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The Child's Right to a Voice

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The Child's Right to a Voice

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Abstract

This article provides a philosophical analysis of a putative right of the child to have their expressed views considered in matters that affect them. Article 12 of the United Nations Convention on the Rights of the Child 1989 is an influential and interesting statement of that right. The article shows that the child's 'right to a voice' is complex. Its complexity lies in the problem of contrasting an adult's normative power of choice with a child's weighted views, in the various senses in which we might consider the child's views, and in the questions of how to weight those views and how their weighting makes a practical difference in coming to a decision. In so doing we criticise other accounts that simply regard a child's views as having consultative value. We also make better sense of how we might weight a child's views. The philosophical issues addressed in the article carry implications for how we might understand Article 12 that are not satisfactorily identified and addressed in the voluminous literature on Article 12 within childhood studies. These issues also have implications for how we might understand the distinction between adults and children in respect of powers of personal choice. We conclude by emphasising the importance and value of the right that Article 12 seeks to formally identify.

Keywords Child · Rights · Authoritative · Consultative · Views · Due weight

Introduction

The philosophical literature on children and childhood is rich and wide-ranging. The recent *Routledge Handbook of the Philosophy of Childhood and Children* (Gheaus et al. 2019) provides an overview of the breadth and depth of this work. It addresses issues such as whether or not children have rights (Archard and Macleod 2002: Part

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I; O'Neill 1988); how we should understand and evaluate childhood in contradistinction to adulthood (Hannan 2018; Tomlin 2018; Schapiro 1999); whether there are 'goods' of childhood (Gheaus 2015; Macleod 2010); and how a child's autonomy stands in relation to its well-being (Bagattini and Macleod 2015: Part I).

Yet there has been scant philosophical attention given to the highly influential idea that while children might not be able to make the choices adults are permitted, nevertheless they should have a voice on matters that affect their lives. Article 12(1) of the United Nations Convention on the Rights of the Child (UNCRC) affirms that, 'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child'. This accords the child a right to have their views considered.

This paper uncovers the philosophical complexity of the child's right under Article 12(1). It identifies the normative basis for and the normative significance of this putative right. This specific focus does not contribute to the philosophical debates on children and childhood mentioned in our introductory paragraph. Nor do we consider here whether and how giving a voice to the child might contribute to the development of autonomy, how we should understand autonomy in this context, or how we might view children as autonomous adults in the making. Rather, the paper's analysis and argument uncover important complexities that are barely acknowledged in existing philosophical discussions nor in the voluminous non-philosophical literature of childhood studies in law, sociology, social work theory, psychology, politics, and by children's rights practitioners. (For instance, many of the articles in the Special Issue of *The International Journal of Children's Rights* (2018 (1)) devoted to Article 12 simply lament children's lack of participation in affairs that concern them or instance examples of good participatory practice.)

The paper accepts the widespread presumption that the treatment of children, understood minimally as those below a certain age, differently from adults requires moral justification. In this context, the major difference is that adults may make choices about how to lead their lives that children may not: children should have their best interests promoted; and we may act paternalistically towards children, but not towards adults (Grill 2019). Article 3 of the UNCRC affirms the child's best interests as a primary consideration in all matters concerning children. What is in the child's best interests is widely regarded as the principal ethical and legal standard for decision-making for children, even if it has been subjected to extensive philosophical criticism (Salter 2012). Giving children the right to a voice in matters that affect them complicates the application of this standard, since it requires that while children are not given the choices that adults have, we should not simply promote children's best interests without taking account of what children say they want.

While Article 12(1) affirms that all children should have a voice in what happens to them in every area of their lives, the simplicity of this claim is deceptive. In what follows we display the complexity of the right by spelling out various ways in which it might be understood. The paper's first section contrasts different ways of regarding a person's expressed views on matters that affect them, and identifies distinguishable ways in which the child's views might be considered; the second section examines the sense in which those views might be weighted as Article 12(1) requires. With

others who write about Article 12(1), we admire its ambition and endorse its essential purpose of giving the child a voice. Yet the paper concludes by insisting that the complexities and the difficulties we expose in understanding the Article as it is formulated must be addressed if it is to fulfil that purpose.

