⁵ The legal age of majority in Locke's case, 'the age which the law may fix as that of manhood or womanhood', in Mill's.

⁵⁶ Spencer, Social Statics, 192.

⁵⁷ *Ibid.*, 193.

⁵⁸ *Ibid.*

are morally defensible, drawn from 'the original constitution of things' and not merely based on expediency.

Parental obligations give rise to two related problems. Firstly we can ask whether the obligations of the parent confer dominion over the child so that even if the child *has* rights the obligations of the parent are superior and may over-rule the rights of the child. Secondly, if this is the case then the question must be asked whether *all* obligations confer dominion - does a doctor, for example, have dominion over an adult patient? If not, why make a distinction between children, over whom dominion *is* conferred by the existence of an obligation, and adults over whom dominion is *not* conferred by the existence of an obligation? Even if we acknowledge that there is a difference between adults and children in this regard what, if any, are the limits to the dominion of the parent? This again begs the question of the limits on the rights of the child.⁵⁹

Spencer concludes that

Unless, therefore, the reader can show that the train of reasoning by which the law of equal freedom is deduced from the divine will, does not recognise children, which he cannot; unless he can show exactly at what time the child becomes a man, which he cannot; unless he can show why a certain share of liberty naturally attaches to both childhood and manhood, and another share to only one, which he cannot; he must admit that the rights of the youth and the adult are coextensive.⁶⁰

Spencer identifies what he calls a 'plausible-looking' way of meeting these objections. This would be to argue that the faculties of the child are not developed.⁶¹ Since the faculties of the child are not developed and since rights are 'primarily dependent' on faculties (in Spencer's own derivation) then it appears to follow that the rights of children cannot be coextensive with those of adults for the faculties of children are not coextensive with those of adults.⁶²

Such an approach would miss the point completely, however.

The fullest endowment of rights that any being can possess, is *perfect* freedom to exercise *all* his faculties. And if each of two beings possesses *perfect* freedom to exercise *all* his faculties, each possesses *complete* rights; that is the rights of the two are *equal*; no matter whether their faculties are equal or not.⁶³

⁵⁹ *Ibid.*, 194.

⁶⁰ *Ibid.*, 194/5.

⁶¹ This would be similar to Locke's position that the child has only the *capacity* for knowledge and reason but has not developed these and to Mill's exclusion of children because they lack 'maturity of faculties'.

⁶² Spencer, *Social Statics*, 195.

⁶³ *Ibid.* (emphasis in original.)

In other words since the rights involved are rights to the *freedom* to exercise the faculties they cannot follow from having had the *opportunity* to exercise the faculties. Rights relate to the possession of freedom, not to the possession, or state of development, of faculties.

In summary Spencer argues that 'implicit faith in the conclusions of abstract equity' which 'eschew prejudice and feelings' compels the conclusion that

the law of equal freedom applies to children as much as to adults; that consequently the rights of children are coextensive with those of adults; that, as violating those rights, the use of coercion is wrong; and that the relationship now commonly existing between parents and children is therefore a vicious one.⁶⁴

Spencer anticipates one final objection to his argument for children's rights which is a logical corollary of the position he maintains:

if the rights of children are coextensive with those of adults, it must follow that children are equally entitled with adults to citizenship, and ought to be similarly endowed with political power.⁶⁵

Instead of endorsing this conclusion as a rational (and reasonable) corollary of his argument Spencer shies away from the prospect of advocating political power for children. It is not the principle of equality of rights which is called into question by the objection, he contends, but the imperfection of human society. If the moral law were 'universally obeyed, government would not exist'.⁶⁶ If government did not exist then there would be no need for the enfranchisement of children. So the objection is a comment on the imperfection of human society and not on any defect in the conclusion that the rights of children are coextensive with the rights of adults. Whatever incompatibility there may be between children's rights and daily experience is due, not to any error in the arguments in favour of children's rights but to 'the necessary incongruity between the perfect law and the imperfect humanity'.⁶⁷

Spencer does not elaborate on the political objection extensively. He must have been aware that in a perfect state of human society, in which law and government were unnecessary, not alone would there be no question of the enfranchisement of children but there would be no question of rights at all. It is precisely because of the imperfection of human society that rights are deemed to be a necessary moral phenomenon: ideal beings, in a perfect society, do not require rights. Nonetheless he anticipated once again a

⁶⁴ *Ibid.*, 197.

⁶⁵ *Ibid.*, 211/2.

⁶⁶ *Ibid.*, 212.

⁶⁷ *Ibid.*, 213.

significant direction which the debate on children's rights would subsequently take and a significant difficulty it would encounter: the demand for political empowerment.

Spencer advances one final argument in favour of the rights of children. This argument is based, not on fundamental principles, but on the observation of the social and political progress that is brought about by the spread of liberty.

'(T)he truth of a belief may be judged by the morality with which it is associated.'⁶⁸ If a particular social practice or theory (such as the social subordination of women) is associated with 'the most degraded sections of our race' then we may 'safely pronounce that theory to be a false one'. The denial of rights (to women in particular) betokens a 'low type of social life'⁶⁹ and the emancipation of women is a sign of social progress and the growing emancipation of society. In the same way the amelioration of the 'despotic rule' which parents and adults generally exercise over children can be seen as a sign of social progress for it is only in societies which are socially and politically undeveloped that women and children hold radically inferior positions in relation to men.⁷⁰ Spencer adduces anthropological evidence purporting to show that in such societies 'wives are slaves and exist by sufferance, but that children hold their lives by the same tenure, and are sacrificed to the gods when fathers so will'.⁷¹ In general the advent of constitutional liberty has been accompanied by a decline in the oppression of women and by a simultaneous 'decline in the rigour of paternal authority and in the severity of political oppression'.⁷² There is a 'uniformity of moral tone' which 'must necessarily pervade a nation's arrangements':

As surely as a man's character shines through all his deeds, so surely does the character of a people shine through all its laws and customsThe change which reforms one must at the same time reform all. The progress which perfects one must eventually perfect all.⁷³

⁶⁸ *Ibid.*, 197.

⁶⁹ Spencer, *Social Statics*, 198.

⁷⁰ Spencer claimed also to see 'a tendency towards systems of non-coercive education' (198). These did not transpire. If anything, compulsory education became more wide-spread and more coercive in the succeeding century.

⁷¹ Spencer, *Social Statics*, 198/9.

⁷² Spencer, *Social Statics*, 199.

⁷³ Spencer, *Social Statics*, 200. For a complementary, contemporary view see Bross, Donald C., 'The Rights of Children and National Development: Five Models', *Child Abuse and Neglect: The International Journal*, 15, Supplement. 1, 89-97, 199. Bross argues that children's rights ('intended to be understood in the more general sense of the broad interests of children') 'are necessary, if not sufficient, to establish modern economic and political systems'. (90) He argues that national development will be impaired if children are not given rights; and that national development cannot occur without children's rights. In support of this thesis he identifies the causal connection between certain social phenomena and national development. He instances the centrality to economic development of literacy and education (92), the associated ideas of a strong school system and an emotionally supportive familial context (93), the centrality of questions about health, nutrition and immunization (94), and the dependence of democracies on adequate development of children's sense of basic trust, autonomy, empathy, and self-discipline. (94)

So, as a consequence of the general improvement in the social, political, and moral quality of a nation's life brought about by the spread of liberty, relations between adults and children will also undergo transformation.

Spencer's promotion of the rights of children at a time when there was a general presumption against extending rights to children and the objections he considered anticipated the major issues which have dominated the debate on children's rights ever since. In particular he realised that the issue of definition and the possibility of conflict between the putative rights of children and the obligations of adults to children would be problematic. He also realised that it was unsustainable to argue that children might have no rights at all and that the growth of children's rights as part of the general improvement of social and political conditions in liberal democracies was inevitable.

Plan of work

In Section 1 I will try to identify those aspects of rights which are relevant to the ascription of rights to children. Chapter 1 examines the meaning, function and justification of rights. I will adopt there a view of rights as social constructions which are historically determined in and by concrete institutions. Chapter 2 addresses some of the issues raised in ascribing rights to children, in particular whether the distinctions which have been introduced since Spencer first raised the issue can be used to justify differential ascription in relation to adults and children. It also explores the contingent nature of rights of freedom: in order to become capable of exercising rights of any kind one must achieve certain minimal standards of human and social functioning. Rights are contingent on the capacities to exercise them being developed in the individual. Chapter 3 explores the connection between rights and the good life, and the role that needs and interests play in identifying and justifying rights, both freedom rights and welfare rights.

Section 2 deals with the moral status of parents. Are parents in any sense the owners of 'their' children? What are the limits to parental power? What weight and significance should be accorded to the natural (biological) relationship? Is there an identity of interest between the parent and the child? Chapter 4 considers whether there is a right to have children and, if so, whether this right is subject to limitations of any kind. I conclude that the right to beget and bear children is contingent on accepting the obligation to rear or to make provision for the rearing of the child. This in turn raises the question of the appropriateness of the concept of ownership in relation to children (Chapter 5). A trust model is proposed as the most likely to explain features of the parent/child relation which appear to invoke some conception of ownership. Finally the crucial question of the rights of natural parents over alternative carers is addressed in Chapter 6.

Is it necessary, or even possible, to arrive at a universally acceptable and defensible definition of 'childhood'? Can we go beyond the perception of childhood defined primarily in terms of a lack of adult characteristics to a more positive view of childhood as a developmental process within which there are discernible stages of progressive development? Section 3 begins with a consideration of some of the difficulties associated with defining the differences between adults and children for purposes of rearing, control, and rights ascription. In Chapter 7 I argue that children must be seen in the psycho-social context in which they develop and acquire their most fundamental capacities. Adolescence is identified as the crucial transition from childhood to adulthood and the period during which the child begins to assert her separate identity as a significant person. The relationship between freedom and responsibility is an essential feature of the assertion of independence. Chapter 8 is devoted to an exploration of the idea of paternalism, its nature and limits. The political question is addressed in Chapter 9: should children have political rights given that they are intimately affected, as the children they are and as the adults they will one day be, by political decisions? Proposals to enfranchise children are examined. I suggest a richer and more developmental view of political participation than simply extending the franchise, one which would demand significant changes in the way we organise our children's lives.

Finally, in Section 4, Chapter 10 looks at the communal context of rights and argues that a proper understanding of moral maturity is impossible without taking into account that moral functioning is based on virtues which are embedded in particular communities. The associated problems of subjectivity and parochialism are addressed.

In the conclusion I will briefly identify some consequences for schools in terms of providing opportunities for meaningful moral/political formation within the educative community of the school itself.

PART 1: RIGHTS

Chapter 1: The Meaning Of Rights

Moral and legal rights

Rights are not natural phenomena. The exploration of rights will not follow the scientific model of observation, hypothesis formation and testing used to establish theories about the natural world. Rights are social or political phenomena created by, and operative in, the social realm. They pertain to persons, that is, to self-conscious human beings, who conceive of themselves as initiators of purposive actions.¹ Since rights are a human invention, not a natural phenomenon, the history of rights is largely the history of the struggle for their extension to hitherto excluded categories of people:

The common-sense world in our culture has traditionally been mapped in such a fashion that some inhabitants, not all, were endowed with 'certain inalienable rights'. These were the white males; the very construct 'men' specifically excludes women, members of minority groups, slaves, 'barbarians' and children as well.²

Human rights pertain to what is essentially human. Other categories of rights are 'more specific, limited and, normally, derivative.'³ The reason for this priority is that as human beings we value a world in which human beings flourish. This is not because human existence is necessarily good but that it is, in the first instance, *human*. To abandon this anthropocentric priority would be to declare a moral neutrality as between various categories of living (and inanimate) things.⁴ We consider human rights to be of supreme importance because they relate to 'those conditions that must be fulfilled if human action is to be possible either at all or with general chances of success in achieving the purposes for which humans act'.⁵

There are two categories of rights - legal rights and moral rights. The former are instituted by legal rules, the latter justified by 'principles of an enlightened conscience'.⁶ The validity of legal rights as claims is adjudged by reference to legal rules and principles; the validity of moral rights as claims is adjudged by reference to moral rules and principles. While legal and moral rights may be analogous they have different grounds and sanctions. Moral rights

¹ Freedon, Michael, Rights, Buckingham, Open University Press, 1991, 6.

² Greene, 'An Overview of Children's Rights: A Moral and Ethical Perspective', Vardin, P.A., Brody, I.N., eds., Children's Rights: Contemporary Perspectives, New York, Teachers College Press, 6.

³ Freedon, Rights, 6.

⁴ *Ibid.*, 9. The priority is not *logical* in its derivation: 'The waiving of human rights is humanly destructive rather than logically impossible.'

⁵ Gewirth, Alan, Human Rights, University of Chicago Press, 1982, 3.

⁶ Feinberg, J., 'The Nature and Value of Rights', Journal of Value Inquiry, 4, 1970, 255. But see Young, R. 'Dispensing with Moral Rights', Political Theory, 6, 1978, 67-74.

may be among the grounds of legal rights but the converse is not the case: legal rights never create moral rights. 'A legal right ... describes an existing entitlement; a moral right prescribes a justifiable entitlement.'⁷

Evidence for the existence of a moral right is not empirical. Even anthropological or sociological evidence that a certain practice is widespread, or widely encouraged or tolerated, tells us nothing about its specifically *moral* value or desirability. Empirical evidence for legal rights may be found in legal codes, statutes, adjudications, court records, and so forth, but the legal right continues to require moral justification and critique. 'Genuine moral rights, if there are any such things, are prior to and may be used to criticise positive rights, whether these are societal or legal'.⁸

If rights talk could be confined to legal contexts things would be straightforward. But then we might overlook the delicate relation between legal rights and moral principles or ideas in general. At least some moral principles or ideas are sources for the formulation of legal rights: the *idea* of equality has paved the way for the struggle for the rights of minorities and other oppressed groups such as black people, women, and children. This casts doubt on the foundational role of rights for it would indicate that moral ideals and principles come first and that rights are only a means of expressing these. 'Rights' may be just a shorthand for saying that an individual or group should be treated in accordance with a particular moral principle. If anything, the moral principles define the *duties* that people have, or support a teleological view that there is an end state which gives ultimate justification to the invocation of rights.

The extension of rights to hitherto excluded groups has not been automatic. It has been (and continues to be) a matter of political struggle: rights are asserted, not received.

An historically important factor in the generation of various rights, their acknowledgement and implementation, and their extension to increasingly larger segments of the population, has been the claims put forward and the demands made by individuals and groups against individuals and groups.⁹

⁷ Franklin, B., The Rights Of Children, London, Basil Blackwell, 1986, 13.

⁸ Campbell, T.D., 'The Rights of the Minor: as Person, as Child, as Juvenile, as Future Adult', Alston, P., Parker S., Seymore J., eds., Children, Rights and the Law, Oxford University Press, 1992, 7. Acceptance of moral rights is not universal: Walker (D.M., The Oxford Companion to Law, Oxford University Press, 1980) holds that moral claims may be no more than mere wishes, aspirations, or assertions. 'In most political discourse, "we have a right" really only means "we want"'. 1070B.

⁹ Golding, M., 'Towards a Theory of Human Rights', Monist, 52, 4, 1968, 521. He refers later to 'the plausible historical thesis that the granting and expansion of rights resulted from a struggle for rights ...'. 525.

The idea of natural law, and hence natural rights, underlay the foundation of the American and other Constitutions¹⁰ and so affected the daily lives of millions of people. If the relationship between legal rights and moral principles or moral ideas is recognised, then the idea of moral rights, which serve as a bridge between legal rights and moral principles or ideas can also be acknowledged.

Are rights necessary?

Do we need the moral concept of rights at all? Bentham¹¹ was sceptical about moral rights because, while he accepted that legal rights follow from (positive) law, he held that moral rights follow from imaginary laws: 'from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons, come imaginary rights, a bastard brood of monsters'. The command of a sovereign is the criterion. Natural rights are just imaginary rights by contrast with the real rights produced by actual systems of law which flow from the command of a sovereign. 'From real law come real rights ... from imaginary laws come imaginary ones'. The so-called 'rights of man' are in fact merely 'counterfeit rights'. The language of the French Declaration of the Rights of Man, for example, which looks as if it is describing rights is actually suggesting what rights there *ought* to be. It is giving reasons why there ought to be rights: 'a reason for wishing that a certain right were established, is not that right; want is not supply; hunger is not bread'. It is even worse to suppose that any of the alleged rights have been found for all time, that they are indefeasible, imprescriptible. 'Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts'. In short Bentham accepts that there are rights within institutions such as laws but not that there are rights 'one might invoke when designing or criticising institutions.'¹²

MacIntyre also takes the view that rights pre-suppose law, 'a socially established set of rules'.¹³ He argues that to represent the individual as one who can, by his or her own untrammelled choice, determine a set of values to live by is simply a reflection of the dissolution of a social order and modes of life which give dignity and meaning to human activity. His preference is to recapture an Aristotelian teleology which can re-unite the three elements which provide the foundation for morality: 'the conception of untutored human

¹⁰ For the historical connection between natural law and the American and French revolutions and subsequently the spread of rights as reflected in various international instruments see Bobbio, Norberto, The Age of Rights, Allan Cameron, trans., Cambridge, Polity Press, 1996, 33-46.

¹¹ Bentham, Jeremy, Anarchical Fallacies, in A.I. Melden, ed., Human Rights, California, Wadsworth, 1970, 28-39.

¹² Lyons, D., 'Human Rights and the General Welfare', Philosophy And Public Affairs, 6, 1977, 115.

¹³ MacIntyre, A., After Virtue, University of Notre Dame Press, 1981, 67, and, generally, chapter 5.

nature, the conception of the precepts of rational ethics and the conception of human-nature-as-it-could-be-if-it-realised-its-*telos*'.¹⁴

MacIntyre claims that the notion of human rights is simply another attempt to

rescue the autonomous moral agent from the predicament in which the failure of the Enlightenment project of providing him with a secular, rational justification for his moral allegiances had left him.¹⁵

We have lost the meaning of our moral language although we continue with its use. MacIntyre's dismissal of belief in rights as 'one with belief in witches and in unicorns' is well known.¹⁶ Every attempt to give adequate reasons for belief in rights has failed: they are not derivable from self-evident truths because there are no self-evident truths; intuition as a basis is notoriously unreliable; the 1949 UN Universal Declaration Of Human Rights gives no good reasons at all (neither does the more recent Convention on the Rights of the Child). MacIntyre concludes that natural or human rights are fictions. A further reason why we should not take rights seriously is that there is no cognate expression in any of a wide range of languages up to relatively modern times. He concedes that it does not follow from this that there are no natural or human rights but that no one could have known that there were.¹⁷ Rights might have either have had to await *discovery* (they were there but no one knew it, and so they could not have been named) or *invention* (they were not there and so could not have been named).

Of course MacIntyre is essentially correct: there has not been an unambiguously successful attempt to prove the existence of rights. Yet belief in them persists. When belief in witches exercised a significant influence on people's moral, social, and political lives they were taken seriously.¹⁸ This did not mean however that witches had *objective* existence: belief in them engendered their social consequences. The social consequences were real. Rights differ ontologically from witches in this respect: rights *are* their moral, social, and political effects. There is no sense in asserting that there are (objectively existing) rights which, somehow, incidentally to their objective existence exercise an influence on our moral, social, and political behaviour because that is not the kind of entity a right is.¹⁹ A right is *no*

¹⁴ *Ibid.*, 51.

¹⁵ *Ibid.*, 65.

¹⁶ *Ibid.*, 67.

¹⁷ *Ibid.*

¹⁸ See Boyer, P., Nissenbaum, S., Salem Possessed: the Social Origins of Witchcraft, Harvard University Press, 1974, especially chapter 8; Evans-Pritchard, E.E., Witchcraft, Oracles, and Magic Among the Azande, (abridged), Eva Gillies, ed., Oxford, Clarendon Press, 1976.

¹⁹ See Ingram, A., A Political Theory of Rights, Oxford, Clarendon Press, 1994, esp. 93-96. When we take rights as 'ways of expressing moral judgements made within a conception of persons we avoid any metaphysical commitments'. (93) We do not have rights in the same way as we have bodily parts or functions. Rights cannot be asserted or denied 'independently of the theoretical context in which they are embedded.' (94)

more than its effect on these aspects of human relations. If belief in rights leads to the adaptation of human behaviour to accommodate the rights in question *then the rights exist*.²⁰ The same cannot be said of witches. Rights are brought into existence, in effect, by persuading people that they exist and that they must adjust their behaviour to accommodate them. This is precisely what happened historically: moral rights were neither discovered nor invented as objectively real entities. They evolved or were created as part of the human conversation, as a persuasive device and as a regulatory mechanism. Their persuasive function is to urge the extension of moral principles to hitherto excluded groups; their regulatory function is to arbitrate between competing claims of individuals or groups.

It has been strongly argued, however, that the language of rights is redundant.²¹ Brown distinguishes two conceptions of rights: the derivative and the foundational.²² According to the derivative conception rights are of secondary importance to some higher moral order (or some more basic moral principles) from which they derive. This position is also argued by Mary Warnock.²³ Like Bentham she argues that there is no legal right without a corresponding law.

(T)he important thing about rights is that they are necessarily contained and defined by law (or at least a convention) and that they are therefore universal. Anyone who is governed by the law is given the right under that law. And the claim to a right must be proved (or disproved). Whether or not you are being deprived of something rightfully yours should be capable of being settled, if necessary, in court.²⁴

Secondly, she argues that the moral rights we claim are simply intermediary concepts which cloak the reality that talk (and disagreement) about moral rights is simply talk (and disagreement) about morality.²⁵

This also appears to be the view of Feinberg.²⁶ He argues that rights are valid claims which are claims *to* something and claims *against* someone. 'To have a right is to have a claim against someone *whose recognition as valid is called for by some set of governing rules or moral principles*.'²⁷ The *act* of claiming does not justify *having* a claim: to have a claim is to be in a position to make a claim. The validity of the claim must be antecedently established, presumably on other grounds. That is to say that the validity of the claim

²⁰ It is the common consent that rights *have* effect which ultimately *gives* them the effect. See Searle, John, R., The Construction of Social Reality, Harmondsworth, Penguin Books, 1996.

²¹ Brown, A., Modern Political Philosophy: Theories of the Just Society, London: Penguin Books, 1986, 102 - 110.

²² *Ibid.*, 102

²³ Warnock, M., The Uses of Philosophy, Oxford, Blackwell, 1992, 17-20.

²⁴ *Ibid.*, 71.

²⁵ *Ibid.*, 72.

²⁶ Feinberg, 'The Nature and Value of Rights', *passim*.

²⁷ *Ibid.*, 257, emphasis added.

cannot be justified simply by appealing to the right which is being claimed: this would be circular. There must be some principle, which is independent of the claim itself, which can be appealed to in order to validate it.

Does the term 'rights' add anything significant to our moral discourse? Is it only of rhetorical or ideological significance? Could we, in fact, abandon the language of rights entirely and still say everything we need to say about our moral relations? What is the difference between saying that something is wrong, or that there is a duty not to do it, and saying that someone (or something) has a right that it not be done?

(Is there any difference between saying, for instance, that it is wrong to torture animals or that there is a duty not to torture animals, on the one side, and saying that animals have a right not to be tortured, on the other: that is the problem of the significance of rights language.²⁸

Moral discourse can go quite a distance without employing the 'quasi-legal conception of rights'²⁹ and has done so for much of human history. Do principles about what it is morally right to do underpin rights? If there is a basis for ascribing a moral right to someone, and if this basis requires us to act in accord with the right, then it would seem that the basis and the requirement can be interpreted as indicating a morally obligatory course of conduct with respect to that person independently of whether we call it a right or not.

Golding illustrates the distinction between 'right' and 'rights' with the example of Socrates in the Crito. Socrates wants to know whether it is just or unjust, right or wrong, to escape his sentence: in rights terminology, does Socrates *have the right* to escape his sentence? It is the same moral dilemma but the latter form switches our perception of the problematic situation from an 'objective' notion of rightness to a 'subjective notion of rights possessed by individuals':

The word 'right' has a dual use and, therefore, an ambiguity that can bedevil the ethical theorist. It may be that in the last analysis the notions of moral, natural or human rights are parasitic on the idea of 'what is right'.³⁰

Historically the importance of rights was reinforced by the increasing influence of legal ideas on ethical thought and the rise of individualism and the nation state.³¹

The language of rights has a special significance within moral discourse because it marks out a special domain of morality. Firstly, the language of rights carries with it, in a way that

²⁸ Golding, M., 'The Primacy of Welfare Rights', Social Philosophy and Policy, 1, 2, 1984, 122.

²⁹ *Ibid.*, 128.

³⁰ *Ibid.*, 126/7. For an account of the etymology of the word and the relationship between 'rights' and 'right' see Dagger, Richard, 'Rights', in Terence Ball, et al., eds., Political Innovation and Conceptual Change, Cambridge, University Press, 1989, 292-308.

³¹ Golding, 'The Primacy of Welfare Rights', 119-128.

non-rights moral discourse does not, a recognition that the object claimed as a matter of right is an element of, or a means to, another's personal good. While it could be argued that there is in any event a personal duty to promote the personal good of others the language of rights establishes *their* claim to the promotion of *their* good.³² The moral centre of gravity, as it were, switches from the moral obligations of the agent to the moral entitlements of the recipient. Talk of rights is 'one with talk of what is right and wrong from the perspective of individual agents'.³³ Talk of right and wrong represents the point of view of the agent whereas rights talk represents the point of view of the recipient. When a right holder's right is violated, he is wronged, (whoever has violated his right has *done* wrong), and the relevant demands, claims or complaints can be validly made on his behalf.³⁴ This is not to say that rights are a substitute for power; they are not, except in the restricted sense of moral power. While rights are conventions for according power to the otherwise powerless by themselves they are ineffectual. '(T)hey depend upon governmental power, which is external to them, for any effectiveness in the real world'.³⁵ They also depend, as Mill realised,³⁶ on the power of social opinion whether this is enshrined in law or not.

Rather than confer immediate power a right ascribes status or worth to the rights-bearer: '(T)he ultimate purpose of ... rights is to secure for each person a fundamental moral status.'³⁷ This status or worth requires, as well as the specific duty called forth by the right in question, a certain regard for those who are rights-bearers. 'This attitude is best not described as a duty at all; it is an ideological or ontological view of the social world'.³⁸ It is a recognition (or an assertion) that the world is populated, not by potential recipients of the duty of others (the ideology of charity), but by autonomous individuals of equal standing one with the other. Feinberg's characterization of rights expresses the distinction succinctly: rights are

especially sturdy objects to 'stand upon', a most useful sort of moral furniture ... Having rights enables us to 'stand up like men', to look others in the eye, and to feel in some fundamental way the equal of anyone. To think of oneself as the holder of rights is not to be unduly but properly proud, to

³² *Ibid.*, 134-136.

³³ Ingram, *A Political Theory*, 93.

³⁴ Haskar, Vinit, 'The Nature of Rights', *Archiv fur Rechts und Sozialphilosophie*, 64, 183-204, 1978.

³⁵ Heslep, Robert D., 'The Power of the Right of Education', *Proceedings of Philosophy of Education*, 48, 1992, 205.

³⁶ Mill, J.S., *On Liberty*, in H.B. Acton, ed., *Utilitarianism, Liberty, Representative Government*, London, J.M. Dent & Sons Ltd., 1972, 69. 'All that makes existence valuable to anyone, depends on the enforcement of restraints upon the actions of other people. Some rules of conduct, therefore, must be imposed, by law in the first place, and by opinion on many things which are not fit subjects for the operation of law.'

³⁷ Gewirth, *Human Rights*, 5.

³⁸ Freedman, *Rights*, 9.

have that minimal self-respect that is necessary to be worthy of the love and esteem of others.³⁹

The difference can be illustrated with reference to children's rights. There are two ways of describing our moral relation to children. We can say that children ought to be looked after or we can say that children have a right to be looked after. We can justify the former with reference to motives which have nothing to do directly with the welfare of the child. Swift's 'modest proposal' to fatten children for consumption is a clear example, as are educational policies designed exclusively, or primarily, with a view to promoting economic or technological development. The assertion that children have a *right* to be looked after is based on a conviction that

each and every child is a being whose needs and capacities command our respect, so that denial to any child of the wherewithal to meet his or her needs and to develop his or her capacities would be wrong in itself ... and would be wrong regardless of the ulterior disadvantages or advantages to anyone else'⁴⁰

Brown claims that rights are only a strong way of presenting a moral claim, that when we claim something as a right we are asserting that there is a good moral reason to respect or promote our freedom in this particular case. He considers Dworkin's point that someone can have the right to do something that is wrong for him to do thus showing that rights have independent moral existence. He objects that 'if something is morally wrong, isn't it merely perverse to say you have a right to do it? ... the rights thesis implausibly maintains the existence of a *sui generis* right to do wrong.'⁴¹ The perversity of the claim of there being a right to do wrong might be given sharper focus if we try to imagine whether a legal right could confer the right to break the law.

Brown concludes that rights are *not* foundational entities and that we can construe them, without loss of plausibility, as claims which can be expressed in terms of familiar moral considerations such as need, desert, merit, or utility.⁴²

The function of rights

Rights are means to the protection and promotion of human well-being. It is not the rights which have special protection but the developmental capacities which the rights protect. To

³⁹ Feinberg, 'The Nature and Value of Rights', 251. Similarly a right is 'a just (or justified) entitlement for making effective claims and demands'. To have rights is to be free of a master-slave authoritarian relation. Bandman, B., 'Some Legal, Moral and Intellectual Rights of Children', Educational Theory, 27, 3, 1977, 170.

⁴⁰ MacCormick, N., 'Children's Rights: a Test-Case for Theories of Rights', Archiv fur Rechts und Sozialphilosophie, 62, 1976, 309. Part of Rousseau's contribution to the growth of children's rights was to shift our perceptions from the extrinsic value of children to the intrinsic value of childhood.

⁴¹ *Ibid.*, 106/7.

⁴² Brown, Modern Political Philosophy, 107.

assert that human beings have rights is to assert that it is not just the existence of human beings which is of value but 'their development, self-expression, mutual support and happiness'.⁴³ Rights are not basic theoretical items, but instruments for the protection of these basic values which are.

The strongest contemporary rights theory holds that a right is a 'side-constraint' on the action of others. '(W)here some goal or good conflicts with someone's right his waiver must be sought if that goal or good is to be legitimately pursued'.⁴⁴ A weaker theory is that although rights are in some way independent, foundational, or *sui generis*, and require special consideration from others, they *can* be over-ridden without the consent of the rights holder but only in the most extreme cases. The weaker view attempts a compromise between rights and consequential considerations.⁴⁵

The first of these theories is an absolutist view of rights whereby rights can never be legitimately violated, that is, overridden without the consent of the right holder. They are absolute in the sense *not* that they can never be overridden but that the consent of the rights holder is required. Brown takes the absolutist view to be 'untenable' because ultimately it fails to address the question of 'moral catastrophe'. He might have added that, within its own terms of reference, it is also incoherent: any theory of rights in which one is required to respect the rights of others *cannot* be absolutist and must be, however minimally, consequentialist: there is always a hidden 'unless'.

The weaker view, the 'compromise theory' recognises the 'unless'. This theory will need to specify exactly when a right may be outweighed by other considerations. But then the decisiveness which rights are supposed to confer in problematic situations is lost to 'interminable casuistry concerning just how much suffering, real or expected, sanctions overriding rights'.⁴⁶ In short the weaker theory gives us no guide in determining, in specific cases, whether rights or consequences should finally prevail.⁴⁷ So rights cannot play the role assigned to them.

Rights express moral judgements within a particular conception of persons. Whatever scheme of rights we endorse is inevitably tied to our judgements about the importance of certain freedoms and capacities, our 'philosophically favoured conception of the person'.⁴⁸

⁴³ Freedman, Rights, 10.

⁴⁴ Brown, Modern Political Philosophy, 104.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*, 105.

⁴⁷ *Ibid.*, 106.

⁴⁸ Ingram, A Political Theory, 94.

Moral rights may be regarded as those interests which are thought to be of such significance to the life of the human individual that they ought to be given priority in the organisation of societal existence whenever possible.⁴⁹

As already noted rights do not have objective existence: they are features of human thinking and practice. Moral entities such as rights (or values or standards) are defined in social situations which promote particular views of human capacity and the conditions necessary for human flourishing.⁵⁰ Various social contract scenarios are not accounts of some supposed actual historical happening, they are simply heuristic devices which attempt to clarify an already existing situation. They do not create the political reality, they attempt to understand and explain it. Nonetheless the design of social contract situations 'must embody some assumption about the political context (they aim) to clarify',⁵¹ including a view on human capacity and flourishing. A right-based moral or political theory has to explain whether the rights it endorses are universally determinable *a priori* by some kind of reason, or are historically determined in and by concrete institutions.⁵²

In this work I will adopt the latter position, agreeing with Mackie when he writes

I am confident that no normative theory ... can in the end be held to be objectively valid. Normative systems ... are made by men, independently or collectively, by explicit invention or by unconscious development. ... But these fundamental principles are not a matter of truth or falsehood, but of choice and endorsement. So we are not to look for any set of self-evident truths about what basic rights people have, nor to think our theory any the weaker because we cannot discover such truths. Rather we have to look for some system of basic rights which we are ourselves prepared seriously to ascribe to people in general, and which there is some hope that people in general may come to recognise one another as having.⁵³

Not all rights, of course, are basic. Non-basic derivative rights draw their authority and force from the basic rights. Rights can be derived from other rights in 'fairly obvious logical ways' including 'a causal derivation of rights from rights'. Mackie concludes that it seems to be 'at least formally possible to have a system of moral ideas in which some rights are fundamental and other rights ... are derived from these'.⁵⁴ Basic rights might be of the kind identified by Mill, freedom of thought and opinion, freedom of tastes or pursuits, freedom of association with others. Derivative rights might be the specific forms of expression that the

⁴⁹ Campbell, 'The Rights of the Minor', 9. Campbell appears to confuse the rights and the interests: they are not identical. The rights are devices to protect the interests.

⁵⁰ Mackie, J.L., Ethics: Inventing Right and Wrong, Penguin Books, 1990, 108.

⁵¹ Ingram, A Political Theory, 97. Her 'social contract situation' of choice is 'liberal democracy, a political culture that insists on the democratic equality of all citizens and recognises the importance in their lives of certain fundamental liberties'.

⁵² Mackie, Ethics, 116.

⁵³ Mackie, J.L., 'Rights, Utility and External Costs', in Mackie, J., Mackie, P., eds., Persons and Values: Selected Papers, Vol. 2, Oxford, Clarendon Press, 220/1.

⁵⁴ Mackie, Ethics, 107. 'Fundamental' here does not mean derived from *a priori* principles, but simply logically prior.

basic rights may take: the freedom to be an anarchist (or conservative), the freedom to collect butterflies, the freedom to belong to a trade union.

The fundamental source of the rights is 'optimal human functioning'. This is

a practical, common-sense desideratum inasmuch as we want human beings to exist and to exist well. The needs and capacities protected by rights are humanly functional and necessary for the rights-bearer, rather than logically entailed by our understanding of what is objectively right.⁵⁵

Human rights

The statement that all men (human beings) are equal can be shown to be empirically false by a wide variety of tests. But it is not an empirical statement: it is a declaration of an aspiration. There are certain respects in which all persons *should* be deemed equal. One of these respects is the belief that all human beings have common developmental capacities which need to be protected and enhanced. Rights are based on this belief. These developmental capacities⁵⁶ are crucial to human flourishing and are the basis of fundamental rights. Rights are socially constructed devices through which constraint may be imposed on the action of others in the service of certain values (including these developmental capacities) when it is held that these values justify constraints. Rights also express empirical beliefs about the fate of those values with and without the constraints.⁵⁷

Is being human a necessary and sufficient condition for enjoying rights? As long as being human does not admit of degrees then all human beings would appear to have these rights to the same degree. This would allow us to give a meaning to the slogan 'all human beings are equal' which is not descriptive (they are not), or normative (they are not to be treated equally but according to relevant inequalities). It is so if we consider 'all human beings are equal' as an analytic proposition to the effect that the predicate 'human' has an 'all or nothing' character, that it does not allow of gradations of 'humanness', of being more or less human. This being so then all human beings are equally human beings and therefore have rights to the same degree.⁵⁸

Is it true that the predicate 'human' does not admit of gradations of completeness i.e. has this 'all or nothing' character? There are two alternatives in analysing the concept. We can read it in relation to certain biological properties which are universal among human beings or we can read it in relation to differential traits such as rationality, knowledge, experience, autonomy, 'maturity of faculties', etc.

⁵⁵ Freeden, *Rights*, 9.

⁵⁶ Freeden's 'vital attributes', *Ibid.*, 9.

⁵⁷ Ingram, *A Political Theory*, 114/5.

⁵⁸ Nino, C.S., *The Ethics Of Human Rights*, Oxford, University Press, 1991, 35.

The biological interpretation appears to give a non-gradual character to 'human'. But is it relevant to the ascription of basic moral rights? It is difficult to see how biological facts can of themselves be morally relevant. It is a commonplace (though contested) of ethical discourse that statements of fact (descriptive) cannot lead logically to statements of value (prescriptive) without the mediation of some ethical principle. Of themselves the biological facts appear not to provide the kind of warrant necessary to conclude that we ought to treat all human beings in a particular way⁵⁹ much less identify the ways in which we ought to treat them.

The legitimacy of the fact/value dichotomy has, however, been challenged in a way which is relevant. MacIntyre identifies functional concepts as concepts (watch, farmer) which cannot be defined independently of their particular excellence (good watch, good farmer). Each of this class of concepts (which includes persons and actions) 'has a given specific purpose or function'. Excellence (for a watch, a farmer) is part and parcel of the definition of the entity. To understand what a watch (or farmer) *is*, is to understand what a good watch (farmer) *is*. If we take 'Man' as a functional concept (that is as having essential human purposes or functions) as the ancients (e.g. Aristotle) did then there is no warrant for concluding that 'ought' does not follow from 'is' in moral matters. That is to say, 'man' stands to 'good man' as 'watch' stands to 'good watch' or 'farmer' stands to 'good farmer' within the classical tradition. To talk about a good watch, a good farmer, a good man is to make factual statements. On this view human action is to be explained teleologically, that is, 'with reference to a hierarchy of goods which provide the ends of human action ...the facts about human action include the facts about what is valuable to human beings ...'. However, 'once the notion of essential human purposes or functions disappears from morality, it begins to appear implausible to treat moral judgements as factual statements'.⁶⁰

The differential traits invoked in the second option would seem to be more relevant to the ascription of rights but they are of a gradual kind so that if the predicate 'human' were defined in terms of them it too would acquire a gradualist character. Thus the slogan, 'all human beings are equal', would be false even in its analytic interpretation since the traits are not equal from individual to individual or within an individual from time to time. Nino concludes that the presupposition

that the concept of moral person must denote a class of individuals (like the class of *human* beings) distinguished by factual properties that are mentioned in fundamental moral principles as conditions for being entitled to certain rights

⁵⁹ MacIntyre, *After Virtue*, 54-57. Mary Midgley (*The Ethical Primate: Humans, Freedom, and Morality*, London, Routledge, 1994, *passim*) argues cogently that human morality is a function of factual human sociability, not a result of some rational process like the Enlightenment project which 'divides thought radically from feeling.' 152.

⁶⁰ MacIntyre, *After Virtue*, 81.

must be rejected.⁶¹ His preferred strategy is Kantian, to start from the moral principles from which basic rights are derived, rather than beginning with the concept of human being. Once this has been done we can then proceed 'to define the class of moral persons as the class of all those individuals (or entities) who possess the properties which are in fact necessary to enjoy or exercise those rights'.⁶²

But this will not do. The moral principles themselves are abstracted from pre-existing human practices. The Kantian and other constructivist approaches to the problem are premised on selecting only one or two human capacities (rationality, freedom) and disregarding others like love, loyalty, sociability, generosity, which are indisputably part of lived moral experience.

Justifying rights: a case study

Gewirth⁶³ identifies a number of unsuccessful attempts to justify moral rights. These include intuitionism which (like claims to self-evidence) provides no way of choosing between conflicting intuitions, and institutionalism (i.e. rights arise from transactions grounded in formal or informal rules of institutions, such as promising) which is irreparably damaged by the fact that some institutions may be judged to be morally wrong.

Gewirth also rules out claims that rights are grounded in interests for two reasons. First of all, interests are at best a necessary condition for having rights, they are not, on their own, sufficient. The argument from interests raises the problem of making the transition from the empirical identification of interests (descriptive) to the (prescriptive/normative) identification of rights. In response to this we could say, however, that the statement of interest itself must invoke some normative criteria. Interest is a developmental concept: in both the dispositional and normative senses (*interested in* and *in one's interest*) there is at least the echo of an evaluation. In the first case a preference for X over Y; in the second case an appeal to some end or end-state (teleological) which allows discrimination between this or that interest. To say that it is in one's interest to be, to have, or to do X only makes sense if there is some end-point which gives X value and relevance. Gewirth's second objection to interests is stronger: if interests entailed rights then there would be an unmanageable proliferation of rights. This would be so only if we conceded the principle of a right for each and every interest. But why should we not accept that universal human characteristics rather than restricted inegalitarian characteristics are the generators of human rights?

⁶¹ Nino, The Ethics Of Human Rights, 36.

⁶² *Ibid.*, 36.

⁶³ Gewirth, Human Rights, 43,44.

Gewirth further objects that the argument that rights devolve from intrinsic worth or dignity is question begging. There is no more reason to accept intrinsic worth in the first place than there is to accept rights in the first place. The intrinsic worth argument adds nothing to what we already know: how do we identify that which has intrinsic worth? This position with regard to 'worth' appears to be based on a confusion, however. 'Worth' is not an empirical quality like mass, colour, location, nationality etc., it is an ascribed quality: things have worth *for us*. To describe this worth as intrinsic is not to attribute some objective reality to the worth: it is more like an assertion that the ascription of worth is more than subjective preference, that it is universally ascribed within a particular community to a particular thing, and that therefore it has a status which goes beyond the particular evaluation or preference of any individual. It is an aspect of *social* reality.⁶⁴

Gewirth accepts, however, that questions of justification may ultimately be irrelevant. Rights judgements and moral rights are prescriptive, advocatory, urging that 'certain facts be brought into existence'.⁶⁵ Nevertheless, we continue to be persuaded that it is possible to adjudicate *between* competing rights claims. Therefore there must be at least a belief in some basis from which we can judge between competing claims.

Gewirth attempts to ground human rights in a rationalist conception of the person as an autonomous, purposive agent. Human rights are a species of moral rights which are equally possessed by all humans by virtue of their humanity. Human rights are moral because they are based upon or justifiable through some valid moral principle. A moral principle

sets forth as categorically obligatory certain requirements for action that are addressed at least in part to the actual or prospective agents and that are concerned with furthering the interests ... of persons or recipients other than or in addition to the agent or the speaker.⁶⁶

The importance of human rights resides in the fact that they are rights to the necessary conditions of human action. The necessary conditions of human action are those conditions which must be fulfilled if human action is to be possible 'either at all or with general chances of success in achieving the purposes for which humans act'.⁶⁷

Gewirth argues that as prospective purposive agents human beings frame objectives before pursuing them. In order to be a prospective purposive agent you must recognise that freedom and well-being are necessary goods, that is they are necessary means to *any* objective you may have. Consequently any agent must claim rights to freedom and well-

⁶⁴ See Searle, The Construction of Social Reality, chapters 1 and 2.

⁶⁵ Gewirth, Human Rights, 45.

⁶⁶ *Ibid.*, 1.

⁶⁷ *Ibid.*, 3.

being, or he will be denying the conditions which are necessary to his being 'able to act either at all or with general chances of success in fulfilling the purposes for which he acts'.⁶⁸ As a further consequence an agent must recognise that everyone else has these rights to freedom and well-being since all agents equally possess the same sufficient grounds. Freedom and well-being also comprise the object of human rights.

The reasons for basing human rights on the necessary conditions of human action are the crucial importance of the latter. They connect rights directly to morality, they are more specific than other concepts, they emphasise that the 'ultimate purpose of the rights is to secure for each person a certain fundamental moral status', and, finally, they provide a way of proof that there are human rights.⁶⁹

Human rights are not contingent but necessary: the form of human rights is not if/then (as in 'If a promise has been made, then ...') but

*Because every human being must have certain goods if he is to be able to act either at all or with chances of success in general in achieving his purposes, it follows that, he has rights to these necessary goods. The 'because' and 'if' in the antecedent are necessary in relation to the general conditions of action: they are not contingent on persons' variable choices or decisions, since they pertain to the very possibility of action and successful action. Hence no person can rationally disavow either the necessary goods or the consequent human rights.*⁷⁰

All human beings have human rights in full 'to the extent that they are inherently capable of exercising them'.⁷¹ This inherent capacity requires that one is a rational agent in the minimal sense of having purposes one wants to fulfil, being able to control behaviour accordingly, while knowing the particular circumstances of the action. Variation in the possession of human rights matches variations in the inherent capacity: '...the human rights pertain equally to all humans who have the minimal degree of rationality needed for action'.⁷² The requirements of intentionality, control, knowledge, and rationality would appear to exclude at least infants and very young children from the category of rights holder.

There are two categories of individuals for whom the rights might be restricted: those who may not be capable of exercising the right at all (he instances the right to education for persons with severe mental handicap) and those who may not be capable of exercising the

⁶⁸ *Ibid.*, 4.

⁶⁹ *Ibid.*, 5. Human rights are 'normative relations to objects which one must have in order to be an agent ... they are the necessary basis and focal point of all morality since no morality ... is possible without the necessary goods of action which are the objects of human rights'. 6.

⁷⁰ *Ibid.*, 7.

⁷¹ *Ibid.*, 8.

⁷² *Ibid.*, 8.

right without causing serious harm to themselves or others (he instances very young children).⁷³

There are three stages in Gewirth's argument. Firstly a rational agent claims rights of freedom and well-being as essential conditions of action. Secondly, these claims are transformed into moral rights by an appeal to a principle of universalization. Thirdly, the scope, content, and limits of the rights are spelled out.⁷⁴

The first difficulty in Gewirth's position is the logical gap between the assertion of a necessary good and the declaration of a right. Even if something is acknowledged to be a necessary good there is still the problem of deriving a right from this fact. Claiming that something is an essential means to some end does not necessarily give one a right to it in the sense that there is a moral obligation on others to respect the claim. The move from claim (I want, I need) to right is 'dubious in its rationality'⁷⁵ and certainly appears to be illicit by virtue of the fact/value dichotomy.⁷⁶ To say that something is a necessary good for someone (A needs X) is not sufficient to establish the necessary good as a right (A has a right to X).⁷⁷ Gewirth does not succeed in showing that anyone other than the agent himself has an obligation to respect his freedom and well-being as a moral agent. The objection is not to the primacy of freedom and well-being in moral agency but to the way in which Gewirth proceeds from this recognition to the assertion of rights, that is the obligation on others to respect the freedom and well-being.⁷⁸ This difficulty is conceded by Gewirth.

Secondly, rights claims presuppose that there is a set of rules which come into existence only in specific historical circumstance because they are socially established. While the needs or wants which underlie the rights claims may be 'universal features of the human condition' rights are not; they are expressions of the prioritization of selected needs and wants by specific human communities: rights and rights-related duties 'can arise only in a social context'.⁷⁹ Gewirth's analysis neglects the inter-personal which is vital to the very existence of the comprehensibility of rights. A conception which relies on historical contingencies does not belong to the characterisation of the rational agent upon which Gewirth bases his argument.⁸⁰ This is a crucial issue. Gewirth begins from a position of

⁷³ The vagueness of the category 'very young children' is notable.

⁷⁴ Gewirth, Human Rights, 41-78.

⁷⁵ Brown, Modern Political Philosophy, 110. MacIntyre makes essentially the same objection. After Virtue, 64/5.

⁷⁶ See Paul, Jeffrey, 'Gewirth's Solution to the "Is-Ought" Problem', The Personalist, 60, 1979, 442-7. MacIntyre's critique of the 'No "ought" conclusion from "is" premises' principle may be relevant here, however. He argues that the principle proceeds from 'an impoverished moral vocabulary'. See MacIntyre, After Virtue, Chapter 5.

⁷⁷ Golding, M., 'From Prudence to Rights: a Critique', Nomos: Human Rights, 23, 1981, 165-174.

⁷⁸ Lomasky, L., 'Gewirth's Generation Of Rights', Philosophical Quarterly, 31, 1981, 248-253.

⁷⁹ Golding, 'The Primacy of Welfare Rights', 130.

⁸⁰ MacIntyre, After Virtue, 64/5.

moral neutrality: his agent is a 'rational [or prudential] amoralist'.⁸¹ The rational amoralist can recognise certain objects as goods for himself or even concede that they are goods for others but such 'goods' are always qualified because the approach of the rational amoralist is prudential, not moral. He recognises goods only as *means* for his own or others' desired ends.

More importantly terms such as 'right', 'duty', and 'obligation', are not part of the rational amoralist's lexicon. The term "a right" does not occur in his basic language. The amoralist, so to speak, does not play in the moral ballpark.⁸² The rational amoralist never claims anything as a right. He can make claims, what he wants others to do or to give to him, but such claiming does not amount to having claims (rights) without the intervention of other factors.⁸³ The nearest that the rational amoralist can get to rights is to claim a 'prudential right', i.e. one that derives from prudent self-interest. This can be the case when a plurality of rational amoralists engage in a situation (the pursuit of a mutually desirable outcome) which requires 'mutual co-operation and mutual undertakings'.⁸⁴ But the principles to which they appeal are not moral principles in the sense that they apply to all in all relevant circumstances. At best they are rules which apply only in the immediate circumscribed circumstances.

Gewirth concedes the logical gap between the identification of a necessary good for an agent and the declaration of a right. But he claims that this logical gap will be closed when we move from an outside view of the situation to an internal, conative view. Even from this conative view, however, it is difficult to see how a statement of one's own wants (or even 'needs'), or an assertion that such-and-such are necessary goods, can be prescriptive for others.

In short, the claim on the co-operation of others is being made on the basis of self-interest and for purely prudential reasons. It is not a claim of right. For the rational amoralist to claim that something is 'due to him' from his own standpoint is no more than the tautology that 'his necessary goods are necessary for him'.⁸⁵

A third major weakness in Gewirth's theory is that freedom and well-being are not necessary means to some objectives human beings might have. Freedom is not an advantage to the incompetent or weak willed, or generally to those who are unable to exercise the freedom. There are legitimate objectives for which well-being is not necessary:

⁸¹ Golding, 'From Prudence to Rights', 167.

⁸² *Ibid.*, 168.

⁸³ *Ibid.*

⁸⁴ *Ibid.*, 169.

⁸⁵ *Ibid.*, 171.

suicide, martyrdom, terminal hunger strike.⁸⁶ Objecting to the counter-examples involves criticising the ends involved and hence invokes more than the notion of agency. To see Gewirth's 'necessary good' as such we must have a prior system of ends for which they are necessary and this 'undermines any claim the theory has to provide foundations for morality in rights'.⁸⁷

Gewirth's attempt to find a conclusive fundamental justificatory principle for human rights shows a number of weaknesses which characterise all such attempts to found rights on purely rational considerations. There is a logical gap between the description of putative real situations and any moral principle binding on all; the account neglects the interpersonal which is the context which give rights their substance and meaning; basing such a heuristic on the interests of an isolated asocial individual, who is by definition rationally amoral, makes it impossible to connect the experience of the individual to the real world of social interaction; while freedom and well-being may be necessary means to some moral objectives there are legitimate human objectives for which they are neither appropriate nor necessary; an adequate account of moral action requires an understanding of ends towards which the moral action is directed.

It is not just Gewirth's but all attempts to find a foundational rational principle for rights or, more generally, for morality, which are doomed to failure. What MacIntyre calls the 'Enlightenment project'⁸⁸ had to fail because it was radically separated from the context which gave sense to the moral language that it used and the moral precepts that it attempted to justify. In particular the loss of any conception (indeed, the abandonment of the entire *concept*) of a human essence or *telos* meant that, in a sense, there was nothing for ethics (or the practice of morality) *to do*. While we retain the concept of untutored human nature ('human-nature-as-it-happens-to-be') we have lost the concept of 'human-nature-as-it-could-be-if-it-realised-its-*telos*' and so, consequently, have also lost the functional understanding of morality, which was the means of transforming the former to the latter. Attempts to provide a rational grounding for morality fail because, in short, they have no place to go, there are no ends towards which moral action is directed.

A foundational principle?

Human beings are not interchangeable one for another; they are not just individuals, they are persons. There is no supreme impersonal standard against which all individuals are interchangeable or in terms of which all ends are commensurable. There cannot be a rational obligation or duty 'to sacrifice for the sake of someone else's interests that which is

⁸⁶ More prosaically, parents will often sacrifice their own well-being for the benefit of their children.

⁸⁷ Brown, *Modern Political Philosophy*, 109.

⁸⁸ MacIntyre, *After Virtue*, chapters 4 and 5.

essential to (one's) own ability to construct a worthwhile life'.⁸⁹ The latter would be supererogation not duty.

The main function of rights in a deontological theory is to ensure that on specifiable occasions we cannot be forced to do or suffer something for the sake of some good. In other words it is morally unacceptable to subordinate an individual to a purpose to which she has not freely consented. If the good is the good of the individual then the rights rule out paternalism, if it is the general good then rights rule out consequentialism in general.⁹⁰

Bobbio believes that the search for an absolute foundational principle for human rights is misconceived. In the first place human rights are ill-defined: every attempt to find, or derive, universal foundational principles has proved to be inconclusive. 'Human rights' is conceptually vague; most of the attempted definitions are tautologous: if they tell us something about the status of the concept it is at the expense of the content and vice versa; where content is the issue it is bedevilled by value judgements and the ideological position of the interpreter.⁹¹

In the second place human rights constitute a variable category: they are historically contingent and change in keeping with historical developments. They are not fundamental by their nature. 'That which appears to be fundamental in a given historical era or civilization, is not fundamental in other eras or civilisations'.⁹²

Thirdly, human rights are heterogeneous: many of the demands in declarations of human rights are mutually incompatible. Bobbio argues that instead of looking for a single all-embracing principle we should talk of *principles* of human rights. Some human rights are 'valid in every situation and concern all human beings without distinction, such as the right not to be enslaved or not to be tortured'.⁹³ Such rights have 'absolute value', a privileged status which only arises in 'a situation in which fundamental rights do not compete with other fundamental rights'.⁹⁴ In the case of slavery and torture, for example, any putative right to own slaves or to inflict torture 'is universally condemned'.⁹⁵ On the other hand many rights are adversarial: it is not possible to assert one (the right not to be enslaved) without denying another (the right to own slaves).⁹⁶ Both the right which is being asserted and the

⁸⁹ Lomasky, Persons, Rights, and the Moral Community, Oxford, University Press, 1987, 53.

⁹⁰ Brown, Modern Political Philosophy, 104.

⁹¹ Bobbio, The Age of Rights, 5.

⁹² *Ibid.*, 6.

⁹³ *Ibid.*, 7. How does this fit with his assertion that human rights are not fundamental? He surely does not mean that new historical circumstances could return us to a situation when torture or slavery would be acceptable?

⁹⁴ *Ibid.*, 27.

⁹⁵ *Ibid.* It is not condemned by those who continue to use torture as an instrument of control.

⁹⁶ This is particularly apposite in relation to parents and children: for it is only in opposition to, and at the expense of, traditional parental rights that the rights of children can be expanded.

right which is being repressed will have arguments in their favour. Clearly both cannot derive from the same justificatory principle.⁹⁷ It appears that we can only decide between them by appealing to deeper justification. This would seem to indicate that a completely *rights-based* morality is not possible.

Fourthly, even the rights claimed by the same category of persons can be contradictory, the rights of freedom (which require others to forbear) for example, and the welfare rights (which require others to interfere). It is clear that two rights which are claimed to be fundamental but which are found, at the same time, to be contradictory cannot be grounded in a single absolute principle which makes them both 'irrefutable and irresistible.' The rights of private property (rights of freedom) were used for a long time to obstruct the development of more equitable social legislation (welfare rights). 'The absolute principle is not only an illusion; on occasions it is also a pretext for defending conservative positions'.⁹⁸

Finally, even if we could find an absolute foundational principle it would make very little difference. What prevents the implementation of rights is not their justification but their infeasibility. It is not how we might justify human rights which is the central contemporary problem but how we might protect them: it is a political not a philosophical problem.⁹⁹ The real task is much more modest than the search for an absolute principle, 'a sublime but desperate undertaking'; it is to find the relevant principles for 'each particular circumstance'.¹⁰⁰

So the search for an absolute foundation is illusory since human rights are not all of a piece. They are vague with regard to content, historically variable, heterogeneous (in the sense that some appear to be unlimited in application and valid for all, while others can apparently be restricted according to circumstances), and frequently mutually contradictory. Any invocation of absolute values is redolent of the kind of religious fanaticism or political absolutism which inevitably leads to intolerance of the kind that rights were intended to prevent in the first instance.¹⁰¹ Bobbio's recourse is to accept the universal adoption (or acceptance) of human rights (as articulated in various international agreements or declarations) as sufficient basis for action and decision. His position appears to be analogous to Marx's dictum that 'philosophers have only interpreted the world in various

⁹⁷ See Mackie, J.L., 'Can There be a Right-based Moral Theory', in Waldron, J., (ed.), Theories of Rights, Oxford U.P., 1984; Warnock, The Ethical Primate, 70-75.

⁹⁸ Bobbio, The Age of Rights, 9.

⁹⁹ *Ibid.*, 10.

¹⁰⁰ *Ibid.*, 11.

¹⁰¹ Historically rights 'were the product of sober English philosophies, English Puritanism and non-conformism, "respectable" English resistance to absolutism and concern for freedom and toleration'. Eugene Kamenka, 'The Anatomy of an Idea', in Kamenka, T., Tay, A.E.S., eds., Human Rights, London: Edward Arnold, 1978, 1.

ways; the point, however, is to change it'.¹⁰² He is, as it were, promoting a pragmatic course of action rather than a search for rational grounding of rights. Bobbio favours 'ideological or conventional' grounding to 'axiological or deontological' foundations.¹⁰³

The historicist thesis

So, rather than become enmired in apparently irreconcilable attempts to provide foundational theories of rights it may be more fruitful to accept rights, which have an identifiable point of origin in human history,¹⁰⁴ as a reality of contemporary moral relations and to proceed accordingly.

Bobbio adopts what Freedman calls a *quasi-contingent* approach to the historical development of rights: that is the belief that rights emerged only at a specific point in time but became lasting 'even if their appearance depended upon a particular set of events that might not have come about'.¹⁰⁵ Bobbio proposes that natural rights are historic rights; that they came into existence at the beginning of the modern era, together with an individualistic perception of society; and that they provide one of the principal indicators of social progress.¹⁰⁶

Bobbio's historicist theory is his basis for disputing 'not only the legitimacy but also the practicality of the quest for an absolute principle'.¹⁰⁷ The history of rights shows their development from their proclamation to their implementation, and from their implementation within individual states to their implementation within the international community.¹⁰⁸

Rights have their origins in the radical inversion of the political relationship between the state and the citizen, or the sovereign and the subject, 'which typifies the formation of the modern state.' The relevant emphasis has moved from the duties of a subject to the rights of a citizen. The central, definitive viewpoint is no longer that of the sovereign but that of

¹⁰² Marx, K., Engels, F., Fuerbach: Opposition of the Materialist and Idealist Outlooks, Moscow, Progress Publishers, 1976, 98.

¹⁰³ This is why Nino refers to Bobbio's position as 'positivism in action'. Nino, C. S., 'Positivism and Communitarianism: Between Human Rights and Democracy', Ratio Juris, 7, 1, 1994, 14-40, 15.

¹⁰⁴ 'A time, however, came in the progress of human affairs, when men ceased to think it a necessity of nature that their governors should be an independent power, opposed in interest to themselves'. Mill, On Liberty, 66.

¹⁰⁵ Freedman, Rights, 38. As the socio-economic circumstances which led to the formulation and assertion of some rights change the rights themselves may also have to be modified. See McGinn, R. E., 'Technology, Demography, and the Anachronism of Traditional Rights', Journal of Applied Philosophy, 11, 1, 1994, 57-70.

¹⁰⁶ This last it will be remembered was also the view of Spencer.

¹⁰⁷ Bobbio, The Age of Rights, viii.

¹⁰⁸ As exemplified in the almost universal adoption of the U.N. Declaration of Human Rights, Resolution 217A (III), 10 December, 1948, and, more recently, in the adoption and ratification of the U.N. Convention on the Rights of the Child, Document A/RES/44/25, 12 December, 1989.

the individual citizen. This reflects 'the success of the individualistic concept of society over the traditional perception of it as an organic whole.'¹⁰⁹ The relationship between rulers and ruled is increasingly seen in terms of the central rights of citizens who are no longer merely subjects but who play an active part in deciding how they will be ruled, and a concomitant decline in the powers of the sovereign in line with a more individualistic concept of society.¹¹⁰ As a citizen the free individual becomes the bearer of rights and duties which are distinguished from the rights and duties which attach to particular occupations and roles.¹¹¹

The experience of the religious wars at the beginning of the modern era 'gave rise to the right to resist oppression'. This right presupposes 'a primary and more substantial right': this is the right of each individual 'not to be oppressed and to enjoy a few fundamental liberties'. These liberties do not depend on the consent of a sovereign, they are not held on a basis of grace and favour, they are not conferred or given by any one or by any agency. They are, to that extent, natural, not because they somehow inhere in the natural world but because they are not contingent on anyone's consent or permission.¹¹² Where for example a natural right was once taken to be derivative of the natural law it has now, de-coupled from natural law theory, taken on an independent existence and is 'ascribed to people solely in virtue of their humanity or some aspect of it' and hence 'becomes the foundation on which the rest of morality is raised'.¹¹³ In Bobbio's view no single unifying principle can explain rights or provide a derivation. However fundamental human rights are, they are historical rights: they arise from specific historical conditions which are 'characterised by the embattled defence of new freedoms against old powers'.¹¹⁴ They are established gradually. Bobbio does not deny the *relevance* of first principles to the problem of rights. There are three ways of demonstrating values: 'deduction from a constant objective fact' e.g. human nature, considering them as self-evident truths, and the test of consensus. The first method leads to an array of theories of human nature which makes a resolution of the problem difficult if not impossible. The second is unreliable because of divergent and changing views about what is, or is not, self evident. In addition 'self-evidence' often masks dominant historical

¹⁰⁹ Bobbio, The Age of Rights, ix.

¹¹⁰ *Ibid.*, x. See chapter 3, 'The Age of Rights', for a full discussion of this analysis. Locke, of course provided the theoretical impetus for the transformation.

¹¹¹ See Plamenatz, J., 'Liberalism', Philip P. Weiner, ed., Dictionary Of The History Of Ideas, Vol. III, New York, Charles Scribner's Sons, 1974, 36 - 61.

¹¹² Bobbio, The Age of Rights, x. In a sense Bentham was correct; he became wrong as the historical context of the discourse changed, that is as the relationship between ruler and ruled was inverted. Power shifted from the will of the sovereign over the subject to the will of the subjects collectively (but acting as discrete individuals) over the state.

¹¹³ Brown, Modern Political Philosophy, 103.

¹¹⁴ Bobbio, The Age of Rights, x.

and social patterns of thinking about human nature.¹¹⁵ Only the third, the test of consensus, offers the hope of progress.

The proof of the Universal Declaration of Human Rights, for example, is not to be found in any transcendent ethical or metaphysical first principles but 'in the general consensus over its validity'.¹¹⁶ MacIntyre's comment is correct: there is no justification in the sense of evidence or argument establishing validity. Consensus replaces objectivity with 'the test of inter-subjectivity'.¹¹⁷ As the ascription of worth to the interest which the right is designed to advance becomes more wide-spread (perceived as 'recognition' of the worth) consensus about the validity of the right grows. It is consensus which is the *test* (proof) of the right; it does not establish the right (although consensus is necessary before the right can be enshrined in positive law). Social and political recognition and status 'are not an essential precondition for claiming or identifying a right'¹¹⁸ but they mark the transition from the status of moral (or aspirational) right to positive right whether as statutorily established or established by the 'acclaim' of universal acceptance and endorsement by the international community.¹¹⁹

We can discern three stages in the development of rights: the first stage is the stage of the development of theory.¹²⁰ The second stage is the transition from theory to practice as exemplified by the various declarations of human or citizen rights such as the American Declaration of Independence and the French Declaration of the Rights of Man. The last stage comes when the

*assertion of human rights is both universal and positive: universal in the sense that the principles it contains no longer concern only the citizens of this or that state, but all human beings, and positive in the sense that it initiates a process whose end is that human rights should no longer only be proclaimed and recognised as ideals, but effectively protected even against the state which violates them.*¹²¹

¹¹⁵ Freedon, Rights, 29.

¹¹⁶ Bobbio, The Age of Rights, 13. In the context it is legitimate to use 'proof' in the sense of 'test' or 'trial' as in 'must be brought to the proof', or 'will stand a severe proof'.

¹¹⁷ *Ibid.*, 14. By this standard the validity of the UN Convention on the Rights of the Child is assured. And yet there are fundamental questions which can be asked about apparent internal contradictions and tensions in that document *despite* the almost universal consensus and without undermining the validity of the whole.

¹¹⁸ Freedon, Rights, 8.

¹¹⁹ The perception of rights as timelessly valid is no more than a function of their historical development. Rights are perceived as 'imbued with immutable character, as if, although originating in specific historical circumstances, (they were) nevertheless timelessly valid'. McGinn, 'Technology, Demography', 62.

¹²⁰ Historically this stage is exemplified in the writings of John Locke.

¹²¹ Bobbio, The Age of Rights, 16. For an alternative view to Bobbio's on the role of the international community in the protection of individual human rights see Przetacznik, F., 'The Socialist Concept of Protection of Human Rights', Social Research 38, 1971, 337-361.

At the second stage in the development of rights it was the state itself which was deemed to be the protector and guarantor of fundamental freedoms. The 'sphere of the individual', 'the private sphere' could only be defined in legal and moral terms which derive from the state and they can only be protected and enforced by the institutions of the state. This raises the fear of the paternalism of the state as much as fear of its oppression: both extremes are in their different ways subversive of the rights of the individual, the first by rendering the individual unfit or unwilling to practice the rights by undermining his self-reliance, the second by denying the rights altogether.¹²²

The completion of this process means that the rights in question are no longer merely the rights of citizens against *their* state but the rights of *all* citizens against *all* states, that is 'human rights as a positive reality'.

Each category of rights resulted from a different historical and political experience: religious freedom from the religious wars; civil liberties from parliamentary struggles against absolutism, and 'political and social freedoms from the birth, growth, and experience of movements representing workers, landless peasants and smallholders.'¹²³ The first generation of rights were a recognition of personal freedom and negative freedoms. The second generation of rights (which introduced the so-called welfare rights) provided provision for basic needs: employment, education, care etc. A third and fourth generation of rights is now being forged as a result of industrialisation and scientific/technological progress.¹²⁴ In short rights do not originate together but come into existence piecemeal at an appropriate time as a result of human action. In other words specific rights demands are created in response to specific needs. New needs are created by changes in social conditions, and when technical developments make it possible to satisfy them.

Talk of natural, fundamental, inalienable or inviolable rights may represent a persuasive formula to back a demand in a political publication, but it has no theoretical value, and is therefore completely irrelevant to human rights theory.¹²⁵

In summary, then, there is reason to believe that rights are not the consequence of either social contract theories or of other rationalist attempts to ground them in foundational principles. They are, rather, historical social phenomena which arose as a result of social and political transformation and which now operate to protect favoured human attributes.

So, what is a right? I will take the following definition as reflecting the discussion so far:

¹²² Plamenatz, 'Liberalism', 36 - 61.

¹²³ Bobbio, The Age of Rights, xi.

¹²⁴ These would include, for example, rights relating to environmental issues and genetic engineering respectively.

¹²⁵ Bobbio, The Age of Rights, xii.

A human right is a conceptual device, expressed in linguistic form, that assigns priority to certain human or social attributes regarded as essential to the adequate functioning of a human being; that is intended to serve as a protective capsule for those attributes; and that appeals for deliberate action (including deliberate non-action) to ensure such protection.¹²⁶

The notion of a right as a 'conceptual device' reflects its contingent, human origin. Freedden's definition also picks out the relationship between the right and some notion of human functioning (individual or social) with respect to which certain attributes are prioritised as being essential to this view of human functioning. The right serves a dual purpose: the promotion of the designated attributes and an appeal for appropriate intervention or non-intervention (as appropriate) to ensure their protection.

This definition does not and cannot determine a particular view of human functioning, does not specify the relevant human or social attributes, and does not stipulate the action or non-action required. These matters are separate from the anatomy of rights.

Summary

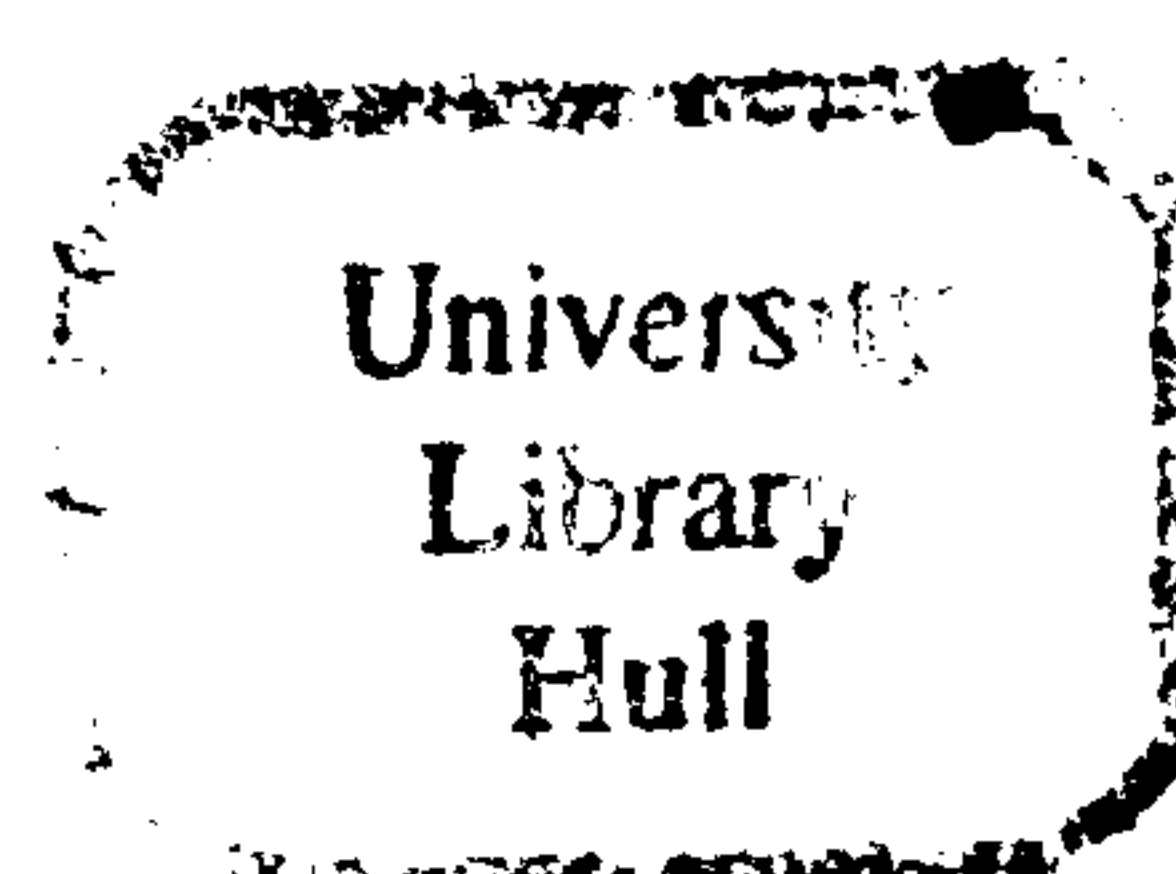
Rights are a public, social phenomenon which express moral ideals and aspirational social principles. They evolved as part of the human conversation, as a persuasive device and as a regulatory social mechanism. Belief in rights persists despite the failure^{of} successive attempts to vindicate their legitimacy. The efficacy of rights must be judged on their effect on aspects of human relations. To the extent that belief in rights leads to the adaptation of human behaviour to accommodate the rights in question, then the rights exist.

A right establishes an individual's claim to the promotion of her own good. Rights switch the moral centre of gravity from the moral obligations of agents to the moral entitlements of recipients. Rights do not confer immediate power; they ascribe status or worth to the rights-bearer which serves as a basis for appropriate claims.

Rights are prescriptive and advocatory. They promote and defend particular human capacities and the conditions necessary for particular views of human flourishing. By protecting selected developmental capacities deemed necessary to human well-being they protect and promote human well-being itself.

An adequate theory of rights cannot legitimately be justified by constructivist methodologies which, selecting one or two human capacities (principally rationality and freedom) disregard others (love, loyalty, sociability, generosity) which are indisputably part of lived moral experience. The moral principles which undergird rights are abstracted from pre-existing human practices and the rights should reflect the richness and diversity of these practices.

¹²⁶ Freedden, Rights, 7.



Attempts to ground rights in purely rational considerations share a number of weaknesses. In particular, such accounts neglect the communal context which gives substance and meaning to rights. In addition, such accounts typically focus on the interests of an isolated (and therefore asocial) individual and it is difficult, if not impossible, to connect the experience of such an individual to the real world of social interaction. Further, although capacities such as freedom and well-being may be necessary means to some moral objectives, there are legitimate human objectives for which they are neither appropriate nor necessary. Finally, an adequate account of moral action requires an understanding of the ends towards which moral action is directed.

The search for an absolute foundational principle for human rights is misconceived because rights are vague, historically variable, heterogeneous, and often mutually contradictory. Even if such a principle were available it would make very little difference: what prevents the implementation of rights is not their lack of justification in the first instance, but their practicability. The crucial problem is not how we might justify rights but how we will protect and implement them: it is a political not a philosophical problem.

Natural rights are part of an individualistic conception of society. They originated in the radical inversion of the political relationship between sovereign and subject (an inversion which, I will argue in Part 3, is perennially recapitulated in the transformation of the adolescent/parent relationship). The fulcrum of power moved from the duties of a subject to the rights of a citizen. The liberties protected by rights are not conferred or bestowed: they are natural because they are not contingent on anyone's consent or permission. In short, rights are historical social phenomena which arose as a result of social and political transformation. The ultimate test of rights is the test of consensus.

If we accept that a right is a socially constructed conceptual device that commands intervention or forbearance to protect favoured human or social attributes regarded as indispensable to the adequate functioning of a human being, we are not thereby endorsing any particular account of human functioning, or any particular selection of favoured human or social attributes. Neither are we stipulating the action or non-action required by rights.

It is now necessary to consider whether rights are relevant to children.

Chapter 2: Rights and Children

The issue as to whether it makes sense to ascribe rights to children must be clarified before the question of substantive theories as to the particular rights they should be accorded can be addressed. One of the crucial features affecting such a decision is the relation of rights to children (and *vice versa*), the kinds of rights there are, and how rights are exercised.

The will or power theory of rights

According to the will or power theory rights are normative powers to determine the obligations of others by the exercise of the will of the rights holder. They are related to capacities for choice and rational action and have the function of protecting and furthering these capacities.

The will or power theory posits rights as 'the legal or moral recognition of some individual's choice as being pre-eminent over the will of others as to a given subject matter in a given relationship'.¹ The bearer of the rights may choose to invoke them (or not) to further his or her interests or projects. Invoking rights in this view is an exercise of legitimate moral control over others. Only those who are capable of claiming, demanding or waiving a right can be rights' bearers.² If rights as moral possessions have, as a distinctive feature, that they can be claimed, asserted, waived, or forgone i.e. that they are discretionary in character, then they cannot extend to entities which cannot claim, assert, waive or forgo. In other words rights can only be held by entities that can exercise them. According to this view one may have duties *regarding* plants, animals and young children one does not have duties *to* them.³ On this view, then, a right is seen as a capacity to impose an obligation on others or to release them from an obligation.

If it is assumed that children of a certain age do not have the relevant volitional capacities to claim or assert rights, then accordingly such children cannot properly be said to have any rights. If it is claimed that the right is being exercised on the child's behalf by another, that is, if the child's right is exercised by proxy, then it is arguable that it is the proxy who is the right bearer and not the child.⁴ MacCormick's version of the will theory is that a right exists only when people have a legal or moral power of waiver or enforcement of duties: 'powers of waiver or enforcement of duties are essentially constitutive of 'rights'.⁵ Since a child ('a

¹ MacCormick, N., 'Children's Rights: a Test-Case for Theories of Rights', Archiv fur Rechts und Sozialphilosophie, 62, 1976, 305-317, 305.

² Campbell, T.D., 'The Rights of the Minor: as Person, as Child, as Juvenile, as Future Adult' in Alston, P., Parker S., Seymore J., eds., Children, Rights and the Law, Oxford University Press, 1992, 4.

³ Kleinig, J., 'Mill, Children and Rights', Educational Philosophy and Theory, 8, 1, 1976, 10. This view is attributed to Benn, S.I., 'Abortion, Infanticide and Respect for Persons', in Feinberg, J., ed., The Problem of Abortion, California, Wadsworth, 1973.

⁴ Campbell, 'The Rights of the Minor', 4.

⁵ MacCormick, 'Children's Rights', 307/8.

baby') 'cannot in fact, cannot in morals, and cannot in law, relieve his or her parents of their duty towards him or her' regarding care, nurture and love then it is linguistically 'inept' to ascribe to children the *right* to such.⁶ (It may be a moral obligation on the part of the parents but it is mistaken to describe it as a right which is the possession of the child.) Is claiming a right for another such as a ward, a child, or an incapacitated individual actually in any real sense claiming the *right* for the other or is it merely asserting the *right of the claimant* to assert what is in the other's best interests? Is it not the right of the guardian to choose what is in the best interests of the other that is being asserted and to have his/her definition of 'best interests' endorsed?

(I)t is at least possible to imagine a legal system in which a parent's duty to care for and nurture his or her own child is neither subject to the parent's issuing a self-directed request on the child's behalf nor indeed to any possibility of waiver by the parent as the child's representative.⁷

What MacCormick appears to be saying is that the notion of a parent giving him- or her-self permission - or worse still denying him- or her-self permission - to care for, nurture, and love the child is simply absurd. It is only as the child comes to resemble the adult and to develop the capacity to exercise the rights for her-self that she can be said to be a rights bearer, but then she is no longer a child.⁸

Campbell, however, differentiates between intrinsic rights and extrinsic or instrumental rights.⁹ The justification of an intrinsic right does not depend on its having a role in securing some other goal, such as some more basic rights. Intrinsic parental rights are directed toward the protection of the interests of the parents themselves. Instrumental parental rights are ascribed to parents so that they can further the interests of their children. The existence of the instrumental rights to further the children's interests affirms that children have their own share of intrinsic rights.¹⁰

The will theory is not without difficulties, however. It fails as a full explanation of rights because it cannot explain acknowledged rights such as children's rights to care, nurture and

⁶ In the Gregory Kingsley case, a case which was widely publicised on both sides of the Atlantic as an instance of a child 'divorcing' his parents, it appeared that a child could file a petition for termination of the parental rights of his natural parents. *Inter alia*, the trial court ruled that the child 'as a natural person who had knowledge of the facts alleged, had standing to initiate the action' on his own behalf. This is the interpretation taken as definitive by Matthews. (Matthews, Gareth B., The Philosophy of Childhood, Cambridge, Harvard University Press, 1994, chapter 6.) The appeal court, however, overturned this particular aspect of the trial court decision on the grounds that 'the disability of nonage prevents a minor from initiating or maintaining an action for termination of parental rights'. The application for termination of the parental rights was upheld, however, because separate petitions were filed on the child's behalf by others. See *Kingsley vs. Kingsley*, 623 So. 2d 780 (Florida 1993).

⁷ MacCormick, 'Children's Rights', 307.

⁸ Campbell, 'The Rights of the Minor', 5.

⁹ *Ibid.*, 9.

