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ON THE ROAD TO RECONCEIVING RIGHTS FOR CHILDREN: A POSTFEMINIST ANALYSIS OF THE CAPACITY PRINCIPLE

Katherine Hunt Federle*

We now breathlessly await the analog to sociology's favorite egg-chicken story (that is, that a chicken is an egg's way of producing another egg): namely, that an adult is a child's way of producing another child.1

INTRODUCTION

I like this quotation. It may seem whimsical to some, but I think that it provides us with a perspective so obvious and yet so startling that we are forced to reexamine some of our assumptions about our children and their role in society, assumptions that are so deeply embedded they have channeled our dialogue and forced us down circular paths of analysis. Within the children's rights debate, these assumptions collapse around one central, organizing principle: capacity. Whether or not children have capacity has never been resolved to anyone's particular satisfaction although legal scholars, developmentalists, psychologists, and sociologists have weighed into the fray and have pronounced, with varying degrees of certainty, that the question has been settled.2 But capacity continues to infuse

* Associate Professor of Law, Tulane Law School. I wish to thank Michael Wald and my colleagues at Tulane Law School, John Stick, Steve Griffin, Terry O'Neill, and Alan Childress, for their insightful comments and unfailing support.

1. Marx Wartofsky, The Child's Construction of the World and the World's Construction of the Child: From Historical Epistemology to Historical Psychology, in THE CHILD AND OTHER CULTURAL INVENTIONS 188, 202 (Frank S. Kessel & Alexander W. Siegel eds., 1983). Wartofsky argues that childhood is a cultural predicate which reflects our society and culture rather than neutral psychological and biogenetic characterizations. Id. at 193-94. He contends that we need an historical psychology which recognizes not only the cultural and social factors of childhood, but also the norms that affect our psychological theory and methods of inquiry. Id. at 213. These norms are themselves the product of deeply embedded cultural and historical conceptions, and we will never be able to truly understand childhood until we acknowledge our own biases and perspectives. Id. at 213-14.

2. See THE CHILD AND OTHER CULTURAL INVENTIONS, supra note 1; HOWARD COHEN, EQUAL RIGHTS FOR CHILDREN (1980); RICHARD FARSON, BIRTHRIGHTS (1974); M.D.A. FREEMAN, THE RIGHTS AND WRONGS OF CHILDREN (1983); JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973); JOHN CALDWELL HOLT, ESCAPE FROM CHILDHOOD (1974); GARY B.
the dispute with obfuscating rhetoric about the meaning of having and exercising rights, drawing the analysis away from a critical examination of the organizing principle itself.

Capacity is deeply embedded in our concept of rights for reasons both historical and social. Those philosophies the Framers of our Constitution and the Bill of Rights found so attractive took competency as a necessary prerequisite, illustrating the correctness and indispensability of the principle by specifically excluding women and children from the category of rights holders. This legacy persists in modern legal philosophies, albeit with a nod towards women's, but not necessarily children's, equality and is the foundation upon which the children's rights theorists have built. The social context, too, in which the development of the paternalistic nuclear family coincided with these classic formulations of rights, reinforced the notion of women's and children's incapacities. Although women have had some success in shifting the dialogue of rights beyond arguments


4. See infra part II (discussing modern children's rights theories).

5. For a definitive history of Western childhood, see PHILIPPE ARIÉS, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE (Robert Baldick trans., Alfred A. Knopf, Inc. 1962) (1960). Ariès contends that until the end of the Middle Ages, children were small adults who played, worked, and lived with their elders. Id. at 33-38. The separation of children from adults and the development of that distinct phase of life we now call childhood closely parallels changes in the family, society, and the economic structure. Id. at 33-49. Hafen suggests that Ariès should be cited for the proposition that childhood has been rediscovered, not recently invented. Hafen, supra note 2, at 613-14. For a more recent account of the history of childhood, see JOHN SOMMERVILLE, THE RISE AND FALL OF CHILDHOOD (1982).
about competence,\textsuperscript{6} when discussing the concept of children’s rights, the debate invariably returns to the capacity of children.

It is my contention not only that competency is unnecessary to any formulation of rights for children, but also that it is extremely confining to rights theory in ways that make it difficult to conceptualize, much less acknowledge, the rights of children and other groups. There are, for example, instances when we speak of rights for certain identifiable interests knowing that those groups indisputably lack the capacities we normally associate with rights holders. In the final analysis, these existing dialogues between animal rights activists, deep ecologists, and advocates for the mentally incompetent fail to adequately account for the limiting effects of capacity on their rights theories.\textsuperscript{7} They do, however, refocus and enrich the analysis of rights for children by revealing that capacity is part of the language of hierarchy and status, of exclusion and inequality. We must reconstruct rights talk about children in terms of power, and only when we make explicit the role of capacity is a new theory of rights for children possible.

I propose to challenge the implications of a rights theory that has handicapped not only women and minorities, but also children. This is, essentially, a feminist undertaking for the methods used are feminist legal methods; to paraphrase, I am “asking the child question.”\textsuperscript{8} But even feminist theorists have fallen prey to the narrow vision of their own perspectives and need to reconstruct their rights theories to repudiate the delimiting principle of capacity. As women, we must recognize that power seduces regardless of gender, that our own rights talk may incorporate notions of hierarchy and status.\textsuperscript{9}


\textsuperscript{7} See infra part III (discussing children’s rights in the context of the discussions of animal rights activists, deep ecologists, and advocates for the mentally incompetent).

\textsuperscript{8} Katharine T. Bartlett, Feminist Legal Methods, 103 HARV. L. REV. 829, 836-37 (1990). Bartlett identifies three methods upon which feminists rely when discussing aspects of a legal issue that a more traditional analysis might overlook. The first, “asking the woman question,” exposes the narrow perspective of substantive law. The second, feminist practical reasoning, expands notions of legal relevance in order to consider nontraditional features of a case, features that may reveal the singular perspective of the law. The third method, consciousness-raising, tests the validity of traditional legal standards by relating the experiences of those directly affected by their application. Id. at 836.

\textsuperscript{9} I am hardly the first woman to worry about the seductive and co-opting effects of power. For an earlier and forceful account of this problem, see SHULAMITH FIRESTONE, THE DIALECTIC OF
do not think this means, however, that feminist legal methods have little to offer to an analysis of children’s rights; on the contrary, I think this may be the only way to widen our vision.

My point here is that an adequate rights theory must account for power. Power is the obverse of social oppression and political inequality, for it licenses hierarchy and status. Rights, however, mitigate the exclusionary effects of power by allowing the powerless to access existing political and legal structures in order to make claims. Permitting these types of rights claims also has the salutary effect of redistributing power and altering hierarchies. Herein lies the real value of rights, for rights require that we respect the marginalized, empower the powerless, and strengthen the weak.

Children’s rights theories are inadequate precisely because they fail to accommodate notions of power. Whether we speak of rights as the power to obligate others or as a set of interests, we still tie these accounts to the competencies of the rights holders either by claiming that children do not have the requisite will to obligate others or by identifying children’s interests in ways that promote their incapacities. If rights are inclusive, and I think they must be if we speak in terms of power and access, then they must also meaningfully challenge hierarchy and status. As a practical matter, the kinds of rights envisioned here are legal and political; the moral rights of children, I think, are inextricably tied to concepts of status and, in any event, have only emotional force. Of course, it is possible that individual rights have less significance because they cannot be reconceived in this way, and while that anti-rights position does hold some attraction, I think rights have enough value to make an attempt at reconstruction a worthwhile endeavor.

This Article, then, is the first part of that endeavor; it seeks to explain why existing legal standards disadvantage children by exposing the hierarchical nature of capacity in rights theory. I begin by tracing the role of competency in the formulation of traditional theories of individual rights to illuminate both the centrality of capacity and its exclusionary effects. The Article next explores the influence of these traditional philosophies on the current debate about children’s rights and reveals the incorporation of principles of capacity, hierarchy, and exclusion into children’s rights theories. It is only by elucidating the role of capacity in the articulation of rights that
we open the dialogue to include more meaningful concepts of power and access. Although this Article does not propose a new rights theory, a task I have left for a subsequent article, it does start down the road to reconceiving rights by discussing the ways in which traditional rights talk disadvantages children.

I. Locating the Competency Principle in Historical Context

The notion of capacity as a prerequisite to having rights has both historical and analytical relevance to the American legal tradition of individualism from which children have been excluded. Seventeenth- and eighteenth-century philosophers, who premised individual relations with the state upon a certain rationality and who barred children from the class of rights holders because of their incompetencies, profoundly influenced this country's Founders. These theorists grounded subsequent dialectics, which unquestioningly incorporated capacity as an organizing principle, in the articulation of individual liberties. In turn, modern reconstructivists of rights draw heavily upon the debates of their predecessors, adopting preexisting concepts of childhood and capacity and their relevance to having rights. It is by tracing this role of the competent rights holder in our individualist tradition that we reveal its hierarchical and exclusionary implications and its uncritical acceptance by rights theorists.

A. The Social Contract: For Adults Only

Social compact theorists constructed a rights theory premised upon a competence to contract that excludes children and envisions a hierarchical ordering of liberty. Hobbes, Locke, and Rousseau, who influenced our nation's Founders, argued that children have no freedom because of their incompetencies and are instead subject to parental authority until they attain capacity. The assurance of liberty provided by the social contract between ruler and ruled, therefore, does not extend to children. But the social compact theorists articulated a vision of childhood and family that influenced their own jurisprudence as well as present notions about children and par-

10. Hafen, supra note 2, at 610-11. Hafen argues that because children have never been included in any theoretical formulation of individual rights, there are several compelling reasons to continue to exclude them. These include children's needs and incapacities and the societal value in protecting parental initiative. Id. at 611-12.
It is to these familial power relationships that the social compact theorists analogize when speaking of the state's authority over its own citizens.

Hobbes, for example, found a direct parallel between the family and a monarchical form of government. For Hobbes, life in nature is "poore, nasty, brutish, and short," where man (I use the term purposefully) is ruled by his passions and war is a constant companion. But the rational, self-interested man may escape the natural life by covenanting with others for the creation of a body politic governed by a sovereign who provides for the "peace and common defense." Hobbes identified two ways in which a body politic may be created: (1) by men who covenant with one another voluntarily (in Hobbes's unique sense of the word) to create a commonwealth by institution and (2) as a consequence of compulsion or accident of birth, in which case a commonwealth by acquisition is formed. The latter Hobbes called a patrimonial kingdom and is to be preferred over a democracy or an aristocracy.

According to Hobbes, the relationship between sovereign and subject most clearly parallels that between father and family member. In a state of nature, the mother has the right of dominion over her...
children because she has the power to preserve or destroy them; she chooses to preserve them because children are presumed to have promised her obedience in exchange for this gift. A man has dominion over his children, however, only through a specific covenant with the mother granting him such authority; marriage presumes such a covenant and creates the right of dominion in the father, who has absolute power over his children. He also may acquire servants through conquest or by their voluntary submission and will act as their master; the servants, children, and parents thus comprise a family of which the father is sovereign. If the family multiplies sufficiently through additional births, adoptions, or conquests so as to enable its self-protection, the family becomes a patrimonial kingdom. Children, then, may be the subjects of two sovereigns: one parental and the other monarchical.

