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NO FIXED LIMITS?

The Uncomfortable Application of Inconsistent Law to the Lives of Children Dealing with Digital Media

Brian Simpson

Introduction

The previous chapter [Chapter 29] explored how the law’s approach to children’s relationship with digital media is shaped by ideological, political, economic, and romantic narratives as much as it is constructed by scientific ones. It was argued that a dominant legal narrative is one that is heavily weighted towards protecting the child rather than granting them autonomy rights. While there are strands within law that speak to children’s agency, they often overlap with the dominant narrative and, as a result, law often lacks coherence and consistency. For example, the very different ways in which children’s rights can be understood bears testament to that point. In this chapter, the application of those principles in a few important cases is examined to better understand the legal process, and to explore the extent to which it might be possible to better articulate children’s rights in the context of digital media through re-thinking what is in the best interests of the child.

While many commentators on children, law, and digital media are unlikely to have read Gault or considered the relevance of debates around competing conceptions of the child in juvenile justice law and policy to their area, those debates have great relevance for understanding laws which affect children and digital media today. However, it must also be noted that in the modern day there appears to have been a shift back to the paternalism of yesteryear. This regressive shift may reflect the manner in which governments pitch their efforts to regulate the digital terrain as a means to appease parents rather than to liberate children. This is evident in the existence of (for example) the e-Safety Commissioner in Australia, which was initially set up to protect children from online harm. Such offices rarely, if ever, speak to the online rights of children to act independently or autonomously. Instead, while the Office of the e-Safety Commissioner professes a concern for children, it initially spoke principally to parents. Another example of this is the General Data Protection Regulation (GDPR) of the European Union. The GDPR raises the age until which parental consent is required for data collection from 13 to 16, although it can be lowered by a member state, but not below 13 (GDPR, art 8(1)). The requirement of parental consent to access social media clearly removes children’s capacity to make their own decisions in this space, and the debate over the appropriate age here underlines the extent to
which this area is governed by competing notions of the child held by adults rather than the practical use, say, of social media by children which would support laws that address that reality rather than parents’ fears (Simpson, 2018, p. 83).

The return to the paternalism of previous years is also evident in a central concern of much of the law today on children and digital media with its focus on cyberbullying. The narrative that now surrounds cyberbullying is mainly concerned with the protection of the child victim. Of course, those bullies are often other children. As with general debates on juvenile justice, if the innocent child is the child in need of protection and nurture, then how should the law respond to the child cyberbully? If the innocent child victim must be protected from online harm because of their immaturity to understand the risks, then how can a same-aged cyberbully be dealt with? Is the child cyberbully as immature as their victim? Should they be punished for what they do not understand? Or are they a wicked and knowing child that bullies, who should learn the consequences of their behaviour?

Casting law around ‘good’ and ‘bad’ aspects of digital media tends to embed a utopian versus dystopian view of the technology. Such an approach relies on various mythologies about digital media rather than embodying a more nuanced and sophisticated understanding of children’s realities with respect to their use of the technology. Likewise, the ideology of childhood that constructs the child as both angelic and demonic also reinforces and creates various tensions and contradictions around how children are to be understood in their interactions with digital media. As a consequence, the relationship between children, law, and digital media is fuelled as much by ideology and narrative as it is by any semblance of scientific analysis of children’s use of the media. It is in this context that the best interests of the child might be recast through an alternative narrative that moves away from a simple focus on the protection of children towards the articulation of their rights in digital contexts.

**Re-Articulating the Best Interests of the Child in the Digital Age Through the Uncomfortable Nature of Children’s Rights**

A contemporary consideration of the law, children’s rights, and digital media has its roots, as is often the case when formulating legal principles, in an age before the advent of digital technology and the internet. Legal principles may aim to address current problems, but the law tends to seek deeper and ongoing principles to invoke as the basis for its response. A case that is not about cyberspace, cyberbullying, or cybersex, but for law raises principles relevant to those matters, was a case about children’s capacity to consent to medical treatment independent of their parents. In 1985, in the United Kingdom, the then highest court in that country, the House of Lords, decided that children had the capacity to make their own decisions regarding medical treatment provided they had sufficient maturity to do so (Gillick and Wisbech AHA [1985] UKHL 7). This case is relevant for the manner in which that court analysed the capacity of children to determine matters that affect them, creating a template for understanding current concerns about children and digital media. It also illustrates a central theme of this chapter: the discomfort that the case brought to discussion of the rights of children.