¹⁰ *Ibid.*, 10/11

love.¹¹ Campbell objects to the will theory on the grounds that it is premised on too narrow a definition of human being and human relations. Its exclusive stress on self-sufficiency and autonomy is a 'woefully partial expression of why people count and why we matter to each other'.¹² (Lomasky, for instance, is willing to acknowledge that children have rights even though his theory of project pursuit does not extend to children.¹³ Since he uses descriptive ethics as the touchstone for his theory he must find a mechanism whereby children will not be excluded: for even though they are not primary rights holders the practice of including them in the moral community is widespread, if not universal.) Children's rights appear to be *givens*, but the will/power theory says that a right is something that must be asserted or waived. Like Freire's account of freedom and liberation¹⁴ the assertion of rights must be a continuing assertion by the rights-holder. In this view those who cannot assert the rights (babies, young children and so on) even in relation to welfare rights (either because they do not know what their interests are or they are unable to articulate them) cannot have them asserted by others any more than I can have my freedom asserted on my behalf by another. For example, if a parent asserts the child's right to X it is only to be understood metaphorically that the child is the bearer of the right. What the parent is in fact asserting is the parent's own (instrumental) right to determine what is in the child's best interests. (This is the paradigm of paternalism which will be dealt with in chapter 8.) If the child were capable of asserting such a right on her own behalf she would no longer be a child and would not require the agency of the parent to assert the right on her behalf. The definition of a child is not chronological but relates to the capacity of the individual to make and sustain claims. If the individual can make and sustain claims it is no longer a child. Ultimately, childhood is defined by power, not age.¹⁵

The net result of the will theory is that it excludes children from the realm of rights or includes them only by proxy. This exclusion reveals both its intellectual and moral limitations. Children are of no less value as human beings on account of the immaturity of their characteristically adult capacities.¹⁶ Yet this itself is a value judgement which seems to be supportable only by choice or dictat: there is no contradiction in asserting the contrary. All that we can do is either to accept children as part of the moral community or not. As a powerless sector of the human community children are incapable of pressing the case of their own value. Yet if children had not been consistently valued in the past the human race would not have survived. As with the present, depictions of child abuse in the past should

¹¹ MacCormick, 'Children's Rights', 316.

¹² Campbell, 'The Rights of the Minor', 3.

¹³ Lomasky, Loren E., Persons, Rights, and the Moral Community, Oxford University Press, 1987, 40/1.

¹⁴ Freire, Paulo, The Pedagogy of the Oppressed, trans. Myra Bergman Ramos, Penguin Books, 1972.

¹⁵ This issue will be discussed in more detail in Part 3.

¹⁶ Campbell, 'The Rights of the Minor', 4.

not be taken as the norm. The thesis of de Mause for example¹⁷ should be tempered with the realisation that children survived childhood and became the adults who were responsible for human social and moral development.

In societies like ours there is near universal agreement¹⁸ regarding the value of children as human beings. Adopting the power theory of rights exclusively is likely to promote a tendency to see children's rights as relating to their future as adults and their developmental progression to adulthood rather than directing our attention to their present needs, interests, and experiences.¹⁹ To address the latter we must turn to the interest theory of rights.

The interest theory of rights

According to the interest theory rights can be the possession of any being capable of having (normative) interests. Interests are the basis for having rules which require others to behave in certain ways with respect to these interests. These rules are rights: 'having one's interests protected in certain ways by the imposition of (legal or moral) normative constraints on the acts and activities of other people with respect to the object of one's interest.'²⁰

It is not necessary for an individual to assert the rights generated by interests on her own behalf: this may be done by others without the complication of their seeming to be exercising their own rights only. If parents, for example, assert the right of their child to some provision then they are, at the same time, asserting their own right as parents to represent and promote their child's interest. This right is not unlimited. It is subject to a measure of communal agreement regarding the kinds of things which may be considered to be genuine interests of this or any other child and will probably be based on consensus regarding needs. Of course parents are not the only ones who may represent the child's interests. It may also be done by welfare agencies (governmental or voluntary) and also by concerned individuals. But in such cases the agencies and individuals are acting *in loco parentis* whether in the absence of the parents or in cases of (proven or alleged) parental incapacity or failure. In any case the primary right being exercised is the child's: the adult's right to promote the child's right is derivative. If rights are defined in terms of interests, then, assuming that they have interests, it follows that children have rights.

¹⁷ de Mause, L., History of Childhood: Untold Story of Child Abuse, Bellew Publishing Co., 1991.

¹⁸ The exceptions appear to be moral philosophers. See for example Tooley, M., 'Abortion and Infanticide', in Singer, P., ed., Applied Ethics, Oxford University Press, 1986, for an argument that infants are not human persons.

¹⁹ Campbell, 'The Rights of the Minor', 7. Campbell is here invoking the Rousseauist tradition which places central value on the experience of childhood itself.

²⁰ MacCormick, 'Children's Rights', 305.

In the interest theory of rights there is no necessary connection with rationality²¹ or with the will of the rights bearer. But the theory raises questions about which interests generate rights, and are any of these interests distinctive to children?

Problems with the interest theory include the difficulty of identifying the interests in the first place. Desires, needs and interests are not identical.²² Distinguishing between them is not unproblematic. Insofar as interests are constitutive of a given individual's good or, more generally, of human good, there appears to be a circularity involved in their identification. Do interests simply point out a *means* to the good or are they constitutive of it? In either case there is the perennial problem of defining human good in the first place.

MacCormick urges that tying rights too closely to 'want regarding categories' such as needs, interests and desires is the characteristic failing of the 'interest theory'. While satisfaction of needs, interests and desires is clearly part of 'the good' for individuals, it is not so clear whether these categories are exhaustive and whether individually or collectively they are constitutive of the good. 'A formal account of rights can and should be neutral on that substantive moral question.'²³

Which theory?

Is the choice between the competing theories of rights a matter for arbitrary decision or is there a substantive resolution?²⁴ The answer appears to be that if we want rights to apply to children (to reflect 'the moral and value status of children'²⁵) then we must have a theory which allows for this. The will theory on its own does not. On the contrary it appears to exclude children systematically from the realm of rights. The inclusion of children is not an arbitrary matter. They must be included in the realm of rights if they are to be fully considered in the social and political arrangements which are decided and to be given full moral weight in such arrangements. For '(w)hether we like it or not, the language of rights is the language in which political priorities are settled'.²⁶ This means that the substantive resolution is a matter of political necessity rather than theoretical consistency. We choose the interest theory not because it is in any rational way more compelling than the will theory but because it is more likely to secure the political purpose of supporting a particular view of society. The choice is not, primarily, between the ethical theories but between the vision

²¹ Although there may be a contingent one if the development of rationality is one of the interests.

²² Golding, M., 'Towards a Theory of Human Rights', *Monist*, 52, 4, 1968, 523 n. 3. According to Golding needs appear to be a special sub-class of interests. For a full discussion of the relationship between desires, needs, and interests see Thomson, Garrett, *Needs*, London, Routledge & Kegan Paul, 1987.

²³ MacCormick, 'Children's Rights', 311. Interests and needs will be considered more fully in chapter 3.

²⁴ Campbell, 'The Rights of the Minor', 5/6.

²⁵ *Ibid.*, 5.

²⁶ *Ibid.*, 7.

of a social order in which children are excluded from full membership and one in which they are included in a particular and vital respect. The latter vision does not say that children are or ought to be the full equals of adults in all respects but that there is a vitally important respect in which they ought to be. So the social vision, an aspect of the definition of the good life, has priority.

It is not that 'the language of rights is the only one with real moral force, so that a change in that language, supported by purely formal arguments, is a sufficient reason for changing moral attitudes',²⁷ but that the practical introduction of rights as a determining feature (one among many) of human relations has changed the language of moral attitudes. Midgley is unhappy with this. She argues that the great philosophers and moralists do not come before us competing for our exclusive support: 'all moral problems contain many aspects, which may need to be dealt with by different ways of thinking'. Half the 'business of moral thinking' lies in reconciling the conflicts which ensue. Appeal to rights is no more than a habit; 'rights talk' is

simply the most competitive and litigious of moral concepts. If rights appear to clash, then one of them must give way. The legal model which is very close here, dictates a zero-sum solution. If I win, you lose. There is a conceptual deadlock; the losing party must leave the court.²⁸

Yet rights-talk reduces complex ethical issues to a simpler political choice. And, perhaps, in practical terms, this is its function. In the real world complex moral issues must be decided eventually. The function of rights is to provide a focal point, a fulcrum for arbitration between competing (and frequently mutually exclusive) claims.

Whatever the philosophical complications of this difference of opinion there is no doubt that 'rights talk' *has* become an increasingly powerful discourse in the structuring of human affairs.²⁹ But surely, from an historical point of view, that is the point of rights talk. It is not just a *different* way of talking about moral or social obligations. It is a *new* way of talking about moral and social obligations. Its introduction marks the displacement of control from the individual sovereign to the sovereign individual. Rights acknowledge my control over myself (insofar as they reflect my autonomy, my *self* governance) and at the same time acknowledge my control over others (insofar as these others must - morally or legally *must* - respect this autonomy and self governance and also meet my needs/interests so that I

²⁷ Archard, David, 'Child Abuse: Parental Rights and the Interests of the Child', Journal of Applied Philosophy, 7, 2, 1990.

²⁸ Midgley, Mary, 'Rights Talk Will Not Sort Out Child Abuse: Comment on Archard on Parental Rights', Journal of Applied Philosophy, 8, 1, 104/5.

²⁹ Golding, ('The Primacy of Welfare Rights', Social Philosophy and Policy, 1, 2, 1984, 136) concludes with the question 'If other people claim rights why shouldn't I?' This seems to be a case of *prudence* rather than moral conviction. It may be that the only claim that the language of rights has on us in our moral discourse is that everybody else is doing it. It has become the principle language of political and moral debate.

can become capable of autonomy and self governance). Now it may be that with the extension of rights a good idea is coming to the end of its usefulness as a means of asserting certain moral or legal realities (realities which were in fact created by the rights). Increasingly, demands for provision or concessions in societies like ours are being made in rights terms; as rights proliferate their force lose their force.³⁰

Option-rights

In addition to the competing theories which claim to explain or justify the operation of rights there is a difference in the kinds of rights which are being asserted or demanded. In particular, rights are described in terms of option-rights or welfare rights.³¹

Option rights, often considered to be the only kind of right, correspond to areas of individual sovereignty where the individual is morally free to act on the basis of his own choices implying 'some kind of rightful control over the actions of others'.³² Option-rights invoke the idea of the freedom of the individual, autonomy. The fundamental value is the autonomy of the individual to shape her life as she chooses as the creator of moral value. Option rights give sovereignty over others, over one's property, and over oneself. This sovereignty is not unlimited or unbounded. It 'is bounded by the (limited) sovereignty other persons have over me, by the duties I have towards others, and by my duties in respect of myself'.³³ This is consistent with a view that the sovereignty must be learned and exercised within a community. It will be a consistent feature of this presentation that a supportive community is essential to the acquisition and exercise of rights.

Of course the acknowledgement of option-rights carries with it the risk that individuals endowed with such rights may not use the freedom they confer for desirable purposes.

To allow for option-rights (and freedom) in any way that is more than trivial is to take the *risk* that their possessors will do what is wrong, harmful, or foolish. ... To opt for option-rights is to opt for a special ideal that subsumes a particular style of life for their possessors: in effect they are allowed to do

³⁰ A consequent and serious difficulty with welfare rights is 'the thinning out of rights' and 'a declining possibility of imposing correlative obligations'. The expansion of rights trivializes rights. Bandman, B., 'Some Legal, Moral and Intellectual Rights of Children', Educational Theory, 27, 3, 1977, 175. See also McGinn, Robert E., 'Technology, Demography, and the Anachronism of Traditional Rights', Journal of Applied Philosophy, 11, 1, 1994. He argues that the increasing rights-based claims to the use and benefits of technology are in danger of seriously diluting the societal quality of life, even to the point where we shall have to re-consider the centrality of modern Western individualism and the rights claims that support it.

³¹ The terminology of option and welfare rights was introduced by Golding in his 1968 essay 'Towards a Theory of Human Rights'. Option rights are variously referred to as choice rights, liberty rights, rights of freedom, or rights to forbearance. Welfare rights are variously referred to as rights of recipience, benefit rights, interest rights, rights to intervention. Whether there is any substantive difference intended by the different labels they will be taken here to mean roughly the same thing and the terms will be used interchangeably.

³² Golding, M., 'The Primacy of Welfare Rights', 122/3.

³³ Golding, M., 'Towards a Theory of Human Rights', 542.

what is wrong, harmful, or foolish within the spheres of autonomy. Completely to opt for option-rights is to opt for a laissez-faire morality.³⁴

Given that option rights are predicated on the freedom of the individual must we expect and accept that the individual will sometimes choose to do what is wrong or self harmful? Option rights presume the capacity of the individual to make informed choices with respect to her own future behaviour.³⁵ Often, however, the capacity is less than perfect, the information available is incomplete (as it usually is), or the will to make the 'correct' choice is absent. But within what limits of tolerance? The limits are set by social consensus regarding what is acceptable in this regard. This consensus is not absolute, it is subject to change, to evolution in order to accept new limits.

Choosing for oneself is not as free of conceptual difficulty as it might at first appear. Sutton distinguishes between choosing and deciding. To choose is to perform a physical act whereas to *decide* is to 'come to a conclusion after some more or less extensive process of deliberation'. Choosing can be a spontaneous or thoughtless act; in this sense of 'choosing' it is obvious that children can choose. Decision must always be deliberative. Children's exclusion from option rights is based on their presumed incapacity to choose on the basis of deliberative reflection.

The value of option rights resides in the fact that they 'protect the fundamental interest all humans have in the unimpeded (within certain spheres of autonomy and under certain social limitations) exercise of rational choice.'³⁶ This follows from Mill and from the argument that it is the exercise of choice itself which is valuable independently of the things opted for: 'The value of choosing for oneself resides not in the production of better decisions, but in the improved quality of the life of the man allowed the opportunity to exercise his option'.³⁷ However one could ask whether the alleged relationship between the improved quality of life and the opportunity to exercise one's options is a necessary (analytical) truth or an empirical fact? It is questionable whether it is always (empirically) the case that free choice opportunities lead to an improved quality of life for the individual who may wish to leave all threatening choices and responsibilities to others.³⁸

³⁴ *Ibid.*, 547. In a note (547 n. 51) he quotes Kant, 'The *freedom* of man as the constitution of the commonwealth (may be stated in) the following formula: ...everyone may seek his happiness in the way that seems good to him as long as he does not infringe on the freedom of others to pursue a similar purpose, when such freedom may co-exist with the freedom of every other man according to a possible and general law.'

³⁵ Sutton, Thomas L., 'Human Rights and Children', *Educational Theory*, 28, 2, 1978, 102-110, 108.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ The problem is that for many 'being oneself' or 'doing one's own thing' poses perhaps insurmountable difficulty. Byron or Napoleon could do their own thing, in the latter case 'by imposing his preferences on others'. But how are those who have 'limited means, limited ability, and limited vision - to be themselves and do their own thing?' Weidhorn, M., 'Doing One's Own Thing: The Genealogy of a Slogan', *Journal of Thought*, 31, 4, 1996, 28.

The view of human being put forward by negative rights theorists is of self-determining and self-developing individuals. The exponents of these theories not only believe that it is possible to be neutral between competing conceptions of the good life, but they also 'bestow on that neutrality a high moral stance, arguing that each individual is the best judge of his or her development, or life-plan'.³⁹ But they also believe that human beings are such that as a rule they need to be protected from one another. That is, that the primary function of rights is to protect what is most essential in human beings from the intrusions of others.

Welfare Rights

If animals or human babies have rights they must be welfare rather than option-rights. An animal or a baby does not exercise any rights over itself, over things, or over people. If we admit rights only for beings who are capable of choice then we are committed to defining rights in terms of autonomy. If the capacity to choose is a necessary condition of having rights then we must conclude that incapacitated and senile people may not have rights, and we must be circumspect regarding any claim that children have rights. However, we do acknowledge the rights of such persons - their welfare rights. 'They have a claim to some of the goods of life under the social ideal, although others must make claims for them, when necessary.'⁴⁰

Freeden argues for a theory of rights which is richer, and more true to the realities of human experience than that provided by the negative rights theorists. Even when the emphasis on autonomy is reinforced by considerations of a functional well-being⁴¹ the latter is insufficient to account for the variety and richness of human experience. For human beings are more than simply atomistic moral agents who inhabit an idealised Kantian universe of moral agency: in addition to moral properties humans have inescapable physical, emotional, and mental properties. These are no less important to the pursuit of the good life, nor are they unconnected with the moral: human well-being must address all of them, and all equally. Freeden calls for a 'pluralistic theory of rights' which will protect *all* human functions.⁴²

Human nature is developmental but it is neither inevitable nor wholly self-determined. Empirically we know that it requires a good deal of intervention both to sustain and promote human growth. Exclusive emphasis on non-interference does not indicate how this fundamental reality will be served by rights at all. In order to promote human development *some* interference is not only warranted but necessary. Such intervention may well be

³⁹ Freeden, Michael, 'Human Rights and Welfare: a Communitarian View', *Ethics*, 100, 3, 1990, 489-502, 492.

⁴⁰ Golding, 'Towards a Theory of Human Rights', 545.

⁴¹ Gewirth, Alan, *Human Rights*, University of Chicago Press, 1982.

⁴² Freeden, 'Human Rights', 490/1.

paternalistic but, as we shall see, objections to paternalism take the greater part of their force from negative rights theories in the first instance.

As well as being developmental human nature is also essentially social. Human beings are *primarily* co-operative and sociable.⁴³ Mutual threat or harm is the exception. Intervention is not, in the first place, threatening but mutually sustaining and beneficial. Consequently, rights theory must find a more adequate grounding (than the extreme individualism of freedom and well-being) and a more sociable direction. The answer is welfare rights.

A right constitutes a claim that directly or indirectly enhances the quality of life in a community⁴⁴ by promoting the welfare of individuals within that community. The ability and capacity of the individual to develop and flourish is intimately connected with the health of the community as a whole. The individual's development and flourishing should not be confined, narrowly, simply to what is necessary to her engagement in a rational process as an autonomous agent but should also embrace 'a whole range of human capabilities such as the human capacity for enjoyment'.⁴⁵

In addition rights are reciprocal. Freeden argues that in addition to the community having rights-based obligations of welfare to its members the community itself also has rights. The rights of the community must be respected by the individual exercising her own rights. 'Autonomy as individual self-determination (is) socially beneficial, provided such self-determination (takes) into account both the individual's role in society and the common good'.⁴⁶ There must be a mutual constraint.⁴⁷ If there is not mutual constraint and benefit it is difficult to see why a community should protect the rights of individuals.

Welfare rights 'are derived from the claims to the goods of life which are conferred by the social ideal of a community'.⁴⁸ Although some of these may be claimed (i.e. that which they are rights to may be claimed) and are subject to waiver (there is no obligation to claim them) they are distinct from option rights. The right to education is an example. Golding is correct in saying that insofar as there is a right on the part of adults to education such a right is claimable and waivable. But this does not seem to be true of children. Feinberg considers some welfare rights as *mandatory rights*: e.g. the right to education or the right to inoculation. He says about such rights: 'You have no choice in the matter. Whether you like

⁴³ Midgley, Mary, The Ethical Primate: Humans, Freedom, and Morality, London, Routledge, 1994.

⁴⁴ Freeden, 'Human Rights', 494.

⁴⁵ *Ibid.*, 496. He criticises Gewirth for the narrowness of his conception of well-being. It is not clear whether Freeden intends us to make the distinction here between 'enjoy' in the colloquial sense (as in 'enjoying oneself') or in the stricter, more legalistic (enjoying the use of one's limbs). See Taylor, Charles, 'Atomism', Philosophical Papers Part 2: Philosophy and the Human Sciences, Cambridge, University Press, 1985, 192.

⁴⁶ Freeden, 'Human Rights', 498.

⁴⁷ *Ibid.*

⁴⁸ Golding, 'Toward a Theory of Human Rights', 542.

it or not you have to exercise these rights'.⁴⁹ This means that children, at least, are left without a choice in the matter of, say, an education: they *must* meet certain preconditions for the right to an education - attend school, study, keep the rules etc. This is defensible because children lack the knowledge, rationality, experience, and capacity for responsibility to know what their interests are and to pursue them on their own behalf. To rectify these lacks they may be required to avail of their welfare rights which, in addition to education, include medical treatment, adequate nutrition, and so forth.

Golding thinks that '(w)hether some given right is waivable will depend on the law or on the social ideal'.⁵⁰ But it goes beyond law or social ideal. For the existence of a law or social ideal begs the question *why* is this the law or social ideal? In the case of education it is a recognition that in order to become capable of exercising rights of any kind one must achieve certain minimal standards of human and social functioning. If this view is correct then it appears that 'a certain minimum education'⁵¹ is a precondition of being a rights holder, not just a right in itself. It is, in the first instance, an obligation of the community which is committed to human freedom.

Welfare rights (rights of recipience) are entitlements to goods. Such rights imply that those who are entitled to these goods have desires and/or interests. Like option rights a welfare right also implies some kind of rightful control over the actions of others.⁵²

To be a potential right-holder one must possess welfare interests. Moreover, the primary rights possessed by rights-holders are to the components of their welfare. These can be briefly stated as physical and mental health, a developed intellect, stable interpersonal relationships, material security, and a certain measure of liberty from interference.⁵³

Welfare rights must be seen in the context of welfare interests (i.e. normative interests). Welfare interests are interests which are indispensable to moral agency, indeed to any conception of a fully human life. It is for this reason that they have a special claim to protection, 'through enforcement, if necessary'.⁵⁴ Welfare interests are not the same as Rawls' primary goods. Rawls considers 'good' to refer to a set of goods deemed to be universally useful - things that are useful no matter what ends a person may pursue. These are the so-called 'primary social goods' comprising 'rights and liberties, opportunities and powers, income and wealth'.⁵⁵ In a later list Rawls elaborated this to: freedom of thought and liberty of conscience; the political liberties; freedom of movement and free choice of

⁴⁹ Quoted in Bandman, 'Some Legal, Moral and Intellectual Rights', 175.

⁵⁰ Golding, 'Towards a Theory of Human Rights', 543.

⁵¹ The phrase 'a certain minimum education' is from the Irish Constitution.

⁵² Golding, 'The Primacy of Welfare Rights', 123/4.

⁵³ Kleinig, 'Mill, Children and Rights', 12.

⁵⁴ *Ibid.*, 12.

⁵⁵ Rawls, John, A Theory of Justice, Oxford, University Press, 1973, 92.

occupation; equal opportunities to take political, social, and economic offices; income and wealth; and the social bases of self-respect.⁵⁶ Now it is clear that Rawls' primary goods are 'primary' only in the sense that they are necessary for the pursuit of self-defined ends. But the human capacities necessary to exercise these goods (the capacity to think and to inform one's conscience, the capacity to formulate and execute plans of action, the capacity to exercise whatever political liberties may be available to one, etc.) do not come ready made and are not the inevitable consequence of undirected human development. They are developmental capacities without which the Rawlsean primary goods would be nugatory. So in a real sense the Rawlsean goods are not *primary* in either a literal, temporal, developmental, or logical sense. They are contingent on the capacities to exercise them being developed in the individual. Prior to this development the individual is (in the relevant liberal sense) only a *potential* rights holder.

Welfare as a primary notion underlies any theory of rights: welfare rights have developmental priority. If there are to be any rights at all there must be welfare rights. The notion of welfare rights has a 'theoretical primacy, conceptually and normatively, over option rights'.⁵⁷ Welfare rights have priority because of their kinship with justice (or, at least, consistency). It is not sufficient to have a notional right to be free one must also have an equal right to whatever means are necessary, including an appropriate education, to the effective exercise of this freedom.⁵⁸ While we may be acting in another's interest if we help him to get what he wants, unless we inculcate the kinds of habits that will be useful in satisfying wants which children may conceive when they grow older, 'we are not justified in frustrating any of their present wants, as we are not justified in trying to alter or mould their character'.⁵⁹ This account qualifies children, as *candidates* for freedom rights, and as having a present welfare which is indispensable to their future interests.

However, whether children actually possess rights depends also on whether their welfare interests 'constitute the ground of our obligation to them'.⁶⁰ (The ground of our obligation to them need not be a right.⁶¹) Children's welfare differs from that of adults in one critical way. Being free from interference is of no value without the provision of other welfare interests. 'A young child left to itself is not free. To be free one must first have developed physically

⁵⁶ Rawls, J., 'Kantian Constructivism in Moral Theory', Journal of Philosophy, 88, 1980, cited in Ingram, A., A Political Theory of Rights, Oxford, Clarendon Press, 1994, 170.

⁵⁷ Golding, M., 'The Primacy of Welfare Rights', 135.

⁵⁸ Bandman, 'Some Legal, Moral and Intellectual Rights', 178.

⁵⁹ Brian Barry, Political Argument, New York, The Humanities Press, 1965, 185.

⁶⁰ Kleinig, 'Mill, Children and Rights', 12.

⁶¹ 'Many legal philosophers, especially positivists, maintain that '(a) right' may be defined in terms of 'duty' and 'obligation', the latter two connoting the fundamental concepts while the former is derivative.' But this 'misrepresents one use of the term 'right' in judicial thinking. At least some duties and obligations are imposed in consequence of the possession of a right'. Golding, 'Towards a Theory of Human Rights', 537n.

and intellectually'.⁶² Until this happens the child's rights (rights to the conditions necessary to become an exerciser of freedom rights, i.e. welfare rights) must be asserted and defended by others on its behalf. This does not establish the rights: it simply speculates on what might be the case if children have rights.

Education, the development of one's personal capacities, and that (*sic*) means by which individuality is cultivated, is something to which they have a right, since it is partially constitutive of their welfare. *But it is a right the securing of which must initially be through the representations of others, since they do not have the capacity to assert it on their own behalf. The capacity to assert one's right to education comes only as a result of education.*⁶³

What, on this view, is the advantage of asserting that children (by definition, those who are incapable of conceiving, articulating, expressing, and claiming the relevant right) have rights? Surely it is more correct - and more economical (Ockham's razor) - to say that we are dealing with social obligations which are not grounded on rights. In the first instance it is the duty of parents to ensure that their children receive the kind of intervention which will enable them (the children) to become capable of asserting their own rights. What we are dealing with is *the right of parents* (or others acting *in loco parentis*) to determine, within certain social constraints, the course of their children's development. To persist in talking about the children's rights is redundant since the children by definition have no capacity to assert claims contrary to those of their parents or other adults. When they have that capacity (or begin to exercise it) they are in the process of becoming adults (that is, rights claimers) in their own right. When the community intervenes on behalf of the child it is on the grounds that the parents have failed in their obligations or have abused their own rights (and in relation to their children this amounts to the same thing). Now the definition of the child's interest is articulated by the community (in the courts, for example) rather than by the parents.⁶⁴ The child's perception of his or her own interest may be consulted but it is not decisive.⁶⁵ (It is proportional to the child's maturity.) The child's best interest is always articulated by someone else.⁶⁶ In such circumstances it is difficult to see why the notion of

⁶² Kleinig, 'Mill, Children and Rights', 12.

⁶³ *Ibid.*, 13 (emphasis added).

⁶⁴ This is usually done only by invoking a notion of the *reasonable* or *good and wise* parent, a notional personage who embodies the virtues which the community in question ascribes to the ideal parent.

⁶⁵ For an insight into the difficulties associated with interpreting the child's best interests see Fordham Law Review, 64, 1996 (A Report on the Conference on Ethical Issues in the Legal Representation of Children, 1995) esp. Margulies, Peter, 'The Lawyer as Caregiver: Child Client's Competence in Context', 1473-1504; Mlyniec, Wallace J., 'A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose', 1873-1915; 'Report of the Working Group on Determining the Best Interests of the Child', 1347-1350; 'Report of the Working Group on Determining the Child's Capacity to Make Decisions', 1339-1345.

⁶⁶ Does a lawyer, for example, place the priority on attempting to advance the child's wishes, or the lawyer's view of the child's best interests (which may be contrary to the child's wishes)? Can the wishes of the child be taken, in particular cases, to indicate that the child *lacks* the competence to make a decision or express a preference which is consistent with the child's best interests? Should the lawyer use her position to counsel the child (who is dependent and

children's rights is necessary at all. The same applies *mutatis mutandis* to other categories: persons in a permanent vegetative state, the insane, animals, etc. The difference in the case of children is that there is a progressive development of the relevant capacities so that part, at least, of what determines their best interests is the developmental goal of becoming capable of exercising rights. In the final analysis it may be that we accord independent rights to children as a recognition of their moral status as equal in certain respects to other human beings.

However welfare rights and rights of freedom in relation to children may be more appropriately considered in terms of their orientation rather than in terms of their substantive content. Rogers and Wrightsman make the distinction in terms of a 'nurturance orientation' (welfare rights) as against a 'self-determination orientation' (freedom rights).⁶⁷ This helps us to pick out the developmental nature of childhood and the function of the rights in promoting this development. Children are not yet capable of claiming their welfare rights or asserting their option rights but they must, in some sense, be growing towards the requisite capacities. 'Nurturance' is preferable to recipience because it stresses the developmental nature of the process we refer to indiscriminately as childhood. Instead of a 'self-determination orientation' however a 'participative orientation' might be preferable because it stresses the interpersonal over the isolated autonomy evoked by the former. In order to grow into participation children require the active, positive, planned interventions of adults to ensure that they acquire the powers, skills, and competencies necessary to participate in human life in all its dimensions. The parameters of these dimensions - individually and collectively - are set by the community in which the child is reared.

Rights, duties, and obligations

Rights and rights-related duties 'arise only in a social context'.⁶⁸ Inter-personal relations are vital to the very existence and comprehensibility of rights. Given the social context, however, why should rights claims be conceded to anyone by anyone? Rights language exists as a device for making claims and demands against others.⁶⁹ Possession of a right, whether it is a welfare or an option right, implies some kind of legitimate control over others. Having a duty does not necessarily entail that there is a corresponding right; having a right does entail that there is a corresponding duty. Who has the responsibility for the duty which corresponds to a welfare right?

vulnerable) and so cause the child to change her preference to be more consistent with the lawyer's perception of the child's best interests? *Fordham Law Review*, 64, 1996, 1282.

⁶⁷ Rogers, C.M., Wrightsman, L.S., 'Attitudes Towards Children's Rights: Nurturance or Self Determination', *Journal of Social Issues*, 34, 2, 1978, 59-68, 61.

⁶⁸ Golding, 'The Primacy of Welfare Rights', 130.

⁶⁹ Bearing in mind that *making* and *having* a claim are two different things.

The correlativity between rights and duties and the weight which has been placed on it in order to try and show that rights are always the source of obligations has been criticised effectively by O'Neill. She gives precedence to obligations arguing that it is obligations which give rise to rights (all children have a right not to be abused because all adults have an obligation not to abuse them) but that not all obligations do so. This approach leaves room for what she calls *imperfect* obligations. These are obligations which are binding on all agents (all adults, say); they are fundamental (they do not 'derive from any more basic ethical claim or relationship and (do) not depend on specific social and political arrangements or on prior acts of commitment'); but they are not universal in that they are not owed to either specified others or to all others. The example, 'to be kind and considerate in dealing with children' helps to illustrate that although we may acknowledge such an obligation it could not be discharged to all children at all times, we cannot *intervene* in respect of all children all of the time. In the case of imperfect obligations it is not the act which is indeterminate but the recipients of the obligation to act. '(So) long as the recipients of the obligation are neither all others nor specified others, there are no right holders, and nobody can either claim or waive performance of any right'.⁷⁰ So here are obligations which do not have corresponding rights.

It has been argued that the correlation between rights and duties is a logical, not a moral or legal relation. If a rule gives rise to a right it does not give rise to a duty as something different. The two terms describe the same normative relation albeit from different points of view.⁷¹ Montague⁷² says that for this reason the term 'correlativity doctrine' is itself misleading because to speak of a correlation (of rights and duties) suggests that rights and the corresponding duties are distinct moral entities. This is not always the case. Much talk about rights is really talk about obligations and in many cases it would be better to confine such discussions to references to obligations rather than references to rights.⁷³ All statements about rights imply statements about obligations but only some rights serve as the grounds of obligations and, as we have seen, there are important obligations which do not entail corresponding rights.

⁷⁰ O'Neill, 'Children's Rights', 31/2.

⁷¹ Benn, S.I., Peters, R.S., Social Principles and the Democratic State, London, George Allen and Unwin, 1959, 89. This is brought out in the following definition by Finnis: 'In short, the modern vocabulary and grammar of rights is a many-faceted instrument for reporting and asserting the requirements or other implications of a relationship of justice from the point of view of the person(s) who benefit(s) from that relationship. It provides a way of talking about "what is just" from a special angle: the viewpoint of the "other(s)" to whom something (including, inter alia, freedom of choice) is owed or due, and who would be wronged if denied that something'. Finnis, J.M., Natural Law and Natural Rights, Clarendon Law Series, Oxford, Clarendon Press, 1980, 205.

⁷² Montague, P., 'Two Concepts of Rights', Philosophy and Public Affairs, 9, 1980, 372-84.

⁷³ *Ibid.*, 376.

It is important to identify rights which are the basis of obligations: the right to practise the religion of one's choice, for example, is itself the basis of another's obligation to forbear from interference.⁷⁴ The distinction between rights which are the basis of obligations and those which are not resolves itself, in part at least, into the distinction between rights of freedom and rights of recipience. Rights of freedom are exercisable rights and are the grounds for others' obligation not to interfere. Rights of recipience, as we have seen, are sometimes non-exercisable rights and are not distinct from the obligation to which they correspond. Consequently they cannot serve as the grounds of those obligations.⁷⁵

It could be argued, for example, that the obligation to promote the development of the child through education follows from the child's right to fullest development. But is the latter a right of freedom or a right of recipience? On the argument that the child is incapable of waiver or enforcement it can only be a right of recipience. In other words the child's right is not exercisable. Hence the child's right to education cannot be the basis for the parental or societal obligation to provide for the child's education. It follows that these obligations are independent of the putative right of the child to an education. The same would not be true of a claim that an adult had a right to an education. In such a case the asserted right *is* an exercisable right (the adult is free to choose whether to avail of the right or not) and is therefore, once the right is recognised, the basis of consequent obligations.

The adult's right to education is an exercisable right in the sense that one acts in a particular way (Montague says, actions which 'are intentional under some description'⁷⁶) in order to further one's education: one enrolls in classes, attends classes, uses books and other research tools, etc. In this sense the right to education is the basis of others' obligation not to obstruct the pursuit. But the right to education is not an exercisable right if we mean to imply that there is an obligation on another to make substantive provision for the education (as is the case for children). In this sense (and there may be an obligation on others, parents or the state) we are referring to a right of recipience and, according to Montague's analysis, this right cannot be the basis of the obligation for the right and the obligation are simply the same relationship of conferring and receiving seen from the opposite points of view of the giver and receiver respectively.

The most interesting implication of Montague's analysis is that 'individuals who are incapable of intentional activity are incapable of exercising rights, and may not even possess those rights that are exercisable'. This rules out infants and 'human adults who, for whatever reason, are incapable of the kind of mental activity required for the performance

⁷⁴ *Ibid.*, 378.

⁷⁵ *Ibid.*, 379.

⁷⁶ *Ibid.*, 383.

of intentional actions'.⁷⁷ (Although he does allow that adults who have once had the capacity and consequently the rights do not lose the rights if they lose the capacity.)⁷⁸

It might be concluded then that if children have rights at all these must be welfare rights based in some way on their separable needs and interests. They cannot have freedom rights since the children (by definition) lack the capacity to make the kinds of decisions which possession of freedom rights necessitate. They are, in a sense, potential rights holders requiring that certain capacities (intellectual, moral, social) be developed before they can participate fully in the community of rights.

What rights should children have?

The acknowledgement that there should be some rights does not determine what rights there should be. Mackie proposes two negative theses: firstly, that specific rights cannot be determined *a priori*, on general grounds and, secondly, that whatever rights are recognised should not be absolute.⁷⁹

Mackie takes issue with Mill's liberal principle of non-interference on two grounds. Firstly, many people are not the best judges or guardians of their own good. Secondly, hardly any part of anyone's conduct concerns only him/her self. Liberty of thought and opinion, for example, are explicitly defended by Mill on the grounds that their effect on others and on society generally is more likely to be beneficial than harmful: but in either case it is *the effect on others* which is the criterion. The kind of rational persuasion that Mill advocates is a double-edged sword since

It is all too clear that people can be persuaded to destroy not only the freedoms of others but also their own, including the freedom of discussion which that persuasion exemplifies.⁸⁰

What we need is not a universal principle of non-interference in the first instance but *principles* which will enable us to judge when interference is legitimate. We need rules which enable us to distinguish acceptable from unacceptable ways of influencing other people. In general the acceptable ways will be those that 'harmonise with the general form of conditions for the good life'.⁸¹ We need to be able to adjudicate between particular rival claims to freedom. Mackie uses the example of parents' claims to raise their children within their own beliefs and moral outlook, and the problem of indoctrination.

⁷⁷ *Ibid.*, 384.

⁷⁸ *Ibid.*, 384 n.13.

⁷⁹ Mackie, *Ethics*, 174.

⁸⁰ *Ibid.*, 181.

⁸¹ *Ibid.*, 181.

(W)e can object to indoctrination in the sense of a style of teaching that tends to preclude any subsequent rational reconsideration of the issues, and we can object to it as an interference with a legitimate freedom of the children.⁸²

How extensive should basic rights be? We should be wary of moral universalism. Communities differ in history, ideals, practices, self-definitions, and so forth. It is highly unlikely that any but the most general of moral principles (or rights) will cover the reality of all human communities. Communities differ in their answers yet each community may have attained the optimum for itself, what Lomasky calls 'the nugget of truth contained in the otherwise dubious theory of moral relativism'.⁸³

The ideal world for a negative rights holder would be one in which she could exercise her own rights while everyone else defers to her. This is either the totally egocentric world of the infant or a reversion to the totalitarian world of the absolute monarch. But it would not in fact be an ideal world, it would be a denial of the very meaning and function of rights, in the case of the monarch no less than that of the infant. The process of becoming human is the

⁸² *Ibid.*, 182. What is this 'legitimate freedom of the children'? What he has to say about indoctrination presumes that there is 'a style of teaching that tends to preclude any subsequent rational reconsideration of the issues'. Is this claim empirical or analytical? We could for example take it as the definition of indoctrination that 'any subsequent rational reconsideration of the issues' is in fact precluded. How does this square with freedom of will? Maybe 'is rendered less likely' would be more persuasive and more consonant with the empirical facts of teaching and learning. It is useful to remember that the word indoctrination received its most forceful definitions in the context of the Cold War when the West could only accept the lack of opposition to the Eastern Regimes by persuading themselves that the capacity to resist had been educated out: the alternative was to acknowledge that the repressive regimes had some persuasive force with their populations. More recent events proved that if there had been indoctrination, it was not universally successful.

We could distinguish 'hard' and 'soft' forms of indoctrination. The hard form is difficult to sustain since it runs counter to all our beliefs regarding human freedom and freedom of will. For if we accept that the hard version is in fact possible then we accept that a totally deterministic view of human behaviour is possible or sustainable. (The fate of Winston Smith in Orwell's *Nineteen Eighty-four* was not a result of childhood indoctrination but of a merciless brain-washing and conditioning in which it is arguable that his self, his personality, was destroyed.) The soft version would simply state that future behaviour may be more or less influenced by the indoctrination but that it is always open to the individual to question. This of course presumes that he/she has the capacity (mental, intellectual) to question and the openness of mind to conceive of alternatives: this is a definition of liberation. The soft version would also raise questions about the other elements involved in teaching and learning, that is elements other than 'style of teaching', which would contribute to the 'less likely'. If we take an empirical approach - and presume the continuing operation and development of free will - then we could list issues which make abandonment, or radical revision, of a set of beliefs less likely on the part of any individual: the completeness of the set of beliefs; their range and adequacy; their coherence; their consistency; their emotional appeal and context (adequacy of source, rituals etc.). R.M. Hare ('Adolescents into Adults', in T.B.H. Hollins, ed., *Aims in Education*, Manchester, University Press, 1964, 47-70) argues that the difference between education and indoctrination is not to be found in content or method but in the *aim*. For a fuller account see Gaden, G., 'Indoctrination and Power', *Irish Educational Studies*, Dublin, Educational Research Association of Ireland, 1981, and Callan, E., 'Indoctrination and Parental Rights', *Philosophy of Education Proceedings*, 41, 1985, 97-106. McLaughlin suggests that a broader approach to the question of indoctrination is necessary, both a deeper exploration of the underlying concepts, and a richer range of perspectives. McLaughlin, T.H., Review of Spiecker and Straughan, eds., *Freedom and Indoctrination in Education: International Perspectives*, London, Cassell Educational, 1991, in *Journal of Philosophy of Education*, 29, 1, 1995, 155-157.

⁸³ Lomasky, *Persons, Rights*, 79.

process - among other things - of learning that there is a reciprocity in rights recognition and that we inhabit human communities on the basis of this reciprocity.

We have seen that the will or power theory of rights is inadequate to explain the moral status of children insofar as it excludes children even though they have acknowledged rights. The interest theory, on the other hand, includes children as bearers of rights but raises the problem of the identification and evaluation of the corresponding interests. Option rights are restricted to those who can exercise autonomy and freedom and as such are denied to children and to others who are, for the time being at least, incapable of exercising autonomy and freedom. In any case there are other human needs and capacities which are arguably as important as autonomy and freedom. These capacities are recognised by welfare rights which do not require the capacity to choose deliberatively. But welfare rights raise the question whether, since the rights in question must be claimed by others on the child's behalf anyway, it is necessary to invoke rights in the case of children at all rather than simply focus on adult obligations. It is not clear whether the provision of the goods necessary to enable the child to become an adult rights bearer is a response to the child's right or simply a fulfilment of independent adult obligations. It may be that by switching the moral focus to the rights of the child we are diverting attention from the obligations of specific adults. We are replacing adult obligations which are *specific* with children's rights which are amorphous as to where the specific duty lies. Children's rights becomes a debate between adults as to who has the ultimate obligation. While ascribing rights to children we may be acknowledging their moral status as the equals of adults, in the final analysis we may have to continue to speak in terms of rights for the simple reason that rights talk has become the predominant discourse in moral and political debate.

Summary

Can we ascribe rights to children? Not if we regard rights as relating to capacities for choice and rational action since children appear to lack the relevant capacities. Yet there are, as Spencer realised, acknowledged children's rights such as their rights not to be mistreated or to be cared for. The will or power theory, which favours self-sufficiency and autonomy, is too narrow. If children are to be included in the 'realm of rights' we need a more inclusive account of human being and human relations.

The interest theory allows rights to be the possession of any being capable of having (normative) interests. These interests are the basis for rules which require others to behave in certain ways with respect to these interests. This allows for children's rights but raises questions about which interests generate rights.

If we want rights to reflect the moral status of children then we must have a theory which allows for their inclusion. Children must be included in our moral discourse if they are to

have full moral weight in social and political arrangements which affect them. The interest theory is more likely to secure a social order in which children are included as significant members. This does not mean that children ought to be considered the full equals of adults in all respects.

The contrast between the will and interest theories reflects the differences between the kinds of rights which will be given moral and developmental priority. Option rights invoke the idea of the freedom of the individual to shape her life as she chooses. Welfare rights, on the other hand, are necessary to protect the interests of those who are unable to pursue their own claims to a wide range of human goods which are necessary for moral personhood.

Human development, especially in childhood, requires sustained, unsolicited intervention: interference is both warranted and necessary to promote human development.

Human nature is irreducibly social. Human beings are primarily sociable and rights and rights-related duties must reflect their origins in social contexts. Inter-personal relations are vital to the comprehensibility of rights. An adequate rights theory, therefore, must look for adequate grounding in the inter-personal activities of human communities.

If children are to become capable of exercising rights of any kind they must achieve minimal standards of human and social functioning. Freedom rights are contingent on the capacities necessary to exercise them and consequently welfare rights must have developmental priority. There cannot be any rights at all if children do not benefit from welfare rights in the first place. They must have a right to the means necessary to the effective exercise of freedom. Children are candidates for freedom rights; their present welfare is protected by welfare rights (to nutrition, security, education, etc.) which at the same time promote their future interests as adult rights bearers.

A distinction between a 'nurturance orientation' (welfare rights) and a 'self-determination orientation' (freedom rights) helps us to pick out the developmental nature of childhood and the function of rights in promoting this development. Children must receive interventions which will enable them eventually to assert rights on their own behalf.

Communities differ in their selection of favoured capacities and the extension of the associated rights. Part of the developmental process of humanisation is the growing realisation that there is a reciprocity in rights recognition both between the individual and other individuals, and between the individual and the community. We participate in human communities on the basis of this reciprocity.

Chapter 3: Rights and Human Being

Contrary to the thrust of the mainstream tradition of European moral philosophy Mackie¹ holds that the belief that moral judgements point to or invoke something which is objectively prescriptive are mistaken: there are no objective moral values.² On the contrary, our moral thinking appears to be relative to particular ways of life and to express the preferences of these ways of life rather than objective moral requirements. This is the argument from relativity. There is also what he calls 'the argument from queerness': there would be great difficulty in describing objective moral precepts if they did exist; they would have to be different from everything else in the universe; they would require some 'special faculty of moral perception or intuition' in order to discern them and to link them to features of actions; they would be related to natural features in the world in ways that we do not understand.³ Anyway, it is possible to account for moral values in terms of the relationship between social practices and traditional moral language in such a way that the persistence of the belief in their objectivity is explained.⁴

The good life

Aristotle's⁵ formal sketch of the structure of the good life does not specify content.

The good life is not pleasure, wealth, honour, or other such things. Nor is it Plato's form of the good. A human being has a function over and above particular functions of the several members of the human body (eye, hand etc.) and also superior to mere growth and sentience. It has to do with the active rational part of human being. Aristotle concludes that 'the good for man is an activity of the soul in accordance with virtue, or if there are more kinds of virtue than one, in accordance with the best and most perfect kind'. This is over a complete lifetime, not just on brief occasions.⁶ Aristotle's is an outline account and he has already warned that we should not

expect more precision in the treatment of any subject than the nature of that subject permits; for demanding logical demonstrations from a teacher of rhetoric is clearly about as reasonable as accepting mere plausibility from a mathematician.⁷

¹ Mackie, J.L., Ethics: Inventing Right and Wrong, Harmondsworth, Penguin Books, 1990.

² Mackie, Ethics, 35.

³ See also Langford, Glenn, Education, Persons, and Society: a Philosophical Enquiry, London, Macmillan, 1985, 27/8.

⁴ Mackie, Ethics, 35. Lomasky is mistaken when he takes issue with Mackie on the matter of the objective reality of *value*. What Mackie is arguing is that there are no objective *moral* values independent of our desires, choices and preferences. This is not, I think, contrary to Lomasky's position. See Lomasky, Persons, Rights, and the Moral Community, Oxford, University Press, 1987, 237-241.

⁵ Aristotle, Ethics, J.A.K. Thomson, trans., revised, Hugh Tredennick, Harmondsworth, Penguin, 1976.

⁶ *Ibid.*, 76.

⁷ *Ibid.*, 65.

While the supreme good consists in the exercise of virtue⁸ happiness also requires a certain kind of prosperity and good fortune: friends, wealth, political influence, good ancestry, good children.⁹

Happiness, the Good Life, 'a kind of virtuous activity of the soul', is the end of political science. It is the chief concern of political science 'to endue the citizens with certain qualities, namely virtue and the readiness to do fine deeds'.¹⁰ Significantly Aristotle's sketch excludes children because the child's age 'debars it as yet from such activities' as are appropriate to the practice of virtue. If children are described as happy it is 'by way of congratulation on their future promise'.¹¹

In sum, the happy man is

one who is active in accordance with complete virtue, and who is adequately furnished with external goods, and that not for some unspecified period but throughout a complete life.¹²

So 'good' in the question 'What is the good life for man?' is indeterminate. The good life must satisfy the interests of those who actually participate *in* the good life as defined. A universal substantive definition is probably impossible. The variety of views of the good life, historical differences, social, cultural, political, religious differences make consensus impossible, 'men's real goals are irresolvably diverse'.¹³ The Universal Declaration and other modern charters of human rights do not offer a *comprehensive* vision of human good. Their purpose, on the contrary, is to secure only what might be termed 'minimum conditions'. Articulating a comprehensive vision of 'the good for man' and how this is to be attained is the province of religions, philosophies, and ideologies. Christianity, Buddhism, and various secular philosophies provide alternative views of human nature and its fulfilment.¹⁴ The definition of the details of the individual good life is more appropriately the work of imaginative literature or speculative fiction: even then the literature simply shows the variety of real possibilities and leaves readers to draw their own moral conclusions.¹⁵

⁸ *Ibid.*, 78.

⁹ *Ibid.*, 80. As we will see these may correspond very roughly to freedom rights and welfare rights respectively.

¹⁰ *Ibid.*, 81.

¹¹ *Ibid.*

¹² *Ibid.*, 84.

¹³ Mackie, *Ethics*, 178.

¹⁴ Keown, Damien, 'Are There Human Rights in Buddhism?', *Journal of Buddhist Ethics*, 2, 1995, 3-27.

¹⁵ One may query here, though, whether the writer for children shows her hand a little more? Is there a 'good life' being defined in children's literature? I think that there is. Is it the *same* good life in all literature for children? This is more problematic. Perhaps there are certain *foundational* values - like Williams' *thick concepts* - which all literature for children promotes. This is the child reader's initiation into the realm of *human* values: a set of deep values which is universal. One can ask whether there is a society or culture (even notional) which promotes in its children dishonesty, falsehood, disloyalty, cowardice, betrayal etc. consistently as a foundational morality?

The good life will be characterized by two features: egoism and self-referential altruism, which are 'kinds of activity and kinds of motivation'.¹⁶

(F)or any individual a good life will be made up largely of the effective pursuit of activities that he finds worthwhile, either intrinsically, or because they are directly beneficial to others about whom he cares ... the happiness with which I am, inevitably, most concerned is my own, and next that of those who are in some way closely related to me.¹⁷

Two comments are necessary here. 'Intrinsically' appears from the context not to mean *inherent in the activity itself*, in some way detached from the actor, but worthwhile *to the actor*, worthwhile in the first person. It is also distinct from the benefit to the significant others. Secondly, Mackie does not mean 'related' as in *blood relation* only but intends it to encompass wider, more fluid and distant relationships such as tribe, community, locality, nation, ethnic group etc.

The natural proclivity of human beings to look after themselves and those who are nearest to them in the first instance is not a defect of human nature: it is what ensures the survival of the individual, the family, the tribe, and the community. The fact of the matter is that '(a)ny possible, and certainly any desirable, human life is social'.¹⁸ Each individual is united with others in a variety of ways both synchronic (at one point in time - our present relations) and diachronic (our historical relations, both past and future). These relations are not just biological and familial but also cultural in the widest sense: each of us is linked not only to biological ancestors but also to cultural traditions which embody favoured activities, forms of thought, belief and value systems. We are indebted for what we are as individuals to many others. Part of the good life for us is inheriting and transmitting in our turn a valued cultural inheritance, and 'this too is a social relation to which there belong appropriate sorts of conflict as well as co-operation'.¹⁹ The function of morality is to counteract the excesses of egoism and self-referential altruism. Different kinds of co-operation can transcend them: it is one of the main functions of political and economic systems to ensure that they do.²⁰

¹⁶ Mackie, *Ethics*, 173.

¹⁷ *Ibid.*, 170.

¹⁸ *Ibid.*, 172. Aristotle: 'man is by nature a political animal. Anyone who by his nature and not simply by ill-luck has no state is either too bad or too good, either subhuman or superhuman ...', *Politics*, trans., T.A. Sinclair, revised and re-presented by Trevor J. Saunders, Penguin Books, 1992, 59. See also Mary Midgley, *The Ethical Primate*, London, Routledge, 1994 for a forceful argument in favour of basing a theory of human morality on the contingencies of human evolution.

¹⁹ Mackie, *Ethics*, 172. See also Langford, *Education, Persons, and Society*, chapter 2 and Paddy Walsh's examination of history in *Education and Meaning: Philosophy in Practice*, Cassell Education, 1993, chapter 12.

²⁰ Mackie, *Ethics*, 170.

One's self-referentially altruistic moral principles will not be entirely determined by the choice of a specific ideal: they will be embedded in the social relationships in which one finds oneself, or into which one enters voluntarily and in which one hopes to remain.

Project pursuit

So a rights-based theory of morality must take account of three factors: firstly, a plausible goal for human beings would be something like Aristotle's *eudaimonia*, it would have to be in the category of an activity rather than an end or termination; secondly, there is an indefinite variety of conceivable goals, since there is a wide variety in the kinds of life that people choose; thirdly, even this way of expressing the situation (i.e. talking about *goals*) is misleading for people do not, as a matter of fact, make a single, once-for-all choice of a total plan of life, '(t)hey choose successively to pursue various activities from time to time'.²¹ Mackie's third point is endorsed by Lomasky's theory of rights in relation to 'project pursuit'. At least some of the kinds of ends that motivate a person's actions persist through time in the individual's life, establish a coherent pattern which is retrospectively discernible, and thus can be seen to have provided a degree of 'structural stability' to that life. These kinds of ends are projects. 'Some of these projects are directed at becoming and remaining a certain sort of person.' In this sense projects 'explain more than an action; they help to explain a life'.²²

But choice of activity is not wholly arbitrary or gratuitous: there are overarching goals which give certain activities priority over others. People's choices of a total plan of life are limited by the way in which their perceptions have been formed and their practical options limited by their cultural tradition. Project pursuit does not necessarily depend on having antecedently deliberated over a choice of future. In fact Lomasky takes exception to the conventional insistence on the centrality of autonomy defined very stringently as being free from, or unconstrained by, external influences. Being a project pursuer is not equivalent to being morally autonomous in this sense. Although one's projects *may* be the product of explicit deliberation about whatever vision of the good one will pursue,²³ they need not be. 'They may instead be ingested with one's mother's milk ... and never be trotted out to be examined at the bar of reason.'²⁴

In all societies persons regularly attach themselves through their actions to the welfare of parents or children or clan or nation, display fealty to their gods, view the contours of the land that is theirs with special affection,

²¹ Mackie, J.L., 'Can There be a Right-based Moral Theory', in Mackie, J., Mackie, P., eds. Persons and Values: Selected Papers, Vol. 2, Oxford, Clarendon Press, 105-119, 113.

²² Lomasky, Persons, Rights, 26/7.

²³ Mill, 'framing the plan of our life'. Mill, J.S., On Liberty, in H.B. Acton ed., Utilitarianism, Liberty, Representative Government, London, J.M. Dent & Sons Ltd., 1972, 75.

²⁴ Lomasky, Persons, Rights, 44.

show allegiance to the virtues and responsibilities of a craft or tradition. Because these constitute patterns of motivated activity that form the structure of a scrutable life, they merit recognition as projects.²⁵

In other words projects do not necessarily occur as the result of reflective planning and commitment. (And even where they are the product of explicit deliberation this does not mean that they are, or can be, formulated *ab initio* by the individual unconstrained in choice by any kind of social or cultural influences.) They are simply the direction and order which can be discerned in a human life when one sees it from the point of view of the consistent values and principles which inform it. Projects are motivated dispositions that '*project themselves temporally* through various stages of a life and render it one connected life rather than a jumble of discrete episodes.'²⁶ Like Aristotelian virtues projects give motivational structure to a human life and concurrently they provide a standard of value for practical judgement.²⁷ But the Aristotelian virtues are discovered and provide an impersonal standard of value rather than created (as some values can be) by commitment to one's own projects.

(A liberal conception) recognises in each individual project pursuer value that springs from his ability to generate value through his own personal commitments. He is not merely a place holder at which external value can express itself.²⁸

This is true, but only to the extent that the project pursuer cannot be the exclusive begetter of his own values. According to Lomasky the project pursuer's value 'emerges from commitment'. A commitment generates a standard of personal value which allows us to arbitrate between alternative outcomes. Since the value follows the commitment it does not influence our choice of commitment. But this is only partly true. Our choices themselves are influenced (not determined) by prior values that we believe to be worth pursuing: when we see the consequences of our choices we shall turn to a revaluation of our values or consider our values to be vindicated. Which comes first, the value or the existential choice?²⁹ And do we follow the existential choice willy nilly or reconsider our position according as we might find the consequence abhorrent? Why, if the choices create value, should we find some of the consequences abhorrent?

²⁵ *Ibid.*, 45.

²⁶ *Ibid.*, 42.

²⁷ *Ibid.*, 49.

²⁸ *Ibid.*, 49/50.

²⁹ This is the Polanyian problem. See Polanyi, M., Personal Knowledge: Towards a Post-Critical Philosophy, 2nd. edition, London, Routledge and Kegan Paul, 1962, part 3. But see also Rawls' notion of 'reflective equilibrium' whereby we attempt to strike a balance between our considered judgements in attempting to ground our morality and our cherished principles. Rawls, John, A Theory of Justice, Oxford, University Press, 1973, 20/1.

For most people their moral options are ultimately limited by the moral community in which they originate. As well as empowering us to play our part in our inherited moral community our developmental experience severely delimits the parameters beyond which we cannot go in moral matters (and not only moral matters) without the most improbable heroism. In the history of the human race only a handful of heroic iconoclasts have broken the mould into which they were born.³⁰

Ultimately, the specifics of the good life are historically worked out by communities for themselves. Such specifications might articulate the shared values and aspirations of the individuals who make up the community and who have made it up (in both senses of comprised and created) in the past. But the process is circular: as each individual is born he is initiated into the values and rituals, beliefs and forms of life (and knowledge) of the relevant community. He may be free to challenge the orthodoxy and develop the self-knowledge of the community, but this will have to be done from within the sustaining community.³¹ There are communities where such individual critique is very difficult - access to alternative modes of experience, interpretation or expression is restricted, and the tradition itself is intimidatory - but it is never eliminated.³² No matter how effective indoctrination, repression and intimidation might be they can never completely eradicate the human capacity for freedom without, as in the exemplary case of Winston Smith,³³ destroying the entire personality which is the wellspring of free will.

One of the things that distinguishes cultural communities is the diversity of the ways in which they identify and respond to human needs.

Needs and well-being

A need is related to some further state of affairs. A 'basic need' is a need that, if unfulfilled, and the further state not attained, will result in some fundamental harm. What we refer to as 'need' must be necessary to the desired state of affairs in the sense that its absence renders the state of affairs unattainable. That is, it cannot be simply *one* of a range of alternatives which would be equally efficacious in bringing the desired state of affairs about. The need is *necessary* to the attainment of the objective but it is not *sufficient*.³⁴

³⁰ See Mead, George Herbert, Mind, Self, and Society, Charles W. Morris, ed., University of Chicago Press, 1962, 215-219. Even in such cases the mould-breaking is more likely to be a re-interpretation of the received tradition rather than a revolutionary destruction and innovation.

³¹ The more appropriate metaphor is of an ascending spiral rather than an enclosed circle.

³² See Langford, Education, Persons, and Society, 36-43, for an account of social criticism from within and from outside communities.

³³ Orwell, George, Nineteen Eighty-four, Harmondsworth, Penguin, 1967.

³⁴ Sutton, Thomas L., 'Human Rights and Children', Educational Theory, 28, 2, 1978, 102/3.

Fundamental or basic needs relate to our overall quality of life, our well-being, rather than to a particular goal or purpose.³⁵

Well-being is the converse of harm. The constituents of well-being are activities in, and experiences of, the real world as well as *awareness* of these activities and experiences. This means that harm can have two possible forms: things which prevent a person from actually engaging in worthwhile activities (incarceration, for example) and things which prevent the person from appreciating the value of what she is doing (depression).³⁶ Harm is not the same as the frustration of desire; to lack what one desires does not in itself necessarily constitute harm. Harm must be judged with reference to our needs rather than to our *immediate* desires.³⁷ Our fundamental needs are permanent (and definitive of being human or of being ourselves) whereas immediate desires can be transitory and intermittent.³⁸ The concept of a need relates to the notion of serious harm whereas the concept of a desire does not.³⁹

While it is 'logically impossible for a person to lack what he needs without being seriously harmed,'⁴⁰ this is not true of desires. Desires are mental *acts* which pertain to the motivation of action whereas needs are 'passive dispositions to suffer certain harms because of certain lacks.'⁴¹ I may desire an ice-cream but I *need* water. Although I may sometimes *desire* water it continues to be the case that I need it even if the immediate desire is fulfilled. Needs are necessarily important, desires are not. Desires can be whimsical and fleeting, words we would never use in relation to needs. It is unusual not to know what we want or desire; it is not unusual not to know what we need: in the case of needs 'we have to enquire to determine what they are'.⁴²

Although needs are not the same as desires and wants '(t)he fulfilment of desires is (itself) a psychological and emotional need which will have to be accommodated to other needs I

³⁵ Thomson, Garrett, Needs, London, Routledge & Kegan Paul, 1987, 8.

³⁶ *Ibid.*, 41.

³⁷ Thomson, Needs, 90. 'Desire may be capricious; need always claims to be taken seriously ... A need is imperative; it is something which, by definition, has a right to satisfaction'. Minogue, K.R. The Liberal Mind, London, Methuen, 1963, 103. Minogue differs from Thomson in relating the concept to happiness/unhappiness rather than to the stronger concept of harm. In general his account of need as a moral concept is skeptical. (103 ff.)

³⁸ 'Interest' is a more useful term than needs or wants because it can contain both without resolving the tension between them. 'If something is in one's interest it will be advantageous. If it is also fundamentally so, it requires rights-protection'. Freedon, M., Rights, Milton Keynes, Open University Press, 1991, 50.

³⁹ Thomson, Needs, 101. Needs are not simply strong desires: the assertion 'I need you' to a loved one can be either an expression of strong desire or a statement that without the loved one one's personality is irretrievably damaged (harmed).

⁴⁰ Thomson, Needs, 99.

⁴¹ *Ibid.*, 100.

⁴² McCloskey, H.J., 'Human Needs, Rights and Political Values', American Philosophical Quarterly, 13, 1976, 4.

and others have'.⁴³ The point to note here, however, is that the psychological and emotional need for the fulfilment of desires is a *general* need, it does not specify any particular desire. In effect it is a negative point: if *none* of my desires are fulfilled then I will be harmed.

To say that something is a fundamental need is to say that to lack that something is to suffer serious harm.⁴⁴ Fundamental needs, however, do not depend on there being a corresponding conscious aim. For even if a person does not consciously wish to improve his life and to avoid serious harm his fundamental needs as a human being will be the same. In the fundamental sense the agent may be completely unaware of what she needs (a baby does not know that it needs nutrition). Needing in this sense is 'not something that we actively do, and therefore is not something that we can have reason to do.'⁴⁵ In general the logic of fundamental need restricts choice to the alternatives of meeting the need or suffering harm. Usually the only viable course of action is to seek what we need.⁴⁶ We can forego, or disrupt, the satisfaction of our fundamental needs in the pursuit of a higher goal or aspiration but not without what is *normally* considered to be self-harm: this is the meaning of *self-sacrifice*.⁴⁷

Fundamental need does not imply a lack nor is it necessary to *feel* the need as Waldron asserts: 'To need something is to suffer a lack, but (...) it is also to *suffer* a lack - to experience it as a burning frustration and as a crippling and overwhelming debility'.⁴⁸ Waldron appears to be confusing the concept of fundamental need and the idea of immediate deprivation.⁴⁹ We are generally not conscious of our fundamental needs at all: I am aware of my need for water only when I am thirsty - and then it is a desire for water which is at the forefront of my consciousness and a motivator for my action - although it is non-trivially true that I have a fundamental need for water, that is, that without water my well-being will be seriously, even fatally, damaged. Certainly acute hunger or thirst may lead to 'desperate and reckless activity'⁵⁰ but the subjective experience of hunger and thirst

⁴³ Freedman, *Rights*, 50.

⁴⁴ Thomson, *Needs*, 14.

⁴⁵ *Ibid.*, 16.

⁴⁶ Thomson, *Needs*, 27. The alternative, self-harm to the point of self-destruction, does not count as a *viable* course of action although it is a possible, morally legitimate, course of action voluntarily to opt for self-harm (as in the case of martyrdom in the name of a 'higher' ideal).

⁴⁷ Thomson, *Needs*, 107. Although life is 'valuable because it is a condition of any desiring; death is the end of all desiring and therefore the worst possible evil. ... (But in the) circumstances of martyrdom ... the continuation of desiring is subordinated to spiritual integrity'. Minogue, *The Liberal Mind*, 27/8. This means that in relation to rights we may, on appropriate occasions, waive our rights whether these be option or welfare rights, if and when we judge some alternative state of affairs to be worth the sacrifice.

⁴⁸ Waldron, J., *Liberal Rights: Collected Papers 1981-1991*, Cambridge, University Press, 1993, 264.

⁴⁹ *Ibid.*, 265/6. But Waldron is correct that *unmet needs* pose a threat to the stability of social organisations.

⁵⁰ *Ibid.*, 264.

are not the same as the needs for food and water. The former are contingent, intermittent states which can be satisfied by the provision of sufficient quantities of food and water. The latter are permanent conditions, individually necessary for my well-being as a human animal.

For example, as a human being I may have a need for companionship.⁵¹ This does not mean that I lack companionship now or at any particular time but only that *if* I am deprived of companionship for a prolonged period I will be harmed as a human being. This is in direct contrast to Sutton's⁵² assertion, following Komisar's analysis⁵³, that the use of 'need' presupposes a deficiency: to say that someone *needs* something is to say that she lacks that thing at that particular time. However it is plainly in accordance with correct usage to say that I need fresh water, clean air, companionship, nutritious food, shelter etc. without the implication that I am bereft of these at a particular time. To say that I have just enjoyed a hearty meal is not inconsistent with saying that I need food.

Neither are needs the same as drives. While drives *explain* behaviour, needs *justify* it: hunger and thirst explain why someone might behave in a certain way in order to acquire food and water but only appeal to needs can *justify* the behaviour. Needs indicate what we *should* do in the name of our own interests: needs justify rather than explain.⁵⁴

Fundamental needs are not socially or culturally relative (although the ways in which the needs are met may be). They relate to our common humanity and to our specific individuality, not to a particular historical or cultural specificity. For something to qualify as a need what is needed must be crucial to the general humanity or to the specific individuality of the person(s) in question. Human needs have to be defined in terms of human nature and human ends. The ends are determined by our natures as human beings and by our potential as individuals to become what we are capable of becoming. Certain conditions must be met if this development from potential to actual is to be realised. A need is something which, if it is not met, will result in fundamental harm to an individual either in terms of her *human* nature or of her *individual* nature. This harm can be in relation to present existence or to future development.

⁵¹ '(P)eople have a need for friendship even when it is clear that they will not die without it. So, survival needs can count as fundamental needs, and yet fundamental needs cover more than survival.' Thomson, Needs, 38.

⁵² Sutton, 'Human Rights', 102-110.

⁵³ Komisar, B.P., "'Need' and the Needs-Curriculum' in Smith & Ennis eds., Language and Concepts in Education, Chicago, Rand McNally, 1961.

⁵⁴ Thomson, Needs, 13/14.

Interests

We can identify three senses of 'interest'.⁵⁵ The *occurrent* use of the word means 'to be attracted to X or to be inclined to give attention to it'. (The visitor showed great interest in the antics of the baby. This interest is conscious; it is an *act* of interest.) The *dispositional* use indicates that one is disposed to show or take an interest in something ongoing. Hence, one pays attention though not at any particular time. (The grandfather took a great interest in the achievements of his grandchild. We would also expect this interest to be conscious; it is an ongoing act of interest.) The *normative* use denotes those things considered both worthwhile and in some way appropriate to the well-being of the individual in question. ('To say that X is in the interest of A is to say that X is good for A, or is a constituent of A's good, or is a means to A's good.'⁵⁶) This is the sense in which we say that something is *in* one's interest. (It is in everybody's interest to have an efficient and equitable justice system.) This is interest as *welfare*. In this case we are not referring to an occasional act of interest (occurrent), or to a disposition to *show* interest in the continuing sense (dispositional). In fact this use is not active or dispositional at all. The judge of the welfare interest may be the individual involved or some outside observer: the individual does not necessarily *know* what his or her interests are in the normative sense since wants or desires are not conceptually necessary to interest in the normative sense: infants may have welfare interests but not feel the corresponding wants or desires.

Normative interests are more extensive than needs. While it is in one's interests to have one's needs met, interests also embrace things other than needs. Needs are just one component of one's interest and there is more to the needs than simply their satisfaction. Human friendship, for example, is valuable not just because it fulfils some need or other but because it confers some benefit on us. To say that we have a need for water is not to understand the benefit water confers on us.⁵⁷

(I)nterests relate to a person's good, where the good is determined not simply by a man's needs, but also by his goals, aspirations, values, and achievements, and where a man may be ignorant of, mistaken concerning, confused about his interests.⁵⁸

The concept of a (normative) interest defines the variety of activities and experiences that are constitutive (in part at least) of a worthwhile life. It also defines the nature of the worth

⁵⁵ The analysis of 'interest' which follows is based upon Sutton, Thomas L., 'Human Rights and Children', *Educational Theory*, 28, 2, 1978, 107, and Kleinig, J., 'Mill, children and Rights', *Educational Philosophy and Theory*, 8, 1, 1976, 11/12.

⁵⁶ Golding, M., 'Towards a Theory of Human Rights', *Monist*, 52, 4, 1968, 523.

⁵⁷ See Minogue, *The Liberal Mind*, 195.

⁵⁸ McCloskey, 'Human Needs', 7/8. 'Needs appear to be a special sub-class of interests', Golding, M., 'Towards a Theory of Human Rights', *Monist*, 52, 4, 1968, 523 n. 3.

of these activities and experiences. Interests are essentially general and non-particular, they can be expressed in a range of needs, wants, or desires.

'Interest' in the relevant sense should not be identified with self-interest. 'Self-interest' means to be consciously pre-occupied with one's own personality or affairs, to be actuated by, or absorbed in what one conceives to be for one's own interests. One's interests, however, like one's needs, are not necessarily the object of conscious attention. The example of the small child is apposite. Although it may truly be said that the new-born infant is self-preoccupied or self-absorbed it is also the case that the new-born has no idea of what his or her true interests are. 'Interest' in the sense of 'self-interest' refers to the dispositional use of the word. The crucial use here is normative.

Human nature

Inquiry into human needs and interests involves value judgements. In order to establish what constitutes a person's well-being we need a theory of human nature, a model of human being.⁵⁹ Needs and interests can be explained and invoked only against

a background belief in the existence of a common human nature and specific and unique individual natures with certain inherent potentialities (as distinct from mere possibilities).⁶⁰

Such a theory will comprise two distinct, though related, elements: the general human nature which we share with all others of the species and a specific personal nature which is unique to each individual ('a human and personal nature, with inbuilt potentialities of natural development').⁶¹ In other words, there is the good for human beings generally and also the good for each individual. When the basic needs which are common to all human beings have been met we encounter the concept of *self-making*. The distinction between development and self-making fits with a distinction between welfare rights and rights of freedom. Until such time as I have achieved a minimal human development in terms of making my human potential actual I will be unable to make full use of my freedom rights, to develop, that is, my capacity for self-making.

There are natural limits to the extent to which we can change ourselves to adapt to the world or change the world to suit ourselves. That is, there are natural constraints on what interests we have and on what can have primary value for us.⁶² Things are relevant to our well-being or harm by virtue of contingent features of our being human. We have little, if any, choice over what counts as a primary good or a basic human interest. This is not to

⁵⁹ I mean 'human being' as a process rather than as a thing.

⁶⁰ McCloskey, 'Human Needs', 1.

⁶¹ *Ibid.*, 8.

⁶² Thomson, Needs, 77.

say that we are passive victims of our human nature.⁶³ We can change aspects of the natural world to suit our interests and we can also accommodate/adapt ourselves⁶⁴ to suit the demands of the natural world. In the last analysis, however, we are creatures of the natural world and have flourished because of our capacity to control what we can, to adapt when we can, and to tolerate the residue. There are natural limits but we can never be certain where they are.⁶⁵

Certain basic avenues of development are dictated by our nature as human beings. In the sense being argued human needs are teleological, that is, they can be ascertained and defined only with reference to some desirable end state or level of functioning. Although there is a relativity in respect of human needs which allows for a range of diversity between individuals and cultures, it is still a requirement that certain fundamental conditions of human well-being be met. Requirements of food, shelter, communication, companionship, or a sustaining set of beliefs do not pre-determine *what* food, *what* housing, *what* language, *what* friends, *what* beliefs. This should not be taken to mean that *any beliefs whatsoever* are acceptable, simply that there must be some belief set. It is only when this condition has been met that we can begin to discriminate *between* belief sets.

So, needs must be defined with reference to human nature, to human potentialities *for good*, and 'what is necessary for the continued existence of the possessor of that nature in a way that is not impaired or marred, and for the actualisation of those potentialities for good.'⁶⁶ What is culturally sanctioned by any society is the particular form of the community's response to the basic human and perceived individual needs.⁶⁷ Needs relate to what it would be detrimental to us as men and as specific persons not to have. In other words 'detrimental' is explained by reference to our natures as human beings and as specific individuals.⁶⁸ The lack of the things we need as human beings and as specific

⁶³ MacIntyre, following Aquinas, explains that there are two ways in which someone may have an end. We have naturally established ends which it is not in our power to change. But it is in our power to decide whether or not we will direct our activities towards the achievement of these given ends. MacIntyre, A., 'Plain Persons and Moral Philosophy: Rules, Virtues and Goods', American Catholic Philosophical Quarterly, 66, 1, 3-19, 6.

⁶⁴ Piaget's cognitive stage theory provides an example of an ontogenetic process of such adaptation. Adaptation involves two processes, assimilation and accommodation. Assimilation involves refining and reviewing our experience so that it fits into our current cognitive organisation. This can only go so far as it involves a certain *distortion* of reality so that our conceptual schema remains untroubled. At times, however, our experience of the world is such that only an alteration of the cognitive schema itself will allow it to be satisfactorily assimilated. See Miller, Patricia, H., Theories of Developmental Psychology, (3rd ed.), New York, W.H. Freeman & Co., 1993, 67-70.

⁶⁵ Human technology is one way of extending these limits unpredictably.

⁶⁶ McCloskey, 'Human Needs', 5.

⁶⁷ Erikson suggests that 'to understand either childhood or society, we must expand our scope to include the study of the way in which societies lighten the inescapable conflicts of childhood with a promise of some security, identity, and integrity. In thus reinforcing the values by which the ego exists societies create the only condition under which human growth is possible'. Erikson, Erik, Childhood and Society, Vintage Books, 1995, 251.

⁶⁸ McCloskey, 'Human Needs', 6. For example food, drink, clean air.

persons, however it comes about, will not only impair our present existence, but also diminish our future development.

In general we can say that a human being's basic or fundamental needs are what each one requires in order to flourish (as against merely surviving) as the kind of individual he or she is; that is to say, that it is in the interests of the individual to have the needs met: the individual will be harmed if the needs are not met. Human needs are objective in that they can be ascertained independently of the desires and wants of any particular individual. The basic needs (such as the need for air, water, food, shelter, human companionship, etc.) are universal but cultural responses to these needs are varied and diverse.

If there are any rights at all then there must be a right to have our fundamental human needs met at a level appropriate to sustaining at least a minimum of human functioning. There seems to be little point in promoting claims to autonomy, freedom, rationality and so forth if the fundamental requirements for basic human well-being have not been met. But how are these fundamental human needs to be identified and ordered?

Maslow's theory of needs

Maslow's theory⁶⁹ is a theory of motivation not primarily a theory of needs: it explains why the lack of a particular component of our well-being will disrupt normal functioning until the lack is met. Its value to the present enquiry lies in the fact that it gives an account of human needs and their hierarchical organisation which may prove useful in helping to establish the relationship of rights to needs.

Needs are the needs of whole individuals, not just a part of them. 'It is John Smith who wants food, not John Smith's stomach'.⁷⁰ There are 'certain need satisfactions that seem to be ends in themselves and seem not to need any further justification or demonstration (these are) ultimate human goals or desires or needs'.⁷¹ It is not these ultimate needs which are subject to cultural variation but the *means* that various cultures find to fulfil these needs.⁷²

⁶⁹ Abraham Maslow, Motivation and Personality, 2nd ed., London, Harper & Row, 1970. Maslow uses the words need, want, desire interchangeably but it is evident from the context when he is referring to needs as distinct from wants or desires as defined so far. He also speaks of 'fundamental goals or needs'. 27. Although his taxonomy of needs has been criticised (see, for example, Doyal, L., Gough, D., A Theory of Human Need, London, Macmillan, 1991, esp. chapter 3, 'The Grammar of "Need"') I shall take it as an example of the kind of objective identification of human need which is required to underpin a theory of rights.

⁷⁰ Maslow, Motivation, 19.

⁷¹ *Ibid.*, 22.

⁷² *Ibid.*, 22/3.

Maslow identifies five separate levels of human need:⁷³ physiological needs, safety needs, belongingness and love needs, esteem needs, and the need for self-actualisation. These needs are hierarchically ordered in the sense that only as one level of need is met consistently does the next level begin to exert its influence on the behaviour of the individual. The physiological needs, for example, take up all our attention when they are not satisfied: our consciousness is almost completely dominated by them.

For the man who is extremely and dangerously hungry, no other interests exist but food. He dreams food, he remembers food, he thinks about food ... and he wants only food.⁷⁴

Domination by a particular need affects the way we see the world, present and future:

For our chronically and extremely hungry man Utopia can be defined simply as a place where there is plenty of food ... Anything else will be defined as unimportant ... Such a man may fairly be said to live by bread alone.⁷⁵

When the physiological needs have been met the individual is preoccupied, to the exclusion of other needs, with the need for security, comfort and reassurance. When the physiological and the safety needs have been met, the next to appear are the needs for love, affection and belongingness. People who have not got them feel keenly the need for friends, sweetheart, wife or children, for a place in the family or in the group. They feel, as sharply as they once may have felt hunger or fear, the pangs of loneliness, of rejection, of friendlessness, of rootlessness.

Once the needs for food and shelter, for security and for love and affection have been met in a consistent way the next group of needs affecting individuals is for 'a stable, firmly-based, usually high evaluation of themselves, for self-respect, or self-esteem, and for the esteem of others'.⁷⁶ Maslow divides these 'esteem needs' into two subsidiary sets of related desires. There are first of all the desire for strength, achievement, adequacy, mastery and competence, 'confidence in the face of the world, and for independence and freedom'. Secondly there are desires for *deserved* 'reputation or prestige ... status, fame and glory, dominance, recognition, attention, importance, dignity, or appreciation'.⁷⁷

⁷³ *Ibid.*, 35 - 58.

⁷⁴ *Ibid.*, 37. For a chilling confirmation of this insight see Primo Levi If This Is A Man, Stuart Woolf, trans., Sphere Books, 1987. 'One can hear the sleepers breathing and snoring; some groan and speak. Many lick their lips and move their jaws. They are dreaming of eating; this is also a collective dream. It is a pitiless dream which the creator of the Tantalus myth must have known. You not only see the food, you feel it in your hands, distinct and concrete, you are aware of its rich and striking smell; someone in the dream even holds it up to your lips, but every time a different circumstance intervenes to prevent the consummation of the act.' 67 and *passim*.

⁷⁵ Maslow, Motivation, 37.

⁷⁶ *Ibid.*, 45.

⁷⁷ *Ibid.*, 45/6.

The ultimate need, the final level, the need for self-actualization, 'the need to become everything that one is capable of becoming' appears with full force only when the lower needs have been met. This is the need to be true to one's own nature and potential, to be what one can be.⁷⁸

Two other possible basic needs are mentioned by Maslow: the need to know, or ongoing curiosity (cognitive or intellectual need), and the need for order, balance and beauty in one's surroundings (aesthetic need). The need to know takes many different forms (the desire for more detail, the desire for more generalised theories, systematisation, organisation and analysis of knowledge, significant relationships) but each appears to be an expression of a basic need for knowledge. Maslow does not include this, however, in his proposed hierarchy. It would not fit; for there are too many examples of the search for knowledge over-riding what might be thought of as more fundamental needs. It is not clear whether the need for knowledge and the aesthetic need⁷⁹ (which does not appear to be as universal or as compelling) are to take a pre-eminent position in the hierarchy or serve as a kind of background to the others. It is also arguable that there is not, in fact, a permanent basic need for knowledge (what appears to be a generalized curiosity). Many people as a matter of fact are content to accept unquestioningly what they are told and wish nothing more than to have their present state of knowledge left undisturbed.⁸⁰

In general the lower needs are stronger than the higher needs i.e. they are more powerful motivators. They also appear earlier in the life of the individual. The higher needs are less important for sheer survival, their satisfaction can be postponed longer (they are less urgent), and they can disappear permanently. The higher needs produce a better quality of life and a healthier mental/spiritual condition but they also require better sustaining conditions (family, economic, educational, social etc.) to flourish.

Failure to meet the dominant need at any particular time results in illness or 'ill-being' (the opposite of 'well-being'). Satisfaction of the need restores well-being.