Hobbes argued that these relationships are essentially consensual although this notion relies less on concepts of choice and liberty and more on a recognition of the need to submit to the sovereign for reasons of self-preservation. Children consent to their parents' dominion, either expressly "or by other sufficient arguments declared," out of recognition of the power that their parents have over their lives. Children thus have a continuing obligation to obey those who preserve and nourish them. Similarly, the sovereign has dominion over his subjects and his subjects' children because he may destroy them if they refuse to submit themselves to his author-

17. Id. at 103. Hobbes's assertion of a woman's right to her body and, consequently, a right over her children who are a part of her body, may be one of the first modern articulations of a woman's right to choose. "[E]very man by the law of nature, hath right or propriety to his own body, the child ought rather to be the propriety of the mother (of whose body it is part, till the time of separation) than of the father." Id.
18. Id. at 104. Hobbes believed that in a marriage it is impossible for both husband and wife to govern, so only the husband has that authority as he is better suited to the task. Id. Hobbes did acknowledge that if the wife were a sovereign queen, she would have the power to govern and dispose of their common property as the Queen (but not as wife). Id.
19. Id. at 105. Hobbes drew a distinction between children and servants. Children are freemen; servants are not. Id.
20. Id. at 105-06. All that a servant has is transferred to his master, including his children, and in this way succeeding generations of servants remain subject to the same master. Id. It is less clear how the father's children's children are subject to their father and grandfather unless one interprets the child's original obligation of obedience as permanent. If this is so, then succeeding generations of children are bound because of the original promise. "He that hath the Dominion over the Child, hath Dominion also over the Children of the Child; and over their Children's Children. For he that hath Dominion over the person of a man, hath Dominion over all that is his . . . ." Hobbes, supra note 3, at 140-41.
21. Id. at 139.
22. Id. at 140.
Yet such consent, according to Hobbes, is no less voluntary because it is motivated by fear: fear springs from the will (over which we have control), and consent is merely the concurrence of the will to some action.24

Despite this rather limited conception of consent, under Hobbes's theory, children lack the requisite capacity to benefit from the laws of the commonwealth. Children lack reason, although they have the potential to attain it,25 and distinguish between good and evil only because of "the correction they receive from their Parents."26 It is this ability to reason that subjects citizens to law because those rational beings who contract with a sovereign for their protection must, in turn, obey the commands of the sovereign. These commands take the form of laws in the commonwealth, and only those who have the ability to contract with the sovereign can take notice of these laws and must submit to the laws' commands.27 Children, however, cannot take notice of these laws because of their irrationality, although they remain subjects of the sovereign if only through the simple expediency of being subjects of their parents over whom the sovereign has dominion.28

Over naturall fools, children, or mad-men there is no Law, no more than over brute beasts; nor are they capable of the title of just, or unjust; because they had never power to make any covenant, or to understand the consequences thereof; and consequently never took upon them to authorise the actions of any Soveraign, as they must do that make to themselves a Common-wealth.29

Hobbes's articulation of the child's relationship to the commonwealth and its laws found subsequent expression in Locke's theory of the social contract. Locke argued that natural man is free, equal, and independent; he may act and dispose of his possessions as he sees fit provided he respects the equal rights of others to life, liberty,
and their possessions.\footnote{30} Government, then, is the product of a voluntary contract between equals who have given up their power to the political society in order to better protect their natural rights.\footnote{31} The power bestowed upon the government can be no greater than the power held by its citizens and is simply a power to make laws to preserve the lives, liberties, and possessions of its members.\footnote{32} It is these laws in a political society which make us free because liberty means freedom from restraint and without law there can be no such liberty.\footnote{33}

Freedom, and the liberty to act according to one’s will, however, depend upon reason. Locke envisioned law as defining spheres of activity in which each citizen could freely pursue his interests without interfering with the rights of others; construed in this manner, law “is not so much the limitation as the direction of a free and intelligent agent to his proper interest . . . .”\footnote{34} But to stay within the bounds of the law, be it natural or political, each citizen must be capable of knowing the law, and that knowledge comes by virtue of each citizen’s reason.\footnote{35} “The freedom . . . and liberty of acting according to his own will, is grounded on his having reason, which is able to instruct him in that law he is to govern himself by, and make him know how far he is left to the freedom of his own will.”\footnote{36} Conversely, one who lacks reason is incapable of knowing the law and cannot be free.\footnote{37}

This connection between freedom and rationality is central to

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30. Locke, supra note 3, at 4-6. Locke, who has been called the philosopher of individualism, was extremely critical of Hobbes; Second Treatise is really a refutation of Hobbes’s Leviathan.
31. Id. at 144. Locke wrote:

Political power is that power which every man having in the state of nature, has given up into the hands of society, and therein to the governors whom the society hath set over itself, with this express or tacit trust that it shall be employed for their good and the preservation of their property . . . . [T]he end and measure of this power . . . can have no other end or measure when in the hands of the magistrates but to preserve the members of that society in their lives, liberties, and possessions . . . .

Id.
32. Id. 144-45. Locke argued that the law of nature commands that each person is equal and independent and that “no one ought to harm another in his life, health, liberty, or possessions.” Id. at 5-6.
33. Id. at 44. Locke, however, noted that some men may be more equal than others: “Age or virtue may give men a just precedency.” Id. at 42.
34. Id. at 44.
35. Id. at 44-45. Locke contended that one is subject only to those laws that one has promulgated and that can be known only by virtue of reason. Id. at 44.
36. Id. at 49.
37. Id. at 44.
\end{flushright}
Locke's assertion that natural freedom and children's subjection to their parents are compatible concepts founded on a shared principle of liberty. Like Hobbes, Locke found the child in a state of ignorance and irrationality, a condition, however, that will eventually give way to reason and the freedom to act in accordance with her will. During the child's period of incapacity, the parents have the duty to care for the child, to educate her, and to govern her actions until such time as she gains her reason and, consequently, her freedom. This temporary state of inequality exists for the child's welfare: "To turn him loose to an unrestrained liberty before he has reason to guide him is not the allowing him the privilege of his nature to be free, but to thrust him out amongst brutes, and abandon him to a state as wretched . . . as theirs." But children will eventually become free and rational because they are born with that capacity for reason which enables men to be free.

It is the impermanence of this parental authority which ultimately led Locke to reject the Hobbesian conception of dominion by generation. Locke first refuted the concept of paternal power. For Locke, the power over the child rests with both parents for the duration of the child's minority; once the child has attained the age of reason, she is free, and her parents have no more authority over her than they would over any other free person. Of course, the child has a continuing obligation to honor her parents, but this debt does not diminish her freedom nor grant her parents additional authority to command her choices. Hobbes's construction of a politi-

38. Id. at 43. Locke wrote:
   Children, I confess, are not born in this full state of equality, though they are born to it. Their parents have a sort of rule and jurisdiction over them when they come into the world, and for some time after, but 'tis but a temporary one. The bonds of this subjection are like swaddling clothes they are wrapped up in and supported by in the weakness of their infancy. Age and reason, as they grow up, loosen them, till at length they drop quite off, and leave a man at his own free disposal.

39. Id. at 45.
40. Id. at 49.
41. Id. at 47 ("Thus we are born free, as we are born rational; not that we have actually the exercise of either: age that brings one, brings with it the other too.").
42. Id. at 41 ("Paternal power . . . seems . . . to place the power of parents over their children wholly in their father, as if the mother had no share in it . . . . [W]hatever obligation nature and the right of generation lays on children, it must certainly bind them equally to both the concurrent causes of it.").
43. Id. at 51. Locke noted that while the father may have authority over his children, he may not dispose of their lives or their own property. Id.
44. Id. at 52.
cal power that rests on paternal authority is misplaced, therefore, precisely because he misconstrues the joint and impermanent nature of parental obligations.

Locke’s and Hobbes’s views on freedom, children, and the family profoundly influenced Rousseau’s theory of social contract and educational philosophy. For Rousseau, the family is the first political society, in which children remain only as long as their self-preservation requires. Once children are able to provide for themselves, they are independent and no longer need obey their father who, in turn, has no further obligations to his children. This desire for self-preservation is the essence of natural liberty, and people will “alienate their liberty only for their own advantage.” It is the social contract which performs this feat of balancing the advantages of joining forces for mutual protection with the desire for liberty: the state thus established is governed by all the people whose expression of self-interest (what Rousseau termed the general will) is embodied in the law.

The social contract brings man closer to his natural state, which alone can make him happy. Rousseau, disputing Locke’s claim that we are naturally rational beings, argued that in the natural state, man is motivated by self-preservation to satisfy his physical wants

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46. Rousseau, supra note 45, at 4. Rousseau wrote:

The most ancient of all societies, and the only one that is natural, is the family: and even so the children remain attached to the father only so long as they need him for their preservation. . . . The children, released from the obedience they owed to the father, and the father, released from the care he owed his children, return equally to independence.

Id.

47. Id. at 4-5. (“The family then may be called the first model of political societies: the ruler corresponds to the father, and the people to the children; and all, being born free and equal, alienate their liberty only for their own advantage.”).

48. Id. at 13-14 (describing the tension between the need to unite with others for self-preservation and the desire for individual freedom and liberty as the fundamental problem for which the social contract provides the solution).

49. Judith N. Shklar, *Men and Citizens: A Study of Rousseau’s Social Theory* 168-69 (1969). Shklar contends that the general will is Rousseau’s “most original contribution to the language of politics.” Id. at 168. The general will is nothing more than pure self-interest, and it is an interest shared by many because the prevention of inequality is the greatest interest that men can commonly share in society. Id. at 169.

50. G.D.H. Cole, *Introduction to Rousseau*, supra note 45, at xvii-xviii. The state of nature is an idealized conception that embodies notions of man’s fullest capabilities and the good. The natural state is not that from which we evolved but that to which we are evolving. Id.
and to avoid pain and death.\textsuperscript{51} The desire for self-preservation necessitates independence, and each individual in nature is equally and freely independent, yet still in a state of innocence and ignorance.\textsuperscript{52} Political society transforms our natural inclinations and fosters inequality, dissension, greed, and a variety of social ills.\textsuperscript{53} The social contract, therefore, offers the promise of a return to freedom and equality, to an innocence found in our natural state, while retaining the advantages inherent in any social organization in which men unite for their self-preservation.\textsuperscript{54}

This belief in the natural innocence of humanity structures Rousseau's theory of education. Rousseau refuted Locke's claim that children are rational beings from birth and proclaimed their natural innocence.\textsuperscript{55} Children lack that capacity for rationality that Locke proposed as the basis for their education;\textsuperscript{56} education should encourage children's natural tendencies to play and to experience life without restraint rather than inhibit them with the premature imposition of reason.\textsuperscript{57} Only after children begin to acquire reason at about age twelve should they learn about the world through actual experience, direct observation, and discovery.\textsuperscript{58} Rousseau did not envision childhood without structure, however, and stated that the child must be made aware of his subjugation to adults "because

\textsuperscript{51} S.E. Frost, \textit{Biographical Note, in Rousseau, supra note 3, at ii.}

\textsuperscript{52} \textit{Rousseau, supra note 45, at 271-72 ("[A]s there is hardly any inequality in the state of nature, all the inequality which now prevails owes its strength and growth to the development of our faculties and the advance of the human mind, and becomes at last permanent and legitimate by the establishment of property and laws.").}

\textsuperscript{53} \textit{Id. at 274 ("We may admire human society as much as we please; it will be none the less true that it necessarily leads men to hate each other in proportion as their interests clash, and to do one another apparent services, while they are doing every imaginable mischief.").}

\textsuperscript{54} \textit{Id. at 13.}

\textsuperscript{55} \textit{Rousseau, supra note 3, at 95. Rousseau actually had two distinct educational theories, one for boys and one for girls. \textit{Émile} addresses the most appropriate education for boys, \textit{id. at 55-216, while Julie} discusses girls' education, \textit{id. at 26-54. Those principles he advocated in \textit{Émile} do not extend to girls; in fact, girls are imperfect and must be taught to obey men. \textit{Id. at 217-52. Their education, therefore, must emphasize their subservience. See id. In the text, I have attempted to avoid this obviously outdated view of women's relationships by using the term children, but Rousseau was truly limiting his educational theories to boys when he wrote \textit{Émile}.}

\textsuperscript{56} \textit{Id. at 95 ("Locke's great maxim was to reason with children; and it is the most popular method at the present day. Its success does not appear to recommend it; for my own part, I have never seen anyone so silly as those children with whom they have reasoned so much.").}

\textsuperscript{57} \textit{Id. at 88-89.}

\textsuperscript{58} \textit{Id. at 146-78. Rousseau extensively detailed his ideal of education, which corresponds to the child's age. \textit{Id. at 76-216.}}
others know better than himself what is good for him and what does or does not conduce to his preservation. 589

For this reason, children are not participants in the social contract. Self-preservation is the essence of liberty, and men will alienate their liberty only if that alienation secures for them some greater advantage. Children, though, do not have that capacity for self-preservation and must rely on adults until they are able to care for themselves. Without the liberating force of self-preservation, children are dependent on others for their needs until they learn what they need for themselves. The family, then, protects and defends children until they mature and can act to preserve themselves.

