Children's Rights and the Law

Submitted by Sarah Fitz-Claridge on 23 June, 2005 - 20:55

From ***Taking Children Seriously*** **12**, **14** and **16**

Sarah Fitz-Claridge (http://www.fitz-claridge.com) and Lawrence White

Following an editorial by **Sarah Fitz-Claridge (http://www.fitz-claridge.com)** in ***Taking Children Seriously*** **10**, Lawrence White wrote:

You propose, as I understand it, that there should be no “age of consent” law. I disagree.

Let us assume, consistent with libertarian rights theory, that genuine and manifest consent to be bound by an agreement is necessary and sufficient for that agreement to be legally respected. The concept of an “age of consent” in natural or common law addresses the question of when children shall be assumed able to give genuine consent, or conversely, addresses the question of when “manipulation” of children to secure their agreement to something represents an invasion of their personal rights. It seems to me that the same questions arise in business as in sexual relations with children, so when I speak of an “age of consent” I mean not just the age at which a child is able to give legally-to-be-respected consent to sexual relations, but also is able to sign legally binding contracts.

You are right that any legal age of consent is arbitrary. For that reason we should think of it as only a default value. That is, a child below the default age of consent can, upon providing evidence of competence, make agreements that must be legally respected.

My concern for distinguishing genuine from pseudo-consent is that children below a certain level of cognitive development are, how shall I put this?, too easily manipulated. They are not competent to give or withhold meaningful consent. Cognitive development is normally associated with age. With a child below a certain age, then, I propose that the burden of proof should rest on a party who contends that the child is competent to give consent (has not been manipulated).

Suppose that a paedophile seeks pleasure from sexual contact with a three-year-old. The child does not protest; he or she may even say “okay” to the paedophile's proposal of sex (accurately described ex ante) for ice cream. It seems to me that, prima facie, the three-year-old's parents (or legal guardians) properly have an actionable claim against the paedophile for physically violating the child's personal sphere. Further, given that most three-year-olds are not legally competent, the burden of proving that this three-year-old is legally competent should lie with the paedophile. (A reasonable age of consent would be above three years.) Has my reasoning gone wrong somewhere?

Thoughts on the Legal Status of Children

First published in ***Taking Children Seriously*** **12**

by **Sarah Fitz-Claridge (http://www.fitz-claridge.com)**

My editorial on children's rights (***Taking Children Seriously***, issue 10, page 5) has provoked some thoughtful responses raising many interesting questions that I'd like to address in this and future articles. First, what would a legal system that treats all individuals equally be like? Secondly, is it a good idea, even in principle, for children to be subject to the same rules adults are? People have various overlapping reasons for believing that this is a bad idea. In this article, I shall outline the main ones.

First, there are political reasons. A society in which children had fully equal rights would be very different from ours. To make such large changes precipitately is utopian and therefore, as **Popper** has stressed, dangerous. Political changes are likely to have unintended consequences because future knowledge is impossible to predict, and the more dramatic the changes, the more unintended consequences there are likely to be. When making political changes, we have no option but to start from where we are now, and make small, incremental changes, being prepared at every stage to change course should we find that our changes have caused deleterious consequences. Furthermore, the changes necessary for children to be made subject to the same laws as adults will never happen until most adults want it to. That seems highly unlikely in the near future.

A second class of reasons for objecting to legal equality for children is that so long as families have the power structure they do now, such a change would be dangerous for children. It would provide further incentive for and means of coercion to parents and adults of ill-will.

This article, then, is not so much a proposal for political action as an attempt to clarify some of the issues and to open the ideas to debate. One of the reasons I think this is worth discussing, despite the criticisms one might justifiably make of its immediate practicality, is that these ideas do have far-reaching implications for family life. Changes in personal lives may seem less dramatic, but are ultimately more important. Real changes in society are rarely caused by political change or legislation; they are caused by shifts in attitudes at the individual level. In other words, political enlightenment follows personal enlightenment, not usually vice versa.

Moreover, one should not dismiss legal issues entirely, for there is a complex two-way relationship between social structures and people's individual views. Ideas, from whatever source, occasionally lead to enlightenment; enlightenment sometimes changes attitudes; and ultimately, it is these changes in attitudes – in this case in individual parent-child relationships – that constitute a change in society.

The third class of reasons includes a variety of objections to the *principle* that children should be subject to the same rules as adults. Broadly, these can be categorised as follows: first, objections arising from a fundamentally authoritarian world-view. I shall not deal with those here. Secondly, there are objections arising from a disagreement about which classes of individuals should be regarded as full, free human beings, entitled to equal treatment under the law. It is those objections that I address in this article.

Lawrence White's letter raises several issues, but the principal one is about consent: is the reason for not wanting children to be subject to the same rules as adults that it would actually result in violations of children's consent, or is it that children's wishes are not regarded as being as important as those of adults? These two reasons are often confused, particularly when people argue in terms of “competence”, which seems to engender much equivocation. In answering Lawrence White's letter, I shall focus upon clarifying this confusion.

Who are the free people?

Popper says there are two approaches to political issues: to ask “Who should rule?”, and to ask “How can we so organise political institutions that bad or incompetent rulers can be prevented from doing too much damage?” In this article, I follow Popper in trying to take the second approach.

The traditional libertarian argument applying to most adults is that it is the function of law, government, and codes of ethics to empower individuals to make decisions in their own lives, and to prevent others from making decisions on their behalf. So for many, the issue hinges on whether the general argument for a libertarian legal system and ethics applies to children or not. In other words, for adults, we do not see the law as a means of making individuals take the right decisions in their lives: we see it as a way of allowing them to conduct their own lives as they see fit, so long as they allow others to do the same.

Many people systematically make the wrong decisions in their lives, yet society allows them to. Take marriage, for instance: many individuals choose partners whom it is generally agreed are entirely unsuitable. Yet we rightly take it for granted that they should be free to do so even if a third party could persuade a judge and jury, or even the entire world, that the individual's choice of partner is likely to be disastrous. In our society, adults are free to make decisions that will have adverse effects upon their lives.

Who are the free people? This is a real and important question in itself, and there have been all kinds of answers in history which would seem bizarre now: at one time or another, the excluded groups have included women, slaves, non-property-owners, various religious groups, and so on. I argue that children should not be excluded, that children should be free people, just as it was once argued that women should be free people.

The legal system

What would our legal system look like if children were subject to the same rules adults are now? This is not central to my argument, but it is worth thinking about, because of the objections many adults raise. Would two-year-olds be signing contracts to buy and sell houses? Might a three-year-old, having accepted an ice cream in return for sex, fall prey to a manipulative paedophile, as Lawrence White has suggested? Would a wealthy minor, through youthful lack of understanding, be likely to lose that wealth to an unscrupulous businessman? The answer to these questions lies partly in existing contract law, to which I now turn, in order to show that if children were treated equally under the current legal system, it would not be the disaster people think it would: for *equal rules would not mean equal outcomes.*

Contract law is one of a number of branches of the law, but in an important sense relevant to the present discussion it is representative. In common with other parts of law, one of the problems encountered in the history of contract law has been that of how to make *agreement,* or consent, a legally significant criterion, in situations in which the existence or even the meaning of agreement or consent is controversial.

Contract law evolved to provide a means by which individuals can make legally binding agreements. In the nineteenth century parties to a contract were seen as representing equal bargaining powers who enter into an agreement of their own free will. The history of contract law reveals a series of clever, creative solutions to the problems encountered in an increasingly diverse and complex society in making sense of the notion of a “freely-entered-into agreement”. Many of those problems were the same as those raised *now* in relation to children.

The first essential of a contract is that there must be ‘consensus ad idem’, that is, the parties must be of the same mind. This means, for instance, that when A is contracting to buy a car from B, both A and B have in mind the same car. Similarly, a party may deny a contract on the grounds that it is in effect not his deed (‘non est factum’) – for instance because he could not read and had been misinformed about what he was signing. If a child found that he had signed a contract fundamentally different from that which he believed it to be, he could disclaim it by pleading non est factum, or that there was no consensus ad idem.

Another essential of contract law is that there is an intention to create legal relations. That is, the parties must intend to be bound by the contract. Casual undertakings, or even promises, are not legally binding unless there is evidence of such an intention. Thus children would not be in danger of incurring liabilities unintentionally. If a child does not know what a contract is, or what it means to be bound, or what it would mean *in this case,* there would be no contract.

Certain contracts, including those where there is a fiduciary or confidential relationship between the parties, are such that only one party knows all the material facts pertaining to the contract. The law requires such parties to show 'uberrimae fidei', that is, utmost good faith, by making full disclosure of all the material facts. (That does not mean that party A has to act in the 'best interests' of party B, and it would be a very bad thing if it did.) This principle ought to apply in any situation in which an adult is making a contract with a child in his care. He would have to make sure that he revealed all information which the child might reasonably want to know to make the decision. In the absence of proper disclosure, the child could rescind the contract.

Were an adult to make a child sign a contract by using pressure or coercion, that would constitute duress, and the contract would be voidable. The forms of intimidation usually recognised involve threats of violence and the like, but the degree of seriousness of threat necessary to render the contract voidable depends on the ability of the threatened person to resist the intimidation. Were children not specifically deemed incapable of making most types of contract, they would simply get relief on grounds of duress in cases where adults used their greater age and power to intimidate or manipulate them.

The law also recognises other factors which might cause one party to be influenced by another in a way that makes a contract between them invalid. This is called 'undue influence'. It is important to note that 'undue influence' in law does not necessarily involve any wrongdoing. Where there is domination which undermines the independence of the decision of a party, that party can claim relief on these grounds.

