Mediating Rights: Children, Parents and the State

Melinda Jones[1] & Lee Ann Basser Marks[2]

When a young woman seeks contraceptive advice and treatment without consulting the parents with whom she lives and upon whom she depends, or when she desires to abort an unwanted foetus without involving her family, the difficulty of speaking in terms of the rights of the child becomes apparent. The young woman claims a right to self-determination — to take control of her own body. The parents claim the right to protect their child from her own immaturity, and to ensure that decisions about sexuality are 'in the child's best interest'. The doctors seek immunity from prosecution for assault or battery and to avoid involvement in private family matters. The state, seeking to mediate all interests, makes rules which facilitate or deny the child in the development of her autonomy. Children exist in relationship: — in relationship to their parents, their siblings and wider family, their neighbours, their community and the society in which they live. No child exists in a vacuum, any more than parents or men or women are atomistic individuals existing in isolation from each other. The focus on children's rights while an important topic, is misplaced unless it is moderated by a realistic understanding of the claims of others to be involved in the child's wellbeing. The difficulty of attempting to problem-solve in terms of children's rights has been the very difficulty of establishing that children in fact have rights, and this in turn has provided a foil for the difficulty of rights-talk generally. This article explores an apparent conflict within rights discourse, that is the conflict between the rights of the child and the rights of parents and perhaps even the rights of the state.

The problem of the language of rights

The modern debate about rights has primarily been run as a debate between the critical legal scholars, feminists and those who would probably now be known as the critical race theorists.[3] These groups accept at a base level that the liberal notion of rights is extremely vexed.[4] Rights are unstable, indeterminate and incoherent. They

---

1 Senior Lecturer, Faculty of Law, University of NSW

2 Lecturer, School of Law & Legal Studies, La Trobe University. The support for this project of the La Trobe University Central Starter Grant and the School of Law & Legal Studies Research Grant are gratefully acknowledged.

3 We leave aside the earlier debate about the nature of rights and the need to take rights seriously: see for example Dworkin R *Taking Rights Seriously* (Duckworth, 1977); Waldron J *Theories of Rights* (OUP, 1984).

4 Tushnet M "An Essay on Rights" (1984) 62 *Texas Law Review* 1363; Gabel P "The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves" (1984) 62 *Texas Law Review* 1563; Morgan J "Equality Rights in the Australian Context: A Feminist Assessment", in P Alston (ed) *Towards an Australian Bill of Rights* (Centre for International and Public Law/Human Rights and Equal Opportunity Commission, 1994) at 123; Williams PJ *The Alchemy of Race & Rights* (Virago Press, 1993); Herman D "Beyond the Rights Debate" (1993) 2 *Social and Legal Studies* 25; Pritchard S "The Jurisprudence of Human Rights: Some Critical Thought and

are abstract and decontextualised. They impose irresolvable conflicts. Rights have impeded advances by progressive social forces. They are alienating of individuals and they may convert real experience into empty abstraction. Rationality and individualism have been shown to be ahistorical (gendered) constructs employed to limit the advances of the socially disempowered rather than to promote equality. Rights-talk has different functions for different people.

Nonetheless from a minority and feminist perspective rights-talk has a lot to offer. Tushnet points out that rights authorise entry into the discourse of society; they help to define the boundaries between people and in the process are useful in structuring relationships; they are strategically of value as has been shown in a number of critical struggles.[5] Minow argues that rights "are calls for communal dialogue: the language we use to try to persuade others to let us win this round."[6] In fact Minow goes so far as arguing that "the notion of rights as tools in communal discourse helps to locate responsibility in human beings for legal action and inaction."[7]

For children, too, rights-talk can be of particular value. Attributing rights to children gives them a status and a stake in the argument about issues affecting them. By being rights bearers, children are entitled to be heard and counted. As holders of rights, the interests of children cannot be ignored and their claims cannot be swept aside. By being participants in the discourse of rights, children become entitled to "a basic equality among participants, as participants".[8]

However, simply saying that children have rights does little to resolve the conflicts and controversies in which children find themselves. The right to freedom of speech, freedom of religion or to individual autonomy, for example, are totally unproblematic until children come into conflict with those in authority: children in relationship to parents, in relationship to teachers, in relationship to doctors, in relationship to the state. These conflicts are inevitable because the parent/child relationship is characterised by dependency and because children exist within relationships where they are not the sole arbiters of their interests.[9]

Until recently matters which are now part of the children's rights discourse were unacknowledged in the public domain. Whether thinking of children as rights

---

4— *Continued*
Developments in Practice" (1995) 2 *Australian Journal of Human Rights* 1.

