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CHILDREN'S RIGHTS AND THE PROBLEM OF EQUAL RESPECT

Lee E. Teitelbaum*

I. INTRODUCTION

Few areas present more difficult problems than does the definition of the rights of children and parents and the authority of the state regarding their conduct. Conceptualizations and organizations that serve perfectly well in talking about other areas of human rights break down swiftly and badly in this context. The difficulty of applying traditional theory to family relationships led Professor Fried to observe that "[c]ertain moral phenomena are peculiarly elusive," 1 and most other writings in the area would at least implicitly confirm his assessment of the rights of family members. 2 American courts, in particular the Supreme Court, have also recognized the complexity presented by the legal position of children and, consequently, have routinely disclaimed any effort to systematically "consider the impact of...constitutional [guarantees] upon the totality of the relationship of the minor and the state." 3

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1. CHARLES FRIED, RIGHT AND WRONG 150 (1978). This observation was directed more broadly than the issue under consideration in this Article. The question of the moral justification for the family's role in unequal distributions of resources to its children, for example, has been a recurring source of difficulty.

2. See JOHN RAWLS, A THEORY OF JUSTICE 511 (1971) (discussing the principle of fair opportunity and how the family leads to unequal chances between individuals); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND THE EQUALITY 229 (1983) (noting that "[t]he family is a sphere of special relationships").

The question of the rights of children and parents is taken up by a number of philosophers and legal theoreticians: John Locke, John Rawls, Bruce Ackerman, David Richards, Gerald Dworkin, and Amy Gutmann, among them, but usually in connection with responsibility for education and, in some cases, incompletely. This Article seeks to identify some of the conditions that create the well-recognized problems encountered in analyses of those rights and to explore in some detail one aspect of those problems. The primary focus will be on a set of principles generally accepted by liberal theories of rights which require (1) that the fundamental human right is a right to equal respect;4 (2) that to be a rights holder means that one is entitled to the same respect as every other rights holder;5 and (3) accordingly, that capacity to claim rights either exists fully or not at all.6

Although the primary concern of this Article is with legal formulations of rights, those formulations draw on more general moral and social discourse. Courts do not, and perhaps they should not, formally adopt one or another moral theory. However, courts cannot avoid thinking in terms of the principal theories in which they have been educated and which ground most popular discourse about the rights and entitlements of persons.

Part II of this Article reviews traditional rights discourse in liberal theory generally, and as applied to children. Part III examines the variety of legal settings in which children are said to have rights and concludes that none of those settings recognizes rights in the sense supposed by traditional rights theory. Part IV suggests that a theory of rights which is sensible in connection with minors cannot rest on a requirement of equal respect, and offers a justification for thinking about the rights as a developmental rather than a categorical phenomenon.

This Article is not concerned with developing a theory of rights generally, or with a general critique of liberal theory. There may be points that are capable of broader application, but this article is concerned only with liberal rights theory insofar as it applies to discussions of the rights of children, and at least implicitly grounds the formation of legal doctrines affecting children's rights.

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4. See infra notes 7-10.
5. See infra notes 11-18.
II. TRADITIONAL RIGHTS THEORIES AND CHILDREN

For liberal theorists, and often in law, rights are a reflection of a basic human right to equal respect in making decisions about one's life; a theory which, it has been argued, the Constitution is meant to express. This approach begins from the assumption that human beings have a special capacity to reason and engage in deliberative decision-making. They can evaluate arguments and form plans according to their rational acceptance or rejection of various possibilities. It is this capacity in each of us that is entitled to respect.

It is further assumed that each of us is entitled not only to respect but to the same respect due others. The principle of equal respect is variously articulated according to the context of the moral theory in which it is situated but it is also associated with the notion of autonomy. Both are found in Locke's propositions that "all men by nature are equal" and of the "equal right, that every man hath, to his natural freedom, without being subjected to the will or authority of any other man." H. L. A. Hart states 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." This right means that in the absence of certain conditions any human being capable of choice has the liberty to undertake any action, which does not coerce, restrain, or aim to injure others, and has a right to forbearance by all others from the use of coercion or restraint against him except as necessary to prevent the imposition of coercion or restraint. Ronald Dworkin rests his theory on principles of human dignity and political equality, such that if some men have freedom of decision irrespective of the general good, all men must have the same freedom.

Even theories of rights that do not separate claims of rights from the creation of social good (that is, utilitarian approaches) strongly emphasize the importance of liberty and the capacity for self-expression. To take...
the most familiar instance, Mill, whose views generally follow consequentialist principles, takes as the central purpose of his celebrated essay, *On Liberty*, the assertion of

one very simple principle . . . . 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. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so . . . .”

While so strong a commitment to individual choice is notoriously difficult to explain within a utilitarian framework, Mill’s own position is that human nature is such that, because of the need for self-expression that follows upon the capacity for thought and reflection, men and women simply *cannot* be made happier by external restrictions on their development and spontaneity.

Several characteristics of these approaches to rights bear emphasis. Rights based on capacity, 18 or moral agency, 19 or ability to engage in neutral dialogue, 20 seem ultimately to be understood as categorical. The entitlement to respect is founded on the ability to think rationally, form plans, and make choices. 21 If an individual possesses this capacity or agency, he or she is entitled to respect for choices about life, and not just to respect in some degree, but to equal respect that is to the same degree of respect accorded to all other rights holders. 22 Absence of this capacity is likewise categorical, in most views. If a rights holder is entitled to the same respect as all others, then one either has the same rights as others or has none of those rights. You may have other rights, if the society decides to give them to you. Animals are protected from cruelty, infants from starvation; but neither animals nor infants have rights to self-determination. 23

A second characteristic of the traditional understanding of rights is its political function. “Rights” have sometimes been described as a militant concept. 24 Standard rights theories based on a respect for the choices

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17. *Id.* at 483-84.
19. See Richards, *supra* note 7, at 6-7 (discussing the theories of John Locke).
20. See *Bruce A. Ackerman, Social Justice in the Liberal State* 71 (1980).
22. See *id.* at 9.
23. See *Ackerman, supra* note 21, at 70-75.
24. See *Cohen, supra* note 18, at 17; see also *Dworkin, supra* note 15, at 198-99
of others create a “space” around the individual. To have a right to do something means at least that no one may intrude on your choice except in very limited circumstances. In fact, if I am a rights holder or a citizen, no one else has any general claim regarding my conduct, except when that conduct invades the space of the other, through coercion or injury. We are all freestanding, independent actors except to the extent we agree to have relationships with others.