In case *Smith v. Kay,* (1859), a young man's claim of undue influence was upheld by the Court because, despite there being no fiduciary relationship involved, the young man had incurred liabilities under the influence of an older man. In another case (*Allcard v. Skinner,* 1887) a woman who had joined an austere religious sisterhood and given all her property to the lady superior, later left the community. There was no suggestion of any undue pressure or other wrongdoing by the community; nevertheless after six years the woman sought to retrieve the property she had given, on grounds of undue influence. The only reason she failed was that she had waited six years before acting.

In certain situations where there is a special relationship of confidence between the parties, undue influence will be *assumed* unless the contrary is proved. One such relationship is parent and child. This list is not closed, and were children allowed to make contracts, it ought to include any relationship that tended to undermine the child's independence of decision.

All this indicates that if children were not considered legally incapable, as they are now, they could still have a high degree of protection under contract law. In cases where there is an unequal power relationship, contract law seeks to protect the underdog. Any adult making an agreement with a child might be risking vitiation of the contract unless he were to ensure that the child received independent advice before signing it. Adults caring for children would find it necessary to act, and be seen to act, with 'utmost good faith'. For example they would have to ensure that the child received proper independent advice before signing any contract. This would protect children from the potential manipulation that rightly concerns so many of us.

What about contracts with strangers? Adults not in a caring relationship with the child would not be subject to the same legal constraint. Nor should they be. Adults should be legally required to act with utmost good faith towards a child only in cases where the child reasonably expects the adult to be trustworthy – in other words, if the child is to a greater or lesser degree in the care of the adult. For instance, let's take the case of a lost child asking an adult to take him home. Whether the adult was a complete stranger or not, in agreeing to take the child home, he would be accepting the role as the child's carer, and would therefore be subject to 'uberrimae fidei'. A taxi driver could not ask a child for a 1000 pound (approx. US$1500) fare without revealing that this was unusually high.

The nature of consent

Lawrence White asks when manipulation of children represents an invasion of their personal rights. The answer to this question must be *prima facie* “when they think it does”. How else can we judge? That others answer this differently suggests that there is disagreement about the nature of consent. By “consent” I mean simply free, willing, genuine agreement. Lawrence White distinguishes between real consent and that gained by manipulation, which he terms “pseudo-consent”. In a case of pseudo-consent, then, the child himself is happy with the situation, but he would not be if he were competent. This may be contrasted with pure coercion, in which he is not happy with the situation.

I shall not argue that manipulation does not occur; indeed, manipulation affects individuals of all ages. It is indubitably more likely that manipulation will occur within certain groups of individuals, for example, children, the sick and elderly, recent immigrants and tourists, than within other groups. Only in the case of children (and to a lesser extent those deemed ‘mentally ill’) does the law that ostensibly protects them from manipulation render them subject to something much worse: outright coercion. Unlike the adult groups, children are arbitrarily deemed legally incompetent, and specifically prevented from acting in accordance with their possible wishes. The law that seeks to thwart the intentions of manipulative paedophiles also prevents sex between mature almost-of-age individuals in a loving relationship. The law whose object is to save callow youths from impolitic contracts also frustrates astute young entrepreneurs.

To suggest that it is possible to create a law which prevents all suffering is to underestimate grossly the complexity of the human condition. The aim must be to minimise the amount of suffering, always bearing in mind the fallibility of human ideas, and the immorality of using force against people who have done us no harm.

Parents or children? Who should have recourse to law?

Lawrence White suggests that in a case in which a three-year-old had agreed to have sex with a paedophile in return for an ice cream, the parents should have an actionable claim against the paedophile. Whether he is referring to a child who is consenting throughout is not clear. If he is not, the situation becomes one of rape, which is a criminal offence. Whilst it is conceivable that a young child might have some attraction to an adult, as one correspondent has said was true in his case, I dispute the idea that it is remotely likely that a three-year-old would actually be happy to engage in sexual intercourse with an adult, whether in return for an ice cream or not. If the child would do, that in itself presumably reflects rather badly upon the way he has been raised, so to argue that the *parents* should have legal recourse against the paedophile seems at best misguided.

In English law, since the Children Act, it is not the parents who would have recourse to law in such a case, but the child, so Lawrence White's proposal would be a backward step. Why *should* the parents have recourse to law in such cases? What is it to do with them? What argument is there for this view?

It seems unlikely to me that any child could be persuaded to have sex by the offer of an ice cream. But let's assume for a moment that he could. Wouldn't his parents have an easy time? If he is that susceptible to the power of ice cream, what could he not be induced to do? “If you unblock the lavatory, Fred, I'll give you an ice cream.” “Why thanks, Daddy. I'll do it right away.” Does that sound likely? And even assuming that the child would do anything in return for an ice cream, it should therefore be even easier for the parents to persuade the child to abstain from sex, shouldn't it? Just think what they could achieve with a whole tub of HAeagen-Dazs Cookie Dough Dynamo ice cream!

Under this assumption, these parents might even be considered negligent: they failed to take the simple action possible (offering their child a carton of ice cream) to keep the child away from the paedophile. I am being a little facetious here, but quite generally, I reject the underlying picture of the parent-child relationship that this argument assumes, and I can see absolutely no argument for giving the parents the recourse to law Lawrence White suggests they should have.

Is consent the real issue?

In wading through a great deal of correspondence on this issue, and in the course of many personal discussions, I cannot help getting a certain feeling of unreality. Are these critics of equal rights for children really driven by a paradoxical fear that children's true wishes would in fact be systematically overridden by a future legal system that did its utmost to respect them? Or are these fears about consent not their real fears?

How one views the suffering caused by the age-of-consent laws and other laws that curtail children's rights depends upon how much importance one attaches to consent. If consent is the real issue, the most important consideration is clearly how the person himself views a situation. As with adults, then, what matters is whether there is *agreement.* If a person cannot be persuaded that he has suffered manipulation, the law should not have anything to say about the matter. Consent is about wishes. If a person's wishes are violated, he is not consenting.

Adults who argue that children are not competent to give or withhold meaningful consent often have no qualms about overriding children's wishes. If a child has to be dragged kicking and screaming away from a situation his parent thinks he has been “manipulated” into, it would surely be disingenuous of that parent to claim to be motivated by considerations of consent. Many parents would do this, believing sincerely that it would be in the child's *best interests.*

One proposal is that there should be a mechanism by which individuals who are under the age of consent may, on proof of competence, make agreements currently legally only open to adults. This does sound more liberal than the present system, but it still evinces an implicit denial of children's autonomy. Adults have a vision of what children should do in a given situation, and if a child chooses to do something else, the child is deemed incompetent and his wishes are overridden. Were the “incompetence” displayed by an adult rather than a child, he would not be dehumanised in this way.

If consent is the real issue, why is there this difference of approach? Why not be consistent about this competence criterion and apply it to adults? Because they are adults? Does that not strike you as a little circular?

Competence or age? Which is the real issue?

Making competence the criterion is fraught with problems. Are Socialists to be denied the vote, because (Libertarians would argue) they don't understand economics and so vote for evil? Are libertarians to be denied the vote, because (Socialists might argue) they don't understand the nature of society and so vote for evil? Should people who have divorced more than a certain number of times be forbidden to marry because they have shown themselves to be incompetent spouses?

Let us assume that we have a legal system in which children younger than the age of majority are able to make agreements on proof of competence. By what criteria should their competence be judged? Are they considered legally incompetent because their consent is in doubt? Because their understanding of the contract is in doubt? Because they don't have the expertise to be able to make a judgement on the matter? Or because they have the wrong frame of mind? *Or because the person empowered to prevent them thinks the contract is a bad idea?* It seems to me that where the ostensible reason for excluding children is that they lack competence, the real reason is that they have not reached a particular age. In other words, the argument is vacuous.

No age-of-consent laws

If there were no legal discrimination on the basis of age *per se,* competence would not be an issue. Consent would be the issue, and the law would not intervene except in cases where there was a dispute. Although there would be no particular age of consent or majority, a young child would be able to complain that he had not consented, and the onus would be on the adult to prove that the child had consented. The younger the child, the more likely it would be that the child would be believed. Adults making agreements with children could minimise their risk by ensuring that the agreements were formalised by a solicitor or commissioner for oaths, who would take whatever steps were necessary to confirm that the child had received independent advice, knew what he was signing, and was fully and freely consenting.

Legal competence based upon consent

If the concern is over whether or not the child is competent to consent, we might envisage a system in which a party making an agreement with a minor would be automatically deemed to be in the wrong unless he was able to prove that the child knew what he was agreeing to and had had proper access to the opposing view. This system, which might one day be a transitional measure, would have an age of consent, but otherwise, it would be quite similar to that outlined above. In *this* system, it would be very likely that anyone contracting with a child would go through a formalised procedure with the child so that it could be established that the child *was* consenting.

On the narrow issue of sexual consent, which is just a different kind of agreement, it might be worth mentioning the system Holland has now. The age of consent is 16, but no prosecutions are ever brought against adults having sex with individuals between the ages of 12 and 16, except in cases where the young person complains. In such cases, the onus is on the adult to prove that the child consented, whereas if the dispute were between two adults, the onus would be on the one complaining to prove lack of consent. Where it can be proved that an adult has had sex with a child who is younger than 12, the adult is deemed guilty, irrespective of whether the child says he consented or not.