But the exclusion of the child from greater political participation signifies a deeper consequence of capacity: incompetency does not merely limit rights; it denies them entirely. The great contribution of the social contractarians and, most particularly, that of Locke was the reformulation of liberty as individual freedom from governmental interference, a concept that infuses current Western political thought. Social contractarians, however, premise the acquisition of this freedom on a concept of competency, and they conclude that the child lacks status as a rights holder precisely because the child’s incompetencies and weaknesses preclude participation in and benefit from the social contract. Thus, the very notion of liberty as autonomy has exclusionary force. Although subsequent political theorists challenged the fundamental tenets of social contract theory, they, too, left unchallenged the exclusion of children from the class of autonomous rights holders on the basis of their incapacities.

B. The Principle of Utility

Bentham and Mill found the concept of consent in the social contract unsatisfactory as an explanation for the coexistence of liberty and governmental authority. They sought to remedy this perceived defect by reconstructing political society around the principle of utility. This doctrine, grounded in our natural inclination to pursue our own or others’ pleasure and to avoid pain, makes these occupations the primary end of political society; consent is irrelevant to the continued allegiance of the citizen to the state. Although utilitarianism eliminates the concepts of consent and the capacity to consent, it postulates a competency to seek personal happiness that, by its

59. Id. at 92.
terms, is exclusionary. If children cannot know how to achieve their own happiness, then their liberty can justifiably be curtailed by others until they reach maturity.60

Bentham's political theory rests on this fundamental assumption about human motivation. Human nature compels each individual to pursue pleasure and avoid pain, and it is axiomatic that each person is the best judge of that which causes either.61 If the individual joins political society, she does so only because she increases her pleasure and reduces her pain by maintaining these political ties.62 The aim of government, then, is to promote happiness of the governed63 and to eliminate everything that may diminish pleasure through the instrument of law.64 Law, however, cannot restrict the choices of the individual to pursue only that happiness which involves no risk of pain to her because such a restriction violates the individual's liberty; the law may only presume that each individual's rationality will prevent her from making such a potentially detrimental choice.65

Despite this simple expedient of seeking pleasure and avoiding pain, Bentham's principle of utility has no application to children. Bentham argued that children suffer a "palpable and very considerable deficiency . . . in point of knowledge or understanding" that renders them incapable "of directing [their] own inclination in the pursuit of happiness."66 The child, therefore, must submit to the authority of a guardian who will pursue the child's happiness until such time as she may seek it for herself.67 "The feebleness of in-

60. See BENTHAM, supra note 3, at 63; infra notes 62-79 and accompanying text (discussing the utilitarian theories of Bentham and Mill).
61. BENTHAM, supra note 3, at 63.
62. Id. at 74.
63. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 74 (J.H. Burns & H.L.A. Hart eds., 1970) (n.d.) ("The business of government is to promote the happiness of the society, by punishing and rewarding.").
64. Id. at 158 ("The general object which all laws have, or ought to have, in common, is to augment the total happiness of the community; and therefore, in the first place, to exclude, as far as may be, every thing that tends to subtract from that happiness . . . .")
65. BENTHAM, supra note 3, at 63. Bentham wrote:

As a general rule, the greatest possible latitude should be left to individuals, in all cases in which they can injure none but themselves, for they are the best judges of their own interests. If they deceive themselves, it is to be supposed that the moment they discover their error they will alter their conduct. The power of the law need interfere only to prevent them from injuring each other.

Id.
66. BENTHAM, supra note 63, at 244-45.
67. Id. at 246.
fancy demands a continual protection" that only "an authority more immediate than that of the laws" can provide through a continual process of education.\textsuperscript{68} That protection ends when the child reaches maturity, an age arbitrarily set by law for reasons of expediency.\textsuperscript{69} It is the fact of infancy that permits adults to interfere with the happiness of children, for children do not understand the future consequences of their actions and, therefore, cannot be dissuaded from pursuing a potentially detrimental course of conduct.\textsuperscript{70}

Mill's theory of liberty, however, rests on a broader view of human motivation: we can derive happiness from the pleasure of others. Like Bentham, Mill believed that we are motivated by our desire to seek pleasure and avoid pain but that we also find happiness in virtue and spiritual perfection.\textsuperscript{71} In our pursuit of happiness, however, we are absolutely free from the interference of others unless, by our actions, we may harm someone other than ourselves.\textsuperscript{72} Self-protection is the only justification for the restriction of individual autonomy in a community; paternalistic concerns for the welfare of the individual only permit the state to persuade, cajole, or otherwise convince the individual to alter her conduct, but they cannot legitimate a restraint upon liberty.\textsuperscript{73} Political society thus offers protection to each of its members from unwelcome interference by punishing those who injure the interests of others; in exchange, society may expect its members to agree to honor and defend the liberty of one another.\textsuperscript{74}

Despite Mill's antipaternalistic approach, children are not free to do as they please. The doctrine of individual sovereignty applies only

\textsuperscript{68} Id. at 209.
\textsuperscript{69} Id. at 245.
\textsuperscript{70} Id. at 161; Bentham, supra note 3, at 263.
\textsuperscript{71} Mill found Bentham's utilitarianism emotionally narrow and espoused a political theory that emphasized the happiness of others. Stefan Collini, Introduction to John Stuart Mill, On Liberty with the Subjection of Women and Chapters on Socialism at vii, xxvi (Stefan Collini ed., Cambridge Univ. Press 1989) (1859).
\textsuperscript{72} Mill, supra note 71, at 13.
\textsuperscript{73} Id. Mill wrote:

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control . . . . That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection.

\textsuperscript{74} Id. at 75-76.
to those beings "in the maturity of their faculties." The distinction was significant for Mill, who argued that the state has no authority to compel those who make bad decisions if they are capable of correction during a "free and equal discussion" about those choices. Children and other people below the age of majority, however, do not have the capacity for improvement through rational discourse and must be protected against their own actions. Society, therefore, has absolute power over minors and may compel them to take certain action in the hope of making them "capable of rational conduct in life."

Utilitarianism, however, uncritically accepts that rights acquisition is premised upon capacity. Although, in utilitarian terms, capacity is the ability to make rational choices in the pursuit of happiness (rather than the competence to consent under social contract theory), it is that capacity which circumscribes governmental interference with individual autonomy. Thus, each person may risk pain freely (provided that risk does not affect the liberties of others) because each has the capacity to learn from her mistakes. But paternalistic concerns do apply in the case of children, for they lack the present ability to pursue their own happiness. Like social contract

75. Id. at 13.
76. Id. at 14.
77. Id. at 13-14. Mill wrote:

It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury. . . . But as soon as mankind have attained the capacity of being guided to their own improvement by conviction or persuasion, . . . compulsion . . . is no longer admissible as a means to their own good, and justifiable only for the security of others.

Id. This quotation is remarkable for two reasons. First, Mill acknowledged that some young people may have capacity but the law simply will not recognize their abilities until they reach an age determined by law. Second, Mill was unique in his recognition of the equality of women. Some have suggested that his relationship and subsequent marriage to Harriet Taylor greatly influenced his thought in this regard. Collini, supra note 71, at xviii.

78. MILL, supra note 71, at 82. Mill wrote:

The existing generation is master both of the training and the entire circumstances of the generation to come; it cannot indeed make them perfectly wise and good, because it is itself so lamentably deficient in goodness and wisdom; and its best efforts are not always, in individual cases, its most successful ones; but it is perfectly well able to make the rising generation, as a whole, as good as, and a little better than, itself. If society lets any considerable number of its members grow up mere children, incapable of being acted on by rational consideration of distant motives, society has itself to blame for the consequences.

Id.
theory, the principle of utility is exclusionary: children are not autonomous rights holders because of their incapacities.

C. Children as Moral Rights Holders

Kant believed that children can be rights holders (although not autonomous ones) and rejected utilitarianism as a philosophy of right as well as an ethical theory. A right, for Kant, meant having "the capacity to obligate others" and the power to compel the performance of that obligation. It is coercion, however, which enables one to live as a free individual responsible only to oneself; thus a right is an area of freedom from external constraint. This conception of freedom is crucial to Kant's theory of rights: freedom is an innate right that belongs to all persons by virtue of their humanity and grounds dignity, which is the source of each person's unconditional and incomparable moral worth. But law itself does not create rights; rather, they spring from our innate freedom and autonomy and preexist the political state.

Moral beings thus create a political society to ensure their freedom from external constraint and construct laws to impose duties or to punish those who do not honor their obligations. The authority to promulgate these laws resides only in the active citizenry of the political state. To be an active citizen, the individual must be free, equal, and independent: free to obey only those laws to which he has given his consent, equal to all other citizens, and independent of the arbitrary demands of others. Fitness to vote is a prerequisite

79. LESLIE A. MULHOLLAND, KANT'S SYSTEM OF RIGHTS 4 (1990). Mulholland's aim in writing this book was to show how Kantian claims of rights can be justified.
80. KANT, supra note 3, at 45. Kant wrote: Inasmuch as duties and rights are related to each other, why is moral . . . philosophy usually . . . labeled the theory of duties and not also of rights? The reason for this is that we know our own freedom (from which all moral laws and hence all rights as well as duties are derived) only through the moral imperative, which is a proposition commanding duties; the capacity to obligate others to a duty, that is, the concept of a right, can be subsequently derived from this imperative.

Id.

81. Id. at 37.


84. KANT, supra note 3, at 75-76.

85. Id. at 76-77.

86. Id. at 78-79.

87. Id. Kant wrote: The members of such a society . . . who are united for the purpose of making laws
to citizenship, and those who are fit are independent and must voluntarily choose to take an active part in the society.\textsuperscript{88} Passive citizens, although they have no right to guide the state, may "demand that they be treated by others in accordance with the laws of natural freedom and equality... namely, that [they] be able to work up from this passive status to an active status."\textsuperscript{89}

Children are passive citizens in Kant's political state because they are dependent upon their parents for their support,\textsuperscript{90} and, although they do have certain moral rights which spring from their innate right to freedom, children lack the capacity Kant associated with greater liberty and political participation. Kant argued that the child, as a person, is a free being who is brought into the world without her consent by the action of her parents.\textsuperscript{91} The creation of freedom, however, is not a purely physical process; consequently, the physical act of conception does not explain the existence of liberty.\textsuperscript{92} Kant concluded that the right to freedom must inhere in all beings prior to their conception and that it is this innate freedom that makes the child more than a mere thing created by her parents over which they would have a purely proprietary interest.\textsuperscript{93} Her parents' voluntary act of bringing her into the world, therefore, imposes an obligation to insure that the child suffers no further loss simply by being in the world;\textsuperscript{94} from this obligation, the child acquires a right to be cared for by her parents until she is capable of maintaining herself.\textsuperscript{88}

The child, however, lacks the moral capacity to obligate another and the power to compel the performance of his obligations, so the

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\textsuperscript{88} Id. at 79.

\textsuperscript{89} Id. at 80.

\textsuperscript{90} Id. at 79-80.


\textsuperscript{92} MULHOLLAND, supra note 79, at 227-28.

\textsuperscript{93} KANT, supra note 91, at 114-17.

\textsuperscript{94} MULHOLLAND, supra note 79, at 228.