It is not surprising that these formulations of rights theory find little place for talk about children. The right to equal respect or to liberty as a recognition of the special character of mankind’s capacity for reason is only thought appropriate for those who possess the capacity for rational choice: a criterion commonly held to exclude children. Mill’s position is again the most familiar. Immediately after his articulation of the famous liberty principle, Mill continues:

> 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 . . . . 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 . . . . Liberty, as a principle, has no application to any state of things anterior to the time when mankind has become capable of being improved by free and equal discussion.

Locke, likewise, observed that children were an exception to his general proposition that “all men by nature are equal.” The human mind, at birth, is a “white [p]aper, void of all [c]haracters, without any [i]deas.” That paper will be inscribed by experience over time but, because children lack reason in at least their early years, parents, he said, “have a sort of rule and jurisdiction over them,” although temporary and (perhaps) proportionate to the child’s level of reason. H. L. A. Hart quite explicitly observed that the principle of equal right to freedom does not extend to animals or babies; to do so, in Hart’s view, makes an idle use of the expression “a right.” Bruce Ackerman observes that “[c]hildren are born

(discussing the idea of political equality).

25. See COHEN, supra note 18, at 19.
26. See ARCHARD, supra note 6, at 7 (discussing the theories of John Locke).
27. MILL, supra note 16, at 484.
28. LOCKE, supra note 11, § 54, at 31.
29. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 104 (Peter H. Nidditch ed., 1975) (emphasis omitted). For a discussion of Locke’s theories regarding children, see ARCHARD, supra note 6, at 1-12.
30. LOCKE, supra note 11, § 55, at 31.
31. See id.
32. See Hart, supra note 13, at 57-58.
radically incomplete." Citizenship—Ackerman's version of moral agency or capacity for independence—is a political and not a biological theory, and requires a capacity for dialogic performance comprising an understanding that claims to goods or power can be justified only in certain ways. Amy Gutmann observes more simply that "it would be absurd to apply [the] principle of equal freedom to children."

III. CHILDREN'S RIGHTS IN LEGAL DOCTRINE

It will occur to those familiar with Supreme Court doctrine and other bodies of law dealing with the rights of children that, whatever may be true for moral theorists, courts and legislatures have been quite ready to accept children as rights holders. Legislatures have created two kinds of rights especially applicable to children. All children are entitled to a variety of what might be called "welfare rights," such as to nutrition, food, shelter, education and the like. State laws also provide for statutory rights, where older children may, even before the age of majority, marry, secure a driver's license, and seek gainful employment. Courts have recognized constitutionally based rights for children in virtually every domain where such rights have been recognized for adults.

Recognition or creation of these various rights for children seems on its face inconsistent with a general claim that children cannot appropriately be regarded as rights holders. The inconsistency may lie in either of two directions. It may be that legal doctrines maintain the theoretical notion of rights described above but treat children as possessing the same rights as adults. Alternatively, legal doctrines may modify the notion of rights themselves in their application to young persons. A review of these bodies of law dealing with minors suggests that the former hypothesis cannot be supported.

A. Welfare Rights

The most pervasively recognized rights of children are positive rights, rights to receive social goods, which find expression in the laws of

33. ACKERMAN, supra note 20, at 139.
34. See id. at 72.
36. See infra Part III.A.
37. See infra Part III.B.
38. See infra Part III.C.
39. See Richards, supra note 7, at 20-23.
40. See id. at 23-28.
every state and in international declarations of human rights. Grants of positive rights are recognized grudgingly and with some suspicion in connection with adults, but are readily accepted in relation to young people. We are quite accustomed to talk of the rights of children to education, nutrition, shelter, and other social and personal goods. For example, the United National Declaration of the Rights of the Child ("United National Declaration") contains the following principle:

The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture, and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgment, and his sense of moral and social responsibility, and to become a useful member of society.\textsuperscript{41}

The right reflected in the United National Declaration, like those to shelter and nutrition, supposes an obligation on the part of others—parents or the state—to supply basic social goods.\textsuperscript{42} It is a positive right in the sense used by Salmond or Hohfeld: that is, an interest with respect to which there exists a duty imposed upon some other person,\textsuperscript{43} and has often enough been recognized, although not always enthusiastically, in Supreme Court decisions.\textsuperscript{44}

Recognition of these positive rights can be justified on various theoretical grounds. For social contractarians, they derive from a hypothetical social contract, as those things that every rational person would consider essential to have as a child. Even without the contractarian framework, a liberal may consider some such entitlements to be essential to achieving the capacity for rational choice on which membership in a liberal society is founded. Utilitarians can justify a broader range of such rights, as long as it appears that production of educated healthy children will maximize human happiness.

Adults have relatively few positive rights. Medicaid would illustrate the exceptional situation.\textsuperscript{45} But even where positive rights are

\begin{itemize}
\item \textsuperscript{41} G.A. Res. 1386, GAOR, 14th Sess., Princ. 7 (1959).
\item \textsuperscript{42} See id. preamble, Princ. 6.
\item \textsuperscript{43} See Wesley Newcomb Hohfeld, Fundamental Legal Conceptions 36-38 (Walter Wheeler Cook ed., 1923); John William Salmond, Salmond on Jurisprudence 261 (Glaville Williams ed., 11th ed. 1957).
\item \textsuperscript{44} See Goss v. Lopez, 419 U.S. 565 (1975), for example, where the court enforced a right of access to public schools when such a right was created by state law. See id. at 573-74. More directly, the Court has also held that the state is obliged to assure that decisions regarding abortion by even immature minors, and notification of their parents, will serve the child's "best interests." See Bellotti v. Baird, 443 U.S. 622, 640 (1979); see Planned Parenthood v. Danforth, 428 U.S. 52, 75 (1976).
\item \textsuperscript{45} See Cohen, supra note 18, at 24.
\end{itemize}
available to adults, there is a very important difference between the posture of positive rights for adults and those rights for children. The adult holder of positive rights retains his autonomy with respect to those rights—he or she may take advantage of Medicaid, or may choose not to do so. By contrast, the United National Declaration does not end with creation of a governmental duty to provide education. It also presumes a duty on the child to accept the benefits of that right. Education is to be "compulsory" quite as much as it is to be free.

