Rights flow downhill

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1. Introduction

What does it mean to have a right, to be a rights holder? For rights theorists, this problem is central to the debate about whether children have any rights and may claim their status as rights holders. When rights are seen as the exercise of free will and choice, as the ability to demand performance of a duty, defining the child as a rights holder will turn on the child's capacity to demand performance of the obligation.1 If, however, we delineate as rights those interests deemed worthy of protection by the imposition of some obligation, then we need not speak of the child's capacity to demand that her rights be honored but rather of her needs and wants which must be satisfied by some other capable being.2 These two theories – one acknowledging the paramountcy of self-determination, the other emphasizing nurturance – essentially characterize the children's rights movement.3

Nevertheless, neither approach to articulating a rights theory for children challenges the underlying notion of capacity as a prerequisite to having rights. As I have said elsewhere, capacity as an organizing principle is central to Western theories of individual liberty.4 To be a rights holder is to be a fully autonomous/rational/competent/moral being with the ability to compel per-

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1 Katherine Hunt Federle (1994), 'Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings', Cardozo L. Rev. 15: 1523, 1529-30. I contend in that article that a weak rights theory disadvantages children in the divorce custody context. Specifically, I note that the indeterminacy of the best interests standard, the conceptual confusion about the roles and responsibilities of the child's representative, and the use of custody as a bargaining chip in the resolution of property and financial issues are the negative consequences of an impoverished account of rights. Id. at 1525.

2 Id. at 1531-32. This account of rights, however, also disadvantages children.

3 See, e.g., Michael Freeman (1992), 'The Limits of Children's Rights', in Michael Freeman & Philip Veerman (eds.), Ideologies of Children's Rights, 29, 30. Freeman argues that rights are important because those who lack rights are slaves. Id. at 31. Freeman, however, believes in a form of limited paternalism, in which interventions into the lives of others would be permissible to protect them against "irrational" actions. Id. at 38. Although Freeman acknowledges that it may be difficult to define irrationality, it is precisely for this reason that such an account of rights would ultimately disadvantage children.

4 Federle, supra note 1, at 1527. For a more complete analysis of the role of capacity in our rights talk, see Katherine Hunt Federle (1993), 'On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle', DePaul L. Rev. 42: 983.
formance of some obligation; to be powerless to oblige others is to lack rights holder status. Even if we argue that rights are not correlative to duties but rather are preidentified interests worthy of protection, the rights conferred inevitably emphasize the future rights holder's present incompetencies. By drawing on these notions of rights, children's rights theorists have confined the meaning of rights in ways that make it virtually impossible to recognize children as rights holders without some reference to their capacities.

Yet capacity remains central to rights talk because it advantages powerful elites. Having a right means having the power to command respect, to make claims and to have them heard. But if having a right is contingent upon some characteristic, like capacity, then holding the right becomes exclusive and exclusionary; thus, only claims made by a particular group of (competent) beings will be recognized. The confining effects of this kind of rights talk is apparent when the obverse is considered: claims made by those without the requisite characteristics of a rights holder need not be recognised, although specific claims which reinforce existing hierarchies may be acknowledged. There is historicity to the claim that rights for excluded groups evolve from paternalistic notions of the need to protect the weak and ignorant to recognition of capacity and autonomy, for this has been the experience of women and people of color. Children, however, have been unable to redefine themselves as competent beings; thus, powerful elites decide which, if any, of the claims made by children they will recognize.

Allowing others to ascertain what rights children may have is nevertheless objectionable as this disadvantages and harms children. If children's claims are ignored, or if only particular claims recognized, then those deciding which claims are worthy of attention have tremendous power. The exercise of that power, however, even if motivated by a paternalistic concern for the well-being of children, has had negative consequences. Furthermore, such theories cannot accommodate these notions of power and powerlessness for tying rights to some conception of capacity forecloses a critical examination of what it means to have rights. But even when we speak of children's rights as a set of interests, we define those rights in terms of children's needs and protection, thereby promoting their powerlessness.

5 Id. at 987–1011.
6 Federle, supra note 1, at 1531–32.
7 Id. at 1524; Federle, supra note 4, at 985.
9 Federle, supra note 1, at 1533. Ostensibly, women and people of color benefitted from this evolutionary process because white male hierarchies were forced to consider their interests.
10 Id. See also note 35 for a survey of the literature on capacity.