Rights and Needs

McCloskey relates rights to our primary needs as human beings or as specific individuals.

Human needs, the needs of men as men, and the individual needs of particular persons as the unique persons they are (and not as holders of

⁷⁸ *Ibid.*, 46.

⁷⁹ *Ibid.*, 51.

⁸⁰ The state of perplexity following the Socratic process of elenchus is not universally welcomed. See Dillon, 'Curiosity as a Non-sequitur of Socratic Questioning', *The Journal of Educational Thought*, 14, 1, 1980, 17-22, and Pekarsky, Daniel, 'Socratic Teaching: a Critical Assessment', *Journal of Moral Education*, 23, 2, 1994.

roles or stations) are the needs with which we are most concerned, when we are concerned with *human and personal rights* and political values.⁸¹

Needs which we might have as holders of assigned roles or stations are secondary to our basic needs as human beings, and to our needs as the individual persons we are.⁸²

The relationship between rights and needs can therefore be put in the following forms (positive and negative):

As a general, ideal, *prima facie* right, we have a right to the satisfaction of those needs which human action can cause to be satisfied or thwarted ... We do not have a right to the satisfaction of those needs which it is impossible to have satisfied by human action, and where human action does not frustrate the realisation of the need.⁸³

If we apply this to Maslow's taxonomy⁸⁴ we can certainly agree that it is appropriate to the two lower levels (physiological and safety needs) for both can be, and commonly are, satisfied by human actions. It is not so clear when we attempt to apply it to level 3 (belongingness and love needs) however. For while 'a sense of belonging' requires the action of others (they must in some way express their recognition of me as a member of the group, my own wishes are not sufficient) it is not clear that they can be *obliged* to accord me this recognition. 'Belongingness' in Maslow's scheme is an emotional condition: it will not be satisfied by administrative measures (granting membership, affording appropriate privileges, etc.) which can be enforced by invoking a right. I may insist on having my membership of the group formally recognised without having my (emotional) need to belong met. The latter requires an affective response from others which, if it is not forthcoming, cannot be wrested from them by the imposition of a duty or obligation.

This is clear in relation to the need for love and affection. While the need for love and affection can be satisfied by human action, the love of others is not something that I can

⁸¹ McCloskey, 'Human Needs', 3.

⁸² *Ibid.*, 10. McCloskey will only acknowledge roles such as mother, father, parent as 'quasi natural' which 'become basic to the fabric of most human social organisations' and which are 'secondary to the needs of men as men, and those of individual persons as those unique persons'. (3/4) It is part of the argument being put forward here that it is the parent-child relationship which has both evolutionary and moral priority. Most people do not, and never have, become parents simply as an option among others. What people have done, as a matter of historical fact, is refrain from becoming parents in the service of some perceived greater cause or as symbolic of commitment to such a cause, that is, as a *self-sacrifice*. Parenthood is not an optional extra to the full dimension of being human. Where parenthood is impossible it is commonly considered a tragedy, where it is freely foregone it may be an admirable sacrifice.

⁸³ McCloskey, 'Human Needs', 9.

⁸⁴ For a related scheme of needs see Hobson, Peter, 'Another Look at Paternalism', *Journal of Applied Philosophy*, 1, 2, which includes a section on the relation of needs to paternalism and harm. Hobson identifies three different types of need: physical needs, psychological needs (which are 'necessary to the maintenance of a minimal level of mental stability and emotional well-being'), and what he calls 'personal needs', that is 'any of the personal needs and interests of an individual which are of overriding importance to him' and would include things like 'religious belief, career aspirations, or personal possessions ...(and) things he does not necessarily see the importance of at the time, such as the need for education'. 298/299.

claim as a right: the requisite response cannot be commanded. We can no more oblige others' love than we can oblige them to be amused, outraged, or happy. If 'right' means that there is always a correlative obligation or duty then 'right' is inappropriate in relation to a concept such as 'love'. There cannot be an obligation to love, much less to love a particular person; it is not something that can be done to order, like the exercise of a skill or a deductive procedure. O'Neill is correct that children's lives are 'particularly vulnerable to unkindness, to lack of involvement, cheerfulness or good feeling' and that these things may not be visible from the perspective of rights. '(C)old, distant, or fanatical parents and teachers, even if they violate no rights, deny children "the genial play of life": they can wither children's lives'.⁸⁵ But 'the genial play of life', including the experience of loving and being loved, cannot be ordered into existence. The verb 'to love' has no imperative mood; we have needs which cannot be appropriately addressed as matters of rights.⁸⁶

Sutton attempts to confirm a theory of welfare rights based on an analysis of the ties between the needs of the rights bearer and the duties of others to satisfy those needs. Welfare rights are 'rights to the goods of life from which we derive the satisfaction of our most basic needs'.⁸⁷ There must be 'some minimal level of consensus' as to the kinds of objectives 'which may be appropriately protected by ascriptions of human rights'. This 'minimal level of consensus' is a pre-condition 'to the effective possession of any particular welfare right'.⁸⁸ There are two levels at which consensus is necessary. At the more general level consensus is required regarding the desirable outcome of human development, that is, a definition of human good. At the more specific, instrumental, level consensus is needed as to the most efficacious means of attaining that objective. The latter will be largely, though not exclusively, an empirical matter. The former, more general consensus will constitute, in part at least, the aspiration of a particular society as a whole, while the latter, instrumental consensus will include the child-rearing and child education practices of that society.

The concept of needs has two advantages in relation to the identification of rights. In the first place needs are reasonably objective with reference to a common humanity and accepted norms of human functioning. (Maslow's taxonomy demonstrates this in principle although we may disagree with the substantive needs or their ordering.) Secondly needs relate to the development and the maintenance of the capacities necessary for the exercise

⁸⁵ O'Neill, Onora, 'Children's Rights and Children's Lives', in Rosalind Ekman Ladd, ed., Children's Rights Re-visioned: Philosophical Readings, London, Wadsworth Publishing Company, 1996, 29-41, 38.

⁸⁶ I am aware that we are famously enjoined to love our neighbour but I am not aware how we might do it contrary to our natural inclinations. The best we can hope to achieve is respect and tolerance.

⁸⁷ Sutton, 'Human Rights', 102.

⁸⁸ *Ibid.*, 104.

of freedom and rationality.⁸⁹ As shown by Maslow's scheme, assurance of physical survival is not sufficient. In order for the capacities required to develop any conception of the good and to respect the moral personality of others to be present 'the human animal requires certain conditions of nurture and instruction'.⁹⁰ We require at least the promotion of intelligence and 'minimal conditions of care and affection' in order to promote our capacity 'to relate to other human beings and to make a life among them'.⁹¹ Freedom rights are essential to meet the higher levels of need, the needs for esteem and for self-actualization, but welfare rights are essential to meet the lower levels which have developmental priority.

The central concern here is with needs and capacities that are essential for human functioning. Now even when human nature is defined by the primacy of some developed capacity, such as rational agency or autonomy, such capacities are contingent on the fulfilment of relevant needs. Welfare-rights ensure the provision of these needs. '(I)f the point of a given right is to ensure that a given choice can actually be exercised at a certain time (...) then it seems clear that facilitating the exercise may sometimes be as important as not obstructing it'.⁹² In other words as well as imposing a duty to forbear a right to freedom may also impose a duty to at least facilitate meeting the needs without which the capacity to choose will not develop. These needs will include physical necessities, health, and some level of educational provision. We cannot exercise rational choice or undertake autonomous action without having enjoyed the conditions for their realization.

However, human beings are not just rational and autonomous beings but also, crucially, 'vulnerable and needy beings in the sense that their rationality and their mutual independence - the very basis of their agency - is incomplete, mutually vulnerable and socially produced'.⁹³ Children, for example, need physical care and appropriate socialization without which they could never become competent agents. If as rational human beings we act in ways which are indifferent to our mutual human needs and interdependence then 'agency would fail or diminish for some, who then could adopt no principles of action, so undermining the very possibility of action on principles that can be universally shared'.⁹⁴ Where we can anticipate needs in broad outline and identify opportunities to satisfy or deny such needs (as we can for those who, in a given society, are charged with the care of children) then we may have compelling reasons to establish 'a legal and social framework that secures certain positive obligations and so positive rights' in relation to these needs. Crucially we recognise children's developmental needs for 'care

⁸⁹ Fried, C., Right and Wrong, Cambridge, Mass., Harvard University Press, 1978, 120.

⁹⁰ *Ibid.*, 120/1.

⁹¹ *Ibid.*, 121.

⁹² Waldron, Liberal Rights, 1993, 9.

⁹³ O'Neill, 'Children's Rights', 34.

⁹⁴ *Ibid.*

and education of a certain standard' and have established legally supported social practices which recognise the rights of children to have those needs met.⁹⁵

There are human capacities, other than autonomy and choice, which are equally valuable in themselves. Giving choice and autonomy a central importance appears to cast other human capacities (physical, emotional, psychological, and mental) in a secondary and subservient role: welfare-rights are made to appear as complementary but subservient to freedom rights.⁹⁶ This appears as a distinction between rights which have an instrumental function in empowering other rights and rights which are arguably ends in themselves.⁹⁷

As an alternative to the welfare/choice rights dichotomy Freeden proposes that encompassing all rights under the rubric of welfare would challenge the assumption that choice rights are superior to welfare rights.⁹⁸ We could escape the constriction of the welfare/freedom rights distinction by recognising that welfare is 'attached to the concept of interest', and that the concept of interest can be 'purged of its conventional association with private interests-cum-wants alone'. Secondly, we must acknowledge the equality of human capacities other than autonomy and choice. Failure to develop and nurture all of these capacities leads to serious harm. (Who will say, for example, that the capacity to love is inferior, or subordinate to, autonomy? Or that where the capacity for self expression - not just the freedom for self-expression - is unrealised the individual is not seriously harmed?) The good of the individual is promoted by 'a generous view of welfare-rights as promoting all aspects of his or her well-being, subject only to a reasoned recognition of what that well-being currently constitutes'.⁹⁹

The conventional liberal preference for rights of freedom over welfare rights reflects a concept of human society which embodies 'an ideology of conflict in which people are potentially hostile to each other'.¹⁰⁰ In the case of freedom rights the right is seen 'only as a protective device for a self-sufficient individual, and not also as an enabling injunction to assist a mutually dependent and co-operative individual'. There does not have to be a

⁹⁵ *Ibid.*, 35.

⁹⁶ Freeden, *Rights*, 51/2.

⁹⁷ The claim that the concept of rights is exclusively concerned with liberty has now been diluted, if not entirely abandoned. See, for example, Waldron, *Liberal Rights*, 11. '(T)he contrast between liberty and the satisfaction of material needs must not be drawn too sharply, as though the latter had no relation at all to what one is free or unfree to do'. 317.

⁹⁸ Freeden, *Rights*, 52. See also Freeden, Michael, 'Human Rights and Welfare: a Communitarian View', *Ethics*, 100, 3, 1990, 489-502, 490-492.

⁹⁹ Freeden, *Rights*, 52.

¹⁰⁰ *Ibid.*, 53, 55. The dominant freedom-rights approach characterises society as 'a broadly individualistic network of human relationships, in which people enter into mutual voluntary agreements, while a large area of private space is retained round each person'. It is an atomistic conception of society which sees the actions of the society as potentially threatening to the free action of the basically self-sufficient individual.

competitive relationship between the two conceptions of rights so that a new emphasis on welfare rights automatically leads to a down-grading of choice rights. Rather, 'it is plausible that autonomy, too, is in one's interest and a constituent of one's well-being'.¹⁰¹ This is borne out by Maslow's taxonomy.

It has been argued that having interests 'indicates at most a necessary condition for having rights'.¹⁰² If having an interest was sufficient to generate a corresponding right there would be 'an enormous and unmanageable proliferation' of rights. Even if 'interests' are restricted to a minimum of basic interests or needs, there still remains the logical problem of deriving a normative conclusion about rights from factual premises about interests or needs. There is also the substantive question of why moral rights are generated by *common* human characteristics 'rather than by more restrictive, inegalitarian characteristics that pertain only to some persons, or to persons in varying degrees, such as expert knowledge or will to power or productive ability'.¹⁰³

Lomasky argues that '(n)eed confers rights only when what is needed is recognisable as a need by the one who is to meet it'. But he dismisses needs as 'an inchoate class that ill support (sic) a theory of basic rights'.¹⁰⁴ Even when the needs *are* recognised by others they are 'not an adequate springboard for a jump to rights' because there is, as yet, no reason why others, even when they recognise the need, must comply.

But it is not the case that there is no privileged need and that all needs are equal and in competition. Clearly a taxonomy such as Maslow's gives reason to at least consider, if not accept, a hierarchical structure. The need for security, for example, may often conflict with the need for autonomy and self-esteem. But it is also plausible to argue, as Maslow appears to do, that the need for self-actualization (which includes autonomy and self-esteem) is contingent on the need for security having been met at crucial times in the developmental life of the individual.¹⁰⁵ In any event there is no conclusive reason for claiming that the pursuit of total autonomy (if this is an achievable goal, or a desirable ideal, at all) is likely to lead to greater human happiness than the development of other human characteristics. Certain choices (to sell oneself into slavery, to become addicted to a mind destroying drug) are actually inimical to the ideal of human autonomy. The exercise of choice *per se* is not necessarily an unalloyed benefit.

¹⁰¹ *Ibid.*, 53.

¹⁰² Gewirth, A., Human Rights: Essays on Justification and Applications, Chicago, the University of Chicago Press, 1982, 44.

¹⁰³ *Ibid.*

¹⁰⁴ Lomasky, Persons, Rights, 61.

¹⁰⁵ See also Erikson, Childhood and Society, *passim*.

The concept of need as the basis of rights sometimes requires that others make judgements on what the needs actually are and that they implement measures to meet the needs. 'For even granted that non-intervention protects one's moral capacities, intervention may be far more important in protecting one's physical and emotional capacities.' Such paternalistic interventions will deliberately influence the ways in which an individual will act (and think) as a consequence. We have to distinguish between protecting the purely moral capacities of people and protecting all human capacities 'which is, in a general sense, to act morally towards people by respecting their rights to function and flourish'.¹⁰⁶

The perspective of welfare rights is more comprehensive than the perspective of freedom rights. Welfare rights require action on the part of others in order to promote a culturally agreed standard of well-being.¹⁰⁷ This view reflects a more realistic view of human nature and human society. Human nature is mutually dependent and human action can only be exercised within the constraints, as well as with the support of, a human community. In such a community 'mutual dependence is the norm and ... human personality, needs and conduct are shaped through human interaction'.¹⁰⁸ Human beings cannot adequately function without the help and co-operation of others and therefore 'membership of a society is itself a fundamental human need that demands protection'.¹⁰⁹

Do rights follow needs?

Rights are 'precious commodities which require positive action (or forbearance) from others'.¹¹⁰ This does not mean that the need must necessarily be met, as a duty, by a *specific* person (although there may, in fact, be a specific person whose individual duty it is to meet the particular need). What it means is that the need requires the effort, as a duty, of '*one of a specific set of persons*'¹¹¹ any one of whom can fulfil the relevant needs. This emphasises the notion of group, or communal, responsibility for meeting individual needs. A link between the needs of the welfare rights bearer and the duties of others to satisfy those needs is sustainable provided we recognise that the duty can be owed by a *set* of possible candidates not necessarily by a specific individual.¹¹² This is consistent with the notion of rights as being embedded in community rather than being exclusively a function of individual freedom.

So, could we have rights to the basic needs of life?

¹⁰⁶ Freedon, *Rights*, 54.

¹⁰⁷ *Ibid.*, 57.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ Sutton, 'Human Rights', 104.

¹¹¹ *Ibid.*, 105

¹¹² *Ibid.*, 104/5

One cannot exercise the initiative of a human being (which is what the rights of liberty are intended to protect), or indeed remain a human being at all, unless the basic needs of life are satisfied, and if a man is not in a position to do this for himself, it seems to me reasonable to say that he has a right, as a human being, to the assistance of others in meeting these needs.¹¹³

Lomasky articulates three objections to this position. His first objection has two strands one empirical, one conceptual. The empirical strand is that we cannot have a right to something which is not available or is in critically short supply. This is similar to Fried's dismissal of needs as the basis of welfare rights because of the immense burden of cost involved in satisfying the needs for everyone.¹¹⁴ This objection raises a crucial question with regard to rights. If scarcity can be used as an argument for denying a right (rather than an argument for postponing or diluting its implementation) then rights have little force in political or economic matters at all. It is surely not a sufficient argument in favour of the retention of slavery, apartheid, or discriminatory pay, to say that the implementation of the corresponding right is prohibitively costly? The force of a right is precisely that we must undertake to change practical arrangements to conform to the right. Once it is accepted that there is a right it is incumbent on the society to reorder its priorities in order to find the means to implement the right as far as is practically possible. The reality is that 'problems of scarcity mean that we may have to opt for very basic needs or acknowledge that needs may always outstrip resources.'¹¹⁵ But doing so does not deny that there is a right established by the fundamental need.

The conceptual strand to Lomasky's objection is that we cannot have a right to something which is in principle not transferable from person to person. For example: no satisfactory life, he says, can be lived by someone lacking a directive conception of the good, motivational energy, fixity of purpose, flexibility of response, or self-respect. While these can be regarded as among the basic needs of human beings, they are not the kind of commodities that can be supplied to those in need of them from those who are in possession of a superfluous amount.¹¹⁶ The best we can hope for is that society is arranged so that individuals 'are *not impeded*' in developing these non-transferable goods for themselves and that others will provide '*support and encouragement*'.¹¹⁷

The conceptual objection is not quite as dissimilar from the empirical as the logical distinction might suggest: the goods listed by Lomasky are all ends or possible ends of education; they are not commodities that one can normally acquire through one's unaided

¹¹³ Raphael, D.D., (ed.), Political Theory and the Rights of Man, London: Macmillan, 1967, 64, quoted in Lomasky, Persons, Rights, 86.

¹¹⁴ Fried, Right and Wrong, 123/4.

¹¹⁵ Freedman, Rights, 50.

¹¹⁶ Lomasky, Persons, Rights, 86.

¹¹⁷ *Ibid.*, 87 (emphasis in original).

efforts. Admittedly the community cannot 'offer these goods to all who are in need of them as a matter of right' and equally it must be admitted that these characteristics 'must be internally generated'¹¹⁸ but this does not mean that the community has no role to play in their generation or development. While accepting that they are things which cannot in principle be transferred from person to person, which people are ultimately responsible for providing for themselves, social measures can be put in place to render them possible (or at least their absence less likely) and to maximise the likelihood that they will occur. This '*support and encouragement*' must take the form of some kind of positive intervention, especially in the areas of family support and schooling. If an individual lacks all of the qualities mentioned there is no likelihood *at all* that she will be able to take the initiative to rectify matters for herself. If '*support and encouragement*' mean anything in this context it must surely mean more than purely *moral* support and encouragement. This is where the empirical and conceptual strands of the objection come together: it is incumbent on the community to provide the resources necessary to support an adequate education system so that each individual has the opportunity to acquire and develop the characteristics necessary to the pursuit of a conception of the good.

It is equally necessary, however, that the educational system provided actually *does* promote the acquisition and development of the relevant characteristics. Providing the resources without the specific educational objectives is pointless and it is no more than tokenism to proclaim the right of the individual to acquire and develop the characteristics if she is not going to receive the necessary assistance from others. If there is an acknowledged need for certain material and non-material goods without which a minimal standard of human functioning is impossible then economic scarcity, while it might be a reason to defer satisfaction of the relevant needs, or to target initially only the most urgent, or to follow a minimalist policy, is not sufficient reason to deny the right to satisfaction of the needs. It is a question of economic priorities, which are ultimately based on human values. If we are expending economic resources for non-essential purposes, or for purposes which are generally regarded as of lesser importance than the satisfaction of fundamental needs (bingo halls instead of hospitals), then we are not morally justified in denying the rights in question.

Lomasky's second objection is that the argument from needs ignores the supply side of the equation. It is not always the case that the giver can give without a loss to himself which will be greater than the advantage to the recipient. In general 'there can be no general obligation to give up that which is of considerable instrumental value to the pursuit of one's own projects on the grounds that someone else has pressing need for those items'.¹¹⁹ It is

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

not necessary that the loss be greater than the transferred benefit: it need only interfere with the potential donor's own legitimate project pursuit.¹²⁰ The recognition of a need simply entails that one *ought* to provide the requisite good, not that one *must* provide it; that is it does not entail that the one in need has a right to it. It indicates, on the contrary, that a positive response would be supererogatory, a matter of discretionary charity, not required justice, a matter of *should or ought*, not *must*.

But other human beings have a demand on us which is stronger than our moral goodness. There is something about human beings 'such that neglecting their well-being can raise questions of justice and right, and not merely of moral goodness.'¹²¹ Lomasky acknowledges that in relevant cases there are non-trivial needs which can be met by others. Yet a *right* to provision is dismissed. Is there a reasonable case for the dismissal or is it just that the positive argument has not been made adequately? It appears that in making the positive case Lomasky has so overstated the case for the right of the one in need that the relevant response is egregiously excessive: diversion of 70% of the GNP of the US to India, donation of a healthy cornea to a blind person one doesn't even know. In both cases there are other, less dramatic, responses to the need; responses which would equally meet the need (albeit in a different way) without presenting us with the necessity for extreme courses of action. It is not the case that a blind person has a right (an enforceable moral claim) to a healthy cornea from a stranger. A blind person has the same rights to the conditions necessary to pursue a conception of the good as anyone else. In her case, however, the educational and social provisions required will be different: they will include appropriate teaching and learning experiences which will enable her to compensate for her blindness, social and architectural arrangements which facilitate her unhindered movement, training and employment policies which will equalize her chances in the labour market. It is reasonable to assert that there is a right to have needs met in practical ways which, although they put pressure on the community, are not so far fetched as to render the very idea of meeting them absurd. In the same way there has never to my knowledge been a serious proposal to appropriate 70% of the GNP of any developed nation for relief in the Third World. Those who assert a right of people in underdeveloped nations to minimal meeting of their needs make much more modest claims.¹²² The rights of the poor to have their needs satisfied will not be met by the impoverishment of anyone else. On the contrary, it can be plausibly argued that only strong First World economies can be relied upon to provide adequate resources to alleviate immediate need and to empower the poor to prepare for their own future.

¹²⁰ *Ibid.*, 88.

¹²¹ Benn, Stanley, I., 'Human Rights - for whom and for what?' in Kamenka, T., Tay, A.E.S., eds., Human Rights, London, Edward Arnold, 1978, 66.

¹²² The UN mandated level of GNP to aid programmes is 0.7%.

Lomasky's third objection is that response to need on the part of others can range from none at all to a mandatory provision (i.e. a right). He correctly dismisses the former as morally implausible, it yields 'a desiccated view of the moral realm'.¹²³ A practical morality must address the issue of rectifying inadvertent inequalities within the moral order: need does confer rights. Lomasky accepts this but argues that it entails only that the recipient be *assisted* in acquiring the good in question. At most there is a '*shared* or *social*' obligation which each individual can meet through contribution to the State.¹²⁴ But that response need only manifest itself as refraining from preventing. (His example is not polluting the only available source of fresh water.) 'A takes account of B's need for G if A brings about a condition *necessary* for B's attainment of G, even though that condition is not simultaneously sufficient.'¹²⁵ But a logically necessary condition can be practically trivial. For A to be educated it is necessary that there be at least one functioning school. This might not be of much significance to A if the school is effectively inaccessible.

Lomasky's argument against rights based on need is far from compelling. He succeeds in showing only that in the case of welfare rights *individuals* do not have the full obligation to meet the needs. This is correct. He has not shown that there are no welfare rights or that rights cannot be successfully argued on the basis of need. His argument that there cannot be a right to the provision of self respect by others (for example) is conclusive; but his corollary should be handled with care. To say '*if* there is a right to self respect, it can *only* be a right to certain necessary conditions and not to sufficient conditions'¹²⁶ is correct. But, as shown above, necessary conditions can be trivial. Simply to refrain from degrading others or rendering them servile is to do little. We must, surely, collectively provide the conditions - all of the conditions insofar it is in our power - necessary to maximise the likelihood that self respect will develop. This is crucial if the 'right' to education is to have any meaning at all. And also crucial if the community is to benefit from the well being of its several members.

Rights conflict

The fundamental rights that people have can be no more than *prima facie* rights since people's final rights result from compromises between the fundamental rights of all. The compromises will be morally defensible 'only insofar as they reflect the equality of the *prima facie* rights'.¹²⁷

¹²³ Lomasky, Persons, Rights, 89.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, 90.

¹²⁶ *Ibid.*, 91.

¹²⁷ Mackie, 'Can There Be a Right Based Moral Theory?', 115.

The foundational right to a rights-based theory that Mackie suggests is 'the right of persons progressively to choose how they shall live'.¹²⁸

If we assume that, ..., what matters in human life is activity, but diverse activities determined by successive choices, we shall, ... take as central the right of persons progressively to choose how they shall live.¹²⁹

This fundamental right is put forward as universal. Mackie does not claim that it is objectively valid, or that its validity can be discovered rationally: he is 'merely adopting it and recommending it for adoption as a moral principle.'¹³⁰ But why then should we accept it? We can accept it as a fundamental postulate. A postulate is a presumption which is so basic in nature that it 'antecedes everything which is said in the logical system which it supports'.¹³¹ We may question the truth of the fundamental postulate but as soon as we do so, it no longer functions as such: its truth or otherwise must be debated with reference to *other* postulates which may be explicitly stated or implicitly believed. It is not necessary to accept the postulate as an ultimate statement of truth but only to accept it tentatively in order to see where it may lead us.

This does not mean that the postulate that we choose can be completely arbitrary. We will choose one postulate rather than another because it appears to promise more (to be more fruitful), it appears to be more likely than any other to be supportive of a form of life that we desire and value (our version of 'the good life').¹³² Once adopted (or acknowledged) the fundamental right provides us with the wherewithal to evaluate features in our moral environment.

Our version of the good life can only come out of a context in which we have learned to perceive certain activities and aspirations as valuable, remembering that 'valuable' is an ascribed quality. If we represent these activities and aspirations as valuable in themselves it is only because the ascription of the value is universal or almost universal within our community of experience. Not everyone within that community of experience will value a specific activity (swimming, say) which an individual may choose. The communal evaluation will be broader (athleticism, health) so that a wide range of specific activities may qualify as acceptable. Some hitherto valued activities may become problematic or even disvalued (professional boxing, for example).

¹²⁸ This seems *prima facie* to promise a developmental theory of rights or, more correctly, a theory of developmental rights.

¹²⁹ Mackie, 'Can There Be a Right Based Moral Theory?', 114.

¹³⁰ *Ibid.*, 116.

¹³¹ Kelly, George A., A Theory of Personality: The Psychology of Personal Constructs, New York, Norton, 1963, 47.

¹³² Polanyi, Personal Knowledge, especially chapter 10, 299-324. As with Polanyi any investigation into the bases of our moral life can, ultimately, only be described as 'a systematic course in teaching myself to hold my own beliefs', Personal Knowledge, 299.

The progressive dimension and the individual's capacity for choice is constrained by the community which provided the basis for the individual's capacity in the first place: the sustaining community. While the principle of the fundamental right offers a defence of the interests (or some interests) of individuals it is not committed to the view that individuals are

spontaneous originators of their thoughts and desires. It can recognise that the inheritance of cultural traditions and being caught up in movements help to make each individual what he is, and that even the most independent individuals constitute their most independent characters not by isolating themselves or by making 'existential' choices but by working with and through inherited traditions.¹³³

A conception of human rights requires a view of the social ideal of the good life and also requires an understanding of the nature of human community.¹³⁴ Mackie's principle will also allow us to discriminate between collectivities which acknowledge and value the rights and autonomy of their members and those which will subordinate the interests of the individual 'to some maximized aggregate of interests'.¹³⁵

The good life is an activity which is not limited by specific undertakings, nor is it a static state. Nonetheless the choices which we are able to make are necessarily constrained by our specific personal circumstances, the existential reality into which we are born, our sustaining community. Our freedom to pursue our own ends is empowered and endorsed, but also constrained, by our given circumstances.

Summary

Aristotle's formal sketch of the structure of the good life does not specify content. Although the good life will satisfy the interests of those who participate in it, a substantive universal definition is unattainable because of the diversity of human history and the variety of social, cultural, political, and religious practices. Our moral thinking is relative to particular ways of life and expresses the preferences of these ways of life.

It is in the nature of human beings to look after themselves and those who are nearest to them. This ensures the survival of the individual, the family, the tribe, and the community. Human life is inescapably social; the constitutive relations are cultural as well as biological and familial.

The individual's pursuit of the good life cannot create values *ab initio*. Our choices are influenced by received values regarding the objects of our pursuit. The specifics of the

¹³³ Mackie, 'Can There Be a Right Based Moral Theory?', 117.

¹³⁴ Golding, 'Towards a Theory of Human Rights', 521.

¹³⁵ Mackie, 'Can There Be a Right Based Moral Theory?', 117.

good life are largely worked out historically by communities, not individuals. For most people moral options are significantly limited (although not entirely constrained) by the values they inherit from family and community. Any version of the good life originates in a context in which certain activities and aspirations come to be perceived as valuable. They appear to be valuable in themselves only because they have been endorsed within a community of experience. Hence, the choices available to us are necessarily limited by the existential reality into which we are born, our sustaining community. Freedom to pursue our own ends is empowered and endorsed, but also constrained, by our given circumstances.

Needs and interests are relevant to rights and to the pursuit of the good life. A taxonomy such as Maslow's demonstrates in principle that needs are reasonably objective with reference to a common humanity and norms of human functioning. Although fundamental human needs are not socially or culturally relative, the ways in which the needs are met are. Needs and interests can be explained and invoked only against a belief in a common human nature and a specific personal nature (identity) which is unique to each individual: there is the good for human beings generally and also the good for each individual. These goods correspond to a distinction between development and self-making and are consistent, in a general way, with a distinction between welfare rights and rights of freedom respectively.

There must be a basic right to have fundamental human needs satisfied in order to support a minimum of human functioning. The value of autonomy, freedom, rationality and so forth is nugatory if fundamental requirements for basic human well-being have not been met. In any case there are human capacities, other than autonomy and choice, which are valuable in themselves. Welfare rights give a more comprehensive perspective than freedom rights and reflect a more realistic view of human nature and human society by requiring intervention to promote a culturally agreed standard of collective, as well as individual, well-being.

Many of the issues raised in this chapter will be further addressed in chapter 10, 'The Communal Context of Rights'.

PART 2: PARENTS

Chapter 4: Begetting and Bearing

This chapter will explore what it might mean to have a right to have children and what such a right might entail. This will be followed in the two succeeding chapters with an exploration of the notion of children as property and then with the question as to who has the right to rear children and especially whether there is a presumptive right on the part of the natural parents.

The right to have children - the negative programme

Is there a right to *have* children?¹ The existence of such a right would have significant consequences for the relationship between parents and children, between prospective parents and society (community), and between the family and the community. If there *is* a right to have children then it is important to know what the status of this right is and also what kind of right it is. If there is no such right on the other hand, or if the right is less than absolute, then it is important to establish in what ways the community, or the state, can intervene in the decision of individuals to have children.²

A fruitful way to address the issue may be to examine a proposal to control human procreation. It has been suggested³ that it would be both 'theoretically desirable' and 'workable and just'⁴ for the state to license all parents. Society already regulates potentially harmful activities which require 'a certain competence' for safe performance, and for which there is a 'moderately reliable procedure' to assess competence.

(A)ny activity that is potentially harmful to others and requires certain demonstrated competence for its safe performance, is subject to regulation - that is, it is theoretically desirable that we regulate it. If we also have a

¹ Archard points out that the terms 'have' and 'bear' are not synonymous in this context: an infertile couple can *have* children. See Archard, D., Children: Rights and Childhood, London, Routledge, 1993. In what follows however I use the terms interchangeably to denote the begetting and bearing of children since the phrase 'Having a baby' is commonly used to denote 'Bearing or giving birth to' a baby. 'Having' in the possessive sense raises other questions which will be addressed in chapter 5.

² It should be noted that there is no question being raised of there being no right *not* to have children even though this too is a significant issue. See Smilansky, S., 'Is There a Moral Obligation to Have Children?', Journal of Applied Philosophy, 12, 1, 1995.

³ LaFollette, H., 'Licensing Parents', Philosophy and Public Affairs, 9, 2, 1980, 186 - 197. The case is also made by Westman, Jack C., Licensing Parents : Can We Prevent Child Abuse and Neglect?, New York, Insight Books, 1994. Westman argues that the enormous waste of human and economic resources which he alleges results from incompetent parenting could be reduced by licensing. Licensing parents would symbolically set a societal standard that parents may raise their children as they wish subject to the requirement that they do not damage their children's abilities to become contributing members of society. A licensing system would recognize children's basic civil rights and create a context of providing help for parents in difficulty. It would recognise the parent's right to be competent as well as the child's right to competent parenting.

⁴ LaFollette, 'Licensing Parents', 182.

reliable procedure for determining whether someone has the requisite competence, then the action is not only subject to regulation but ought, all things considered, to be regulated.⁵

Parenting is an activity that is potentially harmful and requires competence: 'Therefore, child-rearing manifestly satisfies both criteria of activities subject to regulation'.⁶ To avoid this conclusion we would need to show either that there are special reasons why licensing parents is not theoretically desirable, or that there is no reliable and just procedure through which such a programme could be implemented. It is first necessary to point out, however, that licensing of itself does not eliminate harm to others. We cannot even say that it minimises it. The most we *can* claim is that licensing moderates harm to others.

LaFollette contends that the phrase 'the right to have children' is ambiguous denoting either the right to be given children (in the case of, say, infertile couples⁷) or meaning 'that people have rights to intentionally create children biologically without incurring any subsequent responsibility to them'.⁸ The latter would be an extraordinary claim for it is neither more nor less than a claim for irresponsible parenthood. Certainly some children are born to parents who fail to take adequate care of them or to make adequate provision for their care by others. Such occasions do not, however, establish a right any more than any other form of human behaviour arbitrarily establishes a right. Nor does such behaviour reflect any pre-existing right; it does, however, bear on a feature of rights-talk which dichotomises rights and correlative obligations. The conventional view is that rights entail obligations of *others'* forbearance or intervention, but it is largely silent on the obligations of the rights holder him- or herself. It is not unreasonable to expect that a rights holder will exercise the relevant right responsibly i.e. with due consideration for those who may be affected by the exercise of the right. This is surely the intention of Mill's requirement that the liberal freedoms he advocates are exercised without infringing the equal freedoms of others. In the present case, for example, the right to bear is contingent on the understanding that the right will be exercised responsibly, that the parent will exercise the right in the context of an undertaking to acquit the concomitant duties. Asserting a right to bear children is not asserting untrammelled fecundity.

Although people have a 'plausible but not self evident' right to have children this right, LaFollette argues, may be restricted to protect innocent people, in this case the children they may have. The analogies he uses to support this view are not strictly relevant: it has never been claimed that anyone has a *natural* right to drive, or to practise medicine or law.

⁵ *Ibid.*, 183.

⁶ *Ibid.*, 185.

⁷ This interpretation is dealt with in Archard, *Children: Rights and Childhood*, 97.

⁸ LaFollette, 'Licensing Parents', 186/7. It should be noted that there is no straightforward logical connection between the act of bearing and the duties of rearing. If there were, then the right to rear would not be as contentious as it is.

Some people may desire to do these things but this does not establish a right equal in force to that of a putative right to have children. When one is debarred from driving or from practising medicine or law there are alternative ways of achieving the desired end: other means of travel or other means of occupational self-expression. We would not claim that debarring a person from driving (because they failed a test) or from practising medicine (because they failed to acquire a place in college or failed the subsequent courses) contravened a fundamental right. Yet this is what we might plausibly claim in the case of someone prevented from having a child.

The right to have children is stronger if it means the right to 'rear procreated children the best way (the parents) see fit'.⁹ However, if such a right is accepted then licensing would require too much intrusion. LaFollette argues that the necessary intrusion 'would not often be substantial, and when it is, it would be warranted. Those granted licences would face merely minor intervention; only those denied licences would encounter marked intrusion'.¹⁰ But surely the intrusion must come *before* a licence is issued. How then can we differentiate the extent of the intrusion between 'those granted licences' and 'those denied licences' in order to determine who will actually be granted a licence? In addition he compares this proposal to the process of selecting adoptive parents: again, however, prospective adoptive parents are vetted *before* they are given custody of a child. If they are not given custody as a result - not *licensed* - there is no reason for further intrusion. It is when they *are* given custody - licensed - that there may be a period of monitoring or surveillance to ensure that they are fulfilling their obligations to the child.

There are no unconditional rights. Raymond is correct in her view that having a right 'does not mean that the right is without limits or restrictions ... the 'right to parent', *if indeed it is a right at all*, may be so only if one can demonstrate that one's children will receive proper care.'¹¹ Although she concludes that LaFollette's proposal is 'logically sound, theoretically desirable, and practically feasible', she objects that the proposal is vague in relation to the kind of behaviour that it wants to proscribe. There are no precise indicators or universal characteristics of child abusers.¹²

The right would be contingent on competence. This position, however, appears to confuse *possession* of competence with the *exercise* of the competence. A licence is a permission

⁹ *Ibid.*, 187/8.

¹⁰ *Ibid.*, 187.

¹¹ Raymond, Diane, 'Philosophy and Parenting: a Critical Perspective', *Journal of Social Philosophy*, 14, 1983, 31-41, 33 (emphasis added). The final, conditional part of this statement is also in agreement with O'Neill's condition that the right to bear is contingent on 'on begetters and bearers having or making some feasible plan for the child to be adequately reared by themselves or by willing others'. See O'Neill, O., 'Begetting, Rearing and Bearing', in O'Neill, O., Ruddick, W., (eds.), *Having Children: Philosophical and Legal Reflections on Parenthood*, New York: OUP, 1979, 25.

¹² Raymond, 'Philosophy and Parenting', 33-35.

to practise, it is not a guarantee of competent or ethical practice. It is entirely plausible that someone of attested competence may, in the event, be incompetent through carelessness, lack of interest, lack of commitment, etc. Although competence may be a necessary condition for acquisition of a licence possession of a licence is not a guarantee of competent practice. A high level of surveillance - whether by the state or by some regulatory agency - must be a continuing factor. So, ironically, those who acquire licences to practise must be watched and monitored most closely.

A more credible claim of the right to have children (if there is an undertaking not to abuse or neglect them and to provide for their basic needs) is compatible with licensing. The purpose of the licensing LaFollette tells us is

to determine whether people *are* going to abuse or neglect their children ... if the determination is made that *someone will maltreat children*, then that person is subject to the limitations of the right to have children and can legitimately be denied a parenting licence.¹³

LaFollette acknowledges that objections might be raised to the capability to predict, or to the 'moral propriety of prior restraint' which the programme would impose. He attempts to reassure us that 'the prior restraint required by licensing *would not be terribly onerous for many people*'¹⁴ The 'prior restraint' in question here is presumably the denial not just of the right to have a child (in the sense of begetting or bearing) but of the opportunity. This 'prior restraint' would be far less extensive than 'the presumably justifiable prior restraint of, say, insane criminals, criminals preventively detained and mentally ill people ...'.¹⁵ There appears to be a confusion here: criminals can be so designated only as a result of due process in relation to specific charges; in such cases the restraint is not primarily preventive (a crime has already been committed) but punitive, and it certainly is not *prior*. We do not, in democratic societies, lock people away on the basis of a predictive assessment that they *may* commit crimes. We lock them away because it has been established in open court, beyond reasonable doubt, that they *have* committed crimes. So the only category that he can legitimately associate with his proposal is the category of the mentally ill/insane. Even in this case, however, support for the restraint of those designated mentally ill or insane would not be universal. And it is difficult to understand what 'prior' might mean in the circumstances. One would have thought that the restraint of the mentally ill/insane in the present day would be for purposes of treatment, amelioration or cure and not primarily for purposes of the protection of others.

¹³ LaFollette, 'Licensing Parents', 188 (emphasis added).

¹⁴ *Ibid.* (emphasis added).

¹⁵ *Ibid.*, 189.

LaFollette's proposal is a proposal to license *having* children (in the sense of begetting or bearing) in the first instance. 'How would one deal with violators and what could we do with babies so conceived?'¹⁶ This clearly indicates that *conception* is the violation of the licensing system. Thus a further complication of the argument is that *the people whom LaFollette wishes to protect do not exist*. His way of protecting them is to prevent their existence in the first place. This raises very complex metaphysical problems not least of which is whether non-existent persons (if that is not a contradiction in terms) have rights or can be described as being better off than actual persons.¹⁷

Whether the denial of the opportunity to have a child 'would not be terribly onerous for many people' is an empirical matter as well as an evaluative one. It certainly is not a judgement which can be made lightly. If we are to judge the seriousness with which it should be taken we need only look at what LaFollette has to say later regarding the punishment of violators.

There are also practical objections to the licensing proposal especially regarding the development of adequate criteria. LaFollette claims that he is not looking for criteria for the *best* but for the *worst* parents: 'Although we do not have infallible criteria for picking out good parents, we undoubtedly can identify bad ones'.¹⁸ This confuses being able to identify gross neglect or abuse when it occurs with being able to predict when it is *most likely* to occur. He does not anticipate a 100% accuracy rate for such tests. He seems to think that the kind of accuracy suitable for issuing driving licences or fitness to practice certificates will do: 'it would be imprudent to demand considerably more exacting standards for the tests used in licensing parents'.¹⁹ But surely the reliability of the procedure should be proportional to the seriousness of the issue? (Equating having children with the right to drive a car is trivializing the former for purely rhetorical reasons.) There appears to be confusion regarding the purpose of the test: is it designed to *qualify* those who want to be parents or to *eliminate* those who would be unsuitable? Is this a positive or a negative licensing?²⁰ LaFollette is sure, however,²¹ that such tests as he requires could be developed. He dismisses charges that there will be unintentional misuse or intentional abuse of the tests: in relation to the former he argues that there will always be mistakes in

¹⁶ *Ibid.*, 193.

¹⁷ Can non-existent 'persons' have rights? See de-Shalit, A., 'Community and the Rights of Future Generations', *Journal of Applied Philosophy*, 9, 1, 1992, 105-115; Marshall, Peter, 'Thinking for Tomorrow: Reflections', *Journal of Applied Philosophy*, 10, 1, 1993, 105-113; Elliott, Robert, 'The Rights of Future People', *Journal of Applied Philosophy*, 6, 2, 1989, 159-169; Parfit, Derek, *Reasons and Persons*, Oxford, Clarendon Press, 1984, Part Four.

¹⁸ LaFollette, 'Licensing Parents', 190.

¹⁹ *Ibid.*

²⁰ *Ibid.*, 191.

²¹ *Ibid.*, 193.

human affairs,²² in relation to the latter while we have no reason to believe that there will be abuse of the testing system there is always the possibility of appeal and re-test.²³

The whole edifice of LaFollette's argument reduces to the assertion that the restraint in denying people the opportunity to have children 'is minor relative to the harm we are trying to prevent'. Bearing in mind that what is at issue here is the denial of the right to procreate to certain 'identifiable' people it may be well to remind ourselves that to say that someone has a right is not to say that they *ought* to behave in a particular way. Human rights are rights which people have as human beings not as *good* human beings much less as prospectively good human parents. Exercising the rights properly cannot be a condition of having the rights in the first place.²⁴ This is undoubtedly true of freedom rights of which the right to beget and bear is an example. Yet the harm principle applies with an immediacy which is not found in the exercise of other freedom rights: for the exercise of this right creates another human being who is directly and instantly affected by the exercise of the right. Once the right to bear has been exercised there is an obligation on the parents to care for the child or to make appropriate arrangements for its care by others. The right to bear cannot be separated from the obligations created by exercising that right.

LaFollette thinks that his is a practicable proposal. Violators could be dealt with not by punishing them but just by taking the babies away! 'We might not punish parents at all - we might just remove the children and put them up for adoption'.²⁵ If taking the babies away from their parents is not punishment it is difficult to imagine what would be. Punishment has been defined as '*An authority's infliction of a penalty, something involving deprivation or distress, on an offender, someone found to have broken a rule, for an offence, an act of the kind prohibited by the rule.*'²⁶ Although it is unclear what would constitute a violation (engaging in (unprotected) sexual activity? becoming pregnant? giving birth? abusing a born child?) LaFollette is sure that 'a reasonable enforcement procedure can be secured ... At least we should assume that one can be unless someone shows that it cannot'.²⁷ This is a strange inversion of the usual procedure which places the onus of proof on the one making the radical proposal.

LaFollette speculates that the opposition to his proposal springs from an attachment to the notion of parental ownership of children, a belief which he declares to be 'abhorrent'. Parents who hold the belief that they own their children 'may well maltreat their children'

²² *Ibid.*, 192.

²³ *Ibid.*, 192/3.

²⁴ See Page, Edgar, 'Parental Rights', *Journal of Applied Philosophy*, 1, 2, 1984, 189.

²⁵ *Ibid.*, 193.

²⁶ Honderich, T., *Punishment*, Harmondsworth, Penguin Books, 1976, 15 (emphasis in original).

²⁷ LaFollette, 'Licensing Parents', 193.

and will treat them well only because they want to, 'not because they think their children deserve or have a right to good treatment'.²⁸ In addition the children of such parents are likely to be ill-prepared for adulthood. LaFollette gives us no reason to accept these assertions. At any rate ownership of children is a more complex issue than these statements would lead us to believe and even if we accept a simple conception (comparable to the ownership of animals, say) there is no necessary connection between such a conception and abuse and neglect.

Neither does he consider the possibility that *having* children may, in itself, bring about significant changes - for better or for worse - in the emotional circumstances of the individual parent. The experience of begetting and bearing may, in itself, change the attitudes and behaviour of the individual. This means that the parent-child relationship would have to be subjected to constant monitoring by an authoritative agency.

Archard²⁹ acknowledges that a right to have children comprises at least two rights: the right to bear and the right to rear. Like LaFollette he denies that the former is absolute. Like LaFollette, Archard also bases his case on the well-being of the child (even though the former would protect the child by denying its existence). Archard argues that the right to bear would have to be circumscribed by an obligation to ensure that the life of the child is both 'secure and free' i.e. that the rights to life and liberty of the new-born are ensured.³⁰ Can one 'ensure that the life of this new being is both secure and free' in the case of a new-born infant? Security is non-problematic: individuals or societies can take measures to maximise the child's security in relation to the provision of physical and psychological needs. But what *could* the right to liberty mean for a new-born? Here Archard appears to confuse two kinds of rights. New-born infants cannot have a right to liberty because such a right is meaningless in such a case. In order for a right to liberty to mean anything there must be the capacity to exercise the liberty in some substantive way: to exercise freedom of speech, for example, one must have something to say and, more to the point, be able to say it. In order to have freedom of movement or freedom of association one must have the capacity to move or to associate independently. An infant does not have these capacities and consequently to speak of the new-born child's right to liberty is mistaken. The only rights which a new-born infant may be said to have are rights of reciepience: the only capacity the

²⁸ There is a growing realisation that animals may 'deserve or have a right to good treatment' and that they should not have to depend on the arbitrary whims of their human handlers. Why should children be any different? A claim of ownership does not entail cruelty or lack of moral decency. People who are likely to maltreat children (or animals) are unlikely to be swayed by alternative philosophical arguments.

²⁹ Archard, David, 'Child Abuse: Parental Rights and the Interests of the Child', *Journal of Applied Philosophy*, 7, 2, 1990; see also Archard, D., *Children: Rights and Childhood*, 97/8.

³⁰ Archard, 'Child Abuse', 186.

new-born has is the capacity to have things done for it.³¹ Liberty rights impose a duty of non-interference on others: non-interference is precisely what the new-born does *not* require, want or need. 'The child is not born with autonomy, nor is the ideal of autonomy advanced by giving children of all ages the right to be free of all adult control. Autonomy is something that has to be learned ...'.³² This does not mean, of course, that the parent's needs and interests *qua* parent, do not require liberty rights for the proper execution of his or her duty as a parent.

In a later work however, Archard shifts the focus of concern from liberty to welfare and puts the well-being of the child firmly at the centre of the issue, 'a new human being should not be brought into being unless its own rights - to life and to the provision of an adequate level of welfare - can be secured'.³³ Archard also argues that the right may be restricted for reasons of public welfare: the possibility that the child might 'threaten the lives or seriously worsen the welfare of other human beings already existing' (raising issues of population control and public health). The right to bear might be constrained, for example, where a 'highly dangerous and contagious illness' would be automatically transmitted to the foetus.³⁴

Archard's general argument is built upon the denial of an absolute right to bear children: in order to bear children you must prove your fitness, the state must monitor, and if you are deficient then the state may intervene to prevent your begetting and bearing. It is difficult to see how this differs from a totalitarian approach to the family.³⁵

O'Neill³⁶ asserts that a right to beget or bear is 'contingent on begetters and bearers having or making some feasible plan for the child to be adequately reared by themselves or by willing others'.³⁷ the right is not absolute. She would be unimpressed by claims that the pregnancy and birth occurred despite best efforts to prevent it: in general such births are

³¹ It ~~has~~ ^{been} argued that the rights of recipience or developmental rights are the means to the rights of freedom usually associated with the liberal ideal of human autonomy.

³² Blustein, Jeffrey, 'Parents, Paternalism and Children's Rights', Journal of Critical Analysis, 8, 1980, 91/2.

³³ Archard, Children: Rights and Childhood, 97/98.

³⁴ Archard's position is, perhaps unintentionally, sexist. He specifically deals with the right to bear, 'strictly speaking, only women could be possessors of such a right', (which is conceptually true but is not the full story of human procreation), and does not anywhere address the role of the begetter. This is unfortunate as it makes the case appear to be a case against the rights of women when it is, in fact, a case to limit the right of *people* to procreate.

³⁵ Midgley dismisses Archard's proposal for more state intrusion on the grounds that 'every serious attempt of this kind has resulted in highly confused oppression'. And of course any change of the kind that Archard proposes would require radical change in public perceptions. 'In general, deterrence is less effective than legalists tend to think when it is not supported by shared standards'. Midgley, M., 'Rights Talk Will Not Sort Out Child Abuse: Comment on Archard on Parental Rights', Journal of Applied Philosophy, 8, 1, 1991, 103-114, 111.

³⁶ O'Neill, 'Begetting, Rearing and Bearing'.

³⁷ *Ibid.*, 25. It is clear later (34) that O'Neill considers this to be only *one* possible restriction on the right to beget or bear.

not 'an unforeseeable risk'. She uses the analogy of strict liability³⁸ but she leaves the matter of unintended or unplanned births unresolved since her main concern is with those who have *decided* to procreate.

Those who have good reason to believe themselves unable or unwilling to rear or arrange for the rearing of a child cannot reasonably choose to procreate ... A person who faces (serious ill health, abysmal poverty or distaste for children) might reasonably be held to have no right to procreate under those conditions. If decisions to procreate create parental obligations, then those who realise ... that they can neither discharge nor transfer such obligations have no right to procreate *at that time*.³⁹

O'Neill is not saying that such people lose the right to procreate permanently but only for so long as the specific disabilities or the unwillingness to undertake the concomitant duties persist. Her argument makes it clear that she considers that the loss of right to procreate is temporary. So

if persons procreate without having or making any feasible plan for their child to be adequately reared, then a policy which prevented those persons from procreating would not infringe on their right to procreate - for their proposed procreation would have gone beyond that right.⁴⁰

This appears to mean that the right to bear is, as a moral phenomenon, contingent. Unlike LaFollette and Archard, however, O'Neill does not propose more than a moral policy i.e. she does not suggest specific state intervention (such as licensing or monitoring) to prevent particular people from having children. It might reasonably be argued, however, that if she establishes a sound moral case then the implication is that it should, if possible, be implemented in positive law. This is not her purpose: her concern is with procreation and population policy, not with individual cases. The state's positive obligations to children are essentially 'backup' obligations which are meant to support parental care.⁴¹

Hobson⁴² endorses O'Neill's position regarding the existence of morally defensible limitations which can be placed on people's right to procreate: 'The general principle that only those who can give a child at least the minimal care and attention it needs in the early years should have an unrestricted right to procreate is a sound one.'⁴³ LaFollette, Archard, O'Neill, and Hobson do not deny that there is a right to have children: they attempt to identify theoretical, practical and procedural limits to the exercise of the right.

³⁸ *Ibid.*, 28.

³⁹ *Ibid.*, 29 (emphasis added).

⁴⁰ *Ibid.*, 35.

⁴¹ *Ibid.*, 31.

⁴² Hobson, P., 'Some Reflections on Parents' Rights in the Upbringing of Their Children', *Journal Of Philosophy Of Education*, 18, 1, 1984, 63-74.

⁴³ *Ibid.*, 64.

Bayles⁴⁴ defines the human right to procreate as

the opportunity or liberty to decide when and how many children one will have. This liberty may be called the liberty to procreate.⁴⁵

The right to have children is not absolute; any human right can be subjected to limitations. Bayles bases his case for limitation on the need for population control, i.e. a social good (as opposed to LaFollette who bases his case exclusively on the welfare of the individual child).

Human rights are inalienable but not absolute. They are inalienable because they belong to people by virtue of their being human. So to lose a human right one must cease to be human. But since human rights are claims they can be outweighed by other justifiable claims. That is, sometimes there are sufficient moral reasons for not respecting, or completely respecting, human rights.⁴⁶

What does 'inalienable' mean in a rights context? It means that the 'ownership' of the right cannot be renounced, transferred, or given away.⁴⁷ It is not the same as 'imprescriptible'. The latter means that the right cannot be legally *taken* away. (Certain rights are inalienable 'because if these rights would be given up, man would cease to be a person and become a case of alienation; imprescriptible, because if these rights ceased to exist (extinctive prescription), man would likewise cease to be a person in his prescribed condition'.⁴⁸) Now none of the writers cited, and certainly not Bayles, suggests that the right to bear is imprescriptible. On the contrary they are suggesting that it is not: they all identify circumstances in which it can be legitimately and morally be taken away. It is in this sense that it is not absolute: if the right is not imprescriptible then there are (possible) circumstances in which it *can* be superseded, suspended, or even taken away. But this raises a problem: if, as Bayles says, 'to lose a human right one must cease to be human' does it follow that one ceases to be human by losing the right to procreate? Does it follow that if the right is proscribed that the erstwhile rights holder is, somehow, less than human for the duration of the proscription? Bayles repeats the point at his summing up: '(A) human right to procreate, assuming there is one, does not constitute an insuperable moral objection to population control. Human rights are not absolute.'⁴⁹ Can we accept then, that

⁴⁴ Bayles, Michael D., 'Limits to a Right to Procreate', in O'Neill, Ruddick, Having Children.

⁴⁵ *Ibid.*, 14.

⁴⁶ *Ibid.*

⁴⁷ 'Inalienable' means that the right cannot be 'voluntarily renounced and transferred', Freedman, M., Rights, Milton Keynes, Open University Press, 1991, 31; 'Inalienable means that which cannot be transferred or given away'. Mr. Justice Kenny, *Ryan v. A-G.*, Kelly, J.M., Fundamental Rights in the Irish Law and Constitution, Dublin, Allen Figgis and Co., 1967, 205.

⁴⁸ Foriers, P., Perelman, C., 'Natural Law and Natural Rights', Philip P. Weiner, ed., Dictionary Of The History Of Ideas, III, New York, Charles Scribner's Sons, 1974, 14.

⁴⁹ Bayles, 'Limits to a Right to Procreate', 21. It should be noted that he is, in all the cases he proposes, advocating the *limitation* or *restriction* not the *abolition* of the right to procreate. But it should also be noted that if there is a limit placed on the number of children a couple may have then their right to procreate disappears once that limit has been reached.

human rights claims can be 'trumped' by other claims. Are there occasions when we ought not respect human rights? Where such conflicts between human rights and other justifiable claims appear they must be resolved by 'an as yet poorly understood and ill-defined process'.⁵⁰ Can we conclude that as a result of some 'poorly understood and ill-defined process' human rights can be proscribed and people rendered less than human as a result (that they can 'cease to be human')?

There are possible interventions which do not deny the right to procreate. These include providing relevant information, identifying moral objections, providing incentives favouring one course of action rather than another; Bayles would not include coercion which *does* limit liberty to decide 'and is *per se* morally objectionable'.⁵¹ Nonetheless he recognises the context in which population control must be exercised:

Most people value having children. The reasons and causes for this evaluation are complex. There are historical factors in the sexual ethic which suggest that the purpose of marriage is to have children. Many couples want a child of each sex, and it may take three or four children for them to realise this goal. Children provide companionship, love, and a purpose to life. ... it all boils down to the fact that people desire children and derive great satisfaction from having them.⁵²

Raising children is a long-term project or commitment that most people choose to enter into. But this is not so for everyone. There is nothing unnatural or antisocial in not having children.⁵³

Given this acknowledgement of the reality of human sexuality and parenthood however, two difficulties present themselves in relation to the denial of the right to have children. The first is a theoretical difficulty: if the force of rights can be disqualified by other moral considerations then what value do rights have as a moral category?⁵⁴ The second difficulty is procedural: *who* decides on the criteria for disqualification and on their application in particular cases?

The first difficulty might be spelled out as follows: let us suppose that there *are* human rights and let us further suppose that one of these rights is the right to beget and bear

He is not, therefore, advocating a *temporary* loss of right - as O'Neill does for the duration of specific *disabilities* - but an absolute loss once a certain prescribed number has been reached.

⁵⁰ *Ibid.*, 14

⁵¹ *Ibid.*, 15. O'Neill ('Begetting, Rearing and Bearing', 34) is surely correct to point out that in circumstances of extreme poverty providing incentives *is* coercive.

⁵² Bayles, 'Limits to a Right to Procreate', 18. See also Page, 'Parental Rights'.

⁵³ But see Smilansky, 'Is There a Moral Obligation'. Also Wringer, C., 'Family Values and the Value of the Family', *Journal of Philosophy of Education*, 28, 1, 1994, 77-88, especially his defence of 'singledom'.

⁵⁴ See Brown, A., *Modern Political Philosophy: Theories of the Just Society*, London, Penguin Books, 1986, 102 - 110; also Warnock, M., *The Uses of Philosophy*, Oxford, Blackwell, 1992.

children. Certainly there is nothing counterintuitive about such suppositions; there is a general acceptance that people in all circumstances may exercise their right to procreate. People may be criticised for exercising the right *irresponsibly* (as when, for example their families are too large) but this is not the same as denying the right.

The right is either absolute or it is not. If it *is* absolute then it trumps every consequentialist consideration: an absolute right to do X is a licence to do X irrespective of the consequences to oneself or to others. This position certainly *is* counter-intuitive and it is not consistent with the liberal origin and context of rights: a right can *never* be absolute because it is always constrained by the rights or welfare of others. And in the case of child-birth there is always another who is materially affected by the decision to beget and bear, the child herself. In any event Bayles concludes that population control policies are justified if the social gains are more significant.⁵⁵ But none of the policy proposals he outlines completely denies the liberty to procreate.

The procedural difficulty is highlighted by Raymond who is critical of Bayles' proposed⁵⁶ 'voluntary' sterilisation programmes as a response to overpopulation on the grounds that it will disproportionately affect the poor. Her principal criticism of both LaFollette and Bayle, however, has to do with the narrowness of the views they represent. She objects that Bayle's use of phrases like 'public good' and 'collective decision' are 'frighteningly vague'.⁵⁷ Both Bayle and LaFollette 'seem essentially to ignore society's responsibility to provide adequate social services' and instead propose to punish those who are most in need of helpful intervention. In both cases she argues that those who are deprived by economic circumstances, 'poor and minorities', would bear a disproportionate burden of the measures proposed. Specifically in relation to LaFollette's licensing proposal she concludes:

The abuse of children will cease only when the sources of alienation and frustration so many abusers experience are sought after and erased, and when parenting becomes a social concern and not an individual responsibility.⁵⁸

The right to have children - the positive programme

Given that the negative approach to having children is inconclusive would a positive approach be any more fruitful? If there is a right to beget and bear children from whence does it derive? It cannot be from the rights of the child since at that point the child does not exist.

⁵⁵ Bayles, 'Limits to a Right to Procreate', 22.

⁵⁶ *Ibid.*, 17-20.

⁵⁷ *Ibid.* Yet they are precisely the phrases that democratic institutions, legislative and judicial, sometimes use to justify social policies.

⁵⁸ Raymond, 'Philosophy and Parenting', 40.

Parenthood, as a distinctive form of human activity, has a pre-eminent place in human culture and features among our basic values: it 'has a point and a value beyond responding to the needs of children, however satisfying that might be'.⁵⁹ One might wish to be a nurse, teacher, or fosterer in order to respond to children's needs without wishing to become a parent. Parents' rights protect a fundamental and (to date) irreplaceable form of human activity. It is this special value which attaches to parenthood which 'constitutes the ultimate foundation of parental rights'.⁶⁰ Parenthood is a human experience *sui generis*, it is unique and must be judged according to its own proper criteria. Arguments from analogy (property holders, primitive producers etc.) are ultimately inadequate to explain parenthood.

Evidence that parenthood has a special value in human life is the fact that people tend, universally, to choose parenthood as a major project in their lives; having children is an activity that is 'characteristically desired for its own sake, as an end in itself'.⁶¹ Parenthood enhances human life. Parental rights are justified because they protect parenthood as a distinctive form of human activity and enhance the special value of parenthood. Parents should have special rights, not to protect the well-being of individual parents or children in the first instance, but to protect the human institution of parenthood itself.⁶² Abuse of their rights by parents in individual cases does not provide warrant for abandoning the rights themselves but for intervening in individual cases.

Natural parents enjoy a special position because

(I)f the right of natural parents to possess and raise their own children were seriously threatened, this would undermine the possibility of parenthood as the valued activity that it is.⁶³

All other adult-child relations are parasitical on the natural parent-child relation (secondary carers act *in loco parentis*). Adoptive parenthood, for example, models itself on natural parenthood; the commitment of adoptive parents to 'their' child is parasitic on the special bond which is perceived as characteristic of natural parents. If the primary relation of biological parenthood is not protected then ^{RE}they will be serious repercussions for all adult-child relations.

Parents aim not simply at the creation of a new human being but rather at the creation of a person in their own image out of material produced from their own bodies. Begetting and

⁵⁹ Page, 'Parental Rights', 194.

⁶⁰ *Ibid.*, 196.

⁶¹ *Ibid.*, 197. A distinction must be made here between this kind of 'reason' for having children and the conventional sociological reasons - economic, social etc. The sociological kinds of reasons are not necessary to make this common activity intelligible as something positively sought as a major ingredient in life.

⁶² *Ibid.*, 197.

⁶³ *Ibid.*, 198.

rearing are complementary activities: 'neither is entirely intelligible, as a form of human activity, without the other...'⁶⁴ But parental rights are not absolutes; the wider social interest and other rights sometimes place limits on (trump) parental rights. An example of this is compulsory education for children⁶⁵ or a general acceptance of non-coercive population policies.

We shall see later⁶⁶ that there is great need to clarify the status of the parent/child relation in terms of a proprietorial relationship. However we can say that one of the reasons for having children is surely to perpetuate the genetic identity of the individual and family. *Any* child won't do: if there is an anxiety to have a child to bear the family genes then it has to be *my* child. It is difficult to understand how a broader right to family continuity can be denied. A consequence of any radical licensing programme such as that advocated by LaFollette, would seem to be the right of the state to decide, in principle at least, when *an entire family line* might come to an end.

The need to create bonds seems to be fundamental to human well-being.⁶⁷ Of these the most fundamental biological bond is the parent/child bond. To debar people from the experience of this bond, from the condition of being a parent, for whatever reason, is to deny them the most fundamental bond possible. So that if there is a right to create such bonds by begetting and bearing children then this right can be interfered with only for the gravest reasons. The reasons which have been considered include the danger of abuse to the child, the danger to the community if the child is the carrier of a virulent and highly contagious disease, the danger to the (world) community of over-population. In the first two cases the risk can be counteracted by less drastic action: better care, better social and health support for parents and children, more equitable distribution of wealth and opportunity. In the case of over-population the proposal is not to ban certain people from having children *simpliciter* but to limit the number of children they may have. It has not been convincingly argued that certain individuals should not have children at all i.e. that there are circumstances in which the right to beget and bear should be denied absolutely. Nor have any of the proposals considered fully the clear connection between the economic welfare (of states and individuals) and population growth and family size.

The American Supreme Court has declared that 'the rights to conceive and to raise one's children have been deemed "essential" ... and ... rights far more precious ... than property rights'. While the Supreme Court of Canada has held that a court cannot deprive a woman of the privilege of having a child 'for purely social or other non-therapeutic purposes without

⁶⁴ *Ibid.*, 201.

⁶⁵ *Ibid.*, 202.

⁶⁶ Chapter 5

⁶⁷ Almond, B., 'Human Bonds', *Journal of Applied Philosophy*, 5, 1, 1988, 3-16.

her consent'.⁶⁸ On the other hand a judge of the Irish High Court dismissed a claim by a married couple who were serving jail sentences that they be facilitated in the exercise of their Constitutional right to beget children. The judge conceded that the right to beget children was a personal right under the Irish Constitution but held that its exercise would be 'incompatible with the restriction on their liberty which is constitutionally permitted by their imprisonment' and that such exercise would 'place unreasonable demands on the prison service'.⁶⁹ There are two arguments here. The first is conceptual: the penal restriction of liberty intends that imprisoned people forego many of their normal rights; that is the point and effect of the deprivation of liberty. The second is practical and is of no immediate concern.⁷⁰

None of the proposals cited considered the possible harm to prospective parents of not being allowed to procreate. Among the reasons that Erikson gives for failure to develop what he calls the stage of generativity is 'the lack of some faith, some "belief in the species", which would make a child appear to be a welcome trust of the community'.⁷¹

Generativity is primarily the interest in establishing and guiding the next generation, although there are people who, from misfortune or because of special and genuine gifts in other directions, do not apply this drive to offspring but to other forms of altruistic concern and of creativity, which may absorb their kind of parental responsibility.⁷²

This generativity is a stage in the growth of a healthy personality. One can only speculate on the effect of denying it to individuals against their wishes. There is no reason to believe that such effect would be trivial.

Summary

There are negative and positive approaches to human reproduction. A negative approach considers how human reproduction might be limited for the protection of the anticipated children, to protect the welfare of the community, or as an element of population policy. The negative approach holds that the right to have children is not absolute; like other human rights it can be limited subject to more compelling reasons. This view is based on a perception of parenting as a potentially harmful activity which requires administrative state control.

⁶⁸ Vogel, Paul, 'The Right to Parent', *Entourage*, 2, 1, 1987, 34/5.

⁶⁹ Shatter, A.J., *Family Law in the Republic of Ireland*, (third edition), Dublin, Wolfhound Press, 1986, 33/4. The Supreme Court rejected the couple's appeal.

⁷⁰ This is not to say that it is not important. The main reason given to the UN by the Irish Government for its failure to raise the age of criminal responsibility to 12 years was because to do so would place an 'intolerable burden' on the state's social services. Cf. National report.

⁷¹ Erikson, E.H., *Childhood and Society*, London, Vintage, 1995, 240.

⁷² Erikson, E.H., *Identity and the Life Cycle*, New York, Norton and Co., 1994, 103.

Any opposition to licensing proposals must show either that licensing is not theoretically desirable, or that there is no appropriate procedure which is reliable and just. Two major difficulties which any proposal to limit having children (in the sense of begetting or bearing) must face are the punishment of offenders (for engaging in one of the most compelling of human activities) and the disposal of the resulting children. If *conception* is the violation then there is the apparent absurdity that those whom it is intended to protect do not exist and are afforded continued protection by being prevented from existing.

A positive approach to begetting and bearing emphasises that human sexuality and parenthood are essential to individual as well as collective human well-being. In this view parenthood commands a special value in human life and holds a pre-eminent place in human culture. Parental rights are necessary to protect this distinctive form of human activity and to enhance the special value of parenthood. Special rights for parents protect the human institution of parenthood itself.

Radical proposals to restrict human procreation must confront fundamental issues. One of the reasons for having children is to perpetuate the genetic identity of the parent and the biological family. A radical programme of restriction would have to decide, in principle at least, when an entire family line should come to an end. In addition debarring people from the experience of the fundamental bond of parenthood denies them the most fundamental human bond possible.

The question of the right to bear is inseparable from the questions of owning and rearing children, and it is to these that we now turn.

Chapter 5: Children as property.

The 'proprietary' argument

Proprietarian accounts of parenthood have been generally deplored. They are 'deeply, and rightly, repugnant to present western culture';¹ it is 'morally repugnant to think of (children) as property at all';² the idea that children are 'chattels (of their parents) is repugnant to our sensibilities';³ there is '*a strong intuitive feeling* that infants cannot be property because they have special worth or value, as people, and not as objects.'⁴ It is not clear whether these expressed feelings of repugnance are intended as aesthetic arguments or as moral arguments. The status of repugnance as a universal experience with regard to any particular object is problematic. If it is no more than an intuition it is suspect as any intuitive stance is. Intuitions, whether of compassion or repugnance, are unreliable guides to morality: there is no guarantee that they will take the same form or have the same object universally. The presumed 'proper objects' of repugnance or compassion are variable both between persons and in relation to the same person over time. A morally significant position can only come about as a result of a rational evaluation of our initial response. If a feeling of repugnance is to qualify as morally significant it must have been mediated by rational evaluation. A morally significant response is an intuitive reaction which has been interrogated by reason.

The main source of our (modern) repugnance at the idea of ownership of children derives from our repugnance at the idea of slavery: the ownership of another human being on exactly the same terms as a dog, motorcar or house. The proprietary account of parenthood has not always been repugnant; it is not obvious that it is universally so even within contemporary western culture. Children *have* been regarded as chattels of their parents. Even today 'certain puzzling features of the parent-child relationship' seem to require a 'proprietary' explanation of the relationship.⁵ The puzzling features include the requirement that in cases of adoption biological parents must abandon claim to the child, they must waive the presumed rights which parenthood confers. This is analogous to waiving claim to a property which has been disposed of to another. The relationship need not be perceived as *ownership*; it can be seen, less repugantly, as *trusteeship*. Nonetheless there is a relationship similar in this respect to the holding (whether as owner

¹ Archard, David, 'Child Abuse: Parental Rights and the Interests of the Child', Journal of Applied Philosophy, 7, 2, 1990, 186; he argues the case at some length in Children: Rights and Childhood, London: Routledge, 1993, 98-105.

² Page, E., 'Parental Rights', Journal Of Applied Philosophy, 1, 2, 1984, 187.

³ Bigelow, John, *et al.*, 'Parental Autonomy', Journal of Applied Philosophy, 5, 2, 183 - 196, 184. Why the notion that 'children have no property rights in their own bodies' should *of itself* be repugnant is not explained. It would be interesting to know, for example, what property rights in their own bodies new-born infants have. Does the notion of 'property rights' as a *moral* concept rather than a legal concept not require the capacity to exercise the right in question?

⁴ Page, 'Parental Rights', 193 (emphasis added).

⁵ Bigelow, 'Parental Autonomy', 184.

or as trustee) and disposal of property. Secondly, proprietorial notions seem useful in describing what has gone wrong in 'various historical incidents involving parents being given custody of the wrong child'.⁶ Thirdly, the latitude given to parents in the rearing of their children is much wider than is normally given to other adults in similar situations of responsibility; it is more like the latitude afforded to owners or trustees than that afforded to managers. Fourthly, anyone wishing to use the services of a child or to relate to the child in many non-trivial ways must seek the permission of the parents.

So there is a tension between the contiguity of a proprietorial explanation of the parent-child relationship and the intuitive repugnance which such an idea elicits.⁷

The reason why we do not accept that parents really own their children is because we attribute to children the status of *persons* and 'we view them as, defeasibly at least, autonomous'.⁸ This is not unproblematic: infanticide, for example, has been defended on the grounds that infants are not persons.⁹ The problem of ownership hinges on the definition of a person and on the belief that the notions of *person* and *possession* are mutually exclusive. They are not *logically* exclusive. There is no more conceptual contradiction in the assertion of ownership of a slave than there is in the assertion of the ownership of a horse or a shirt. The disjunction is a *moral* one, the perceived repugnance is a moral repugnance. The question as to whether past generations were always morally wrong in owning slaves - or asserting ownership of their children - or whether the moral wrongness only appeared with the realisation that adult slaves *were* persons is moot.¹⁰

Interference with a person's property is a threat to autonomy. Bigelow and his collaborators seem to argue from this that since children are 'involved in their parents' life plans in such a way that interference can easily threaten the parents' autonomy' they can, (in some obscure way) be considered as similar to property.¹¹

⁶ *Ibid.*, 184.

⁷ *Ibid.*, 184/5.

⁸ *Ibid.*, 191.

⁹ Tooley, M., 'Abortion and Infanticide', in Singer, P., ed., *Applied Ethics*, Oxford University Press, 1986. Tooley argues - and this should give us pause before we can accept any notion of *repugnance* as a basis of our moral stance - that infants are not persons and are therefore not entitled to the same consideration, and in fact may be killed. In answer to the question, when is a member of the species *homo sapiens* a person? he answers: 'An organism possesses a serious right to life only if it possesses the concept of a self as a continuing subject of experiences and other mental states, and believes that it is itself such a continuing entity.' (64) What is the status of feelings of repugnance in relation to this proposal? Is the feeling of repugnance itself sufficient to refute the claim that infanticide is permissible on the grounds that the infant lacks the characteristics of a person?

¹⁰ This kind of issue is addressed in Taylor, C., *Sources of the Self: The Making of the Modern Identity*, Cambridge U.P., 1989 and Williams, B., *Ethics and the Limits of Philosophy*, London, Fontana Press, 1993.

¹¹ Bigelow, 'Parental Autonomy', 191. See Lomasky, Loren E., *Persons, Rights, and the Moral Community*, Oxford University Press, 1987. Ch. 7 on the derivation of children's rights from the rights of parents as project pursuers.

Archard is uneasy that 'a long shadow' of the proprietary account still remains in the belief that in some way the bearing of a child grounds the right to rear it. Yet we accord children claims against their parents in certain circumstances - a fact which would be inconceivable if they were merely the property (or chattels) of the latter.¹² This view, however, depends on the kinds of claims that are meant. Animals, less controversially the 'possessions' of people, are entitled to a certain minimal level of care and protection. Whether based on a belief in 'animal rights' or simply out of considerations of humaneness, we can consistently deny anyone the right to inflict gratuitous suffering on animals. That is to say that animals can have claims to certain levels of care and treatment against their human owners. It is open to non-related others to prosecute a claim on behalf of the animal, just as they may do on behalf of a child. So in this regard there is no appreciable difference in principle between children and animals: very young children can no more prosecute a claim on their own behalf against their parents than animals can against their owners. This fact does not mean that in either case they do not *have* a claim.

Archard bases his dismissal of the proprietary claim on the notion that the child's 'liberty undercuts any presumptive rights of another to its ownership'.¹³ This is a variation of the personhood claim. What is the child's liberty (or personhood) at the time of birth? Or for a long time thereafter? There appears to be little point in attributing freedom rights to those who are constitutionally incapable of exercising them. The new-born child is incapable of exercising the right of freedom of speech, for example. It seems meaningless to attribute to such a one a right of liberty, or self-ownership, which Archard claims is the general presumption from which the right of liberty derives. The liberty argument does not answer the proprietary argument in the case of very young children.

The proprietary argument must be addressed in a different way: not from the conviction that it is 'repugnant', or false, but that since it is historically grounded it may have some element of truth which needs to be explicated.

It may reasonably be claimed ... that some qualified notion of at least temporary ownership does apply in the case of the parent-child relation, and that this is linked, however conditionally, to the biological fact of generation. It may be that Hobbes was correct in seeing this as more like the right people have to their own body¹⁴ than their right to ownership of

¹² Archard, 'Child Abuse', 187; Children: Rights and Childhood, 101.

¹³ Archard, Children: Rights and Childhood, 100.

¹⁴ Or Aristotle. 'A parent knows better what has come from him than the children know that they are from the parent; and the parent regards the children as his own more than the product regards the maker as its own. For a person regards what comes from him as his own, as the owner regards his tooth or hair or anything; but what has come from him regards its owner as its own not at all, or to a lesser degree.' Aristotle, Ethics, trans., J.A.K. Thomson, (revised, Hugh Tredennick), London, Penguin, 1976, 279.

property. If so the recognition of this right can only be intuitive, and cannot be founded on any consideration more compelling than itself.¹⁵

Yet while the notion of ownership might be 'deep and intuitive'¹⁶ it is 'nevertheless (a) disputable, assumption'.¹⁷ The Lockean argument that the child is owned by the parents because it is the fruit of the parental (maternal) labour is not really sustainable. The association of 'labour' with childbirth is no more than a metaphorical connection. It rests on a simplistic view of language: because we use the same word it does not follow that we mean the same thing. In the case of *labour* we have a very good example of a *dead metaphor*.¹⁸ Dead metaphors are metaphors which have lost their metaphorical force although their origins may be still visible.¹⁹ The use of the word *labour* in relation to childbirth is no more literally intended than is the word *sift* in relation to forensic evidence. The *labour* of a mother in childbirth denotes the physical exertion (largely involuntary) of the uterine contractions involved in the process of giving birth. It may be difficult, painful, and exhausting, but it is not *labour* in the way in which the word is usually used to mean work or toil involved in supplying goods or services. *Labour* in the sense of working to produce or improve something and *labour* meaning the act of giving birth are homonyms: they share a form, they may even share a common etymological origin, but they no longer share a substantive meaning. Mill would appear to be in agreement with this view:

One would almost think that a man's children were supposed to be literally, and not metaphorically, a part of himself, so jealous is opinion of the smallest interference of law with his absolute and exclusive control over them.²⁰

Mill is asserting that the use of the notion of possession in relation to children is at best metaphorical: parents do not *own* their children in the same way that they might own a chair or a horse. Metaphor does not mean identity: the relationship between the parent and the child is *like* ownership in certain respects.

In the case of possession of children we are not dealing with an entirely metaphorical origin, however. Under Roman law the *paterfamilias* had 'absolute power of life and death over his son; he completely controlled his person and property'.²¹ This is a paradigm instance of

¹⁵ Almond, Brenda, 'Education and Liberty: Public Provision and Private Choice', Journal of Philosophy of Education, 25, 2, 193-202, Winter, 1991, 199.

¹⁶ Just as the repugnance to the idea is intuitive.

¹⁷ Almond, 'Education and Liberty', 199.

¹⁸ Sharpe, R.A., 'Metaphor', Honderich, T., ed., The Oxford Companion to Philosophy, Oxford, University Press, 1995, 555.

¹⁹ Fowler, H.W., Fowler's Modern English Usage, 2nd ed., Oxford, University Press, 1965, 359.

²⁰ Mill, John Stuart, On Liberty, in H.B. Acton, ed., Utilitarianism, Liberty, Representative Government, London, J.M. Dent & Sons Ltd., 1972, 160.

²¹ Archard, Children: Rights and Childhood, 10. 'In Roman law (*Patria potestas* was) the power which a father exercised over his male descendants, including those adopted into his family. Under it he had control of their persons,

possession of another person; the father *literally* owned his son as he owned slaves, animals and other disposable chattels. The *origin* of the concept of possession as descriptive of the relationship between parents and children, then, is not only metaphorical, it is literal. If the case is different in more recent times, and Mill appears to think that it is, it is either because the concept of possession no longer applies *except* metaphorically or because it applies in a different, i.e. less extreme or decisive, way.

In the case of both slaves and infants a more compelling argument against possession would be the Kantian injunction against using others as means rather than as ends. Infants differ from animals in that they can come to share in, or agree to, the ends of our actions with regard to them. Yet although children are destined to become autonomous, rational beings, treating them as ends will not amount to quite the same as treating adults as ends. Control over infants, for example, is not as obviously morally objectionable as similar control over (competent) adults would be. This is a significant, and perhaps decisive, difference between slaves and infants. Slaves *are* adults. It is wrong to treat them as property *because* they are persons and because as persons they have rights in their own person, rights to action including autonomy, freedom of speech and movement, as well as rights to the products of their own labours. It is because children and infants are *not* adults that their case is problematic. What is morally repugnant in treating adult human beings in certain ways includes the fact that they are, unreasonably, being treated like children.²²

Nor are all property rights identical: the kinds of rights which possession of property confers differ according to the kinds of property in question 'different kinds of objects elicit different ranges of interests'.²³ Perhaps it could be argued that it is not the concept of ownership *per se* which is inappropriate in the circumstances but the particular conception of ownership which we bring to the situation. Normally ownership is a relatively unproblematic concept: disputed claims to ownership in particular cases are usually differences in the interpretation of facts and not in the interpretation of the central concept. The generally accepted meaning of ownership carries with it the notion that it is a permanent relationship with an object (property) unless a deliberate decision is taken to discontinue the relationship (sell, bequeath, or transfer ownership). In all such cases it is the possessor who decides whether the relationship will change or not. Dogs, motorcars and houses do not participate in any way in decisions to dispose of them.