Three preliminary points are in order. First, in affording the child a right to express their own views on 'all matters affecting the child', Article 12(1) accords the right to children capable of forming and expressing such views. This capacity is not possessed by children at all ages; simple expressions of feelings, or behaviourally revealed preferences do not constitute views. The matters on which the child has a right to have their views considered include what would *in the case of adults* be called self-regarding in that they principally concern the individual him or herself. Such matters can concern education, dietary and lifestyle choices, and acceptance of medical treatment, for instance. In relation to such matters, adults have a right to decide for themselves, whereas under Article 12(1) children have a right to have their views given due weight in decisions made for them by adults. An adult's normative power *to choose*, and a child's right *to have their views considered* do not, as it were, sit as a neat contrast in the same normative space. (An adult's making a self-regarding choice is sufficient to place others under a correlative duty not to interfere: an adult making such a choice need not express nor indeed have any view on the matter.) In this paper we seek to explicate this contrast by attempting to clarify what it is to have a right to have one's views considered and what it might mean to have one's views make a difference.

Second, the paper takes no position on who may decide what is best for children on matters on which children cannot decide for themselves. We do not presume, for instance, that parents or guardians have the right to make such decisions or have a duty to do what is best for the child; nor do we presume the extent of any parental rights.

Third, we note the ambiguity of Article 12(1)'s use of 'the child', which could mean either an individual child or denote the class of all children. The general difficulties subsequently identified in interpreting Article 12(1) apply on either interpretation. However, there are particular difficulties in estimating the maturity of, and of attributing a right of expression of views to a collective. In what follows we consider 'the child' to mean each and every individual minor.

I

In an influential article, Harry Brighouse contrasts the 'authoritative' way in which we treat an adult's views on self-regarding matters, with the 'consultative' way in which we can treat someone's views on matters that affect them. According to Brighouse, to regard someone's view as authoritative is to regard it as 'defining the person's interests for the purpose of decision-making' (Brighouse 2003, p. 692). By contrast, 'to regard a view as consultative is to treat the person who expresses it as having a right to express her own view of her own interests, but not to treat that expression as sufficient grounds for action, even if only her interests are at stake' (Ibid., p. 693). Brighouse argues that the child's views on matters that affect them

are appropriately regarded as consultative. Prior to assessing whether Brighouse's notion of 'consultative' can provide a satisfactory understanding of the child's right to have their views considered, it will be instructive to attend to the terms in which he explicates a contrasting notion of 'authoritative'.

Here an important difference between two senses of 'authority', set out by R. S. Peters (1958), is helpful. A person is *an* authority on some matter if they have epistemic privilege in respect of that matter; such a person has knowledge in that domain that others lack. On the other hand, someone who is *in* authority has, by virtue of their role or position or office, a right to issue directives or commands with which others are obliged to comply. These two types of authority can in fact coincide where someone who is *an* authority on ϕ is also *in* authority in respect of what happens regarding ϕ . (For example, the leading expert on conservation of a region's wildlife might be put in charge of that region's wildlife conservation policy.) Nonetheless, a person who is *in* authority is not necessarily an authority on the matter on which they have a right to issue directives or commands, and someone who is an authority on some matter might not be *in* authority in respect of that matter.

Given these two senses of 'authority', how should we interpret Brighouse's explication of an authoritative expression as one that we regard as 'defining the person's interests for the purpose of decision-making'? An expression understood in this manner *has* authority, but authority in which sense? On the one hand, we might take Brighouse's explication to mean that we regard an expression as authoritative when we regard the person as epistemically in the best position to define what is in their own interests and so in the best position to decide what to do; in this case, that person's right to decide would be based on their epistemically privileged position. Alternatively, we might take the explication of 'authoritative' to mean that we regard the person's expressed view as having the normative status of a directive that places others under a duty to act in accordance with what is said. (An adult who says of a self-regarding matter, 'I wish to do ϕ ', is authorised to do ϕ . Her utterance makes public her intention to do ϕ and places others under a correlative duty not to interfere.)

Arguably the sense of 'authoritative', in relation to 'authority', can remain imprecise in the context of Brighouse's contrast with 'consultative': to regard a person's expression as authoritative is to treat it as *settling the issue* for the purposes of decision-making; whereas to regard an expression as consultative is not 'to treat [it] as sufficient grounds for action'. Nonetheless, it is unhelpful to represent this contrast between 'authoritative' as opposed to 'consultative' as a difference between two ways of regarding the status of a person's expressed view. This is because to regard a person as *in* authority in relation to ϕ is to regard their utterance as the expression of a *decision* on a matter on which they have the exclusive right to choose. (Within the same normative space, a relevant contrast would be with someone who, in virtue of their membership of a group, has a right to contribute to a collective choice, say by exercising a vote. Here the person's vote constitutes *a* say in the decision, as opposed to *the* say.) An expression that is regarded as authoritative in this sense is not *considered* as (merely) a *view*; it is *treated* as a *directive*. We can, however, contrast the status of an expressed view that is regarded as decisive because epistemically

privileged, with the status of an expressed view that is treated as insufficient grounds for action.