5 Tushnet M "Rights: An Essay in Informal Political Theory" (1989) 17 *Politics and Society* 403 *passim*.

6 Minow M *Making All the Difference: Inclusion, Exclusion and American Law* (Cornell U P, 1990) p 295.

7 Ibid at 309.

8 Ibid at 297.

9 For an interesting analysis of the parent child relationship in terms of rights see Seymour J " An 'Uncontrollable' Child: A Case Study in Children's and Parents' Rights" in Alston P, Parker S & Seymour J (eds) *Children, Rights and the Law* (Clarendon Press, 1992) and see Carney T "'Reconciling the Irreconcilable'?: A Rights or Interest Based Approach to Uncontrollability? A Comment on Seymour" ibid; see also Dwyer JG, "Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights" (1994) 82 *California Law Review* 1371.

bearers is the cause or effect of the politicisation of children's issues, it is clear that unless some other stake holder has been threatened by the intervention of the state the controversy will not be articulated in terms of rights.[10] For example, the sterilisation of children with intellectual disabilities had historically been thought to be unproblematic — on the rare occasions where there was a challenge to the performance of this extremely intrusive, serious medical procedure, it was simply justified in terms of eugenics or convenience. In any event it was regarded as a private family decision which was a normal response to an abnormal situation.[11] For some reason, whether it was a matter of the rise of individualism and the 'me' generation or because of the availability of information about what was happening, or simply because there has been a growing awareness of the inhumane treatment of people living in institutions of the state and of the changing conceptions of disability, decisions about sterilisation have begun to be viewed differently. How decisions are to be made in this changed context has been uncertain. The major response has been to shift the focus away from the 'needs of the society' to the 'best interests' of the child. Even so, without rights there has been little real protection for the individuals concerned. The best interests of the child have been the best interests of the child in the context of the family or the institution, with some attempt from interested outsiders to reinvent the debate in terms of rights.[12]

To give children rights focuses on yet another problem with the intersection of rights and law generally. While on one level it may be empowering to give someone rights, unless the rights are appropriately supported, the grant of rights can be counterproductive. Take for example, a decision with respect to the sterilisation of a young girl with an intellectual disability which acknowledges her right to bodily integrity and refuses treatment. The right is hollow if it cannot be enforced and if it is not accompanied by a range of supports and resources including training in menstrual management, contraception, supervision of the taking of medication, education about the consequences of sexual intercourse, adequate well resourced respite care for the carers and so on. It is not enough just to recognise the right of a young woman with intellectual disabilities to bodily integrity nor even enough to 'allow' her to keep her child should she become pregnant, she also needs to be supported, particularly through the early, difficult stages of being a parent. The grant of a right may cause as many problems as it solves, and as rights-talk is

---

10 Minow M "Rights for the Next Generation: A Feminist Approach to Children's Rights" (1986) *Harvard Women's Law Journal* 1; Eekelaar J "The Emergence of Children's Rights" (1986) 6 *Oxford Journal of Legal Studies* 161.

11 Jones M & Marks L "The Dynamic Developmental Model Of The Rights Of The Child: A Feminist Approach To Rights And Sterilisation" (1994) 2 *International Journal of Children's Rights* 265.

12 See for example Freeman M "The Limits of Children's Rights" in Freeman M & Veerman P (eds) *Ideologies of Children's Rights* (Kluwer, 1992); Freeman M "Towards a Critical Theory of Family Law" [1985] *Current Legal Problems* 153; Freeman M *The Rights and Wrongs of Children* (Francis Pinter 1983); Parker S & Drahos P "Closer to a Critical Theory of Family Law" (1990) 4 *Australian Journal Family Law* 161; Goldstein J, Freud A & Solnit A *Before the Best Interests of the Child* (The Free Press, 1989).

employed to overcome values-conflicts, a more sophisticated approach reflecting a relational theory of rights is required.

The rights of the child

Establishing that children have rights has not been easy. Despite the international norms relating to children[13], the legal postulation of standards has in no way provided a resolution to hard cases, nor has it attempted to do so. With all the good intentions of the state, problems involving children cannot be resolved by legislation alone. Issues of children's rights cannot be effectively divorced from the provision of social and economic rights: the sort of demands made by the *Convention on the Rights of the Child*, for example, require significant resourcing by the state. Such resourcing is over and beyond the obligations that a community acquires whenever it removes a matter from the private sphere.

There has been a modern movement which has attempted to work from first principles to delineate children's rights.[14] We have elsewhere proposed the dynamic developmental model of the rights of the child which seeks to integrate the issues of autonomy and welfare and by which it is possible to determine a standard by which all people, including children, can be treated with equal concern and respect.[15] It is our position that it is desirable to move away from the idea that rights are derived from human capacity. Rationality and competence are culturally defined concepts, open to the very manipulation exposed by feminists and others and cannot therefore be taken as the basic requirements for the attribution of rights. By embedding rights in 'human-ness', our solution is to take a baseline approach to rights. We argue that whatever conditions for living we want to protect, a person's integrity as a person (and within this we include her bodily integrity) is more significant than her rationality or even potential rationality. It is crucial that a rights theory be able to accommodate the fundamental interests of *all people*, even those without capacity or rationality. Our approach means that there can be a potential ordering of rights, such that a person is entitled to be treated with equal concern and respect even before there is evidence of rationality.