Property ... is defined by a system of rules that assigns to persons rights over things, where the things capable of being owned can range from a

including in early law the right to inflict capital punishment, and owned all the family property ... By classical times the *Patria potestas* was much reduced, the power of punishment being limited to modest punishment ...'. Walker, D.M., *The Oxford Companion To Law*, Oxford University Press, 1980, 935.

²² This matter will be discussed more fully in chapter 8.

²³ Page, 'Parental Rights', 195.

person and his or her labour to land, natural resources, and what is produced by labour from land and natural resources. The rules of property defining rights of owners and duties owed to owners may be moral, legal, or both. Specific forms of property differ from each other depending on the rights and duties which the rules confer, how the rights or duties are acquired, and the kinds of things which are capable of being owned.²⁴

So even if we accept that the parent-child relation is one of possession it still remains to define the rules, and 'the rights and duties which the rules confer', which regulate this relation.

The parent/child relationship is *sui generis*. No other human relationship is even remotely like it. At best we can describe it by drawing analogies with other relationships but without committing ourselves to the acceptance of something repugnant. Since, historically, the parent/child relationship *has* been described as one of ownership or possession we are left without a distinct language with which to describe it. Using the language of possession is, in a sense, not optional in respect of human relationships: there are certain things which, if we wish to say them, we must say them in this language or not at all. Great love involves *possessiveness*, the understanding that the person loved *belongs*, in some non-trivial way, to the lover. We *must* fall back on analogies; the crucial thing is to know that they *are* analogies and to realise when they cease to be useful.

As mentioned in the previous chapter the genetic makeup of the child makes her the child of particular parents: one of the reasons for having children is to perpetuate the genetic identity of the family. Natural parents have an interest in the child which others do not and cannot have: genetic and familial continuity. If there is an anxiety to have a child to bear the family genes, and to perpetuate the family culture, *any* child won't do: it must be *my* child. The proprietarian picture of the child as 'owned' by its parents may ground a right to rear on the vested interest of the parent in the genetic and cultural continuity of the particular family. If we accept that having children is a (metaphorical) investment in the future then it is reasonable that the biological parent(s) would have the first claim on overseeing and directing the process of rearing.²⁵

Transgenerational members of a family are not complete strangers, although they may never, as a matter of fact, have met. They embody the same genes, the same culture, the same family idiosyncrasies, whether these are transmitted genetically or culturally.²⁶ This is

²⁴ Grunebaum, J.O., 'Property', Honderich, The Oxford Companion to Philosophy, 723.

²⁵ There is growing empirical evidence that reported life events, at least in adult life, are not entirely random. Life events tend to cluster in families and appear to be influenced by genetic factors. See Thapar, A., McGuffin, P., 'Genetic Influences on Life Events in Childhood', Medicine, 26, 4, July, 1996, 813-820.

²⁶ See Csikszentmihalyi, Mihaly, 'Contexts of Optimal Growth in Children', in Daedalus: Journal of the American Academy of Arts and Sciences, 122,1, Winter 1993, 34: 'Reproductive success is not simply a matter of passing on

not a trivial fact. My daughter's grandmother is not just any old woman with whom my daughter shares a resemblance; she is *her* grandmother - a unique individual in a continuing story. In a real sense my daughter *owns*²⁷ her grandmother in a way that no-one else (other than her siblings and first cousins) can. She has a distinct and provable *claim* to her: to her appearance, to her identity, to her culture. The genes and culture are not static; they survive through the generations and they are important because they are *ours*, they are elements in *our* story.

No-one can replace natural parents; to lose them is not just to lose identifiable people, it is to lose rootedness and self-identity which can only be partially made up. The availability of excellent parent surrogates does not contradict this; the fact that some natural parents are brutes without whom the child may be better off cannot either. Part of the tragedy of having to separate children and their parents, and one of the crucial reasons why it should be done only in extreme circumstances, is the child's loss, not just of parents but of the connectedness with the past, with a family, which the parents provide. Family is more than an empirical social organisation, an effective means for society to care for its children. It is also a context of personal history, of identity, of *belonging*.

The claim of natural parents has two aspects: a deep emotional investment and a concomitant probability that their bonding with the child will make them the most suitable rearers. The use of words like 'own' and 'belong' in this context have a special use, but it is 'one that is far more primitive than any institutions affecting property'.²⁸ When we use terms like 'belonging' or 'own' in respect of human relationships we are not making property claims.

While it may be true that 'bond-forming is a separate topic from property'²⁹ it is not obviously so. We speak of people becoming 'very attached' to *their* dog, or *their* house, or to a particular item of furniture. Objects acquire sentimental value by which we understand them to have a value which is beyond their monetary value and which involves an *emotional* attachment. This fact neither confirms nor denies any statement regarding the separation of bonding and property claims. We *invest* objects with emotional significance for a wide range of reasons. What makes *human* relationships different is the fact that the investment can be reciprocal, but the reciprocation must be learned.

chemical information coded on chromosomes, but involves transmitting extrasomatic information coded in words, works, and behavioural models.'

²⁷ as in 'admits to' as well as in 'possesses'.

²⁸ Midgley, Mary, 'Rights Talk Will Not Sort Out Child Abuse: Comment on Archard on Parental Rights', Journal of Applied Philosophy, 8, 1, 103-114, 108.

²⁹ *Ibid.*, 108/9. For a detailed discussion of human bonding see Almond, Brenda, 'Human Bonds', Journal of Applied Philosophy, 5, 1, 1988, 3-16.

The trust model

Perhaps the analogy most useful in describing the parent-child relation is the trust model which recognises the temporary and contingent nature of parental power. The trust relationship lies somewhere between outright ownership and total separateness. Children are not the property of their parents in the sense that parents can do whatever they like with them; the children are separate human beings. On the other hand children are clearly not self-possessed autonomous individuals because this would mean that the parents would have no responsibility for them and no obligations to care for them. 'Both of these options', Kolakowski correctly comments, 'are absurd'.

So it must be recognised, in accord with common sense and secular tradition, that parents are responsible and must make decisions on behalf of their children, and that children are not things but that they depend on the decisions of others ... parents have the responsibility to lead their children into adulthood.³⁰

If we accept that children have rights it is also clear that in many instances they are incapable of exercising those rights prudently and that they must be exercised on the child's behalf by someone else, usually a parent. The analogy of the trust model has been used to conceptualise this relationship between the rights-holding child and the parent exercising those rights on the child's behalf.³¹ This trust-model mechanism allows us to recognise the child's rights while continuing to permit others (notably parents) to exercise the rights on the child's behalf until such time as the child is capable of exercising them for himself.

The trust model gets the relationship between rights and duties the right way round; it recognises that the right to bear and rear is limited by the duty to meet the requirements of the trust:

The parents acting as trustees, the rights they exercise belonging not to them but to their children, this exercise of rights lasting only as long as the trust, namely up to that point where the trust's purpose has been accomplished and the children are able to exercise their own rights for themselves.³²

³⁰ Kolakowski, Leszek, 'On the Practicability of Liberalism: What About the Children?', *Critical Review*, 7, 1, 1993, 6.

³¹ See *Fordham Law Review*, *the Rights of Children: a Trust Model*, 46, December, 1977, 670-780. Also Hobson, P., 'Some Reflections on Parents' Rights in the Upbringing of Their Children', *Journal Of Philosophy Of Education*, 18, 1, 1984, 63-74. Hobson argues that the parent acts in the best interests of the child. The parent acts as trustee rather than as agent for these interests. The ultimate purpose of the parent's action is the autonomy of the child.

³² Archard, 'Child Abuse', 187.

A trust must relate to its purpose. The purpose of parental power (as understood by Locke) is to facilitate the gradual development of the capacities of children to the state where they are capable of the autonomy and rationality necessary to control their own lives.³³

The corpus of the trust, which the trustee must protect and develop in the beneficiary's behalf, consists of the body of rights which are, or should be, ascribed to children. *It should be clear that the trust law is used here only as a conceptual analogy, since no conventional trust could be formed with such an unconventional res as a person's rights.* One strength of such a conceptual model is that it reinforces the fact that the rights in question belong to the child as beneficiary and not to either the parent or the state as trustee.³⁴

That is, the child's interests (which are reflected in the child's enforceable rights) constitute the corpus of the trust which is held by parents or state as trustee for the benefit of the child. The rights exercised by the trustee are not his own. They belong to the child, the beneficial owner. Traditionally, in cases of conflict, the interests of parents usually prevailed because it was assumed that the interests of parents and their children were identical. The trust analogy helps to make the child's interests separately visible so that they are seen as a paramount consideration in practice. At the same time, however, the model also preserves the parental discretion necessary for adequate child rearing.

By viewing the parent child relationship as one of trust, the child's individual interests and the parent's discretion are both protected because the parent would have an obligation, akin to a trustee's duty of loyalty, to exercise his discretion solely for the child's benefit.³⁵

A trustee's power is circumscribed in two ways. First of all the trustee is expected to meet high standards of care and loyalty.

A trustee is required to exercise the power given him solely in the interests of the beneficiary, allowing neither his own self-interest nor even the interests of other beneficiaries to colour his decisions.³⁶

The child's (best) interests must be given full consideration with reference to the requirement that the child's future options will be protected and preserved.³⁷

The second limitation relates to the duration of the trust. A trust terminates when its purposes have been accomplished. This point is determined by the child's ability to exercise, protect, and enforce his own rights. *The trust model, however, allows for a gradual assumption of responsibility which is balanced by a gradual relinquishing of control*

³³ Montgomery, Jonathan, 'Children as Property', *Modern Law Review*, 51, 1988, 323.

³⁴ *Fordham Law Review*, the Rights of Children, 672 (emphasis added).

³⁵ *Ibid.*, 779.

³⁶ *Ibid.*, 673.

³⁷ *Ibid.*, 673.

by the trustee. As the child develops the capacity to exercise each particular right on his own behalf the need to protect him from the imprudent exercise of the right diminishes accordingly. When the purpose of the trust (the emancipation of the competent individual) is achieved the trustee finally relinquishes his control and the trust terminates just as a property trust automatically terminates when the purpose of the trust has been accomplished. The trust is finally terminated when the child is able to exercise all of his rights.³⁸

Summary

Proprietarian accounts of parenthood have been deplored because the idea of owning another human being is repugnant to the modern sensibility: we do not accept that parents own their children because we believe that children are *persons*, and we believe that the notions of *person* and *possession* are mutually exclusive. Yet certain features of the parent-child relationship appear to demand explanation in terms of ownership.

Metaphorical justifications of parental possession do not sustain absolute ownership: parents do not *own* their children in the same way that they might own an item of furniture. The relationship between the parent and the child may be like ownership in certain respects but metaphorical similarity does not mean identity.

We are not dealing with an entirely metaphorical origin in the case of possession of children, however. It has been accepted in the past that the ownership of children conferred absolutist powers on fathers. Even so, not all property rights are identical: they differ according to the kinds of property in question. Accepting that the parent-child relation is one of possession does not specify the rules which regulate the relation.

Because of the genetic and familial continuity represented by the child the parent/child relationship is not identical with any other human relationship. A qualified proprietarian picture of the child as 'owned' by its parents may ground a right to rear on the parent's vested interest in this genetic and cultural continuity. There is also the element of bond-forming: objects acquire sentimental value when we recognise their emotional significance for us. What makes human relationships unique is the fact that the emotional investment can be reciprocal.

The analogy which most usefully describes the parent-child relation is the trust model which reflects the temporary and contingent nature of parental power. The trust relationship is intermediate between outright ownership and total separateness. It recognises that the right to bear and rear is limited by the duty to meet the requirements of the trust, that is, the

³⁸ *Ibid.*, 674/5, 777.

child's interests. The rights exercised by the trustees are not their own, they belong to the child, the beneficial owner.

A trustee's power is circumscribed morally, by a demand for high standards of care and loyalty, and temporally, by the specific termination of the trust when its purposes have been accomplished. The trust ends when the child is capable of asserting his or her own autonomy and assuming the corresponding responsibility. The purpose of the trust is to bring this state of affairs about.

Chapter 6: The Right to Rear

Who should have the right to rear children?

Consulting the needs and interests of children will not of itself identify who should be the carers of the children. In cases where needs and interests require liberty rights this is not a problem since liberty rights require only that no-one else may interfere with their exercise. Children do not live by liberties alone (if indeed they live by liberties at all), they also have a claim on the services of others if they are to thrive. A consideration of their needs and interests alone 'cannot show who (if anyone) has the obligation to meet the claims of a particular child'.¹ This raises the question as to who has the right to rear children.

The intuition that the primary right to rear lies with the biological parents cannot, of itself, provide sufficient basis for that right. It must be buttressed by other reasons, in particular the religious (or, more broadly, ideological) freedom of the parents, a right to participate in intimate human relationships, and a concomitant right to privacy.²

There are three conventional arguments in favour of the right of natural parents to rear their children: the argument from ownership, the argument that the biological parents are 'best suited' (the 'blood ties' argument), the argument from interests, and the argument that the care of the natural parents is the least detrimental alternative. As we have seen, the best form of the proprietarian position, which sees the carers as trustees, does not establish *who* should rear a child. It tells us only that the task of rearing a child must be carried out in the child's interest and only for so long as the child is unable to pursue those interests for herself.

The 'blood ties' argument

The 'blood ties' argument attempts to show that the natural parents are best suited to rearing the child. Irrespective of whether the relationship between a natural parent and his or her child is to be described as some form of ownership or not, the related question is whether being the natural parent grounds a right to rear the child or even gives a preferential claim. This question must be separated from the question whether the generation of a child creates an *obligation* to rear the child or to make adequate provision for its rearing. The act(s) of procreation can create an obligation in the sense that there is an acceptance that the act entails duties which must be fulfilled and that the right to beget/bear is conditional on accepting the obligations involved i.e. it is a *contingent* right.

¹ O'Neill, O., 'Begetting, Rearing and Bearing', in O'Neill, O., Ruddick, W., eds., Having Children: Philosophical and Legal Reflections on Parenthood, New York: OUP, 1979, 26/7.

² Almond, Brenda, 'Education and Liberty: Public Provision and Private Choice', Journal of Philosophy of Education, 25, 2, 1991, 193-202, 199/200.

Clearly the obligation can be fulfilled without actually taking on the rearing oneself. In such a case the separation of the child from the natural parents would not interfere with the obligation provided adequate alternative arrangements are made.³

Midgley is in no doubt about the connection between procreation and the right to rear: she opposes Archard's contention that 'in the absence of a proprietary justification, it is difficult to see how the bearing of a child would ground the right to rear it'.⁴ To bear children, she replies, is 'normally to be put in a situation where their removal will cause one great pain and lasting psychological trauma. If that does not ground a "right", it would be interesting to know what does.' The attachment of parents to their children is 'one of the innate emotional tendencies that has made possible the success of the human species'.⁵ If there is a *right* to rear the child arising out of the begetting/bearing, however, it is not clear how these acts *create* such a right.⁶

Page echoes Midgley's concern with the pain of separation, 'the special form of suffering that would be inflicted on natural parents whose children were taken from them'. He is surely right that the special status of parenthood as a valued human activity would be seriously threatened if natural parents could not presume on their priority as rearers. What would be the point in having children if one could not confidently expect to rear them? Archard considers 'bonding' as more likely to form between natural parents and their children: 'parents have an innate tendency to bond to their children, and therefore the parents have a claim on their children which amounts to a right to rear'.⁷ But this is in fact only one premise of what he calls the 'best suited' argument. According to this argument the child has, firstly, a right to be reared by the person best suited to do so and, secondly, the natural parents are the best suited because they are most likely to bond with the child. The first of these assertions is a highly questionable proposition. There are undoubtedly many people who are better fitted to rear children than many natural parents are (though it is far from clear what the standard might be). Yet if 'best suited' became the criterion no natural parent would be free from the risk of losing their child to a more adequate carer. In addition it should be noted that a care policy based on 'best suited' would radically separate the bearing and rearing functions. This has a disturbingly anti-woman ring to it. For inevitably

³ Nonetheless there is a close connection between the obligation and the right to whatever is necessary to fulfil the obligation.

⁴ Archard, David, 'Child Abuse: Parental Rights and the Interests of the Child', Journal of Applied Philosophy, 7, 2, 1990, 186.

⁵ Midgley, Mary, 'Rights Talk Will Not Sort Out Child Abuse: Comment on Archard on Parental Rights', Journal of Applied Philosophy, 8, 1, 107.

⁶ That parental rights over children are also biologically based is argued by Charles Fried in Fried, C., Right and Wrong, Cambridge, Mass., Harvard University Press, 1978.

⁷ Archard, D., Children: Rights and Childhood, London: Routledge, 1993, 102.

under such a policy some women, judged to be less adequate as rearers of their own natural children, would be reduced to the status of breeding stock.

The bonding in question is only likely or probable, not certain however, and likelihood or probability does not give an unambiguous claim. Yet in Archard's universe these are clear-cut matters of either/or: '(e)ither the parent bonds to its child and is best suited to rear, or it does not bond and is not best suited'.⁸ But human bonding is not an all or nothing, either/or matter. There are degrees of bonding as there are degrees of affection or dislike. The existence of a right cannot be contingent on the possibility that some parents may not bond with their children or not bond fully. If they do not then this, in the event, means forfeiture of the right in individual cases if in fact the bonding (or maximal bonding) is the basis of the right. This is a situation where there must be intervention *either* to encourage or to develop the absent, or weak, bonding *or* if bonding turns out not to be possible to make alternative arrangements which will take into account the interests of the child *and* of the parent. Failure to bond is not necessarily a moral failure and in many, if not all, cases it is a tragedy for the people involved and something which we should make every effort to prevent. Rather than seeing the bonding as a necessary condition for possession of the right to rear we should consider the right as a protection of the opportunity to form the bond. Human relations and behaviour do not exist to support rights; rights exist to support desirable human relations and behaviour.

'Biologism' is the notion that all parents naturally love their children.⁹ Archard opposes the belief that biology alone equips a person to pass the test of adequate parenthood and he suggests that we should 'discount any presumption of natural affection'.¹⁰ Natural parents abuse and neglect their children and the presumption of natural affection blinds us to that fact to a large extent: we are likely to be more shocked that a natural parent will abuse/neglect than we are by the substantive abuse/neglect itself. Feeling is no guarantee of promotion of another's good and such feeling is not exclusive to blood ties. The capacity of a parent to rear the child should be viewed neutrally, 'that is by discounting any presumption of their biologically grounded superiority as guardians'.¹¹

It is precisely the 'presumption of their biologically grounded superiority as guardians' which must be extended to natural parents however. It is not insignificant that we *are* more shocked that a natural parent will abuse or neglect his or her child. This is because the presumption in favour of the natural parent provides the norm by which all adult/child

⁸ *Ibid.*, 103.

⁹ Jordanova, Ludmilla, 'Children in History: Concepts of Nature and Society', in Children, Parents and Politics, Geoffrey Scarre, ed., Cambridge: UP, 1989, 11.

¹⁰ Archard, 'Child Abuse', 188.

¹¹ *Ibid.*, 190.

relations are judged. It is the paradigm case. It cannot be otherwise: biologically, psychologically, historically, culturally we are programmed to see the natural parent as the *natural* guardian of the child. We ascribe to this relationship dimensions of trust, of sanctuary, which we ascribe to no other with the same intensity. If we abandon the presumption in favour of the natural parent then we have no model of parent/child relations to guide us. All human relations, interpersonal, professional/client, confessor/penitent, lead to abuses from time to time. We do not normally consider such abuses as sufficient reason for changing our view of the ideal relation in these cases. On the contrary, it is because there is an ideal of behaviour in such cases that we are horrified by, and condemn, the abuses as a betrayal of trust.

But perhaps it is *appropriate* bonding which is the issue. All incidences of child abuse should not be lumped together to score moral points: *some* child-abuse occurs because a parent bonds in an inappropriate way; some because the parent does not bond at all or bonds inadequately; some because of a lapse of normal care on the part of a parent who is disturbed for other, extraneous reasons. There is no such thing in relation to child-abuse *in general* as a typical case. In addition it is difficult to see how we can make *post hoc* judgements in advance of particular cases so that we can predict when bonding will be inadequate. To admit that there is natural bond-forming between parent and child does *not* commit us to believing that parents and children will always bond maximally or that parents will never behave badly towards their children.

Archard considers that the 'trauma of separation' is an empirical matter.¹² He is right to say that such feelings 'may help to support a presumption in favour of natural parents' bringing up their own children'¹³. But surely this is all that is required. Archard is chasing a chimera in trying to find unassailable grounds for what is at best a variable situation. If we add to the trauma of separation the obligation undertaken in begetting and bearing the child in the first place the result is a strong case for a *presumption* of right for the natural parent. The limitations which Archard identifies in all of the attempts to ground the right to rear are no more than indicators as to when the presumption might be challenged. A presumption is the most we can expect in such matters. Indeed it might be said that, like the presumption of innocence in law, a presumption of right is the only suitable recourse here. Just as the guilty do not have to establish their innocence, biological parents do not have to establish their right to rear their children. It is incumbent on those who would *deprive* them of their right to make the case *beyond reasonable doubt*. And this can be done only in individual cases.

¹² Archard, Children: Rights and Childhood, 104; It is tendentious to refer to an '*alleged* trauma of separation'. Both parents and children, and if there are exceptions they are no more than that, feel keenly *any* separation, even where it is known that the separation will be only temporary. Consider the situation of children in hospital for example.

¹³ *Ibid.*, 104.

The interest argument

The child's best interest is not a simple univalent matter which can be set in opposition to all other interests. The child is rooted in a social and communal milieu and the ties that bind the child are many and complex. There are relevant factors in addition to (the child's) best interest. In cases of contested custody, for example, these would include the wishes of the parents as to the child's custody; the wishes of the child as to his or her custodian; the relationship of the child with his or her parent or parents, siblings, and any other person who may significantly affect the child's best interest; the child's adjustment to his or her home, school, and community; and the mental and physical health of all individuals involved.¹⁴

Parents acquire a dispositional interest in their children (in the child's *normative* interests)¹⁵ by having them and this begetting and bearing is, in itself, a powerful statement of the parents' preparedness to have that interest in the child. Most parents *are* interested in their children without being suffocatingly so. Admittedly some parents are not interested in an appropriate way. Nor, we can add, are all parents' interests in their children comparable: interest may be defective or deficient but this is deviation from the normal relationship. Like bonding, dispositional interest lies along a continuum from virtually none at all to extreme, even overbearing interest. But exceptional or extreme situations cannot be allowed to invalidate a general rule of human behaviour. People whose dispositional interest in their children is defective or deficient need help, not a denial of the rights of others.

Among the possible reasons for having children Archard lists

to bring about a life that avoids the errors of its begetter, to create a companion¹⁶ and an assistant for one's dotage, to add another soldier to the army of the motherland or another true believer to the ranks of the faithful, to prove it can be done, to spite another adult. None of these interests in rearing a child are of self-evident value or obviously consonant with the interests of existent adults.¹⁷

It serves no useful purpose to lump together trivial reasons (to prove a point, to spite another) with reasons which *are* in fact 'consonant with the interests of existent adults' such as patriotism or religious belief and duty. Two points need to be made here. In the first place people's motivations are rarely uncomplicated, they rarely act for one reason only. Most frequently their motives and motivations are mixed, the important with the trivial, the

¹⁴ Stein, T.J., 'Child Custody and Visitation: The Rights of Lesbian and Gay Parents', Social Service Review, 70, 3, 1996, 435-450.

¹⁵ See the analysis of 'interests' in chapter 3.

¹⁶ 'The parents' own need for the intimate relationships of child rearing could not alone justify any broad authority over another person.' Henley, K., 'The Authority to Educate', in O'Neill, O., Ruddick, W., (eds.), Having Children: Philosophical and Legal Reflections on Parenthood, New York: OUP, 1979, 257.

¹⁷ Archard, Children: Rights and Childhood, 105.

selfish with the generous, the high-minded with the base. Some of the things listed (motherland, faith) are precisely the kinds of things which are part of the interests of real people, by reference to which they define themselves and which give long-term significance to their decisions and on-going commitments. We do not have to agree with people's interests to recognise that they are interests. Secondly, Archard's standards are either impossibly high or unreal. Having peremptorily dismissed serious matters as not being 'consonant with the interests of existent adults' he declares that an interest we might recognise as of real value 'would be to bring into existence another human who could be the object of our disinterested love, concern and care'.¹⁸ Archard's use of the word 'disinterested' is inappropriate in the context of parental/child relations. Whatever else we would expect of an adequate parent we would certainly expect that he would not be impartial as between the normative interests of his own children and those of others: their dispositional interests *will* be partial. To be committed to the best interests of one's own child is to pursue the child's advantage. Parents will provide the best life possible, within their means and often making significant sacrifices of their own comfort and welfare, for their children precisely to give them whatever advantages they can over other children. This is not a defect (although the application may be defective), it is a fundamental part of what it means to be a parent.

People have children for all kinds of reasons having to do with their own normative interests. They frequently do not realise what they are letting themselves in for when they engage, even voluntarily and intentionally, in procreation. This is why parental obligations are atypical: prospective parents have only the haziest idea of what they are committing themselves to in having children; they frequently misjudge 'their own inclinations and capacities'.¹⁹ Even if we could accept Archard's impossible criterion it won't do. As he himself acknowledges this would be a child-centred argument, 'it is the child's interest in a loving upbringing which does the moral work'.²⁰ This is not necessarily so. The normative interests of the parents as separate individuals ^{are} also relevant.

The normative interests of the child are not the *only* morally relevant factor in the interactions between parents and children. Other considerations may have to be weighed against them: the well-being and safety of the community, respect for the interests and autonomy of other people (including the parents themselves), the welfare of other children (including siblings), for example. The 'best interests' of the child is not necessarily an overriding principle in all cases²¹ and therefore could not be the exclusive reason for the

¹⁸ *Ibid.*

¹⁹ O'Neill, O., 'Begetting, Rearing and Bearing', 27.

²⁰ Archard, *Children: Rights and Childhood*, 105.

²¹ It is noteworthy that the UN Convention, (U.N. General Assembly, Convention on the Rights of the Child, Document A/RES/44/25, 12 December, 1989) in Article 3, asserts that the best interests of the child shall be a primary

right to rear. Nonetheless one of the long-term commitments that people commonly choose to enter into, is that of raising children.²² Society acknowledges the right of adults to rear their own child without undue interference even if this is not in the child's best interests. It is often acknowledged that parents will harm their children to some degree (perfection in parenting is as rare as perfection in any other human activity), and yet a free society should 'morally allow their autonomy to overrule ... paternalist obligation to see that the child suffers minimal harm.'²³ There are two aspects to parental autonomy: rights and duties.

Parents should be allowed to raise their child as they see fit, as long as they do not harm the child too severely: this is their 'right'. Yet it is also their 'duty' to care for the child, even if they do not want to do so.²⁴

The narrow view of parental prerogatives imposed by the liberal ethic has not gone unchallenged.²⁵ According to the liberal view parents when making decisions which will affect their children must consider only those principles mandated by the liberal philosophy i.e. the 'child's best interests' and the limitation of harm to others. In this way the same principles are used to control the prerogatives of parents as are used to limit the actions of states.²⁶ Schoeman points out, however, that while the state may be limited by the best interests criterion the parents are not. Often the decisions which parents make regarding their children are neither in the child's best interests or made with a view to promoting the child's welfare.

Parents frequently deprive children of rights and in other ways exercise authority over children that would be impermissible in other contexts between citizens or even between incompetents and state appointed guardians.²⁷

The primary grounding of the parent's right to rear the child are the normative interests of the adult who becomes the parent. But becoming a parent creates a significant

consideration, not *the* primary consideration. 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' This means that there can be other primary interests. At this point it is unnecessary to speculate on what they might be.

²² Bigelow, John, *et. al.*, 'Parental Autonomy', Journal of Applied Philosophy, 5, 2, 188; 'Raising children is a long-term project which involves a lasting personal commitment to other people. It is an exercise of autonomy and a development of a person's potential; and for some people, it is the only long-term project which gives their life direction and significance.', 192. '(H)uman beings have an overwhelming propensity to choose parenthood as a major ingredient in their lives ... (and) it is clear that this activity is characteristically desired for its own sake, as an end in itself.' Page, E., 'Parental Rights', Journal Of Applied Philosophy, 1, 2, 1984, 197.

²³ Bigelow, 'Parental Autonomy', 189.

²⁴ *Ibid.*, 189.

²⁵ See Schoeman, Ferdinand, 'Parental Discretion and Children's Rights: Background and Implications for Medical Decision Making', Journal of Medical Philosophy, 10, Feb., 1985, 45-62.

²⁶ It seems hardly necessary to point out that even the ideal relationship between the state and its adult citizens is not the same as the ideal relationship between a parent and a child.

²⁷ Schoeman, 'Parental Discretion', 49.

responsibility which is not borne by other adults. In allowing people the autonomy to have children we are also requiring them to take the consequent responsibility: the right to beget and bear children is contingent on the obligation to care for them adequately. This is so even where the child was 'unplanned': people must be required to cope with inconveniences which result from their own actions. This is a consequence of autonomy: a person is not only entitled to pursue his or her own projects, but is reasonably expected to accept responsibility for the outcome.

The least detrimental argument

Midgley is rightly critical of what she calls Archard's 'strangely legalistic view of the aims of life'²⁸ when he argues that 'if there are any rights to rear they derive from duties to bring children into rational maturity where they can exercise rights for themselves'.²⁹ In fact Archard eventually acknowledges that there should be a presumption in favour of the natural parents as the 'least detrimental alternative' in the choice of rearer.³⁰ 'Arguably', he continues, 'this presumption is defeated only if it can be shown that the only feasible alternatives have no greater benefits and worse harms'.³¹

Midgley is more robust in her defence of the natural parent: natural parents are taken to be the 'least bad' available rearers for their children, not because of rights but because 'it is widespread experience that other people are, almost always, much less willing even to try to do the job properly than the parents are'.³² Surrogate parents or institutional arrangements do not appear to have any guaranteed superiority over natural parents with regard to child abuse, for instance. It might be added in support of her point that appeals to alternative 'institutional arrangements' simply cloaks the child's need for *individual* care. This individual care may be provided *in* an institution but if it is not individualised, and the care provided really *is* institutional, then there is no contest between the natural and the institutional arrangement. Although we are coming to realise that some natural parents have been behaving abominably towards their children the record of other carers does not appear to have been any better. Midgley is correct that it is unrealistic to think that there is 'a vast, reliable majority of respectable citizens' available to rescue children from unsuitable parents.³³ We should take it as axiomatic that the natural parent is the model for the carer. All other categories of carer (adoptive parents, surrogate parents, institutional carers, etc.)

²⁸ Midgley, 'Rights Talk', 110.

²⁹ Archard, 'Child Abuse', 188.

³⁰ Instead of looking for a way to ground the parent's right to rear the child why do we not, alternatively, try to discover whose right it is to decide whether the parent will be the rearer or not?

³¹ Archard, Children: Rights and Childhood, 106.

³² Midgley, 'Rights Talk', 106.

³³ *Ibid.*

are parasitic on the presumption that there is an ideal natural parent. This does not mean that all parents conform to this ideal - they aspire to it and are successful to varying degrees.³⁴

Biology, interests, or 'best interests' alone do not entirely explain the basis of parental duties; there is also the requirement of social sanction. There are social and cultural arrangements where the rearers are not the begetters or bearers (adoptive parents for example). As Blustein remarks, '(N)ormally procreation is relevant to parental duty only insofar as social practices and customs make it relevant'.³⁵ That is to say that natural parents have priority where this is the arrangement endorsed by the relevant society. The source of child-rearing duties lies in established social practices and in the various interests of the involved parties (children, parents and the sustaining community) which are co-ordinated to yield 'a coherent set of social practices conferring corollary rights and duties which satisfy the interlocking interests of all parties'.³⁶ The child's legitimate (normative) interests include an interest in physical care, education and socialization and also in the 'warmth, consistency and continuity of the relationship he has with the person who takes care of him'.³⁷ As well as being fed and protected children need to be loved, and so do their parents. It is no small part of the urge to have children that as well as providing us with an object for our affections it creates the opportunity to be loved in return. There is a reciprocity in parents' preoccupation with their children which is not the calculation of a return on an investment but the expectation of a spontaneous response to loving kindness. As Midgley says, 'The reason why having a thankless child is sharper than a serpent's tooth is not just that we have sunk a lot of capital in the investment, but that we thought we were loved and find that we are not.'³⁸

As we will see states do not confer parental rights on natural parents, they simply acknowledge a biological, psychological, and social reality. The connection between evolutionary biology, parental feelings and societal norms is not arbitrary. We are here because the social practices which grew up around child bearing and rearing were effective.

Natural affections

³⁴ For Hegel the Family is the first moment in the union of moral subjectivity and objectivity. The human spirit first objectifies itself in the family which is the 'logically prior society inasmuch as it represents the universal in its logically first moment of immediacy. The members of the family are considered as one, united primarily by the bond of feeling, that is, by love'. (Copleston, Frederick, *A History of Philosophy*, 7, 1, New York, Image Books, 252. In a note Copleston explains: 'Obviously, Hegel is not so foolish as to maintain that as a matter of empirical fact every family is united by love. He is talking about the concept or ideal essence of the family, what it ought to be'. n.32, 252.)

³⁵ Blustein, J., 'Child Rearing and Family Interests', in O'Neill, Ruddick, *Having Children*, 115/6.

³⁶ O'Neill, Ruddick, *Having Children*, Editors' Forward.

³⁷ Blustein, 'Child Rearing and Family Interests', 117.

³⁸ Midgley, M., *The Ethical Primate: Humans, Freedom and Morality*, London, Routledge, 1994, 147.

have served the essential function of making possible strenuous and devoted provision for the young. If all parents had cared as much for every passing infant as they did for their own, this provision would have been impossible. In such a casual, impartial regime, few warm-blooded infants would be likely to survive at all.³⁹

It is important to acknowledge at this point that the parent's interest in having a child can have a legitimate economic dimension: the relationship between parents and child can be valued economically as well as emotionally. According to this view 'children are either liabilities or assets to be used in family survival strategies'.⁴⁰ The economic value of children is seen where the survival, or thriving, of the family unit depends on the contribution of each family member. This is most clearly seen in pre-industrial communities where children begin to contribute to the family wealth as soon as they are able. Even in our own society children of farming families are expected to contribute (within reason) to the routine chores of the farm. The same is usually true of small family businesses. In these cases the child has a real and measurable economic value. This does not mean that the child is valued *only* for her economic contribution or that the economic contribution is ever even measured. It is there none-the-less.⁴¹

For the parent the fact that the child may be an economic or insurance investment does not preclude valuing the child as the embodiment of the parents' love for one another. In this case children are valued not for their economic or genetic value but because they symbolise the mutual love, the joint normative interests, of the parents:

(The) mutual love of the child-rearers becomes inextricably bound up with a common love for their children. This may happen whether or not the child rearers are their children's biological parents.⁴²

The State

Biological parents are normally in a better position to care for and to harm their child because they are (in societies like ours) customarily allowed almost exclusive care and control of the child. This cannot be justified by repeating that biological parents have a special duty: 'If it is only the social practice of assigning care and control to biological parents that gives those who cause children to exist parental duties, the source of parental

³⁹ *Ibid.* Plato feels it necessary to separate parents and children because he wishes to supplant the natural with a rational order.

⁴⁰ Jordanova, 'Children in History', 11. There is a number of ways in which a child could be economically active: in paid work or apprenticeship outside the family; by taking care of younger children and freeing the adult carer (usually the mother) for paid work; by working with parents and so helping to raise their productivity. The need in such cases is for regulation and humanisation rather than for abolition. It is not irrelevant that parents in economically deprived circumstances tend to have larger families.

⁴¹ Hart, Roger, A., Children's Participation: from Tokenism to Citizenship, Innocenti Essays, 4, Florence, UNICEF, 1992, section 6, 23-28 identifies the relevant issues.

⁴² Blustein, 'Child Rearing and Family Interests', 118.

duties cannot be the fact of causation itself'.⁴³ Blustein appears to have gotten the causality the wrong way round. It is not because they are 'customarily allowed' almost exclusive control of their children that biological parents are normally better at it. It is because they are normally better at it that the practice continues.

Blustein's use of the phrase 'assigning care and control to biological parents'⁴⁴ appears to imply that some agency, usually the state, has a primary responsibility for the distribution or disposition of children independently of the claims of biological parents; that there is somehow a *prima facie* case in favour of state intervention, as if the biological parent is just one of a number of possible agents waiting in the wings to take on the responsibility of child rearing on behalf of the State. It is not, and never has been (certainly not in any kind of democratic society) the function of the state to assign care and control to natural parents. Plato's proposal in The Republic⁴⁵ to separate all children under ten from their parents so that they can be reared by the Guardians would not be abhorrent to us if we accepted the prior authority of the state in relation to child rearing. A presumption in favour of the biological parents appears to meet the reality more closely: the right (or more correctly the duty?) of the state is to intervene only where the biological parents are clearly not meeting their obligations. It is because of the direction of the responsibility that the intervention of the state must come in the form of aid and assistance to the natural parents in the first instance. The separation of parents and children is a last resort, justifiable only when all efforts at remediation have been exhausted.

The State certainly has legitimate interests in the welfare of children. These interests include population policy and the care of children as future citizens. Society has a legitimate interest in ensuring that children are not harmed by those who have charge of them, that they receive a minimally adequate rearing, and that child-rearing practices are co-ordinated with other social practices and policies. The family is not the only child-rearing institution and 'institutional co-ordination may dictate the transfer of many child-rearing responsibilities to non-familial structures of the society', such as schools, for example, but significantly only with parental consent. What is required is the adjustment of competing interests, not their 'ranking or aggregation'.⁴⁶ The State may act as a party to the process of adjustment, it may even facilitate the process, but in democratic societies it assigns roles and duties in relation to child care only in exceptional cases.

⁴³ *Ibid.*, 115/6.

⁴⁴ Or elsewhere, '(A)ssigning children to their biological parents', Blustein, Jeffrey, 'Parents, Paternalism and Children's Rights', Journal of Critical Analysis, 8, 1980, 89-98, 97. Compare: 'It is not just because the parent provides the best services for the child *that the parent is authorised* to make decisions for the child. It is because the parent and the child are presumed to be intimately related *that the parent is given authority over the child.*' Schoeman, 'Parental Discretion', 60 (emphasis added).

⁴⁵ Plato, The Republic, G.M.A. Grube, trans., London, Pan Books, 220.

⁴⁶ Blustein, 'Child Rearing and Family Interests', 119/20.

We cannot ignore the temporal, logical and psychological priority of the biological parents. To acknowledge that the society has a legitimate interest in ensuring that children are not harmed by those who have charge of them does no more than *protect* the child and society's interests: it does not establish any claim over the disposition or distribution of children in the first instance. O'Neill has written

Only if the State controls and mandates procreation - as in Plato's Republic - could one hold that the State acquires the same sort of obligations as persons do by deciding to procreate, so undertaking to rear. Only in this case would the State, or certain State agencies, have chosen to bring dependent human beings into existence and so be committed to care for them and to train them until they can live independent lives.⁴⁷

The State is not, and cannot be, even a surrogate parent except in a metaphorical sense, while the notion of 'guardianship' is ambiguous: it means *either* that the State acts directly as the child's guardian in the same way as the parent should have done *or* that it merely acts as guarantor for the child's welfare. All that the State can do in relevant cases is to transfer the care of the child from one set of individuals to another who then become the surrogate parents. Even if this is transfer to an institution it falls on some identifiable individuals within the institution to act as parent surrogates: the alternative is the kind of impersonal institutional care which has been condemned repeatedly. The State is not a substitute parent: it must provide a substitute parent and there is no absolute guarantee that the substitute is any more likely than the original to be adequate.

The roles of parents and states are not interchangeable; the state's relationship with the child is formal but the parent's is intimate. Impositions and practices which would be unthinkable outside the context of the family are acceptable within the intimacy of the family. Parents' proprietary interests in the welfare of their children is based on a sovereignty which is at once more intimate and more benevolent than is possible for an impersonal state.⁴⁸ The state cannot occupy an intimate role with the individual child. Nor is the parent's role limited to providing such care for the child as the state cannot practically provide. The parent is not the functionary of the state.⁴⁹

Even though we recognise that there are limits on the parents' activities *vis-à-vis* the child we acknowledge that, in part at least, the parents' function is characterised 'as providing

⁴⁷ O'Neill, O., 'Begetting, Rearing and Bearing', 30/1 .

⁴⁸ Baumrind, Diana, 'Reciprocal Rights and Responsibilities in Parent/Child Relations', Journal of Social Issues, 34, 2, 1978, 179-196, 189.

⁴⁹ Schoeman, 'Parental Discretion', 48. These are different too from the usual insistence that the primary duty of the parent is to bring the child to some ideal of liberal functioning characterised by autonomy and rationality. Most parents would prefer their children to be good, as defined in terms of their own conception of the good life, than to be rational and uncommitted as between conceptions of the good.

opportunities for the emergence of meaning, intimacy, identity, and character - altogether inner qualities and not the kind of thing that can develop from abstract relationships'.⁵⁰

The relationship within a family typically has an inner focus and an independent meaning which results from sharing of life and its intimacies. While the relationships within a family may be very complex and in some ways dependent upon the wider social context, responsibilities are aimed at making the family as such a working entity. They are not typically concerned with the maximization of individual welfare or the promotion of social interests.⁵¹

In general democratic states have set high threshold conditions before intervening to protect the rights of individual family members, or before recognising the right of others to intervene. The reason being that although the liberal principles which democratic states promote are relevant in the family context they 'are not exhaustive of the principles which may legitimately bind people together and structure their relationship'.⁵² So there is therefore a 'separation of powers' between state and parent. Although the state has authority to intervene in extreme situations this does not mean that the parent derives authority from the state. The authority of the state is regulatory, not constitutive. Conceding its right to intervene in extreme cases is not to acknowledge that it is the ultimate authority in matters pertaining to the family.

There is a difference between saying that the state has a right to step in when an urgent situation emerges and saying that the state has ultimate authority in the domain of child rearing, delegating some powers but reserving some supervisory powers for itself ... The right to intervene does not presuppose possession of ultimate authority.⁵³

'Life-or-death' dilemmas, when 'a good case is made for imminent and serious harm befalling the child as a result of parental discretion'⁵⁴ illustrate that this separation of powers principle is not without marginal difficulties. But these dilemmas should not distort our judgement generally:

The fact that we think that the child's life is more important to protect than the choices of the parents, and possibly even the child, does not show that when the situation is less urgent it is still only the child's welfare that carries any moral weight in judging the appropriateness of any particular exercise of parental discretion.⁵⁵

⁵⁰ *Ibid.*, 48.

⁵¹ *Ibid.*, 49.

⁵² *Ibid.*, 50. For a discussion of such principles see Meyer, Michael J., 'Rights Between Friends', *Journal of Philosophy*, 89, 9, 1992, 467-483; Smith, Tara, 'Rights, Friends and Egoism', *Journal of Philosophy*, 90, 3, 1993, 144-148.

⁵³ Schoeman, 'Parental Discretion', 50/1.

⁵⁴ *Ibid.*, 60.

⁵⁵ *Ibid.*, 52.

The obligations of the state towards children must, therefore, rest on different foundations than do the obligations of parents. The state's main claim is based on the 'public interest in ensuring that the next generation is reared in ways that will make its members at least adequate citizens'.⁵⁶ This public interest principally requires 'backup' obligations of two kinds: to ensure that *someone* carries out the basic parental task and to supplement the efforts of the parents (or surrogate parents) by providing services. This, in turn, leads to a tension between the relative roles of 'experts' and parents.

The battle lies between the champions of the 'helping' professionals, employed by state agencies, who trust in the advance of expertise, and those sceptics and libertarians who suspect that the choice and decisions of ordinary parents may offset ignorance of theory with involvement, commitment, and knowledge of the particular case.⁵⁷

If it could be shown that there were demonstrable principles of good child rearing and an appropriate concomitant expertise then according to the liberal principles of best interest (present welfare and future autonomy) and protection of others, then parents would have no real discretion in the matter of rearing their children. They would have to conform in the application of the guidelines of the experts, and would have discretion only in matters which did not involve the child's best interests: for the experts would define the child's best interests and the most efficacious means to attain them.

Once persuaded that there were right ways of rearing children, from the liberal perspective there would be no excuse for not following recommended patterns in any field in which limitations on children's freedom were being legitimately imposed.⁵⁸

Almond also remarks on the conflict between 'parents on the one hand, representing the perceived interests of their children, and professionals, on the other, claiming the authority of expertise'.⁵⁹ The child is the object of competing claims by the state, the parents and the professionals. Unlike the state and the professionals, however,

⁵⁶ O'Neill, O., 'Begetting, Rearing and Bearing', 31.

⁵⁷ *Ibid.*, 31. Not all of the 'helping professionals' are ignorant of the need for 'involvement, commitment, and knowledge of the particular case', nor is the perception of the relative roles of parents and professionals necessarily one of conflict. Smith (Smith, Carole, 'Children's Rights: Have Carers Abandoned Values?', *Children and Society*, 11, 1997, 3-15) argues that the ascendancy of rights over values in social work practice has dislocated the relationship between the client and the professional in a damaging way. The ascendancy of rights talk has emphasised the formal requirements of social work practice (regulating, measuring, monitoring the observable and measurable elements of performance) to the detriment of the social and emotional content of caring relationships.

⁵⁸ Schoeman, 'Parental Discretion', 53. Callan argues persuasively that the obligations of parents cannot be entirely explained by the child's interests. In addition the parents themselves have present and future interests which are deserving of respect. Callan, Eamonn, *Creating Citizens: Political Education and Liberal Democracy*, Oxford, Clarendon Press, 1997, 138-145.

⁵⁹ Almond, Brenda, 'Education and Liberty: Public Provision and Private Choice', *Journal of Philosophy of Education*, 25, 2, 1991, 193-202, 196.

parents have always had duties laid upon them in respect of their children, and it is arguable that duties presuppose rights. If, for example, parents are regarded as having an *obligation* to care for, instruct and protect their child, their *right* to do these things must be simultaneously recognised. It would be inconsistent to admit the 'ought' here, whilst withdrawing the 'can' - to demand fulfilment of the duty but to deny the practical conditions necessary for fulfilment of the duty.⁶⁰

Other child-rearing institutions - in Western democracies at least - are secondary, derivative institutions. Schools, for example, provide education for children where parents are unable or unwilling to provide this education themselves.⁶¹ Nonetheless many international agreements endorse the right of parents to direct their children's education and to give them an education which is consistent with the parents' own philosophical and religious convictions.⁶²

Summary

In Western European and similar cultures there is a general presumption that biological parents have the primary right to rear their own children. This presumption is buttressed by three kinds of arguments: arguments based on the blood relationship itself, arguments based on the interests of the child, and arguments that the biological parent is the 'least bad' choice as the child's carer.

Becoming a parent creates a significant additional responsibility: the right to beget and bear children is contingent on the obligation to care for them. The normative interests of the individual parents themselves are not inconsequential, however, but they are not entirely sufficient. While we will expect parents to consider the child's 'best interests' when making decisions child there are other relevant considerations which they may also bear in mind, including their own interests. Unlike the state, parents are not strictly limited by the child's best interests principle. Often the decisions which parents make regarding their children are neither in the child's best interests nor made primarily with a view to promoting the child's welfare.

The State has legitimate interests in the welfare of children as future citizens. But this does not confer on the state the responsibility for assigning care and control of children to their natural parents. The presumption in favour of biological parents is simply an

⁶⁰ *Ibid.*, 198.

⁶¹ Cf. the Irish Constitution, Article 42: 1. 'The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children. 2. Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.' Also the 'Education Otherwise' movement in Britain, and private schools in U.S. Though the erosion of the doctrine of *in loco parentis* and the increasing interest of the state in education might indicate that there is a change in the traditional balance of interests. Cf. Zirkel, P.A., Reichner, H.F., 'Is *In Loco Parentis* Dead?', Phi Delta Kappan, February, 1987.

⁶² Almond, 'Education and Liberty', 193/4. 'Children are first educated by their parents, and so must they continue to be as long as raising children constitutes one of our most valuable personal liberties.' Gutmann, Amy, Democracy in Education, New Jersey, Princeton University Press, 1987, 50.

acknowledgement of biological, psychological, and social reality. The state has a right (or duty) to intervene only where biological parents are clearly not meeting their obligations. Separating parents and children must be a last resort, justifiable only when all efforts at remediation of problematic situations have been unsuccessful.

PART 3: CHILDREN

Chapter 7: Re-defining Child/Adult

Every human society has a policy on the treatment of its young. Communal moral decisions are taken which affect those who are not themselves included in the decision making process; those designated 'children' comprise the major class of people so excluded. Children are ruled by adults and society must decide how this rule is to be exercised. All political theories carry implications for the treatment of the young for they must take decisions about future members of the body politic.¹ It is not so much that society must decide *how* this rule is to be exercised but that society must decide the acceptable limits to its exercise leaving as wide as possible a freedom of discretion within the constraints of specific imperatives. Every society *embodies* certain child-rearing practices: it is the limits of these which must be defined. A presumption of all such policies is that we know how children differ from adults in ways that are relevant to their differential treatment.

Used to denote a biological or social relationship between one individual and others (parents or parent substitutes) that is, as a descriptive term, the words 'child', 'children' are unproblematic so long as it is understood that they denote an empirical relationship. In this sense it is both conceptually and contingently true that every human being ('man who is born of woman') is a child since everyone is biologically related in a parent/child relationship to a unique pair of other human beings. But 'child' in opposition to 'parent' also carries a normative significance. We expect that the designations in such cases imply understandings regarding the *quality* of the relationship, understandings of mutual obligations, etc.

Writers on children's rights, both protectionists and liberationists, use the word 'child' in the expectation that we will know what it means. This is so even to the point that many of them use the word ambiguously, failing to distinguish between 'child' meaning a young human being under the age of 18 (for the upper limit of which a certain range of adult rights may be claimed) and 'child' meaning 'infant' (i.e. younger than 7 years old) or 'child' meaning 'pre-pubescent' or 'pre-adolescent', or 'child' meaning 'adolescent-becoming-adult'.

Children are not adults. This is not a proposition which requires evidence. It is an fundamental feature of human experience. There is a school of thought which holds that childhood is a relatively recent 'invention' historically and that childhood itself is a socially

¹ Haydon, G., 'Political Theory and the Child: Problems of the Individualist Tradition', Political Studies, 27, 3, 1979, 405-420, 409.

constructed phenomenon.² This is the Ariès' interpretation which is disputed.³ Franklin, however, for example, seems to take the Ariès thesis as proven: alternative explanations, for example that Ariès' conclusions about changing views of childhood could be displaced, on the same evidence, by changing styles of iconography and conventions of representation, are not considered. Repeating Ariès' thesis on the role of the rise of schooling and the disappearance of childhood⁴ Franklin concludes that schools 'were established and middle-class males became the first to undergo a long and segregated training for adult life; they became the first children.'⁵ Could we not equally conclude that they became the first industrialised adults? The language used, 'training for adulthood', appears to contradict the assertion that they became the first children. More correctly they were the first children to be systematically trained for adulthood. Arguably it was not *childhood* which was invented by the industrial and educational revolution but a particular conception of *adulthood*. After all, up until then, we are told that adults and children shared the same games, stories and pastimes: subsequently these activities became the exclusive domain of children. In this respect at least it was the adults who changed (became more sophisticated perhaps, more focused in relation to labour options, were educated *out of* childhood) not the children.

What is socially constructed is the way we *treat* children, the way we organise relations between them and adults. If the Ariès thesis is true and if childhood is indeed simply a socially constructed distinction why is it that *rites de passage* marking the transition from the powerlessness of childhood to the privileges and prerogatives of adulthood appear almost universal in primitive communities? The passage from one state to another marked by rituals of knowledge, endurance, and competence is a recognition of difference, not the creation of it.⁶ These rites may reinforce the differences and this may in fact be their purpose, but they are based on an apparent universal human recognition that there *is* a difference and that children require an extended period of preparation before they can assume their place in adult society.

² Ariès, Philippe, Centuries of Childhood, Penguin Books, 1986. On *conceptions* of childhood, see Archard, D., Children: Rights and Childhood, London: Routledge, 1993, 21-28, and chapter 3.

³ Pollock, L.A., The Forgotten Children: Parent Child Relations from 1500 - 1900, Cambridge University Press, 1983; Freeman, M.D.A., The Rights and the Wrongs of Children, Frances Pinter, 1983; Wilson, A., 'The Infancy of the History of Childhood', History and Theory 19, 1980, 132-53; Vann, R., 'The Youth of Centuries of Childhood', History and Theory, 21, 1982, 279-97.

⁴ This thesis was popularised by John Holt in Escape from Childhood: the Needs and Rights of Children, Penguin Books, 1975.

⁵ Franklin, B., ed., The Rights of Children, London, Basil Blackwell, 1986, 11.

⁶ The annual phenomenon of terminal secondary school examinations is in many respects a similar practice. Those concerned are required to show that they have accumulated the requisite knowledge, skills, endurance, and self-discipline to qualify for membership of the adult community in an active, productive capacity.

It has been claimed that childhood is not a universal experience, that it is subject to wide variations of time, place and culture,⁷ and that there is wide variation in the social and cultural structuring of childhood, that is, in the ways in which adults relate to children individually and collectively. Further, the division between child and adult is incoherent in that the age of transition changes with different purposes threatening 'arbitrary and inconsistent relativism'.⁸ This incoherence is attributable to the fact that within the age range of 'childhood' as distinct from 'adulthood' there is wide discrepancy in terms of development and maturation. Crucially, the term 'child' is often interpreted as denoting not a chronological, or even developmental, stage at all but a condition of powerlessness.⁹

Yet there is no 'wholly satisfactory generic term' for those who have not attained the status of adulthood:¹⁰ there is no straightforward, universally agreed answer to the question 'What is a child?' in terms of role, age, or general characteristics. 'In a society at any one time, no general definition of childhood exists'.¹¹ This is because of the perennial difficulty of defining an unexceptionable and consistent demarcation between children and adults. For 'child', 'childhood' are not free-standing concepts like 'fish' or 'tree'. It is only *in contrast* to adulthood that the concept of childhood is meaningful. Even if we distinguish between the infant, the child, the juvenile, and the adult¹² the likelihood that we can successfully forge a universally acceptable definition is no greater. In relation to the juvenile Campbell, for example, writes:

The characteristic aspect of this stage is a largely adult physical development and significant capacities for autonomous choice and conduct guided by the juvenile's own perceptions of the social world and her own scheme of values and beliefs.¹³

Given this we might well ask just what is the difference between the adult and the juvenile, just as we might ask, at any point, what the definitive difference is between an individual at

⁷ Franklin, The Rights of Children, 7-9. See also See Purdy, Laura M., In Their Best Interests?: The Case Against Equal Rights for Children, London, Cornell University Press, 1992, 197-210, for a brief survey of such differences.

⁸ Franklin, B., 'The Case for Children's Rights: a Progress Report', in The Handbook of Children's Rights: Comparative Policy And Practice, B. Franklin, ed., Routledge, 1995, 8.

⁹ See Reed, T.M., Johnston, P., 'Children's Liberation', Philosophy, 55, 1980, p.263-6. Kim (Kim, Ki Su, 'Mill's Concept of Maturity as the Criterion in Determining Children's Eligibility for Rights', Journal of Philosophy of Education, 24, 2, 1990, 235-244) concludes that 'in both Mill and Bentham the term "maturity", regardless of its equivocal nature, was nothing more than a landmark dividing the territories of power and powerlessness'. 242.

¹⁰ Haydon, 'Political Theory and the Child'. 1979, 408.

¹¹ Jordanova, Ludmilla, 'Children in History: Concepts of Nature and Society', in Scarre, Geoffrey, ed., Children, Parents and Politics, Cambridge: UP, 1989, 10.

¹² Campbell, T.D., 'The Rights of the Minor: as Person, as Child, as Juvenile, as Future Adult', Alston, P., Parker S., Seymore J., eds., Children, Rights and the Law, Oxford University Press, 1992. It has also been suggested that we could replace the portmanteau term 'childhood' by replacing it with infancy and adolescence to denote the experience of human life up to adulthood. See William Ruddick, 'When Does Childhood Begin?' in Scarre, Children, Parents and Politics, 31-34.

¹³ Campbell, 'The Rights of the Minor', 19.

any given age and an individual one or two years older or younger. Developmental psychology, as well as telling us that human development moves through certain fixed stages, has also established that our intuition that individuals move through these stages at idiosyncratic rates of development is true (a child is described as 'precocious', or as a 'late developer'). Over a wide range of capacities individuals of comparable chronological age differ significantly in the development of these capacities. Thus, while we continue to implement age-specific arrangements in our schools and other social institutions, we also recognise that the range of developmental progress among children of the same chronological age can vary enormously.

Popper warns against the lure of essentialism in relation to definitions.¹⁴ It is tempting to simply adopt a particular definition of 'child' or 'childhood' and to assert that it is the true or real definition. But 'child' or 'childhood' is not like a term in, say, physical science which, given agreement on the utility of a particular definition has acquired universal acceptance.¹⁵ In any case, childhood is only partially a socially constructed phenomenon. Childhood is also an existential experience influenced but not fully determined by social practices. It is experienced and lived from within as well as formed and perceived from without. Any definition we give is likely to be 'programmatic' or 'stipulative'¹⁶ but it is also likely to be contested and equally plausible alternatives suggested. It is only by looking at the way in which children manifest themselves in a particular social and cultural milieu that we can arrive at an understanding of childhood. But such an understanding will be in many ways parochial, in geographical and cultural as well as in historical terms.

Rather than searching for an *a priori*, essentialist definition of 'child' or 'childhood' we must try to identify the characteristics in respect of which differences between adults and children are described at a particular time. Such differences are usually couched in negative terms: what the generality of children lack when compared with some (idealised) view of adulthood. At best such definitions define *non-adult*. The essential and fundamental weaknesses of children have been identified as their not having political rights, economic independence, or autonomous legal status; as being subject to arbitrary authority and limitations on their personal liberty; as being subject to constant control and surveillance.¹⁷ Yet we must ask whether it is because they are children that these absences and restrictions exist or because they lack the necessary powers and capacities to make these absences and restrictions necessary that their treatment in a certain way (paternalistic) is justified? Clearly some of these characteristics are not natural characteristics of children:

¹⁴ Popper, K., Unended Quest: An Intellectual Autobiography, Fontana Books, 1976, 18-31.

¹⁵ Terms such as 'mass', 'acceleration', etc.

¹⁶ Scheffler, I., The Language of Education, Charles C. Thomas, 1974.

¹⁷ Franklin, The Rights of Children, 3/4.

they are the consequences of adults' perceptions of children as incapable of exercising certain capacities.¹⁸ Political rights, for example, are withheld from children because of this kind of perception. On the other hand these characteristics of childhood can be seen as a consequence of children's weakness because the children lack the power - which other oppressed groups do not - to challenge these deprivations for themselves. In either case they are the *symptoms* of the weakness, not the weakness itself. But the continuing use of 'children' as a portmanteau term cloaks the reality of a wide variety of capacity among those to whom the term is applied, those under the age of 18.

The central question must be whether children's subordination to adults is contrived by keeping them in an unnecessary servility, and in the ignorance necessary to sustain this servility, or whether children's subordination to adults is a necessary prerequisite to their eventually becoming autonomous individuals themselves. The second option does not preclude some oppression of children by individual adults, institutions, or social practices whereas the first does not appear to allow for even a 'best case' exception in present practices.

Institutionalised and Normative Conceptions of Childhood

We can distinguish *institutionalised* and *normative* conceptions of childhood.¹⁹ The former classifies the person according to some 'customary or legal-like criterion'. The latter recognises that there is also a normative contrast between the behaviour of children and the behaviour of adults. The institutionalised conception appears to be parasitic on the normative which has logical priority. The point of the institutionalised conception is to give explicit expression (and institutional status) to what are already perceived as significant normative differences between adults and children.

(T)here is good reason to think that a normative concept has priority over its related institutionalized concept. There would be no justifiable *point* to the institutionalized contrast were there not thought to be differences of some normative significance.²⁰

¹⁸ The accuracy of these perceptions need not be the issue here; whether they are accurate or not they influence the behaviour of adults in relation to children.

¹⁹ Kleinig, J., 'Mill, Children and Rights', *Educational Philosophy and Theory*, 8, 1, 1976, 1-16 deals with Mill's exclusion of children from his doctrine of non-interference with the self-regarding action of others (the principle of liberty from interference). This leads to the crucial question 'What has being a child got to do with the qualification for the right to liberty from interference?' Kleinig uses the word 'concept' where 'conception' would be more correct. See Archard *Children: Rights and Childhood*, 21-28.

²⁰ Kleinig, J., 'Mill, Children and Rights', 3.

Failure to distinguish between the normative and the institutionalized can lead to confusion.²¹ There is at best a causal connection (from the former to the latter) between them. Two possible deleterious consequences follow on this kind of confusion.

Firstly, some who would qualify morally (i.e. who are *normatively* the equal of adults) will not qualify institutionally (because they are too young - the reality for all those under the age of 18 and defined as 'children') and some who would qualify institutionally (they are adult by the institutional criterion, e.g. chronological age) will not qualify morally because they are not *normatively* the equal of (other) adults.²²

Secondly, the institutionalisation of the concept of childhood may 'function to extend the period of childhood in the normative sense'.²³ The dependent status of children is problematic since its relationship to the definition of 'child' is circular. One is a child as long as one has dependent status; as long as one has this dependent status, one is (or can be treated like) a child. This is a chicken and egg situation: giving institutional expression to perceived normative differences is to *endorse* the latter. This, in turn, reinforces such perceptions of normative difference and our responses to them.²⁴ The period of dependence can be extended beyond what is necessary by subjecting a capable individual (or an individual-becoming-capable) or an entire category of such individuals, to the restrictions of the institutional definition thus depriving them of (or at least delaying) the opportunities to develop the capacities picked out by the institutional differences. Our perceptions of such distinctions are formed in large part by the institutional practices with which we grow up.

Normative definitions of childhood have become the province of developmental psychology. Various developmental definitions invoke a wide range of criteria and characterise childhood in terms of the possession of certain interests or needs, certain biological characteristics, certain stages of development of various capacities and abilities. These accounts provide little guidance to moralists, however, for the multiple criteria involved rarely hang together in an integrated way.²⁵ Possession or non-possession of a

²¹ Mill treats a normative definition, those not 'in the maturity of their faculties', and the institutionalised definition, those 'below the age which the law may fix as that of manhood or womanhood', as if they were identical, or at least interchangeable.

²² This is the reality for adults who are mentally retarded. See Wikler, Daniel, 'Paternalism and the Mildly Retarded', in Rolf Sartorius, ed., *Paternalism*, Minneapolis, University of Minnesota Press, 1983, 95-104.

²³ Kleinig, J., 'Mill, Children and Rights', 4. See also Baumrind, Diana, 'Reciprocal Rights and Responsibilities in Parent/Child Relations', *Journal of Social Issues*, 34, 2, 1978, 179-196, 189.

²⁴ '...it could be denied that children's immaturity is an inevitable feature of human development, and argued that it is instead a consequence of their oppressed state: the freedom denied them causes their inadequacies rather than the reverse'. Purdy, *In Their Best Interests*, 198. Purdy recognises, however, that this is an empirical claim and that 'nothing short of full-scale experimental trials would definitively prove it true or false'.

²⁵ Kleinig, J., 'Mill, Children and Rights', 5. Yet Erikson (see below), for example, provides an account of human development which is integrated, coherent, and morally significant.

particular capacity or characteristic is not sufficient to determine whether that person is or is not a child, even though the characteristic figures in the prevailing conception of childhood. For, whatever their differences, contemporary psychological theories are agreed that human development is both gradual and continuous.²⁶ Yet the absence of a clear and distinct point of demarcation between one stage of development and the succeeding stage does not mean that a distinction should not be drawn between adults and children. Relevant perceptible differences are frequently socially determined (adults have independent status and children do not), but this is to beg the question. Why *should* adults have independent status and children not? Two main criteria for the distinction have been mooted: chronological age and competence.²⁷

Chronological age

The state of being a child is temporary: the transition to adulthood is marked by a succession of developmental shifts.²⁸ These shifts describe *qualitative* changes in the process of human being. Even a full account of such qualitative shifts leaves the problem of deciding when the transition from childhood to adulthood occurs. For the term 'childhood' is not a purely descriptive term. It also *prescribes* the differential treatment of two categories of humans: those we designate, as a result of this (moral or linguistic) legislation, 'children' and those we designate 'adults'.

Holt's proposal, for example, that 'the rights, privileges, duties, responsibilities of adult citizens be made *available* to any young person, of whatever age, who wants to make use of them'²⁹ appears to entail the virtual abolition of childhood insofar as that institution embodies a difference between younger and older human beings. He advocates the removal of all barriers that 'deny to young people the possibility of serious, independent, responsible participation in the life of the world around them'.³⁰ These barriers constitute the oppression of young people and as such are unjust.³¹ Yet Holt is not advocating adult-

²⁶ 'Report of the Working Group on Determining the Child's Capacity to Make Decisions', *Fordham Law Review*, 64, 1996, 1339-1345 argued for a presumption of capacity. 'The ability of the child to express a preference constitutes a threshold requirement for determining capacity. Once that threshold is passed, the child is presumed to have capacity.' The Working Group rejected age as a sole determining factor ('a poor proxy for maturity or developmental age') since age alone did not take individual factors into account. Age is one factor and provides an orientation point: '...the lack of any age cut-off would lead to the ridiculous result of considering a one-month old child to have capacity'. 1340.

²⁷ These are, respectively, examples of institutionalized and normative criteria.

²⁸ Descriptions of such shifts can be found in the literature of human development. See Miller, Patricia, H., *Theories of Developmental Psychology*, New York, W.H. Freeman and Co., 1993, for a representative selection of developmental theories. For the variety of conflicting views among developmental psychologists see Purdy, *In Their Best Interests*, 201-206.

²⁹ Holt, *Escape from Childhood*, 15.

³⁰ *Ibid.*, 17.

³¹ He tells us later (*ibid.*, 22), however, that he discarded the idea of using the term 'liberation' in his title. One cannot use the word 'oppression' and disown the word 'liberation' as its antithesis.

child equality. For his proposal is that children *may* adopt the adult rights optionally whereas adults must assume them as obligation and responsibility. This is an example of the way in which 'child liberationists' hedge their bets. Although their rhetoric is radical their substance falls short of the rhetorical spirit by leaving 'escape clauses' (as Holt does here) or by playing on the vagueness and ambiguity of terminology (such as 'children').

There are in fact two problems associated with chronological age: one concerns the definition of the beginning of childhood, the second the definition of its end: the transition from childhood to adulthood. The difficulties associated with the first, whether to define the start of human life from conception, quickening, birth, or early infancy need not detain us.³² It is sufficient for present purposes to confine our interest to the *born* child.

The UN Convention defines a child as anyone under the age of eighteen.³³ That this is a purely conventional, institutionalized definition is manifest. It is also a programmatic definition: insofar as we accept it as authoritative it affects how we will perceive certain categories of people.³⁴ It is not helpful to use the word 'child' to refer to all persons under the age of 18 (or any other age). Such classification obscures significant differences (in terms of knowledge, skills, maturity, rationality, responsibility, in fact any criterion one cares to mention) among children of different ages. It also obscures similarities between some children and adults in respect of the same criteria.³⁵

The 'age of majority' is the conventional demarcation between adulthood and childhood. As a criterion it has the virtue of impartiality: it provides a yardstick which is empirical, detached, and objective. However since the development to human maturity is gradual and

³² See Ruddick, 'When Does Childhood Begin?' for a discussion of the possible starting points and Tooley, M., 'Abortion and Infanticide', in Singer, P., ed., Applied Ethics, Oxford University Press, 1986 for an argument that infants are not human persons at all. John Harris ('The Political Status of Children', in K. Graham, ed., Contemporary Political Philosophy: Radical Studies, Cambridge University Press, 1982) argues that children should be deemed to have become *persons* when they have become 'reasonably competent language users'. (55)

³³ Significantly the substantive articles of the UN Convention avoid the issue of defining the beginning of childhood (i.e. when the rights will apply) in favour of a definition in terms of the *end* of childhood. Article 1 states 'For the purposes of the present Convention, a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.' However, in the non-binding Preamble the earlier Declaration of the Rights of the Child is quoted: 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth*' (emphasis added). It is notable too that the provisions of the Convention which apply to children are subject to limitation by legislation of the jurisdiction in which the child lives. By defining the age of majority at an earlier age any state can remove significant numbers of its children from the protection of the Convention. Insofar as the Convention is intended to protect children against the abuse or neglect of the state among others it is odd that it begins by offering the state a limited way out.

³⁴ In Article 38.3 for example the Convention allows for the recruitment of those over fifteen into armed forces. This tragically points up one facet of the moral problem of the definition of childhood: for we must conclude that *either* it is acceptable to train children to kill or, in some circumstances, childhood ends at fifteen. The former is, indeed, a grim equality with adults.

³⁵ Houlgate, L.D., 'Children, Paternalism and Rights to Liberty', in O'Neill, O., Ruddick, W., eds., Having Children: Philosophical and Legal Reflections on Parenthood, New York: OUP, 1979, 267.

idiosyncratic: some who are younger than 18 are more mature - on a wide range of criteria - than some older, and in some cases very much older, than 18. Imposing a distinction based on chronological age appears to violate the basic principle of justice that we should treat equals equally and unequals unequally.

We are morally required to treat like cases alike and different cases differently. The only moral justification for treating human beings differently is that they are seen to differ in some morally relevant and non-trivial respect.³⁶ Is chronological age a morally relevant difference, on this view? What makes a difference morally relevant is that it bears on the goodness or badness of people's lives. Gender or race, for example, are not morally relevant since they have nothing to do with how good or bad a person's life is. On the other hand (natural) abilities and needs are morally relevant.³⁷ It is not age which is of primary importance; it is the capacity for choice and responsibility although there is a widespread belief that a person's age correlates with these capacities (a normative criterion justifying an institutionalised practice). However, it is alleged that there is no *empirical* basis for drawing a chronological line and asserting that only those under the specified age 'ought to be paternalistically restricted from engaging in certain activities'. Consequently those 'who have set the age of majority at eighteen years have no such basis either'.³⁸ This is crucial for it challenges those who set the age of majority to justify, from a normative basis, why *this particular* age has been selected. A search for an exceptionless principle of differentiation between adults and children may be ultimately fruitless. There are few situations in life in which we can draw unequivocal and exceptionless distinctions between categories. We are always challenged to decide whether our exceptions are so significant that they undermine the distinction.

Competence

The second criterion of differentiation between adults and children is competence. The competence criterion continues the tradition of Mills' insistence on 'maturity of faculties' or Locke's rationality as the discriminatory criterion. The competence criterion offers the hope that once individuals reach a certain level of competence (however it is defined) they can immediately join the ranks of adults and come into possession of full political and legal, as well as moral, rights. Since a stringent competence criterion would be based on the performance or capability of individuals it would avoid the problem of a universal discrimination on grounds of age. It would also be congruent with what we know of

³⁶ *Ibid.*, 273.

³⁷ *Ibid.*

³⁸ *Ibid.*, 274.

human development in that it could take account of varying rates of individual development in relation to whatever competence criterion might be selected.

Competence as a criterion is not without difficulties, however. A perfect competence testing system is unlikely: human action is complex and subject to many indeterminacies. Competence also raises fundamental political questions: what will be tested? who will perform the tests? who will choose what tests to use? how can impartiality be assured? will those responsible for developing the test (and consequently for determining exactly what is to be tested) not be at least the nucleus of an elite?

A competence criterion should pick out only those features which are relevant to right-ascription: what are the competencies one must possess, or the conditions which one must satisfy, if one is to possess rights? Mill requires (for the ascription of the right to liberty from interference) maturity of faculties, for example. This criterion is so general and vague as to be of little value for it neither specifies the faculties or defines 'maturity'. Mill also stipulates that the individual should not require to be taken care of by others. This, of course, raises questions regarding the status of adults (as defined by chronological age) who because of infirmity or disability, are unable to care for themselves or whose ability to care for themselves is limited. Who *is* in any absolute sense able to take care of him or her self? Kleinig finds Mill's requirement that the individual be capable of being improved by free and equal discussion more promising.³⁹

Margulies requires that competence in the case of a child should manifest itself in the ability to 'explain the reasoning behind a decision'.⁴⁰ This is a requirement that the child be able to *articulate* a rationally arrived at choice. But we know more than we can tell⁴¹ and this is especially true of children. It is possible for the child to have good reasons without necessarily being able to articulate them. There is also the question of what constitutes a good reason. 'I don't like the nurse' is excluded although it may be a legitimate expression of a sincerely felt emotional unease. It is precisely the child's expression of such emotional unease which is at the core of many child empowerment projects. Margulies may be correct that to take the 'whimsical or capricious reasoning of the child' betrays the adult the child will become, but not to take it may well betray the child the child already is.

The main difficulty here is that adulthood, as presently defined, and qualification for the right to liberty are not necessarily congruent. The passage from childhood to adulthood is

³⁹ Kleinig, 'Mill, Children and Rights', 6. I do not think that what Mill actually said in this matter refers to individuals. He was talking about states. (Mill, *On Liberty*, 73) In any event Kleinig rightly casts doubt on the validity of this as a device for discriminating between children and adults.

⁴⁰ Margulies, Peter, 'The Lawyer as Caregiver: Child Client's Competence in Context', *Fordham Law Review*, 64, 1996 (A report on the Conference on Ethical Issues in the Legal Representation of Children, 1995), 1473-1504, 1487.

⁴¹ Polanyi, M., *The Tacit Dimension*, London, Routledge & Kegan Paul, 1967.

not like 'crossing the border from one country into another - unless we adopt some institutionalized criterion of childhood'⁴² which, as we have seen, will anyway ultimately depend on a (more or less) arbitrary normative criterion. The process, as has been noted already, is developmental, gradual, and variable.

A possible compromise is to accord children 'the right to liberty from interference commensurate with the development of their capacities'.⁴³ Kleinig's proposal appears to opt for a presumption of capacity subject to some form of competence test. We must choose whether the onus will be to prove capacity or to prove incapacity in individual cases. In either case there will have to be a test of competence and this, of course, will be subject to all of the limitations already mentioned.

(T)he onus ought always to be on those who wish to interfere with another to justify their interference in the particular case.⁴⁴ ... However, the effect of institutionalization (because of the need for practicability) is to remove this onus when dealing with members of an institutionally defined category of persons - children. I see no easy way out of this dilemma.⁴⁵

Kleinig retreats from the moral position for pragmatic reasons. The dilemma is that we must choose, on the one hand, between a universal criterion, 'an institutionally defined category', which allows of straightforward administrative application but which will be unfair in the event to many individuals, and a criterion of individualized competence, which would be difficult if not impossible to implement, on the other. A number of comments are necessary. In the first place it is strange for a moral philosopher to build a case and then concede it on grounds of practicability. As was noted earlier⁴⁶ if a course of action is morally necessary then we do not have the moral *luxury* of conceding it because its implementation will be difficult. Secondly, Kleinig's dilemma may be resolvable by a re-consideration of the *social* difference between competence and age as determinants of the way in which children will be treated.

There are two facets to the problem. Firstly, in the case of the child in the intimate community of the family, or school classroom, making distinctions on the basis of individual competence is entirely feasible and can be consistent with fairness to all. Secondly, what we call childhood is significantly different at different stages: the two-year-old and the sixteen-year-old are not the same, nor are they subject to the same considerations. The two-year-old is virtually exclusively subject to the authority of her parents. The wider

⁴² Kleinig, 'Mill, children and rights', 7.

⁴³ *Ibid.*,

⁴⁴ In other words it is presumed that there is no general right of interference with the liberty of anyone, children included.

⁴⁵ Kleinig, 'Mill, children and rights', 7.

⁴⁶ Chapter 3.

community and the state have a role only in ensuring that the parent does not neglect the child or exceed the limits which parental authority confers. In general, society is content to leave the parent/child relationship undisturbed by outside interference. The teenager, on the other hand, has begun the process of moving out into the wider community beyond the immediate authority of the parent. This does not mean that they are entirely free of parental control but as they grow older the authority claims of the parents are contested by other, non-familial associations, notably the peer group. Adolescents are becoming subject to the requirements and standards of the wider community and to the minimal standards of competence and behaviour which the wider community imposes on all of its members.

The two aspects of the problem correspond to the age/competence dichotomy. In the micro-community of the younger child (the family or classroom) the competence criterion can predominate for in the intimacy which this context allows the capacities of the individual child are known (they *should* be known) and the caring adult who contrives opportunities for the child to exercise her growing competence is on hand to ensure that in doing so she comes to no harm. At the other end of the developmental span the individual 'child' (adolescent) is expected to function in the macro-community. This macro-community differs in two important respects from the micro-community of the family. In the first place the individual is not 'known' in the same way to other members of the community, there is no-one in particular who is, as it were, 'looking out' for her, there is no intimacy. There is no-one whose particular task or role it is to ensure that, as she develops her competence in this wider arena, she comes to no harm. The second difference is that this wider community is not deliberately contrived (as is a good home, or playgroup, say) to facilitate her experimentation with her growing competence and evolving identity. On the contrary, this is the world of the adult, the 'real' world in the sense that it can be gratuitously dangerous, impersonal, ruthless, unfeeling, and unconcerned. The only way *here* of providing the necessary protection for the individual adolescent-becoming-adult is the imposition of universal rules of constraint prohibiting certain activities (drinking, driving, marrying) and severely limiting others. There will also be positive requirements (attendance at school, college, place of work or vocational training). These rules are not intended to oppress (although, as we will see, it is a feature of this age-group that the imminence of full membership of the adult community - and the concomitant delay - is perceived as oppressive) but to protect. This is communal paternalism displacing the parentalism of the family.

School is the transitional experience between the home and the wider community, between the open, personalised criterion of competence and the closed, impersonal criterion of

age.⁴⁷ Although at all stages of schooling children are subject to age-specific systems of organisation and certain impersonal regulatory rules (attendance, punctuality, social behaviour) the experience of contemporary schooling (or at least its theory) reflects the transition from an individualized competence standard (progressive or child-centred education) in the early years to the more impersonal and institutionally based requirements of examination-oriented standards. The latter is, of course, a test of various kinds of competence but it is imposed in a detached, impersonal manner. Senior school pupils are not evaluated on the basis of their personal accomplishments but against publicly determined norms of performance.

I would like to sketch an account of human growth which redresses some of the deficiencies of the conventional (liberal/utilitarian) picture and which may buttress the competence/age distinction which I have sketched. The sources of this brief picture will be the contextualist account of development suggested by the work of Mead⁴⁸, Vygotsky⁴⁹ and other 'contextualist' psychologists⁵⁰ and especially the psycho-social developmental stages of Erik Erikson⁵¹.

The contextualist view

Children are born into human communities. Their attitudes, beliefs, perceptions of reality, even their cognitive styles, are formed to a greater or lesser degree by the community into which they are born. There is no universal ideal endpoint to human development: the ideal is a function of the beliefs and practices of the particular culture. Human nature can be understood only in such a cultural context. Human beings are not independent entities that engage their environment at their discretion: they are part of it - a person-in-context. A child is an active, inherently social organism in a broad system of interacting forces in the past,

⁴⁷ 'Though surrounded by images of childhood, the intimacy of family life is drawn into touch and sound and movement in the shared spaces of our homes, and the image must compete with these other more compelling and immediate expressions of the child's presence. Schools, on the other hand, requiring order and stillness, replacing touch with the exchange of performance for grades, are dominated by the images of adulthood and childhood and organise their curricula that mark the developmental space between them.' Grumet, Madeline, R., 'The Lie of the Child Redeemer', Journal of Education, 168, 3, 1986.

⁴⁸ Mead, George Herbert, Mind, Self, and Society, Charles W. Morris, ed., University of Chicago Press, 1962; also Aboulafia, Mitchell, 'Mead and the Social Self', in Burch and Saatkamp, eds., Frontiers in American Philosophy, (Texas A&M University Studies in American Philosophy, No. 1), 1993.

⁴⁹ An Introduction to Vygotsky, Harry Daniels, ed., London, Routledge, 1996, esp. Daniels, Harry, 'Introduction: Psychology in a Social World', 1-27, and Minick, Norris, 'The Development of Vygotsky's Thought: an Introduction to Thinking and Speech', 28-52.

⁵⁰ Miller, Theories of Developmental Psychology.