\textsuperscript{95} KANT, supra note 91, at 114.
child must rely on others to enforce her rights. She does not have all the rights that adults have because of her inability to obligate others; thus, the rights others will enforce for her are those rights she has peculiarly as a child.\(^{96}\) One such right, the child's right to upkeep and care, necessitates a correlative duty undertaken by her parents to nourish and protect her.\(^{97}\) The enforcement of the right, that is the power to compel the child's parents to perform their duty as to their child, rests with those moral beings who have the capacity to determine the behavior of others through choice and judgment.\(^{98}\) The child, however, lacks that capacity, if only temporarily, and the reliance on others to enforce her rights as well as to compel her parents' obligations expires naturally upon the child's emancipation.\(^{99}\)

From the parental obligation to care for the child flows a parental right to train and educate her because of the parents' responsibility for any harms caused by the child during her minority.\(^{100}\) As long as the child is "incapable of making proper use of its body as an Organism, and of its mind as an Understanding," she is subject to her parents' authority.\(^{101}\) The child, therefore, is not free to do as she pleases; she is dependent upon her parents and must submit to their commands until she attains the "capability of self-maintenance" upon reaching the age of majority.\(^{102}\) Only then does the child regain her natural freedom and become her "own Master," thereby absolving her parents of any further obligation.\(^{103}\) The child is free, of course, to remain in the household after she reaches maturity, but the parties' rights and obligations flow from a subsequent contractual arrangement and not from their familial relationship.\(^{104}\)

Kant thus used capacity to explain why children not only have certain limited rights yet no ability to exercise them, but also why they are precluded from having certain rights entirely. Although children have certain moral rights, such as an innate right to freedom and a right to care from their parents, they have no capacity to

\(^{96}\) Mulholland, supra note 79, at 229.
\(^{97}\) Kant, supra note 91, at 114.
\(^{98}\) Mulholland, supra note 79, at 8.
\(^{99}\) Kant, supra note 91, at 114, 116.
\(^{100}\) Id. at 116-17; Mulholland, supra note 79, at 229.
\(^{101}\) Kant, supra note 91, at 116.
\(^{102}\) Id. at 118.
\(^{103}\) Id.
\(^{104}\) Id. at 118-19.
enforce either right. Freedom for children, then, is best understood as the potential for independence. Children also lack that capacity to obligate others and to compel their performance, which precludes children from acquiring certain other rights entirely. The Kantian conception of capacity, therefore, insures children's dependency, either upon their parents or upon some third party, and their exclusion from greater political and legal participation.

Kant's contribution — that children have status as moral beings from which form certain moral rights — has profoundly shaped much of the children's rights debate. Kant does not dispute the centrality of capacity to concepts of freedom and autonomy; consequently, the rights children have are protective rights that depend upon others for enforcement. This reliance on others is, however, merely the coinage of paternalism and hierarchy. Children have no real autonomy and their rights, while they have seductive and co-opting force because they appeal to us on an emotional level, confer no real power. It is this powerlessness that makes children peculiarly vulnerable to exclusion in our rights talk, even when we speak of moral rights.

D. The Hegelian Dialectic

Kant's conception of the child's dependence upon and obedience to her parents found new form in the work of Hegel, whose own philosophy of right and morals is best understood in terms of the dialectical movement.\(^{105}\) Stated simply, everything — each thought, each condition — leads to its opposite and, through the process of evolution, unites with that opposite to form a more complex, unified whole.\(^{106}\) Thus, the state, in Hegel's political theory, is the result of the unification of two opposites, individuality and universality;\(^{107}\) a

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107. Hegel, Elements of the Philosophy of Right, supra note 106, at 287. Hegel wrote:
rational society that permits the actualization of individual freedom, or spirit, achieves this harmony of opposites and is, in itself, a complex, unified form of individuality and universality.\textsuperscript{108} Liberty, however, is more than doing as one pleases, more than the mere satisfaction of personal ends; it is the meaning given to one's life through choices made without external interference and the pursuit of ends that are universal in scope.\textsuperscript{109} It is only through membership in the rational state that one may experience this highly evolved form of freedom.\textsuperscript{110}

Spirit is itself an evolving concept and, in its most complex form, is rational thought embodied in the will. "[S]pirit is initially intelligence and . . . the determinations through which it proceeds in its development, from feeling to representational thinking to thought, are the way by which it produces itself as will — which, as practical spirit in general, is the proximate truth of intelligence."\textsuperscript{111} In its most basic form, the spirit is the immediate or natural will, determined by drives, desires, and inclinations.\textsuperscript{112} Although natural, these feelings are irrational while the will itself is analytical; it is the will, therefore, that overcomes our irrational drives.\textsuperscript{113} Will in itself is freedom, and as will is "thinking translating itself into existence" so does it enable the translation of freedom into reality.\textsuperscript{114}

A system of rights is the concrete actualization of freedom within political society.\textsuperscript{115} Some of these rights — the right to our own bodies and free status and the right over our ethical lives, religions, and consciences — are inalienable and imprescriptible.\textsuperscript{116} But the precise content of our other rights as free beings cannot be determined outside the system of rational institutions that comprises the

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Individuals . . . embody a dual moment, namely the extreme of individuality . . . and the extreme of universality . . . They can therefore attain their right in both of these respects only in so far as they have actuality both as private and as substantial persons. . . . [T]hey attain their right in the first respect directly; and in the second respect, they attain it by discovering their essential self-consciousness in [social] institutions . . .

\textsuperscript{Id.} at 287.
\textsuperscript{108} \textsuperscript{Id.} at 286-87.
\textsuperscript{109} \textsuperscript{Id.} at 276.
\textsuperscript{110} \textsuperscript{Id.} at 276-77.
\textsuperscript{111} \textsuperscript{Id.} at 37.
\textsuperscript{112} \textsuperscript{Id.} at 45.
\textsuperscript{113} \textsuperscript{Id.}
\textsuperscript{114} \textsuperscript{Id.} at 35.
\textsuperscript{115} \textsuperscript{Id.}
\textsuperscript{116} \textsuperscript{Id.} at 95-96.
These positive rights draw upon national character, historical development, and necessity for their context. Positive law, then, is the political society's determination of the content of these other rights.

The emphasis on development in the Hegelian philosophy of rights necessarily precludes the full and equal participation of children in society. The child, according to Hegel, has only the potentiality of reason and freedom, because the child's will is only immediate or natural, that will is both good and evil and as such is opposed to the content of freedom. The child, therefore, is less accountable for her actions than a self-conscious individual who has knowledge of the good, and her legal accountability is thereby diminished. The child also lacks the will necessary to own property because her will does not have the ability to be recognized by others; the child's sense of ownership, then, is purely internal to the child. The child does not even have a moral will, that ability to determine herself, and must be determined by her parents.

The parental role in the upbringing of the child is, therefore, crucial to the child's development of rationality and freedom. The child begins life with a natural will, but she cannot develop into a rational and free being by instinct alone; she must be taught self-sufficiency and freedom. The child thus has a right to be brought up and

117. Id. at 28-29.
118. Id. at 28.
119. Id. at 28-29.
120. Id. at 45 ("The child is in itself a human being; it has reason only in itself; it is only the potentiality of reason and freedom, and is therefore free only in accordance with this concept. Now what exists as yet only in itself does not exist in actuality.").
121. Id. at 169.
122. Id. ("But the natural will is opposed to the content of freedom, and the child and uneducated man whose wills are natural are for that reason accountable for their actions only to a lesser degree. Thus, when we speak of human beings, we do not mean children but self-conscious individuals . . . .").
123. Id. at 160 ("The right of the subject to know . . . . action in its determination of good or evil, legal or illegal, has the effect, in the case of children, imbeciles, and lunatics, of diminishing or annulling . . . . their responsibility in this respect, too . . . .").
124. Id. at 81-82.
125. Id. at 136.
126. Id. at 211-12. Hegel wrote:

Human beings do not arrive by instinct at what they are destined to become; on the contrary, they must attain this by their own efforts . . . .

[Their upbringing . . . has the negative determination of raising the children out of the natural immediacy in which they originally exist to self-sufficiency and freedom of personality, thereby enabling them to leave the natural unit of the family.]
supported by her family until she becomes self-sufficient.\textsuperscript{127} Until that time, her parents have a right over the child's will to eradicate her natural but irrational desires and drives and to instill thought and judgment.\textsuperscript{128} Hegel suggested that discipline is the only way to break the child's natural will; parents must command obedience and punish without kindness or explanation.\textsuperscript{129} "Unless the feeling of subordination, which creates a longing to grow up, is nurtured in the children, they become forward and impertinent."\textsuperscript{130}

Hegel clearly envisions childhood as a developmental stage in the human spirit. Children have the potential for rationality and freedom but lack the capacity for liberty because they are driven by their feelings and emotions. Parents then must maintain and educate their children for the sole purpose of instilling in them that sense of freedom that leads to self-sufficiency. But even parents' rights in their children are limited by the aim of that upbringing — to make their children self-sufficient — and by the need of the state to replenish its citizenry. Thus, the civil society has the right to supervise and influence the education of children when parents have failed to fulfill their obligations.\textsuperscript{131}

\textit{Id.}

\textsuperscript{127} \textit{Id.} at 211 ("Children have a right to be \textit{brought up and supported} at the expense of the family. The right of the parents to their children's \textit{services}, as services, is based on and limited to the common concern of caring for the family in general.").

\textsuperscript{128} \textit{Id.} Hegel wrote:

\begin{quote}
[T]he right of the parents over the arbitrary will of the children is determined by the end of bringing them up and subjecting them to discipline. The end to which punishments are directed is not justice as such; it is rather of a subjective and moral nature, seeking to have a deterrent effect on a freedom which is still entrapped in nature and to raise the universal into the children's consciousness and will.
\end{quote}

\textit{Id.}

\textsuperscript{129} \textit{Id.} at 211-12. Hegel wrote:

One of the chief moments in a child's upbringing is discipline, the purpose of which is to break the child's self-will in order to eradicate the merely sensuous and natural. One should not imagine that kindness alone is sufficient for this purpose . . . . If one presents children with reasons, it is left to them to decide whether to accept these or not, and thus everything is made to depend on their caprice. The fact that the parents constitute the universal and essential element entails the need for obedience on the part of the children.

\textit{Id.} (footnote omitted).

\textsuperscript{130} \textit{Id.} at 212.

\textsuperscript{131} \textit{Id.} at 264. Hegel wrote:

In this character as a \textit{universal family}, civil society has the duty and right, in the face of arbitrariness and contingency on the part of the parents, to supervise and influence the \textit{education} . . . . of children in so far as this has a bearing on their capacity to become members of society, and particularly if this education is to be completed not by the parents themselves, but by others. In so far as communal arrangements can be
Hegel's paternalism is a frank acknowledgement of the powerlessness of children. Certainly his articulation of the relationship between the child, her parents, and the state, which has some currency even today, envisions the child as a nonautonomous being subjugated to the will of her parents and of the state. Hegel's struggle with the relationship between the individual and the government, like that of his predecessors, however, does not challenge capacity as a prerequisite to rights acquisition. Even those rights Hegel acknowledged the child does have — like the right to be brought up and supported by her family — are rooted in the child's current incapacity for freedom and rationality. It is in this sense, then, that these rights (if they can even be conceived of as rights) are exclusionary and hierarchical.

E. Revising the Social Contract

This conception of a relationship between children, their parents, and the state also influenced Rawls, who draws upon the theories of Kant as well as those of Locke and Rousseau. Rawls argues that justice is the governing principle of any political society, without which its laws and institutions may be reformed or abolished. Given the primacy of justice, Rawls contends that it and its principles, rather than participation in a given society or the formation of a particular form of government, are the objects of the social contract. Rawls thus imagines the formation of the social contract as the collective effort of a group of rational and disinterested men and women who, unable to know of their future positions in society or of their conceptions of the good, create a state in which no one is advantaged or disadvantaged by the choices made during the contract's formation. The rights and obligations of the citizen and

made for this purpose, it is likewise incumbent upon civil society to make them.

Id.

132. JOHN RAWLS, A THEORY OF JUSTICE, at viii (1971). Rawls writes:

What I have attempted to do is to generalize and carry to a higher order of abstraction the traditional theory of the social contract as represented by Locke, Rousseau, and Kant. In this way I hope that the theory can be developed so that it is no longer open to the more obvious objections often thought fatal to it.

Id.