Competence based upon expertise

Another possible criterion of competence might be expertise. In this case, the test might be whether the child has understood enough of the situation to be able to make an agreement. If society deems such a test of expertise necessary, such as a driving test, that may in many cases be justifiable, but if this test of competence *only* applies to *children,* one must suspect disingenuousness on the part of the advocates of such a system.

If the real issue is that professed, namely, ignorance, there can be no justification for not applying it consistently, to adults as well as children. Ignorant adults should be prevented from making contracts just as this system's advocates would frustrate the potential contracts of ignorant children. If the advocates for this system do not apply the same criteria to all, it must be the case that physical age, rather than ignorance, is the critical factor. If so, this requires justification.

The right frame of mind

The next level of test advocated to determine competence is not about competence or consent at all. It is about whether the child is in the right frame of mind to make a decision. Those who advocate tests of competence for minors wishing to make agreements might consider the following question. What would it take to pass the test? What sort of person would pass or fail this test? Are there any minors with a desire to do something apparently radically unwise who would pass the competence test?

The answer to this question exposes the real psychology underlying this approach. Those for whom the answer is “no” deem children incompetent whenever the children do not choose to act as *they* think best. So they are not really talking about competence at all, but merely status, as determined by *age.*

In conclusion

To sum up: I have explained why the fears about the legal effect of abrogating the age-of-consent laws are unfounded, that even *existing law* contains many subtle yet powerful safeguards to ensure genuine agreement in complex situations. I have pointed out that the laws whose rationale is to protect children from their own folly actually harm them in many instances. I have identified the flaws in the idea that the parents of a child who has consented to something supposedly harmful should have recourse to law. I have argued that many claims of concern for consent are disingenuous. I have demonstrated the vacuousness of the competence argument. Therefore, it still remains for those whose professed argument for excluding children from legal equality is one of consent or competence to justify their position.

Questionable motives?

First published in ***Taking Children Seriously*** **12**

by **Sarah Fitz-Claridge (http://www.fitz-claridge.com)**

To unite the most diverse and argumentative group of parents, you need only mention the issue of the legal status of children, as I did recently on the Internet. For greatest effect, say that you believe that the age-of-consent laws harm children. As one correspondent pointed out, I succeeded in creating a 'miracle': all the usual disputants were united in their opposition to my 'execrable' views. Some of them questioned my motives and made odious insinuations, implying that since some paedophiles campaign ostensibly for children's rights, anyone who cares about children's rights must be a paedophile. When one party in a discussion starts defaming his opponent, one cannot help wondering whether he has any arguments at all.

Ironically, most of those people have a view of children which in a key way resembles that of the very paedophiles they abominate. That is, they have a preconceived vision of how they want a child to behave, and they want to channel the child into that vision using various levels of pressure and, if necessary, force. And they want the law to sanction this. It is quite alien to those critics, just as it is to people who sexually assault children, to start by looking at what the individual child wants, and who he is, and trying to find ways of helping him do what he wants to do. It is not surprising that these two opposing groups share that view, for it is of course the standard view in our society. It is taken for granted that the role and function of the adult in an adult-child relationship is to control the child.

I think that any intimate relationship that is based on control rather than consent is both immoral and likely to fail. But this immediately raises the issue (rather topical at the moment), to what extent should parents seek to control their children's sexuality? Should they control it at all? We must give our children the best advice we can, the best information, protection, and moral guidance both by word and by example. But should we really control something so personal? If a person's *sexuality* is not his own, what is? Punishing children, or making them feel dirty, on account of 'playing doctors and nurses', or masturbating, or engaging in any consenting sexual activity whatsoever, is a form of sexual assault (cf. the actions of the 'caring professionals' mentioned in TCS Opinion ("Beware: child-protectors at work", page 4, ***Taking Children Seriously*** **12**)).

I must admit that the paedophiles on the Internet would eagerly agree with this particular children's right. "If consent is the criterion," they would say, "why should we not be allowed to have sex with children, provided that they consent?" We seem to be in the awkward situation that a child's right to engage in consenting sex is, by inexorable logic, equivalent to a paedophile's right to have sex with a consenting child. Many people would grudgingly grant the former, but never the latter. Antipathy to the idea of paederasty tends forestall all thought about the issues. However, rather than simply vilifying paederasts as being evil by definition, I should like to consider the matter rationally, from the point of view of children's welfare and rights. Might paederasty, in some cases, be consistent with real concern for children's welfare?

I think that the single most important fact bearing on this issue is this: in any close relationship between an adult and a child, a gross imbalance of power is unavoidable. And generally, having power over someone is morally incompatible with having a sexual relationship with that person. Vladimir Nabokov's book, *Lolita,* gives a good illustration of this.

The paedophile in *Lolita* was quite coercive and became more so when the girl began to have boyfriends of her own age. But even if the adult tries hard to use his power non-coercively, if he is a significant person in the child's life it is nevertheless he who has all the power in the relationship. However benevolent and sensitive he may be, however much he respects the child's rights, it is still predominantly his ideas, his decisions and his personality that shape the child's options, rather than vice-versa.

In addition to the issue of power, there is the related one of the adult's duty to protect the child. As many TCS readers will know, protecting one's children from coercion is, in our society, a daily struggle, not just against active interference, but against sheer bother, unpleasantness and acute embarrassment when one is forced to disregard social convention, violate cherished taboos and collide with authority ("Yes, Mum, I did tell her that you were lying when you told her

about Santa Claus. No, doctor, I will not make him swallow it. No, Mr Jones, they do not go to school.”). All this is taxing and bruising enough as it is, for any adult who is serious about protecting a child. Any sexual relationship that existed between the adult and the child would greatly multiply all such problems.

Power imbalances can and do happen in adult sexual relationships too, though they are seldom in the same league as that between a child and a significant adult. But my point is that a child needs many things from such an adult – stability, trust, un-demanding approval and interest – which, in our society at least, sexual relationships frequently put at risk. Certainly sexual relationships are much worse at providing these things than, say, ordinary friendships between adults, or conventional parent-child relationships. And yet, we want to do better than the conventional parent-child relationship. We want to provide even more in the way of security and commitment, and demand even less in return.

A paedophile on the Internet argued that most people in this world are caring, decent individuals, able to overcome power imbalances with those they care about. He claimed that in a truly loving relationship, the child would benefit and not be harmed. But that argument is not convincing. If we were to accept love as a guarantee that children will not be harmed by the adults who have power over them, we might as well forget about campaigning for non-coercive child rearing and children's rights.

Only a tiny minority of children are not loved. The rest are hurt and harmed by those who love them. Overcoming the imbalance of power between adults and children is not easy; love alone will not begin to do it; it is not something that anyone in our society can claim to do well. I have already mentioned how incompatible it is with the child-centred approach that I advocate, to have a preconceived vision of how one wants a child to behave. When such a vision has a sexual component, how can it fail to make matters worse?

If an adult nevertheless seeks a sexual relationship, we must ask, to what end? What sort of relationship can he be hoping for? Would it be like a marriage – demanding exclusivity and fidelity, and often breaking down acrimoniously within a few years? Since the reality is that the child is powerless in the relationship, what kind of relationship would it be? What if the child wanted to end the sexual side? Would the adult simply revert to providing the loving intimacy that the child wants and needs, dropping the sexual overtones? Is that how adults normally behave when sexual relationships between them break down? Of course not. It is just not credible. And if children in such situations did not find it credible either, then there would inevitably be immense pressure on them not to reveal their dissatisfaction, and so they would be trapped in situations of extreme sexual exploitation.

As I have said, an adult who genuinely loves a child and cares about children's rights already has enough trouble protecting the child in a thousand different ways. One must suspect that, whatever they may think, paedophiles involved in ‘loving sexual relationships’ with children are not motivated by an overriding concern for the welfare of their young lovers. The paedophile's belief that he could have a love affair with a child can be no more than a romantic vision. At best, it may be a gentle sort of vision, as visions go. Nevertheless it is an impossible vision. And when it fails, as it almost invariably does for adults, the child will, to put it mildly, suffer.

But does it follow that there should be an age of consent? This idea is so rarely questioned that one may be forgiven for ascribing to it more wisdom than it deserves. One situation I have not so far considered is that where a *child* seeks to further his own sexual development. This situation is quite different from that discussed above. For example, suppose an adolescent goes to a bar hoping to lose his or her virginity there. In that case there is no parental or quasi-parental relationship to be damaged, so it is much less likely that an adult who obliges could be doing any harm. So let's shed our comforting assumptions for a moment and consider the possible harm in having an age of consent.

That sexuality might develop suddenly, conveniently coinciding with the sixteenth birthday, is about as likely as the sudden development of language. Were there no age of consent, sexual development would be able to follow a more natural, incremental course, just as children develop language incrementally. The effect of the current law is to sabotage this natural evolution of sexuality. In effect, those below the age of consent are heavily pressured to pretend that they have no sexual feelings; they are assumed not to have a sexual side to their personality at all; they are not even allowed to watch films that include depiction of sex. Those above the magic age are under a different kind of pressure, to

participate in the conventional sexual patterns, to prove that they are attractive women, or that they are "real" men – all this in preparation for a marital relationship.

The complete denial of children's sexuality must cause guilt and confusion in those children who are aware of sexual feelings within themselves, and is surely at least partly responsible for the preponderance of twisted, guilt-ridden, dysfunctional sexuality apparent in the adult population. It must also be to blame for many teenage pregnancies, because guilt and fear prevents many under-age individuals from seeking contraceptive advice. Similarly, it makes young people less likely to take precautions against AIDS and other diseases.

