

Abstract:

That we treat children differently from adults is clear. The attitude of increased paternalistic standards can be seen in a number of cases – be it the rights which children have in terms of medical treatment, decisions about their lives which are left up to parents or guardians, or the prohibition of certain activities before a certain age. However, we can only treat ‘children as children’ if we can prove that this stands in great enough distinction from the adult. Either it can be shown that children are significantly unique (and certainly so in relation to adults) such that different treatment on this basis is justified, or, if it cannot be shown that children are different to adults or we cannot say who is and who is not a child, then the second conclusion must be that we cannot justify children as deserving of paternalistic treatment, and must either reject paternalistic intervention altogether, or else look for a new criteria upon which to base the application of these increased paternalistic standards. In the course of this paper, the nature of childhood will be examined, as will its value in matters of ascribing rights and responsibility in matters concerning young people. Instead of age and childhood being used as indicators of capacity and responsibility, it will be argued that a mark of the agency of an individual should be taken and that this should hold, regardless of the age of the individual in question. Furthermore, it will be suggested that this agency is task specific. Such a view leads to offering (tentatively) greater rights to children who are developed agents. However, it is clear that the notion of developed agency does not only have connotations for the rights of children – there must also be corresponding responsibilities that come with being a developed agent.

Keywords: autonomy; agency; rights; responsibility

Crianças e uma agência desenvolvida

Resumo:

Que tratamos as crianças de forma diferente dos adultos é claro. A atitude de padrões cada vez mais paternalistas pode ser vista em vários casos – seja nos direitos que as crianças têm em termos de tratamento médico, nas decisões sobre suas vidas que são deixadas aos pais ou responsáveis, ou na proibição de certas atividades antes de uma determinada idade. No entanto, só podemos tratar as ‘crianças como crianças’ se podemos provar que isso é suficientemente distinto do adulto. Ou poder-se-ia mostrar que as crianças são significativamente únicas (e, certamente, isso em relação aos adultos) de tal forma que um tratamento diferente com base nisso esteja justificado ou, se não puder ser demonstrado que as crianças são diferentes dos adultos ou não podemos dizer quem é e quem não é uma criança, então a segunda conclusão deve ser que não podemos justificar as crianças como merecedoras de tratamento paternalista, e devemos rejeitar a intervenção paternalista por completo, ou então procurar um novo critério sobre o qual basear a aplicação destes padrões paternalistas. No decorrer deste trabalho, a natureza da infância será examinada, e também seu valor em matéria de atribuir direitos e responsabilidade em questões relativas aos jovens. Em vez da idade e a infância serem utilizadas como indicadores de capacidade e responsabilidade, vamos argumentar que uma marca da agência de um indivíduo deveria ser tomada e que esta deveria ser sustentada, independentemente da idade do indivíduo em questão. Mais ainda, será sugerido que esta agência é uma tarefa específica. Tal visão leva a oferecer (como tentativa) maiores direitos para as crianças que são agentes desenvolvidos. No entanto, é claro que a noção de agência desenvolvida não só tem

conotações para os direitos das crianças mas também deve haver responsabilidades correspondentes que vêm com o fato de ser um agente desenvolvido.

Palavras-chave: Autonomia, agência, direitos, responsabilidade

Los niños y una agencia desarrollada

Resumen:

Que tratamos a los niños de manera diferente de los adultos está claro. La actitud de un aumento de las normas paternalistas se puede ver en una serie de casos - ya sean los derechos que los niños tienen en términos de asistencia médica, las decisiones acerca de sus vidas que se dejan a los padres o tutores, o la prohibición de determinadas actividades antes de una determinada edad. Sin embargo, sólo podemos tratar a los 'niños como niños' si podemos probar que esto tiene una diferencia significativa del adulto. Ya sea que se pueda demostrar que los niños son significativamente únicos (y, ciertamente, que lo son en relación con los adultos) de tal manera que sobre esa base se justifica un tratamiento diferente o, si no se puede probar que los niños son diferentes de los adultos o si no se puede decir quién es y quién no es un niño, entonces la segunda conclusión debe ser que no podemos justificar que los niños reciban un trato paternalista, y debemos, o bien rechazar la intervención paternalista del todo, o bien buscar un nuevo criterio sobre el que basar la aplicación de estas normas paternalistas agregadas. En el curso de este trabajo se examinará la naturaleza de la infancia, y también su valor en materia de adscribir derechos y responsabilidad en asuntos relacionados con los jóvenes. En lugar de la edad y la infancia ser utilizadas como indicadores de capacidad y responsabilidad, se argumentará que una marca de la agencia de un individuo debe ser tomada y que esta debería ser sostenida, independientemente de la edad del individuo en cuestión. Más aún, se sugerirá que esta agencia es específico en tareas. Este punto de vista conduce a ofrecer (tentativamente) más derechos a los niños que son agentes desarrollados. Sin embargo, está claro que la noción de agencia desarrollada no sólo tiene connotaciones para los derechos de los niños sino que también debe haber correspondientes responsabilidades que conlleva ser un agente desarrollado.

Palabras clave : Autonomía, Agencia , Derechos, Responsabilidad



CHILDREN AND DEVELOPED AGENCY.

That we treat children differently from adults is clear. The attitude of increased paternalistic standards towards children can be seen in a number of cases – be it the rights which children have in terms of medical treatment, decisions about their lives which are left up to parents or guardians, or the prohibition of certain activities before a certain age. However, such a view seems incompatible with also wanting to ascribe blame to children in some instances. If childhood is a state that carries responsibility on one hand, and the exemption from it on the other, how do we sort out when we follow one rule, rather than the other?

It is often thought that no special justification is required to act paternalistically towards children in the same way that is true for adults. When justification is required, often appeals are made to consequences. That is to say, justification is often given by arguing that a child's interests will be better served by allowing older, more experienced and capable people to take charge of their affairs. I am not denying that some individuals *are* the proper subjects of paternalism, but maintain that age is not a reasonable test for this. Subsequently, I hold that children are *not* the proper subjects of paternalistic intervention simply because they are children. This is because the adult/child distinction is fundamentally flawed, and should be replaced by a distinction between *developed* and *undeveloped agents* (Schapiro, 1999; 718).

What is a 'Child'?

The UN convention on the rights of the child defines a child as “every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier” (UN Convention on the Rights of the Child, 1989; Article 1). Because this is the stance that is taken in England as the age of general majority, it is this age that should be taken as the age constitutive of the end of childhood during the discussion of children below.

Of course there are also common sense intuitions about what a child is, and indeed how they should be treated because of this, and these common sense intuitions probably fall broadly in line with the suggestion of the UN Convention. It may be said that using such common-sense notions is helpful, since if it is generally agreed that childhood is a state that continues until the age of 18 then it is so. This argument is even more forceful if such a principle is enshrined in law. But this does not necessarily mean that such an argument is *normatively* sound, even if it makes perfect common-sense to say 'a child is anyone under the age of 18 because the law says so and we all agree'. The problem is that simply stating that all children are "human beings under the age of 18" doesn't tell us any more than precisely that. And it certainly doesn't give us any basis for treating them any differently from adults. A further problem is that all too often it *is* taken to mean something more than this, and we treat children very differently because we think that the threshold of age separating childhood from adulthood marks something more than just a difference in ages. Using age as a marker of the ability to make decisions is flawed not least because what these ages actually correspond to differs greatly between cultures and individuals. "Where the line between childhood and adulthood falls in each instance cannot be determined by a general rule; it changes often, in respect to age, from country to country, from one civilization to another, and also from individual to individual" (Arendt, 1993; 195). If this is so, then what does this line correspond to such that different treatment is justified?

While it may be argued that age in and of itself is no grounds for treating children differently, it may be said that the ages used correspond to some shared experience or status of childhood which *does* require markedly different treatment. Following from this then, in order to justify the increased paternalistic standards that are applied to children, it must be shown that childhood is sufficiently different from adulthood; and that this difference matters. As I see it then, childhood must be established as empirically different from adulthood and it must be established that this difference informs and justifies increased paternalistic treatment. Furthermore, it must also be the case that there is some shared ground between all childhoods so that this principle justifies treating all children the same.