⁵¹ Erikson, Erik, Childhood and Society, Vintage Books, 1995; Identity and the Life Cycle, London, W.W. Norton and Co., 1980.

present, and future. A child's actions occur in the context of others' actions and pre-existing social and cultural structures.⁵²

Higher mental functioning has its origins in social life.⁵³ Children's thinking, their 'self', is shaped by their interactions with others in social settings⁵⁴ (which are shaped by the culture and social structures of the community in question) using 'psychological tools', such as language,⁵⁵ which are also pre-determined by the specific cultural community. Knowledge and skill is socially shared by the adult community with the children, gradually and in congruence with the child's capacity to benefit from the sharing, in order to advance the latter's cognitive and social development.

The person and the environment (natural and human) are not two distinct entities that interact.⁵⁶ On the contrary 'a single unit or process exists, in that certain forms of social practice relate the child and her needs and goals to the environment and define what the environment means to the child'.⁵⁷ According to this 'contextualist' view the proper unit of study for psychology is not the child in the environment as two separate entities over against one another but 'the child-in-activity-in-context'. The human and natural environment are not just 'influences' on the growing child; together they *define* children and their activities. The context can range from the microsystem of immediate face-to-face interaction such as the family, the school, or the peer group to the macrosystem which includes the general cultural blueprint which determines the possible activities, shared beliefs, symbols, values, knowledge, skills, structured relationships, etc. which pertain at the lower, microsystemic levels and which differentiate one cultural group from another.

⁵² Miller, Theories of Developmental Psychology, 407. Psychological processes 'have their source not in biological structures or the learning of the isolated individual but in historically developed socio-cultural experience'. Minick, 'The Development of Vygotsky's Thought', 31.

⁵³ Such as voluntary attention, voluntary memory, and rational, volitional, goal-directed thought. Minick, 'The Development of Vygotsky's Thought', 32.

⁵⁴ Mead, Mind, Self, and Society, Part 3. The self 'is not initially there, at birth, but arises in the process of social experience and activity, that is, develops in the given individual as a result of his relations to that process as a whole and to other individuals within that process'. 135.

⁵⁵ Psychological tools are tools that are 'directed towards the mastery or control of behavioural processes - either someone else's or one's own - just as technical means are directed towards the control of nature'. Vygotsky, cited Minick, 'The Development of Vygotsky's Thought', 32. See also Tappan, M.B., 'Narrative, Language, and Moral Experience', Journal of Moral Education, 20, 3, 1991, 243-256. Following Vygotsky and others, Tappan argues that language functions as a tool to structure our thinking, feeling, and acting.

⁵⁶ 'Vygotsky went in search of a philosophical base which moved the debate away from Cartesian dualism into some form of monistic account'. Daniels, 'Introduction: Psychology in a Social World', 19. 'We have recognised in words that we need to study the child's personality and environment as a unity. It is incorrect, however, to represent this problem in such a way that on one side we have the influence of personality while on the other we have the influence of the environment. Though the problem is frequently represented in precisely this way, it is incorrect to represent the two as external forces acting on one another. In the attempt to study the unity, the two are initially torn apart.' Vygotsky, cited Minick, 'The Development of Vygotsky's Thought', 47.

⁵⁷ Miller, Theories of Developmental Psychology, 375.

All human communities demonstrate the ability to construct, and operate in, a culturally organised environment: this ability is a *universal*, species-specific characteristic of humans but it is the specifics of the culture which differentiate human communities and societies. The culture determines and structures the child's everyday experiences. More 'distant' levels of the context, such as generally held cultural beliefs about what kinds of skills children should acquire, (tracking and hunting rather than reading and writing) reach a child through immediate social relationships in which she engages in activities with a parent, sibling, or peer who demonstrates the relevant practice and encourages the learning of the relevant skills.⁵⁸

The role of the adult (or, in some cases, peer or sibling) is to bring the child from her present level of competence to a level of competence slightly beyond that: this is Vygotsky's 'zone of proximal development', the distance between what a child can do with and without help.⁵⁹ The parent, or more competent peer, builds bridges between the child's present abilities and new skills which she is required to possess in order to play her full role in the community. This is done most frequently not by overt instruction but by an interactive process of 'scaffolding' whereby the child's efforts are reinforced, encouraged and directed by comments, questions, demonstrations, and so forth. The central regulatory concept here is competence rather than chronological age. Children learn the skills which their culture values largely by observing others and responding to informal instruction. Adults provide supportive contexts which enable children to perfect the skills which are needed to survive or succeed in that culture. Children learn from skilled others by observing every-day activities in their natural setting and by having the adult (or peer, or sibling) provide verbal and practical commentary on what is going on. The zone of proximal development can refer to any situation in which some activity is leading children beyond their current level of functioning - even in play (or, perhaps in the case of younger children, *especially* in play).⁶⁰

The path of development available to the child is not totally open, options are not unlimited: they are constrained by whatever patterns of behaviour are sanctioned by the specific culture. Each culture excludes a range of possible situations, experiences, and engagements which are not then available to the growing child: parents and other child carers permit (*can* permit) only certain kinds of actions and encourage only certain kinds of behaviour. Only selected human behaviours and physical objects and particular sanctioned ways of interacting with them are available at a given time or in a given culture.⁶¹ The contextualist view stresses a dynamic rather than a static or passive picture of the child's

⁵⁸ *Ibid.*, 379.

⁵⁹ Daniels, 'Introduction: Psychology in a Social World', 4.

⁶⁰ See Minick, 'The Development of Vygotsky's Thought', 43.

⁶¹ See Langford's account of what he calls the 'Gombrich' view in Langford, G., Education, Persons, and Society: a Philosophical Enquiry, London, Macmillan, 1985, 7-32.

development. At any given time the process of development is itself more important than actual developmental achievement.⁶² The metaphor of apprenticeship captures the notion of children's active participation in real-life settings (be they verbal or non-verbal) with more skilled, supportive others.

The process of learning is a collaboration between the child and the adult. Learning is possible because of *inter-subjectivity*, a shared understanding based on a common focus of attention and a common goal between the child and the more competent person.⁶³ Intersubjectivity not only contributes to learning but also results from the social interactions involved in learning. The child is an active participant. Gradually, as her level of competence increases, she can take more responsibility for the engagement.

The contextualist approach stresses the social nature and origins of human communication and thought. Thinking, remembering, and attending are not only activities of an individual; they were first carried out *between* individuals.⁶⁴ Higher intellectual functions appear first between people as *intermental* phenomena and then within the learner (the child) as *intramental* phenomena.

Any higher mental function was external (and) social before it was internal. It was once a social relationship between two people ... We can formulate the general genetic law of cultural development in the following way: any function in the child's cultural development appears twice or on two planes ... it appears first between people as an intermental category, and then within the child as an intramental category. This is equally true of voluntary attention, logical memory, the formation of concepts, and the development of will.⁶⁵

Children internalise (or appropriate) social interactions, and the language in which they are conducted and embodied, and so grow into the intellectual life of their community. As a consequence they gradually become more self-regulated and less other-regulated. The internalisation of interpersonal communication leads to intrapersonal communication: the structure of public conversation becomes the structure of private thought. As a result of the experience of interpersonal communication the individual becomes capable of the internal process of thinking for herself. Although at first speech (non-conceptual speech such as babbling) and non-verbal thought are initially separate they begin to merge at about age 2. From social speech the child develops *egocentric* speech which in turn becomes *inner*

⁶² It is the interactive process itself which is of fundamental importance to parents, for example. Even where parents find that they 'have' a child with a significant disability their interaction with the child continues unabated. We do not love our children because they are clever, strong, or fast (although we take a vicarious pride in their achievements); we love them because they are 'ours'.

⁶³ The foundation for this idea may be Buber's notion of 'the instinct for communion', the primitive urge to relate to the world not as a thing but as a person. Buber, Martin, 'Education', in Between Man and Man, Fontana, 1961.

⁶⁴ Miller, Theories of Developmental Psychology, 385.

⁶⁵ Vygotsky, cited Minick, 'The Development of Vygotsky's Thought', 33.

speech.⁶⁶ This link between thinking and language persists, the two are dynamically related: 'comprehending and producing language are processes that transform, not merely influence, the process of thinking'.

Language is primarily a social device for social contact, communication and interpersonal influence. This social tool goes into the mental underground to direct thinking, control one's own behaviour during development, organise categories of reality, represent the past, and plan for the future. The intermental becomes intramental.⁶⁷

Much of contemporary Western philosophy tends to separate the individual from the social and natural world and to locate cognition in the first instance 'inside' the autonomous individual. This isolate, autonomous individual is at the heart of much of the moral thought of Western civilization culminating in the disembodied moral intellect of Kant. Some contemporary developmental psychologists have reinforced the philosophers' perception by concentrating on an individualistic account of human development which sees the individual as developing *in* an environment which is either facilitating or restricting that development. In addition developmental psychology has tended to concentrate on the cognitive (the acquisition of a personalised rationality) to the exclusion of other important features of human experience. Piaget for example, coming as he did from a tradition of individual rationality, thought that cognition is prior to and broader than language.

Piaget's stage theory of development tacitly reflects the ideology of individualism. The stage theory is based on an interactionist metaphor in which the relation between the person and the social world is conceived as an individual standing apart from and interacting with a social environment.⁶⁸

This focus has been compounded by the contemporary preoccupation with testing and measurement which tends to reinforce the individualist stance and marginalise features of human experience which do not lend themselves to quantification. The notion that social activity shapes the mind is contrary to this view. (It was prefigured in educational thought by

⁶⁶ Minick, 'The Development of Vygotsky's Thought', 36, 39-41.

⁶⁷ Miller, Theories of Developmental Psychology, 389.

⁶⁸ Bidell, cited Daniels, 'Introduction: Psychology in a Social World', 4.

such as Pestalozzi.⁶⁹) There are alternative socially constructed ways of viewing the individual in relation to her environment.⁷⁰

Following the rationalist tradition philosophers often present an inadequate characterisation of childhood. Children as seen by philosophers as simply lacking 'the capacity to act rationally in pursuit of their own self-chosen goals'.⁷¹ To say that children are immature is a tautology and it is indisputable that they require greater protection than most adults. However, the portrayal of children as totally lacking in reason until a particular age 'leaves no room in our thinking about children for things like thinking and learning, or development in understanding and character and all those other concepts which refer to processes and not to states'.⁷² The philosophers cited by Hughes present 'a pretty unconvincing picture' of children and childhood. If we begin with the assumption that children are completely non-rational then we must account for the fact that they become so as they pass a certain age. 'If, on the other hand, you allow rationality to children, then you cannot use their lack of it as a criterion to distinguish them from adults'.⁷³ Hughes' concern is with the way in which philosophers concentrate on rationality. She could also have criticised them for presenting a static picture of children, when in fact the experience of childhood is dynamic and developmental, and for their total failure to recognise adolescence as marking the critical transition from childhood to adulthood.

Erik Erikson: the needs of the child

Erikson's psychosocial account of human development describes the developmental life of the child in terms of a dialectical relationship between the individual and the cultural community.⁷⁴ The life of the child is presented as a series of challenges for mastery and identity integration within the sustaining cultural group. As the individual progresses through developmental phases common to all human beings the culture specifies what the person is to do and to be and determines how she or he should be recognised within each particular culture.

⁶⁹ Gertrude's teaching of her children did not set up any formal pedagogical ideal; she simply acted in the role of the natural mother. The ordinary conversational and emotional commonplaces were emphasised so that their true educational significance was recognised: 'She never adopted the tone of instructor toward her children; she did not say to them: "Child, this is your head, your nose, your hand, your finger"; or "Where is your eye? your ear?" but instead she would say: "Come here child, I will wash your little hands", "I will comb your hair", or "I will cut your fingernails". Her verbal instruction seemed to vanish in the spirit of her real activity, in which it always had its source. The result of her system was that each child was skilful, intelligent and active to the full extent that his age and development allowed.' Leonard and Gertrude quoted in L.F. Anderson, Pestalozzi, London, McGraw-Hill, 1931, 25.

⁷⁰ Miller, Theories of Developmental Psychology, 402-405.

⁷¹ Hughes, Judith, 'The Philosopher's Child', in Rosalind Ekman Ladd, ed., Children's Rights Re-visioned: Philosophical Readings, London, Wadsworth, 15-28, 18.

⁷² *Ibid.*, 19.

⁷³ *Ibid.*

⁷⁴ Identity and the Life Cycle, 51-108; Childhood and Society, 222-247.

Here we need concern ourselves only with the first five of Erikson's eight stages of the developmental process as they describe the establishment of childhood and the transition to adulthood through adolescence. The point to be noted is that human development is not an undifferentiated curve of development but rather a sequence of stages each presenting its own distinctive challenge to the individual and each of which is treated differentially by different cultural groups. The main importance I wish to attach to this theory, however, is the significance it attaches to the fifth stage, adolescence, as a significant watershed between childhood and adulthood. The adolescent is neither a child nor yet an adult. Adolescence is not a state (none of the stages are) but a process of change from the achievements of childhood to the potential of adulthood.

First stage: Trust v. mistrust: 'I am what I am given'.⁷⁵

The initial organisation of a person's mental structure is oriented along the axis of *trust* versus *mistrust*: that is 'reasonable trustfulness as far as others are concerned and a simple sense of trustworthiness as far as oneself is concerned'.⁷⁶ Basic trust is the cornerstone of a healthy personality. The first internal representation of the world is made up of inchoate feelings about the goodness or the badness of the environment. If the environment is caring and supportive the infant will conclude that the world is basically a good place to be in; if it is cold and rejecting, the baby learns to be suspicious and withdrawn with respect to the world: an orientation which will be very difficult to change later on. Faith (in God or in humanity - any kind of faith) is difficult to achieve for an adult whose first experience of life was rejection and neglect. Although this initial experience of trust or mistrust is universal the means of achieving it is culturally determined: childrearing practices are related to the culture's general aim and system.⁷⁷ The '*firm establishment of enduring patterns for the balance of basic trust over basic mistrust*' is the first task of the budding personality and therefore first of all a task for maternal care'.⁷⁸ The relationship between the maternal carer and the child must convey the fundamental belief that what transpires is meaningful, dependable, reliable, and worthwhile.

⁷⁵ Birth - 1 yr. *Identity and the Life Cycle*, 57-67; *Childhood and Society*, 222-225.

⁷⁶ *Identity and the Life Cycle*, 57.

⁷⁷ 'There is a certain leeway in regard to what *may* happen; different cultures make extensive use of their prerogatives to decide what they consider workable and insist upon calling necessary. ... (W)hat is "good for the child" what *may* happen to him, depends on what he is supposed to become and where.' *Identity and the Life Cycle*, 59/60.

⁷⁸ *Ibid.*, 65/6. 'Anyone who understands the good of deep trust in interpersonal relationships will have done so not just by having read a masterful account of trust, but by having had a life in which deep trust has been enjoyed over a sustained period of time.' Thomas, L., 'Virtue Ethics and the Arc of Universality: Reflections on Punzo's Reading of Kantian and Virtue Ethics', *Philosophical Psychology*, 9, 1, 1996, 28.

Second stage: autonomy v. shame/doubt: 'I am what I will'.⁷⁹

The second shift in the organisation of consciousness occurs along the axis of *autonomy* versus *shame and doubt*. During the first two years or so, the most important skills infants develop have to do with the control of their own bodies: moving their limbs, crawling, staying upright, babbling and then talking, and learning to control eliminatory functions. This whole stage 'becomes a battle for autonomy'.⁸⁰ If the child's attempts to secure control over her body meet with success, she is likely to think of herself as capable. If, however, her caretakers discourage autonomy, or expect too much too early, the child is more likely to become insecure and develop a dependent, helpless orientation towards her environment.

From a sense of self-control without loss of self-esteem comes a lasting sense of autonomy and pride; from a sense of muscular and anal impotence, of loss of self-control, and of parental overcontrol comes a lasting sense of doubt and shame. To develop autonomy, a firmly developed and a convincingly continued stage of early trust is necessary.⁸¹

At this stage the child begins to form an understanding of the concept of 'law and order', that to each, in his or her social place, is apportioned privileges and limitations, obligations and rights.⁸² The sense of autonomy which is fostered by the carers is a function of *their* 'sense of rightful dignity and lawful independence' which reassures the growing child that 'the kind of autonomy fostered in childhood will not be frustrated later'. The reassurance of the dignity of the parents within the social milieu reinforces the child's sense of her own dignity as a human person. This is not a one-sided affair, however.

Social organisation assigns with the power of government certain privileges of leadership and certain obligations of conduct; while it imposes on the ruled certain obligations of compliance and certain privileges of remaining autonomous and self-determining.⁸³

What is noteworthy at this stage is the beginning of autonomy as a psychological state and its association with security and self-esteem.⁸⁴

⁷⁹ 1 - 3 yr. Identity and the Life Cycle, 67-77; Childhood and Society, 226-229.

⁸⁰ Identity and the Life Cycle, 70.

⁸¹ *Ibid.*, 70/1.

⁸² *Ibid.*, 76.

⁸³ *Ibid.*, 76/7.

⁸⁴ Campbell argues that autonomy is a feature of all but the 'very earliest stages of human development'. The autonomy interests of the child 'stretch right back into the heart of early childhood. Lack of physical independence at these early stages is erroneously confused with lack of the capacity for choice autonomy which is an everyday feature of a child's life even in conditions of extreme dependency'. Campbell, 19.

Third stage: initiative v. guilt: 'I am what I can imagine I will be'.⁸⁵

The polarity between *initiative* and *guilt* appears when children acquire full mobility and 'a firm solution to the problem of autonomy'.⁸⁶ With the further development (to the point of mastery) of mobility, of language⁸⁷, and of expanding imagination a high, yet realistic, sense of ambition and independence is developed. The issue now becomes not what she *can* do but she *may* do. The child at this stage gets herself into all sorts of trouble yet a surplus of energy allows her to forget failures quickly and to persevere.⁸⁸ If her attempted explorations and experiments are successful she will learn that taking risks is not necessarily bad whereas if she keeps breaking things, spoiling things, failing in her attempts to help, with consequent reprimands from adults, then what develops is a fear of letting others down. This is likely to result in adult behaviour that lacks daring and spontaneity. Conscience begins to influence behaviour and personality.

Only as a dependent does man develop conscience, that dependence on himself which makes him, in turn, dependable; and only when thoroughly dependable with regard to a number of fundamental values can he become independent and teach and develop tradition.⁸⁹

A sense of responsibility begins to appear: the child's response to the new feeling of guilt is to over-restrict herself through repressions, regressions, and resentments. If she can transcend this negativity then she is well on the way to developing that sense of responsibility which the adult world requires.

When the child, ..., can gradually develop a sense of responsibility, where he can gain some simple feeling for the institutions, functions, and roles which will permit him to anticipate his responsible participation as an adult, he will soon find pleasurable accomplishment in wielding miniature tools and weapons, in manipulating meaningful toys, and in taking care of himself - and of younger children.⁹⁰

At this point too the child begins to manifest the need to combine with others for the purpose of constructing and planning instead of trying to coerce and use them for her own self-interested purposes.⁹¹ She is now 'able and willing to profit fully by the association with

⁸⁵ 4 - 5 yrs. *Identity and the Life Cycle*, 78-87; *Childhood and Society*, 229-232.

⁸⁶ *Identity and the Life Cycle*, 78.

⁸⁷ The child's sense of language at this stage is perfected 'to the point where he understands and can ask about many things just enough to misunderstand them thoroughly!' *Ibid.*, 78.

⁸⁸ *Ibid.*, 78/9.

⁸⁹ *Ibid.*, 84.

⁹⁰ *Ibid.*, 85. 'We are so accustomed to the rhetoric (legal and social) about protecting minors that we forget that a great deal of the work of rearing and protecting the young is done by persons who are themselves still minors.' Boulding, Elise, 'Children's Rights', *Society*, 15, 1, 1977, 40.

⁹¹ This is similar to what Buber calls 'the instinct for communion'. I-Thou relationships, relationships with the world as person, go beyond the originative instinct and arise from the instinct for communion with other people. In such relationships the being of the world is presented to us not as an object which can be formed, controlled and

teachers and ideal prototypes', adults other than parents. The successful conclusion of this stage leads to the capacity in later life to collaborate freely with others while retaining equality in worth regardless of differences in age, kind, or function.⁹²

Fourth stage : Industry v. inferiority: 'I am what I learn'.⁹³

The last stage of true childhood involves learning to participate in the world outside the home, to cope with formal institutions outside the family, and to undergo systematic instruction. In all cultures most children enter some kind of instructional relationship by the age of 6 or 7, or start working in fields or shops.⁹⁴ They become subject to impersonal, public standards of performance and begin to develop a view of themselves in relation to others along the axis of *industry* versus *inferiority*. If the child's efforts in school or work compare well with that of others, if her skills are seen by others as adequate or useful, a sense of industry results. Excessive competitiveness, or a crippling feeling of inferiority are likely to result if one's efforts are not recognised in the public sphere.⁹⁵ There is no violent inner conflict at this stage: it is what Freud called the latency period, a busy, productive lull 'before the storm of puberty'.⁹⁶

According to the Eriksonian account of human development we can say certain things about the individual on the verge of puberty/adolescence. Optimally (which is ideally) the child will have developed a firm sense of trust in the world and in people, tempered with a certain scepticism, the belief that the trust is not invariably well-placed: it is *trust* rather than a simplistic ingenuousness. She will also have developed (a belief in) her capacity to control herself with a concomitant sense of her own dignity as a human person and as a member of a supportive community. Her capacity to take initiatives and to assume associated responsibility is established and she has begun to relate to others as collaborators in her activities rather than as means to her ends. Finally she has established a positive attitude to work, learning, and competition.

manipulated, but as a subject; not as a thing, but as a person. Buber, M., Between Man and Man, Fontana Books, 1961, 109-131.

⁹² Identity and the Life Cycle, 86.

⁹³ 6 - puberty. *Ibid.*, 87-93; Childhood and Society, 232-234.

⁹⁴ We should beware of simplistic responses to the notion of children working. Cultural difference should not blind us to the legitimacy of such undertakings in other societies. It is not the employment of children *per se* which should concern us, but their exploitation. See Hart, Roger, A., Children's Participation: from Tokenism to Citizenship, Innocenti Essays, 4, Florence, UNICEF, 1992, 25-28.

⁹⁵ Erikson advocates a middle ground between the traditional, instructional and progressive, discovery approaches to education. 'Both methods work for some children at times but not for all children at all times ... Children at this age do like to be mildly but firmly coerced into the adventure of finding out that one can learn to accomplish things which one would never have thought of by oneself, things which owe their attractiveness to the very fact that they are not the product of play and fantasy but the product of reality, practicality, and logic; things which thus provide a token sense of participation in the real world of adults.' And which also provide a necessary sense of mastery and the concomitant prestige. Identity and the Life Cycle, 88.

⁹⁶ *Ibid.*, 93.

What is of crucial importance, however, is the role that adults have played in bringing her to this point: it has not been a fortuitous and haphazard growth (although in real cases influenced, positively and negatively, by fortuitous and haphazard circumstances) but the result of intervention and formation in a context of loving care and support.⁹⁷

Ideally, at the end of the fourth stage, the growing individual has developed a consciousness that experiences the self and the world in terms of trust, autonomy, initiative, and industry. She has established a good relationship to 'the world of skills and to those who teach and share the new skills'.⁹⁸ She is well prepared to grow into a vital adolescence and a productive adulthood. But she is no longer a child.⁹⁹

Fifth stage: identity versus identity diffusion: adolescence.¹⁰⁰

Youth begins and with it come significant (disturbing) physical, sexual, and social changes. When

the body changes its proportions radically, when genital maturity floods body and imagination with all manner of drives, when intimacy with the other sex approaches and is, on occasion, forced on the youngster, and when life lies before one with a variety of conflicting possibilities and choices.¹⁰¹

Identity development is closely associated with the acquisition of competence and a sense of being worthwhile to oneself and others. The identity struggle of adolescence carries with it a sense of mastery of childhood issues and an increasing readiness to face the challenges of the adult community as a potential equal. The identity crisis typical of adolescence is not a pathological condition. It is an inevitable turning point in the life of the individual, for better or for worse. The dynamic of development in the adolescent stage should be emphasised. It is adolescence-becoming-adult, not simply a static condition requiring remediation or treatment. The *ego synthesis* or sense of *ego identity*

⁹⁷ 'The child, lacking the capacities necessary to being a self-governing moral agent, can improve only as a result of chance or the intervention of others'. Kleinig, 'Mill, Children and Rights', 6.

⁹⁸ Identity and the Life Cycle, 94.

⁹⁹ Erikson, Childhood and Society, 234/5. This account of childhood is a far cry from Franklin's characterisation of the adult-child relationship in terms of 'an adult political elite which, in the name of protection, interferes in children's lives and represses and damages their potential for learning and development by denying them the possibilities of growth'. Franklin, The Rights of Children, 34. Or Freeman's endorsement of de Mause's description of childhood (de Mause, L., History of Childhood: Untold Story of Child Abuse, Bellew Publishing Co., 1991) as a 'nightmare'. '(M)any would confirm that childhood as experienced by English children comes close to this description'. Freeman, Michael, 'Children's Rights in a Land of Rites', in Bob Franklin, ed., The Handbook of Children's Rights: Comparative Policy and Practice, London, Routledge, 1995, 70.

¹⁰⁰ Identity and the Life Cycle, 94-100; Childhood and Society, 234-237.

¹⁰¹ Identity and the Life Cycle, 97/8.

is the accrued confidence that one's ability to maintain inner sameness and continuity (one's ego in the psychological sense) is matched by the sameness and continuity of one's meaning for others.¹⁰²

It is noteworthy that the *ego identity* has two polarities, an inner (the individual's self-worth) and an outer (the individual's worth for others). It is only as reflected in the esteem of significant others that the individual's self-valuation is confirmed. The esteem is, in part at least, a function of the achievement of the personal developmental goals which are valued by the individual's community or social group (such as peer group). The enhancement of *ego identity* requires 'wholehearted and consistent recognition of real accomplishment' in engagements that have meaning in their culture.¹⁰³ However, confrontation is also a feature of the adolescent experience. Many of the conflicts of earlier stages have to be re-fought even though this means 'artificially appoint(ing) perfectly well-meaning people to play the roles of adversaries'.¹⁰⁴

The danger at this stage is *identity diffusion*. This is the inability, for the time being, to assume a stable and coherent identity based on strong convictions regarding one's ethnic and sexual identity, one's social status and role, and a suitable occupational identity. The adolescent takes refuge in the peer group which offers identity, support, affirmation, but only at the cost of conformity to the sometimes petty requirements of the group.¹⁰⁵

Adolescence is a time of deep intolerance.¹⁰⁶ The sources of this intolerance are, largely, dissatisfaction with the self and with the lack of secure identity which would allow for the acceptance of others on their own terms:

It is difficult to be tolerant if deep down you are not quite sure that you are a man (or a woman), that you will ever grow together again and be attractive, that you will be able to master your drives, that you really know who you are, that you know what you want to be, that you know what you look like to others, and that you will know how to make the right decisions without, once for all, committing yourself to the wrong friend, sexual partner, leader, or career.¹⁰⁷

Moving into adulthood adolescents gradually establish a synthesis within this period of self-standardisation in their search for identity as an adolescent, as members of a sexual and

¹⁰² *Ibid.*, 94.

¹⁰³ *Ibid.*, 95. This is relevant for Holt's observation that in effect we have caused the 'problem' of adolescence by trivializing it: 'One reason why teenagers seem to be so preoccupied with (their personal, emotional, and social lives) is that we do not allow them to be preoccupied with much of anything else. We have made a cult, a way of life, and (for adults) a profitable industry out of adolescence.' Holt, *Escape*, 122. See also Gaden, Gerry, 'Rehabilitating Responsibility', *Journal of Philosophy of Education*, 24, 1, 1990, 27-38.

¹⁰⁴ *Childhood and Society*, 235.

¹⁰⁵ *Identity and the Life Cycle*, 97.

¹⁰⁶ *Childhood and Society*, 236.

¹⁰⁷ *Identity and the Life Cycle*, 98.

sociocultural age group, as members of a community, and as persons with a present and a future. Crucially, though, 'the adolescent mind is a mind of the *moratorium*'. It is in transition between the morality learned by the child and the ethics to be developed by the adult.¹⁰⁸

Adolescence

Prior to adolescence parental control can be absolute or developmental. The best case scenario¹⁰⁹ is that the wise and judicious parent, conscious of the child's need for both growing freedom and diminishing protection, will try to balance the two.¹¹⁰ The continuation of an absolutist approach into adolescence will leave the young person with little alternative but radical rebellion. A developmental approach already established as the norm for parent/child relations will provide a much more flexible context for the resolution of the difficulties of adolescence.

Contrary to Holt's assertion that 'There are no breaks or gaps in (the curve of human life)'¹¹¹ and to the belief that the facts of human development do not justify the conventional distinction between adult and child¹¹² there is in fact a sharp demarcation, adolescence, which marks the social recognition of the biological transformation from childhood to adulthood through puberty.¹¹³ There are generally recognised physical, psychological, and biological changes which mark the transition which is not a modern or recent invention historically: it has been marked since time immemorial by appropriate rites of passage (*rites de passage*) which publicly mark the transition of the individual from the earlier to the later stage of development. Rituals and initiation ceremonies are both the social recognition of this transition and its legitimation. These rituals have often been accompanied by tests, of endurance, stamina, courage, initiative, knowledge, skill etc., in short, the qualities necessary to function adequately in the adult world. Evidence of the individual's possession of the requisite qualities was necessary before he or she was admitted to full participation in the adult life of the community.

¹⁰⁸ Childhood and Society, 236.

¹⁰⁹ Baumrind, 'Reciprocal Rights'.

¹¹⁰ See also Csikszentmihalyi, Mihaly, 'Contexts of Optimal Growth in Childhood', Daedalus: Journal of the American Academy of Arts and Sciences, 122, 1, 1993, 41-44. Significantly Csikszentmihalyi does not mention rights at all in an extended account of children's development but rather considers it in terms of adult, parental, school, or community responsibilities.

¹¹¹ Holt, Escape, 21.

¹¹² Harris, 'The Political Status of Children', 38.

¹¹³ In accordance with the Concise Oxford Dictionary I take puberty to mean: being or becoming functionally capable of procreation through natural development of reproductive organs.

In Western industrialized societies adolescence is a 'considerably longer transitional period than it used to be'.¹¹⁴ It is being extended at both ends with earlier puberty and longer periods of dependence and semi-dependence. In addition to 'status ambiguity' (it is unclear in Western industrialized societies when young people actually become adults) adolescence suffers from pervasive negative stereotypes; deviant behaviours are seen as the norm with the result that negative expectations are created which focus predominantly on the problems of adolescence rather than on its positive aspects.¹¹⁵

It is difficult for the parent of an adolescent to have clear sense of how exactly to behave. Parenting itself at this age is poorly defined with regard to, for example, the monitoring and supervision of behaviour, the growing autonomy of the young person, and the difficulty of control against the wishes of the adolescent. A general erosion of authority in contemporary industrialized societies is reinforcing the erosion of parental authority. Role confusion is compounded by changing family structures. As the individual grows through infancy, childhood, adolescence and late teens (pre-adulthood) parents' rights to supervise her upbringing will diminish, certainly their power to control, if not to influence, the behaviour of the adolescent will. Individual adolescents increasingly fall under the influence of other agencies, many of which may be the result of their own choosing¹¹⁶ and some of which at least will be antipathetic to both the familial value-base and the method of parental control. It is here that the need for a developmental model of autonomy as basic to human welfare is important. The parents are in this view no more than custodians (trustees) whose claims over the child diminish with time, not as a matter of fact - though it is a matter of fact in the context of parental/child power relations - but as a basic principle of regulation.

Relations between adolescents and their parents might be more fruitfully considered in the first instance in terms of the exercise of power rather than in terms of the assignation of rights. Anyone who has lived through the experience (and as a young person who has not?) knows that autonomy is not conferred unproblematically upon adolescents. It is asserted, it is fought for (often with traumatic consequences), it is seldom if ever conceded in a non-confrontational way.¹¹⁷ As a rule we do not *grant* young people their freedom, they take it (at best the adult can concede with some grace). This is an important distinction, for the difference between power and powerlessness cannot be eliminated by *conferring* power on others as some kind of delegation or favour. Power conferred can be withdrawn: it belongs

¹¹⁴ Coleman, John C., 'The Parenting of Adolescents in Britain Today', Children and Society, 11, 1997, 43-51, 45. This is a review of the relevant literature.

¹¹⁵ *Ibid.*, 45/6.

¹¹⁶ Hobson, P., 'Some Reflections on Parents' Rights in the Upbringing of Their Children', Journal of Philosophy of Education, 18, 1, 1984, 63-74, 65.

¹¹⁷ The notion that the power conflict manifests itself in 'the daily round of grumbling disputes over homework, untidy bedrooms, too much television, late bedtimes and so on' (Coleman, 'The Parenting of Adolescents', 49) is only trivially true. More seriously it concerns life-styles, beliefs, values, attitudes, aspirations, and peer-group behaviour.

(if that is the right word) to the person who conferred it. The only way to overcome powerlessness is to take power. It is arguable that adolescents recapitulate the historical assertion of rights as they make the transition from dependent child (subject) to autonomous adult (citizen).

This issue points up the ambiguity of the terminology of 'child' or 'childhood'. If there is a struggle between infants and adults it is for the immediate gratification or deferral of the infant's desires; if there is a struggle between the adolescent and the adult it is a struggle for the former's freedom to do as she wishes i.e. to form her own life plan, make her own choices, and take responsibility for the consequences.

There is surely a major difference between the sensitivities of a rebellious 16 year-old and the status of a contented (or even discontented) two-year-old with regard to paternalism. What the rebellious 16-year-old wants is the right to determine her own destiny. What the two-year-old wants is gratification: the continuation or restoration of the *status quo* of provided care and comfort. It is simply not possible to consider the two categories meaningfully under the common rubric of 'child'. Yet philosophers appear to play on the ambiguity of the word 'child' which can mean what they want it to mean depending on the rhetorical point they wish to make. Conceptual clarity is not to be found in using the word 'child' promiscuously.

Parental sovereignty is morally justified by the dependent status of children and by the moral obligations to protect and nurture which the parents undertake.¹¹⁸ Adult sovereignty over children has two objectives: the short-range objective of maintaining order in the family (that is, the stability necessary to accomplish the purposes of the family) and the long-range objective (to which the former is subordinate) of producing 'a self-determining person from a dependent child'.¹¹⁹ This is a process of emancipation or empowerment. The twin parental aims of familial order and individual emancipation are in constant tension and parents must strike a balance between them. Parents must also make their children feel emotionally secure and attached to society at the same time as they teach them practical coping skills (survival skills) and the values necessary to maintain their identity and integrity within the prevailing social order, even if this means *challenging* the prevailing social order.¹²⁰

¹¹⁸ Legal justification and obligation follow from the communal perception and endorsement of the moral. If there is a change in the latter then the former will, eventually, change to comply.

¹¹⁹ Baumrind, 'Reciprocal Rights', 193.

¹²⁰ On the personal dynamics of the process of social criticism see Mead on the difference between the 'me' and the 'I', *Mind, Self, and Society*, 173-178, 199-200.

Parental control will be predominantly either authoritarian or authoritative.¹²¹ Authoritarian control

places arbitrary limits on the developing child's autonomous strivings, arbitrary because they are static and unrelated either to the child's actual competencies and needs or to the requirements of family living.¹²²

Authoritative control on the other hand is positively related to social independence: parental interventions are firm but not restrictive, children are left with significant opportunities, appropriate to their perceived competence, to make their own decisions, and reasons are given for parental commands. Adults who exercise legitimate rational authority 'model a life in which the mores and laws of the society may be circumvented, but only for principled and not for prudential or capricious reasons'.¹²³ Such democratic and inductive modes of relating to adolescents are more likely to have positive benefits.¹²⁴ Parents' monitoring and supervision have to be balanced against the adolescent's growing requirement for her privacy and growing capacity to make informed decisions. The function of parents (and teachers) is not to prevent children from making mistakes but to protect them from the worst consequences of their mistakes and to structure and encourage a critical and reflective response.¹²⁵ In short, this form of control acknowledges a developmental growth in human autonomy. While there is a sense of powerlessness among young people there is also a growing realisation of power. Adults must be prepared to relinquish some of their power and to be flexible about it.

In relation to the perception of their parental control there is evidence to support the intuitive belief that

the more parents perceive that they are in control, the more effective they will be in managing the child care environment and in providing authoritative rather than coercive discipline.¹²⁶

Among the most important weaknesses of Holt's case, for example, is his failure to understand the family dynamics of adolescence and young adulthood. He tells us that he has known many children

¹²¹ Baumrind, 'Reciprocal Rights', 187. This is similar to the distinction which Coleman ('The Parenting of Adolescents', 64) identifies between 'power-assertive or coercive control' and 'firm control with consistency of discipline'.

¹²² Baumrind, 'Reciprocal Rights', 187.

¹²³ *Ibid.*, 188.

¹²⁴ Coleman, 'The Parenting of Adolescents', 48. Inductive modes refer to 'attempts by parents to legitimise their authority by providing explanations for rules, and by helping young people see things from the parents' perspective as well as their own'.

¹²⁵ We must 'distinguish between mistakes which promote learning and mistakes, including irreversible mistakes, which prejudice the ability to learn in the future'. Margulies, 'The Lawyer as Caregiver', 1485.

¹²⁶ Coleman, 49.

who for years have been living happily with their parents (and) have suddenly found them intolerable and have become intolerable to them. The happier was their previous life together, the more painful will this be for the parents, and perhaps for the young person as well.¹²⁷

These 'children' he tells us are 'usually' in their 'late teens or early twenties'¹²⁸ and there 'is too seldom any sensible and gradual way to move out of (childhood) and into a different life, a different relationship with the parents'.¹²⁹ One is prompted to ask what kind of 'sensible and gradual way' out of this situation would serve? Most young adults simply move out when the parental home becomes too restrictive. There is a more serious aspect to this, however. For it illustrates clearly how Holt slips between the use of 'child' to describe a biological relationship and 'child' to describe the dependent relationship of the young. The dynamic of family life is that at some point children become adults (and they spend some time *becoming* adults) and need their own autonomy and social space. They must *make* this autonomy and social space for themselves. The separation from the parental home is traumatic only if a sense of over-dependence on either side has been allowed to develop over the years. Children who have been allowed and encouraged to assume responsibility and autonomy appropriate to their developmental experience will have no difficulty leaving home, with their parents' blessing, despite whatever temporary sadness and regrets there may be on either side when the final break comes.

Accounts of childrearing such as that proposed by Baumrind and others do not claim to be descriptive accounts of how any or all parents rear their children. They present, as it were, a best case scenario, how *best* parents will relate to their children. Such parents' treatment of the children will not be arbitrary. It will be informed by a specific plan based on the best interests of all concerned, parents, children, siblings, and the wider community, within the context of a comprehensive conception of the good.

Freedom and Responsibility

If I invoke the Freirean conception of freedom¹³⁰ I do not mean to suggest that the condition of children in family relationships is one of oppression, although it often is. What I wish to suggest is that the dependent relationship of the child on the parent (based, ideally, on a warm and nurturing primary paternalism) must at some point come to an end and be replaced by a relationship between equals. I wish to suggest that this point comes at the end of an extended process of disengagement from the paternalistic relationship rather

¹²⁷ Holt, Escape, 23.

¹²⁸ *Ibid.*, 24.

¹²⁹ *Ibid.*

¹³⁰ See Freire, Paulo, Pedagogy of the Oppressed, Harmondsworth, Penguin Books, 1985, Ch. 1.

than in an all-at-once fashion.¹³¹ It is only in cases where the dependency relationship persists that we might speak of oppression in Freirean terms. The denial of freedom, often disguised as paternalistic concern for the 'welfare' of the oppressed who cannot be trusted to pursue their own interests, is central to oppression. What needs to be stressed is a dynamic of freedom, a process to be pursued by the growing individual rather than a gift to be received on a certain birthday. Freedom is central to humanisation, it is something we must continually struggle for:

Freedom is acquired by conquest, not by gift. It must be pursued constantly and responsibly. Freedom is not an ideal located outside of man; nor is it an idea which becomes myth. It is rather the indispensable condition for the quest for human completion.¹³²

This conception of freedom is dynamic because it requires constant reaffirmation by the individual. It is not a state which, once achieved or acquired, is permanent.

While knowledge (or capacity) is a pre-condition of autonomy it is not synonymous with it. Aristotle's downgrading of women, for example, was not based on the belief that they lack the *capacity* to make good and wise judgements but that they lack the *authority* to follow through on such judgements. Aristotle's women lack autonomy because they lack authority, not because they lack abilities or capacities. Their lack of authority is a function of the absence of the acknowledgement of their right to make decisions and to speak for themselves. Such acknowledgement is absolutely essential, 'for without it no mental act which they perform, however well, will count as a decision at all'.¹³³

An essential but often neglected aspect of concern about autonomy (especially in relation to children) is responsibility.¹³⁴ Responsibility involves more than free will and reason albeit these are essential elements of autonomy. There is a social context which involves assigning responsibility, holding people responsible for their actions and decisions, requiring people to *take* responsibility. We may say, indeed, that without responsibility human action does not have a moral dimension at all. 'The whole apparatus of right and wrong, duty, obligation, and rights may seem undercut by absence of responsibility, as in cases of insanity or accident'.¹³⁵ When we tell an adult to 'grow up' we do not mean that they are physically stunted or intellectually deficient. We are recognising that, ultimately, the demarcation between adult and child is neither physical size nor intellectual capacity but emotional stability, consistency, and the capacity to carry responsibility. People are not

¹³¹ Buber provides a model of this transformation in Between Man and Man, 126-9.

¹³² Freire, Pedagogy of the Oppressed, 24.

¹³³ Hughes, 'The Philosopher's Child', 23.

¹³⁴ Gaden, 'Rehabilitating Responsibility', 27/8.

¹³⁵ Brown, D.G., 'The Rights of Children', Journal of Education, University of British Columbia 1971, 8 - 20, 11.

only responsible *for* something they are also responsible *to* someone. It is only in a social context that it makes sense for the concept of responsibility to be invoked.¹³⁶

We can identify a number of requirements for the assignation of responsibility. The first is dispositional: we expect the individual to show a willingness to engage in the activity in question in a way which is socially appropriate to the activity, that is, to be true to the spirit of the activity as socially constructed. Secondly, we require competence. This has two separable but related components. There is cognitive competence, the knowledge and understanding necessary to undertake the task with some hope of success and, in addition, the practical competence necessary to accomplish the task. Thirdly, we require a free acceptance of the associated responsibility, the acceptance of the engagement as a matter of personal concern. To be responsible is to be able to ^{account} satisfactorily for one's actions. This is a moral account rather than a simple narrative account, it is to account *for* one's actions, to be accountable. Being responsible is being able to, and prepared to, accept responsibility for an area of life into which one has entered freely, in relation to which one has an adequate understanding, and over which one exercises appropriate control.¹³⁷

There is a further requirement which is conditional on, but separable from, the combination of the others, which is crucial to our understanding of responsibility in relation to children. This is the *capacity to bear the burden* of responsibility. For when we speak of responsibility an important component of our understanding of individual responsibility is this capacity of the individual to carry the burden. In the case of children in particular we can find, or imagine, situations where all of the necessary requirements are present but where, in the event, the burden of the responsibility involved is disproportionate to the capacity of the child to carry it.¹³⁸

An illustration of this feature may be instructive. It is provided in A. Rutgers van der Loeff's classic children's novel Children on the Oregon Trail¹³⁹ which is an imaginative reconstruction of the travails of the Sager children, in 1844, following their decision to remain true to their dead parents' dream of reaching Oregon. The oldest child, John (who is not yet 15 when the Sager parents die), assumes leadership and shows clearly that he lacked none of the preliminary requirements. He freely and willingly undertook the engagement - to lead his brothers and sisters from Fort Hall in Idaho to Oregon. The

¹³⁶ Hughes, 'The Philosopher's Child', 25.

¹³⁷ Gaden, 'Rehabilitating Responsibility', 32.

¹³⁸ How many adults do we know who lack nothing of the requirements with regard to engagement, competence, and personal commitment but whom, nonetheless we would not require to assume the burden of responsibility for a particular task? When we consider people for promotion, for example, a crucial question, when the preliminary questions have been answered satisfactorily, is one of character, whether the candidate is *equal* to the responsibility.

¹³⁹ London, Puffin Books, 1963.

account of the journey shows that he lacked neither sufficient knowledge and understanding of what was required nor the practical competence necessary to accomplish the task. Lastly, not only did he freely assume the engagement of the task itself but as evidenced by his decisions, actions, and demeanour to his siblings he also accepted the concomitant responsibility. And he succeeded. Through an iron will, a relentless commitment to his parents' dream, through almost fatal deprivation and suffering he finally delivers his small family to the sanctuary of the home of Dr. Marcus Whitman.

But it was too much. Despite his eventual success the burden was too great. His relief was not the relief of an adult who had accomplished a trying and dangerous mission and achieved a temporary respite, but of a child who could at last throw off the burden of disproportionate responsibility and *reclaim his childhood*.

At first John Sager had excited merely cold admiration from (Dr. Whitman). The boy had achieved something, and caused something to be achieved, which was unbelievable. He must necessarily be a born tyrant and a bully. Yes ... those had been the Doctor's first feelings. But now?

Marcus Whitman smiled in the darkness. Before they went to bed, something had happened. He could still feel that shaking, thin body against his, that boy's head on his shoulder

'Take the load off me', John had sobbed. 'I can't go on, I can't. They don't love me any more, they couldn't understand, and I love them so much. ... I had to be so strict and horrid to them, I've beaten them, I've dragged them along ... and now we've got here, and they don't love me any more! Please, please, won't you be our father, I can't go on! Won't you, please?'

Dr. Whitman had patted him on the back. He had spoken soothing words to him.

But that had not been any use. John had repeated his question, urgently, imploringly, with burning eyes.

'Won't you be our father? I want to ... play with them again.' That last had been spoken very softly. Like an admission of guilt.¹⁴⁰

In a similar story,¹⁴¹ also based on actual events, Ruth Balicki leads her brother, sister, and an orphaned urchin through the chaos of war-torn Europe in an effort to be reunited with their parents in Switzerland. She is successful, but again the responsibility has taken its toll. We are told that

(Ruth) had all the time been so brave, wise and unselfish that you might have expected her to present no problem at all. But she had grown up too quickly and shouldered responsibilities far beyond her years. As she wanted to be a teacher, her father lost no time in arranging for her to go away to university to be trained. She refused to go. Her parents and her

¹⁴⁰ Children on the Oregon Trail, 203/4.

¹⁴¹ Ian Serrallier, The Silver Sword, Puffin Books, 1981.

new home meant so much to her that she could not bring herself to leave them. She behaved like a young child, clinging to her mother and following her about everywhere. It seemed as if she were trying to recover the lost years of her childhood.¹⁴²

While these stories celebrate the heroic qualities of children in situations of extreme challenge they also point up the inappropriateness of adult responsibility to the capacity of children to carry it. It was not that John Sager or Ruth Balicki lacked a sense of responsibility. They clearly accepted the responsibility that they had assumed for the duration of their respective quests. What they lacked was the capacity to carry the burden of the responsibility indefinitely. The point about these stories is that they are persuasive to children themselves.¹⁴³ Despite the heroic and thrilling adventures child readers know that the true vocation of the child is to be a child, not an adult, and that the transition from the one to the other is gradual, not precipitate.

Children cannot be declared responsible simply on the grounds that they knew what they were doing. While knowledge and understanding are necessary conditions for autonomy (they allow us to ascribe agency to the child) they are not sufficient. It is not the harm which they may do to themselves which is the main reason why we exclude children from the benefit of the liberal principle (which was Mill's reason) but the burden of the responsibility for their actions. It is not that children cannot plan and execute actions, it is that they are not capable of assuming the full responsibility for these actions in a way which adults are presumed to be. Responsibility is a matter of interaction. We cannot simply ascribe it to children without their co-operation.

Growing up, maturing, emerging into autonomy is the process of the child assuming more and more of the responsibility for those actions which she does knowingly. Respect for the dignity and freedom of the child consists in the recognition that the burden of responsibility shifts from the adult to the child as the child herself demands it.¹⁴⁴ It is a gradual developmental process, not a once-for-all commission.

This assumption of responsibility is the child's claim for membership of the moral community. In dealing with children we must be sensitive to the child's claim to have her 'decisions treated as authoritative' and her readiness to bear the concomitant responsibility. 'Holding a child responsible is not the same as making her responsible; we may succeed in the former, without her co-operation we can never succeed in the latter'.¹⁴⁵

¹⁴² Serrallier, *The Silver Sword*, 158.

¹⁴³ This is demonstrated by the perennial popularity of the books since their publication..

¹⁴⁴ Hughes, 'The Philosopher's Child', 26.

¹⁴⁵ *Ibid.*, 26/7.

The difference between adults and children in this regard is that we presume that adults are responsible whereas we presume that children are not. This does not mean that adults always are or that children never can be: it means that in each case the presumption prevails until we have evidence to the contrary. In the case of the adult, for example, it may be that we are shown that this particular adult lacks the knowledge or understanding or capacity for responsibility which we presume of all adults. In the case of children we presume *incapacity* until the children themselves tell us they are ready to assume the burden of responsibility for their actions.¹⁴⁶

Should we liberate children?

To grant that children should have freedom rights now possessed by adults (and bearing in mind that the rights carry with them the associated responsibility) would sacrifice the welfare of children to their presumed rights.¹⁴⁷ Such a concession of rights contradicts a number of convictions which have both popular and scientific support.

Firstly, as we have seen, human development involves successive qualitative transformations which require commensurate changes in social status from one stage of development to the next.

Secondly, children are inferior to adults in the competencies required to survive independently (they are in the process of acquiring these competencies) and therefore they require special protection. This is not unique to childhood: it applies equally to adults who have disabilities and to people in advanced old age who must be treated paternalistically because in relevant respects their situation is identical with that of young children. Adults with mental or other disabilities which militate against their being able to make crucial decisions for themselves may legitimately be treated paternalistically. The problem is to decide when such paternalism is justified and when it is wrongfully imposed in order to confine people in an oppressive, dependant relationship. One could go further and say that the adults' situation is even more demanding of paternalistic intervention. For children are, as it were, on an upward developmental curve while the elderly are on a downward curve. Children are being prepared for autonomy while ageing adults are being prepared for increasing dependency.

Thirdly, self-determination in adulthood is a product of maturation, it is not a gift which can be bestowed by permissive caretakers.

¹⁴⁶ The legal principle of *doli incapax* is a good example of this.

¹⁴⁷ Baumrind, 'Reciprocal Rights', *passim*. See also Hafen, Bruce, C., Hafen, Jonathan O., 'Abandoning Children to their Autonomy: the United Nations Convention on the Rights of the Child', Harvard International Law Journal, 37, 2, Spring 1996.

(N)o child psychologist would seriously contend that the child is equal to an adult in instrumental, intellectual and moral competence. And not even child liberators deny the immense differences in knowledge, experience, and power, separating the child from the adolescent or the adolescent from the adult.¹⁴⁸

The freedom made possible by this maturation is itself a product of knowledge, understanding, and responsibility and must be claimed in practice.

Finally, properly exercised adult authority in the early years is a necessary precondition for, and is positively related to, later independence.¹⁴⁹

Self-determination is developmental and is promoted by opportunities for self-determination commensurate with the child's actual ability and experience and by providing appropriate conditions for stability of self-concept.¹⁵⁰ Self-determination is a capacity to be developed and asserted, not a right to be exercised indiscriminately. It assumes that the individual can choose between known alternatives where the consequences of such alternatives are also known and accepted responsibly. The difficulty in the case of children is that they lack the experience to form an appreciation of the consequences of a decision and/or the maturity to accept and bear the burden of the consequent responsibility. Experience is a critical element of knowledge and decision-making. Without the relevant experience some consequences are more difficult to appreciate and others, while easier to appreciate are so only because of relative triviality. (Long-term issues regarding the significance of lost life opportunities, about identity and values, are crucially different from short term issues about how to spend one's pocket money.)¹⁵¹ Someone who has the capacity to make a decision with short-term consequences and minor risks might not have the capacity to make more significant, long-term, life-threatening decisions.¹⁵²

The search for 'morally relevant differences' between adults and children which are qualitative rather than 'a very gradual development of powers which are always present to some degree, or if a gradual development, at least one that does not stretch out over the entire life span'¹⁵³ is unlikely to succeed for the candidate capacities such as knowledge, understanding, autonomy, and moral responsibility are present from the earliest age in however rudimentary a form.

¹⁴⁸ Baumrind, 'Reciprocal Rights', 184.

¹⁴⁹ *Ibid.*, 181. See also Kandel, Denise, Lesser, Gerald S., 'Parent Adolescent Relationships and Adolescent Independence in the U.S. and Denmark', in Urie Bronfenbrenner, ed., Influences on Human Development, Illinois, Dryden, 1972.

¹⁵⁰ Baumrind, 'Reciprocal Rights', 185.

¹⁵¹ Margulies, 'The Lawyer as Caregiver', 1489/90.

¹⁵² 'Report of The Working Group On Determining The Child's Capacity To Make Decisions', Fordham Law Review, 64, 1996, 1341.

¹⁵³ Schrag, F., 'The Child in the Moral Order', Philosophy, 52, 200, 1977, 170.

Baumrind, for example, suggests that there are three conditions for 'true freedom of personality': intellectual and physical competence, internal locus of control, and an understanding of moral reciprocity.¹⁵⁴

Firstly, competence in any field of human activity is itself developmental. There are degrees of competence ranging from barely capable to what may well be an open-ended continuum of expertise in the relevant capacity, a 'range property' which still requires a decision on the precise point along the range which will be taken to constitute 'full' competence.¹⁵⁵

Secondly, 'internal locus of control' (the ability to get what one wants and to direct one's affairs through one's own efforts) is evident from very early on in infancy. Babies begin very early in life to control the grasping instinct so that they can grasp deliberately targeted objects of desire. This is 'internal locus of control' in rudimentary form: it may be primitive but it is none-the-less identifiable as deliberately initiated action.

Baumrind's third requirement, moral reciprocity, meaning the capacity to understand the universal norm of reciprocity: 'those whom you have helped have an obligation to help you, and ... you should help those who help you'¹⁵⁶ is too narrow. It fails to capture fully the fundamental role of imagination in morality. If we are not to be restricted by a purely cognitivist morality (such as Kant's or Kohlberg's) which has no compelling emotional appeal beyond whatever commitment we might have to the abstract principle of 'duty' then we must conceive of morality as the sympathetic engagement with the subjective experience of others.¹⁵⁷ This is the task of the imagination and it is present from the child's earliest engagement with story. Children do not listen to stories with a detached moral judgement but with an engaged moral sympathy. They identify with the plight of the protagonists and develop their sense of the values by which to judge human action from the engagement.¹⁵⁸

¹⁵⁴ Baumrind, 'Reciprocal Rights', 186.

¹⁵⁵ See Wikler, 'Paternalism and the Mildly Retarded', 85-91.

¹⁵⁶ Baumrind, 'Reciprocal Rights', 193.

¹⁵⁷ For the limitations of the Kohlbergian view see Punzo, V.A., 'After Kohlberg: Virtue Ethics and the Recovery of the Moral Self', *Philosophical Psychology*, 9, 1, 1996, 7-23; Straughan, R., 'Why Act on Kohlberg's Moral Judgements?', in S. Modgil & C. Modgil, eds., *Lawrence Kohlberg: Consensus and Controversy*, Philadelphia, F&T Press, 1986, 149 - 161.

¹⁵⁸ See Inglis, Fred, *The Promise of Happiness: Value and Meaning in Children's Fiction*, Cambridge, University Press, 1982, Chapter 1; Bettelheim, Bruno, *The Uses of Enchantment*, Introduction. 'The development of a moral self has cognitive and motivational prerequisites. While basic knowledge about moral rules appears to be available to rather young children already, the motivation to accept these rules as strictly binding for the self lags behind in development.' Keller, M., Edelstein, W., 'The Development of a Moral Self from Childhood to Adolescence', *Moral Education Forum*, 18, 1, 1993, 1-19, 1.

Role-identification in story is paralleled by perspective-taking in life.¹⁵⁹ This is the ability to view one's own actions through the meanings these actions acquire for others. In interaction with others the individual acquires the experience that violating normative standards not only affects others but also influences others' perception and evaluation of oneself and this in turn affects one's own perception of oneself. 'Through perspective-taking the self comes to share the other's world cognitively. Through emphatic feelings the self comes to share the world of others emotionally'.¹⁶⁰

In the last analysis, given what we know about the needs and limitations of children in their pre-adolescent years we cannot endorse the open agenda of the liberationist programme. The responsibility of adults is to provide children not 'with a multitude of pseudo-possibilities, but rather with genuine choices among a few good options'.¹⁶¹ The kinds of options which are available to parents and to children are not unlimited, they are available *within* the comprehensive conception of the good life to which the parents and their sustaining community or communities subscribe. As in all cases of human behaviour, however, the parameters set by these conceptions cannot be absolute for they contain within them the possibility of being transcended.¹⁶²

Childhood is a developmental process, not a condition to be overcome. Childhood ends when the individual is capable of taking control and responsibility for his/her own affairs. When this happens will vary from individual to individual. In no case will it happen in a sudden once-for-all fashion which would allow an inclusive definition of childhood and an unproblematic distinction between children and adults. If we must choose between age and competence options then the age-criterion seems the more realistic (that is to say, the more manageable). The age criterion can be differentially set depending on the capacities

¹⁵⁹ What Mead calls 'social intelligence' depends upon 'the given individual's ability to take the roles of, or "put himself in the place of", the other individuals implicated with him in given social situations; and upon his consequent sensitivity to their attitudes toward himself and toward one another'. *Mind, Self, and Society*, 141n. Midgley argues that the capacity for sympathy the capacity 'for entering directly into some of the feelings (of others) and responding to them' is crucial to our understanding of human morality. This is 'an ability to put oneself imaginatively in the place of others and to see how it is with them'. '(I)maging them as subjects like oneself, subjects who experience life in the same way and are not of a quite different status'. The important point about sympathy is that its emotional and cognitive aspects are inseparable, it bridges the gap between feeling and reason. The kind of intelligence which it involves is not exclusively intellectual, 'it is a development of communication, which is, among animals as opposed to machines, always an emotional as well as an intellectual business'. Midgley, M., *The Ethical Primate: Humans, Freedom and Morality*, London, Routledge, 1994, 142-145.

¹⁶⁰ Keller, Edelstein, 'The Development of a Moral Self', 2.

¹⁶¹ Baumrind, 'Reciprocal Rights', 194. Contrast this with Gutmann, A., 'Children, Paternalism and Education: a Liberal Argument', *Philosophy and Public Affairs*, 9, 4, 1980, 338-358.

¹⁶² 'The "I" is the response of the organism to the attitudes of the others; the "me" is the organised set of attitudes of others which one himself assumes. The attitude of the others constitute the organised "me", and then one reacts toward that as an "I".' 175. A common example of such transcendence is the way in which learning to read for the purpose of having access to sacred texts confers the ability at the same time to read profane texts.

required in relation to specific activities: the resulting 'incoherence'¹⁶³ is not necessarily undesirable. On the contrary it can reflect a flexibility of response to the differential capacities of young people at different ages. But it will be the same for all of the same age. While an age criterion might not be fair to all affected it is intended to be equally protective of all. There seems no rational solution to the age/competence dilemma: we must choose between fairness to the few or safety for the many.

'It is the focused attention of caring adults that a child needs most if he or she is to develop a positive attitude towards the world.'¹⁶⁴ The appropriate context for the task of rearing children is the family. This does not necessarily mean the conventional nuclear family or any other particular conception of family. But it does require, at least

the continuous presence of one or more adults who have the means and the willingness to provide for the physical needs of the children, who can prepare them for the opportunities and challenges of adulthood, and who love them - i.e. express genuine pleasure in their existence and hold their well-being to be as important as their own.¹⁶⁵

If these conditions are not met it is unlikely that the child will achieve the developmental levels identified by Erikson which are necessary for a satisfactory adulthood.

Children (whether infants, children, or adolescents) have at every point needs which require to be met and interests to be accommodated if they are to live full lives, or even if they are to achieve a minimal level of human functioning appropriate to the developmental stage they are at. Identifying such needs requires a conception of human being which is socially (communally) determined: what it is (maximally) to be a child in that community and what is the ideal of human adulthood within that community.

Summary

The concept of childhood is meaningful only in contrast to adulthood. The temptation to adopt an arbitrary definition of 'child' or 'childhood' as the true or real definition should be resisted. On the contrary, we must try to identify the salient characteristics in respect of which adult-child differences are described, while at the same time accepting that possession or non-possession of any singular capacity or characteristic is not sufficient to determine whether a person is or is not a child.

One of the central questions in relation to children, rights, and adults is whether adults' subordination of children is contrived by keeping them in the state of ignorance necessary

¹⁶³ Franklin, 'The Case for Children's Rights', 8.

¹⁶⁴ Csikszentmihalyi, 'Contexts of Optimal Growth in Childhood', 41.

¹⁶⁵ *Ibid.*, 42. This is the 'psychological parent model' proposed by Goldstein and his colleagues. See Goldstein, J., Freud, A., Solnit, A.J., Beyond the Best Interests of the Child, New York, The Free Press, 1984, 53-63.

to sustain servility, or whether children's subordination is a necessary prerequisite to their eventually becoming autonomous individuals.

Institutionalised conceptions of childhood presume normative differences between childhood and adulthood. Yet, the state of being a child is not static, it is a dynamic condition marked by a succession of developmental transformations. An 'age of majority' is the conventional institutionalised demarcation between adulthood and childhood. As a criterion it has the virtue of impartiality, but only at the cost of not being strictly equitable.

Perceived competence is the normative criterion on which age distinctions are based. Since normative criteria are neither universal nor evenly distributed a normative criterion cannot be applied consistently without some form of individualized testing which would be both onerous and politically unacceptable; for if a competence criterion were consistently applied it would disenfranchise individuals who are already deemed adult. The dilemma is that we must choose, on the one hand, between a universal criterion, 'an institutionally defined category', which allows of straightforward administrative application but which will be unfair in the event to many individuals, and on the other hand, a criterion of individualized competence, which would be difficult if not impossible to implement.

A possible compromise is to accord children a liberty commensurate with the development of their capacities.

The transition from the intimate, protected world of the family to the freer, but more threatening, life of the wider community bridges the competence-age dichotomy. The competence criterion predominates in the intimacy and individualized protection of the micro-community of the younger child. The macro-community in which the adolescent is expected to function differs in two important respects from the micro-community of the family: the individual is not personally known to other, authoritative, members of the community and the wider community is not deliberately contrived to facilitate her experimentation with her growing competence and evolving identity. The individualized and flexible regulation of the home is replaced by universal rules of constraint. These rules are designed to be protective of all; communal paternalism displaces the parentalism of the family.

School is the transitional experience between the flexible, personalised criteria of competence and the rigid, impersonal criterion of age. The experience of contemporary schooling (or at least its theory) reflects this transition from an individualized competence, to impersonal, institutional requirements which test the individual against publicly determined norms of performance.

Children acquire higher mental capacities in the context of human communities. The path and outcome of their development is constrained by the specificities of their cultural community. They internalise the prevailing social interactions in order to grow into the social and intellectual life of that community. This contextualist view is at odds with contemporary views which radically separate the 'autonomous individual' from the social and natural world. Erikson, in particular, locates human development within a formative social context. The needs of the growing child are met by a wide range of socially specific and culturally determined measures according to the ideal of adult functioning which prevails in the relevant community.

The development of identity is inseparable from the acquisition of competence and a concomitant sense of self-worth. The identity crisis typical of adolescence is a critical watershed in the life of the individual. It is a dynamic transformation from the secure and protected world of childhood to the fraught world of adulthood with its associated freedom, choices, and responsibility.

Adolescence is a time of an overt struggle for power: autonomy is not conferred, it is asserted. The process of parenting is a process of empowerment; ideally, parents are conspiring at their own redundancy. The ultimate aim of authoritative parental control is independence. Authoritative control attempts to build the emotional security, practical skills, and moral values necessary to maintain identity and integrity, while at the same time inculcating a social attachment or commitment. The dependent relationship of the child is eventually replaced by a relationship of equality which comes at the end of an extended process of disengagement from the paternalistic adult-child relationship, and the assumption of adult responsibilities.

Responsibility is an essential aspect of autonomy. In addition to free will and reason autonomy entails a social context in which responsibility is assigned and assumed. It is essential to the moral dimension of human action and requires, as a necessary moral feature, a requisite capacity to bear the burden of responsibility.

Growing into autonomy involves the individual assuming increasing responsibility for her own self-initiated and self-directed actions. It is a process promoted by opportunities for self-determination which are commensurate with the child's actual ability and experience. Respect for the dignity and freedom of the child requires that adults recognise that responsibility is a gradual acquisition in which the consensual participation of the child is crucial. The incremental assumption of responsibility indicates the child's growth towards full membership of the moral community.

Childhood ends with the assumption of control and responsibility. This is a gradual, developmental process not a once-for-all transformation which precludes an inclusive,

universal definition of childhood and an unproblematic adult-child distinction. An age criterion appears to be more realistic than a competence criterion because it is more manageable. While an age criterion might not be fair to all affected it is intended, in the first instance, to be equally protective of all: it sacrifices fairness to the few for safety for all.

Chapter 8: Paternalism

As generally understood 'paternalism' means interfering with the freedom of another in the name of the other's best interest. Whether the individual involved recognises the benefit of the intervention does not materially affect the situation. Dworkin's definition may be taken as authoritative: 'the interference with a person's liberty of action, justified by reasons referring exclusively to the welfare, good, happiness, needs, interests, or values of the person being coerced'.¹ Paternalism is predicated on the belief that it is permissible to interfere with another's liberty in order to promote his or her welfare. Such interference is specifically prohibited by Mill who declared that the only justifiable interference is to prevent harm to oneself or to others. We cannot interfere in the name of the moral good of the individual who is capable of choice which is both voluntary and rational. This is why paternalism is normally objectionable: it violates people's 'independent moral right to be free to act as they choose'.² Mill famously excluded children from his principle of liberty.³

If the possession of liberty becomes counterproductive regarding the benefits for which liberty is normally valued (e.g. happiness and self-respect) then it appears reasonable to suggest that it should be restricted appropriately.⁴ This is the position of children. If they were to be allowed complete freedom from the beneficent coercion of adults 'it is hardly credible that they should achieve happiness (or even, in many cases, survive at all)'.⁵ This echoes Worsfold's view that children have traditionally been treated paternalistically due to the perceived need to protect them from themselves and from others (because) 'they lack an adequate conception of their own present and future interests'.⁶ Adults are presumed to have such an 'adequate conception'.⁷

Liberty, as the absence of restraint, does not, however, necessarily produce the desired results. It is surely arguable that happiness and self-esteem are both possible under conditions of restraint. It is Erikson's view, for example, that children before adolescence can be both happy and have a high measure of self-esteem even though their lives are

¹ Dworkin, Gerald, 'Paternalism', in Sartorius, Rolf, ed., Paternalism, University of Minnesota Press, 1987, 20.

² Sartorius, Paternalism, 1987, xi.

³ Mill, J.S., On Liberty, in H.B. Acton ed., Utilitarianism, Liberty, Representative Government, London, J.M. Dent & Sons Ltd., 1972, 73. Mill did not, as Brown suggests (Brown, D.G., 'The Rights of Children', Journal of Education, University of British Columbia 1971, 8 - 20, 9) 'wash his hands of children' for purposes of ethical theory. As we will see below Mill was concerned with the educational consequences of his proposal to exclude children.

⁴ This is a principle proposed by Vlastos, G., 'Justice and Equality', in Waldron, J., ed., Theories of Rights, Oxford University Press, 1984, 48/9: 'We must find *reasons for our natural rights which will be the only moral reasons for just exceptions* to them in special circumstances'. 48.

⁵ Scarre, G., 'Children and Paternalism', Philosophy, 55, 1980, 117-124, 122. All of the foregoing presumes a definition of children which appears to mean the very young. But in the first instance when we argue for freedom for children it is the case of older children - those approaching the age of 18, however - that we mean: and they are, it is not implausible to assume, capable of (some of) the kinds of things which Scarre appears to have in mind.

⁶ Worsfold, Victor, 'A Philosophical Justification for Children's Rights', Harvard Educational Review, 44, 1, 1974, 142.

⁷ *Ibid.*, 143. This is identical with the conventional position.

circumscribed by adult prohibitions. In fact, in childhood both happiness and self-esteem are likely to diminish, if not disappear altogether, if all restraints are removed. For restraints are not always merely negative prohibitions, they may sometimes be (and ideally in childhood frequently are) enabling conditions providing the space and safety necessary for individual development.

To describe someone as autonomous means that on appropriate occasions they assert their own preferences against those which are being imposed by others. Clearly children up to a certain age (puberty/adolescence) have *some* capacity for autonomous action (which must include the notion of appropriate responsibility). Yet it is equally clear that they have not achieved the level of self-directed and responsible action sufficient to be described as 'autonomous' in the fullest sense.

In some instances paternalism is justified, in some not. If we condone paternalistic action in some circumstances there will inevitably be those who will be *mistakenly* identified as proper candidates for paternalistic treatment.⁸ This is undoubtedly true in the case of children. Lacking a clear and unambiguous criterion of demarcation between adults and children it is not always possible to identify unerringly on which side of the boundary a particular individual may be situated. Paternalism is justified on the part of parents or other adult carers until it becomes problematic through the developing autonomy of the growing individual. This problematic period is when the individual begins to assert him- or her-self consistently as a morally independent individual.

Insofar as paternalism is justified in relation to children it cannot be challenged by citing examples of the wrongness of paternalism in relation to adults, either singly or in categories: it is precisely that they are *not* children which makes treating adults as if they were objectionable. The adolescent-becoming-adult, however, presents the most problematic marginal category because of its transitional nature.

Parentalism

It is surprising that Locke's suggested substitution of the word *parental* for the word *paternal* has not gained any, much less widespread, support. He rejected the view that the mother's relationship with the child was in any way inferior to the father's:

It may perhaps be censured as an impertinent criticism ... to find fault with words and names that have obtained in the world: and yet possibly it may not be amiss to offer new ones when the old are apt to lead men into mistakes, as this of Paternal Power probably has done, which seems so to place the power of parents over their children wholly in the father, as if the mother had no share in it, whereas if we consult Reason or Revelation, we

⁸ Sartorius, Paternalism, xii.

shall find she hath an equal title. This may give one reason to ask, whether this might not be more properly called Parental Power.⁹

Parentalism is certainly a more inclusive and exact description of the parent/child relationship embracing as it does both the maternal and the paternal relationship. It also eliminates any suggestion of patriarchy which the word 'paternalism' evokes. It would be desirable, for instance, to adopt the term 'parentalism' in order to distinguish between the treatment of children by their parents and the paternalistic treatment of adults. Despite these advantages it is not intended to adopt the practice suggested by Locke here for the simple reason that to introduce such a change unilaterally would lead to confusion.¹⁰ However, the priority of the parent-child relation (parentalism) as foundational of human relations should be borne in mind in what follows.

The parent-child relationship is one of the definitive relationships of human experience. It is not reducible to, or describable in terms of, other relationships. On the contrary, it is the parent-child relationship itself which is used to illustrate other, non-parental relationships. Claims such as 'He/she was like a father/mother to me' are immediately understandable because the relationship being invoked is part of the irreducible texture of human experience: it usually requires no further elaboration. This is not to say that everyone has had a uniform experience of parental caring. It is simply to suggest that despite great variety in childhood experience there is a common and widespread understanding of what parental roles, properly exercised, should entail in a general way. The significance of 'Our Father which art in Heaven ...' does not need to be explained although it can be elaborated on.

Literal and metaphorical paternalism

Like many words in the English language 'paternalism' as it is most commonly used in philosophical discussion is a metaphor. A clear distinction should be maintained between what I will call primary paternalism and its metaphorical derivatives. The *primary* sense of paternalism is the relationship between the parent (especially the father) and the child. This is a *sui generis* relationship. It is not reducible to description in terms of other relations: it is not described in terms of anything other than itself. On the contrary, because it is more fundamental and universally understood, the parental or paternal relationship is used metaphorically to describe *other* relationships: God the father, Mother Church, Fatherland, Motherland. Metaphorical paternalism is the use of our understandings of certain aspects of primary paternalism in order to describe relationships which are *not* parental, paternal, or

⁹ Locke, John, 'Paternal Power', in O'Neill, O., Ruddick, W., (eds.), Having Children: Philosophical and Legal Reflections on Parenthood, New York: OUP, 1979, 240-246, 241.

¹⁰ A confusion which would be compounded by the orthographic similarity of the words.

maternal. In the metaphorical use (as in all metaphors) we invoke *selected features* of primary paternalism in order to illustrate, explicate, or elucidate features of non-parental relationships.¹¹

Douglas¹² makes a similar distinction referring to 'genetic paternalism (or maternalism)' and 'extensions of paternalism'. The former denotes the normal loving relationship between the parent and the child in which the parent acts in ways which are sincerely believed to be in the child's best (long-term) interests; this is what I have called primary paternalism. '(E)xtensions of paternalism' denote relationships in which those who wish to influence or control others mimic (hence metaphorical) the parent/child relation and make claims regarding their love, concern for best interests, etc., in order to justify continuing dominance and exercise control.¹³

The context of primary paternalism is, ideally and most frequently, a context of loving care which is not necessarily, ideally, or even usually present in non-parental paternalistic relationships. Parent/child relations are, in the first instance *personal* relations, they are fundamental to human society, and they normally involve powerful emotional attachment. This emotional attachment is not incidental to the parent-child relationship. On the contrary it is, in Douglas's words, 'the genetically determined motivational guarantee that maternal and paternal care will, on average, be provided'.¹⁴ Without such care being the norm in human reproduction, the human race would not have survived; for devoting time, energy, and self-sacrifice to children is a very long-term, and ultimately, unrewarding investment if the 'pay-off' is to be solely the adult success (however defined) of the children.

Whenever a species depends on a limited reproductive strategy, it must find mechanisms for ensuring that adults will take care of their offspring. In humans, attachment behaviour generally arises spontaneously whenever an adult and infant interact. We are genetically programmed to respond protectively to a baby's facial features, sounds, and smells. Of course, parenting behaviour, like any other genetic instruction, can get scrambled in the transmission from one generation to the next. Yet if most individuals did not feel attracted to and protective towards children, humans long ago would have joined the ranks of the fossils.¹⁵

¹¹ Gutmann points to an illustrative example. 'When the Laws and Constitution of Athens speak to Socrates in the *Crito* of his duty to obey, they claim not that they are right but that they have a right to rule him: "Did we not give you life in the first place? Was it not through us that your father married your mother and begot you? ... (S)ince you have been born and brought up and educated, can you deny, in the first place, that you were our child and servant, both you and your ancestors?" Gutmann comments: 'The advantage of resting the authority of the family state on parental imagery is obvious'. Gutmann, A., *Democratic Education*, Princeton, University Press, 1987, 24.

¹² Douglas, Jack D., 'Co-operative Paternalism vs. Conflictful Paternalism', in Sartorius, *Paternalism*, 171-200.

¹³ *Ibid.*, 172. He adduces a long list of examples.

¹⁴ *Ibid.*, 173.

¹⁵ Csikszentmihalyi, Mihaly, 'Contexts of Optimal Growth in Children', in *Daedalus: Journal of the American Academy of Arts and Sciences*, 122,1, 1993, 33.

This emotional attachment is at the very centre of the parent-child relationship. Parent-child relationships which are not informed by such emotional attachment are *perceived* as exceptions and acknowledged to be exceptions. In a sense they prove the rule, for unless we had a general expectation of a standard of loving care we would have no criterion against which to measure performance and identify exceptional cases. Nor is this a question of duty. Parents do not normally act out of a sense of duty although they may be aware of their responsibilities as duty. Their primary motivation is love for their child and concern for her welfare. This loving care is the natural and normal context of primary paternalism. Parents' care for their children is directed towards the child's best interests over the course of the child's life. The point and purpose of parental care is to make an individual child eventually independent of the paternalism of the parent at an appropriate time.

Many (if not most) of the relationships which are termed paternalistic do not involve the loving care which we believe to be typical and necessary in parent-child relations.¹⁶ This is a significant difference between primary paternalism and metaphorical paternalism.

'Sincerely co-operative' and 'conflictful' paternalism

We can also distinguish between 'sincerely co-operative paternalism' and 'conflictful paternalism'. The former is paternalism which attempts to help the recipient become more independent and competent in the long term. The latter is not aimed at long-term independence and equality, but at the maintenance of submission and dominance.¹⁷ The relationship of sincerely co-operative paternalism is based on the mutual perception of reciprocal love. The aim is an eventual equality.¹⁸

The point of sincerely co-operative paternalism is to promote the autonomy and freedom of the paternalized individual. For this to happen the paternalistic intervention must be exercised in such a way that it provides opportunities to develop the necessary powers of judgement, to accumulate the relevant experience, to develop the required capacities for freedom and responsibility. Such powers do not come into being all at once,¹⁹ they can be

¹⁶ State paternalism is perhaps the most important case in point.

¹⁷ Douglas, 'Co-operative Paternalism', 174/5. This distinction is very close to that outlined in McLaughlin, T.H., 'Parental Rights and the Religious Upbringing of Children', Journal of Philosophy of Education, 18, 1, 1984, 75-83. He contrasts a non-indoctrinatory form of religious up-bringing based on the transmission of 'stable' (but not unshakeable) fixed beliefs which would be compatible with the aim of the eventual autonomy of the individual with an indoctrinatory form based on unshakeable fixed beliefs which would make eventual autonomy extremely difficult, if not impossible, to attain. See also Callan, Eamonn, Creating Citizens: Political Education and Liberal Democracy, Oxford, Clarendon Press, 1997, 152-157, on 'ethical servility' as an obstruction to moral development.

¹⁸ For a description of such a relationship in an educational setting see Buber, M., Between Man and Man, Fontana Books, 1961, 124-128.

¹⁹ 'The mental and moral, like the muscular, powers are improved only in being used'. Mill, On Liberty, 116/7.

developed only by use in an environment which is encouraging and supportive of tentative efforts.²⁰ Developmental efforts involve making mistakes and learning from them. This means that the child must be allowed to act on her own initiative and to exercise her own judgement from time to time (and increasingly as she grows older) and in relation to increasingly non-trivial matters *even when we believe that she is mistaken*. The point of sincerely co-operative paternalism is not to *eliminate* mistakes but to minimize the adverse effects of such mistakes while maximizing opportunities to make them. It is a risky business. We can only eliminate the risk by replacing sincerely co-operative paternalism with conflictful paternalism.²¹

Two issues relating to the treatment of children as children (that is treating them paternalistically) require a definition of limits. In the first place we need to know what are the justifiable limits to our treatment of them. (This cannot be decided with reference to paternalism in general. The *sui generis* case of parents and children is itself the paradigm of paternalism: it cannot be elaborated on in terms of the metaphorical uses which are drawn from it.) Secondly, we need to know when individuals cease to be children and ought no longer to be subject to parental control.

Paternalism in relation to children

A number of justifications for the paternalist treatment of children have been suggested. Firstly, since they lack rationality, knowledge, and understanding, children have a limited conception of their present and future interests. This, together with a limited capacity to defer gratification, means that their capacity to make decisions in their own interest is deficient. They are unable to formulate systematic purposes of action and, consequently, they must rely on their parents' (or other adults') superior understanding of their best interests. Secondly, their general lack of self-sufficiency and maturity means that there are many dangers which threaten them over which they have no control. If left entirely to their own devices children would make mistakes which would be harmful and damaging to themselves and others. Thirdly, if present paternalistic intervention is successful the children concerned will come to see the necessity for, and wisdom of, the intervention (future oriented consent). Finally, their own future well-being will be enhanced by paternalistic intervention which will not only prevent them from engaging in action which

²⁰ See Hughes, Judith, 'The Philosopher's Child', in Children's Rights Re-visioned: Philosophical Readings, Rosalind Ekman Ladd, ed., London, Wadsworth, 15-28; Gaden, Gerry, 'Rehabilitating Responsibility', Journal of Philosophy of Education, 24, 1, 1990 27-38.

²¹ For a detailed description of the dynamics of conflictful paternalism see Freire, The Pedagogy of the Oppressed, Ch. 1, 20-44. The distinction is similar to Baumrind's distinction between authoritative and authoritarian parental control. Baumrind, Diana, 'Reciprocal Rights and Responsibilities in Parent/Child Relations', Journal of Social Issues, 34, 2, 1978, 179-196, 187.

would impair their capacity for autonomy and freedom in the future, but which will also promote this capacity.