The model we put forward adopts a fluid individualised approach to human rights, particularly to children's rights. Borrowing from psychology, the dynamic developmental model recognises the evolving nature of human development.[16] It is dynamic

---

13 The most relevant documents are the 1989 *UN Convention on the Rights of the Child* and the 1959 *Declaration on the Rights of the Child*. See Hodgson D "The Historical Development and the 'Internationalisation' of the Children's Rights Movement." (1992) 6 *Australian Journal of Family Law* 252. For further references see Jones and Marks op cit at 265.

14 See generally Alston, Parker & Seymour (1992) op cit; Alston P *The Best Interests Of The Child: Reconciling Culture And Human Rights* (Clarendon, 1994); Eekelaar J & Sarcevic P (eds) *Parenthood In Modern Society: Legal And Social Issues For The Twenty-First Century* (Martinus Nijhoff, 1993); Freeman & Veerman (1992) op cit; Freeman (1983) op cit.

15 Jones & Marks (1994) op cit, *passim*.

16 This model also applies to adults. On an optimistic note we go on developing and maturing through our life unless some illness intervenes to stifle our development.

because it recognises the emerging independence of the child and the complex web of relationships in which children live. It acknowledges the double dependence of children on parents and the state, at the same time recognising the importance of giving the child a voice. It recognises the dynamic nature of human development and the corresponding inappropriateness of a static view of development.

The effect of adopting the dynamic developmental model of children's rights is to provide a standard for those who make decisions on behalf of children at points in their lives where they are unable to make decisions for themselves. The dynamic developmental model builds on the approach in the House of Lords decision in *Gillick*[17] which recognised the autonomy of the mature minor in the context of medical decision making and clarified the extent of parental authority with respect to the maturing minor.

Other theories of children's rights point to the difficulty of having one category of children and take to be significant the emerging potential capacity for rationality and autonomy in children. Michael Freeman argues that children have autonomy to the extent that this potential is realised, and that parental power is limited by the notion of the 'future-oriented consent' of the child.[18] For Freeman the parental role is as representative of the child's interest, the parent being obliged to choose the course of action which maximises the possibility of the child developing a life plan of her own. Where parents and children cannot agree, an alternate forum is required in which disputes can be heard.[19] Thus Freeman seeks to find a balance between protectionism and full autonomy, a balance which respects the rights of the child and recognises the child's need to be protected by and from her parents.

Tom Campbell argues that the bundle of rights and interests the child has at any one point of time are a reflection of the fact that the minor is a person, a child, perhaps a juvenile and potentially a future adult.[20] So the conception one has of the child determines the content of the rights. Nonetheless, children live in the context of their families (howsoever defined) and their communities.[21] Whatever theory of children's rights one adopts, granting children rights is a matter not only for the state but also for the parents. Even if children are rights bearers, even if they have a wide range of entitlements, for much of the time they remain in a dependent status. It is

---

17 *Gillick v West Norfolk & Wisbech Area Health Authority* [1986] AC 112; applied in Australia in *Secretary, Department of Health and Community Services v JWB & SMB* (1992) 175 CLR 218 (*Marion*). For an argument on treating adolescents differently see also Levesque R J R "The Internationalization of Children's Human Rights: Too Radical for American Adolescents" (1994) 9 *Connecticut Journal of International Law* 237.

18 See Freeman (1992) op cit; Freeman (1983) op cit. For a more detailed analysis of Freeman's theory see Jones & Marks op cit 275-6.

19 Freeman (1983) op cit 51.

20 Campbell TD " The Rights of the Minor: As Person, as Child, as Juvenile, as Future Adult" in Alston, Parker & Seymour (1992) op cit 1.

21 Binder N "Taking Rights Seriously: Children, Autonomy and the Right to a Relationship" (1994) 69 *New York University Law Review* 1150.

not surprising then that there has been a movement for 'parental rights' paralleling that of children's rights.

Onora O'Neill has conceived of the parent/child relationship as based on fundamental obligations.[22] Building on this, Katherine O'Donovan has taken the trust concept from the law of equity in order to construct a relational theory of parental responsibility.[23] In law, children cannot legally hold property, they can only be beneficial owners. Adults have the stewardship, that is they must account to the adult beneficiary for property dealings. When children become adults they can sue for breach of trust if there has been any mismanagement. Duties of trustees are clearly defined and stem from the idea of conscience — the standard of conduct is high.[24] O'Donovan argues for a concept of stewardship of the person, as well as of the property, of the child. She argues that this is consistent with other developments in the law such as those dealing with violations of the trust relationship through criminal law, family law and child protection and welfare laws. There is also now a trend for adults to seek public account for what happened to them in their childhood with respect to instances of child abuse, sexual assault and other denials of rights.[25]

The rights of parents qua parents

The notion of parents' rights predates any discussion of children's rights. Children were regarded as the father's property, human chattels over which parents had an absolute right. This attitude has its roots in the Roman civil law doctrine of *patria potest* or paternal power or authority. In ancient Rome the father as head of the family had very extensive powers and rights in relation to his wife and children. The early common law supported full paternal authority.[26] The doctrine of unity denied to the wife any separate personhood from her husband, and similarly the children of her womb were denied personhood at least during their minority or when the law recognised them as having capacity.