133. Id. at 3.

134. Id. at 11. The principles of justice are "the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association." Id.

135. Id. at 12. Rawls refers to this as the original position in which all parties operate under a
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state naturally flow from this just conception of the political society: once the veil of ignorance is lifted, no party to the original contract should desire its rescission.\textsuperscript{138}

The principles of justice as they relate to Rawlsian conceptions of rationality and morality do not accord children any greater liberty, however, than do the classical formulations of right. Rawls states that “the capacity for moral personality is a sufficient condition for being entitled to equal justice.”\textsuperscript{137} What Rawls means is that the mere potential for moral personhood, defined as the capacity to acquire a sense of justice and to have a conception of personal good as expressed by a rational life plan, requires that each human being be treated in accordance with the principles of justice.\textsuperscript{138} Children have both the potential to develop a rational life plan and a notion of justice; in this sense, they have the capacity to acquire those competencies associated with moral personhood.\textsuperscript{139} Children actually fulfill their potentialities and become moral persons when they attain the age of reason and thus may participate in the formation of the social contract.\textsuperscript{140}

But Rawls, like Kant, rejects the contention that the mere humanness of children confers equal liberty. Rawls sees children as moral primitives\textsuperscript{141} who must be protected from the “weakness and infirmities of their reason and will in society”; others, therefore, are authorized to act on children’s behalf in a manner most likely to secure their approval when they become rational persons.\textsuperscript{142} Rawls’s paternalism would require that the guardian account for the individual child’s preferences and interests to the extent that they are rational and limits the guardian’s authority to the pursuit of the child’s expressed conception of good, if the child is capable of hav-

\begin{itemize}
  \item veil of ignorance. Id.
  \item Id. at 61.
  \item Id. at 505.
  \item Id.
  \item Id. at 509. Rawls provides a detailed account of the moral development of children. See id. at 453-79.
  \item Id. at 146.
  \item Id. at 462.
  \item Id. at 249. Rawls writes:
  Thus the principles of paternalism are those that the parties would acknowledge in the original position to protect themselves against the weakness and infirmities of their reason and will in society. Others are authorized and sometimes required to act on our behalf and to do what we would do for ourselves if we were rational, this authorization coming into effect only when we cannot look after our own good.
  Id.
\end{itemize}
ing a conception of the good, has formed a conception, and has expressed it. Although this may suggest that we should assume the rationality of children before presuming to act in their interests, Rawls does not argue that there is an affirmative obligation to learn of these rational desires, although he clearly rejects as inconsistent with his paternalistic principles an obligation to honor children's irrational whims. This emphasis on irrationality, then, merely reiterates the classical view of childhood and does not reconceive of rights without the principle of capacity.

Rawls, like his predecessors, merely introduces the concept of a child's moral right to expect certain treatment without displacing the principle of capacity. He acknowledges the incapacities of children and the need for paternalistic interventions but contends that moral considerations limit paternalism in ways that preserve future individual freedom. The notion of future-oriented consent, that the child will see the wisdom of the choices made when she reaches the age of capacity, and that parental authority is morally restricted to the sphere of actions that the child might be expected to approve of when she reaches maturity, is, however, self-fulfilling. The person who consents in the future is the product of earlier paternalistic interventions; she is certainly not the same person upon whom those previous choices were imposed. Rawls thus finds within the child's incapacity a certain right to be treated benevolently but not equally. This distinction between rights flowing from the child's incapacity and rights denied because of it, while it characterizes one aspect of the current debate about children's rights, also tends to obscure the other aspect: that is, the idea of capacity itself as a prerequisite to having rights.

143. *Id.* at 249-50. Rawls writes:

> Paternalistic decisions are to be guided by the individual's own settled preferences and interests insofar as they are not irrational, or failing a knowledge of these, by the theory of primary goods. As we know less and less about a person, we act for him as we would act for ourselves from the standpoint of the original position.

*Id.* at 249.

144. *See* Worsfold, *supra* note 28, at 153. Worsfold argues that under a Rawlsian theory of right, "children are presumed to be able to exercise their own rights unless all of society agrees that someone else should make decisions for them." *Id.* at 143. I believe, however, that Rawls makes no such claim, and Worsfold certainly never articulates what rights children do have within Rawls's schema.

F. Legal Positivism

Capacity does remain central to the modern positivist conception of right, most vigorously defended by H.L.A. Hart, who contends that rights are not grounded necessarily in any moral code.\textsuperscript{146} Hart argues that a legal system is comprised of social (nonmoral) rules that originate exclusively in the social system.\textsuperscript{147} These rules establish obligations and duties and create legally redressable wrongs;\textsuperscript{148} they also confer public and private powers to enforce, create, and vary these obligations and duties.\textsuperscript{149} The private power to undertake duties, to impose obligations on others, or to affect the application of law, however, is dependent upon the capacity or status of the individual to exercise this power.\textsuperscript{150} For Hart, to have power one must also have the ability to exercise it, and only rational adults have that

\textsuperscript{146} Ronald Dworkin, Hart's most persistent critic, maintains that there is an essential connection between law and morality. \textit{Ronald Dworkin, Law's Empire} I (1986) [hereinafter \textit{Dworkin, Law's Empire}]. Hart and Dworkin have, for some time, symbolized the ongoing debate between legal positivism and natural rights theory, although some have suggested that this debate no longer has any force. \textit{See}, e.g., Vincent A. Wellman, \textit{Dworkin and the Legal Process Tradition: The Legacy of Hart and Sacks}, 29 Ariz. L. Rev. 413 (1987).

Dworkin contends that every person is morally entitled to equal respect and concern, that each individual's pursuit of her personalized conception of what is good in life must be taken seriously. \textit{Ronald Dworkin, Taking Rights Seriously} 272-73 (1977). Equal respect and concern does not mean that each person must be treated the same or that the state must benefit and burden all members of society equally. \textit{Id.} at 273. The state's allocation of benefits and harms, the equal and unequal distribution of goods, opportunities, and liberties, must simply ensure that each person's right to equal respect and concern is not violated. \textit{Id.} Individual liberty, therefore, exists not as a right, \textit{id.} at 269, but as a consequence of the right to equal respect and concern; nevertheless, there are certain liberties that the state must respect, for a diminution of a liberty may entail a violation of the fundamental right to equal respect and concern, \textit{id.} at 272.

When legislatures make decisions that unequally benefit or burden its citizens, the courts are often left with the difficult task of assessing the validity of these enactments. Dworkin contends that judges make decisions in hard cases by resorting to a principle of integrity: "[P]ropositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice." \textit{Dworkin, Law's Empire, supra}, at 225. Dworkin's point is that legal reasoning is an inherently moral enterprise, \textit{id.} at 1; when there is more than one interpretation of applicable law, the judge must ask which one best fits the community's legal standards, \textit{id.} at 225-26.

What does this mean for children? Dworkin never directly answers this question, but he does acknowledge that our interpretations of justice may, for example, permit parents to choose spouses for their daughters on the theory that this is a social practice within a context of other practices that we cannot call unjust. \textit{Id.} at 204-05. I think, therefore, Dworkin would find other restrictions placed on children as so entirely consistent with social practices that we cannot call them unjust and since those practices are justified (in our culture at any rate) by reference to children's incapacities, Dworkin's theory does little to advance the debate about children's rights.

\textsuperscript{148} \textit{Id.}
\textsuperscript{150} MacCormick. \textit{supra} note 147, at 21.
present ability.\textsuperscript{151}

Even if there are moral rights, Hart forcefully contends that children must be excluded from the class of rights holders. Hart argues that "if there are any moral rights at all . . . there is at least one natural right, the equal right of all men to be free."\textsuperscript{162} It is from man's natural freedom and the ability to voluntarily limit his liberty that moral rights are created;\textsuperscript{163} consequently, only "adult human being[s] capable of choice" have that power.\textsuperscript{164} Thus, infants do not have a right to proper treatment although it may be morally wrong to mistreat them;\textsuperscript{165} at the same time, parents have a right to obedience from their children because of the special relationship in which they stand to each other.\textsuperscript{166}

Like all such rights, there must be some justification for the interference with another's freedom,\textsuperscript{157} but in the case of parents and children, this right is a natural one\textsuperscript{158} that is neither created nor conferred by voluntary action and thus requires no special justification because children do not have the natural right of freedom.

Hart, however, is not a children's rights theorist and, like the aforementioned philosophers, focuses only peripherally on children's rights. Yet these theories of individual rights have profoundly influenced the debate over the rights of children. These accounts, which attempt to explain the coexistence of individual liberty with coercive state power, provide a foundation for our modern rights talk which

\textsuperscript{151} Hart, \textit{supra} note 149, at 28. ("Thus behind the power to make wills or contracts are rules relating to capacity or minimum personal qualification (such as being adult or sane) which those exercising the power must possess.").


\textsuperscript{153} Id. at 62.

\textsuperscript{154} Id. at 61.

\textsuperscript{155} Id. at 65-66.

\textsuperscript{156} Id. at 71.

\textsuperscript{157} Id. at 68.

\textsuperscript{158} Id. at 71. Hart writes:

There remains a type of situation which may be thought of as creating rights and obligations: where the parties have a special natural relationship, as in the case of parent and child. The parent's moral right to obedience from his child would I suppose now be thought to terminate when the child reaches the age "of discretion," but the case is worth mentioning because some political philosophies have had recourse to analogies with this case as an explanation of political obligation, and also because even this case has some of the features we have distinguished in special rights, viz., the right arises out of a special relationship of the parties (though it is in this case a natural relationship) and not out of the character of the actions to the performance of which there is a right.

\textit{Id.}
inevitably structures and defines rights discourse. Consequently, children’s rights theorists draw on these philosophies to demonstrate that children do have rights and to show that they do not. As will be seen in the following section, the modern debate over children’s rights cannot be anything but a debate about capacity.

II. CHILDREN’S RIGHTS

Children’s rights theorists inevitably focus on the competency of children when articulating the nature and scope of the rights held by children. The least complex arguments directly link capacity and rights; the source of the dispute among these thinkers is not the legitimacy of that connection but whether and when children are competent. Some theorists concede children’s incapacities but find they have certain moral rights stemming from the obligation to care that serves to protect children from parental abuse and mistreatment. Still others contend that incompetent children should not be denied rights simply because they are unable to exercise them and construct systems of agents or proxies who will exercise children’s rights for them. Feminist theorists have tried to break away from patriarchal concepts of individual autonomy and rights by emphasizing the relationships between children and adults and the rights that flow from these affiliations. But even these constructions of rights, in their articulation of children’s relationships, subtly revolve around the principle of capacity.

A. Children as Competent Persons

Children’s rights theorists use capacity to argue both for the liberation and for the greater protection of children. Gary Melton, for example, claims that competency is the overriding issue in the law affecting children, which should be informed by psychological research. His findings and those of others suggest that while compe-

159. See infra notes 163-84 and accompanying text (discussing the children’s rights theory that uses capacity to argue for both the liberation and protection of children).

160. See infra notes 188-94 and accompanying text (discussing the moral interest theory of rights).

161. See infra notes 185-87 and accompanying text (discussing the rights theory that suggests that children have rights which can be exercised by competent persons).

162. See infra notes 195-215 and accompanying text (discussing the theories that purport not to revolve around the issue of competency).

163. Melton, supra note 2, at 448.

164. Id. at 452-53.
tency may be both developmentally and socially determined, even young children seem to have the capacity to make certain decisions.\textsuperscript{165} Child psychology, however, may in itself be a cultural invention that predicts certain behavioral outcomes because of preconceived societal norms.\textsuperscript{166} This difficulty in knowing precisely where to draw the line between competency and incompetency is overcome by presuming that children have capacity. Richard Farson and John Caldwell Holt thus argue that children have the same political and legal rights held by adults because children are competent.\textsuperscript{167}

Tying rights to capacity, however, permits opponents of children's rights to claim that children, for their own protection, should not and do not have political and legal rights. Bruce Hafen, an outspoken critic of rights for children, argues, quite correctly, that the law has "long assumed the necessity of competency."\textsuperscript{168} Citing to Locke and Mill for the principle that children need a protective environment in which to develop their capacities,\textsuperscript{169} Hafen contends that according children rights prematurely will damage individual liberty because children are incapable of making meaningful and rational choices.\textsuperscript{170} Additional psychological and sociological findings in direct contradiction to the research cited by children's rights advocates support these assertions.\textsuperscript{171} Joseph Goldstein also concurs with Hafen's view of childhood and is a forceful proponent of expanded parental control:

To be a \textit{child} is to be at risk, dependent, and without capacity to decide what is "best" for oneself.