Claims of this sort, which I have called "integrative rights" elsewhere, are evidently based on principles concerning the needs rather than the preferences or choices of children, at the point at which the decision is made. A young person's choice to forebear from education, even with thanks, will not be accorded respect but rather will result in an incorrigibility petition to deprive her of physical liberty. A neglected child does not have the negative right to decline becoming a ward of the court and remain in an inadequate home, however dearly she may wish to do so. There is, in short, no question of equal respect for actual choices in this sense of rights.

Nor do these integrative rights express the individualism conveyed by liberty interests. Rights in the latter sense create a social and political distance between the holder and all others, including the state. Integrative rights point in precisely the opposite direction. As the United Nations Declaration itself makes plain, the thrust of the right to education is to become a useful member of the society. American juvenile court law has said exactly the same thing about the coercive intervention of that tribunal: the assumption of jurisdiction over delinquent and neglected children was explained as an effort by the court to place children on the road to "good, sound, adult citizenship" when their parents could not or would not do so.

B. Other Statutory Rights for Children

State positive laws also typically recognize certain rights for older minors that are not based on welfare interests. These laws permit older

46. See G.A. Res., supra note 41, preamble, Princ. 7 (stating that children are "entitled" to an education).
50. See id.
children to engage in activities that are generally permitted for adults and generally prohibited for minors. It is sometimes argued that these statutory legal entitlements demonstrate that legal rules do not follow the categorical approach to competency supposed by traditional rights theory. There is, it is said, no single age of majority but rather multiple ages: twenty-one for purchase of alcohol; eighteen for voting and purchasing tobacco; sixteen for most kinds of employment, for marriage, and eligibility for the death sentence; sixteen or even fourteen or fifteen for permission to drive; and "maturity" for deciding whether to terminate a pregnancy. These variations in ages of legal capacity are taken to suggest that "rights" are not all-or-nothing propositions as traditional theory supposes, but rather that legal practice and perhaps legal theory expects that different rights require different competencies.

While the argument below will suggest the desirability of considering competence to be more continuous than categorical, these legislative distinctions do not demonstrate that such a theory has already been accepted in practice. For one thing, these age limits do not generally reflect legislative conclusions about the relationship of levels of competence to

51. See, e.g., ARCHARD, supra note 6, at 85; MARTIN R. GARDNER, UNDERSTANDING JUVENILE LAW 4-5 (1997).
52. See LEGAL RIGHTS OF CHILDREN § 14.09, at 620 (Donald T. Kramer ed., 2d ed. 1994). The sale of alcohol to persons below the age of 21 is now prohibited in every state, largely because adoption of a lower drinking age threatens loss of federal highway construction funds. See id.
53. See U.S. CONST. amend. XXVI, 1.
54. See LEGAL RIGHTS OF CHILDREN, supra note 52, § 14.09, at 623 (noting that a few states set the minimum legal age for purchasing tobacco at 15 or 16 years).
55. See Andrea Giampetro-Meyer & Timothy S. Brown, Protecting Society From Teenage Greed: A Proposal for Revising the Ages, Hours and Nature of Child Labor in America, 25 AKRON L. REV. 547, 557 (1992). Most states allow minors at age 16 to work for industrial plants and/or to work during school hours. "Once a child reaches age 16, federal and state regulators place few restrictions on their labor." Id. at 558.
56. See generally LEGAL RIGHTS OF CHILDREN, supra note 52, § 14.04, at 592-96 (discussing restrictions on the legal rights of adolescents with regard to marriage). The minimum age for marrying with parental consent is 16 in most states, and as low as 14 in some states. See id. at 594. For the rationales of age restrictions on marriage, see Lynn D. Wardle, Rethinking Marital Age Restrictions, 22 J. FAM. L. 1 (1983).
57. See Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (concluding that the Eighth and Fourteenth Amendments prohibit the death penalty for children younger than 16 at the time of their offense); Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (finding that the imposition of the death penalty on offenders who were 16 and 17 at the time of the offense did not violate the Eighth Amendment).
58. See LEGAL RIGHTS OF CHILDREN, supra note 52, § 14.06, at 601-04.
59. See generally Planned Parenthood v. Danforth, 428 U.S. 52, 72-75 (1976) (striking down a Missouri statute requiring the consent of a parent or guardian as a condition for an unmarried minor to obtain an abortion).
60. See ARCHARD, supra note 6, at 85.
This is most dramatically true of the age at which people can buy alcoholic beverages. Many states lowered their drinking ages from twenty-one to eighteen after the adoption of the Twenty-sixth Amendment lowering the voting age. Currently, the drinking age in all states is twenty-one as the result of federal legislation requiring that they do so in order to qualify for highway construction funds. The initial reduction in the drinking age, if it had anything to do with the competence of eighteen-year-olds, arose from their supposed competence to vote rather than to use alcohol responsibly. The later increase in the drinking age followed not from a state legislative finding that eighteen-year-olds were after all incompetent to drink responsibly, but from a Congressional decision to that effect implemented by conditioning eligibility for highway funding on state acquiescence in that judgment. Nor is it clear that either conclusion would be supported by data about capacity to use alcohol responsibly in general or even about the specific risk that eighteen-year-olds present a greater risk in driving vehicles. Studies do show that lowering the drinking age increased fatalities somewhat among younger drivers. However, they also show that traffic fatalities among persons under twenty-one were lower than those for young adults between twenty-one and twenty-five. There was, however, no movement by those who wished re-election to raise the drinking age to twenty-five.

Even the adoption of the Twenty-sixth Amendment, lowering the age for voting in federal elections from twenty-one to eighteen, is hard to explain entirely as a judgment about adolescent competence to exercise the franchise. Although much of the debate took that turn, it has the flavor of a second-order justification for an essentially political decision that drafting eighteen-year-olds to fight in an unpopular war about which they had no right to vote was unacceptable or at least unappealing.