---

22 O'Neill in a paper titled "Children's Rights and Children's Lives", reproduced in Alston, Parker & Seymour (1992) op cit, conceptualises the adult child relationship in terms of fundamental obligations. The advantage of this approach is that it allows a wide base to encompass imperfect obligations eg the obligation of kindness and allows obligations to be identified successively rather than what she conceptualises as an all or nothing approach of rights. In O'Neill's view the rhetoric of rights merely serves to remind adults of their duties.

23 O'Donovan K, *Family Law Matters* (Pluto Press 1993), chapter 6, *passim*. For O'Donovan, the theory of fundamental obligations "...may provide a satisfactory theoretical and political account but in legal terms there are a myriad of practical problems, not the least of these remains the problem of children as legal actors in the making of claims or the imposing of obligations." [102]

24 On the law of trusts generally see Finn P *Fiduciary Obligations* (Law Book Co, 1977); Meagher R, Gummow J & Lehane J *Equity: Doctrines and Remedies* (3rd Ed Butterworths, 1992)

25 See Batley J "Stolen Children" (1996) 2 (No 2) *Australian Journal of Human Rights* 177.

26 See Hodgson, op cit. "We inherited a common law concept of status derived from a feudal order which denied children legal identity and treated them as objects or things, rather than as persons. Chancery, with its vague doctrine of parens patriae, and occasional interventions by ecclesiastical courts, accorded only slight amelioration of a paternalistic common law" Foster H *A "Bill of Rights" for Children* (1974) quoted in Hodgson 1992 at 255.

At the beginning of the 19th century the legal commentator Blackstone recognised an obligation of a parent to support his child and a right in the child to be supported.[27] The scope of that obligation and right at the time was limited. However during the 19th century, the state increasingly limited paternal authority, largely in the interests of the industrialised state. The introduction of compulsory education and laws prohibiting the use of child labour, moves to 'protect' children, had the effect of increasing the dependence of the child on the parent. Within the western tradition there was no concept of a separate stage of life called 'childhood' prior to the sixteenth century.[28] According to Hodgson the 19th century marked the attribution to children of a legal personality. However the characterisation of childhood as a time of innocence, weakness, irrationality and helplessness led to the need for special protection. As a consequence, special laws and policies were introduced to deal with children. Children were removed from adult prisons, orphanages were founded and a separate system of juvenile justice was developed. These special laws and policies were paternalistic. Childhood was viewed as a period of legal 'disability' and few positive rights were conceded to children.

Children's rights were initially conceived in terms of "child saving".[29] Children were to be protected from the worst abuse of their parents but parents remained entitled to control all aspects of children's lives. At law parental rights stem from the position of parent as guardian of the child. Guardians have authority to make decisions with respect to the name, residence, education, religion, domicile, citizenship and medical treatment of their wards. The source of parental authority in Australian law is found in s 63F of the *Family Law Act* 1975 in the parent's position as guardian of the child. The Act itself does not define the rights of the guardian, reference must be made to the common law to determine the precise extent of parental authority.[30] This position is about to change.

Family Law (Reform) Bill 1994 has passed both Houses of Federal Parliament and awaits Royal Assent. The Act replaces the concepts of guardianship, custody and access with provisions which focus on parental responsibility for the care, welfare and development of children. Parental responsibility is defined as " all the duties powers, responsibilities and authority which, by law, parents have in relation to children" (cl 61B). Section 63F will be replaced by cl 61C (1) which provides that " Each of the parents of a child who is not 18 has parental responsibility for the child."[31] Presumably the scope of "parental responsibility" will be determined by reference to the common law powers of the guardian. A major feature of the *Family*

---

27 Sir William Blackstone, *Commentaries on the Laws of England* Vol 1 (1829), p 446.

28 See Aries P *Centuries Of Childhood: A Social History Of Family Life* (Jonathon Cape 1962); Archard D *Children: Rights and Childhood* (Routledge 1993). For a discussion of the competing histories of "childhood" see Levesque (1994) op cit at 243-252.

29 Minow (1986) op cit.

30 s 63E; see also *Marion* (1992) 175 CLR 218.

31 See *Newsletter* Family Law Section, Law Council of Australia, 1 December 1995; The Hon R Chisholm and Housego J *Australian Family Law Bulletin* No 128 September 1995, 3.

Law Reform Bill is an attempt to move from an adversarial litigation focus to one of conciliation and co-operation; the primary form of dispute resolution being alternative dispute resolution options.

