Do Children Have Rights?

Five theoretical reflections on children's rights

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Declaration

This work is the result of original research carried out by the author. Where joint research was undertaken during the candidature and used in this thesis, it has been acknowledged as such in the body of the text. The applicable research is listed below, alongside the contribution from the author.

Chapter Three: the paper *'Capacity' and 'Competence' in the Language of Children's Rights* is co-authored with Joanne C Lau (Australian National University). The paper constitutes equal contribution between authors in conceiving the core argument and writing the text.

Mhairi Catherine Cowden

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Acknowledgments

The idea for this thesis first arose after I was asked several years ago to write a brief article for the UNICEF newsletter entitled, 'What are rights and why children have them'. After doing some preliminary reading I found that surprisingly there was a lack of consensus on either question. It struck me that without such foundational theory that rhetoric to secure and expand children's rights seemed fairly empty. A country built on shaky foundations. Bringing this project to fruition, however, was a lot harder than identifying the problem. I could not have done it without the help of many people.

First thanks must go to my principal supervisor, Keith Dowding. Without his help and guidance I would never have read Hohfeld nor got past the first paper of this thesis. Sincere thanks also to the other members of my supervisory panel, Tom Campbell and Christian Barry. I am also indebted to Joanne C. Lau for many useful discussions and collaborations. Thank you to the School of Politics and International Relations at the Australian National University for providing the institutional support for my work. Special thanks to my fellow PhD students for coffee, cupcakes and Friday drinks.

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Abstract

The existence of children's rights in law does not resolve the question as to whether children have rights in reality. In 1973 Hillary Rodham Clinton claimed that children's rights were a 'slogan in search of a definition'. Since then many advances have been made in children's rights: the United Nations Convention on the Rights of the Child was adopted in 1989 and many countries have introduced national legislation protecting the rights of children. Despite these advances the rights of children remain under theorised and poorly implemented. The fundamental question 'do children have rights?' remains contested.

This thesis defends and applies a theoretical argument for children's rights over five papers. It does so in two parts. The first part builds a theory for children's rights across three papers: paper one *Capacity, claims and children's rights*, paper two, *'Capacity' and 'Competence' in the Language of Children's Rights* and paper three, *Children's Rights and the Future Interest Problem*. Children have rights because they have interests that are of sufficient importance to be protected and these interests ground claims that produce duties in others to act or refrain from acting. Rights are therefore understood as Hohfeldian claims with correlative duties. This thesis sets out the relationship between a child's capacity, competence and their rights. It is not conceptually necessary for a child to hold the power to enforce or waive their claim in order to hold a right. However a child must be competent in realising the interest to which a particular claim pertains. Furthermore the duty correlated with a child's claim must be reasonable and achievable and the duty-holder must hold the capacity to fulfil the correlative duty. Children are in a special category of right holders as their capacities are rapidly evolving. As a consequence they hold claims to the development of core capacities that produce duties in others to assist in their development.

The second part of the thesis applies this theory of children's rights to two cases across two papers: paper four, *What's Love Got to do with it? Why children do not have a right to be loved* and paper five, *No harm, No Foul: donor conceived children and the right to know their genetic parents.* The case of a child's right to be loved demonstrates what children's rights are *not.* Children do not have a right to be loved because love as a duty

cannot be reasonably fulfilled or enforced. The case of a right to know one's genetic parents illustrates what children's right *are.* Children have a right to identifying information as they have an interest in being free from psycho-social harm. They have a corresponding right to be told that they are donor conceived. These two cases demonstrate the importance in locating the interest grounding the claim in order to determine the shape of the corresponding duty. This is essential for addressing real policy problems. Understanding why children have rights therefore presents effective pathways for moving children's rights from 'a slogan' into reality.

Table of Contents

Declaration i

Acknowledgements ii

Abstract iii

Chapter One: Introduction

1.1 Introduction 3

1.2 Thesis Aim 8

1.3 Thesis Structure 9

1.4 Summary of Papers 11

1.4.1 Paper One 11

1.4.2 Paper Two 13

1.4.3 Paper Three 14

1.4.4 Paper Four 15

1.4.5 Paper Five 17

1.4.6 Concluding Chapter 19

1.5. Conceptual Clarifications 20

1.5.1 What are Children? 20

1.5.2 What are Rights? 29

1.6. Children's Rights So Far 41

1.7. Conclusion 53

1.8 References 56

Part One: Theoretical Basis

Chapter Two: Capacity, claims and children's rights

2.1 Abstract 66

2.2 Concepts and Definitions 67

2.3 Theories and Functions of Rights 71

2.4 Realising Rights and Imposing Duties 75

2.5 Conclusion 81

2.6 References 82

Chapter Three: 'Capacity' and 'Competence' in the Language of Children's Rights

3.1 Abstract 86

3.2 Part One 87

3.3 Part Two 91

3.3.1 The case of capacity and competence 91

3.3.2 A conditional analysis of competence 93

3.4 Part Three: External conditions and Ableness 96

3.5 Part Four 99

3.5.1 The Series Problem 99

3.5.2 The objection from 'constant competence' 103

3.6 Part Five: Application to the rights of the child 105

3.7 Part Six: Conclusion 109

3.8 Reference List 110

Chapter Four: Children's Rights and the Future Interest Problem

4.1 Abstract 113

4.2 Introduction 113

4.3 The Future Interest Problem 114

4.4 Potential Solutions 117

4.4.1 Feinberg 117

4.5 Reconciling Rights and Future Interests 120

4.5.1 Capacities and Competencies 122

4.6 Positive Duties 124

4.7 Constraints on these rights 127

4.8 Some Objections 129

4.8.1 Deafness as a disability 129

4.8.2 Protecting core capacities 131

4.9 Conclusion 133

4.10 Notes 134

4.11 Reference List 136

Part Two: Cases and Application

Chapter Five: What's Love Got to do with it? Why children do not have a right to be loved

5.1 Abstract 140
5.2 Introduction 140
5.3 Liao's argument and empirical nonsense 141
5.3.1 Maternal Deprivation 143
5.3.2 Acute Distress 145
5.3.3 Experiential/nutritional privation 145
5.3.4 Bond privation and antisocial disorder 147
5.3.5 Is this lack of love? 148
5.4 Loving is not a duty 149
5.4.1 The command problem 151
5.4.2 What does love add? 152
5.5 Some alternatives 155
5.5.1 Love as a manifesto right 155
5.5.2 Non interference and architecture 156
5.6 Conclusion 158
5.7 Notes 159
5.8 References 159

Chapter Six: No harm, no foul: donor conceived children and the right to know their genetic parents.

6.1 Abstract 162
6.2 Introduction 164
6.3 Australia and Anonymous Donor Conception 166
6.3.1 History of Anonymity in Australia 166
6.3.2 Legislation in Australia Today 167
6.4 A Child's Right to Know 169
6.4.1 Genetic and Medical History 169
6.4.2 Consanguinity 170
6.4.3 Psychological Harm 171

6.5 No Harm, No Foul 173
6.5.1 Inadequacy of Arguments from Harm 174
6.6 Risk of Harm and Respect 176
6.6.1 Risk of Harm 177
6.7 Respect 178
6.7.1 Two Claims – Two Rights? 180
6.8 Conclusions 184
6.9 Notes 185
6.10 References 186

Chapter Seven: Conclusions and Future Directions

7.1 Conclusions and Future Directions 188
7.2 Children have Rights 189
7.3 Capacity and Competence 191
7.4 Duties 194
7.5 Children's rights as special claims 196
7.6 A strong theory 198
7.7 Future directions for Research 201
7.7.1 Hohfeld 202
7.7.2 Capacity 203
7.7.3 Duties 204
7.8 Conclusion 206
7.9 References 207

Appendix

A Need is not a Right: A reply to Liao's Response 212

Chapter One

Introduction

No political theory is adequate unless it is applicable to children as well as to men and women

- Bertrand Russell

Introduction

In 1973 Hillary Rodham Clinton wrote that children's rights were a 'slogan in search of a definition' (1973, 487). Nearly 40 years have passed since Clinton wrote these words. Rights for children are no longer just a slogan but a reality. The United Nations Convention on the Rights of the Child (CROC) was adopted in 1989, and now stands as the most ratified UN convention. All member states, with the exception of the United States and Somalia, have ratified the Convention. There are now national and regional charters on children's rights and individual states have made significant steps to integrate CROC into national law.[1] The work of organisations such as UNICEF, Save the Children and Defence for Children International (DCI) continues to provide a high profile for the rights of the child.

However all is not well in the world of children's rights. Despite these steps forward the rights of children remain under theorised and the fundamental question 'do children have rights?' remains contested. Although on the surface policy makers and politicians seem to be in furious agreement in support of the Convention, philosophers and political theorists are not always sure rights work for those who are not quite adults. One reply to this may simply be - so what? Philosophers and theorists often spend their time examining issues that do not affect people's lives.[2] If the world has a Convention

[1] Regional charters on the rights of children include the African Charter on the Rights and Welfare of the Child (1990) and the Charter of the Rights of the Arab Child of the League of Arab States. National declarations include The Children's Charter Japan (1950), Declaration of the Rights of the Child in Israel (1989) and Declaration of the Rights of Mozambican Children (1979). Regional human rights instruments protecting the rights of the child have also been adopted by the Council of Europe and the Organisation of American States (OAS).

[2] One example that has always struck me to be particularly separate from reality is the field of moral philosophy called (tongue firmly in cheek) 'trolleyology' - hypothetical scenarios regarding an agent's acts or omissions. For example I must choose whether to pull a lever to stop a runaway train (or trolley) from running over 5 men but will as a consequence kill one man. See Fried, B. (2012) 'What Does Matter? The Case for Killing the Trolley Problem (Or Letting it Die), *The Philosophical Quarterly,* forthcoming 2012.

protecting the rights of the child that is internationally binding, does it really matter if theorists disagree on the details? I believe that in this case the answer is yes. It does matter because the lack of theory underpinning rights for children hinders their implementation.

Near universal ratification of CROC does not guarantee that children's rights exist as a logically coherent concept in theory or that they are adequately protected and implemented in practice. It is not clear that simply by drafting an article, treaty or legislation that a right can be coherently justified outside of the black letter of the law. For example the Australian parliament could pass a law tomorrow that protected the rights of domestic pets to vote in federal elections. Despite the existence of this right in law, there would still be doubts over whether it had moral justification or could ever be implemented in practice. There is also disagreement about whether rights in international law are in fact individual rights at all. Some claim that the rights outlined in international treaties are nothing more than social ideas or goals, albeit justified ones (Wellman, 2002, 368; Fienberg, 1970; Fortin, 2005, 12). Others worry that this means that some rights in CROC will never be translated into meaningful legal rights (King, 1994, 395).

In practice the Convention has been poorly implemented and as Caroline Moorhead observed in her study of the treaty, it has for many become, 'something of a sham' being violated 'systematically and contemptuously' (1997). The recent study by Alston and Tobin on the implementation of the Convention reaches similar conclusions. Although advances have been made, these are hard to reconcile with the massive violations that continue across the world (Tobin & Alston, 2005, ix). Martha Minow (1995, 267) points out that a lack of understanding about why children have rights can lead to their ridicule and be counterproductive to their implementation. When Hillary Rodham Clinton announced that the US would be signing CROC (an attempt that did not lead to ratification by the USA) several news articles appeared satirising Rodham's work from the 1970's. These articles portrayed the concept of rights for children as inappropriate and potentially dangerous as they could break down the family unit (Palmer, 1992). An article by humorist Art Buchwald (1992) titled 'Make bed then sue' depicted the 'worst case scenario' – a child asking a judge to be divorced from her parents and little sister due to irreconcilable differences and asking for part custody of

the family dog, Spot. Comic portraits like this do little to help engender understanding of children's rights.

Where genuine commitment exists it is often ungrounded in strong theoretical explanation for *why* children have rights in the first place. Much work has been done on the concept of human rights and we now have a solid grounding of theory to draw on when making the case for these rights.[3] The controversies have been visited and revisited so that we are comfortable in our use of them – or at least comfortable in our disagreement over their use. Discussion of children's rights has generally lacked such analytical rigour. This often means that when children's rights are translated from paper into practice they lack the strong theory that underpins human rights in general. This can have real consequences for their implementation.

A good example of this is the renewed discussion of child soldiers following the Kony 2012 campaign.[4] Kony 2012 is a campaign run by the organisation Invisible Children that seeks to achieve the arrest of indicted Ugandan war criminal Joseph Kony. Kony is notorious for the use of child soldiers in his Lord's Resistance Army (LRA). The campaign and accompanying film brought discussion of child soldiers to the fore. For most people the case of child soldiers is an easy one – children have a right not to fight in armed conflict. But why? In the case of Kony's child soldiers the answer may lie in their forced coercion into the LRA. Being forced to fight against one's will is clearly against the interests of children, yet is such coercion not also against the interest of adults? Many countries still allow the option of forced conscription for adult citizens. Why is the issue particularly different for children? More problematically many child soldiers are not coerced into participating in conflict but join autonomously. Joining a military group is often an ideological choice for children, a way of gaining social esteem or demonstrating solidarity with family, clan or nation. The international legal definition of a child soldier, however, does not recognise this. Instead it says that no child under the age of 18 is

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[3] For a good overview of the different arguments underpinning human rights see Dembour, M. (2010) 'What are Human Rights? Four schools of thought', *Human Rights Quarterly* 32: 1-20.

[4] Details of the campaign can be found at www.kony2012.com. My thanks to Georgia Swan whose own work and comments helped bring out the complexities of this case.

capable of consenting to fight.[5] This view can be problematic as it sees children simply as passive objects in need of protection rather than people that display agency in conflict zones and that have a desire to participate politically. Furthermore in situations of conflict where children grow up fast, who counts as a child? Should modern understandings of childhood still apply? Should we treat a 17 year old child soldier the same as a 7 year old?

Despite whether a child has joined voluntarily or was coerced there seems to be something particular about children fighting that we wish to prevent. This may lie in the nature of childhood that can be seen as a period of rapid development of capacities. Children who are soldiers are exposed to harm in ways that adults are not. They spend their formative years immersed in a culture of violence and denied other forms of education, development and agency (Wessells, 2006, 3). Given this it would appear that understanding the relationship children have with conflict may be essential in properly identifying their rights and what duties we owe them. Simply stating that children have a right not to be soldiers is not enough. We need to understand *why* they have this right in order to properly shape our corresponding duties, to make strong arguments to others in favour of these duties and to see the way these rights interlock and relate to the rights of others.

It is also often unclear exactly what a particular right is protecting and what kind of duty it produces. Theoretical arguments are important in identifying the different interests a right may be protecting. For example is it the exposure to physical harm, the lack of education or the corrupting influence of a culture of violence that a child's right not to be a soldier is concerned with? If it is all three then there will be many types of corresponding duties to shape our actions. In order to build up a specific argument for *particular* rights we must have a solid answer to the question how and why children have rights in *general*. Gut instinct is not enough. More worrying still, the vague

[5] As outlined in the 2002 United Nations Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. The Optional Protocol outlaws the involvement of children in armed conflict, raising the previous age of 15 to 18. The definition of a child soldier as held by UNICEF includes children working as cooks, porters, messengers etc. The definition, therefore, does not only refer to child who is carrying, or has carried, weapons (Cape Town Principles, 1997).

language of CROC ungrounded in any strong theory lets governments 'off the hook' as it allows them to couch their language in formalistic terms while avoiding any substantive improvements in children's lives (King, 1994, 396). Acting to prevent children from becoming soldiers may address one particular problem yet do nothing to enfranchise children's agency or address their true needs and interests in conflict zones. A sound, nuanced and expressly articulated theoretical basis is necessary to identify when rights oriented action is meeting its moral objectives and when it is not.

This example highlights the common assumption that children are passive objects in need of protection rather than active participants who hold rights. Despite the Convention's recognition that children have 'evolving capacities' most measures to protect children's rights work from the starting point that children are static in their incompetence. Underestimating children's capacities and their development of competencies ignores a child's participation and contribution to their environment. The assumption of static incompetence may deny rights where they are due and miss the complexity of implementing children's rights according to their development.

Throughout this thesis I answer the fundamental question, 'do children have rights', resoundingly in the positive. In defending this position I also examine some key questions about children's rights. For example if children are the type of beings that can hold and claim rights, are these rights identical to those held by adults? If not, in what way are they different and how do these differences influence how the rights play out in practice? How do children's developing capacities relate to their rights? The disagreement about whether a child has rights reflects both a broader discussion about the nature and function of rights but also the moral status of children. As such this thesis contributes to a growing movement of scholars who seek to consider the philosophical and theoretical groundings of children's rights. This introductory chapter will first outline the thesis aim, the thesis structure and provide a brief summary of the papers that make up the body of the text. The second part of this chapter then turns to addressing two questions – what are children and what are rights – before providing an overview of the children's rights literature so far.

1.2 Thesis Aim

This thesis does not seek to find the rights of children in law, nor does it seek to test if children's rights are protected in practice. It examines the theoretical construction and application of children's rights. It argues that the foundations of *why* children have rights are under theorised. Discussion of children's rights is often dominated by an assumption of their static incompetence. The role of capacity and competence is under investigated in rights theory. This is a problem when we are concerned with building a theory of rights for children as denying children rights usually relies on some interpretation of incapacity or incompetence. In order to show why children have rights we must build upon our understanding of how capacity and competence interact with rights theory as determinants for the allocation of rights, or indeed justifications for the exclusion of certain categories of people from particular rights. This type of theory is essential in ensuring strong and consistent application of children's rights. It also, as I shall argue in the final chapter of this thesis, helps us translate rights from theory into practice. Knowing *why* children have rights is essential to know *how* to protect them.

Samantha Brennan (2002, 53) has argued that anyone responding to the challenge of children's rights must do two things. First they must address the theoretical issues and show that we can overcome the logical problems within theories of rights as applied to children. Second, once it has been demonstrated that it is conceptually possible for children to have rights, we must also show what it means for children to actually have particular rights. This can only be done through the application of rights theory to real cases.

This thesis therefore has four aims;

1) to present a theoretical argument for why children have rights;

2) to examine and unpack the role of 'capacity' and 'competence' in rights theory and their application to children's rights;

3) to apply the theory of children's rights to particular cases; and

4) to demonstrate the power of a strong theory in bringing children's rights from the realm of 'slogan' into reality.

1.3 Thesis Structure

This is a thesis by publication. This thesis answers the question, 'do children have rights' through five papers written throughout the period of my doctoral candidacy. Each paper can be read as a standalone piece of academic research that individually contributes to the literature on children's rights. However, while the individual papers can be seen as independent, they are not designed to sit in isolation next to their neighbours. When the five papers are read together, consecutively and within the context set out by the introductory and concluding chapters, the thesis becomes greater than the sum of its parts. Concepts and theories developed in one paper are often revisited and applied in other papers in order to bring out new and different aspects of rights for children.

In order to respond to Brennan's twofold challenge the thesis is broken into two parts. The first part establishes the analytical and theoretical argument, demonstrating that it is conceptually possible for children to have rights and considers some conceptual problems that will inevitably arise when working with theory. The second part of the thesis demonstrates that children have the type of interests that ground rights by examining two discrete case studies. The first, the proposed right to be loved, illustrates what children's right *cannot* be. The second paper illustrates what children's rights *are* by examining a current policy issue, the rights of children conceived using donated gametes. This helps us understand the type of interests that ground rights. The structure of the thesis can be seen overleaf in figure one. The following section provides a brief summary of each paper.

I am indebted to the editors of *Contemporary Political Theory, Critical Review of International Social and Political Philosophy* and *International Journal of Law, Policy and the Family* for kindly allowing the papers to be faithfully reproduced here. Each paper has been reproduced as it appears in the original publication, therefore the formatting style and referencing of the original publisher has been retained. For papers currently under review, the house style of the journal to which it has been submitted has been retained.

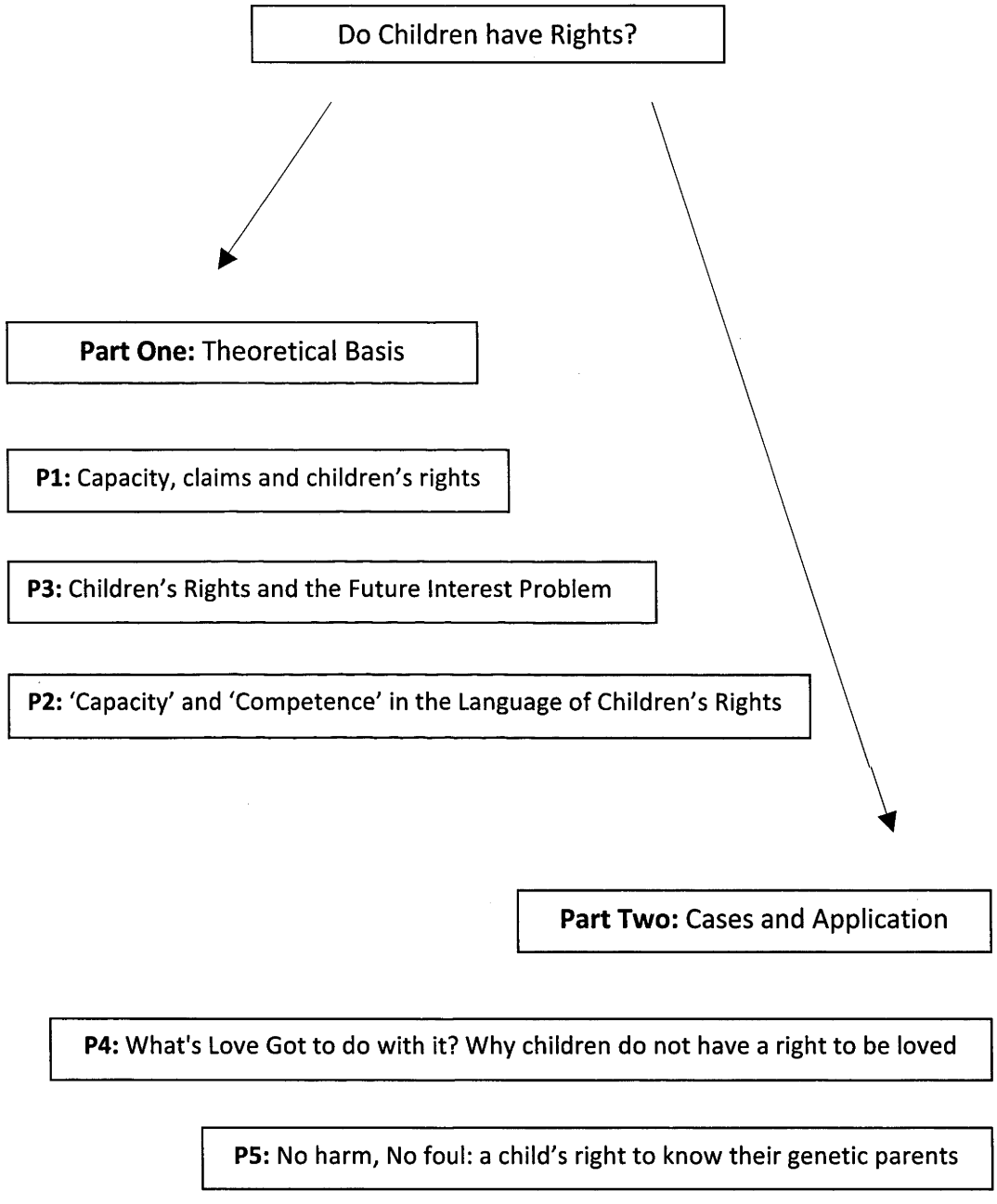

Figure One: Thesis Question and Structure

1.4 Summary of Papers

1.4.1 **Paper One:** Capacity, claims and children's rights

The first paper, 'Capacity, Claims and Children's Rights' sets out the debate between the two leading theories of rights, will theory and interest theory, and examines the role that the concept of 'capacity' plays in determining who qualifies as a right-holder within each theory. In doing so it introduces the work of Wesley Hohfeld and establishes that for the purpose of this thesis rights are understood as Hohfeldian claims.

The paper introduces the 'argument from incompetence' that claims children should be denied rights on the basis of their incompetence. For example we deem it appropriate to exclude children from those who are allowed the right to vote primarily due to their lack of capacity to make informed political decisions. Traditional liberal theorists such as Hobbes, Locke and Mill employed variations on the argument from incompetence. The concept of competence still plays a central role within contemporary will theory of rights. According to will theory, as children lack the capacity of rational choice, they cannot be the type of beings eligible to hold rights. Interest theory, however, does not apply capacity in this way. Interest theory argues that those who have interests (children or adults) that are sufficiently important to impose duties on others are the type of beings that hold rights.

This paper broadly defines children as young human beings in the period of development before they become an adult. This period is defined by two particular features: lesser physical and cognitive capacities and rapid development of these capacities. In this paper I first introduce the distinction between capacity and competence. Capacity is understood as one's potential ability and competence as one's actual ability. This is the first time in this thesis that the distinction is employed and the definitions as they stand are simple and are not yet comprehensive. The full conceptual distinction appears in the following paper, "Capacity' and 'Competence' in the Language of Children's Rights'. Having made the distinction I examine whether the denial of rights to children in will theory is based on incapacity or incompetence. I conclude that given the emphasis on factual competence within will theory it must be competence, as actual ability, that is the relevant factor.

Rights holders under interest theory do not need to meet this competence requirement. This is because it is the relevant *interest* of the right-holder and not their competence to exert power over their claim that determines the right. Children, on this account, hold interests and therefore they hold rights. However questions of capacity or competence are not completely absent from interest theory. Interests are only sufficiently strong to found a right-claim when the claim-holder has the competence to realise the benefit to which that interest pertains. Therefore although interest theory allows that it is conceptually possible for children to hold rights it does not allow that children can hold *all* rights. Children only hold rights that they have the competence to realise the benefit of. For example a young baby cannot have rights surrounding employment, they cannot have an interest in receiving a fair pay, having sufficient time off work as they lack the competence to hold most jobs in the modern labour market.[6] This allows us to recognise children as right-holders while constraining the types of rights they hold according to their developing competencies.

Therefore the first paper of the thesis provides a thorough analysis of the relationship between capacity, competence and rights. This paper establishes the basis for a theory of rights for children. It argues that children have rights if we understand rights as Hohfeldian claims that pertain to a duty to either do or to refrain from doing a particular action. The power to enforce this action can be held by the right-holder or by another designated entity. This claim constitutes a right when it is based on an interest worthy of protection. An interest is worthy of protection when the right-holder has the capacity to realise the benefit to which the interest pertains, and the corresponding duty is reasonable and achievable.[7] This central argument will be built upon and employed throughout the following papers of the thesis.

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[6] Perhaps with the exception of modeling baby clothes or appearing in advertisements for nappies. Older children however certainly do have interests in fair employment. Child employment in the entertainment industry is a difficult legal area as children lack the legal competence to sign a binding employment contract. The interests of child employees have to be protected in other ways. For the Australian context see ACT Government, *Employment of Children and Young People,* http://www.dhcs.act.gov.au/ocyfs/young_workers#actors

[7] It may be the case however that some duties that are not achievable are still justifiably imposed and therefore the corresponding reparations for their violation are also justified. This is the case in strict liability. Strict liability is legal or moral responsibility for a wrong without finding fault. It

1.4.2 **Paper Two:** 'Capacity' and 'Competence' in the Language of Children's Rights

The second paper, "Capacity' and 'Competency' in the Language of Children's Rights', was co-authored with Joanne C. Lau. This paper investigates in more detail the conceptual distinction that was briefly introduced in the first paper – namely that there is a relevant and useful difference between the terms 'capacity' and 'competence'. Understanding these terms correctly can help avoid confusion when using them in relation to the rights of the child.

Within this paper we argue that the terms 'capacity' and 'competence' are often used interchangeably. This is of little consequence when the terms are used in everyday public discourse, however is more problematic when the use occurs within the literature of children's rights. This is because capacity and competence, as outlined in the first paper, play a central role in moral and political philosophy by determining the moral status of a subject. More specifically, they play a central role in determining the subject's rights. Insufficient distinction between these concepts leads to talking past each other within scholarly debates and a lack of clarity of what is actually required for an agent to be considered competent or to hold a capacity.

We propose a distinction between the concepts 'capacity' and 'competence' and introduce the additional concepts of ableness and latent capacities. A capacity is the potential ability to do *A*. One has the capacity to *A* when one has all the relevant skills internal to that person to *A*. Competence is one's actual ability to *A*. By actual ability we mean the capacity to *A* plus the relevant intentional states, such as knowledge and intention, necessary for successfully doing *A*. We fine-tune this framework by introducing the additional concepts of ableness and latent capacities. Ableness is one's actual ability (viz. competence) to do *A* plus the availability of external resources and

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is designed to ensure that in particularly dangerous or risky cases all possible precautions are taken. For example even if it is legal to store explosives in a certain area, and impossible to completely guarantee that a freak accident will not occur, the individual storing the explosives holds strict liability for any injury that results from such an accident. For a thorough discussion see chapter eight of Kramer, M. (2004) *Where Law and Morality Meet*, Oxford: Oxford University Press.

opportunity to do so. Latent capacities refer to the capacity to develop a capacity. We provide a conditional analysis for each concept.

The distinctions between 'latent capacities', 'capacities' and 'competencies' will assist those concerned with children's rights. First, the distinctions provide us with the requisite tools to properly identify the threshold that is needed for the allocation of individual rights. Second, the distinctions can prevent talking past each other when engaged in debates. Finally, the terms can assist us in identifying special duties we hold towards children due to the constant development of their latent capacities into capacities proper and capacities into competencies. The second paper in the thesis therefore further develops the theory of children's rights by investigating the distinction between capacity and competence. The distinction is relevant in the first paper when developing a theory of rights for children and will be used throughout the following papers.

1.4.3 **Paper Three:** Children's Rights and the Future Interest Problem

The third paper, 'Children's Rights and the Future Interest Problem' deals with a central problem arising from the theory set out in the first two papers of the thesis - namely the problem of how to protect the future interests of children.

The first two papers of the thesis outlined that children's rights are most properly conceptualised through the interest theory of rights. However the interest theory works best when identifying the present interests of the claim-holder. As the first paper of the thesis outlined, rights are constrained by the capacities and competencies of the right-holder. Children, however, are often defined by the development of their capacities. Although they may not have certain capacities or competencies (and therefore interests) now, they are in the processes of developing and acquiring capacities, competencies and interests. Therefore actions can be taken towards children that do not harm their present interests but do harm interests that they are likely to hold in the future. The second paper in the thesis identified the concepts of latent capacities and capacities proper and acknowledged the difference between children and other incompetents. A child may not hold some competencies and capacities but they hold

latent capacities. A child's latent capacities may mean that others have duties to assist in developing these capacities.

Any comprehensive theory of rights for children needs to able to account for and protect not only the present interests of the child but also the future interests. This paper examines two potential solutions to the future interest problem, one from Joel Feinberg and the other from John Eekelaar. I argue that these two proposals fail to identify the wrong that is occurring in such future interest cases. Instead this paper uses a framework of competencies and capacities to argue that children have a right to non-interference in the development of certain capacities and a potential right to assistance in developing other capacities.

The final section of this paper examines whether the potential right to assistance in developing capacities and competencies can be applied to the case of congenitally deaf children and cochlear implants. I argue that children have a right to assistance of the development of their capacities, but not of all capacities. A useful way of determining which capacities are sufficiently important to constitute a right is the adoption of the normal human functioning model. Children have rights to certain core capacities that allow them to achieve normal human functioning.

This paper therefore begins to apply the theory developed throughout the three papers of this thesis to a real case study, along with offering a solution to a conceptual problem arising from it. The assessment of the future interest problem reveals that capacity and competence are once more important in the determination of rights for children.

1.4.4 **Paper Four:** What's Love Got to do with it? Why children do not have a right to be loved

The fourth paper of the thesis examines the question as to whether children have a right to be loved. It is often stated in international and national legal documents that children have a right to be loved. Yet there is very little explanation of why this right exists or what it entails. Matthew Liao has recently sought to provide an explanation by arguing that children have a right to be loved as a human right. Throughout this paper I examine Liao's explanation and in turn argue that children do not have a right to be loved.

Although love may be seen to be a good thing for children, this does not equate to love as a claim right. The first part of this paper argues that loving cannot be a duty. Love cannot be a duty because the structure of a right, as set out in the first three papers of this thesis, necessitates that there be a real and achievable corresponding duty.[8] The internal emotional component of love is often something we do not have proper control over and therefore may be an unachievable duty. The expressions of love, such as caring for and interacting with a child, may be reasonable and achievable, however this paper argues that the emotional aspect of love can be logically separated from treatment we deem desirable for a child. A child has a claim to this desirable treatment irrespective of whether it comes from a place of love or not

Even if we were willing to concede that love could be a duty, love is not always accompanied by, nor does it guarantee, loving treatment. Protecting love for children is not enough. This paper considers two alternative interpretations of the right to be loved, that the right to be loved is a manifesto right and that the right to be loved is a claim right against the state. I argue that even given these, children do not have a right to be loved. Not all interests translate into claims. This paper was partially developed as a critique of Matthew Liao who responded in a subsequent issue of the journal for which the editor gave me a right of reply. I include my reply, 'A Need is not a Right', as an Appendix to this thesis.

In applying this theory of why children have rights to the proposed right to be loved we consolidate a number of particular aspects of how rights apply to children. First duties need to be reasonable and achievable. Secondly, it demonstrates that rights are at their

[8] Throughout the papers I argue that a duty must be achievable. In this introductory chapter I pointed out that some duties that are not achievable are still justified (see...). The case of the duty to 'love' is not one of these justified unachievable duties. First of all the duty to 'love' does not fulfill the weaker requirement that a duty be reasonable, for reasons I set out in length in the paper. Second, the reasons for justifying strict liability are usually based on public policy considerations, for example that the action or situation is so risky or dangerous that strict liability must be undertaken before one voluntarily takes on this risk/danger. The dangers discussed in this paper do not come about because of a lack of 'love' but rather other omissions or actions such as negligence or abuse. I have argued that these duties restricting these omissions or actions *are* reasonable and achievable.

most powerful and effective when they protect interests that are manifest and identifiable.

1.4.5 **Paper Five:** 'No harm, no foul': donor conceived children and the right to know

The final paper of the thesis illustrates how rights can be effectively employed in a real policy situation. The case examined in this final paper is the right of children conceived using donated gametes (sperm and egg) to know the identity of their donor. The paper examines this case within the legislative and regulatory framework of Australia.

In many countries, including Australia, governments have legislated against anonymous gamete donation. A recent Australian Senate inquiry has reinforced this position and has supported non-anonymous donation grounded in a child's right to know the identity of their genetic parents. This paper considers the main reasons for the existence of such a right and as such applies the interest theory of rights developed in the first paper by asking, 'what interest is sufficient to ground a claim to know the identity of one's genetic parents?' I review the three main interests that are commonly cited, first that children have an interest in knowing their medical and genetic history, second that children have an interest in knowing their genetic family in order to avoid concerns of consanguinity and finally that children who do not know the identity of their donor can suffer psycho-social harm. An appeal to this third interest, the most valid of the three, is open to the response that parents should simply not tell children they are donor conceived. Therefore in order to argue that children have a right to know the identity of their genetic parents it must first be shown that there exists a prior right to know the nature of one's conception. The existence of such a right requires that the principle of 'no harm, no foul' is false in the case of non-disclosure of a child's genetic origins.

In this paper I argue that children are due respect

Establishing the interest that grounds this right is imperative to guide Australian legislation and regulatory frameworks. If 'no harm, no foul' does not hold then the state in Australia will hold a duty not only to allow donor-conceived children access to identifying information regarding their donors but also a duty to ensure disclosure regarding the nature of the child's conception in the first place. Understanding and

applying the theory of why children have rights allows us to see the shape of how a right and duty should be implemented within a policy framework. A right to know one's genetic parents is inadequate without a corresponding right of disclosure to children that they are donor conceived.

1.4.6 Concluding Chapter

The concluding chapter draws these five articles together and highlights the conclusions that arise from reading them together as a whole. The conclusions of this thesis are:

1) Children have rights. Children have rights because they have interests that are of sufficient importance to be protected and these interests ground claims that produce duties in others to act or refrain from acting. Rights are therefore understood as Hohfeldian claims with correlative duties.

2) There is an important relationship between capacity, competence and children's rights. It is not conceptually necessary for a child to hold the power to enforce or waive their claim in order to hold a right. Consequently it is not necessary for a child to be competent in autonomous choice to be the type of being that may hold rights. However a child must be competent in realising the interest to which a particular claim pertains.

3) The nature of duties is relevant to children's rights. A Hohfeldian claim always has a correlative duty. Furthermore the duty correlated with a child's claim must be reasonable and achievable and the duty-holder must hold the capacity to fulfill the correlative duty.

4) Children's rights are special claims. A strict definition of a 'child' is not necessary in order for it to be conceptually possible for children to hold rights. However a broad definition of children is useful to identify particular aspects of their rights. Children are in a period whereby their capacities and competencies are rapidly evolving; therefore many children will hold claims to the development of core capacities. This produces correlative duties in others to assist in their development.

5) Finally, a strong theory of rights for children is important to understand the nature of the right and the shape of the correlative duty. A theory of why children have rights helps to effectively translate rights into practice.

1.5 Conceptual Clarifications

In the first part of this introductory chapter I set out the thesis's aims and structure, and provided a summary of the papers that make up the body of the thesis. In the second half of this introductory chapter I provide some conceptual clarifications and an overview of the literature surrounding the construction of children's rights as a theoretical concept.

Before we begin the substantive task of answering the question 'do children have rights', it is important first to address two key questions, what are children and what are rights? In order to know whether children have rights, we need to know what we mean by children, whether is it possible to determine children as a separate class of right-holders and furthermore is it necessary to do so. We also need to understand what is meant by rights, what are their form and justification. Answers to these questions appear throughout the five papers that make up the body of this thesis, however they are often brief due to the constraints of publication, this section will consider them in more detail.

1.5.1 What are children?

It should be easy to identify what we mean by children for they are everywhere in our social lives. We have children, we see them going to school, we teach them, we play with them and we were all once children ourselves. So what are children? The simple answer is that children are young human beings. However in digging deeper the question becomes a little more complicated. Is a 17 year old attending university still a child? If they are, in what way are they a child? In the same way as a 5 year old? Is age the best way to classify children, or should we use some other criteria? Considering these issues maybe the more appropriate question to ask is 'who are children?', which young people can be classified as children and what is it that is particular about them? Identifying who children are is essential to determining whether they have rights.

I turn to this question briefly in the first paper presented in this thesis. In that paper I define childhood simply as,

> The period of time before one becomes an adult, usually defined by lesser physical and cognitive capacities, coupled with the rapid development of these capacities.

This is an intentionally broad definition of childhood, which I argue is useful when considering the rights of children. However it is worth investigating in further detail the debates surrounding children and childhood in order to understand the types of assumptions that often underpin claims regarding their rights. In this section I argue that children are defined in two ways, first by age and secondly by normative significance. The two often, but not always, align and overlap. The definition of children differs between cultural traditions and has changed throughout history. I conclude by arguing that for the purposes of considering whether children have rights, it is not necessary to have a strict definition of children. However, for the purposes of policy in regulating rights, it is necessary to have a clear requirement for who qualifies as a right-holder.

Age

The most common way to answer the question, 'What are children?' is by age. Children are young human beings and for many people it is enough that you cease to be a child once you cross the threshold of a certain age. According to the United Nations Convention on the Rights of the Child (CROC) children are those individuals under the age of 18. Article one of CROC defines children as;

> 'Every human being below the age of eighteen unless under the law applicable to the child, majority is attained earlier' (CROC, Article 1)

In the vast amount of cases eighteen is the age of majority. [9] However the Convention does allow for individuals younger than 18 to be no longer considered a child if the

[9] Those countries that adhere to 18 as the age of majority include for example Australia, United Kingdom and most countries of the European Union. However other countries hold older ages for liberties such as drinking alcohol, for which the age is set at 21 years in the USA and 19 years in Canada.

domestic law of the state allows so. For many countries this means that children can be considered to have full legal capacity with regard to various matters at differing ages (Fortin, 2005, 6). For example in Australia an individual can join the Defence Force at 16 and 6 months, drive a car at 17 and vote in federal elections at 18. Defining children by age is simple and useful; it provides a clear and unequivocal point by which all individuals of a given age are treated equally. The age of 18 as stipulated in the Convention represents an upper limit to childhood, a threshold above which individuals must be treated as full citizens and cannot be denied certain rights.

Despite its ubiquity much has been made of the arbitrary nature of an age based definition of childhood (Archard, 2004, 85-91). The age of 18 is itself a relatively new threshold, previously it was common to set the age at twenty one for no other reason than this was the age in Medieval England that a man was deemed strong enough to wear full amour (Freeman, 1997, 91). Any age, whether 18 or 21, is necessarily arbitrary. What is special about 18 that is not captured in 17? Yet arbitrariness itself cannot be the sole concern. Many standards in life are arbitrary. For example there is no significant difference in the probability of an accident if one drives 51 km per hour rather than 49 km per hour. Yet in suburban Australia driving at 51 km per hour is 'speeding' and therefore illegal.[10] The limit of 50 km per hour is arbitrary in that it is no more significant than 49 or 51, however it is clear that to have a law against speeding there must be *some* threshold by which driving at a certain speed is illegal. There is no great harm in choosing 50 km/hour and therefore the arbitrary nature of the law is acceptable - indeed necessary. Childhood, for the law, is the same. No one seriously claims that there is a significant difference between an individual who is 17 and 364 days old and someone who is 18 years old, but in order to maintain a distinction between child and adult there needs to be *some* age. The problem is not that the cut-off is arbitrarily chosen, but that age is used as a proxy for competence.

Using age as a proxy for competence is usually unproblematic. For example the harm that arises from excluding a competent and intelligent 17 year old from casting their vote, or including an 18 year old who does not yet know how the political system works, is in most situations very small. Especially since the 17 year old will usually be able to

[10] Though in practice you do not get fined unless you are going 55km/hr. However it remains true that the legal speed limit is 50 km/hr not 51, 52, 53 or 54.

vote in the next election. The problem for age-based definitions arises when we are dealing with individuals for whom the consequences of the competence assessment are much higher. For example consider a girl under the age of 16 who wishes to obtain contraception from her GP, her parents refuse to give their permission and she cannot obtain it alone as being under 16 she is deemed incompetent to consent. Despite this she clearly understands the nature of contraception, the consequences of unprotected sex and wishes to enter a consensual sexual relationship with her boyfriend. For her the assumption of incompetence that excludes her from autonomous action has grave consequences. It was this exact hypothetical that was considered in the 1986 House of Lords case, *Gillick v West Norfolk and Wisbech Area Health Authority.* The case established the standard of 'Gillick competence' that measures a child's capacity to consent to medical treatment on their individual understanding of the medical treatment involved (Bridge, 2003; Fortin, 2005, 136). *Gillick* established that it is no longer appropriate to tie age unmovably to an assessment of competence. *Gillick* recognises that one can be legally a child but competent in making decisions about one's life. The arbitrary nature of the legal definition of the child is still valuable and valid, however it cannot be strictly used as a proxy assessment of the competence of a child. This observation about competence brings us to a broader issue regarding the children. 'Child' does not just carry implicit assumptions about competence but also other normative judgments.