To be an \textit{adult} is to be a risktaker, independent, and with capacity and authority to decide and to do what is "best" for oneself.

To be an \textit{adult who is a parent} is to be presumed in law to have the capacity, authority, and responsibility to determine and to do what is good for one's children.\textsuperscript{172}

\begin{itemize}
  \item \textsuperscript{165} \textit{Id.} at 460, 463; Arlene Skolnick, \textit{Introduction to Rethinking Childhood: Perspectives on Development and Society} 7 (Arlene Skolnick ed., 1976).
  \item \textsuperscript{166} Skolnick, \textit{supra} note 165, at 1-4; see William Kessen, \textit{The Child and Other Cultural Inventions, in The Child and Other Cultural Inventions, supra note 1, at 26, 29-30}; Arlene Skolnick, \textit{The Limits of Childhood: Conceptions of Child Development and Social Context, 39 Law & Contemp. Probs.} 38, 43 (Summer 1975).
  \item \textsuperscript{167} Farson, \textit{supra} note 2, at 16; Holt, \textit{supra} note 2, at 18-19.
  \item \textsuperscript{168} Hafen, \textit{supra} note 2, at 613.
  \item \textsuperscript{169} \textit{Id.} at 612-13.
  \item \textsuperscript{170} \textit{Id.} at 657-58.
  \item \textsuperscript{172} Joseph Goldstein, \textit{Medical Care for the Child at Risk: On State Supervention of Parental Autonomy, 86 Yale L.J.} 645, 645 (1977). For other criticisms of the children's rights movement,
Children’s rights advocates counter that principles of liberty and justice mandate the extension of legal rights to those children with capacity, but fail to challenge the legitimacy of the underlying premise that competency is a prerequisite to the acquisition of rights. Hillary Rodham Clinton, for example, argues that the blanket presumption of children’s incompetency should be set aside in favor of a more discriminating set of assumptions about the variable capacities of certain children at certain ages.\textsuperscript{178} She favors instead a presumption of capacity, the consequence of which would be the imposition of responsibilities on, as well as the extension of rights to, children.\textsuperscript{174} Other proponents analogize the children’s liberation movement to the struggles for racial and gender equality and caution that our paternalistic practices may obscure a true appreciation of children’s competencies.\textsuperscript{176} If we cannot demonstrate that children do lack capacity, then we should treat any interference with their liberty as a serious matter.\textsuperscript{176}

Some theorists argue that certain individual rights theories provide sufficient justification for the extension of rights to children without disputing the validity of capacity as an organizing principle. Victor Worsfold interprets Rawls’s theory of benevolent paternalism to mean that we cannot act protectively towards children until we

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\textsuperscript{178} Rodham, supra note 2, at 508.

\textsuperscript{174} Farson, supra note 2, at 213-27; Firestone, supra note 9, at 81-118; Holt, supra note 2, at 82; Ann Palmeri, \textit{Childhood’s End: Toward the Liberation of Children}, in \textit{WHOSE CHILD?} 105, 112-13 (William Aiken & Hugh LaFollette eds., 1980). See O’Neill, supra note 2, at 461, for a rejection of the contention that children are like other oppressed social groups.

\textsuperscript{176} Palmeri, supra note 175, at 113.
are satisfied that they cannot act for themselves.\textsuperscript{177} This presumption of competency necessarily implies greater liberty for children, although Worsfold never articulates the exact rights which flow from his reconstruction of Rawlsian theory.\textsuperscript{178} Laurence Houlgate, however, interprets Rawls's theory as a restriction on the liberty of children. He counters that Rawls's conception of rights unfairly discriminates against children simply because of their age: Rawls's paternalism provides a sufficient justification to intervene but only in the lives of the incompetent, a distinction, Houlgate insists, that discriminates not between children and adults but between the competent and the incompetent.\textsuperscript{179}

Houlgate's point, that Rawls does not accept such paternalistic limitations on adults and that all but the youngest children are sufficiently rational to make their needs known,\textsuperscript{180} merely reiterates the competency of children; thus, Houlgate rejects legal theories that deny children certain legal rights to liberty because of their supposed incapacities. Houlgate argues that the Kantian conception of moral agency, as well as the Lockean notion of autonomous will, are fatally flawed because they begin from the false premise that children are not moral agents, that they lack an autonomous will.\textsuperscript{181} The assumption is doubly misleading, according to Houlgate, because it not only incorrectly excludes morally developed children from the class of moral agents, but it also precludes their acquisition of rights: as children have certain moral rights anyway (like the right not to be abused), it is false to say that moral agency is a prerequisite to having rights.\textsuperscript{182} Houlgate similarly refutes Mill's utilitarian view of children's rights on the grounds that Mill unduly emphasizes the capacity for rational choice which, Houlgate contends, children have; but Houlgate also lodges a moral objection to the notion that the beneficial effect of restricting children's liberty is a sufficient justification.\textsuperscript{183} Houlgate thus concludes that because paternalistic legal theories provide no additional justification for the

\textsuperscript{177} Worsfold, supra note 28, at 156.
\textsuperscript{178} Id. at 143. Worsfold's interpretation of Rawls has been criticized by both proponents and opponents of children's rights. See, e.g., Laurence D. Houlgate, The Child & the State: A Normative Theory of Juvenile Rights 88 (1980); Hafen, supra note 2, at 652-53.
\textsuperscript{179} Houlgate, supra note 178, at 87-90.
\textsuperscript{180} Id. at 89.
\textsuperscript{181} Id. at 59.
\textsuperscript{182} Id. at 54-55.
\textsuperscript{183} Id. at 81.
restriction of children’s liberties, it is unjust to deny children their rights in the absence of empirical evidence to support that they lack capacity.\footnote{184}{Id. at 102-03.}

**B. Incompetent Children as Rights Holders**

Even if children are incompetent, some theorists argue that children are, in certain limited ways, rights holders. Howard Cohen, for example, dismisses traditional paternalistic arguments based on children’s supposed incapacities; he contends that if children can borrow those competencies necessary to the exercise of rights, then there is no compelling reason to deny them the legal and political liberties accorded adults.\footnote{185}{Cohen, supra note 2, at 57.} Cohen envisions a right not merely as a freedom from noninterference but as a correlative obligation on another to assist the rights holder to take some specified action.\footnote{186}{Id. at 56.} As constructed, Cohen’s theory permits us to obligate competent others on behalf of the incapacitated by charging them with the responsibility of exercising the rights of those who cannot do so for themselves. In the case of children, Cohen envisions a system of child agents to assist and advise children in the exercise of their liberty and, when needed, to provide the competency required to assert their rights.\footnote{187}{Id. at 74-90. For discussions of proxy consent, see \textit{Who Speaks for the Child?: The Problems of Proxy Consent}, supra note 2, and Koocher, supra note 2.}

Under a moral interest theory of rights, however, children’s incompetencies create legally enforceable rights. The premise here is that children have a moral right to be cared for and nurtured because they are incapable of caring for themselves.\footnote{188}{Id. at 102-03.} We can account for that right, the interest theorists contend, only if we characterize children’s rights as a set of goods or needs, in which no one good (like liberty) takes precedence and any need may be overridden by another if they conflict.\footnote{189}{Adler, supra note 188, at 24.} In the case of children, we may order these interests: the more important the need the greater the right.\footnote{190}{Neil MacCormick argues that the characteristic failing of the interest theory is the con-}

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  \item[184] Id. at 102-03.
  \item[185] Cohen, supra note 2, at 57.
  \item[186] Id. at 56.
  \item[187] Id. at 74-90. For discussions of proxy consent, see \textit{Who Speaks for the Child?: The Problems of Proxy Consent}, supra note 2, and Koocher, supra note 2.
  \item[188] Neil MacCormick, \textit{Children’s Rights: A Test-Case for Theories of Right}, 62 Archives Phil. L. & Soc. Phil. 305 (1976). MacCormick claims that this right is “simple and barely contestable” although he does acknowledge that it is not a universally recognized legal right. Id. at 305-06; see Ruth M. Adler, \textit{Taking Juvenile Justice Seriously} (1985); O’Neill, supra note 2.
  \item[189] Adler, supra note 188, at 24.
  \item[190] Neil MacCormick argues that the characteristic failing of the interest theory is the con-
constraints on others with respect to those interests; the duty imposed, therefore, does not preexist the right, and performance of the obligation is not contingent upon the request or waiver of the interest holder. Children thus have certain limited legal rights because they have needs and wants which some adult (usually a parent) must satisfy to ensure their survival.

Other theorists, however, argue that the child’s right to self-determination limits the scope of paternalistic action taken on behalf of the child. Although children need nurturing and protection because of their incompetencies, the decisions made by adults must take into account the fact that children will themselves mature and become responsible adults. For that reason, adults must recognize that the actions they take should not unduly limit the opportunities available to children as they mature. Parents, therefore, must preserve the rights children are not capable of exercising by limiting their parental power. The child’s incapacities thus mandate respect

nection made between needs, interests, and desires. MacCormick, supra note 188, at 311. This suggests that needs are entirely constitutive of the good, but this is a substantive moral question on which an account of rights must remain neutral. Id. MacCormick, therefore, proposes the following formula:

[T]o ascribe to all members of a class C a right to treatment T is to presuppose that T is, in all normal circumstances, a good for every member of C, and that T is a good of such importance that it would be wrong to deny it to or withhold it from any member of C.

Id.

Samuel Stoljar suggests that this “new test seems simple: the more important the good, the greater the right attributed.” SAMUEL STOLJAR. AN ANALYSIS OF RIGHTS 119 (1984). Adler, who is influenced by MacCormick, seems to bolster Stoljar's thesis by identifying those interests of children that take precedence. Basic interests, like the need for food, love, shelter, and clothing take priority over intrinsic interests, like the need for privacy, and can be ordered. ADLER, supra note 188, at 109-10.

191. MacCormick, supra note 188, at 305, 306-07. MacCormick is particularly concerned with the will theory’s account of rights, most clearly articulated by Hart. Id. That theory defines a right as the “recognition of some individual’s choice as being preeminent over the will of others as to a given subject matter in a given relationship.” Id. at 305. MacCormick claims that the will theory cannot account for the child’s right to be cared for because the will theory permits the right holder to waive the right and, clearly, the child cannot waive her right to be nurtured. Id. at 306-07.

Similarly, O’Neill argues that we should think in terms of obligations to children rather than rights because obligations are more easily constructed. O’Neill, supra note 2, at 456. She denies that the rhetoric of rights is persuasive in the context of children because their dependence is not like that of oppressed social groups. Id. at 461-62.


for the child's potentialities and create a right to an open future.  

C. Children's Rights and Relationships

Although most theorists construct children's rights within the traditional framework of individual autonomy and responsibility, a few scholars have deemphasized the significance of competency in rights talk by focusing on individual relationships between children and adults. Feminists object to notions of autonomy and individuality as fundamentally hierarchical and patriarchal because these principles emphasize power and minimalize the interconnectedness of human beings. This underlying foundation has historically operated to exclude and disadvantage certain segments of society, most notably women and people of color. Accordingly, many feminist theorists reject traditional rights discourse in favor of a construct that emphasizes the relationships between and interdependencies of people. As I hope to demonstrate, concepts of relationship and interdependency collapse around notions of need, which, I contend, are simply a less obvious way of talking about capacity. It is that subtlety, however, which compels the more detailed analysis to follow.

Ferdinand Schoeman argues that intimacy between people should be the central concern of any civilized society. In Schoeman’s analysis, children’s incompetencies (whatever they may be) have little relevance because rights are neither morally nor legally paramount. Schoeman contends that the emphasis on the moral relevance of capacity to rights defines relationships in terms of autonomy and the maximization of individual interests but ignores the moral value inherent in personal intimacy. Intimacy, however, has a moral worth independent of rights: by promoting understanding, trust, and shared values, intimacy permits those emotional attachments that children need and rights cannot provide. The state, therefore, should encourage and promote relationships that foster intimacy between children and adults by fashioning rules that limit governmental intrusions to those situations where there is no choice but to intervene.