Notwithstanding these changes there are four situations in which claims to parental rights are made. First, in the context of divorce/marriage breakdown, the parent who is denied guardianship/custody of the child often claims there is an interference with his/her rights. Where an abusive parent is denied even minimal access to his/her children, the protest is invariably couched in terms of denial of parental rights. Secondly, a man wishing to assert his entitlement to control the behaviour of a pregnant woman, may argue that he has parental rights with respect to the foetus. Thirdly, in defence to action by the state to protect children from neglect and abuse, disaffected parents protest the interference with their rights as parents. Finally, where the extent of parental powers was unclear at law, as in the case of medical treatment decision making, it was argued that parents had rights. Generally, the claim to parental rights is said to arise from the natural rights of parents *qua* parents.

These issues cannot be resolved by the simple assertion of a parental right. Even if the scope of children's rights are unclear, no one today would deny that the perspective of children and others involved must be taken into account. Children are not property, mere extensions of their parents' egos. Because relationships affect parents as much as they affect children and as the object of the claimed rights is the child, not the parent, it is better to approach these problems from a children's rights perspective. It is essential to begin with the dynamic developmental model of children's rights, and to conceptualise the parent's role as that of trustee.

The concept of legal and equitable ownership of property is well understood in the context of the law of trusts, and an analogous position makes sense with respect to children. The parents' rights over their children are akin to the legal ownership of trust property — they retain power to make decisions with respect to children if, and until, the children become competent adults. In the meantime, the children have something akin to a beneficial interest in the decisions — an equitable right. The responsibilities of parents are similar to that which would arise from the 'future-oriented consent' of the child, and in this way can be seen as *legal rights*. The exercise of these rights is limited by the child's 'beneficial ownership' over the parent's actions, as parents acquire fiduciary duties as a result of their guardianship. When this is the approach taken, it is our contention that it is possible to reach an ethical and a pragmatic legal resolution to these problems. In each case of claimed parental right, there are a range of other rights claims which need to be considered. The rights of the child, being *beneficial rights*, moderate the power of parents in the would-be exercise of their *legal rights*.

Within our conceptualisation of the parent/child relationship it becomes clear that when the claims for custody and access to children are analysed, the child is more than an object of the decision-making — albeit an object whose interests are taken into account. Custody and access decisions are viewed by courts as involving determinations of who is the better parent, rather than matters involving rights.

Parental claims to have rights become problematic where there is an abusive parent. If the parents' guardianship claims are reconceptualised in terms of the trust relationship, then it will be understood that the parents' *legal right* to know and develop a relationship with the child must to be moderated by the child's *beneficial right* to know and develop a relationship with the parent. As the most fundamental of all rights involve protection from the harm of others, a parent who has been abusive has interfered with the rights of the child. That parent has breached the trust of the child. It is therefore inappropriate for the child to be expected to know the parent at this, or maybe even at a later point in her life. Requiring children to submit to the authority of an abusive parent involves denying the rights of the child. This is so even where the child expresses a wish to have on-going contact with the abusive parent.

The amendments embodied in the *Family Law Reform Bill* with regard to child abuse are of considerable concern. The importance of the child having contact with both parents is elevated to such a position that in our opinion the right of the child to protection from harm is at risk.[32] Under Division 11 of the Bill the court may make a contact order which over-rides a family violence order. Clause 68Q sets out the purposes of the Division. While seeking '..to ensure that... contact orders do not expose people to family violence' (subclause (b)), a purpose is 'to respect the right of the child to have contact, on a regular basis, with both the child's parents where: (i) contact is diminished by the making or variation of a family violence order; and (ii) it is in the best interests of the child to have contact with both parents on a regular basis' (cl 68Q(c)).

Clearly if parents are unable to provide a safe physical environment for their children the state must intervene to protect the child's rights. In Australia such intervention is a matter of state jurisdiction. The effect of child welfare legislation is to bring parents and children together with professionals to determine how to provide a safe physical environment for the child. In many circumstances the jurisdiction may be invoked in the context of poverty. Even if the parents appreciate that the position of parent is one of trustee they may be unable to fulfil the role due to a lack of resources. In order to properly determine the interests of the child two things are necessary, the first is that it is necessary that there be a process by which not only the child's voice is heard, but the child's interests are independently advocated. While in the context of family law decision-making there is provision for

---

32 The object of Part VII of the *Family Law Reform Bill* is set out in cl 60B:

"(1)...to ensure that children receive adequate and proper parenting to help them achieve their full potential, at to ensure taht parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

(2) The principles underlying this object are that:

(a) children have the right to know and be cared for by both their parents...;

(b) children have the right of contact, on a regular basis, with both their parents...."

separate legal representation of the child's interests[33], there is no similar provision when courts exercise 'child-welfare' jurisdiction. For example, in Victoria the *Children and Young Person's Act* 1989 provides for the legal representation of children,[34] however while this ensures that the child's instructions are placed before the court it does not assist the court by independently assessing the best interests of the child and advocating those interests. The second point is that if there has been no breach of trust, or the breach could be easily rectified, the role of the state should be to support the *legal rights* of parents by providing appropriate resources to break the poverty cycle.