To regard a person's expressed view as decisive for the purposes of decision-making requires others to act in accordance with that view; this does not tell us what it is to regard the status of someone's view as consultative. Taken by itself, Brighthouse's statement that 'to regard a person's view as consultative is to treat the person who expresses it as having a right to express her own view of her own interests, but not to treat that expression as sufficient grounds for action, even if only her interests are at stake', elides different ways in which a person's view of her own interests might be considered consultatively. It is important to distinguish these types of consultative consideration because they represent different reasons for taking the person's view into account which, in turn, represent significant differences in the normative status afforded the person's own view in making decisions on matters that affect them. With the help of contrasting examples, we will now elucidate three such ways: instrumentalist, informative and recommendatory.

Say an adult friend suffering significant tooth decay expresses a negative view about dental treatment. Concerned for your friend's health, you adopt a purely instrumentalist rationale for taking account of his view in deciding how to respond; you seek to understand and engage with what he says against dental treatment, and you do this with a view to trying respectfully to persuade him to change his mind. Now contrast this example with one in which you undertake to find rental accommodation for your friend. Here you consult him about the type and location of property that he wants, and you do this because his view on these matters informs you about what would be suitable accommodation for him. While in both examples you seek to act in your friend's interests, they illustrate a significant difference between consulting someone's view for *instrumentalist* reasons, as a means of possibly persuading the person to act in their own interests, as opposed to consulting someone's view because it directly *informs* you about what is in their interests.

We can also recognise a third way of consulting someone's view, one that regards that view as *recommendatory* inasmuch as it is the person's own view. To regard an expression as recommendatory in this way does not afford it the normative power of a directive that requires that one act in accordance with that view; nonetheless, it regards the expression as prescriptive, as opposed to (merely) indicative. By regarding a person's own view as a *pro tanto* reason for doing what they wish independently of the merits of the content of their view, this type of consultation affords a person what we might call a right of influence in respect of a decision that affects their interests. The following example illustrates consultation that is regarded as recommendatory in this way.

You agree to manage some funds for a sick friend. How you manage her money is ultimately left up to you, but your friend expresses her own views on appropriate distribution. While what she says is not binding on your decisions, nonetheless you regard it as recommendatory. Here the thought, 'It's her money', is itself a reason for your distributing her funds one way rather than another. To consider a person's own view as recommendatory in this way is to regard their view as a *pro tanto* reason for acting in accordance with that view inasmuch as it is the view of the person expressing it and independently of the merits of that view's content. Practically speaking,

this could mean that you do not consider your friend's preferences entirely on their objective merits. You might ask yourself, for instance, whether her nephew should receive a sizeable portion of her funds as she suggests, as opposed to your prudently investing that money for her. But by taking account of your friend's fondness for her nephew and desire to be generous towards him, her view carries influence *qua* the view of the person whose funds they are. Significantly, in this example of recommendatory consideration, your acting sub-optimally in relation to your friend's own interests, given her view, can invoke her underlying right of choice as a competent adult regarding use of her funds.

Brighouse regards what, following Amartya Sen, he calls 'agency rights' in the case of adults as rights to be the ultimate judge of how to act (Brighouse 2003, p. 696). In distinguishing different ways in which an expressed view might be regarded consultatively, we have drawn a more complex picture of agency-related rights that includes a person's having a right of influence over a decision that affects their interests where, for some reason, the right to decide lies with another person. To consider a person's own view on a matter as recommendatory in this way is not merely to consult their view and allow it to make a meaningful input into a choice made by someone else. Importantly, it is also to afford their view prescriptive status *qua* the view of the person *for* whom a decision is made.

The first two types of consultative consideration we have highlighted in the case of adults suggest a range of normatively and practically significant reasons for consulting the child's views on matters that affect them. Some of these reasons will be more appropriate in some individual cases as compared to others and the child's age and maturity can be important factors in determining this. In any individual case, we will need to decide whether the child's view is relevant, and if so in what way, to the judgement or decision in question. For example, the fact that a five-year-old suffering tooth decay does not want dental treatment is not a reason against the judgement that dental treatment is appropriate. Here consideration of why the child is against the treatment can be regarded as instrumentally relevant to deciding what approach might best promote the child's welfare. By contrast, a twelve-year-old's wish to discontinue non-curative cancer treatment that has very unpleasant side effects is relevant to whether further such treatment is appropriate for them. Here the child's view that the treatment should be discontinued can be regarded as itself a reason against the appropriateness of their having further treatment. (It is worth emphasising that in such a case, if we do what the child wishes, we are not thereby complying with a directive.)

