

A PHILOSOPHICAL REVIEW OF ENHANCED AGENCY RIGHTS FOR SCOTTISH CHILDREN WITH ADDITIONAL SUPPORT NEEDS (ASN)

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<http://bit.ly/CREID-seminar-autonomy-rights-sen-children>

PURPOSE OF PAPER

- To provide a brief overview of the children's rights tradition from a philosophical perspective
- To think about whether a rights based approach is the best way to provide the care and support that children need to flourish
- I conclude that the **capability approach**, what Nussbaum & Dixon have suggested is the capacity of people to realise their legal rights in practice and not just on paper, might be a helpful one through which to analyse the extent to which children with ASN in Scotland really do have enhanced agency rights in practice

THE EVOLUTION OF THE HUMAN RIGHTS TRADITION

- There is some consensus that a recognisably modern use of the term 'right' emerged in the middle ages of the 12-13th centuries (MacIntyre, 1984, Arneil 2002 & Griffin 2002).
- Kant was the first philosopher to say that there should be autonomously chosen rules that apply to all human beings designed to protect the dignity of all human beings. Kant, held that all persons have a moral duty to follow the categorical imperative. It is categorical because it should apply to all! He believed people must show respect and dignity toward others by always treating them as ends in themselves and never as means to their own ends (this is sometimes called Kant's humanity formula)
- 'The United Nations says little in its declarations, covenants, conventions, and protocols about the grounds of human rights; it says simply that human rights derive from 'the inherent dignity of the human person', but the most plausible interpretation of this use of 'dignity' is that it is still the

WHAT ARE HUMAN RIGHTS?

- Griffin (2002, p 4) argues that while the rights tradition has evolved and may continue to, rights are at base 'protections of our human standing'. The rights of human agents that need protection include:
 1. assessing and choosing one's own course through life (**autonomy**).
 2. at least minimum **education** and information to know what the possibilities are
 3. at least the minimum resources and **capabilities** to see choices through, to follow them
 4. Others must not stop one from pursuing, within limits, what one sees as a good life (**liberty**)



IF YOUNG CHILDREN ARE NOT AGENTS, WHAT RIGHTS DO THEY HAVE?

- Griffin (2002) suggests young children are not agents as they lack the capacity of autonomy. Brighouse (2002) draws the same conclusion (that young children lack the capacity for full agency) as they have yet to develop the stable desire and preference structures that are necessary to form an image of, and then live out an authentic and freely chosen life.
- Here Griffin and Brighouse do however both stress that older children can and do often have the capacity for autonomy. Children progressively develop the capacity for agency and autonomy as they mature – it comes in stages.

2 KINDS OF RIGHT

- 1. rights that require the possessor to do things and more specifically to choose and make decisions about their life (agency/autonomy rights – the right to vote, sexual choice, having a say over one's life)
- 2. rights that require others to do things (welfare rights – adequate health care/education, freedom from violence)
- *The argument about whether or not children should have agency rights hinges on whether or not they are deemed capable of exercising them*

CHILDREN'S RIGHTS

CHILD CARETAKERS

- 1. children should not be seen as self-determining agents
- 2. the “caretaker thesis” thinks self-determination too important to be left to children’ (Archard, p 52)
- 3. Paternalism towards children is merited as they have not yet developed the cognitive capacities to make intelligent choices and they are prone to wildness and emotional inconstancy
- 4. ‘The good caretaker must strive both to realise the child’s particular nature *and* to safeguard it’s open future’ (ibid, p 57)

Child liberationists

- 1. The ‘modern separation of the child’s and adult’s worlds is an unwarranted and oppressive discrimination’
- 2. This ‘segregation is accompanied and reinforced by a false ideology of childishness’
- 3. ‘Children are entitled to all the rights and privileges possessed by adults’
- 4. Child liberationists want to secure **agency** and **welfare** rights for children (Archard, p 46-7)

ARCHARD'S ON THE CHILDHOOD LIBERATIONISTS

- “”childishness”, connoting vulnerability frailty and helplessness, is not a natural quality of children but rather an ideological construct which helps to support the denial of their proper rights. The innocence and incompetence of children is not a biological fact...We want children to be helpless so we can help them; we need them to be dependent so we can exercise authority over them...The adult’s concern to assist the helpless child in its development is as patronisingly offensive as the “respect” a man might declare he had for the “weaker sex”” (Archard, 1993, p 49)
- ‘It is one thing to underestimate the capacities of children, another to reckon them equal to those of adults’ (ibid, p 50). Archard thinks this is the most obvious flaw in child liberationist thinking.