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61. See id. at 58-61.
62. See, e.g., FRANKLIN E. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE 3-4 (1982) (giving the example of Michigan, which lowered its drinking age from 21 to 18 after the Twenty-sixth Amendment was ratified).
63. See LEGAL RIGHTS OF CHILDREN, supra note 52, § 14.09, at 620.
65. See ZIMRING, supra note 62, at 4-5.
66. See id.
67. See id.
68. Cf. id. at 5-6 (questioning the rationale behind the drinking age and why it was not raised to 25).
69. See WENDELL W. CULTICE, YOUTH'S BATTLE FOR THE BALLOT: A HISTORY OF VOTING AGE IN AMERICA 234 (1992). Cultice not only emphasizes the power of the rallying cry, "old enough to fight, old enough to vote," he also emphasizes the need to justify lowering the voting age by reference to the maturity of 18 year olds. See id. at 38.
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It is, moreover, important that most of these age-variant laws do not create rights in the usual adult sense. While a sixteen-year-old may marry in most states, he or she can only do so with parental permission.70 By the same token, a minor seeking a drivers permit typically must have the consent of a parent or guardian.71 And while a minor may be entitled to decide, or have a court decide, whether termination of a pregnancy is in her best interests, her parents are entitled to receive notice and must consent to that procedure unless a court decides that requiring parental notification or consent would be harmful to the child.72 To vest such authority with parents obviously contradicts the claim that legislatures have determined that minors are themselves competent to make decisions about these activities. Rather than create spheres of autonomy for minors, these laws transfer responsibility for decisions about competence with respect to these activities from public to private authority—here, the authority of parents.

It may be suggested that since a seventeen-year-old has more of a right to marry or drive than a fifteen-year-old, rights are not all-or-nothing propositions, at least to that extent.73 In one sense, this is true because older adolescents may be able to do something that is categorically prohibited to their younger siblings. In another sense, however, older adolescents who wish to marry or drive are less subject to a regime of rights than their younger brothers and sisters. One feature of rights, as we have seen, is equal respect for choices. All fifteen-year-olds are treated equally by the law, although they are equally denied the right to marry. However, all seventeen-year-olds are not treated equally. Some seventeen-year-olds who wish to marry will be allowed to do so by their parents, others will not. Whether they will be allowed to do so depends entirely on the private views of their parents rather than any public judgment about capacity. There is, moreover, no assurance that parents will act in a consistent fashion regarding that decision or that they will employ any consistent criterion in making that decision. Most particularly, there is no requirement that parental judgments be made solely on the basis of assessments of the child's relative maturity. One set of parents may approve of youthful marriages; another may not. A second set of parents may want to encourage the independence that goes with driving a car; another may see

70. See LEGAL RIGHTS OF CHILDREN, supra note 52, § 14.04, at 594.
71. See id. § 14.06, at 602.
73. See ARCHARD, supra note 6, at 86.
only risks of bad associations and dangerous conduct. A third set of parents may not wish or be able to pay the greater insurance premiums that come with a youthful driver, and a fourth set may want to withhold consent until the child improves her grades or church attendance.

With respect to these decisions and the reasons for them, older minors are subject not to rules of general applicability, but to the personal domination of their parents. However important and socially acceptable that domination may be in this setting, a regime in which authority may be exercised on the basis of the private values and beliefs of the person exercising authority cannot be reconciled with liberal rights theory. To take only the most familiar example, the vice of vague rules is that they allow officials an almost unlimited power to grant or deny freedoms, and "the very idea that one man may be compelled to hold his life, or the means of living. . . at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." Subjection to the "mere will" of another captures, however, the kind of authority held by parents of minors above some age over decisions to marry or drive, and for many other purposes as well.

C. Supreme Court Doctrine and Children's Rights

The strongest declarations of minors' rights, and the classes of rights that seem most indistinguishable from rights in traditional political and moral theory, are found in decisions of the United States Supreme Court. The Court has by this point recognized rights claims for children in many areas where autonomy-based rights have been recognized for adults. The core meaning of liberty—freedom from physical confinement—was held applicable to children in

*In re Gault* and reaffirmed in

*Breed v. Jones.*

*Gault* extended the privilege against self-incrimination to minors, not solely from concern for untrustworthy confessions but because children are entitled to decide whether and how they will participate in proceedings affecting their liberty.


75. 387 U.S. 1, 27-31 (1967).

76. 421 U.S. 519 (1975). "[C]ommitment [of a minor to an industrial school] is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil.'" *Id.* at 530 (quoting *In re Gault,* 387 U.S. at 50). "Nor does the fact 'that the purpose of the commitment is rehabilitative and not punitive . . . change its nature . . . Regardless of the purposes for which the incarceration is imposed, the fact remains that it is incarceration.'" *Id.* at 530 n.12 (quoting *Fain v. Duff,* 488 F.2d 218, 225).

77. *See In re Gault,* 387 U.S. at 47.
First Amendment rights to political expression have also been recognized for very young children. Tinker v. Des Moines Independent Community School District,\(^{78}\) for example, held that the suspension of students (in that case ages eight, eleven, thirteen, fifteen and sixteen),\(^{79}\) for wearing armbands to protest the Vietnam War infringed on their right "to freedom of expression of their views."\(^{80}\) The right of children to receive information as well as to express themselves was recognized in Erznoznik v. City of Jacksonville,\(^{81}\) where the Court held:

Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors.\(^{82}\)

Children, of course, have been held to possess some interest in privacy, reflected in rights of access to contraception and abortion.\(^{83}\) The Court has struck down categorical legislative rules requiring the consent of a parent of an unmarried minor as a condition to obtaining an abortion\(^{84}\) and prohibiting the distribution of contraceptives to minors.\(^{85}\)

When claimed by adults, these rights are typically understood as reflecting values of autonomy and choice. They are "negative rights"—rights not to be controlled by others in our choice about the good life. Edwin Baker, for example, argues that this view provides the most coherent theory of the First Amendment. "The liberty model holds that the free speech clause protects not a marketplace but rather an arena of in-

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The roots of the privilege [against self-incrimination] . . . tap the basic stream of religious and political principle because the privilege reflects the limits of the individual's attornment to the state and—in a philosophical sense—insists upon the equality of the individual and the state . . . . One of its purposes is to prevent the state, whether by force or by psychological domination, from overcoming the mind and will of the person under investigation and depriving him of the freedom to decide whether to assist the state in securing his conviction.