The third area where parents' rights are claimed is also complex. The problem of unborn children prejudges the fraught question of whether and at what stage a foetus is a person. It is not possible in this article to engage in a lengthy discussion of the problem.[35] Suffice it to say that we accept the position put forward by McLean and Petersen that until birth the foetus is devoid of personhood.[36] Paternal claims arise with respect to issues of abortion, foetal surgery and control of maternal health and lifestyle.[37] However, because the foetus cannot be a rights-bearing entity, no trust relationship can be involved. If this is accepted, then the contest about the unborn child cannot accurately be conceptualised as involving children's rights and parents' rights at all. It is a dispute between a man and a woman. The man demands an interest in the potential product of the woman's womb and he seeks to assert control over the woman. The woman, on the other hand, has a right to bodily integrity and to self-determination over her own body. The claims of the man must give way to the rights of the woman.

With respect to medical decision-making, a number of judicial decisions have grappled with the relationship between parental rights and children's rights. The cases of *Marion* and *P and P* have been discussed widely. The effect of these decisions is that the parents only retain the legal right to consent to medical treatment on behalf of the child until such time as the child becomes competent to make her own decision. It has been recognised that the child's competence is an emerging one, and that parental authority diminishes in inverse proportion to the

---

33 Section 65 *Family Law Act* gives the Court power to order separate legal representation for the child. For court determined guidelines see *Re Kay* (1994) 17 Fam L R 537 and *P and P and the Legal Aid Commission of NSW* (1995) 19 Fam L R 1.

34 Sections 20 & 21. See also Ardley M "Children's Court Services: What's Available - Custody & Other Aspects" (1992) Leo Cussen Institute.

35 For a detailed discussion see Karpin K "Legislating the Female Body: Reproductive Technology and the Reconstructed Woman" (1992) *Columbia Journal of Gender and Law* 325; Seymour J *Foetal Welfare and the Law - A Report of an Inquiry Commissioned by the Australian Medical Association* (1995).

36 McLean S & Petersen K *infra*. See also P Alston "The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child" (1990) *Human Rights Quarterly* 156.

37 See Fitzgerald J "Selective Abortion and Wrongful Birth in Queensland: Veivers v Connolly" *Queensland Law Society Journal* (April 1995) 189; See: *Attorney-General (Qld) (Ex rel Kerr) v T* (1986) 46 ALR 275; *Paton v British Pregnancy Advisory Service* [1979] QB 276, 279; O'Neill and Handley *Retreat from Injustice* (Federation Press, 1994) at 97-103.

emergence of the child's competence. Once the child is *Gillick* competent, the parents' rights are eclipsed by the rights of the child. This raises questions for the treating doctor — where the parents' rights are extinguished, their consent would not be legally binding. To use the trust analogy the child no longer has a mere 'beneficial' interest in the outcome of the decision-making; she clearly has a 'legal' right to decide for herself.

These cases also confirm that there are some medical treatment decisions which are beyond parental authority. As a matter of public policy, the courts have held that in the case of serious, irreversible medical treatment, parents may not consent to the treatment unless it is ancillary to treatment that is required to save life or preserve health. The state has assumed that if parents cannot make the decision, the state has power to authorise the procedure. This is highly problematic. The suitability of the state as an alternate decision-maker is dependent on the constitution of the alternate decision-maker. Getting this right is no simple task, as is demonstrated in the difference of opinion contained in the Family Law Council recommendations and the Full Family Court decision in *P and P*. More significantly, given that this medical treatment involves such an infringement of the child's bodily integrity that it is beyond parental power on public policy grounds, it should also be beyond the power of the state to authorise such an infringement. This was the position taken by Brennan J (as he then was) in *Marion*, when he accepted that the power of the state as *parens patriae* could not exceed the power of the parent.[38] Such a limitation on the *parens patriae* power respects the *beneficial right* of the child.

The role of the state

The role of the state is more than that of residual decision-maker. The state provides the boundaries for the structures of society including the institution of the family. The family, and the roles of individuals within the family, are constructed by "common sense" and mediated through law. Individuals only have autonomy to the extent allowed by the state; for example there are laws which restrict child labour and which promote compulsory education.[39] As Frances Olsen recognises, the status quo within the family varies over time, so that what is regarded as state "interference" in the family is constantly changing.[40]

---

38 (1992) 106 ALR 385 at 432.

39 Freeman M *The Rights and Wrongs of Children*, (Frances Pinter London and Dover 1983) at 248.

40 Olsen F "The Myth of State Intervention in the Family" (1985) 18 *University of Michigan Journal of Law Reform* 835 at 843. Olsen gives the example of the change in the position of women within the family from complete dependence in the nineteenth century to one of legal separateness and apparent equality in the twentieth century. She argues that the public/private dichotomy is constructed by the State, that the State intervenes in the "private" when it upholds the power structures found in the family just as much as when it intervenes to protect the weaker members from abuse. See also Olsen F "The Family and the Market: A Study of Ideology and Legal Reform (1983) 96 *Harvard Law Review*" 1497.

