

## Political Theory and the Child

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### 'The Age of Majority'

'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.'<sup>1</sup> In this fashion John Stuart Mill qualifies the scope of his liberty principle. He also gives expression to a familiar general view. This is that a distinction in law needs to be drawn between children and adults when it comes to questions of who shall enjoy rights, be entitled to benefits, merit protection, be burdened with duties, and so on. Mill also subscribes to the commonly accepted view that the distinction between childhood and adulthood is best fixed by reference to some shared understanding of an appropriate competence or capacity. On his understanding 'manhood or womanhood' is thought of as a 'maturity of faculties'.

Since children lack a certain capacity, since they are in the relevant respect, incompetent, they should be legally or politically denied the status accorded to adults. Critics of the disabilities imposed on children, defenders of their rights to those very things accorded to adults will, therefore, be quick to argue that children are not incompetent as charged.<sup>2</sup> A distinct but often related response by adults on behalf of children draws attention to the arbitrariness of marking, and investing with considerable significance, any precise point in what is evidently a continuous process of human development. Why, runs the argument, should a young person just below any age of majority be denied what someone just above that same age is entitled to? How can a matter of days make all the required difference? This is very familiar. Much if not all of the debate about the age of majority is directed to the issues of childhood incompetence and the arbitrary character of any age which the law may fix as that of adulthood.<sup>3</sup>

The point of the debate is to determine whether there is discrimination insofar as the difference in treatment to which children and adult are subject is not merited by the alleged differences between these two groups. It is not merited if age alone serves as the basis of the difference. Nor is it merited if the difference in age does not correlate with any significant, relevant difference in competence. What this debate often ignores are the interesting questions which lie beyond these two issues of alleged childhood incompetence specific differences between the disabilities which are imposed on children. Beyond the wrongfulness of discrimination as such there is the question of what in each case that discrimination comes to. What is it specifically that adults can, and children cannot, do or enjoy? And what difference is made by the fact that necessarily different answers to this question

<sup>1</sup>J.S. Mill, *On Liberty*, edited with an introduction by Gertrude Himmelfarb, Penguin, 1974, p.69.

<sup>2</sup>A good example of this form of argument can be found in John Harris, 'The political status of children', in Keith Graham (ed), *Contemporary Political Philosophy, Radical Studies*, Cambridge University Press, 1982.

<sup>3</sup>I examine the arguments in my *Children, Rights and Childhood*, Routledge, 1993, chapter 5, 'Arbitrariness and Incompetence'.

can be given in specific instances? What follows is an attempt to explore some of these differences and to suggest their import by comparing two applications of an age of majority principle: voting and sexual consent.

Children below the age of majority cannot vote in national or local elections; children below the age of majority cannot give their consent to sexual intercourse. The age of majority need not be the same in each instance. Indeed suffrage normally succeeds sexual liberty. However in each instance the standard view applies. Children lack a certain capacity – a maturity, an independence of judgement, set of settled preferences, understanding of the issues – which is required if they are to be enabled to vote or to engage in sexual activity. On the standard view children may be discriminated against, and equally discriminated against, if they cannot, as adults can, vote and make sexual choices. They are so discriminated if age alone or an incapacity they do not display provides the warrant for the discrimination.<sup>4</sup>

But what of the differences between the two cases? Do these help us to see a child's disability to vote and to make sexual choices as different kinds of discrimination? Let me suggest that there are at least seven differences. The first is that lacking the suffrage is a straightforward lack of a liberty-right and a power. The disenfranchised child cannot vote. There is no activity which the child can engage in but which does not count as voting. It is not that there is something the child does – something along the lines of 'officially express its political preference for some candidate or party' – which is not then characterised in the same way as would the same activity be if engaged in by an adult. A child lacks the vote. On the other hand a child can engage in sexual activity, and it can even give its consent to that activity, if we understand by 'consensual' something minimal like 'in the absence of coercion or deliberate deception'. However, 'consensual' sexual activity by someone below the age of majority is characterised as non-consensual. Non-consensual here means not so much that the child's participation is unwilling, but rather that its 'consent' is viewed as not consent proper and is thus discounted. It follows that someone who engages in sexual activity with a minor, even if it is voluntary, is guilty of an offence. In the United States the crime is 'statutory rape'. No-one, by contrast, can be guilty of procuring the vote of a minor. The second difference between the two cases concerns the reasoning to each disability in terms of harms that may be prevented. Criminalising under-age sex is clearly thought to be warranted on paternalist grounds. The child who engages in sexual activity harms or risks harming herself by so doing. She runs this risk because her lack of maturity makes her vulnerable to damage, principally psychological but possibly also physical. This kind of a claim can be made without committing oneself to a contentious view of childhood 'innocence' 'corrupted' by premature sexual experience and knowledge. It is surely plausible to believe that doing something before one is ready to do so

On the other hand no harms are thought to be done to a child by allowing it to vote before it is ready to do so. This is evidently so inasmuch as the voter does not incur any burdens or costs in consequence of the commitment that voting represents. If there are harms from under-age voting these are to the democratic system.