Alternatively, children may have rights irrespective of their ca-

194. Bishop, supra note 192, at 173-75; Feinberg, supra note 193, at 126.
195. Schoeman, supra note 2, at 287.
196. Id. at 279.
197. Id. at 281-82.
198. Id. at 287.
capacities merely because the community accords rights to them. Samuel Stoljar argues that rights are operative only as claims made by free and equal individuals in a discursive community.\textsuperscript{199} The community, however, must replace its citizens over time to maintain its existence and so relies on its children as a continuing source of new members.\textsuperscript{200} Children lack the capacities normally associated with having rights, so the community simply confers rights on them to safeguard them as potential (competent) members of the community and to insure the community's continued existence.\textsuperscript{201} It is children's potentialities, rather than their limitations, therefore, that make them rights holders.

Schoeman's notion of intimacy in interpersonal relationships and Stoljar's concept of rights conferred by a discursive community have found joint expression in the work of Martha Minow. Minow, like Schoeman, argues that rights rhetoric makes an account of rights for children problematic by unnecessarily excluding interpersonal relationships and emphasizing individual autonomy.\textsuperscript{202} Issues of competency, however, are mere proxies for what lawmakers think children need, political decisions based not on scientific evidence but on some sense of fulfilling society's purposes.\textsuperscript{203} In any event, the notion of the autonomous rights holder is itself a fiction, ignoring as it does the many ways in which adults are dependent on one another.\textsuperscript{204} Drawing on feudal notions of status-based relationships,\textsuperscript{205} Minow thus contends that rights talk may encompass notions of mutual connection and need irrespective of concepts of capacity and individual responsibility.\textsuperscript{206}

Minow seeks to reconstruct rights as part of a communal language embedded in social contexts that yet challenge patterns of authority and power.\textsuperscript{207} By asserting rights for children, claimants

\textsuperscript{199} Stoljar, supra note 190, at 119.
\textsuperscript{200} Id. at 120.
\textsuperscript{201} Id.
\textsuperscript{202} Martha Minow, Rights for the Next Generation: A Feminist Approach to Children's Rights, 9 Harv. Women's L.J. 1, 17-18 (1986) ("Rights could be part of legal arrangements that permit, not to mention promote, relationships for adults — while also combatting hierarchy and fixed assignments of status. This conception remains problematic given a regime of rights that emphasizes individual autonomy to the exclusion of duty and interpersonal connection.").
\textsuperscript{203} Id. at 5.
\textsuperscript{204} Id. ("Legal rules that imply that only independent people may enjoy rights fictionalize the actual grant of rights to people who remain dependent in many ways.").
\textsuperscript{205} Id. at 16.
\textsuperscript{206} Id. at 17-18.
\textsuperscript{207} Martha Minow, Interpreting Rights: An Essay for Robert Cover, 96 Yale L.J. 1860,
acknowledge that children are members of the community who implicitly accept the decisions of that community as to their claims. This type of rights discourse neither creates conflict nor disrupts community since the very act of claiming is, in itself, a communal affirmation. Rights claims, however, do not grant equality but merely equality of attention: in this way, rights claims challenge existing hierarchies by making the community hear different voices. Community and claiming are part of a slow historical process that will invigorate the debate about children’s rights and will, someday, lead to a better life for children through the articulation of ideal relationships between children and adults in the larger community.

Minow’s rights theory is problematic in two respects. First, notwithstanding her criticism of traditional rights discourse, she herself fails to account for the organizing effect of the capacity principle. Her emphasis on relationships presupposes a connection between adults and children that merely underscores children’s dependencies rather than rendering them irrelevant. The fact that Minow finds adults interdependent too, however, misses a fundamental distinction in these two types of relationships, a difference that Minow accepts as crucial. The interconnectedness of adults and children is different in origin; children have no real choice in the creation or continuation of the relationship precisely because they are thought to “need” these relationships, and they need these relationships because they are immature and incompetent. Claiming rights, then, is merely another way to catalogue children’s dependencies and to portray idyllic, rather than ideal, relationships; claiming rights discursively limits rights talk to communal notions of development and nurturing without examining hidden concepts of power and inequality.

Second, if we speak of children’s rights in relationships, we are inevitably caught in that spiral of capacity that diverts us from our task of honestly assessing the power we have over our children. Minow’s theory really is little more than a sophisticated version of the argument that children should have rights because of their incom-

1861 (1987).
208. Id. at 1874-75.
209. Id. at 1874.
210. Id. at 1879-80.
211. Id. at 1876.
petencies — indeed, I am not altogether certain that Minow would dispute this assertion. Minow recognizes that "the question is very truly how to 'reconcile the sight of a battered child with the belief that we choose what happens to us, that we create our own world' . . . ."212 In attempting to reconcile positivist notions of right with the concern for children's welfare, however, Minow comes down squarely on the side of protective rights. "I find something terribly lacking in rights for children that speak only of autonomy rather than need, especially the central need for relationships with adults who are themselves enabled to create settings where children can thrive."213

Ultimately, my difficulty with this line of reasoning stems from my belief that feminist concerns about the importance of connection and social relationships actually mask the power (perhaps the only power) that women have. Ignoring our own hierarchical position in relation to children may prevent us from seeing our acceptance of capacity as a prerequisite to the acquisition of rights. I do not mean to suggest that concerns about connectedness do not have a place in some accounting of rights; after all, they are an integral part of feminist doctrine. But we need to think carefully about the relationships in which women may actually have some power for it is very tempting to claim that our relationships with children are good for them when they are really good for us.214 This may, in fact, disempower children and allow us to obscure racial and gender-based distinctions in their treatment under the guise of doing what is needed.215 At best, talking about social relationships may engender an attitude of benevolent paternalism, but it will not redress problems of hierarchy and status.

212. Id. at 1863 (quoting G. Anzaldúa, 'La Prieta, in This Bridge Called My Back at 198, 208 (C. Moraga & G. Anzaldúa eds., 1981)).

213. Id. at 1910.

214. FIRESTONE, supra note 9, at 118. Firestone argues that children are as oppressed as women, often for the same reasons. She contends that childhood is a myth and that as women we must speak to the oppression of children until they are able to tell their own story. Id. at 81-118. Martha Fineman's work in many ways epitomizes Firestone's concerns about power. For a discussion of how Fineman's forceful arguments about male-oriented custody decisions often overlook the rights and voices of children, see MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY (1991).

To summarize, capacity is relevant not only to determining what rights children have, but also to determining whether they have any rights at all. Thus, when we speak of rights as normative powers to determine others’ obligations, we do not include children as rights holders because they lack the requisite will to bind those others. Autonomy and the capacity for rational choice are pertinent to this analysis precisely because these constructs define the class of rights holders. It is in this sense, then, that we say children do not have a right to vote or a right to contract, but that children have a limited right to an attorney or a right to due process. This distinction has internal logic only if we rely on some concept of variable capacity; and this kind of rights analysis permits us to say that a child cannot participate in the political process because she cannot make the rational choices associated with citizenship but that she is sufficiently competent to assist her lawyer in a delinquency proceeding.

Capacity also has relevance when we speak of children's moral rights. While this kind of rights talk is particularly attractive to children’s rights theorists because it does not automatically exclude children from the class of rights holders, it does define children's interests in terms of their capacities. We thus may argue that all citizens, adults and children alike, have a moral right to economic security. But an interest theory of rights permits us to conditionalize children's interests so that we may speak of children’s greater (or lesser) rights based on their needs and incapacities. While this may not be a bad result or an unintended consequence of moral rights theory, it does not help us answer more difficult questions about children’s rights to emotional, intellectual, and physical integrity since these implicate parental decisions on upbringing and, consequently, variable parental and societal mores. Thus, we cannot say a child has a moral right to be free from spanking or a right to receive her religious instruction of choice because moral rights have less force in a society that prizes individuality and heterogeneity.

III. On the Road to Reconstructing Children’s Rights

I have suggested that we cannot account satisfactorily for children’s rights until we acknowledge the effects of capacity on our rights talk, and I have shown that even the most sophisticated version of rights encompasses principles of children’s competencies. On the one hand, capacity bars children from acquiring political and legal rights because of the connection between having rights and the
ability to exercise them. Given this premise, children's rights theorists resort to a form of legal analysis that resembles little more than a catalogue of children's abilities and developmental capacities. On the other hand, however, is a clear acknowledgment of children as beings worthy of moral respect. But notions of competency organize the ways in which we define, implement, and protect these moral rights.

It is the hierarchical and exclusionary aspects of capacity that limit children's legal, political, and moral rights in ways that validate paternalistic assumptions and practices. When we speak of individual political and legal rights, we do not mean to include children in that category of rights holders because we have accepted capacity as a prerequisite to acquiring these rights and, therefore, believe children are incapable of making the choices associated with the power that rights bestow. Capacity also narrows the nature and scope of children's moral rights to those that children need because of their peculiar vulnerability, helplessness, and powerlessness. And we implement those few rights that children do have in ways that limit the choices children can make by requiring them to seek adult assistance for the enforcement of the right. In many ways, the notion of capacity acts as a blinder when we engage in rights discourse and narrows our field of vision; we cannot broaden our perspective until we acknowledge the ways in which capacity suppresses choice, slights interests, inhibits growth, and excludes children.

The task before us, then, is a seemingly insurmountable one: to reconstruct children's rights within a theory that is at once aware of our rich tradition and yet sensitive to notions of status and power that are deeply embedded in the competency principle. While I do not propose any alternative and coherent theory here, I do think that any future analysis is enriched by now considering the rights claims made by other groups whose members undeniably lack the capacities associated with autonomous rights holders. These theories extend rights to the incompetent, human or otherwise, by creatively redefining the role of capacity in the acquisition of rights. The success of many of these rights claims, however, is somewhat limited for precisely the same reason that children's claims are: capacity organizes and structures their rights talk. But from a feminist perspective, there is value in this failure, for it exposes the many ways in which capacity submerges and excludes the legitimate perspectives not only of children, but also of other groups.
In struggling with the notion of competency, accounts of rights for the incompetent often follow the same patterns evinced in children's rights theories. Animals and mental incompetents thus have the requisite capacity for rights or they have a form of capacity which is adequate to the possession of rights. Henry Salt, for example, contends that rights are based on appeals to justice and the demand for freedom; because animals, like humans, have "individuality, character, and reason," they are entitled to live their lives with freedom and thus have the right to do so.  

Similarly, advocates for the mentally incapacitated argue that the mentally disabled and critically ill retain many of the rights held by competent adults but have simply lost the capacity to exercise them, so some other individual is authorized to act on those rights. Theorists of both schools also redefine the capacity needed for a being to be identified as a rights holder and conclude that human and nonhuman incompetents have this requisite capacity.

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216. HENRY S. SALT, ANIMALS' RIGHTS CONSIDERED IN RELATION TO SOCIAL PROGRESS 16 (1980).


Exactly what standard is to apply when an individual acts on behalf of the mentally incapacitated or critically ill patient is a matter of some dispute. Some favor a substituted judgment standard, which requires the actor to consider the express or implied interests of the patient. See, e.g., Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417 (Mass. 1977). Others advocate a best interests test that, while considering the preferences of the patient, may also take into account other factors like the patient's quality of life. See, e.g., In re Conroy, 486 A.2d 1209, 1232 (N.J. 1985). For a criticism of these tests, see Rebecca S. Dresser & John A. Robertson, Quality of Life and Non-Treatment Decisions for Incompetent Patients, 17 LAW MED. & HEALTH CARE 234 (1989); Nancy K. Rhoden, Litigating Life and Death, 102 HARV. L. REV. 375 (1988).