The law intended to protect children from abusive paedophiles concomitantly prohibits loving sex between just-under-age peers. But isn't this harm outweighed by the good the law does in protecting children from ill-intentioned paedophiles? On the contrary, age of consent laws may even lead to more exploitation than there would be otherwise. How?

For example, frustration resulting from being forbidden sexual contact with individuals their own age may lead some children to tolerate or even seek sexual intimacy with adults, which then becomes unwelcome sex which they find it hard to rebuff. Other children, knowing that under-age sex is illegal, mistakenly blame themselves. The entire legal framework that accords children a lower status than that of adults, dis-empowers and de-humanises them in such a way that they are psychologically, as well as legally, unable to stand up to adults. All their young lives, they receive the message that they must obey adults; they are powerless against adults; they have little control over their own lives. It is extremely difficult to stand up to those in whom the law vests such power.

Large imbalances of power, such as that of adults over children, make it easy for the powerful to coerce the powerless in a thousand ways, from the most overt to the most subtle. Slaves were commonly raped by their masters. Yet even where this was illegal, the slaves could do little about it. The cure – the only effective cure and the only morally justifiable one – was not harsher penalties for "miscegenation"; it was to free the slaves: to give them equal rights.

Generally, were children accustomed to being in control of their own lives, they would be far more likely to complain about any ill-treatment they received. In particular, in the absence of age-of-consent laws, there would be less cause for children to feel frustration and guilt, and it would be psychologically easier for them to defend themselves from sexual assaults. There would also be a legal framework that was devoted to giving practical effect to their consent and their wishes. I have written more about this in the article, "Thoughts on the legal status of children" (Taking Children Seriously, page 9, issue 12).

Let me leave you with another disturbing thought: since children are used to being coerced by adults, is it inconceivable that they might be attracted to adults who are nice to them? How many children therefore become sexually involved with adults simply because they seem to treat them with respect, in a way that other adults in their lives don't? And would this happen if children were not so used to being controlled and disregarded?

Following the above article and editorial, Lawrence White replied (in ***Taking Children Seriously*** **14**):

In her stimulating article "Thoughts on the Legal Status of Children" (TCS **12**), Sarah [Fitz-Claridge] raised several objections to the argument I made in a letter (in the same issue) in which I defended a particular type of "age of consent" legal rule with respect to contracts and sexual relations. I would like to try to clarify where we agree and where we disagree.

THE COMMON LAW

Sarah [Fitz-Claridge] begins by proposing to follow Popper in asking how institutions can be organised to prevent rulers from doing too much damage (to the liberty of the citizens, presumably), rather than asking who is to rule. I agree that

this is the right way to proceed. I would argue that a common-law legal system, based on the accretion of decentralised judge-made precedent rather than on parliamentary legislation, is a very good way to constrain the damage done by rulers. In defending a particular kind of "age of consent" rule – spelled out below – I took for granted that such a rule (or something like it) was historically developed by common law judges. I argued that this kind of a rule is consistent with libertarian rights theory. I have since been told by a legal scholar that the common law did indeed traditionally recognise "infancy" as a defence against being bound to a contract. If this is correct, then Sarah [Fitz-Claridge] is proposing to overturn the common law by abolishing all age-of-consent rules.

CONSENT AND THE AGE OF CONSENT

Sarah [Fitz-Claridge] correctly notes that the principal issue is about consent. If so, she wonders, when then should the law have a rule formulated with regard to age? What does age have to do with consent?

My argument for allowing age-based distinctions into consent-based law runs as follows. Disputes will arise over contracts or sexual relations involving children, in which the children or their advocates will plead that the children in question did not genuinely consent (therefore they should not be held to the contracts or have been sexually assaulted). In adjudicating such disputes the courts need to decide in each case not only (a) whether the child gave apparent consent, but also (b) whether the child was legally competent, that is, capable of giving genuine consent. The court needs to assign the burden of proof regarding a child's competence or incompetence to one side of the dispute or the other. In assigning the burden of proof the court is justified in taking note of the fact that children below some age are typically not capable of giving the sort of full-fledged or genuine consent that normal adults can give. Agreements involving very young children are therefore properly subject to a different burden of proof – a higher standard of scrutiny for genuine consent – than are agreements strictly among adults.

Genuine consent requires a certain level of cognitive development, and human cognitive development is age-related. Although different individuals reach various cognitive milestones at different ages, there is a much lower probability of error in assuming that an adult has achieved the cognitive level requisite for meaningful consent than in assuming that a very young child has achieved that level. A body of law based on consent is therefore justified in having an age-related default rule of the sort: an individual younger than x is presumed incapable of giving genuine consent; an individual older than x is presumed capable.

In calling this sort of an age-of-consent rule a "default rule," I wish to emphasise that I am not at all arguing for a rule whereby "under-age" children may never lawfully engage in contractual or sexual relations. (Thus, like Sarah [Fitz-Claridge], I would oppose a law that "prevents sex between mature almost-of-age individuals" or that "frustrates astute young entrepreneurs.") Age provides a legal presumption of competence or incompetence, but the presumption is rebuttable. Legal protection should be provided to the freely made agreements of under-age children who provide evidence that they are "mature beyond their years," that is, who can show that do have the requisite capability. The type of age-of-consent rule I am defending is simply a line below which the burden of proof shifts: the court presumes that an over-age party is capable (unless shown otherwise) of meaningful consent, whereas it presumes that an under-age party is incapable (unless shown otherwise).

PLEADINGS AND PRESUMPTIONS

Sarah [Fitz-Claridge] discusses at some length the remedies that the law of contract should properly make available to children when unscrupulous adults attempt to take advantage of them. She says that these remedies would be available "if children were subject to the same rules adults are now" or "if children were treated equally under the current legal system," but in fact the application of several of the remedies she cites would treat children and adults differently or unequally. Sarah [Fitz-Claridge] does want the court to take into consideration the respective ages of the parties to a dispute. Thus Sarah [Fitz-Claridge] implicitly endorses age-based distinctions in the law, though she explicitly decries them in principle.

(1) Sarah [Fitz-Claridge] writes: “If a child does not know what a contract is, or what it means to be bound, or what it would mean in this case, there would be no contract.” This suggests that a child, sued for breach of a contract he signed, could defend himself by pleading ignorance of one of these things. This is reasonable. But it does not seem reasonable that an adult could equally well defend himself this way. We rightly presume that adults who sign contracts do know these things. If the court, as a rule, accepts the child's plea of ignorance unless it is specifically rebutted, but requires the adult attempting to plead the same ignorance to provide evidence of mental incapacity at the time, we have an age-of-consent distinction in the law.

(2) Sarah [Fitz-Claridge] writes that children “would simply get relief on grounds of duress in cases where adults used their greater age and power to intimidate or manipulate them.” Here Sarah [Fitz-Claridge] clearly posits an age-based distinction, and one which takes the form of an age-of-consent rule. No such defence is available, I would think, to a 25-year-old who seeks relief from a contract with a 50-year-old. Both are adults. If a child is granted relief on this grounds it is because the child has not yet attained the age at which the law presumes the ability to deal with elders as equals.

(3) Sarah [Fitz-Claridge] cites “undue influence” as a defence for voiding a contract, offers the relationship of parent to child as a situation in which “undue influence will be assumed unless the contrary is proved,” and proposes that the list of such situations “ought to include any relationship that tended to undermine the child's independence of decision.” It should be obvious that such a rule treats children and adults asymmetrically, not equally, when an adult cannot plead that his independence of decision has been undermined by a child's “undue influence.”

(4) Sarah [Fitz-Claridge] says of legal disputes between children and adults in her preferred legal system: “Although there would be no particular age of consent or majority, a young child would be able to complain that he had not consented, and the onus would be on the adult to prove that the child had consented.” If a young child may offer this defence, as is reasonable, but an adult may not, the courts need a definite rule regarding how young is “young”. Let us apply this principle to sexual relations. Consider a thought-experiment in which we gradually increase the age of the party who complains that he had not consented. At some age, older than that of a young child, the onus of proof must shift, so that it no longer rests with the adult defendant to prove his innocence of sexual assault (by showing that the complaining party genuinely consented, a defence Sarah [Fitz-Claridge] is rightly committed to allowing), but it rests with the complaining party to prove the defendant's guilt. There must be some such age assuming that Sarah [Fitz-Claridge] would, as is required by the principle of presuming innocence until guilt is proven, wish the court to place the onus of proving non-consent on an adult who complains of sexual assault by another adult. The age where the onus of proof shifts is the age I am calling the age of consent. When Sarah [Fitz-Claridge] writes that “there would be no particular age of consent,” she seems not to recognise that the court needs a particular (specific) default rule for assigning the burden of proof, and needs that rule to be based on a generally relevant and readily ascertainable fact like the complaining party's age.

(In principle, the rule need not be strictly chronological. As an alternative, the court might formulate a rule based on physical indicators. For example, it could presume competence for individuals who have reached puberty, but not otherwise. If common-law courts have not formulated such rules, I would assume that this is either because physical indicators are more ambiguous, or because cognitive development is more closely associated with age that with physical indicators.)

All this indicates that if children are to receive the “high degree of protection under contract law” that Sarah [Fitz-Claridge] rightly seeks, in a world in which adults know more than children and can manipulate children into not-genuinely-consented agreements more readily than the reverse, an age-of-consent default rule is necessary. Sarah [Fitz-Claridge's] disagreement is more apparent than real.

WHO DEFENDS THE CHILD?