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<sup>4</sup>Discussions of children's right to vote which concentrate on children's possession or not of a relevant competence include, Francis Schrag, 'The Child's Status in the Democratic State', *Political Theory*, 3, 1975; Carl Cohen, 'On the Child's Status in the Democratic State: A Response to Mr. Schrag', *Political Studies*, 3, 1975; Bob Franklin, 'Children's Political Rights', in Bob Franklin (ed), *The Rights of Children*, Basil Blackwell, 1986.

The outcome of any poll would be affected in a way that can be seen as unfair. The vote of any adult, capable in principle of understanding the relevant issues and making a considered choice, would have the same weight as that of someone, a child, not so capable. The instrumental value of democratic decision-making is that its outcomes mirror the aggregated wishes of all those whose wishes should count. The wishes of children should not count because they can have no appreciation of how such democratically achieved outcomes affect everyone. This is not paternalist reasoning inasmuch as it is the harm to the public not to themselves that is thought to be averted by denying children the vote. Children should not vote not because they do not know what is good for themselves but because they do not know what is good for others.

I should, however, note a certain similarity of reasoning in this context. Children may, it is argued, be subject to the undue influence of adults. This is on account of the former's dependence, vulnerability and immaturity, and the latter's greater authority, status and power. Children might only vote the way in which they were told to by significant adults (or as they thought these adults might wish them to vote). Similarly children can be sexually seduced by adults by whom they are unduly impressed, before whom they are especially vulnerable, or upon whom they are particularly dependent. These facts, if true, reinforce the conviction that children lack the competence required to make independent choices. It does not, however, alter the view of what the relevant harms are of permitting children to make such choices.

The third difference between denying children the vote and denying them the right to make sexual choices lies in the degrees of disability that may follow from each denial. A child who cannot exercise her sexual freedom is disabled from engaging in each and every form of activity that the law construes as sexual in the relevant sense. Most criminal law systems distinguish degrees of seriousness in sexual offences. These will depend on aggravating factors, such as the accompanying use of violence, and the very nature of the act perpetrated, whereby sexual assault may be viewed as a lesser offence than penetrative rape. However, below the age of majority a child cannot, even consensually, engage in any act of sexual familiarity with another. Of course the manner of activity makes a difference to the seriousness of the offence of those who engage in sexual activity with a minor. But for the minor it makes no difference to their freedom to so engage with someone else.

By contrast, lacking the adult suffrage does not debar the child from each and every imaginable instance of voting. Least of all does it exclude the child from any form of political influence. A child might be ineligible to vote in general and local elections but entitled to participate in some other forums of democratic decision making. For instance, the management of a school might be democratic, and it is possible to envisage greater or lesser degrees of such democratic self-management. It is not inconceivable – though I know of no actual instances – that children, or at least those in a certain age group below the age of majority, should be accorded a vote in national elections, but one given a lesser weight than that of adults. Again, referenda or plebiscites might be so organised as to permit children to participate where their outcome had a particular importance for them as an age group. In a bicameral system with provision for representation of interest groups in an Upper Chamber one can imagine children being given a vote in elections to that chamber alone. All of these possibilities – however far-fetched they might seem – serve to illustrate the point that having or lacking the vote is not an all-or-nothing matter. They are possibilities inasmuch as there is nothing incoherent in the idea that there should be a single age of majority for national elections, and yet that those below this age should have some officially recognised political status.

The fourth difference between the two cases – the right to vote and sexual liberty – concerns the extent to which it is possible to make good the loss of value that is represented by the denial of the right or liberty. Having a right to do or to have X is of value to an individual, and, consequently, lacking that right means that the individual loses something of value. Is it nevertheless possible for the individual to do or to have things other than X which are of comparable if not equivalent value, such that the lack of the right to X need not mean an absolute and uncompensatable loss of value? Clearly the loss of the right to life is irredeemable. For a more specific right, such as that to, for instance, freedom of religion, it may be hard to see what activities an individual, denied that right, could still engage in which would be of comparable value to those assured by the possession of the right.