“Unequal Childhoods” (Lareau, 2003)

But it is not clear that all childhoods (and hence all children) *are* sufficiently the same. Childhoods can be affected by any number of differences in the situation of any young person which are not linked to their age and potentially defeat the notion of childhood as a shared experience altogether. One such difference appears to be the social class of a young person’s parents (Lareau, 2003). As Lareau’s study of a number of families of different socio-economic status points out, there are profound differences in what a childhood may involve, and subsequently the skills and traits it will inspire in the individual who has that particular childhood.

One may argue that differences in the lives and experiences that young people experience doesn’t provide a firm basis for rejecting the term. However, the things that Lareau points to in her research findings are exactly the kind of things that will feasibly have significant differences on the capacities and skills of young people, and as such *do* refute the existence of childhood as a phase with any universal aspect.

According to Lareau, young people from a working-class background have “more autonomy from adults” (Lareau, 2003; 36) compared to their middle-class counterparts, who in turn can be expected to experience far more preparation for “performance-based assessment at school” and in later life (Lareau, 2003; 61). But the differences do not end here. Lareau also finds that children from middle-class families are also far more likely to develop skills which are of particular importance with fitting in with expectations of “[occupational] and other social institutions” (Lareau, 2003; 63). Related to this is the question of organised activities and the effect that this may have upon the development of young people from different socio-economic backgrounds. Because of the sheer cost of enrolling children in organised activities (be it ‘subs’ for a football club, sports equipment, petrol money to take a child to dance lessons, acting classes et c.) it is not surprising that a great

many more children from well-off backgrounds take part in such activities than do their poorer counterparts.

What may be less clear is the impact that this can have. A child who has an abundance of scheduled activities will be more comfortable integrating into formal institutions and regulated activity of all kinds, but will naturally have less time to play on their own terms. This is not true for the child whose parents cannot afford to support such organised activities, and who because of this will have greater skills of self-regulation because they spend less time receiving instruction through adult-led activities (Lareau, 2003).

Of more direct interest to our current question is Lareau's suggestion that middle-class children feel a greater "right to be involved" in the adult world (Lareau, 2003; 60). This instinct towards belonging to an adult and not a 'childlike' world clearly has a huge impact upon what kind of people such an upbringing will create, and how quickly such children are likely to 'grow up'. On the other hand, working-class and poor children are more likely, according to Lareau, to interact more freely with children of different ages, suggesting that they are more comfortable with spending time of children of all ages, rather than just those of their year or class group (Lareau, 2003; 75). Also relevant is a child's use of language and their education. Here it may be that often the middle-class child has a distinct advantage over working-class or poor children.

I use Lareau's study to show that talk of 'childhoods' groups individuals of too great a difference into the same category. Even when we talk in terms of rather gross generalisations about class, gender and race, the ways in which a child's life and development may differ are massive. What Lareau shows is that childhoods are markedly different for different people, and that these differences *matter*. I am not using Lareau's study to show that this class or that class should be given preference in one matter or another, or to suggest that a middle-class child has a greater grasp of the adult world, and I strongly resist any claim that this may be the case. I am simply using it as an example of the multiplicities of experience that can be seen in



a category of people. It is the case that using childhood as a way to categorise individuals fails to capture this, since it groups them together by age, and indeed nothing else.

Another concern that may be voiced over existing notions of adulthood and childhood is that it involves a giant leap from the one state of affairs to the other. Because adulthood is (in the UK at least) attained at the age of 18, it seems that this happens all at once, so to speak. As such the 18 year-old has a very different status to the 17 year old days away from their 18th birthday. This seems odd, as the small difference between the two individuals in question confers a large difference in their statuses and what they are permitted to do.