218. Peter Singer, an animal rights activist, argues that animals have a capacity for suffering and pain and therefore are entitled to have their interests considered equally with those of all other beings who also suffer. PETER SINGER, ANIMAL LIBERATION: A NEW ETHICS FOR OUR TREATMENT OF ANIMALS 9 (1975). Likewise, Kevin Quinn argues that the essential characteristic of humanity is the capacity for interpersonal relationships and that it is this standard which should inform our decisions about life-sustaining treatment. Kevin P. Quinn, Comment, The Best Interests of Incompetent Patients: The Capacity for Interpersonal Relationships as a Standard
Similarly, human and nonhuman incompetents, like children, are thought to have interests which give rise to rights. Joel Feinberg, for example, suggests that children, animals, and certain incompetent human beings have rights for the simple reason that they are all aware. According to Feinberg, if one has awareness, then one also has expectations, desires, and purposes which give rise to identifiable interests.\textsuperscript{219} One who has interests can be benefited, and if one can be benefited, then one has rights.\textsuperscript{220} Reason has nothing to do with the acquisition of rights, merely their exercise, and since children, animals, and incompetents lack reason, their rights may be asserted by some third party with the requisite capacity.\textsuperscript{221} Feinberg acknowledges, however, that if a being is so incapacitated as to lack awareness, then that being also lacks rights.\textsuperscript{222}

Even Minow applies her theory of social relationships to the status of the mentally incapacitated. As with her children's rights theory, Minow contends that we must define the differences in our relationships rather than in traditional terms of right and individual autonomy.\textsuperscript{223} The problem with rights talk, according to Minow, is that it ignores social relationships and permits us to treat unequally those who are different.\textsuperscript{224} If, however, we ground rights in relationships, we force those in power to recognize their interconnectedness and to consider their decisions in that light.\textsuperscript{225} Ironically, Minow's theory of rights for the incompetent is more sympathetic to the notion that relationships mask power and status.

Minow's analysis here is more honest, I think, because she is able to leave behind her own perspectives and to recognize the hierarchical effects of relationships. Unlike her children's rights analysis, in which her own perspective prevents her honest assessment of the relationships between children and adults, Minow's analysis of rights for the mentally incompetent acknowledges that the social relations

\textsuperscript{220} Id.
\textsuperscript{221} Id. at 47-50.
\textsuperscript{222} Id. at 61.
\textsuperscript{224} Id. at 183.
\textsuperscript{225} Id. at 189.
approach recognizes the unavoidability of perspective. Minow correctly asserts that our relationships with each other are revealing for precisely this reason. But even Minow concedes that the social relations approach does little to change “the way people think and act much less actually recognize and deepen the shared humanity of others.” In the final analysis, Minow’s social relations theory does little to redress problems of hierarchy, exclusion, and power.

Theories of rights for human and nonhuman incompetents are important, not as theoretical opportunities to advance the children’s rights debate, but because these accounts reflect the delimiting qualities of capacity. As with children, competency serves to exclude claims of rights for incompetents from our rights discourse as somehow illegitimate. Yet these children’s rights theorists and children’s advocates have systematically failed to challenge the neutrality of the competency principle in their own accounts of rights and thus cannot adequately respond to traditional rights theorists. A postfeminist perspective, however, rejects those movements that validate the hierarchical nature of capacity and allows us to see how competency disadvantages those with different voices. By recognizing the persistence of non-neutral features of traditional rights discourse, we are able to move forward in our task of reconstructing rights not only for children but for other excluded groups as well.

Theories of environmental rights recognize the inherent limitations of the capacity principle and creatively reconstruct the dialectic to account for nonautonomous and insentient rights holders. Known as deep ecology, the movement’s most sophisticated

226. Id. at 183.
227. Id.
228. Id. at 187.
230. Arne Naess is credited with coining the phrase “deep ecology.” According to Naess, deep ecology has seven principles: (1) acceptance of man as merely one of many organisms in the environment; (2) the equal right of all organisms to live and blossom; (3) the enhancing potential of diversity and symbiosis; (4) the need for an anti-class posture; (5) the dangers of pollution and resource depletion; (6) the value of ecological complexity; and (7) the liberating influences of decentralization and local autonomy on environmental policy. Arne Naess, The Shallow and the Deep, Long-Range Ecology Movement. A Summary, 16 Inquiry 95, 95-98 (1973).
proponents advocate a nonanthropocentric and ecofeminist perspective that is vigorously antihierarchical. If we no longer locate

231. Environmental rights theories fall generally into two schools: one emphasizes the rights of humanity to a clean environment; the other contends that the environment itself is the rights holder. Feinberg, for example, acknowledges that plants have no interests and therefore cannot have rights but notes that we have sufficient interests in the environment to create rights in us. Feinberg, supra note 219, at 52-54. William Blackstone argues that access to a livable environment is a human right which should become an enforceable legal right. William T. Blackstone, Ethics and Ecology, in PHILOSOPHY AND ENVIRONMENTAL CRISIS, supra note 219, at 16, 30-33. Joseph Sax articulates a public trust doctrine in which the right of each individual to be free from environmental hazards (or to have access to environmental benefits) is a legal right against governmental action that threatens to harm the environment. Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 MICH. L. REV. 471 (1979).

Those who seek to locate rights within the environment itself further divide along the issue of anthropocentrism. Christopher Stone typifies those theorists who propose an anthropocentric view of the environment. Stone proposes that the natural environment should be given legal rights which may be enforced by a human guardian. Christopher P. Stone, Should Trees Have Standing? — Toward Legal Rights for Natural Objects, 45 S. CAL. L. REV. 450 (1972). Non-anthropocentric thinkers, however, reject a human centered, rights-based framework in favor of a holistic gestalt of person-in-nature. See, e.g., Bill Devall, The Deep Ecology Movement, 20 NAT. RESOURCES J. 299 (1980). Aldo Leopold was one of the first to articulate a land ethic premised on humanity as merely one member of a biotic team. ALDO LEOPOLD, A SAND COUNTY ALMANAC WITH OTHER ESSAYS ON CONSERVATION FROM ROUND RIVER 219-20 (1966); see also Richard Delgado, Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform, 44 VAND. L. REV. 1209 (1991) (dismissing the public trust doctrine as defective and drawing the discussion away from three previously articulated approaches to environmental rights: earth-centered ethics, Native American thought, and ecofeminism); Calvin Martin, The American Indian as Miscast Ecologist, in ECOLOGICAL CONSCIOUSNESS 137 (Robert C. Schultz & J. Donald Hughes eds., 1981) (asserting that Native Americans cannot teach us wise land use because their interpretation of the world is radically different from our Western cosmology); James D. Whitehill, Ecological Consciousness and Values: Japanese Perspectives, in ECOLOGICAL CONSCIOUSNESS, supra, at 165 (stating that the Zen ethic of simplicity and austerity allows one to see the mutual dependency of life); Michael E. Zimmerman, The Critique of Natural Rights and the Search for a Non-Anthropocentric Basis for Moral Behavior, 19 J. VALUE INQUIRY 43 (1985) (arguing that until people are committed to protecting human rights, it is unlikely that rights will be extended to nonhumans and much less likely that anthropocentrism will be overcome).

232. See Karen J. Warren, The Power and Promise of Ecological Feminism, 12 ENVTL. ETHICS 125, 126 (1990). Warren states: "The promise and power of ecological feminism is that it provides a distinctive framework for reconceiving feminism and for developing an environmental ethic which takes seriously connections between the domination of women and the domination of nature." Id.; see also Jim Cheney, Eco-Feminism and Deep Ecology, 9 ENVTL. ETHICS 115 (1987) (arguing that attempts to overcome human alienation from nature fail because they are unable to overcome the masculine sense of self and ethical theories that accompany the sense of self); Marti Kheel, The Liberation of Nature: A Circular Affair, 7 ENVTL. ETHICS 135 (1985) (discussing how feminist notions of holism reveal dualism in environmental thought); Ariel Kay Salleh, Deeper Than Deep Ecology: The Eco-Feminist Connection, 6 ENVTL. ETHICS 339 (1984) (criticizing the concept of deep ecology as articulated by Naess and Devall).

233. Ecofeminists argue that value-hierarchical, patriarchal thinking creates an oppressive conceptual framework in which women and nature are subordinated to men's interests. Ecofeminism rejects any way of thinking about nature that reflects values of domination and embraces notions of relationships that celebrate and maintain differences. Warren, supra note 232, at 141-42.
ourselves pyramidally but vertically as merely members in a larger community of others with whom we are connected, we can see the hierarchical and essentially patriarchal limitations of anthropocentrism. In this reconstruction, capacity has no role because rights and interests are themselves mere fictions that mask our anthropocentric view of the world and our relationship to the environment. We are left, then, with an inherently transformative and holistic construct: we are one within a universe larger than humanity, a single organism in which harm to a part damages the whole.

It is the transformative aspect of deep ecology that, I think, has the most to offer to the debate about the rights of children. Although ecofeminism is acutely aware of the parallels between the domination of women and the abuses to the environment, in the final analysis, the doctrine falls back on notions of relationships and feminist principles of caring and loving that, in themselves, have hierarchical consequences, particularly when we speak of children. I do not mean to suggest that there is no value in exposing patriarchal structures for I recognize their subversive influences, but the emphasis on difference in feminist thought merely creates new hierarchies that negatively affect children. The liberating effects of nonanthropocentrism permit us to discard capacity and status and to transform our rights talk by seeing ourselves, not in terms of relationships but as existing within each other. It is the task of the postfeminist to find this unity, to recognize being as significant, in order for us to reconceive rights for children.

non-anthropocentric view also rejects hierarchy and articulates a view of humanity as in nature, not above or outside it. Devall, supra note 231, at 303.


235. Zimmerman, supra note 231, at 50. Despite the limitations of rights, Zimmerman finds them a “useful fiction for changing how human beings relate to each other.” Id.

236. Leopold, supra note 231; Devall, supra note 231. Ecofeminists warn against a “unity of sameness” in which like beings are treated alike and differences are erased. Ecofeminists envision a “loving perception” which presupposes and maintains differences between beings from which a “tapestry of voices” emerges. Warren, supra note 232, at 137-39.

237. See supra note 232.

238. Michael Zimmerman, Feminism, Deep Ecology, and Environmental Ethics, 9 Envtl. Ethics 21, 41-42 (1987). Despite Zimmerman’s criticisms of ecofeminism, he sees many similarities between deep ecology and ecofeminism. He contends that deep ecology should consider the insights of ecofeminists who link male-centered domination of nature with the domination of women, but he seems to suggest that ecofeminists should put aside their differences with deep ecologists in order to move forward in the development of an environmental ethic. Id.
CONCLUSION

I believe it is essential for us to recognize the centrality of capacity as an organizing principle in our rights talk. Our rights tradition, which emphasizes autonomy and individuality, perpetuates hierarchy and exclusion by limiting the class of rights holders to those with capacity. Social contractarians, utilitarians, and legal positivists exclude children entirely from the class of rights holders because of their incapacies. Natural law theorists, while recognizing that children are moral beings, construct protectionist rights for children premised on children's needs and wants. Even feminist theories which emphasize relationships rather than rights envision children as incompetent beings requiring protection and nurturing.

It is these effects of capacity that exclude children and that order rights based on the acquisition of certain competencies. As long as we premise rights upon ability and view children as undeveloped or underdeveloped beings evolving into adulthood, we can discuss individual rights only in terms of hierarchy and exclusion. To speak of children's rights, however, means to hear children's voices without the filtering influence of our preconceived notions about children's incompetencies. To hear children's voices requires us to look beyond our status-based relationships and to set aside the power that we have. We need to acknowledge that rights have value because of their power to eliminate hierarchy and exclusion, but as long as capacity plays a role in defining rights, we minimize value. Reconceiving rights means reconceiving our sameness; this we can accomplish only if we cast capacity aside as an organizing principle in our rights discourse.

The question then turns on whether we can speak of individual rights without some reference to capacity. It may simply be impossible to construct rights without this context, for rights may not have the force to challenge hierarchy. Certainly, if we are to acknowledge a valid theory of children's rights, one that accounts for power and status, then our rights talk must change dramatically. It is not entirely clear that such change is possible within our legal tradition although the implicit value of rights mandates that we must try. In any event, I do think we must ask these questions if we are able to walk down that road to reconceiving children's rights.