This issue is independent of whether the value of a right is understood in terms of the interests which its exercise protects or as the exercise of the choice which constitutes the right.<sup>5</sup> Either the right to vote is valuable because voting secures important benefits to the voter, or because the exercise of the choice to vote is valued. Either way it is plausible to think that there are things a disenfranchised person can do or have which are of comparable if necessarily lesser value. The value of voting lies in such things as the publicly registered expression of political preferences, participation in the political process whereby policy outcomes are determined, and influencing the making of decisions in the light of values and desires. Crucially, voting is not the only way in which these values can be promoted.

It is certainly arguable that voting is the main way, within any democratic society, that these values can be and are promoted. But children can have a say in how policy is determined, their interests can be protected, without their being enfranchised. A government may institute an official ministry for children, or it may appoint an ombudsman whose brief is to monitor children's complaints and repre-

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<sup>5</sup>The contrast between a 'benefit' or 'interest' and a 'choice' or 'will' theory of rights is a very familiar one. The two theories are summarised, and their respective merits assessed, in a recent study of rights, Peter Jones, *Rights*, Macmillan, 1994, Chapter 20.

sent their grievances to elected officials.<sup>6</sup>

There is a general point of importance at stake here. Rights of self-determination, of which the right to vote is one particular instance, may be denied without it following that those who lack the right also lack any influence on the outcomes that affect their interests. Indeed a right to have some say in how things that do affect one turn out may be recognised and protected. A key Article of the United Nations Convention on the Rights of the Child, Article 12, requires states to 'assure to the child who is capable of forming his or her own view the right to express those views freely in all accordance with the age and maturity of the child'. The provision for such a right is reflected in domestic legislation such as the British Children Act of 1989 which requires a court which is determining any question with respect to a child's upbringing to have due regard to 'the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)'.<sup>7</sup> Defenders of children's rights may insist that a right to have only a say in how things affecting one turn out is still considerably less than a right to determine for oneself how they turn out. That is true. But the right to have a say, and thus to influence outcomes, is still considerably more than no right at all in such matters.

The upshot of this discussion is that lacking a right to vote does not mean lacking any means of doing and having the same sort of things which are valued in having the right. However, when we turn to sexual activity, the lack of a right to choose seems uncompensatable. To lack such a right is to not be able to choose what sexual activity to engage in, when to so engage, and with whom, whatever one's actual wishes might be. Of course, strictly speaking, a minor can engage in sexual activity if she chooses, but that behaviour is sanctioned. To choose it is to expose any partner to the risk of punishment. That means that a minor is coerced into not making a choice of sexual activity. Sexual activity is *sui generis*. There is no other kind of activity which can be thought plausibly to have the same sort of value. To that extent someone below the age of majority who lacks the right to make sexual choices is denied something of value which cannot be made good by means of some other activity open to them.

The fifth distinction to be drawn between voting and sexual choice lies in the status that is conferred upon the adult possessor of the right in question, and denied to the child who lacks the right. Since both rights are rights of self-determination the denial of each involves the constitution of the child as someone incapable of choosing, as insufficiently mature, independent, autonomous, or whatever. But beyond this similarity there are differences. Someone who does not have the right to vote is not a full citizen; she is not a full member of the polity. This does not mean, as we have seen, that a disenfranchised child has no civic or political status, merely one lesser to that of the enfranchised adult.

By contrast, someone who does not have the right to make sexual choices is effectively considered to be a person without sexual desires, an asexual being. Whatever sexual wishes a minor might have they are, in practice, discounted. They are given no weight; they are insufficient, most obviously, to acquit any chosen sexual partner of a criminal offence. To prosecute someone for engaging in voluntary sexual activity with a person below the age of majority, and not to prose-

<sup>6</sup>For an interesting account of the Norwegian experiment with an ombudsman see Målfrid Grude Flekkøy, *A Voice for Children: Speaking Out as Their Ombudsman*, Jessica Kingsley Publishers, 1991.

<sup>7</sup>*Children Act 1989*, Part I, 1 (3).

ecute this latter person, is to acknowledge that sexual activity has occurred and yet refuse to acknowledge the expressed sexuality of one party to the activity. It is frequently observed that defenders of a sexual age of majority rely on a presumption that children, those below such an age, are without sexual desires and lack a sexuality.<sup>8</sup> In similar fashion, some American feminists have worried about statutory rape laws which criminalise the sexual acts of male minors but not of complicit female minors. They do so inasmuch as such a distinction derives from a view of young women as passive, asexual victims of male sexuality.<sup>9</sup> In summary, lacking the right to vote whereas lacking the right to make sexual choices means the denial of any sexuality or sexual desire.

