

Chapter Title: Childhood

Book Title: Law Through the Life Course

Book Author(s): Jonathan Herring

Published by: Bristol University Press. (2021)

Stable URL: <https://www.jstor.org/stable/j.ctv1ktbdt.9>

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at <https://about.jstor.org/terms>



JSTOR

Bristol University Press is collaborating with JSTOR to digitize, preserve and extend access to *Law Through the Life Course*

Childhood

Introduction

Childhood is a time of life that gives rise to competing connotations and conflicting images. A golden era of innocence and fun; or a time of abuse? Are children little angels or little devils? Some children are admired for their goodness and clarity of thought: Greta Thunberg, who started her School Strike for Climate protests aged 15, and the countless children supporting her have played an enormous role in the public debates around environmental issues. She is seen by some as a visionary. By contrast, the media is still obsessed with Robert Thompson and Jon Venables who, at the age of ten, kidnapped, tortured and murdered James Bulger, aged two. Many years later they are still presented in the tabloid media as evil.¹ We shall see in this chapter that the law's response to childhood plays an important role in reflecting and reinforcing the conflicting images society has about children.

One of the major themes of this chapter is that childhood, in many ways, is a response to adulthood. How we understand childhood tells us much about how we understand adulthood. To some extent childhood gets defined in terms of which adult characteristics children lack. Hence, part of the law's response to childhood is a list of things which children cannot do, which adults can. But there is also a growing literature on the goods of childhood, which are reflected in the legal sphere by special rights that children, but no adults, have.

This chapter will start by exploring some of the broader models of childhood in the literature before exploring how these are reflected in conflicting legal responses to childhood.

¹ Edwards, N. and Wells, T. (2018) 'Evil child killer Jon Venables was living with secret girlfriend who knew about his sick past', *The Scottish Sun*, 17 February.

Models of childhood

In this section I will describe in broad terms some of the models of childhood which have provided overarching ways of understanding young people. Of course, there are those who reject the concept of childhood altogether, and those views we will deal with in a section entitled 'Social construction of childhood'. It should be noted that different models of childhood seem more accurate or gain prominence at different times in history and in different geographical locations. So, to some extent, they are a reflection of a particular cultural context. Furthermore, it should not be thought that only one model may be adopted at a time: often attitudes towards children are contradictory.

The child as developing adult

Many parents will be familiar with the developmental approach to childhood. This suggests that the child gradually improves their physical, mental, emotional and social skills as they 'grow up' and become increasingly like an adult. This is encouraged by charts of expected growth in terms of weight and height gain produced by respected health bodies. Indeed, 'ticking off milestones', particularly in the early years, is common practice for parents, who worry if the milestones are not reached by a particular age or take pride if they are reached early. I am sure I am by no means the only parent who has a wall marking their children's height so they can see how they have been gradually growing taller.

Rousseau² proposed five stages a child travels through to reach adulthood:

- (1) infancy (birth to age 2);
- (2) the age of sensation (3 to 12);
- (3) the age of ideas (13 to puberty);
- (4) the age of sentiment (puberty to age 20); and
- (5) the age of marriage and social responsibility (age 20 onwards).

Such developmental models, and there are many of them, lead too easily to childhood being presented as simply the process by which someone becomes an adult. That way of understanding childhood seems to downplay the importance of childhood itself. The child is 'deficient' at birth and during childhood is given the skills and attributes they need to

² Rousseau, J.-J. (1762) *Émile*, London: Dent. For a more recent formulation see Kohlberg, L. (1984) *The Psychology of Moral Development*, New York: Harper and Row.

become a 'successful' adult. Interventions in the lives of children should be based on asking what intervention will produce the best adult. A good childhood becomes reduced to creating a good adult.

This is a highly problematic approach. I will highlight four challenges.

First, it seems to be based on the idea there is a 'ideal' of adulthood we are reaching for and that if a child fails to achieve the expected standards then they have 'failed'. The dangers of this approach can be seen from Gilligan's powerful critique of the Kohlberg test for moral development.³ Gilligan complained that Kohlberg's test, designed to determine a child's progress in moral reasoning, promoted a particular form of moral thinking, one dominated by 'male thinking' and focused on justice. This failed to take into account other moral values such as 'care'. Clearly there is much to discuss about that debate, but for now it is enough to note how difficult it might be to establish what a good progression to adulthood is if we do not agree on what is good adult thinking, living and so on.

The second challenge to the view that childhood is primarily about development to adulthood is that it does not see much good in childhood in itself. As we shall see in a later section of the chapter (page 102ff), some commentators make the case for there being 'goods' in childhood that are not well captured by the idea of childhood as a passage to adulthood. Does a good childhood not involve play and wonder, which may play little role in achieving goals? Further, does the model not suggest that adults have got things right and can set the agenda as to how children should be treated? That seems an oppressive way for adults to treat children.

A third objection to the developmental model is that it presents the child as passive in this process. Green claims the model 'positions the child as overwhelmingly and unidirectionally created by either society (socialization) or biological maturation and genetics (developmental psychology) or both'.⁴ Children's role is to grow and make sure they do not do anything that inhibits their growth. The sense the child might shape their own future or, indeed, shape the futures of those around them is ignored.

A final objection is that it sees children as 'little adults'. Gopnik writes:

Children aren't just defective adults, primitive grownups gradually attaining our perfection and complexity. Instead, children and adults are different forms of homo sapiens. They have very different, though equally complex and powerful,

³ Gilligan, C. (1982) *In a Different Voice*, Cambridge: Harvard University Press.

⁴ Green, L. (2016) *Understanding the Life Course*, London: Polity Press, 39.

minds, brains, and forms of consciousness, designed to serve different evolutionary functions.⁵

She goes on to explain: 'Babies' brains are actually more highly connected than adult brains; more neural pathways are available to babies than adults.'⁶ We tend therefore to greatly underestimate the abilities of babies:

We used to think that babies and young children were irrational, egocentric, and amoral. Their thinking and experience were concrete, immediate, and limited. In fact, psychologists and neuroscientists have discovered that babies not only learn more, but imagine more, care more, and experience more than we would ever have thought possible. In some ways, young children are actually smarter, more imaginative, more caring, and even more conscious than adults are.⁷

So, although the image of childhood as a time of growth and development is intuitive and widespread, it certainly has several problematic aspects.

Childhood as a time of purity

A different model sees childhood as a time of innocence and purity, where the child is gradually corrupted by the adult world.⁸ Like the developing adult model, it pictures childhood as a progression, but rather than being an upwards trajectory towards the goods of being an adult, it is seen as a downwards trajectory to the corruption that is adulthood.⁹ This has been an influential theory among some religious, particularly Christian, writers, who see children gradually becoming more sinful as they develop the capacity to choose evil and are open to the temptations of the adult world.¹⁰

The response to the argument that childhood is a time of purity has considerable practical significance. If it is true that childhood is indeed a time of bliss and purity, we would be seeking to maintain it for as long

⁵ Gopnik, A. (2009) *The Philosophical Baby: What Children's Minds Tell Us About Truth, Love, and the Meaning of Life*, New York: Farrar, Straus and Giroux, 5, 9.

⁶ Ibid, 11.

⁷ Ibid.

⁸ Smith, K. (2011) 'Producing governable subjects: Images of childhood old and new', *Childhood*, 19(1): 24–37.

⁹ Rousseau, J.-J. (1762) *Émile*, London: Dent.

¹⁰ Although other Christian thinkers have emphasized the concept of 'original sin' and claimed that children need overcome their natural instinct to sin.

as possible. By contrast, if it is wretched state then the state has a duty to move us on to adulthood as quickly as possible.¹¹

End of childhood

It is common to read of the ‘end of childhood’ or a ‘crisis of childhood’.¹² This is the belief that in recent years we have seen dramatic changes in the lives of children, meaning the innocence and wonder of childhood has been eroded. This was prominently claimed in David Buckingham’s book *After the Death of Childhood*,¹³ which claimed: ‘The sacred garden of childhood has been increasingly violated.’ In 2006 the then Archbishop of Canterbury Rowan Williams attracted considerable attention in the media when he declared that childhood was under threat, being damaged by commercial pressures, family breakdown and parents who refuse to grow up.¹⁴ Stevi Jackson and Sue Scott write that ‘[c]hildhood is increasingly being constructed as a precious realm under siege from those who would rob children of their childhoods, and as being subverted from within by children who refuse to remain childlike’.¹⁵

Alongside this narrative is the message that the distinction between adulthood and childhood is becoming blurred, with adults eating ‘children’s food’ and children wearing ‘adult clothes’, for example. West has written of the ‘adultification’ of children and the ‘infantilization’ of adults, leading to a ‘generational mulch’.¹⁶ So, paradoxically, children are behaving more like adults, and adults are behaving more like children. An article for the BBC, for example, suggests that people should now be seen as teenagers until they reach 24.¹⁷

¹¹ Matthews, G. and Mullin, A. (2018) ‘The philosophy of childhood’ in E. Zalta (ed) *The Stanford Encyclopedia of Philosophy*, Stanford: University of Stanford.

¹² See, for example, Kehily, M. (2010) ‘Childhood in crisis? Tracing the contours of “crisis” and its impact upon contemporary parenting practices’, *Media Culture Society*, 32: 171–92.

¹³ Buckingham, D. (2000) *After the Death of Childhood*, London: Polity Press.

¹⁴ BBC News Online, ‘Childhood “in crisis”’, 18 September 2006, <http://news.bbc.co.uk/1/hi/programmes/breakfast/5355080.stm>

¹⁵ Jackson, S. and Scott, S. (1999) ‘Risk anxiety and the social construction of childhood’ in D. Lupton (ed), *Risk and Sociocultural Theory: New Directions and Perspectives*, Cambridge: Cambridge University Press, 86.

¹⁶ West, D. (2010) *The Death of the Grown-Up: How America’s Arrested Development Is Bringing Down Western Civilization*, New York: Griffin.

¹⁷ BBC News, ‘Life begins at 24 ... why being a teenager now lasts 15 years’, 22 January 2018.

There are a number of responses to this ‘moral panic’. An obvious one is to say it is based on an idealized vision of childhood. The suggestion that in the past children did not suffer sexual abuse or family disharmony is hard to believe. We may be more aware of these harms than we were in the past, but it is hard to prove there was in fact a lower prevalence.

A second might be to say the changing nature of childhood is highly mixed. Especially in the West, there is increased consumerism targeted at children and it might be argued that parents are remarkably indulgent towards children in meeting their needs. The spending power of children might sit uncomfortably with the idea that children are suffering a crisis. This perspective might suggest it would be better to talk of changes to childhood, rather than a crisis in childhood. If children treat adults with less respect, that might indicate an awareness of their position as rights holders and not being subservient, rather than suggesting moral delinquency. If there are higher levels of divorce that might mean fewer children are living in unhappy families. And so forth.

An alternative response would be to argue we should listen to children on these issues. Action for Children in a 2019 survey of children found that ‘fitting in’ was a major concern, while nine out of ten of those interviewed said they were worried about issues such as poverty, sexism and Brexit.¹⁸ However, interestingly, the survey found that while two thirds of parents and grandparents thought childhood was ‘getting worse’, only a third of children agreed.

Finally, we might take the concerns seriously. There can be no denying the significant rise in pornography use, body issue concerns and self-harm among young people.¹⁹ The impact of pornography in the objectification of women is well established. It is increasingly used as a form of sex education by young people, something which must be concerning. To take one statistic, 71 per cent of young men said they had slapped, choked, gagged or spat on their partner, with a third saying they did not ask for consent. It is hard not to believe this is because such behaviour has been mainstreamed, with nearly 75 per cent accepting this was a result of pornography.²⁰ In another survey, 38 per cent of women said they had experienced unwanted slapping, choking, gagging or spitting.²¹ Further, children’s mental health is clearly an issue.²² There certainly does appear to

¹⁸ BBC News, ‘UK is “sleepwalking into crisis of childhood”, charity warns’, 9 July.

