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Jane Fortin

Excerpt

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Part One

Theoretical perspectives and international sources

Chapter 1

Theoretical perspectives

(1) Introduction

Children's lives are underpinned by an incoherent hotchpotch of legal principles and government policies. A rights-based approach might address at least some of their weaker aspects very effectively if the government and judiciary were prepared to utilise it more wholeheartedly. In particular, such an approach can address the problem experienced by children, alongside other minority groups, of being the focus of various specialised branches of law and policy, all with their own distinctive character, with no coherence or similarity in objectives. By placing the differing aspects of childhood in a framework of rights, rather than, for example, in a medical or educational-based context, the boundaries between the various disciplines start becoming irrelevant, with a far more coherent outcome being possible.

The time is right for such a change in approach, given the greatly increased level of 'rights consciousness' in the country today. The UK's ratification, in 1991, of the United Nations Convention on the Rights of the Child (CRC) and the incorporation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (ECHR) by the Human Rights Act (HRA) 1998, into domestic law, have undoubtedly played their part in achieving this. There appears now to be more sympathy with a desire to promote children's rights in more realistic and practical ways. Nevertheless, it would be foolish to ignore the real concerns that many retain over the wisdom of utilising the concept of rights to increase children's well-being.

Important though they are, the CRC and the HRA 1998 have had a relatively late impact on the development of thought on the concept of children's rights. The idea that children enjoy rights is not a new one – rather, it has been the topic of speculation and comment for over 30 years. Certain themes constantly recur. Indeed, although writers have often approached this field of thought from a variety of viewpoints, they have all identified common areas of concern, principally surrounding how to identify children's rights, how to balance one set of rights against another in the event of a conflict between them, and how to mediate between children's rights and those of adults. Practitioners are wrong to assume that such a voluminous body of theoretical inquiry should be confined to the realm of intellectual speculation. If made more accessible, it

might usefully inform their own attempts to apply legal principles to individual children in a way which promotes those children's moral and legal rights more effectively. Better still, when it can be demonstrated that existing legal principles clearly reflect such theoretical ideals, the law gains a greater intellectual validity. This chapter sets out to identify these recurring themes and provide a brief summary of their treatment.

(2) Rights awareness and rights scepticism

(A) Children's liberation

The ideas of the American 'children's liberationists' generated a wealth of valuable debate about the extent to which society should encourage children to develop their powers of self-determination. The American civil rights movement had encouraged, in the 1960s and early 1970s, a far more sympathetic attitude to the treatment of all minority groups, including children. In the long run, however, the early American children's liberationists probably did the concept of children's rights a disservice, in so far as they conveyed the misleading impression that it is almost wholly concerned with giving children adult freedoms. It was Foster and Freed, writing in the 1970s, who claimed that adults exploited their power over children and that children's inferior status should be radically reassessed.¹ They gathered inspiration from a series of decisions reached by the United States Supreme Court.² Most notable of these was the landmark decision of *Re Gault* in which the court ruled that 'neither the Fourteenth Amendment nor the Bill of Rights is for adults alone'³ and that as 'persons', children were entitled to claim the same procedural safeguards as those offered to adults by the United States Constitution.

Holt and Farson, the most well-known of the children's liberationists, adopting the view of Ariès⁴ that childhood is a relatively recent Western social 'invention', argued that it was a form of oppressive and unwarranted discrimination to exclude children from the adult world. They maintained that since children's ability for self-determination was greatly underestimated, there was little reason to exclude them from the freedoms granted by the state to adults. Thus Holt argued that children of any age should have, amongst other things, the right to vote, to work for money, to own and sell property, to travel, to be paid a guaranteed minimum state income, to direct their own education, to use drugs and to control their own private sexual lives.⁵ The fact that children might

¹ H. Foster and D. Freed (1972).

² E.g. *Tinker v. Des Moines Independent Community School District* 393 US 503 (1969) and *Goss v. Lopez* 419 US 565 (1975).

³ 387 US 1 at 13 (1967).

⁴ P. Ariès (1962). The strength of his view has been undermined by later historical research. See e.g. L. Pollock (1983).