Discussions of Article 12(1) often emphasise that the reasons for considering the child's own views include the importance for the child's welfare of their willing involvement in relation to decisions that affect them. The bad effects of ignoring, deceiving or coercing children, eroding their trust in those adults who are responsible for their care, can be important reasons for consulting the child. In many situations, consulting the child can also provide valuable insight to their hopes, likes and dislikes, uncertainties, fears and other concerns that are relevant to a judgement about what would best promote their interests (Brighouse 2003). Howsoever nuanced each of these reasons might be, nonetheless they can all be instrumental or informative reasons for taking account of the child's views. And as such they can

and ought to flow from a sufficiently sophisticated understanding of a duty upon responsible adults to act in the child's best interests. (In the United Kingdom, the Children Act 1989 (1 (1) 3 (a)) notably includes 'the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)' amongst the considerations in a determination of a child's welfare).

Might recognition of the child's right that their views be given due weight in accordance with (their) age and maturity also appropriately regard the child as having something akin to a right of influence in respect of a decision that affects them, *qua* the person for whom the decision is made, independently of the merits of that view? Consideration of the child's views as recommendatory in this way raises complexities and difficulties of a different order than those arising from instrumentalist or informative reasons for considering the child's views that derive from regard for the child's best interests.

The rights of competent adults over self-regarding matters include a right to choose and to act in ways that are sub-optimal or that thwart or set back their interests. Respect for a competent adult's right of choice requires that we act in accordance with their *decision*, irrespective of its objective merits, in matters in which they have an exclusive right to determine the outcome. Even where we are not required to act in accordance with a competent adult's *views* about matters that directly affect them, nonetheless due respect for that person's agency can require affording their views recommendatory consideration *qua* the views of the person about whom a decision is made. This latter type of consideration can arise when, for example, on the basis of their values or personal priorities a competent adult requests medical treatment that is within a range of clinically indicated treatments but is sub-optimal for their condition (Uniacke 2013, pp. 98–102). Neither of these norms—of acting in accordance with a competent adult's *decision* or of recommendatory consideration of their *views*—can simply be transferred to making decisions for children precisely because children are not competent adults.

Article 12(1) requires that the child's views be 'given due weight in accordance with the age and maturity of the child'. Recognition of something akin to a right of influence that might be afforded the child's views, such that their views carry weight *qua* the views of the person for whom the decision is made, needs to be consistent with accepting the child's best interests as a primary consideration. More deeply, we also need to be able to make sense of how to weight the child's views in this way.

II

Article 12(1) requires not only that the child's views be considered on matters affecting the child—it also says that on such matters the child's views should carry weight in accordance with the child's age and maturity. What is it to weight the child's views in this way? Intuitively the idea is simple: the older and more mature the child is the greater the weight to be given to the view expressed. However, it is not easy to make sense—especially practical sense—of what this amounts to.

Prior to addressing this issue, it is worth noting that 'age and maturity' is an awkward and misleading conjunction in this context. A disjunction would make clearer

that age differs from maturity and raise the question of which of the two matters more. It is evidently maturity that does the work in assessing the weight to be given the child's views and age is presumed to co-vary with maturity. That presumption is defeasible, because children mature at different rates and display different degrees of maturity in different circumstances. If the child's age is a measure of maturity, the measure is very rough albeit ready to hand as a rule of thumb.

As indicated earlier, the principal way in which adults are treated differently from children is that adults are presumed competent to make their own choices; they are taken to be rational and mature choosers. This does not mean that everything an adult chooses is sensible or prudent. It means only that they should be thought minimally rational and able to make their own decisions. According to a familiar liberal doctrine, adults should enjoy a freedom to act on such choices, limited only if others are harmed. As a corollary, to deny an adult the right to make what are called self-regarding choices requires showing that person to be incompetent. In the case of adults, the presumption is of competence and the onus of proof otherwise must establish incompetence. By contrast, children—those below a certain age—are presumed incompetent unless they can be shown to be competent, to make choices of self-regarding actions. In the case of children, the onus of proof lies with those who must establish a child's competence.