¹⁹ Wild, J. (2013) *Exploiting Childhood: How Fast Food, Material Obsession and Porn Culture are Creating New Forms of Child Abuse*, London: Jessica Kingsley Publishers.

²⁰ <https://www.bbc.co.uk/news/uk-scotland-51967295>

²¹ <https://www.bbc.co.uk/news/uk-50546184>

²² Gunnell, D., Kidger, J. and Elvidge, H. ‘Adolescent mental health in crisis’, *British Medical Journal*, 361: 2608–9.

be a huge increase in diagnosis in mental health among young people. It might be easy to dismiss this as improvements in detection and awareness of mental health issues, rather than changes in the actual health of young people. However, the fact that there was a 68 per cent increase in self-harm cases presenting in hospital between 2011 and 2014 seems hard to so readily dismiss.²³

Jim Wild's book, *Exploiting Childhood: How Fast Food, Material Obsession and Porn Culture are Creating New Forms of Child Abuse*,²⁴ expresses concern at the relentless stream of advertisements and pornography to which children are exposed. It would be easy to dismiss this as simply moralism in disguise. But the issues of pornography, body image and mental health are hardly unique to children. These are problems for all of society, but it is revealing that adults fixate on the implications for children, rather than acknowledging the implications for themselves. Perhaps, then, the concerns about childhood have a genuine basis, but they are just as much concerns about adulthood too.

Children and adulthood

One of the major themes in understanding childhood is to distinguish it from adulthood. At one extreme there are those who deny the division between the two; at the other there are those who see there being important differences between adulthood and childhood. For many commentators, a point in between these two extremes is sought. Martyn Hammersley²⁵ notes the similarity to debates in feminism over the differences between men and women. He notes:

Feminists have been caught between an inclination to deny that there are inherent differences between men and women, on one hand, and an insistence on the distinctiveness and value of women's experiences, on the other. The same sort of tension seems to operate within Childhood Studies: in some respects, differences between children and adults are played down, denying deficit views and promoting children's right to adults' rights, but on other occasions the differences between

²³ Ibid.

²⁴ Wild, J. (2013) *Exploiting Childhood: How Fast Food, Material Obsession and Porn Culture are Creating New Forms of Child Abuse*, London: Jessica Kingsley Publishers.

²⁵ Hammersley, M. (2017) 'Childhood Studies: A sustainable paradigm?', *Childhood*, 24(1): 113–27, 125.

children and adults are emphasised; this being essential to the rationale for Childhood Studies as a distinct field.

We will be exploring these issues further as the chapter progresses.

Social construction of childhood

One of the liveliest debates around childhood studies is the extent to which childhood is a social construction. For those unfamiliar with the concept, constructionism is an idea found in a wide range of social sciences. In essence it is a claim that a concept does not have an objective meaning, but that its meaning is taken from the society and age in which it is situated. In this context it means there is no universal concept that is true for all children but rather what 'child' means depends on different societies and different times. It is not, on this view, a scientific or fixed concept, but one that changes over time and across borders.

The challenge to childhood came from Philippe Ariès, in 1960,²⁶ who looked at the historical analysis of childhood and claimed that childhood did not exist in medieval times, when children were seen as mini-adults as soon as they could talk and walk. Hence, child marriage was seen as uncontroversial. While there have been disagreements over Ariès' methodology, he opened up the possibility of there being societies that have no concept of childhood,²⁷ and that, therefore, each society creates its own version of childhood, if any at all.

The social construction view is that society assumes that childhood is a particular set of experiences and labels these as childhood and attaches a particular meaning to them. The fact that that meaning varies between different cultures and societies, and at different times, shows that the meaning of childhood is not a natural given, but reflects the attitudes of the broader society. Norozi and Moen write²⁸:

The idea that childhood is socially constructed refers to the understanding that childhood is not natural process rather it is society which decides when a child is a child and when a child

²⁶ Ariès, P. (1960) *Centuries of Childhood*, New York: Vintage.

²⁷ Stainton-Rogers, R. and Stainton-Rogers, W. (1992) *Stories of Childhood: Shifting Agendas in Child Concern*, London: Prentice-Hill.

²⁸ Norozi, S. and Moen, T. (2016) 'Childhood as a social construction', *Journal of Educational and Social Research*, 6: 75–98, 76.

becomes an adult. The notion of childhood cannot be seen in isolation. It is deeply intertwined with other factors in society.

Indeed, it is striking that defining childhood has become problematic. Constructionists argue the difficulty in producing a clear definition of childhood reinforces their view that the concept is the product of particular societies and communities.

It might seem that the most natural understanding of childhood is that it relates to age. The United Nations Convention on the Rights of Child (UNCRC) deems anyone below the age of 18 a child. This, however, is problematic. There seems a huge difference between those who are six months old, and those who are 17 years old. Indeed, there are more significant differences between those ages than between those who are 17 and those who are 30. If all that unites the group of children is that they have a chronological age that does not suggest that anything particularly meaningful can be said about childhood. Even if we were to suggest it is not age per se but the physical, social and psychological developments that typically occur at certain ages, this would not help. Different people will develop in different ways, depending on personal, social, educational and cultural contexts. Class, disability, ethnicity and gender might all be seen as impacting development. It would be hard to pick a particular age at which certain intellectual milestones would be even vaguely accurate across all times or places.

Also much depends on what the milestones of adulthood are. We might choose knowing how to operate a smartphone as a sign of adulthood, for example, but that might indicate there are many more under-18-year-olds who are adults and many more over-18-year-olds who are children! Or is knowledge of the royal family a mark of adulthood? Or, if we were to propose the ability to comfort someone who is crying? Again there is not an age which relates to this. Such things seem to depend on attributes not associated with age.

So, when someone points to a study which shows that children lack characteristic x that adults do not have, we might question the study and ask 'why choose x ?' and 'how is x assessed?'. Do adults get to choose the form of assessment? Did adults get to choose what they considered to be knowledge justifying a higher legal status? Such questioning leads to doubt as to whether anything certain can be said about childhood which does not reflect an implicit bias about what childhood should be like.

Despite these points, it might simply be said that there are some significant aspects in which children are less able than adults, mental capacities being one, and that these cannot be reduced to social construction. Surely babies are clearly lacking in abilities adults have.

However, Alison Gopnik et al²⁹ report that even young children are as good as adults at theoretical reasoning. They argue that babies ‘think, draw conclusions, make predictions, look for explanations, and even do experiments’. As Matthews writes:

For many people the art or philosophy of their childhood is never equaled, let alone surpassed, by the art or philosophy of their adult lives. If painting or doing philosophy has any non-instrumental value for them, it is their child art and their child philosophy that have such value.³⁰

Allison James and Adrian James suggest that we can identify some essential characteristics of children:

childhood is a developmental stage of the life course, common to all children and characterized by basic physical and developmental patterns. However, the ways in which childhood is interpreted, understood, and socially institutionalized by adults through their engagement with children and childhood varies considerably across and between cultures and generations. And, importantly, it varies with regard to the concepts of child specific needs and competencies that are made evident in law and social policy as well as in the more mundane and everyday social interactions that take place between adults and children.³¹

They argue that simply seeing childhood as a social construction risks losing sight of the commonalities of childhood.

Perhaps, then, a compromise view is the best. There are many assumptions about childhood which are socially produced. But there are some universal biological needs and behaviours common to all children.³² It's just there are not very many of these.

²⁹ Gopnik, A., Glymour, C., Sobel, D.M., Schulz, L.E., Kushnir, T. and Danks, D. (2004) ‘A theory of causal learning in children: Causal maps and Bayes nets’, *Psychological Review*, 111(1): 3–32.

³⁰ Matthews, G. (1996) *The Philosophy of Childhood*, Cambridge: Harvard University Press, 123.

³¹ James, A. and James, A. ‘Childhood: Toward a theory of continuity and change’, *American Academy of Political and Social Science*, 575: 25–37, 36.

³² Woodhead, M. (1997) ‘Psychology and the cultural construction of children's needs’ in A. James and A. Prout (eds) *Constructing and Reconstructing Children*, Abingdon: Routledge.

Gender and childhood

One important aspect of the social construction of childhood is the impact of societal forces on gender. There are extensive debates over the extent to which different behaviours between those assigned male or female are due to biological factors or are socially conditioned, and it is not possible to do that debate justice here.³³

There is, however, widespread acceptance of the concept that, to some extent, social conditioning impacts on the identities of children as gendered people. Young people report considerable pressure to dress, perform sexually,³⁴ speak and relate to others in particular ways. A further aspect of the debate is that children's understandings of sex, gender and sexuality are shaped by the images and attitudes of those around them. There is concern that patriarchal gender norms and heteronormativity are imposed on children from an early age.³⁵

Law and children

This section will not set out the whole of the law on childhood, which would take a separate book.³⁶ It will, however, provide a discussion of legal interventions in relation to childhood at a general level. We will then move on to the more theoretical models that could govern the law's construction of childhood.

The key legal responses to childhood will now be summarized.

Legal responses to childhood: protection

One of the law's primary responses to childhood is in offering a series of protections to children, particularly through the criminal law. These are typically in the form that it is a criminal offence to do something to someone under a certain age. Such offences seek to deter people from acting in a particular way towards a child. Sometimes the law is separating

³³ Roberts, S. (2012) 'Boys will be boys ... won't they? Change and continuities in contemporary young working-class masculinities', *Sociology*, 47(4): 671–86.

³⁴ Connell, R. (2000) *The Men and the Boys*, Cambridge: Polity.

³⁵ Corteen, K. and Scraton, P. (1997) 'Prolonging "childhood", manufacturing "innocence" and regulating sexuality' in P. Scraton (ed), *Childhood in Crisis?*, London: Taylor & Francis.

³⁶ See, for example, Fortin, J. (2012) *Children's Rights and the Developing Law*, Cambridge: Cambridge University Press.

out acts that are permitted for an adult but are not permitted for a child (such as regulation over the sale of alcohol). But on other occasions, the act is already unlawful if committed against an adult, but is seen as even more serious if committed against a child. For example, under the Sexual Offences Act 2003 there is the general offence of rape (section 1) and then a specific offence of rape of a child under 13 (section 5). The age of the victim in other crimes (for example assaults) is simply marked at the sentencing stage. There is no special crime of assault of a child, but the fact a victim is a child may well lead to a higher sentence being imposed than would be the case if the victim were an adult.³⁷ But in the case of rape, the age of the child is reflected in the name of the offence, not just the sentence.

The most significant protections in criminal law offered to children relate to consent. There are a host of activities that are offences unless they are done with the consent of both parties. Tattooing, sexual activities or surgery would all be unlawful, for example, without such consent. The question then arises whether or not children have the capacity to consent to harms. The law breaks this down into two categories of cases:

- those where the consent of the child will be a defence, but only if the child is shown to have capacity to give consent;
- those where the consent of the child is never a defence, even if the child has capacity.

The first category of cases is not particularly notable for our purposes. The consent of a child who lacks capacity is as worthless in this context as the consent of an adult who lacks capacity. Children are, therefore, treated in a similar way to adults. The only point of significance may be that there seems to be a presumption of a lack of capacity in relation to children, while there is a presumption of capacity in relation to an adult.³⁸

It is in the second category, where there is an age limit, that there is a significant difference in treatment. Even though the child has capacity (the same level of understanding as an adult) their consent is ineffective. Perhaps the best-known example of this is that a child under the age of 16 cannot give effective consent to sexual intercourse, even if it is shown the child has the understanding and maturity of an adult. There are quite a number of these age bars and they will be discussed later (see page 118).

³⁷ See, for example, whole life sentences for murder of a child under the Criminal Justice Act 2003, as amended.

³⁸ Mental Capacity Act 2005, s 1(2).