In response to my raising the question of when “manipulation” of children represents an invasion of their personal rights, Sarah [Fitz-Claridge] writes: “The answer to this question must be prima facie ‘when they think it does.‘ How else can we judge?” This strikes me as a wholly inadequate answer in the case of children who are too young (i.e. do not yet have the cognitive skills) to say, or to know, that their rights have been violated. As Jan Narveson, in his contribution to the

debate on this question in the July “TCS Forum,” quite rightly asked: how is a preverbal child, or a child who does not understand how to hire a lawyer, supposed to mount a defence?

I proposed, having especially in mind just such children who are preverbal or prejurisprudent, that a child's parents (or legal guardians) have a right to bring legal action against an adult who violates the child's rights (say, molests the child).

I did not imagine that this proposal would be controversial, but Sarah [Fitz-Claridge] questions it. Can it really be true that English law, as Sarah [Fitz-Claridge] maintains, does not give parents recourse to the law when their child is molested, but only gives the child recourse? (If the parents are denied recourse because only the state may bring criminal prosecutions, I would hardly regard this as a libertarian or desirable state of affairs.)

The argument for giving parents or legal guardians recourse to the law is, of course, that a child is typically not capable of hiring a lawyer, much less of mounting his own case. The molestation is not a crime against the parents, of course, but as the parties who have assumed the responsibility for raising the child they should be empowered to seek redress on the child's behalf. Who is more properly empowered, when the child himself is incapable?

COMPETENCE AND CONSENT

Sarah [Fitz-Claridge] writes: “Consent is about wishes.” She asks: “Are these critics of equal rights for children really driven by a paradoxical fear that children's true wishes would in fact be systematically overridden by a future legal system that did its utmost to respect them?” I cannot speak for other critics, but my view is that meaningful consent involves more than simple wishes. Children begin expressing wishes long before they attain the cognitive level associated with meaningful consent.

Genuine or meaningful consent, I have argued above, requires a certain level of cognitive development. Children (or mentally handicapped adults) well below that level can at most give superficial or non-meaningful consent to a contract or sexual proposition. I am reminded of the climactic scene in the movie _Rain Man_. Raymond Babbitt, the (in some ways easily manipulated) autistic adult played by Dustin Hoffman, is asked whether he would like to live with his brother Charlie. “Yeah,” he says. He is then asked, would he like to return instead to the residential institution where he had been living before Charlie removed him? “Yeah,” he says. The questions are put again, with emphasis on the either-or nature of the choice. “Yeah,” Raymond replies time and again. Given Raymond's cognitive deficits, as highlighted by his inability to respond appropriately to an either-or choice, his “yeah” does not provide meaningful consent to either option.

I am afraid that in calling superficial consent (of which this is an unusually stark example) “pseudo-consent” in my letter, I was guilty of a poor terminological choice. In any case the distinction I had in mind is not consistent with Sarah [Fitz-Claridge's] interpretation that “in a case of pseudo-consent, then, the child is happy with the situation, but he would not be if he were competent. This may be contrasted with pure coercion, in which he is not happy with the situation.” Happiness with a situation is evaluated ex post; it can not tell us whether the situation was entered ex ante with consent or under coercion. In a case of merely superficial consent, an individual – manipulated or not, happy ex post or not – agrees without sufficient ability to understand.

Sarah [Fitz-Claridge] writes: “Adults have a vision of what children should do in a given situation, and if a child chooses to do something else, the child is deemed incompetent and his wishes overridden.” I hope it is clear that I do not, in fact, propose that the courts should judge competence in regard to particular choices, but rather by evaluating an individual's overall level of cognitive function. Consequently I have no trouble endorsing Sarah [Fitz-Claridge's] demand that we should consistently apply the same competence criterion to adults as to children. I would only add the proviso that at some age the burden of proof shifts; individuals above but not below the age of consent are properly presumed competent. The presumption of competence is rebuttable, however. An over-age individual, to be judged incompetent to manage his own affairs, must be shown to be insane or to be of unusually low cognitive function. An under-age individual, to be judged competent under the legal system I am defending, must be shown to be of unusually high (i.e. approaching normal adult) cognitive function.

Sarah [Fitz-Claridge] worries that “making competence the criterion” for legal protection of an individual's agreements, as I have proposed, “is fraught with problems,” because people who are ignorant or make foolish decisions might be declared incompetent. My argument refers, on the contrary, to a much narrower sense (what I take to be the standard legal sense) of competence. Sarah [Fitz-Claridge] asks: by what criteria is competence to be judged? I do not know the exact standard the court should use for judging competence, but in general it will assess whether the individual reasons well enough, or understands the consequences of making choices sufficiently well, to pilot his own life. Courts use some such criteria for judging competence today (to cite an example, in adjudicating the suit by other members of the Beach Boys seeking to take control of Brian Wilson's musical estate on the grounds that Wilson's alleged psychoses and drug abuse have left him mentally incompetent).

Sarah [Fitz-Claridge] mulls various possible criteria for competence. Among them, a party's ability to understand the contract and its ramifications, and ability to understand enough of the situation (“expertise”) are indeed germane to judging his competence. “Frame of mind” and taste are not at issue, just as they are not at issue when an adult's legal competence is questioned. Sarah [Fitz-Claridge] asks: “Are there any minors with a desire to do something apparently radically unwise who would pass the competence test?” As I conceive the test, yes, unless the same desire on the part of an adult provides sufficient evidence to judge the adult mentally incompetent.

IN CONCLUSION

Sarah [Fitz-Claridge] concluded her article with a challenge: “it still remains for those whose professed argument for excluding children from legal equality is one of consent or competence to justify their position.” I hope I have met that challenge. To summarise, I have pointed out that children, by and large, do not have the cognitive capacities of adults. The law is therefore justified in a general presumption that a child below a certain age lacks the cognitive capacity, or competence, to give meaningful consent to contractual or sexual relations. An age of consent rule of this sort is not a blanket prohibition. It does not authorise prosecuting minors for victimless activities. It allows legal protection to the agreements of children below the age of consent who do have the requisite competence to make them, because the presumption of incompetence is rebuttable in specific cases. Finally, I have shown that the legal safeguards necessary to protect the rights of children from unscrupulous adults – as Sarah [Fitz-Claridge] herself describes those safeguards – lessen the burden of proving non-consent for a child preyed upon by an adult. These safeguards therefore embody, explicitly or implicitly, age-of-consent rules.

A reply to Lawrence White

First published in ***Taking Children Seriously*** **16**

by **Sarah Fitz-Claridge (http://www.fitz-claridge.com)**

In his thoughtful response (***Taking Children Seriously*** **14**) to my articles, “Thoughts on the Legal Status of Children”, and “Questionable Motives?” (***Taking Children Seriously*** **12**) Lawrence White argues that “…children do not have the cognitive capacities of adults,” and that the law “ … is therefore justified in a general presumption that a child below a certain age lacks the cognitive capacity, or competence, to give meaningful consent to contractual or sexual relations.” He stresses that an age-of-consent rule of this sort “ … is not a blanket prohibition”, and that it “...allows legal protection to the agreements of children below the age of consent who do have the requisite competence to make them, because the presumption of incompetence is rebuttable in specific cases.” Finally, he suggests that “ … the legal safeguards necessary to protect the rights of children from unscrupulous adults... lessen the burden of proving non-consent for a child preyed upon by an adult,” and that “ … these safeguards therefore embody, explicitly or implicitly, age-of-consent rules.”

I should like to comment on this reply in detail, because I think there are serious problems with it. I must at the outset thank David Deutsch for helping me to clarify my ideas on the legal status of children. Some of the arguments below are due to him, and others have been improved in the light of his comments on an earlier draft.

The Common Law

Let me start with what is, perhaps, a small point. Lawrence White is wrong to say that in Popperian thinking, the overall aim of politics is to prevent rulers from doing too much damage to the *liberty* of the citizen. The real Popperian maxim is that we should aim to prevent rulers from doing too much damage *according to whatever criteria are currently thought to be best*. These criteria may change over time. It is because of its evolutionary, error-correcting properties that common law is a good way of constraining the damage done by rulers.

But just because a common law legal *system* is the best system, that does not mean that a *particular law* that arises in such a system must be right, as Lawrence White assumes. On the contrary, the whole point of that kind of system is that it can gradually replace laws when they seem to be wrong, even if they did come up in that system. He rather contradicts himself by judging age-of-consent laws according to whether they are "...consistent with libertarian rights theory," which implies a particular class of laws. The common law is not libertarian. Libertarians hope that further evolution of the common law, if allowed to proceed, would make it more libertarian, but it is not self-evident that that is what would happen, and it certainly is not libertarian *now*.

Lawrence White goes on to say: "I have since been told by a legal scholar that the common law did indeed traditionally recognise 'infancy' as a defence against being bound to a contract. If this is correct, then Sarah [Fitz-Claridge] is proposing to overturn the common law by abolishing all age-of-consent rules." This is a non sequitur. How can I be "...proposing to overturn the common law," by merely arguing that one particular law is mistaken? Proposing to overturn particular laws because they seem mistaken is the very life blood of common law, as it is of every rational human institution.

"Competence"

First I must clarify something: the word 'competence' has several different meanings, both in everyday English, and technically too. Each meaning is relevant in a different context. So, to avoid the equivocation I think there is here, I'd like to state specifically these different uses, and in so doing, elucidate the flaws in Professor White's reasoning. If one uses the terms consistently, then none of these 'competence' arguments for treating children differently actually holds up.