*Id.*

79. *See id.* at 504, 516.
80. *Id.* at 511.
81. 422 U.S. 205 (1975).
82. *Id.* at 213-14.
85. *See* Carey, 431 U.S. at 694.
dividual liberty from certain types of governmental restrictions. Speech is protected not as a means to a collective good but because of the value of speech conduct to the individual. 86

Reproductive rights are, perhaps even more clearly, founded on recognition of the value of choice.

"Although '[t]he Constitution does not explicitly mention any right of privacy,' the Court has recognized that one aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment is 'a right of personal privacy, or a guarantee of certain areas or zones of privacy.' 87 The "right of personal privacy includes 'the interest in independence in making certain kinds of important decisions.'" 88 The decision over whether or not to have a child is "at the very heart of this cluster of constitutionally protected choices." 89 Further, "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." 90

The privilege against self-incrimination, in the adult context, also can be understood in terms of a zone of autonomy. The privilege is not solely or even primarily concerned with the accuracy of statements by those facing criminal prosecution, but rather with assuring that suspects may freely decide whether to cooperate in a proceeding affecting their liberty. 91

The above cases do seem to suggest that children are generally entitled to rights in the strong sense enjoyed by adults: to claims of self-determination and self-realization against all others, including the state. But how can the Supreme Court have held that children have autonomy-based rights in the midst of a legal setting that supposes that children are obliged to accept parental and governmental control regarding health, education, housing, and the like? Part of the answer to this dilemma is that, although rights to speech, procreation and the like are justified for adults in terms of their capacity for rational choice, the extension of these

86. C. Edwin Baker, Scope of the First Amendment Freedom of Speech, 25 UCLA L. Rev. 964, 966 (1978); see also Thomas I. Emerson, The System of Freedom of Expression 6 (1970) (discussing the values and functions of a system of freedom of expression in a democratic society); Thomas Scanlon, A Theory of Freedom of Expression, 1 Phil. & Pub. Aff. 204, 215-22 (1972) (defending "the Millian Principle by showing it to be a consequence of the view that the powers of a state are limited to those that citizens could recognize while still regarding themselves as equal, autonomous, rational agents").
88. Id. (quoting Whalen v. Roe, 429 U.S. 589, 599-600 (1977)).
89. Id. at 685.
90. Id. (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)).
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rights to minors has never been explained on grounds assuming the same capacity for choice. In fact, discussion of the competence of children rarely appears in decisions extending procedural protection in delinquency cases, or even in decisions regarding privacy and First Amendment interests claimed by or on behalf of children. The Court has, on the one hand, recognized that minors enjoy some degree of liberty interest in virtually all areas where such interests are recognized for adults. On the other hand, these liberty interests have not usually been explained on grounds of adult-like capacity for choice.

Rather, the Court's analysis has begun textually with the observation that the Constitution talks of "persons." It has followed that minors have some claims arising from the due process clause, but not that the extent of state power to regulate is the same for minors and adults, as would be true on an assumption of equal capacity. On the contrary, the Court has long recognized greater governmental authority to regulate the activities of minors than would be allowable for adults. States may restrict religiously motivated activities of children when some danger exists, although adults probably could not be so controlled. They may require attendance at school by minors, and may limit minors' access to "objectionable" but not "obscene" material that could not constitutionally be kept from adults.

The greater authority of the state to regulate the decisions and conduct of minors reflects precisely the belief that adjudication of their claims to rights does not entail assumptions about equal capacity. Justice

92. Neither In re Winship, 397 U.S. 358, 368 (1970), requiring proof beyond a reasonable doubt, nor Breed v. Jones, 421 U.S. 519, 541 (1975), holding that the prohibition against double jeopardy extended to delinquency adjudications, were framed in terms of the competence of children, focusing rather on the consequences of adjudication for them.

93. See, e.g., Carey 431 U.S. at 693 (upholding the right of access to contraceptives); Planned Parenthood v. Danforth, 428 U.S. 52, 102 (1976) (dealing with the termination of a fetus); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 511 (1969) (dealing with First Amendment rights); Ingraham v. Wright, 430 U.S. 651, 653 (1977) (concerning the use of corporal punishment and a student's right to physical integrity).

94. See Tinker, 393 U.S. at 511.
95. See Danforth, 428 U.S. at 74-75.
96. See Prince v. Massachusetts, 321 U. S. 158, 170 (1944) "[T]he power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . . ." Id.
97. See id. at 170-71.
98. This proposition has routinely been assumed. See, e.g. Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) (acknowledging that a State has the power "to impose reasonable regulations for the control and duration of basic education"); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) ("the State can require all children of proper age to attend some school").
Stewart, concurring in *Ginsberg v. New York*, justifies protecting children from non-obscene publications in the following way:

> I think a State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults.¹⁰⁰

Justice Brennan’s plurality opinion in *Carey v. Population Services International*¹⁰¹ sounded the same theme. The privacy interest implicated (access to contraceptives) was at base an “interest in ... making certain kinds of important decisions,”¹⁰² and “the law has generally regarded minors as having a lesser capability for making important decisions.”¹⁰³ This assumption is reflected as well in the standard of review employed by Justice Brennan in connection with privacy rights of minors. The issue is whether state restrictions “serve ‘any significant state interest ... that is not present in the case of an adult,’”¹⁰⁴ a test he characterizes as: “[l]ess rigorous than the ‘compelling state interest’ test applied to restrictions on the privacy rights of adults. Such lesser scrutiny is appropriate ... because of the States’ greater latitude to regulate the conduct of children.”¹⁰⁵

Constitutional doctrine—even when it upholds children’s rights that are founded on the principle of equal respect when recognized for adults—does not assume that children are as capable of mature choice or that they possess the same “negative rights,” rights to be left alone, as do adults.