Whichever justification for such legislation is used, the driving motivation is protection of children. Rose³⁹ explains why this protection of children is seen as so important to the state:

Childhood [became] the most intensively governed sector of personal existence. In different ways, at different times, and by many different routes varying from one section of society to another, the health, welfare, and rearing of children has been linked in thought and practice to the destiny of the nation and the responsibilities of the state. The modern child has become the focus of innumerable projects that purport to safeguard it from physical, sexual, and moral danger, to ensure its 'normal' development, to actively promote certain capacities of attributes such as intelligence, educability and emotional stability.

At the heart of the law's protective role is an assumption that children are vulnerable. Vulnerability is at the heart of the law's response to childhood. Indeed, in a sense it can be seen as almost definitional. To be a child is to be vulnerable and in need of protection. Meyer⁴⁰ usefully separates out the alleged forms of childhood vulnerability into three categories: physical, social and structural. These are readily understandable. Physical vulnerability refers to the suggestion that children's bodies tend to be weaker and smaller than those of adults. Many adults can pick up a child; not many children can pick up an adult. Social vulnerability refers to the fact that children are said to lack the social skills, experiences and relational contexts to protect themselves from harm. The reference to structural vulnerabilities relates to the argument that children have limited access to resources such as transport, food and medical care, especially without adults to enable their access. Further, children are taught to be wary of adulthood and the multiple dangers they face, which it is said they are unable to protect themselves from. Anneke Meyer's argument is that the notions of innocence and vulnerability combine to provide childhood a form of 'moral rhetoric', meaning that 'children and childhood function to explain and legitimize any practice or opinion as right while removing the necessity to provide reasons: children are the reason'.⁴¹

This image of the child as being vulnerable is seen as justifying a paternalistic response. Children are seen as open to a range of harms that

³⁹ Rose, N. (1989) *Governing the Soul*, London: Routledge, 121.

⁴⁰ Meyer, A. (2007) 'The moral rhetoric of childhood', *Childhood*, 14: 85–102.

⁴¹ Ibid.

adults do not face, and they lack the resources to respond to those harms. Adults are presented as being in a position to protect children from the harm and to help them cope with any harms they do befall. Ironically, this role of adults as protectors is used to mean that adults are permitted to exercise force to ensure children are protected.⁴²

A final point before leaving the role of law as protector is that the law is highly selective of the kinds of dangers that children face. Sexual abuse and physical harm at the hands of strangers tend to be emphasized. Yet the numbers of children who suffer sexual or physical abuse at the hands of strangers is tiny. Children are far more likely to be abused by someone known to them than by a stranger. Far more children are harmed by the environment or by social or economic harms.⁴³ The ‘vulnerability’ depicted in the media presents the government as posing no risk to children: the risk is from individuals, while the government is the protector of children. Such views can sideline the impact of socio-economic disadvantage on children.

Legal response to childhood: welfare

A second legal response is to give children particular privileges as compared to adults. We can see this in English law, in the well-known ‘paramountcy principle’ found in section 1(1) of the Children Act 1989,⁴⁴ which states:

When a court determines any question with respect to—
 (a) the upbringing of a child; or
 (b) the administration of a child’s property or the application
 of any income arising from it,
 the child’s welfare shall be the court’s paramount consideration.

The reference to ‘paramount consideration’ has been subject to quite some academic debate,⁴⁵ but it is generally taken to mean that the courts should focus on the welfare of the child, and not consider the interests of

⁴² Children Act 2004, s 58 authorizes parents to use force less than actual bodily harm by way of punishment.

⁴³ Herring, J. (2018) *Vulnerability, Childhood and the Law*, Berlin: Springer.

⁴⁴ Herring, J. (2005) ‘Farewell welfare’, *Journal of Social Welfare and Family Law*, 27: 159–81.

⁴⁵ Herring, J. (1999) ‘The Human Rights Act and the welfare principle in family law – conflicting or complementary?’, *Child and Family Law Quarterly*, 11: 223–45.

adults.⁴⁶ So, in a family case, if the interests of a parent favour solution A and the interests of a child favour solution B, then solution B must be chosen. Indeed, that seems to be the position even if solution B slightly favours the child but is very harmful to the parent.

This especial privileging of children is found in many jurisdictions. The United Nations Convention on the Rights of the Child, Article 3 states:

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 is generally taken to be slightly different from the paramountcy principle in the Children Act 1989 as it accepts that the interests of adults can be a consideration. Nevertheless, it makes it clear that children's interests rank higher than those of adults.

The emphasis placed on children's welfare may reflect the view that, if a court order causes a loss or hurt, children have fewer resources open to them than adults do. Children lack the material, psychological and relational resources that parents have. If children are the most vulnerable, the law should do most to protect them. Further, of all the parties to a family dispute it is clear that children are least to blame.

Legal responses to childhood: services

It also seems that children have particular rights against the state or privileges in services that others do not have. The most obvious would be the right to education, which is generally seen as applying to children, but not adults.⁴⁷ Another example might be medical services, such as free prescriptions available under the NHS, which are not available generally to adults. These can be justified in part by the state's need for children to develop into worthy and healthy citizens, but also because we cannot expect children to provide for such services themselves.

⁴⁶ Eekelaar, J. (2002) 'Beyond the welfare principle', (2002) 14 *Child and Family Law Quarterly*, 14: 237–52.

⁴⁷ European Convention on Human Rights, Article 2, First Protocol.

Legal response to childhood: parenthood

A major aspect of the law's response to children is the allocation of responsibilities for and rights over them to parents (and others in a parental position). We will discuss this in detail in Chapter 8.

Legal responses to childhood: citizenship rights

Children are often seen not having the citizenship rights that adults can claim. Hence, they are not able to vote or stand in elections. There are also liberties included here, such as not being accountable under the criminal law. Generally, these reflect the fact that children are not yet in a position to accept the responsibilities of citizenship and so should not have the rights and responsibilities that go with that.

Autonomy and children

At the heart of legal regulation of people is the concept of autonomy. For many commentators, at the heart of the debates about the legal response to childhood is the argument that children lack capacity to make competent decisions and therefore cannot exercise autonomy.

First, is it necessary to say a little more about autonomy. As Daly⁴⁸ explains, the concept of legal autonomy means:

we are all permitted to define what constitutes a 'good life', and to live accordingly, as long as we do not harm others. It does not matter whether our decisions are 'rational, irrational, unknown, or non-existent.' The law provides legal tools to us as independent legal individuals to maintain our autonomous status. It ostensibly ensures that free people will be treated equally, their liberty guaranteed against encroachment by government or others.

This right to be able to choose how to live is seen as a key principle of freedom. Daly suggests it is 'the quality most valued in Western democracies'.⁴⁹ For many, it forms the basis of the English legal system. Any law which restricts freedom, for example by creating a criminal

⁴⁸ Daly, A. (2018) *Children, Autonomy and the Courts*, Amsterdam: Brill, ch 3.

⁴⁹ Ibid, 135.

offence, can be justified only if it is done in the name of protecting others from harms or because a person cannot exercise autonomy.⁵⁰

We will explore the philosophical basis behind the concept of autonomy further in Chapter 9. For now, it is enough to emphasize that this right applies only to those who are capable of making decisions as to how they lead a good life. If they lack the mental characteristics necessary, then they are not able to make those decisions. And, generally, this is seen to be the position of children, at least in respect of important decisions of the kind that the law will be interested in. At least, that is the standard version of the argument, which I will develop a little further before critiquing it.

The case that children should not have autonomy rights

To be clear, when people claim that children lack autonomy it is not claimed that children are unable to make a decision, but rather that the decisions that children take are not entitled to the kind of respect due to the decisions of adults with capacity. Generally speaking, for a decision to be protected by autonomy rights the decision must be one which is made with an understanding of the relevant facts and which a person reaches applying their own reasoning and values to it. This will be discussed in more detail in Chapter 9. For now, it should be noted that to have the strongest claims to autonomy a person must understand the relevant information and weigh it in the balance using values they have adopted for themselves to reach a rational decision. Opponents of children having autonomy rights claim that, in a range of ways, children lack these abilities: they will not understand the necessary information; or not be able to exercise their will free from the influence of parents or others; or will lack the foresight and intellectual skills for rational thought; or will be unable to hold clear values they have adopted for themselves.⁵¹

There is certainly evidence to show that children, as compared with adults, generally have limited understanding of facts, are impressionable and suggestible, and have more limited powers of reasoning.⁵² Viljoen,

⁵⁰ Ibid, 123.

⁵¹ Matthews, G. and Mullin, A. (2018) 'The philosophy of childhood', in E. Zalta (ed) *The Stanford Encyclopedia of Philosophy*, Stanford: University of Stanford.

⁵² Saz, P., Bittencourt-Hewitt, A. and Sebastian, C. (2015) 'Neurocognitive bases of emotion regulation development in adolescence', *Developmental Cognitive Neuroscience*, 19(1): 558–66.

Penner and Roesch argue⁵³ that adolescents have lower abilities to appreciate the long-term consequences of their decisions. Indeed, they claim that, although it used to be assumed that the cognitive functioning of people in mid-adolescence was comparable to that of adults, in fact brain development continues until one's early twenties. There is also evidence of adolescence being a time of increased impulsivity and sensation-seeking.⁵⁴

Matthews and Mullin suggest that 'it is typical for philosophers to be sceptical about the capacity for children under the age of ten to have any capacity for autonomy, either because they are judged not to care stably about anything, lack information, experience and cognitive maturity, or are too poor at critical reflection'.⁵⁵ However, there is certainly no consensus on this. Daly argues:

Advances in neurobiology highlights that our brains do not reach full maturity until our mid-20s at least, challenging many of our assumptions about the child/adult divide. Empirical research demonstrates that although children do not reason as 'well' as adults, context is crucial (because with help, they often can), and it is very difficult to generalise about what children can do at a particular age.⁵⁶

Perhaps because of the conflicting evidence from psychology, many commentators highlight maturity as a key issue. As Archard puts it⁵⁷:

Children, or at least children of a certain age, may not differ markedly from adults in respect of their cognitive and volitional capacities. They may be as capable as older humans of making their own minds up about what to do and be as independent in their resolution to act on their choices. But they may simply not have had as much experience of the world as their adult counterparts. Being thus naïve and inexperienced in the ways

⁵³ Viljoen, J. Penner, E. and Roesch, R. (2011) 'Competence and criminal responsibility in adolescent defendants: the roles of mental illness and adolescent development' in D. Bishop and B. Feld (eds) *The Oxford Handbook of Juvenile Crime and Juvenile Justice*, Oxford: Oxford University Press.

⁵⁴ Delmage, E. (2013) 'The minimum age of criminal responsibility: a medico-legal perspective', *Youth Justice*, 13: 102–21.

⁵⁵ Matthews, G. and Mullin, A. (2018) 'The philosophy of childhood', in E. Zalta (ed) *The Stanford Encyclopedia of Philosophy*, Stanford: University of Stanford.

⁵⁶ Daly, A. (2018) *Children, Autonomy and the Courts*, Amsterdam: Brill, 121.

⁵⁷ Archard, D. (2017) *Children Family and the State*, Abingdon: Routledge, p 17.

of the world they will not be as able, that is as qualified, as older (and wiser) humans are to make sensible choices.

If persuasive, this is an important argument for two reasons, in particular. First, it means that the debates over the understanding and reasoning abilities of children can be put to one side. Whatever evidence is introduced to show that children are far more capable of reasoning than we have assumed, nothing can get round the fact they simply have not had experience of the world. Second, even if a particular child can show they have the same reasoning abilities as an adult, they cannot demonstrate the same level of maturity as an adult.