‘Children’s rights’ as a juristic concept has become one of the most misrepresented, manipulated, and misunderstood concepts in legal and political discourse (Simpson, 2018, pp. 51–2). It is often mentioned as if its meaning is self-evident and it is often assumed, because of the connection with children, that the purpose of such rights is to support a wholesome and virtuous idea of childhood. Such representations of the concept of children’s rights has evolved from the manner in which adults have historically controlled the meaning of childhood and employed various smokescreens, such as the paternalism of the ‘best interests’ of the child, to consistently oppress, harm, and endanger children while justifying such treatment for their welfare (Ferguson,
What is good for children has all too often been about advancing the interests of adults. For the most part this has been enabled by the difficulty children have had throughout time in finding a means to have their voice heard.

A large part of the paternalism that has always underpinned discussions of the child may be grounded in a desire to have certainty around what constitutes ‘good parenting’ and what is ‘bad parenting’. While the notion of the best interests of the child is clearly based on normative content, it is also arguable that, for the most part, adult society can formulate some consensus about how children should be treated, often based on highly idealised notions of the child. The articulation of children’s rights as granting the child independent action is both threatening and disruptive to such a consensus. However, the groundwork for children’s independent rights was not based on an alternative romantic notion of what childhood should be like; it was articulated in terms of certain social realities, as challenging as that made the legal conclusion. As Lord Scarman said in *Gillick*:

> Certainty is always an advantage in the law, and in some branches of the law it is a necessity. But it brings with it an inflexibility and a rigidity which in some branches of the law can obstruct justice, impede the law’s development, and stamp upon the law the mark of obsolescence where what is needed is the capacity for development. The law relating to parent and child is concerned with the problems of the growth and maturity of the human personality. If the law should impose upon the process of ‘growing up’ fixed limits where nature knows only a continuous process, the price would be artificiality and a lack of realism in an area where the law must be sensitive to human development and social change.

(*Gillick v. Wisbech AHA, per Lord Scarman*)

In other words, legal principle about the capacity of the child should be formulated around the acceptance that the nature of childhood is changing, as is the idea that parents can always make decisions on behalf of their children. One of the Law Lords in the majority, Lord Scarman, thus concluded that

> the parental right to determine whether or not their minor child below the age of 16 will have medical treatment terminates if, and when, the child achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed.

(*Gillick v. Wisbech AHA, per Lord Scarman*)

However, the decision in *Gillick* (which is also accepted to state the law in Australia) carried with it a level of discomfort about what it meant to give children such effective control over their lives. John Eekelar famously said at the time that the decision gave children “that most dangerous but most precious of rights: the right to make their own mistakes” (Eekelar, 1986). That children had such a right caused much anxiety for both parents and judges in later cases – often involving the refusal of medical treatment by children – and it would be wrong to suggest that the adoption of such a legal principle was simple or without challenge. Even in recent cases, there continues this tension between recognising children’s capacity to decide and the role of others to determine the matter based on the child’s best interests. In *Re Kelvin*, for example, the Family Court of Australia decided that court authorisation was no longer required in the case of stage 2 treatment for gender dysphoria in cases involving children wishing to transition, where the child consents to the treatment, the child is *Gillick* competent, and the parents do not object to the treatment. This case is often presented as the court removing itself from people’s lives and, thus, a progressive development for children. But the fact that *Gillick* competence alone is not
sufficient to determine the matter (as in other countries such as the UK) indicates how the notion of children’s rights is continually contested and qualified and, by extension, what is in the best interests of children.

By 1989, a view of children’s rights that embraced children’s independent capacity to decide matters began to appear in such documents as the United Nations Convention on the Rights of the Child (UNCROC). Article 13 of that Convention states:

The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child’s choice.

(UNCROC, Art. 13)

While the overarching principle in the Convention is that in all areas affecting children their best interests shall be the primary consideration (UNCROC, Art. 3(1)), other articles, such as Article 13, indicate that the paternalism of bygone days and the use of the child’s ‘best interests’ to conceal acts done according to adult’s views of how children should behave, may be under siege. There is a greater sense today, at least, that children have a right to be heard and to be listened to seriously, lest their perspective on what should happen to them be ignored. This also finds expression in Article 12 of the UNCROC:

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.

(UNCROC, Art. 12(1))

This statement of the position of children clearly reflects the conclusion in Gillick and underscores the point that that case reaches far beyond the question of medical treatment in its reasoning. The difficulty is in the detail, as giving effect to the process of listening to children is as challenging for many adults as it is to give effect to the child’s views in appropriate cases. The participation of children in deciding matters that affect them is easy to state in principle, but as a practical matter remains the cause of much anxiety to many adults.

For some adults, children are, by definition, incapable of acting maturely, and to countenance a conclusion about their welfare that is contrary to their own views is anathema. That such a position runs counter to the legal principles that inform this area may not matter to such adults whose position is usually based on particular views of the child’s best interests or welfare, and thus may gain much currency. In effect the tension, as Michael Freeman has described it, is often between different notions of the rights of children, between the protection rights of children and their autonomy rights (Freeman, 1983).