Normative Significance of Children

If we wished to resolve some of the problems related to an age based definition of children we could choose to adopt a strictly biological definition. That is, children are those human beings who have not yet developed a certain body size, physical features or cognitive abilities. We could even develop more complex methods for measuring the development of the brain and the body to decide exactly when one ceases to be a child and becomes an adult. Yet to do so would fail to recognise the deeper meaning society attaches to childhood. We do not use child just to mean those people of a certain biological state but also those who act or represent a certain normative state, for example we call adults 'children' when they act irrationally, white Americans historically called African Americans 'boy' and frequently other civilizations were deemed 'children

of the Empire' during periods of colonialism. As Schapiro points out this indicates the existence of a deeper meaning attached to children - one of moral status (1999, 717). It is these types of observations that have prompted scholars to conclude that childhood is socially constructed.

In 1962 French historian Philippe Ariès' text, *Centuries of Childhood* was translated into English. The text is influential as it was the first general historical study of childhood (Archard, 2004, 19). Ariès' central argument was that within medieval society the idea of childhood did not exist. Although children were recognized to be vulnerable they were treated much the same as adults and did not have the special status in society that they currently enjoy. Therefore childhood, according to Ariès, is a modern invention (Ariès, 1962, 125). There is now considerable criticism of the evidence used to support his thesis. Ariès drew these conclusions from observations such as the depiction of children as scaled down adults in paintings, the clothing children wore at the time, the games they played and finally from evidence in the diary of Heroard, Henri IV's doctor. Historians now argue that he ignored other sources such as legal documents from the time and important evidence of artistic conventions that would lead to differing interpretations (Cassidy, 2007; Cunningham, 1998; Heywood, 2001; Pollock, 1983). It is not just that there are flaws with Ariès' evidence but also that his conclusions and discussion are value laden (Archard, 2004, 22). Ariès judged that the past lacked *any* idea of childhood, but in fact what it lacked was our *present* understanding of childhood. So although Ariès was trying to argue that any idea of childhood is a modern invention he unwittingly laid the foundation for the fuller and deeper understanding of childhood that now exists in the literature - that the modern understanding of childhood is not solid and unchanging but is fluid and contextual. This observation has been important in informing the growing scholarship of socio-cultural theorists.

Throughout the 1980's many scholars grew increasingly dissatisfied with the superficial treatment and understanding of childhood within disciplines such as sociology, psychology and philosophy (Prout, 2005, 1). As a result the new school of 'childhood studies' emerged. The movement critiqued the previous emphasis on the inevitable unfolding of child development. Psychologists such as Jean Piaget claimed that children move through a series of developmental stages that represent a universal path from immaturity towards rationality and autonomy (Smith, 2002, 73). Socio-cultural theorists argue that there is no one route to development dependent on innate biological

structures such as the developmental stages set out by Piaget, but rather development is dependent on cultural goals (Smith, 2002, 77). The way we understand children as incompetent and developing is not grounded in biological facts but rather socially constructed (McGillivray, 1997, 5). The socially constructed nature of childhood means that it is natural that different understandings of children and childhood will exist within different social contexts. The definition of who is a child, and what children are expected to do, will differ widely and fundamentally both between and within countries (Morrow, 1999, 14, Heywood, 2001). For example children within Australia are expected to attend school until they are 16, reflecting the idea that childhood is a period of learning, development and play. Childhood in Australia is a period free from work and separate from adult decision-making. Yet for children of other countries, such as the newly created state of South Sudan, childhood necessarily includes work such as looking after cattle, assisting in collecting water and participating in family decision- making.

Socio-cultural theory also tells us something important about *how* children are constructed. The normative significance we afford to children is produced and reproduced through government policy, media representation, historical and philosophical influences and individual experiences of childhood and family (Allison, Jenks & Prout, 1983). Often the depiction of children can be contradictory. The trial of Jon Venables and Bobby Thompson for the murder of James Bulger in the United Kingdom in 1993 saw children represented in the media both as 'victims' and 'villains'. Bulger was depicted as the classic innocent child, free from the corruption of the world, a *tabula rasa*. The two boys Venables and Thompson were depicted as inherently evil and dangerous, a confirmation of the suspicion that all children are bad and need to be cured, socialized and controlled by society (Franklin, 2004, 33). Archard (2003) suggests that children simply reflect what adults want or need them to be. Indeed the status that children are accorded by adults can shape the way they children see themselves (Cassidy, 2007, 2012).

Children as a concept and a conception

It is important not to overstate the conclusions of socio-cultural theory. Recognising that childhood can be socially constructed does not mean that the biological differences between children and adults are irrelevant. Childhood cannot be a 'purely social'

phenomenon (Prout, 2005, 2). There are real and identifiable biological differences between a 25 year old and a five year old. However the *meaning* we give to these biological facts is informed by normative assumptions of society. Children are both young human beings and also beings that are interpreted and understood differently across time and culture. Given this, it is useful to adopt a distinction suggested by David Archard between concept and conception. Building on the distinction between a concept and a conception of justice set out by Rawls in *A Theory of Justice*, Archard suggests that childhood can be understood in a similar way. The *concept* of childhood requires that children be distinguishable from adults in respect of some unspecified set of attributes, whereby a *conception* of childhood is a specification of those attributes (Archard, 2004, 27). The concept of childhood simply recognises that children differ from adults. A conception of childhood is to specify how children differ and why it is significant.[11]

The definition of children that I set out at the start of this section is a specific conception of children. The 'lesser physical and cognitive capacities, coupled with the rapid development of these capacities' are the attributes of childhood that define this conception.[12] Even though the definition is broad and does not specify exactly what these capacities are, it states that they tend to be less than those held by adults and that they are rapidly developing. Therefore it must be understood as a conception of children and a conception informed by the project it is designed for – in this case the investigation of rights. There are many aspects of childhood that are not part of this definition, but this does not make them any less valid in other contexts. As we will see throughout the thesis, it is the capacities and competencies of an individual that are important in deciding whether they hold a right or not. We could say that the definition

[11] However unlike Rawls, who sought to argue that only one conception of justice was the correct one, Archard does not adopt the stance that only one conception of children is correct. However he does suggest that if there are better and worse ways of treating children then some conceptions of childhood will be more conducive to treating children well (2004, 28).

[12] However I want to be clear that in adopting this definition of children I do not wish to imply that acquisition of the capacities and competencies we hold as adults is necessarily a better way of being and therefore an improvement on the state of childhood. In becoming adults we often lose the particular capacities or competencies we held as children, such as a child's incredible capacity for imagination.

of a child I offer here is a conception of the child as right-holder, in that it identifies the aspects of childhood relevant to being a person who does or does not hold particular rights.

Does it Matter?

Any definition of childhood can be challenged by different conceptions of childhood. Does this matter when we consider whether children can have rights? It would seem that the difficulty of adopting any definition of children would cause problems for an assessment of their rights. I argue throughout this thesis that the truth is quite the opposite. The complex nature of childhood and children does not pose a significant problem for a theory of children's rights. For the theory of rights that I will present here it does not strictly matter whether an individual falls within the bounds of 'child' or 'adult'. This is because rights are determined by particular interests. Interests differ not only between children and adults but also between individual children and between individual adults.

What does matter is being *aware* of the various conceptions of children and how they inform the types of decisions we take regarding their rights. As Fortin points out,

> 'Ideas about children's rights undoubtedly reflect the nature of the society in which they are being brought up and the type of childhood they will experience' (2005, 10).

Differing conceptions of children will affect which rights we recognise for children. Some conceptions of children hinder the implementation of rights. For example if a particular society sees children as passive beings that are primarily in need of protection, rights such as Article 12 of CROC, which states that children have a right to participate in decisions that affect their lives, may be more difficult to implement into policy and practice. Yet conceptions of children can be useful too. The very same understanding of children as helpless and vulnerable may aid in controlling and shaping society's actions towards them. It may foster strong expectations that children are not neglected or abused and guarantee this outcome in a far more effective way than any government legislation. Tamar Schapiro in her article, 'What is a child', concludes that,

> 'The enlightenment did away with arbitrary distinctions in status, distinctions based upon lineage and wealth. The danger is in concluding that all distinctions in status are therefore arbitrary. Some differences ought to count, such as the difference between adults and children' (1999, 738).

From the discussion of rights and children that will follow, it becomes clear that the appropriate question to ask is *why* the difference ought to count. I will argue throughout this thesis that the difference should count because it tells us something distinct about children, first that they have fewer capacities and competencies than adults and second that they are in a period of rapidly acquiring new capacities and competencies. This matters because this shapes the types of claims children can make and the type of duties that adults hold to them. In short it shapes the determination of their rights. In the next section I will briefly consider what we mean by 'rights' before turning to how children's rights have been constructed and understood in the literature so far.

1.5.2 What are rights?

The question, 'what are rights?' is one that has concerned philosophers for centuries and is still an area of political and moral philosophy riddled with intractable disagreements. This is true despite the ubiquity of 'rights' throughout modern political and public discourse. There is disagreement on who can hold rights, children or adults, groups or individuals, humans or animals. Whether rights protect choices or interests, are universal or culturally relative. Whether rights are primarily legal instruments or moral creatures. There is even debate on the validity of a rights based approach at all.[13]

I consider the question 'what are rights' in the section, 'Theories and Functions of Rights' in the first paper of this thesis. In that paper I provide a brief outline of the Hohfeldian framework of rights and investigate the place of children within the two dominant theories of rights, will theory and interest theory. Here I provide a broader overview of the concept of rights in general, the depths of the debates surrounding their function and position the papers that make up the body of this thesis within this debate. I divide the discussion of rights into the structure of rights and the justification of rights. I examine some recent scholarship that claims to bridge the intractable debate regarding rights, and finally I lay the foundations for the discussion of the rights of children.

Structure of Rights

The most conventional way to begin any discussion of the concept of rights is to separate out discussion of their *structure* from their *justification* – that is –

[13] For an overview of these debates: on children see Archard, D. (2004) *Children. Rights and Childhood,* 2nd ed, London: Routledge, on group rights see Shapiro, I and Kymlicka, W. (2006) *Ethnicity and Group Rights*, New York: New York University Press, on animal rights see Singer, P. (1975) *Animal Liberation*, London: Random House, on choices vs interests see Kramer, M., Simmonds, N and Steiner, H (1998) *A Debate Over Rights: Philosophical Enquiries*, Oxford: Oxford University Press, on cultural relativity see Macklin, R (1999) *Against Relativism: Cultural Diversity and the Search for Ethical Universals*, Oxford: Oxford University Press, on the appropriateness of rights see Taylor, C (1985) 'Atomism' in *Philosophy and the Human Sciences: Philosophical Paper 2*, Cambridge: Cambridge University Press, pp 187-210.

distinguishing the logical description of how a right is constructed from the normative significance it is given by various theorists. In this way rights could be seen to be a bit like cars; it is possible to separate the discussion of the mechanics of how a car physically fits together and is constructed, from discussion of *why* it is constructed in this way. While two interlocutors may both agree that cars are machines with four wheels that propel passengers forward, they may disagree as to whether a car's real purpose is to safely carry its passengers, or if it is a machine whose sole purpose is to maximize speed. This 'justification' for cars may then influence which parts of the car's construction are deemed the most important. Our safety conscious driver may argue that a solid structure able to travel in a stable manner is the most important, whereas our speed fiend may think that these aspects of construction can be compromised in order to make the car as aerodynamic and fast as possible. They might also add that these characteristics are the 'true' features of the car. For the safety conscious driver a Volvo is the epitome of 'carness' but for our speedster a Ferrari represents the true 'car'. The debate over rights often proceeds in much the same way. Most rights theorists can identify the core structure of a right but many disagree on its justification, its key function. Disagreement on the function then influences what parts of the right's structure are considered the most important.

The internal structure of rights was elucidated in an analytical framework conceived by American legal theorist Wesley Hohfeld. Hohfeld (1913) argued that we often conflate various meanings of the term 'right', sometimes switching senses of the word several times in a single sentence. He sought to clarify the structure of rights in order to facilitate reasoning. As Steiner points out the consequences of non-univocality entail unacceptable costs, as rights are concepts that constrain and guide our actions. False assessments due to any confusion over language are harmful and unnecessary (Steiner, 1998, 235). Therefore the examination of the structure of rights is an analytical project; separate from the debates regarding moral weight, function and content of rights (Kramer, 1998; Raz, 1984).

Hohfeld identified eight elements that are referred to when we speak of rights.[14] These eight are divided into first and second order elements and are relational. The first order elements consist of Claim, Duty, Liberty and No Claim.[15] These form 2 correlative pairs. Therefore when there is a claim there is always a duty, when there is a liberty there is always no claim.[16]

First Order Correlatives Pairs

Claim - Duty

Liberty - No Claim

A claim is defined by the type of action or inaction of people who bear the correlative duty. A claim is held by an individual and creates a duty in others to either 1) abstain from interference or 2) render assistance or remuneration.

As a claim and a duty form a correlative pair, a claim always has a duty. However some scholars dispute this correlativity axiom. For example McCormick argues that the axiom reduces any talk of rights to logically prior duties and therefore rights become a simple reflex on duties (MacCormick, 1976). However this is to misunderstand the axiom. Neither Hohfeldian duties nor claims are logically or existentially prior to the other, just as one side of a coin is not logically prior to its other side. The existence of each is a necessary and sufficient condition for the existence of the other (Kramer, 1998, 26).

Others argue that duties exist without correlative claims and therefore the correlativity axiom cannot hold (Perry, 2009; White, 1982). For example we may have duties to

[14] Throughout the first paper of this thesis, 'Capacity, claims and children's rights' I have used the term 'incidents', since publication I prefer to use 'elements' for the singular and 'pair' for the relations between Hohfeldian elements. I use this later terminology throughout the rest of the thesis.

[15] Hohfeld used 'Right' instead of 'Claim' and 'Privilege' instead of 'Liberty'. I use 'Liberty' and 'Claim' throughout this thesis, as do many other scholars. For an explanation of terms see Kramer, M. (1998) 'Rights Without Trimmings', in M. Kramer, N. Simmonds and H. Steiner, *A Debate Over Rights: Philosophical Enquiries*, Oxford: Oxford University Press, p. 8)

[16] Hohfeldian pairs can also be stated as opposites. For example, when there is a claim there is no, no claim, when there is a duty there is no liberty.

animals and children, yet they, so this argument goes, do not hold claims against us. For a moment we must put aside the question of whether children or animals can hold claims and consider the observation that there are certainly *some* types of duties and obligations we hold that do not seem to be connected with a claim held by another. If this is true, this is not to deny the correlativity axiom, it is simply to state that the Hohfeldian duty is one type of obligation, it is an obligation that is always associated with a correlative claim.[17] Other obligations may arise out of relationships or promises (Brink, 2001; Dworkin, 1986). For example I may hold special obligations to my students because of my *role* as a teacher, or I may hold an obligation to lend a book to a colleague because I promised to do so. If we really think that there is no claim associated with these obligations, then they cannot be understood as Hohfeldian duties.

Unlike a claim, a liberty is specified by reference to the actions of the people who hold the liberties, not the correlative no claim. Liberty is defined by the absence of both duty and claim. For example I have a liberty to cook myself a risotto for dinner because there exists no claim, held by another person, producing a duty not to do so. It may seem therefore that liberties, as the absence of claim or duty, are completely unprotected from other people's actions. Then why speak of them at all? Despite the absence of both claim and duty, acts and omissions based on a liberty can be effectively protected through a combination of other claims and duties (Kramer, 1998). For example consider that instead of cooking myself a risotto I am impatient and choose to eat at McDonalds. I have a liberty to eat at McDonalds every day of the week if I choose. As this is a liberty and not a claim, my healthy friend is under no duty to allow me to eat at McDonalds every day, free from interference. My friend can therefore try and dissuade me with logical argument, take me out for dinner, or even lie to me and tell me that McDonalds has shut down in order to prevent me from eating there.[18] However my friend's actions in this respect are constrained by his other duties towards me. He cannot tie me up to a chair, as he has a duty not to deny me freedom of movement, nor can he tamper with my car to prevent me driving to MacDonald's as I have a claim over my property. Liberties are therefore an important aspect of our moral relations.

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[17] I don't seek to answer in this thesis whether all duties are Hohfeldian duties. I am inclined to think not and that Hohfeldian duties are one type of duties or obligations. However I cannot address this in full here.

[18] Provided we think that my friend is under no duty not to lie to me.

Hohfeld's Second Order elements consist of Power, Liability, Immunity and Disability. Again these elements form two correlative pairs.

Second Order Correlative Pairs

Power – Liability

Immunity – Disability

Second Order elements specify how agents can change their own or other people's first order and second order elements. A power consists in one's ability to effect changes in other's or one's own claim, duty, immunity and power (Sumner, 1987). For example if I wish to no longer continue to eat at McDonalds, I have the power to waive my friend's duty not to physically restrain me, in order to prevent me from succumbing in a moment of weakness. One has a liability when one is unshielded from the bringing about of changes by the exertion of a power. My friend therefore has a liability as the existence of his duty is subject to my power to waive or enforce it.

One has immunity when one is shielded from another's power. For example a witness in a court has an immunity from being forced to incriminate themselves. One holds a disability when one lacks the ability to effect the change due to someone else's immunity. In the example above the court has a disability as the witness's immunity blocks their power. These first and second order relations can be seen in isolation as 'atomic' elements. However Wenar argues that most rights, legal or moral, are atomic Hohfeldian elements bonded together in ways to create a *molecular* right (2005, 233). Figure two, overleaf, represents an adaptation of Wenar's complex molecular right as applied to my claim right over my computer.

This molecular right can be further qualified by other people's first order claims and second order powers in much the same way as the McDonald's case discussed above. For example, I have a liberty to use my computer but not to strike someone over the head with it *or* my immunity may not block the state's power to obtain my computer in a criminal case. These qualifications determine the details of the contours of my property right but do not affect its basic shape. In this sense, Wellman describes each right as having a 'defining core' surrounded by 'associated elements' (1985)

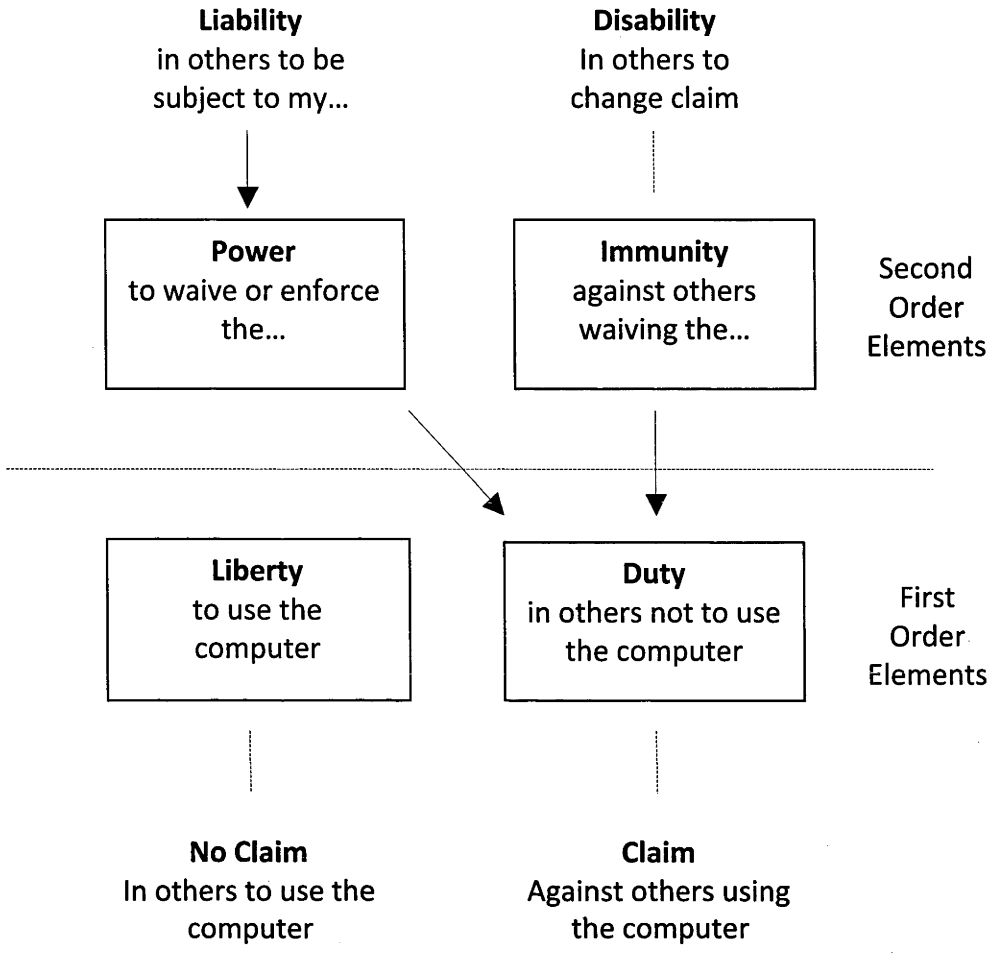

Figure Two: Molecular nature of the property right over my computer.[19]

Over this framework of Hohfeldian elements and pairs a number of classifications such as active or passive and negative or positive can be transposed. These classifications are also important in beginning to understand the different fundamentals of rights. Liberties and powers can be seen as *active* elements as they are defined by the actions of liberty or power-holder. X has a liberty or power to α. Claims and immunities however are *passive* elements as they are defined by the actions of the duty or disability-holder. X

[19] For Wenar's original diagram see Wenar, L. (2005) 'The Nature of Rights', *Philosophy and Public Affairs* 33(3): 223-252, p233.

has a claim or an immunity that B α (Lyons, 1970). Another way to think of the distinction may be that liberties and powers are *exercised* while immunities and claims are *enjoyed* (Wellman, 1985, 70).

Negative or positive elements are both forms of passive elements and therefore the negative or positive distinction cannot be used to classify all Hohfeldian elements. A claim is *negative* when the right-holder is entitled to non-interference, the claim is *positive* when the claim-holder is entitled to some good or service. However when it comes to *enforcing* negative or positive claims the distinction becomes far less clear. It may take as much time and resources to run a competent legal system to protect negative claims as it would to provide social services to protect positive claims. It could therefore be said that in the context of citizens' claims to state enforcement all rights are positive (Holmes and Sunstein, 1999: 43).

Before moving on to the justification of rights it is useful to draw one further distinction - between moral and legal rights. Without a distinction one may assume that legal rights are the archetypal rights and this could lead to equating the law with morality. As Raz argues,

> 'It is true that one ought to keep one's promises but false that it is the law that one ought do so. It is (in many legal systems) true that it is the law that one may kill one's pets at will but it is false that one may do so.' (1984, 8)

Legal rights are rights that exist in law. Legal rights can have normative justification or no normative justification. For example as previously discussed, it is conceptually possible for the Australian Parliament to pass legislation tomorrow conferring on domestic pets a legal right to vote in federal elections. Such a legal right could be seen to lack normative justification. That is to say that it is possible to construct all types of legal rights. However most legal rights have normative justification, many legal rights are justified as they codify rights we believe exist outside the law. These rights that exist whether they have been translated into law or not can be called moral rights, or non-legal rights. In this sense moral rights are normatively justified claims.

Not all justified legal rights have a corresponding moral right. For example within the law corporations have certain rights as legal persons, these rights are usually justified through pragmatic reasons for effective functioning of the law. The rights of

corporations as legal persons are a 'legal fiction' to judge the legality of business proceedings and relationships (Schane, 1986). However outside of such a legal system we would be unwilling to argue that the corporation holds some sort of normatively justified claim right.

Similarly not all moral rights should be translated into legal rights, often for reasons to do with the boundaries of appropriate state intervention. For example one may have a claim to be told the truth based on a right to respect.[20] However for most instances it is not appropriate to translate this into a legal right, enforceable through the judicial system, every time someone tells a lie. This particular problem is explored in the final paper of this thesis where I argue that children conceived using donated sperm and eggs have a right to be told the nature of their conception based on their right to be treated with respect.

When I talk about rights in this thesis, I am talking about normatively justified claims, some of which should for their effective functioning be translated into law, some which are more appropriately seen as rights and duties between two individuals that can exist and function outside of the legal system. In this I take a similar position to Raz (1984, 1) that the best approach is to think about rights in general first and then to consider which of these rights should be translated into law. In this sense this thesis is a project of political theory and not analytical jurisprudence. Although Hohfeld's jural relations were originally conceived to analyse legal rights, they can also be effectively used to analyse non-legal rights. The Hohfeldian framework demonstrates the different elements we consider to be associated with the term 'right' and the ways that these can interact. What combination of Hohfeldian elements we consider to be a 'right' will depend on the function we wish rights to fulfil.

[20] It could be suggested that it is not that truth telling is a form of a respectful behavior, but rather it is more plausible that not being deceitful is a form of respectful behavior. It is correct that truth-telling and not deceiving are two distinct claims, however I argue in the final paper of this thesis that in the context of donor conception disclosing the truth is what is required to fulfill the duty.

Justification of rights

Although a combination of Hohfeldian elements make a right, not every combination represents what we would think of as a 'true' right. Hohfeld's analysis provides us with the useful tools of analytical jurisprudence but rights themselves also hold moral and political weight. Rights serve a function and we have them for justified reasons. Broadly speaking there are two philosophical approaches to explaining why rights should be protected, a deontological or status approach and a consequentialist approach. A deontological approach argues that there is something specific to the right-holder's status that means that their rights should be respected. Early theories of rights, such as natural rights theory often relied on a deontological justification. A consequentialist approach argues that rights should be respected because they bring about good outcomes, to protect the welfare or interests of the right holder.

Contemporary debate over the function of rights plays out these two philosophical approaches, indeed it has been suggested that the debate over rights is a proxy for a debate over normative commitments (Wenar, 2005, 25). The heated debate is between two theories and famously described as a 'standoff' (Sumner, 1987, 51). These are will theory and interest theory.[21] The intractable nature of this standoff is no better exemplified in the exchange between Matthew Kramer, Nigel Simmonds and Hillel Steiner in *A Debate Over Rights* (1998).

Those that adhere to will theory, such as HLA Hart, Carl Wellman and Hillel Steiner argue that the core function of a right is to protect or enable an individual's will or choice. A right makes the right-holder a 'small-scale sovereign' (Hart, 1982, 183). In order to protect this choice the right-holder must have a claim that invokes a duty but also the power to enforce or waive it. This is because the power to enforce or waive allows claim holders control over the corresponding duty and therefore full control over their right. This power can be broken down into three distinct steps.

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[21] Will theory is also referred to as choice or power theory throughout the literature. For consistency I only refer to it as will theory throughout this thesis. It is sometimes problematic to talk of these theories in general as they differ between theorists. For example Matthew Kramer's description of interest theory is somewhat different from that proposed by Joseph Raz. However the differences do not outweigh the similarities and the core function of the different versions of the theory remain the same.

1. I can waive the duty or leave it in existence before any breach of my claim.

2. I can seek or not seek remedy after a breach of my claim.

3. I can waive or enforce the obligation to implement remedy for the breach of my claim.

Each step includes two choices, thus I as the claim-holder have six distinct Hohfeldian powers (Steiner, 1998: 240). As a result enforcing or waiving a claim is not a single event but happens in stages. Different versions of will theory disagree on whether one needs to have power over all or just some of these steps but the common element is that the claim holder must enjoy decisive control over the effectuation of their claim. Many have observed that this often means that will theory will not recognise the more serious claims as rights, such as the claim not to be enslaved or the claim not to be tortured, as these claims do not have a corresponding power to waive their correlative duties (Wenar, 2005, 239). Therefore will theory restricts the type of relationships that can be considered rights. The charge that will theory also restricts the type of beings that can hold rights is considered in the first paper of this thesis.

Those that adhere to interest theory, such as Joseph Raz, Neil MacCormick and Matthew Kramer, argue that the function of a right is to further a right-holder's interests. Instead of constraining the function of rights to the protection of an agent's choice or free will, interest theory seeks to encompass a wider domain. Interest theorists believe that rights also have an important function in protecting those things, goods and services that are in our 'interest'. Most importantly, those people who may lack the power to obtain these goods for themselves, who lack capacities or are powerless and vulnerable to oppression, are often those that need the protective force of rights the most. An interest that grounds a right in this broad definition is an interest that is deemed worthy of protection as it is of sufficient importance to impose a duty on another person. An interest is generally deemed to be worth protecting and of sufficient importance when it will intrinsically benefit the claim holder (Raz, 1982). Interest theory and will theory therefore fundamentally disagree on the function and justification of a right.

Bridging the Divide

The debate between interest and will theory appears intractable because theorists are arguing over what they deem to be the true function of a right. It is in this sense like the debate over the true function of a car. It may be a hard task indeed to convince a racing car driver that a Volvo is the real 'car' and a Ferrari is not. There have been some recent attempts to bridge the divide between will and interest theory and to put forward a 'third way'.

In 'The Nature of Rights', Leif Wenar presents an analytical framework that he claims will resolve the debate between interest and will theory. Wenar (2005, 224) claims that this new theory is superior to both will and interest theory, as it more closely aligns to the way that rights are used in common discourse. Rowan Cruft (2004) also makes this argument. He states that that both will theory and interest theory are revisionist theories of rights, in the sense that they would both necessitate us revising the way we currently use the term 'right' if we were to put the theories into practice (2004). To solve this problem Wenar puts forward a 'several functions theory' of rights that protects both interests and choices. He argues that only those combinations of Hohfeldian elements that perform one of the six specific functions (exception, discretion, authorization, protection, provision and performance) are rights (Wenar 2005, 252). While Wenar's critique of the restrictiveness of both interest theory and will theory is valid and should be a point of concern for advocates of both theories, his proposed theory does not seem to truly be a 'third way'. As subsequent analysis has argued, Wenar's several functions theory is really an extended version of interest theory (Kramer & Steiner, 2007). While his analysis is insightful and useful, its true value lies in strengthening the already existing interest theory rather than bridging the divide and creating a new one.

Gopal Sreenivasan has also put forward a 'third way' theory in the paper 'A Hybrid Theory of Claim Rights' (2005). In doing so Sreenivasan seeks to address many of the shortcomings of interest and will theory. Unlike Wenar's several functions theory, Sreenivasan does come up with a new theory. Sreenivasan proposes a Complex Hybrid model of rights, stated below;

> (CH) Suppose X is duty-bound to β. Y has a claim right against X that X β just in case:

> Y's measure (and, if Y has a surrogate Z, Z's measure) of control over a duty of X's to β matches (by design) the measure of control that advances Y's interests on balance (Sreenivasan, 2005, 271).

His theory does go much of the way to addressing some of the concerns regarding both will and interest theory. Although his theory concerns itself with the interest of the right-holder it cannot be said to be a simple extension of interest theory as its emphasis sits squarely across interests and choice (articulated here as control). Sreenivasan address the problem that children cannot hold certain powers themselves by introducing a surrogate, Z. However Sreenivasan's theory is certainly complex, so complex in fact that I think it fails on the first critique that those seeking a 'third way' are addressing. It does not seem to reflect the way in which rights are used in reality. Employing Sreenivasan's complex theory would entail a serious shift in how we use 'rights' in public discourse. The disconnect with the way we use rights and the way theorists prescribe them may not be such a problem, however once we admit this, what is there to prefer Sreenivasan's theory over the more established and simpler will and interest theories? Sreenivasan's theory seems to lack the normative pull or weight that drives both the interest and will theories. For this reason it does not effectively bridge the divide.

Understanding of rights, both their structure and justification is fundamental for engaging in the debate about children's rights. As I will set out in the next section the question over the status of children, the function of rights and the way these play out in practice, intersperse and influence all considerations of rights for children. A strong grounding in the debates over both the nature of children and the nature of rights will equip us with the tools and understanding we need to begin to answer the question - 'do children have rights?'. I now turn to how children's rights have been constructed in the literature so far.

1.6 Children's Rights so far

Over the last 40 years children's rights have come a long way as both a concept and a reality. There is a growing body of literature considering the question of children's rights. In this section I will present a brief history of the development of children's rights as a theoretical construct. I will consider the moral status of children within traditional liberal philosophy and the growth of literature on children in rights theory from the 1970's up to the 1990's. I will briefly consider the shift in emphasis after the ratification of the Convention on the Rights of the Child from philosophical to practical and legal considerations and finally provide an overview of the small group of contemporary theorists examining children's rights. I do not intend to provide a comprehensive summary of all that has been written on children's rights but rather an illustrative narrative that follows the development of children's rights as a theoretical concept. I argue that although the literature is growing there are still significant questions to be considered. Many of these questions cannot be considered properly unless they begin from a more solid theoretical understanding of children's rights.

Traditional Political Theory

Children are notably absent from the western liberal philosophical tradition as a genuine subject of philosophical inquiry. John Locke's *Thoughts on Education* along with Rousseau's *Emile* are notable exceptions. Although *Emile* is a seminal text it is widely known that Rousseau was not the great defender of children in practice – he famously left his own illegitimate children at an orphanage. However his words in the preface to *Emile* still tell truth today about children's place in society,

> 'Childhood is unknown. Starting from the false idea one has of it, the farther one goes, the more one loses one's way. The wisest men concentrate on what it is important for men to know without considering what children are in a condition to learn. They are always seeking the man in the child without thinking of what he is before being a man' (Emile, 34).

However it is not that other philosophers ignored childhood altogether; remarks concerning the moral and political status of children are often scattered throughout the work of traditional liberal philosophers. (Turner & Matthews, 1998, 1). However the

remarks are often cursory and not very rigorous. Frequently they make illiberal assumptions about children's moral status. One explanation for why children receive so little attention throughout this literature may be that claims regarding children's moral status were considered obvious, in that they are considered to be trivially true and not susceptible to rational doubt. For example, Hobbes considered children to be 'in most absolute subjection' to the parent (King, 1998, 65). Hobbes assumes that children are not part of the social contract – he states in *De Cive*,

> 'So let us return to the state of nature once again and consider men as though they were suddenly sprung from the earth (like mushrooms) as adults right now' (De Cive, 8.1, 160).

Children are therefore potential problems to Hobbes's theory of the state of nature for people clearly do not spring from the earth like mushrooms, fully formed. Children, for Hobbes, are an exception to the rational liberal agent. In a similar vein, Locke's contractarian theory simply presumes that children lack what adult human beings possess. According to Locke, children lack knowledge, moral sense and reason (Archard, 1998, 87). Children are given a little more attention in the work of John Stuart Mill. However Mill's concern with explaining the status of children arises from his desire to ensure that the argument for the female suffrage which he sets out in *The Subjection of Women* would not be reduced to 'absurdity', by being applied to the enfranchisement of children (Turner, 1998, 137). In short the treatment of children in traditional liberal political philosophy has been that they are obviously and significantly different from adults and therefore do not need to be included in political theory. Consequently it was not considered necessary to explain *why* children did not hold rights.

Child liberation

There was a growing movement throughout the 1970's that it was no longer enough to consider the status of children as 'obvious' and simple assumptions regarding the status of children were inadequate. Their position in social and political life should also be challenged and subject to inquiry. From the growing civil rights, women's rights and gay rights movements arose a children's rights movement that was headlined by a group of scholars who called themselves, child liberationists.

Child liberationists argued that society considerably underestimates the capacities of children. Foster and Freed argued that adults exploited their power over children and that children's inferior status should be radically reassessed (1972, 344). Other liberationists built upon the work of Ariès (Holt, 1975; Farson, 1978). It is here that we see the danger of thinking that childhood *full stop,* not just the *modern* conception of childhood, is a recent invention. Holt and Farson (1975; 1978) argue that once we recognise children as a social construct there is no reason to exclude them from the adult world. To do so would be a form of oppression and unjustified discrimination much like the discrimination levelled against women or African Americans at the time. Child liberationists therefore argue that there was no justified reason that children should be denied the same right as adults. Foster and Freed (1972, 347) state that a child should have the right to 'earn and keep his own earnings', 'to emancipation from the parent-child relationship when that relationship has broken down' and 'to be free of legal disabilities or incapacities save where such are convincingly shown to be necessary and protective of the actual best interest of the child'. Holt and Farson (1975; 1978) advocate a similar set of rights, but go further to suggest that children also had the right to vote, to work, to choose their own education, to use drugs and to control their own sexual lives. The fact that they do not exercise some of these rights is not problematic for child liberationists – this is simply the part of the child's choice regarding the exercise of their rights.

There are major criticisms of the child liberation movement. Hafen argues that there were considerable risks associated with the uncritical transfer of egalitarian concepts to the unique context of the family (Hafen, 1976, 607). Wald argues that liberationists misunderstand the type of rights children held which he claims are primarily rights to protection (1979, 261). Predominantly it has been suggested that liberationists appear to ignore the evidence on developmental growth throughout childhood. Children are not just simply small adults; they have different capacities, competencies and interests. As Fortin argues,

> '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' (Fortin, 2005, 5).

Unlike the women's rights movement or the civil rights movement that sought to demonstrate that those who are subject to different treatment do not hold different (or at least significantly different) capacities, children *are* different in many real and relevant ways. Very young children are dependent on others. It is arguable that child liberationists did the children's rights movement a disservice by creating the impression that it is all about giving children adult freedoms and rights (Fortin, 2005, 4). Hafen's critique demonstrates that the immediate reaction to child liberation was to reject the idea of children's rights altogether. Hafen argues that children's rights could, in the long term, harm children's interests and destroy the family unit. Children should not be 'abandoned to their rights' (Hafen 1976, 644). In a similar vein, Goldstein, Freud and Solnit (1979) argue that children have a right to autonomous parents and family integrity; therefore the rights of parents are intimately connected to the rights of children. Caught up in this is a misunderstanding that the children's rights movement is solely concerned with guaranteeing and achieving children's autonomy rights. This mischaracterises the debate. Where autonomy rights *are* sought they are usually of a very different kind from those held by adults.

Howard Cohen differs from other liberationists by acknowledging and conceding that children have lesser and different capacities from adults. However he argues that it is not true that these incapacities disqualify children from holding rights. This is because capacities can be 'borrowed'. Cohen argues that most adults do not have all capacities they need in order to exercise their rights. For example I have a right to a fair trial, but I do not have the legal knowledge or skills to ensure this myself; however I can engage a lawyer and 'borrow' their legal capacities (Cohen, 1980, 56). Cohen therefore employs a different version of the arbitrariness argument – that because all adults use and borrow capacities, any line which uses age to afford people rights from can be shown to be arbitrary (Cohen, 1980, 48). Therefore there is no real threshold at which one gains a sufficient set of capacities and children should be able to 'borrow' the capacities they need through a system of child 'agents'. Child agents could advise children with a view to ensure that the child's right is properly exercised on the child's behalf. Yet there are clear questions regarding Cohen's idea of 'borrowing' capacities. Who are these advisors? What principles should guide the advisors - the opinions of the child or their best interest? Is the child free to not follow the advice the advisor gives? Archard (1993, 26-27) provides a sustained critique of Cohen's theory. Cohen's position poses problems, but it successfully challenges the idea of how capacity relates to rights.

Although the liberationists might go further than most regarding which particular rights they afford to children, the presence of their work within the scholastic tradition of children's rights represents a shift towards recognising the developing capacities of children. As the United Nations Convention on the Rights of the Child outlines, children's rights are not only about recognising children's capacity to contribute to their own lives but also to protect children from the exploitation of adults. It is not just children who hold rights to 'both care for one purpose and autonomy or self-determination for another' (Fortin, 2005, 6). This is also true for all human rights.

Children and theories of rights

The work of child liberationists has changed the agenda. It is no longer acceptable to completely exclude all discussion of children. Those devising a theory of rights must now consider the question of rights for children one way or another. As a consequence much of the good philosophical discussion on the question of whether children have rights arose from the consideration of children as a 'test-case' for the two dominant theories of rights, will and interest theory. Will theorists' definition of a right necessitates that children cannot hold rights, yet will theorists have famously had little problem grabbing what Kramer calls this 'nettle' boldly (1998, 69). Legal theorist, H.L.A Hart, originally embraced the position that will theory could not recognise children as right holders. In 1955 Hart claimed that the use of 'right' to describe the existence of a duty to children is 'idle use' and confuses it with other moral expressions (Hart, 1955, 82). In the 1980's Hart refined his position and attempted to reconcile the notion of children as right-holders within will theory. He argued that when infants or younger children do not hold the enforcement or waiver powers they can be exercised on their behalf by an appointed representative. Even though this representative is exercising these powers,

a) the representative is bound by the consideration that their exercise of power is determined by what the right-holder would have done if *sui juris*[22]; and

b) when the right-holder becomes *sui juris* they can exercise the powers without

[22] In civil law the phrase sui juris indicates legal competence, a person who is of full age and full legal capacity (Butterworths Concise Australian Legal Dictionary, 2001, 45)

any transfer or fresh assignment.

Therefore it can be said that the powers remain with the right-holder throughout (Hart, 1982, 184). Those that support Hart's revised position on children's rights (Flathman, 1976; Ross, 1958; Simmonds, 1998, 226) believe that he offers a compelling argument for how legal rights can be ascribed to children even when the relevant powers of waiver or enforcement are exercised by adults. However it is apparent that this revised argument represents a departure from traditional will theory, for how can a power reside with a child if a) they do not have the factual competence necessary to hold the power and b) the power is exercised by another? The Hohfeldian analytical logic seems to break down at this point. In addition Hart's revision suffers from epistemic weaknesses due to considerable problems with the first constraint - that the appointed representative must act as the right-holder would have done if *sui juris*. Actual knowledge of what the child would have done if they were factually competent is clearly epistemologically inaccessible; we cannot know what they would have chosen or what they would have judged to be beneficial to them. Even the idea of retrospective assessment is fraught. The child as an adult is still not the child as a child and the child with full capacities need not be the child as an adult. Therefore despite the constraints laid on the representative, in practical terms the power would seem to lie with the representative and not the child.

Hart's concessions are not enough for most scholars and other theorists have mounted sustained attacks against will theory regarding the question of children's rights in order to demonstrate the superiority of interest theory. MacCormick's 1976 article employed rights for children as a 'test case' to assess each theory, arguing that will theory's inability to explain rights for children was sufficient evidence to reject it in favour of interest theory. Campbell (1992) also argues that the will theory is inadequate as an expression of the 'moral significance of persons' as it cannot account for children.

Campbell's paper was primarily written as a response to Onora O'Neill's (1988) critique of children's rights. O'Neill's opposition to children's rights is one that sits outside the interest and will theory debate. O'Neill argues that we should start our moral thinking on children by first asking what adults owe children and by specifying our obligations to children. She argues that there exist two types of obligations, perfect and imperfect. Perfect obligations are those we owe to specific children or to all children, for example

we have a perfect obligation not to physically abuse all children and specific children we come into contact with. Imperfect obligations are those obligations that are not owed to particular children but that we cannot owe to all children. Some rights correspond with perfect duties but other rights correspond with imperfect duties. Consider for example a child's right to adequate nutrition, it cannot be that as individuals we owe all children this, we cannot possibly fulfil this. Therefore *which* children do we owe this obligation to (O'Neill 1988, 448)? Thinking of what we owe children in terms of rights therefore presents a 'blurred picture' (O'Neill 1988, 445). O'Neill's basic criticism here is that rights only tell us part of the story. It may even be true that we can talk about our moral relationship to very young children by articulating it by reference to those Hohfeldian elements that do not necessitate capacity or competence. For example children can hold immunities that protect them from the actions of others and as previously discussed Hohfeldian liberties can be protected by other claims and duties. Rights as Hohfeldian claims are not the be all and end all of morality; however they are useful and powerful tools in our moral arsenal. O'Neill's argument urges us to give up the idea of rights for children altogether and by doing this we commit her previous criticism; we miss part of the picture.