Liberationism

Liberationists hold that freedom from paternalistic intervention should be granted on capacity, but argue that children are not to be denied this on the basis that they do not possess the same capacity as adults (Cohen, 1980). The liberationist stance can be cashed out in two main ways. The first of these is to whom the principle is to be extended. A liberationist may claim that *all* children should be allowed to act according to their own will, or they may claim that only *some* are. Claiming that only some children can do this is more plausible since it is obvious that infants and very young children do not have the capacity to exercise choices of any kind. Even those who claim that *all* children can have rights, nevertheless acknowledge this point (Farson, 1974: 31). If the liberationist stance acknowledges that only some children should have rights (or at the very least that infants and very young children cannot) then the position can be summed up by saying that the liberationist believes that drawing a line separating those who can have the right to be free of paternalistic action from those who cannot is not inherently wrong, but that the line itself has been made in the wrong place.

Yet there are those who claim that the drawing of *all* such lines is wrong, and is based on the thought that any such lines “can be shown to be arbitrary” (Cohen,

1980; 48). Arbitrariness can be taken in two separate ways here. One can argue that the idea of drawing *any* lines is arbitrary or, as above, that the drawing of a *particular* line is arbitrary.

Could the drawing of *any* line whatsoever be arbitrary? Let us consider a hypothetical example. Imagine that we are taking a group of 10 children to a theme park, and there is one particular ride that they all wish to go on. However, the ride carries with it a safety restriction, only admitting individuals of 5 feet and over onto the ride. The heights of the 10 children we are accompanying are: 5'1", 5'0", 4'11", 4'10" and one child at each descending height at one inch intervals, down to the shortest child. According to the rules of the theme park, only 2 of the 10 children will be allowed upon the ride. It may seem rather pedantic to refuse admission to the child a mere 1 inch below the required height to be allowed upon the ride.

As such, we may question the wisdom of drawing such a line, since refusing entry to the ride of the child who is only an inch shorter than a child who is allowed to go upon the ride, seems to mark a difference too insignificant for the large difference in the way in which they are treated and the things which they are permitted to enjoy. The second objection that we may have to the 5 foot policy of the theme park may be that we question *why 5 feet is significant, as opposed to any other height*. We could claim that the drawing of 5'0" as a line between those who can and cannot enjoy the ride is arbitrary since it discriminates against the child who is a mere 1 inch too short for the ride, even though there is little difference in height that marks a significant difference in treatment (that the line does not mark a *significant enough* difference between can and can't).

The response is simple. If the criticism of creating thresholds delineating between can and cannot comes from the notion that the basis for that threshold has somewhat been 'plucked out of the air', then one could respond by stating that it may be that 5'0" is a height that has been well thought out, and does carry some significance. It may be that the safety mechanisms of the ride are only 100% effective on people of a height of at least 5'0" and above. Denying the 4'11" child



access onto the ride seems less arbitrary if it can be shown that *this* height, rather than any other, marks a significant break in circumstances, and is thus a reasonable boundary, regardless of how small that difference may be.

But the same is not true for age. If we agree that freedom from paternalism be granted mapping the capacity to choose, then it makes no sense to infer that two children will have the same capacity for choice, purely on the basis that they share the same age. As such the drawing of lines between those who can and cannot have access to something is not what is flawed, but it is the doing so on the grounds of age which is.

Another liberationist argument suggests that allowing children to make important decisions forms an important part of them acquiring the capacity that they need to be able to make prudent choices in the future. Those sceptical of giving children this right often suggest that one part of a child's inability to hold rights stems from their lack of experience. This says the liberationist, becomes nothing more than a self-fulfilling prophecy – if children should not be allowed to make decisions because they lack the experience to so, then how can they become more experienced if the opportunity to practise decision-making is denied them? Liberationists then claim that denying the responsibility of children is the main obstacle that prevents them attaining the capacity for such responsibility in the future.