This rendering of the contrast between adults and children is binary: either a person is competent, or they are not; and it is presumed that adults are competent and children are not. It thus fits with what we can call a 'threshold standard' of competence in which a child might qualify as competent if they display enough maturity to qualify for a right of choice. The *Gillick* standard of English law is the most celebrated example. This concerns the point at which a parental right to choose a child's medical treatment gives way to the child's right to decide. The judgment allows that minors below the age at which they are accorded such a right might nevertheless show that they have enough capacity to exercise choice: 'As a matter of Law the parental right to determine whether or not their minor child below the age of sixteen will have medical treatment terminates if and when the child achieves *sufficient* understanding and intelligence to understand fully what is proposed' (Gillick 1986, p. 7, emphasis added).

On a threshold standard the child is either mature enough (and gets to choose) or they are not (and have no choice). By contrast, in proposing a weighting of the child's views, Article 12(1) differs in two respects: it adopts a scalar rather than a threshold standard of maturity and it weights the child's *views* rather than give or not give effect to their *choices*. On the scalar standard a child can display greater or lesser maturity: it thus acknowledges that the contrast between adult and child is not a simple binary one.

The scalar standard is not incompatible with the threshold one. Those who are judged by the threshold standard to be immature minors may lack the right of an adult to choose in respect of a self-regarding matter. But their views might still be given some weight using the scalar standard. Nevertheless, the *Gillick* standard, strictly construed, has nothing to say about such weighting of a child's views if the child is judged not mature enough. Indeed, it works with a simple binary contrast: either the parent decides or the child, if sufficiently mature, does.

The weighting of the child's views makes a difference to their influence on what is decided for but cannot be chosen by the child. To appreciate the complexity of this, consider again the contrast between adult and child. An adult is presumed competent and is permitted to choose what to do in self-regarding matters. Here the expression of an adult's views is irrelevant. An adult's right to choose, and their right to express their views about what they want, do not occupy the same normative space. It is not that the adult's views on self-regarding matters are weighted decisively in favour of allowing them to choose. Rather, adults are simply permitted to choose in respect of self-regarding matters. Moreover, they are granted a normative power to do so that is independent of any views—expressed or otherwise—as to what they would wish to do or have happen.

By contrast, the child is not accorded a normative power to choose in self-regarding matters. Instead they are accorded a right to express their view, and their view is given a weight that can make a difference to what is decided.

Two basic questions arise about this scalar standard. First, how do we accord a greater or lesser weight to the child's views? In other words, how do we measure or calibrate the weightiness of the child's views? Second, how does whatever weight is accorded to a view make a difference to what is decided? In other words, how does a greater or lesser weight influence to a greater or lesser extent what happens? These two questions are significantly different. Working out what weight is given to something does not tell us how that weight makes a difference. To understand the difference between these questions, consider a traditional set of balance scales, comprising two weighing pans suspended from either end of a pivoted beam. We can know what weight is in one of the scales without knowing how far it will tip the beam. We only know that when we know what is in the other scale. In the case of a weighted view that we think should make a difference, what is in the other scale is not a weight equivalent to that of the view, but rather something other than the weighted view. The tip of the beam will vary depending on what this is and what *its* weight is.

Having identified these two questions, we must first ask how the maturity of the child's expressed view is assessed and given a weight. In addressing this, we need to distinguish between a content-independent as opposed to a content-dependent assessment of maturity. This distinction concerns whether an assessment of the child's maturity includes the sensibleness of the view that the child expresses. On a content-independent assessment there is a simple, single scale of maturity: as a rule of thumb the older a child is, the more mature they are. Such a scalar content-independent judgement of maturity takes no account of what the child is expressing views about. In contrast, a content-dependent assessment measures the child's maturity with reference to the sensibleness of the view expressed: the more sensible the view the more mature the child. Here an assessment of the sensibleness of the view is context-dependent in that it needs to be judged in relation to the matter about which the view is expressed. As we now employ it, a content-dependent assessment of the child's maturity takes account of the content of the child's view in relation to the matter the view concerns.

The philosophical literature on consent provides a lead. There it is standard to think that although one either is or is not competent to consent, the nature of what

it is one is consenting to (or not) makes a difference to the degree of competence needed. Competence must meet a threshold standard but in each case the standard is set higher or lower depending on the matter on which capacity must be demonstrated. Allen Buchanan and Dan W. Brock (1990, pp. 18–23), for instance, characterise competence as binary but nevertheless to be understood as relative to the task in hand. An individual is or is not competent in respect of some matter, but the nature of the matter makes a difference to the level of competence needed to make the relevant decision: a person might be competent to take decisions about their diet, for example, and incompetent to take decisions about managing their finances. (See also Culver and Gert (1990), pp. 619–643.)