Whether children are likely to harm themselves or to fail to promote their own good or welfare if left to their own devices is, however, a matter of fact to be decided in individual cases. There is evidence that in situations where they are deprived of parental or other adult care children can care for themselves very well even in the most testing circumstances.²² We can make general statements only about very circumscribed categories and if we are to take this assertion as being universally true of a category of children then it can only refer to very young children in a very open environment. We will look at each of the proposed justifications in turn.

Rationality, knowledge, and understanding

Dworkin²³ argues that we are justified in acting paternalistically towards children because they lack some of the 'emotional and cognitive capacities' which rational decision-making requires. The many deficiencies in children's conception of their own present and future interests include the inability to defer gratification for more than a short time.²⁴ In addition many dangers threaten children and consequently it is not only permissible, but even obligatory, for parents to restrict their freedom in various ways. It is generally true that parents have an understanding of the best interests of their children which is superior to that possessed by children themselves. (Although superior understanding alone would not be sufficient to justify intervention which overruled the wishes of an adult: a presumed knowledge of my best interest on the part of another would not entitle them to act against my wishes. Even if such superior understanding is possible or present no intervention is necessarily warranted.)

Scarre argues that it is possible to justify the conventional belief that paternalist intervention in the case of children does not infringe their rights, and 'to remove any suspicion that we treat children and adults according to a morally invidious double standard'.²⁵ He believes that the search for a distinguishing feature which constitutes a qualitative difference between adults and children is misguided since it begins with the

²² See Holt, Escape from Childhood, Penguin Books, 1975, 20/1, about the Italian twin boys who survived on their own 'for several years, in a large city, in a country terribly torn and dislocated by war'. Also Van der Loeff, A. Rutgers, Children on the Oregon Trail, Roy Edwards, trans., Penguin Books, 1961, and Serrallier, Ian, The Silver Sword, Puffin Books, 1960. Both of these depict historical events. In each a family of children copes with significant hardship and adversity. If not literally true these stories are at least fictionally plausible.

²³ Dworkin, 'Paternalism'.

²⁴ The law shares Dworkin's view of the child in this regard. See Margulies, Peter, 'The Lawyer as Caregiver: Child Client's Competence in Context', Fordham Law Review, 64, 1996 1473-1504, 1475. The law sees the child as 'prone' to preferring short-term over long-term thinking.

²⁵ Scarre, 'Children and Paternalism', 118

presumption of a morally relevant difference between the two.²⁶ On the contrary what we require, he thinks, is a rationale for the conventional belief that we may treat children, but not adults, paternalistically. Such a rationale must be impartial as between children and adults. In other words it must not *presume* a relevant difference between the two, it must establish it. '(I)t must locate a feature of persons, without distinction, which when present makes it reasonable for them to be subjected to paternalist coercion.'²⁷ It is wrong to exclude adults from paternalistic intervention *tout court*. We must find some feature or features of persons (which is independent of whether they are adults or children) which may be possessed by both but which will, in the event, in practice be possessed by far more adults than children.²⁸

Strangely, in view of the programme he has set (to find 'some feature or features of persons which will in principle be capable of being possessed by both children and adults') Scarre continues '(t)his leaves us the task of locating *the specific features of children which make paternalism appropriate in their case*'.²⁹ He suggests the notion 'which has much common-sense backing', that it is a person's rationality or lack of it which is 'a relevant factor in determining whether he is a suitable subject for paternalist intervention'.³⁰ So we're back to Mill and Locke despite the attempt to diverge from an absolutist theory of freedom.

Absence of rationality, knowledge, or understanding does not distinguish children from adults but the rational from the irrational, the knowledgeable from the ignorant, the wise from the stupid. Adults, as well as children, can be irrational, ignorant, and stupid yet liberal defenders of adult autonomy are not willing to accept what appears to be the inevitable conclusion: either such adults should be treated paternalistically (that is, as children) or the conditions of irrationality, ignorance, and stupidity are not (individually or jointly) sufficient warrant for justifying paternalistic interventions. Like Dworkin, Scarre³¹ has argued that since children are not capable of planning 'systematic policies of action' for themselves 'adults must impose a comprehensive "system of purpose" on them' since children have no such 'systems of purpose of their own'. Scarre rebuts the objection that this could justify paternalist intervention in the affairs of some adults. Adults have 'plans and policies of their own' whereas 'children do not have such systems of purpose of their own so it does not infringe their rights to intervene in their behalf when their irrationality threatens their well-

²⁶ *Ibid.*, 120/1.

²⁷ *Ibid.*, 121.

²⁸ *Ibid.*

²⁹ *Ibid.*, 122 (emphasis added).

³⁰ *Ibid.*, 123.

³¹ *Ibid.*, 117-124.

being'.³² It would appear then that even when the adult (Scarre instances the 'akratic alcoholic') is determined on a course of action which will significantly shorten his life, and/or reduce the value of it and radically affect his loved ones, a policy of non-intervention is obligatory because of his 'right to equal concern and respect'. Scarre does not allow paternalistic interference in the case of the alcoholic because the alcoholic as an adult 'has plans and policies of his own', but it is not clear how the behaviour of the 'akratic alcoholic' manifests rational action, or constitutes a systematic policy of (rational) action.

Lomasky also thinks that children are incapable of having their own plans and policies, certainly in the earliest stages of their lives: '(u)nder no reasonable construal can infants be taken to be pursuing projects during their infancy'.³³ But at least Lomasky is careful to specify infants rather than using a global exclusion which does not differentiate between one year-olds and seventeen year-olds. Yet children clearly can and do plan things, that is, they appear to be, from the earliest post-natal behaviour, capable of self-directed effort, however minimal it might be. The question as to when such self-directed behaviour becomes a systematic policy of action remains open.

Mistakes, self-sufficiency, and maturity

It is further argued in defence of paternalism that children, if left to their own devices, will make mistakes which may be harmful and damaging to themselves and to others. Franklin is correct in pointing out that the error here 'lies in confusing the right to do something with doing the right thing'.³⁴ Adults make mistakes (many of which can have very far-reaching consequences) without having the associated rights withdrawn. There is a developmental aspect to this. We learn from mistakes: errors are an inescapable part of the maturation and learning process. It is by making mistakes that we learn how to do things. Franklin thinks that our treatment of children is indicative of a double standard:

Confronted by the apparently irrational behaviour and mistakes of both adults and children, paternalism is deemed appropriate only for the latter group. ... (P)aternalism, sanctioned on this ground, produces an adult political elite which, in the name of protection, interferes in children's lives

³² *Ibid.*, 123/4.

³³ Lomasky, Loren E., Persons, Rights, and the Moral Community, Oxford University Press, 1987, 155.

³⁴ Franklin, B., ed., The Rights of Children, London, Basil Blackwell, 1986, 33. This point is also made by Page in relation to parents' rights. See Page, E., 'Parental Rights', Journal Of Applied Philosophy, 1,2, 1984, 190. Aristotle is clear that acting unjustly as a citizen does not disqualify one as a citizen. 'Some would go further and question whether anyone can be a citizen unless he is justly so, on the ground that unjust and false mean the same thing. But when persons exercise their office unjustly, we continue to say that they rule, though unjustly; and as the citizen has been defined by some kind of office ... we cannot deny the propriety of using the term even in these cases.' Aristotle, Politics, trans., T.A. Sinclair, revised and re-presented by Trevor J. Saunders, Penguin Books, 1992, 172.

and represses and damages their potential for learning and development by denying them the possibilities of growth.³⁵

This judgement raises two separate issues. The first is the portrayal of the treatment of children by adults. Even allowing for rhetorical flourish the depiction of adult treatment as arbitrary³⁶, repressive, damaging, and growth inhibiting goes too far. There is no reason whatever to believe that the *general* treatment of children by adults is such. Undoubtedly there are many deficiencies in the practice of even the best parents, as, undoubtedly, many children suffer greatly at the hands of some adults. However, Franklin is making a much more sweeping condemnation: adults generally and systematically oppress children to the point that their lives are significantly damaged. A possible corollary of this judgement is that the majority of adults in the world are radically dysfunctional.

The second issue is the issue of the double standard: Franklin is saying that we cannot treat children and adults differently in the absence of a relevant difference. This is to confuse primary paternalism and metaphorical paternalism; it ignores the affective context of the former and uses metaphorical paternalism as the standard. Paternalism is *prima facie* objectionable in the case of adults precisely because they are *not* children. Paternalism is the appropriate way to treat children because they *are* children; in a sense paternalism is not the issue, the issue is when an individual ceases to be a child so that primary paternalistic treatment is no longer appropriate. The purpose of sincerely co-operative paternalism, or authoritative parenting, in relation to children is not to prevent their making mistakes but to protect them from the more threatening consequences of such mistakes, and to help them to learn from the mistakes.

It is argued that since children are dependent i.e. incapable of 'self-maintenance', they must be looked after by adults who will make paternalistic decisions on their behalf. Now, apart from the apparent tautology, this argument cannot be used to distinguish children from adults since no-one is entirely self-sufficient. Even Mill recognised the interdependency of individuals: echoing Donne he wrote 'No person is an entirely isolated being' and argued that 'it is impossible for a person to do anything seriously or permanently hurtful to himself,

³⁵ Franklin, *The Rights of Children*, 34. His position on this matter makes it all the more surprising that Franklin adopts such a cognitivist and non-participatory view of political action. See chapter 9.

³⁶ *Ibid.*, 3/4. During Erikson's third stage of development (initiative vs. guilt) when parents thoughtlessly exploit the inequality in power between the child and the adult the result is that the child 'comes to feel that the whole matter is not one of universal goodness but of arbitrary power'. Erikson, Erik H., *Identity and the Life Cycle*, New York, Norton and Co., 1994, 84. Harris's rhetoric in the matter of parent/child relations is equally extreme: 'Certainly the idea that children do have a moral obligation to obey their parents and to attend school during the working day is of great utility to adults. Perhaps, though, it would be more realistic to regard this situation as resulting from the exercise of naked power by adults, and to think of the status of children as a consequence of their losing out in the perpetual struggle between the generations in power and the generation seeking power'. Harris, J., 'The Political Status of Children', *Contemporary Political Philosophy: Radical Studies*, Ed., K. Graham, Cambridge University Press, 1982, 45.

without mischief reaching at least to his near connections, and often far beyond them'.³⁷ The notion that adult human beings are, or even in principle can be, self-sufficient is a radical misconception. Human life is social life, it is life made possible and lived only as a consequence of the contributions of others to our well-being. Even the fictional Robinson Crusoe was not self-sufficient for he could not have survived to build a human life for himself without the inheritance of human culture he brought to his island with him. This does not mean just the hardware that he salvaged from his ship (although the tools, materials, and weapons were vital). Of more critical importance was the cultural knowledge that he brought with him, in his language, his rationality, his conceptual schemes, his memories and understanding of human activities.³⁸ He embodied a selection of the concepts and practices of a particular cultural milieu; this was what enabled him not just to survive but to survive in some security and comfort.³⁹ The requirement that children should somehow manifest a high level of self-sufficiency as a prerequisite to not being treated paternalistically, especially in a technologically advanced culture in which mutual interdependence is becoming more critical, is not only too stringent, it betrays a radical misunderstanding of the nature of human existence. No one is totally self-sufficient and the degrees of dependency and self-sufficiency are as gradual and tricky as degrees of maturity or rationality.

Self sufficiency is too vague and runs the risk of including within our definition of permissible paternalism those whom we would not wish to include: those such as the ill, the elderly, the unemployed etc. who although they may require our assistance, give us no reason to suppose that, as a general policy, they should be coerced in their own best interests. ⁴⁰

The notion of 'maturity' is no more helpful in determining a demarcation between children and adults than rationality or self-sufficiency. Since Mill the acquisition of rights has always been associated with the process of maturing. Mill's principle of liberty is meant to apply 'only to human beings in the maturity of their faculties'.⁴¹ Mill tells us that the exclusion of children from the prerogatives of adults ends at 'the age which the law may fix as that of manhood or womanhood' but not before.⁴² The exclusion is justified on the grounds that children must be 'protected against their own actions as well as against external injury' and

³⁷ Mill, On Liberty, 136.

³⁸ While it is 'impossible to conceive of a self arising outside of social experience' when the self 'has arisen we can think of a person in solitary confinement for the rest of his life, but who still has himself as a companion, and is able to think and converse with himself as he had communicated with others'. Mead, George Herbert, Mind, Self, and Society, University of Chicago Press, 1962, 140.

³⁹ We may say that while Crusoe lacked human company he did not lack human community..

⁴⁰ Schrag, F., 'The Child in the Moral Order', Philosophy, 52, 200, 1977, 167-177, 173.

⁴¹ Mill, Liberty, 73.

⁴² *Ibid.* Like Locke, Mill quickly transforms his normative criterion into an institutional one.

on grounds of the general utility of the community.⁴³ So it would appear as if it is the case *not* that children are incapable of choosing and pursuing their own goals but that they will, for some unexplained reason, choose and achieve goals which will in fact endanger them.⁴⁴

The central question however is, what definition can be given to this notion of the 'maturity of faculties'? The central ethical principle in Mill's moral philosophy is the principle of utility, it is 'the ultimate appeal on all ethical questions'.⁴⁵ The right to liberty is to be judged on the basis of its utility, and the exercise of liberty is available only to the individual 'in the maturity of his faculties'. We are entitled to deny liberty where the individual is not 'in the maturity of his faculties' because such an individual is both incompetent to judge what is in his own interest and is incapable of pursuing the happiness of the community.⁴⁶ Such intervention must always have an educational objective involving the 'permanent interests of a man (or woman) as a progressive being'.⁴⁷ So that, with respect to the status of children, Mill argues that the denial of rights and intervention are justified, not only on the basis of communal utility, but also by the development of the child as a 'progressive being'.⁴⁸

The child must undergo a developmental process before he or she can qualify to benefit from the principle of liberty. The child must rely on the authority of adults until she develops her ability to make appropriate judgements in matters related to utility. There are a number of problems with this argument. Firstly, subjecting the child to authority is unlikely to promote autonomy, quite the reverse: at first blush subjection to authority would appear to promise submission and dependency rather than independence and autonomy. Secondly, the meaning of 'faculties' is far from clear: are they purely intellectual ('associating right means with desired goals'), or more general (including imaginative, emotional capacities), do they imply not just the ability to make a judgement, but the ability to carry it through?⁴⁹

⁴³ *Ibid.*.

⁴⁴ Hughes, *The Philosopher's Child*, 19.

⁴⁵ Mill, *Liberty*, 74. It has been pointed out, however, that Mill was not a complete utilitarian but that his works display 'an unresolved tension between utilitarianism and liberalism'. See Nordenbo, Sven Erik, 'Children's Rights, 'die Antipadagogen', and the Paternalism of John Stuart Mill', *Scandinavian Journal of Educational Research*, 31, 4, 163-180, 1987; Habibi, D.A., 'The Status of Children in John Stuart Mill's Theory of Liberty', *Educational Theory*, 33, 61-72.

⁴⁶ Habibi, 'The Status of Children', 64. This article, however, offers little to our understanding of the criterion of 'maturity of faculties'.

⁴⁷ Mill, *Liberty*, 74.

⁴⁸ Kim, Ki Su, 'Mill's Concept of Maturity as the Criterion in Determining Children's Eligibility for Rights', *Journal of Philosophy of Education*, 24, 2, 1990, 235-244, 237.

⁴⁹ *Ibid.* This is analogous to the difference between moral thinking and moral action. See Straughan, R., 'Why act on Kohlberg's moral judgements?', in S. Modgil, C. Modgil, eds., *Lawrence Kohlberg: Consensus and Controversy*, Philadelphia Farmer Press, 1986, 149-161. The distinction is even closer to S.I. Benn's distinction between what he calls 'autoarchy' (the ability to make rational choices) and 'autonomy' (the ability to make and act on rational choices). (Cited in Nordenbo, 'Children's Rights'.)

With regard to the ambiguity of the term 'maturity' Kim identifies a difference between the young (classic utilitarian) Mill for whom 'faculties appear to be purely intellectual or rational and involve determining right means for desired ends', and the older Mill for whom 'maturity in faculties can be construed in a broad sense to include intellectual, moral and aesthetic dimensions'.

In short, maturity in the classical utilitarian sense is specifically intellectual, whereas in the revised utilitarian sense it is overall and total, covering moral and aesthetic as well as intellectual aspects.⁵⁰

Kim considers that despite Mill's equivocal use of the term, 'maturity' was 'nothing more than a landmark dividing the territories of power and powerlessness'.⁵¹

Future oriented consent

According to the liberal view parental intervention is limited by the notion that children will eventually come to see the correctness of the parents' decisions made in their behalf. Dworkin compares paternalistic intervention to a wager⁵² by parents that children, at some point in the future, will come to welcome the constraints which parents now place on their freedom, that is, come to see that the intervention was for their own good or in their own best interests. The retrospective justification requires that we believe that the individual in question will actually come to accept that our decisions were in his best interests. However, not every means available to increase the individual's endorsement of the components of his life is acceptable. 'We would not improve someone's life, even though he endorsed the change we brought about, if the mechanisms we used to secure the change lessened his ability to consider the critical merits of the change in a reflective way'.⁵³ This retrospective justification is 'methodologically dubious', however, since the adult who retrospects is the adult who has been formed as a result of the interventions.⁵⁴

This is a developmental difficulty: the retrospective endorsement might be 'manufactured', that is, the endorsement might be no more than a self-fulfilling prophecy, a function of the formation of the person and their values and standards: 'My parents were right to do as they did because I am the person I am!' There is a further logical difficulty in attempting to justify present actions on the grounds that the person affected by them *might* subsequently

⁵⁰ Kim, 'Mill's Concept of Maturity', 238.

⁵¹ *Ibid.*, 242.

⁵² Dworkin, 'Paternalism', 28

⁵³ Dworkin, Ronald, 'Liberal Community', in Gerald Dworkin, ed., Morality, Harm, and the Law, Oxford, Westview Press, date? 42.

⁵⁴ Campbell, T.D., 'The Rights of the Minor: as Person, as Child, as Juvenile, as Future Adult', in Alston, P., Parker S., Seymore J., eds., Children, Rights and the Law, Oxford University Press, 1992, 21.

endorse them: it means that there is no present way of knowing whether the actions are in fact justified or not.⁵⁵

The future-oriented-consent argument also presents difficulties because it situates the future adult, as well as the present efforts of the parents, in radical isolation from the social milieu in which they live. The parents are not simply 'producing' an individual, isolate human being. They are also, within the context of a given cultural community, reinforcing and contributing to the developmental continuity of that community. The retrospective endorsement depends on whether the individual remains a member of that cultural community or not, or on whether the cultural community has changed radically in relative respects in the intervening period.⁵⁶

A further difficulty is that the method of retrospective judgement does not 'play fair and equally with the interests of the child as they are manifested in the experiences of childhood'.⁵⁷ The crucial consideration appears to be the future adult interests of the individual rather than the present childhood interests. The two are not the same. We can assert present childhood interests without denying that the needs of the future adult should be considered. The retrospective judgement argument gives no status to the present interests of the child at all.

Well-being

Dworkin's concern is entirely future-oriented. He is anxious to ensure that individuals do not make irreversible decisions now (or have them made in their behalf) which would damage their capacity to exercise autonomy in the future. That is, given a commitment to individual autonomy and freedom,

we would be most likely to consent to paternalism in those instances in which it preserves and enhances for individuals their ability to rationally consider and carry out their own decisions.⁵⁸

This is true of both adults and children. Paternalism is justified when goods such as health or education, which contribute to the autonomy and freedom of the individual, are promoted

⁵⁵ For a discussion of the moral and epistemological problems involved in using possible future events to justify present decisions see: Elliott, Robert, 'The Rights of Future People', *Journal of Applied Philosophy*, 6, 2, 1989, 159-169; de-Shalit, Avner, 'Community and the Rights of Future Generations', *Journal of Applied Philosophy*, 9, 1, 1992, 105-115; Marshall, Peter, 'Thinking for Tomorrow: Reflections', *Journal of Applied Philosophy*, 10, 1, 1993, 105-113.

⁵⁶ Many who were raised in the repressive and punitive ethos of Irish Catholic schools and society in the 1950's for example would certainly hesitate to endorse the way they were treated as children without any loss of affection for parents and teachers who, in most cases, did what they thought was best according to the mores of the time. There were of course occasions when children were abused by parents, teachers, and other carers even by the standards of the time.

⁵⁷ Campbell, 'The Rights of the Minor', 21.

⁵⁸ Dworkin, 'Paternalism', 31, 33.

even when they are not recognised as beneficial at the time by the individuals concerned. 'At one level therefore, paternalism seems to treat others as means (with the important difference that it is a means to their ends, not ours).⁵⁹ In the case of primary, or parental, paternalism, however, this distinction is not so clear or so easy to make. The child's ends are, for a long period of childhood, identical with the parents' ends. The parents have a comprehensive conception of the good life which they believe to be most valued inheritance they can give to their children. The parents' aspiration is to raise the child so *that* the parents' conception of the good life becomes the child's, not just for the child's sake, but also for the sake of the continuity of that conception of the good life which is central to the parents' self-definition and identity. Even on a liberal account, a significant part of the parents' expression of autonomy is their right, subject to minimum limits of care and to protecting the future autonomy of the child, to initiate their children into their own cultural community.⁶⁰

In many cases over-ruling the present interests of the child in the interests of the future adult is only an apparent conflict: they are not two different people. The child who is required to visit the dentist, even though she does not want to, is the same person as the adult who will suffer toothache if her teeth are neglected.⁶¹ It is part of the point of bringing her to the dentist that she learns the consequences of good oral hygiene so that as a child and an adult she may enjoy an improved standard of well-being. This is not to say that *any* intervention on the part of the parent is justified. The burden of proof for intervention ought always to be on the intervenor and the test must be whether, on balance of probability, and to what degree, the intervention is likely to lead to an improved standard of well-being now *and* in the future.⁶²

⁵⁹ Dworkin, Gerald, 'Paternalism: Some Second Thoughts', Sartorius, Paternalism, 107.

⁶⁰ See McLaughlin, 'Parental Rights'. This is not a view shared by all liberals some of whom do not scruple to advocate the imposition of a liberal education. See Nino, Carlos Santiago, The Ethics Of Human Rights, Oxford, University Press, 1991, Appendix i, 299-300, 'The principle of personal autonomy requires that the state provide across society a liberal education which puts minors in contact with the most diverse conceptions of the good so as to enable them to choose freely when reaching "the age of reason" ...'; also Kolakowski, Leszek, 'On the Practicability of Liberalism: What About the Children?', Critical Review, 7, 1, 1993, 1-13, argues that a liberal society must educate its young, and this means engendering liberal principles in them. "(T)he civic virtues on which the viability of the liberal state depends are not simply born spontaneously; they demand a type of "indoctrination". A perfectly neutral liberal state is unviable'; also Gutmann, Democratic Education, in which she argues for mandatory education embodying the principles of nonrepression and nondiscrimination irrespective of parents' actual comprehensive conception of the good life. Her views are challenged, especially her 'contestable, value-laden conception of autonomy', in Gilles, Stephen G., 'On Educating Children: a Parentalist Manifesto', The University of Chicago Law Review, 63, 3, Summer, 1996, 937-1034, 938.

⁶¹ I am aware that this is a naive metaphysical view. If people did not believe in this continuity then it would raise serious questions regarding the point of education. For a full discussion of the persistence of human identity see Parfit, Derek, Reasons and Persons, Oxford, Clarendon Press, 1992, Part 3.

⁶² '(T)he lawyer for a child really has two clients: the child today, and the future adult whose life will be irrevocably changed by the decision in which the lawyer is involved. The lawyer must consider the interests of "both" clients.' Margulies, 'The Lawyer as Caregiver', 1491n.

Rationality

It is necessary to say more about rationality since it is so often invoked as a distinguishing feature between adults and children.

Rationality is too imprecise a notion on which to base a distinction: for possession of rationality excludes some adults as well as some children from the benefit of the liberal principle. It also begs the question as to when rationality is achieved or the requisite 'quantity' of rationality accomplished. Even as this question is addressed it raises another: we have no warrant that the individual designated as rational will actually behave rationally in all (or even in any) situations. There appears to be a tacit moral requirement that rational people *ought* to behave rationally and be able to distinguish those situations where and when a rational calculus is appropriate. Furthermore we expect that they will know what the appropriate response is and be able to act accordingly with some competence.⁶³ It could be built into our definition of rationality that 'being rational' requires that we behave rationally on all appropriate occasions: those who don't are not rational in the required sense. But there is a feeling of interminable circularity about such a position. In addition we know, we must know because it is an integral part of human experience, that at many of the most crucial decision points in our lives we do not necessarily act rationally at all: making friends, falling in love, having children, supporting our team, choosing a career, etc. Very few of our decisions rest on purely rational considerations.

There is no clarity in, nor is there any universally agreed operational definition for, the notion of 'rationality'. Dworkin, for example, writing about the exclusion of children from the liberal principle, tells us that

what justifies us in interfering with children is the fact that they lack some of the emotional and cognitive capacities required in order to make fully rational decisions.⁶⁴

It is not clear what these emotional and cognitive capacities might consist of: they certainly include 'an adequate conception of present and future interests' (cognitive), the capacity to significantly defer gratification (emotional), and the 'very real and permanent dangers which may befall' children. Such uncertainty of meaning raises difficult problems for anyone who wishes to distinguish between children and adults. For either rationality is a simple notion or it is complex. If it is a simple notion and if we accept, for example, a performative cognitivist definition of rationality (such as the ability to solve certain kinds of intellectual problems) then it will be easy to identify and easy to measure. If, on the other hand, as

⁶³ There is a similarity between the limitations of an undefined rationality and the learning of morality. See Straughan, 'Why act on Kohlberg's moral judgements?'.
⁶⁴ Dworkin, 'Paternalism', 28.

Dworkin appears to be suggesting, it is complex, comprising emotional as well as cognitive capacities and also being affected by extraneous contingencies, then the prospect of arriving at an unproblematic operational definition appears to recede in proportion to the complexity.

At some points Locke appears to consider a gradualist, developmental approach to the acquisition of reason: 'age and reason as they grow up loosen (the bonds of the parental subjection) till at length they drop quite off, and leave a man at his own free disposal'.⁶⁵ He advocates reasoning with children⁶⁶

(W)hen I talk of reasoning, I do not intend any other but such as is suited to the child's capacity and apprehension. No body can think a boy of three or seven years old should be argued with as a grown man. Long discourses and philosophical reasonings, at best, amaze and confound, but do not instruct children. When I say, therefore, that they must be treated as rational creatures, I mean, that you should make them sensible, by the mildness of your carriage, and the composure even in your correction of them, that what you do is reasonable in you, and useful and necessary for them; and that it is not out of *caprichio*, passion or fancy, that you command or forbid them anything.⁶⁷

What Locke advocates is closer to a concept of reasonableness than it is to a concept of rationality. Not only should children be given only 'such reasons as their age and understanding are capable of'⁶⁸ (an eminently *reasonable* principle) but he opposes the use of 'reasonable' to '*caprichio*, passion or fancy', not, as one would expect if he was advocating a purely cognitivist rationality, to 'irrational' or 'non-rational'.

Rationality has been suggested as a criterion for deciding whether a person is suitable subject for paternalist intervention and as a demarcation between adult and child because 'a rationally selected action has a greater chance of increasing the agent's stock of good than an action which has not been rationally considered'.⁶⁹ This depends on what one means by a 'stock of good'. Purely rational calculation may indicate ways in which I may, for example, increase my personal wealth but only at the cost of my personal relations. How does one rationally choose between these outcomes? What we need is a *reasonable* consideration of the alternatives in terms which are broader, but less liable to quantification and logical analysis, than in a purely rational approach.

Scarre proposes what he calls a 'reasonable rule' for paternalist intervention:

⁶⁵ Locke, 'Paternal Power', 243.

⁶⁶ Locke, John, Some Thoughts Concerning Education, Cambridge, University Press, 1899, 60/1.

⁶⁷ *Ibid.*, 60/1.

⁶⁸ *Ibid.*, 61.

⁶⁹ Scarre, G., 'Children and Paternalism', Philosophy, 55, 1980, 123.

the paternalist should intervene in an individual's affairs only when there is reason to believe his decisions are not based on *rational considerations*, and that they are likely to result in a diminution of his stock of existing good, or under-achievement of his possible stock of good.⁷⁰

Who is to decide, and what are to be the criteria, on what is one's 'stock of existing good' or 'possible stock of good'? And if 'rational considerations' are to be the sole, or even primary, criteria where does this leave those whose decisions are taken on the basis of religious belief, political commitment, aesthetic preferences, personal affection? If 'rational' means a narrow calculation of what is in one's immediate self-interest then these other considerations have no force. To suffer or die for one's lover, friend, people, country, beliefs is not a rational action.

Harris acknowledges that many personal decisions are not made on rational grounds and that of those which are, many are not good decisions.⁷¹ He refers to Scarre's two hallmarks of rationality: rational actions are those which aim at maximising the utility of the agent, and they are part of a systematic approach.⁷² Harris rightly notes that this is really one test 'since acting rationally and being a utilitarian with respect to one's own good turn out to be one and the same'. He continues 'I am unhappy with Scarre's narrow account of rationality which seems to make self-sacrifice, lack of competitiveness, and modesty, etc., irrational'.⁷³

Hobson⁷⁴ suggests that the three 'essential elements' rational decision making are

being able to decide what are one's goals or where one's interests lie, knowing the means towards achieving these goals or realizing these interests, and knowing how to act accordingly given one's own particular capacities.⁷⁵

Those who would be unable to achieve these minimal conditions for rational choice (i.e. knowledge of one's interests, knowledge of effective means, competence in implementing the means) include those who are too young to understand the issues involved; those who are temporarily excluded because of temporary mental disturbance; those who are permanently mentally deficient. A further source of disqualification would be ignorance of the facts of the particular case.⁷⁶

⁷⁰ *Ibid.*, 123 (emphasis added).

⁷¹ Harris, 'The Political Status of Children', 40.

⁷² Scarre, 'Children and Paternalism', 123/4. By these criteria a squirrel hoarding nuts is rational.

⁷³ Harris, 'The Political Status of Children', 40.

⁷⁴ Hobson, Peter, 'Another Look at Paternalism', *Journal of Applied Philosophy*, 1, 2, 293-304.

⁷⁵ *Ibid.*, 297.

⁷⁶ Are we ever assured of possession of all of the facts in particular cases?

It should be noted that the elements in Hobson's definition are hierarchical: given knowledge of the facts one must know one's goals or interests before the question of the means is appropriate, one must know the relevant means before the question of taking action is appropriate, and one must be in a position to take suitable action given a knowledge of one's relevant capacities. So rationality involves knowledge of the relevant facts, knowing one's interests, being able to discern means/ends relations, liberty, and the capacity to act. It is far from being a simple criterion.

Rational and reasonable

A less stringent criterion, and one which is closer to the realities of human experience, may be reasonableness. The development of the capacity of reason takes two forms: rationality and reasonableness. These are not the same. Rationality is the ability to calculate the cause and effect relations between things - quantities, events - and is quite independent of the value of the things in themselves. Even very small children are capable of *some* rationality. The prudential behaviour of a four-year-old who refrains from a particular course of action because she anticipates an unpleasant outcome can be legitimately described as *rational* behaviour: it is certainly behaviour based on a logical and calculating thought process. If this is rational behaviour then we must ask: how much rationality is required to qualify as a competence criterion? We are not, at present, in possession of a comprehensive calculus of rationality (whether we ever shall be is another question) which would enable us to quantify it.⁷⁷ But, even if we were, where would we draw the line between sufficient or insufficient rationality without begging the perennial question of the adult/child distinction? Or is there some critical point at which one simply *is* rational? That is, is there a sudden qualitative change from non-rational to rational analogous to the transformation of water into steam? (This appears to be implied in traditional doctrines of *age of reason*.) Developmental theories such as Kohlberg's, however, show that 'pure' rationality (the development of universal ethical principles) does not ever fully displace 'lower' forms of motivation and justification.

We have seen that cognition and language are closely linked. Children are born with a *capacity* for language and for non-verbal thought. This does not mean that they are born *with* a language but that they are sufficiently equipped, physiologically and cognitively, to acquire a language. From their earliest age infants manifest this capacity in their vocal behaviour. Left to their own devices, however, children would not progress to the mastery of speech in any language, for human language is a social phenomenon and can be mastered only in a linguistic environment. In an analogous way children are born with the

⁷⁷ I do not consider IQ tests as tests of rationality *per se* although they may be a significant move in the direction of such a test.

capacity to reason. It is only through the social interaction of thought and language, and the internalisation (or appropriation) of public, interpersonal communication that the child becomes capable of structured thinking.⁷⁸

The calculations of the young child may be erroneous and his predictions mistaken, but even mistaken calculation is still calculation. The small child can reason (even if the reasoning is faulty) in the same way as a young child can speak (even if the utterance is grammatically flawed, syntactically incorrect, or factually untrue). Human development is a matter of learning the appropriate application of the power of reason as it is a matter of learning the appropriate application of the power of speech.

Scientific rationality, which is the dominant paradigm in industrialized societies, is not the only legitimate form of rationality. Any thought process which involves a calculation of the optimum cause/effect relation within a given cultural belief set is a rational calculation.⁷⁹ Western rationalism has appropriated the notion of rationality so that thought processes which do not conform to the scientific rationalist paradigm are considered to be *irrational* thought rather than an alternative form of rational thought. So although we do not any longer consider placing dishes of smoking meat in designated situations at appropriate times to be rational behaviour, within the context of a different belief set it is a calculated effort to influence events and hence, within that belief set, rational.⁸⁰ Just as we learn our specific language from within the context of our own linguistic community we learn our rationality from within the belief set and practices of our own community.

Rational behaviour is just adaptive behaviour of a sort which roughly parallels the behaviour, in similar circumstances, of the other members of some relevant community. Irrationality, in both physics and ethics, is a

⁷⁸ See An Introduction to Vygotsky, Harry Daniels, ed., London, Routledge, 1996, especially Daniels, Harry, 'Introduction: Psychology in a Social World', 1-27, and Minick, Norris, 'The Development of Vygotsky's Thought: an Introduction to Thinking and Speech', 28-52.

⁷⁹ See Evans-Pritchard, E.E., Witchcraft, Oracles, and Magic Among the Azande, abridged, Introduction by Eva Gillies, Oxford, Clarendon Press, 1976, and Polanyi, M., Personal Knowledge: Towards a Post-Critical Philosophy, 2nd. edition, London, 1962, 286-292 for an account of the internal consistency and rationality of Zande beliefs. Taylor (Taylor, Charles, Philosophical Papers Part 2: Philosophy and the Human Sciences, Cambridge, University Press, 1985, 134-151) argues that other cultures cannot be accused of irrationality (it 'seems a foolish as well as an arrogant thing to say') but we can at the same time argue that the consequences of our form of rationality are superior in effect to others' in that they deliver a superior form of life (in particular control over the forces of nature).

⁸⁰ The predominant world-view in modern industrial societies is the naturalistic world-view which is the basis of science. Differences in world-view are not due 'to qualitative differences between the working processes of the mind'. On the contrary, 'the kind of logic in mythical thought is as rigorous as that of modern science'. Levi Strauss, C. Structural Anthropology, Jacobson and Schoepf, trans., New York, 1963, 230. It is not that the thought process of the naturalistic conceptual framework are superior to others (for what does 'superior' mean in this context?) but that it is preferable to others in that it 'opens up such a noble vista of the natural order of things ... and establishes so much more decent and responsible relationships between human beings.' Polanyi, M., Science, Faith, and Society, 2nd. edition, London, 1964, 26. Alternative conceptual frameworks lead to less human and less responsible life-views.

matter of behaviour that leads one to abandon, or be stripped of, membership in such a community.⁸¹

The question of which version of rationality is *better* makes as little sense as asking which is the better natural language. We may say that the way of life represented by a particular belief set (with a concomitant form of rationality) is *preferable* to another. But in either case there is a rationality appropriate to the belief set in question. So the choice is not between rationality and *irrationality* but between different forms of rationality, or between what is rational and what is reasonable.

Ryle⁸² has argued that philosophers have adopted a narrow exclusionary conception of thinking (rationality) which is not true to the reflective life of ordinary individual men and women. The scholar's theoretical reason has no cause for precedence over the practical reason of everyday life. Theoretical reason is, in Ryle's words, 'thinking that has achieved a sort of autonomy'.⁸³ It is more methodical, has stricter standards of rigour and evidence, is more general and objective; it has, in short, its own disciplines. Our tendency to equate rationality with logical reasoning is inadequate. Even the professional scholar (whatever her discipline) manifests more intellectual virtues than logical rigour.⁸⁴

The preoccupation of philosophers with theoretical reasons or justifications has often induced them to treat practical reasons and justifications as mere varieties or off-shoots of theoretical reasons, as if all scruples and all carefulness reduced, somehow, to theorists scruples and theorists carefulness.⁸⁵

The rational is distinct from the reasonable.⁸⁶ People are rational insofar as they use powers of deliberation and judgement in pursuing their own ends and interests: rationality determines how the ends and interests are selected, adopted, affirmed, and prioritized. The rational selection of means is guided by beliefs about the effectiveness of means to ends.

⁸¹ Rorty, Richard, 'Postmodernist Bourgeois Liberalism', *Journal of Philosophy*, 80, 10, 1983, 586. Williams refers to the 'rationalistic conception of rationality' which 'comes ... from social features of the modern world, which impose on personal deliberation and on the idea of practical reason itself a model drawn from a particular understanding of public rationality. This understanding requires in principle every decision to be based on grounds that can be discursively explained'. (Williams, Bernard, *Ethics and the Limits of Philosophy*, Fontana Press, 1985, 18.)

⁸² Ryle, G., 'A Rational Animal', in R.F. Dearden, P.H. Hirst, R.S. Peters, eds., *Education and the Development of Reason*, London, Routledge & Kegan Paul, 1972, 176-193.

⁸³ *Ibid.*, 188

⁸⁴ *Ibid.*, 191

⁸⁵ *Ibid.*, 192. In the same volume Black (Black, Max, 'Reasonableness', in R.F. Dearden, P.H. Hirst, R.S. Peters, eds., *Education and the Development of Reason*, London, Routledge & Kegan Paul, 1972, 194-207) takes 'rational' to be 'a mere stylistic variant' upon 'reasonable'. (194) That he is mainly concerned with 'rational' as I understand it is evident from his conclusion that 'A man will be acting reasonably to the extent that he tries to form a clear view of the end to be achieved and its probable value to him, assembles the best information about available means, their probable efficiency and the price of failure, and in the light of all this chooses the course of action most strongly recommended by good reasons'. 205.

⁸⁶ Rawls, John, *Political Liberalism*, New York, Columbia University Press, 1993, 48-54

Nothing in the notion of rationality debars the rational agent from having interests or affections other than the self i.e. rational agents are not necessarily purely self-regarding (although they may be) or self-interested. What the *purely* rational agent lacks, however, is

the peculiar form of moral sensibility that underlies the desire to engage in fair co-operation as such, and to do so on terms that others as equals might reasonably be expected to endorse.⁸⁷

Reasonable people are prepared to engage in dialogue with others about the principles and standards which might constitute fair terms of co-operation between them; they are prepared to abide by agreed principles and standards if they are assured that others will do the same. They are prepared to discuss others' proposals regarding fair terms and to see others' points of view and give them fair consideration. They are motivated by the notion of 'a social world in which they, as free and equal, can co-operate with others on terms all can accept'.⁸⁸ To engage in co-operative schemes only insofar as it suits one's own interests is rational, not reasonable. Similarly, to be prepared to violate fair terms whenever it is in one's interests is rational calculation, not reasonableness.

The reasonable is not derived from the rational (although Rawls thinks it may not be possible to prove this): they are complementary ideas.

Merely reasonable agents would have no ends of their own they wanted to advance by fair co-operation; merely rational agents lack a sense of justice and fail to recognise the independent validity of the claims of others.⁸⁹

The reasonable is public in a way the rational is not. It is through reasonableness that we engage with others as equals and 'stand ready to propose, or to accept, as the case may be, fair terms of co-operation with them'.⁹⁰ Being reasonable is being prepared to work out an agreed 'framework for the public social world'. It is reasonable to expect that such a framework will be endorsed and acted on by all, provided we can rely on others to do the same.

Reasonable disagreement⁹¹ results from a number of causes: the complexity of the evidence relevant to any particular case, the weighting we attribute to this evidence even when we agree on its relevance, the indeterminacy of our political and moral concepts, the difficulty of choosing between conflicting normative considerations on both sides of an

⁸⁷ Rawls, Political Liberalism, 51

⁸⁸ *Ibid.*, 50.

⁸⁹ *Ibid.*, 52.

⁹⁰ *Ibid.*, 53. Buber's 'instinct for communion' which is the essential prerequisite for 'sharing in an undertaking and ... entering into mutuality' (Between Man and Man, 113) is substantively related to reasonableness rather than rationality.

⁹¹ There appears to be no possibility of *rational* disagreement given the acceptance of shared axioms and mutually accepted procedures. Dissent in such cases can only be irrational. Given the premises of the classical syllogism I cannot deny that Socrates is a man without being irrational (or, at least, arational.)

issue, the reality that we are necessarily confined to a selection of all the possible moral and political values that might be realized. For present purposes however, the most important consideration is that

the way we assess evidence and weigh moral and political values is shaped by our total experience, our whole course of life up to now; and our total experiences must always differ. Thus, in a modern society with its numerous offices and positions, its various divisions of labour, its many social groups and their ethnic variety, citizens' total experiences are disparate enough for their judgements to diverge, at least to some degree, on many if not most cases of any significant complexity.⁹²

Taking this distinction as a starting point what can we say about the relationship between rationality and the child/adult demarcation?

In the first place rationality is purely a matter of calculation regarding ends and means. It can be either a purely self-interested calculation or a calculation regarding social utility. In either case it does not require consulting the views of others, it is sufficient that it is consistent with its own premises. On this view a small child can be rational and a utilitarian of the ethical hedonist stripe. A small child can make a rational prudential judgement (albeit in limited circumstances) regarding the balance of (her personal) happiness over unhappiness.

Even a more rigorous and precise definition of rationality (Piaget's for example) lacks relevance to the kind of competence we require for ordering our affairs in the social world.⁹³ Anyway we know that some adults do not ever reach the final stage in the Piagetian scheme of cognitive development: the stage of formal operations. What are we to do with them? The concept of 'rationality' itself cannot provide us with a clear answer. Perhaps a 'clear' answer is not possible but a conception of reasonableness which connects with such things as sympathetic moral engagement, knowledge, understanding, autonomy, and moral responsibility, provides a more promising standard of difference since each of the components listed requires developmental time and accumulated experience before they can be collectively deployed in relevant ways.

What is to count as paternalism

Hobson⁹⁴ proposes five conditions which must be met if an action is to count as paternalism. A is acting paternalistically toward S if and only if A's behaviour (correctly)

⁹² Rawls, *Political Liberalism*, 56/7

⁹³ For a fuller discussion of the meaning of rationality in relation to educational objectives see Michael Bonnett, *Children Thinking: Promoting Understanding in the Primary School*, London: Cassell, 1994.

⁹⁴ Hobson, 'Another Look at Paternalism'. His analysis of the conditions for paternalism follows Gert, B., Culver, C.M., 'Paternalistic Behaviour', in Cohen, M., Nagel, T., Scanlon, T., eds., *Medicine and Moral Philosophy*, New Jersey,

indicates that A believes that: (1) his action is for S's good; (2) he is qualified to act on S's behalf *or*⁹⁵ he is in a better position than S to promote the latter's interests; (3) he is justified in acting on S's behalf independently of S's past, present, or immediately forthcoming (free, informed) consent; (4) his action involves violating (or doing that which will require him to violate) S's rights in some way;⁹⁶ (5) S believes (perhaps falsely) that S generally knows what is for his own good.

How does this apply to the parent-child relationship, the relationship of primary paternalism? Most parents sincerely believe (most of the time) that they are acting in the best interests, of their child. So the first condition is met. They further believe that they are qualified (in terms of obligation, competence, and experience) to act in behalf of the child as well as being in a better position than anyone else to promote the child's interests. So the second condition is met. Certainly parents sincerely believe that they are justified in acting in their child's behalf independently of whether the child has given, is giving, or will eventually give (free, informed) consent to the present restriction or intervention. For the future oriented consent argument is not decisive. Parents act in the *hope* (Dworkin's wager) that their child will grow up to be the kind of adult who will give retrospective assent to their present actions. Whether, in the event, the child does so or not cannot be relevant since the rightness of present decisions must be decided now. So the third condition is met.

However neither the fourth nor the fifth conditions are relevant to the parent-child relationship. Parents do not believe that their intervention in behalf of the best interests of their child involves violating a moral rule (or doing that which will require the violation of a moral rule). On the contrary, the parental obligation of care for the child is *itself* the relevant moral rule in the circumstances. This is one crucial difference between primary paternalism and metaphorical paternalism. Hobson's qualification that the action involves violating (or doing that which will require the violation of) the child's rights poses a problem, however. It can be argued that the purpose of the parental intervention is to fulfil the welfare rights of the child, so that the question of violation does not arise at all. To consider the parental intervention a violation of the child's freedom rights actually begs the question as to whether the child has such rights independently of the parental obligations. For the crucial dilemma in relation to the freedom rights of children is whether (and if so when) the child's putative freedom rights over-rule the parental obligation to treat the child paternalistically.

Princeton University Press, 1981, with one 'amplification' and one 'qualification'. I have changed the ordering of these conditions to suit the present argument.

⁹⁵ This is Hobson's amplification.

⁹⁶ This is Hobson's qualification. Originally this read 'his action involves violating a moral rule (or doing that which will require him to do so) with regard to S'. Hobson later declares that 'paternalism as it is most commonly understood (...) always involves a violation of human rights and thus directly or indirectly harms the subject in some way'. Hobson, 294.

The notion that in imposing requirements on their children parents are in some way violating a liberty is strange. Certainly it could not be consistently argued that parents who take their infant child on their choice of holiday are violating any liberty, for the child has no power of choosing an alternative. This is not because the child has been denied that power by scheming parents but because the relevant power has not yet been developed. Similarly it would be nothing short of perverse to suggest that parents are violating a liberty by obliging their child to acquire an education (by attending school, say). What 'liberty'? What are the alternatives? While there have been approaches to limit the imposition of compulsory formal schooling⁹⁷ or state schooling⁹⁸ I am not aware of any conclusive argument that parents should refrain from requiring their children to acquire an education altogether.⁹⁹ In general parents are aware that if they are to enhance their children's capacity for liberty and the concomitant capacities (knowledge, understanding, responsibility, deferral of gratification) some form of prolonged educational experience is necessary.

The fifth condition might be used to mark the beginning of the child's transition to adulthood. It is arguably part of the definition of autonomy and freedom that the individual comes to believe that he generally knows what is for his own good. This belief may be short-sighted, ill-informed, irrational, and unreasonable but none-the-less it is a belief that generates consistent self-directed activity on the part of the individual.

Given his analysis Hobson suggests two criteria which are 'jointly necessary and together sufficient' if paternalism is to be justified. These are that

- (i) the subject is not able to make a rational decision about his own best interests by virtue of some special feature about him which prevents rational deliberation in the case in question, or he is ignorant of relevant facts;
- (ii) the paternalistic interference is necessary to avoid serious harm befalling the subject and the harm thus avoided outweighs any harm (loss of liberty etc.) brought about by the interference.¹⁰⁰

The first criterion is certainly met in the case of infants or very young children and arguably even in the case of adolescents but it should be added that with the effects of an

⁹⁷ Illich, Ivan, Deschooling Society, Penguin Books,

⁹⁸ There is a wide range of apologies in favour of private schooling (see Gilles, 'On Educating Children', 937-1034) and home schooling.

⁹⁹ Although Gutmann uses the possibility that they might as a hypothetical case. See Gutmann, A., 'Children, Paternalism and Education: a Liberal Argument', Philosophy and Public Affairs, 9, 4, 1980, 338-358. But see Nordenbo, Sven Erik, 'Against Education', Journal of Philosophy of Education, 30, 3, 1996, 401-413, which outlines and analyses the ideas of the Movement Against Education (*die Anti-Pädagogik*). It is suggested that the Movement is a critique of the conduct of formalised education rather than a proposal of a sustainable alternative.

¹⁰⁰ Hobson, 'Another Look at Paternalism', 297

appropriate educational experience rationality and reasonableness (under some description) is increasing (this, after all, is the point of education) and ignorance of relevant facts is diminishing. An educational enterprise may be criticised in terms of its failure to bring about these results but the fact that some educational enterprises may fail in this programme of increasing rationality and reducing ignorance does not refute the central point. Parents *coerce* their children (and states coerce parents to coerce their children) to undergo education in the belief that the experience will maximise their opportunities to live more rewarding and satisfying lives. They know certainly that the absence of such experience will inevitably reduce their children's future well-being significantly.

The second criterion appears to be fulfilled when the harm to be avoided by the paternalistic intervention outweighs the harm that may be caused by it.¹⁰¹ The problem with this criterion is its vagueness; it provides no operational definition to guide substantive decisions in individual cases. How, and according to what values, are we to compare alternative harms, for example? Where the two conditions are 'clearly satisfied it could even be argued that the use of paternalism would not only be legitimate but morally obligatory'.¹⁰² How can this be reconciled with the notion that paternalism always involves the violation of a human right (condition 4)? Rights are very strange things indeed if they can be over-ruled by a moral obligation to the individual claiming the right.

It would be more correct to say that in the case of children there is no moral or rights violation and that the issue of a conflict between the freedom of the child and the obligations of the parent do not become sharply defined, other things being equal, until adolescence. It is at this point that the individual's claim to know what is best for him or herself begins to come into overt conflict with the primary paternalism of the parents.

Hobson's analysis illustrates at least one anomaly which arises when metaphorical paternalism is taken as the paradigm case. The context within which primary paternalism operates is not the same as its metaphorical derivative. His analysis appears to be correct in relation to paternalistic intervention in the lives of other adults. Such intervention does indeed conflict with their presumptive right to make their own decisions and to plan their own lives. But there are no such presumptive rights in the case of infants or children before adolescence. On a wide range of criteria (rationality, reasonableness, knowledge, understanding, experience, maturity) they lack the capacity to form a life plan for themselves. There is no infringement of right or liberty since liberty has not yet been established (that is, consistently asserted). By taking metaphorical paternalism as the starting point and presuming it to be sufficient to cover all cases we create the problem of

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*, 301.

trying to justify paternalism towards children in the same terms as we justify it in the case of adults. This entails presuming rights and liberty in the case of children where they do not (yet) exist.

A related feature of this approach is that it completely ignores the affective context of primary paternalism. Parents do not simply operate out of a sense of duty or moral obligation with regard to their children. This is not to say that they do not have duties and moral obligations. They have, of course, but these become manifest as such only when the normal context of loving care is absent or deficient in some way.

The conclusion that there is no clear distinction between children and adults which will unproblematically justify paternalism in the case of the former without at the same time making it less controllable in the case of the latter appears inevitable only when we take metaphorical paternalism as the standard case. This leads inevitably to subjecting children to the same considerations as adults, considerations which are not relevant to children (at least until adolescence) because they are *not* adults. It is important that, in all matters relating to primary paternalism, we remember that children are not adults, that paternalism is the natural form of parental relation to the child, that the purpose of the primary paternalism is to promote the development of the child's well-being (including autonomy), and that metaphorical paternalism is parasitic on primary paternalism. When we begin with a consideration of metaphorical paternalism, as if *it* were the paradigm case then we have difficulty justifying the distinctions necessary in dealing with children. If, however, we begin (as we logically should) with primary paternalism then the distinctions are already reflected in the difference between children and adults.

Is the paternalist dilemma irresolvable?

Schrag¹⁰³ does not want to argue *against* paternalistic intervention in the case of children: he wants a criterion or principle which will allow us to justify paternalistic intervention in the case of children while not opening the door to such intervention in the case of adults.¹⁰⁴ He attempts a defence of current arrangements. The purpose of these arrangements, he believes, is the utilitarian maximization of human happiness. Those with 'some experience and understanding of the world' are more likely to be the best judges of what will make them happy. Those whose understanding and experience is limited are less likely to be the best judges of what will make them happy.

¹⁰³ *The Child in the Moral Order*.

¹⁰⁴ He appears to have forgotten the 'moral distortion' which he claims paternalism in relation to children represents in the human moral order. *Ibid.*, 169.

In the case of children the chances of their achieving happiness if left to pursue their own good in their own way are slim. They must submit for a time to the paternalistic rule of others.¹⁰⁵

It is an easy move from this declaration to accepting that the establishment of a precise point of transition between childhood dependence and adult autonomy 'can safely be left to convention'.¹⁰⁶ Schrag is not happy with his 'solution':

If the freedom of some may justifiably be limited by others under certain circumstances may not our freedom be justifiably limited in analogous circumstances? So the spectre of extensive paternalism beyond childhood will continue to haunt us.¹⁰⁷

Reed and Johnston are critical of Schrag because he simply offers a 'new argument for the traditional view, whose incoherence and arbitrariness he himself exposes',¹⁰⁸ that paternalism is acceptable in the case of children and unacceptable in the case of adults. They conclude that 'the problem is not with the traditional arguments but with the tradition itself'. What is distorted in the traditional account is 'the fact that, from a *very early age*, children have *essentially* the same rights as adults; and what it conceals is the failure of Western morality to provide for those rights'.¹⁰⁹

This is not an argument. As is so often the case in liberationist rhetoric it is a declaration. It is, as so many such declarations are, characterised by vagueness where we might reasonably expect specificity. We are given no real indication as to what a *very early age* might be, nor an explanation of the coyness of the phrase '*essentially* the same rights as adults'. The phrase 'a very early age' on its own is so vague as to be useless. It is worse than useless: its rhetorical force is to mislead us into thinking that there *is* an unproblematic 'very early age'. Given that the span of childhood as conventionally defined goes from birth to eighteen 'a very early age' might be any time from birth to ten, twelve, or fourteen.¹¹⁰ When excluded categories of adults demanded that they be treated in a fashion similar to white males they sought *the same rights* as white males, not the more vague '*essentially* the same rights'. It is important for liberationists to leave this vagueness, however. For, on the one hand they would not wish to demand equal rights for some categories of children (infants, say) or certain rights (such as equal access to alcohol, powerful cars, freedom not

¹⁰⁵ *Ibid.*, 174. This is not a solution to the problem. The *problem* is to find a morally relevant principle of differentiation between children and adults which will justify paternalistic intervention in the case of the former without threatening the freedom of the latter. It is not a solution to declare that there *is* one. And anyway how does this differ from the classic Millsean position?

¹⁰⁶ *Ibid.*, 175.

¹⁰⁷ *Ibid.*, 176.

¹⁰⁸ Reed, T.M., Johnston, P., 'Children's Liberation', *Philosophy*, 55, 1980, 263/4.

¹⁰⁹ *Ibid.*, 266 (emphasis added).

¹¹⁰ Would fourteen be 'a very early age' to give children the vote, the right to marry, enlist in the army, drive high-powered motor-cycles, and so forth?

to be coerced to attend school) for most categories of children. On the other hand by refusing to be specific with regard to age or individual rights they can avoid the difficult issue of drawing the line that Spencer, their intellectual predecessor, called for. Those who

maintain that whilst children have certain rights, their rights are not equal with those of men, are called upon to draw the line, to explain, to define. They must say what rights are common to children and adults and why. They must say where the rights of adults exceed those of children, and why.¹¹¹

Wikler addresses Schrag's dilemma in terms of the treatment of the mentally retarded. If we (the 'normal' people of the world) feel that we are justified in paternalist action towards the mentally retarded then, by whatever justification we care to use, those who are intellectually superior are similarly justified in paternalistic action towards us. This point is directly relevant to the adult/child dichotomy.

It would seem that if the intellectual superiority of normal persons legitimates their controlling the decisions of the mildly retarded, the same difference in intellect would justify their being regulated by the gifted. Our right to self-direction, however, is a right to be free from constraint by any person ... even when our decisions are poor, and when others happen to know better. We are in the position, then, of using relative intellectual superiority as our rationale for regulating the retarded, while rejecting the possibility of the same rationale being imposed upon us. Unless the apparent inconsistency is resolved, we shall have to either find new foundations for our paternalistic policy towards the mildly mentally handicapped or abandon it.¹¹²

What would be the effect of substituting 'adult' for 'normal persons' and 'child' for 'mildly retarded', 'mentally retarded', or 'retarded' in this passage? We would see at once that Wikler is referring to a category of *adults*. If we were to extend his argument to children it would be illicit since they are *not* adults.¹¹³

We must always leave open the possibility of an adult's *needing* our paternalistic intervention. Though we might agree that most adults are the best judges of their own interests it is in the definition of the *most* that the trouble arises. Under what circumstances are we entitled - or even morally obliged - to intervene in the affairs of an adult in a paternalistic way? We cannot say 'never' for there are too many real and conceivable occasions when we feel intuitively that we must intervene. If paternalistic intervention *does*

¹¹¹ Spencer, Herbert, *Social Statics*, London, Williams and Norgate, 1868, 193.

¹¹² Wikler, Daniel, 'Paternalism and the Mildly Retarded', in Sartorius, *Paternalism*, 85.

¹¹³ Many of the analogies used in the debate about the moral or political differences between adults and children depend on misleading analogies: Schrag's own allegory of the Tludas and Dlihs ('The Child in the Moral Order') has force only because we are temporarily deceived into considering the Dlihs as a group of *adults*. Similarly Harris's example of an alien race of beings who are 'naive in comparison with ourselves' (Harris, 'The Political Status of Children') confuses the issue by comparing alternative *social groups* rather than the adult/child distinction found in *any* social group.

lead to 'the vilest exploitation' in which the recipients of the paternalistic concern 'lost both their freedom and their happiness'¹¹⁴ we would have to reply that exploitation is not a function of paternalism *simpliciter* but of the gross misuse of power by the paternalist.

Maybe 'the spectre of extensive paternalism beyond childhood' *should* 'continue to haunt us'. Maybe the problem must be left unresolved to allow for concerned intervention in cases of adults who can no longer (be relied upon to) make correct choices for themselves. The price we pay for this openness is the possibility that it will lead to abuse. We make a presumption of adults' capacity to use freedom appropriately - even if, in some cases, its exercise leads to self-harm. But would we really allow a loved one to exercise without restraint a freedom which, on balance of probability, would lead to his or her being harmed? Would we not judge, or at least consider as a moral option, that intervention was the lesser of two evils?

The potential for abuse seems more *manageable* if we remember that freedom is a *condition of life* which we acquire, hold and exercise in a condition of continuous struggle. If unwarranted paternalistic intervention is a possibility in the case of a given adult or category of adults it is for them to assert their freedom in opposition to the paternalist intervention. Maybe we could say that if they accept the intervention they require it? Or that the fact that they accept it means have gone *beyond* the exercise of autonomy. Freedom is asserted and paternalism declines at the same time: they are not two different things which co-incidentally happen together: they are two aspects of the same thing, the power relations between the parties involved. When the franchise is accorded to a new category it is because they have demanded it: it is at once an assertion of their maturity and a declaration of their freedom. If 5-year olds could muster sufficient political force to acquire the right to vote then they would no longer be treated paternalistically in that regard. But of course they don't. If some one or group *other than* 5 year-olds acquired the vote on their behalf then that would not be a sign of autonomy but the displacement of one paternalism by another. This is a fundamental weakness of the position of Holt and other liberationists: it is not children (undifferentiated) who are looking for, much less demanding, liberation from adult paternalism but adults who are seeking it for them. We do not know whether the wishes or preferences of the children have even been consulted in relation to the objective, the means, or the selection of their putative spokespersons. The presumption of speaking on behalf of children and demanding what we think they want (or might be good for them) is itself paternalistic. It differs from the conventional adult/child relationship only in terms of its specific programme.¹¹⁵

¹¹⁴ Schrag, 'The Child in the Moral Order', 176.

¹¹⁵ Holt, for example, writes: 'I make myself - uninvited - a spokesman for children in this matter because they have so few other spokesmen and are in so poor a position to speak for themselves.' Escape from Childhood, 17.

The transition between childhood and adulthood comes as the growing individual realises that to acquire freedom one must assert it: this at least would explain the perennial conflict between parents and adolescents over *control* of the adolescent's life. So there must be two points of departure: the difference between the literal and the metaphorical use of 'paternalism', and the redefinition of freedom to a more dynamic mode which was attempted in the preceding chapter.

It is an inescapable feature of the debate regarding the justification of primary paternalism that we address the issue of the difference between adults and children. The crux of this issue is not an inability to define 'children', or to point to real (and in some instances measurable) differences between the generality of people of different ages, but the political problem of determining, for a wide range of practical purposes, the point at which people will be deemed to be capable of assuming adult responsibility.

Summary

Paternalism involves interfering with the liberty of others in order to promote their welfare. If children were freed in the long term from the beneficent coercion of adults they would not survive, at least under any understanding of normal human functioning.¹¹⁶

If adults do not have an adequate conception of the child's present and future interests then who has? Paternalism, expressed through adult prohibitions and imperatives, does not preclude children's happiness and self-esteem which are more likely to diminish if adult restraints are removed. Restraints in childhood establish the space and safety necessary for individual development.

There is a difference between primary and metaphorical paternalism. The ideal context of primary paternalism is the loving care of the adult carer for the child. This emotional attachment is definitive of the parent-child relationship. Parental care is not a matter of duty; the primary motivation of the good parent is love for their child and concern for her welfare. This is the natural, and normal, context of primary paternalism. Metaphorical paternalism is derivative in that it uses understandings of aspects of primary paternalism in order to describe and justify relationships which are not parental. What makes paternalism objectionable in the case of adults is that they are not children. 'Sincerely co-operative paternalism' attempts to help the individual develop long term competence and independence. 'Conflictful paternalism' aims at the maintenance of submission and dominance.

¹¹⁶ We cannot overlook occasional cases of 'feral children'.

Learning from mistakes is more than a pedagogical shibboleth. Children need to make mistakes and to learn from them. The child must be allowed opportunities to act on her own initiative and judgement in relation to increasingly non-trivial matters even when we believe that she is mistaken.

Paternalist treatment of children has been justified on several grounds, including their lack of rationality, knowledge, and understanding, their limited conception of their own interests, their limited capacity to defer gratification, their inability to formulate systematic purposes of action, and their lack of self-sufficiency and maturity. In addition it is argued that if the paternalistic intervention is successful the children concerned will come to consent to it at some future time. In any case the future well-being of the individual will be enhanced by promoting the capacity for autonomy and freedom even by paternalistic interventions. Thus, for example, paternalism is justified when goods (health or education, for example) which contribute to autonomy and freedom are promoted irrespective of the consent of the individual concerned.

Rationality as a criterion on which to preclude paternalistic intervention is too narrow. Many of our most significant decisions are not made on rational grounds at all, and many of our rational decisions are not good decisions. In any case, even very small children are capable of prudential behaviour which can be legitimately described as rational, that is, guided by beliefs about the effectiveness of means to ends. Reasonableness is an alternative, and richer, criterion. It is less stringent and is closer to the realities of human experience. It allows for public engagement with others as equals, for mutually agreed purposes, in pursuit of shared values.

An analysis of Hobson's five conditions for paternalistic action reveals that there are significant differences between paternalism in relation to children and in relation to adults. His proposed necessary and sufficient conditions for justified paternalism are not entirely congruent with the requirements of primary paternalism. The operational context of primary paternalism is not the same as that of its metaphorical derivative. It is disregard for the affective context, coupled with the parental mission to liberate the child when the capacities necessary to the exercise of reasonableness have been developed, which gives primary paternalism its unique (foundational) character.

The conclusion that paternalism in relation to children cannot be justified without making it less controllable in the case of adults appears inescapable only when we take metaphorical paternalism as the paradigm case. This in turn leads inevitably to subjecting children to the same considerations as adults, considerations which are not relevant to children (at least until adolescence) because they are *not* adults.

Chapter 9: Children's Right to Vote

A specific practical proposal that addresses the adult/child dichotomy is the proposal to extend the franchise. The latter has heretofore been used, in effect, as a public endorsement of the adult-child distinction. Children have been systematically excluded from the democratic process as exercised in the universal franchise and treated as *marginal* members of the community.¹ And since the passage from childhood to adulthood is not 'sharply demarcated'², but gradual and highly variable from person to person, the exclusion is problematic. Who is eligible to pass from disfranchised childhood to enfranchised adulthood and on what basis can the eligibility judgement be made?

Exclusion

It is a matter of justice that people should possess a vote:³ 'democracy requires that everyone should have the right to participate in making political decisions which will affect their lives.'⁴ The exclusion of children from political involvement is 'not simply the denial of citizen rights but the right to be a citizen'.⁵ It is a 'clear example of the violation of the democratic principle that no individual or group should be subject to laws which they have not participated in making'.⁶ As a consequence of this exclusion children are the only group in a democracy whose political rights are exercised on their behalf by others without any formal mechanism of restraint, accountability or democratic control.⁷

The ground for the exclusion is age, not incompetence (which might exclude many adults). Harris⁸ argues that we should consider 'full political status' for children since

If full political status is to be granted only to the competent, then a large and significant proportion of children must be granted full political status and a very great number of adults must be disenfranchised.⁹

¹ Schrag, F., 'The Child's Status in the Democratic State', *Political Theory*, 3, 4, 1975, 441-57.

² It is not 'the sort of metamorphosis manifested in the caterpillar's becoming a butterfly', *Ibid.*, 443. This view is an echo of John Holt's assertion that 'There are no breaks or gaps in (the curve of human life). We do not, like some insects, suddenly turn from one kind of creature into another that is very different'. Holt, J., *Escape from Childhood*, Harmondsworth, Penguin, 1975, 21. Yet Holt's entire argument is based on the premise that there are 'greater and more important differences' between someone aged two and someone aged sixteen than there are between someone aged sixteen and someone aged twenty-two.

³ Holt, *Escape*, 118-121.

⁴ Franklin, B., ed., *The Rights of Children*, London, Basil Blackwell, 1986, 43.

⁵ *Ibid.*, 24.

⁶ *Ibid.* 'No taxation without representation' is not a robust conception of participation. Electing representatives is a substitute for political participation not the same as participating in the democratic process itself.

⁷ *Ibid.*, 24.

⁸ Harris, J., 'The Political Status of Children', in K. Graham, ed., *Contemporary Political Philosophy: Radical Studies*, Cambridge University Press, 1982, 35-55.

⁹ *Ibid.*, 36.

A capacity criterion (a combination of 'competence and rationality') applied to children simply distinguishes 'the competent from the incompetent'.¹⁰ Such a criterion will include 'a large and significant proportion of children' while excluding many adults:

If freedom from control and full political status are things that we qualify for by the acquisition of a range of capacities, then as soon as anyone possesses those capacities they qualify, and if they never acquire them they never qualify.¹¹

Once we possess the relevant capacities we qualify for freedom from control and full political status. There are numerous children 'whom it would be implausible to regard as incompetent and numerous adults whom it would be implausible to regard as anything else.'¹²

Under present arrangements children are denied political rights simply because they are children, they acquire them simply by ceasing to be children.¹³ The exclusion is arbitrary and touches on many of the central concerns of political philosophy such as the nature of equality, the significance of rationality in human affairs, the distribution of power, the ways in which subordination is legitimated, the nature of democracy, the definition of citizenship, defensible grounds for exclusion from the political process, the possession of rights, and participation in the making of laws.¹⁴

Two possible justifications for exclusion could be advanced: the paternalist argument and the competence argument.

The paternalistic argument holds that the young child is not affected by the decisions of the polity in the same way as adults would be and therefore does not have the same claim to participation in the electoral process. This view is false. Firstly, many of the decisions which affect the child's parents affect the child directly or indirectly; secondly, the child has a direct stake in many of the decisions taken (educational provision, welfare etc.); and, thirdly, the child might be expected to live longer than his parents and therefore to be affected by the decisions taken over a longer period.¹⁵ But can the child's concerns not safely be left to others? One of the convictions which sustains the present exclusion is that adults will, for the most part, consult the best interests of children in matters affecting them. Now while it is certainly true that it is 'dangerous for one class to have its interests entrusted

¹⁰ *Ibid.*

¹¹ *Ibid.*, 37. Any attempt to include some children on the basis of a capacity criterion will also exclude some adults. Unless proof of capacity will not be required of adults but only of children, in which case a significant distinction is still being made between the two groups.

¹² *Ibid.*

¹³ Franklin, *The Rights of Children*, 24.

¹⁴ *Ibid.*, 25

¹⁵ Schrag, 'The Child's Status in the Democratic State', 444/5.

to another'¹⁶ in the case of adults, to presume that it is so in the case of adult-child relations is to beg the question. In the case of the adult groups they are not children and therefore to treat them paternalistically is to deny them the freedom and autonomy which in a relevant sense defines their adulthood.

(M)odern writers are fond of describing the political enfranchisement of children as a natural and inevitable follow-on to the enfranchisement of women and blacks, a move which women and blacks may care to ponder. We did not spend a couple of centuries arguing that we were not children but adults simply to be told that, in that case, children are too.¹⁷

Children are children: this is a fundamental datum of human experience. There is no reason to suppose that we can dispense with the long period of development and maturation necessary to become an adult human being capable of functioning with at least minimal competence in human society. The necessary knowledge, understanding, and skills take a long time to acquire. Their acquisition may be delayed by excessive protectionism but this raises the question *not* of adult-child equality but of a need for reform of child-rearing practices and, possibly, for an adjustment in the age of transition from child to adult.

The second possible justification of exclusion is the child's alleged lack of appropriate competence. There is no generalised conception of competency and therefore there is no clear test for determining the competence of a child. Competence must be assessed in the context in which it is being exercised: thus the competence to vote, if there is such a thing, must be assessed in the context of exercising the franchise.¹⁸

There does not appear to be any general agreement on the capacity required in order to vote. If the vote is exercised to represent the general welfare then it will require a higher capacity than if it simply records a personal interest or preference. Likewise, the capacity required to judge general policy is not as great as that required to evaluate specific legislative enactments.¹⁹ Schrag proposes, as a minimal qualification, the capacity to match correctly two major parties with their respective ideologies and major policy orientations even though the individual may not be able to translate these into specific

¹⁶ *Ibid.*, 445. And even the word 'entrusted' is too weak: for 'entrusted' denotes the free transfer of competence to another, as in conferring power of attorney, for example. In order to entrust a responsibility or power to another one must have it in the first place. It is the case of infants and children that they do not already have the power which adults presume to exercise on their behalf. While the adult may claim to be acting in the best interests of the child it is some adult's conception of this best interest which is decisive.

¹⁷ Hughes, J., 'Thinking About Children', in Scarre, G., Children, Parents, and Politics, Cambridge University Press, 1989, 37.

¹⁸ For a full discussion of competence in the legal context see Margulies, Peter, 'The Lawyer as Caregiver: Child Client's Competence in Context', Fordham Law Review, 64, 1996 (A report on the Conference on Ethical Issues in the Legal Representation of Children, 1995), 1473-1504.

¹⁹ Schrag, 'The Child's Status in the Democratic State', 446.

policy recommendations.²⁰ He does not anticipate that such a situation would yield a greater number of incompetent voters than existing arrangements.²¹ A maximal qualification - the ability to make a detailed evaluation of separate policy and legislative initiatives - involves such a burden of knowledge and judgement that the voter 'who had not reached the highest level of cognitive functioning would be severely handicapped'.²² While empirical data on the actual political development of older children is inconclusive, it is clear that the kind of competence required to vote is not universal among adults nor universally absent among children. One advantage of the proposed test is that it would discriminate relevantly only against those who lack the capacity to vote (as required by the minimal formulation). This is its purpose. The present arrangement is unjust because it discriminates against 'capable voters under eighteen'.²³ The real question concerns the basis 'for including or excluding any particular person'.²⁴

This is not necessarily so. If the real question is the basis for including or including any *particular* person then the only plausibly consistent position is an individual test of competence of some description, some kind of 'customized, subjective determinations of personal capacity rather than traditional age-based classifications'.²⁵ A general criterion, such as an age criterion, will not, *cannot*, be just to all individuals. The difficulty is that while it is relatively easy to come to an agreement on a general criterion in principle, it is extremely difficult to come to an agreement on a specific application of that principle (such as the age to be the cut-off point). A 'principle generally acceptable in its abstract

²⁰ Simple two-party electoral systems are rare, certainly in European countries. Even in the traditional U.S. Republican/Democrat division voters are required to decide between various positions within the general partisan categories. Who can easily differentiate globally between right wing Democrats and left-wing Republicans?

²¹ Schrag, 'The Child's Status in the Democratic State', 452/3. It is not clear how existing arrangements yield incompetent voters, unless we count those who spoil their votes. The point is surely that present arrangements *presume* that because those under the voting age are actually incompetent to vote they are not voters at all; those over the age are presumed to be competent voters.

²² *Ibid.*, 450. It 'seems reasonable that either formulation (or any in between) would exclude most children below age 10'. Why does it 'seem reasonable'? Is there any evidence to show that some children under the age of ten are not capable of making even finer judgements than the minimal formulation requires? See the work of Gareth Matthews, (Dialogues with Children, Mass., Harvard University Press, 1984; Philosophy and the Young Child, Mass., Harvard University Press, 1980) and other 'philosophy for children' programmes which appear to show that at least some children are capable of much finer metaphysical, epistemological, moral and political discriminations than they are usually given credit for. Accounts of the representative organisations of 'street children' in Brazil and the Philippines show that children are capable of organising and representing their own interests given appropriate adult support. See Hart, Roger, A., Children's Participation: from Tokenism to Citizenship, Innocenti Essays, 4, Florence, UNICEF, 1992, section 7, 29-36.

²³ Schrag, 'The Child's Status in the Democratic State', 453. The ground for the discrimination is not relevant and therefore the discrimination is unjust. Schrag, however, appears to miss the point: the excluded category *are not voters*. That is, they are not acknowledged voters who have had their franchise withdrawn for arbitrary reasons; they belong to a category which has not had the vote. The problem is the universal exclusion of this category not the deprivation of the rights of individuals.

²⁴ *Ibid.*, 450, 451.

²⁵ Hafen, Bruce, C., Hafen, Jonathan O., 'Abandoning Children to their Autonomy: the United Nations Convention on the Rights of the Child', Harvard International Law Journal, 37, 2, 1996, 449-491, 453.

formulation, commonly meets with uncertain and flexible application'.²⁶ In short the demand appears to be self-contradictory: we cannot consistently have a test of individual competence and an age criterion. The former will almost certainly rule out many who now qualify for the franchise, while the latter, no matter what age is selected, will exclude all under that age irrespective of their individual capacity. There does not appear to be a middle ground which will allow us to include all individuals on the basis of measured capacity while at the same time fairly protecting the prerogatives of those who qualify because of their age. (And this raises the question as to why their prerogatives should be protected anyway if they are demonstrably incompetent.)

Three objections to any proposal for a test of competence are possible. Firstly, a test cannot ensure that the capacity to vote will be accompanied by the determination to vote responsibly, that is, possession of the information and knowledge necessary to pass the test of competence does not guarantee maturity - which only comes with age, experience, and understanding. Secondly, while the age criterion is non-partisan, in that it discriminates against all who fall under the prescribed age-limit equally, a test requirement might well confer benefit along traditional lines of privilege by favouring certain groups. An age requirement does not do this. Finally, a test is open to interference by those who have control of the testing procedure:²⁷ powerful groups can manipulate the test to suit their own purposes. No such opportunity for interference is available in the context of an age qualification: barring mass murder, those who are at present under eighteen will become eighteen and so qualify to vote.²⁸

Schrag considers such objections to a test of competence to be persuasive. So, having identified what he appears to consider a major injustice he is prepared to tolerate it. Other considerations reinforce this conclusion. The interests of children will not be seriously disregarded under the present arrangements because voters will wish to protect the interests of their own children and grandchildren.²⁹ (He appears to have forgotten the principle that 'it is always dangerous for one class to have its interests entrusted to another'.) Under the present arrangements the disfranchised group will, in time, become enfranchised and the knowledge of this will keep present voters honest. (This is an optimistic reading of present practice. Even among those with political power the knowledge that their opponents will someday replace them and have access to the files is

²⁶ Cohen, Carl, 'On the Child's Status in the Democratic State: a Response to Mr. Schrag', *Political Theory*, 3, 4, 1975, 458-463, 459.

²⁷ This could be said of any test - school examinations, say, or driving tests - but it does not prevent us having them: and they make highly significant differences to children's welfare and future which go largely unchallenged.

²⁸ Schrag, 'The Child's Status in the Democratic State', 453/4. Unless, of course, someone (some group) changes the rules and the age of qualification.

²⁹ *Ibid.*, 454.

often insufficient to keep them honest.) Although the present injustice is real the injury is temporary, probably unconscious, and 'does not normally impair the self respect of the victim'.³⁰ It is not temporary. It is a permanent condition of children as a class. Individual children can acquire political rights by growing up, but there are always children. Schrag confuses the child as an individual with children as a group. While individual children grow and move up into political enfranchisement children as a group 'remain permanently disfranchised and politically ineffectual'.³¹ Even if children are unconscious of a wrong this would not make the wrong any less or diminish the reality of the injustice that Schrag appears to acknowledge.

What is required to vote?

The crucial question is not *when* the change from child to adult may be judged to occur (generally or in individuals) but the set of attributes³² which is being invoked in defining or recognising the change. The fact is that, whether it happens suddenly or gradually, something happens in the course of the change from infancy to adulthood 'that is critical for democracy' although 'the identification of that critical turn remains elusive, imprecise'.³³ According to Cohen the attribute that full members of the (democratic) community must have is

rationality, in a broad and powerful sense of that term .. understood as the capacity of the members to do certain fundamental kinds of thinking. The absence of such rationality is the reason it makes little sense to talk of democracy among brutes, or infants. It is not just that they cannot operate a democracy well; they cannot operate one at all.³⁴

He distinguishes between rational capacities and intellectual abilities or attainments. Possession of the rational capacities as a *general characteristic of a group* is a presupposition of democracy, whereas increase of the latter on the part of individuals tends to make democracy more successful.³⁵ While it is true that the possession of a certain set of capacities is essential for democracy this does not mean that a test is suitable to distinguish between those who should have the franchise and those who should not. 'The right to vote cannot hang upon attainments, or the ability to pass tests. If some must be deprived of that right it will be because, in them, the capacities democracy presupposes are largely absent.'³⁶

³⁰ *Ibid.*, 454/5.

³¹ Franklin, *The Rights of Children*, 38.

³² '(A) set of capacities to be possessed by voters', Cohen, 'On the Child's Status', 460.

³³ *Ibid.*, 459.

³⁴ *Ibid.*, 460.

³⁵ *Ibid.*

³⁶ *Ibid.*, 461. The context makes it clear that Cohen is thinking of categories rather than individuals.

There is a danger of confusing full membership of the democratic community and the right to vote. Full membership of the democratic community comes first. The right to vote is a prerogative of full members. Membership of the community is decided on the basis of rationality and the capacity to 'do certain fundamental kinds of thinking'.³⁷ That is, membership of the community 'looks to capacity, not ability or attainment'.³⁸ Once it is presumed that people have these capacities then their membership is assured irrespective of their individual intellectual attainments: 'The many stupid, foolish citizens must have their right to vote protected; the rational capacity presupposed by participation is theirs'.³⁹ The difference in the case of children is that although some children display striking precocity at an early age, in general the young do not have the rational capacity which democracy presupposes. The aim of an age criterion is not to sort potential voters by some contingent capability.

Rather, the age criterion aims simply to delay the full membership of those who, by nature, cannot be expected to deal satisfactorily with questions of the kind facing voters in a democracy. It looks to capacity, not ability or attainment. ...Chronological age does this bluntly. But no abstract examination can do it at all.⁴⁰

So the question becomes one of reviewing the age for full membership of the community rather than replacing the age criterion in principle.

If the age is to be reviewed, Schrag argues, any new age should not diverge too much from present arrangements. In addition the minimum age for voting ought, in justice, to be close to the minimum age for exercising other rights (but he does not say how *these* will be decided). There is also a developmental aspect to making the age of franchise lower. This is that the exercise of the franchise might *itself* lead to more responsible use: participation is a learning process.⁴¹ Schrag arrives at a position very close, if not identical, to the present system but ultimately gives us no compelling reason why we should endorse the present age-criterion.

If age is *not* to be the criterion then how is the problem of political inclusion to be resolved?

Franklin endorses Holt's solution: give the vote to everybody.⁴² But he does not explain how the inclusion can be unproblematically defined. To say that everyone should have the vote begs the question of how we define the limits of 'everyone'. (It cannot be intended to include infants, for example.) Franklin adduces evidence to suggest that children are

³⁷ *Ibid.*, 460.