⁵ J. Holt (1974) p. 18. Farson's list of rights was very similar to that set out by Holt, R. Farson (1974). See also the list of rights proposed by H. Foster and D. Freed (1972) p. 347.

be too young to wish to exercise any of these rights was merely part of their freedom of choice; they could exercise them, when and if they chose, in precisely the same way as adults do. The publicity these radical views attracted led to the movement for children's rights becoming inextricably associated with giving adult rights to children⁶ and being treated with considerable scepticism.⁷

To modern readers the claims of writers like Holt and Farson for children to enjoy adult freedoms might seem not only unrealistic but reckless. Indeed, the views of the child liberationists were, from the first, extremely controversial. Much of the criticism, both in the 1970s⁸ and after,⁹ has focused on a variety of relatively practical issues. Two main topics have been recurrent themes. The first is that there are obvious dangers in ignoring the slow rate of children's physical and mental development by giving them the same rights and responsibilities as fully mature adults. The second is the danger of interfering with the relationship between children and parents, including the potential damage to the family unit as a whole.

Many writers have voiced considerable concern over the liberationists' failure to accord sufficient attention to the physical and mental differences between childhood and adulthood. Indeed, this is the most obvious weakness of the liberationists' ideas. They appeared to ignore the evidence on developmental growth through childhood, which establishes clearly that children are different from adults in development, behaviour, knowledge, skills and in their dependence on adults, most often their parents. Research evidence now reinforces the view that the liberationists' ideas were based on an unrealistic perception of children's capacities.¹⁰ It is obviously impossible to set a single age when all children can be deemed competent to reach any particular type of decision. It seems clear, however, that the relatively slow development of children's cognitive processes makes the *majority* of children unfit to take complete responsibility for their own lives by being granted adult freedoms before they reach mid-adolescence.¹¹ Moreover, as Fox Harding cogently points out, a failure to regulate childhood would lead to more exploitation of children, rather than less.¹²

The need to protect children from being forced into adulthood before they are sufficiently mature is also a common theme of those opposing calls for recognition of children's autonomy rights. Campbell points to the constant stress on children's adult-like competence to make rational decisions for themselves, which in his view is tantamount to claims to redraw the boundaries between childhood and adulthood. He urges that the current needs of the child *here and now*, should not be sacrificed to those of the future child. Children have a right to be children and not adults.¹³ The frequency with which these arguments and

⁶ The work of the children's liberationists is described by D. Archard (2004) Part II.

⁷ Eg B Hafen (1976). ⁸ Inter alia, M. Wald (1979) and B. Hafen (1976).

⁹ Inter alia, L. Fox Harding (1997) ch. 5; see also D Archard (2004) chs. 5 and 6.

¹⁰ Discussed in Chapter 3. ¹¹ L. Fox Harding (1997) pp. 128–37.

¹² Ibid. at p. 134. ¹³ T. Campbell (1992) p. 20.

counter-arguments are raised reinforces the notion that the same child may need both care for one purpose and autonomy or self-determination for another.¹⁴

The more recent proponents of the children's liberation school, such as Franklin,¹⁵ though less radical than the early writers, continue to promote their central premise – that even quite young children are capable of competent thought and of making informed choices, and some are far more competent to make decisions than many adults. Indeed, adults, like children, make mistakes; they too may be ignorant and lack education and experience. There is also the not unreasonable criticism that until quite young children are trusted with more decision-making, they are denied the opportunity of gaining experience in doing so and, more importantly, of developing any decision-making skills. It is certainly difficult to defend some of the more arbitrary and inconsistent age limits determining children's competence to take part in various activities.¹⁶ Such arguments came to the fore once again in the debate over lowering the minimum age for voting. Those advocating reform criticised the laws prohibiting intelligent 17-year-olds from voting, whilst allowing incompetent adults to exercise such rights.¹⁷

The answer to the criticism of arbitrary age limits is, of course, that all lines are essentially arbitrary and that they must be drawn somewhere.¹⁸ Nevertheless, at the very least, the views of the liberationists justified a more critical examination of the law's treatment of children. The majority of the House of Lords in *Gillick v. West Norfolk and Wisbech Area Health Authority*¹⁹ obviously sympathised with the notion of adopting a more intelligent approach to assessing children's legal competence. Lord Scarman commented:

If the law should impose on the process of 'growing up' fixed limits where nature knows only a continuous process, the price would be artificiality and a lack of realism in an area where the law must be sensitive to human development and social change.²⁰

Freeman wisely suggests that whilst the special treatment of children can be justified on the basis of the child's incapacity or immaturity, at the same time they should be brought 'to a capacity where they are able to take full responsibility as free, rational agents for their own system of ends'.²¹

(B) Children's rights and the parental role

A constant theme of those questioning the notion of children being rights holders concerns their relationship with their parents. These doubts are often rooted in the assumption that the concept of children's rights revolves solely around children's autonomy, as strongly suggested by the children's liberationists. Such

¹⁴ M. Minow (1986) p. 14. ¹⁵ B. Franklin (2002) pp. 22–8.