Supreme Court decisions do not make a great deal of this modification in the theory of rights for children.¹⁰⁶ Since all rights are subject to regulation in some circumstances, it seems to follow easily that the rights of children can be regulated according to the abilities of their holders. In principle, however, there is more to it than that. We have already seen that rights in the adult setting are universal in scope. Your right to speech and

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100. *Id.* at 649-50 (footnote omitted).
102. *Id.* at 693 n.15 (quoting *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977)).
103. *Id.* (quoting *Planned Parenthood v. Danforth*, 428 U.S., 52, 102) (Stevens, J., concurring in part and dissenting in part).
105. *Id.* at 693, n.15 (citations omitted).
106. *See supra* notes 76-105 and accompanying text.
my right to speech are identical; your privilege against self-incrimination and mine are formally identical. For some persons to have broader rights than others would be an unacceptable denial of the principle of equal respect. A regulation limiting speech where there is an immediate risk of violence must apply to all instances of such risk, which means that all speakers are subject to an identical range of limitation. The thrust of the Supreme Court cases discussed above, however, is precisely to say that the rights of children are more limited in their extension than those of adults. Whatever their status as rights, children’s rights are understood differently than are the rights of adults.

IV. RETHINKING RESPECT FOR CHILDREN

A. Are Equal Respect and Children’s Rights Compatible?

Even though children are said to have legal rights of at least three kinds,107 none reflects the understanding of rights developed for adults in liberal political and moral theory. Welfare or positive rights for adults may be predicated on hypothetical choices in the sense that they are justified by the belief that all reasonable persons would wish to have those social goods available. However, the provision of those goods to adults ultimately depends on their actual choices as well; presumably, competent adults are free to decline them if they choose. Children are not free to do so; their actual choices regarding positive rights are not entitled to respect.

Special statutory rights, such as rights to marry or drive, likewise do not reflect respect for choices by minors. These laws may permit minors access to these privileges, and in most families the realization of those opportunities are negotiated between parents and children.108 However, the formal structure of special statutory rights respects choices by parents or guardians on behalf of minors rather than choices by the minors themselves.

Even constitutionally based rights, such as freedom of access to information or to express oneself, or to decide on childbearing, do not embody the same notion of respect that they reflect when applied to adults. The Supreme Court has made clear that the scope and implementation of these rights for children may be conditioned in ways that they

107. See supra Part III.
108. I am grateful to Mitchel Lasser for reminding me of the functional aspect of these special rights.
could not be limited for adults precisely because children lack experience and judgment. Limitations of these kinds cannot be reconciled with the equal respect to which choices by adults are entitled.

Plainly, the extension of “rights” to children does not mean that law treats children as if they were adults. Would it then be right to say that legal doctrine as it applies to children reflects a different understanding of rights, or alternately that legal doctrine is really not talking about rights at all, but rather about a regulatory scheme that borrows the language of rights?

The difficulty with the latter explanation is that all three bodies of law establish claims to which the language of rights seems appropriate. As we have seen, positive rights are thought of as rights in Salmond’s and Hohfeld’s sense of claims upon others to carry out some publicly established duties. Special statutory rights do recognize circumstances under which older children may marry or drive. Constitutional rights do, under some circumstances, allow minors to resist incarceration and personal intrusions and to express themselves or decide to terminate a pregnancy.

It is those circumstances that are special in the case of children and for which standard liberal rights theory makes no place. The question becomes, is it possible to create a rights theory that makes sense for minors and maintains the principle of equal respect?

One approach, already examined to some extent, would understand rights of children in the same way as we understand rights of adults, but modify our notion of minority by varying the ages at which they are recognized. In this approach, competence is variable across activities, but all rights holders reaching a certain age will be entitled to equal respect for their decisions within particular domains. It has sometimes been suggested, as we have seen, that this approach has been taken with respect to, for example, capacity to marry, obtain a driving license, or terminate a pregnancy. However, as we have also seen, those bodies of law do not incorporate a principle of equal respect for the decisions of minors as they reach varying ages but rather transfer authority for these decisions from public to private (parental) authority.

109. See supra notes 96-101 and accompanying text.
110. See supra note 44 and accompanying text.
111. See supra notes 71, 74.
112. See supra Part III.C.
113. See ARCHARD, supra note 6, at 85.
114. See id.
115. See supra notes 52-75 and accompanying text.
The fact that we have not adopted a domain-specific notion of competence does not mean that we could not do so. The project is not, however, a simple one if it is indeed attainable. It requires that we come to some understanding of the meaning of competence for a particular purpose that can be related specifically and categorically to age. A general understanding of competence in that domain will not suffice. If all persons of the threshold age are to receive equal respect for their decisions (to marry, choose medical care, or the like), we must be confident that virtually all persons of that age can and will make decisions meeting that understanding of competence.

One could also maintain the notion of equal respect but vary the point at which the entitlement attaches on a less categorical basis—that is, through a process of factual determination of competence. All minors found competent to make a particular kind of decision thereby acquire an entitlement to equal respect with respect to decisions of that kind.\footnote{116}{This may seem to be the approach taken by the Supreme Court with respect to procreative decisions and by states which allow “mature minors” to decide on medical care. However, as we observed earlier, the Supreme Court’s decisions regarding procreation do not in fact recognize equal liberty interests even for “mature minors” in general. Unlike anyone else, including the spouse of a pregnant woman, a minor’s right to choose an abortion may constitutionally be conditioned on notice to and consent by her parents except when the minor demonstrates in a judicial proceeding that notice and consent would be harmful to her. See Planned Parenthood v. Casey, 505 U.S. 833, 895, 899 (1992).}

Several observations might be made about individualized decisions to determine a child’s stage of development. One is that individualization does not allow persons to plan in advance, as we suppose citizens or rights holders to do. Their plans must be contingent on the result of some process: a contingency that, I suggested earlier, is difficult to reconcile with our general scheme of rights. A second, somewhat related aspect of this strategy is that the basis for finding a child competent may turn on his or her agreement with some external standard for “good” judgment. Those occasions where adults say that a child’s choice of goals and perception of social reality regarding his or her accomplishments are “mature” or “sensible” may occur where the child’s views coincide with the adults, those occasions where adults conclude that a child has not proved capable of mature and sensible choices of goals and means arise when the child’s choices depart from the adult’s own views.\footnote{117}{See John Eekelaar, The Interests of the Child and the Child’s Wishes: The Role of Dynamic Self-Determinism, in The Best Interests of the Child: Reconciling Culture and Human Rights 42, 55-56 (Philip Alston, ed. 1994).} John Eekelaar provides this illustration, where a judge agreed
with a nine-year-old girl’s preference not to live in France with her mother:

It seems to me that the view she has put forward, looking at the whole circumstances of her life, is a mature and rational view, which seems to be based on genuine and cogent reasons. I would go further and say that I think it is probably in her best interests . . . in deciding whether the views are mature, if they coincide with what seems to me to be the best interests of the child, I am entitled to take that into account in assessing her maturity."