³⁸ *Ibid.*, 462.

³⁹ *Ibid.*, 461.

⁴⁰ *Ibid.*, 461/2.

⁴¹ Schrag, 'The Child's Status in the Democratic State', 455/6.

⁴² Franklin, *The Rights of Children*, 39; Holt, *Escape*, 118-120.

capable of political judgement long before they are allowed to exercise it through the vote. He assumes that granting political status to children will make no difference to the overall distribution of support for the political parties.⁴³ The point of the exercise would be to give children the opportunity to put their concerns on the political agenda. This would require all political parties to take children's issues seriously in order to win their support. If we can know in advance that children will make no difference to the distribution of party support why would parties need to do this?

Neither is there evidence to support the belief that children would cast their votes any more frivolously than adults;⁴⁴ children are not any more likely to vote for personalities than adults are. But would children not be more likely to come under the controlling influence of their parents? Apparently not, for if children had greater political status from the start they would not be as easily influenced by their parents or others in matters of political choice and judgement. (Which neatly begs the question of the extent to which they are *capable* of autonomy and responsibility.⁴⁵) Holt believes that

a society which had changed enough in its way of looking at young children to be willing to grant them the vote would be one in which few people would want or try to coerce a child's vote and in which most people would feel this was a very bad and wrong thing to do.⁴⁶

The ballot will be secret and this ensures autonomy of selection; parents need never know how the child voted. Finally, however, Franklin concedes that parental influence is one of the determining factors in how a great many people vote anyway.⁴⁷ If it is so in the case of adult voters we might expect it to be much more significant in relation to children.

What kind of politics?

Franklin and Schrag both address politics as exemplified by national, electoral politics, that is as representative politics; their approach appears to be very liberal, the broadest possible in fact, enfranchisement equal to adults'. Yet neither makes mention of participatory politics, that is of participation in the exercise of power at what might be called the

⁴³ He does not explain how he can know this in advance.

⁴⁴ Franklin, *The Rights of Children*, 43. There is no evidence to the contrary either.

⁴⁵ Holt advocates the vote for *all* children, not just older children who are capable of autonomy and/or responsibility. Holt, *Escape*, 120.

⁴⁶ *Ibid.*, 129. Note the similarity between Holt's optimism, regarding a transformed social context which would be associated with children's right to vote, and Spencer's. The latter stopped short of giving children the franchise on the grounds that it is not the principle of equality of rights which is called into question by the issue of children's franchise but the imperfection of human society. If the moral law were 'universally obeyed, government would not exist'. Spencer, Herbert, *Social Statics*, London, Williams and Norgate, 1868, 212.

⁴⁷ Franklin, *The Rights of Children*, 44/5, Holt, *Escape*, 129.

'vernacular' level: home, school, association, local community, etc.⁴⁸ Their approach stresses a narrowly cognitivist view of political understanding, not an active participation; it endorses representative politics where participation largely consists in selecting someone else to act on our behalf rather than participatory politics where we act for ourselves. It could be argued that real political power is participatory: actually influencing what is to be done rather than merely selecting who does it. Franklin presumes that the franchise would 'lead to the democratisation of a whole range of educational, social and welfare institutions of which young people are currently the major consumers'.⁴⁹ Yet the most significant of these institutions in the life of most children, the school, usually denies any form of significant political participation through which children might learn how to operate politically and to take political responsibility proportionate to their capacities.⁵⁰

The school, the first community that the child experiences outside the home, is organised and managed on hierarchical and authoritarian lines, administrative principles which set powerlessness as the norm. Teachers view the issue of control as of central, crucial, professional importance. As a result of systemic disempowering individual pupils survive by learning appropriate behaviour: how to lie to those in authority, to ingratiate oneself, to secure anonymity, to make friendships which will provide support and a sense of individuality. There are no mechanisms through which students can constructively express dissent or even preference, either individually or collectively. Dissatisfaction is frequently

⁴⁸ See Sarason, Seymore, B., The Predictable Failure of Educational Reform, San Francisco, 1990, on the exercise of power in the classroom and Neill, A.S., Summerhill: a Radical Approach to Child-rearing, Harmondsworth, Penguin, 1985, on school government. See also Smeyers, P., 'On the Unavoidability of Power in Child-rearing: Is the Language of Rights Educationally Appropriate?', Studies in Philosophy and Education, 14, 1, 1995, 9-21; Tony Jeffs, 'Children's Rights at School', in Franklin, The Rights of Children, 54-72, also 'Preparing Young People for Participatory Democracy', in Bruce Carrington, Barry Troyna, eds., Children and Controversial Issues: Strategies for the Early and Middle Years of Schooling, London, The Falmer Press, 1988, 29-53. Jeffs argues for the kind of development and participatory political involvement that Franklin appears to be ignoring. This participatory approach is also advocated by Hart (Children's Participation).

⁴⁹ Franklin, The Rights of Children, 46.

⁵⁰ See for example Langford, Peter, E., Lovegrove, H., Lovegrove, M.N., 'Do Senior Secondary Students Possess the Moral Maturity to Negotiate Class Rules?', Journal of Moral Education, 23, 4, 1994. The moral reasoning of post-primary students appears to be more mature than predicted by Kohlbergian theory. Their most important source of information for making moral decisions in relation to their own governance is the general welfare of other students and teachers. The majority thought that there ought to be class rules to protect others' right to learn. There was a small dissenting minority, whose main aim was revenge upon schools and teachers, and a rather larger minority, who were not prepared to uphold such rules even in theory when it came to classes in which they were not interested. The authors conclude that while it is possible to reach a consensus with the great majority of students of this age about rules to protect the learning of others, sanctions are needed to back class rules opposed by a minority even in theory. Three remarks are necessary. Firstly, it is unlikely, even if the rules are formulated by the majority, that the need for sanctions will be entirely obviated. This is how democracies work in practice: we may have laws which rest on the consent (of the majority) of the governed but we still need a judicial and penal system to deal with those who do not obey the laws. Secondly, if this is the case with regard to secondary students is it likely that Sarason's proposals for elementary classes will work? Sarason's is an educational programme, however, not an administrative proposal. Thirdly, the support for self-governance at secondary level would be greater if it came as part of an on-going developmental, educational programme begun in the primary school.

expressed as rejection of the school or disruptive behaviour which is damaging to the well-being of all. Schools reflect a general refusal to accept that children have the right to be treated with the same respect as other people, inside the school as well as outside.⁵¹

It seems, then, that the kinds of 'skills and potentials' that children are likely to develop from proposals to extend the franchise are the cognitive skills involved in 'discussing politics' and not the skills required to ^{actively} participate in political processes, that is, the negotiation and the exercise of power. Franklin appears to acknowledge the narrowness of his own proposal and to contradict his belief that children's voting choices would not be unduly influenced by their parents or other adults: 'to give young people rights is of little use unless they also achieve an understanding of how to exercise them. The mere possession of rights without this knowledge can lead to the worst kind of tokenism, with young people being manipulated by more experienced participants.'⁵²

Development, experience, and insult

Harris agrees with Schrag that the facts of human development do not justify the conventional distinction between adult and child.⁵³ Yet this claim depends on what 'facts about human development' are being invoked. Insofar as developmental theories can be deemed reliable at all they do show reasons why distinctions *could* be justified. If Harris means the differential development of individuals (including the fact that some individuals never 'complete' the developmental process) then distinctions can still be made but only on an individualized basis.

Schrag contends that it is children's lack of experience and understanding rather than powers or faculties which might justify their exclusion. A delay in granting them full freedoms is required to give them the opportunity to gain the relevant experience and understanding.⁵⁴ But the possession of this experience and understanding is a question of fact in individual cases: many children may have it earlier and many adults not at all. Many of the decisions routinely made by those of us who claim the relevant capacities, experience, and understanding are often of doubtful wisdom and long-term utility. Adults' exercise of freedom, individually and collectively, has not led to signally positive results; adults have not been singularly expert in the choices they have made; much of what they do is injurious to themselves, to others, and to future generations (smoking, motor deaths, waste of resources, wars, nuclear weapons, etc.).⁵⁵

⁵¹ Tony Jeffs, 'Children's Rights at School', in Franklin, The Rights of Children, 54-72.

⁵² Franklin, The Rights of Children, 47.

⁵³ Harris, 'The Political Status of Children', 38.

⁵⁴ That is, to become adults?

⁵⁵ Harris, 'The Political Status of Children', 39.

Harris concludes that Schrag's suggested alternatives (the development argument and the experience and understanding argument) 'license paternalism for many adults and emancipation for many children'.⁵⁶ While Schrag ends with an affirmation of the traditional demarcation, which he describes as a 'noble lie' in which we all believe for our own good, Harris declares that 'many children don't believe' this 'noble lie' because it isn't true,⁵⁷ but he doesn't say how he knows that many children don't believe it.

To insult someone by imposing our plans for his life upon him when he has plans of his own is wrong; it is to treat him as less than equal and to withhold the same concern and respect that we accord to other autonomous agents.⁵⁸ Harris argues that if we could show that children are not capable of being insulted in this way and 'that they do not have the right to be shown a concern and respect equal to that which adults deserve or can command', then the distinction between adults and children and the paternalistic treatment of the latter by the former adults would be justified.⁵⁹ However, he believes that many children 'do have plans of their own and are insulted'.⁶⁰

Is it the case that denying children control of their own lives is to offer them a most profound insult? Do 5, 7, or 10 year-olds live in a continuous condition of 'profound insult'? Arguably adult control is insulting only to those who have already developed the capacity to govern themselves. In relation to children it is question begging: being insulted requires a certain level of subjective consciousness and a certain kind of sense of self-worth. One cannot insult a dog or a new-born infant (although one can harm them). To be insulted by a denial of one's freedom and integrity it is necessary that one has already achieved the kinds of developmental states in which freedom and integrity are important elements denial of which is perceived by the individual as damaging to her self-esteem and sense of self-worth.

Persons

The crucial distinction which Harris wishes to make with regard to being 'deserving of equal concern and respect' is between 'persons and non-persons'. We need an account of who is valuable as a person:

⁵⁶ *Ibid.*, 39.

⁵⁷ *Ibid.*, 40.

⁵⁸ Scarre, G., 'Children and Paternalism', *Philosophy*, 55, 1980, 120. Walsh (Walsh, P., *Education and Meaning: Philosophy in Practice*, Cassell Education, 1993, 88) points out that only to angels, who have 'sprung into being without parentage or nurture, already fully-formed and spiritually self-possessed', would external direction or restraint necessarily be an indignity. Our human being falls short of such perfection, especially in our earlier years.

⁵⁹ Harris, 'The Political Status of Children', 44.

⁶⁰ *Ibid.* This is trivially true. Even small infants can have plans and be insulted; consider how they throw a tantrum when their wishes are thwarted. While it may be empirically true that many children have plans of their own and are insulted there is a logical gap between the matter of fact and how children ought to be treated.

If we value people, and if we are committed to a conception of equality which protects a person's dignity and independence by requiring that each person is shown the same concern and respect as that shown to any, then we need some account of who is valuable and who is protected by the principle.⁶¹

There are plausible ways, other than conferring 'full political status', of showing 'concern and respect' and for acknowledging others as persons. The proper treatment of small babies, for example, is predicated on the recognition that their welfare, comfort, safety, security, happiness, nutrition, etc. must be taken care of. This is concern. We show respect for them as separate individual human beings by acknowledging their rights to bodily integrity, to freedom from pain and want, and to having their various needs met, at least minimally. (It is significant that Harris nowhere mentions the needs of children as the basis of our treatment for them.) We afford them this concern and respect *because* we recognise them as human persons. Are they persons? We do not determine who will be deemed a person by definition: on the contrary the verbal definition proceeds from established practice. Defining babies out of the category of human persons is of course one way of going about changing our perceptions and ultimately our practice in relation to them. At present, however, we do not relate to babies as some kind of non-person. On the contrary the general practice is to address them, acknowledge them, recognise them at least as 'becoming-persons'. Their responses, their growing capacity to recognise and respond to human communication, are important to us. We constantly look for indications that they are becoming-persons. Human infants are presumptive members of the human community.

Harris appears to be confusing the concepts of personhood and adulthood. 'Person' signifies a moral rather than a political status, although its attribution carries political implications. 'Adult' in the present context signifies a certain kind of political status, based on developmental considerations. To say that children are not adults is not to provide a reason for treating them as non-persons; it is to treat them as young persons. Where adult status is expressed in terms of voting rights it seems reasonable that this coincides with ceasing to be legally subject to the jurisdiction of parents or other adult carers.

How do we recognise human beings as persons for the purpose of assigning them 'full political status'? What kinds of characteristics are deserving of our 'concern and respect'? Harris's answer is 'creatures who value their own lives', who have 'a conception of their life as their own', who are self-conscious, who have an awareness of being 'an independent being existing over time', who are aware that life is an enterprise over which they have direction.⁶²

⁶¹ *Ibid.*, 47.

⁶² *Ibid.*, 47/8.

To have a life to lead, then, is to have decisions and plans to make and things to do, it is to be aware of doing it all, to understand roughly what doing it all involves and to value the whole enterprise.⁶³

What is required is 'notoriously difficult to quantify' and will include recognition of other subjectivities, an understanding of the causality of human action, awareness of danger, 'in short, the sort of knowledge that allows us to say that beings are responsible for their actions, the sorts of knowledge and awareness that make praise and blame appropriate'.⁶⁴

What Harris does not acknowledge is that the criteria he has identified (selected) are not the kinds of things which are susceptible to quantification at all. How, for example, even in principle, would one measure recognition of other subjectivities? Taken together, however, his selected criteria add up to an adult human being.

Harris himself suggests that the requisite qualities would be possessed in sufficient quantities by a 'reasonably competent language user', a criterion which is more likely to be associated with age 10 than 18.⁶⁵ This is a highly contestable criterion. It has been claimed, with some persuasiveness, that whatever the borderline between persons and non-persons might be children are well past it by the time they begin formal schooling. Even a five year-old has mastered complex language skills, has a recognisably developed personality, has an awareness of her own identity, and 'is quite capable of implicitly invoking a generalisation principle to protest unfair treatment by a parent or teacher'.⁶⁶ In more general terms we might say that the definition of linguistic competence is crucially affected by the context in which the language is to be used.

What might equality mean given Harris's criterion of being a 'reasonably competent language user'? A principle of equality 'is a principle of protection':

If children are genuinely regarded as *the equals of* adults, then they are regarded as being entitled to equal protection, as being entitled to be shown the same concern and respect as adults.⁶⁷

There are a number of weakness in this position. Whatever else equality might entail it certainly entails equal treatment and equal status. But the first of these (equality of treatment) is certainly not appropriate to children. Whatever reservations we might have

⁶³ *Ibid.*, 48. This is very like Lomasky's project pursuit.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, 49. However this criterion is not an absolute. 'Where we have reason to suppose that beings, while not possessing language (or not giving evidence of such a capacity), are nonetheless self-conscious beings, aware of themselves as existing over time and valuing existence, then we will have reason to include those creatures as well.' 49. Harris does not explain how such beings will be able to persuade us of their self-consciousness, awareness of temporal persistence, and so forth, in the absence of a common language in which such abstract conceptions can be communicated.

⁶⁶ Brown, D.G., 'The Rights of Children', Journal of Education, University of British Columbia 1971, 8-20, 15. Given such criteria 'We are certainly thinking about people, very young and rather strange people, but people nevertheless.'

⁶⁷ Harris, 'The Political Status of Children', 50.

that our treatment of children is inadequate or flawed in some way (such that it reinforces their dependence, for instance) there is certainly no doubt but that we should treat them differently from adults. Although we might recognise their individual human worth as being the equal of adults' we also recognise that their needs are different, their developmental condition is demonstrably different, their capacities, especially their capacity to assume responsibility, are different. We should treat them equitably, not equally. According to Vlastos' doctrine of equality people vary in 'merit', but each has the same 'individual human worth'; and justice requires that people be treated in accordance with their identical human worth, not in accordance with their various merits.⁶⁸ Children need more protection than most adults, not equal protection. This does not affect the matter of concern and respect which allow for differential treatment where such is warranted by the needs of the person who is the object of the concern and respect.

It also raises the question of priority: which comes first, our perception of children, including babies, as deserving of our concern and respect or our perception of their equality? Perhaps these are not two separate things, one causally affecting the other, but alternative descriptions of the same thing: showing concern and respect is recognising a certain kind of equality, acknowledging equality is affording others concern and respect. Harris goes on, however,

(t)o regard people as equals is precisely to recognise that they are not equally able to protect themselves, or further their own interests, or are necessarily the same in any other sense.⁶⁹

He appears to want the best of both worlds: to extend equality to a certain category of children but to want to continue to treat them differentially for certain purposes: children must be accorded concern and respect 'irrespective of their ability to achieve that state for themselves'. It is precisely that children have been 'treated as children and not as equals that they have been fair game for adults'. We should grant them the states of equality 'merely out of paternalistic concern for their welfare'.⁷⁰ Now if children are to be accorded concern and respect irrespective of their ability to achieve it for themselves, if their equality is to be differential, if our reason for acknowledging their equality is 'paternalistic concern for their welfare' then there seems little point in introducing a criterion at all. Surely we should be paternalistically concerned for the welfare of *all* children?

⁶⁸ Vlastos, Gregory, 'Justice and Equality', in Waldron, J., ed., Theories of Rights, Oxford University Press, 1984, 41-76.

⁶⁹ Harris, 'The Political Status of Children', 49.

⁷⁰ *Ibid.*, 50. The problem is not that children have been treated as children which illustrates that they have been 'fair game' for adults, but that they have, and continue to be, *mistreated* as children. Any adult who considers children 'fair game' is not treating them as children ought to be treated. There is an appropriate way of treating children with the necessary concern and respect.

Even if we accept his criterion of 'reasonably competent language use' we are left with very little guidance as to what this might entail. He appears to be saying that the reasonably competent language user is one who can recognise other subjectivities, understand the causality of human action, have an awareness of danger, etc., in short, be responsible for their actions, suitable candidates for praise and blame. Yet in the first place the phrase itself is redolent with tacit assumptions and evasions: it assumes that we will agree on the exact extension of 'competent', and that such competence is more than a matter of the ability to utter grammatically and syntactically correct sentences. The vagueness of 'competent' is compounded by the equally vague 'reasonably'. Is there a test of such competence? Who decides *what* constitutes reasonably competent language use? This appears to be a different but no less problematic competence criterion. Every objection that Harris himself has levelled at other candidate competence criteria can be brought to bear on this.

Whatever the linguistic competence of children of a particular age it is only when they begin (individually or collectively) the struggle for freedom that they begin to make their claim to recognition as adults. This requires understanding and experience as well as linguistic facility. Anyone who has had any dealings with children will be familiar with the linguistically precocious child who, at the same time, lacks the kinds of responsibility, maturity, cognitive development, knowledge, and experience to be taken seriously as an adult with a comparable linguistic facility. Such experience shows us that, on its own, linguistic competence is no guarantee of maturity. Children must 'find their voice' as well as learn the language: they must have something to say which is to some purpose and be able to explain the reasoning behind a decision.⁷¹ Not only do children require to learn the language of their social group they also need to learn a great deal more. They need education and connection with others.⁷² They need opportunities to learn from their mistakes and their adult guardians need to recognise the distinction between mistakes which are relatively short-term and trivial, if not revocable, and those which are irrevocable and have long-term consequences for the welfare of the adult which the child will become.

What would be the consequences of treating children (who are competent language users) as equals? Harris does not follow through on his own programme. What would be 'reasonable', he suggests, would be some kind of 'junior citizen' status with reduced opportunities for work and correspondingly increased opportunities for education (but without the element of compulsion in the case of the latter).

⁷¹ Margulies, 'The Lawyer as Caregiver', 1487.

⁷² *Ibid.*, 1480-1482.

Perhaps this sort of status would enable us to treat children as equals while recognising their special needs. Or perhaps it would highlight the deficiencies of our provision for the elderly?⁷³

Harris compounds confusion by suggesting that in relation to certain adult prerogatives children, even those who are linguistically competent, should be subject to an age requirement. Yet he claims that what he is granting is 'full political status'.⁷⁴ (If it is full political status then there should be no difference between adult and child; if there are certain rights which are restricted by age or expertise then political status must be differential.) He manages the matching between the 10-year-old child's political status and the electoral process by reducing the franchise to matter of making a mark on paper or pulling a lever. 'The whole apparatus of voting, whether by making an X-shaped mark⁷⁵ on a ballot form or by pulling a lever, is designed so that a child could perform it.'⁷⁶

Do we really believe that electoral responsibility in a democracy comprises no more than the ability to perform a simple physical act - so simple 'that even a child could perform it'? The crucial question is not whether a child could perform the act of voting but whether a child could vote responsibly. More is required to establish equality than the observation that two categories can perform the same simple physical act.

Excluded from the category of 'full political status'⁷⁷ are fetuses, babies and young children (presumably under 10), and 'adults who through severe disability had ceased temporarily or permanently to be persons'. This *invention* of a category of non-persons who 'would have political disabilities' is a chilling corollary of Harris's case.

I do not see however that the disqualification of adults *who had ceased to be persons* could be anywhere near as worrying as the disqualification of children, and many mental patients, who are clearly persons.⁷⁸

One consequence of the extension of 'limited political status' to children would be 'common ownership of the family home'. Quite how this proposal is supposed to work is not clear. The analogy he draws with women is not only beside the point, it is insulting to women: women are adults, not children. Children are *ex hypothesi* different (if they were not he would not be advocating dividing children into those who have linguistic competence and those who have not, or advocating limited political rights for the former category). The psychological literature makes clear that there are significant attitudinal and behavioural

⁷³ Harris, 'The Political Status of Children', 50.

⁷⁴ *Ibid.*, 51.

⁷⁵ What is that but an 'X'?

⁷⁶ Harris, 'The Political Status of Children', 55. It is not: it is designed to facilitate adult participation so that there is no, or minimal, qualification required.

⁷⁷ Or even from the limited political status he proposes later.

⁷⁸ Harris, 'The Political Status of Children', 55 (emphasis added).

differences between adolescents and adults. It is presumptuous to suggest that an adolescent who shared ownership of the family home would act as responsibly as a mature woman: even in the best case the adolescent is significantly different. Fears about the adverse effects of recognising the equal rights of women were themselves functions of the prejudicial view (prejudicial because based on irrelevant perceptions) that one category of adults was inferior to another category and would therefore be less likely to behave responsibly. Such objections (prejudicial fears) have always been expressed. Retaining control over the lives and thoughts of children while they are children is not comparable because they *are* children, not adults. The perceptions of general differences are not only relevant, they are empirically demonstrable.

While Harris and others are clearly concerned about the existential condition of childhood and respect children enough to search conscientiously for the most appropriate way of *showing* them concern and respect, Harris's difficulty is that he cannot accept that different categories of human beings - or different stages in human being - require different responses. The phrase 'the same concern and respect' is unsatisfactory given that the terms can mean radically different things depending on circumstances: the golden rule is that we treat equals equally and unequals unequally.

With his language competence criterion Harris has already set limits to equality. It is only within that definition that the differential treatment of equals is justifiable since those excluded are not equal in the relevant respects. But human equality is not an equality of any measurable characteristics or capacity - *including* the capacity to use language. It is a recognition of individual human worth which is independent of the personal capacities, talents, or achievements of any particular individual.

Harris is inconsistent in offering 'junior citizen' status to certain categories of children (those over 10 - competent language users). Either these people are equal or they are not. What Harris is in fact doing is creating a new category of human individual who is neither child nor yet adult. This is an unexceptionable idea but needs to be seen for what it is. It is not the extension of the franchise to children it is the creation of a new non-child/non-adult category. If we postulate a middle ground we are accepting that children are not the equal of adults and that (despite their developmental sophistication) they continue to require unequal treatment. He suggests that in relation to certain adult prerogatives (the right to use certain mood altering drugs, drive powerful cars, run for political office) children (even those who are linguistically competent) should be subject to an age requirement. What is being invoked here is knowledge and experience as a competence criterion.

The discussion of the political enfranchisement of children of any age may remain an academic pursuit but understanding the distinction between children's capacities and

performance in legal contexts is an urgent priority for both psychology and the law.⁷⁹ As a matter of fact under present arrangements children receive *more* protection than adults because of their immaturity. Not alone are children up to age 10 deemed mentally incapable of committing a crime but under the *doli incapax* rule a minor between 10 and 14 has the benefit of a rebuttable presumption of incapacity. This presumption may only be overcome by evidence of mischievous disposition or that the child knew that what he was doing was wrong.⁸⁰ Concern about the difficulties faced by child witnesses in legal systems has led to relaxation of competence and corroboration requirements, and to the introduction of special procedures and physical facilities to reduce the emotional pressures of testifying.⁸¹ In other words in the legal context, rather than extending adult prerogatives to children, reform recognises their developmental differences .

In the end Harris's attempt (and others') to justify extending the franchise to children fails because he does not address the realities of childhood and adolescence. He confines himself to a rather austere conception of childhood which is excessively cognitive and does not take account of the other vital dimensions of human experience without which true human agency is impossible. He is searching for a legalistic either/or demarcation which, given the nature of human development cannot be found. Ultimately his search appears to evade the issue of adult responsibility. Responsibility for the state of the world is not children's, it is adults'.

Denying the vote to children is not based on some false assumption about 10-year-old's political knowledge, nor to deny that they have interests, nor to protect them from the harm their votes might do. It is to take responsibility to ourselves for the way the world is.⁸²

⁷⁹ Cashmore, J., Bussey, K., 'Judicial Perceptions of Child Witness Competence', Law and Human Behaviour, 20, 3, 1996, 313-334. Magistrates and judges in New South Wales differed considerably in their views about the competence of child witnesses and the need for appropriate protective measures in court. There was, however, more consensus about those aspects of children's ability to testify that give rise to judicial concerns about their competence. They were generally regarded as being at least as honest as adults, if not more so. They were, however, perceived as highly suggestible and susceptible to the influence of others, and prone to fantasy. See also Carter, C.A., Bottoms, B.L., Levine, M., 'Linguistic and Socioemotional Influences on the Accuracy of Children's Reports', Law and Human Behaviour 20, 3, 1996, 335-358, regarding the impact of certain questioning tactics on the accuracy of children's reports.

⁸⁰ Walker, D.M., The Oxford Companion to Law, Oxford, Clarendon Press, 1980, 372A. This is also the situation in the Republic of Ireland. See Shatter, A.J., Family Law in the Republic of Ireland, (third edition), Dublin, Wolfhound Press, 1986, 416/7, 417n..

⁸¹ See Woolard, J.L., Reppucci, N.D., Redding, R.E., 'Theoretical and Methodological Issues in Studying Children's Capacities in Legal Contexts', Law and Human Behaviour 20, 3, 1996, 219-228; Mlyniec, Wallace J., 'A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose', Fordham Law Review, 64, 1873-1915.

⁸² Hughes, 'The Philosopher's Child', 27. See also Grumet, Madeline, R., 'The Lie of the Child Redeemer', Journal of Education, 168, 3, 1986, 87-97. The child redeemer is a 'special class born to bear the burden of their parents' lost innocence ... The child redeemer has become the adorable symbol of society's self deception, a means of foisting the mission of our own liberation upon those least able to effect it'.

It is not being denied here that adult voters are of variable competence. It is not being denied that there are even adults who, for reasons of basic incompetence, are unable to vote at all. Nor is there any doubt that there are certain children who, if given the opportunity, would exercise the franchise circumspectly and judiciously. But those who advocate the franchise for children have confused cause and effect: it is not the vote which is the demarcation between adult and child, it is the distinction between them which is the basis for assigning the vote. People do not become full members of the political community by acquiring the right to vote, they acquire the right to vote by becoming full members of the political community. In a sense it doesn't matter whether children are competent or not. What matters is that they are children, still engaged in the process of growing to adulthood. The present situation does not discriminate against 'capable voters under eighteen' since there are no voters under eighteen. If we must take exception to anything it must be to the adult/child distinction itself. Voting is only a symptom of this.

Summary

The exclusion of children from political involvement appears to endorse the adult-child distinction in violation of the democratic principle that individuals and groups should be allowed to participate in making laws which affect them. Children's exclusion is usually justified in terms of paternalism and competence.

A general criterion, whether of exclusion or inclusion, cannot be just to all. While an agreement on a general criterion (age) is possible, specific application of the criterion (what age?) leads to difficulties. Deciding by means of a test of competence would exclude many who now qualify for the franchise, while an age criterion would exclude all under that age irrespective of individual capacity.

A test of competence does not ensure that any individual will vote responsibly. In addition such a test is open to manipulation by those in control and could be used to reinforce traditional distinctions and privileges. An age criterion is not any worse in relation to the first objection and is clearly preferable in relation to the second. Giving the vote to everybody is not an unproblematic solution since the inclusion, the 'everybody', must be defined in any case.

Proposals to extend the franchise focus on representative rather than participatory politics. The skills involved are passively cognitive, not the skills required to participate actively in the negotiation and exercise of power. True political power is participatory, influencing decisions rather than merely selecting representatives. The most significant non-familial institution in the life of children, the school, would be unaffected by such apparently radical proposals, and could continue to deny significant participation in the exercise of power and

the corresponding sharing of political responsibility. In-school powerlessness would remain the norm with students denied constructive opportunities for dissent or preference.

A crucial question in relation to the political issue is who is to count as a person. Personhood is not conferred by definition; on the contrary definitions follow from established human practices. Even human infants are treated as at least presumptive members of the human community. Personhood and adulthood are not identical: 'person' is a moral category and although its attribution carries political implications it is not decisive in the ascription of political rights. Non-adults are not necessarily non-persons, and there is nothing inherently objectionable or logically contradictory in considering all children as young persons.

Children should be treated equitably, not equally. There is no moral inconsistency in treating children differently to adults. Recognising that their needs, their developmental condition, and their capacities are different does not entail denying their equal human worth. Human equality is a recognition of individual human worth independent of personal capacities, talents, or achievements. Children need more protection, not equal protection. Concern and respect allow for differential treatment which is required by the needs of the person.

PART 4: COMMUNITIES

Chapter 10: The Communal Context Of Rights

The 'atomistic' individual

Hegel was among the first to reject the Kantian notion that universal obligations can prevail over those which are contingent on our membership of a community.¹ On the contrary, he believed that we can achieve our highest and most complete moral existence *only* as members of a community. Individuals are part of a larger social, cultural, and historical reality. They derive their identity partly (even largely) from their membership in their given community: we are what we are because we belong to a cultural community.²

The liberal ethic, which is articulated in terms of individual human rights, opposes the conception of self identity which is constituted by social and cultural particularities. Socially and culturally defining elements of human experience are excluded in favour of a notional universe in which prior experience and knowledge of individuating circumstances, are considered irrelevant to the construction of a moral order. 'The implication ... is that the moral universe which the independent self in the deontological conception must inhabit is a world devoid of inherent meaning, a world "disenchanted" in Max Weber's word, a world without an objective order.'³

Liberalism assumes that morality is constituted by rules that any rational individual would accept under ideal circumstances. A heuristic for the derivation of such rules is to be found in Rawls' 'original position'.⁴ Such rules would be neutral between, and equally constrain, competing interests. They would also be neutral with regard to whatever conception of the good particular individuals might hold, for the individual is both the subject matter and the agent of morality. Finally, the standpoint of every moral agent is deemed to be the same regardless of his or her social context.⁵

¹ For an account of Hegel's view of freedom and community see Singer, Peter, Hegel, Oxford, University Press, 1983, Chapter 3, 24-44. A definite content cannot be given to morality on the level of pure inwardness: for the content of morality we must turn to the idea of the organized society. 'Concrete ethics is for Hegel social ethics. It is one's position in society which specifies one's duties. Hence social ethics is the synthesis or unity at a higher level of the one-sided concepts of right and morality'. Copleston, Frederick, A History of Philosophy, 7, 1, New York, Image Books, 1965, 252/251.

² See Taylor, Charles, 'Atomism', in Philosophical Papers Part 2: Philosophy and the Human Sciences, Cambridge, University Press, 1985.

³ Tao, Julia, 'The Chinese Moral Ethos and the Concept of Individual Rights', Journal of Applied Philosophy, 7, 2, 1990, 119-127, 122.

⁴ Rawls, John, A Theory of Justice, Oxford, University Press, 1973, 17-22. I use the term 'heuristic' to reflect both the dimension of discovery and the dimension of demonstration in Rawls' method. He writes, 'The idea here is simply to make vivid to ourselves the restrictions that it seems reasonable to impose on arguments for principles of justice ...'. 18.

⁵ MacIntyre, A., 'Is Patriotism a Virtue?', The Lindley Lecture, University of Kansas, 1984, 8/9. See also Nino, Carlos Santiago, The Ethics Of Human Rights, Oxford, University Press, 1991, 87/8.

Atomistic conceptions of human being arise from moral theories which promote a social vision as constituted by individuals for the pursuit of individual ends. Such 'primacy-of-rights-theories' (for which Locke provides the paradigm⁶) ascribe rights to human beings as unconditionally binding on other human beings, but without there being any concomitant principle of belonging, or of obligation to other human beings. Such an approach 'affirms the self-sufficiency of ... the individual'.⁷

Communitarians reject the liberal ideal because they hold that moral rules derive their scope and content, not from abstract rational heuristics but from particular social settings. The goods which justify moral rules are goods connected with a particular conception of social life. Indeed, outside of a particular community there is no reason to be moral: an unattached individual would not have access to the goods which justify morality. In addition, such an 'unencumbered' individual would lack the strength to be moral, for the strength to be moral is drawn from the support of the social environment. Without a strong attachment to a particular community a person cannot flourish as a moral agent.⁸

The principal communitarian objection to liberalism is that the latter presupposes an atomistic conception of the self which is unaffected by commitments to particular traditions, cultures, communities, or ways of life. This 'unencumbered self' stands outside all particular ties and influences and surveys the world from a detached, decontextualised, depersonalised, almost quasi-divine perspective. The communitarian asserts, on the contrary, that the human agent's identity is, as an inescapable matter of contingent fact, constituted by a matrix of specific commitments which form the starting point for 'ethical appraisal and debate'.⁹ Outside of some form of social organisation the individual human being could not develop the distinct human capacities which primacy-of-rights atomistic theories appear to require.

Liberal individualism demands respect for selected human capacities which are deemed to be constitutive of human being. These 'respect-commanding' capacities help to define the rights: possession of the relevant capacities by an individual commands respect from other

⁶ See Langford, Glenn, Education, Persons, and Society: a Philosophical Enquiry, London, Macmillan, 1985, 27-32, for the limitations of the Lockean account of practical principles.

⁷ Taylor, 'Atomism', 188/9.

⁸ MacIntyre, 'Is Patriotism a Virtue?' It is worthwhile to note that Article 29.1 of the United Nations Declaration of Human Rights (U.N. General Assembly, Declaration of Human Rights, Resolution 217A (III), 10 December, 1948), recognizes the individual's obligation to the community when it observes that 'Everyone has duties to the community *in which alone the free and full development of his personality is possible*.' (Emphasis added.) The individual/community relationship is a reciprocal (even synergistic) relationship. It is not a matter of the individual taking what he or she can get from the community but of having reciprocal obligations to the community which protects and sustains whatever rights the individual might have.

⁹ O'Neill, J., 'Should Communitarians be Nationalists?', Journal of Applied Philosophy, 11, 2, 1994, 135-143, 135. O'Neill concludes that communitarians need not be committed to nationalism.

human beings. This requires, however, a prior consensus regarding the moral status of the selected capacities: not all human capacities command respect. The selected capacities carry a special moral status: their normative force is contingent on the *shared* conviction that they are valuable.

In other words, our conception of the specifically human is not at all irrelevant to our ascription of rights to people.

...

The affirmation of certain rights involves us in affirming the worth of certain capacities and thus in accepting certain standards by which a life may be judged full or truncated.¹⁰

In addition liberal ethics favour the ascendancy of regulatory over substantive principles. But the source and the justification of these regulatory principles over other possible alternatives must be some conception of the good, that is, a substantive preference. Values such as toleration, freedom and fairness for example, cannot be defended by the claim that no values be defended, that there is substantive equality between contending conceptions of the good. What is the source of these values if not some conception of the good which is presumed to override others? It is only because of a commitment to a community of values (even a notional community) that liberals can assert their values as superior to others.¹¹ As Sandel asks: 'How is it possible to affirm certain liberties and rights as fundamental without embracing some vision of the good life, without endorsing some ends over others?'¹² The liberal commitment and the procedural and regulatory values it espouses is itself a preferential vision of the good for man.

Once we acknowledge the relevant human capacities (and the associated values) and their crucial role in the identification, ascription, and protection of rights, we must further acknowledge that aid and encouragement should be given to the development of these capacities in ourselves and in others: a negative attitude of non-interference is not sufficient. If it can be shown that the relevant capacities can develop only in some kind of

¹⁰ Taylor, 'Atomism', 193,199.

¹¹ See Rothfork, J., 'Postmodern Ethics: Richard Rorty and Michael Polanyi', Southern Humanities Review, 29, 1, 1995, 15-48. 'When the day-to-day tacit process of belief, decision, dedication, and community involvement breaks down, principles often assume an exaggerated, even a salvific, importance. For they promise to restore the very thing that was lost. The problem is that what was lost was not a principle, but a lived way of life, embodied knowledge, for which the principle is, at best, an abstraction, at worst, a caricature. It is in these actual communities where moral life is lived out, rather than in moments when principles are announced or analyzed.' ²¹ Langford points out that practical principles are abstract only in the sense that they are abstracted from already existing practices. The latter are the primary reality, the social principles are simply abstract summaries of existing or proposed practice which cannot, in themselves, provide a practice with external guidance. Education, Persons, and Society, 36.

¹² Sandel, Michael J., 'The Political Theory of the Procedural Republic', Review of Metaphysics and Morality, 93, 1988, 57-68, 60. This point is nicely illustrated in Singer, Hegel, 25-29. It is of interest that three formidable defenders of the liberal view consider it necessary to require (coerce?) children to be educated into the values of liberalism. See chapter 8, note 60.

human society then this entails that 'we ought to belong to or sustain ... this kind of society'.¹³

The small community of the family (even the extended family) cannot be sufficient (though it may be necessary) to the development of the capacities in question. These capacities (which would be engaged collectively in the freedom to formulate one's own life plan, for example) require an entire culture or civilization. Human beings are not born with an identity or with self-understanding. They can acquire identity and self-understanding only by participating in social practices which embody elements necessary to identity and self-understanding: how people recognise and treat each other, how they deliberate together, how they engage in various forms of exchange. The autonomous individual agent

can only achieve and maintain his identity in a certain type of culture ... but these ... do not come into existence spontaneously each successive instant. They are carried on in institutions and associations which require stability and continuity and frequently also support from society as a whole.¹⁴

Taylor concludes that the assertion of 'primacy-of-rights' is impossible. To assert the rights is to affirm the capacities and to affirm the capacities is to endorse commitment to the kind of social organisation necessary for the acknowledgement, promotion, and development of these capacities. This 'commits us to an obligation to belong'.¹⁵ Hence the assertion of rights is inseparable from the obligation to belong.

It appears, then, that a liberal ideal of radical individual autonomy is ultimately self-contradictory.¹⁶ It argues for the recognition of certain 'respect-commanding' capacities so that there is an obligation to preserve and expand these capacities (and the conditions necessary for such preservation and expansion). These capacities are contingent on membership in a society since they cannot exist without, for example, language, conceptual schemes, institutions, all of which are irreducibly social. Consequently, even on the liberal's own premises, the ascription of rights presupposes the duty to belong to, and to preserve, forms of community which nurture the development of the capacities which underlie rights. There is also a procedural contradiction, for the rules which govern fundamental relationships between people cannot be the outcome of theorizing based on an even more fundamental set of rules.

For suppose someone were to deny this and to embark upon the project of co-operating with others in constructing a theory designed to provide them with a rational justification. In order to do so successfully, she or he would

¹³ Taylor, 'Atomism', 195.

¹⁴ *Ibid.*, 205.

¹⁵ *Ibid.*, 197.

¹⁶ Mulhall, S., Swift, A., Liberals and Communitarians, Oxford, Blackwell, 1992, 23.

first have to enter into co-operative relationships already informed by allegiance to just those rules for which he or she aspired to provide a justification.¹⁷

A description of the morality based on a disembodied reason is incoherent. Such a procedure has, for example, no symbol system through which it can express or organise its cognition. Further disembodied selves (as in Rawls' original position) cannot differ in their traits and interests so as to bargain with each other and to reach an agreement. How could disembodied, decultured selves differ in their opinions of what would constitute a just arrangement? They are different in no respect. Robbed of the particularities of individual identity they become, not individual selves but a collective reason, they are not many, but one. The self proposed is too empty to choose principles of justice and conceptions of the good. Nor does such an account take cognizance of aspects of our moral experience which indicate that some attachments and commitments partly define our identity and are an essential object of our self-knowledge and of the knowledge of others.¹⁸

The liberal idea that persons can be detached from their conceptions of the good fails to reflect the ways in which people actually do relate to these conceptions. In the first place this notion misrepresents the person as independent of the ends and values which give her life meaning and value. We are not, in the first instance, persons who, once our personhood has been secured, turn to the choice of our most fundamental and defining beliefs. Even if we were we would have no distinguishing characteristics which would affect our choice. So that, in the event, our choice could only be arbitrary. In the second place the notion that the two (the person and her choice of conception of the good) are detachable trivialises the notion of conceptions of the good itself. It makes it appear as if there is a range of equally legitimate conceptions from which we can freely choose, the only difference between them being that we will (for the time being) endorse one rather than another by choosing it. Simply choosing something does not confer worth or value. The choice must be made with reference to some pre-existing value which persists independently of my choosing.¹⁹

Even if we accept that for purposes of the heuristic we should detach the individual choosers from certain aspects of their experience we have no reason to accept that freedom and equality should be exempted rather than other values.²⁰ too much is left out

¹⁷ MacIntyre, A., 'Plain Persons and Moral Philosophy: Rules, Virtues and Goods', American Catholic Philosophical Quarterly, 66, 1, 3-19, 10.

¹⁸ See Punzo, V.A., 'After Kohlberg: Virtue Ethics and the Recovery of the Moral Self', Philosophical Psychology, 9, 1, 1996, 7-23; Thomas, L., 'Virtue Ethics and the Arc of Universality: Reflections on Punzo's Reading of Kantian and Virtue Ethics', Philosophical Psychology, 9, 1, 1996, 25-32; Tappan, M.B., 'Narrative, Language, and Moral Experience', Journal of Moral Education, 20, 3, 1991, 243-256.

¹⁹ Taylor, C., The Ethics of Authenticity, Mass., Harvard University Press, 1991, 32-36.

²⁰ As in Rawls' original position.

(there are aspects of our humanity which we might choose in preference to individual freedom as a basis for political morality²¹) and what is left in is clearly selective for purposes of making a specific political case. Detachment from values (other than freedom and equality) and the endorsement of a value-free position from which values can be chosen is ultimately incoherent.

This procedure is also acultural in a way which is at odds with human experience. It does not appear to allow for cultural particularity whereby different ways of organising society are appropriate, and morally justified, in different cultures. It is universalist, in that it presumes that what is good for the rationalist individual of post-Enlightenment industrialized societies will equally hold good for other cultural groups. Yet we have no reason to accept that this is so: 'Do those who have a higher order interest in their freedom to frame, revise and rationally pursue their own conceptions of the good have it even if they have never heard of it, do not think that they have it, and would not want it if it were explained to them?'²² There is the suspicion that liberalism is being presented, not as one possible form of social organisation, but as the one true form in comparison with which all others are more or less deficient.²³

The significance of the social matrix which communitarians stress does not necessarily neglect the importance of individual freedoms. It all comes down to the value we ascribe to the capacities which alternative views promote. The liberal promotes the value of individualism, autonomy, and the freedom to choose an individualised conception of the good life. Communitarian views stress the value of co-operation, mutual assistance, and fidelity (not blind obedience) to received traditions. The individual can only be what she is by virtue of the fact that she grew in a particular community. Her choices of the good life are ^{largely} constrained by the way in which that growth has formed her perception of alternatives. In effect she can only live the kinds of life that her community makes available to her.

The communitarian critique is not purely theoretical. It is also a critique of contemporary 'Western' society and its institutions insofar as they embody liberal values.²⁴ It is an argument against the disappearance of special ties and commitments in favour of an

²¹ This is the force of Freedman's objection referred to in chapter 3.

²² Mulhall, Swift, Liberals and Communitarians, 12. One is reminded of Mill's endorsement of the ruler 'full of the spirit of improvement' in using whatever means are necessary to ameliorate backward states of society. Mill, J.S., On Liberty, in H.B. Acton, ed., Utilitarianism, Liberty, Representative Government, London, J.M. Dent & Sons Ltd., 1972, 73.

²³ This tendency in liberal thought is well illustrated in Francis Fukuyama's The End of History and the Last Man, London, Hamilton, 1992 and his thesis that, now that liberal democracy has (apparently) triumphed in the 20th century East/West, communist/capitalist confrontation, it is only a matter of time before it triumphs universally. This shows a shallow view of history, and a parochial view of political variety, for, in historical terms, liberal democracy can be considered as no more than an interesting, and so far successful, social experiment.

²⁴ Mulhall, Swift, Liberals and Communitarians, 22/3.

untrammelled individualism.²⁵ From the communitarian point of view, on the contrary, 'all human beings are born into societies and obtain rights by dint of that membership'.²⁶ Rights are relative to historical and/or cultural contexts: a rights view provides only one possible conception of human dignity and social justice, it is not *synonymous* with human dignity or social justice.²⁷

Science

The liberal moral agenda derives much of its persuasive force from the positivist ideal of science: it is an effort to enlist the reductionist methodology and the deductive certainties of the 'hard' physical sciences to the reflective interpretivism of ethics. But such a totally detached methodology is impossible even in the context of science itself. 'Detachment in the ordinary and true sense always means commitment to a particular approach ...'.²⁸ For example, scientists working within the prevailing paradigm of science (what Kuhn calls 'normal science' or, less flatteringly, 'mopping up operations', that is, solving residual problems in the context of the prevailing paradigm) are so fully committed to the paradigm within which they are operating that it is, for them, beyond question or discussion. It is only because prevailing paradigms can evoke a passionate commitment from individuals that progress in science is possible; for when individual scientists can take the paradigm for granted they need not begin from first principles each time and justify each new concept.²⁹

The intellectual standards invoked by practising scientists are public standards enshrined in the culture of science and perpetuated through an articulate framework. Because they accept the authority of the cultural milieu in which they find themselves (the scientific community) individual scientists accept the intellectual standards set by the culture. In doing so they set these standards for themselves, acknowledging them as the proper objects of their intellectual passions. These standards are neither of their own making nor are they objectively chosen. In this sense a 'passion for mental excellence believes itself to be fulfilling universal obligations'.³⁰

The general authority of science resides in the consensus of the opinions of individual scientists and this consensus is regarded as 'competent to decide all questions for science

²⁵ 'There is no such thing as society. There are individual men and women and there are families.' Margaret Thatcher, Conservative Prime Minister of the United Kingdom, reported in the Observer, 27 December, 1987. '(T)o an (subjective preference theory) economist ... there is no such thing as society, only the individuals who constitute it'. Ormerod, P., The Death of Economics, London, Faber, 1994, 34.

²⁶ Freeden, Michael, 'Human Rights and Welfare: A Communitarian View', Ethics, 100, 3, April, 1990, 500.

²⁷ See Tao, 'The Chinese Moral Ethos'.

²⁸ Polanyi, M., The Logic of Liberty, London, Routledge and Kegan Paul, 1951, 25.

²⁹ Kuhn, T.S., The Structure of Scientific Revolutions, Chicago, 1962, 10-22.

³⁰ Polanyi, M., Personal Knowledge: Towards a Post-Critical Philosophy, 2nd. edition, London, 1962, 173/4.

as a whole'.³¹ In accepting science and the premises of science as valid, individual scientists accept the community of science, and its general authority to which they contribute. This community accepts that members are competent to judge their own contribution in the context of the tradition, in the atmosphere of free discussion and criticism within the tradition itself. Indeed it is the discussion and criticism which ensures the continuity of the tradition as fundamental aspects of it.³² In presenting a novel finding, or a revolutionary paradigm, scientists are not attempting to destroy the community or authority, for in submitting their vision to the judgement and criticism of their peers they are tacitly proclaiming their fealty to these institutions. In such a situation, however, scientists are attempting to change the tradition: 'Such processes of creative renewal always imply an appeal from a tradition as it is to a tradition as it ought to be.' For this reason it must be accepted that the consensus of scientific opinion at a given moment represents 'only a temporary and imperfect embodiment of the traditional standards of science'.³³

So, the actual practice of science provides no warrant for the *ab initio* discovery and justification of principles of morality. Science is a *practice*, it is neither purely rational nor is it an individual pursuit although it is pursued by individuals. It is a communal tradition.

The communitarian alternative

Morality is based, not on abstract principles of regulation and distribution of freedom but on virtues which are embedded in particular communities.

The enacted narrative of each human life is embedded in the story of the community from which that individual derives identity: community traditions are essential for defining what is good in human lives.³⁴

Open-ended though it be, the story of my life is always embedded in the story of those communities from which I derive my identity - whether family or city, people or nation, party or cause. On the communitarian view, these

³¹ Polanyi, M., Science, Faith, and Society, London, 1964, 46.

³² Polanyi's account of the scientific tradition is similar to that put forward by Popper. See Popper, K.R., 'Toward a Rational Theory of Tradition', in Conjectures and Refutations: the Growth of Scientific Knowledge, London, Routledge and Kegan Paul, 1972, 120-135.

³³ Polanyi, M., Science, Faith, and Society, 46-56.

³⁴ MacIntyre, After Virtue, University of Notre Dame Press, 1981, chapter 15. Narrative has a central role in virtue ethics. See MacIntyre, A., 'Plain Persons and Moral Philosophy: Rules, Virtues and Goods', American Catholic Philosophical Quarterly, 66, 1, 3-19. MacIntyre holds that we need narratives which point beyond themselves to theories. See also Tappan, 'Narrative, Language, and Moral Experience', and Punzo, 'After Kohlberg'. Erikson insists on unity of 'life history', the role of story/narrative to structure human experience. Jostein Gaarder, author of Sophie's World considers story the fundamental language of human experience: 'I think the story is our mother tongue. Our human brain is made for stories, more than it's made for storing information'. Irish Times, 21 June 1996. See also Egan, Kieran, Teaching as Storytelling: an Alternative Approach to Teaching and Curriculum in the Elementary School, University of Chicago Press, 1986 for an account of the centrality of story for children in an educational context.

stories make a moral difference, not only a psychological one. They situate us in the world, and give our lives their moral particularity.³⁵

Four different conceptions of community have been set in opposition to liberal individualism.³⁶ In the first place there is community understood simply as the imposition of majority rule i.e. the right of the majority to impose its view of the good life on all of the members of the community. Secondly, there is the idea of a paternalistic community in which each member is deemed to have a responsibility towards the others for the sake of the community as a whole. This communal interest justifies intervention to prevent, or reform, the self-threatening behaviour of some members of the community. Thirdly, there is the idea of community for mutual self-interest. In a wide variety of ways individuals (who are not atomistically self-sufficient) need community to serve these needs which they cannot adequately meet by their unaided efforts.³⁷ Finally, there is the integrated community. In this view the value of the life of the individual is inseparable from the value of the life of the community. It is only through participation in the life of a community that the individual can thrive.

There is an ascending order of significance of 'community' here, from a purely numerical grouping, to community as a political group with a shared responsibility, to a recognition of community as necessary to the individual well-being of each of its members, to the notion of community as independent of, and prior to, individual citizens: the 'root idea' in this last conception is that 'people should identify their own interests with those of their political community'.³⁸ This conception is reminiscent of Aristotle's account of the state and is the one which I wish to adopt here as the central meaning of community.

Aristotle's view of the nature of the state,³⁹ as the supreme form of human association, involves three fundamental claims. The first of these is that human beings have natural ends, the realization of which constitutes an important part of the human good life. The second stresses the collaborative nature of groups: human beings cannot fully realise their ends without living in a *polis*, that is, in association with others. The third claim is that the *polis* develops naturally and exists for the sake of the human good life, the two are

³⁵ Sandel, 'The Political Theory', 62.

³⁶ Dworkin, Ronald, 'Liberal Community', in Gerald Dworkin, ed., *Morality, Harm, and the Law*, Oxford, Westview Press, 1994, 36/7.

³⁷ This is the sense outlined by Plato. *The Republic*, trans., G.M.A. Grube, London, Pan Books, 1981, 369-375.

³⁸ Dworkin, 'Liberal Community', 37.

³⁹ Aristotle, *Politics*, trans., T.A. Sinclair, revised and re-presented by Trevor J. Saunders, Penguin Books, 1992. The translator reminds us that the use of 'constitution' as a translation of *politeia* is inadequate. The latter 'embraces the whole social, political and economic organisation of the state; and also that "virtue" (areté, excellence, efficiency) is often conceived in terms of civic function rather than of character or mental or spiritual condition: "what I can do" as well as "what I inwardly am".' 177. In contemporary usage 'community' may be a more appropriate term from this point of view than 'state'. The latter has come to be seen in opposition to the individual, something which threatens the individual and which must be held in check.

inseparable. So, in the Aristotelian account, the natural ends of human life are achievable only in association with others in the sustaining context of a community.⁴⁰ The state exists by nature and man is by nature a political animal. 'Anyone who by his nature and not simply by ill-luck has no state is either too bad or too good, either subhuman or superhuman ...'⁴¹ Furthermore the state has a natural priority: it is both natural and prior to the individual.⁴² This does not mean that somehow the state pre-dates the individual historically (which would be absurd) but that we are born into, and die out of, a community. The community transcends the lives of its individual members.

A community is more than a simple aggregation of people and is not necessarily defined geographically. It has a number of crucial characteristics. Firstly, it embodies an identifiable set of values, interests, concerns, etc., that is, a certain conception of 'the good'. Secondly, there must be a common sharing of these interests. This is the central, and even dominant, social dimension. Thirdly, there must be mutual awareness of this common sharing of interests. Fourthly, within the community, the rights and duties of individuals are relative to their relationships with other individuals and to the community itself. Finally, social and moral criticism depend upon social and moral practices embodied in the traditions, institutions, and culture of the community itself. People derive their cultural and moral identities, and the meaning of their values, from their community. The community defines the appropriate cultural interaction, the relevant discourse on the ideas, values, and aspirations that constitute the community's identity, and hence its members' identities. Cultural and moral debate are an essential part of every vital community. Although the members of a community generally undergo the same political, social and cultural formative experiences, they must individually interpret the significance of events and reflect on the relevance and adequacy of their received values to these events.⁴³

Community reaches forward and backward in time, beyond the immediate environment of the individual, to embrace past generations as well as future generations; it is trans-generational. It perpetuates the heritage of past generations. The communal process of cultural and political debate regarding common norms, values, and ways of life may be

⁴⁰ All communities are part of the political community since the latter aims at advantage for the whole of life. 'It appears, then, that all these associations are parts of the political community; and the secondary friendships that we have described will correspond to these limited associations.' Aristotle, *Ethics*, trans., J.A.K. Thomson, (revised, Hugh Tredennick), London, Penguin, 1976, 273/4.

⁴¹ Aristotle, *Politics*, 59.

⁴² *Ibid.*, 60/1. This should not be taken to mean that, somehow, the state/community as an idea or institution, pre-dates human individuals but that without some form of natural human community the human race - and the individuals who comprise it - could not have survived.

⁴³ de-Shalit, A., 'Community and the Rights of Future Generations', *Journal of Applied Philosophy*, 9, 1, 1992, 105-115, 112. This re-echoes Polanyi's description of the scientific community. That these experiences are not uniform can be seen in the way that communities divide in disagreement about how they develop into the future. See Arons, Stephen, *Compelling Belief: the Culture of American Schooling*, New York, McGraw-Hill, 1983, *passim*.

directed to the past in an attempt to acquire self-understanding⁴⁴ (the community *re-interprets* its heritage: this is the limit on how conservative it may be) or to the future to direct self-becoming.⁴⁵ The future is also a dimension of our 'selves'. This is reminiscent of Erikson's concept of a stage of *generativity* in normal human development. Generativity refers to the interest which the older generation has in establishing and guiding the next generation in the beliefs, practices and values which have already given their lives stability and meaning. Generativity presumes continuity of family, community and species.⁴⁶ It involves faith in the future, not as an open-ended possibility, but as a continuation of the past through the present. It involves the ability to care about others. There is a dynamic in human community; human communities have, as it were, a life of their own which is greater than the sum of the interests of their individual members. Consequently, communities are concerned not just with physical protection and survival but also with the continuity of their unique identity. This continuity can only be assured through its treatment of its children.

A community, like a friendship, has a mutual orientation. In each case narrow self-interest is moderated by concern for the common good, that is for the good of the mutually enjoyed relationship. The well-being of the other members of the friendship or larger community constrains the self-concerned actions of the individual. Individuals, who have been formed by communities, friendships, and other close relationships, will often consider acts of self-denial, if not outright self-sacrifice, which contribute to the common good, to be in their own self-interest.⁴⁷

It is not necessary to abandon liberal institutions in order to espouse communitarian values, nor is it being suggested that we should. Rorty⁴⁸ follows the Hegelian tradition in holding that morality should be conceived, not as a set of universal abstract principles establishing rights, but as the interests of a historically conditioned community. The moral self is not an entity *separate* from interests, attachments and causal influences, but a network of beliefs, desires and emotions which is constantly reweaving itself: 'For purposes of moral and political deliberation and conversation, a person just *is* that network, as for purposes of ballistics she is a point-mass, or for purposes of chemistry a linkage of molecules.'⁴⁹ Our loyalties and beliefs consist entirely in the fact that living by them cannot be separated from understanding ourselves as the people we are: we are who we are because of these loyalties and convictions. There is no objective court of appeal against which they can be

⁴⁴ See Walsh, P., Education and Meaning: Philosophy in Practice, Cassell Education, 1993, chapter 12 on 'History and Piety'.

⁴⁵ de-Shalit, 'Community and the Rights of Future Generations', 113.

⁴⁶ Erikson, Erik H., Identity and the Life Cycle, New York, Norton and Co., 1994, 103/4. Significantly, Erikson sees the opposite of generativity as *stagnation*.

⁴⁷ Meyer, Michael J., 'Rights Between Friends', Journal of Philosophy, 89, 9, 467-483, 1992, 470.

⁴⁸ Rorty, R., 'Postmodernist Bourgeois Liberalism', Journal of Philosophy, 80/10, 1983, 583-589.

⁴⁹ *Ibid.*, 586.

tested. Moral conflicts are resolved, not by appeal to abstract rules and principles, but by invoking shared social aspirations and history.

The appropriate epistemology is pragmatic: it promotes the discussion of any subject with tolerance for the opinions of others, curiosity for new ideas, etc. It promotes the idea that the search for truth and goodness is a quest for a community which permits free encounters and promotes solidarity.⁵⁰ Our morality is an appeal to the part of our 'beliefs, desires, and emotions' which overlap with those of other members of our communities: morality is a matter of 'we-intentions'. Most moral dilemmas are reflections of the fact that most of us identify with *several* communities and do not wish to marginalise ourselves in relation to any of them.⁵¹

One of the functions of education is to increase the number of communities with which a person may identify. Each of the different communities will maintain a distinctive social ideal to which we subscribe, more or less critically. But there is also a broader, over-arching community which gives meaning to the notion of human rights, the community of human beings.

For someone to ask me to concede something to him as a human right is implicitly to ask whether I admit the notion of a human community at large, which transcends the various special communities of which I am a member; whether I admit him as a member of this larger community; and whether I admit a conception of the good life for this community.⁵²

Calling

The Polanyian conception of 'calling' is relevant here to explain how we can speak of personal responsibility when it seems that the conceptual framework within which we operate is the product of a local culture and that 'our motives are mixed up with forces holding onto social privilege'?⁵³ The answer is that we are more than mere products of a culture for our mental growth, although it is conditioned by circumstances, is never fully determined by circumstances.⁵⁴

⁵⁰ Historically the Socratic method. For an analysis of the associated idea of dialogue see Buber, M., Between Man and Man, Fontana Books, 196, and Freire, Paulo, The Pedagogy of the Oppressed, trans. Myra Bergman Ramos, Penguin Books, 1972. Mead acknowledges a *higher* community, 'a wider social environment' (like Golding's 'human community at large', see below) to which the individual can appeal over the immediate formational community. See Mead, George Herbert, Mind, Self, and Society, Charles W. Morris, ed., University of Chicago Press, 1962, 260-273. This is also clearly related to Polanyi's account of the scientific community.

⁵¹ The dilemma is illustrated in Sartre's example of the young man who had to choose between loyalty to his family (mother) or nation (war-time France). Sartre, J-P., Existentialism and Humanism, Philip Mariel, trans., London, Methuen & Co., 1948, 35-37.

⁵² Golding, M., 'Towards a Theory of Human Rights', Monist, 52, 4, 1968, 521-549, 549.

⁵³ Polanyi, Personal Knowledge, 322.

⁵⁴ Polanyi, M., 'Scientific Outlook: Its Sickness and Cure', Science, 125, 1957, 483.

Human individuals are placed, through no choice of their own, at a particular point in space and time which determines their education and up-bringing. The ultimate limitation, their own bodies, confines them and their experience for the span of their lives: 'All thought is incarnate; it lives by the body and by the favour of society'.⁵⁵ The received limitations determine the individual's calling: they are beyond individual responsibility, yet they constitute a personal situation for which each is responsible.

'In any given situation', Midgley writes, 'only a certain range of responses makes any sense at all'. But the 'possible paths are limited, and the landscape around us has features ... which must limit them still further'.⁵⁶ There are many constraints on human action: the fundamental nature of human being, the socio-cultural context in which the individual is brought up, the specific natural talents and capacities which the individual possesses, and the specific familial and educational nexus in which he or she grows. For there to be any meaningful choices there must be an existential coherence which recognises these features and accepts their limitations - without accepting these limitations as being completely determinant.

Within the narrow confines of the accidents of personal existence individuals must exercise their personal responsibility 'to fulfil the universal obligations to which (they are) subject'.⁵⁷ This personal calling both offers the individual opportunity for seeking the truth, and limits responsibility for arriving at individual conclusions.⁵⁸

Polanyi does not attempt to create a new system of thought, a new 'meta-narrative', built on some rationally discovered or intuited first principles beyond doubt or contradiction. Nothing we know can be known independently of the confines within which we accept the sense of our calling. On the contrary since birth we have subscribed to a complex of beliefs and assumptions which are ultimately beyond question for we have no alternative base from which to question them. Mentally (and, *a fortiori*, morally), as well as physically, each of us is a prisoner of the accidents of our birth and education: there can be no complete escape from the conceptual framework which is a necessary condition of thought.⁵⁹

⁵⁵ Polanyi, M., 'Knowing and Being', in M. Grene, ed., Knowing and Being, London, Routledge & Kegan Paul, 1969, 134.

⁵⁶ Midgley, M., The Ethical Primate: Humans, Freedom, and Morality, London, Routledge, 1994, 150.

⁵⁷ Polanyi, Personal Knowledge, 322/3. Note the similarity to Freire's notion of the 'ontological vocation'. Freire, Pedagogy, chapter 1.

⁵⁸ Polanyi, 'Knowing and Being', 133.

⁵⁹ Even Peters' search for 'a rational form of morality, which enables a person to adopt a stance that is critical of tradition but not subjective' is conducted within a tradition which allows for the rational appraisal of received ideas. Peters, R.S., Psychology and Ethical Development, London, Allen and Unwin, 1974, especially chapter 17, 'Moral Development and Moral Learning'. The 'group of rational passions' required to support the undertaking cannot be simply invented or randomly selected by the individual. A regard for things like 'consistency, order, clarity and relevance' is learned, it is part of a tradition.

Polanyi's philosophical programme is, ultimately, an interpretivist one: it is a process of probing to the depths of our knowledge and beliefs and interrogating the precise nature of their foundations. The ultimate objective of philosophy is not the discovery of objective foundational principles but

to realise that we can voice our ultimate convictions only from within our convictions - from within the whole system of acceptances that are logically prior to any particular assertion of our own, prior to the holding of any particular piece of knowledge. If an ultimate logical level is to be attained and made explicit, this must be a declaration of my personal beliefs. I believe that the foundation of philosophical reflection consists in bringing to light, and affirming as my own, the belief implied in such of my thoughts and practices as I believe to be valid; that I must aim at discovering what I truly believe in and at formulating the convictions which I find myself holding;

...

Logically the whole of my argument is but an elaboration of this circle; it is a systematic course in teaching myself to hold my own beliefs.⁶⁰

Philosophy is a programme of self-identification. An inquiry into our fundamental beliefs will not uncover beliefs which were not part of our faith in the inquiry itself.⁶¹

The calling of the educated mind is situated within the frame of reference of the culture to which it belongs. Children accept a culture 'constructed on the premises of the traditional interpretation of the universe' and rooted in the idiom of the social group to which they belong.⁶² The educated mind is committed to the given culture and idiom beyond its responsibility, for, in accepting the conceptions which the given culture and idiom communicate as true the educated mind is accrediting them with this truth: they must be true since they provide the only criteria of truth which it has. Intellectual standards are public standards enshrined in the culture and perpetuated through an articulate framework. Because they accept the authority of the cultural milieu in which they find themselves, human beings accept the intellectual standards which are set by their culture. By doing so they set these standards for themselves and acknowledge them as the proper objects of their intellectual passions. Clearly these standards are neither of an individual's own making nor are they subjectively chosen. But the individual is not completely constrained by them.

⁶⁰ Polanyi, Personal Knowledge, 267, 299. This is similar to the Socratic injunction to 'know thyself'. It may be that Gutmann has something similar in mind when she distinguishes between our principles and our 'firmest convictions'. In general, she writes, 'we cannot understand a political theory or use its principles to evaluate existing practices until we engage in the process of formulating its principles, translating them into practices, and judging the practices against our convictions.' Gutmann, A., Democratic Education, New Jersey, Princeton University Press, 1987, 18.

⁶¹ Sandel similarly believes we cannot consider ourselves as disembodied creators of our own moral meaning 'without great cost to those loyalties and convictions whose moral force consists partly in the fact that living by them is inseparable from understanding ourselves as the particular people we are - as members of this family or community or nation or people, as bearers of this history, as sons and daughters of that revolution, as citizens of this republic'. Sandel, M.J., Liberalism and the Limits of Justice, Cambridge, University Press, 1982, 179.

⁶² Polanyi, Personal Knowledge, 112.

G.H. Mead⁶³ has described the process by which individuals acquire the prevailing symbolic representations and interpretations of the world which are embedded in a form of symbolic representation (language). Through this means they are empowered; they acquire a tool with which they can reflect upon the received representations and interpretations, and the significance which these have for their own particular experience. This enables them to recognise and assert their own individuality.

Mead's symbolic interactionism attempts to explain how the mind and self are generated in a social process. Language is the mechanism by which mind is socially constituted and through which the self becomes aware of itself as an object: 'self' is the capacity of the human organism to be present to itself as an 'other'. This happens through our taking the role of the other. 'We cannot realise ourselves except insofar as we can recognise the other in his relationship to us. It is as he takes the attitude of the other that the individual is able to realise himself as a self'.⁶⁴

The self which is constituted by internalising various specific and generalised roles is the 'me'. But this is not the full story: this would simply lead to a view of the individual and society in which the former is totally dominated and determined by the latter. We need to be able to account for individual freedom and responsibility, creativity, or, for that matter, for social change or evolution. Freedom and creativity come about as a result of the 'I': the capacity of the individual to respond to what is received (internalised) in a reflective and potentially novel way. The social process of communication, which the individual internalizes in the formation of the 'me', confers the capacity for reflective thought (I can talk to my 'self') which is the ability to direct action in terms of the anticipated consequences of alternative courses of action. Symbolic representation is a tool with which individuals can reflect upon their culture's representations and the significance of these representations for themselves. It is by this means that they are able to recognise and realise their own individuality. 'The 'I' reacts to the self which arises through the taking of the attitudes of others. Through taking those attitudes we have introduced the 'me' and we react to it as an 'I'".⁶⁵

By implanting itself in each individual, society ensures a measure of predictable regulation: a population of me's subordinate to the overall pattern of society. But the mechanism involved also equips the individual with the capacity to transcend conformity and orthodoxy and consequently to contribute to the transformation of society. The unqualified 'me' would

⁶³ Mead, Mind, Self, and Society.

⁶⁴ *Ibid.*, 194.

⁶⁵ *Ibid.*, 174. 'The 'I' is the response of the organism to the attitudes of the others; the 'me' is the organised set of attitudes of others which one himself assumes. The attitudes of the others constitute the organised 'me', and then one reacts towards that as an 'I'. 175. See also 198/9.

be a creature of unremitting conformity. An 'unencumbered' 'I' (if such were even theoretically possible) would be a creature of unrestrained self-interest. In reality the conformity of the 'me' is leavened by the constrained creativity of the 'I'. The response of the 'I' is unpredictable: our response to any situation will not be - cannot be - thoroughly conditioned.

(A)n individual is constantly reacting to such an organised community in the way of expressing himself, not necessarily asserting himself in the offensive sense but expressing himself, being himself in such a co-operative process as belongs to any community. The attitudes involved are gathered from the group, but the individual in whom they are organised has the opportunity of giving them an expression which perhaps has never taken place before.⁶⁶

The contrast between 'tribal' and 'critical' communities is that the individual in the former is almost totally determined and constrained by the community of which she is a part while in the latter the individual is more liberated and engages in more creative, innovative, or novel responses. Nonetheless the liberated individual is not - and cannot be - totally liberated from the sustaining community since no individual has a mind which operates completely autonomously, 'in isolation from the social life-process in which it has arisen or out of which it has emerged, and in which the pattern of organised social behaviour has consequently been basically impressed on it.'⁶⁷ By the same token it is difficult to imagine an individual completely unable to act with *some* autonomy in any community.⁶⁸

Human beings form their ethical dispositions naturally, but 'naturally' does not mean 'spontaneously': the formation requires education and rearing. The ethical life involves convention, human beings live naturally by convention. We are, collectively and individually, identified with a set of ethical considerations which derive from our socially constituted conception(s) of well-being. As a consequence we wish to educate our children to share these ethical beliefs and other cultural conceptions we may have. This process is not just good for us but also for our children,

both because it is part of our conception of their well-being and also because, even by more limited conceptions of happiness or contentment, we have little reason to believe that they will be happier if excluded from the ethical institutions of society.⁶⁹

⁶⁶ *Ibid.*, 197/8.

⁶⁷ *Ibid.*, 221/2. Later Mead writes that 'There is no *necessary or inevitable* reason why social institutions should be oppressive or rigidly conservative, or why they should not rather be, as many are, flexible and progressive, fostering individuality rather than discouraging it'. 262 (emphasis added).

⁶⁸ See Langford, Education, Persons, and Society, 21-43. For an account of the individual/community nexus within a traditional community see Tao, 'The Chinese Moral Ethos'.

⁶⁹ Williams, Bernard, Ethics and the Limits of Philosophy, Fontana Press, 1985, 47/8.

Rights and community

Individual rights are constrained not just by the rights and freedoms of others but also by the just requirements of the general welfare. As well as being balanced against other individual rights they must be harmonised with the interests of the sustaining community. Although certain rights are individual in kind (privacy, the right to fair due procedure in criminal trials) the individual must be able to act collectively (this is, after all, the point of rights of assembly and of association⁷⁰) in cultural, religious and linguistic contexts. In fact there are certain individual rights which cannot be exercised in isolation from the community. Economic, social and cultural rights by their nature are collective, and even though the individual is a beneficiary, the collective, too, benefits over and above the benefit to individuals. It may be that the communal benefit is more than the sum of the individual benefits.⁷¹ In fact, as Triggs argues, not to grant special rights to (ethnic, religious, or linguistic) groups to protect their cultures, religious practices, and languages, is to treat them unequally and unjustly. 'Minority rights thus have the purpose of ensuring the effective implementation of fundamental individual human rights.'⁷² In addition unequal treatment which could lead to the decline of minority groups will irretrievably impoverish the human community. The fate of the rights, entitlements, and prerogatives of diverse human communities is of inestimable benefit to human well-being.

One of the main constraints on the exercise of individual rights comes from the spread of technology and its increasing availability for individual use. Technologically and demographically the world in which rights are exercised has been transformed. As a consequence if traditional rights of freedom continue to be exercised in a context of growing technological development, and increasing accessibility of the fruits of these developments to increasing numbers of individuals, then there is 'considerable potential for diluting or diminishing societal quality of life'.⁷³ We must either question the viability of modern western individualism or radically revise the traditional concept of individualism: untrammelled exercise of individual rights will inevitably come into conflict with a greater good: the societal (communal) context in which the rights are exercised.⁷⁴

McGinn asserts that a right may justifiably be restricted if it threatens the very existence of society, or continued effective social functioning, or some natural resource vital to society.

⁷⁰ There is also a collective dimension to rights of freedom, thought, and opinion. For the purpose of these rights is surely to change and influence communal perceptions. This, at least, appears to be Mill's view.

⁷¹ Triggs, G., 'The Rights of 'Peoples' and Individual Rights: Conflict or Harmony?', in Crawford, J., ed., The Rights of Peoples, Oxford, University Press, 1988, 156.

⁷² *Ibid.*, 145.

⁷³ McGinn, Robert E., 'Technology, Demography, and the Anachronism of Traditional Rights', Journal of Applied Philosophy, 11, 1, 1994, 57-70, 66.

⁷⁴ *Ibid.*, 67. It should be remembered that Mill's rights are so contextualized: his litmus test is social benefit.

It may also be restricted if a seriously debilitating financial cost is imposed, or if some phenomenon of significant aesthetic, cultural, historical, or spiritual value is jeopardised, or if some highly valued social amenity would be seriously damaged or eliminated.⁷⁵ All of these limitations presume precedence for community over untrammelled individual choice. They provide for a contextualised theory of rights. An acceptable theory of rights in contemporary technological society must account for the implications of their exercise in a context in which a rapidly changing, potent technological arsenal is diffused throughout a populous, materialistic, democratic society. Use of such a technological arsenal by a large and growing number of individual rights holders has considerable potential for diluting or diminishing societal quality of life.⁷⁶

A conception of individual rights requires a view of the social ideal of the good life as well as a view of the nature of human community. The content of these rights, and their distribution, must ultimately be decided with reference to the social ideal embodied in that community. Community, in other words, is of the very essence of rights: every claim of right invokes reference to a community. No one can assert a right who is not a member of a community of at least two. It would be pointless to speculate about the rights of Robinson Crusoe prior to his rescue of Friday. Until there were two inhabitants (or, more correctly, co-habitants) on the island there could be no question of regulatory rights being necessary, much less invoked: there was no social environment. Once Friday appeared on the scene the type of community required to give rise to talk of rights came into existence. In such a community there are at least two individuals who are capable of communicating demands to one another, each has a capacity to respond to these demands, and the possibility of a clash between competing demands is present.⁷⁷ Rights are always 'possessed' in relation to a community. When someone claims a right they immediately raise the question of community membership. It is not rights which create community but communities which create rights.

There is no necessary incompatibility between a community which promotes close mutual bonds (friendship and family for example) and the exercise of rights which co-ordinate relationships within such a community, although having and exercising rights seems most appropriate in an atmosphere which is individualist, adversarial, and egotistical.⁷⁸ Justice is

⁷⁵ This raises serious questions about the viability of rights at all: at least about the criteria which will be used in the event of any one of these conflicts occurring. For if rights are not the principal deciding factor in conflicts between the individual and the collective then what is?

⁷⁶ McGinn, 'Technology, Demography', 66.

⁷⁷ Golding, 'Towards a Theory of Human Rights', 528/9.

⁷⁸ Meyer, 'Rights Between Friends', 470/1. See also Smith, Tara, 'Rights, Friends and Egoism', *Journal of Philosophy*, 90, 3, 144-148, March, 1993.

a remedial virtue: it is not prior to other social values.⁷⁹ It is resorted to when other virtues fail (e.g. a deterioration in the links of fraternity - friendship, family, or community). Appeal is made to rights most appropriately when the natural context of mutual regard, love, benevolence, and shared aspirations for mutual well-being, begins to fragment.

Appeal to rights in a properly functioning relationship is inappropriate and may well damage the relationship. In cases where one has rights without claiming them rights operate as 'unneeded reminders' of mutual obligations. They provide a sense of individual self-worth which does not necessarily undermine the relationships involved.⁸⁰ In a community without rights, on the other hand, one is dependent for one's welfare exclusively on the good will of others. There is no separate ground, apart from the attitude of the others, for one's self-esteem. If, for whatever reason, their regard is withdrawn one is left with no resource at all. Granted that we have rights we may refrain from claiming them because of the disruption such claiming may cause to the constitutive relations. On the other hand rights are there to be claimed when regulative relations were never properly established, have already begun to deteriorate, or have changed to a new mode, as in the case of the adolescent/parent relation. Although as a child one may have rights against one's parents it is generally unnecessary to claim them because they simply operate as guides to the proper operation of the parent/child relationship.⁸¹ In ordinary ('normal') circumstances this relationship functions adequately (without recourse to rights) because of the understandings of the regulative relations. (These understandings become mutual as between parents and children as the latter adopt the understandings of the former. In this sense 'regulative' has a formative, as well as a regulative sense.⁸²) When the regulative relations are in the process

⁷⁹ Sandel, M.J., Liberalism and the Limits of Justice, Cambridge, 1982. Callan (Callan, Eamonn, Creating Citizens: Political Education and Liberal Democracy, Oxford, Clarendon Press, 1997) takes issue with Sandel on this point arguing that the language of justice is needed as much in intimate relationships as it is in more impersonal, political relationships. Although his case is persuasive, it is not compelling because he bases it on an ambiguous understanding of 'care'. In the first place he uses 'care' in the sense of selfishly value ('If I care for my wife merely as a source of domestic service, emotional solace, and sexual gratification' 72) and while he admits that such a use is morally uninteresting he has nonetheless succeeded in devaluing the concept. He then uses the word in conjunction with the idea of exploitation ('the caring exploitation of others'). The 'care' that is at issue is not 'care' in the sense of looking after a valuable statue or a race horse. To 'care' for one's car is no more than the prudent protection of an investment. When we use the word in the context of human relationships we normally mean it to connote concern, interest, regard, affection, etc. We do not care in this sense out of duty (or in response to demands of justice) but out of emotional attachment at some level of engagement. In institutional settings, for example, we expect the care provided to be more than the mechanical provision of food, shelter, medical attention, etc. If these things are not done in a context of concern for the individual's well-being as the person she is then we would rightly condemn it as an 'uncaring' environment even though the basic physical needs were being met.

⁸⁰ Meyer, 'Rights Between Friends', 474.

⁸¹ Kleinig concludes that we should assert our rights 'only when adequate moral relations are absent or have broken down'. For children to get their rights 'only because they have asserted them is not so much a triumph for morality but a sign of its "scarcity" or breakdown.' Kleinig, J., 'Mill, Children and Rights', Educational Philosophy and Theory, 8, 1, 1976, 1-16, 15.

⁸² This is the sense in which the law has an educative as well as a regulative function. This formative sense allows for the distortion of parent-child relations which leads to the prolonged exploitation and abuse of children until such time as

of transformation or deterioration it may be appropriate to invoke rights. We may threaten to claim a right, or note that a right has been violated, without actually claiming the right.⁸³ This may be sufficient to regulate the relationship, to restore the proper functioning when it has, for whatever reason, been disrupted. Recourse to rights claims is an indication that normal regulative relationships have broken down.

It will be remembered that Bobbio⁸⁴ accepts that the widespread adoption (or acceptance) of human rights is a sufficient basis for action and decision. His programme is pragmatic: the priority is action on the basis of established rights rather than a search for a rational grounding for rights. It is the historical development of moral ideas which gives legal ideas their force. The universal assent of the international community (and its evolution over time) is itself the moral warrant for rights.⁸⁵ But how do we ensure that the community, at any level of generality, will not simply oppress individuals into a lock-step conformity to orthodox belief and behaviour?

Nino argues that Bobbio's position, and that of communitarians generally, can result in quite unacceptable, even appalling, extremes: Nazi or Fascist totalitarianism (right defined by the power to impose a particular conception of the good), or collectivist, tribalist, or nationalist attitudes which can justify the sacrifice of the individual in the interest of the collective.⁸⁶

The primacy of the good over individual rights allows for the justification of perfectionist policies which intend to impose ideals of excellence or personal virtue, even when individuals do not perceive them and thus do not subscribe to them.⁸⁷

Communitarians, in turn, are skeptical about the possibility of 'subjective and arbitrary moral conclusions' in the liberal canon: the notion that 'noumenal beings', abstracted from particular interests, conceptions of the good, and social circumstances may, on the basis of their culturally conditioned 'enlightened' views, attempt to impose moral conclusions which are antipathetic to local and historical realities.⁸⁸

children acquire alternative models of parent-child relations which provide them with a stance from which they can challenge and critique their own childhood experience.