O'Neill's more worrying criticism is that children's main remedy is 'to grow up' and that rights are inappropriate tools for children, as they are powerless to claim them. Yet this I think, is an oversimplification on O'Neill's part of rights based thinking. Rights do not have to always be framed as things that are held by disadvantaged groups against a powerful majority. Rights can be useful ways to articulate relationships between people, to demarcate choices and interests and to help guide our actions towards others. A point I hope will become clearer as this thesis progresses.

The treatment of children in will and interest theory is considered in more detail in the first paper of this thesis. This debate inspired a collection of work considering the question of whether children have rights from a philosophical and theoretical perspective. Much of the work has been primarily concerned with outlining the different types of rights children held. Eekelaar (1986, 171-177) provides a threefold taxonomy for the type of rights children hold. These include rights that protect basic interests such as healthcare, rights that protect developmental interests and rights that protect autonomy interests. Freeman (1997) proposes a fourfold taxonomy, between welfare, protective, social justice and autonomy rights. Campbell (1992) splits rights up according

to the person, the child, the juvenile and the future adult. Feinberg (1980) similarly identifies rights that are only held by adults - A rights - rights that are only held by children - C rights - and rights that are held both by adults and children - AC rights. It is tempting to engage in the activity of splitting different types of rights up in this way.[23] However strict adherence to these categories can be misleading. Furthermore by identifying these different categories of rights these legal theorists such as Campbell and Feinberg are seeking to address the problem of a child's developing capacities and competencies. However simply identifying categories of rights does not properly address the problem since the margins of the categories are still arbitrary. We must still engage in the critical task of theoretically *justifying* a right rather than noting its similarity to other rights of a particular category.

Convention on the Rights of the Child

The development of this theoretical literature is punctuated by perhaps the biggest real step forward in the children's rights movement: the adoption of the United Nations Convention on the Rights of the Child (CROC) by the United Nations General Assembly in 1989. CROC is an ambitious document that begins with the assumption that children, as human beings, are entitled to rights.

The vulnerability of children as a group had long been recognised on the international stage. The Declaration of the Rights of the Child or the 'Declaration of Geneva' was adopted by the fifth assembly of the League of Nations in 1924. It contained five basic principles that were seen to work as guiding principles in the work of child welfare. The more comprehensive Declaration of the Rights of the Child (1959) was adopted by the General Assembly of the United Nations and contained an expanded 10 principles. The rights listed in the Declaration did not constitute legal obligations and were therefore not binding on member states. The Declaration was also dominated with outdated stereotypical ideas, such as the proper roles played by mothers and fathers in the family (Fortin, 2005, 35). The principles were overly general and contained no recognition that

[23] Indeed I do it myself in the first paper of this thesis.

children could hold first generation political or civil rights.[24] However it does represent the first real attempt to describe, in an organised way, a child's overriding claims.

By the 1970's there was a global push for a document that would guarantee legal obligations. It was believed that governments would continue to ignore their obligations to children unless a document was binding in a way that was sufficiently specific and realistic (Fortin, 2005, 37). Following a period of consultation and drafting, the Convention on the Rights of the Child was submitted to the Commission on Human Rights for approval in 1989, subsequently adopted by the General Assembly and entered into force in 1990. CROC contains 54 articles and departs from earlier documents that primarily focused on a child's need for care. As such it reflects the growing recognition that children are not just in need of protection but active participants in social and political life. However CROC contains what has been called 'a strange mix of idealism and practical realism' (Fortin, 2005, 37). Some articles contain detailed policy provisions while others contain broad aspirational philosophical statements. There is concern regarding whether some of these articles can ever be translated into meaningful legal rights.

The Committee on the Rights of the Child has elevated article two - the freedom from discrimination, article three - the child's best interests, article six - the right to life and article twelve - respect for the child's view and right to participate to the status of general principles. None are more important than the others but it is often pointed out that article three concerning the child's best interests, underpins all of the other articles. Much of the literature following the adoption of CROC has been concerned with the interpretation of this key principle of the best interests of the child (see Alston, 1994; Hammarberg, 1990; Parker, 1994). Understandably, the focus post CROC has been on the interpretation and implementation of the Convention (Himes, 1995; Andrews and Kaufman, 1999; Tang, 2003). CROC does not provide a detailed analysis on *why* children have rights. Indeed it's not its job to do so. However this has the effect of neutralising

[24] First generation civil and political rights are often distinguished from second generation economic, social and cultural rights. The distinction is more historical than categorical. In the post Cold War world most treaties now recognise that both types of rights are needed for effective implementation. Indeed the Convention on the Rights of the Child (1989) contains both types of rights and does not seek to distinguish between the two.

the question of why children have rights. Most scholars can now simply point to the existence of the Convention to answer the prior question of, 'do children have rights'. The role of political theory and philosophy is to continue to critique this, to counter the assumption that if children do have rights then it must be those particular rights set out in the Convention.

Legal scholarship on children's rights is therefore primarily concerned with the jurisprudence of the convention. This approach takes CROC as the starting point and seeks to justify the rights it outlines. I think this is the wrong way around. The adoption of CROC by the international community has not resolved the disagreement that exists regarding children as right-holders. The concerns raised in earlier literature still stand. In fact, if anything, CROC adds an added layer of complexity to the debate. Language in CROC is often promising, such as reference to the 'evolving capacities' of the child, yet there is no clear definition in the treaty document on what these are, how they should be treated and how they influence the implementation of other rights. The approach I take throughout this thesis is 'bottom up' rather than 'top down'. I start by piecing together the theory of why children hold rights and then applying this to cases to determine how we should shape the corresponding duties. However this does not mean that CROC is not valuable, it will probably become clear as I refer to CROC at numerous times throughout the various papers. CROC serves as a reference point, a point of critical examination to be revised and improved upon, a basis on which to deepen our understanding and from which to launch normative and philosophical discussions.

Contemporary Theorists

Contemporary discussion of children's rights consists of a small group of scholars who consider children from a philosophical and political perspective. This work includes both a critique of children's rights (especially for very young children) and also thoughtful and thorough accounts of how we can begin to deepen our understanding of how rights might work for children. James Griffin offers a more contemporary argument for why children do not hold rights (2002). Griffin argues that the language of rights is best reserved for those who are capable of agency. Brighouse (2002, 45-46) however argues that it might be quite plausible to attribute to children rights that protect their welfare interests, but it is inappropriate to ascribe agency rights to children. The existence of

contemporary theorists who continue to promote the idea that children cannot hold rights based on arguments of agency, demonstrates the importance of unpacking and examining these arguments in more detail.

David Archard (2003; 2004) offers comprehensive treatment of the moral status of children throughout history and an analysis of the child's relationship with the state. He presents an argument for the relationship between family, children and the state. Samantha Brennan and Robert Noggle (1997) argue that children have basic human rights like adults but that they do not have the same type of 'role-dependent' rights that adults have. Building upon this work, Colin MacLeod (2006) puts forward an 'Egalitarian Provision Thesis' – that children are entitled to an upbringing that gives them prospects for development and happiness equal to those of other children of their generation. In establishing a theory of 'role dependent' rights Brennan and Noggle (1997, 5) are attempting to tread the middle ground between the Equal Consideration Thesis – that children deserve equal moral consideration, and the Unequal Treatment Thesis – that it is justified to treat children differently from adults. It is a similar 'middle line' that this thesis seeks to establish – that children are of the same moral status as adults in that they hold rights, but that they may not hold all the same rights as adults. Brennan and Noggle (1997, 7) argue that,

> A person can have a role-dependent right only if she can fill the role in question. When rights depend on roles, if you can't play the role, then you don't get the right. So whether one has a role-dependent right is partly a function of the capacities and abilities of the person to play the role associated with that right.

As will become clear throughout this thesis, Brennan and Noggle's theory comes close to what I propose. I argue that the allocation of rights turns on interests and the individual's competence to realise the benefit of an interest. I directly address the difference between my own theory and that of Brennan and Noggle's in the concluding chapter.

Feminist philosophers and writers also consider the rights of the child. This work includes critical feminist critiques of the Convention (Olsen, 1992) and of the law's treatment of children broadly conceived (Bridgeman and Monk, 2002). It is often noted that the concerns of children are similar in many ways to those of women, for example both groups are subject to the implications of the public/private divide which often

obscures the interests of women and children. So in some sense it is correct to point out the similarities but in other ways so close a comparison is unhelpful. As previously mentioned children *are* different in their rapidly developing capacities and competencies. The work of Martha Minow (1986; 1995) identifies the way in which a feminist critique can helpfully enrich our understanding of children's rights. A feminist methodology identifies types of interests, such as 'the importance of connection, care-taking, and social relationships' that might have previously been overlooked (Minow, 1986, 3). Minow also identifies one important similarity between the children's rights and women's rights movement - the previously mentioned tension between equal consideration and special protections or treatment which 'complicate the meaning and shape of rights sought by advocates for women' (Minow, 1986, 14). Therefore feminist scholarship is useful for expanding, critiquing and challenging children's rights.

In order to build upon the work of contemporary theorists, the challenge, as articulated by Archard and MacLeod (2002, 4), is to;

> 'deepen our understanding of children's interests and to explore how the conceptualization of children's interest affects the character of the moral claims they have'.

With the exception of those just mentioned, there is a notable lack of attention being paid to the philosophy of children's rights since the start of the new millennium. In this sense, this thesis examines a question that has been addressed by some but continues to lack the debate and attention that other areas of human rights scholarship garners.

One way to rise to this challenge is to further investigate the relationship between capacity, competence and rights. Much of the literature continues to employ a simplistic understanding of capacity. Most theorists argue that children's incapacities will exclude them from holding all rights. In this way they are seeking to stop a slide towards the type of claims and rights made by child liberationists and to walk Brennan and Noggle's middle line. Yet it is often not entirely clear what aspect of a child's developing capacities prevents them from holding certain rights. For example when Griffin (2002, 21) sets out his argument for restriction of children from the realm of rights he simply states, 'human infants are not agents', agents, he says 'have the capacities to reflect and choose and act'. Yet what does this really mean? Is one's capacity to choose and act the same as one's actual ability to choose and act? Many children do choose and act, but

surely the problem is that they do not do so rationally. Furthermore how is it that a lack of agency restricts one's ability to hold rights at all? Even for those who afford children some rights it is not clear. Brighouse (2002) also uses ability, capacity or competences interchangeably to refer to acting on one's conception of the good. Do they all mean the same thing? Although he recognises that children learn through experience, the role of the development of these capacities is not fully considered (Brighouse 2002, 45-46).

To restate, this thesis builds upon the literature of rights and children to address four aims;

1) to present a theoretical argument for why children have rights;

2) to examine and unpack the role of 'capacity' and 'competence' in rights theory and their application to children's rights;

3) to apply the theory of children's rights to particular cases; and

4) to demonstrate the power of a strong theory in bringing children's rights from the realm of 'slogan' into reality.

In doing so it makes some claims about the idea of 'children's rights' as a separate category from general rights, begins to tackle the issue of children's developing capacities and demonstrates how understanding children's rights enriches our understanding of rights in general. This thesis does not represent the conclusion to the debate over children's rights and throughout the concluding chapter I identify directions for future research.

Conclusion

Although children have rights in law it is important to build a strong theory as to *why* they have these rights. This is necessary as the central question of 'do children have right?' remains contested. A strong theory of rights for children will aid their implementation by unpacking complex and long existing assumptions and providing pathways into new policy problems.

This thesis presents and defends an argument that children indeed *do* have rights. By examining the problem throughout five papers it builds up a theory of why children have rights with particular reference to the concepts of capacity and competence. In the second part of the thesis I apply this theory to two distinct case studies, the right to be loved and the right to know one's genetic parents. The final chapter of the thesis argues that such theoretical consideration is important as it provides us with the tools to properly address practical problems for children in the real world. In this sense I am putting forward an argument about rights in general, that they are at their most powerful when they can be used to enact change and protect those things we think to be most important, not only on paper but also in reality.

This introductory chapter addressed two questions central to the thesis, what are children and what are rights. I argued that children are young human beings defined by their lesser and rapidly developing capacities. Children are both a concept and a conception and the normative significance attached to childhood is socially constructed. However the difficulties in defining children are not fatal to children's rights. Rights can be understood in terms of both their structure and justification. I outlined the Hohfeldian framework of rights and the two leading theories of their justification; will and interest theory, and addressed recent work to bridge the divide. I argued that understanding both the structure and justification for rights equips us with the tools to assess whether children can hold rights.

Finally this introductory chapter presented an overview of the children's rights literature so far. Although children are largely absent from traditional liberal political theory, the work of the child liberationists in the 1970's through to the treatment of children by leading rights theorists has seen a growing base of literature addressing rights for children. Yet too often children's rights are used as a test case for theories. The argument over the justification for children's rights is often seen as a proxy for the argument over the nature of rights in general. The adoption of the UN Convention on the Rights of the Child (CROC) in 1989 however, represented a shift in focus towards interpretation and implementation. Despite this a small group of contemporary scholars continue to examine the rights of the child from a theoretical perspective.

Many aspects of the question, 'do children have rights' need to be considered further, including the relationship between capacity, competence and rights. The following

chapters begin the investigations into the nature of rights, the way they are constructed for children and the role capacity and competence plays. It concludes that children have rights because they have interests that are of sufficient importance to be protected and these interests ground claims that produce duties in others to act or refrain from acting. It is not conceptually necessary for a child to hold the power to enforce or waive their claim in order to hold a right. Consequently it is not necessary for a child to be competent in autonomous choice to be the type of being that may hold rights. However a child must be competent in realising the interest to which a particular claim pertains. Furthermore the duty correlated with a child's claims must be reasonable and achievable and the duty-holder must hold the capacity to fulfil the correlative duty. Children are in a special category of right holders as their capacities are rapidly evolving. As a consequence they hold claims to the development of particularly important capacities that produces duties in others to assist in their development.

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Chapter Two

Capacity, claims and children's rights

Mhairi Cowden

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Capacity, claims and children's rights

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Abstract Children are often denied rights on the basis of their incompetence. A theory of rights for children is essential for consideration of the child's political status, yet the debate surrounding children's rights has been characterised by the divisive concept of 'capacity' typified in the two leading rights theory, Interest Theory and Will Theory. This article will provide a thorough analysis of the relationship between capacity, competence and rights. Although Interest Theory has successfully dealt with the competence requirement for being a right-holder, the competence requirement still holds for the type of rights a child holds. Children's interests are determined sufficiently strong to found a right when the claim-holder has the competence to realise the benefit to which that interest pertains. This allows us to recognise children as right-holders while constraining the types of rights they hold according to their developing competencies.
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Keywords: children; rights; W.N. Hohfeld; capacity; competence

We often assume that it is correct to deny children rights by reference to their lack of capacity. For example the debate about lowering the voting age in Australia is dominated by claims that those younger than 18 lack the capacity to understand the complex political system.[1] We find it acceptable that there is a fixed age in law below which one is incapable of consenting to sex, driving a car or incompetent to stand trial. Many of us laugh at cartoons in the media depicting children asking their lawyers to negotiate higher levels of pocket money (Fortin, 2003, p. 10). But why? It seems that a child's lack of capacity sets her apart from adults in such a way that the systematic denial of rights is entirely appropriate. If this is true then it is important to locate the basis of this capacity argument within rights theory.

Locating the correct relevance of capacity (or more correctly, incapacity) within rights theory will help to shed light on the nature of children's rights.

Many will be surprised to learn that although much of our contemporary political discourse is dominated by the concept of rights, there still exists a largely unresolved debate over whether children actually have them.[2] This may not be as surprising to others who have observed the traditional neglect of children throughout moral and political philosophy.[3] Exploring the relationship between capacity and rights is part of the broader project of rectifying this neglect.

This article will offer an explanation of the proper relationship between rights and capacity and how this affects children as right-holders. After setting up a broad definition of children and childhood I will identify the 'argument from incompetence', which seeks to deny or restrict children's rights by reference to their incapacity. I will then introduce some conceptual distinctions between capacity, competence and ableness, arguing that we need such clarity to properly understand the relationship between these concepts and rights theory.

The second part of the article will examine the two leading theories of rights – will theory and interest theory. In will theory children are denied the status of right-holder owing to a focus on their incapacities whereas interest theory's shift from 'self-determination' to the protection of interests does not account for the limitations a child's developing capacities present. This article employs Hohfeld's analytical rights framework to determine how a child's capacity for enforcement and realisation influences the different concepts that may constitute a right and concludes that the Hohfeldian incident of power is the most relevant for the question of capacity.

Finally I will argue that while competence may not be necessary for the enforcement/waiver of a right, it is necessary for the realisation of a right. Competence plays an integral role in interest theory, one that is fundamental to understanding the structure of children's rights. Rights are constrained by the competence of the claim-holder and the importance of their interest to impose upon others' Hohfeldian liberties. Conceiving of rights in this way will provide us with the building blocks with which to begin more complicated theoretical conversations concerning the position of children within moral and political theory.

Concepts and Definitions

As Brocklehurst points out, there is 'no single or agreed definition of childhood recognised or acted upon worldwide (2006, p. 1). The concept of childhood is used to identify everyone from newborn babies to young adolescents, and the meaning of the term differs greatly across history and cultural traditions (Aries, 1962). The diverse nature and significance of childhood presents deep challenges for anyone wishing to bring analytical rigour to the subject.

  1470-8914 **Contemporary Political Theory** 1–19

Article One of the United Nations Convention on the Rights of the Child (UNCRC) defines children as 'every human being below the age of eighteen unless under the law applicable to the child, majority is attained earlier' (UNCRC, Article 1). Much has been said about the arbitrary nature of any age-related definition of children (Archard, 2004, p. 85). Given the gradual and variable nature of human development any fixed age will be open to the challenge that some individuals are physically and cognitively adult long before they are recognised so by the state. Lowering the age from 18, however, would similarly draw criticism that some 16-year-olds are not yet mature enough to be considered adults. There will always be outliers in any age-related definition of childhood.

Despite the difficulty of age-related definitions, one thing is certain, the concept of childhood cannot be understood unless we have a concept of adulthood. A child is defined as one who is *not yet* adult. If being adult is when one is in full control of one's factual capacities then childhood can be generally understood as a period of reduced physical and cognitive capacities coupled with a rapid development of these capacities. It is a time when one goes from total dependence as a baby to relative independence as an adult. As Archard states, 'the underdevelopment of children is a biological given, a brute fact of human existence' (2004, p. 25). However, the concept of childhood is not entirely biological but is also socially constructed. The way in which we understand and attach meaning to these 'biological givens' is created by the society we live in. Therefore the significance attributed to this period of cognitive, moral and physical development has differed greatly across history and continues to differ across cultures today (Veerman, 1992; Brocklehurst, 2006, p. 1).

While recognising the differing significance of childhood, I will take childhood simply to mean the period of time before one becomes an adult, usually defined by lesser physical and cognitive capacities coupled with the rapid development of these capacities. This definition is intentionally broad and does not seek to identify an age by which one ceases to be a child. The vast difference in capacities between a 2-year-old child and a 14-year-old child, the development and evolution of children's capacities, is what any theory of rights must account for. It must explain how to recognise children as right-holders *despite* their differing capacities yet also taking account of the *importance* of these capacities. The approach that I propose throughout blurs the line between child and adult. I shall argue that rights are contingent on an individual's interests and ability to realise the benefit of the interest, and therefore the distinction between child and adult becomes largely unimportant for right theory.

The most common argument employed when denying children of any age the rights afforded to adults is that they have reduced physical and cognitive

capacities. For simplicity I will refer to this as the argument from incompetence. The argument from incompetence generally can be described as thus:

> To hold a right one must have certain capacities, such as the capacity to feel pain, make choices or to think rationally. Children are in a state of developing those capacities and acquiring competency and therefore cannot hold the rights, unlike adults whose physical and cognitive competencies are fully developed.

The argument from incompetence can be seen throughout traditional liberal philosophy. Hobbes regarded children as lacking the capacity to enter into the social contract because of their inability to reason (1985), Locke argued that children were in a temporary state of inequality because of their irrationality (2004, p. 306) and John Stuart Mill stated with regard to his political theory that it was 'hardly necessary to say ... we are not speaking of children' (1992, pp. 13–14).

A version of the argument from incompetence pervades one of the leading theories of rights – the will or choice theory, hereafter referred to as will theory (Hart, 1955; Wellman, 1995; Steiner, 1998). Will theory claims that children cannot be right bearers because they lack the capacity to make rational choices. It is widely recognised by developmental psychologists that children are not born with the capacity to make rational choices, and that this is a capacity that they develop (Piaget, 2004). Therefore the argument from incompetence, as espoused by will theorists, seems to be fatal for understanding children as rights bearers. Recent literature on the rights of children has focused on 'autonomy' rights – those rights that involve the uncoerced choices and actions of the right-holder according to their conception of the good life (Brennan, 2002; Brighouse, 2002). Brighouse argues that it is not sensible to ascribe agency rights to children (2002). Griffin, too, in an extension of his definition of human rights, has argued that infants do not have rights by virtue of their lack of the capacity for agency (2002).

If such significance is placed on a child's lack of capacity – with implications for their moral and political status – then it seems necessary to locate the exact way in which capacity, or the lack of it, is important to rights theory. To do this I will employ a Hohfeldian framework to examine how exactly capacity is relevant to will theory. I will then examine the rival alternative, interest theory, and argue that even though interest theory makes it conceptually possible for children to be right-holders, it has not completely overcome the argument from incompetence.

Before examining each theory of right it is useful to introduce some conceptual clarifications. Although the definition of childhood is sufficiently

broad for our purposes, our understanding of capacities must be further refined. So far throughout this article I have been using the term capacity in its broadest sense, encompassing both capacity and competence. Although the terms capacity and competence are often used interchangeably throughout the children rights literature there are important conceptual differences between the two. Any consideration of capacity is best understood through a breakdown of the definitions of capacity, competence and ableness.[4]

Capacity can be understood as one's counterfactual ability, and competence as one's actual ability. This distinction between capacity and competence can be seen through the simple example of the student and the turtle. Neither the turtle nor the student is currently capable of speaking Russian; however, while the student can take Russian lessons and will one day be able to speak the language, the turtle will never be able to, no matter how many lessons he takes. In this way both the turtle and the student currently lack the *competence* to speak Russian; however, the student has the *capacity* to one day be competent (Cowden and Lau, 2011). A further layer can be added through the concept of ableness (Morriss, 2002, p. 80). Ableness is one's specific competence plus opportunity, for example I may have the competence to get married, but I cannot do so because I have no one to marry. In this sense I am not *able*. Ableness encompasses the external resources and opportunities one needs to complete an act (Dowding, 2006, p. 325). The relationship between the three concepts can be seen below Figure 1.

This raises an important moral distinction between children and other groups of incompetents such as animals. Although a young baby and a puppy may both currently be incompetent, a young child will develop the competencies to one day make complex moral decisions while the puppy will not.

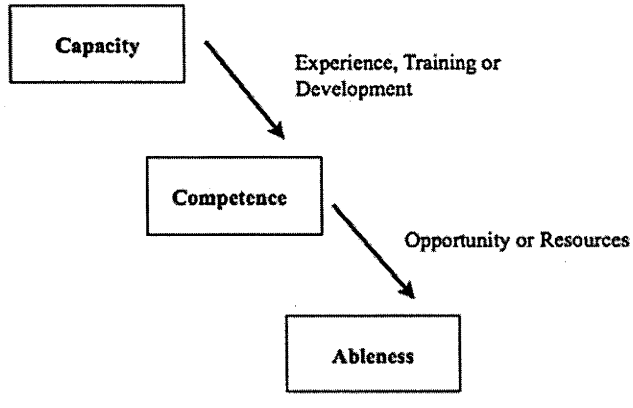

Figure 1: The relationship between capacity, competence and ableness

As we will see will theory places both children and animals in the same category; however, a proper understanding of the distinction between capacity and competence shows that there is a distinction. This distinction, I believe, is sufficient to warrant acknowledgement in any theory of rights. It is relevant therefore to ask whether the denial of rights is based on one's actual competence or one's capacity.

Theories and Functions of Rights

All assertions of rights can be understood in terms of four basic elements, the Hohfeldian incidents (Wenar, 2005, p. 2). Hohfeld's framework of rights is an exercise in analytical jurisprudence and logical reasoning, separate from the contentious disagreement surrounding the normative force of rights. The Hohfeldian framework can therefore provide us with the necessary tools in order to engage in a clear, reasoned argument regarding the proper function of rights.

The Hohfeldian rights framework unpacks the internal structure of a 'right' into eight incidents: claim, duty, liberty, no claim, power, liability, immunity and disability. The relationship between these can be seen below Figure 2.

A/B can be understood as 'When there is A, there is no B'

A – B can be understood as 'When there is A, there is B'

By briefly examining the four prominent Hohfeldian incidents – claim, liberty, power and immunity – we can begin to pinpoint the exact issue capacity or competence poses for a child's right.

In Hohfeldian terms, *A has a claim that B do α if and only if B has a duty to A to do α*. The Hohfeldian framework stipulates that a claim always has a correlative duty specified by reference to the actions of the object that bears the correlative duty. A's claim creates a duty in B to (1) abstain from interference or (2) render assistance or remuneration (Wenar, 2005, p. 7). I have a claim to

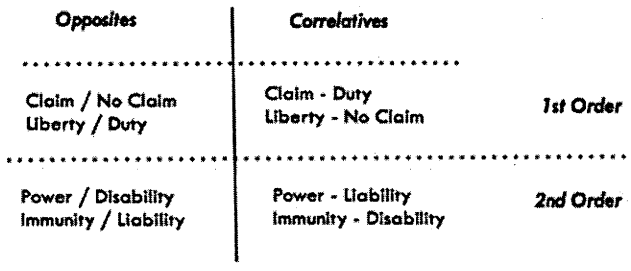

Figure 2: The Hohfeldian rights framework

my life and therefore you have a duty not to kill me. As a claim is always defined by the actions of the duty bearer, neither capacity nor competency on the part of the claim-holder is relevant to their status within Hohfeld's framework. A child's incapacity or lack of competence does not prevent them from being a claim-holder.

Within Hohfeld's framework *A has a liberty to do α if and only if A has no duty not to do α*. A liberty is specified by reference to the actions of, A, the liberty-holder. For example my liberty to ride my bike is my freedom from any duty to refrain from riding my bike. A liberty is not dependent on the liberty-holder's actual competence or capacity to exercise the liberty even though it is defined by the actions of the liberty-holder (Sumner, 1987). For example, if I break my leg and am bound to bedrest, I am still at liberty to walk down the street, even though I am currently unable to exercise this liberty. In this way a liberty is not concerned with the liberty-holder's competence or capacity. If this holds true, then a child's developing capacities and competencies do not preclude them from holding a liberty. A baby holds a liberty to walk down the street before it has developed the actual competence to do so.

A power consists in one's ability to effect changes in other's or one's own claims and duties (Sumner, 1987). I have a power to enforce my claim to exclusive possession by removing a squatter from my land; I also have the power to waive my claim to exclusive possession to allow him to stay. Therefore: *A has power if and only if A has the ability to alter her own or another's Hohfeldian incidents.*

Powers like Liberties are specified in reference to the actions of the holder. However, unlike a liberty, in order to hold a power, one must be factually competent (Sumner, 1987; Kramer, 1998). There is a difference between factual and legal competence as one can be factually competent in an act but not be legally authorised (Kramer, 1998, p. 69). For example one may be legally authorised to drive a car, but be temporarily factually incompetent to do so due to a broken arm. Therefore for a child to hold a power we must consider their competence. We are not concerned with one's counterfactual capacity to alter one's own or another's Hohfeldian incidents but with one's actual competence. For example, if I am in a coma I may have the capacity to speak and make decisions regarding my life and property but currently lack the competence to do so. This incompetence means I lack the power to waive my rights.

The necessity of factual competency poses a problem for children because they are, at any given time, at different stages of gaining both physical and cognitive competency. Therefore at varying points of their development they may not have the factual competency required to hold a power.

One has immunity when one is shielded from another's power. A landowner's immunity prevents the government from compulsorily acquiring

their land without just compensation. Therefore: *A has an immunity if and only if B lacks the ability to alter A's Hohfeldian incidents.* As an immunity relates to one's protection from the exercise of another's power, not to the immunity holder's capacity or competence, therefore a child would seem to be equally capable of holding an immunity as an adult.

The Hohfeldian framework demonstrates that when we consider the essential building blocks of rights, it is the incident of power that is of most concern for children as right-holders. For the majority of Hohfeldian incidents – claim, liberty and immunity – a child's developing capacities and competencies pose no problem. We can also observe that it is competence, one's actual ability to do the act, and not capacity, that is necessary for a child to hold a power. Having identified that it is the Hohfeldian incident of power that is relevant to competence we can now examine what part power has to play in the two competing understandings of the function of rights, will theory and interest theory.

Will theory understands rights as normative allocations of freedom; they demarcate domains or spheres of practical choice where individuals are not subject to interference (Steiner, 1998, p. 238). Thus a right makes the right-holder a 'small scale sovereign' (Hart, 1982, p. 183). The function of the right is to give its holder power over another's duty. Therefore a *will theory right = Hohfeldian claim + Hohfeldian power.* The Hohfeldian rights framework tells us that one must have factual competence in order to hold a power. Therefore for a child to be able to hold a will theory right they must be factually competent of the rational choice to enforce or waive one's right (Kramer, 1998, p. 69).

It is this emphasis on factual competency and the necessity of the inclusion of power within a will theorist's definition of a right that is fatal for children's rights. Studies show that very young children do not have the competence to distinguish between self and others; it is clear that without such a competence a very young child would be incapable of making the decisions relating to the enforcement or waiver of their claims,[5] because to make such a decision would necessarily involve the ability to conceive of interpersonal concepts such as 'claim' (Piaget, 2004; Lansdown, 2005, p. xiii).

Will theorists have famously had little problem boldly grasping this nettle. As children, particularly infants and young children, are incompetent to engage in enforcement and waiver decisions, they cannot hold the enforcement/waiver powers and therefore cannot hold rights (Hart, 1955). The distinctive feature of children's rights in will theory seems to be that they do not exist (Campbell, 1992, p. 2).

Will theory's emphasis on choice has a 'confining effect' on the articulation of children's rights that cannot be avoided (Federle, 1994, p. 348). Children's state of evolving capacities means that according to will theory they fall into

the same category as all other non right-holders, such as the mentally incapacitated, animals or inanimate objects. Will theory therefore is unable to distinguish between children and other incapacitated groups; it fails to recognise that although children may not currently have the requisite competency, they do hold capacities – a point that seems to distinguish them from those individuals who are static in their incompetence. It is owing to these difficulties that many reject will theory as an appropriate theory to properly define how we wish to use rights.

Interest theory holds that the function of a right is to further a right-holder's interests. Instead of constraining the function of rights to the protection of an agent's choice or free will, interest theory seeks to encompass a wider domain. Interest theorists argue that a right's function is to protect those things, goods and services that are so intrinsically important to us that they are in our interest. Those people who may lack the power to obtain these goods for themselves, who lack competencies, are often those that need the protective force of rights the most.

In this way Kramer defines rights as 'modes of protection for interests that are treated as worthy of protection', and Raz states that 'x has a right if ... an aspect of x's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty' (Raz, 1984, p. 195; Kramer, 1998, p. 79). Therefore an *interest theory right = Hohfeldian claim that protects an interest worthy of protection.*

An interest deemed worthy of protection is one of sufficient importance to impose a duty on another person. An interest is of sufficient importance when it will benefit the claim-holder. However, the most important distinction between will theory and interest theory is that a claim protecting an interest does not need to be combined with the power to waive or enforce this claim. The power can theoretically lie outside of the claim-holder without damaging the conceptual coherence of the claim. A's competency to demand or waive the enforcement of a right is neither sufficient nor necessary for A to be endowed with that right (Kramer, 1998, p. 62). For example, consider the fact that I am in a coma because I have suffered a violent and unprovoked beating. I am not able to go to the courts and seek remedy for my attack, as I am unconscious. However, just because I am temporarily powerless to enforce my claim to be free from physical assault does not mean that I have lost the claim altogether. In fact in this situation it may be appropriate that in the absence of my competency someone else will enforce the claim on my behalf. In recognising that the power to enforce or waive a claim can lie outside the claim-holder, we can acknowledge that this power can lie with the state or a designated institution or individual.

The separation between claim and power logically allows for the fact that a child lacking the competency to hold a power is not excluded from holding an

interest theory right. As observed in the previous analysis, there is no competence-related impediment involved with a child holding a Hohfeldian claim, as these claims are defined by reference to the actions of the duty bearer. Therefore children are capable of holding rights if we understand rights as Hohfeldian claims held by an individual that pertain to a duty to either do or refrain from doing a particular action. The power to enforce this claim can be held by the right-holder or another designated entity. This claim constitutes a right when it is based on an interest of sufficient importance to impose duties on others.

From here the conclusion drawn by interest theorists is that by shifting the focus of rights to interests the argument from incompetence is overcome. Children can now hold rights unconstrained by concerns regarding competence or capacity (MacCormick, 1976; Campbell, 1992; Kramer, 1998). Campbell concludes that a child's lack of development does not pose a problem for children holding rights. He argues that lack of development is really just a 'superficial point of theory'; the incapacities of the child and the implications this has for protecting a right are really a political question (Campbell, 1992, p. 12). Federle, too, despite her belief in its inadequacies, claims that 'in this regard, the interest theory appears most promising to children's rights theorists because it proposes to resolve the problem of having a right without the present ability to exercise it' (Federle, 1994, 352).

I argue, however, that interest theory has not accomplished this. A proper understanding of the relationship between competence and interest theory demonstrates that a child *cannot* hold a right without the present ability to exercise it. A child's developing capacities and competencies are not just a superficial point of theory. The next section of this article will argue that although interest theory may have shown that competence is unnecessary to qualify as the type of thing that could hold a right, it may still be necessary to *realise* a particular right.

Realising Rights and Imposing Duties

To hold an interest theory right one must have interests. There is much debate about whether other beings, such as animals, have interests and therefore rights. However, I do not seek to enter into this argument here. I take an interest simply to mean something that is presumptively beneficial to the claim-holder (Raz, 1984, p. 205). The thin evaluative stance of interest theory assumes the basic distinction between beneficial and detrimental (Kramer, 1998, p. 93). This is not to say that the boundaries of what constitutes a presumptively beneficial interest are not controversial; there will always be (and rightly so) debate regarding the edges of what is beneficial. However,

a controversial fringe does not logically preclude that such beneficial interests do exist. Most importantly it seems relatively uncontroversial that children have interests that are of intrinsic benefit to them, such as a baby's interest in receiving adequate nutrition. If we accept that children are beings that have interests then a child (so far) can hold an interest theory right.

From this first step the clearest way to identify the role competence plays in interest theory is by examining the different ways in which a right comes *not* to be fulfilled. Disregarding the intentional choice of the duty-holder to breach their duty or the choice of the right-holder to waive a duty, why would a right not be fulfilled? I identify three situations where this may be the case.

A right cannot be fulfilled when the *external environment* precludes either the right-holder or duty-bearer from fulfilling their duty or exercising their right, respectively. For example, a government may wish to fulfill its duty to provide young children with adequate food and nutrition; however, the country suffers a debilitating drought. Although the government wishes to fulfil its duty, it is prevented from doing so.

A right cannot be fulfilled when the *duty-holder* does not have the *competence* to *fulfil* the duty. For example we may state that children have a right to be loved by their parents, yet a mother who suffers from severe postnatal depression may be incapable of loving her child (Cowden, 2011).

A right cannot be fulfilled when the *right-holder* does not have the *competence* to *realise* it. For example the claim that one has a right to work may produce a duty in the state to assist those who are unemployed to find employment. This would not hold for a new born baby who lacks the competence to work at a job.

Do any or all of these extinguish the existence of the right, or do they simply point to its abrogation? The first situation, that of the drought-stricken country, benefits from consideration of the concept of ableness set out at the beginning of this article. Ableness encompasses two parts – competence plus external resources. The government of the country may have the competence to deliver food to its child citizenry, as it has a functioning agricultural industry and a bureaucracy for effective distribution. However, the existence of a drought deprives the government of the external resources and opportunity to do so. This situation presents a complicated and important question for those concerned with the implementation of rights. However, as it is about external circumstances and does not address the issue currently at hand, that of the claim-holder's competence, I will not consider it further. I will focus on the second and third situations. We will first examine the relevance of a claim-holder's competence to realise a right, and then consider how this can create duty-holders who are incapable of fulfilling their duty. I argue that interest theory necessitates that the right-holder have

the competence to realise the right in order for the interest to be of sufficient importance to impose duties and restrict the liberties of others.

As we saw above, the claim-holder is able to realise the content of their claim when they have both the competency, as in the actual ability, and the ableness, as in the external resources and opportunity, to do so. By putting aside the necessity of external resources we have singled out the requirement of competence.

The competence required to realise a claim is distinct from the previously discussed competence required to hold the power to waive or enforce that claim. For example, I realise my claim to vote when I fill out the ballot paper. I enforce my claim to vote, however, when someone breaches their duty to allow me to vote and I take them to court. I waive my right to vote when I decide not to attend the polling booth. If the state legislates against me voting, I have lost my power to enforce or waive my claim, but not my competence to realise it. Therefore the competence relating to the power to enforce or waive one's claims can be unrelated to the competence required to realise one's claim. The second part of this article demonstrated that interest theory allows the power to enforce a claim to reside outside the claim-holder; therefore the competency to enforce or to waive is no longer necessary to hold a right. What interest theorists have not done is to demonstrate that the competence to *realise* the claim is also unnecessary.[6]

When the claim-holder does not have the competence to realise the content of their claim, the claim is unfulfilled. The reason for this lies at the core of what it means to protect an interest – that it is presumptively beneficial to the claim-holder. From this, it follows that if a child does not have the competence to realise the benefit to which the claim pertains, the interest may not qualify as of sufficient importance to be protected. To illustrate this we can consider whether a blind man has a right to illumination. A blind man can have no interest in the lights being on so he can read the newspaper, whereas an able-sighted person may do. If we consider the thin evaluative stance of presumptively beneficial, the presence or absence of light can have neither benefit nor detriment to someone who cannot detect it. As the blind man cannot see, he cannot realise the benefit of the light, and therefore can have no interest on which to ground a claim. Without the relevant competence he has no right to illumination.[7]

Consider an alternative example: assume I have a deep and intense interest in flying without the assistance of external mechanisms; it is of constant concern to me, and it occupies my thoughts day and night. The fulfillment of this would greatly enhance my intrinsic well-being. Flying without assistance seems at first glance to be presumptively beneficial. I also assert that this claim produces a positive duty in others to help me to realise it. However, we know

that it is impossible for me to fly without assistance, because I lack not only the competence to currently achieve it but also the underlying capacities to ever be able to do so in the future. Furthermore, unlike the example of the blind man, to impose a duty on others to help me achieve my interest in flying is to impose a duty on others that they can never fulfill, a situation I will return to below. It therefore seems that the competence of the claim-holder to realise the claim is extremely relevant to whether or not it constitutes a right. To return to our original example, a newborn cannot hold a right to gainful employment, because they lack the competence to work at a job and therefore cannot realise the benefit to which their claim pertains.

The impossibility of fulfilling one's duty leads us to the second important feature of an Interest theory right. According to interest theory, rights ground *requirements for action* in other people (Raz, 1984, p. 208). An interest, therefore, must be of sufficient importance to impose a duty on someone else. If we are protecting the right-holder's interests by imposing normative constraints on other people's Hohfeldian liberties, then these actions of constraint must be justified (MacCormick, 1976). The constraints must be reasonable and achievable. It is not just the competence of the claim-holder that is relevant but also the cost of fulfilling the duty imposed on the duty-holder.

Let us consider again the blind man's prospective right to illumination. Although the blind man lacks the competence to realise the benefit of the right, the correlative duty would still be possible to comply with. In other words the potential duty is still achievable – for example, if we considered the blind man's interest as worthy, we could dictate that we must turn the light on for him and enforce this duty. Now consider two people in a room, an able-sighted person who wishes to go to sleep and the blind man who wishes to keep the light on. The sleeper's liberty to sleep in the dark would be constrained by their duty to keep the light on. The cost of the duty, in depriving the able-sighted person of their liberty to sleep in the dark, seems to outweigh the negligible benefits the blind man could derive from illumination. Therefore, the assessment that the blind man's interest in illumination is not of sufficient importance to impose a duty rests not only on the blind man's lack of competence to realise the interest, but also on the disproportionate costs imposed on the potential duty-holder's liberties.

Determining whether one holds a right under interest theory is therefore a balance between (a) the claim-holder's interest, (b) the claim-holder's competence, and (c) the cost to others of bearing the duty. This relationship can be examined by further breaking down the types of claims. All claims are passive as they require action or inaction on the part of the duty-holder, not the claim-holder. Claims can broadly be seen to fall into four categories, those claims that produce a duty of non-interference (N1 and N2) and those claims

that produce a duty to provide goods or services (P1 and P2). All of these claims necessitate competence within the claim-holder.

N1: Claims producing duties of noninterference protecting the actions of the claim-holder.

These are claims of noninterference from others to protect the action of the claim-holder, for example, I have a claim to walk down the street without someone preventing me. For this to be a claim based on an interest of sufficient importance, the claim-holder must have the competence to realise the claim. If I am temporarily incompetent and cannot walk down the street because I have broken my leg, I am still at *liberty* to do so, but my lack of competence means it is of insufficient importance to impose a duty on others, as I will not be able to realise the benefit to which the claim pertains.

N2: Claims producing duties of noninterference protecting the state of being of the claim-holder.

These claims do not protect actions by the claim-holder, but instead protect the claim-holder's state of being, for example, the right not to be tortured. We do not decide whether to feel pain or not; rather it is something that refers intrinsically to the state of being of the agent. However, a claim-holder must be competent of feeling pain. For example, if I cannot feel pain, I do not suffer if someone pokes me with a needle repeatedly. I may have a claim against this person for other reasons, such as violation of my bodily integrity, but it cannot be based on a right to be free from pain.

P1: Claims producing duties of action to enable actions of the claim-holder.

These are claims of assistance in enabling the claim-holder's actions. For example, a child's claim against the state to receive adequate education in order to vote; or, in the hypothetical case above, my right for others to enable me to fly. Much like N1, a claim-holder must have the competence to realise these claims or else they impose duties that can never be fulfilled. They become unreasonable constraints on the Hohfeldian liberties of others.

P2: Claims producing duties of action that protect the state of being of the claim-holder.

> These claims protect the claim-holder's state of being but still require a level of competency. Consider a child's claim to be provided with adequate healthcare or to clean water. The child must be competent of deriving benefit, and the water is of intrinsic benefit to the child, because they have the competency to use it to extract nutrients and convert them into energy.

In this broad classification all four types of claims necessitate a certain level of competency on the part of the claim-holder. In situations N1, N2 and P2, a duty-holder can still fulfill the duty imposed on them even if the right-holder is not competent of realising the right. However, in each situation the imposition of a duty would not serve an interest worthy of protection. More importantly, in the case of P1 the duty-holder would simply not be able to fulfil their duty if the right-holder was not competent of realising the right. All rights necessitate a level of competency on the part of the right-holder, and some rights necessitate that this competence be linked to autonomy.