Suppose that I am a patient in hospital for tests to see whether I might benefit from a heart bypass operation. I know nothing whatever about hearts, let alone how to judge whether the bypass operation is a good idea. The doctor has worked in the field for twenty years, and is considered one of the leading heart specialists in the country. This is my first time even *thinking* about heart bypass operations. Who is competent to decide whether I should have the operation or not? In one sense of the word "competent", I am *incompetent* to make the decision: for instance, nobody in their right mind would let me make that decision *for them*, or ask my advice about whether *they* should have such an operation. Clearly, in that sense of the word "competent", the doctor is eminently more competent than I, by virtue of his superior knowledge.

But suppose that I do not want the operation. Who is legally competent to make the final decision? Not the doctor: if he goes ahead with the operation against my will, he will be committing a criminal offence. That is *not* because I am more competent than he is at taking the decision in that first sense – I am obviously not. But *legally*, I am the *only* one competent to make that decision. The doctor is *not* competent to make that decision on my behalf. In this second sense of the word "competent", I, the patient, am the only person competent to decide what treatment to have. In this second sense of the word, the doctor's superior knowledge confers no authority upon him to act against my will. That is because I am a human being with rights, who can take decisions on my own behalf.

Suppose I am suffering from some other disease, and I have just had an operation, and I am delirious from the anaesthetic, and the surgeon realises that an immediate heart bypass operation might save my life. Someone has to make the decision as to whether I should have the heart bypass operation *now*. At that moment, I am not legally competent to make the decision: I have been rendered incompetent by being under the influence of an anaesthetic. When the anaesthetic wears off, I am competent again. When I am back under it, I am incompetent again. And so on. None of this

has anything to do with my knowledge of medicine. When I come round I do not suddenly learn about heart bypass operations. It is just that when I am conscious and can express a clear wish ("No, I do not want that treatment.") then the doctor becomes legally incompetent to make the decision for me.

There is a third context in which "competence" may be an issue: Suppose that I am unconscious as a result of a road accident that has just occurred. A policeman or ambulance man is competent to decide whether I should go to hospital, or which hospital I should go to, and so on, irrespective of whether I have signed a consent form, and irrespective of their own medical expertise. But anything that these people do to me on this basis must be reasonable and must be relevant to the accident. It would *not* be reasonable for the surgeon to perform a breast augmentation, say, just because he was convinced that I would benefit from it, but was currently incompetent to give consent. Performing unrelated surgery, however beneficial, would put the doctor in the same position as one who simply went ahead with my heart bypass operation despite my explicit instruction not to.

When Lawrence White says a child is not competent, he is comparing a child with the delirious patient, or the unconscious road-accident victim. The argument in such cases that I am not a doctor – that I don't *know the answer* – is irrelevant. What matters is that I am delirious, or unconscious. But what if I say to the doctor, "Well, I have come round now, and I do *not* want the operation", and *he* says, "Well what do you know about it? To me it is just as if you are still delirious. You don't know any more about hearts now than you did when you were delirious, so why should I let you take the decision? I will take it for you, for your own good."

The role of consent in our legal tradition

Decision-making is all about knowledge. So why have our legal traditions and other basic institutions of our society been arranged so as to put the decision into the hands of the person who knows *less*? Why don't we require that whenever there is a dispute between two people, the one who knows more should make the decision? Why don't we say (as Lawrence White does in the case of children) that the patient can only take the decision if he *rebuts* the natural presumption that he doesn't know anything about hearts? He is unusually competent for a patient, say. He has read the text books and has clued himself up about this issue, and that then the normal assumption that he doesn't know anything, can be rebutted. Why don't we say *that*? Why isn't that the way the system is set up?

Why do we go to extraordinary lengths to ensure that every single (adult) patient in hospital is scrupulously given the final word as to whether they have the operation or not? Only in the tiny number of cases involving a patient who also happens to be a doctor or medical researcher is there even any dispute about who knows more about it. So the law *systematically* puts the decision in the hands of the person who knows less. Why is this? It is because *that is the best way to get the right answer*. The overwhelming majority of patients take their doctor's advice. But some don't and are right not to. One might consider the many examples of cases in which the medical establishment has been systematically wrong, and people who have rebelled against them have been systematically right – such as the idea that all pregnant women should lie flat on their back to give birth. If knowledge is to grow, it can only grow through creativity, reason and open criticism. And that means that many new ideas – and almost all important new ideas – begin as a minority idea, a deviation from the best expert opinion at the time. Of course, many people have rebelled against medical advice, and have been *wrong*. Our liberal institutions are not a method of *always* getting the right answer. There is no such method. But *other* methods – illiberal, tyrannical methods – tend to get the *wrong* answer.

There is an epistemological principle here: when there is a dispute between two people, there is no mechanical way of determining who is right. In particular, who is right on a particular issue is independent of what *other* things the people in dispute know. If they can't agree, the one who first abandons reason and resorts to force is likely to be wrong. Our legal traditions and our traditions of human rights *know* this. That is, they embody the knowledge inexplicitly. The suggestion that a child doesn't know something and therefore shouldn't take the decision is a non sequitur: the *patient* doesn't know either, yet everyone agrees that he should be allowed to take such a decision on his own behalf.

Rule by experts – the aristocracy, if you like – is as stultifying a system of government as any other tyranny. It prevents the growth of knowledge by removing the condition of consent. A liberal state which respects human rights *does* make

progress. What does it *mean* to give people human rights? It means (paradoxically, but when you think about it, *necessarily*) taking responsibility for decisions out of the hands of those who *know*, and putting it in the hands of those who *don't* know the right answer.

Consent is a condition for rationality in the decision-making process. But what if children were systematically irrational? Rationalism is the doctrine that knowledge grows only through reason. So given that children's knowledge grows, a rationalist must believe that children possess reason. (Some people say that early learning, by babies, is pre-programmed, but there is no real evidence for this.)

The argument

Having an age of consent is like having a rule that if one has more than 100 cc's of anaesthetic in one, then one is deemed incompetent unless one can prove otherwise, and if one has less than that, one is deemed competent. Okay, but the thing one would have to prove under such a rule is *not* that one has suddenly learnt about heart surgery: it is simply that one wants to make the decision: that one knows what the question is and *knows what it is one wants*.

Lawrence White says: “My argument for allowing age-based distinctions into consent-based law runs as follows. Disputes will arise over contracts or sexual relations involving children, in which the children or their advocates will plead that the children in question did not genuinely consent (therefore they should not be held to the contracts or have been sexually assaulted). In adjudicating such disputes the courts need to decide in each case not only (a) whether the child gave apparent consent, but also (b) whether the child was legally competent, that is, capable of giving *genuine* consent. The court needs to assign the burden of proof regarding a child's competence or incompetence to one side of the dispute or the other. In assigning the burden of proof the court is justified in taking note of the fact that children below some age are typically *not* capable of giving the sort of full-fledged or genuine consent that normal adults can give. Agreements involving very young children are therefore properly subject to a different burden of proof – a higher standard of scrutiny for genuine consent – than are agreements strictly among adults.”

Let's replace “child” by “patient” and “parent” by “doctor” in Lawrence White's argument, and we'll see clearly where his mistake is:

“My argument for allowing level-of-anaesthetic-based distinctions into consent-based law runs as follows. Disputes will arise over contracts involving patients, in which the patients or their advocates will plead that the patients in question did genuinely consent or not, and that therefore they should be held or not be held to the contracts, or to have been assaulted during the operation. In adjudicating such disputes the courts need to decide in each case not only (a) whether the patient gave apparent consent, but also (b) whether the patient was legally competent, that is, capable of giving *genuine* consent.”

That is true, because the patient might have been babbling in his delirium. But what the court would mean by whether the patient was *competent* or not is merely whether the patient was *actually* in a delirium, so that his words did not express his wishes, or whether he was *not* in a delirium and his words *did* express his wishes.

“The court needs to assign the burden of proof regarding a patient's competence or incompetence to one side of the dispute or the other. In assigning the burden of proof the court is justified in taking note of the fact that patients who have more than a certain level of anaesthetic are typically *not* capable of giving the sort of full-fledged or genuine consent that *normal* patients can give. Agreements involving anaesthetised patients are therefore properly subject to a different burden of proof – a higher standard of scrutiny for genuine consent – than are agreements strictly among well people.”

This is all true. But that still does not entitle one to drag the patient off, kicking and screaming “*I don't want this operation*,” to the operating theatre. So why does Lawrence White assume that it does, when the patient is a child?

“Genuine consent requires a certain level of consciousness, freedom from the anaesthetic, and human cognition depends upon the blood concentration of anaesthetic. Although different individuals reach various cognitive milestones at different concentrations, there is a much lower probability of error in assuming that an anaesthetic-free person has the cognitive level requisite for meaningful consent than in assuming that an anaesthetised patient is at that level. A body of law based on consent is therefore justified in having an *anaesthetic-related default rule* of the sort: an individual with more than x cc's is presumed incapable of giving genuine consent; an individual with less than x cc's is presumed capable.”

Well, maybe. I can imagine such a default rule. But actually, of course, the law doesn't have such a rule in regard to anaesthetic. The reason why it doesn't is that these cases come up very rarely. And the reason they come up rarely is that patients have human rights, and therefore, when it seems that there may possibly be a dispute about whether the patient consented, people go to great lengths to make sure that the patient really *does* genuinely consent, and that there is *evidence* of this. And measuring the patient's anaesthetic level is a very poor sort of evidence of consent, when you could instead just *ask* him.