In short, the more serious the decision the greater the competence needed to make it. Seriousness is normally construed in at least two dimensions: the *complexity* of any decision and its *significance*. A complex decision is one between many options or between options each of which is composed of several features. Consider, as a trite example, choosing a meal from a menu of multiple possibilities that comprise numerous courses, a range of accompaniments, different ways in which each course can be prepared and so on.

A decision is significant inasmuch as it is momentous, having to do with the gravity and irreversibility of its consequences. Choosing a meal—even from a complicated menu—is not significant whereas choosing (or refusing) a life-saving medical procedure is. In this manner we could characterise a medical choice as simple in the sense of being a straightforward binary matter of agreement to or refusal of a basic procedure. Or it might be complex in that there are several treatment options each of which has a complicated set of features. By contrast, a medical choice might be significant in that what follows for the person choosing is a matter of life or death, or is attended by significant risks of harm to the patient. Or a medical choice, such as a minor risk-free cosmetic procedure, might be relatively insignificant in that what follows has very little impact on the person's life. In sum, a medical choice might be simple and yet significant, or complex and yet insignificant.

A child needs to be more mature to grasp the seriousness of a choice. Yet the maturity needed is different in relation to the two dimensions. To grasp a more complex matter a greater degree of cognitive facility and command of the subject is needed; to grasp a more significant matter a greater appreciation of what it means for certain outcomes to eventuate is needed. Thus to understand a proposed medical procedure one may need to know only what it involves (what is done by whom, where and when); whereas to understand what it means to have or to refuse that procedure may require an appreciation of the risks of possible outcomes and their impact on the future well-being of the person. In both cases we need also to take account of the child's command of relevant knowledge. To understand a medical procedure—in both senses of knowing what it is and what it means—a child must be able to access the appropriate information.

Just as we can assess the capacity to consent in content-dependent fashion, so we can and should assess the child's maturity by taking into account the matter about which the child is expressing a view. The more complex and the more significant the matter, the greater the maturity required to understand it and to appreciate what it portends for the child. However, care is needed to distinguish this claim

from the different assertion that someone's maturity or immaturity can be directly inferred from the sensibleness of the view they express. The latter claim is that the immaturity of the person who expresses a view, just like that of the chooser, can be measured simply by the degree of imprudence of their view or choice. (When the imprudence of the view or choice is relative to that in respect of which the view is expressed or choice made.)

Consider as a denial of this latter claim the principle affirmed as one of the six that underpin the provisions of the Mental Capacity Act (2005), applicable in England and Wales: 'A person is not to be treated as unable to make a decision merely because he makes an unwise decision' (Mental Capacity Act 2005 Part I 1(4)). In colloquial terms, the badness of the choice a person makes is not and should not be used as a straightforward measure of that person's immaturity. Note that the Act says that a person should not be regarded as lacking capacity 'merely' because of an imprudent decision. Clearly unwise choices and ill-considered views may count as evidence for a judgement of immaturity and may lead to a fuller assessment of capacity. Nonetheless, a lack of wisdom is not itself a sufficient basis upon which to draw a conclusion about immaturity.

We know that even those—adults—whom we presume competent to make their own choices can both make good choices for poor reasons and bad choices for good reasons. Moreover, we can distinguish between the degree of capacity possessed and the degree to which that capacity is exercised well or poorly. Consider by way of analogy that someone may have greater or lesser competence in French but exercise that competence more, or less well on any occasion. They can speak French better than someone else. But sometimes when they are tired or distracted, they speak it less well than they otherwise can.

In sum, the answer to the first question—how do we accord a greater or lesser weight to the child's views?—is that we must evaluate the maturity of any child's views in relation to the matter under consideration but not allow the prudence or sensibleness of the view be the sole measure of that maturity.

The second question asks how a greater or lesser weight accorded the child's views might influence to a greater or lesser extent what happens. The claim that a view has more weight is, on one obvious interpretation, equivalent to the claim that there is more reason in favour of taking that view. That is not the case here. It is not that the more weight we attach to the child's views the more reason we have to believe that the child has got it right about what to do. It is rather that we have more reason to act in accord with the view.