But the argument is not persuasive. 'Maturity' is in danger of simply being another word for being older. If that is all it means, then we are saying that older people have more autonomy rights than younger people because they are older, which is simply a circular argument. More plausibly, maturity means experiences of life: having met a range of different people; heard different viewpoints; suffered different emotions and so forth. However, it is far from clear that that is related to age. As Alderson's study of very sick children demonstrates, life experiences can give considerable insight.⁵⁸ So, it is rather the quality of what you have experienced and how you have come to understand it that matters more than the years you have been on the planet. In any event, it seems people repeat the same mistakes again and again, suggesting that maturity does not bring with it greater mental capacity.

Supporters of the claim that children should not have any autonomy rights claim that children lack the capacity to exercise autonomy, are likely to be abused, and this will cause harm. As Archard argues, 'granting fundamental liberties to a child before he possesses the capacities to be the guardian of his own life is cruel'.⁵⁹ Further, children are a 'valuable asset'. Indeed, they are the taxpayers of the future. They require nurturing and supporting so that they fulfil that promise, rather than respecting foolish decisions which might mean they become dependent on the state for support.

However sympathetic you are to the arguments in this section about children's lack of capacity, it seems to be arguing too much to say that no child has sufficient autonomy. At its strongest, the case must be that very few children do.

⁵⁸ Alderson, P. (1993) *Children's Consent to Surgery*, Buckingham: Open University Press.

⁵⁹ Archard, D. (2001) 'Philosophical perspectives on childhood' in J. Fiona (ed) *Legal Concepts of Childhood*, Oxford: Oxford University Press, 52.

The case for full autonomy rights

By contrast to the views discussed in the previous section, there are some commentators who argue that children should have all the autonomy rights that adults have open to them. This is commonly known as the ‘child liberation’ case. It seems that those seeking to make that case have three routes open to them:

- (1) To build up further evidence on the reasoning and understanding abilities of children to demonstrate that they are on a par with those of adults. This evidence may be either
 - (a) that children’s abilities are far higher than is commonly supposed (‘traditional child liberation’) or
 - (b) that adults’ abilities are far lower than is commonly supposed (‘modern child liberation’).
- (2) To accept that children have lower abilities than adults, according to the standards used for capacity, but to deny they are so low that their decisions do not deserve respect.
- (3) To accept that children have lower reasoning and understanding abilities than adults, but argue that we have good reason to respect people’s views even if they lack capacity. That would require reliance on principles other than autonomy.

My views on this are as follows. I do not think the case for (1)(a) is made out. I think the case for (1)(b) is well made. I think that (2) is not made out. As will be argued further in Chapter 9, we should have a high bar for decisions to be seen as autonomous. I think that (3) is also well made out, and that argument is developed in Chapter 9.⁶⁰ Arguments 2 and 3 will be discussed in Chapter 9 because they are really points about capacity generally, rather than specifically about children. So, here the focus will be on the traditional and modern child liberation arguments.

Traditional child liberation

In the 1960s and 1970s there was a growth of interest in child liberation. This view, while initially attracting considerable attention, has fallen from popularity in recent years and has few adherents today. In essence, the claim of child liberation is that childhood is used as a construct to

⁶⁰ Mullin, A. (2011) ‘Children and the argument from marginal cases’, *Ethical Theory and Moral Practice*, 14(3): 291–305.

control and disadvantage children. We need to liberate children from the 'tyranny' that is imposed through childhood and treat them as we do all human beings.⁶¹ The argument went that children's ability to make decisions for themselves was underestimated; deliberately so, because it meant that children could be kept as 'super-pets' or slaves for the convenience of adults. The child liberationist argument claimed that children should have the same legal rights that adults had. For example, John Holt⁶² argued for children having the right to vote, work, own property, receive minimum state education, use drugs and be able to consent to sexual relations.

Child liberationists see childhood as a means by which adults are able to exercise power over children. Claire Cassidy et al wrote that children:

are stifled and excluded from a society formed and defined by adults' interests until they – the children – are trimmed and shaped in a way that allows adults to find children agreeable. This demonstrates the power relation between adult/child quite clearly.⁶³

Adults set themselves up as 'all-knowing' experts to whom children must defer. Children who do not obey are seen as behaving morally wrongly and, indeed, 'immaturely'.⁶⁴ Ironically, being obedient to adults is seen as the best mark of becoming mature.

Child liberationists today might invoke the argument that treating children and adults differently amounts to age discrimination. Although the Equality Act 2010 prohibits age discrimination in the workplace, the provision of goods, facilities and services, strikingly, persons under the age of 18 are not covered. Harriet Harman, in introducing the Bill, explained:

It is right to treat children and young people differently ... and there is little evidence of harmful age discrimination against young people.

⁶¹ For example, Holt, J. (1974) *Escape from Childhood*, London: Pelican.

⁶² Ibid.

⁶³ Cassidy, C., Conrad, S.-J., Daniel, M.-F., Figueroia-Rego, M., Kohan, W., Wu, X. and Zhelyazkova, T. (2017) 'Being children: children's voices on childhood', *International Journal of Children's Rights*, 15: 1–26, 15.

⁶⁴ Medina-Minton, N. (2019) 'Are Children an Oppressed Group? Positing a Child Standpoint Theory', *Child and Adolescent Social Work*, 36: 439–40.

A statement from the Equalities Office⁶⁵ expanded this explanation:

It was decided that age discrimination legislation is not an appropriate way to ensure that children's needs are met. It is almost always right to treat children of different ages in a way which is appropriate to their particular stage of development. Any such legislation would require a large number of exceptions.

Even if it is accepted that the treatment of children as different from adults is a form of discrimination,⁶⁶ it might be argued that it is justified, the most likely justification being the issue raised in the previous section: that children lack capacity to make decisions for themselves. What the discrimination argument means is that those wanting to treat children differently from adults must produce a convincing reason why that should be so.

Child liberation has plenty of critics. At the heart of many responses is that the theory fails to appreciate that if children were treated like adults, far from leading to their liberation, this would open them to exploitation and abuse. As Archard writes⁶⁷:

The child liberationists overstate their case when they represent all childhood incapacity as mere conventional, enforced dependency. Some of it is natural. Being very young does mean being small and weak, even if the contrast between dependent child and independent adult can be exaggerated.

The awareness nowadays of sexual abuse, modern-day slavery and the dangers of social exclusion mean that a straightforward argument that 'childhood is a prison from which children need liberating' has few supporters. We know that adults take advantage of other adults who do not have the protection of childhood, in terms of sexual exploitation, employment and finance. We can predict all too well that adults would do the same to children if children were not protected as they are by the law.

⁶⁵ UK Government Equalities Office (2010), *Equality Act 2010: Banning Age Discrimination In Services, Public Functions And Associations, Equality Impact Assessment*, London: TSO, 25.

⁶⁶ Young-Bruehl, E. (2012) *Childism: Confronting Prejudice against Children*, New Haven, CT: Yale University Press.

⁶⁷ Archard, D. (2005) *Children: Rights and Childhood*, Abingdon: Routledge, 26.

The next section suggests in response that maybe, therefore, the problem lies with the kinds of rights we currently give adults, rather than the position of children.

Modern child liberation

I have supported the basic premise of the child liberationists but argued that the current law is flawed not because it underestimates the capacities of children, but because it overestimates the capacities of adults.⁶⁸ Adults, just like children, fail to understand the necessary facts, are heavily influenced by the views of others, and have not developed their own values. So, we should treat adults and children in the same way, but by treating adults like children. In Chapter 9, there will be further elaboration of the lack of capacity of adults, and in Chapter 5, a challenge to the kinds of law we currently give adults. Therefore, only a very brief explanation will be provided here.

In Chapter 5 it will be argued that we need to reject the law's assumption that the norm is the autonomous liberal individual and replace it with the norm of the vulnerable person. Hence, while the law might pretend that adults do not need care and are self-sufficient, I argue that adults do need care, and it is commonly provided by children. Once the vulnerabilities and challenges to capacity for adults are recognized, the justification for distinctions then falls away.

If we were to see vulnerability and interdependence as being at the heart of the human condition, then this would change how we would understand decision making.⁶⁹ It would no longer be about individual ideas of autonomy but taking care of each other together. As Wall⁷⁰ puts it:

human rights would be understood as grounded, not in modernist ideas of autonomy, liberty, entitlement, or even agency, but in a postmodern circle of responsibility to one another.

Such a model of rights would be suitable for both adults and children.

⁶⁸ Herring, J. (2018) *Vulnerability, Childhood and the Law*, Berlin: Springer.

⁶⁹ Clough, B. (2017) 'Disability and Vulnerability: Challenging the Capacity/Incapacity Binary', *Social Policy and Society*, 16(3): 469–481.

⁷⁰ Wall, J. (2008) 'Human rights in light of childhood', *International Journal of Children's Rights*, 16: 523–43, 541.

As Wall expresses it, this requires a shift from ‘individual autonomy’ to ‘interdependent responsibility’. Interdependent responsibility means:

Each of us belongs to interdependent networks of received developmental supports, imposed top-down protections, and active bottom-up opportunities for agency. Together, but not separately, these interlocking trajectories create dynamic societies capable of expanding human mutual responsibilities rather than contracting into exclusions and hegemonies.⁷¹

Adopting such an approach would require a major rethinking of the law.⁷² Without such a transformation, the argument that adults should be treated in the way children currently are treated would be unacceptable to most people.

Moderate views

Many writers, while sympathetic to child liberationist cause, are unwilling to completely equate children and adults. They prefer, instead, to propose a moderate route, with children’s autonomy being recognized to some extent, but not so much as that of adults. For example, Daly promotes a ‘children’s autonomy principle’ which means that:

children should get to choose – if they wish – how they are involved (*process autonomy*) and the outcome (*outcome autonomy*) unless it is likely that significant harm will arise from their wishes.⁷³

Notably this view seeks to give some weight to children’s autonomy: both in the extent to which they are involved and in the weight attached to their views. The argument that we should respect children’s autonomy unless significant harm arises is a common theme among moderate approaches. In explaining her approach, Daly argues:

⁷¹ Wall, J. (2015) ‘Why children’s rights matter’ in C. Bernard and J. Shea (eds) *Giving Children a Voice: The Transforming Role of the Family*, Newcastle upon Tyne: Cambridge Scholars Publishing, 43–51, 44.

⁷² Herring, J. (2019) *Law and the Relational Self*, Cambridge: Cambridge University Press.

⁷³ Daly, A. (2018) *Children, Autonomy and the Courts*, Amsterdam: Brill, ch 3.

‘Autonomy’ simply should not mean that children are abandoned to harmful situations, or to manipulation by another. It is the lack of nuance which is the problem – we can have a conception of autonomy which involves a degree of paternalism only where necessary. It also means that respect for children’s autonomy involves having to go to the trouble of facilitating their decision-making process – providing information, giving advice and support, and properly resourcing these facilities.

This, she suggests, justifies respecting children’s autonomy without giving it the same status as adults’, because that would mean children would be ‘abandoned to harmful fates unaided’.

Many thinkers on children’s rights have been drawn to an approach which seeks to ensure that children have maximum autonomy when they reach adulthood – ‘a child’s right to an open future’,⁷⁴ as it has become known.

It is worth exploring one of the leading writers in this area: John Eekelaar. He argues that children have three types of interests: basic, developmental and autonomy interests. He explains that basic interests are children’s claims concerning their physical, emotional and intellectual well-being. Developmental interests include claims to be able maximize their potential and maximize the resources available to them during childhood, while an autonomy interest is ‘the freedom to choose [their] own lifestyle and to enter social relations according to [their] own inclinations uncontrolled by the authority of the adult world, whether parents or institutions’.⁷⁵ He explains that where there is a clash between these interests, basic and developmental interests should trump autonomy interests. There are two reasons for this ranking. First, Eekelaar argues that we should consider how a child might retrospectively, as an adult, have wished to be treated. He believes that most of us would not have wanted all our autonomy wishes granted as we were growing up, certainly not those that interfered with basic or developmental interests. Second, he argues that the ideal which we should be striving for is ‘to bring a child to the threshold of adulthood with the maximum opportunities to form and pursue life goals which reflect as closely as possible an autonomous

⁷⁴ Feinberg, J. (2007) ‘The child’s right to an open future’ in R. Curren (ed) *Philosophy of Education*, Oxford: Blackwell.