MacIntyre argues that to believe there are human rights that all human beings have in virtue of their being human is akin to believing in witches and unicorns (MacIntyre, 1984). He reasons that in the same way that every attempt to prove the existence of witches and unicorns has failed so too has every attempt to prove the existence of human rights based upon universal facts of the human condition. For MacIntyre 'there are in no way universal features of the human condition' (1984, p 67). Human rights are instead an unhelpful 'moral fiction' (1984). Unhelpful, because human practices underpinned by a rights based understanding of human personhood encourage human beings to be individualistic and manipulative in their interactions (1984).



THE GREAT SKEPTICS OF CHILDREN'S RIGHTS

- Barbara Arneill is like MacIntyre a skeptic of liberal, rights-based, political theory and philosophy.
- She maintains that from Locke in the seventeenth century onwards 'liberal theory has never looked at the political world from the perspective of the child as beings in his/her own right from the point of birth' (2002, p 7). Children are instead viewed as **becomings**, not beings. They are regarded as potential bearers of rights in the future but only when they have been educated to the point by which they can exercise rational autonomy. Until that point children are not entitled to be full rights bearers in the communities they are part of.

IS RIGHTS-BASED THINKING AND PRACTICE ADVERSARIAL?

- 'While rights have evolved and adapted over time they are still the products of their historical origins. In using them for new groups of people, including children, rights theorists cannot escape this legacy. As a result rights theorists do not see children as children. They are still not beings in their own right, but small adults who can be measured to the extent that they are autonomous' (Arneill, 2002, p 29)
- The 'state, and ultimately the court of law, gets involved in children's lives *after* the breakdown occurs, rather than being proactively involved in the care of children' (ibid, p 18-19)
- A pitfall of rights-based thinking, law and practice is that it can create conditions where adversarial rather than caring relationships grow between parents and children. Such relationships are not in the best interests of the child (Arneill, 2002)



ARNEILL'S ALTERNATIVE: AN ETHIC OF CARE

- Arneill maintains that dependence on others and a need for care are universal characteristics of childhood. Children do not most need rights designed to protect their autonomy but relationships of care that enable them to grow. In an ethic of care:
 1. Responsibilities to protect and care for children have primacy over rights
 2. The state and families should be understood as communities of people, not associations of individuals competing for rights
 3. As people are interconnected (child and adult alike) the state should do all it can to sustain the relationships of care that children need to grow
 4. The activity of caring for children must be taken seriously in private and public life. This requires a revised concept of autonomy. The autonomous liberal self is free to pursue projects so long as these don't harm others. The caring self by contrast recognizes the need to care for all community members whilst pursuing projects – they aspire to more than doing no harm.

RIGHTS ARE NECESSARY BUT NOT SUFFICIENT FOR GOOD CHILDREARING

- Archard however argues it is mistaken to think that family relationships can be based on rights or bonds of affection but not on both. When relationships break down 'recourse to rights may well be what is second best. But this is not by itself a reason not to have rights' (1993, p91)
- The 'possession of rights is not a cure-all. Any expansion of entitlements must form part of a more general empowerment. But, like it or not, rights are an important part of our moral and political discourse. How we see and value humans is crucially determined by what rights we accord them. Giving rights to children is thus a public and palpable acknowledgement of their status and worth' (Archard, 1993, p 168-169)
- **Childrearing should be egalitarian, democratic and (modestly) collectivist – we should presume that teenagers can rationally self determine in a way younger children cannot**



THE CAPABILITY APPROACH (CA) MIGHT PROVIDE A BETTER FRAMEWORK FOR THEORISING ABOUT THE AGENCY RIGHTS OF YOUNG CHILDREN

- ‘The idea of agency has a central role to play in the CA: the CA sees people as striving agents, and in contrast to approaches that aim only at the satisfaction of preferences, it aims at supporting the growth of agency and practical reason. This emphasis on agency, under a CA, further means that children should be afforded the maximum scope for decisional, freedom consistent with their actual—or potential—capacity for rational and reasoned forms of choice, or judgment...In many cases, it will also mean granting at least certain decisional rights to younger children. For young children...the right to make certain decisions provides an important opportunity to practice thinking, and making decisions, within certain protected bounds, so as to develop their future capacity for meaningful agency.’ (Dixon & Nussbaum,