In the context of children’s use and access to digital technology and social media there is a tendency to stress the ‘positive’ aspects of the technology as something that is ‘good’ for children, while also pointing to those ‘negative’ areas of cyberspace that children need to be protected from. The extent to which this construction of children and online activity has permeated popular consciousness results in it being accepted as essentially unobjectionable. In that context, the idea that children may claim uses of digital media that challenge such views of childhood are both uncomfortable and challenging for adults. Children now create their identity and forge new connections on the internet that disrupt older views about who should guide and define what it means to be a child. In effect, digital media grants to children a higher degree of autonomy than ever before and the possibility of them participating in the construction of childhood in
meaningful ways (Simpson, 2018). In this sense, law’s failure to rearticulate children’s best interests around greater autonomy rights risks making the law either irrelevant for children’s lives, or it being applied against children because of their cultural practices.

**Good Children, Bad Children: The Importance of Rights Talk for Children and Digital Media**

Rights mean little if they are only asserted when others approve. Ultimately, the value of rights is in their capacity to effect change (Donnison, 1999). As argued previously, what is ‘good’ and what is ‘bad’ in relation to children is often what is subjected to challenge in children’s use of digital media. To the extent that this is about the capacity of children to use digital media to create identities that upset adults or to ask questions about their treatment that challenge parental and state authority, this is in effect to ask whether children have a right to be ‘really annoying’.

Much of the law in this area is geared towards supporting children so that they access the ‘good’ material online while being shielded from the ‘bad’. But in fact, defining what is good and what is bad is difficult, because as with any attempt to articulate the best interests of the child, it eventually falls to a normative judgement that is always going to be subjective and value laden. The construction of digital media as a place with ‘good’ and ‘bad’ in it panders to similar notions about children that assume a good child will result from exposure to only the good things online. An assertion along these lines rarely if ever engages with what is meant by ‘good’ in this context.

These strands can be seen in high-profile examples of legal cases considering children and digital media such as that of Michelle Carter in the United States. Michelle Carter was a young woman, aged 17, who was found guilty of involuntary manslaughter on the basis that she had encouraged her 18-year-old boyfriend to commit suicide through a series of texts she had sent to him. She was sentenced to two and a half years in prison for the crime (Logan, 2018). Carter appealed her conviction to the Massachusetts Superior Judicial Court which upheld her original sentence. The various arguments advanced in support of her appeal highlight the conflicting notions around how children are perceived generally, and in relation to digital media.

Much of the case is not about digital media at all. Massachusetts has no offence of encouraging suicide, so a large part of the case involved whether the definition of involuntary manslaughter could embrace her acts. Another aspect of the case is whether her acts – the sending of texts – was causative of her boyfriend’s death. However, the appeal also raised the question of whether Carter’s words were protected speech under the United States Constitution protection of free speech. The point here is that while it may seem abhorrent to send texts that encourage someone to kill themselves, this is the very point of free speech, to protect a category of speech even if others find it distasteful (Carter Appellant Brief, p. 46). This goes to the purpose of such protection of free speech. In effect, although some may find the words annoying or unpleasant, this is the very reason for protecting that speech. A person encouraging suicide may present as cold and lacking in concern, but is this a basis for criminalising their behaviour? As the appellant brief remarked:

> Encouragement, even if ugly or strident, remains protected, and a law that penalises such speech (or chills related speech about suicide, including by physicians or family) is unconstitutional.

*(Carter Appellant Brief, p. 49)*

The American Civil Liberties Union submitted an *amici curiae* brief in support of Carter’s appeal and explained further the basis for arguing the speech was protected under the Constitution:
Because the prohibition at issue here criminalises speech encouraging suicide, and because [the decision of the trial court] seems to draw distinctions between those encouraging suicide for reasons that are deemed compassionate and those that are not and between those who encourage suicide by people ‘coping with a terminal illness’ and those who encourage suicides for other reasons . . . it is both content and indeed viewpoint based.

*(ACLU Brief, p. 36)*

What is unstated is that Carter as a young person was also engaging in behaviour that does not fit well with the notion of the angelic child discussed above. And while part of the appeal argument focussed on the extent to which Carter should receive the same rights as adults with respect to how her speech was to be treated – no matter how distasteful it was – another part of the appeal focussed on her lack of maturity. Massachusetts law allows children to be dealt with as adults where they have inflicted ‘serious bodily injury’. The Youth Advocacy Division of the Committee for Public Counsel and the Massachusetts Association of Criminal Defence Lawyers also submitted an *amicus curiae* brief on the appeal. They argued that, as a juvenile, Carter’s brain functioning was not that of an adult and she should not be held accountable for her actions as an adult. Their core submission was that there should have been further evidence to examine whether Carter actually understood her actions:

All juveniles have structurally and functionally immature brains, which influence their conduct. Experts on juvenile brain development are relevant to whether a juvenile’s conduct departs from that of a reasonable juvenile by defining what can be expected of juveniles.