Interest theory may have shown us that there is no conceptual need for competence in order to qualify as a right-holder. However, the theory necessitates that the right-holder have the competence *to realise* the right in order for the interest to be of sufficient importance to impose duties and restrict the liberties of others. This assessment is of particular relevance when considering whether children hold rights. The limited and evolving capacities and competencies of children of all ages do not preclude them from being recognised as a person capable of holding rights. However, the evolving competencies of individual children are relevant to the question of *which* specific rights they hold. Interest theory, thus understood, demonstrates that a child's capacities and competencies are an essential part of their rights claims. Therefore a child only holds a right when they have the competence to realise the benefit to which the claim pertains.

Conceiving of the relationship between capacity, competency and rights in this way lessens the importance of the distinction between child and adult in rights theory. In order to decide whether one can hold rights and which rights they have, it is not crucial to know whether one falls directly into the category of child or adult, but rather what interest, constrained by the competencies, that individual holds. This aligns to recent work on the enfranchisement of the child, as Lopez-Guerra has argued:

> A person ought to have the right to vote if she has this capacity in the minimum degree required for voting – that is, to the extent where she can understand what an election is about and complain for not being allowed to participate. (Lopez-Guerra, 2010, p. 21)

Similarly persons that do not have the required competency to vote, 'cannot suffer the harms of disfranchisement' (2010, p. 20).

The accrual of rights is not linear to the accrual of competencies – for an individual's competencies and interests may fluctuate throughout their life. This may in turn challenge the idea that there exists a static full set of rights for adults. Just as rights change for children as they gain or lose competencies, the same may be true for adults. However, children still present a distinct case from others with reduced competencies, such as the elderly and the mentally incapacitated, for two reasons. First, children are in a unique period of development; they acquire competencies at a rate unparalleled in other stages of life. Because of this rapid change, if we are not clear on exactly how competency interacts with rights, we are in very real danger of disenfranchising those who should be enfranchised. Second, as children are not in a static state of incompetence, unlike the mentally disabled, they may hold rights to develop competencies in the future, which will produce new and different duties. To put children in the same basket as animals, the mentally disabled, or the elderly, as many traditional liberal philosophers have done, is to overlook the differences in their state of being, a grave mistake that may be of detriment to members of all groups.

A clear understanding of these concepts – capacity, competence and rights – and the relationship between them provides us with a clear framework, the necessary tools if you like, in order to properly tackle the contemporary challenges to children's rights, for example how to translate these rights into a legislative regime, or to protect the future interests of the current child. The framework of rights presented above allows us to recognise children as right-holders, but still constrain the particular types of rights they hold according to their competencies.

Conclusion

Throughout this article I have demonstrated the relationship between capacity, competency and rights, an important project due to the continuing prevalence in rights theory of the argument from incompetence. I have argued that children are capable of holding rights, if we understand rights as Hohfeldian claims that pertain to a duty to either do or to refrain from doing a particular action. The power to enforce this action can be held by the right-holder or by another designated entity. This claim constitutes a right when it is based on an interest worthy of protection. An interest is worthy of protection when the right-holder has the capacity to realise the benefit to which the interest pertains, and the cost of fulfilling the duty is not unreasonable.

Interest theory has successfully removed the conceptual impediments to children being right-holders by determining that it is not necessary to have the capacity to enforce a claim in order to hold a right. However, it has not shown

that it is unnecessary to have the capacity to realise a claim. I have argued that one's competency to realise the interest to which the claim pertains is necessary for that claim to constitute a right and to justify the cost of the duty imposed on the liberties of others.

Understanding claims in this way allows us to conceive of a theory of children's rights that properly enunciates the relationship between an individual's competencies and their rights. It in turn lessens the importance in rights theory for a clear definition of childhood. Understanding the relationship between competence and rights is necessary for the specific challenges the rights of children present us, such as their rights to develop future competencies.

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Notes

1 *The Australian.*
2 For children's status as right-holders see David Archard (2004); Tom Campbell (1992); Neil MacCormick (1976); Onora O'Neill (1988); Laura Purdy (1994).
3 For an interesting discussion on how children have been neglected throughout political theory, see Turner and Matthews (1998).
4 In this section I am indebted to the work of J.C Lau. These distinctions and how they play out in relation to children are further explained and developed in forthcoming work by Cowden and Lau (forthcoming).
5 For will theory the relevant factor is not that cannot simply articulate a choice but that they 'lack the requisite autonomy, in the moral much more importantly than in the merely physical sense of the term' (Goodin and Gibson, 1997, p. 186).
6 Goodin and Gibson do argue that competence is still necessary to interest theory, but for a different reason. They assert that competency in autonomy and the capacity to have plans for the future are integral to the construction of an interest. Even if children cannot articulate these plans, they are easily discernible to the duty-holder (Goodin and Gibson, 1997, p. 195).
7 Singer takes a similar position when stating that a man cannot have a right to have an abortion. 'A stone does not have interests because it cannot suffer. Nothing that we can do to it could possibly make any difference to its welfare. A mouse, on the other hand, does have an interest in not being tormented, because it will suffer if it is' (Singer, 1974).

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Chapter Three

The Language of 'Capacity' and 'Competence' in Children's Rights

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The Language of 'Capacity' and 'Competence' in Children's Rights ^

It is a fact about us, and a far from superficial one, being reflected as it is in our most fundamental legal institutions – that we tend to regard infants who are likely to develop the cognitive capacities of persons as at least more closely approximating the moral status of persons than non-persons. Consequently any theoretical view which utterly denies the rights of moral personhood to normal human infants, no matter how strong its philosophical arguments, is in our society at present and for the foreseeable future, not likely to be adopted.

- Buchanan and Brock[1]

Abstract

The terms 'capacity' and 'competence' play a central role in moral and political philosophy by determining the moral status of a subject. More specifically, they play a central role in determining their rights, especially in the literature on children's rights. Despite their importance, these terms are often used interchangeably, or not defined at all. This leads to confusion regarding their application and significance, particularly when using the terms to determine the rights of the child. In this paper, we propose a distinction between capacity and competence that will help to address and clarify the debates in the literature. We then introduce the additional concepts of ableness and latent capacities. In the final parts of the paper we reply to the series problem of capacity and the argument from constant competence. We argue that these concepts, distinguished in this way, can help to address future research within the field of children's rights.

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[1]Allen Buchanan and Dan Brock, *Deciding for others: the ethics of surrogate decision making.* (Cambridge: Cambridge University Press, 1989).

Part One

The use of capacity and competence

The terms 'capacity' and 'competence' are often used interchangeably. The Oxford English Dictionary defines capacity as 'the ability or power to do or understand something' and competence as 'the ability to do something successfully or efficiently'.[2] At first pass these definitions seem to be sufficiently similar in order to justify their interchangeable use. It has even been observed that the only difference between the concepts is professional discourse; medical practitioners will give an assessment of an individual's *capacity*, while the legal system will determine whether they are *competent* or not.[3] Since this distinction is only one of convention, it is argued that the terms can and indeed *should* be used interchangeably.[4]

Using terms interchangeably is common and usually does not present a problem for everyday use. However, this does not hold true when the terms are used throughout the literature of rights and in particular in relation to the rights of the child. By a right, we mean a claim, held by a singular claim-holder, which produces a duty in others to either refrain from doing or do a particular action.[5] Capacity and competence are central to the decision over whether an individual holds a right or not, and children often inhabit the boundary between competence and incompetence, capacity and incapacity. Although the terms are also used to determine the rights that adults hold, we focus here on the rights of the child as they offer a clear example of the prevalent use of the terms. For example an adolescent may be denied the right to give informed medical consent, a young child may be prevented from holding liberty rights to drive a car, or a political

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[2] 'capacity' and 'competence', (2010) The Oxford English Dictionary. *OED Online*. Oxford University Press, available at http://dictionary.oed.com/

[3] Tom, Beauchamp and James Childress, *Principles of Biomedical Ethics* (Oxford: Oxford University Press, 2001) p.69; Thomas Grisso and Paul Appelbaum *Assessing Competence to Consent to Treatment: A Guide for physicians and other Health Professionals* (New York: Oxford University Press, 1998) p.11.

[4] Scott Y.H. Kim, *Evaluation of Capacity to Consent to Treatment and Research* (Oxford: Oxford University Press, 2010) p.18.

[5] Joel Feinberg, 'The Nature and Value of Rights', *The Journal of Value Inquiry*, 4 (1975): 243-257, p. 251; Cowden, M, 'Capacity, Claims and Children's Rights', *Contemporary Political Theory*, (2011 forthcoming).

philosopher may find children of insufficient mental capacities to cast a vote. The terms 'capacity' and 'competence' therefore are important as they can determine what rights (if any) a child holds.

The problematic use of capacity and competence has led to problems within the children's rights literature, including lack of clarity and talking past each other. For example, in 'Deciding for Others', Buchanan and Brock consider the threshold an individual must meet in order to have a right to medical decision making. They state that in order to be *competent* in decision making one must have:

1) the *capacity* for understanding and communication,

2) the *capacity* for reasoning and deliberation.[6]

This may seem an adequate description, but upon closer examination it only serves to produce further questions. It cannot be that competence in decision making is merely the same as having the capacity for understanding, communication, reasoning and deliberation. There seems to be a great difference between a 14-year-old girl who has the *capacities* for understanding and communication, and for reasoning and deliberation, but who has never been able to exercise these capacities, and someone who is clearly a competent negotiator, such as Henry Kissinger. The 14-year-old may have the capacity to understand and communicate but has never learnt how, nor had the opportunity to express these capacities. Can she properly be considered competent? This seems to be a very different type of competence from a person who has extreme experience in understanding and communicating with others, reasoning and deliberating, such as Kissinger.

Therefore having the capacities to do an act may not be enough to do the act that one wishes to be competent in. However, if the conclusion is that Kissinger is competent in decision making and our 14-year-old girl is not, on what ground is that determination made? Does it follow that she would not be allowed to choose for herself? Even if she is not competent in the same way as Kissinger, she has capacities that a 6-month-old baby does not. Surely we still want to say that there is something different about the girl that sets her apart from other incompetents. But do we treat these as differences in capacity

[6] Allen Buchanan and Dan Brock, *Deciding for others: the ethics of surrogate decision making.* (Cambridge: Cambridge University Press, 1989) p.45

or competence, or both? This is not simply an issue of semantics. It leaves us without the adequate tools to properly conceive of the relation between capacity and competence and therefore understand how the concepts should operate regarding rights for children.

This kind of use is not particular to Brock and Buchanan. The meaning of a single term also varies between theorists leading to a certain amount of talking past each other. Such an example of talking past each other is apparent in the exchange between Schrag and Cohen in the 1970s regarding the capacity for children to vote.[7] However, close examination of the debate reveals that throughout the exchange they each meant something different when they talked about 'capacity'. For Schrag, capacity required rationality as evidenced by understanding political concepts, which seems to imply some sort of proven ability. However, for Cohen, capacity involved 'rationality plus intelligence', things that are internal to the subject. As such, they failed to properly engage with each other in their discourse, which has consequently led to misunderstandings in the development of the literature on the political capacity of children.

The problems arising from a lack of definition are not limited to philosophical debates. One of the key principles of the United Nations Convention on the Rights of the Child (CROC) is that of 'evolving capacities'. Article Five of the Convention states that children have a right to begin involvement in the exercise of their rights in a manner 'consistent with the evolving capacities of the child'. Article Five makes no mention of age as the determining factor for the child to exercise rights on his or her own behalf, but rather recognises the 'demonstration of the requisite skills, knowledge and understanding is crucial to the exercise of rights'.[8] The importance of the principle of evolving capacities is therefore central to realising a child's right to participation. Despite this the principle continues to be one of the most widely violated – Why? One answer may lie in the lack of clarity on exactly what a child's capacities *are,* how they acquire them and what threshold must be met into order to qualify. The leading document in this area

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[7] Francis Schrag, 'The Child's Status in the Democratic State,' *Political Theory* 3, 4 (1975): 441-457., Carl Cohen, 'On the Child's Status in the Democratic State: A Response to Mr. Schrag,' *Political Theory* 3, 4 (1975): 458-463.

[8] Gerison Lansdown, *The Evolving Capacities of the Child.* (UNICEF Innocenti Research Centre, 2005) p.4.

frequently uses the terms 'capacity' and 'competence' interchangeably without reference to any possible distinction between the two.[9] In order for people to fulfil their duties and assist children in the realisation of their rights we must be clear exactly what these evolving capacities are.

It is therefore necessary to establish a clear definition of capacity and competence for two reasons. First to provide a more precise set of concepts in order to help to prevent talking past each other in political discourse, and second to assist use of the terms in practical contexts such as the UN CROC guiding principle of 'evolving capacities'. These terms, understood in the way we present here, may also present a useful framework for future research on the rights of children.

In part two of the paper we offer a primary distinction between capacity and competence by way of the example of the student and the turtle. This distinction is then generalised through the use of a conditional analysis. Having presented a distinction between the terms, we then introduce the additional term of ableness. Part Four of the paper will deal with two potential objections to our distinction: first, the series problem of capacity, and second, the argument from constant competence. Finally we return to how these distinctions and terms can be useful in the debates regarding children's rights and present context for future research.

We do not wish to say that others have used the terms capacity and competence incorrectly. Indeed, other scholars may have used the terms consistently within their own schema, but we simply wish to point out that the lack of consistency *between* scholars and the interchangeable use of the terms are problematic when considering their application to children's rights. Furthermore, this is not intended to be a complete analysis of the terms capacity and competence but simply a useful stipulative distinction between the two terms that will be of help when working within a feasible framework of rights.

[9] Gerison Lansdown, *The Evolving Capacities of the Child*. (UNICEF Innocenti Research Centre, 2005) pxi

Part Two

A case of capacity and competence: the student and the turtle

Consider first a case of a student and a turtle.[10] Both the (human) student and the turtle are unable to speak Russian – neither of them can articulate the correct tones and accents required to be a Russian speaker. However, given the right training and enough practice, the student can eventually speak Russian. That is, he has what it takes to become a competent Russian speaker. Notice that the turtle, no matter how much training it receives, will never be able to speak Russian. The crucial difference is that the student already has the right physiological and neurological equipment to process and understand the language, whereas the turtle does not, and will not. From this we can say that the student has the capacity to speak Russian but not the competence, but the turtle lacks not only the competence but also the capacity to speak Russian.

There is a clear difference between a student's inability to speak Russian, and the turtle's. That difference lies in the student's *potential* mastery of Russian. In what follows, we will use a form of conditional analysis to show how the terms capacity and competence relate. The simplest form of conditional analysis (CA) would be as follows:[11]

(CA) Someone *S* is able to Action *A* if *S* would likely *A* if *S* tried to *A*.[12]

We say here that S *would likely* A to allow for unforeseen and extraordinary instances of failure. Agents might be unsuccessful at certain actions contingent on how we describe those actions, but they might also be unsuccessful for reasons outside their control. We

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[10] This example is adapted from Lewis' illustration of an ape speaking Finnish, although the points we aim to make are quite different: David Lewis, 'The Paradoxes of Time Travel', *American Philosophical Quarterly,* 13(1976): 145-152.

[11] Our understanding of a conditional analysis here draws heavily from the philosophy of action literature. We are aware that conditional analyses are not perfect—they suffer from problems regarding modalities—but we cannot solve those problems here. We employ a conditional analysis here because it does the work required to find a practical solution to how we can understand 'capacity' and 'competence', but we could easily vary our account to reflect an alternate theory from philosophy of action, such as a probabilistic analysis.

[12] For debates surrounding different versions of conditional analysis see Donald Davidson, *Essays on Actions and Events*, (Oxford: Oxford University Press, 1980); Christopher Peacocke, *Being Known* (Oxford: Oxford University Press, 1999).

might think that the student would be able to speak Russian if he tried to, but perhaps a muscle spasm causes him to mispronounce a word or two. We would not, on this account, say that the student is unable to speak Russian because of such factors. As such, we might think that, under ordinary conditions, if an agent would be likely to succeed in an action, then that is sufficient to say that they are able to perform that action.

How can we use a conditional analysis to understand capacity? Let us refer to the example above again. Roughly speaking, we distinguish the student from the turtle by features *internal* to each. At first pass, the capacity to do X, for our purposes, refers to the *potential* to do X. That is, the agent has the *capacity* to do X when the agent has the requisite set of skills internal to them for X-ing, but perhaps has not exercised those skills yet. To have a skill set required for a capacity is to possess the requisite skills necessary to be able to exercise that capacity. The capacity to speak Russian, therefore, attaches to the existence of the physiological abilities within the student to speak Russian. As the student has the appropriate language centre in his brain, can move his mouth in the correct way to intone Russian words, and is able to hear and interpret sounds from others, we would say that he has the capacity for speaking Russian. The turtle, however, does not have the mental or physical apparatus for language, and so lacks the capacity to speak Russian.

Let us clarify what we mean by 'internal features'. From the above example, internal features are those which are innate to the agent and are also necessary for the agent to do the task in question. We take these to be physiological features, such as the wiring of the student's brain, his auditory system and the ability of his mouth muscles to move appropriately to intone Russian words. These features, however, are not present in the turtle. So, the turtle lacks the requisite internal features, and therefore the capacity to speak Russian. Nevertheless, as we will discuss shortly, some features *external* to the agent may also be relevant, such that the student might have the capacity to speak Russian (in terms of having the relevant internal features or skill set) but still be unable to speak Russian on account of not having anyone teach him, or because he is currently asleep, or because he has temporarily lost his voice. So, the student's cognitive and physiological properties count as internal features, because they necessarily facilitate the student speaking Russian and are innate or ordinarily present in the student.

With this understanding of the term, let us now state the conditional analysis for 'capacity'. In order to construct a conditional analysis for capacity, we do two things: first, we optimise all external conditions. External conditions include training, experience, resources and opportunity and mental states, such as the knowledge arising from this training, and also the intention to act. Secondly, we hold fixed everything else and see whether the agent would be able to perform the action. In this way we are isolating that which is internal to the agent. Therefore a conditional analysis for capacity can be stated as:

> (Cap - CA) *S* has the capacity to *A* if, optimising all external conditions and mental states, *S* would likely *A* if *S* tried to *A*.

Despite the optimisation of external conditions such as training, experience, resources and opportunity and mental states such as 'know how' and intention, the turtle would still be unable to speak Russian, while the student would be able to. On this analysis, then, the student has the capacity to speak Russian, while the turtle does not. To see this, we have isolated those features internal to the subjects. Therefore one has the capacity to A if, optimising all external conditions and mental states, one would A if one tried to A.

A conditional analysis of competence

In our story, neither the student nor the turtle can *actually* speak Russian. Competence to do A, on our account, attaches to the combination of internal capacity and mental states bringing about the actual demonstrable ability to do A. Once the student has had enough lessons, he will be deemed a competent speaker. We say that the student is competent if he can fluently speak Russian on command. In this way, competence usually requires that the agent has (or gains) the experience of doing A, and can successfully A when he wants to. That is, the student has to have the requisite mental states necessary to understand the Russian language, knowledge about how to speak Russian and the intention to speak Russian when he wants to speak Russian. [13] Effectively conversing in Russian, then, requires the student to have not only the right

[13] This is a first glance of our understanding of competence. A more nuanced consideration is discussed below.

physiological apparatus, but also the requisite mental states to do so. Notice that we say that the student is not competent until he can *effectively converse* in Russian. That is, the agent must be generally successful at A-ing in order to be deemed competent. Knowing how to A, then might be necessary for competence in A, but it is not sufficient.

We can perform the same conditional analysis for competence by holding fixed that internal to the agent and also their mental states and optimising external conditions of resources and opportunity. A conditional analysis for competence can be stated as:

> (Comp - CA) *S* has the competence to *A* if, optimising resources and opportunity, *S* would likely *A* if *S* tried to *A*

Notice that we do not specifically refer to success. However, that S could A if S tried to A *implies* that S has successfully done A. Our meaning of competence, then, aligns with the dictionary definition outlined at the beginning of the paper as involving a success condition. The student would not be deemed a competent speaker of Russian unless he could successfully speak Russian if he wanted to. That is, to be competent is not to be acting out of accident.

However, does this imply that previous knowledge of how to A is required for competence? Not necessarily: an agent may become competent on their first try of an act. For example, a young boy growing up a landlocked country may never have seen a large body of water, let alone know that one could swim in it. Suppose that on his first visit to the coast he sees people swimming, and he also jumps in and swims successfully on his first attempt. If he intends simply 'to do what the other swimmers do', then he is not acting out of accident. This demonstrates that competence can also be learned: the boy did not have the experience of swimming, but he can gain competence by observing the other swimmers and successfully mimicking what they do.

The conditional analysis demonstrates an important point regarding competence – it is task- specific. In order to assess if the agent is competent we must examine their conditional analysis in relation to each task. If an agent is competent at driving a car, this does not mean that they are competent at driving a truck. Competence is always

competence *for some task*, or competence *to do something*.[14] Whether or not an agent is competent at a particular task will depend on how we describe the task in question.[15]

Clearly, the competence to do one task may be related to the competence to do another task under a different description. If I am competent at running a four-minute mile, then I am also competent at running a four-minute mile on Sundays, and I am presumably also competent at running a five-minute mile. Interesting cases arise, however, where the competence to do X may be related to the capacity to do Y. Suppose that I have had piano lessons for a while and I can play 'Twinkle, Twinkle, Little Star' perfectly. I have the capacity to play it: I have the coordination and skills to read music, and I know where the keys are on a piano. And because I can *actually* play it, I am competent in playing 'Twinkle, Twinkle, Little Star'. In some sense, then, I can be said to be a competent pianist. But this only applies at quite a general sense. I might be able to play 'Twinkle, Twinkle, Little Star' perfectly, but perhaps I have not learnt how to play something more complicated, such as Beethoven's 'Moonlight Sonata'. Perhaps learning how to play 'Twinkle, Twinkle, Little Star' is something that one needs to learn to play before 'Moonlight Sonata'. In this way, being competent at 'Twinkle, Twinkle, Little Star' helps me develop the capacity to become competent at something else, like 'Moonlight Sonata'.

What becomes important is the level of description and analysis in which we discuss what we have the capacity and the competence to do. In other words, what we are interested in here is the relevant *task* – if we are interested in competence *simpliciter* it might be sufficient if I can play 'Twinkle, Twinkle, Little Star'. But if I am interested in competence *qua* concert pianist then obviously 'Twinkle, Twinkle, Little Star' will not cut it, and we may have to look at other tasks to determine competence.[16]

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[14] Allen Buchanan and Dan Brock, *Deciding for others: the ethics of surrogate decision making.* (Cambridge: Cambridge University Press, 1989) p.18.

[15] See, for example, Donald Davidson, 'Actions, Reasons, and Causes,' *The Journal of Philosophy* 60 (1963): 685-700, or John McDowell, *Perception as a Capacity for Knowledge*, (Marquette University Press, 2011) pp.34-36.

[16] Applying a contextualist argument here should not be particularly difficult. We can be contextualists about all sorts of things, such as language and knowledge, so it follows that we could also be contextualists about abilities: David Lewis, *Philosophical papers*, (Oxford: Oxford University Press, 1987) chap. 13.; David Lewis, 'Elusive knowledge', *Australasian Journal of*

So far, our discussion has outlined the difference between capacity and competence. Capacity relates to the internal physiological features of an agent that are necessary for her to A, while competence requires that an agent have the capacity to A, but can also A with some consistent success. The conditional analysis of capacity and competence highlights what is meant for each: capacity relates to an agent's internal features, whereas competence relates to the agent's successful exercise of those features. This should already indicate that capacity and competence are not interchangeable.

Part Three

External conditions and Ableness

Our discussion so far has examined what we mean by 'capacity' and 'competence'. An agent has the capacity to A when they have the requisite skill set internal to them to be able to A. Competence to A, on the other hand, relates to an agent's ability to exercise that skill set to successfully A. Having shown that there is a simple intuitive distinction between competence and capacity, we now further fine-tune the meaning of 'competence' by examining the distinction between competence and ableness.

Pete Morriss offers a distinction between power as ability, and power as ableness. Ableness, on his account, roughly relates to the presence of external features necessary for an agent to successfully do a particular action. So, for example, a piano player who has the requisite coordination and training to play the piano has the capacity to play the piano. We would also say that the pianist is competent if they are successful at piano playing more often than not, and that they were able to do so, on cue, if a piano were available. However, in the absence of a piano, the pianist is unable to play. But this is not because he is defective in his piano playing skills, but rather because he lacks the opportunity or resources necessary to play the piano. This shows that the difference between capacity to do A and ableness to do A is contingent on whether the relevant factors are internal or external to the agent.[17]

Philosophy 74 (1996): 549. Particularly the discussions on what it means for something to be 'flat'.

[17] However, if the piano were suspended in the air, the pianist's vertigo would negate his ability to play, but not his competence. Even so, we are simply trying to give a general account of the

Following the structure of the previous section, we could do a conditional analysis on ableness as follows:

(Ableness - CA) *S* has the ableness to *A* if *S* would likely *A* if *S* tried to *A*

Notice that the conditional analysis for ableness is the same as the original form of CA outlined at the beginning of the previous section. This is because an agent is able to perform an action when he has both the capacity and competence to do it, and also is not impeded by any external factors. That is, ableness to *A* necessarily requires an agent to be competent to *A*, and in order to be competent to *A* the agent necessarily has to have the capacity to *A*. Consequently, the relationship between the three concepts can be seen as so:

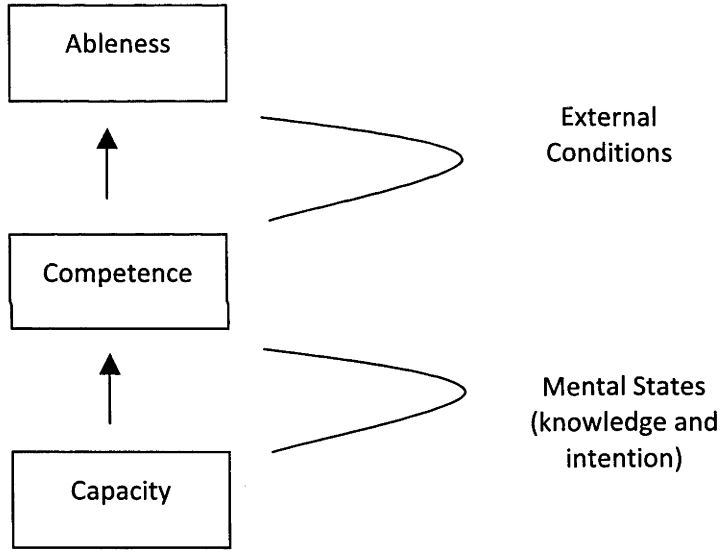

Figure One: Relationship between capacity, competence and ableness

concepts, and as such can bracket off extreme examples such as this for the moment: Keith Dowding and Martin van Hees, 'Freedom, Coercion and Ability', in Matthew Braham and Frank Steffen (eds.) *Power and Freedom: Conceptual, Formal and Applied Dimensions*, (Springer, 2008) pp. 303-4.

This establishes a symmetrical relationship between capacity, competence and ableness. Capacity requires an agent's internal physiological abilities or skill set, while competence involves the agent's internal physical and mental states. Ableness, then, is the aggregation of the agent's internal physical states, mental states and the presence of the right external conditions.

There are some circumstances, however, where ableness seems to be not so distinct from competence and capacity. A man who has lost both of his arms, for example, has not only lost the competence to pick up heavy objects, but he has also lost the capacity to do so, as he no longer has the skills internal to him to develop the competence in lifting heavy objects (viz. the requisite motor skills, muscles and ligaments). However, if the man is given bionic arms, he can once again lift heavy objects.[18] At first, being able to lift heavy objects with bionic arms might seem to an instance of ableness. However, he is being given the underlying capacity to be competent in acts such as heavy lifting. Having arms is usually considered a capacity, as they are physiological features of the agent. The bionic arms merely replace the agent's own arms in allowing him to be competent in lifting heavy objects, if he so desired. Given the relationship between capacity and competence, in that capacity is necessary for competence, we would argue that if the bionic arms are necessary for the agent to be a competent object-lifter that they would be an instance of capacity.

Instances of ableness, on the other hand, are those that would truly be *external* to the agent such as opportunities or resources such as money. In order for the man to lift heavy objects, he must already have the capacity to lift heavy objects, and as we have claimed, that capacity exists in his having arms. If there were no heavy objects around, we would say that the man is unable to lift heavy objects, even if he had bionic arms. The bionic arm example seems to be an unusual case as arms (and the capacity to lift objects) are ordinary features of agents.[19] However, on our account, the distinction stands. Therefore, on our account, an agent has the capacity to A when she has all the requisite features and skills *internal* to her to A, and the potential to do A. Competence

[18] We are grateful to William Bosworth for the suggestion of this example.

[19] Another example may be cochlear implants.

is one's actual ability to A.[20] By 'actual ability', we mean the successful, intentional exercise of that capacity to A. Finally, ableness is one's competence to do A in the presence of external resources and opportunity to do so.

Part Four

The Series Problem

So far, we have defined capacity, competence and ableness. On our account, capacities are necessary for an agent to be competent. However, it is obvious that not everyone has all capacities at all times. An objection to this understanding of capacity, then, is that it could continue *ad infinitum*, in that one needs the capacity to have a capacity, and so on.

Consider driving a car. On our analysis, the ableness required to drive a car is to have the requisite skills and coordination to drive a car, as well as any relevant external factors, such as being licensed and having the freedom and opportunity to take a car out whenever one chooses. To be a competent driver is to have the actual ability (that is, successful exercise of a capacity) to drive a car, as evidenced by taking driving lessons and acquiring the skills to do so. To have the capacity to drive a car is to have the skill set necessary to learn to drive (such as the relevant hand-eye coordination or cognitive potential to understand road rules), whether or not one has actually driven yet. For example, an unlicensed sixteen-year-old has the capacity to drive a car, but has yet to take lessons to gain the competence.

Yet what do we say of a toddler who is learning how to stand? A toddler certainly does not yet have the relevant motor skills to drive a car, but he will develop these motor skills over the course of a normal life. Does this mean that we should say that he has the capacity to drive a car, if he will develop into the sixteen year old with the relevant coordination and motor skills to learn to drive a car? If so, why stop there? If we say that the toddler has the capacity to drive a car (on the basis that he has the capacity to

[20] Our use of competence is equivalent to Morriss's definition of 'ability'. We use the term 'competence' for two reasons. First, it is already used throughout the rights literature and second the term ability is not sufficiently distinct from capacity. See Peter Morriss, *Power: A Philosophical Analysis*, 2nd ed. (Manchester: Manchester University Press, 2002)

develop the capacity to be a competent car-driver), we could continue along this path and say that since a zygote has the capacity to develop limbs, it has the capacity to drive a car. Or even, a group of four cells without a form has the capacity to drive a car, because it will one day turn into a zygote, which becomes a child, which becomes the sixteen year old that can learn how to drive. But it is absurd to claim that a group of cells has the capacity to drive, on the basis that it has a causal connection to some (distant) future agent with the competence to do so.

So, here are the six potential agents for our case:

1. Licensed driver who has a car

2. Licensed driver who does not have a car

3. 16 year old who has not yet had driving lessons

4. Toddler who is learning how to stand

5. Embryo, in utero

6. Group of four cells, in utero

How do we distinguish between them? Morriss identifies this problem in his analysis of ability but simply dismisses it as irrelevant for most discussion. He states that:

> 'there is, at least in principle, the possibility of an infinite chain of abilities: one can have the ability to acquire the ability to acquire the ability to...I doubt, though, whether we usually want to look beyond second order abilities.'[21]

We could, in theory, simply follow his argument, and stop at the second level of series, but this seems to be unsatisfactory and ad hoc. What we offer in the following is a principled approach to addressing the series problem, which is more robust than Morriss' response.

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[21] Peter Morriss, *Power: A Philosophical Analysis*, 2nd ed. (Manchester: Manchester University Press, 2002) p. 58

Consider again the conditional analyses we gave above for capacity, competence and ableness. Here, despite the optimisation, the only potential agents who would be able to drive the car would be the two licensed drivers and the 16 year old. We consequently isolate those features internal to the subjects, their *capacity.* The toddler, embryo and group of four cells cannot drive the car as they lack the requisite capacity.

Likewise, our understanding of competence also yields the right results. If we optimise external conditions of resources and opportunity, the agents that are competent are only the two licensed drivers. The other potential agents are not. Further, the same sort of analysis can also be done for ableness: when we no longer optimise external resources and opportunity, the only agent who could do the act of driving a car would be the licensed driver who has a car at hand.

This conditional analysis neatly aligns with our earlier working definitions of capacity and competence and it also draws a distinction between the capacity held by the 16-year-old and that of the embryo. It indicates that the 16-year-old holds what we may call 'capacity proper', but the embryo does not. If we return to our example of the turtle and the student, the crucial difference there was that the student would one day be able to speak Russian. It still remains true that the toddler, embryo and group of four cells will one day become something that can drive a car, but, as we have just demonstrated through the conditional analysis, they do not have capacity proper. Instead, we can call the capacity of the toddler, embryo and group of cells a 'latent capacity' – the capacity to acquire a capacity.

What makes a capacity latent is that it is a pre-existing capacity that requires development or enhancement *in the agent* to become a capacity proper. The embryo has a latent capacity to drive a car because, under optimal circumstances, it will develop into the kind of thing that can drive a car. Latent capacities can also themselves be tiered, such that the group of cells has the latent capacity to become a toddler, even if it cannot become a toddler yet. The relevant feature, then, for latent capacities, is temporal: the agent will likely develop into something that holds the relevant capacity we are interested in. Consequently, a conditional analysis for latent capacities would be as follows:

(Latent Cap - CA) *S* has the latent capacity to *A* if, optimising all external conditions and mental states, *S* would likely develop into something that could *A* if, at that time, *S* tried to *A*.

However, it may be countered that the series problem still exists, as the capacity to have a capacity could continue *ad infinitum*. Even so, we may acknowledge that although the series exists, it is not problematic for our purposes. What we are interested in is the capacity to drive a car, not the capacity to have a capacity to drive a car. That, strictly speaking, is a different capacity. To have a capacity to A is not the same as A. This is evidenced by the fact that not all latent capacities manifest into actual capacities. We can envisage that, as a toddler, an agent may have the capacity to become many things: an Olympic athlete, an astronaut, or an academic. But, over time, some of those possibilities become closed to the agent.[22] Perhaps she is severely injured and will no longer be able to achieve a high level of sporting prowess, or perhaps future preferences, external factors and interests will steer her in a particular direction away from sports. In some sense it might be true that the toddler has the capacity to become an Olympic athlete, but what is really being expressed in 'the toddler has the capacity to become an athlete' is shorthand for 'the toddler has the latent capacity to have the skill set required to become an athlete', where, as we have stipulated, to have a capacity is to have a particular set of skills to be able to perform a particular task. As such, while we can concede that capacity-speak gives rise to a seriesion, it is still possible to differentiate between capacities proper and latent capacities and, insofar as latent capacities give rise to seriesion, we can also argue that it is not a vicious series.

Recognising the nature of latent capacities and their relationship with capacities proper we may amend our earlier diagram. See figure two overleaf.

[22]Keith Dowding, 'Can Capabilities Reconcile Freedom and Equality?' *The Journal of Political Philosophy* 14 (2006): 323-336

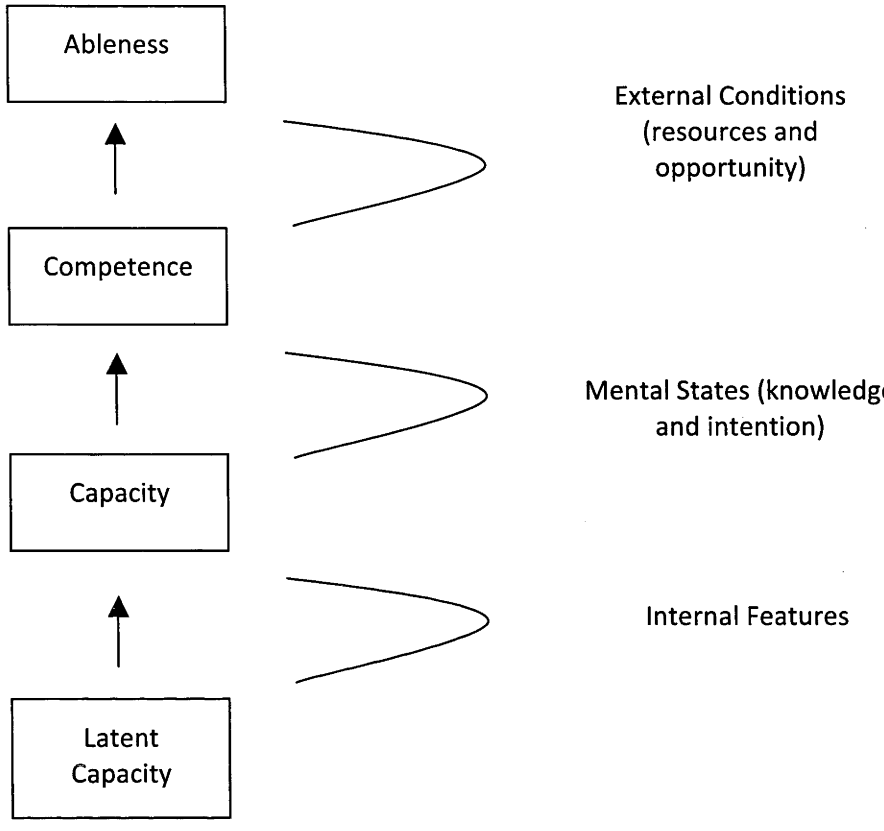

Figure Two: Relationship between ableness, competence, capacity and latent capacity

The objection from 'constant competence'

On our conception of competence, to be competent at A is to have the capacity to A, as well as the successful exercise of using those capacities to A. Clearly, an agent is competent if they are A-ing successfully. However, competence does not have to necessarily be demonstrated to be present. But if an agent can be deemed competent in A without actually doing A, what motivates us to say that they are competent? It seems that it would be difficult to distinguish between cases where an agent is competent at A and merely not A-ing, and cases where they cannot A at all.

Our response is as follows: Consider the Aristotelian distinction between the actuality of capacities.[23] Schellenberg describes it as follows:

[23] Aristotle, *De Anima*, II.5, 417a22–417a30

> 'We can distinguish between an English speaker's innate capacity to speak a language, her capacity to speak English when she is sleeping (first actuality), and her capacity to speak English when she is talking English (second actuality). The distinction between first and second actuality is the distinction between the developed capacity to do something and the execution of this doing... First actuality is not itself an activity, but only a capacity to act. Therefore, Aristotle understands it as a kind of potentiality.'[24]

Translating Aristotle's actualities into our terminology, the agent is a competent English speaker on both accounts. This is demonstrated when the speaker actually speaks English (the second actuality). Regarding the first actuality, our account would say that as long as the speaker still has the right capacities and *could* speak English (successfully) if he were awake, he would remain competent. One's competence is not extinguished simply because one is not exercising it.[25] We attribute competence to agents once they have demonstrated that they can consistently do the action in question, regardless of whether they are *currently* performing that action. Our piano player, for instance, is still competent at playing the piano even when there is no piano available to him.

However, competence can come and go, but not as sporadically as the above discussion might suggest. An athlete, for example, might be able to run a four-minute mile when she is at the peak of her training, but not at other times of the year. What can we say about this case? It seems that we can distinguish between the athlete being unable to run the four-minute mile at the peak of her fitness because she is not wearing the correct running shoes, and the athlete being unable to run the four minute mile because she has lost her fitness. In the first case, we would argue that the athlete still retains her competence at running the four-minute mile in a general sense; she does not drop in and out of competence. Instead, on our analysis, what is going on is that she merely lacks the ability due to the absence of appropriate running shoes. Presumably, if she had the right running shoes, then, given her training, she would be able to run the four-

[24]Susan Schellenberg, 'Action and Self-Location in Perception', *Mind* 116 (2007): 622-623.

[25] To think that this is the case would mean that English speakers would be dropping in and out of competence in a conversation, depending on whether it was their turn to speak or not, and this is absurd.

minute mile. If she is somewhat consistently successful at the four-minute mile once she has trained, then we can say that she is generally competent at running a four-minute mile, even if it is not the case that she could spontaneously do it.

In the second case, however, where the runner is out of practice, she has temporarily lost the competence to run the four-minute mile. On our conditional analysis, even if we optimised her resources and opportunity to run a four-minute mile, she would not be able to do so. However, given that she still has the relevant skills and features to potentially run a four-minute mile, she retains the underlying capacities that could once again be developed into competence to run a four-minute mile with the relevant training. Furthermore, competence can be lost in cases where the underlying capacities to do that action are also lost. The extreme elderly, for example, often lose the required motor skills to drive a car. In this case, given that capacity is necessarily required for one to be competent, we would say that they have lost the capacity to be a competent motorist.

Part Five

Application to the rights of the child

In the first section of this paper, we outlined the confusion that lies with definitions of capacity and competency. They are ill-defined and often used interchangeably. We highlighted how a lack of clarity can have implications for how rights are afforded to children. Having outlined our definitions of latent capacities, capacities, competence and ableness we can now return to examine what these distinctions can offer for our understanding of children's rights. Our account allows us to clarify what is distinct about the terms capacity and competence in a way that avoids the confusion plaguing the literature on these terms.

Let us briefly return to the examples set out at the beginning of the paper. Brock and Buchanan outlined the threshold an individual must meet in order to have a right to decision-making. With the distinction between 'capacity' and 'competence' now in mind, we can begin to differentiate between the type of decision making abilities held by someone like Henry Kissinger or a 14-year-old girl. We can now say that Kissinger is

competent decision maker as he not only has those internal elements necessary for decision making, but also the mental states such as knowledge, intention and experience. However the 14-year-old girl may be said to hold the capacities for good decision making but may have not yet acquired the competence. She has those elements internal to her for good decision making but may lack the experience. Furthermore, the distinctions allow us to distinguish between the 14-year-old girl and a six-month-old baby who does not yet even have the capacity for good decision-making. However, the six-month-old has the *latent* capacity for good decision-making. These sorts of distinctions show us that we must be clear on which threshold we award rights. For example if a right to consent to medical treatment necessitates rational decision making, is it necessary that the right holder has the competence, the capacity or merely the latent capacity for decision making? The stipulative distinctions between these terms offered provide us with the tools necessary to engage in this type of debate. They help us to avoid the lack of clarity that often plagues the allocation of rights.

Likewise, we can use the conditional analyses to illuminate the discussion between Schrag and Cohen on the allocation of voting rights. If we understand the capacity to vote as the internal physiological and mental features of the agent to enable him to vote, then this allows us to gain ground in understanding the discourse between Schrag and Cohen. Here, what is confused in their discussion is simply that each had a different understanding of the requisite mental states that the agent must possess in order to have capacity. As such, we can use our notion of capacity to isolate the disagreement between Schrag and Cohen in greater detail.

The final implication for children's rights is the recognition of latent capacities. The recognition of the development of latent capacities into capacities proper and then into competencies aligns with the language used in the United Nation Convention on the Rights of the Child (CROC). Article 5 of CROC discusses the '*evolving* capacities' of the child. Recognition of the child's capacities as evolving allows us to make a crucial distinction between a child and other incapacitated groups. Other incompetent groups, such as the mentally disabled and animals, lack latent capacities because their capacities are static. Identifying latent capacities allows children to inhabit a separate and distinct moral sphere, which clearly has implications for their rights.

Latent capacities may also produce a special set of duties in others to act in a way to help develop these capacities and eventually assist in the acquisition of competencies.