CHILDREN, WOMEN & THE DISABLED MAY NEED SPECIAL RIGHTS PROTECTION AND SPECIAL OPPORTUNITY FOR CAPABILITY DEVELOPMENT

- The capability approach can better explain than theories in the social contract tradition of political philosophy why even young children ought to be rights bearers. The argument here is simply that all human beings including children and those with disabilities ought to 'be afforded full human dignity, regardless of their capacity for rational or reasoned participation in public or civic life' (Dixon &
- **'From the perspective of a CA...where education is likely to have real benefits for people with cognitive disabilities, and the state resources exist, it is a moral imperative to provide such education-regardless of the expense involved'** (Dixon & Nussbaum, 2012, p 586-87)

CHILDREN'S RIGHTS AND THE CAPABILITY APPROACH

- 'rights are not fully secured unless the related capabilities are actually present: otherwise rights are mere words on paper... all human capabilities have social and economic conditions that require affirmative government action (and government expenditure) for their realization' (Dixon & Nussbaum, 2012, p 561)
- The CA begins from the premise that human frailty and vulnerability are a fact of life and that the state has a moral duty to preserve the dignity of all
- Nussbaum calls this the *principle of each person as an end* (2011)
- Children (unlike most non-human animals) begin life dependent (physically, emotionally and cognitively) on others and requiring the care of others for more than 10 years – children are often also legally dependent and this may be one key reason why giving special priority to the rights of children is justified

CHILDREN'S VIEWS MIGHT BE HEARD BUT WILL THEY MAKE A DIFFERENCE?

- Archard and Skivenes (2009) identified 2 reasons why it is important to hear children's views and give weight to them relative to their capacity to form a view and what is in their best interests.
- The **pragmatic** reason is that the process can help in the gathering of relevant information. The **moral** reason is that children are entitled to have their view heard – to fail to do so would be an affront to their dignity as persons. However they stressed that children need information in a format comprehensible to them if they are going to be able to develop informed views.
- When interviewing social workers in England and Norway about the value of hearing a child and how best to do it, Archard & Skivenes found that while social workers wanted to and were often highly skilled at hearing the 'authentic' voice of the child, this view did not make a difference in situations when the views expressed by the child were in conflict with the views of the professionals. The views of the professionals trumped the views of the child when it came to making a decision about what to do in respect to the welfare and protection of the child.

POSSIBILITIES AND PITFALLS OF NEW LEGISLATION IN SCOTLAND

- Following Archard (1993) it can be concluded that granting rights to children aged 12-15 with ASN greater say over important decisions gives a clear signal to these children that they have moral status and worth
- The new legislation may over time help to create conditions where more children with ASN than before are able to have a say in their life and education. If and when such opportunities to express a view arise such opportunities may also sometimes help such children develop their human capabilities
- The new legislation may be founded on a one-sided view of human personhood where persons are only deemed fully human when they can be autonomous. Care ethics and capability theory question this view.
- The **capability approach**, what Nussbaum & Dixon have suggested is the capacity of people to realise their legal rights in practice and not just on paper, might be a helpful one through which to analyse the extent to which children with ASN in Scotland really do have enhanced agency rights in practice.

PITFALLS OF NEW LEGISLATION IN SCOTLAND

- Some key informants expressed fears that the new legislation may create situations where parents, children and professionals are brought in to conflict with each other about how to support a child with ASN. Arneill points out adversarial approaches are normally not in the best interests of the child.
- From the point of view of the capability approach I am sympathetic to, the competence test for autonomy is problematic for at least two reasons. Children with ASN should not be viewed as agents who have to prove their competence. Instead they should be viewed as **striving agents**. Agents that is who are entitled to have a say over important life decisions irrespective of perceived competence because anything less is both an affront to their human dignity and likely to reduce opportunity for them to engage in the very activities that might enhance their capabilities generally and their autonomy/agency especially.
- In order for the new rights to be realised in practice as capabilities the state will have to (as a matter or moral imperative as Nussbaum & Dixon put it) provide substantially more resources to local authorities than at present. Otherwise they are merely making authorities responsible for the new laws without providing them with sufficient means and resources to see the responsibilities through. Local authorities will also need to provide information on the new rights that is much clearer and more child friendly than at present.

NEW RIGHTS AND GETTING IT RIGHT

- The new legislation may create conflicts with other more established education policies such as inclusion and GIRFEC without offering clear guidance about how such legal/policy conflicts ought to be resolved.
- In terms of inclusion, if a child wants to not be included in a mainstream setting what will local authorities do? Override the views of the child to follow the policy of inclusion or follow the views of the child and override the policy of inclusion?
- In terms of GIRFEC if the state, schools, social services and local authorities have a responsibility to get it right for every child, why does the new legislation seem to place the ultimate responsibility to ensure the state and authorities do get it right on the very children who need most support in life? A concern here is that children trying to claim their rights may be perceived as easier to manage than parents trying to claim rights for the sake of their children.

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