The sixth difference concerns the acquisition of the relevant competence to engage in the activity in question. In particular I am thinking here of a cognitive capacity understood both as a knowledge of the appropriate facts and a mature understanding of their import. To be able to engage in some activity a person needs to know what they are doing. This involves both a simple factual awareness of the nature of the activity, its preconditions, consequences, possible forms, and so on, and an appreciation of its significance. Someone may know what it is to vote without recognising the import of casting one's vote. Someone may know the facts of life without understanding what is at stake in sexual activity. All of this can surely be accepted without the need to endorse any contentious account of what exactly is required, cognitively, of someone permitted to vote or to make sexual choices.

It is possible to deny someone the right to do X whilst allowing them to acquire the cognitive capacity which is the prerequisite of doing X. Indeed it is arguable that adults are under an obligation to bring any child to that state of rational maturity, or at a minimum not to prevent a child from coming to that state, which is the mark of adulthood and a qualification for the possession of adult rights.<sup>10</sup>

Thus, denying children the vote is perfectly consistent with requiring their political education. Such an education is a necessary preparation for the acquisition of the suffrage. However, things are different with sexual choice. Here it seems to be the case that children are denied both the right to make sexual choices and the sexual education which it must be thought is a condition of their acquiring that right. This simultaneous denial derives, fairly evidently, from a belief that a certain sexual 'innocence' marks the child and disqualifies her both from being sexually active and from being sexually well-informed.

There is a further related belief that to acquire the knowledge is at the same time to acquire the disposition to engage in the activity. To know what can be done disposes whoever knows to do it. Sexual education, or at least to be fair a premature education in sexual matters, is thus thought of as a double corruption of innocence. It brings to an end both sexual ignorance and sexual indifference or unwillingness. These sorts of belief are deeply rooted in a prevalent, long-standing understanding of sexuality and innocence whose most powerful metaphor is to be found in the Christian narrative of the Fall. I do not wish to comment here on that understanding save to emphasise its role in seeing sexual, by contrast with

<sup>8</sup>Richard Davenport-Hines, "Too young to know?", *The Times Saturday Review*, February 9 1991, pp.10-12.

<sup>9</sup>See, for instance, Frances Olsen, "Statutory Rape: A Feminist Critique of Rights Analysis", *Texas Law Review*, 63/3, 1984.

<sup>10</sup>This is an essential element of what I have called the 'caretaker thesis'; see my *Children, Rights and Childhood*, Routledge, 1993, Chapter 4.

political, education as inappropriate for children.

There is a final point that needs to be made about the child's acquisition of those capacities which qualify it to possess adult rights. This is that there are different models of cognitive development. One influential model should be indicated. This is the understanding of a child's development as endogenous and as universal or culturally invariant. The child's gaining of some ability develops at its own internal rate, barely altered by outside factors. This model's most celebrated defender is obviously Jean Piaget. The import of the model is that no significant difference is made to the child's acquisition of a competence either by social context or by permitting the child to engage in X through making it possible for the child to do or to practise X. This model is open to serious criticism.<sup>11</sup>

The point to be made here is that if this model is mistaken, then there is a further reason why voting and sexual choice differ. If children do become capable of exercising a right to vote through practice in the making of political decisions and the expression of political choices, then such a political education is both possible and desirable. No-one need deny that a child should, before getting the vote but in preparation of the getting of it, have opportunities to be politically active. However, it is in the nature of sexual activity – particularly as this is understood by defenders of the traditional view of children and sexuality – that a child cannot, and should not, be sexually active before and in anticipation of its reaching majority.

I have outlined seven respects in which the child's lacking of the vote differs from its lacking of sexual liberty. These are independent of more general considerations about having any age of majority at all. Fixing an age of sexual majority has implications which are not those of fixing an age of political majority. Children may be discriminated against simply insofar as they do not have all the rights that adults do. Or children of particular ages and in respect of particular rights may be discriminated against by the denial to them of those rights adults have. If discrimination is shown to occur in the case of voting and sexual choice, I hope I have done enough to show that it is more serious in the case of sexual choice than voting. This is so inasmuch as what the child loses in not having a right of sexual choice is more serious and extensive than the loss incurred through being denied the suffrage.