For example, we believe that a child's latent capacities to understand language and to talk produce in others duties to foster these latent capacities into capacities proper and further into competence in the spoken language. Furthermore, the existence of latent capacities may mean that although a child is currently incompetent, actions could be taken towards that child to violate or even destroy that future competence.[26] Therefore, in addition to duties to foster a child's capacities, we may have duties to refrain from actions that will 'close off' opportunities or competencies for the adult that child will become.

However, if a child has a right to be competent, how do we choose which competencies they have a right to develop? It may be the case that there is a narrowing effect from the development of latent capacities through to ableness. For example we may have a large number of latent capacities, from which only some develop into capacities. From these capacities, the nature of experience may mean we only acquire a few competencies. For example, from one's capacity to learn all kinds of languages, one might only ever gain competence in English and Italian. The nature of the availability of external resources and opportunity will further narrow one's ableness or opportunity to speak these languages. If we have a duty to enable the development of competencies it is not clear which competencies should be acquired, does a child therefore have a right to be competent in playing every instrument in the orchestra, or speaking every language?[27] Understanding latent capacities as a distinct category allows us to begin to identify problems that must be resolved.

Our account is not a simple extension of the Potentiality Principle. The 'Potentiality Principle' is an attempt to show that infants and children are 'persons' in a morally relevant sense. The Principle can be stated as follows:

> (P): A being that now is not a person, but has the potential to become a person (a being who will, under normal circumstances develop the capacities necessary and sufficient for personhood) should be accorded now the moral status, and rights, of a person.

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[26] Joel Feinberg, 'The child's right to an open future', in Feinberg, J, *Freedom & Fulfilment: Philosophical Essays*, (Princeton: Princeton University Press, 1980) pp.76-97

[27] Claudia Mills, 'The Child's Right to an Open Future?', *Journal of Social Philosophy* 34 (2003): 499-509

The difference between the principle and our account lies in the all-or-nothing approach that is taken by the principle: either one is a moral agent if one is a full person, or one is not a moral agent if one lacks the relevant moral import. Consequently, an infant must have the same moral status as other people (namely adults) or the same moral status as incompetents (namely animals and the severely mentally retarded). It is ridiculous to conclude that one's *potential* to become a person means they should have the same rights as if they were a person. Borrowing from Stanley Benn's example, if Sarah Palin is potentially the President of the USA, this does not mean she should be afforded the same status and rights as the *current* President of the United States.[28] Our point in this paper is not to state that those who have latent capacities and are not yet competent are the same morally as those who *are* competent, but rather that the complex way that capacities and competencies interact means that those with latent capacities are simply morally different from both those who are not competent *and* those who are competent. Respect for an individual's latent capacities *now* is very different from respect for the competent individual they will become.

It is this distinction that perhaps comes closest to offering an answer to the concern expressed by Brock and Buchanan in the passage quoted at the start of this paper.[29] Recognising a child's latent capacities allows us to maintain that 'infants who are likely to develop cognitive capacities of persons as at least more closely approximating the moral status of persons than non-persons'. Children who hold latent capacities are neither completely competent nor lacking the capacity to be competent in the same manner as other incompetents.

It should now be clear that the distinctions between 'latent capacities', 'capacities' and 'competencies' will assist those engaged with children's rights. First, the distinctions provide us with the requisite tools to properly identify the threshold that is needed for the allocation of individual rights. Second, the distinctions can prevent talking past each other when engaged in debates. Finally, the terms and identification of latent capacities

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[28] Stanley Benn, 'Abortion, Infanticide and Respect for Peoples', in Regan, T (eds) *Matters of Life and Death,* (New York: Random House, 1980)

[29] It also neatly aligns to a similar sentiment expressed by Goodin & Gibson, that affording some rights in some sense to those who are not fully competent is a way of showing respect to their status as beings that will one day be competent. Robert Goodin and Diane Gibson 'Rights, young and old' *Oxford Journal of Legal Studies* 17 (2002): 202

can assist us in properly identifying special duties we hold towards children due to the constant development of latent capacities into capacities proper and capacities into competencies. These features are an area for fruitful future research.

Part Six

Conclusion

Throughout this paper we have offered a distinction between capacity and competence. A capacity is the counterfactual ability to do A. One has the capacity to A when one has all the relevant skills internal to that person to A. Competence is one's actual ability to A. By actual ability, we mean the capacity to A plus the relevant mental states (such as knowledge and intention) necessary for successfully doing A. We then fine-tuned this framework by introducing the additional concepts of ableness and latent capacities. Ableness is one's actual ability (viz. competence) to do A plus the availability of external resources and opportunity to do so. Latent capacities refer to the capacity to develop a capacity.

The project of distinguishing between these terms is not an isolated case of semantics; it has implications for how we understand children's rights. The distinction provides a useful tool to engage in debates regarding the requisite threshold children may have to meet in order to be awarded rights. The precise use of language is relevant in philosophical debates but also in policy making. The current literature on children's rights is plagued by inconsistent and often imprecise use of these terms which can lead to talking past each other. Finally, the articulation of latent capacities has significance for the direction of future research. Because children are neither wholly incompetent nor fully competent, they inhabit a separate moral sphere defined by their latent capacities. These latent capacities may produce particular duties to foster these capacities and not to violate future rights these latent capacities may produce. Although at this stage we do not propose to offer an account of what particular rights should be applied to children, we argue that our definition of the terms equips us with the requisite tools to make these assessments. In doing so, we address and remove the confusion that currently pervades the literature regarding children's rights.

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Chapter Four

Children's Rights and the Future Interest Problem

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Under review at: *Journal of Social Philosophy*

Children's Rights and the Future Interest Problem [i]

Abstract

In this paper I introduce the future interest problem of children's rights. Actions can be taken towards children that do not harm their present interests but can harm or 'close off' the interests they may have in the future. I argue that the usual solution to this problem – Feinberg's 'Right to an Open Future' – is insufficient. Instead I argue that children have a present right to develop their latent capacities and this produces strong negative duties not to interfere with this development. In fact, the future interest problem is not about future interests at all, but present interests to develop future capacities. I then examine whether this right can also produce positive duties to assist in the development. In doing so I investigate the case of congenitally deaf children and cochlear implants. I conclude that children have a right to assistance in the development of core capacities essential to normal human functioning.

1. Introduction

In thinking about how parents and society act towards children we are more often than not concerned with protecting their future. This includes equipping children with the right skills and knowledge to live a fulfilled and happy life when they are adults. It also includes protecting children from actions that will 'close off' or harm this future. For example, ensuring adequate child nutrition is not simply about the child's current state of hunger and health, but also their future physical development. Laws about child labour are as much concerned with ensuring a child's opportunity to receive education for their future life as it is about their present experience of labour. These interrelated twin goals of developing capacities and protecting futures appear consistently throughout government policy and legislation regarding children.

However within the tradition of rights theory, protecting the future of an individual in terms of rights has presented certain challenges. Those who argue for children's rights usually frame rights in terms of the interest theory approach, arguing that children have rights because they have interests worthy of protection. Interest theory works best

when protecting clearly identifiable present interests. Children, however, are in a process of developing their interests. This may lead to situations where actions taken towards children may not necessarily harm their *present* interests but can certainly impact the interests they are likely to develop in the *future.* This is particularly a problem when we are discussing rights that depend upon a certain capacity or competence in the right-holder, in order for the right to be enjoyed.

In this paper I will first outline in more detail the interest theory account of children's rights and what I will call the 'future interest' problem. The future interest problem is the question of how interest theory should characterise actions taken towards a child that can impact on the future interests, capacities, or rights of the adult that child will become. Having detailed the problem in section two, section three of the paper will then briefly consider the way the problem has been dealt with in the past. I argue that past discussion of the future interest problem is lacking in two ways. First, it mischaracterises the temporal nature of the right by placing rights with the future adult and not the present child. Second, it frequently under-conceptualises the nature of these rights, failing to answer *why* they deserve to be thought of as rights.

In the fourth section of the paper I argue that these types of future interest rights are held by children now, not by their future adult selves, and that this produces a present duty of non-interference in the child's development of capacities. This is because the interests to be protected are not *future* interests but *present* interests in the development of *future* capacities. I then consider whether this right can also ground a positive duty to assist in the development of these capacities and in doing so I examine the well-known case of cochlear implants for congenitally deaf children.

Although this paper cannot provide a complete analysis of how *all* rights of this type may operate, the consideration of the cochlear implant case presents a useful framework and brings into focus some of the challenges in protecting the development of children's capacities through rights theory.

2. The Future Interest Problem

International law, treaties and national legislation such as the United Nations Convention of the Rights of the Child (CROC), The African Charter on the Rights and

Welfare of the Child and the Children Act (2004) of the United Kingdom, clearly demonstrate that children have legislated rights. However the reason *why* they have rights is considerably less clear. Most scholars hold that interest theory provides the best approach to children's rights (Campbell 1992; MacCormick 1976). Interest theory holds that the function of a right is to further a right-holder's interests. Kramer defines rights as 'modes of protection for interests that are treated as worthy of protection' and Raz states that 'x has a right if...an aspect of x's well being (his interest) is a sufficient reason for holding some other person(s) to be under a duty' (Raz 1984, 195; Kramer 1998, 79). These interests ground claims that produce duties in others to at or refrain from acting.

Interest theory argues that it is not logically necessary for the power to enforce or waive a claim to reside within the right-holder themselves. Children, therefore, can hold rights even if in cognitive terms they lack certain decision-making abilities, because they have interests sufficiently important to be worthy of protection. At the most basic level children have an interest in living that produces duties in others not to kill them. Despite the fact that a young child may not be able to enforce these claims personally, they can be enforced by others on their behalf.

Yet interest theory does not allow children to hold all rights that adults might possess. For many rights an interest is only of sufficient importance to produce duties in others when the right-holder has the competence to realise the benefit to which that interest pertains (Cowden 2012, 9). This is particularly true when the realisation of that right involves autonomous action. To use a somewhat fanciful example, if I have a desire to fly without mechanical assistance, this cannot be an interest worthy of protection as I will never be able to realise the benefit to which the interest pertains. More realistically, when the realisation of a right involves rational decision making, one may not be able to hold that right until one possesses the relevant competence. In this way we constrain the rights of children so as to exclude decision-making activities such as voting. This manner of differential allocation of rights is grounded in the proposition that we cannot have a claim-right to things we have no competence to realise. That proposition is not just a feature of children's rights but of rights generally: as Singer points out, it seems unreasonable to argue that a man has a right to an abortion, as he lacks the capacity to ever become pregnant (Singer 1989).

The importance of capacity and competence in interest theory is therefore a problem for children as right holders. Interest theory functions best when there is an identifiable present interest, and this entails that the interest is directly and presently applicable to the right-holder. Children, however, are not static in their capacities like most adults, but are in a constant process of developing them.[ii] As the growing literature on child development from Jean Piaget onwards demonstrates, capacities such as literacy, intellect or counterfactual reasoning, are developing rapidly throughout childhood (Piaget 1972; Whitehurst & Lonigan 1998; Beck & Guthrie 2011). The United Nations Convention on the Rights of the Child also recognises this feature: Article Five outlines that the exercise of a child's rights should be in close relation to their 'evolving capacities' (CROC). Children therefore are constantly developing and evolving new capacities - their capacities are not static but fluid. This adds a temporal problem to the interest theory of rights presented above which so far often relies on the present capacities and competencies an individual holds.

If children will have capacities in the future that they do not have now, it follows that they may have rights in the future that they do not have now. This may result in problems. For example, consider the case of a young pre-pubescent girl who has not yet developed the capacity to have children nor developed the secondary sex characteristics that lead to the enjoyment of sex.[iii] According to the logic set out above, because she lacks the capacity for bearing children and sexual enjoyment she can have no legitimate interest in those activities and therefore, lacking this interest, she can have no claim against interference by others that deprives her of them. At first this may seem unproblematic. Why should she presently have a right to protect her non-existent capacity to have children? However, in the extreme case does this mean that a young prepubescent girl has no right against genital mutilation? Practices of female circumcision can certainly prevent women from ever developing the capacity to enjoy sex, and the complications or infections that may arise from such practices can sometimes render women unable to conceive (Annas, 1995). Of course there may be other interests that the young girl presently holds that would generate a right not to be subjected to genital mutilation, for example the right to bodily integrity or the right to be free from pain and harm. However it is not just these rights that we intuitively believe are being violated, it is also the deprivation of some *future* interest - that of having children or enjoying sex – that we believe is at play.

If rights are to be useful for children we must be able to demonstrate how they protect the development of interests a child will have in the future. This is not isolated to what may be taken as extreme cases such as female genital mutilation. Choices and actions are made towards children every day that impact on their future interests. Therefore we are left with the question of how to account for future interests in the world of rights theory. Neatly stated: if an interest an individual may have in the future can be harmed by actions in the present, does that individual have a right to protect their future interests now?

3. Potential solutions

This issue has not been completely ignored throughout rights theory. However it may be the case that the problem of developing capacities and interests throughout the life of an individual has received little attention as it is less of an issue for the traditional liberal agent - the fully developed rational adult.[iv] Much of the discussion of what I have called the 'future interest' problem derives from the work done by Joel Feinberg in his consideration of a child's right to an open future (1980). In this section I will consider Feinberg's proposition of rights in trust and also briefly consider the discussion by other scholars on this issue.

Feinberg

The most influential account of the future interest problem has been Feinberg's article 'The Child's Right to an Open Future' (1980). Feinberg suggests that children hold 'rights in trust' for their future interests. These rights in trust look like claim-rights to autonomous action but can't be currently exercised by children as they lack the present capacity. According to the theoretical rights framework I set up above this would mean they weren't actually rights at all. However Feinberg says that these autonomy rights refer to rights that are to be *saved* for children until they are capable of exercising them, and therefore need to be considered proper rights because violation or breach *now* could destroy the child's ability to realise their right in the future. As Feinberg explains;

> 'the violating conduct guarantees *now* that when the child is an autonomous adult, certain key options will already be closed to him' (1980, 126).

Feinberg calls these 'anticipatory autonomy rights' as they ensure that the future autonomous adult will be able to choose freely. For example Feinberg argues that an infant who is currently incapable of locomotion has a right in trust to walk freely down a public footpath. This produces a duty not to interfere with the child's future means of locomotion or, to put it crudely, not to cut off her legs (1980, 126). What is supposedly special about these 'rights in trust' is that they impose duties on others before the right-holder is capable of exercising the right herself. Therefore for our purposes the young prepubescent girl would hold a right in trust for her future fully sexual self. The right would protect her from any action, such as genital mutilation, that could interfere with her future self's enjoyment of sexual and reproductive autonomy.

There are two main areas of concern with Feinberg's theory. First that the right lies with the future adult and secondly that is difficult to quantify what constitutes an 'open' future. The construction of Feinberg's rights in trust for the future adult is problematic. In Feinberg's example of the child who cannot yet walk, what is actually being violated is the future adult-self's interest in being able to choose whether to walk down the street or not. Feinberg seems to be suggesting that since an infant will *develop* the capacity to walk down the street; this creates a right held in trust. In this it appears that really what Feinberg is constructing is a right held in trust by the child-self in order to protect the future *liberties* of the adult-self. One has a Hohfeldian liberty to walk down the street, it is a Hohfeldian liberty that can be exercised or not according to the choice of the liberty-holder. For this reason it appears what is being protected is not the future adult's right at all, but the future adult's ability to exercise a liberty protected by a right that is actually held by the child.

Not only does this construction seem to confuse the relative importance and difference between claim and liberty, the interests of the present child seem completely absent. It is not important what the child has an interest in, only the future liberties of the adult. This again seems to be missing something we want to get at, namely that the present child has relevant interests too. The child is not just a vehicle for getting the autonomous self to adulthood but a person with interests and claims themselves. In the female genital mutilation example, it is not just the future women's choice of whether to have children or not that we are concerned with protecting, but also the present girl's

interest in developing. This seems to suggest that the future interest problem isn't about *future* interests at all but present interests to develop capacities into the future.

Putting aside the temporal problem to do with the construction of these types of rights, even if we are willing to accept Feinberg's idea of rights in trust, there is still a further issue to do with how we conceptualise an 'open future'. If we are to take the idea of an 'open future' seriously we must determine exactly how open that future must be. Arneson & Shapiro interpret the 'open future' as requiring individuals to acquire 'to the greatest possible extent' the capacity to choose between 'the widest possible variety of ways of life' (1996, 412). Archard and Mill, however, have argued that a truly open future is both impossible to achieve but also undesirable (Archard 2003; Mill 2003). First, how can one quantify everything that is possibly available to the child? And even if one could, some choices necessarily preclude others. For example, if a child were to become a professional ballet dancer, the physique required would preclude them from competing in a heavy weight boxing competition. The preparation and training it takes for either of these futures would also be incompatible; one only needs to look at the training hours of young athletes to see that it would be virtually impossible for them to also pursue careers as professional musicians. Life and the choices we make are path dependent. Therefore it is impossible to keep options truly open in the way Arneson and Shapiro suggest. Furthermore the duty to expose children to these options and to keep their futures 'open' could produce unreasonable burdens on parents (Archard 2003, 32). Yet perhaps most importantly, is it really in a child's interest to have *all* possible futures open to them? It may be sufficient to say that a child has a right not to have *significant* life choices closed to them and that they have a right to *a* particular or possible future (Archard 2003, 32). Claudia Mills raises a similar objection arguing that what is really important for children is the meaning gained from an in-depth experience, not a shallow 'smorgasbord' approach to all careers, religions and futures on offer (Mill 2003). The problem, then, is that Feinberg doesn't tell us what this open future actually consists of, and why a child might have an interest in it. So not only is there a problem with his analytical construction of the right but also in his specification of *why* it is a right.

Feinberg's work has been incredibly influential. Much of the work addressing the future interest problem concentrates on either directly critiquing Feinberg, propping up his position or applying his theory to new cases, especially in the case of new reproductive technologies.[v] Yet the work of Feinberg is not the only solution offered, in contrast to

Feinberg, John Eekelaar argues that the right should not lie with the future adult but with the current child. Eekelaar argues that all children,

> 'should have an equal opportunity to maximise the resources available to them during their childhood (including inherent abilities) so as to minimise the degree to which they enter adult life affected by avoidable prejudices incurred during childhood' (1986, 170).

Children, on this argument, have a right that produces a duty on society (including their parents) to ensure that they are no worse off than most other children in their opportunities to realise their life chances (1986, 170). These he calls 'developmental rights'. Eeekelar's account seems to be far closer to the construction and sentiment we are trying to capture. However it is still underdeveloped. For example what counts as equal opportunity, what kind of duties does the right create and what kind of interest grounds it? Although Eekelaar's account is on the right track it needs to be further fleshed out in order to properly address the concerns raised earlier.

To sum up: although the future interests problem seems to be a real issue in the definition of what constitutes an interest sufficiently important to ground a right, the usual solution to such problems is to appeal to Feinberg's work. Although groundbreaking, Feinberg's 'rights in trust' are lacking as they place the interest and right with the future adult and not the current child, contrary to our intuitive understanding. Other discussions of this issue places the right appropriately in the hands of the child but up to this point have not been adequately conceptualised. In the next section of this paper I offer a way of constructing these rights and develop an account of why children have an interest in their future capacities.

4. Reconciling Rights and Future Interests

In order to reconcile rights and future interests I argue that children have an interest in developing the capacities that, if they were not interfered with, the child would normally develop. This places the interest correctly with the existing child and not with the future adult. I argue that a child has an interest in the *development* of capacities now, and that this interest therefore founds a claim that produces a duty in others not to interfere or prevent the present development. In order to overcome the future interests problem for

children's rights we must first show why the right belongs with children now and not with the future adult they will become, and second why it is that such construction should be a right. These two questions are inescapably interlinked and I will deal with these two concerns together in order to support my assertion of a child's right to develop capacities.

It may be worth more clearly articulating *why* we need to offer a reason for placing the right with the present child and not the future adult. There may be those that doubt that it is this really a problem we need to overcome. Archard claims that there is no difference between placing the interest with the current child or the future adult as arguably they are one and the same person. He argues, discounting the metaphysical issues posed by Parfit[vi], that,

> 'child and adult are merely distinct temporal stages of a single individual. Child and adult have thus the same interest in development' (2003, 33).

This may be true, but only serves to displace the underlying question. When asking 'why does a child have an interest in developing in the future?' we cannot simply answer – 'for the same reason that adults do'. This simply begs the bigger question as to why anyone, including a child or adult, has an interest in developing in the future.

I argue that the interest can be isolated in the following way. First, it seems uncontroversial that children (and adults) have an interest in *being* in the future, in at least *a* future state – that is to say, existing. Therefore it cannot be true that we cannot have interests in future states. As stated earlier, at the most basic level a child has an interest in life and therefore others have a duty not to end this life. It is true that some individuals may have lives so full of pain and suffering that they may consider non-existence better than existence, and so have no interest in any future state at all. Yet these individuals represent an exceptional case with a distinct theoretical literature.[vii] In any case, the existence of such individuals does not falsify the proposition that one can presently have interests in future states. It is therefore conceptually possible to have interests not just in the present but also in the future.

Why then do children have interests in specific future states such as being able to bear children? As Mills demonstrated it cannot be that we have a right to *all* possible future states, as this would be unreasonable and undesirable. Instead I argue that these rights

exist on the following basis; children have an interest in being free from interference in developing core capacities.

Capacities and Competencies

Children have an interest in developing capacities due to their *potential* to develop. At the start of this paper I claimed that many children's rights are dependent on the child as right holder holding the requisite competence to realise the benefit of the interest. At this point it is worth taking some time to explain in more precise language what is meant by capacity and competence. The terms are often used interchangeably throughout the literature surrounding children's rights but there is a useful distinction to be made between the concepts.

Cowden and Lau argue that we can understand the distinction by considering the difference between a human student and a turtle. At the moment neither the English speaking student nor the turtle can speak Russian. However if the student takes intensive Russian lessons he may be able to speak fairly competent Russian in a matter of months. The turtle, however, no matter how many lessons he is given, will never be able to speak Russian. In this sense the student and the turtle both currently lack competence in speaking Russian, but the student has the *capacity* to speak Russian while the turtle does not (Cowden and Lau 2011, 7). Capacity, therefore, is a counterfactual ability. One has the capacity to *A* when one has all the relevant skills internal to that person to *A*. Competence, on the other hand, is one's *actual* ability to *A*. Competence is the capacity to *A* plus the relevant mental states (such as knowledge and intention) necessary for successfully doing *A*. There are also two additional identifiable concepts – latent capacities and ableness. Ableness refers to the competence of the agent plus external conditions to actually do the act. For example a piano player may be competent in playing the piano but must actually have a piano present in order to do so. Latent capacities, however, consist of the capacity to develop a capacity. In this sense a baby may not yet have the capacity to speak Russian as they do not yet have the internal skills (such as cognitive functioning) to learn any language at all, however they do have the capacity to develop the capacity to be competent in Russian. It is the acquisition of these latent capacities and capacities proper that set children apart. The relationship between these four concepts can be seen below in Figure One.

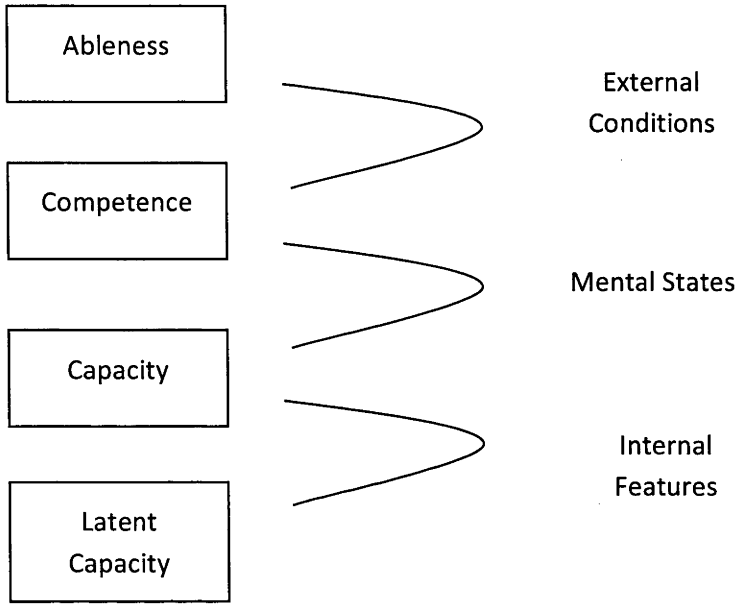

Figure One: Relationship between ableness, competence, capacity and latent capacity

With this distinction of terms now in mind let us consider the prepubescent girls interest in developing the capacity and competence to bear children. The capacity to have children refers to the relevant skills internal to a person, such as the secondary sexual characteristics, fertile gametes and a well nourished body. One's competence to have children refers to knowledge and intention, in this case the knowledge that conceiving a child involved sexual intercourse.[viii] Ableness to fall pregnant refers to external conditions such as the necessity of a willing, fertile man. Our prepubescent girl therefore lacks the *capacity* to have children in the strict sense, as she lacks the secondary sexual characteristics. However, unlike a man for example, who also lacks the secondary sexual characteristics, our prepubescent girl has the primary sexual characteristics. She therefore has the capacity to develop the capacity to become pregnant. This second order capacity we can call the 'latent capacity'.

Genital mutilation (or more controversially puberty inhibiting drugs) can destroy the child's latent capacity to bear children. We can therefore say that the girl, by virtue of her latent capacities, has a present interest in being free from interference in these latent capacities and this produces a duty in others not to act in such a way that will

destroy them. Furthermore actions that interfere with the development of latent capacities into capacities proper would constitute a violation because it is a form of harming. Genital mutilation is not simply an action that removes a capacity that a child has not developed yet, therefore causing no detriment, it is an action that actively removes the child's latent capacity – their potential to develop the capacity to bear children or enjoy sex. By essentially keeping children in a state of childhood one harms their interests by removing their potential to leave it

Therefore the young girl has a right to develop her capacity to bear children free from interference actions (such as genital cutting) from others. This is because she holds the latent capacity to acquire this capacity and interference with this process of development would constitute harm. At this point the arguments laid out above present a case for why children have a present right to develop capacities that produce strong negative duties of non-interference. In the next section I consider whether this can be extended to include positive duties such as assistance in developing capacities.

5. Positive Duties

The arguments laid out above seem to work well in cases where a child can be expected, all other things being equal, to develop the relevant capacity, such that the relevant right produces strong negative duties of non-interference. But does this type of claim-right also produce positive duties to assist in development of certain capacities? In many cases children are not going to develop certain capacities by themselves and yet we think they have some sort of claim to assistance in this development. Let us now complicate the picture of a simple negative right to develop capacities with a case that has received much attention in the area of children's rights - that of congenitally deaf children and cochlear implants.[ix]

Consider a child who is born with congenital deafness. Such children have structural differences or damage to their inner ear usually caused by genetic factors, and are unable to hear from birth. Congenitally deaf children are not only without the ability to hear, but often also have severe difficulties in learning the written and spoken language.[x] Written and spoken language is essential for modern life, something that we may consider that children have a right to develop. However, it is not enough simply to

impose a duty of non-interference with respect to those with congenital deafness, since they will not develop the capacity to hear, speak and understand the spoken language unaided. In this case the congenitally deaf child is most unfortunately cast into the same category as our turtle, while lacking the underlying capacity to develop the capacity for hearing (or in the turtle's case speaking) and thus having no antecedent rights.

Yet unlike the case of the turtle, congenitally deaf children can be given cochlear implant surgery that will allow them to hear. Studies show that cochlear implants given to children allow these children to develop the same level of spoken and written skill as other hearing children. The failure to give congenitally deaf children cochlear implants could then produce a future interest problem, as it is an omission that could interfere with the development of capacities in the future. Just as genital mutilation may prevent girls from bearing children in the future, so does the failure to give a child cochlear implants irreversibly prevent them from fully participating in the written and spoken language. The difference is that while secondary sexual characteristics will develop on their own, for congenitally deaf children hearing will not. Therefore simple negative duties of non-interference are insufficient to guarantee the right.

It would be easy to leave the discussion here by concluding that future interests can produce only rights with concomitant duties of non-interference that are relatively easy to fulfill. Yet this would be counterintuitive – it seems that so long as society is capable of assisting those with congenital deafness, it may be under a duty to do so. Why, then, do we have rights that ground not only non-interference with the development of our future capacities but also assistance in development of these capacities? We must show that children not only have an interest in retaining the latent capacities they already have, but also in acquiring capacities proper they would not develop unaided.

One option may be to adapt the work done by Norman Daniels on the importance of 'normal human functioning' in health care allocation. Daniels argues that we have a duty to restore individuals to the level of 'normal human functioning' or 'species typical normal functioning' to guarantee equality of opportunity to access Rawlsian primary goods.[xi] Normal human functioning or normal species functioning is a concept that originated in the field of biology, in particular through the work of Christopher Boorse (1977). Daniels adapted the concept to specifically mean 'functioning that is exhibited by a majority of member of a species' (Daniels 1985; Satz 2006, 232). Daniels argues for the distribution of health care resources according to a baseline of functioning considered

normal for the human species. He deals primarily with questions of distributive justice – what kind of health care services will exist in society, who will get them and on what basis (1985, 2). However his answers to these questions draw on some important principles about what we think is important in treating people and these principles may be just as applicable in the context of rights theory. In fact Daniels himself argues that his distributive justice theory of health care can be seen to support and properly sculpt right-claims, for,

> 'such a theory would tell us which kinds of rights claims are legitimately viewed as rights. It would help us specify the scope and limits of justified right claims' (1985, 5).

Therefore, by applying the concept of normal human functioning, we can argue that children have a right to core capacities that are essential to normal human functioning. This right produces duties of assistance in others to help children develop or acquire these capacities. Since the capacity to hear is essential to developing the competence to understand, speak and write the written language, it can be considered a core capacity essential to normal human functioning. A child therefore has an interest in cochlear implants in order to acquire the core capacity for hearing. This is true despite the claim that congenitally deaf children lack the latent capacities to develop the capacity to hear unaided.

Critics have argued, however, that the normal human functioning approach focuses overly on *mode* of functioning and not functional *outcomes* (Satz 2006). For example consider Hannah who has been born with partial upper arms. She can type with upper arm prostheses but finds them painful so prefers to type with her feet. Critics claim that a normal human functioning approach would see normal as typing with one's upper arms and therefore seek to restore this rather than recognise the alternative functioning outcome of feet typing (Satz 2006, 224). I don't think this is a fair criticism. I have used the concept of normal human functioning in terms of *capacities*. A right to a capacity does not impose any obligation to *use* that capacity. It may be correct that Hannah has the choice to feet type if she wishes, however it may also be correct that if she chose otherwise that other people would therefore hold a duty to assist this. What becomes important is ensuring that right-holders have the core capacities to make the types of choices they wish about functioning and that they are not denied the capacity for normal human functioning.

6. Constraints on these rights

One advantage of adopting a normal human functioning model for determining core capacities and rights, is that we are now well placed to answer some of the challenges posed to the alternative model – Feinberg's right to an open future – that were introduced at the beginning of this paper. The two criticisms leveled against a child's right to an open future were that a truly open future imposed unreasonable obligations on parents and the State and that even if it were possible to ensure a truly open future, the outcome is probably undesirable (Mills 2003, 499). I will deal with these two objections in turn.

Mills argues that the 'inescapable finitude of life' renders it is impossible to truly keep our options open (2006, 499). Even if we are able to approach this kind of openness, the type of duties it would impose on parents are simply unreasonable. It would necessitate taking children to all sorts of sporting activities, allowing them to learn several languages, several musical instruments and even gain experience and knowledge of each spiritual tradition, something, she points out, all too many parents do try to attempt! This smorgasbord approach does indeed seem unreasonable and the reason lies with interest theory itself. An interest only constitutes a right when it is sufficiently important to impose duties on others. Although it may be true that if you speak both English and Spanish you may gain a benefit, it is easy to imagine that the additional benefit would decrease with each language one learns, since there are relatively few areas of human life that would actually be improved by such pan-linguism. Therefore the benefit a child would get from being exposed to all of these things would simply not constitute an interest of sufficient importance to ground a right.

The normal human functioning model further narrows this requirement. This paper has established a child's right to develop their latent and capacities proper. However most of what Mills is concerned with in her objections are clearly competencies, not capacities. There is an argument to be made that in guaranteeing the development of certain latent capacities and capacities proper, an individual will be in the position to acquire and develop competencies as they choose. The normal human functioning model also tells us which capacities a child has a right to. These are clearly the capacities that allow the child to achieve normal human functioning; therefore this type of right

would not impose the type of unreasonable duties discussed by Mills. The right to the core capacities, however, must still have correlative duties that are reasonable and achievable. For some capacities, such as hearing, the duty (cochlear implant surgery) is achievable. For other capacities we may not yet have the technology to assist in the same way. Furthermore there may be many other capacities we would like a child to have but which do not fall within this core of normal human functioning. These might include the capacity to become a great leader, or the capacity to be creative and use one's imagination.[xii] However, no matter how desirable we might consider these to be, we would not consider that a child has a right to them. Capacities that are impossible to achieve, or are not always clearly in the child's interest, or that would impose unreasonable duties, are not capacities that would ground rights.

The second objection listed by Mills was that a truly open future is undesirable because being exposed to this 'smorgasbord' approach misses what is truly valuable about these experiences; the child would become a 'Jack of all trades and Master of none' (Mills 2006, 506). As Raz points out, it is not about the number of choices one has but the quality of these choices. It becomes clear by the capacity-based rights model offered above that what we are concerned with is not the number of options per se but one's ability to achieve any of these options in the most basic sense.

Therefore by adopting a normal human functioning model to guide our judgment about what rights a child has, we impose certain constraints that neatly align with one of the core principles of interest theory – that the interests that ground rights are those sufficiently important to justify imposition of duties on others. There may be capacities that we would like children to have and competencies we would like them to develop or we might even see as beneficial to have. However these are not necessarily rights if they are not sufficiently important to impose duties on others to guarantee them.[xiii]

The previous discussion concludes that children have a right to develop certain core capacities. This right produces a duty of non-interference in those capacities children will normally develop and also in some cases a positive duty of assistance. These capacities are in the child's interest to develop, due to their latent capacities and also the benefit of acquiring these capacities to achieve normal human functioning. However, if we are to hold this statement to be true in regards to congenitally deaf children and the cochlear implant case, we must address some further counterarguments.

7. Some Objections

The question about cochlear implants is not one of rights theory alone. There is a history of strong objection to cochlear implant surgery by those in the Deaf community.[xiv] These objections can broadly be broken into three issues. First that Deaf people have an equally high quality of life as hearing people and therefore deafness is not a disability. Second, that trying to 'cure' Deaf people through cochlear implant surgery sends a strong message to society that their lives are less valuable; and finally that if Deafness is understood as culture and not as a disability then Deaf parents have a right to bring up children in their own cultural tradition - that is, without cochlear implants.

Due to constraints of space in this paper I am going to only deal with the first objection. I don't deny that there may be genuine concerns arising from the second objection, which can be broadly called the argument from 'Expressivism' (Edwards 2004). The concerns in the third objection deserve to be dealt with thoroughly elsewhere. The approach I take here gives us the answer that Deaf parents should not be able to refuse cochlear implants for their children. This argument is one based wholly on the consideration of a child's right to develop certain core capacities and does not consider cultural identity. There may be cultural considerations that override this capacity based right. However even the most ardent of advocates admit that there are 'genuine and difficult' concerns regarding the rights of parents to choose a cultural identity for their children that may substantially reduce their opportunities (Sparrow 2005, 140). The argument offered below is an account of one such concern.

Deafness as a disability

Throughout the 1980's and 1990's many Deaf communities began to argue that deafness should not be understood as a disability. They argued that those living within the Deaf community are not disadvantaged, that in fact they benefit from access to the community support. Davis writes,

> 'Deaf pride advocates point out that as Deaf people they lack the ability to hear, but they also have many positive gains: a cohesive community, a rich cultural

> heritage built around the various residential schools, a growing body of drama, poetry and other artistic traditions, and, of course, what makes all this possible, American Sign Language' (Davis 1997, 12).

The reporting of a good quality of life despite popular assumptions is not unique to deaf people. There also exists a broader 'disability paradox'. The problems can be essentially stated as,

> 'Why do many people with serious and persistent disabilities report that they experience a good or excellent quality of life when to most external observers these people seem to live an undesirable daily existence?' (Albrecht & Devlieger 1999, 977).

Albrecht and Devlieger's study reported how those facing severe disabilities had a high quality of life despite often lacking the capacities necessary for normal human functioning. Therefore, Deaf advocates argue, if Deaf people consistently report a high quality of life, applying the 'normal human functioning' model gives a false standard of what is necessary to live a good life. Participating in Deaf culture is just as valuable.

In addition, many consider that any disadvantage that the Deaf community experience is the product of an unaccommodating society. For example the community in Martha's Vineyard, Massachusetts has a high rate of hereditary deafness. In the late 19th century one in every 155 people on the island were deaf, almost 20 times the average for similar sized communities (Groce, 1985). As a result the majority of the community could speak American Sign Language and deaf people participated fully in all forms of political and social life. The Deaf communities claim that this example shows how 'disability' disappears with social adjustment (Sparrow 2005, 137). The proper approach should not be to 'fix' the target of discrimination in society, but society itself. As Roslyn Rosen, President of the National Association of the Deaf, has stated,

> 'In our society everyone agrees that whites have an easier time than blacks. But do you think a black person would undergo operations to become white?' (Davis 1997, 12)

It follows from this line of argument that deaf children do not need cochlear implants, but that they do need proper support societal support.

Protecting core capacities

Essentially, the objection raised above argues that demonstrating that Deaf people have a high quality of life shows us that children do not have an interest in cochlear implant surgery to acquire a capacity to hear. In this final section I argue that this is not the case, we can hold these two claim simultaneously – Deaf people have a high quality of life and children have an interest in acquiring the capacity to hear.

It may not be the case that our specific goals in life, whatever they may be, will always be achieved less readily if we fall short of normal human functioning. However it is the case that achieving normal human functioning has a tendency to make our lives go better, at the very least it provides us with the opportunity, the equality of access to our goals, or as Daniels puts it, to the Rawlsian primary goods. It is an unfair comparison to compare the individual as they would be as a hearing person and the individual as they would be as a non-hearing person. We can, however, compare the category of non-hearing people and the category of hearing people. Although non-hearing people may live self reported high quality lives, it still remains true that they face numerous challenges to their lives that hearing people do not face. The same applies for the broader disability paradox. The study by Albrecht & Devlieger demonstrates that those with a disability often adapt to their situation. However, this relative happiness is again asking the wrong question. It is not whether one can live a good life with the disability but whether having a certain core capacity would be in a child's interest.

In addressing this it becomes clear that we cannot *just* have a cultural understanding of deafness. *Even* if society were changed so it was even easier for Deaf people, those who could both sign and hear would still be at an advantage. When considering the Martha's Vineyard argument, it is worth pointing out that at the time in the 19th century, the major industries for the island were farming and fishing, occupations where oral or written communication skills were not necessary for success. It is questionable whether such a seamless integration would be still possible today. It cannot be denied that competence in understanding, speaking and writing the spoken language is an advantage in modern life and that the capacity to hear is essential to acquiring these competencies. Denial of cochlear implants to children may therefore constitute counterfactual harming. According to Feinberg the counterfactual test harm exists if B's

interest is in a worse condition than it would be had A not acted as he did (1986, 149). It is even possible to *improve* B's condition while still counterfactually harming her. Suppose I go to see the doctor with a serious throat infection and instead of prescribing me antibiotics he sends me away with painkillers. The painkillers make me feel better but do not address the infection. By failing to prescribe me antibiotics my doctor has adversely affected my interests even though I am better off from his actions than I would be had he not acted at all. Not allowing a child access to cochlear implant surgery can be seen as counterfactual harming in this sense. A child may be happy and healthy growing up deaf and using sign language but their interests are still harmed by the loss of opportunity to acquire the core capacity of hearing.

Although, as was pointed out earlier, it is impossible to keep *all* options open for a child, this does not mean that talk of open or closed options or choices is completely meaningless when applied to individual cases. For example, choosing to give a child cochlear implants leaves open the options of a) developing skills in the spoken language, b) taking the implants out and choosing to be deaf once the child has reached the age that they can do so, and c) learning sign language and participating in deaf culture. Research does suggest that it may be more difficult to acquire competence in sign language while simultaneously learning spoke language, but it is not impossible (Crouch 1997). This breadth of choice is considerably more 'open' than those that would be available if cochlear implants surgery were not undertaken. Although the child will have access to Deaf culture as described above, without the implant it is highly unlikely that a deaf child will be able to learn the spoken and written language and that their ability to participate in majority society will be severely restricted (Sparrow 2005, 140).

Despite individual stories and evidence that one can live a valuable life in the deaf community, when considering the rights of the child, it is still in their interest to have the capacity to hear. Ensuring that children have the capacity still allows for the option of removing the cochlear implant later in life. Therefore it seems possible to hold the two claims simultaneously, first that Deaf people have a high quality of life and second that it is in the interests of children to acquire the capacity to hear. This interest of children to acquire this core capacity should be taken into account when considering claims that Deaf parents have a right to bring their children up in their own cultural tradition.

Conclusion

This paper has presented the future interests problem of children's rights. It examined the dominant solution to the problem - Feinberg's right to an open future - but found it insufficient. Such a right does not acknowledge the importance of the interests of the present child and fails to properly distinguish what constitutes an open future. The paper then offered an alternative understanding of the future interests problem. I argued that it was not about *future* interests but about *present* interests in developing capacities. The right belongs to the child now, as children have an interest in developing their latent capacities. Others have a duty not to interfere or destroy a child's latent capacities.

I then examined whether the right not only had a correlated duty of non-interference but also a duty to assist in the development of certain capacities. In doing so I considered the controversial case of cochlear implant surgery for congenitally deaf children. I argued that children have a right to assistance of the development of their capacities, but not of all capacities. A useful way of determining which capacities are sufficiently important to constitute a right is the adoption of the normal human functioning model. Children therefore have rights to certain core capacities that allow them to achieve normal human functioning.

Finally I considered some objections to my position on cochlear implants presented on behalf of the Deaf community. Although I cannot present a full analysis of the 'deafness as culture' argument here, I have argued that the right to cochlear implants as established by a child's right to the acquisition of certain core capacities, presents a compelling case. Any cultural objection will have to overcome this argument in a more substantial way in order to establish that Deaf parents have a justified power to bring their children up within a cultural identity that clearly restricts the development of core capacities. The difficulties presented in this paper surrounding the cochlear implant case are indicative of the difficulties in protecting the capacities and futures of children. However, if there ever were a goal for rights, especially children's rights, this would seem to be it.

Notes

[i] The author would like to thank Keith Dowding, Nicholas Duff, Rosa Terlazzo and Leif Wenar for their comments and criticisms of earlier drafts.

[ii] Adults are also developing capacities and competencies. They are not truly 'static'. However children present a special case as they are at a point of their lives where their capacities are developing particularly rapidly. Although adults are still developing capacities most of their physical and cognitive capacities have developed beyond the threshold we may consider relevant for holding rights. For example a 50 year old may have far more developed political decision-making skills than an 18 year old but both of them are beyond the threshold of what we deem necessary to hold the right to vote in a way that an 18 month old baby clearly lacks.