To understand the difference, it helps to see that in the case of adults we have a reason to act in accordance with what the person states shall be done (in respect of a self-regarding matter over which they have a right of self-determination) even if we believe that the person's stated preferences are ill-judged, mistaken or unwise. We should do or allow what they wish because and solely because it is their wish that it shall be done or allowed: it is their *decision*. (To reiterate: the statement of the wish is the public expression of the person's preference to do what they have the normative power to choose to do; that normative power may be exercised in the absence of any statement of wishes.) If we understand Article 12(1) as recognising the child's emerging *agency*, then its scalar standard would imply that the more mature the

child, the more reason there is to do (or allow) what they want done. This is not because we have more reason to think that what the child wants is the right thing to be done; rather, in crude terms, it is because we think that it is more the child's concern than it is that of others who want to do what is in the child's best interests.

Think then of the weighted view as pushing us in a certain direction—to do what the expressed view favours—and the greater the weight of that view the stronger the push towards that outcome. We can measure the strength of such a push by seeing what it pushes against and how far it succeeds in pushing back what opposes it. To re-employ the metaphor of balance scales, we can see how weighty a view is, how much of a difference it makes, by the extent to which it depresses the scale, where there is a weight in the other pan. In the first instance what might push—or weight—against the child's view is a contrary judgement of what is best for the child.

Now, here is a possible problem. The seriousness of the matter on which the child expresses a view affects the balance between the weighted view and what is best for the child in two distinguishable ways. Consider some matter on which the child can express a view, which requires a simple decision either to do or not do something. For example, the child expresses a view against having a medical procedure that all can reasonably agree is in the child's best interests. We can, as stated earlier, work out what weight to attach to the child's view by assessing the seriousness—the complexity and significance—of the matter on which the view is expressed: whether to have the procedure or not. The child's weighted view against having the procedure then pushes us with a certain degree of strength towards a decision by adults not to subject the child to that procedure.

Yet the relative seriousness of the matter on which the child expresses a view does not just affect the weight given to that view. It also affects the countervailing weight of what the child's view is balanced against. The more the procedure promotes the child's interests, the stronger its push against the child's view not to have it.

At the same time, the more the procedure is in the child's interests, the more serious are the consequences of not having the procedure and, as a result, the more mature the child must be to understand what it would mean. The child's view against the procedure has less weight than would their view on less serious matters requiring decision.

In sum, the more serious a matter is, the less weight the child's views on it will have for any age or general degree of maturity *and* the more likely it is that those views will be outweighed by countervailing considerations of what is best for the child. The more serious the matter the less push the child's views have *and* the greater the countervailing push to do what is in the child's interests.

It may of course be entirely appropriate to allow the seriousness of some matter on which the child has views both to weaken the push of the child's preference (given the content-dependency of judgements of maturity) and also to strengthen the countervailing push of a judgement of what is best for the child (given how much it is in the child's interests). Yet we should not conflate these two ways in which a scalar standard can make a difference to whether the views children have on some matter make a difference to what happens. These are, first, in weighting those views in terms of the maturity and understanding of children when maturity varies in relation

to the seriousness of the matter on which they express a view; and second, in varying the countervailing weight of what pushes against those views according to the seriousness of the matter in question.

The foregoing discussion assumes that we have a simple balancing to manage between the child's weighted view and the weighted determination of what is best for the child. Things become more complicated once we allow other relevant considerations; for instance, the views of the child's parents, which need not be reducible to what is best for the child, and third-party or public interests that can be at stake in many decisions. We have set these matters aside in order to concentrate on the principal issue concerning how we weight the child's views in accordance with the child's maturity. Here we have considered two pressing questions: How should we weight the child's maturity in expressing a view? and How should this weighting make a difference to the final decision on which the child is expressing a view?

We can sharpen the problem the second question identifies by asking how exactly the differential weighting makes a difference that reflects that weighting. How precisely, in practical terms, does what is eventually decided for the child take account of the child's weighted view? The problem is that when it comes to simple (non-complex) medical decisions, for instance, we normally have a binary choice between performing a procedure or not. Is the child's view weighty enough to carry the day? Imagine we view the procedure as in the child's best interests but regard the child's view—against the procedure—as sufficiently weighty to prevail against our judgement on interests. Then we can say that the child's weighted view *tips the scales*: that is, their weighted view outweighs what is in the other scale (best interests).