⁷⁵ Eekelaar, J. (1986) ‘The emergence of children’s rights’, *Oxford Journal of Legal Studies*, 6: 161–78, 170–1.

choice'.⁷⁶ A child who develops into an 18-year-old with maximum autonomy will, then, have the maximum choice to decide for themselves how they wish to live their life.

Eekelaar argues that to achieve this we need to ensure that during childhood the child's basic or developmental interests are protected, even where the child's autonomy interests point in a different direction. He argues, further, that enabling a child to have maximum autonomy in adulthood requires restrictions on their childhood now. It also requires that children be able to practise making decisions for themselves as they grow up. Children therefore must exercise autonomy in order to be able to have it later on. As Freeman puts it:

We would not be taking rights seriously if we only respected autonomy when we considered the agent was doing the right thing. But we also would be failing to recognise a child's integrity if we allowed him to choose an action, such as using heroin or choosing not to attend school, which could seriously and systematically impair the attainment of full personality and development subsequently.⁷⁷

So, the position we have reached is this. If we accept a model of the kind promoted by Eekelaar, there is an acceptance that some limitation can be imposed on the autonomy of children, in the name of protecting their developmental or basic interests. These restrictions on the autonomy of children are commonly justified in the name of promoting a child's autonomy later in life.

Eekelaar's approach is not unproblematic. Parents inevitably have to choose between different interests or skills a child might have: sport or music, for example. If we ask what, as an adult, the child would want, this is problematic because what the child will think when they grow up will depend on the choice. If the parents choose music and the child grows up a talented musician, they will approve of their parents' decisions. However, if the parents choose sport and the child becomes a successful sportsperson, the child will approve of that decision.⁷⁸

⁷⁶ Eekelaar, J. (1994) 'The interests of the child and the child's wishes: the role of dynamic self-determinism', *International Journal of Law Policy and the Family*, 8: 42–63, 60.

⁷⁷ Freeman, M. (1992) 'Taking children's rights more seriously', *International Journal of Law Policy and the Family*, 6: 42–63, 66.

⁷⁸ A similar issue arises in raising a child with a particular religious belief or ethnic identity.

There are also problems because the hypothetical adult will decide using adult eyes. Would the hypothetical adult let the child go to an expensive Santa's grotto at Christmas, or would they regard that as a waste of money? There is a real danger that children are regarded only as 'adults in the making' and childhood is not appreciated in its own right. Lucinda Ferguson has strongly criticized much writing on children's rights for failing to take a child-centred version of children's rights, giving children the rights adults think they should have, rather than looking at the issue from the children's perspective.⁷⁹

A rather different concern is that Eekelaar's approach very much focuses on producing maximum autonomy for children. This may be important but there are other values that are important too. We want children to learn the values of altruism and the importance of relational obligations. Allowing them to make decisions unless they are going to cause themselves harm seems to place insufficient weight on developing other desirable characteristics, apart from autonomy.

Children's welfare

The other major conceptual tool for considering childhood apart from autonomy is the concept of children's welfare.⁸⁰ If children are not able to make decisions for themselves, then others should make decisions for them based on what promotes the welfare of the child.

Immediately that raises a host of controversial questions over what does promote a child's welfare. It will be instantly apparent that anyone looking at the lives of parents in England will see a bewildering range of views on what is a good way of raising children. Whether in terms of issues around diet, discipline, religion, schooling, internet use or the importance of study, parents simply do not agree. This makes it difficult for the law therefore to assess what is in the interests of a child's welfare.

⁷⁹ Ferguson, L. (2013) 'Not merely rights for children but children's rights: the theory gap and the assumption of the importance of children's rights', *International Journal of Children's Rights*, 12: 177–208.

⁸⁰ Skelton, A. (2018) 'Children and well-being' in A. Gheus, G. Calder and G. Wispelaere (eds) *The Routledge Handbook of the Philosophy of Childhood and Children*, Abingdon: Routledge.

The meaning of welfare

The first major question is what we mean by welfare in this context. The notion of a 'good life' is fiercely debated among philosophers. This is a complex debate, and there is not space to properly enter into it here.⁸¹ To hedonists, happiness is the sole marker of a good life, in which case the law should be seeking to promote the happiness of children. To virtue ethicists, a good life is marked by the characteristics of virtue and we should be seeking to raise children who are altruistic and kind. Autonomists might see the meeting of one's own goals in life as ideal, in which case we should be seeking to enable children to formulate these goals and then reach them. Charles Foster and I⁸² have suggested that 'wellbeing can only sensibly be defined by reference to the nexus of relationships in which humans exist. It can include the cultivation of virtues, such as relationship, the achievement of worthwhile goals, and the satisfaction of one's obligations.' It will be immediately apparent that a judge seeking to promote the welfare of a child is facing an unenviable task in deciding what welfare means.

The most sophisticated discussion by the courts on welfare can be found in *Re G (Education: Religious Upbringing)*.⁸³ Munby LJ emphasized that welfare in section 1 of the Children Act 1989 should be understood broadly to cover the child's well-being:

Evaluating a child's best interests involves a welfare appraisal in the widest sense, taking into account, where appropriate, a wide range of ethical, social, moral, religious, cultural, emotional and welfare considerations. Everything that conduces to a child's welfare and happiness or relates to the child's development and present and future life as a human being, including the child's familial, educational and social environment, and the child's social, cultural, ethnic and religious community, is potentially relevant and has, where appropriate, to be taken into account. The judge must adopt a holistic approach.⁸⁴

⁸¹ Foster, C. and Herring, J. (2018) *Altruism, Welfare and the Law*, Berlin: Springer.

⁸² Herring, J. and Foster, C. (2012) 'Welfare means relationality, virtue and altruism', *Legal Studies*, 32(3): 480–98.

⁸³ [2012] EWCA Civ 1233.

⁸⁴ *Ibid*, [27].

Somewhat controversially, he made it clear this is not simply a matter of happiness:

I have referred to the child's happiness. Very recently, Herring and Foster⁸⁵ ... have argued persuasively that behind a judicial determinations of welfare there lies an essentially Aristotelian notion of the 'good life'. What then constitutes a 'good life'? There is no need to pursue here that age-old question. I merely emphasise that happiness, in the sense in which I have used the word, is not pure hedonism. It can include such things as the cultivation of virtues and the achievement of worthwhile goals, and all the other aims which parents routinely seek to inculcate in their children.⁸⁶

Furthermore, the child's welfare has to be considered in their relational context:

The well-being of a child cannot be assessed in isolation. Human beings live within a network of relationships. Men and women are sociable beings. As John Donne famously remarked, 'No man is an Island ...'. Blackstone observed that 'Man was formed for society'. And long ago Aristotle said that 'He who is unable to live in society, or who has no need because he is sufficient for himself, must be either a beast or a god'. As Herring and Foster comment, relationships are central to our sense and understanding of ourselves. Our characters and understandings of ourselves from the earliest days are charted by reference to our relationships with others. It is only by considering the child's network of relationships that their well-being can be properly considered. So a child's relationships, both within and without the family, are always relevant to the child's interests; often they will be determinative.⁸⁷

The judge, when deciding about a child's welfare, had to act as a 'judicial reasonable parent' and have regard to the general standards in 2012 and the 'ever-changing nature of the world'. Munby LJ expounded three aspects of this. First, we must recognize that equality of opportunity

⁸⁵ Herring, J. and Foster, C. (2012) 'Welfare means relationality, virtue and altruism', *Legal Studies*, 32(3): 480–98.

⁸⁶ [2012] EWCA Civ 1233, [29].

⁸⁷ *Ibid*, [30].

is a fundamental value of our society: equality as between different communities, social groupings and creeds; and equality as between men and women, boys and girls. Second, we foster, encourage and facilitate aspiration: both aspiration as a virtue in itself and, to the extent that it is practical and reasonable, the child's own aspirations. Far too many lives in our community are blighted, even today, by lack of aspiration. Third, our objective must be to bring the child to adulthood in such a way that the child is best equipped both to decide what kind of life they want to lead – what kind of person they want to be – and to give effect so far as practicable to their aspirations. Put shortly, our objective must be to maximize the child's opportunities in every sphere of life as they enter adulthood. And the corollary of this, where the decision has been devolved to a 'judicial parent', is that the judge must be cautious about approving a regime which may have the effect of foreclosing or unduly limiting the child's ability to make such decisions in future.⁸⁸

A full analysis of such conceptions of welfare is beyond the scope of this book. But there is one aspect of the debates over the concept of welfare that is relevant to the life course. That is the debate over whether children's welfare differs from adults' welfare or, in other words, whether there are particular aspects of a child's good life which differ from an adult's.

Goods of childhood

As mentioned earlier, one mainstream view is that childhood is a vehicle to reach adulthood. Aristotle saw children as imperfect, unfinished adults.⁸⁹ Todres⁹⁰ summarizes well the popular image of childhood:

the dominant view of children today is that they are adults in the making – that is, dependent individuals who are not yet capable of mature and autonomous thought or action and who need to be socialized to conform to the world.

A successful childhood is, on that view, one that produces a good adult. Decisions concerning children should be made primarily based on what will help to produce a successful adulthood.

⁸⁸ Ibid, [80].

⁸⁹ Gheaus, A. (2015) 'Unfinished adults and defective children: On the nature and value of childhood', *Journal of Ethics and Social Philosophy*, 12: 1–21.

⁹⁰ Todres, J. (2014) 'Independent children and the legal construction of childhood', *Southern California Interdisciplinary Law Journal*, 261–92, 270.

In a challenge to such an approach, there has been a rapid growth in the philosophical literature explore ‘the goods of childhood’. This is the view that there are goods that are intrinsic to childhood itself. If accepted, it has significance consequences on how we understand childhood. Gheaus writes that if there are goods of childhood:

childhood is not entirely a predicament, but also a privilege insofar as it is a state of life when we display higher abilities to experiment, learn, enjoy and relate to others in trustful and spontaneous ways.... In this case, children are more than deficient adults.⁹¹

At one extreme, advocates of the goods of childhood might claim that childhood is a morally superior status.⁹² However, it may not be helpful to reduce down the debate to asking whether childhood is better than adulthood. As Gheaus⁹³ writes:

the change from childhood to adulthood may not in every way be either progress – as the view of ‘children as unfinished adults’ would have it – or regress – as suggested by the view of ‘adults as defective children.’ Rather, it is a transformation from one intrinsically valuable kind of human being to a different intrinsically valuable kind of human being.

Before exploring the debate over the goods of childhood, it is important to emphasize its significance. First, if childhood is bad it would mean that, as an overarching policy, we would be doing all we could to get through it quickly. A primary goal of legal and social interventions would be to enable children to reach adult status as quickly as possible. Second, if there are goods of childhood, then these could justify different legal treatments for children and adults. For example, children might be entitled to rights to enable them to enjoy those goods, while adults would not need those rights as they could not access the goods.

⁹¹ Gheaus, A. (2015) ‘Unfinished adults and defective children: On the nature and value of childhood’, *Journal of Ethics and Social Philosophy*, 12: 1–21, 4.

⁹² Dwyer, J. (2011) *Moral Status and Human Life: The Case for Children’s Superiority*, Cambridge: Cambridge University Press.

⁹³ Gheaus, A. (2015) ‘Unfinished adults and defective children: On the nature and value of childhood’, *Journal of Ethics and Social Philosophy*, 12: 1–21, 20.