Continuing the substitution, Lawrence White would claim, in his defence: “In calling this sort of de-humanising rule for patients a ”default rule,“ I wish to emphasise that I am not at all arguing for a rule whereby anaesthetised people may never lawfully engage in contractual relations. (Thus, like Sarah [Fitz-Claridge], I would oppose a law that ”forces operations upon only slightly anaesthetised people“ or ”forces people who are only slightly anaesthetised, to stay in hospital against their will“). The dosage of anaesthetic provides a legal presumption of competence or incompetence, but the presumption is rebuttable. Legal protection *should* be provided to the freely made agreements of patients who provide evidence that they are ”conscious beyond one can usually expect for people of that level of anaesthetic,“ that is, who can show that do have the requisite capability.”

“The type of de-humanising rule for patients I am defending is simply a line below which the burden of proof shifts: the court presumes that a well party is capable (unless shown otherwise) of meaningful consent, whereas it presumes that a very anaesthetised person is incapable (unless shown otherwise).”

Well, again, yes. But why does he keep going on and on about anaesthetic dosages? The thing is, it is *easy* for a patient to show that they “have the requisite capability”. All they have to do is say clearly, “I don't want this operation.” That's it. If the surgeon fears lawsuits, he can ask a supplementary question, such as “which operation do you mean?” And he can get bystanders to witness the reply: “*The heart operation you are trying to get me to agree to, you twit!*”

We can go through the same thing with women or black people (immigrants, say), and it makes exactly as much sense:

“My argument for introducing length-of-stay-based discrimination between immigrants and other citizens law runs as follows. Disputes will arise over contracts involving recent immigrants, in which the recent immigrants or their advocates will plead that the immigrants in question did not genuinely consent (therefore they should not be held to the contracts, or have been defrauded, for instance, because their culture was so different that they did not understand what kind of agreements they were entering into when they stepped off the boat). In adjudicating such disputes the courts need to decide in each case not only (a) whether the immigrant gave apparent consent, but also (b) whether the immigrant was legally competent, that is, capable of giving *informed* consent.”

So, if one signs a contract with somebody who is from a different culture or is ill or whatever, you have to make sure it is informed consent. In America, I'm told, before they do an operation, they do sometimes have to read one pages and pages of stuff, just to make sure it is informed consent.

“The court needs to assign the burden of proof regarding a immigrant's competence or incompetence to one side of the dispute or the other. In assigning the burden of proof the court is justified in taking note of the fact that immigrants who have only recently entered the country are typically *not* capable of giving the sort of full-fledged or genuine consent that those who have been here much longer can give. Agreements involving very recent immigrants are therefore properly subject to a different burden of proof – a higher standard of scrutiny for genuine consent – than are agreements strictly among natives.

Genuine consent requires a certain understanding of the culture in which one is immersed, and the degree to which immigrants reach this varies from one individual to another. Different individuals reach different milestones at different lengths of stay in the country, but there is a much lower probability of error in assuming that a native person understands the relevant cultural details required for meaningful consent than in assuming that an immediately-arrived immigrant has achieved that understanding. A body of law based on consent is therefore justified in having a length-of-stay-related default rule of the sort: an individual who has arrived very recently is presumed incapable of giving genuine consent; an individual who has been here for longer than x years is presumed capable."

Yes, it *might* think it convenient to do that, but in fact it isn't convenient, because in fact it hardly ever arises, because *immigrants* have human rights. I don't object to this kind of rule in principle as a matter of convenience; it is just that when people suggest this rule in regard to children, it is usually because they have in mind the wrong notion of competence. They want the child to prove he knows the answer rather than to prove that he *wants* something.

Were we discussing this 100 years ago, we could have substituted the word "woman" for "child", because women were brought up not to understand financial matters and to defer to men.

"Disputes will arise over contracts involving women, in which the women or their advocates will plead that the women in question did not genuinely consent (therefore they should not be held to the contracts, or have been cheated). In adjudicating such disputes the courts need to decide in each case not only (a) whether the woman gave apparent consent, but also (b) whether the woman was legally competent, that is, capable of giving *genuine* consent. ..."

And so on. Now *if* in a society it is the case that most women are brought up not to know what money is and always to defer to men, then that society *could* have a default rule that unless proved otherwise, the woman is assumed to have merely deferred to the man, rather than to have genuinely consented. That would be a possible way to go, but the way a woman could rebut that, would be to go to a lawyer, for instance, and say, "I want this contract!" One would *never* get the situation where a woman was dragged kicking and screaming into somewhere, because she "could not genuinely consent".

In real life the law does not do any of those things: if consent is *really* the criterion it is *easy* to determine. These Byzantine complexities only arise when what you are *really* interested in is whether the person makes the decision *you want him to make*.

Pleadings and presumptions

Lawrence White suggests that I am arguing that a child, sued for breach of a contract he signed, could defend himself by pleading ignorance. That is not quite true. It is *not* that he could plead *ignorance*, it is that what he would be pleading is that given his age, it was unreasonable for the other person not to tell him certain things, because it would have been obvious that he did not know them. The burden of proof would be on *him* but being a child of a certain age (say, a child of four) it would be easy for him to show that a reasonable person would have presumed that he did not know what an interest rate was, and that if he were signing a contract to do with interest rates, then it would be incumbent upon the other side to ensure that he *did* know about them. It is *not* that he is pleading ignorance as an excuse from a contract. It is that it really was unreasonable to have expected him to have known about interest rates; and the same would be true if he was a recent immigrant who was unaware of some peculiar aspect of English culture, *and the other party had reason to know that he was ignorant of it*.

Lawrence White says that we rightly presume that adults who sign contracts do know what a contract is, what an interest rate is, or whatever, and that thus, adults cannot use this defence I am suggesting some children might have. True, not *all* adults, in all situations, have such a defence, but some, in some situations, do. For instance in the case of a nun who has been under the influence of the mother superior for many years, we presume that she is not truly able to make decisions independently of the mother superior unless we have reason to believe otherwise.

Lawrence White argues that in saying that children would simply get relief on grounds of duress in cases where adults used their greater age and power to intimidate or manipulate them, I am positing "...an age-based distinction, and one which takes the form of an age-of-consent rule." But it *isn't*. The age is simply a *piece of evidence* that would suggest whether there had *in fact* been intimidation or manipulation, or other undue influence. If a trade union stages a violent demonstration outside a company, and somebody agrees not to enter the gates because of that, and it *looks* like intimidation *prima facie*, then we *assume* that the person has been intimidated unless someone proves otherwise. On the other hand, if a coach load of 50 heavyweight boxers claim to have been intimidated by me waving a placard, then it'll be assumed that I did *not* intimidate them, because of our different intimidation capacities, which in general *might* have to do with age or it *might not*. (Now if I were waving a Smith and Wesson .44 magnum revolver rather than a placard, things might well be different!) In a violent row between a ninety-year-old person and an eighteen-year-old, the *older* person can be presumed to have been intimidated. It depends. That is not an *age* based thing, it is simply looking at the *facts*: it is *whether* he *was* intimidated that is the important thing, not how old he is.

In discussing 'undue influence' as a defence for voiding a contract, I suggested that undue influence should be *assumed* unless the contrary is proved, where the relationship is one that tends to undermine the child's independence of decision. Lawrence White argues that this amounts to a rule treats children and adults asymmetrically, but that is not necessarily true. That is a bit like saying it treats nuns and mother superiors asymmetrically, not equally. That isn't so. It treats them *perfectly equally*. If the circumstances indicate that the mother superior would have been unduly influenced by the nun, then that is the way the presumption will go. One could imagine strange situations in which that was so.

Lawrence White argues that if a young child could complain that he had not consented to a contract, and that the onus would then be on the adult to prove that the child had consented, the courts would need a definite rule regarding how young is "young". But that is like saying the courts need a definite rule to determine how many pages of medical notes one has to have seen before it is informed consent. The courts *might* have such a rule, but probably they wouldn't need it. Probably it would be enough to say that the child must have genuinely consented. Then people will take care to ensure that the dispute simply does not arise, by providing themselves with the requisite evidence, just like the doctor.

So again, the reason we probably wouldn't have a rule about age, is that *age is not the issue* – it is *consent* that is the issue. If we *had* a definite rule, *then* the courts could easily get overwhelmed with the cases that are trying to rebut the assumption in the rule. If the aim is not to have the courts overwhelmed, we have got to use the *actual* criterion, and the one which is easy to determine. Consent is very easy to determine. Not always; but in general it is much easier to be sure of than is a person's *age*!

A thought experiment

Lawrence White asks us to consider a thought-experiment in which "…we gradually increase the age of the party who [later] complains that he had not consented." To translate into my example: "Let's consider a thought experiment in which we gradually increase the number of pages of medical notes that a patient has been given before it counts as informed consent." He then points out that at some age, the onus of proof must shift, so that it no longer rests with the adult defendant to prove his innocence of assault, by showing that the complaining party genuinely consented, but that it rests with the complaining party to prove the defendant's guilt. Exactly the same is true with the patient and doctor, with informed consent. So why isn't this a problem? It isn't a problem because *everybody knows what it means for a patient to consent to an operation*.

And everyone knows what it means for a *child* to consent to an operation. It is just that where a *child* is concerned, they panic: "You can't use *that* notion of consent", they think, "because the child might *make the wrong choice*." And so they start changing the meanings of words: "When the child screams '*I don't want the operation*,' he is not *genuinely* withholding consent, because he is not capable of genuine consent: he is not rational enough to make the right decision, perhaps because his judgement is impaired by fear or a 'childish fit', and anyway he *needs* the operation". Yes, Larry. And when the woman says "*no*" it isn't *really* rape. When women say no they mean yes. And anyway, she *needs* a good seeing-to! And those immigrants. They're not like us. It's pointless giving them the vote because they can't understand the issues….