Unfortunately, this is a limit case and at this limit it is impossible practically to distinguish the scalar view of Article 12(1) from the threshold view of *Gillick*. That the child's view is weighty enough to outweigh a contrary judgement of what is best for the child is not significantly different, certainly not in practical terms, from a judgement that the child is mature enough to decide what should happen. Yet the same outcome is justified by different means: on the one hand, judging that the child is as mature as an adult and can choose as an adult would, and, on the other hand, judging that the child's weighted view tips the scales in favour of allowing what the child has indicated is preferred.

What difference does our giving the child's view some weight make when it falls short of tipping the scale? How should we understand what it means in practical terms to give a greater or lesser weight to the child's view when in the final analysis we act against that view? How might we recognise that we are giving 'due weight' to the child's view? In addressing these questions, we can imagine a situation in which we have to respond to the child's subsequent complaint when we act against their stated view: 'You did not listen to what I wanted'. If our framework is the *Gillick* threshold standard we might respond, 'We did listen to you and we evaluated your maturity and understanding of the issues. You were judged not mature enough to make your own decision and thus we did what we thought was best for you'. If, on the other hand, our framework is the scalar standard of Article 12(1) we might answer, 'We listened to you and we evaluated your maturity and understanding of the issues. We gave a weight to your view based on that evaluation. However, your view was not weighty enough for us to do what you wanted'.

If the child responds, 'What does that actually mean?' or 'How do I know you gave my view weight?' we need a plausible answer. Here we might say, for instance: 'We took longer than we would otherwise have done to reach a decision; some but not all of the adults involved in the decision-making wanted to do what you favoured; we carefully considered other similar cases involving children of your age to see if your case was different in any important way; we looked at whether there was a compromise between our view as to what was best and your own view'.

Can we appeal here to a 'right of influence' for the child, akin to the recommendatory consideration that we can accord an adult's view even though we judge that view not to be what is best for that adult? Recall the example discussed in Sect. 1 involving a friend's preferences for your distribution of her funds. In such a case we take the adult's view as a *pro tanto* reason for acting in accordance with that view; we do so independently of the objective merits of that view's content because it is the view of the person for whom we are making the decision. However, as noted earlier, a barrier to simply extending this norm to decision-making for children is that a decision to act sub-optimally in respect of an adult's best interests, and in accordance with that person's own preference, can invoke the presumption of competence or an underlying right of choice on the matter in question.

What we seek to explain to the child must be something less, at best that their view was taken account of to some degree and that the decision was not made entirely on an objective assessment of what was in their best interests. We might add that we took such account of the child's view because the outcome most directly affected them and it was they who would bear the risks, costs and benefits of our decision, and furthermore that we considered their view as that expressed by someone with a not insignificant degree of maturity. We might say all of this. Yet the child need not be persuaded that we did all of what we said if they cannot see that their view made any practical difference to the outcome. After all, having considered the child's view and assessed the child's degree of maturity, we still decided against what they wanted.

The difficulties of giving a proper response to the child should make us very aware that while the idea of giving due weight to the child's views in accordance with [their] age and maturity is intuitively attractive and on the face of it simple enough, it is in fact unclear how we are to understand and enact the corresponding right.

Conclusion

Article 12(1) states a core right of the UNCRC that is both attractive and intuitively straightforward. This Article provides a ready-to-hand and influential statement of what a requirement to take proper account of the child's views on all matters affecting them might be. Yet as we have shown, this right is complex. Its complexity can be seen in the problem of contrasting an adult's normative power of choice with a child's weighted views. It is also to be seen by distinguishing various senses in which we might consider someone's views on decisions that affect them. While instrumentalist or informative consideration of the child's views can be practically challenging, these

types of consideration are derived from a sophisticated understanding of the standard of best interests. By contrast, if we think that the child's view might properly carry weight insofar as it is their view and independently of the merits of that view's content, then the normative basis for this cannot be, as it is for adults, an underlying right of self-regarding choice. Article 12(1) adopts a scalar standard of influence that gives the child's views 'due weight' in accordance with the child's age and maturity. In seeking to explain the child's right under Article 12(1), we must resolve questions of how to weight the child's views and how this weighting makes a practical difference in coming to a decision.

To identify the complexity of the child's right to a voice is not to abandon the necessary attempt to elucidate the requirement to take 'due' account of the child's views. Children should be heard on matters that affect them and we should do more than simply hear their views without that making any difference. However, if we are to hear children in this manner, we must clearly explain what it might mean to do so. Elucidating the right as stated by Article 12(1) shows how difficult it is to make clear sense of such a right.

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