Brennan⁹⁴ has used that first point to make an argument that we do believe there are goods of childhood. She creates a thought experiment where a pill could be taken and a child would immediately transform into an adult. She doubts we would think it advisable to take the pill, indicating we do not think childhood is simply a useful route to adulthood.⁹⁵ If you thought the taking of the pill was a good idea, that would indicate you saw childhood as a severe disadvantage. I suspect many people would think that it would not be a good idea to take the pill. But what if we reversed the question: if as an adult you could take a pill so you became a child again, would you take it? This may take us back to Gheaus's point that it is not that one stage of life is better than the other, but that there is a good in the natural process from childhood to adulthood.

There is a further tricky aspect to the issue. Is the argument about whether the goods in question are only available to children (they are unique goods of childhood), or is it that children are able to access these goods more easily than adults or simply an empirical claim that most children are able to enjoy these goods?⁹⁶ Or is the claim that these 'goods' would not be beneficial to adults? Gheaus⁹⁷ claims:

the goods of childhood are good for adults, too, and ... they are not typically entirely out of adults' reach. However, given biological facts about children (such as underdeveloped prefrontal cortices) and other factual constraints (such as the need for someone to work in order to ensure survival), adults cannot hope to enjoy these goods to the same extent as children.

So, what are some of the alleged goods of childhood? The following regularly appear as suggestions in the literature.

Innocence

It is sometimes claimed that sexual innocence is a good for childhood. Brighouse and Swift propose this, although there is little explanation for

⁹⁴ Brennan, S. (2014) 'The goods of childhood and children's rights', in F. Baylis and C. McLeod (eds) *Family-Making: Contemporary Ethical Challenges*, Oxford: Oxford University Press, 29–48.

⁹⁵ Presumably she has in mind that you would live the same total number of years whether you take the pill or not.

⁹⁶ Hannan, S. (2018) 'Why childhood is bad for children', *Journal of Applied Philosophy*, 35: 11–28.

⁹⁷ Gheaus, A. (2015) 'Unfinished adults and defective children: On the nature and value of childhood', *Journal of Ethics and Social Philosophy*, 12: 1–21, 3.

what precisely is the good in mind.⁹⁸ It might be the idea that sexual feelings, if unrequited, can be a source of frustration or distraction and children do not have that burden, although that sounds like the absence of a harm, rather than a good as such. There may be a question mark over whether children are lacking any sexual feelings at all.⁹⁹ Assuming they do, it may be the claim is that children's sexual feelings are free from guilt or other adult preoccupations and so more pleasurable than adults. But that seems to vary hugely from person to person and adult to adult.¹⁰⁰

Trust

Children are commonly credited with being able to love and trust without inhibition or reservation. Children can very quickly form attachment and deep trust in a way that adults seem not to be able to do.

However, Hannan¹⁰¹ questions whether this is a benefit. She notes that the dangers of inappropriate trust are not equal for adults and children:

Children's vulnerability is more profound and asymmetric than the vulnerability associated with most adult relationships. Moreover, children are often unaware of their vulnerability, insensitive to facts about the world and those they are in relationships with. While my friends can harm me – intentionally or not – this vulnerability is roughly reciprocal.... Most importantly, adults can normally withdraw their love and trust and choose to exit relationships that don't suit their needs. Even if children had this option, which they often don't, they might not realise that they were being treated badly, or know what to do if they did realise it.

Being carefree

It is commonly supposed that childhood is a time of being carefree, lacking concerns about the future. However, that may not necessarily be a good thing. Being uninhibited for an adult (for example through intoxication) is normally seen as a harm and a potential source of danger.¹⁰² Not being

⁹⁸ Brighouse, H. and Swift, A. (2014) *Family Values*, Princeton: Princeton University Press.

⁹⁹ Hannan, S. (2018) 'Why childhood is bad for children', *Journal of Applied Philosophy*, 35: 11–28.

¹⁰⁰ Ibid.

¹⁰¹ Ibid, 27.

¹⁰² Ibid.

aware of the longer-term consequences of actions or not understanding dangers may be a source of disadvantage, rather than a benefit.

Imagination and play

It is sometimes claimed that children have greater gifts of imagination, for example with games of ‘make-believe’ whereas adults seem more restricted. Gheaus writes:

the real distinguishing mark of childhood is children’s superior ability to learn and change in the light of experience and their mental flexibility that allows them to imagine how things could be – as opposed to how they actually are – better than adults.¹⁰³

She¹⁰⁴ refers to some goods that are unique to childhood: ‘engaging in world discovery, artistic creation, philosophical pursuits and experimentation with one’s self’. These, she argues, can only be fully accessed during childhood. The new can only be discovered once in human nature as we experiment with versions of ourselves for a while, but by adulthood our self is set. She explains further the need for:

the experiencing of caring affection from adults whom the children can trust and love wholeheartedly and unstructured time during which children engage in fantasy play, experimentation and undirected exploration of the world and of their minds.

Macleod¹⁰⁵ argues that adults reach cognitive maturity and this inhibits their capacity for imaginative play. However, Hannan¹⁰⁶ replies that adults are able to engage in imagination and play. She notes the popularity of novels, television shows and movies, even for adults. Live action role

¹⁰³ Gheaus, A. (2015) ‘Unfinished adults and defective children: On the nature and value of childhood’, *Journal of Ethics and Social Philosophy*, 12: 1–21, 20.

¹⁰⁴ Gheaus, A. (2018) ‘Children’s vulnerability and legitimate authority over children’, *Journal of Applied Philosophy*, 35: 60–75, 64.

¹⁰⁵ Macleod, C.M. (2018) ‘Are children’s rights important?’ in E. Brake and L. Ferguson (eds) *Philosophical Foundations of Children’s and Family Law*, Oxford: Oxford University Press.

¹⁰⁶ Hannan, S. (2018) ‘Why childhood is bad for children’, *Journal of Applied Philosophy*, 35: 11–28.

play is popular, and also sexual fantasy. Sports and computer games are all signs of adult play and imagination. Nevertheless, Brennan¹⁰⁷ argues:

Despite the rise of play therapy for adults and discussions of making peace with one's inner child, there seems to be something unique about play as a good of childhood.

Conclusion on the goods of childhood

The debates over the goods of childhood are hard to assess. While it is easy to recognize many of the alleged benefits in the lives of children, two questions are raised. The first is whether these goods are in fact denied to adults, or whether it is just that our society makes it difficult for adults to enjoy them. I know, for example, that when I am with my children at a playground I sensibly watch them play, but if I think no one is looking, I will swing as high as anyone! So, is it just our inhibitions or embarrassment that stop us being childlike?¹⁰⁸ Or is there something inevitable about being 'grown up' that denies us access to these goods?

The second is that, as will be apparent from the discussion, several of these goods might be seen as a mixed blessing. Complete trust is good if the person is worthy of the trust, but harmful if not. Uninhibited play is good if someone is checking whether you are safe, but not if they are not. That makes it difficult to declare that any of the alleged goods are always and straightforwardly good.

Harms of childhood

A very different perspective is that childhood is a harm. It is a necessary evil to get us to adulthood. So, Lomasky¹⁰⁹ writes that

were one condemned ... to remain a child throughout one's existence, or to grow in bulk without simultaneously growing in the capacity to conceptualize ends and to act for their sake, it would be a personal misfortune of the utmost gravity.

¹⁰⁷ Brennan, S. (2014) 'The goods of childhood and children's rights', in F. Baylis and C. McLeod (eds) *Family-Making: Contemporary Ethical Challenges*, Oxford: Oxford University Press, 29–48, 46.

¹⁰⁸ Giesinger, J. (2017) 'The special goods of childhood: Lessons from social constructionism', *Ethics and Education*, 12(2): 201–17.

¹⁰⁹ Lomasky, L. (1987) *Persons, Rights and the Moral Community*, Oxford: Oxford University Press, 202.

From such a perspective, it is correct to focus our response to childhood on ensuring the child successfully reaches adulthood and is able to appreciate the joys of adulthood, ideally as quickly as possible. So, from this perspective, what are harms of childhood?

Impaired reasoning

It is commonly claimed that children have impaired reasoning, in particular, means-ends reasoning. That is the reasoning needed if one has a goal and one needs to determine how to reach that goal. So, if an adult is feeling hungry we might think they should be able to easily work out ways to find food and decide what kind of food would be suitable, whereas a child might not be able to do so. They may not understand that the desire they have is for food. Or even if they do understand their feeling, they may not know where or how food might be available. This means, the argument goes, that children lose out in identifying and meeting their needs.

Children are also said to be dominated by emotions which govern their decisions. Children often respond in anger or frustration and seem to find it more difficult than adults to control their emotions. In all these ways, children are harmed, it is said, because they do not reach their goals and are not in control of their lives.

Lack of identity

Children, it is said, lack a 'stable practical identity'.¹¹⁰ They lack a set of moral positions and identity, settled projects and values. This leads to their aims being incoherent and frequently subject to change. This causes problems with long-term planning and consistency.

Need for support

Children need intervention in their lives to have their basic needs met and to develop. Particularly early on, adults make decisions over many areas of their lives, including what they eat and who they socialize with. Indeed, it is parents who get to decide what happens for large parts of their day, especially for younger children. It is regrettable that children need these, entirely appropriate, limits on their freedom for day-to-day activities.

¹¹⁰ Brennan, S. (2014) 'The goods of childhood and children's rights', in F. Baylis and C. McLeod (eds) *Family-Making: Contemporary Ethical Challenges*, Oxford: Oxford University Press, 29–48.

Lack of moral agency

Some argue that not only are children impaired in their rational thinking, they also lack moral agency. That means they cannot live ethically good lives, and this is a harm to them. The argument, from Kantian origins, is that an ethically good person chooses to do the good over the evil and that requires a degree of understanding and autonomy that children lack.¹¹¹ Children who are forced to share or share without realizing what they are doing lack goodness. Further, from a virtue ethics perspective, it might be claimed that children cannot have empathy or altruism if they lack the ability to understand the position of others.¹¹²

This might be questioned from two perspectives. First, it might be argued that, in fact, research suggests that children have higher levels of empathy generally than others and can be extremely affectionate and kind.

Second, it might simply be claimed that ethical responses do not require rational ability. Indeed, the heights of love, bravery or compassion do not involve a choice but instinctive acts.¹¹³ The toddler running over and hugging her friend who has fallen over is acting just as virtuously, if not more so, than the philosopher who, after many hours of consideration, decides to donate £10 to a famine relief charity.

Third, even if children are morally deficient, some would say they are not so in a way that makes childhood harmful. If, as some suggest, children are more caring, even if not in a thought-through way, that may not necessarily be bad.¹¹⁴

Vulnerability

Children are said to be vulnerable.¹¹⁵ Sarah Hannan says that vulnerability per se is not bad, but it is for children, because it is 'profound and asymmetric'.¹¹⁶ They are physically weak and their bodies are easily prone

¹¹¹ Korsgaard, C. (2005) 'Two conceptions of goodness', *The Philosophical Review*, 92(2): 169–95.

¹¹² Darwall, S. (1998) 'Empathy, sympathy, care', *Philosophical Studies*, 89(2–3): 261–82.

¹¹³ Jaworska, A. (2007) 'Caring and full moral standing', *Ethics*, 117(3): 460–97.

¹¹⁴ Gheaus, A. (2015) 'Unfinished adults and defective children: On the nature and value of childhood', *Journal of Ethics and Social Philosophy*, 12: 1–21, 20.

¹¹⁵ Schweiger, G. and Graf, G. (2017) 'Ethics and the dynamic vulnerability of children', *The Ethics Forum*, 12(2): 244–61.

¹¹⁶ Hannan, S. (2018) 'Why childhood is bad for children', *Journal of Applied Philosophy*, 35: 11–28, 14.

to illness and harm; for example, the skulls of babies are still thin. They are in a state of profound vulnerability. They also lack the resources to reason or to physically escape from danger. It is claimed that this vulnerability is asymmetrical to that of adults as, according to Hannan:

it's one thing for adults to voluntarily open themselves up to others, but children have no such choice. Similarly, even when adults cannot entirely avoid unwanted vulnerability they have greater resources to protect themselves. That children are vulnerable in absolute terms, and considerably more vulnerable than those with extensive power over them, is bad for children.