[iii] This example is an extension and expansion of one given in Dena Davis's piece Davies, Dena (1997) *Genetic Dilemmas and the Child's Right to an Open Future*, The Hastings Center Report, 27(2) 7-15. p9

[iv] It may also be seen as less interesting than that of another 'future' interest problem of a different sort, the non-identity problem, discussed by Derek Parfit in 'Reasons and Persons' (1984) Oxford: Oxford University Press.

[v] See Brock, Dan (2002) 'Human Cloning and Our Sense of Self', *Science*, 296 (5566) 314-314; Strong, Carson (2003) 'Two Many Twins, Triplets, Quadruplets, and So On: A Call for New Priorities', *The Journal of Law, Medicine and Ethics*, 31(2) 272-282; Davis, Dena (1997) 'What's Wrong with Cloning', *Jurimetrics*, 18(83) 83-90; Scully, Jackie Leach, Banks, Sarah & Shakespeare, Tom (2006) 'Chance, choice and control: Law debate on prenatal social sex selection', *Social Science & Medicine*, 63(1) 21-31.

[vi] Parfit raises objections surrounding the supposed moral significance of the continuation of identity. Why are problems involving the same person over time given more moral weight than different people? See, 'Reasons and Persons' (1984) Oxford: Oxford University Press.

[vii] See Feinberg, Joel (1986) 'Wrongful Life and Counterfactual Element in Harming', *Social Philosophy and Policy*, 4, 145-178; Shiffrin, Seana V, (1999) 'Wrongful Life, Procreative Responsibility, and the Significance of Harm', *Legal Theory,* 5, 117-148.

[viii] Of course one could fall pregnant by accident without knowing these things, however if one wanted to fall pregnant and did not know *how* the likelihood of them being competent in doing so, or doing so by accident, is very low. See reference to accidental competence in Cowden, M &

Lau, J.C. (2012) 'The Language of Capacity and Competence in Children's Rights', unpublished, available from mhairi.cowden@anu.edu.au

[ix] For more detailed work on the congenitally deaf children and cochlear implant case see Sparrow, Robert (2005) 'Defending Deaf Culture: The Case of Cochlear Implants', *The Journal of Political Philosophy* 13(2) 135-152; Dolncik, E (1993) 'Deafness as Culture', *The Atlantic Monthly* September, 37-52; Lane, H and Grodin, M (1997) 'Ethical issues in cochlear implant surgery: an exploration into disease, disability, and the best interests of the child', *Kennedy Institute of Ethics Journal,* 7, 231-51.

[x] There is significant evidence establishing that children who receive cochlear implants benefit in the form of improved language comprehension and production. See Tomblin, J. Bruce, Spencer, Linda, Flock, Sarah, Tyler, Rich and Gantz, Bruce, (1999) "A Comparison of Language Achievement in Children With Cochlear Implants and Children Using Hearing Aids", *Journal of Speech, Language, and Hearing Research* Vol 42, 497-511. Geers, Ann E., Nicholas, Johanna G., Sedey, Allison L, (2003) 'Language Skills of Children with Early Cochlear Implantation', *Ear & Hearing*, Vol 24(1) pp465-585. Svirsky, Mario A,. Teoh, Su-Wooi, Neuburger, Heidi (2004), ' Development of Langauge and Speech Perception in Congenitally, Profoundly Deaf Children as a Function of Age at Cochlear Implantation', *Audiology & Neurotology*, Vol 9, pp224-233.

[xi] Note that at this stage I do not deal with the question of whether individuals have rights to have their capacities raised *beyond* the normal human functioning level, i.e. if we can not only make someone hear but make them hear better than anyone else. However for a good discussion of human enhancement see Savulescu, Julian and Bostrum, Nick (eds) *Human Enhancement*, Oxford: Oxford University Press.

[xii] Capacities like these are set out in Nussbaum's 'capabilities' list. Nussbaum, Martha (1997) 'Capabilities and Human Rights', *Fordham Law Review*, 273-300.

[xiii] There even may be some capacities which we deem to be normal human functioning but we wish to prevent from developing, for example many children who have gender disorder are given puberty stopping drugs to prevent the development of secondary sexual characteristics. I cannot deal with this in full here but it may be a fruitful place for future research.

[xiv] Here I follow other scholars and use the capitalised 'Deaf' to indicate the broader Deaf community and culture and the lower case 'deaf' to indicate the loss of hearing purely in the medical sense.

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Chapter Five

What's love got to do with it? Why a child does not have a right to be loved.

Mhairi Cowden

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What's love got to do with it? Why a child does not have a right to be loved

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It is often stated in international and domestic legal documents that children have a right to be loved. Yet there is very little explanation of why this right exists or what it entails. Matthew Liao has recently sought to provide such an explanation by arguing that children have a right to be loved as a human right. I will examine Liao's explanation and in turn argue that children do not have a right to be loved. The first part of the paper will be concerned with showing that Liao cannot support his empirical claims. I will then argue that loving cannot be a duty, and that even if we were willing to concede that it is, love is not always accompanied by loving treatment. Finally, I consider two alternative interpretations of the right to be loved and argue that even given these, children do not have a right to be loved.

Keywords: rights; children; love

Introduction

In 1972, Foster and Freed wrote in their article 'A bill of rights for children' that 'a child has a moral right and should have a legal right, to receive parental love and affection' (Foster and Freed 1972, p. 347). Such a legal right now exists in Israel, Japan, Mozambique and the United States, and appears in the preamble of United Nations Convention on the Rights of the Child (CROC); 'a child should grow up in an atmosphere of happiness, love and understanding.'[1] The assertion that children have not only a *moral* but a *legal* claim to love, with all the State power of enforcement that entails, seems to ask a lot more of the child/parent/State relationship than we currently conceive. The right itself is backed by scant philosophical debate.[2] Philosophical justification is needed, considering that the right presents significant issues for both the theory of rights and the moral and political status of children. Is love an appropriate concept to include in our international and domestic legal documents? Can we really impose a duty on others to love? Is protecting parental love the best way

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to protect children? The questions surrounding a child's right to be loved go the heart of what it means to have a right.

Matthew Liao has recently directly addressed this issue (Liao 2006). He seeks to provide a philosophical argument for why a child has a right to be loved. In this paper, I will examine Liao's argument and in turn argue that children do not have a right to be loved. The first part of this paper will consider Liao's argument and examine the scientific literature – the study of 'maternal deprivation' in humans and non-human primates, the study of social isolation of monkeys, and recent neuroscientific studies linked to deprivation in both human and non-human primates – that he uses to substantiate the central empirical claim. I argue that this literature fails to support the claim that love is a primary essential condition for a good life.

The second part of the paper will argue that, even if the empirical claim could be substantiated, 'loving' cannot be a duty. Loving cannot be a duty because the structure of rights necessitates that there be a real and achievable corresponding duty. There are significant problems with conceiving of emotions as duties. The emotional component of love may be an unachievable duty. I argue that the emotional aspect of love can be logically separated from treatment we deem desirable for the child, and in some cases the emotion of love may bring about undesirable treatment. If the proposed right cannot fulfil its desired function, the justification for its existence may be severely undermined.

Having shown the central explanation for a right to be loved to be lacking, the final part of the paper will consider two alternative conceptions of the right to be loved; namely, the right to be loved as a manifesto right, and the right to be loved as a claim-right against the State. Even given these alternatives I conclude that the real objectives of the child's right to be loved can be achieved through other clearer rights and that, accordingly, it still cannot be said that children have a right to be loved.

Liao's argument and empirical nonsense

It should be stated first that throughout this paper I, like others, make two assumptions. I assume that rights exist and that children are right-holders. Objections to either of these assumptions may halt the discussion of a child's right to be loved before it has begun. However, debate regarding the existence of rights and children's status as right-holders has been thoroughly examined elsewhere[3] and I will not revisit it here. Matthew Liao states that children have a right to be loved as a human right on the grounds that human beings have rights to those conditions that are primary essential for a good life. This is because '[b]y their nature rights secure the interests of the right holders by requiring the duty-bearers, to perform certain services for the right-holder or not to interfere with the right holder's pursuit of their essential interests' (Liao 2006, p. 422). If we attach

meaning and importance to the end (a good life) then we must attach importance to the 'primary essential' means used to achieve this end. In this Liao draws on James Griffin's defence of human rights (Griffin 2008). As children are human beings they therefore have rights to those conditions that are primary essential for a good life. Liao (2006) defines parental love as:

> to seek a highly intense interaction with the child, where one values the child for the child's sake, where one seeks to bring about and to maintain physical and psychological proximity with the child, where one seek to promote the child's well-being for the child's sake, and where one desires that the child reciprocate or, at least, is responsive to, one's love. (p. 422)

This love need not only come from the child's biological parents but can include other individuals such as foster parents and nannies. The 'highly intense' aspect of this definition is designed to show us that love also has an emotional component that permeates all our dealings with the child. Parental love, defined in this way, is an essential condition for a good life for children, therefore, children have a right to be loved.

Liao's argument can be broken down to four steps:

- Human beings have rights to those conditions that are primary essential for a good life.
- Children are human beings.
- Parental love, that is,
  (a) seeking a highly intense interaction with the child;
  (b) seeking to bring about and maintaining physical/psychological proximity;
  (c) seeking to promote the child's well being for the child's sake;
  (d) valuing the child for its own sake; and
  (e) desiring reciprocity of love;
  is a primary essential condition for a good life.
- Therefore children have a right to parental love.

From this we can see that Liao's argument rests on the claim number three, that parental love, broadly defined as above, is a primary essential condition for a good life of children.

Interestingly Liao (2006) explicitly wishes to argue that it is an empirical claim (p. 423). If this claim is not backed by evidence then Liao's conceptual framework of *a* right to be loved may stand but the content of the particular right will not. Liao seeks to substantiate this empirical claim by demonstrating that without love children suffer severe negative consequences. In doing so he draws upon several broad branches of scientific literature: the study of 'maternal deprivation' in humans and non-human

primates, the study of social isolation of monkeys, and recent neuroscientific studies linked to deprivation in both human and non-human primates. However none adequately support this empirical claim. It is beneficial to look closely at these studies as they not only expose the flaws in Liao's empirical claim, but also have implications for the broader concept of a right to be loved.

Maternal deprivation

The broad base of literature that Liao draws on is the study of 'Maternal Deprivation'. Liao (2006) argues that

> [c]hildren who did not receive love but only adequate care, became ill more frequently, their learning capacities decreased significantly, became decreasingly interested in their environment, failed to thrive physically by failing to gain weight or height, suffered insomnia, were constantly depressed, developed severe learning disabilities ... in one study, 37% of these infants had died by two years of age, compared with none in the adequately mothered control group. (p. 423)

This does seem to be very strong evidence. It claims that adequate care was controlled for, and that lack of love was the only relevant explanatory variable. The results are not only emotional but also measurable such as weight and height and most seriously, death. The evidence comes from a 1945 study by Rene Spitz entitled *Hospitalism: An Inquiry Into The Genesis Of Psychiatric Conditions in Early Childhood* and a 1946 study by Spitz and Wolf entitled *Anaclitic depression – an inquiry into the genesis of psychiatric conditions in early childhood.* These are classic studies, part of a collection of work in the 1940s and 1950s that reformed the way in which foster homes operated and led to further understandings of childhood, development and socialization (Emde 1992). However they are inadequate to support the claim that love is a primary essential condition for a good life in children.

The literature on Maternal Deprivation is not restricted to the 1940s, in the 1960s and 1970s the concept of maternal deprivation came under considerable criticism (Ainsworth 1962; Rutter 1981; Yarrow 1961). Reviews of the literature identified complex differences between 'insufficiency of interaction implicit in deprivation' and the 'discontinuity of relations brought about through separation' (Ainsworth 1962, p. 99). Michael Rutter has suggested that the literature is in fact dealing with three distinct syndromes and the use of the phrase 'maternal deprivation' is misleading (Rutter 1972). Rutter suggests that they should be broadly characterized as acute distress from loss, experiential/nutritional privation and bond privation. This neatly demonstrates the different variables that are at play in Liao's analysis.

Acute distress

Acute distress is suffered by young children removed from their families, often at the time of admission to hospital. Rutter (1972) argues that separation causes distress only in children older than six months, which indicates that distress is due to interrupting an important bond at a time when children have difficulty maintaining a relationship through absence. This syndrome is best understood as the study of 'loss'. In the study, 'Anaclitic depression', children who had been with their mothers were separated from them for three to four months. The children showed a range of symptoms such as weeping, screaming, weight loss and insomnia which Spitz and Wolf (1946) diagnosed as anaclitic depression (p. 313). The symptoms stopped when the child was restored to the mother. The only mention of love is in reference to the depression following the loss of their 'love-object', referring to the subject of their attachment.

In this way 'Anaclitic depression' is a study of the effects of the *loss* of a mother or mother-substitute, not the effects of an unloving mother or mother-substitute. In addition, experimental studies have shown how distress may be reduced by provision of toys, or by increased quality of care and changes in the hospital admission process (Rutter 1972, p. 242).

It is clear that separation from a 'love-object' is different from a lack of love as defined by Liao. We would not be inclined to say that while our mother was travelling overseas that we were no longer loved by her. The acute distress suffered from separation seems to indicate the existence of a close relationship from which the loss of the missing person presents a cause for mourning, not the complete disappearance of love. Furthermore the distress can be alleviated through high quality institutional care. If lack of love could be reduced to separation alone, it would seem to imply the extreme claim that all children have a right to their parents' physical presence around the clock. The study of the distress from loss does not encompass Liao's claim that children who are not loved suffer negative outcomes.

Experiential/nutritional privation

Rutter's second syndrome, experiential/nutritional privation, bears directly on Liao's claim that children suffering from a lack of love will fail to thrive both physically (reduced gains in height and weight) and cognitively (learning difficulties and disabilities). The study, '*Hospitalism*', is an enquiry into the effects of prolonged institutionalization in infants. It compares two institutions, an institutional Nursery where infants had access to the mother and a Foundling Centre where the infants did not. The study observed that the mothers provided intense stimulation for the infants in the Nursery, which was lacking in the Foundling Centre. It concluded that the infants in the Foundling Centre consequentially suffered physically and

emotionally in their development (Spitz 1945, p. 70). '*Hospitalism*' was a study of deprivation of stimulation, where the lack of development in these children is due to insufficient human interaction, rather than a lack of love. In fact Spitz argues that the care and attention given to the children by their mothers in the Nursery did not constitute love (p. 65).

Review of the literature shows that physical developmental impairment is reversed by 'increasing social, tactile, and perceptual stimulation without altering any other aspect of institutional life and without altering the child's separation from his family' (Rutter 1972, p. 244). This seems to account for many of the observations in '*Hospitalism*'. The children in the Foundling Centre did not have toys and were often placed alone in their cot for most of the day (Spitz 1945, p. 63). These children were deprived not only of any proper visual stimulation but also of any human interaction. In contrast the children in the Nursery not only had access to their mothers but were able to observe play in adjacent cubicles. These important differences led to controversy over whether the observable negative symptoms were attributable to the absence of a mother figure (what Liao might have termed 'lack of love') or to 'environmental deprivation' (Ainsworth 1962).

Liao's use of the study of rhesus monkeys shows the stark nature of the problem (Dodsworth and Harlow 1965). Liao argues that infant monkeys raised in maternal privation settings have hampered social cognitive and emotional development (Dodsworth and Harlow 1965, p. 90). The study, *'Total social isolation in monkeys'* does not talk about 'love' nor seek to measure the effect of an unloving relationship, but specifically seeks to measure the detrimental effects of social isolation. The young monkeys were separated from their mother at birth and raised in bare wire cages, they were devoid of any maternal contact or opportunity to form affectional ties with peers. In addition some monkeys were in total social isolation, having been housed from birth until 12 months in a stainless steel chamber with no contact with any animal or human. They were then released into playrooms with two normal 'control' monkeys. The symptoms exhibited were hostility to the outside environment, self-harm, repetitive rocking movements and inability to interact with normal monkeys. On release, the two that were in total social isolation went into emotional shock and refused to eat. One died five days later and the other was force fed. The autopsy showed that the infant monkey died of 'emotional anorexia' (Dodsworth and Harlow 1965, p. 90). This case shows the extreme nature of experiential privation, but as it is concerned with highly specific sensory stimulation, it is of limited application to questions about the effects of lack of love.

It is important to note that the necessary visual, physical, and experiential stimulation can be given by someone who is not the primary care-giver or parent. This seems to indicate that experiential privation affecting physical development can be separated from the formation of attachment and

bonds between child and care-giver. For example, more recent studies have focused on how lack of physical stimulation can affect the biochemical processes of growth hormone (GH) secretion, leading to psychosocial dwarfism (Liao 2006, p. 423). The studies conducted into the effects of maternal touch and massage on young infants as a stimulant for growth continue to support the conclusion that the physical stimulation can be provided by someone who does not necessarily 'love' the child (Champoux *et al.* 1989; Wang *et al.* 1996). In the study by Scafidi *et al.* (1990) the tactile and kinaesthetic stimulation was provided by the investigator or a nurse trained in the procedure.

It is apparent from these studies that visual/physical and experiential stimulation is important for the proper social and physical development of a child. However in many cases someone who is not party to a loving relationship with the child can provide this stimulation. Despite showing that these elements are important for a child's development it fails to demonstrate why they would need to be provided as part of a loving relationship in order to have the same positive consequences.

Bond privation and antisocial disorder

Empirical studies demonstrate the more serious long-term effects of bond-privation. While studies of Acute Distress showed the short-term effects of disruption in the bond creation phase, studies such as those by Hodges and Tizzard (1989) and Kahler and Freeman (1994) look at the long-term effects of the lack of bond formation. Children who are prevented from forming bonds when young often exhibit antisocial behaviour throughout their adult lives. Kahler and Freeman studied the cognitive and social development of Romanian orphans. There study however was complicated by the added variable of experiential and nutritional privation as over 100,000 children were 'warehoused with minimal food, clothing, heat or caregivers'. Hodges and Tizzard (1989) sought to control for the lack of visual stimulation by providing toys and interaction to the children who were growing up in an institutional setting.

Recent neuroscientific research has shows the chemical effects of the disruption of bond formation. In studies of infant rhesus monkeys and non-human primates, changes in the mother's foraging habits or differing rearing conditions could: '[d]ysregulate the development of the brain biogenic amine neurotransmitter systems such as norepinephrine (NE), dopamine (DA), and serotonin (5HT); and the hypothalamic–pituitary–adrenal (HPA) axis; cause the development of adrenal glucocorticoid responses to be modified in negative ways' (Champoux *et al.* 1989; Higley *et al.* 1991, 1992; Heinz *et al.* 1998; Coplan *et al.* 1988).

Changes in the complex neurochemical systems can have serious effects: serotonin and norepinephrine are widely recognized to be related to

feelings of well-being (anti-depressants raise serotonin and norepinephrine levels), dopamine is associated with our ability to experience pleasure and glucocorticoid responses are strongly linked with stress.

This appears to be the strongest support for Liao's claim, for it seems that there is considerable evidence that the failure to form bonds in early childhood is linked to antisocial, attention seeking behaviour and a reduced ability to form lasting relationships later on in life. It should be noted however that this disruption in the bond-formation constitutes a very different arrangement from the previous cases. If we are to identify what is meant by 'lack of love' we must be clear whether this is a child who is denied an opportunity to form a bond with their carer, a child who has formed a bond but who is routinely separated from their carer, or a child who has not formed a bond with their carer but the carer states that they 'love' the child. It should also be highlighted that bonds may not be the same thing as love; it is generally recognized in attachment theory that attachment is not synonymous with love or affection (Prior and Glasser 2006). What these studies seem to demonstrate is that the formation of an uninterrupted bond with the child's care-giver is an important part of their social development, and disruption of this bond formation can lead to negative affects on the child's neurotransmitter systems.

Is this lack of love?

From this evidence we can conclude that short-term separations cause distress, but can be countered by improving institutional care and stimulation. Experiential or sensory privation can lead to a lack of physical and cognitive development but this can be reversed by increasing stimulation which need not necessarily be linked to the primary care-giver. Finally, children who grow up in institutions or are exposed to multiple changing care-givers can suffer lasting social consequences from the lack of bond formation in early childhood. The use of 'love' in Liao's claim must therefore be replaced by these different variables. It may be disingenuous to state that 'lack of love' will result in these negative consequences with no qualifier that what is being measured is different in each study. Many writers have rejected the use of 'love' on the grounds that it introduces 'mystical and immeasurable elements' (Rutter 1981, p. 18). The controversy over whether variables such as privation, distress and lack of 'bond' development can properly be understood as 'lack of love' serves to highlight that love is problematic to measure, as we often believe it to involve intangible elements.

The literature therefore fails to measure the effects of a lack of love in the way Liao suggests that it does. It fails conclusively to show that the desirable treatment identified by Liao, the provisions labelled (a) to (e) above, are essential conditions for a good life. What has been demonstrated

is that intense social interaction, sensory and experiential stimulation is necessary for young children's normal development and long-term socialization. This could be interpreted as fulfilling provision (a) 'seeking a highly intense interaction with the child' and (b) 'maintaining physical and psychological proximity'. Yet the second finding of the literature, that separation from a 'love-object' will cause distress, can only obliquely be understood as fulfilling provision (c) 'promoting the child's well being for the child's sake' if we accept that a child's wellbeing includes always being free from distress. There is no support in the literature for provisions (d) 'valuing the child for its own sake or (e) 'desiring reciprocity of love'. It seems that these are assumed to be self-evidently primary essential conditions for a good life.

Liao has not made a serious case that there is a right to be loved, rather than just a right to some of the (a)–(e) provisions. The empirical evidence alone however has not shown us that there is no such thing as *any* right to be loved, if sufficient empirical evidence is found the right may still stand. In the second part of the paper I address the conceptual problems with the right, demonstrating that even with sufficient scientific literature the right does not exist.

Loving is not a duty

Even if the studies are not adequate to support the empirical claim that parental love is an essential condition for a good life it still may be that the structure of the child's right to be loved is correct. That possibility raises the question: if there was sufficient scientific literature to back up the claim that parental love was an essential condition of a good life – what form would this take as a right?

Rights, especially in a legal sense, are generally understood to be Hohfeldian claims. The Hohfeldian framework stipulates that a claim always has a correlative duty and is specified by reference to the actions of the people who bear the correlative duty (Hohfeld 1964). For example, I have a claim to my life and therefore you have a duty to refrain from killing me. A's claim creates a duty in B (1) to abstain from interference or (2) to render assistance. The duty to love must therefore contemplate the existence of 'love' as an action. If we return to the definition of parental love we can observe that, with the exception of the desire for reciprocity, all of the elements (seeking a highly intense interaction, maintaining physical/ psychological proximity, promoting the child's interests and valuing the child) are actions that the duty-holder would take towards the child. As actions we can rightly understand them as duties.

However these actions could be simply defined as desirable treatment. Although such desirable treatment could be the consequence of one's love, it could also arise without love being present. For example, the carer of the

child, such as a nurse or nanny, may promote the child's interests for the child's sake while not feeling love for the child. They may recognize that the child's interests are important and should be respected. Therefore there is a distinct difference between desirable treatment simpliciter and desirable treatment that arises from a place of love in the duty-bearer. If we accept Liao's definition of parental love as it stands then really what we wish to say is that a child has a right to these specific actions that constitute desirable treatment.

However Liao does not wish to limit the scope of the right only to the actions and behaviour of the lover. He argues that the 'highly intense' nature of parental love indicates that parental love is not just 'behavioural or attitudinal but has emotional components' as well (Liao 2006, pp. 422–423). According to Liao the duty holder must not only show 'the appearance of the emotions appropriate for the circumstances, but actually have the genuine emotions appropriate for the circumstances' (p. 427). Therefore desirable treatment simpliciter is insufficient. In order to fulfil a child's right to be loved the duty-bearer must provide the desirable treatments plus the internal emotion. It must come from a place of love. This would be like saying I have a right to bodily integrity whose fulfilment requires people to *want* not to stab me, not just to restrain themselves from the action.

There is an alternative interpretation of the Liao's definition of parental love, that the first three elements of parental love, (a)–(c), are *conative* rather than *affective*. Liao's definition of parental love is *seeking* highly intense interaction with the child, *seeking* to bring about and maintaining physical/psychological proximity and *seeking* to promote the child's well being for the child's sake. In this interpretation a parent will have fulfilled their duty of parental love by *trying* and *seeking* to achieve these ends, they will be blameless if in trying to fulfil both the actions and the emotional aspect, they achieve neither. I am dubious of this interpretation for the reason that although it may offer a more charitable and achievable interpretation of the duty, I do not believe it is what Liao means. If the duty were truly conative then a parent's unsuccessful attempts would be enough to fulfil their obligations. What a child would have a right to is the *striving and seeking* to love rather than the actual outcome of love. Why then was Liao at all concerned with showing that the presence of love is of benefit to the child? It is clear from the discussion that what Liao wishes to protect is the actual presence of the (a)–(e) provisions plus the emotional content. Furthermore, provisions d and e are clearly not conative and require the duty-holder actually to desire reciprocity and to value the child for their own sake.

Therefore, in placing the conative interpretation aside, to argue that the emotional component is necessary is to argue that one has a right not only to the desirable treatment but also to the proper motivation. There are clear problems with defining parental love in this way, the most pressing being

that if the duty does not just consist of actions but also of motivation, can the duty always be properly discharged? In order for the emotional component to be necessary, it too must be a primary essential condition for a good life; in other words the desirable treatment alone must be shown to be insufficient. I will consider these two objections in turn (1) can loving, an emotion, be a duty?; and (2) is the emotional component an essential condition for a good life?

The command problem

A duty will necessarily constrain the liberties of the duty-holder. The actions of constraint must not only be justified by the claim but also be reasonable and achievable. MacCormick (1982) infers that ascription of a right to an individual presupposes that there is some act or omission, performance of which will satisfy, protect or advance some need, interest or desire of that particular individual. It is not clear that the emotion of love is an action that can be performed by all duty-bearers as emotions are traditionally assumed to occur without conscious control. They cannot be commanded. How then can the duty-holder reasonably discharge their duty?

Liao argues that it is untrue that emotions can *never* be commanded and sometimes they are successfully commanded. He argues that one can give oneself reasons to have particular emotions therefore demonstrating a level of control (Liao 2006, p. 426). In addition to these internal controls we can place ourselves in external circumstances we know will bring about certain emotions. Internal controls may include practices such as giving ourselves reasons to feel warmth and affection towards a child or removing impediments to feeling this emotion. For example, recognizing the fact that the unplanned nature of a pregnancy was not the resulting child's fault may remove impediments to loving the child. Liao argues that external controls might include getting enough sleep to help one be more affectionate towards the child. This example seems somewhat counterintuitive – that by simply having a good night's sleep one may wake up in the right place to experience the emotion of love. It is certainly true that it is easier to be affectionate and caring when one is not sleep deprived but surely this is true for all duties, whether they are to love or to help my little sister with her homework and patiently explain concepts such as 'rights'. Sleep may help with the expressions of love but it does not have effect on the motivation, the underlying love emotion.

Though the example of being suitably rested may be an ill-chosen one for Liao's purposes, it indicates the broader problem with this approach. I have serious doubts about whether Liao is actually offering an explanation of how one can command an emotion. It seems that these are simply *conditions* by which it is easier to fulfil one's duties. We have already dealt with the interpretation of conative duties. It may well be that parents have a

moral obligation to *try* and love a child, many of us may be happy to concede this, however this is a distinct from a duty to actually love the child.

Liao is only talking about commanding the presence of love in any given time. It may be appropriate to draw a distinction between two ways in which emotions manifest themselves. There is the emotion we may feel in a particular moment and the overarching feeling of emotion that is always present. For example, there is a difference between the intense love I feel for a child when she takes her first steps or says her first words, and the emotion I feel when I get up at 3am to attend to her screams. In the latter case I may still have the overall feeling of love for my child but I may not feel the intense feeling of love in that moment. The conditions that Liao sets out refer to cultivating the feeling of love in a particular moment in order to act in a loving and caring way towards the child. They do not seem to be concerned with building a loving relationship or the overarching feeling of love. I would argue that this is probably the case because it is harder to control or even know *how* one would control this broader type of emotion.

Therefore it still seems unclear that the emotion of love is an appropriate object of a duty as loving is not an action but a reason for action. In this I am making a double claim. A claim about love – that it is not only about actions – and a claim about rights – that they are only about actions or inaction.

What does love add?

I have demonstrated the problems with conceiving of loving as a duty; now I will turn to the question of whether the emotional component of Liao's parental love is necessary. It is unclear what sort of relationship there is between the emotion of love and desirable treatment. Why is the desirable treatment necessary to fulfil the duty but not sufficient? Liao is essentially making two claims, first that the desirable treatment (provisions (a) to (e)) are primary essential conditions for a good life and secondly that the internal emotion of love is a primary essential condition for a good life. If we return back to the empirical research cited earlier we can observe that there is no mention of the necessity of the internal emotion of love from the duty-bearer. How then, is the presence of the internal emotions within the duty-bearer beneficial to the right-holder? What does love add?

In order to test this we can take the example of an individual who behaves as if they loved a child, provides the child with the desirable treatment but in fact does not feel the internal emotion of love towards that child. They *pretend* to love the child. Does this pretence fulfil the duty to love the child? Liao (2006) argues no, that a child in such a situation would be unable to develop certain 'primary essential capacities such as knowing how to love others and having a positive conception of self' from

receiving pretended love alone (p. 429). His reasoning is that in practice it is hard to pretend to love someone for more than a short period of time and that soon the child would realize that it is pretence. This however is an argument demonstrating that *discovering* deceit and pretence will vitiate the fulfilment of the duty. It does not answer the question about whether the duty is being fulfilled during the period of pretence.

If the child is unaware of the love does this change the way we think of the duty being fulfilled? Although a baby may be able to observe the external expressions of love it is unlikely that they can perceive or understand the internal emotion of love that may be present in their parents. Given this, does it matter if the love is real or pretend? The analogous situation, Liao argues, would be where I am owed 5 dollars by my friend *x*. I have a claim to the 5 dollars therefore friend *x* has a duty to pay me back. *X* however repays me using a fake five-dollar note. Liao argues that *x* has not truly fulfilled her duty. Even if I successfully use the fake note to buy something and never realize that it was fake, the element of deceit will constitute an abrogation of the duty as there is something morally wrong taking place. Therefore my knowledge of the deceit or pretence is not relevant to the fulfilment of the duty.

In the example of lending money I believe the opposite is true. Friend *x* had a duty to pay me back; he did so as the money fulfilled its purpose and I was able to purchase something. *X* has fulfilled his duty to me, however in doing so he may have breached a duty to others, for example to the government not to forge its currency. We can understand the morality of his actions as separate from the claim and duty relationship that constitutes a right. Similarly if I pretend to love a child and the child is unaware that my actions do not come from a place of love, they may still receive all the benefit that the right was created to achieve. I find the suggestion that is it morally wrong to show affection and care for a child even though you do not feel the internal emotion of love, somewhat jarring. For most cases, we are not discussing the deceit of someone who really hates a child but pretends to love it – such as an evil stepmother in a fairytale – but instead consider a dedicated health care professional or foster parents who despite all their conscientious efforts, feelings of duty and respect, do not feel the emotion of love towards their child. Liao has failed to show that the internal emotion is necessary; he has not demonstrated that the desirable treatment by itself is insufficient.

There is an assumption that (1) love will always be coupled with these beneficial treatment and that (2) it will not be coupled with negative treatment. Both of these assumptions are flawed. The emotion of love may not always be coupled with beneficial actions; for example many parents may not think it is appropriate (one may imagine for cultural, societal or personal reasons) to be physically or psychologically close to their child, however this would not necessarily mean that they love their child less. We

could also conceive of a situation where one would love a child in silence and isolation such as a mother with postnatal depression. Similarly autistic parents may be incapable of these outward expressions of love. In both cases it seems intuitively wrong to claim that the children are not loved.

Not only can love be present without the desirable treatment, but the emotion of love may produce undesirable treatment. As we have observed, love is an emotion that often produces loving actions – yet it can also produce harmful ones. The family courts are unfortunately littered with cases where horrible things are done to children in the name of love. Children are routinely beaten by parents who love them. A child's relationship with their parents is often defined by power and too often this power can be abused. Even in instances where parents may not be intentionally harming the child, actions done from a place of love in order to benefit the child may be harmful. For example, the Victorian-era father who beats his child while saying 'This is going to hurt me more than you' need not be lying. Or parents who spoil their children with the sweets they never had when young, but who therefore cause the children to become diabetic. Many parents have followed bad childcare advice not through viciousness but through love, believing that what they were doing was for the good of the child. In such cases it would be difficult to argue that the parents did not love their child and therefore impossible to show that a duty had been breached.

Jeremy Waldron identified a similar situation in the case of marriage and posited the idea of rights as either 'fall-backs' or 'constant constraints' (Waldron 1988, p. 629). Waldron argues that often the bounds of love and affection will be enough to generate the type of treatment one wishes. For example, money is shared between partners because they wish to be generous not because of a claim-right to equal property. However the existence of these claim-rights is still necessary, despite the fact that a partner may not need to 'stand on them'. They are necessary as 'fall-backs' if the relationship collapses. Fall-back rights are coupled with rights that act as 'constant constraints'. These constantly constrain the actions of the partners. For example, a wife may have a claim-right to bodily integrity that constantly imposes a duty on her husband not to beat her. Liao seems to understand a child's right to be loved as a claim-right of constant constraint, that parents should constantly love their child *because* they have a duty to do so. In fact it may be better to conceive of the relationship as such – most often parents love their children and provide them with desirable treatment and children in this situation have no need to assert or stand upon their claim-rights. However sometimes love may produce undesirable outcomes or fail to produce desirable outcomes and children's claim-rights to desirable treatment will need to be claimed and enforced. Throughout both situations there are claims of sufficient strength such as the right not be abused that constantly constrain parental behaviour. Consider how this may work in practice in family courts; if a child's claim against their

parents is cast in terms of love, then it is too easy for 'bad' parents to counter criticism with the retort that they in fact love their children. Focusing on the actions rather than their motivations allows a clearer diagnosis of what is wrong with the relationship – it is not the failure of loving emotions, but the failure to translate these into beneficial actions towards the child.

The fact that love can go wrong does not disprove that it can be good, it simply demonstrates that 'love' as an emotion is not universally connected with desirable treatment and Liao's (a)–(e) provisions. We have seen that children can benefit from caring treatment and intimate interaction without the emotional connection and, further, that actions resulting from this emotional connection may in fact be detrimental to a child. Therefore the internal emotion of love is neither necessary nor sufficient for the child's best interests and does not constitute a primary essential condition for a good life.

Some alternatives

The conception of a child's right to be loved outlined above clearly demonstrates empirical, structural and normative problems. However are there any conceivable alternative ways in which we *can* conceive of a right to be loved? Before dismissing the right to be loved altogether I wish to address here two alternative interpretations, namely: the right to be loved as a manifesto right and the right to be loved as a claim-right against the State.

Love as a manifesto right

Joel Feinberg has argued that there is a well established practice in international law where statesmen often speak of 'rights' when they are really concerned with the natural needs of deprived human beings. For example, take the assertion that orphans *need* a good upbringing. We know that in many places there are not enough resources immediately available to bring about this outcome. In these cases there are no determinate individuals who could actually hold the duty to provide the orphans with the goods they need, the claim therefore is not *against* anyone but an *entitlement to* some good (Feinberg 1970, p. 252). The statesmen are therefore, by referring to these basic needs as 'rights', are urging us to see them as worthy of sympathy and consideration even though they cannot now be treated as rights proper that bring about duties within other people. Feinberg is willing to speak of these basic needs in a special 'manifesto' sense of a right and recognize that they need not be correlated with another's duty. Manifesto rights are 'the natural seeds from which rights grow' (Feinberg 1970, p. 252). A child's right to be loved may therefore be considered a 'manifesto right', a fair use of rhetorical license. Understanding the right to be loved as a manifesto right would mean that the corresponding duty is

not imperative. Without the necessity of a duty and duty-holder, many of the objections I have raised would no longer be relevant.

There are significant objections against allowing manifesto rights to be recognized as rights in any sense. For example, if rights do not necessitate a duty then we begin to lose the very political and moral weight that rights-talk holds. Rights may become nothing more than important goals. However the idea of a child's right to be loved as a manifesto right can be countered without entering into potential objections of the concept, because the right to be loved cannot constitute a manifesto right. The important aspect of manifesto rights is that they are 'laws that ought to be made' or in Feinberg's language, the seeds from which rights proper will grow. Manifesto rights are not considered 'real rights' because their corresponding duties cannot be fulfilled due to a lack or scarcity of resources. The desire is that acquisition of resources will enable the manifesto right to become a fully fledged right with correlative duties. However the impediment to the child's right to be loved is not one of scarcity. It is not the case that there is insufficient 'love' to go around but instead that 'loving' cannot *ever* constitute a duty. The impediment to the child's right to be loved is not solved by the passage of time. Therefore the right to be loved cannot even be properly understood as a manifesto right.

Non-interference and architecture

Almost all international declarations and domestic conventions are State-centred; they are designed to regulate the actions of the State in regards to the individual, not the interpersonal actions of individuals. Given this aspect of international law we should consider the possibility that a child's right to be loved is not a claim-right to receive love held against the child's parents or care-giver, but a claim-right against the State. A claim-right against the State could be understood in two ways: (1) a duty in the State not to interfere with that love, and/or (2) a duty in the State to provide the architecture by which the love can be received.

The State's duty of non-interference may consist of provisions such as not doing anything to prevent the development of a loving relationship between parent and child. For example, the State should not forcibly remove children from their parents or primary care-givers except in extreme need, nor should the State lie or mislead either parent or child as to the nature of the separation. Just that happened in Britain and Australia throughout the 1920s to 1960s when 500,000 British children were removed to Australia. Not only were they removed but many families were told that their child had died and the children told that their parents did not love or want them anymore (Commonwealth of Australia 2001). Duties of non-interference such as these are tangible and able to be enforced.

In addition to duties of non-interference, the State may hold duties to provide the architecture in which a child could be loved. The State holds within its power the ability to modify institutional architecture to enable parental love to flourish. For examples programs such as paid paternity leave would allow parents and children more time together to develop bonds of love. It could also include not separating children from parents in immigration decisions and providing adequate visiting time for parents of children who are jailed.

Many of the provisions identified above already exist in the UN Convention for the Rights of the Child without any reference to love. For example, Article 7 states, 'the child shall ... as far as possible, the right to know and be cared for by his or her parents'. Articles 9 and 10 provide that a child shall not be separated from his or her parents against their will, and gives detailed explanation of the exceptions by which the separation may occur, including provisions for the State's responsibilities in the event of the detention, deportment or death of the parents. Article 18 states that 'State Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children' and Article 20 asserts that children temporarily or permanently deprived of his or her family environment are entitled to special assistance by the State. These articles explicitly set out the type of provisions that would make up the content of the State's duty of non-interference and provision of the architecture to allow love to flourish. CROC seeks to do this clearly and by effectively by identifying the duty-holder, claim-holder and action required without any mention of 'love'. A child's right to be loved as a claim-right against the State may be the most convincing way of interpreting the right to be loved but it is better expressed without mention of love. For this reason I argue that the right to be loved does not properly exist in this context either, for really it is only a re-badging of a range of other claim-rights, some of which children already hold within law, others of which are still to be codified.

The provisions creating the architecture of love come closest to the policy suggestions that Liao himself makes in the final section of his paper. Liao speaks of developing 'institutional arrangements that would adequately provide for children's various essential needs' such as compulsory parenting classes and changes to the current single family adoption scheme (Liao 2006, p. 439). These two policy suggestions seem to be advocating the involvement of government in enhancing institutions to increase the possibility that more children are loved – in short to provide the necessary architecture. The policies he explores do not relate to a child's claim to be loved held directly against her parents or care-givers – the very theory for which he spent so long arguing. A quick look at the type of policies that would be needed in order to enforce such a right, may provide good reason for why Liao avoids confronting it. Teachers or friends may have a responsibility to

report the parents of any child they suspected were not being loved. However how would a teacher or friend establish the presence or absence of love? Would we accept a child's assertion that she is being loved? No, as Liao argues, because if she is mistaken in her belief then the duty is still not being fulfilled. Maybe trained authorities could judge the presence of love in a parent–child relationship? Finally, if it were possible to identify a breach of duty it seems inconceivable that we could force a parent to love their child in the same way that we enforce other duties such as debt repayments. If there is no way to remedy the claim after it has been abrogated then maybe the only way to enforce the right is to prevent the breach from ever occurring. For example, we may envision that those who are deemed unable to provide proper parental love would not be allowed to have children. Prospective parents may need to sit some sort of 'love test' the same way in which prospective adoptive parents are subjected to intense scrutiny, not just of their material ability to provide for the child but of their psychological endowments (Lafollette 1980). In such a policy autistic couples may well never be able to have children due to their inability to perform actions that the strict definition of parental love calls for. The objector may say that these examples are simply ridiculous, however they are only ridiculous given the ridiculous nature of the right itself.

Conclusion

I am not seeking to argue that children should not be loved. Children should ideally be loved by their care-givers who genuinely care for the child's interests and combine this with loving treatment and respect for the rights of the child. Parental love is a particular and unique experience; it is something that is often cherished by those who grew up with it and by parents who feel it towards their children. It is almost always a desirable state of affairs.

Liao seeks to provide the philosophical basis for a statement many people may find self-evident – that children have a right to such love. I sought to demonstrate in this paper that although many people may feel that it seems right that children should be loved, this does not equate to a right as a claim. Liao's argument fails to establish a child's right to be loved exists, as opposed a simple right to desirable treatment. The scientific literature used to substantiate the claim that parental love is a primary essential condition for a good life is insufficient. It does not even show that Liao's (a) to (e) provisions are essential conditions. Instead it shows that short-term separations cause distress, but can be countered by improving institutional care and stimulation. Experiential or sensory privation can lead to a lack of physical and cognitive development but this can be reversed by increasing stimulation which does not have to be linked to the primary care-giver. Finally, children who grow up in institutions or are exposed to multiple

changing care-givers can suffer lasting social consequences from the lack of bond formation in early childhood.

Even if Liao had sufficient empirical evidence, loving cannot be a duty. Loving is a reason for action and not an action itself. This double claim states that the 'emotional aspect' is not an action and that to include it in the discourse of rights is to misunderstand the nature of a duty. It is also unclear what the relationship is between the emotional aspect of parental love and the (a) to (e) provisions. I have shown that the emotional component does not always result in desirable treatment. A claim to love does not always achieve that which it is constructed to protect.

Finally I considered two alternative interpretations of a child's right to be loved: love as a manifesto right and love as a claim-right against the State. Manifesto rights are defined by the understanding that they can become legal rights. The right to be loved is constrained by conceptual impediments, not issues of scarcity, and therefore can never become a fully fledged right. A child's claim-right against the State seems to be an interpretation that could be realized as a legal right. However the United Nations Convention for the Rights of the Child lays out these provisions individually and in far more detail than any consideration of a right to be loved could accomplish.

Children's rights should be statements defining the relationship between the interests of the child and the duties to which they give rise. These duties are actions or inactions that are in some way able to be achieved by the duty-holder and are properly understood to lie both with the State and with individuals with whom the child frequently comes in contact. In this way a child's rights begin to sketch out the relationships they have with the rest of the world, but are by no means an exhaustive description. There is much to be done in the area of children's rights. If one wishes to increase the effectiveness of the care and protection given to children, one should concentrate on establishing moral and philosophical grounding for rights that are currently given little attention by adults and the State – such as a child's economic rights and to fair political representation – rather than confusing rights with love.