This is not to say that discrimination does occur when an age of majority is fixed, either in general or in particular instances. Only radical defenders of children's rights insist that no age of majority should be fixed in respect of any right an adult possesses.<sup>12</sup> Most criticisms of ages of majority are directed at the particular age adopted and at the justification for any such age in terms of a particular alleged incapacity. My intention has been to cast light on the distinct implications of fixing any age of majority in respect of particular rights, and to suggest some ways in which these differences can be captured. This is important inasmuch as a general defence of children's rights or a critique of the wrong in general that is allegedly done by denying children the rights of adults may miss these differences and their import.

<sup>11</sup>For a concise statement of the criticism and its significance see Priscilla Anderson, 'In the genes or in the stars? Children's competence to consent', *Journal of Medical Ethics*, 18, 1992.

<sup>12</sup>Such as, most notably, John Holt, *Escape from Childhood, The Needs and Rights of Children*, Penguin, 1975 & Richard Farson, *Birthrights*, Macmillan, 1974.

This piece has a further point. The charge that the fixing of any particular age of majority is unacceptably arbitrary derives much of its force from the fact that someone just below an age of majority lacks everything that someone just above can enjoy. It seems manifestly unfair that so much – the possession or lack of some right – should turn on so little – a matter of insignificant age difference. However, if it can be shown that the lacking of a right need not have such enormous significance then the charge is, to that extent, defused. I have indicated ways in which the lack of suffrage need not involve an irreparable loss of value. Let me conclude by suggesting some ways in which the effects of the lack of a legal right of sexual choice might be similarly moderated. One obvious way to do so is to re-examine the view, characterised as a traditional one, that sexual education is inappropriate below a certain age. This should involve a recognition that children are not sexual innocents and do have an erotic life. Indeed the general understanding of childhood as a state of ‘innocence’ needs to be subjected to critical scrutiny. Thinking about policy needs also to accommodate the well-attested fact that an early sexual education does not mean a greater degree of premature sexual activity. Indeed what seems to be the case – by comparison of the United Kingdom with Scandinavian and other countries – is that the earlier and fuller the education in sexual matters the later the first sexual experience and the lower the degree of sexual experimentation. It should also be obvious that sexual activity in the context of sexual ignorance has disastrous consequences.<sup>13</sup>

Another way in which the age of sexual majority might be instituted so as not to constitute some great divide would be to lower it to the lowest feasible point but constrain the exercise of the consequent right. For instance, on the Dutch model which was much pilloried in the British press on its introduction in 1991, the age of sexual consent is 12. This associates the age of first sexual activity with early pubescence. Nevertheless, in principle sexual activity is forbidden to children between the ages of 12 and 16. If there is no complaint, however, there will be no prosecution. A complaint can be made by the child, a parent, or a child welfare organisation, and can be made up to 12 years after the incident. Such a model does not have the effect of criminalising the sexual behaviour of young teenagers, but at the same time it recognises the vulnerability of such persons and protects them from exploitation. It thus offers a balance between paternalist protection of the child and the concession of a full, unconstrained right.

Other European laws make provision for the protection of children from sexual exploitation by much older adults and those in positions of special authority over them, such as teachers. In practice the British police recognise that a sexual relationship between two 13-year-olds differs significantly from one between a 13-year-old and a 35-year-old. They will tend to institute prosecutions in the latter case, but content themselves with warnings in the former. There is no reason why the considerations which lie behind this practice should not shape the actual provisions of the criminal law. In this way, once again, it would not be a simple case of denying children, outright and completely, a right of choice accorded adults.

The law needs an age of majority. It need not be the same for every activity

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<sup>13</sup>The 1990 *Health of the Nation* White Paper stated that 10 out every 1,000 13- to 15-year-olds get pregnant, and that over half the girls under 16 having intercourse do not use contraception. 84% of those who conceive do not intend to, and half of all pregnancies amongst this group ends in abortion. By comparison, Holland has achieved a teenage conception rate seven times lower than the United Kingdom.

which is regulated by the law. It does need, in each instance, to be sensitive to the actual capacities of children, and to recognise that the acquisition of such capacities can owe much to social context and practice. It need not be discriminatory and it is no more arbitrary than the setting of any legal limit or line between what is allowed and what is not. Finally, as this piece has argued, each and every age of majority has its own implications. But the gap between what is possible for those under and for those above such an age need not be as dramatic as most critics of an age of majority allege.