Conclusion on the harms of childhood

As with the debate over the goods of childhood, there are two similar issues which are raised. The first is whether these alleged harms are not experienced by adults too. I think adults suffer from all the impairments in reasoning children have (see Chapter 9 for further discussion). Second, I am not sure these alleged harms are actually all harms. Living with the heart rather than the head is not necessarily bad. Not having a fixed identity is not necessarily harmful.

Patrick Tomlin argues that the problem is we cannot really compare adulthood and childhood if they are measured by different standards.¹¹⁷ He makes this point:

imagine, at the ends of such lives, we could give people a pill which ensured that they had a period of ten years or more where their mental and physical capacities deteriorated into those of children. Would we give people that pill? It seems doubtful, to say the least. We spend billions of pounds trying to combat 'illnesses' in which something like this happens. Why imagine that inferior intellectual and physical ability is a personal tragedy at the end of a life, but a boon at its beginning?

His point is that childhood may be a good at the start of life, but it is good as being at that stage. He argues 'it cannot be better or worse to be an adult or a child, as what is better or worse for you depends on whether you are an adult or a child'. But that seems to assume the distinction is

¹¹⁷ Tomlin, P. (2018) 'Saplings or caterpillars? Trying to understand children's wellbeing', *Journal of Applied Philosophy*, 35: 112–31, 112.

one we should draw. Whether we are children or adults, I would argue, in the right contexts, innocence, trust, play and so forth are good. Everyone should be encouraged to enjoy them. Similarly, impaired reasoning and needs can be experienced by both adults and children. We all need a helping hand or a cuddle sometimes, however old we are.

Children's rights

In this section we will consider whether the law should recognize that children have rights. Rights play an important role in our legal and political system. Therefore, granting or denying children rights sends a significant message. Colin Macleod¹¹⁸ separates out three important functions of rights:

- (1) *A signalling function.* He explains: 'Rights pick out particular interests or claims of persons and express the idea that moral agents have reason to be especially attentive to securing a protected interest or respecting a protected claim.'
- (2) *A normative weight.* He explains that where there is a genuine right to an interest this indicates it should have weight over claims for which there is not a right. So, where a government is seeking to determine whether to spend money on giving person A x or person B y , if A has a right to x but B does not have a right to y then it should spend the money on giving A x . Of course, it may be that both A and B have rights to x and y , respectively, and then the government must decide how to balance those rights.
- (3) *An enforcement dimension.* The state and the law should ensure that if a person has a right to something there are means of enforcing that right. So, I like eating chocolate, but I have no right to chocolate, and so if I cannot get hold of it I cannot bring any kind of legal claim against the government or other public authority for failing to ensure I can eat chocolate. However, my children have a right to education. If they are not able to access education, they could bring a claim against the state authorities for failing to protect their right.

¹¹⁸ Macleod, C.M. (2018) 'Are children's rights important?' in E. Brake and L. Ferguson (eds) *Philosophical Foundations of Children's and Family Law*, Oxford: Oxford University Press, 163.

While, therefore, the debates over whether or not children have rights are commonly undertaken by lawyers, it is important not to forget that the legal context is only one in which rights have an important role. In political and public decision making, rights can be pivotal.

In legal terms the disputes between those who wish to give priority to children's autonomy and those who wish to emphasize the importance of children's protection are often played out as a clash between children's rights and children's welfare. However, it is important to appreciate that that there is nothing inherently tied to autonomy or protection within the nature of children's rights or within the nature of children's welfare. In other words, one can claim to be a children's rights supporter and yet regard the right to protection as the most important children's right and downplay the importance of the right to autonomy. Similarly, a child protectionist may yet believe the best way to protect children is to allow them to make decisions for themselves. That said, it is true that the majority of those commentators who emphasize children's rights do so because it can be an effective route to promote children's autonomy, and most of those who promote children's welfare place more weight on children's protection.

Further, it is important not to present the debate too starkly. There are few (if any) children's rights supporters who would not recognize rights to protection and acknowledge the need to balance rights to autonomy and rights to protection. And there are few children's welfare supporters who would not recognize the benefit to children of allowing them to make decisions about their lives. John Eekelaar's analysis, discussed above, is deliberately framed in terms of interests so that it could be adopted by either a children's rights or children's welfare approach.

Therefore, it matters much less whether you are a children's welfare or children's rights supporter than the values you put in to utilize rights- or welfare-based reasoning. So, if you are committed to the idea that autonomy is important, you will produce the same outcome whether you use a welfare- or a rights-based analysis.

Perhaps, therefore, the important thing about the rights versus welfare debate is the symbolic value. As Ferguson¹¹⁹ states:

The statement that a child has a particular right is both an expression of an existing social norm that recognises the

¹¹⁹ Ferguson, L. (2013) 'Not merely rights for children but children's rights: The theory gap and the assumption of the importance of children's rights', *International Journal of Children's Rights*, 21: 177–208, 177.

importance of the content of that legal right to the child, as well as a means of changing social norms to be more reflective of that importance.

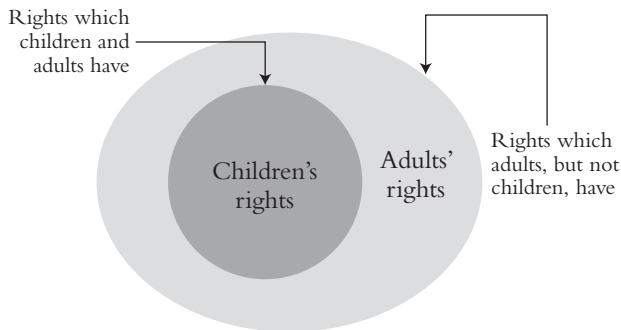
Before going further, it should be mentioned that there are some legal scholars who find the language of rights unhelpful. For them, the debate over whether children should have human rights is irrelevant, as they don't think anyone should have rights. I will assume for my purposes here it is accepted that there are rights that adults should and do have. The question is where children fit into that picture. Here, are the four alternatives.

Children's rights: model 1

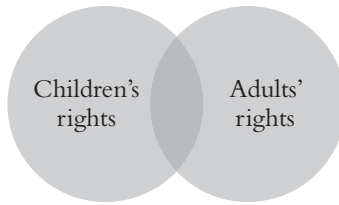


On this model, children and adults have exactly the same set of rights. All people are entitled to the same rights, regardless of their age.

Children's rights: model 2



This model imagines that children have some of the rights that adults have, but not all. It also imagines that there are no rights that children have that adults do not.

Children's rights: model 3

This model envisages that there are some rights that both children and adults have, but there are also some rights that only adults have and some rights that only children have.

Children's rights: model 4

Children have no rights



This model suggests that children have no rights. Human rights make sense only for adults.

We will explore these options as we progress the discussion.

The basis for rights

There is a dispute among jurists about the basis of rights. While this can appear a technical argument, it reveals a deep division about the nature of humans. As a standard there are said to be two primary theories on the nature of rights: the will or choice theory, and the interest theory.¹²⁰

¹²⁰ Macleod, C.M. (2018) 'Are children's rights important?' in E. Brake and L. Ferguson (eds) *Philosophical Foundations of Children's and Family Law*, Oxford: Oxford University Press.

The will or choice theory

Under the will or choice theory, core to the concept of a right is that the right holder can choose whether or not to enforce that right.¹²¹ Rights are about giving especial power or significance to certain choices. Therefore, a person ‘cannot be described as a right-holder unless he or she is able to exercise a choice over the exercise of that right’.¹²² Hence, for H.L.A. Hart, freedom is at the heart of rights and so it must be in the nature of rights that an adult can decide to limit their rights.¹²³

This theory poses real challenges for those who cannot exercise a choice, including at least some children. Indeed, some critics of the choice theory have used the example of children to suggest this shows the theory is flawed.¹²⁴

Supporters of the choice theory have two options when considering children. One is to suggest that children’s rights can be held in trust by their parents, who can exercise the choice on children’s behalf. This would enable them to support the idea of children’s rights, but by putting the power of their exercise in the hands of parents that would be seen by many to mean that children’s rights will do nothing to strengthen the position of children. The other is simply to bite the bullet and say children do not have rights. This does not mean they should not be protected in the law and have a special position in the law, it is simply that rights are not the best way of doing this.¹²⁵

The interest theory

Under the interest theory, rights protect well-being. We identify the key things that are important for human thriving and protect those interests with rights. This theory would have no difficulty with the concept of children’s rights because clearly children have interests. It would open

¹²¹ Steiner, H. (1994) *An Essay on Rights*, Oxford: Blackwell.

¹²² Fortin, J. (2003) *Children’s Rights and the Developing Law*, Cambridge: Cambridge University Press, 12.

¹²³ Hart, H.L.A. (1995) ‘Are there any natural rights?’, *The Philosophical Review*, 64: 131–47.

¹²⁴ Brennan, S. (2014) ‘The goods of childhood and children’s rights’, in F. Baylis and C. McLeod (eds) *Family-Making: Contemporary Ethical Challenges*, Oxford: Oxford University Press, 29–48.

¹²⁵ Griffin, J. (2008) *On Human Rights*, Oxford: Oxford University Press.

up the possibility that there are different goods that children need from those adults need, and so children's and adults' rights need not correlate.¹²⁶

Opponents will typically argue that the interest theory fails to give sufficient protection to notions of autonomy. It opens up the possibility of saying to someone that their rights justify overriding their wishes. In theory, a patient who refuses to receive medical treatment might be told it's in their interest to receive treatment, and even though they do not want it they have a right to it. That can be somewhat mitigated if we see respect for autonomy as one of the interests that people have, and many supporters of an interest approach would use such an argument to say treatment should not be given to the patient in the scenario just discussed.¹²⁷

Special rights for children

As already mentioned, there are some who claims that there are special rights which children, but not adults, have. There are two primary reasons why people believe such rights exist. The first is a belief that there are special goods of childhood which adults do not have. We discussed this issue at page 102. To accept such a claim, it would be necessary to agree that such goods of childhood exist and that they are suitable to be protected by legal rights. The second is that children may be particularly prone to certain harms to which adults are not prone and so need rights to defend them from those harms. This issue is discussed at page 107. I have argued that, in my view, neither of these claims is made out. At least, I accept the many goods and harms claimed for childhood, but argue these are available to adults too

United Nations Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child is the leading international document on children's rights.¹²⁸ Created in 1989, it has been signed by all the countries in the world except for the United States.

¹²⁶ MacCormick, N. (1982) 'Children's rights: A test-case for theories of right' in N. MacCormick (ed) *Legal Right and Social Democracy*, Oxford: Oxford University Press.

¹²⁷ There are some theories which attempt to combine interest and will theories, but these will not be discussed here.

¹²⁸ Article 1 of the UN Convention defines a child as any human being below the age of 18 years 'unless under the law applicable to the child, majority is attained earlier'.

Some countries have incorporated it into their national law; for others, such as the UK, it is an internationally signed treaty that can impact on the interpretation of the law but is not directly enforceable.

The UN Convention provides a wide range of rights. Of particular note are the following:

- Children have the right to have their ‘best interests’ as a ‘primary consideration’ in all actions concerning them.¹²⁹
- Children have ‘the inherent right to life’.¹³⁰
- A child ‘who is capable of forming his or her own views [has] the right to express these views freely in all matters affecting the child’.¹³¹

Additionally, Article 5 states:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

The reference to ‘the evolving capabilities of the child’ implies that not every child will be able to exercise every right in their own name.

Critics of children’s rights

There are some critics of children’s rights. As we have seen, supporters of the choice theory of rights may claim that children who cannot exercise choice cannot have rights.