Lawrence White's assertion that “There *must be some such age*,” is like saying “there must be some such number of pages”. Suppose there *was* a rule that said that sixteen pages is the right number to inform a patient of the nature of the operation, and that if it is above sixteen, it is up to the patient to prove that he had not consented, and that if it is below sixteen, it is up to the doctor to prove that the patient *had* consented. Well that would be absurd. It would lead to *a lot more* cases going to court, because *the number of pages isn't the issue*. *Consent* is the issue. In a different case, one might need a completely different number of pages.

Lawrence White says that “*the court needs a particular (specific) default rule for assigning the burden of proof*, and needs that rule to be based on a generally relevant and readily ascertainable fact like the complaining party's age...[but that] in principle, the rule need not be strictly chronological.” Translation: “It need not be strictly the number of pages.” He goes on to suggest that as an alternative, the court might formulate a rule based on physical indicators. True, they might try to measure the *amount* of medical information. For instance, it might be the *number of side effects* that have been listed, rather than the number of pages of notes. But it is still a very bad idea and still totally beside the point, for the same reasons.

Lawrence White suggests that if children are to receive protection under contract law “…in a world in which adults know more than children and can manipulate children into not-genuinely-consented agreements more readily than the reverse, an age-of-consent default rule is necessary.” That is simply not true. Let's ‘translate’ again: “if patients are to receive protection under contract law in a world in which doctors know much more than patients and can manipulate patients into not-genuinely-consented operations more readily than the reverse, a number-of-page default rule is necessary.” The suggestion that my rule, if implemented, would necessarily involve *de facto* ages of consent, is clearly not true.

Who has recourse to law when a child is abused?

Lawrence White follows Jan Narveson in asking how a pre-verbal child, or a child who does not understand how to hire a lawyer, would be able to mount a defence. Well, how is a new immigrant, who doesn't know how to hire a lawyer, supposed to mount a defence? How is a person who is under anaesthetic supposed to mount a defence? There is rather a surprising assumption here, that an ordinary person knows how to mount a legal defence. *I* don't. I suggest that most non-lawyers don't either.

Lawrence White is so surprised to learn that English law gives a molested *child* recourse to law but *not* his parents, that he suggests that this might be because only the state may bring criminal prosecutions. That is not true. First, it is not the case in English law that only the state may bring criminal prosecutions, Anyone may bring a criminal prosecution, although the Attorney General can strike it down if he wants to, as being “not in the public interest.” Secondly, the alternative to the parents is not that the state brings it: it is that *the child* brings it.

A while ago, a boy of nine took an Oxford college to court, and he won. The child can appoint a lawyer, or the state can appoint a lawyer *for* the child. In such a case there can be *four* sets of lawyers in court: the parents' lawyers, the child's lawyers, the state's lawyers (or prosecution, as the case may be), and the Official Solicitor. The Official Solicitor is a social worker type: he instructs lawyers to act “in the child's best interests”. The *child's* lawyer is a *different lawyer with a different brief*: he has to follow the child's instructions. So there is one lawyer in court who is following the child's instructions; there is another one who is to act “in the child's best interests”.

What does real consent look like?

In saying that children begin expressing wishes long before they attain the cognitive level associated with “meaningful consent”, Lawrence White is, I think, showing what he really thinks the issue is. Translating again: “the patient begins to show wishes, and as he is coming out of the anaesthetic, he expresses wishes *long* before he attains the cognitive level associated with meaningful consent.” In other words, in that intervening time, the patient can be saying, “No, no, don't cut me open,” and we can say, “Tough luck. We want to.”

Lawrence White then goes on to compare children to mentally-handicapped adults. He mentions a scene in the film *Rain Man*, in which Raymond Babbitt, the autistic adult replies "Yeah" repeatedly, to each of the contrary either-or questions posed to him. Lawrence White then says rightly: "Given Raymond's cognitive deficits, as highlighted by his inability to respond appropriately to an either-or choice, his "yeah" does not provide meaningful consent to either option." It doesn't provide meaningful *wishes* either. If he *had* provided meaningful wishes, they would have been granted him, because he was an adult. This example is quite a good one: it is an example of not having meaningful *wishes*. It would have been quite sufficient for him to say "Yeah" to some questions and "No" to the contrary questions. He would not have *then* been given a test of *competence*. That would have *defined* competence.

If there is *prima facie* reason to believe he does not have clear wishes, then we do a further test. In other words, we find out whether he is really consenting, whether the "Yeah" is really consent or just noise. In the film, the "Yeah" is just noise. What sort of test might we do? We could, for instance, ask one question in two very different ways, to see whether we got the same answer; we could ask one question, then ask it again later, to see whether the person still answered the same way; or we could ask a question, then provide an opportunity for equivalent action, to see whether the person acted in accordance with his answer to the verbal question.

By the way, comparing children to this sort of mentally disabled individual is odd in itself. Even *extremely* young children do not behave like that. Even pre-verbal *babies* have *some* clear wishes which are obvious.

Many metaphors have been used historically to 'explain' why children are different. Children are likened to animals, to devils, to savages, to unconscious people, and so on. Here, children are likened to mentally disabled people. As often happens with metaphors, Lawrence White is not aware that he is using a metaphor. He seems to think that he is stating a plain fact; but actually, it is a metaphor, and a controversial one, which I absolutely reject and which he has not justified at all.

If this metaphor did hold, then I would agree that it would be right to treat children in some respects differently in law from adults. But Lawrence White claims not to be arguing that. He says: "I have no trouble endorsing Sarah [Fitz-Claridge's] demand that we should consistently apply the same competence criterion to adults as to children." But then he adds a proviso ("that at some age the burden of proof shifts") which he interprets effectively to nullify that endorsement.

Later, he says that as he conceives the competence test, there *are* some minors with a desire to do something apparently radically unwise who would pass, "...unless the same desire on the part of an adult provides sufficient evidence to judge the adult mentally incompetent." He says that he does not propose that the courts should judge competence in regard to particular choices, "...but rather by evaluating an individual's overall level of cognitive function." The word "cognitive" is doing a lot of work there, and he does not tell us what it means. But he ends by saying: "An under-age individual, to be judged competent under the legal system I am defending, must be shown to be of unusually high (i.e. approaching normal adult) cognitive function." (Compare: "an immigrant, to be judged competent ... must be shown to be unusually well assimilated.") Without a substantive theory of "adult cognition", showing how its difference from "child cognition" confers special rights upon a person, this is just circular. It *defines* adult cognition as that experienced by an adult.

Conclusion

I have refuted Lawrence White's suggestion that the legal safeguards I suggested embody, implicitly, age-of-consent rules. He explores various rationales for overriding children's wishes on the grounds that they cannot give "genuine" consent. But none of these make sense if one insists (as I do) on using the same notion of "consent" (and "competence", etc.) for all human beings. Finally he appears to contradict his own argument by saying that the same criteria should be used to judge the legal competence of children as adults. If he really means that, then we have no disagreement at all. But does he?

Clarification

by **Sarah Fitz-Claridge**

In case you think that I was using an analogy (the heart surgery patient), let me correct that misapprehension. I was not using an analogy *at all*. I was just applying the criteria people purport to use, to a different case, to see if they like the result.

I was not saying “a child is in essence a patient, and a parent a doctor, so parents must behave towards children as doctors do towards patients”. That is no argument, and in any case I don't *want* parents to behave like doctors! What I was saying is, if you coerce children on the grounds you and most others claim, you would also be in favour of this or that form of coercion by doctors. Since my critics are not in favour of that, we can deduce that the reasons they give for coercing children are not their real reasons.

to post comments

Comments

MY APPRECIATION

*Submitted by **Josephat M.Mtawa (not verified) (http://www.yahoo.com)** on 9 October, 2006 - 09:59*

Well, I have read through the whole of your work. I appreciate it so much.

However, I recommend that your activity could be more appealing than it is now if you had suggested how the laws could be formed so as to protect children against injustices that they often get. For example, nowadays there are mushrooming uses of child labour force in different economic occupations. Only a few people know that by employing children as young as 16 years is not to help them, instead, it is to destroy their future life and that of the community in particular.

I think it would be better if you could suggest that the problem of child labour could be treated as a criminal issue so that the policing institutions nad or personnel could deal with it as they do with other criminal fellonies.

Generally, your work is very good indeed.

I hope you will see how you can put that suggestion of mine in your other activities.

May God bless You!

Mtawa, J. Michael Law student at The Open University of Tanzania

to post comments

child rights

Submitted by ouinon (not verified) on 20 December, 2007 - 21:19

I am unbelievably happy to find this page, because i am currently trying to argue the case for child rights on a thread on wrongplanet, the site for people with aspergers syndrome, because i think it's posssible that the so called autism epidemic in the industrialised west of the last 10-15 years is related to childrens rights currently resembling nothing so much as the welfare rights of household pets, in the same way as the "epidemic" of hysterical disorders

in the late 1800s was related to middle-class white womens equally disenfranchised state at that time. I am not doing very well so am thrilled to find such a brilliant page of argument which i shall now go and post a link to on the thread. Thank you very much for your closely argued and subtle presentation. Just to place me, i am a 44 year old woman, and home-unschooling mother of an 8 year old boy. Best wishes. I will come back to read more and find out more about the "journal". xxxx o

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