Liberationists may also seek to redefine capacity, choosing to defend a thinner definition of capacity than the sceptic offers. In terms of enacting choice it can be said that children *are* capable of choosing. After all, even very young children can display preference for one thing over another. Another way that the Liberationist may seek to justify their claim that children should share the same status as adults is by denying that anyone, *including* adults, possesses the requisite capacity to 'pay the tariff' of being thought of as independent, fully-developed agents. The liberationist will suggest that even adults do not fully grasp the content of their decisions, yet they are still 'qualified' to exercise such choices. The

argument persists, whichever definition of capacity one favours (the thick or the thin definition) and is this; the alleged difference between adults and children which justifies adults being free from paternalism and children as not is simply not there. Under the thin definition of capacity, the child satisfies as much of the prerequisites as does the adult, and under the thick definition, neither does. To assert the latter is to assert that if we take capacity to represent the prerequisite of granting the right to choose which has as its basis the “evaluation of the content of any choice or decision” (Archard, 2007) that choice *must* in turn, display sufficient evidence of the capacity to choose. The problem with ascribing a different status to children than adults on such a basis (which Archard points out) is that adults are frequently given the opportunity to make imprudent choices without the suggestion that they be restricted from exercising their right to choose because they do not understand the full content of their decisions, or are making unwise choices.

‘(Un)-developed Agency’

If we acknowledge that granting freedom from paternalism turns on capacity and the capacity to fully appreciate one’s choices, but that age is not a satisfactory indicator of such capacity, then we must provide an answer how to get around or replace the current system of using ages as (generally) indicative of the capacity to exercise choices. If we maintain that age is not a reasonable test of capacity, we can assert that children should not be thought of as distinct from adults normatively speaking and that they are no more the proper subjects of paternalism any more than some adults are. Rather than appealing to liberationist arguments about arbitrariness or claiming that no one can pay the tariff of a thick conception of capacity, the problem may be best solved by cashing out a concrete notion of developed and undeveloped agency.

The term ‘developed agent’ I borrow from Schapiro (1999), but my own account of developed agency differs from her own in some fundamental ways. Firstly, Schapiro uses developed agency to constitute agency in a more general sense. That is to say that a developed agent will act according to the “law of her



will" (729). Therefore a developed agent is one who has such a set of internal laws by which to regulate their conduct, where an undeveloped agent does not.

By 'undeveloped agent' I mean those who cannot be said to have fully formed the skills they need to make a *particular* decision, rather than all decision-making *per se*. Whether or not someone is to be viewed as a developed or undeveloped agent is not based on an assumption of incapacity due to age, but maps an individual's capacity to make a decision or be held responsible for an act. Where my own account of developed agency differs most from Schapiro's is that for me an appraisal of one's agency can be task specific. So rather than saying I have a set of laws in general by which I regulate decision-making, I have them in place in regard to this or that decision. I think it makes sense for me to say that in terms of some issues, I simply do not have enough knowledge, interest, or experience in order to make a decision about them. There is an element of the law of my will involved, but only in terms of what this or that particular decision means for me, and what the impact of it will be. Therefore it seems reasonable to suggest that although I may be permitted to make a decision about one thing, I may not about something else. Note that this does not mean that we are justified in prohibiting a decision simply because we do not approve of it. For Schapiro this comes from the fact that she develops her theory in line with a Kantian ethic – under which we are bound to respect the decisions of others as ends in themselves. For me this comes from a commitment to respecting the decision of a developed agent in this case.

Using developed agency in this sense would not only answer the criticisms of using age as the benchmark for the attainment of certain rights, but would also avoid having to class certain individuals as *generally* developed or undeveloped agents. As such, it is feasible that someone be permitted to make a particular decision (and yet be denied the opportunity to make another) if it can be demonstrated that they have developed agency in that particular instance, regardless of their age.