Another issue of concern is whether rights work well in the family context in which most children live. Children live much of their childhood dependent on adults, and their relationship with adults is crucial. Rights typically pit one person’s claims against another, which might be thought inappropriate in a family context. Sacrifice and mutual support are the overriding values of the family unit, rather than the individual market-place philosophy where rights might make more sense. It may be possible

¹²⁹ Article 3(1).

¹³⁰ Article 6.

¹³¹ Article 12.

to produce a vision of rights that promotes individual autonomy *and* interpersonal connection, but this would not be identical to rights as they are commonly understood.¹³² We will explore alternative visions of rights in Chapter 5.

A further argument is that even if in theory children's rights are beneficial, in practice they can be used to the disadvantage of women and children.¹³³ The fear is that rights are of use to those who have strength within society and, in particular, rights are of use to men as tools of oppression. For example, children's rights could be used to investigate and control the intimate lives of women. This concern arises particularly because of the problems over the enforcement of children's rights. If children's rights can only realistically be enforced by adults, it may be that such rights will be used only for the benefit of adults. In *R (on the Application of Williamson) v Secretary of State for Education and Employment*,¹³⁴ Baroness Hale memorably opened her speech:

My Lords, this is, and has always been, a case about children, their rights and the rights of their parents and teachers. Yet there has been no one here or in the courts below to speak on behalf of the children ... The battle has been fought on ground selected by the adults.

Children and the use of age in law

One of the most striking features of the law is how age is used in different ways. To give you just a flavour, here are some ages at which you can do different things.¹³⁵

- 5 years old:** A child can have a bank account in their own name and must now receive education.
- 10 years old:** A child can be convicted of a crime.
- 12 years old:** A child can see a film certified as 12A without an adult and can be trained to take part in dangerous performances as long as the local authority gives a licence.

¹³² Herring, J. (2013) *Caring and the Law*, Oxford: Hart.

¹³³ Olsen, F. (1992) 'Children's rights: Some feminist approaches to the United Nations Convention on the Rights of the Child', *International Journal of Law, Policy and the Family* 6: 192–220.

¹³⁴ [2005] 1 FCR 498, para 71.

¹³⁵ These examples are taken from Child Law Action Service (2020) *At What Age Can I ...?*, London: Child Law Action Service.

- 13 years old:** A child can get a job, but with a limit on the number of hours they can work. A child can be locked up in a secure unit of a children's home for up to 72 hours, or longer by court order, if looked after by a local authority.
- 14 years old:** A child is responsible for wearing a seatbelt. With a licence, they can take part in public performances abroad, which can include singing, playing, performing, being exhibited for profit, taking part in a sport or working as a model.
- 16 years old:** A child can: get married; consent to have sex; and donate blood. They can buy aerosol paint and buy a pet.
- 17 years old:** A child can join the Royal Navy or the Royal Marines as an officer at 17 (with parental consent), the Royal Air Force at 17 years and six months, and the Army at 17 years and nine months.
- 18 years old:** A person can: buy alcohol and tobacco; make a will; and vote in elections.
- 21 years old:** A person can drive any mechanically propelled vehicle.

Such laws are easy to criticize. To many people they appear inconsistent and confusing. It would be difficult to find an entirely consistent line of reasoning to explain why you can have sex with your MP at age 16 but are not at that point deemed sufficiently mature of vote for them! But clearly what the law is trying to do is acknowledge that different activities carry different dangers. A child should be permitted to do a safer activity earlier than a more dangerous one.

A major criticism of the use of age in this way by the law is that it draws a bright line between one day and the next. Surely nothing magical happens on the night of your 16th birthday which makes you suddenly more mature. That is the issue to be considered next.

Bright lines

The law inevitably draws bright lines. That is, in part, because the rule of law requires that the criminal law be clearly defined so that a person can know in advance whether their proposed conduct will be a criminal offence or not.¹³⁶ Imagine a law which said it was an offence 'to drive at too fast a speed'. This would clearly seem to breach the rule of law requirement. A driver would not know in advance what speed a court

¹³⁶ Raz, J. (1979) *The Authority of Law*, Oxford: Oxford University Press, ch 1.

might deem to be 'too fast'. A set speed limit, say 30mph, offers clear guidance as to what speed is regarded too fast. That example provides us with another evident benefit of such a bright line, which is ease of proof. A court can easily resolve a case about whether a car was driving over 30mph with appropriate technology. A case of 'driving at too fast a speed' could take a considerable amount of time to resolve.

Of course, such bright-line rules have a serious drawback. They can operate in a way which in some cases may seem over-protective. Imagine if a person is driving at 35mph in a 30mph zone and can show that, given their excellent driving abilities, the weather conditions and lack of other vehicles or pedestrians, their driving was, in fact, safe. They would nevertheless have committed the offence. Perhaps more plausibly, a driver may be driving at 26mph, and so commit no offence but, in all the circumstances, might not be driving at a safe speed. They would, nevertheless, be entitled to be acquitted of the speeding offence. In short, the clarity and efficiency of the bright line comes with 'errors' on either side of it.

These arguments apply too in relation to age of consent. No one will pretend that at, say, midnight on their 16th birthday a teenager magically acquires the knowledge and maturity to be treated as an adult. Rather the age of consent or permission provides a bright-line determination. No one believes that every child under a particular age in fact lacks capacity to consent or that every child over that age has capacity, but rather that there are sound policy reasons for conclusively presuming lack of capacity before that age.

I suggest that in order to justify a bright-line decision in relation to age we need to be persuaded of the following:

- (1) the situation is better resolved by using a bright line than individual assessment in the particular circumstance; and
- (2) age is a good way to draw that line, and the correct age has been selected.

Thinking about the first point, an interesting contrast can be drawn between consent to medical treatment and consent to sex. In English law a child who is below the age of 16 can give effective consent to receiving medical treatment, if they are able to persuade a doctor that they have sufficient maturity to understand the issues raised (*Gillick* competence, as it is known¹³⁷). By contrast, in relation to sex, there is a bright-line rule that a child under the age of 16 cannot consent. Even if the child were able to show they were especially mature they would not be able to give consent.

¹³⁷ After *Gillick v West Norfolk and Wisbech AHA* [1986] 1 AC 112.

The distinction between these examples is readily justifiable for two reasons. First, while a doctor may have the expertise, detachment and time to make such an assessment, a would-be sexual partner does not. Second, the doctor is proposing to provide medical treatment, which we might suppose is beneficial for the child. Therefore, even if the doctor has got the capacity question wrong (the child does not have capacity to consent) no great harm is done. Indeed, if the child lacks capacity the doctor can provide the treatment anyway. By contrast, if the would-be sexual partner has the consent question wrong (the child does not have capacity to consent), they will have committed a serious wrong (rape).

This comparison, therefore, gives us helpful guidance as to when an individual assessment of capacity is appropriate and when an age-based rule is needed. The individual assessment is particularly appropriate where there is an expert decision-maker or where the activity in question is a beneficial one for the child. These points can help explain the law as it has developed in relation to consent to medical treatment, which will be considered next.

Consent to medical treatment

In *Gillick v West Norfolk and Wisbech AHA*¹³⁸ there was a dispute over whether a teenage girl could give effective consent to receive contraceptive treatment, without her mother's consent. The House of Lords held that if the doctor decided the girl had 'sufficient understanding and intelligence to enable her to understand fully what is proposed' to make the decision (or was '*Gillick* competent'), she could give as effective consent as an adult. Many commentators took the logic of the court's approach to be that if a child had the same levels of capacity as an adult then it would make no sense for the law to distinguish them.¹³⁹ However, to some consternation, later cases¹⁴⁰ stated that the *Gillick* approach only applies to cases of consent and that in cases of refusal, even if a child was *Gillick* competent, their refusal could be overridden.¹⁴¹ As MacDonald J in *Plymouth Hospitals NHS Trust v YZ and ZZ*¹⁴² confirmed: 'With respect

¹³⁸ Ibid.

¹³⁹ Cretney, S. (1989) 'Gillick and the concept of legal capacity', *Law Quarterly Review* 105: 356–62.

¹⁴⁰ *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1993] Fam 64.

¹⁴¹ For alternative readings of the case law see Gilmore, S. and Herring, J. (2011) "'No" is the hardest word: Consent and children's autonomy', *Child and Family Law Quarterly* 23: 3–30.

¹⁴² [2017] EWHC 2211 (Fam).

to children under the age of 16, the court has the power to override the decisions of a *Gillick*-competent child where it is in the child's best interests for it to do so.'

To many commentators the law makes no sense. If the child is competent to decide the question, it seems a bit odd to say to them: 'You can decide this issue but only if you decide to answer "yes". If you decide "no" we may override your wishes.' It is especially odd because it is a far greater infringement of a child's rights to operate on them without their consent than to deny them treatment that they would like to have. If anything, the law would be more logical if it said that the doctor cannot operate on the child if they refuse but has a discretion if they consent.¹⁴³

There are two ways that the current law could be justified. One approach focuses on capacity. In a controversial argument, Stephen Gilmore and I have argued that a child may have capacity to consent to treatment, but lack the capacity to refuse treatment.¹⁴⁴ Examples will clarify our argument. Imagine a child has grazed her knee and a teacher offers a plaster. Most children will know what it is like to have a plaster and be able to understand the process sufficiently to consent. They may not, however, understand the consequences of refusing to accept the plaster (the risks of septicemia) and so lack the capacity to refuse. Similarly, in a more complex case, a child may be offered a range of treatments for their condition and have the capacity to refuse one (maybe one they have tried before), but not have sufficient capacity to refuse to consent to other more complex treatments. The child needs to understand the details about what they are consenting to or what they are refusing in order to have capacity to do so. It is, therefore, quite plausible that a child has the capacity to consent, but not refuse. This argument has been objected to by those who argue that in order to have capacity to make a decision about a medical treatment the child must understand what both receiving and refusing a treatment involves.

An alternative justification is to argue that the current law is perfectly logical once it is recalled that the basis of the law relating to children is set out in section 1 of the Children Act 1989 – the welfare principle. The law is based on the view that, if the doctor wants to perform treatment, this will be in the best interests of the child because this is the view of the medical expert. The law is then engineered to make it as easy as possible

¹⁴³ The law becomes particularly illogical when the parent is under the age of 16 and can have a greater say over her child's body than her own: *Plymouth Hospitals NHS Trust v YZ and ZZ* [2017] EWHC 2211 (Fam).

¹⁴⁴ Gilmore, S. and Herring, J. (2011) "'No' is the hardest word: Consent and children's autonomy', *Child and Family Law Quarterly* 23: 3–30.

to enable the doctor to go ahead. The doctor can operate either if the mature minor consents, or if the parents consent, or if the courts give approval. The law could hardly do more to enable the doctor to treat, once they have decided that the treatment is in the best interests of the child. Put this way, the law is a clear example of ensuring that the child's best interests are promoted.

Conclusion

This chapter has explored the concept of childhood. Several key themes emerge. First, we can see the emphasis that is placed in the commentary and the law on the concept of autonomy. A primary justification for the difference in treatment in law between children and adults is that children lack the capacity to exercise autonomy. However, some commentators argue this underestimates the capacity of children, while others argue it overestimates the capacity of adults. We will be returning to this theme in the next chapter.

Second, we have seen how the law has struggled to deal with the evolving capacities of children. As we have seen, in some circumstances, an individual assessment of capacity is undertaken, but in others a bright-line test based on age is used. We have explored how different approaches may be appropriate in different circumstances. We will return to some of those issues in Chapter 9.

Third, we have seen how the social understandings of childhood end up being reflected in and reinforced by the law. The image of childhood as a time of innocence at threat from the adult world leads to the protectionist threads in the law. By contrast the image of childhood being a time for self-development underpins the emphasis placed on autonomy for children.