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Notes

1. For detailed analysis of these domestic documents, see Veerman (1992).
2. Exceptions include Liao (2006), MacCormick (1982) and Archard (2004).
3. For children's status as right holders, see Archard (2004), Campbell (1992), MacCormick (1982), O'Neill (1988) and Purdy (1994).

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Chapter Six

No Harm, No Foul: A Child's Rights to Know their Genetic Parents

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'NO HARM, NO FOUL': A CHILD'S RIGHT TO KNOW THEIR GENETIC PARENTS

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ABSTRACT

In many countries, including Australia, governments have legislated against anonymous gamete donation. A recent Australian Senate inquiry has reinforced this position and has supported non-anonymous donation grounded in a child's right to know the identity of their genetic parents. This article will consider the main reasons for the existence of such a right and will argue that it must first be shown that there exists a right to know the nature of one's conception before a right to identifying information regarding one's donor can be properly respected. The existence of such a right requires that the principle of 'no harm, no foul' is false in the case of non-disclosure of a child's genetic origins. Establishing this is imperative to guide Australian legislation regulating and protecting a child's right to know their genetic parents. In this paper, I consider two arguments to overcome no harm, no foul – the argument from risk of harm and the argument from respect. If no harm, no foul does not hold, then the state in Australia will hold a duty not only to allow donor-conceived children access to identifying information regarding their donors but also a duty to ensure disclosure regarding the nature of the child's conception in the first place.

INTRODUCTION

On a Friday night, I go to a bar to meet a friend who has told me she has had a terrible week and needs to unwind. When my friend arrives, she is wearing a very ugly dress; it accentuates all the wrong features and makes her look unattractive. After greeting me, she says 'do you like my dress? I just bought it today!' I smile, tell her she looks fantastic and buy her a drink. In this, I *pretend* to like her outfit and *pretend* she looks good when in fact the truth is quite the opposite. Yet in withholding the truth from her, I have done her no harm; in fact, I may have even done her some good. If I had told her that she looked a wreck, she may have sunk into further depression and failed to enjoy her night out; by choosing to tell her she looks fantastic, I have spared her of the harm that may have resulted from learning the truth.

For many Australian parents of children conceived using donated gametes, this is a very persuasive logic.[1] If the child is never told that they were donor-conceived, then they are saved from any psychological damage, or 'genealogical bewilderment', that may arise from the knowledge that the people who have raised them are not their genetic relations. 'No harm, no foul', right?[2] Why does a child have a right to know they are donor-conceived if such knowledge will cause them harm and being separated from this knowledge will protect them from such harm? It seems that the no harm, no foul rule presents a strong argument against openness in cases such as these. In order to explain why a child has a right to know their genetic parents, we must not only show why it is important that a child, once knowing they are donor-conceived, has access to information regarding their donor, but also why it is important that children are told of the nature of their conception in the first place.

In this article, I will first give some background by briefly outlining the differing legislative positions across the States and Territories in Australia and highlighting the recent recommendation by the 2011 Australian Senate, Legal, and Constitutional Affairs References Committee report on donor conception practices in Australia (hereafter Senate Inquiry Report) for separate but uniform legislation across the country. The Senate Committee's recommendations, taken with the respective legislation of the States and Territories, indicate strong support for non-anonymous donation throughout Australia, based on a child's right to know their genetic parents.

Part Two of the article will then consider the three most commonly cited reasons for moving to a system of non-anonymous donation:[3] (i) that children have an interest in knowing their true medical and genetic history, (ii) that children have an interest in knowing their genetic family in order to avoid concerns of consanguinity, and finally (iii) that children who are aware that they are donor-conceived suffer psychologically when they are denied information about their origins and identity. An appeal to this third reason, arguably the most convincing of the three, is open to the response that children should therefore not be told about the nature of their conception at all. It is difficult to resolve this problem by referring to traditional ideas of harming.

Therefore, in order to support the position that children have a right to know their genetic parents, we must show that children have a right to be told of their genetic origins in the first place. I will explore two alternative arguments in support of this latter claim. First, non-disclosure generates strong risks for the donor-conceived child. Second, even if these risks could be mitigated, children have a right to be treated with respect and truth-telling about information regarding one's life course is intimately tied up with respect for an individual's identity.

I conclude that the second argument constitutes good cause for rejecting no harm, no foul.

If the no harm, no foul principle does not hold, then Australian governments may have an obligation not only to allow access of donor-identifying information to donor-conceived individuals but also to ensure these individuals are informed of their status as right holders in the first place. In the final section of the article, I argue that if a child's right to know their genetic parents does indeed imply a right to disclosure, then governments may have to ensure or enforce this disclosure.

1. AUSTRALIA AND ANONYMOUS DONOR CONCEPTION

A. History of Anonymity in Australia

Donated gametes are sperm or eggs donated from a third party to produce a pregnancy through artificial reproductive technologies (ART). In ART, pregnancy is achieved by intracervical insemination or intrauterine insemination of donated sperm, or less commonly through in vitro fertilisation (IVF) using donated sperm or eggs or both. Sperm and egg donation can be done directly between individuals, but for the purposes of this paper, I will focus primarily on gamete donation facilitated through clinics. Preserving the anonymity of gamete donors in ART procedures in Australia was the norm until very recently. Secrecy and donor anonymity were initially considered essential for legal, social, and policy reasons; however, these once persuasive reasons have lost their resonance.

Legally, donor anonymity was necessary to allow the donor-conceived child to be properly seen as the legal child of the social parents.[4] Anonymity not only gave the social father rights over the child but also protected the donor from incurring any legal duties towards the child (Dewar, 1989; O'Donovan, 1989). However, in the 1970s and 1980s, legislation was enacted by all Australian States and Territories, protecting the legal status of children conceived by donor conception.[5] This removed the legal rationale for secrecy. A second reason for secrecy arose from negative public attitudes. Donors were viewed with suspicion, especially as donation involved masturbation. The close association in people's minds with eugenic practices, as well as the perceived shame of infertility, added to negative perceptions (Daniels and Taylor, 1993: 157–9; Firth, 2001). However, public attitudes have largely changed. Indeed, fertility technology is now seen as a treatment that couples have a right to access (see the debate in Uniacke, 1987). The third and final argument for preserving anonymity claims that without anonymity to protect donors, rates of sperm and egg donation would drop, thereby denying many infertile couples access to treatment.[6] However, this argument too has lost resonance. In Sweden, the first

country to move to an open system of gamete donation, donation rates initially slumped when anonymity was abolished in 1985, but they soon rose back to normal levels (Daniels and Lalos, 1997; Turkmendag et al, 2008: 288). Victoria in Australia has shown similar findings (Blood et al, 1998). However. I will briefly return to this objection in more detail at the end of the article.

Just as the reasons to preserve anonymity have largely fallen away, the reasons *against* anonymity have grown stronger. There is now a community of adult donor-conceived individuals who argue that they have a right to know their genetic parents (Turner and Coyle, 2000). In response to the advocacy of donor-conceived individuals and the removal of countervailing considerations, in 1988 Victoria became the second jurisdiction in the world (following Sweden) and the first in Australia to adopt a non-anonymous system of gamete donation, whereby children were allowed access to the identity of their donors. Since then, many countries have adopted similar systems.[7]

B. Legislation in Australia Today

The current legislative position within Australia is characteristically fragmented. The regulatory framework of ART has been described as 'a patchwork . . . lacking cohesion and order' (Szoke, 2003). There is no Commonwealth legislation governing donor conception in Australia and there is considerable debate regarding whether the Commonwealth is constitutionally empowered to legislate in this area (Schneller, 2005: 228; Szoke, 2003: 75).[8] At present, each State and Territory has the legislative power to regulate gamete donation; however, only four states, Western Australia (WA), South Australia (SA), New South Wales (NSW), and Victoria (Vic), have done so. There remains no legislation in Tasmania (Tas), Queensland (Qld), the Northern Territory (NT), or the Australian Capital Territory (ACT).

Amongst the States that do have legislation, the approach and direction differ greatly. Victoria, WA, and NSW all recognise a child's right to know their genetic parents and do not allow clinics to accept anonymous gamete donations. Victoria and NSW allow donor-conceived individuals, aged 18 years and over, to access identifying information regarding their donor by contacting the respective State registers. WA allows donor-conceived individuals aged 16 years and above to access identifying information after they have completed compulsory counselling. Importantly, WA, Vic, and NSW explicitly interpret a child's right to know their genetic parents as encompassing a right to *identifying* information regarding their donor, and recognise a state responsibility to enable access to this identifying information. SA legislation does not explicitly state that a child has a right to know, though this is implicit within the requirement to adhere to NHMRC

guidelines, which specify that 'persons conceived using ART procedures are entitled to know their genetic parents' (Part B, 6.1: 25). SA has not, however, undertaken the responsibility for enabling access to this information through the establishment of a register (SA legislation has recently been amended to enable the establishment of a register in the future if desired). At the moment, individuals must contact the clinic directly.

Although there exists no Commonwealth legislation, the Commonwealth still exerts some influence over the regulation of gamete donation within Australia. The National Health and Medical Research Council (NHMRC), Australia's leading statutory body on health and medical research, was established by Commonwealth legislation.[9] The Prohibition of Human Cloning for Reproduction and the Regulation of Human Embryo Research Amendment Act (2006) establishes that all clinics operating in States or Territories where no existing legislation exists must still comply with the NHMRC guidelines and the Fertility Society of Australia's Reproductive Technology Accreditation Code of Practice (2010) in order to obtain accreditation. ACT, NT, and Qld do not have legislation regulating donation, although they are subject to NHMRC Guidelines as indicated above. The NHMRC Guidelines specify that 'persons conceived using ART procedures are entitled to know their genetic parents' (Part B, 6.1: 25). Therefore, even where there is no explicit legislation, it is implicit through the registration process that all children in Australia have a right to know their genetic parents. Significantly, in ACT, NT, and Qld, as in SA, it is left to the donor-conceived individual to identify and contact the correct clinic to obtain identifying information.

Australia is also a signatory to the United Nation Convention on the Rights of the Child (CROC), which has been invoked by theorists as a potential additional basis to support a child's right to know their genetic parents. Article 3, the primary guiding principle of the Convention, states that parties must act in the best interests of the child. Furthermore, Article 7 states that children have a right to a name and nationality, and Article 8 states that children have a right to the preservation of their identity. Yet there is debate regarding whether CROC really can support a donor-conceived child's right to know their genetic parents. Blair (2002) argues that CROC does not support an unequivocal right of access, as the original intent of the drafters was not to encompass reproductive technologies. Tobin however puts forward a strong argument that the combined force of articles within CROC provides a basis for such a right (2004).

In February 2011, an inquiry by the Australian Senate's Constitutional and Legal Affairs Committee produced a set of recommendations that overwhelmingly supported legislation against anonymous donation and reiterated a child's right to know their genetic parents. However,

the Committee noted that the varied approaches between States with legislation, and the lack of legislation in the other States and Territories, were leading to confusion and in some instances breaches of the child's right to know (Senate Inquiry Report, 2011, sec 2.3: 7). It recommended separate but uniform legislation across all the jurisdictions, facilitated through the Standing Committee of Attorneys General (SCAG) mechanism. It seems clear, then, that the Commonwealth will continue to support a system of non-anonymous gamete donation. A clear basis for non-anonymous donation needs to be established if Australia is to introduce uniform legislation. In order to clarify the duties that governments hold in protecting a child's right to know, we must be clear about the basis for this right. In the next section, I identify the three main arguments that ground a child's right to know their genetic parents.

2. A CHILD'S RIGHT TO KNOW

In order to properly understand the duties that lie with the state,[10] we must identify why a child has a right to know their genetic parents. There are scholars that hold that rights can only be awarded to those that have the capacity to make rational choices and that this necessarily excludes children (Hart, 1984; Steiner, 1994). However, it is widely acknowledged that the interest theory of rights allows children to be properly understood as right holders and aligns to our commonsense understanding of children's rights (Archard, 2004, Campbell, 1994; Cowden, 2012; MacCormick, 1975). Therefore, throughout this article, I assume a 'right' to be a claim that is grounded in an interest held by a claim holder that is worthy of protection and therefore creates a duty in others. Therefore, we must identify what interest of the claim holder, the donor-conceived child, is of such sufficient importance that it creates a duty to allow them access to identifying information about their genetic parents. In short, what interest grounds this right? In this section, I will consider the three main reasons cited in support of a child's right to know their genetic parents: the importance of genetic and medical history, the risk of consanguinity, and psychological harm.

A. Genetic and Medical History

People have an interest in accessing genetic and medical information about their genetic parents. It is in a child's interests to have knowledge of congenital diseases or traits that run in her (genetic) family. This is important for diagnosing and treating diseases, and also for making fully informed family-planning decisions (Dennison, 2007: 14). False assumptions regarding one's medical history can lead to an individual being misdiagnosed, unknowingly forgoing important care or undergoing unnecessary treatment (Lamport, 1988). This concern seems to constitute an interest worthy of protection.

However, even if this interest is of sufficient importance to ground a right, the duty it produces would not necessarily entail *knowing* one's donor. This interest can be protected without revealing identifying information about the donor. Indeed, information about the donor's medical and genetic history is already released to the families of most donor-conceived individuals before the treatment begins. Clinicians often consider that they have met reasonable demands about genetic histories by the careful screening of potential donors for a great variety of heritable diseases and characteristics (Dennison, 2007: 14; McWhinnie, 1995: 815). For example, the Californian Cryobank provides a quarterly catalogue of donors detailing information from blood type, medical history to hair colour and the highest education level attained (California Cryobank, 2011). In Australia, the social parents are allowed access to the medical and genetic history of the donor, while still being denied identifying information (NHMRC Guidelines). Even if this non-identifying information had not been previously provided or an unexpected situation arose whereby genetic testing of the donor was needed, this could be done without revealing the donor's identity.

So one's interest in genetic and medical history can ground a right to *non-identifying* information, but it is not clear why this interest would be sufficient to allow children access to *identifying* information and to *know* their genetic parents. This interest would be most appropriately protected by building more detailed donor profiles rather than revealing the donor's identity. The comprehensive genetic screening undertaken by clinics is usually far more detailed than an individual's own knowledge of their family health history (Dennison, 2007: 14). Therefore, the child's claim to the genetic and medical history of their genetic parents cannot alone be the basis for identifying information about one's genetic parents.

B. Consanguinity

Many donor-conceived children are concerned about the risk of unknowingly forming a sexual relationship with their genetic half-sibling. Consanguineous relationships can increase the risk of serious genetic disease in resultant children (Schull, 1958). If consanguineous couples do have children, they should undertake genetic counselling and screening, a process that most couples will only undertake if they are aware they are consanguineous. In addition, consanguinity may have adverse legal consequences. In Australia, the Marriage Act 1961 (Cth) states that marriage is void when it is between a half-brother and -sister (Commonwealth of Australia, Subsection 23(2)). However, the chances of a consanguineous relationship occurring seem to be very low. In evidence given to the Australian Senate Inquiry, one witness stated, '. . . there is no adjective which accurately describes just how tiny

this chance really is' (Senate Inquiry Report, 2011: 70). Yet this remains a real concern for donor-conceived individuals (Dennison, 2007: 15). As noted by another witness:

> [i]t is not just the issue of consanguineous relationships, which are statistically unlikely; it is the psychological impact on the child who, for a fellow, will be wondering about every girl he sees, "Is she my half-sister?"

Yet if we take this as a legitimate interest, albeit one based in being psychologically secure rather than statistical importance, again there exist many ways to address this concern without providing donor-conceived children with the identity of their donor.

Currently within Australia, there are limits to the number of families that may receive gametes from a single donor. In WA and New South Wales, this limit is set at 5 families and in Victoria it is 10 (Human Reproductive Technology Directions [WA] para 8.1; Assisted Reproductive Technology Act 2007 [NSW] s 27(1); Assisted Reproductive Treatment Act 2008 [Vic] s 29). This restriction is designed to reduce the statistical possibility of individuals forming consanguineous relationships, although there has been some criticism about inconsistent enforcement of these limits (Senate Inquiry Report, 2011: 73). Yet even if limits on the number of families to whom donors can donate prove ineffective, other steps can be taken to address these concerns. In the UK, long before the removal of anonymity, donor-conceived individuals could contact the Human Fertilisation and Embryology Authority and request information about whether their prospective partner is a genetic relation. The Authority would then check the register and let the donor-conceived individual know without revealing the identity of the donor (Blyth and Hunt, 1998).

Given the statistical rarity of consanguineous relationships and the fact that they can be prevented by revealing non-identifying information regarding the relation between two donor-conceived individuals, this interest does not seem sufficient to ground a right to access identifying information about one's genetic parents. It cannot ground a child's right to *know* their genetic parents.

C. Psychological Harm

The most persuasive basis for a child's right to know their genetic parents is that lack of access to identifying information about an individual's donor can lead to psychological harm. Most donor-conceived children report a feeling of loss of identity, and what has been termed 'genealogical bewilderment' when they are not allowed access to identifying information regarding their genetic parents. As one advocate website stated, 'who we are is partly inherited – it is the beginning of our life story, knowing our history helps to understand who we are' (Parentlink, 2011). For many donor-conceived children, the importance of knowing their donor does not lie in issues of medical

history or consanguinity, but rather in a deeper understanding of who they are and where they sit in the world in relation to others. One witness told the Australian senate inquiry:

> I cannot begin to describe how dehumanizing and powerless I am to know that the name and details about my biological father and my entire paternal family sit somewhere in a filing cabinet . . . with no means to access it. Information about own family, my roots, my identity. (Senate Inquiry Report, 2011, 77)

Another man, conceived by donated gametes in the 1970's, described the feelings and trauma he had lived with his whole life:

> After having children of my own and holding them in my arms, I came to realize what my conception had truly deprived me of. I had lost kinship, my heritage, my identity and my health history. This realization was crushing, depressing and immensely painful . . . the consequences of my conception had profound implications and affected me deeply without my even knowing it, and it is something that will negatively impact on me for the rest of my life. Every day I have to get up and look at a face in the mirror that I do not know. As a teenager, I struggled constantly with my sense of self and identity. (Senate Hansard, November 2010)

In 1964, Sants (1964: 113–41) demonstrated that adopted children may develop psychological difficulties regarding identity if information about their origins and details of their genetic parents were not made available. Further studies have confirmed that for adoptees, not knowing their biological origins led to an incomplete sense of self that resulted in low self-esteem and a threat to their identity (Brodzinsky et al, 1992; Krueger-Jago and Hanna, 1997). Many commentators argue that the findings arising from the study of adopted children apply equally to children conceived by donor gametes, that in having conclusive evidence of this harm we should work to prevent it occurring again (Dennison, 2007; McWhinnie, 2001; McGee et al, 2001). Others, however, have disputed this claim. Shenfield (1994) and Turkmendag et al (2008) maintain that the position of adopted children is dissimilar to donor-conceived children as adopted children are abandoned whereas donor-conceived children are *wanted* and are usually genetically related to one of their social parents. Nevertheless, emerging research about the experiences of donor-conceived children supports the contrary view. The first study of adult donor-conceived individuals found a diversity of negative experience resulting from not knowing their genetic parents. Participants reported feelings of 'genetic discontinuity', shock, deceit, mistrust of family, abandonment by donor and practitioners, frustration, and loss due to lack of information (Turner and Coyle, 2002). Although their study is of a relatively small sample size and participants were recruited from donor support groups, the evidence is growing that access to identifying information regarding

one's genetic parents is essential to a child's mental health (Scheib, Riordan and Rubiri, 2003).

Unlike concerns about medical and genetic history or consanguinity, one's interest in being free from psychological harm cannot be remedied by non-identifying information about the donor. The very harm arises from a lack of knowledge about the donor's identity. Providing identifying information will allow donor-conceived individuals the opportunity to place a name, a face, and a person in a space that was once empty. It allows individuals the opportunity to contact and know their donor, to complete their family history, and to fulfil their own sense of identity. Many donor-conceived individuals, having been presented with the opportunity to contact their donor, have reported a sense of fulfilment, contentedness, and even enrichment in the new family relationships they have formed (Senate Inquiry Report, 2011: 78–80). As Turner and Coyle reported, donor-conceived individuals expressed a:

> need and a right to know who their donor fathers are and, if possible, to have some sort of relationship with them. It seems, therefore, that for these donor offspring, 'non-identifying' information might not be sufficient to meet their identity needs. (Turner and Coyle, 2000: 2050)

Therefore, the interest in being free from psychological harm seems to present the most convincing argument that an individual has a right not only to information about their donor's medical and genetic history or about who they might be related to but also to information about who their donor actually is.

3. NO HARM, NO FOUL

Yet if one's right to know one's genetic parents is grounded in an interest to be free from psychological harm, surely a more effective way to protect children from this harm is not to tell them about the nature of their conception at all. When one has *a* sense of identity and genetic history that seems to be so important for the psychology of an individual, does it matter that this genetic history and identity is false? Just as my friend may have a better night not knowing that she is wearing an ugly dress, a donor-conceived child may lead a better life not knowing that their social parents are not their genetic relations. The best way to protect an individual's right to be free from psychological harm seems to be not to tell them of the nature of their conception at all.

Indeed, this seems to be the most common reaction from parents. Worldwide, disclosure rates are very low. It appears that that legislating the child's right to know does not necessarily communicate the message to potential parents that they have an obligation to tell their child of their genetic origins. In the UK, where there is a legal right to access

identifying information, only 5 per cent of parents have informed their adolescent children about their genetic origins. Similar rates exist in Italy (0 per cent), Spain (4 per cent), and The Netherlands (23 per cent) (Golombok et al, 1996, 2002a,b; Scheib, Riordan and Rubiri, 2003). Blood et al, 1998 have reported similar findings in Australia. These low rates are not necessarily due merely to the short time the legislation has been in force. Sweden's legislation was introduced in 1985, yet in 2000 still only 11 per cent of parents had informed their children of the nature of their conception. A 2004 study indicated that by then 46 per cent *intended* to tell; however, this still falls below a majority of parents (Golombok et al, 2004; Gottlieb et al, 2000). The option of keeping a child's genetic origins secret is often not available to parents of adopted children. Gamete donation, however, offers the opportunity of a pregnancy that appears to the child and to outsiders to be a product of natural conception.[11] Obviously, this is only true for heterosexual couples; same-sex couples must necessarily be open about the nature of the conception (Vanfraussen et al, 2001: 2019).[12] Therefore, in the following I will be primarily concerned with heterosexual couples who choose to keep the involvement of donated gametes a secret.

A. Inadequacy of Arguments from Harm

It is difficult to refute the no harm, no foul principle by appealing to traditional ideas of harming. Not disclosing the nature of a child's conception does not seem to constitute harm to the child. Traditional notions of harming are most commonly expressed in the 'harm principle', famously articulated by John Stuart Mill (1985/1859: 22), holding that 'the only purpose, for which power can be rightly exercised over any member of a civilised community against his will, is to prevent harm to others'. It follows that if no harm is caused to others by your actions, then you have no reason not to engage in that action.

What, then, is harm and how do we tell when it has been caused? According to Feinberg, harm must lead to some kind of adverse effect on its victim's *interests* – distinguishable components of a person's good or well-being (1986: 145–6). To demonstrate the way in which harming works, Feinberg introduces the idea of an interest graph. For example, to set back an interest is to reverse its course on the graph, to thwart an interest may be to stop its progress without necessarily putting it in reverse and to impede an interest is to slow down its progress without necessarily stopping or reversing it (Feinberg, 1986: 147). For an action to constitute prima facie harm, it must satisfy the 'worsening test', that B's interest is in a worse condition on the interest graph than it was before A acted.

Non-disclosure fails to satisfy the worsening test. Studies seem to indicate that donor-conceived children are not harmed when they are

not told about the nature of their conception. Indeed, they might benefit from ignorance about the nature of their conception. In the comparative studies conducted by Golombok, four groups of children – conceived naturally, by donor insemination (DI), by IVF, and adopted – underwent standardised tests and observational procedures. The children conceived by donor conception were not told of the nature of their conception. The quality of the parent–child relationship in DI families, IVF families, and adoptive families emerged as *better* than in the control group of natural conception families (Golombok et al, 1996, 1998; Golombok, 1998). This suggests that a child's interest in being free from psychological trauma would measure highly on the interest chart when they do not know the truth about their conception. Telling them of the truth would almost necessarily lead to a downward trend in this interest, whereas concealing the truth would allow the interest to continue, up or down, as it would if the child were naturally conceived.

Yet not all harms are 'worsening' harms – in order to show conclusively that the action is not harmful we must also show that it fails the 'counterfactual test'. The counterfactual test states that harm exists if B's interest is in a worse condition than it would be had A not acted as he did. To use Feinberg's example, suppose the hot favourite for the Miss America contest is detained on the eve of the competition, and that if she had competed she would certainly have won the prize of a million dollars. She is no worse off than she was before the detention, but she is much worse off than she would have been if she were not detained (1986: 149). It is even possible to *improve* B's condition while counterfactually harming them. Suppose I go to see the doctor with an ear infection. My doctor prescribes painkillers that alleviate my pain, but the infection still lasts another 2 weeks and significantly drains my energy. If my doctor had prescribed a course of antibiotics, the infection may have cleared up immediately. My doctor's negligence adversely affected my interests even though I am better off from his actions than I would be had he not acted at all.

Is the child's interest in being free from psychological trauma worse off than it would have been if their parents decided to disclose the nature of their conception? As we have seen, knowledge of one's status of being a donor-conceived person often brings negative psychosocial consequences. However, we must acknowledge that this might not always be the case. Indeed, some donor-conceived children born to same-sex partners are well-balanced and secure in their identity (Vanfraussen et al, 2001). Yet in the pure comparison between the two counterfactuals' respective positions on the interest chart, the position of the non-disclosure situation will still sit comfortably higher than the disclosure situation. We are comparing a harm-free existence to one where the child will inevitably have to deal with a difficult situation – even if some children deal with it relatively well.

So the non-disclosure action fails the counterfactual test as well as the worsening test.

At this point, we must take time to address the objection that the definition of harm offered above is too narrow as it relies on harm being understood in experiential terms. Harms can occur when we are not aware of them (Archard, 2007). Consider, eg, that my colleague's work is badly mistranslated into another language in a way that grossly misrepresents his views. This mistranslation causes damage to his reputation in another country, to the point that one university decides not to offer him a prestigious invitation. Even though my colleague is unaware of the mistranslation, the resulting damage to his reputation or the lost opportunity, he has clearly been harmed as his interest in advancing his career has been set back. This constitutes a case of non-experiential harm. However, in our case of non-disclosure, the very harm we are trying to avoid is one that only arises from knowledge or awareness. Unlike the mistranslation case, which involves a clear setback in concrete interests, it is still unclear what interest is being set back when one is unaware of one's genetic origins. It cannot be that I am harmed when I am unaware of my genetic origins simply because I have an interest in being aware of my genetic origins – such an argument would attempt to pull the case for disclosure up by its bootstraps. Unlike the mistranslation case, we cannot identify an independent harm that exists without the child's knowledge.

If the right to know one's genetic parents is grounded solely in one's interest in being free from psychological harm, then the availability of the total non-disclosure option seems to render the right nugatory. Social parents may point to the no harm, no foul principle, and argue that they can protect the child by keeping the nature of their conception a secret, rather than disclosing the donor's identity. So while even though a child may have a legal right to access identifying information about their donor, they will not know that this information even exists unless they are first told by their parents that they are donor-conceived. Therefore, in order to continue to support the notion that donor-conceived children have a right to know their genetic parents, we must find some way to overcome the no harm, no foul principle and show that children also have a claim to be told the nature of their conception.

4. RISK OF HARM AND RESPECT

In this section, I present two arguments that may support the right to know, independently of traditional notions of harming. First is the argument that children have a claim to be told the truth because they have an interest in not being exposed to the *risk* of harm in non-disclosure, and second that disclosing the truth about the nature of the child's conception is a form of respectful behaviour

towards the child, and that the child has an interest in being treated with respect.

A. Risk of Harm

The risk of harm, as opposed to harm itself, may offer a credible grounding for a child's interest in being told the truth about their genetic origins. The risk of a donor-conceived child finding out about their conception from someone else is quite high. In Golombok's study, 89% of parents had not informed their child about the nature of their conception, but 53% had told other people (Golombok et al, 1999). A New Zealand study found that 75% of couples had informed others of the nature of the conception of their child (Daniels, 1988: 380). Even when doctors and clinics had advised couples not to, most had told someone else (Manuel, Chevret and Czyba, 1980; Klock and Maier, 1991; Lasker and Borg, 1989). Even if they are not directly told, donor-conceived children may pick up on signals caused by secrecy as they grow older (Brewaeys, 1996). Baran and Pannor reported that DC children often feel like they 'do not fit in . . . because of differences in physical features, characteristics and talents' (1993). Furthermore, McGee argues that as genetic technology becomes more advanced, genetic screening – which may inadvertently reveal paternity – will become more and more common, further increasing the risk of discovering the nature of one's conception (McGee, 2007).

Not only is the risk of harm high but also the gravity of the potential harm increases as the child becomes older and is not told of their genetic origins. Children who are told early have neutral or positive responses (Daniels and Lalos, 1997). In Australia, Kane's research shows that:

> people who have been informed as young children appear to have a very clear sense of who is their father – it is the man who raised them, even when it has been a difficult or distant relationship. (Johnson and Kane, 2007: 125)

Parentlink recommends that, in order to reduce the risk of harm, children should not need to be 'told' of their conception, rather they should simply always have known. They argue that 'children should grow up with this knowledge rather than be told in a way that makes it seem unusual. From a very early age it can be woven into your child's understanding of who she is – even if you feel she is too young to understand' (Parentlink, 2011). As mentioned earlier in the paper, individuals who are told later in life are far more likely to report feelings of stress and psychological trauma.

We may (and do) prohibit risky behaviour because of the high likelihood that harm will arise. For example, dangerous driving, such as speeding or running a red light, is usually harmless; yet we prohibit this risky

action in order to prevent potential harm. Similarly, we may say that non-disclosure is likely to cause harm later if the donor-conceived individual discovers the truth; therefore, we should prohibit non-disclosure. This may give us good reasons to engage in truth-telling behaviour, but it does not explain why the donor-conceived individual has a *right* to know of the nature of their conception. For no individual has a right to be free from others' reckless driving unless that driving ultimately results in harm. If I am standing of the side of the road as a car speeds past me, I cannot impose a duty on that driver nor seek compensation from him because of the *risk* that he could have hit me.[13] The prohibition on dangerous driving does not ground rights in individuals nor is it based on their individual claims.

In fact, the prohibition on non-disclosure could be seen simply as a way of *mitigating* the risk of harm arising from finding out later in life. If so, then we must consider whether the risk could be mitigated in other ways. The risk argument is based on the assumption that there is a high likelihood that the child will find out. One response to this may be simply to try harder to ensure that the child never finds out. For example, one could require potential parents to sign a confidentiality agreement and attend counselling to ensure they are able to conceal any unwanted 'signals'. We could even ensure that clinics providing genetic screening for health purposes are prevented from revealing paternity issues that might also arise.

So while the risk of harm argument may provide strong moral imperatives to tell the truth, it seems insufficient to explain for why an individual has a valid claim to know the nature of their conception. And, perhaps most importantly, the risk of harm does not seem to properly capture what donor-conceived individuals themselves are expressing. Many people have said that even if they never found out, they *still* think they had a right to know and that *still* somehow they would have been wronged. So in order to properly establish an individual's right to know the nature of their conception, we need a claim that exists even when there is *no* risk of the child being told.

5. RESPECT

The stories told by donor-conceived children place considerable emphasis on the element of deceit and lack of respect associated with non-disclosure. This seems to more closely reflect the wrong that donor-conceived individuals believe has been done even if they would never discover the deception. Children, therefore, may have a right to be told about their genetic origins not because of the potential harm of not telling, or the preventing of harm in not telling, but because deception of this nature constitutes a wrong in that it violates the respect owed to that child.

Consider the example of 'pure' rape (Gardner and Shute, 2000). Pure rape is a case where a victim is raped but is not aware that it has happened: she may have been drugged at the time, is left with no physical injuries and because of her lack of knowledge of the act, suffers no psychological harm. In this case is the act of rape wrong? Gardner and Shute argue that this case in fact isolates the core wrong of rape, stripping it of the associated harms that usually accompany it (2000: 196). Rape is wrong, according to them, because it involves treating the woman as something other than a person; it constitutes treating her as a thing (Gardner and Shute, 2000: 203–04). Therefore, harmless acts can still be seen as wrongs. I believe the same is true for the donor conception. By focusing on the case where the child does not know she is donor-conceived, we can isolate the wrong without the distractions of collateral harms.

'Respect' captures this sense of 'wrongness' that is independent of the consequences of the individual finding out about the nature of their conception. Respect is a mark of status owed to someone. Recognition of this value is expressed through behaviour towards the subject of respect. Darwall identifies two types of respect: the first is 'recognition respect' that is owed to members of a class simply and solely in virtue of their possession of some qualifying feature (1977: 38). This kind of respect is of a fixed and determinate kind. The other form of respect, 'appraisal respect', is respect that derives from a positive evaluation of persons or things by some standard. Importantly for our purposes, recognition respect restricts the type of morally permissible actions one can take towards the object of respect (Darwall, 1977: 40).

It is recognition respect that is relevant to this argument; we owe the child respect not because of their life achievements but because of their status as a subject worthy of respect. Truth telling is a form of respectful behaviour and therefore the individual child has a claim, based in respect, to know the truth about their conception. Eekelaar (2006: 75–6) too has argued that disclosure consists of respect as it empowers children with information that is incapable of manipulation by adults. Some commentators have pointed out that children may not be due the same type of respect as adults (Teitelbaum, 2006). This is because often the property that gives an individual the relevant status is that of autonomy or rational decision making. Children, it is argued, do not have this property. In this sense, they are unable to form rational preferences and pursue them. Without this essential element of autonomy, children are not due recognition respect.

There are a number of responses to this objection. First, it may be that we owe respect not to the child, but to the adult that child will become. Feinberg constructs a category of rights called 'rights-in-trust'

whereby the child holds rights in trust for the future adult, who will be a rational, autonomous agent (1986). Therefore, we owe a duty to tell the truth of the nature of the conception to the child because this is a form of behaviour respectful towards the autonomy of the adult they will develop into. There are a number of problems with constructing rights in trust, including metaphysical concerns regarding predictions of the autonomy of the future adult. However, one way to demonstrate that respect is owed to the child now vis-à-vis the adult they will become is to consider the case of a terminally ill-child (Archard, 2004). Does a child who is going to die in 5 years have the same claim to be told the nature of their conception? It seems that a 5-year-old child who is not told of their true genetic origins and who dies not knowing (and who was always going to die before becoming a fully autonomous agent) has been wronged in the same way as we think adult donor-conceived individuals have.

The wrong seems caught up somehow in the individual's identity. We need not insist that the essential property of respect is autonomy.[14] Although recognition respect is binary rather than scalar (unlike appraisal respect), the concept may admit different bases for recognition. For example, one can have recognition respect for the law by virtue of it being the law, or recognition respect for nature (Darwall, 1977: 40). Recognition respect could also encompass respect for persons who hold their own identity. Children certainly form a sense of identity from a very early age. Children can understand that their social parents are important to them and who they are – how they sit in relation to the rest of the world. Children in their middle childhood become increasingly aware of biology as an underlying characteristic of family relations, and also rapidly begin to express greater curiosity about their origins (Brodzinsky et al, 1995; Newman et al, 1993). For these reasons, children are due the same kind of respect as adults – as persons with a sense of identity. Failing to tell the truth about a child's genetic origins is therefore a morally impermissible action as it fails to respect that child's status as an identity-holding entity.

A. Two Claims – Two Legal Rights?

There are many reasons cited for why social parents should disclose the nature of the conception to the child: that the risk of later discovery remains, that family secrets are destructive, that secrecy reinforces the stigma of donor-assisted conception, and the previously examined medical and consanguinity concerns (see Baran and Panor, 1993; Daniels and Taylor, 1993; McWhinie, 2001; Triseliotis, 1988). However, the most common and emotive reason is that a person simply has a right to know the truth about their conception and their biological parents. It may be far easier to construct a legal constraint around the

broader non-rights-based reasons for ensuring disclosure, but organisations, politicians, and donor-conceived individuals themselves still come back to the right of the individual. In this article, while I acknowledge that those parallel tracks to outlawing non-disclosure may exist, I have sought to build a framework that does justice to reference to the central right claim. From the above analysis, it is clear that the child's right to know their genetic parents must be comprised of two distinct claims:

1) a child's right to be told about the nature of their conception based on their interest in being treated with respect and
2) a child's right to access identifying information regarding their donor based on their interest in being free from psychological harm.

I will now examine whether these claims create only moral duties, or whether they are sufficient to support legal prohibition on non-disclosure and legal entitlement to access identifying information.

The second claim is a strong claim with a solid basis in harm. There is a clear reason for legislating to protect this right and a clear legal tradition for legislating to protect from harm (Feinberg, 1986). The first claim, however, seems much weaker – in two distinct ways. First, the concept of respect is not as solid as harm. Although I have offered a definition of respect, I have in no way offered a conclusive understanding of the concept; respect is still based on something more intangible and therefore is harder to use it as a basis for legal regulation (Lysaught, 2004: 665). Second, the claim to be treated with respect may create a moral duty in parents to be honest to their children; but is this really any different from other types of deception regarding paternity? Many children are not told the truth about the nature of their conception even when they are conceived naturally. Doctors conducting tissue typing for organ donation estimate that 5–20 per cent of organ donors discover that they are genetically unrelated to the men believed to be their biological father (McEwan, 2003; Rothman, 1989). Recent systematic review suggests that up to 9.6 per cent of the naturally conceived population is unrelated to their presumed fathers (Bellis et al, 2005). Why then should we create a legal right to disclosure for children born by donor conception if we do not regulate truth telling in other cases? If we, as a society, are content for the law not to interfere in the 'marital infidelity' case, even though it is based on the same argument from respect, what further reasons support legislative interference in the donor conception case? I argue that the claim regarding donor conception can move from a weak moral claim into a strong legal right in three distinct ways.

Firstly, the first claim to disclosure is necessary in order to protect and enable the second stronger claim to access of identifying information. As previously noted, one cannot know that one has a right to access identifying information about one's genetic parents unless one is first

told that one was donor-conceived. Therefore, the first weaker claim becomes a necessary part of the stronger second claim, for if we want to enable individuals to access their legislated right to indentifying information then we must ensure that they are aware of the relevant facts.

Second, the first claim is also necessary to protect the previously mentioned concerns regarding medical and genetic history and consanguinity. Although these two concerns were inadequate to ground a right to identifying information, they may very well stand on their own, producing duties to gain access to genetic and medical non-identifying information and non-identifying information about one's siblings. Disclosure regarding the nature of one's conception is necessary to realise these additional interests. Not ensuring disclosure also infringes on the legislated rights of the donor themselves. In Victoria, the donor can approach the Victorian-Assisted Reproductive Technology Authority requesting information about children resulting from their donated gametes. The Authority is required to contact the child for their consent to releasing the information (IT Act, 1995, Vic, ss.76, 77). There is the possibility (given the high levels of non-disclosure) that the individual will not know of their genetic origins. Schneller notes '. . . that this section of the Act Is unworkable without the ability to ensure that parents inform their children of their DI conception' (2002: 233). In order to carry out its current obligations under the legislation, the State of Victoria has an interest, or even a responsibility, in ensuring disclosure takes place. In this sense, these additional interests of the child and of the donor act as parallel props for the claim that donor-conceived children have a right to be told the truth regarding the nature of their conception.

Finally, and perhaps most importantly, the claim is distinct and of greater significance than other children's claims to disclosure, because of the involvement of the state. Unlike the examples of private individuals who conceive a child and then conceal its paternity, the state is involved in the creation and conception of donor-conceived children. The Commonwealth provides funding for ART processes, including donor conception, through the Medicare scheme. Ten items are listed on the Medicare Benefits Schedule relating to ART, attracting a 75 to 85 per cent rebate (Senate Inquiry Report, 2011: 4). Additional funding for ART procedures is provided through the Extended Medicare Safety Net, which provides a rebate for those who incur out-of-pocket costs for out-of-hospital services. In addition to funding the practice, the States, Territories, and Commonwealth play an important role in regulating it through legislation and guidelines.

The state's involvement in the conception of these children causes it to acquire duties towards them that it does not hold to children at large. This principle is not a new one. The Commonwealth has made

two high-profile public apologies to children who were removed from their families, from Indigenous communities or the UK, and relocated elsewhere in Australia. The state's involvement in these practices of removal produced special duties that it was seen to have breached. Therefore, it may be that the state is complicit in the deception of children conceived using donated gametes through state-funded medical procedures and conducted at state-regulated clinics, if it does not take steps to ensure disclosure. This would arguably constitute unconscionable action by the state.

To return to an objection raised at the start of the article, in legislating a right, governments must also consider wider public policy considerations. Turkmendag et al (2008) argue that legislating a child's rights to know fails to take into account the rights of the would-be-parents. The removal of anonymity, it is argued, causes a drastic drop in the rate of gamete donation therefore infringing the would-be-parent's right to conceive. This argument seems to have much resonance throughout the debate; however, it is unclear that there is any evidence supporting it. As mentioned previously, donation rates have risen again in Sweden and Victoria, but furthermore there is clear evidence that the rate of donations has *not* dropped in the UK since removing anonymity, in fact the number of first-time donors has actually increased (Human Fertilisation and Embryology Authority, 2011). Even if there was a shortage in gamete donations, there is a strong argument that this outcome is more acceptable than knowingly creating individuals who will never be able to know their genetic parents and therefore subject to the psychological harm outline earlier, especially when it is unclear on what basis would-be-parents claim a right to procreate that creates a duty to assist in the process, rather than a duty simply not to interfere.

The combined force of these three arguments, but especially that of state involvement, demonstrates that a child's right to disclosure and a child's right to access not only creates moral duties in their social parents but also imposes two distinct duties on the state to use its legislative power. First, the state should ensure that donor-conceived children are aware of their status and nature of their conception; and secondly it should allow donor-conceived children access to identifying information regarding their donor. These would correspond to legal rights in each donor-conceived individual. It is important to recognise that the framing the legal rights in this way does not mean that the state has a duty to ensure that the donor forms a relationship with the donor-conceived child. Once the child has access to the information, the state cannot force the donor to interact with the child. The law 'may be able to destroy human relationships; but it does not have the power to compel them to develop' (Goldstein et al, 1979).

Finally, it is worth noting that just as the second right bolsters the strength of the first, the reverse is also true. If the second right, to know

identifying information about one's donor, is based purely on harm, then does it cover a child's right to know the 'true' identity of the donor? For example, a child may be told they are donor-conceived, and their donor may in fact be a famous mass-murderer. At the time he donated his sperm, the donor seemed a respectable young man but a few years later he was uncovered and sentenced to a life in prison in a very public trial. Clearly, telling the child the truth would harm them; is it therefore permissible in this case to lie? I argue not, because a child's right to be told the truth regarding the nature of their conception (grounded in respect) encompasses a right to be told the truth about the identity of their donor. So even though the right to identifying information regarding one's donor is primarily based in harm, it too is bolstered by the claim to be treated with respect.