¹⁶ J. Claridge (2008). ¹⁷ Discussed further in Chapter 4. ¹⁸ D. Archard (2001) p. 47.

¹⁹ [1986] AC 112. ²⁰ Ibid. at 186. ²¹ M. Freeman (1983) p. 57.

an assumption is false; children have a whole range of rights and many, such as the right to care and protection, have little to do with making decisions. Acknowledging these may be much more important to young children than acknowledging any claimed right to autonomy. Nevertheless, children soon move out of dependence and into a developmental stage where their capacity for taking responsibility for their lives needs encouraging. Indeed, there is a growing view in wealthy nations that teenagers should be provided with far greater opportunities for developing their decision-making capacities and their sense of responsibility, not only for their own sake, but also for the sake of the communities in which they live. Industrialised societies expect children to emerge from minority immediately ready to take their place as newly minted citizens. In truth, childhood is short and it is unrealistic to argue that a child who is protected throughout from responsibility and from participation in important decisions regarding his or her upbringing will become a confident young person and responsible citizen.²² A sympathy for these ideas underlies the establishment of the citizenship education programme in schools.²³

Schools undoubtedly play an important part in producing confident young people, but most writers agree that the parent's role is infinitely more important. Whilst in Victorian times it might have suited society well to promote the idea that children should be seen and not heard and that parents could treat their children with some disdain, today such ideas have lost their appeal, quite simply because society needs more sophisticated children. 'Good' parents should help their children develop 'the ability to conceive, evaluate alternatives, and act on a life plan – to pursue, in other words, a self-given system of ends that has at least rough internal consistency'.²⁴ However mature, they will be unable to make a successful transition to adulthood unless they are given opportunities for practising their decision-making skills and are provided with 'a dry run' at adulthood.²⁵ Indeed, contemporary society may have contrived a situation whereby its children can only thrive if they are able to take on more responsibility for their own lives at an earlier age than before and in more complex situations. As Gardner has said:

We have remade childhood experience in a way which requires an earlier engagement with adult concerns, and hence an earlier submission to ideals of adulthood such as autonomy.²⁶

Is it reasonable to make such demands on parents? Requiring them to promote their children's capacity for autonomy may result in a diminution of their own confidence and ability to bring up their children according to their family beliefs and values. A recurring concern is that by promoting the rights of children, law and policy will undermine the status and authority of parents.

²² M. de Winter (1997) p. 26. ²³ Discussed in Chapter 6.

²⁴ P. Brown (1982) pp. 210–12. ²⁵ I am grateful to John Gardner for his 'dry run' idea.

²⁶ J. Gardner (1996) unpublished communications with author.

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Anxieties such as these drove Victoria Gillick and Sue Axon to seek legal confirmation of their right to bring their daughters up as they thought fit.²⁷ These concerns are well expressed by O'Brien Steinfelds:

There is a deep contradiction between the political theory underlying our law with its impulse to protect individuals by an appeal to rights, and the biological and psychological requirements for successfully rearing children to participate as adults in such a polity. In effect, one of the most perplexing questions raised by these changes is whether the efforts to extend rights of citizens to minors will not inhibit and undermine the kind of parental authority and family autonomy necessary to foster the qualities and virtues adult citizens must possess and be able to exercise in our society.²⁸

Many of the children's liberationists were sceptical of parents' capacity to adopt a more liberal family regime. Indeed, Holt saw childhood as an oppressed state and parents as the chief oppressors. Rather than the family being a protective haven, it was the place where, at best, parents might exploit their children and treat them as a mixture of expensive nuisance, slave and 'Ideal Cute Child';²⁹ at worst, a place where parents could abuse their children in private. Holt undoubtedly had a distorted view of the parent-child relationship in the majority of modern homes. He failed to recognise that, although parents may once have treated their children like chattels, this is no longer the case. Furthermore, although a minority of parents abuse their children, most parents are, in reality, the adults who know and love their children best and are therefore rightly cast by the state in the caring role and in a position to exercise powers over their children.