Those who wish to deny that children should be granted freedom from paternalism claim that it is obvious that children lack certain cognitive abilities (in general) in relation to adults, be it developmentally in terms of their lack of understanding, or experientially simply because they have not been around as long as adults and so cannot draw on experience in the way which adults can. On the face of it this seems a damaging argument – after all, one will get more experience simply by being around for longer. There are two responses to this argument. One is that the importance of experience has been overstated. After all, we grant privileges on the basis of passing a test in many instances, but we do not necessarily demand a level of experience to go along with it: simply an agreed level of proficiency in the activity to which the test applies. Archard (2003) uses the example of a driving license: we do not require that a certain number of lessons are taken, nor are we required to rack-up a set amount of hours in driving experience before we take the wheel. Another argument may be that although a set amount of experience may not be a pre-requisite to proficiency in a certain area, at least *some* direct experience is. As such, it makes sense to foreclose certain decisions from children, because they do not have enough direct ‘life-experience’. Again though, this claim is mistaken. There are a great many ‘experts’ who have no direct experience at all of that which they are experts. We would not strip a history professor of their title simply because they have not been to this or that historical period, nor would we claim that someone who has slavishly learned a language to proficiency is less capable than we to converse with native speakers on the grounds that we have been to the country of the language’s origin many times. In the same way, it makes no sense to say that experience ‘of life’ is so important to the child – surely it is understanding and not experience that is important? Furthermore, it is not clear to me that all children are destined to fail such a test, any more than all adults would pass it.

Even if we admit that experience is an important part of making good decisions, since my own formulation of developed agency is task specific, age still may be no barrier to the kind of experience that is required in order to make well thought out decisions. For example, I would argue that a child who has a long



history of suffering from a particular condition would be far greater placed to make a decision about the treatment of that condition than I would were I diagnosed with it tomorrow. What strikes me as odd is that I would be allowed to make a choice, or even refuse treatment altogether, regardless of the fact that I may have no experience and very little knowledge of what faces me, simply because I am 29, and not say, half that age. In many cases there seems to be a hierarchy of experience at play here. Often 'life experience' is more highly prized than any other kind of experience. Why should it be that my experience of life counts for more than a child's experience of the condition upon which the decision is to be made, particularly if it is *direct* experience that is being claimed as important?

Schapiro establishes her notion of developed agency in relation to children, and although Schapiro shows that there are some cases in which paternalistic intervention is justified and responsibility for actions diminished, it does not necessarily follow that children are those for whom this rule applies. This is because the criteria by which she defines the child could just as easily (and I think, more fittingly) be used to define the undeveloped agent. Schapiro argues that "Our basic concept of a child is that of a person who in some fundamental way is not yet developed, but who is in the process of developing" (p.716). But this is not necessarily the case with all children, nor should it be presumed it is. Since the lack of development of an individual is the only consideration which would lead us to conclude that they are undeveloped, we could *only* fail a test of agency on the grounds of our agency (which seems fair) rather than on the grounds of our age (which does not). This would mean that some adults would be considered undeveloped agents at the same time as it would class some children as developed agents.

Testing for Developed Agency

So far I have talked about the notion of Developed Agency, but have said little as to how a test would be made. What is vital is that we be able to measure the capacity for decision-making in individuals, rather than the decisions themselves.

In order for a decision to be considered 'developed', it should include: *evidence of choice* (quite simply, the display of a preference of one outcome over another), *rational reasons* (that the choice is arrived at in a logical manner, based upon reasons which correspond to the decision at hand), and *understanding* (that the choice made is done so appreciating the risks and benefits of doing so).

Evidence of choice is probably the most straightforward (and easiest for an agent to fulfil). Those who cannot display any preference of choice over a matter cannot be said to display developed agency regarding that decision. We are either uninterested, or else our failure to decide also fails to demonstrate *any* kind of independence, qualifying us as an undeveloped agent in such an instance. The display of preference must truly be our own, and we must not be cajoled or coerced into making a decision: we must arrive at a decision based on our own reasons and logic, and not someone else's. We may take advice on board, but taking it (or not) is something that we *ourselves* must freely decide upon. Rational reasons for a decision are logical reasons connected to the decision at hand. Therefore, if we are making a decision on whether or not to join a university this should be based on the courses, campus, sports teams, et c., and not because we picked it out of a hat.

Understanding may be the hardest criteria to fulfil, and turns on the notion of really *appreciating* the benefits, risks and *implications* of any decision that we make. Such a thought has been echoed by Lord Scarman, who stated that a child should be permitted to make their own decisions (in terms of medical treatment) when they reach "a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision" (Gillick [1986] AC 112, 186) and I see no reason why this notion should be confined to medical decisions. Understanding any decision involves appreciating possible outcomes of that decision and is based upon at least some knowledge of the area our decision is in and the outcomes it may produce. It also entails us being prepared to accept those outcomes.