This strategy plainly fails to carry out its aim of maintaining the principle of equal respect insofar as it makes agreement with an external standard the measure of capacity to choose.

Moreover, individualized assessments of development entail considerable transaction costs, even if we can identify some satisfactory notion of competence that is independent of generally-prevailing adult views of the good life. The intellectual and moral development of each minor, and perhaps his or her resistance to impulse and ability to conform behavior to knowledge, must be established through proof and measured against the standard(s) applicable to the domain in question.

Ultimately, neither strategy for maintaining the principle of equal respect in connection with children seems feasible. In addition, and perhaps more important, neither takes account of the child’s relationship to others, and especially to his or her parents. That failure seems inevitable if we seek to maintain the basic structure of liberal rights theory. Standard rights theories create a “space” around the individual. The right to equal respect means that no one is entitled to control an individual’s choices on the ground that it would be in the general interest to do so or that the individual himself or herself is less worthy than others. To have a right to do something means at least that no one may intrude on your choices. As a result, no one else has any general claim regarding your conduct, except when that conduct invades the space of the other, through coercion or injury. Relationships that may create limitations on decisions arise only from hypothetical or actual agreements or from conduct.

This may or may not make sense for adults. But whatever may be true for adults, it does not seem to work when we are talking about parents and children. Unlike the term “individual,” the term child does not stand alone from all others, but necessarily implies parents. One does not use the word “child” without having parents in mind. Even the

phrase "parentless child" makes clear that thinking about children is in some way incomplete without reference to parents.  

A theory of rights that ignores parents is similarly incomplete without some attention to the general claims that parents may make with respect to the ways in which their children develop. Those rights may be said to belong to the parents themselves or to derive from rights held by their children. The choice of theory may make some difference in how we think about the rights of children, and on any theory, parents have considerable responsibility for influencing their choices and assessing their capacity for choice. Accordingly, the relationship between the claims of parents and those of children must be taken into account in talking about the rights of children and that may, as well, require rethinking of the premises of traditional rights theory.

B. The Possibility of Differential Respect

Perhaps, then, we should inquire into the possibility of a theory of rights that does not depend on the principle of equal respect. As we have seen, this principle means that rights must be universal in their extension. And if rights are universal in their extension in the sense that all those who qualify as rights holders have the same rights claims as all others, the capacity to have rights must be categorical. If one is competent, then one is fully competent; if one is incompetent, then one is not competent at all.

This understanding of competence may be sensible when applied to adults. Above a certain, not very high, level of intelligence, we may be comfortable in saying that all persons—whether they be more or less intelligent, or sophisticated or experienced—are equal. Adulthood is considered an achieved state that is largely defined by its contrary; that is, adulthood is when childhood is left behind. Whether we are comfortable or not in treating virtually all adults as equally capable, liberal theory vir-

119. I am indebted to Jim Ellis at the University of New Mexico Law School for this observation.

120. See ARCHARD, supra note 6, at 97-109; see also Gutmann, supra note 35, at 348 (discussing the competing rights of parents and children and the balancing of their interests).


122. Ackerman is quite clear about the limited requirements for what he calls citizenship. His theory of citizenship—the basis for claims to respect—requires only "a thin thread of mutual intelligibility" not great mental acuity or great loquacity. See ACKERMAN, supra note 20, at 75. Indeed, a five-year-old may have at least an initial claim of this sort. See id. at 146-47.

123. See ARCHARD, supra note 6, at 36.
tually requires that we act as if we are. If the fundamental right of citizens of a liberal state is to equal respect for their choices about a good life, requiring a high level of capacity would, in the first place, deny citizenship to many persons—indeed, it would create an aristocracy of intelligentsia that would offend liberal principles. Even if the necessary level of capacity were not very high, the fact that it could routinely be contested would deny citizens the assurance of respect assumed by liberal theory.

However, this simplifying strategy does not capture what we know, and what we think, about children. We may, it is true, talk about childhood as a “stage” as we talk about adulthood as a stage. At the same time, we recognize that children are an inescapably differentiated group with respect to their capacity for choice. Infants cannot feed themselves, much less engage in cognitive or moral reasoning. Nor, we believe, can they control their sense of need or desire sufficiently to act according to what reasoning would suggest the right course of action to be. In short, infants present the classic case for paternalism. They can appropriately be forbidden to eat dirt or play in the streets. Even the most committed advocates of children’s rights concede the incapacity of babies and infants to exercise choice.¹²⁴

Beyond infancy, however, the question of competence and the extent to which their choices should be controlled becomes complicated. As children grow, they develop—at differing rates—various aspects of the capacity for choice. One body of research on cognitive development suggests that even quite young children (by age four or five) can engage in what appears to be causal reasoning.¹²⁵ Research concerning consent to treatment indicates that elementary school age children can identify the risks of therapy and children in the intermediate grades make “adult-like” decisions about routine therapeutic and educational questions, even if they are less able than adults to evaluate the risks and benefits associated with treatments.¹²⁶ Research on moral reasoning also suggests that very young children are capable of sociocentric, rather than egocentric, reasoning and behavior, and that even preschoolers have some notion of the difference between intentional and unintentional conduct.¹²⁷ The political implications of this literature may be found in Professor Ackerman’s conclusion that a five year old who asks something like “Parent, why are you entitled to boss me around?” is raising the question of legitimate authority and ac-

¹²⁴ See, e.g., RICHARD FARSON, BIRTHRIGHTS 172, 185 (1974).
¹²⁶ See id. at 153-54.
¹²⁷ See id. at 154.
Accordingly taking the essential first step to dialogic competence and citizenship.\(^{128}\)

At first glance, it is sobering to realize that behavior by a five-year-old which Professor Ackerman celebrates in terms of citizenship would lead most of us to send the emerging citizen to her room. On second thought, however, we do think differently of and act differently toward even five-year-olds than we do of babies. Five-year-olds are capable of communication and of reasoning to some degree, which produce a far different interactive relationship between child and parent. These differences become even more pronounced as the child's experience, knowledge, and capacity for judgment increase.