⁸³ Meyer, 'Rights Between Friends', 474.

⁸⁴ Bobbio, Norberto, *The Age of Rights*, trans., Allan Cameron, Cambridge, Polity Press, 1996.

⁸⁵ See Searle, John, R., *The Construction of Social Reality*, Harmondsworth, Penguin Books, 1996, especially chapters 4 and 5 for an account of the way in which institutional facts are established.

⁸⁶ Nino, Carlos Santiago, 'Positivism and Communitarianism: Between Human Rights and Democracy', *Ratio Juris*, 7, 1, 1994, 14-40, 25-27.

⁸⁷ *Ibid.*, 27. The 20th century is replete with illustrative examples.

⁸⁸ As already mentioned Mill excused 'a ruler full of the spirit of improvement' in the use of 'any expedients that will attain an end' when dealing with 'those backward states of society in which the race itself may be considered as in its nonage'. Mill, *On Liberty*, 73. But it is noteworthy that Mill's entire argument in favour of individual liberty is utilitarian, made out of concern for the general welfare (or general utility) which is the ultimate criterion of moral worth. Individual liberty is instrumental, not an end in itself. See Lyons, D., 'Human Rights and the General Welfare', *Philosophy and*

Nino is silent about the (equally experienced) excesses of liberal individualism which have led to alienation, oppression, human suffering, the impoverishment of individuals, the fragmentation of communities, and the destruction of ecological environments. In recent times commitment to radical economic individualism has led to the dismantling and curtailment of social welfare provision and increasingly regressive taxation policies in the name of liberalism. This does not mean that such outcomes are a *necessary* corollary of this philosophy. But it does indicate that it, too, is prone to excess.

Nino's response to the fear of individualist excess is to argue that the mechanisms of democracy are sufficiently strong to prevent abuse in the absence of *perfect* rational discourse about important social and political decisions. The 'resort to democracy about the extent, balance, and modes of violations of human rights is what prevents the elitism, subjectivism and arbitrariness which positivists like Bobbio and Communitarians perceive behind liberal moralism.'⁸⁹ He offers no explanation as to why this democratic control cannot extend to preventing communitarian views degenerating into totalitarianism. He appears to believe that it is only liberalism which has access to democracy as a form of political regulation.

One possible solution to the problem of relativism is Mackie's theory which is individualist 'in that individual persons are the primary bearers of rights'. But it is not radically individualist since 'even the most independent individuals constitute their distinctive characters not by isolating themselves or by making "existential" choices but by working with and through inherited traditions'. This does not mean that ethical discrimination between alternative collectives (communities) is impossible. It will discriminate between those which

express and realise the rights of their members and those which sacrifice some or even most of their members to a supposed collective interest, or to the real interest of some members, or even to some maximised aggregate of interests.⁹⁰

Communitarian moral criticism is dependent on embodied moral practice so there is no evident way to adjudicate between alternative traditions or conventions because there are no independent principles. On the other hand Williams⁹¹ alleges that ethical theory of the Kantian tradition cannot itself proceed without social understanding. It needs the understanding of institutions, how they work, and how they generate belief in themselves, in order to

Public Affairs, 6, 1977, 113-129. Also Sandel, 'The Political Theory': 'The utilitarian calculus treats people as means to the happiness of others, not as ends in themselves, worthy of respect.' 59.

⁸⁹ Nino, 'Positivism and Communitarianism', 37

⁹⁰ Mackie, J.L., Ethics: Inventing Right and Wrong, Penguin Books, 1990, 117.

⁹¹ Williams, Ethics and the Limits of Philosophy.

answer questions about itself that it cannot ultimately avoid, about its relation to social life, its social or psychological connections with practice, and the ways it might hope to turn its supposed rational authority into power.⁹²

Summary

Moral existence is contingent on membership of a community from which individual identity can be acquired: we are who and what we are because we belong to a cultural community, this is an inescapable starting point. Identity and self-understanding can be secured only through developmental participation in social practices which embody the necessary elements: forms of inter-personal recognition and regard, political deliberation and social exchange, accepted restrictions and freedoms.

This view is contrary to conceptions of human being which derive from moral theories in which society is constituted by self-sufficient individuals for the pursuit of individual ends. In such views individual rights are ascribed as being unconditionally binding but without any concomitant principle of belonging or of obligation to others.

Human beings are sociable: the natural ends of human life can be achieved only in association with others in the sustaining context of a community. Human communities are natural features of human experience and transcend the lives of their individual members.

Communitarians reject individualist conceptions on the grounds that morality is based on virtues which are embedded in the culture and practices of particular communities. Moral rules derive not only their scope and content but also their authority from specific social settings and particular cultural traditions. Moral identity is constituted by a pattern of particular social practices which form moral capacities which constitute, but do not irreversibly determine, moral identity. Possession of the moral capacities commands respect from other members of the relevant community because of the shared conviction that they are valuable. These capacities require the promotion and protection of an entire culture. They cannot exist without the appropriate symbolic and conceptual schemes, institutions and practices, which are irreducibly inter-personal. It follows that commitment to the selected capacities presupposes forms of community which nurture their development.

Personhood is not a prerequisite or precondition of the choice of fundamental beliefs and values, on the contrary, it is a function of constitutive beliefs and values. People cannot become radically detached from the ends and values which give their lives meaning and value without incurring significant self-harm. For there is not a range of equally legitimate conceptions of the good from which we can make an unconstrained choice. Individual

⁹² *Ibid.*, 199.

choices must be made with reference to already existing values which persist independently of individual choices. The choice to abandon a value or change a preference can only be made with reference to another deeper, more fundamental value.

Communitarian values do not entail the abandonment of liberal institutions. The communitarian insistence on the social origin and validation of values does not deny the importance of individual freedoms, but such freedoms must operate within a social context which requires co-operation, mutual assistance, and fidelity to shared traditions. The freedoms of the individual are constrained by the way in which her perception of alternatives has been influenced by social practice and inherited values. In a healthy community the well-being of others constrains the scope of the self-concerned actions of the individual, narrow self-interest is moderated by concern for the common good.

Science is not a model for an individualist moral agenda. Even in the context of science itself radical detachment is impossible. The method of science is a communal method in which the findings of individual scientists are constantly subjected to the consensual values, standards, and traditions of the community of science as a whole.

An essential part of every community is its discourse on the ideas, values, and aspirations that constitute its identity and, consequently, its members' identities. The individual members of a community can re-evaluate the significance of events and the relevance and adequacy of their received values to these events to the point where they can propose re-interpretations (often to the point of radical revision) of the community's perception of its own identity.

Education increases the range of communities within which a person may re-evaluate her identity. Each of these communities will maintain a distinctive social ideal and these various social ideals may come into conflict. When this happens commitment to the conflicting communities must be critically interrogated before a resolution can be found.

Personal responsibility can be reconciled with commitment to a community through the notion of calling. Individual human beings are more than mere products of a culture for their individuality, the reflective 'I', is never fully determined by circumstances. Nonetheless human action is constrained by several contingencies over which we have limited, if any, control. As well as the givens of human being these include, the constitutive socio-cultural context, individual natural endowments, and specific familial and educational circumstances. These limitations do not completely determine our existence. We can extend them, however, only when we recognise their existential reality and the nature of the limitations they impose on our freedom. We exercise personal responsibility within the confines which these accidents of personal existence impose.

Although our ethical dispositions are natural they do not emerge spontaneously, they are formed by education and rearing within an ethical tradition. The ethical tradition becomes part of our identity: it is part of us and we are part of it, it gives our lives value and meaning. As part of our conception of the good life we wish our children to share the ethical beliefs endorsed by the tradition as well as our other cherished cultural conceptions.

In addition to the constraints imposed by the rights and freedoms of others individual rights are also constrained by the requirements of the general welfare. Individual rights must be accommodated within the general interests of the sustaining community. In the particular case of the spread of technology it is clear that the continued individual use of environmentally and socially damaging technologies must be constrained by the greater good, however this is to be defined.

Community membership provides the context for rights. Communities create rights by coordinating inter-personal relations, and adjudicating in cases where claims of rights violations are made. Without such a context rights would be contentless. Any conception of individual rights entails a view of a shared ideal of the good life which includes a view of individual entitlements within constraints imposed by this shared ideal. The content of the rights, their distribution, and their vindication must ultimately be decided with reference to a social ideal embodied in a community: every claim of right invokes reference to a community.

Communities which promote close mutual bonds (such as friendship and family) and regulatory rights are not incompatible, although rights are usually associated with adversarial situations. The justice provided by appeal to rights is resorted to when the virtues which are constitutive of close human relationships begin to deteriorate or fail. Recourse to rights claims is appropriate only in situations where normal regulative relationships are no longer functioning properly. A too hasty resort to rights claims may well be destructive of more intimate relationships.

Chapter 11: Conclusion

Rights

We should heed Aristotle's warning not to 'expect more precision in the treatment of any subject than the nature of that subject permits; for demanding logical demonstrations from a teacher of rhetoric is clearly about as reasonable as accepting mere plausibility from a mathematician'.¹ The search for an unassailable grounding for rights, for a rigorously systematic classification of rights, for an unambiguous demarcation between childhood and adulthood, for an unproblematic definition of best carers or best interests,² for a neat universal description of human ontogenesis, for an unproblematic distinction between the individual and her community, has not led so far, nor is such a search likely to lead, to uncontroversial conclusions. Human life is complex and ultimately unpredictable, and although we can construct theoretical models to explain aspects of it we should never expect such models to yield the precision, completeness, or control offered by theories about the non-human physical world. Complex moral problems are not amenable to clear-cut either/or solutions.

In contemporary democratic societies no-one is more circumscribed by authority and more dominated by authority figures than the child. When adults complain that they are being 'treated like children' they are identifying precisely this aspect of the quotidian experience of the child: absence of liberty, powerlessness, not being taken seriously as a significant individual.

The case of children's rights differs from adults' in two ways. In the case of adults the principal forms of exclusion from the realm of rights can be contested on the grounds that perceived differences - gender, race, colour, religion, ethnicity, etc. - are irrelevant to the ascription of rights; more crucially, perhaps, they can be - and have been - contested by members of the excluded groups themselves. In the case of children, however, some of the perceived differences are more likely to be relevant - knowledge, immaturity of understanding and judgement, adequacy of life-experience, capacity for autonomous action or for moral responsibility - and as a consequence the child's ability to contest exclusion is proportionally reduced.

Children are children. There is no reason to suppose that we can dispense with the long period of development and maturation necessary for them to become adults capable of

¹ Aristotle, *Ethics*, trans., J.A.K. Thomson, (revised, Hugh Tredennick), London, Penguin, 1976, 65.

² In the 'Report Of The Working Group On Determining The Best Interests Of The Child', *Fordham Law Review*, 64, 1996, 1347-1350, it is concluded that the definition of best interests varies according to circumstances. The best interests of a child in a custody case would not be the same as the best interests of a child in an educational placement case. It comes down to the specific needs of the child in each situation. There is no global declaration of what the best interests are.

functioning with at least minimal competence in human society. The necessary knowledge, understanding, sympathies, values, and skills take a long time to acquire. If this acquisition is delayed by excessive paternalist protectionism the solution is not to pretend that children are the equals of adults in relevant ways but to reform child-rearing practices. As children grow towards and through adolescence what they require from adults is not increasingly intrusive paternalism but supportive understanding and the kinds of structures necessary for them to practise their developing competencies in relative safety. The objective is autonomy for the new adult; parental autonomy 'must run out, and paternalism must wind down'. But this change must be gradual: growing autonomy for the child and a 'gradual restriction' of the autonomy of the parents except in cases where the normal development of the child is 'in some way impeded'.³

In the case of children a preliminary distinction must be made between what might be called 'enabling' rights and 'instrumental' rights, that is, rights in respect of which the holder is a passive recipient (the infant's right to nutrition) and rights in respect of which the holder is an active participant (the adult's right to freedom of speech).⁴ To what extent do different rights apply to the child immediately or must all, or any, of them be acquired by training, education, use, or maturation? What limits can be justifiably placed on their exercise because of the specific characteristics of childhood? In this work I have tried to sketch out a developmental account of moral and social being which takes account of the process of entering into possession of rights.

Categorically excluding children from the application of rights and freedoms ignores the developmental nature of childhood. Ironically the attempt to extend rights to children in exactly the same way as they are extended to adults⁵ also ignores the developmental nature of childhood and the gradualist nature of the child's capacity to deal with moral responsibility.

However strongly they may be defended, parental rights are not absolutes: the interests of society and the existence of the rights of others legitimately place limits on the extent of parental rights. Compulsory schooling is a case in point.⁶ As far back as Aristotle it has been recognised that the state has a 'legitimate interest' in the education of the young.⁷ Contemporary justifications of this 'legitimate interest' include the need to protect the rights

³ Bigelow, J., *et al.*, 'Parental Autonomy', *Journal of Applied Philosophy*, 5, 2, 1988, 183 - 196, 192/3.

⁴ This is similar to the distinction which Rogers and Wrightsman make between rights of nurturance and rights of self-determination. Rogers, C.M., Wrightsman, L.S., 'Attitudes Towards Children's Rights: Nurturance or Self-Determination', *Journal of Social Issues*, 34, 2, 1978, 59-69.

⁵ See, for example, Holt, J., *Escape from Childhood*, Harmondsworth, Penguin, 1975.

⁶ Page, Edgar, 'Parental Rights', *Journal of Applied Philosophy*, 1, 2, 1984, 187-203, 202.

⁷ 'But since there is but one aim for the entire state, it follows that education must be one and the same for all, and that the responsibility for it must be a public one.' *Politics*, trans., T.A. Sinclair, revised and re-presented by Trevor J. Saunders, Penguin Books, 1992, 452.

of other citizens and the community in general, and to protect the interests of the child: children are not mere property and their welfare is a public responsibility.

I have suggested that paternalism is not a problem for children until they perceive it as problematic. The reason why children are not clamouring for liberation from adult oppression is because the majority of children in western industrialized societies are not oppressed in a relevant way. Even if their situation was as dire as child liberationists allege the children themselves are incapable of developing or assuming their own leadership, not because they are oppressed but because they are unequal to the task in terms of knowledge, understanding, competence, and responsibility. They are not oppressed adults, they are children. If they *are* oppressed by adults then the necessary reforms must be undertaken *by* adults.

It has been alleged, with some justification, that the world of the liberal theorist is a 'childless universe'⁸, that is that the liberal theorist tends to 'conceive of the world as consisting entirely of fully-formed adults (usually adult males)'.⁹ The 'contract myth', according to Midgley, relies on a conception of human nature radically divorced from its past, both social and individual, as if human beings start life 'grown up, without infancy or childhood'.¹⁰ Where children do appear in liberal theory they are rather pallid, bloodless creatures, notable for the deficiencies of their intellect but for little else which reflects the reality of childhood or adolescence. What we get is a rather austere conception of childhood which is excessively cognitive and does not take account of the other vital dimensions of human experience without which true human agency is impossible.

The only moral sense in ascribing rights to children is that the rights entail a claim to 'positive action on the part of others, not to mere non-interference'.¹¹ Once we take childhood into account we cannot ignore the extent to which rearing children in a particular community with particular values is 'constitutive of the individual; it is not just information that the child requires'.¹² Indeed not, children also require *formation*.

Schools

Education is the initiation of the child into the life of the diverse, and often conflicting, communities in which he will participate throughout his life. 'Conscious social reproduction

⁸ Haydon, G., 'Political Theory and the Child: Problems of Individualist Tradition', Political Studies, 27, 3, 1979, 405-420, 414.

⁹ Van Wyk, R.N., 'Children and Community: A Reply to Jonathan Schonsheck's "Deconstructing Community Self-paternalism"', Law and Philosophy, 15, 1, 1996, 75-80, 75.

¹⁰ Midgley, M., The Ethical Primate: Humans, Freedom, and Morality, London, Routledge, 1994, 112.

¹¹ Haydon, 'Political Theory', 415.

¹² *Ibid.*, 416.

is the primary ideal of democratic education'.¹³ The best we can hope for is an individual who is capable of making defensible moral decisions within the complex contingencies of life. This is surely true of all education - in this regard it is a trivial point. But there is also a reformative dimension to the task. Gutmann, for example, is not just trying to understand how actual democratic societies work, she is attempting to explain and persuade how they *ought* to work. Her conception of education is unabashedly political, it is an acknowledgement that, ultimately, all educational theory is political.

A democratic state of education tries to teach virtue ... democratic virtue: the ability to deliberate, and hence to participate in conscious social reproduction.¹⁴

Taking rights seriously means that as well as taking our own rights and the rights of others seriously we accept the concomitant responsibilities to the community which recognises and supports the rights which we claim for ourselves and others. Rights should not be a one-way arrangement; a right is an implied covenant. Rights must be balanced by the notion of service and obligation to the community which acknowledges and sustains their exercise. Children need to learn that as well as having rights they have responsibilities which go along with these rights whether the rights are freedom rights or welfare rights. In the first place they have an obligation to respect the rights of others and to intervene actively when they can to protect and promote those rights. This is no less than they come to expect in relation to their own rights. Secondly they must learn that rights (rights of freedom) must be exercised responsibly, freedom is not licence, and that this responsibility is owed to the community and individuals who sustain these rights. Thirdly they must learn that the rights they possess come to them at some cost to others. This is especially true of welfare rights but is also true of freedom rights where the cost to others is their acceptance of the limitations on their own freedom.

In a democracy citizens are allowed to consider changes in their form of government. In general there is no recognition of this principle in school curricula or practices. Schools present children with existing forms of government of the world outside the school as an historical *fait accompli*. Consent to the political system is not so much manufactured as assumed. Schools engage in political indoctrination because it is believed necessary to establish stable, democratic government through the creation of a *faithful* citizenry. By offering their pupils a fixed set of beliefs, rather than opportunity for political engagement, schools fail to prepare young people, as Jeffs puts it, 'to join democratically with others in the kind of flexible response to a changing world that is ultimately necessary for genuine stability'.¹⁵ The culture of school embodies a culture of fear of democracy, a fear on the part

¹³ Gutmann, A., Democratic Education, New Jersey, Princeton University Press, 1987, 45.

¹⁴ *Ibid.*, 46.

¹⁵ Jeffs, Tony, 'Children's Rights at School', in Franklin, The Rights of Children, London, Basil Blackwell, 1986, 43.

of teachers and school administrators that meaningful pupil participation will lead, if not to chaos, then to an unacceptable dilution of the schools' proper role.

The important issue is not the existence of rules: all social contexts require rules. What is important is the way in which the rules are made and enforced. What is needed is not simulated democracy which leaves the authority of the teacher untouched¹⁶ but a participation appropriate to the developmental status of the pupils and a recognition of their capacity to participate responsibly. We become responsible by practising responsibility.

Williams acknowledges that 'an education which enhances the capacity for considered choice is at odds with the culture of communities whose way of life emphasises the following of tradition and in which obedience to authority autocratically exercised is highly valued'.¹⁷ He does not suggest how the democratic virtues necessary for the maintenance of democratic societies will be developed by the schools, whether these are common, secular, or religious. Indeed, he does not acknowledge that the communities which best typify his description of autocratic control are schools. There is *no* 'emphasis on individual autonomy in conventional schools'.¹⁸ On the contrary schools which emphasise individual autonomy in a real rather than a theoretical sense (such as Summerhill) are rare and controversial.

In a detailed assessment of the responsibilities to be faced by a 'common' school McLaughlin concludes that it must be a complex institution and that 'It might be wondered whether (the) responsibilities are too difficult, or perhaps impossible, to discharge'.¹⁹ Any hope that a school (be it common or not) might develop a democratic tolerance among its pupils will depend very heavily on the ways in which the pupils' own immediate needs and interests as members of the school community are addressed. Directing their attention to social issues which do not impinge directly on their experience as members of the immediate community might be seen as irrelevant to their immediate interests and as distracting their energies from matters over which they might reasonably expect to have some control.

Everything about a school (its structures, organisation, programmes, content, rituals, traditions, expectations, the relationships it promotes, etc.) has the purpose of furthering the educational objectives which the school embodies: a school (whether it is religious or secular, public or private) exists to promote certain values, attitudes and beliefs. The notion

¹⁶ Hart, Roger, A., Children's Participation: from Tokenism to Citizenship, Innocenti Essays, 4, Florence, UNICEF, 1992, 43.

¹⁷ See Kevin Williams 'Education and Human Diversity: the Ethics of Separate Schooling Revisited', British Journal of Educational Studies, 46,1, March 1998, 26-39, 37.

¹⁸ *Ibid.*, 37.

¹⁹ McLaughlin, T.H., 'Liberalism, Education and the Common School', Journal of Philosophy of Education, 29, 2, 1995, 252.

of a school which does not promote these kinds of things appears to be contradictory. 'Children do not leave their souls at home when they enter school.' Gutmann's remark is necessary to remind us that the choice facing us therefore is not *whether* we should provide moral education in our schools, but what sort of moral education we *should* provide.²⁰

The issue of democracy in the school is not a simple confrontation between oppressive authoritarianism and a libertarian absence of constraint. The contribution of the school to democratic formation must begin in the communities of the schools themselves with structures which recognise and accommodate the growing moral awareness and competence of pupils to order their own affairs individually and collectively. After the family the most rudimentary community is the school community. I have already suggested that the school bridges the gap between the home and the world at large.²¹ It is where the transition is made from the protected life of the cherished individual child to the impersonal life of the autonomous adult in an open society.²² How that transition is experienced will have deep and far reaching effects. The daily experience of life in school forms children's expectations and acceptances of how life in a community should be lived.

In particular, the competence, confidence, and willingness to become involved in political participation at any level must be acquired by practice: forms of meaningful participation must be available to children. There is a stark contrast between the liberal democracies we value, endorse, and promote and the autocratic schools and classrooms in which our children are prepared for life in such democracies. At best our schools teach the principles of democratic procedures as verbal constructs illustrated by flow-charts, diagrams and other gaudy representations purporting to show democracy at work. But if the culture of the classroom and the schools are anti-democratic then the lessons are mere empty promises, as relevant to the real lives of the pupils as a dead language.

Rights are granted to children conditionally. This can mean either that the rights are simply institutional rights which may be withdrawn and which do not reflect underlying moral rights²³ or a recognition that children have developing moral rights which can be recognised in institutional practices but which are subject to supervision or to some other condition.²⁴ The latter option requires an intimate context in which the individual capacities of children are known and guided. Given appropriate opportunities children can become

²⁰ Gutmann, Democratic Education, 54. Kelly quotes the Newsom Report to the same effect: 'teachers can only escape from their influence over the moral and spiritual development of their pupils by closing their schools'. Kelly, A.V., Education and Democracy: Principles and Practices, London, Paul Chapman, 1995, 175.

²¹ Chapter 7.

²² I do not mean 'open' in the Popperian sense but merely in the sense that the protection of the individual afforded by parental home and school is no longer there.

²³ Brown, D.G., 'The Rights of Children', Journal of Education, University of British Columbia 1971, 8 - 20, 11-13.

²⁴ *Ibid.*, 14/15.

competent in specific activities and engagements before they assume general responsibility for their own affairs.²⁵

This means that there are two options open to educators. The first is to consider children (of whatever age) as individuals who are ignorant and incapable of significant social participation and whose activities must be constrained so that they will do as little damage to themselves or others as possible. The second option is to recognise that children are evolving the capabilities necessary for participation and that their involvement in the public sphere should be gradual and determined by their interests and abilities.²⁶

Giving children opportunities to take responsibility includes recognising their right to learn from their mistakes. The freedom to make mistakes is crucial in acquiring experience. But a distinction must be drawn between mistakes which are relatively short-term, and trivial if not revocable, and those which are irrevocable and have long-term consequences for the present welfare and for the welfare of the adult which the child will become: some mistakes further education while some mistakes retard it. Adults (parents and teachers) must discriminate between the two in formulating and supervising the conditional rights of children.

The structures of the school organisation itself are based upon the denial of basic human rights 'to those who occupy the lower echelons'.²⁷ School rules are profoundly undemocratic and if there *is* a mechanism for pupils to participate in rule formation and implementation it is usually not a recognition of a right but a 'grace and favour' concession which can be withdrawn if the results are unacceptable to those in authority. School pupils 'by law and practice have no power, right or mechanism by which they may involve themselves in the creation or administration of those rules, they can never be viewed as citizens in miniature'.²⁸ Under the same criteria as apply to adults children cannot be morally obliged to follow such rules. If they are obliged to follow them it is coercion, similar to that of the coerced slave.²⁹ It is a fundamental principle of democracy that there should be no government without the consent of the governed. The crucial difference, however, is that in the case of schools the governed must learn how to give responsible consent. Children must learn to exercise rights of limited self-determination within the context of limiting and enabling rules and under sympathetic supervision in home and school. Homes cannot be

²⁵ *Ibid.*, 16.

²⁶ Boulding, Elise, 'Children's Rights', *Society*, 15, 1, 1977, 39-43, 40.

²⁷ Jeffs, Tony, 'Children's Rights', 58.

²⁸ *Ibid.*, 64. See also Smeyers, Paul, 'On the Unavoidability of Power in Child-rearing: Is the Language of Rights Educationally Appropriate?', *Studies in Philosophy and Education*, 14, 1, 1995, 9-21.

²⁹ It is not irrelevant that one of the most potent paradigms of teaching in the history of education is the incident in *Meno* where Plato has Socrates teach an anonymous slave.

reformed by public order but schools can because they, not the family, are the appropriate arena for public control. As Gutmann writes

Parents command a domain of moral education within the family that is - and should continue to be - largely immune from external control. If there should be a domain for citizens collectively to educate children in the democratic virtues of deliberation, then primary schools occupy a large part of that domain, although they do not monopolise it.³⁰

Political formation

Children must be encouraged to develop towards political maturity through opportunities for political action which is relevant to their position as members of a community of learning and which reflects their growing capacity to function as members of a community.

Kelly argues persuasively that education in a democratic society must promote democratic ways of thinking which are rooted in a programme of moral education and which tailor individualism to communal responsibility.³¹ This requires that any form of authoritarianism must be eschewed in favour of more democratic practices within the schools themselves. He is dismissive of religious education on the grounds that any truly moral behaviour must entail a willingness to accept the law without being coerced by 'an acknowledgement of, or even respect for, the authority of its source'.³² This is altogether too extreme, however. In the first place part of a properly democratic education must be to instil in pupils a respect for the authority of democratic institutions. No individual is going to re-start the process of evaluating laws from first principles each time. Even the most critical democrat will afford democratic institutions a presumption of legitimacy and authority.

Secondly, young people need to develop a set of stable beliefs and values in order to acquire stable moral identities. The danger of too much critical reflection, or critical reflection encouraged too soon,³³ is that children will fail to form a stable self-identity. Supporters of separate schools, for example, will argue that children need to encounter religion as part of the total experience of growing up because otherwise they will not assimilate and maintain a religious faith. Religion, or some ideology, is necessary to provide individuals with a world view which lends coherence to their lives and provides a foundation for their moral commitments. Thirdly, a capacity for rational choice requires that some prior limitations be placed on children's choices, limitless choice would be disabling. 'To have a rational sense of what we want to become, we need to know who we are;

³⁰ Gutmann, Democratic Education, 52.

³¹ Kelly, Education and Democracy, 170-182.

³² *Ibid.*, 172.

³³ Callan, Eamonn, Creating Citizens: Political Education and Liberal Democracy, Oxford, Clarendon Press, 1997, 158/9.

otherwise our choices will be endless and meaningless.³⁴ But of course our choices cannot be endless and meaningless for then, not alone would we not know who we are, we would be nobody, in effect, a dis-embodied rationality, unable to choose at all.

In any case Kelly's dismissal of authoritarianism within the schools is too quick. He acknowledges³⁵ a distinction between the teacher as *an* authority (based on expertise) and *in* authority (based on position). Yet the teacher *is* in authority and it is unrealistic to pretend otherwise or that it could be otherwise. Firstly, school is a place of coerced attendance, at least for those up to 16 years of age. Secondly, it is the teacher who is ultimately responsible, to school authorities and to parents, for the safety and welfare, including the educational progress, of the child. This responsibility cannot be abandoned in the name of pupil freedom. Thirdly, as I have suggested already, the teacher must supervise and contain the exercise of the child's conditional rights. It may be objected that this is a matter of professional expertise also. This is so but insofar as the teacher must take decisions regarding the freedom of action of the pupil she is *in* authority. Whether she draws this authority from her position as an agent of the school and parents (or of the state) or from her professional expertise is irrelevant in that the result is the same: she must impose limits. At best she can do this in a way which is authoritative (see chapter 7) but, like the reasonable parent, the ultimate decision must be hers.

Democracy is necessary *within* the school because of the priority of cultivating an ethos of self-regulation and mutual co-operation among pupils. It is desirable, however, only if it recognises the need to avoid the 'disorder and arrogance' which can 'threaten the very enterprise of education within schools'.³⁶ The enterprise of education and the promotion of 'participatory virtues' is contingent on the maintenance of the 'disciplinary virtues', which are at the core of teachers' professional obligations (imparting knowledge, instilling emotional and intellectual virtues). Democratic participation must be constrained by the professional obligation of the teachers to teach the disciplinary virtues as well as promoting the participatory ones. This is not a denial of the democratic ideal. It is not being argued that schools are, or can be, fully functioning democracies. Children are in schools to *learn* participative democracy through controlled, supervised engagement. A set of balances must be contrived between the pupils' coerced attendance and their freedom to participate, between the demands of equality and freedom and the professional obligations of the teachers, between the pupils' right to take, and act on, their own decisions and the responsibility of the school for their health, safety, and welfare.

³⁴ Gutmann, Democratic Education, 35.

³⁵ Kelly, 179.

³⁶ Gutmann, Democratic Education, 90.

The moral education of children must involve a process of self-reflection, a critical awareness of their own beliefs.³⁷ But this, like so much rhetoric about children and schooling, is too vague. At what point can children begin the process of interrogating their own received beliefs to begin with? There must be an opportunity for the beliefs to *become* theirs in the first place. The process of critical questioning and re-evaluation cannot begin until the beliefs have been established and the preliminary (i.e. pre-adolescent) self-identity of the child has been formed. There would appear to be a case for postponing the radical critique of beliefs and values at least until secondary school. This is not to say that preliminary work on the formation of democratic character cannot begin before that. The organisational and pedagogic structures associated with primary schools are much more conducive to the process of democratic formation than those associated with secondary education. The primary classroom, presided over by a single teacher for most of the time, provides the temporal and developmental space to engage in the learning of the skills needed to engage in co-operation, political understanding and decision making. This is not so in the secondary classroom in which, because of the exigencies of a subject-centred timetable, pupils are faced with a succession of subject specialists in encounters which are of necessity relatively brief and intensive.

Kelly rightly stresses the social and moral dimension of every area in the curriculum³⁸ and the responsibility of every teacher to contribute to the moral development of the pupils. He is also aware of the multi-faceted nature of moral education which, in addition to a cognitive capacity, must recognise the affective dimension which is indispensable in moral judgement, the need to develop respect, empathy, inter-personal skills, an ability to formulate 'general moral principles' and to implement these into decision and action.³⁹ The contribution of diverse subject areas must be co-ordinated and pupils must be given opportunities to explore 'controversial issues of social importance'.⁴⁰ But Kelly has little to say about issues of fundamental immediate importance to the pupils in the school: how they are treated as individuals and as a community, how the rules which govern their day-to-day lives in the school community are formulated and implemented, how a balance is struck between the imperatives of the teachers' professional obligations and the freedom of pupils to order their own affairs and concerns within the community of the school. There cannot be a growth towards individual autonomy where freedom, of pupil and teacher alike, is severely restricted.⁴¹

³⁷ Kelly, Education and Democracy, 174.

³⁸ *Ibid.*, 175.

³⁹ *Ibid.*, 176. The alternative to a cognitivist approach is virtue ethics. See Punzo, V.A., 'After Kohlberg: Virtue Ethics and the Recovery of the Moral Self', Philosophical Psychology, 9, 1, 1996, 7-23, and Tappan, M.B., 'Narrative, Language, and Moral Experience', Journal of Moral Education, 20, 3, 1991, 243-256.

⁴⁰ Kelly, Education and Democracy, 176.

⁴¹ *Ibid.*, 177. The first prerequisite which P.H. Pearse the great Irish educational reformer demanded for any education system was freedom - freedom for schools, for teachers and for pupils. 'In particular I would urge that the Irish school

Parents and teachers must be empowered if their children and pupils are to be empowered. Hart remarks that better-off families are more likely to value independence and autonomy in their children than those who are less well-off.⁴² Parents who have little freedom in their own daily lives value obedience and efficiency, not autonomy. In the same way, as Sarason rightly remarks, teachers are likely to treat their students as they themselves are treated by their superiors.⁴³ A disempowered teacher, subject to the decisions and requirements of administrators who are often remote from the realities of the classroom, is unlikely to accept that her pupils are capable of dealing with issues of power when she herself has no opportunity to do so.⁴⁴

A cognitivist view of electoral democracy, a programme of 'civic, social, and political' education which, however necessary it might be to inform pupils about structures and practices, duties and obligations, is insufficient to prepare them for participation. Indeed if such programmes go no further than the transmission of information they are more likely to induce apathy and passivity rather than a determination to play a positive role in the life of the community. Of course participation in the school context would have to be controlled by some kind of constitution, a covenant which would protect the legitimate professional obligations and responsibilities of teachers at the same time as it provided opportunities for pupil empowerment. In addition schools must have some form of continuity to allow for a developmental approach, a 'whole school programme'.

Neill recognised that younger children do not have the same interest in self-government as older children and yet they need the opportunity to develop such an interest over time. The Summerhill system depended on the presence of a cadre of older pupils who took it seriously. Although the younger children participated in the system they were incapable of running it on their own.

Frankly younger children are only mildly interested in government. Left to themselves I question whether younger children would ever form a government. Their values are not our values, and their manners are not our manners.⁴⁵

system of the future should give freedom - freedom to the individual school, freedom to the individual teacher, freedom as far as may be to the individual pupil. Without freedom there can be no right growth; and education is properly the fostering of the right growth of a personality.' Pearse urged that individual teachers should be free to impart their own individuality, their own gifts, their own enthusiasms to the work of education and that pupils should be free to follow their own strengths, interests and capacities. See Ó Buachalla, S., (ed.), A Significant Irish Educationalist: The Educational Writings of P.H. Pearse, The Mercier Press, 1980.

⁴² Hart, Children's Participation, 38/9.

⁴³ Sarason, S.B., How Schools Might be Governed and Why, New York, Teachers College Press, 1997.

⁴⁴ Apple, M.W., Oliver, A., 'Becoming Right: Education and the Formation of Conservative Movements', Teachers College Record, 97, 3, 1996, 419-445, argue that people are driven into conservative stances by the inflexible and unresponsive nature of official institutions.

⁴⁵ Neill, A.S., Summerhill: a Radical Approach to Child-rearing, Harmondsworth, Penguin, 1985, 60.

But through participation in a meaningful system the younger children learned; and in their turn they became the older students who were committed to the ideal of self-government.

The promotion of democratic capacities cannot be done by exhortation, but only by developmental practice. By developmental practice I mean that there must be an incremental approach to the amount of control children are required to exercise and this must be congruous with their capacity, collectively and individually, to exercise the control and to carry the concomitant responsibility. This requires more than curricular changes. In order to escape from the cognitivist notion of self-government and autonomy it is necessary to introduce practical measures in the day-to-day life of the school, in its organisation and administration.

The competitive ethos of schools need not necessarily be an obstacle to democratisation any more than the competitiveness of life in a capitalist society is in general. Despite Kelly's assertion that it is 'a nonsense to expect schools and teachers to be able to develop attitudes of co-operation and caring for others in their pupils when those pupils are being expected for most of their time to be competing with their fellows'.⁴⁶ Competitiveness in capitalist societies is a fact of life. It may be considered by some to be an unfortunate fact of life but it is there nonetheless. Pending any radical transformation of social life towards a more co-operative and caring ethos we must prepare children for the reality of the life they will be expected to live after school. It is possible to address the need for competitiveness within an ethos of care, equality, and respect. The analogy of sport may be more appropriate than the analogy of the wider society in explaining this.

School councils are a significant development in promoting school democracy.⁴⁷ Their worth, however, depends on the participation of individual pupils who are not elected to relevant bodies. For school councils (like student representation at third level) too easily become versions of the passive democracy of the wider society whereby individuals transfer their responsibility and participation to others so that they can get on with other things. It is the quality of consultation, answerability, and individual responsibility which will determine whether efforts in this regard are successful or not. There is little point in allowing a minority of pupils to 'play' politics unless the effect on the majority results in a democratic maturing.

Values

The practice of adult-child dialogue must begin from the earliest stages of the child's encounter with the world of adult values, in the family home, in the pre-school setting, in the

⁴⁶ Kelly, *Education and Democracy*, 180.

⁴⁷ *Ibid.*, 181.

primary and secondary school. Such practice will certainly not be 'combative' dialogue⁴⁸ in the sense that Callan deplores⁴⁹ but neither will it necessarily be informed by the 'truth' regarding the great moral issues that he lists.⁵⁰ The priority for the child must be an adult-child dialogue in which the point is neither to 'win' the argument with the child, nor to engage in some shared Socratic search for essential truth. The developmental priority is to build the child's confidence and self-esteem, her understanding of the modalities of human communication, and of the foundational values that the adult cherishes, so that the child may later engage in more ethically significant conversation/dialogue as a practised, if not accomplished, participant.

In order to exercise freedom appropriately (indeed to exercise it at all) children must develop their 'voice'. Obviously they must have opportunities to make decisions individually and collectively and to take responsibility for these decisions. Less obvious is their need to learn how to articulate their own interests in ways which are true to their own integrity. Finding one's voice is important for instrumental as well as for expressive reasons.⁵¹ The child's 'voice' is the sharing of experienced insights, participation, and a sense that others value one's opinions and sentiments. The participation of children, the hearing of their voice, can only be brought about by the specific effort of the adult to empower the child to contribute to the discussion.

It should not be inferred from anything I have written that foundational values are *imposed* on the child. The proper mode for teaching is influence, not interference.⁵² Yet the teacher cannot be neutral. Callan provides a neat example.⁵³ The student teacher who listened to the 'sheer ignorance' and 'morally puerile understanding of democracy' in a class discussion failed as a teacher not only because he adopted a stance of 'scrupulous neutrality' but also, in a professional sense, because he failed to address the ignorance and to advance the understanding. His failure was not only the moral failure to assert his own more informed and deeper point of view (and to assert it in a way which did not impose it as the 'true' answer to the question at issue) but the pedagogical failure (also moral) to address the deficiencies of knowledge, understanding, information, and appropriate values.

Participation in the communal life of the school must be real and the consequences of children's participation must be irreversible, otherwise it is no more than a sham. In schools as presently constituted there is little freedom of choice for pupils and certainly not in

⁴⁸ a contradiction in terms in the Buberian or Freirean senses of 'dialogue'.

⁴⁹ Callan, Creating Citizens, 202-206.

⁵⁰ *Ibid.*, 204.

⁵¹ Margulies, Peter, 'The Lawyer as Caregiver: Child Client's Competence in Context', Fordham Law Review, 64, 1996, 1473-1504, 1482.

⁵² Buber, M., Between Man and Man, Fontana Books, 1961, 117.

⁵³ Callan, Creating Citizens, 216/7.

relation to anything significant. In general children internalise the perception of themselves which they receive from their teachers: as ignorant, incapable, irresponsible. When this view persists into adolescence it results in an alienation from school (and education and learning) or a docility which masks the real feelings of the student.

Gutmann says that schools are capable of teaching the morality of association (Kohlberg's second stage). This morality is characterized by the acceptance of rules which are 'appropriate to fulfilling the roles that individuals play within various associations'.⁵⁴ But it is questionable whether this is a success of the school or simply a developmental achievement of children. Children demonstrate the morality of association in their games and play quite independently of their schools. The schools may reinforce and structure this morality, they do not create it in the first instance. She mentions the 'co-operative moral sentiments that go with morality of association: empathy, trust, benevolence, and fairness. These moral sentiments are necessary to the development of democratic virtues. They are not sufficient. What the school needs to do is to provide structures to harness and to educate them.

Life in a democratic society requires that the members of the school community acquire the civic virtues necessary to the well-being of the sustaining community. That community cannot be neutral or indifferent to the formation of its future members. This is true of the liberal approach no less than of any form of communitarian approach: the children of the community require to be formed in the values of the community in the first instance. The democratic school community should inspire the sense of community and civic engagement that the larger community requires.

Our conception of individual freedom must account for a wide range of moral and political obligations (loyalties to family and familial culture, to local or other restricted communities, to professional organisations and the values they promote, etc.) that we commonly recognise. Insisting that we are bound only by ends and roles we choose for ourselves 'denies that we can ever be claimed by ends we have not chosen - ends given by nature or God, for example, or by our identities as members of families, peoples, cultures, or traditions'.⁵⁵ Accommodating these sources of value and loyalty by de-coupling the private and the public/political and assigning unchosen ends to the former raises the difficulty of justifying this personal/public dichotomy in the first place:

Why insist on separating our identity as citizens from our identity as persons more broadly conceived? Why should political deliberation not reflect our best understanding of the highest human ends? Don't arguments

⁵⁴ Gutmann, *Democratic Education*, 60.

⁵⁵ Sandel, Michael J., 'America's Search for a New Public Philosophy', *The Atlantic Monthly*, 277, 3, March, 1996, 57-74, 70.

about justice and rights unavoidably draw on particular conceptions of the good life, whether we admit it or not?⁵⁶

Liberals fear that a communitarian approach to political behaviour would have a coercive character and eliminate individual freedoms in favour of a general will of some description. But it is by no means inevitable that the 'soulcraft' of the communitarian, the formation of the character of the individual, will be absolutist in nature. Any effective programme of moral formation works its way, not by coercion but by a mixture of habituation⁵⁷ and persuasion. It bears repeating, however, that, at least until the age of 16, children are in school involuntarily. They may like being there but they do not have a choice: the school community is already premised on coercion. We are faced with the apparent paradox (exploited with relish by de-schooling advocates⁵⁸) of using coercion to make children free.

Political science has not paid much attention to the home, the school, or the classroom despite the fact that each is a political organisation in which power is exercised. The authority which parents, teachers and school administrators wield over pupils is taken for granted as justifiable by reference to the purposes of schooling and family life. The issue of power in these settings is unquestioned only because it has become invisible.

How does power get defined in the classroom? What understanding of power do we want children to obtain? Should students have some kind of role in defining power, thus giving them some sense of ownership, not only in regard to definition but also to implementation? Is the unilateral definition and exercise of power desirable for the development of children? Does it tend to breed the opposite of what it intends to achieve? *

Teachers formulate the classroom constitution and assign themselves the roles of legislator, executive and judiciary. They articulate the rules (sometimes *post hoc*) but do not necessarily provide a rationale. They are unlikely to assign a role to pupils in collaboratively addressing question as to how the communal life of the classroom should be lived. When should children begin to experience the nature and dilemmas of power in group living? Perhaps one reason why adults are often sceptical about politics and cynical about their elected representatives (and consequently unsupportive and apathetic) is that we have never experienced the difficulties of governing, not even on a minor scale.

If they are to promote democratic formation as part of a virtuous individual schools should accord their pupils the right and responsibility to participate in appropriate forms of self-government. Those who inhabit classrooms should feel that they will be governed by rules and values which they have helped to formulate. The long-term educative goal is not the formulation of rules, but learning the complexities of power in a group setting. The

⁵⁶ *Ibid.*

⁵⁷ Aristotle, *Politics*, trans., T.A. Sinclair, revised and re-presented by Trevor J. Saunders, Penguin Books, 1992, 438/9.

⁵⁸ See Nordenbo, Sven Erik, 'Against Education', *Journal of Philosophy of Education*, 30, 3, 1996, 401-413.

* Savasou, *op. cit.*

development of the child's moral self takes place in community with others: in the family, in the peer group, in the school. The virtuous self is a relational, interdependent self which needs a community of other individuals 'in and through which moral lives are played out'. These others continually clarify and expand the agent's moral vision. The 'cognitive, affective and behavioural qualities which are constitutive of the virtuous self cannot be formed and maintained in isolation'.⁵⁹

Nothing that I have written in the course of this work should be taken to mean that I disavow democratic procedures and principles. On the contrary, the social context which best promises to promote human well-being is one that encourages and facilitates the free exchange of ideas and social political criticism. My position is that we cannot justify an educational programme (much less an entire moral order) on *a priori* principles and must look to models of functioning communities in order to find a reasonable justification. Like Callan my use of the concept of reasonableness is removed from 'a tidy moral calculus' such as Kohlberg's. Callan writes that 'justice as reasonableness' is reducible to a cluster of more fundamental, mutually supportive 'habits, desires, emotional propensities, and intellectual capacities'. The co-ordination of these requires judgement which is contextually sensitive. The capacities that we need to promote include imaginative sympathy, respect for reasonable differences, a spirit of moderation and compromise, an awareness of the responsibilities imposed by the rights of others, as well as a sense of one's own rights-based dignity. These accomplishments 'may be subsumed under the idea of justice only so long as we bear in mind that the idea captures no master-rule rule for moral choice'.⁶⁰ They cannot be effectively taught without meaningful opportunities for practice. It is in community, and centrally the educative community of the school, that these capacities are promoted or impeded.

Teaching, education, cannot avoid some level of indoctrination. Indeed it is arguable, given the unavoidable social responsibilities of education, schools and teachers in relation to the creation and maintenance of social cohesion and order and to the pursuit of shared social aspirations and ideals, (whether these are liberal or not) that a certain element of indoctrination is obligatory as well as unavoidable. Although such indoctrination may be obscured by the rhetoric of 'education' there is no doubt that every education system embodies a set of values, perceptions, and judgements which, though invisible within the system itself, exercise a profound influence on learners. Education is not neutral; neither is philosophy of education. The history of educational thought is a history of the attempt to influence the way in which society initiates and socialises its young, and forms their beliefs, knowledge, judgements and behaviour. It is also a history of the struggle within society to

⁵⁹ Punzo, 'After Kohlberg', 19/20.

⁶⁰ Callan, Creating Citizens, Oxford, Clarendon Press, 1997, 8.

exercise that control. The leading educational thinkers of the past were not engaged in a detached, objective evaluation of contending educational ideas. They were attempting to influence the way in which education was being conducted. They were attempting this in order to promote the political and social ideals which they advocated.

Education is future oriented; it is about the way in which the people of the present think the people of the future should live and the kind of society they should live in. It is prescriptive by its very nature. It is not for the sake of detachment or objectivity that churches, states, political parties and other interest groups contest the control of education in any society. Their primary interest is not the description of the society as it is but the definition of the society as it ought to be in the future.

Bibliography

'Report of the Working Group on Determining the Best Interests of the Child', Fordham Law Review, 64, (A report on the Conference on Ethical Issues in the Legal Representation of Children, 1995), 1996, 1347-1350

'Report of the Working Group on Determining the Child's Capacity to Make Decisions', Fordham Law Review, 64, (A report on the Conference on Ethical Issues in the Legal Representation of Children, 1995), 1996, 1339-1345.

Aboulafia, Mitchell, 'Mead and the Social Self', in Burch and Saatkamp, eds., Frontiers in American Philosophy, (Texas A&M University Studies in American Philosophy, No.1), 1993

Almond, Brenda, 'Education and Liberty: Public Provision and Private Choice', Journal of Philosophy of Education, 25, 2, 1991, 193-202

-----'Human Bonds', Journal of Applied Philosophy, 5, 1, 1988, 3-16

Anderson, L.F., Pestalozzi, London, McGraw-Hill, 1931

Apple, M.W., Oliver, A., 'Becoming Right: Education and the Formation of Conservative Movements', Teachers College Record, 97, 3, 1996, 419-445

Archard, David, Children: Rights and Childhood, London, Routledge, 1993

-----'Child Abuse: Parental Rights and the Interests of the Child', Journal of Applied Philosophy, 7, 2, 1990, 183-194

Ariès, Philippe, Centuries of Childhood, Penguin Books, 1986

Aristotle, Ethics, trans., J.A.K. Thomson, (revised, Hugh Tredennick), London, Penguin, 1976.

----- Politics, trans., T.A. Sinclair, (revised and re-presented by Trevor J. Saunders), London, Penguin Books, 1992

Arons, Stephen, Compelling Belief: the Culture of American Schooling, New York, McGraw-Hill, 1983

Bandman, B., 'Some Legal, Moral and Intellectual Rights of Children', Educational Theory, 27, 3, 1977, 169-178

Barry, Brian, Political Argument, New York, The Humanities Press, 1965

Baumrind, Diana, 'Reciprocal Rights and Responsibilities in Parent/Child Relations', Journal of Social Issues, 34, 2, 1978, 179-196

Bayles, Michael D., 'Limits to a Right to Procreate', in O'Neill, O., Ruddick, W., (eds.), Having Children: Philosophical and Legal Reflections on Parenthood, Oxford, University Press, 1979, 13-24

Beck, C.K., *et al.*, 'The Rights of Children: a Trust Model', Fordham Law Review, 46, 1977, 670-780

Benn, S.I., 'Human Rights - for Whom and for What?' in Kamenka, T., Tay, A.E.S., eds., Human Rights, London, Edward Arnold, 1978

----- and Peters, R.S., Social Principles and the Democratic State, London, George Allen and Unwin, 1959

Bentham, Jeremy, Anarchical Fallacies, in A.I. Melden, ed., Human Rights, California, Wadsworth, 1970, 28-39

Berding, J.W.A., 'Meaningful Encounter and Creative Dialogue: The Pedagogy of Janus Korczak', Journal of Thought, Winter 1995

Bernstein, B., The Structuring of Pedagogic Discourse, London, Routledge, 1990

Bettleheim, Bruno, The Uses Of Enchantment: the Meaning and Importance of Fairytales, New York, Vintage Books, 1977

- Bigelow, John, et al., 'Parental Autonomy', Journal of Applied Philosophy, 5, 2, 1988, 183-195
- Blustein, Jeffrey, 'Child Rearing and Family Interests', in O'Neill, O., Ruddick, W., (eds.), Having Children: Philosophical and Legal Reflections on Parenthood, New York: OUP, 1979, 115-122
- 'Parents, Paternalism and Children's Rights', Journal of Critical Analysis, 8, 1980, 89-98
- Bobbio, Norberto, The Age of Rights, trans., Allan Cameron, Cambridge, Polity Press, 1996
- Bonnett, M., Children Thinking: Promoting Understanding in the Primary School, London: Cassell, 1994
- Boulding, Elise, 'Children's Rights', Society, 15, 1, 1977, 39-43
- Boyer, P., Nissenbaum, S., Salem Possessed: the Social Origins of Witchcraft, Harvard University Press, 1974
- Bross, Donald C., 'The Rights of Children and National Development: Five Models', Child Abuse and Neglect: The International Journal, 15, Supplement 1, 89-97
- Brown, A., Modern Political Philosophy: Theories of the Just Society, London, Penguin Books, 1986
- Brown, D.G., 'The Rights of Children', Journal of Education, University of British Columbia 1971, 8 - 20
- Buber, M., Between Man and Man, Fontana Books, 1961
- Callan, Eamonn, Creating Citizens: Political Education and Liberal Democracy, Oxford, Clarendon Press, 1997
- 'Indoctrination and Parental Rights', Philosophy of Education Proceedings, 41, 1985, 97-106
- Campbell, T.D., 'The Rights of the Minor: as Person, as Child, as Juvenile, as Future Adult', Alston, P., Parker S., Seymore J., eds., Children, Rights and the Law, Oxford University Press, 1992
- Carter, C.A., Bottoms, B.L., Levine, M., 'Linguistic and Socioemotional Influences on the Accuracy of Children's Reports', Law and Human Behaviour 20, 3, 1996, 335-358
- Cashmore, J., Bussey, K., 'Judicial Perceptions of Child Witness Competence', Law and Human Behaviour, 20, 3, 1996, 313-334
- Cohen, Carl, 'On the Child's Status in the Democratic State: a Response to Mr. Schrag', Political Theory, 3, 4, 1975, 458-463
- Cohen, L., Manion, L., Research Methods in Education, London, Routledge, 1994
- Coleman, John C., 'The Parenting of Adolescents in Britain Today', Children and Society, 11, 1997, 43-51
- Copleston, Frederick, A History of Philosophy, New York, Image Books, 1965
- Csikszentmihalyi, Mihaly, 'Contexts of Optimal Growth in Children', in Daedalus: Journal of the American Academy of Arts and Sciences, 122, 1, 1993, 31-56
- Dagger, Richard, 'Rights', in Terence Ball, et al., eds., Political Innovation and Conceptual Change, Cambridge, University Press, 1989, 292-308
- Daniels, Harry, 'Introduction: Psychology in a Social World', in Daniels, Harry, ed., An Introduction to Vygotsky, London, Routledge, 1996, 1-27
- Denzin, Norman K., Lincoln, Yvonna S., Handbook of Qualitative Research, London, Sage, 1994
- de Mause, L., History of Childhood: the Untold Story of Child Abuse, Bellew Publishing Co., 1991

- de-Shalit, A., 'Community and the Rights of Future Generations', Journal of Applied Philosophy, 9, 1, 1992, 105-115
- Dillon, J.T., 'Curiosity as a Non-sequitur of Socratic Questioning', The Journal of Educational Thought, 14, 1, 1980, 17-22
- Douglas, Jack D., 'Co-operative Paternalism vs. Conflictful Paternalism', in Sartorius, Paternalism, 171-200
- Doyal, L., Gough, D., A Theory of Human Need, London, Macmillan, 1991
- Dworkin, Gerald, 'Paternalism', in Sartorius, Rolf, ed., Paternalism, University of Minnesota Press, 1987, 19-34
- 'Paternalism: Some Second Thoughts', Sartorius, Paternalism, 105-112
- Dworkin, Ronald, 'Liberal Community', in Gerald Dworkin, ed., Morality, Harm, and the Law, Oxford, Westview Press, 1994, 36-43
- Egan, Kieran, Teaching as Storytelling: an Alternative Approach to Teaching and Curriculum in the Elementary School, University of Chicago Press, 1986
- Elliott, Robert, 'The Rights of Future People', Journal of Applied Philosophy, 6, 2, 159-169
- Erikson, Erik H., Childhood and Society, Vintage Books, 1995
- Identity and the Life Cycle, New York, Norton and Co., 1994
- Evans-Pritchard, E.E., Witchcraft, Oracles, and Magic Among the Azande, (abridged, Introduction Eva Gillies), Oxford, Clarendon Press, 1976
- Feinberg, J., 'The Nature and Value of Rights', Journal of Value Inquiry, 4, 1970, 243-257
- Finnis, J.M., Natural Law and Natural Rights, Clarendon Law Series, Oxford, Clarendon Press, 1980
- Foriers, P., Perelman, C., 'Natural Law and Natural Rights', in Philip P. Weiner, ed., Dictionary Of The History Of Ideas, Vol. III, New York, Charles Scribner's Sons, 1974, 13-27
- Fowler, H.W., Fowler's Modern English Usage, 2nd ed., Oxford, University Press, 1965
- Franklin, B., ed., The Rights Of Children, London, Basil Blackwell, 1986
- 'The Case for Children's Rights: a Progress Report', in B. Franklin, ed., The Handbook Of Children's Rights: Comparative Policy And Practice, Routledge, 1995
- Freeden, Michael, 'Human Rights and Welfare: A Communitarian View', Ethics, 100, 3, 1990, 489-502
- Freeden, Michael, Rights, Buckingham, Open University Press, 1991
- Freeman, M.D.A., The Rights and the Wrongs of Children, Frances Pinter, 1983
- 'Children's Rights in a Land of Rites', in Bob Franklin, ed., The Handbook of Children's Rights: Comparative Policy and Practice, London, Routledge, 1995
- Freire, Paulo, The Pedagogy of the Oppressed, trans. Myra Bergman Ramos, Penguin Books, 1972
- Fried, C., Right and Wrong, Cambridge, Mass., Harvard University Press, 1978
- Fukuyama, F., The End of History and the Last Man, London, Hamilton, 1992
- Gaden, G., 'Indoctrination and Power', Irish Educational Studies, Dublin, Educational Research Association of Ireland, 1981
- 'Rehabilitating Responsibility', Journal of Philosophy of Education, 24, 1, 1990, 27-38.
- Gewirth, A., Human Rights: Essays on Justification and Applications, Chicago, the University of Chicago Press, 1982

- Gilles, Stephen G., 'On Educating Children: a Parentalist Manifesto', The University of Chicago Law Review, 63, 3, 1996, 937-1034
- Golding, M., 'From Prudence to Rights', Nomos: Human Rights, 23, 1981, 165-174
- 'The Primacy of Welfare Rights', Social Philosophy and Policy, 1, 2, 1984, 119-136
- 'Towards a Theory of Human Rights', Monist, 52, 4, 1968, 521-549
- Goldstein, J., Freud, A., Solnit, A.J., Beyond the Best Interests of the Child, New York, The Free Press, 1984
- Greene, M., 'An Overview of Children's Rights: A Moral and Ethical Perspective', in Vardin, P.A., Brody, I.N., eds., Children's Rights: Contemporary Perspectives, New York: Teachers College Press, 1979
- Greene, M., ed., Knowing and Being, London, 1969
- Griffin, James, Well-being, Its Meaning, Measurement, and Moral Importance, Oxford, Clarendon Press, 1986
- Grumet, Madeline, R., 'The Lie of the Child Redeemer', Journal of Education, 168, 3, 1986, 87-97
- Grunebaum, J.O., 'Property', in Honderich, T., ed., The Oxford Companion to Philosophy, Oxford, University Press, 1995
- Guba, Egon G., Lincoln, Yvonna S., 'Competing Paradigms in Qualitative Research', in Denzin, Norman K., Lincoln, Yvonna S., eds., Handbook of Qualitative Research, London, Sage,
- Gutmann, A., 'Children, Paternalism and Education: a Liberal Argument', Philosophy and Public Affairs, 9, 4, 1980, 338-358
- Democratic Education, New Jersey, Princeton University Press, 1987
- Habibi, D.A., 'The Status of Children in John Stuart Mill's Theory of Liberty', Educational Theory, 33, 61-72
- Hafen, Bruce, C., Hafen, Jonathan O., 'Abandoning Children to their Autonomy: the United Nations Convention on the Rights of the Child', Harvard International Law Journal, 37, 2, 1996, 449-491
- Hare, R.M., 'Adolescents into Adults', in T.B.H. Hollins, ed., Aims in Education, Manchester, University Press, 1964, 47-70
- Harris, John, 'The Political Status of Children', in K. Graham, ed., Contemporary Political Philosophy; Radical Studies, Cambridge University Press, 1982, 35-55.
- Hart, Roger, A., Children's Participation: from Tokenism to Citizenship, Innocenti Essays, 4, Florence, UNICEF, 1992
- Haskar, Vinit, 'The Nature of Rights', Archiv fur Rechts und Sozialphilosophie, 64, 1978, 183-204
- Haydon, G., 'Political Theory and the Child: Problems of Individualist Tradition', Political Studies, 27, 3, 1979, 405-420
- Henley, K., 'The Authority to Educate', in O'Neill, O., Ruddick, W., (eds.), Having Children: Philosophical and Legal Reflections on Parenthood, Oxford, University Press, 1979
- Heslep, Robert D., 'The Power of the Right of Education', Proceedings of Philosophy of Education, 48, 1992, 205-211
- Hobbes, Leviathan, in Stephen M. Cahn, ed., Classics of Western Philosophy, Indianapolis, Hackett Publishing Co., 1977
- Hobson, Peter, 'Another Look at Paternalism', Journal of Applied Philosophy, 1, 2, 1984, 293-304

----- 'Some Reflections on Parents' Rights in the Upbringing of Their Children', Journal Of Philosophy Of Education, 18,1,1984, 63-74

Holt, John, Escape from Childhood: the Needs and Rights of Children, Penguin Books, 1975

Honderich, T., Punishment, Harmondsworth, Penguin Books, 1976

Houlgate, L.D., 'Children, Paternalism and Rights to Liberty', in O'Neill, O., Ruddick, W., eds., Having Children: Philosophical and Legal Reflections on Parenthood, Oxford, University Press, 1979

Hughes, Judith, 'The Philosopher's Child', in Children's Rights Re-visioned: Philosophical Readings, in Rosalind Ekman Ladd, ed., London, Wadsworth, 15-28

Hughes, Judith, 'Thinking About Children', in Scarre, G., Children, Parents, and Politics, Cambridge University Press, 1989

Serrallier, Ian, The Silver Sword, Puffin Books, 1981

Illich, Ivan, Deschooling Society, Penguin Books, 1976

Inglis, Fred, The Promise of Happiness: Value and Meaning in Children's Fiction, Cambridge, University Press, 1982

Ingram, A., A Political Theory of Rights, Oxford, Clarendon Press, 1994

Jeffs, Tony, 'Children's Rights at School', in Franklin, The Rights of Children, London, Basil Blackwell, 1986

----- 'Preparing Young People for Participatory Democracy', in Bruce Carrington, Barry Troyna, eds., Children and Controversial Issues: Strategies for the Early and Middle Years of Schooling, London, The Falmer Press, 1988, 29-53

Jonathan, R., 'Liberal Philosophy of Education: a Paradigm Under Strain', Journal of Philosophy of Education, 29, 1, 1995

Jordanova, Ludmilla, 'Children in History: Concepts of Nature and Society', in Geoffrey Scarre, ed., Children, Parents and Politics, Cambridge, University Press, 1989

Kamenka, E., 'The Anatomy of an Idea', in Kamenka, T., Tay, A.E.S., eds., Human Rights, London: Edward Arnold, 1978

Kandel, Denise, Lesser, Gerald S., 'Parent Adolescent Relationships and Adolescent Independence in the U.S. and Denmark', in Urie Bronfenbrenner, ed., Influences on Human Development, Illinois, Dryden, 1972

Keller, M., Edelstein, W., 'The Development of a Moral Self from Childhood to Adolescence', Moral Education Forum, 18, 1, 1993, 1-19

Kelly, A.V., Education and Democracy: Principles and Practices, London, Paul Chapman, 1995

Kelly, George A., A Theory of Personality: The Psychology of Personal Constructs, New York, Norton, 1963

Kelly, John M., Fundamental Rights in the Irish Law and Constitution, Dublin, Allen Figgis & Co., 1967

Keown, Damien, 'Are There Human Rights in Buddhism?', Journal of Buddhist Ethics, 2, 1995, 3-27

Kim, Ki Su, 'Mill's Concept of Maturity as the Criterion in Determining Children's Eligibility for Rights', Journal of Philosophy of Education, 24, 2, 1990, 235-244

Kingsley vs. Kingsley, 623 So. 2d 780 (Florida 1993)

Kleinig, J., 'Mill, Children and Rights', Educational Philosophy and Theory, 8, 1, 1976, 1-16

Kolakowski, Leszek, 'On the Practicability of Liberalism: What About the Children?', Critical Review, 7, 1, 1993, 1-13

- Komisar, B.P., "'Need' and the Needs-Curriculum' in Smith & Ennis eds., Language and Concepts in Education, Chicago: Rand McNally, 1961
- Kuhn, T.S., The Structure of Scientific Revolutions, Chicago, 1962
- Ladd, Rosalind Ekman, ed., Children's Rights Re-visioned: Philosophical Readings, London, Wadsworth Publishing Company, 1996
- LaFollette, H., 'Licensing Parents', Philosophy and Public Affairs, 9, 2, 1980, 186 - 197
- Langford, Glenn, Education, Persons, and Society: a Philosophical Enquiry, London, Macmillan, 1985
- Langford, Peter, E., Lovegrove, H., Lovegrove, M.N., 'Do Senior Secondary Students Possess the Moral Maturity to Negotiate Class Rules?', Journal of Moral Education, 23, 4, 1994
- Leites, Edmund, 'Locke's Liberal Theory of Parenthood', in O'Neill, O., Ruddick, W., eds., Having Children: Philosophical and Legal Reflections on Parenthood, New York: OUP, 1979
- Levi, Primo, If This Is A Man, (trans. Stuart Woolf) Sphere Books, 1987
- Locke, John, 'Paternal Power', in O'Neill, O., Ruddick, W., eds., Having Children: Philosophical and Legal Reflections on Parenthood, New York: OUP, 1979
- Some Thoughts Concerning Education, Cambridge, University Press, 1899
- Lomasky, L., 'Gewirth's Generation Of Rights', Philosophical Quarterly, 31, 1981, 248-253
- Persons, Rights, and the Moral Community, Oxford, University Press, 1987
- Lyons, D., 'Human Rights and the General Welfare', Philosophy and Public Affairs, 6, 1977, 113-129
- MacCormick, N., 'Children's Rights: A Test-Case for Theories of Rights', Archiv fur Rechts und Sozialphilosophie, 62, 1976, 305-317
- MacIntyre, A., After Virtue, University of Notre Dame Press, 1981
- 'Is Patriotism a Virtue?', The Lindley Lecture, University of Kansas, 1984
- 'Plain Persons and Moral Philosophy: Rules, Virtues and Goods', American Catholic Philosophical Quarterly, 66, 1, 3-19
- Mackie, J.L., 'Can There Be a Right Based Moral Theory?', in Waldron, J., (ed.), Theories of Rights, Oxford University Press, 1984
- Ethics: Inventing Right and Wrong, Harmondsworth, Penguin Books, 1990
- 'Rights, Utility and External Costs', in Mackie, J., Mackie, P., eds., Persons and Values: Selected Papers, Vol. 2, Oxford, University Press, 1985
- Margulies, Peter, 'The Lawyer as Caregiver: Child Client's Competence in Context', Fordham Law Review, 64, 1996, 1473-1504
- Marshall, Peter, 'Thinking for Tomorrow: Reflections', Journal of Applied Philosophy, 10, 1, 1993, 105-113
- Martin, R., 'On the Justification of Rights', in Floistad, G., ed., Contemporary Philosophy: a New Survey, Boston, Martinus Nijhoff, 1986, 153-186
- Marx, K., Engels, F., Fuerbach: Opposition of the Materialist and Idealist Outlooks, Moscow, Progress Publishers, 1976
- Maslow, Abraham, Motivation and Personality, 2nd ed., London, Harper & Row, 1970
- Matthews, Gareth B., Dialogues with Children, Mass., Harvard University Press, 1984
- The Philosophy of Childhood, Cambridge, Harvard University Press, 1994

- Philosophy and the Young Child, Mass., Harvard University Press, 1980
- McCloskey, H.J., 'Human Needs, Rights and Political Values', American Philosophical Quarterly, 13, 1976, 1-11
- McGinn, Robert E., 'Technology, Demography, and the Anachronism of Traditional Rights', Journal of Applied Philosophy, 11, 1, 1994, 57-70
- McLaughlin, T.H., 'Liberalism, Education and the Common School', Journal of Philosophy of Education, 29, 2, 1995, 239-255
- Review of Spiecker and Straughan, eds., Freedom and Indoctrination in Education:: International Perspectives, London, Cassell Educational, 1991, in Journal of Philosophy of Education, 29, 1, 1995, 155-157
- 'Parental Rights and the Religious Upbringing of Children', Journal of Philosophy of Education, 18, 1, 1984, 75-83
- Mead, George Herbert, Mind, Self, and Society, Charles W. Morris, ed., University of Chicago Press, 1962
- Meyer, Michael J., 'Rights Between Friends', Journal of Philosophy, 89, 9, 1992, 467-483
- Midgley, Mary, 'Rights Talk Will Not Sort Out Child Abuse: Comment on Archard on Parental Rights', Journal of Applied Philosophy, 8, 1, 99-104
- The Ethical Primate: Humans, Freedom, and Morality, London, Routledge, 1994
- Mill, J.S., On Liberty, in H.B. Acton ed., Utilitarianism, Liberty, Representative Government, London, J.M. Dent & Sons Ltd., 1972
- Miller, Patricia, H., Theories of Developmental Psychology, (3rd ed.), New York, W.H. Freeman & Co., 1993
- Minick, Norris, 'The Development of Vygotsky's Thought: an Introduction to Thinking and Speech', in Daniels, Harry, ed., An Introduction to Vygotsky, London, Routledge, 1996, 28-52
- Minogue, K.R. The Liberal Mind, London, Methuen, 1963
- Minow, Martha, 'Rights for the Next Generation: a Feminist Approach to Children Rights', in Ladd, Rosalind Ekman, ed., Children's Rights Re-visioned: Philosophical Readings, London, Wadsworth Publishing Company, 1996
- Mlyniec, Wallace J., 'A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose', Fordham Law Review, 64, 1996 (A report on the Conference on Ethical Issues in the Legal Representation of Children, 1995), 1873-1915
- Montague, P., 'Two Concepts of Rights', Philosophy and Public Affairs, 9, 1980, 372-384
- Montgomery, Jonathan, 'Children as Property', Modern Law Review, 51, 1988, 323-342
- Mulhall, S., Swift, A., Liberals and Communitarians, Oxford, Blackwell, 1992
- Neill, A.S., Summerhill: a Radical Approach to Child-rearing, Harmondsworth, Penguin, 1985
- Nino, Carlos Santiago, The Ethics Of Human Rights, Oxford, University Press, 1991
- 'Positivism and Communitarianism: Between Human Rights and Democracy', Ratio Juris, 7, 1, 1994, 14-40
- Nordenbo, Sven Erik, 'Children's Rights, 'die Antipadagogen', and the Paternalism of John Stuart Mill', Scandinavian Journal of Educational Research, 31, 4, 163-180
- 'Against Education', Journal of Philosophy of Education, 30, 3, 1996, 401-413
- Nozick, R., Anarchy, State and Utopia, New York, Basic Books, 1977

- O'Neill, J., 'Should Communitarians Be Nationalists?', Journal of Applied Philosophy, 11, 2, 1994, 135-143
- O'Neill, O., 'Begetting, Rearing and Bearing', in O'Neill, O., Ruddick, W., (eds.), Having Children: Philosophical and Legal Reflections on Parenthood, Oxford, University Press, 1979
- 'Children's Rights and Children's Lives', in Rosalind Ekman Ladd, ed., Children's Rights Re-visioned: Philosophical Readings, London, Wadsworth Publishing Company, 1996
- and Ruddick, W., (eds.), Having Children: Philosophical and Legal Reflections on Parenthood, Oxford, University Press, 1979
- Ormerod, P., The Death of Economics, London, Faber, 1994
- Orwell, George, Nineteen Eighty-four, Harmondsworth, Penguin, 1967
- Page, Edgar, 'Parental Rights', Journal of Applied Philosophy, 1, 2, 1984, 187-203
- Parfit, Derek, Reasons and Persons, Oxford, Clarendon Press, 1984
- Pearse, P.H., Ó Buachalla, S., (ed.), A Significant Irish Educationalist: The Educational Writings of P.H. Pearse, The Mercier Press, 1980
- Pekarsky, Daniel, 'Socratic Teaching: a Critical Assessment', Journal of Moral Education, 23, 2, 1994, 119-134
- Peters, R.S., Psychology and Ethical Development, London, Allen and Unwin, 1974
- Plamenatz, J., 'Liberalism', Philip P. Weiner, ed., Dictionary Of The History Of Ideas, Vol. III, New York, Charles Scribner's Sons, 1974
- Plato, The Republic, trans., G.M.A. Grube, London, Pan Books, 1981
- Polanyi, M., The Logic of Liberty, London, 1951
- The Tacit Dimension, London, Routledge & Kegan Paul, 1967
- 'Scientific Outlook: Its Sickness and Cure', Science, 125, 1957
- 'Knowing and Being', in M. Grene, ed., Knowing and Being, London, 1969
- Personal Knowledge: Towards a Post-Critical Philosophy, 2nd. edition, London, 1962
- Science, Faith, and Society, 2nd. edition, London, 1964
- Pollock, L.A., The Forgotten Children: Parent Child Relations from 1500 - 1900, Cambridge University Press, 1983
- Popper, K.R., 'Toward a Rational Theory of Tradition', in Conjectures and Refutations: the Growth of Scientific Knowledge, London, Routledge & Kegan Paul, 1972, 120-135
- Unended Quest: An Intellectual Autobiography, Fontana Books, 1976
- Przetacznik, F., 'The Socialist Concept of Protection of Human Rights', Social Research 38, 1971, 337-361
- Punzo, V.A., 'After Kohlberg: Virtue Ethics and the Recovery of the Moral Self', Philosophical Psychology, 9, 1, 1996, 7-23
- Purdy, Laura M., In Their Best Interests? The Case Against Equal Rights for Children, London, Cornell University Press, 1992
- Raphael, D.D., ed., Political Theory and the Rights of Man, London: Macmillan, 1967
- Rawls, John, A Theory of Justice, Oxford, University Press, 1973
- Political Liberalism, New York, Columbia University Press, 1993
- Raymond, Diane, 'Philosophy and Parenting: A Critical Perspective', Journal of Social Philosophy, 14, 1983, 31-41

- Reed, T.M., Johnston, P., 'Children's Liberation', Philosophy, 55, 1980, 263-6
- Rorty, R., 'Postmodernist Bourgeois Liberalism', Journal of Philosophy, 80, 10, 1983, 583-589
- Rothfork, J., 'Postmodern Ethics: Richard Rorty and Michael Polanyi', Southern Humanities Review, 29, 1, 1995, 15-48
- Rousseau, J-J., Émile, trans., Alan Bloom, Harmondsworth, Penguin, 1991
- Ruddick, W., 'When Does Childhood Begin?' in Scarre, Geoffrey, ed., Children, Parents and Politics, Cambridge, University Press, 1989
- Sandel, M.J., Liberalism and the Limits of Justice, Cambridge, University Press, 1982
- 'The Political Theory of the Procedural Republic', Review of Metaphysics and Morality, 93, 1988, 57-68
- Sarason, S.B., How Schools Might be Governed and Why, New York, Teachers College Press, 1997
- Sartre, J-P., Existentialism and Humanism, Philip Mariel, trans., London, Methuen & Co., 1948
- Scarre, Geoffrey, 'Children and Paternalism', Philosophy, 55, 1980, 117-124
- ed., Children, Parents and Politics, Cambridge, University Press, 1989
- Scheffler, I., The Language of Education, Charles C. Thomas, 1974
- Schoeman, Ferdinand, 'Parental Discretion and Children's Rights: Background and Implications for Medical Decision Making', Journal of Medical Philosophy, 10, 1985, 45-62
- Schrag, F., 'The Child in the Moral Order', Philosophy, 52, 200, 1977, 167-177
- 'The Child's Status in the Democratic State', Political Theory, 3, 4, 1975, 441-457
- Schwandt, Thomas, A., 'Constructivist, Interpretivist Approaches to Human Inquiry', in Denzin, Norman K., Lincoln, Yvonna S., Handbook of Qualitative Research, London, Sage,
- Searle, John, R., The Construction of Social Reality, Harmondsworth, Penguin Books, 1996
- Sharpe, R.A., 'Metaphor', in Honderich, T., ed., The Oxford Companion to Philosophy, Oxford, University Press, 1995
- Shatter, A.J., Family Law in the Republic of Ireland, (third edition), Dublin, Wolfhound Press, 1986
- Singer, Peter, Hegel, Oxford, University Press, 1983
- Smeyers, P., 'On the Unavoidability of Power in Child-rearing: Is the Language of Rights Educationally Appropriate?', Studies in Philosophy and Education, 14, 1, 1995, 9-21.
- Smilansky, S., 'Is There a Moral Obligation to Have Children?', Journal of Applied Philosophy, 12, 1, 1995, , 41-53
- Smith, Carole, 'Children's Rights: Have Carers Abandoned Values?', Children and Society, 11, 1997, 3-15
- Smith, Tara, 'Rights, Friends and Egoism', Journal of Philosophy, 90, 3, 1993, 144-148
- Spencer, Herbert, Social Statics or the Conditions Essential to Human Happiness Specified and the First of them Developed, London, Williams and Norgate, 1868
- Stein, T.J ., 'Child Custody and Visitation: The Rights of Lesbian and Gay Parents', Social Service Review, 70, 3, 1996, 435-450
- Straughan, R., 'Why Act on Kohlberg's Moral Judgements?', in S. Modgil & C. Modgil, eds., Lawrence Kohlberg: Consensus and Controversy, Philadelphia, Faarmer Press, 1986, 149 - 161
- Sutton, Thomas L., 'Human Rights and Children', Educational Theory, 28, 2, 1978, 102-110

- Tao, Julia, 'The Chinese Moral Ethos and the Concept of Individual Rights', Journal of Applied Philosophy, 7, 2, 1990, 119-127
- Tappan, M.B., 'Narrative, Language, and Moral Experience', Journal of Moral Education, 20, 3, 1991, 243-256
- Taylor, Charles, 'Atomism', Philosophical Papers Part 2: Philosophy and the Human Sciences, Cambridge, University Press, 1985
- Sources of the Self: The Making of the Modern Identity, Cambridge, University Press, 1989
- The Ethics of Authenticity, Mass., Harvard University Press, 1991
- Thapar, A., McGuffin, P., 'Genetic Influences on Life Events in Childhood', Medicine, 26, 4, 1996, 813-820
- Thomas, L., 'Virtue Ethics and the Arc Of Universality: Reflections on Punzo's Reading of Kantian and Virtue Ethics', Philosophical Psychology, 9, 1, 1996, 25-32
- Thomson, Garrett, Needs, London, Routledge & Kegan Paul, 1987
- Tooley, M., 'Abortion and Infanticide', in Singer, P., ed., Applied Ethics, Oxford University Press, 1986
- Triggs, G., 'The Rights of 'Peoples' and Individual Rights: Conflict or Harmony?', in Crawford, J., ed., The Rights of Peoples, Oxford, University Press, 1988
- U.N. General Assembly, Convention on the Rights of the Child, Document A/RES/44/25, 12 December, 1989
- U.N. General Assembly, Declaration of Human Rights, Resolution 217A (III), 10 December, 1948
- Van der Loeff, A. Rutgers, Children on the Oregon Trail, (Roy Edwards, trans.) Penguin Books, 1961
- Van Wyk, R.N., 'Children and Community: a Reply to Jonathan Schonsheck's "Deconstructing community self-paternalism"', Law and Philosophy, 15, 1, 1996, 75-80
- Vann, R., 'The Youth of Centuries of Childhood', History and Theory 21, 1982, 279-97
- Vardin, P.A., Brody, I.N., eds., Children's Rights: Contemporary Perspectives, New York, Teachers College Press, 1979
- Vlastos, G., 'Justice and Equality', in Waldron, J., ed., Theories of Rights, Oxford University Press, 1984
- Vogel, Paul, 'The Right to Parent', Entourage, 2, 1, 1987, 33-39
- Waldron, J., ed., Theories of Rights, Oxford University Press, 1984
- Liberal Rights: Collected Papers 1981-1991, Cambridge, the University Press, 1993
- Walker, D.M., The Oxford Companion To Law, Oxford University Press, 1980
- Walsh, P., Education and Meaning: Philosophy in Practice, Cassell Education, 1993
- Warnock, M., The Uses of Philosophy, Oxford, Blackwell, 1992
- Weidhorn, M., 'Doing One's Own Thing: The Genealogy of a Slogan', Journal of Thought, 31, 4, Winter 1996, 17-32
- Wikler, Daniel, 'Paternalism and the Mildly Retarded', in Rolf Sartorius, ed., Paternalism, Minneapolis, University of Minnesota Press, 1983, 95-104.
- Williams, Bernard, Ethics and the Limits of Philosophy, Fontana Press, 1985
- Wilson, P. S., Interest and Discipline in Education, Routledge & Kegan Paul, 1971
- Wilson, A., 'The Infancy of the History of Childhood', History and Theory, 19, 1980, 132-53

Woolard, J.L., Reppucci, N.D., Redding, R.E., 'Theoretical and Methodological Issues in Studying Children's Capacities in Legal Contexts', Law and Human Behaviour 20, 3, 1996, 219-228

Worsfold, Victor, 'A Philosophical Justification for Children's Rights', Harvard Educational Review, 44, 1, 1974, 142-157

Wringe, C., 'Family Values and the Value of the Family', Journal of Philosophy of Education, 28, 1, 1994, 77-88

Young, R. 'Dispensing with Moral Rights', Political Theory, 6, 1978, 67-74

Zirkel, P.A., Reichner, H.F., 'Is *In Loco Parentis* Dead?', Phi Delta Kappan, February, 1987, 466-469