Admittedly, the privacy of family life does allow a minority of parents to undermine their children's self-confidence and capacity for self-determination. Does it follow that the government should intervene to promote a 'better' relationship between all parents and children? The more radical children's liberationists certainly considered parents quite incapable of giving children greater freedom without being forced to do so. Nevertheless, the prospect of government interference with the parental role has traditionally provoked strong hostility. Fox Harding notes that nineteenth century laws restricting child labour and introducing compulsory education were opposed on grounds that they constituted an unacceptable interference with family responsibility and parental rights.³⁰ Today, anxieties about family privacy are often linked with the fear that if children's capacity for autonomy were promoted by the state, this would involve a much closer monitoring of the way parents bring up their children, with the consequent undermining of their authority. Goldstein,

²⁷ *Gillick v. West Norfolk and Wisbech Area Health Authority* [1986] AC 112 and *R (Axon) v. Secretary of State for Health and the Family Planning Association* [2006] EWHC 37 (Admin), [2006] 2 FLR 206; discussed further in Chapters 3 and 5.

²⁸ M. O'Brien Steinfelds (1982) p. 232. ²⁹ J. Holt (1974) p. 126.

³⁰ L. Fox Harding (1997) p. 35.

Freud and Solnit, the most famous proponents of a 'laissez-faire approach', argued strongly that privacy is essential to family life and that state interference detracts from its value to its members.³¹ Guggenheim adopts a not dissimilar approach, proposing a 'parental rights doctrine' which, he asserts:

guarantees children at least that the important decisions in their lives will be made by those who are most likely to know them best and to care the most for them. There may be no assurances that, in any given case, parents will make the best choice for their children ... But the alternative of unleashing state oversight is also unable to promise any of these things.³²

He continues:

Children do not need rights within the family. What they need are rules that work. Keeping families free from state oversight will do more for children than encouraging litigation and judicial intervention.³³

Such views are diametrically opposed to those of the children's liberationists, but as extreme. Although a degree of family privacy is obviously desirable, a hands-off presumption endangers the concept of children's rights by fostering the view that parental behaviour towards their children should largely be outside the scope of the law. The family may be likened to a state within a state; interference by the public state within family affairs is a grave matter, comparable to interference by one state with the internal affairs of another.³⁴ The consequence of such an approach is that children are doubly dependent. Not only are they themselves excluded from a rights-bearing status, but they are also within the sphere of the private family, with parents standing between them and the state.³⁵

(C) The dangers of 'rights talk'

The view that rights claims can protect the minority of children who need protection against their parents seems irrefutable. Nevertheless, 'rights talk' has, on a more general basis, a variety of opponents. Wellman urges far greater restraint over employing the language of rights. As he points out, asserting the existence of unreal moral rights discredits the genuine ones and even produces public scepticism over the very existence of such a concept.³⁶ Similarly, Freeman has observed: 'Many references to children's rights turn out on inspection to be aspirations for the accomplishment of particular social or moral goals.'³⁷ As discussed below, this comment is particularly apposite to the development of international human rights law. A failure to distinguish

³¹ J. Goldstein, A. Freud and A. Solnit (1973) and J. Goldstein, A. Freud and A. Solnit (1980). For a more detailed assessment of their views and those of their critics, see J. Fortin (2003) pp. 8–9.

³² M. Guggenheim (2005) p. 46. ³³ Ibid. p. 249.

³⁴ J. Bigelow *et al.* (1988) p. 185. ³⁵ M. Minow (1986) p. 18.

³⁶ C. Wellman (1999) pp. 3 and 176–81. ³⁷ M. Freeman (1983) p. 37.

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between real and illusory rights undoubtedly plays into the hands of the media, who are only too keen to lampoon the concept of children having rights. The cartoons depicting small children consulting their solicitors over trivial grievances provoke derision. Furthermore, the language of rights sometimes becomes a form of political correctness used to mask claims made by adults on behalf of children, which might not otherwise escape critical analysis. Thus practitioners from various disciplines tend to assert that children have rights to a range of services, without pausing to reflect on the theoretical strength of such claims.³⁸