These differences in how we think about children, moreover, carry normative significance in our society. At early stages, the relationship between parents and children is one of control, mediated by affection. This stage of intensely personal authority is so generally true that we can indeed regard that quality as universal, or nearly so. There is no conflict between spheres of personal autonomy, and limits on parental authority can only be justified to the extent that their conduct harms others; here, their children.

As the child grows older, however, the value of parental control weakens, as it confronts a conflicting value. Children must not only be kept safe and socialized to accept authority, but they must also develop a capacity for autonomous action within existing norms. A child who does not learn to make choices within our cultural framework is plainly unable to perform the adult role in society. Indeed, the emphasis on acceptance of authority that is valued during infancy gives way to a normative expectation that children will assert some degree of autonomy as they move through adolescence.\(^{129}\) Thus, a child who fails to assert that autonomy may be described as “tied to his mother’s apron strings.” That description is pejorative, and the criticism it conveys is directed to both the child and his or her parent.

\section*{C. Justifications for Differential Respect}

The problem with founding rights on a principle of equal respect is that doing so fails to give normative significance to differences in capacity or to partial capacity that we recognize and to which we attach social significance. Here, at least, rights theory is inconsistent with what we under-

\begin{footnotes}
\item[128.] See Ackerman, supra note 20, at 147.
\item[129.] See Katz & Teitelbaum, supra note 75, at 17-18.
\end{footnotes}
stand about the psychological and moral development of children and with what we expect of children and their guardians.

Such an inconsistency is surely at odds with the importance we ordinarily attach to beliefs about psychological and moral capacity in political and moral theory. Indeed, psychological convictions routinely ground rights talk. Theories of rights routinely appeal to “human nature”—and human nature is routinely employed as a summary term for what we believe about our intellectual and moral capacities. When Mill says that human nature is such that men will usually not be made happier by even benevolently intended external constraints on their behavior, he appeals to psychology. And it is absence of intellectual capacity that excludes children and young persons from claims to the liberty principle. For Locke as well, as we have seen, it is the exercise of reason that qualifies an individual for the exercise of freedom. And, at least in connection with paternal education if not political authority, Locke seems to believe that the capacity to reason is a continuous rather than categorical phenomenon and that a parent’s exercise of power over a child’s freedom should be proportionate to the degree of the child’s development of experience.

Justification for taking account of the developmental nature of capacity in formulating a rights theory can be found in a variety of more modern sources as well. Roscoe Pound, for example, suggested that law should reflect the “received ideals” of the “time and place.” The same sense is expressed by the notion that legal doctrines should embody, as a matter of prudence or legitimacy, the moral sense of the community. The moral sense of the community surely includes recognition that parental authority varies by their children’s stage of development. One of the few empirical studies of community attitudes found that those attitudes, unlike legal rules insisting on undifferentiated parental responsibility for children, recognized the importance of choice by adolescents. Most particularly, the respondents in that study disapproved plenary parental con-

130. See Mill, supra note 16.
131. See Locke, supra note 11, § 54, at 31.
133. See Roscoe Pound, Law and Morals 113 (1924).
135. See Cohen et al., supra note 134, at 194.
control over decisions regarding important life choices (such as higher education, career paths, and religious affiliation) for older children.\(^{135}\)

John Rawls explicitly incorporates beliefs about psychology, and particularly developmental psychology, in his approach to justice.\(^{136}\) A well-ordered society, in his view, is one in which everyone accepts and knows that the others accept the same principles of justice. These principles must be relatively stable, in order to appeal to persons choosing those over other competing principles. And, he argues, the stability of a notion of justice depends on the extent to which it is consistent with human psychology, expressed as moral sentiments.\(^{137}\) Professor Rawls finds his theory of justice as fairness supported by standard views of moral development, according to which children move from an early morality of authority founded on their perception of their parents' love and support for their development to progressively higher levels of judgment: a development consistent with a dynamic view of the rights and relationships of children and parents.\(^{138}\)

The importance of this description of moral development, for Professor Rawls, lies in establishing the fit between basic human psychology and moral theory, on the assumption that persons will choose a moral theory that is consistent with their basic social nature.\(^{139}\) Its importance for us is more limited, but nonetheless substantial. If the justification for recognizing certain rights rests on what we know or believe about the course of moral development, it is appropriate for legal institutions to take account of the nature of development in determining the claims of children and those of parents, rather than ignoring that development in favor of dichotomous judgments about capacity for moral choice.\(^{140}\)

V. CONCLUSION

The aim of this Article has been only to explore one aspect of the problems encountered in employing traditional rights talk in connection

\(^{135}\) See id. at 3-4.

\(^{136}\) See RAWLS, supra note 2, at 453-58.

\(^{137}\) See id.

\(^{138}\) See id.

\(^{139}\) See id. at 460.

\(^{140}\) The relevance of a developmental view of moral choice does not depend on any particular taxonomy of the stages of that development. To take only the best known alternate scheme, Professor Carol Gilligan's view is equally developmental, although she suggests that women tend to emphasize a relational rather than a hierarchical understanding of rights and interests. See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 62-63 (1982). Indeed, her argument assumes precisely the importance of a fit between basic human psychological orientation and moral theory, although she differs from Professor Rawls in the theory she supports.
with minors. As it turns out, that discussion suggests that the Supreme Court has been wise to defer consideration of the complete relationship between children and the state if that consideration were to rely on the ordinary requirements of rights talk. And it may be that the approach actually taken by the Court is justifiable despite its departure from the requirements of traditional rights theory. The Court’s decisions do not assume that children are equal among themselves; some are capable themselves of making decisions to terminate their pregnancies and others are not. Nor are minors equal to adults; it is appropriate to take account of circumstances that are special to young people when doing so can be shown to be justified. But despite these inequalities within the class of minors and between minors and adults, it is nonetheless important to talk about rights if we are to show some appropriate level of respect for members of the community who have some, if not complete, capacity to reason and some, if not complete, capacity to engage in moral activity.

This takes us only part of the way, however. It is a useful first step to consider one of the ways in which developing an approach to rights that applies sensibly to children will require reconsideration of traditional rights theory itself. A revised theory will require a diminished emphasis on universality, greater specificity with respect to the relationship between rights and social institutions, and reconsideration of our understanding of parents’ rights, among other things. But these are subjects for another day.