A recent, and worrying example of state intervention in the arena of parental and children's rights is the implementation of juvenile curfews.[41] Curfews have been used as a means of social control for centuries, but have not been a feature of Australian society.[42] Yet, the moral panic about youth crime and youth gangs have recently resulted in the imposition of juvenile curfews which have barely been noticed by the adult world.[43] Several State and local government areas have either introduced juvenile curfews or dabbled with the idea. In 1993, the Western Australian Coalition Government announced, as part of its law and order policy, its intention to implement juvenile curfews in "...a number of country regions where problems of crime exist as a characteristic of the region"[44] The South Australia House of Assembly Select Committee on the Juvenile Justice System issued a discussion paper in 1991 in which curfews were suggested as a means of controlling juvenile crime. The 1992 Interim Report of this Committee contains little discussion of the issue, and the Committee made no recommendation against the use of curfews.[45] In 1991, the Queensland township of Cloncurry introduced a curfew on teenagers, prohibiting their presence in public places between the hours of midnight and six am. The curfew, which still stands, is an initiative of local community service groups and police; it has no direct legislative authority, but operates as a community policing project.[46] In 1990, the Local Government Area of Port Augusta held a referendum in which 3,707 of 4,423 residents voted in favour of imposing a 10 pm curfew on children aged 16 years or under. Less than half the registered voters voted however, and no legislative effect has yet been given to the result.[47]

---

41 The word appears to originate from the French *couvre feu*, meaning to cover the fire - in parts of Europe, a town bell would toll, calling citizens to put out their fires and retire for the night. This was supposed to help prevent fires and reduce activity after dark. See Davis SM & Schwartz MD, *Children's Rights and the Law* (Lexington Books, 1987) at 101. The use of curfews by the State to control the activities of children are intended to reduce juvenile delinquency, particularly that occurring late at night; protect children from harm and from harmful influences; and reinforce parental authority.

42 Major American cities currently employing curfews to combat juvenile crime include Los Angeles, Panora (Iowa), Miami, Detroit, Dallas, Oakland and Camden (Philadelphia), San Fransisco, Baltimore (where parents are fined for their children's infringements of the curfew) and Washington. Hundreds of small towns also employ this strategy: see Marketos AK, "The Constitutionality of Juvenile Curfews" (1995) *Juvenile and Family Court Journal* 17.

43 Curfews that have been imposed as conditions of bail, which are not considered here, have also been considered to be extremely problematic: see Youth Justice Coalition and the Law Foundation of NSW "Kids in Justice: a blueprint for the 90s" (1990) 280-285.

44 See *Law and Order: Western Australian Coalition Policies for the Nineties*. Liberal Party of WA; National Party of Australia (AGPS, Canberra, 1992) p 8; cited in Simpson B & Simpson C "The Use of Curfews to Control Juvenile Offending in Australia: Managing Crime or Wasting Time?" (1993) 5(2) *Current Issues in Criminal Justice* 184 at 192.

45 See *Interim Report of the Select Committee on the Juvenile Justice System*; Parliament of South Australia, 1992, cited in Simpson & Simpson, ibid at 192. The Final Report of the Committee is as yet unavailable.

46 See Simpson & Simpson, ibid.

47 Ibid at 193.

In NSW the *Children (Parental Responsibility) Act* 1994 imposes an implied 24 hour curfew on all children under the age of 15. Part III of the Act deals with the management of 'dangerous' and 'endangered' children. Police are given the power by this Act to forcibly remove any child under the age of 15 from a public place whenever that child is not under the direct supervision or control of a responsible adult. Although it is unlikely to happen to affluent Anglo-Australians, the police have the power to pick up a child going to buy milk from the local milkbar or independently catching a bus to the local library. The police may request the names and ages of children, and the residential address of the parents/carers of children. The police may then escort that child to her parent's/carer's residence or, if the parent is not at home, to a prescribed place of refuge, which cannot be a police station, but does include juvenile justice detention centres. The child may be held in detention for a period not exceeding 24 hours, and it is an offence for a child to attempt to leave a place of refuge. This power to detain children is only limited by the requirement that police may only take action where they consider "that to take that action would reduce the risk of a crime being committed or of the person being exposed to some risk." Given that children are by their nature vulnerable, they can always be considered to be at risk. Further, removing anyone from a public place reduces the risk of a crime being committed because there is then one less potential victim of crime; Further, while some children on the streets may be at risk of becoming victims, it is a sad fact that it is equally clear that for some children their residence exposes them to significant risk of harm (physical, sexual and psychological abuse), harm from which the streets represent a relatively safe haven.