CONCLUSIONS

In this article, I have argued that in order for a child to have a right to know their genetic parents, we must first overcome the principle of no harm, no foul. The no harm, no foul principle cannot be easily overcome by reference to traditional ideas of harm. However, I have argued that children should be informed of the nature of their conception, based on their right to be treated with respect. Truth telling is a form of respectful behaviour related to the importance of identity to an individual. Once we have shown that no harm, no foul does not apply, it follows that the child's right to know their genetic parents is comprised of two distinct claims: (i) the right to access identifying information regarding one's donor based on one's claim to be free from psychological harm arising from lack of access to identifying information and (ii) the right to be told about the nature of one's conception based on one's claim to respect as an identity-holding individual. The existence of this additional and separate claim to disclosure regarding the nature of one's conception produces new duties within the state. Unlike the case of other naturally conceived children, Australian governments are directly involved in the process of donor conception through legislation, regulation, and funding.

As it stands, no jurisdiction has legislated to compel parents to disclose the nature of their child's conception nor taken steps to inform children independently (Schneller, 2005: 223). At the moment, clinics are under no direct guidelines to encourage parents to disclosure the nature of the conception. If the state does not compel or encourage parents or clinics to disclose, and takes no steps to inform donor-conceived individuals directly, it may be viewed as complicit in the deception of these children. I argue that if no harm, no foul does not apply, the state must take steps to ensure that children are informed of

the nature of their conception. It is unclear whether the Commonwealth has power to legislate in this area. Therefore, the best method to ensure disclosure seems to be to establish separate but uniform legislation through the process of the SCAG. There are many ways in which the States and Territories can ensure disclosure, such as annotating birth certificates, notifying the child directly, or mandating counselling to couples who receive state assistance. It is not in this scope of this paper to examine which approach would be best – that is a project for future research – however it is clear that a child's right to know their biological parents must encompass a right to be told about their genetic origins. A harmless action may yet still constitute a foul.

NOTES

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[1] The study by Turkmendag et al. (2008) also indicates that this is persuasive logic for parents in the UK. Potential parents are concerned about the potential adverse affects of disclosure on a child's development.

[2] The phrase, 'no harm, no foul' was originally coined by American basketball sportscaster, Chick Hearn in the 1960's. The phrase indicates the rule of advantage play. If an action that is against the rules of the game does not affect the outcome of the game, then no foul (wrong) has been committed and no punishment should be played out.

[3] I use 'non-anonymous donation' to refer to countries or States whereby anonymous donation is not allowed. This is not to be confused with other systems, which may be considered 'open' as both anonymous and non-anonymous donations are accepted, such as the 'double track' system recommended by Pennings. See Pennings, G. (2007) 'The Double Track Policy for Donor Anonymity', *Human Reproduction* 12 (12): 2839–44.

[4] Throughout this paper, I shall refer to the parents who are genetically related to the child as the 'genetic parents' and the parents who are the legal guardians of the child as the 'social parents'.

[5] Status of Children Act, 1975 (Tas); Artificial Conception Act 1984 (NSW); Family Relationships Act 1984 (SA); Family Relationships Amendments Act 1984 (ACT); Status of Children Act 1984 (Vic); Artificial Conception Act 1985 (WA); and Artificial Conception Act 1985 (Qld).

[6] In January 2011, the UK Human Fertilisation and Embryology Authority (HFEA) launched a public consultation regarding increased compensation for gamete donors. Submissions expressed the view that adequate compensation may be a method to address the gamete 'shortage'. See 'HFEA launches public consultation on sperm and egg donation', http://www.hfea.gov.uk/6285.html (accessed: 29 July 2011).

[7] Countries that no longer support anonymous gamete donation include Sweden, UK, Austria, Switzerland, New Zealand, Australia, Norway, and The Netherlands.

[8] During the 2010 Senate inquiry, the Attorney Generals' department declined to provide legal advice on whether there exists a commonwealth power within the constitution that would allow the commonwealth to legislate in this area.

[9] *Commonwealth National Health and Medical Research Act* (1992 (Cth)).

[10] I will use the lowercase term 'state' to refer to the institution of the state generally, as distinct from the capitalised 'State', which refers to one of the six States of Australia.

[11] In fact, this was one of the 'selling points' of gamete donation. Dr Finegold explained that when presenting the reasons for preferring artificial insemination over adoption he would explain to prospective parents that, 'To his friends, the husband has finally impregnated his wife . . . in AI (Artifical Insemination) the child is never told'. See Wilfred J. Finegold, MD, *Artificial Insemination*, Springfield, IL: Charles C Thomas Publisher, 1964a.

[12] While it is theoretically possible for a same-sex couple to conceive, with the assistance of ART, a child that shares the DNA of both parents, the technology required for this does not yet exist, and even if it did there would be considerable ethical, legal,and possibly genetic impediments to its application.

[13] This remains true in Australia as seen in the recent asbestos miner case, *Amaca Pty ltd v Ellis; The State of South Australia v Ellis; Millenium Inorganic Chemicals Limited v Ellis* [2010] HCA 5. Although the appellants were found to be negligent and to have breached a duty or duties owed to the defendant, Mr Cotton, it could not be shown that Mr Cotton's lung cancer was a result of the appellant's risky behaviour. Mr Cotton had no claim to be free from risky behaviour without the risk eventuating into harm.

[14] It has not always been the case that respect for persons entailed that a 'person' must be autonomous. See Lysaught, M. T. (2004) 'Respect: Or, How Respect for Persons Became Respect for Autonomy', *Journal of Medicine and Philosophy* 29 (6): 665–80.

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Chapter Seven

Conclusions and Future Directions

Introduction

Michael King has argued that CROC is like the magical fairy Tinkerbell from 'Peter Pan'. Like Tinkerbell the Convention possesses the power to change children's lives but in order to do so it depends on people believing in its existence (King, 1994, 385). As lovely as this analogy is, it is simply not enough for people to just *believe* in the existence of children's rights. Belief is a hard subject to introduce into any social science project. One's belief in the power and existence of children's rights can be just as easily countered by someone else's belief in the superiority of the family, the subordinate status of children and the denial of rights to children. How does one resolve a debate based on belief? Rights do not appear out of nowhere like magical fairies. Rights, as they are understood in this thesis, are not based on belief but justification. Rather than have an ultimately fruitless debate about belief in the existence of such rights, the proper approach is to have a debate about what it is that such rights are intended to protect and why or why not those things are worth protecting. Rights are human creations; they are powerful social and political tools for change.

This thesis began with the question - do children have rights? Despite the advancement of children's rights in law, such as the adoption of the Convention on the Rights of the Child (CROC), national legislation and regional charters protecting children's rights, there still exists an underlying disagreement about whether children have rights in a philosophical or theoretical sense. Addressing this disagreement and providing a theoretical basis for children's rights is necessary to properly understand how such rights function, the shape of their corresponding duties and how to effectively implement them in policy and practice. In the introductory chapter I stated that this thesis has four aims: first, to present a theoretical argument for why children have rights; second, to examine and unpack the role of the terms 'capacity' and 'competence' in rights theory and their application to children's rights; third, to apply the theory of children's rights to particular cases; and finally, to demonstrate the power of a strong theory to bring children's rights from the realm of 'slogan' into reality. This thesis has

addressed these four aims in two parts. In part one I developed the theoretical basis for children's rights over three papers. In part two I applied this theory to two case studies: whether children have a right to be loved, and whether children have a right to know the identity of their genetic parents. The former illustrates the limitations of rights for children while the later illustrates their power. Throughout the investigation into why children have rights this thesis has also highlighted some important aspects of the nature of rights in general.

In this concluding chapter I draw together the main conclusions from the previous five papers and identify areas for future research. The five conclusions from this thesis are;

1) children have rights;

2) there is an important relationship between capacity, competence and children's rights;

3) the nature of duties is relevant to children's rights;

4) children's rights are special claims; and

5) a strong theory of rights for children is important for translating rights into practice.

7.2 Children have rights

It should be clear by now that children do indeed have rights. They not only have rights in law they also have conceptually defendable rights in theory. Children have rights because they have interests that are of sufficient importance to be protected. These interests ground claims that produce duties in others to act or refrain from acting. Rights are therefore understood as Hohfeldian claims with correlative duties. In the introductory chapter I stipulated that when I speak of rights I mean normatively justified claims. Some of these claims can (and should) be translated into legal rights. However some of these claims function better outside a legal framework.

The five papers of the thesis directly address Brennan's two-fold challenge of first demonstrating that it is conceptually possible for children to hold rights and second, providing evidence that children do hold particular rights. The first paper applied the Hohfeldian framework of rights to the two leading theories of rights, will theory and interest theory. The analysis demonstrated that children can hold rights under the interest theory of rights because children can hold claims. The simplest definition of interests employs a thin evaluative stance to distinguish between benefit and detriment. Interests therefore must be those things that are at the very least presumptively beneficial to the claim holder. It is clear that children have interests that are presumptively beneficial, such as an interest in adequate nutrition. If children can hold interests then it is conceptually possible for them to hold rights.

However, even if children hold interests, it may be that none of these interests are sufficiently important to justify the imposition of duties of others. Therefore the second part of the thesis applies the theory of children's rights to illustrate how children can hold particular rights. The final paper applies the theory of why children have rights to the question of whether children who are conceived using donated sperm and eggs have a right to know the identity of their genetic parents. The paper draws upon empirical evidence to argue that donor conceived children have a genuine interest in being free from any psycho-social harm that might arise from being prevented from knowing the identity of their donor. This is a real interest held by real children that justifies the restriction of the Hohfeldian liberties of others through the imposition of duties. The right to know the identity of one's genetic parents is an example of why children are not only conceptually capable of holding rights, but actually do hold them. In this sense the final paper of the thesis illustrates what children's rights *can be.*

The work of showing that children hold particular rights is not only done in the final paper; examples appear throughout all five papers. The first paper argues that children have a right to life that produces duties in others not to kill them and that children have a right to nutrition that produces duties in others to provide adequate nutrition. The fourth paper argues that children have a right to adequate socialisation as they have an interest in the benefits of social interaction and being free of the harms of social

deprivation. This produces a duty in others to provide them with adequate interaction and stimulation. The third paper argues that children have a right to develop core competencies and this produces a duty in others to assist in the development of these competencies. Therefore all five papers of the thesis build upon and defend the conclusion that children have rights.

7.3 Capacity and Competence

A child's competence is relevant to the determination of their rights. The second paper of this thesis argued that there is a useful distinction to be made between the concepts of 'capacity' and 'competence'. A capacity is a counterfactual ability. One has the capacity to *A* when one has all the relevant skills internal to that person to *A*. Competence, on the other hand, is one's *actual* ability to *A*. Competence is the capacity to *A* plus the relevant mental states (such as knowledge and intention) necessary for successfully doing *A*. The distinction provides a useful tool to engage in debates regarding the requisite threshold children may have to meet in order to hold rights. The precise use of language is relevant in philosophical debates but also in policy-making.

In the first paper I outlined the argument from incompetence whereby children are denied rights on the basis of their reduced capacities and competencies. For will theorists the argument from incompetence takes the form of denying children the status of right-holder as they lack the power to waive or enforce their claims. Having drawn the distinction between capacity and competence it becomes relevant to ask which is the correct threshold for will theory. I have argued that it is actual competence that is required in order to hold a power. This is a relatively high threshold for children (especially young children) to meet. Therefore many children lack this power as they are incompetent in rational decision-making, and therefore cannot hold rights.

Interest theory, however, demonstrates that it is conceptually possible for children to hold rights. The first paper of the thesis argued that it is not conceptually necessary for a

child to hold the power to enforce or waive their claim in order to hold a claim right. Children's rights can be enforced by others, such as their parents or the State, without the force of the claim being reduced. Therefore it is not necessary for a child to be competent in autonomous choice to be the type of being that may hold rights. Yet this does not show that children can hold *all of the* rights that we normally ascribe to adults. The type of rights that children can hold is constrained by their competence.

Although the argument from incompetence as it is employed by will theory can be overcome, a thorough analysis of interest theory demonstrates that capacity and competence still plays a part in constructing the rights of children. A child must be competent in realising the interest to which a particular claim pertains. This is necessary for the interest to be considered of sufficient importance to impose duties on others.

At this point, in order to avoid confusion, it is necessary to point out a small revision. In the first paper of the thesis, I argued that children must have the competence to realise the interest for the claim to constitute a right, in doing so I stated that,

> 'If I am temporarily incompetent and cannot walk down the street because I have broken my leg, I am still at liberty to do so, but my lack of competence means it is of insufficient importance to impose a duty on others, as I will not be able to realise the benefit to which the claim pertains.'

However, as becomes evident in the second paper, one does not simply drop in and out of competence if one is not exercising this competence. In this sense there is a distinction between a 'material existence' and a 'formal existence' of a right (Dowding & Van Hees, 2003, 288). My claim to walk down the street free from interference may still have formal existence in that it is still formally recognised in theory but it does not have material existence, as it cannot currently be exercised. Therefore temporary incompetence in exercising a right does not always preclude its existence. Future development of the theory presented here will need to incorporate a distinction between this temporary incompetence and the type of incompetence that not only

means a right does not exist in the material sense but also in the formal.[1]

Despite this distinction between temporary incompetence and incompetence proper, it is still true that the concept of competence restricts the type of rights that children can hold. They will not hold all the same rights that adults hold as they are in a period of developing their capacities and competencies. If the benefit of the right pertains to autonomous action that a child cannot yet do they cannot have an interest that protects this action. For children, the rights that we will restrict are ones usually pertaining to physical or cognitive incompetence. For example a newborn baby cannot have an interest in voting, but may have an interest in being treated well by the government. When acknowledging the distinction between capacity and competence it appears that it is again actual competence that is required in order for a child to realise the benefit to which the claim pertains. I argued this in the first paper of the thesis, however, as I will discuss below in the section on future research, it may be possible for rights to be awarded on the basis of a child's capacity even when their competence is unknown.

The analysis of competence in the second paper demonstrates that it is 'task specific'. Competence in one area does not entail competence in another. Similarly incompetence in one area does not necessarily entail incompetence in another. For example just as my competence in making a rational decision about what I would like to wear today does not necessarily entail competence in making complex medical decisions about a potential surgery, my incompetence at driving a large truck does not entail incompetence in driving a car. This makes sense in terms of the relationship between

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[1] Such a distinction may follow the framework laid out by Dowding and Van Hees in Dowding, K & Van Hees, M (2003) 'The Construction of Rights', *American Political Science Review,* 97(2): 281-293. Such a framework may be useful for addressing arguments such as the following; some may argue that the right to be free from pain still exists even if one cannot feel pain. The corresponding duty not to cause pain is easy to fulfill, as it is impossible to breach. Yet we may ask if these types of formal rights are worthy of the name? What does rights-talk gain from insisting that those incapable of feeling pain have a theoretical right to be free from pain? Further research can build on this to determine when rights materially exist.

competence and rights set out above. It is the specific competence to realise the particular interest that is of concern.

In the introductory chapter I argued that this theory of competence constraining rights is different from Brennan and Noggle's 'role dependent rights'. In their paper 'The Moral Status of Children', Brennan and Noggle seek to reconcile three common sense assumptions regarding children. These are the 'Equal Consideration Thesis' - that children are due equal moral consideration as adults; the 'Unequal Treatment Thesis' – that we can prevent children from doing things that it would be illegitimate to prevent adults from doing; and the 'Limited Parental Rights Thesis' – that parents can exercise limited but significant discretion when raising children (Brennan and Noggle, 1997, 3-4). In order to reconcile these, Brennan and Noggle (1997, 6) convincingly argue that 'granting equal moral consideration does not imply that each person has the same package of rights and duties'. As I have argued above, demonstrating that children can conceptually hold rights does not entail that they immediately hold all the same types of rights as adults; they may have a different 'package of rights and duties'. However, the reason that Brennan and Noggle give for this conclusion is importantly different from my own. Brennan and Noggle argue that the reason unequal treatment is consistent with equal consideration lies in the difference between *basic* rights and rights that are dependent on context.

> 'Some rights are constructed from basic moral rights plus other factors. They depend in part on facts about the persons who bear them, facts about the relationships of which they are a part, facts about previous commitments they have made, and facts about the societies in which they live' (Brennan and Noggle, 1997, 7).

Some of these contextual rights are dependent on the right-holders 'role' and if one does not play the role then one cannot hold the right. For example Brennan and Noggle argue that many of our political rights derive from our role as citizen or voter, as children are not mature enough to play these role they cannot hold the rights. Contrary to this position, I have argued that rights turn on interests, not roles.

First, many of these role dependent 'rights' that Brennan and Noggle identify are Hohfeldian powers not claims. For example a Judge has the *power* to sentence someone to prison, that is, to change someone else's Hohfeldian relations. It may be true that these powers are bestowed on them because of their professional roles; however they are not claim rights based on interests. Saying that children do not hold these powers is the same as saying that adults do not hold these powers - this does not tell us why children may hold different claim rights.

Furthermore for the examples that are indeed claim rights, such as the right to vote (that has strong correlative duties that others not impede our rights to vote and that perhaps the government has positive duties to enable us to vote) these claims are not properly explained by pointing to roles alone. We do not have the claim right to vote because we play the role of 'citizen' or 'voter', we have the claim right to vote because we have an interest in voting. Maybe part of the explanation of why we have these interests is related to our role in society, but it is not the ultimate justification. Brennan and Noggle's theory is initially appealing because I think it is ultimately reducible to interests. Understanding rights as claims justified by interests constrained by competence not only explains those rights that are attached to roles but also the rights of children and adults generally. It allows us to maintain that children have rights but not all of the same rights as adults. Children have particular rights because they have interests that are of sufficient importance to impose duties on others. Children do not have other rights because they do not have the relevant interests; for some of these interests the reason children do not have them is because they do not have the competence to realise the benefit to which the interest pertains.

Capacity and competence therefore have an important role in understanding rights for children. However the analysis of the relationship between capacity, competence and rights also sheds light on an aspect of rights in general. The requirement that the claim-holder be competent to realise the benefit of the claim is not only true for children, but also for adults. This aspect of rights theory, though, is often obscured when we only concentrate on the rights of adults, for adults are often in command of most of the core competencies. It is likely, however, that as adults we will lose and acquire new competencies throughout our lives that will influence our interests and, as a result, our

rights. Arguments about how rights are constructed for children may be just as relevant for the elderly (Lau, 2012) or other classes of people. Establishing a strong theory as to why children have rights can therefore shed light upon the rights of adults as well children as they develop and decline.

7.4 Duties

It is not just capacities and competencies that play a role in how a right is constructed. Rights are also constrained by whether the corresponding duty is reasonable and achievable. The first paper of the thesis demonstrates that a Hohfeldian claim always has a correlative duty. The duty correlated with a child's claims must be reasonable and achievable in order for the claim to be sufficiently important to impose restrictions on the Hohfeldian liberties of others. The duty-holder, therefore, must hold the capacity or competence to fulfill the correlative duty.

This constraint becomes clear when considering a child's right to an open future in the third paper of the thesis. Feinberg (1980) claims that children have a right to an open future. For a child to have a truly open future, their parents may be required not to 'close off' any potential future. However to properly protect such a right we would have to impose significant duties on the parents and the State. It would be almost impossible to truly guarantee that no potential future at all will be closed off to a child. Some futures are simply incompatible: for example, one cannot complete the training to be a world class ballerina without closing off other possible futures, such as becoming a weightlifter. Attempting to achieve as open a future as possible may result in parents taking what Mills (2003) calls a 'smorgasbord' approach by exposing children to many experiences and skills. These duties may be onerous on parents but they might also have dubious benefit. It is far more likely that what is important is the possibility of *a* meaningful future, the quality not the quantity. It is clear that the reasonableness of the correlative duties can constrain which interests are sufficient to ground rights.

A similar conclusion is reached when considering the question as to whether children have the right to be loved. In order for children to have a claim to parental love, there

needs to exist a reasonable and achievable correlative duty. However a child cannot have a right to be loved because 'love' is not a duty that can be controlled or reasonably imposed upon people. This, though, does not preclude us from stating that parental love is a desirable state of affairs for children; it is just not something that can appropriately take the form of a right. This example demonstrates the limitations of children's rights. There may be things that we think are desirable outcomes but that we cannot construct, and therefore protect, through rights. So whilst there is some truth to O'Neill's (1988) critique – that we only see part of the story by looking at rights – it is not fatal for children's rights. Rights still remain powerful and useful tools for protecting the needs and interests of children. I will set out the case for their power below. However, it is reasonable to see rights as only part of the way in which we understand a child's moral status.

Finally, the emphasis on duties allows us to see how rights are not isolated elements, but rather sit within a matrix of relationships. Rights based frameworks are often criticised as being atomistic, of being overly focused on the individual and ignoring the complex nature of groups, communities and relationships (Taylor, 1992). Feminist critiques of rights point to the importance of relationships, especially for children (Minow, 1986). Wenar's (2005) model of a molecular right demonstrates that rights must be seen as sitting within a web of Hohfeldian elements. The fourth paper of this thesis argued that parental love cannot be the object of a right but acknowledges that the combined effect of Hohfeldian elements can be used to create circumstances where relationships and love may thrive. The emphasis on a duty needing to be reasonable and achievable is not a drawback of thinking of rights in this way; instead, it should be seen as a strength. It recognises that rights are held by individuals but sit in relation to other Hohfeldian elements; they impose duties on others, and are restricted by the liberties of others. This tells us something not just about rights held by children but rights in general. Rights are social beings, they cannot exist in isolation, without other people to bear the duty, hold the claim and realise the interest.

7.5 Children's rights as special claims

In the introduction to this thesis and the first paper I argued that a strict definition of a 'child' is not necessary for a theory of children's rights. This is because what is important are the interests of the individual, constrained by their competencies. It does not matter whether an individual falls strictly into the category of 'child' or 'adult', but rather whether they hold interests that are of sufficient importance to justify the imposition of particular duties on others. One could conclude from this that we should do away with talking about 'children' altogether when it comes to rights. Analytical political theory is the project of examining concepts, terms and ideas and refining their use. By using the terms interests, capacities and competencies when we speak of rights, we equip ourselves with a more precise language and avoid the value laden term 'child'. These terms can be used not only to describe the rights of young human beings but also the middle aged and the elderly.

In addition there are certain disadvantages of focusing on the term 'children's rights', the term leads us to believe that there is a fixed and determinable group of rights that is clearly assigned to a fixed and determinable group of people. From the discussion and arguments presented in this thesis it is clear that this is not the case. It is almost impossible to determine a fixed definition of children that will reliably tell us who is and who is not a child and that is not open to challenge. Even if such a definition did exist, rights may vary drastically in both content and form between different children. The interests of a small baby will be different from the interests of a 15 year old and this is partly to do with the difference in their capacities and competencies. By focusing on the interests of an individual we cut through these concerns. So maybe the key conclusion of this thesis should be that children can hold rights but talking of 'children's rights' is unhelpful. We should just simply talk of the rights of particular individuals regardless of what stage of life they are at.

Whilst we could possibly do away with the term 'children' when talking about rights, it might not be desirable when we consider the way in which rights work in practice. Rights are at their most powerful when they are effective social and political tools to protect those things we think are most important. Doing away with the term children

altogether may not allow us to achieve this. Speaking simply of capacities, competencies, claims and interests may be more precise but it is unlikely that people will stop referring to young human beings as 'children'. If we want these rights to 'work' then they need to attach to concepts that people will use. Analytical political philosophy therefore cannot solely be about identifying stipulative definitions and concepts but also engaging with the use of 'ordinary language' ultimately in order to make something that works. As I argued in the introduction it can even be the case that some conceptions of children can be very effective in providing motivation to secure and protect their rights. So although a definition of children is not necessary in the conceptual construction of rights it may be useful in translating them into policy. Especially since I have argued that children are people with rapidly developing competencies.

Furthermore, I have argued that it is useful to define children as young human beings whose capacities and competencies are rapidly evolving, because this highlights an aspect of how rights for children may work differently to those for adults. The distinction between capacity and competence allows us to recognise something special about children, that while they may not have the same developed competencies as adults, unlike other incompetents they have the *capacity* to become competent. In addition children have the capacity to gain a capacity; these are 'latent capacities'. This becomes important when we begin to talk about the development of a child's capacities. It also allows us to refute claims made by traditional liberal political theorists that children are in the same moral category as others who are static in their incompetence.

The existence of these developing latent capacities, capacities proper and competencies ground special claims held by children. In the third paper of the thesis I outlined the future interest problem, which stated that interest theory works best with clearly identifiable present interests, however actions could be taken towards children now that could harm their *future* interests. In response I argued that children have a present right to develop their core capacities. Core capacities are those they would normally develop or those that are important to achieving normal human functioning. Therefore children hold claims to the development of particularly important capacities. This

produces duties in others to assist in their development. It is true that adults may also hold these types of developmental interests, however because children are defined by the rapid development of capacities and competencies it is likely that these types of interest will be a special feature of childhood. Therefore despite the fact that a strict definition of child is not necessary for a theory of children's rights, a broad understanding of children as young human beings who are in a process of developing and acquiring capacities and competencies is useful for constructing rights for children.

7.6 A strong theory

I began this thesis by arguing that it was not enough to point to the existence of children's rights in law, we must also show that rights for children are theoretically defensible. This is not just an exercise in theoretical consistency. A strong theory of rights for children is necessary to understand the nature of particular rights and the shape of the corresponding duties. It can strengthen and build upon existing legal jurisprudence and effectively assist to translate rights into reality.

The theory of why children have rights tells us what children's rights *are*. The main strength of interest theory is that it squarely focuses the attention on what the right is protecting. By identifying the relevant interest we can identify the correlative duties and the shape the right takes. The power of a clear theory of why children have rights becomes apparent when examining the child's right to know the identity of their donor. This right is often given as the justification for removing anonymous gamete donation. Investigating what interest grounds the right can tell us important things about how the corresponding duties should play out in reality. In the final paper of the thesis I examined the three major interests that are usually cited to justify a child's right to know the identity of their donor. These are: a child's interest in knowing their own medical and genetic history; a child's interest in knowing their genetic family in order to avoid concerns of consanguinity; and a child's interest in being free from the psychological and social harms that can arise from being prevented from knowing the identity of one's genetic parents. If the right really does exist to protect the first two

interests then this right can be fulfilled while simultaneously protecting the anonymity of the donor. For example we can provide detailed medical and genetic history information without specific identifying information or we can provide specific information about whether an individual was or was not related to someone else without providing the identity of their genetic parents. However to protect the third interest, the interest in being free from psychological harm, we must impose a corresponding duty to reveal the identity of the donor. In this sense the theory of why children have rights properly guides our actions by shaping our duties.

In this case, identifying the interest that the right protects also tells us something more. If children have a right to know the identity of their donor they must also hold a separate but related right to disclosure, to be told that they are donor conceived in the first place. I argued that the involvement of the State within the gamete donation process produces duties in the State to ensure this disclosure. This aspect of a child's right has also been recently recognised by the Victorian Assisted Reproductive Treatment Authority (VARTA), which now sees part of its role as to provide public engagement to encourage and ensure disclosure. VARTA runs several 'Time to Tell' campaigns and seminars each year.[2] A theory of rights for children therefore makes it clear what our *specific* duties to children are - it guides how rights should be translated into policy. Arguments about *why* children have rights are also powerful in pushing back on the momentum that previously established rights possess. A striking example is the foreword to the Victorian Law Reform Committee's report, 'Inquiry into Access by Donor-Conceived People to Information about Donors'. The Chair of the committee states that;

> 'When the Committee commenced this Inquiry, it was inclined toward the view that the wishes of some donors to remain anonymous should take precedence - as they made their donation on that basis – and that identifying information should only be released with a donor's consent.

[2] Victorian Assisted Reproductive Treatment Authority, http://www.varta.org.au

> Upon closer consideration, however, and after receiving evidence from a diverse range of stakeholders...the committee unanimously reached the conclusion that the state has a responsibility to provide all donor-conceived people with an opportunity to access information, including identifying information, about their donors' (Newton-Brown, 2012, xvii).

Existing rights, such as the right to privacy or the right for the terms of a contract to be honoured, have great force. This is because their justifications are often well known and well established. So it is understandable that the law reform committee came to this area with the assumption that this existing right would be more powerful than the simple assertion that children have a right to know the identity of their donor. However, having been presented with the first hand evidence of the harm that can arise when individuals are denied this information, the committee changed its mind. Identifying the interests of children is a powerful way to establish their rights in practice.

The donor conception case is also interesting as it shows us the power of rights theory to provide a way into new policy problems. The questions as to whether individuals conceived using donated sperm of eggs have these particular rights has only arisen due to the development and spread of new reproductive technologies. With the expansion of biotechnologies, theories of rights will play an important role in shaping our actions towards them. Rights therefore push back on simple assumptions by establishing justified claims and requirements for action.

Finally, we need to know what children's rights *are* in order to know what they *are not*. In the fourth paper of this thesis I argued that children do not have a right to be loved. However, knowing what children's rights are not also plays out in the contemporary policy discourse. In a recent submission to the Australian Senate Inquiry re 'Marriage Equality Amendment Bill 2010', the organisation 'Doctors for the Family' argued that:

> 'The evidence is clear that children who grow up in a family with a mother and father do better in all parameters than children without' (Doctors for the family, 2012).

Following the release of the submission, there was much talk in the media of a child's 'right' to be brought up by heterosexual parents in a stable relationship.[3] Therefore, the argument goes, the debate surrounding same sex marriage or donor conception for same sex couples is not one of prejudice or discrimination but a question of protecting the rights of children.[4] Understanding why children have rights equips us with the tools to unpack such arguments. Arguing that children have rights because they have interests that are of sufficient importance to impose duties on others forces us to point to the existence of the interest. In this case it needs to be made clear what interests of the child are supposedly furthered by having a mother and a father, and whether these interests are really sufficiently important to justify limiting the liberties of same sex couples to have children. The evidence presented in the final paper of this thesis seems to indicate that the opposite is true. Children born to same sex parents are well adjusted and suffer no detriment compared to those with heterosexual parents (Vanfraussen *et al*, 2001). Understanding why children have rights is therefore essential to counter attempts to use their rights as a proxy for other social policy debates.

7.7 Future directions for Research

The job of building a theoretical argument for why children have rights and how they work is in no way finished. Along with establishing that children have rights, this thesis has also identified areas of future research. In this final section of the concluding chapter I briefly address three potential areas of future research to indicate how

[3] 'The right of a child to at least begin life with a mother and a father is a fundamental right that should never be deliberately denied by a government which has a solemn duty to always act in the best interests of the child', Mark Brown, Australian Christian Lobby, http://au.christiantoday.com/article/tas-voters-urged-by-christian-lobby-group-to-support-child-rights-to-heterosexual-parents/10788.htm

[4] A good example of this argument was made by Joe Hockey MP on the ABC television program *Q&A*, 14th May 2012. See http://www.youtube.com/watch?v=TulbEJz23uY

thinking in this field of study can progress. These areas are: first, our understanding of children's rights may be deepened by applying Hohfeldian analysis to the Convention on the Rights of the Child; second, more work is needed in developing the idea that rights may be awarded on the basis of capacity rather than competence alone; and finally, further investigation is needed on the precise nature of duties correlating to the claims of children.

7.7.1 Hohfeld

Hohfeldian rights analysis has played an important role throughout this thesis. Hohfeldian analysis proved useful for unpacking what children's rights mean. It allowed us to determine exactly what aspects of a right may be problematic for children and how rights might work as a combination of Hohfeldian elements. Future research could apply a Hohfeldian rights analysis to the United Nations Convention on the Rights of the Child (CROC). The Convention is a comprehensive document that contains 54 articles – but how many of these articles are actually claim rights held by children? This may seem to be a strange thing to ask of a Convention designed to protect children's rights. However a Hohfeldian analysis may reveal that many of the articles are immunities, liberties or powers; not claims rights at all. Such an analysis may not constitute a damning critique of CROC. As I indicated above claims are set in a matrix of Hohfeldian elements. In my response to O'Neill I also indicated that our moral relationship to children may very well be defined by Hohfeldian elements other than claims. An internationally binding agreement can reasonably be expected to include articles that not only detail the rights themselves but the associated powers or even conditions and specifications of how the duties should be carried out. Hohfeldian analysis in this sense can lend clarity to understanding how CROC functions.

However what may also be interesting is to examine how many of the claim rights in the Convention are the claims held by children. One central critique of the children's rights discourse is that many of the proposed rights protect the rights of parents, not children (Dwyer, 1994; Eekelaar, 1986). A Hohfeldian analysis can unpack such an assertion to reveal how many articles bestow powers, claims, immunities or liberties on those other

than children. Rights for parents may be justified but it is also very important to be clear that often we are not talking about children's rights per se.

7.7.2 Capacity

Throughout this thesis I have argued that it is necessary for children to have the competence to realise the benefit to which an interest pertains. However there may be cases where holding a capacity is sufficient to convince us that the interest is important enough to impose duties on others. For example, consider a claim right to be free from torture. In the first paper of this thesis I argued that if a person could not feel pain then they may not have this claim. They may have a right to be free from torture based on other interests such as bodily integrity or freedom of movement; but the claim right could not be based on an interest to be free from pain, since the claim holder lacks this competence.

However, imagine that we do not exactly know whether a particular person will feel pain or not, or whether the pain one person feels will be the same as the pain of another. My doctoral supervisor, for example, has suggested that torture techniques such as solitary confinement would not affect him in the same way as it would psychologically affect others. Consider, then, that we have two individuals, my doctoral supervisor and a gregarious and social undergraduate student. For the potential torturer, the only way to know whether these two individuals will feel the psychological pain of solitary confinement is to subject them to it. This would be an unacceptable state of affairs for most of us, for we must run the risk of potentially violating a right in order to ascertain whether someone has a particular competence to possess the right in the first place. We do know, however, that both individuals have the *capacity* to feel pain and this capacity may be sufficient for us to justify a claim-right to be free from torture techniques such as solitary confinement. It may not matter in this situation that my doctoral supervisor ultimately will not feel the psychological pain; because the act of establishing capacity is enough to justify awarding rights on capacity rather than competence.

Considering that it is often difficult to make a clear competence assessment for children who are in a period of rapid development, it may be the case that there are some rights that we are happy to attribute to children even if we do not know if they are competent to realise the benefit to which the right pertains. The interest is important enough to justify the imposition of limits on the Hohfeldian liberties of others. Future research may consider how and when knowing one's capacity to realise the benefit of an interest may be sufficient to impose duties.

7.7.3 Duties

Along with further research on capacity and competence there are opportunities for future research on the nature of duties, especially on how the duties that correspond to particular rights are enforced. The first paper of the thesis argued that children's rights can be enforced by others, by their parents, guardians or by the State. This overcomes the problem of a child's lack of competence to exercise powers of enforcement or waiver. Yet for this to work effectively in practice it has to be clear exactly how others exercise these powers on behalf of children. For example, it may be appropriate for a third party to have the power to enforce a child's right, but can this third party also hold the power to waive the child's right? It may be that some claim rights held by children such as the right to education or adequate nutrition cannot be waived by a third party. This thesis has not sought to address whether there are constraints on the enforcement and waiver powers held by others, yet this would seem to be an important area for future research.

On closer examination it may transpire that the nature of duties can change depending on the changing capacity and competencies of the right holder. For example, there has been recent discussion on what a doctor's duty to provide patients with medical information actually entails (O'Neill, 2003). The nature of the duty – that is to what extent and what type of information a doctor may have to provide – may differ in reference to the patient's competence. If I go for a surgery such as a knee reconstruction, my doctor cannot reasonably be expected to provide me with information about the procedure to the same level as his own knowledge. Now consider

that between then and now I gain a medical degree, and have to go in for a different procedure. My right to be informed may now entail a very different type of duty. The surgeon may now have to provide me with much more detailed and specific medical information in order for me to give free and informed consent. Similarly the corresponding duty may change again if my mental capacities decline. In this vein Joseph Raz has identified the dynamic nature of rights (1984, 200). By dynamic, Raz means that the corresponding duties may change over time. Children's rights may be more dynamic rights than others, as their capacities and competencies are continually developing, the corresponding duties to their claims may be dynamic and changing.

Perhaps more controversially, examining the nature of duties and children's claims could lead us to ask if it is sometimes acceptable to infringe children's rights. Samantha Brennan has built upon the work of Judith Jarvis Thompson to suggest that there is a difference between infringing, violating and overriding a right (Brennan, 1995, 144). Infringements are any failure to accord a right, violations are morally unjustifiable infringements and overriding rights consist of permissible cases of infringement due to the consequences at stake. Therefore it is conceivable that caught up in the story about developing core competencies, is some sort of assessment that some of the rights that children hold can be justifiably overridden to bring about positive consequences. For example the international tennis player, Andre Agassi, has recounted the story of how his father trained him as a child. At the age of two Agassi was running around the tennis court with a racquet taped to his hand. His father trained him tirelessly and at levels that pushed the young Agassi's psychological limits.[5] Despite this gruelling upbringing, or more precisely only because of this gruelling upbringing, Agassi enjoyed a career as an international tennis star. We do not have to agree that this particular treatment was justified by Agassi's later success to see that there can be later benefits from having burdens imposed upon them as children.

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[5] See 'André Agassi Profile', http://edition.cnn.com/CNN/Programs/people/shows/agassi/profile.html and Agassi, A. (2009) *Open: An Autobiography*, New York: Random House.

Success as adults is often path dependent; we may not be where we are today unless our parents had acted as they did when we were children. Could it be that such extreme behaviour from parents is justified to bring about success? Are there rights that children hold against such treatment? Can they be justifiably overridden? I am not sure what these rights are or how such a system would function free from abuse, but these questions begin to get at the heart of how children's rights may function and offer an interesting and compelling case for future research.

7.8 Conclusion

Children have rights, if we understand rights as Hohfeldian claims with correlative duties. Specifically children have rights because they have interests that are sufficiently important to ground claims that produce duties in others to do or refrain from doing particular actions. A child may not need to be competent in the enforcement or waiver of their claim but they must be competent to realise the benefit to which the claim pertains. Furthermore the correlative duty must be reasonable and achievable to justify constraint of the Hohfeldian liberties of others. Children are in a special category of right holders due to their rapidly developing capacities and competencies. Their interest in developing particular core competencies can produce duties in others to assist in this development.

At the start of this chapter I argued that belief in children's rights is not enough. A statement about what rights a child has should not be just an empty slogan, but should instead be a full and comprehensive statement about the interests of that child and the kind of duties the protection of these interests imposes on others. The power of the theory of children's rights presented here is that it necessitates that rights be *justified* – they must be based on interests that children have the competence to realise, that are of sufficient important to impose duties on others, duties that are both reasonable and achievable. Rights cannot guarantee all desirable conditions for children but they are powerful tools that can be effectively used to enact change and protect interests of the

utmost importance. Understanding why children have rights presents pathways to translating rights from a 'slogan without definition' into practical social and political instruments for change.

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Appendix

A need is not a right

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A need is not a right

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> It may be true that the law cannot make a man love me, but it can keep him from lynching me, and I think that's pretty important.
>
> (Martin Luther King Jr)

In his response to my paper 'What's love got to do with it?', Liao (2012) presents further empirical studies to support his claim that love is a primary essential condition for a good life. He claims that my critique of his use of the earlier literature denies the validity of such indirect scientific research. This mischaracterizes my argument for I clearly state that my critique is not sufficient to show that there cannot be *any* right to be loved. Indeed, I stated that with sufficient empirical evidence 'the right may still stand' (Cowden 2011, p. 9). However, recognizing the validity of the scientific project does not obscure the problems.

One problem lies here – Liao's insistence that there is an important internal emotional aspect of love, separate from external actions and expressions of love. This internal expression is almost impossible to measure even using indirect techniques. While we may improve methods of measuring indirect indicators such as the presence and absence of a parental figure, it seems unlikely that we will be able to measure the effect such an internal emotion has on children.[1] The studies that Liao cites may be good indirect measures of the usual *expression* of love, but they still do not capture the internal aspect. It is Liao's insistence that this internal emotion be included in the 'love' that children have a right to that is particularly problematic.

Given the difficulties isolating the internal aspect of love, why should we include it in the right we claim children to have? It is clear from the empirical literature that children benefit from the presence, touch and attachment to a consistent parental figure (Liao 2006, 2012). Surely we can characterize these elements as rights and avoid the controversial claim of 'love'. The insistence of taking the claim that children have a right to be

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loved and trying to mould evidence to support it seems to be the wrong way around. Should we not examine what evidence we have regarding the conditions that lead children to have a good life and construct rights to protect those?

Yet I am reluctant even to say that a child has a right to some of these conditions. Take for example the observation of the benefits of touch to a child (Scafidi *et al.* 1990). How do we go about translating this into a right? Rights, as we understand them, have correlative duties. Would the duty in this sense be to a certain amount of touch? How can this been measured and reasonably be implemented? Hugs are good for children, massage beneficial for infants, but do we really want to translate this into a claim children have over their parents? This goes to the heart of my central argument: not everything beneficial can be governed by rights and duties.

Love is not a right

Even if there were adequate scientific evidence to show that 'love', including the internal emotion, was a primary essential condition for a good life, it would still not constitute a right. This is because 'loving' is not an action that can be a duty and 'love' as defined by Liao cannot be meaningfully enforced. Rights need to correspond to achievable and reasonable duties (MacCormick 1976/1982, Raz 1984). Love, as defined by Liao, includes not only the desirable treatment outlined in the empirical literature, but also the internal emotion of love. Children then have a claim not only to the treatment, but also to the *motivation* for the treatment. My original paper argues that this mischaracterizes the object of rights as it is not reasonable to impose duties on parents that they may not have the capacity to fulfil. Liao contends he is arguing simply that it is not true that we can *never* command the emotion of love. But he does not show this; all he demonstrates that we can make it easier to experience emotions, not that we can command them. The presence of the emotion is still beyond conscious control.

In my original paper I argued that the enforcement and protection of such a right would be undesirable. In response Liao states that children have a *moral* not a legal right to be loved. Yet moral rights still need to have identifiable duties that are reasonable to impose on others, otherwise they are only moral goals. Liao's appeal to a right to respect as a right that exists without enforcement simply begs the question. What does a right to respect mean? Respectful behaviour, when pulled apart, does indeed entail duties that are enforceable. Furthermore, if Liao truly does not want to argue that there is also a legal right, then why talk of the duties of the state or indeed begin his discussion with the observation that the right exists within law?

Nothing in my argument denies that children *should* be loved. But acknowledging that love is beneficial for children does not mean that being loved is a right. We can just as easily say that adults have better lives if they form loving sexual relationships, yet there are strong reasons why we do not claim this is a right that imposes duties on others to form such relationships. There are lots of things that make our lives better that are not rights. Something can be in one's interest yet *not* constitute a claim important enough to be a right.

These 'shoulds' may constitute moral desiderata that we want in society that are inappropriate to achieve through rights for the reasons outline above. However we may wish the state to use other means to achieve them, such as social and public policy mechanisms. For example, it may be desirable and beneficial that children learn more than one language or that they have exposure to many cultures. It is unreasonable to impose a duty on parents to fulfil this; indeed most would be unable to do so (Mills 2003). Yet the state may take measures through funding school language programmes or providing incentives for cultural exchange. In short, establishing a case that children need to be loved does not establish that they have a right to be loved.

Note

1. Though of course we may be able to do so in the distant future, the isolation of 'feelings' and the testing of the effect of these emotions on other is not completely out of the realm of imagination. However, it is not currently possible.

Notes on contributor

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