The language of rights should not be used loosely. But from a slightly different perspective, another group of commentators are united in their view that rights themselves are a destructive concept. They argue that a rights-based society is 'a cold, hollow one, drained of the sentiments of mutual care and love', where individuals assert their rights *against* each other.³⁹ Sir John Laws asserts the view that rights are not a moral but a legal construct,⁴⁰ and that whilst the language of rights is a necessary ingredient in any developed system of law,⁴¹ interpersonal morality is not a function of law and not governed by a framework of moral rights, but of duties.⁴² Indeed, when discussing the then impending introduction of the HRA 1998, he pointed out the limitations of the concept of rights:

the idea of a rights-based society represents an immature stage in the development of a free and just society ... nothing is more important, if we are truly dedicated to freedom and justice, than to see the shortcomings of this fragile pedestal. A society whose values are defined by reference to individual rights is by that very fact already impoverished. Its culture says nothing about individual duty – nothing about virtue. We speak of respect for other people's rights. But, crudely at least, this comes more and more to mean only that we should accept that what someone wants to do, he should be allowed to do. Self-discipline, self-restraint, to say nothing of self-sacrifice, are at best regarded as optional extras and at worst (and the worst is too often the reality) as old-fashioned ideas worth nothing but a scoff and a gibe.⁴³

Many authors consider that children's worlds are genuinely different from those of adults, due to their vulnerability and their dependence on their parents and other carers. As noted above, O'Brien Steinfelds argues that loving family relationships can be damaged by assertions which not only promote individualism but also inhibit and undermine parental authority and family autonomy.⁴⁴ Some feminist theorists also argue that a rights approach focuses on the wrong things, downplaying the relationships which underlie the reality of daily life.⁴⁵ Their ideas on women's powerlessness throw light on the way

³⁸ E.g. a health practitioner's enthusiastic assertion to the author that 'babies have a *right* to be breast fed by their mothers'.

³⁹ D. Archard (2004) p. 119. ⁴⁰ J. Laws (1998) p. 255. ⁴¹ J. Laws (2003) p. 273.

⁴² Ibid. at pp. 265–8. ⁴³ J. Laws (1998) p. 255. ⁴⁴ M. O'Brien Steinfelds (1982) p. 240.

⁴⁵ E. Kiss (1997) and V. Held (2006), ch. 1.

that rights theories relating to children are similarly influenced by children's dependence.⁴⁶

Nevertheless, as Archard points out, such views would lead to the dubious proposition that even if children are to be deemed rights-holders, they should not be permitted to enforce them against their parents, because of their dependence and interdependence. Furthermore, this type of criticism implies that family relationships can *either* be based on mutual affection *or* the existence of rights and duties, but not both. Archard refutes this as being far from the truth. For a child to have rights against its parents is not evidence that parental love is not forthcoming. It is regrettable if that love has broken down and recourse to rights may be second best, but this is not a reason not to have rights.⁴⁷ The position is summed up well by Waldron:

the structure of rights is not constitutive of social life, but is instead to be understood as a position of fallback and security in case other constitutive elements of a social relationship ever come apart.⁴⁸

Articulating children's interests in terms of rights may indeed lead to the behaviour of their caretakers being submitted to far more intensive examination than before, however well-intentioned such behaviour is. This, in turn, may risk undermining the relationships through which their needs are usually met. Nevertheless, as Minow asserts, children would not be better off if schools and families were removed from the purview of public scrutiny permitted by rights claims. She suggests that if rights need asserting, conflict has occurred already, and the process of enforcing the right often gives it expression and provides a method of resolution.⁴⁹ The validity of Minow's approach is borne out by the case law, particularly that involving children who apply to court for legal authority to reside with an adult other than their parents.⁵⁰ It seems quite unrealistic to argue that without the prospect of court proceedings, the child and parents would become reconciled. Whilst mediation might avoid the polarising effect of litigation, the damage to the relationships between child and parents probably predates the litigation. In summary, many authors conclude that it is better to be a rights-holder than to 'depend on the kindness and favors of others'.⁵¹

(3) Do children have any rights and, if so, which ones?

Moral philosophers have devoted much theoretical thought to the nature of rights, and, in the context of children's rights, whether children can be rights-holders at all. Practitioners and policy-makers, assuming that children must be rights-holders, worry more about the rights children have or should have and

⁴⁶ H. Lim and J. Roche (2000) esp. at pp. 235–41. ⁴⁷ D. Archard (2004) pp. 120–1.

⁴⁸ J. Waldron (1993) p. 374. ⁴⁹ M. Minow (1987) pp. 1890–1.

⁵⁰ Under the Children Act (CA) 1989, s. 8; discussed in Chapters 4 and 7.

⁵¹ B. Bandman (1973) p. 236.