Consider two examples in which the principle may feasibly be enacted: the ability to vote, and to join the armed forces. Currently, each decision is regulated by age restrictions – 18 and 16 respectively. If we are to be allowed to vote then we must be able to have a genuine preference over who we want to vote for (evidence of choice). This preference should be based on rational reasons (for example because we have read the manifesto, and not because we think this or that politician has nice hair, or that we will die if we do not vote for them). Finally we must fully appreciate that if we vote for this person/party, they may well win an election and that we would be subject to any policies that they implement (understanding). If it were the case that a 14 year old displayed all of the above, then I do not see why they should not be allowed to vote any more than I see that I should be refused the chance to vote at the age of 29 if I do not.

In the case of joining the armed forces, the same test could be used. For evidence of choice, I must have a preference for joining the army as opposed to not joining it. In terms of rational reasons, I must base my decision on the fact that I want to protect my country, or that I see it as worthwhile career, and not on the fact that I love the uniform or guns. In terms of understanding, I must fully appreciate that in joining the army, it is feasible that I may fight on the front lines, and that it is possible that I may die.

An important part of the test for developed agency is that the principle is only enacted upon the application of an agent to make a decision. Returning to the above examples of voting and joining the army, this would mean that in my own case it wouldn't matter to me either way if I were allowed to join the army, as I have no intention of ever doing so. By contrast, I *do* have an interest in voting, and so would have my capacity to do so appraised.

Admittedly, there are problems with the use of a test of developed agency. The most damning of these is its (lack of) practicality in many instances. Feasibly, a way in which the test could be conducted would resemble current proceedings involved in the establishment of Gillick competence in medical proceedings, and

would involve a number of experts (not least an expert in the field upon which the decision is to be made) deciding whether the person in front of them fulfils the criteria for developed agency. Having a 'test' of this kind means that a decision will be reached following often lengthy discussion about the individual in question and their circumstances. While it is true that this avoids crudely assigning status based on some kind of 'agency score', it does mean that deliberations regarding an individual's agency could take an appreciable amount of time. While this may be ok for some decisions such as voting, there are others in which time is a luxury that simply cannot be afforded, such as with some forms of medical treatment. Often it is the case that treatment must be administered quickly, and so investigating if an individual refusing such treatment is a developed agent whose choice must be respected, or an undeveloped agent who is in need of protection from their choice, is simply not something that it is reasonable to do.

Developed Agency in the Courtroom

It has been argued that instead of age and childhood being used as indicators of capacity and responsibility, a mark of the agency of an individual should be taken and that this should hold regardless of their age. Furthermore, I have suggested that this agency should be task specific so that this does not exclude the undeveloped agent from all spheres, and merely that in which their undeveloped agency has been established. However, it has also been shown that the practical burden of such a test is almost insuperable in most instances, be it due to the sheer weight of administration in ascertaining *everyone's* developed agency in a number of spheres, or because of the protracted timescale that fairly testing an individual's capacity for developed agency would take.

The principle of developed agency may still be of practical use to us though, and may be able to solve many of the problems faced by youth justice procedures. The principle as devised above clearly has an impact on how children are properly viewed, and this has the effect of changing how they should be viewed in matters of justice and responsibility:



“Giving children legal rights or according them a certain status at law will make a huge difference to how we then think about them. If the law represents children in a certain light – as entitled, for instance, to make claims against adults – then it is correspondingly harder to continue seeing them as helpless dependents. At the same time children may make good use of the status they have been accorded legally to show that they do indeed merit that standing. Or they may simply employ the opportunities provided to acquire the requisite abilities” (Archard, 2007; 252).