The *Children (Parental Responsibility) Act* 1994 can be contrasted with the common law of arrest and detention, law which has been codified in s352 *Crimes Act* 1900 (NSW) and which provides that police may only arrest and detain a person whom they reasonably suspect has committed an offence. While the provisions of the *Crimes Act* provide some safeguard against arbitrary arrest, the *Parental Responsibility Act* involves a massive interference with the rights of the child. Article 37 of the *Convention on the Rights of the Child* proscribes the arbitrary arrest, detention or imprisonment of children; Article 15 proscribes interference with their freedom of movement and association; and Article 16 proscribes interference with their privacy, family, honour and reputation. The *Parental Responsibility Act authorises violations of all these provisions. Similarly, it violates a number of provisions of the International Covenant on Civil and Political Rights,*[48] and of the *Universal Declaration of Human Rights*: the right to protection from arbitrary arrest and detention; the right to protection from interference with privacy, family and reputation; the right to freedom of movement; and the right to freedom of association and assembly.

---

48 Australia has not only ratified the ICCPR but has also acceded to the First Optional Protocol by which an individual may complain to the United Nations Human Rights Committee about violations of her rights.

Not only does this Act, and the imposition of more formal curfews, involve a massive intrusion on children's rights by the state. It also attempts to renegotiate the scope of parental rights. The *Parental Responsibility Act* attempts to impose obligations on parents to control their children which go far beyond those which have ever before been thought to be reasonable. The Act assumes that parents/carers have a duty to adequately supervise children; and that parents failing in that duty should be punished. Section 7 permits a court to require parents to give a security, by payment of money or otherwise, for the good behaviour of their child, either until the child turns 18 or for any period specified by the court; enables courts to require parents to give undertakings guaranteeing the child's compliance with her own undertakings given to the court, and/or to promote the child's development, to guard against the child's future offending and to periodically report to the court on the child's progress. A failure to ensure that the child is of good behaviour may result in forfeiture of the security to the Crown.

This imposes a significant burden upon parents, who may be unable to provide the control necessary in ensuring their child's good behaviour. This applies whether the inability arises as a result of economic constraints; whether or not parents are physically able to provide sufficient control; whether or not the child has behavioural problems or is mentally ill; whether or not parents have sufficient parenting skills and family support. The legislation implies that there is no duty on the part of the state to support parents and families for whom child-raising is particularly difficult, for whatever reason. It places an unreasonable additional load on already struggling parents. Further, the law takes away from parents the 'right' to determine when a child is ready to make her own decisions.

The NSW legislature has failed to appreciate the delicate balance between the rights of the child and the rights of parents, which is beginning to be understood by the Australian courts and other institutions of the state. Parents, rightly, dispute the entitlement of the state to impose controls on the activities of their children beyond those controls ordinarily applying to every citizen: children have the right to be treated as moral agents and to be accepted as participants in the community. At the same time as legalising a very intrusive policy of state control of the children, the *Parental Responsibility Act* espouses a philosophy of parental responsibility, yet the Act attempts to require a policing role which does not arise from the relationship of the parent and the child. Rather, it imposes a burden on parents which properly resides with the state, and denies children rights to which they are entitled.

The essential problem here is that the law has been mobilised without regard to the rights of children, or even the purported rights of parents. Rather, a law directly impacting upon children and families has been introduced as a *law and order* measure. Yet analysis of juvenile curfews have found that the curfews are more concerned to reinforce traditional family values than they are to control crime.[49] Such a law is not acceptable in a community adhering to the moral regime of rights.

---

49 Simpson & Simpson op cit at 196-9.

Regard must always be had to human rights and any law affecting children's fundamental freedoms will only be acceptable if this is recognised.

Conclusion

Rights, we have argued, are founded not in rationality or autonomy, but in our very human-ness. Rights-talk is of particular value for children, providing them with a status and a stake in the argument about issues which effect them. Given that children exist is relationships, and given the dependent nature of childhood, it is important to understand the inevitable and indeed appropriate place of the state in mediating the rights and interests of parents, children and families.

The power of the state as *parens patriae*, however, must not exceed the power of the parent and must respect the *beneficial rights* of children in laws and decisions concerning them. The fundamental governing principle of a moral community is the equality of human beings in all their diversities. Wherever the legal system is mobilised to resolve issues relating to children, the fundamental rights of the child must be respected. These emerging rights are best understood through an appreciation of the dynamic developmental model of children's rights. Equally, the rights of the parents must be respected. Once it is recognised that the parents' rights are not fully fledged rights, but are akin to the *legal right* of a trustee, who must always exercise her power to promote the *equitable right* of the beneficiary of the trust, then some difficulties in the parent/child relationship can be overcome. While children are in the process of *becoming*, ensuring the protection of their residual beneficial rights is a key priority. Where issues arise in the context of the family, the best means of establishing appropriate legal intervention is found by mediating the relationship between children, parents and the state through the discourse of rights.