Essentially, the principle of developed agency renders the question of ‘youth’ justice redundant. Rather than focusing upon justice for adults or for children, a system which used the notion of developed agency would dichotomise its response in terms of the developed or undeveloped agent. Youth justice proceeds on the assumption that individuals of a certain age have certain capacities, and this assumption has been shown to be false. Archard sees a central question in examining youth justice as “How...can we think of children both as vulnerable young persons whose needs must be met and as agents capable of exercising fundamental rights?” (Archard, 2007; 250) and to this I would give the answer that using a model of developed agency avoids having to ask such questions in the first place. Once again, the application of the principle is to be specific, so that someone may hold certain rights, yet still be judged to lack the requisite capacity to either stand trial, be held accountable for a certain act, or both. Furthermore, this specificity means that culpability may be determined for one crime and not another rather than for all crimes *per se*.

It is all well and good to suggest that developed agency should be used as a guiding principle in (youth) justice, but it is undoubtedly a complex notion, and furthermore one that must be ascertained in *all* cases. As such, it may be a concern that the application of this principle is simply too complex to be used practically in cases. However, a system every bit as complex as that I am proposing is already in existence – the system where appraisals of the mental health of defendants are made to ascertain if they are capable of being held accountable, and if they are able

to stand trial. The case of justice is different from those above in which a test is applied *before* an act (and the law works *de-facto*) but if establishing *actus reus* and *mens rea* after the event is something which can (and is) a part of criminal proceedings, then I don't see why an appraisal of developed agency could not proceed in the same manner.

In most cases we want to treat children as a homogeneous group, yet we seem unable to agree upon what the features of this group even are. On one hand we want to believe that children are vulnerable, undeveloped and somehow in need of protection. Yet as we have seen this discriminates unfairly to children in terms of foreclosure of the things they may want to do, and may well be capable of doing. Moreover, viewing children in this way often resists ascribing accountability to young people for their acts, seeking to blame others for their conduct, or lessening their punishment. Once again, this is done primarily on the assumption of capacity linked to age. If the principle of developed agency is applied instead, then it becomes possible to ascertain if the person before us (regardless of their age) is to be held accountable for their actions, and to what extent.

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Notes:

(1825). *Hall v. Hollaender*. 4 B&C. 660.

(1893). *Re McGrath*; 1 Ch. 143.

(1927). *Departmental Committee on Young Offenders*.

(1989). *UN Convention on the Rights of the Child*.

References:

Anderson, M. (1974). 'The Relevance of Family History'. *The Sociology of the Family: New Directions for Britain*. C. Harris. University of Keele.

Archard, D. W. (2003). *Children, Family and the State*, Ashgate.

Archard, D. W. (2007). Children's Rights and Juvenile Justice. *Youth Justice and Child Protection*. M. Hill, Lockyer A., and Stone, F. London, Jessica Kingsley Publishers: 250-266.

Arendt, H. (1993). 'The Crisis in Education'. *Between Past and Future*. New York, Penguin.

Cohen, H. (1980). *Equal Rights for Children*. NJ, Littlefield, Adams & Co.

Dingwall, R., Eekelaar, J. M., & Murray, T. (1984). 'Childhood as a Social Problem: A Survey of the History of Legal Regulation.' *Journal of Law and Society* 11(2): 207-232.

Eekelaar, J. (1986). 'The Emergence of Children's Rights'. *Oxford Journal of Legal Studies* 6(2): 161-182.

Farson, R. (1974). *Birthrights*. London, Collier Macmillan.

Kahn-Freund, O. (1977). 'Blackstone's Neglected Child: the Contract of Employment'. *LQR*.

Kant, I. (1996). *Doctrine of Right*. *The Cambridge Edition of the Works of Immanuel Kant*. P. Guyer, & Wood, A.W., Cambridge, Cambridge University Press.

Lareau, A. (2003). *Unequal Childhoods*. London, University of California.

Parton, N. (1985). *The Politics of Child Abuse*. Hampshire: Macmillan.

Pollock F., & Maitland, F. W. (1968). *The History of English Law*. Cambridge: Cambridge University Press.

Schapiro, T. (1999). "What Is a Child?" *Ethics* 109: 715-738.

Ten Broeck, J. (1964). "'California's Dual System of Family Law: Its Origin, Development and Present Status.'" *Stanford Law Review*: 257-317.