*(Youth Advocacy Division of the Committee for Public Counsel and the Massachusetts Association of Criminal Defence Lawyers, Amici Curiae brief, p. 1)*

Arguments that rely on the immature child do not challenge the nature of the behaviour. Carter was alleged to have sent many texts to her boyfriend that encouraged her boyfriend to kill himself. Those read into the evidence at trial were certainly lacking in compassion on one reading. Read as the actions of a wicked juvenile, they can support the lawyer’s recourse to the immaturity of the child as a defence. On the other hand, to claim that the child has the right to free speech sits uncomfortably with many adults as it supports the proposition that children may also have the right to engage in conduct (or speech) that others find not only unpalatable but also at odds with what a child should be, innocent, naïve, but certainly not knowing and challenging of dominant views about how to behave. Yet again, in all of the briefs presented on this appeal, the competing and contradictory views of the child are in evidence.

The appeal court judgment reinforces this conclusion as to the confused messages about children that are embedded in the applicable legal principles. On the argument that Michelle Carter’s actions should have been evaluated as those of a juvenile and not those of an adult, the court concluded:

The defendant argues essentially that, when considering a juvenile’s actions under the objective measure of recklessness, we should consider whether an ordinary juvenile under the same circumstances would have realised the gravity of the danger. It is clear from the judge’s findings, however, that he found the defendant’s actions wanton or reckless under the subjective measure, that is, based on her own knowledge of the danger to the victim and on her choice to run the risk that he would comply with her instruction to get back into the truck. That finding is amply
supported by the trial record. Because the defendant’s conduct was wanton or reckless when evaluated under the subjective standard, there is no need to decide whether a different objective standard should apply to juveniles. Moreover, it is clear from the judge’s sentencing memorandum that he did in fact consider the defendant’s age and maturity when evaluating her actions and that he was familiar with the relevant case law and ‘mindful’ of the general principles regarding juvenile brain development. He noted that on the day of the victim’s death, she was seventeen years and eleven months of age and at an age-appropriate level of maturity. Her ongoing contact with the victim in the days leading to his suicide, texting with him about suicide methods and his plans and demanding that he carry out his plan rather than continue to delay, as well as the lengthy cell phone conversations on the night itself, showed that her actions were not spontaneous or impulsive. And, as the judge specifically found, ‘[h]er age or level of maturity does not explain away her knowledge of the effects of her telling [the victim] to enter and remain in that toxic environment, leading to his death’. Where the judge found that the defendant ordered the victim back into the truck knowing the danger of doing so, he properly found that her actions were wanton or reckless, giving sufficient consideration to her age and maturity.


What is apparent here is that the court’s judgment about the maturity of the child was heavily focussed on the nature of the actions rather than the individual circumstances of the child. Emphasis was placed on her age being close to 18 and that, as such, she was at ‘an age-appropriate level of maturity’ which is the very issue in question. There was no discussion of the role of digital technology in her life and the manner in which digital culture itself creates new cultural norms within which young people’s behaviour can be understood.

Orthodox narratives about children’s digital behaviour in cases such as Michelle Carter become concerned about cyberbullying, the potential of the ‘bad’ aspects of digital media to harm young people, and the potential for young people to get into legal difficulty across jurisdictions. However, this narrative assumes that what is ‘good’ and ‘bad’ in digital domains is self-evident. It does not consider that there are often competing values over such questions. Moreover, it fails to consider that, while there may well be negative outcomes of some behaviour, that same behaviour may also rest on important principles that need to be defended. Thus, while the right to speak in digital and other contexts may lead to speech that many find distasteful or against normal values, there will be other examples where such free speech leads to the accountability of others that do harm to children. And in the case of children, it should also be remembered that the freedom to self-expression in digital contexts contains developmental aspects. The children who become skilled in developing their own digital norms online today while still children will likely become better and more active citizens tomorrow. In this regard, the role of adults is not to deny children access to digital media ‘in their best interests’ but to offer guidance that enhances their rights rather than stymies them.

Conclusion: Why Uncomfortable Rights Matter for Children in Digital Media

It is important to have a clear understanding of the nature of the rights claimed in relation to children using digital media. David Donnison argues that rights are valuable commodities in the hands of the powerless that challenge the powerful and their norms (Donnison, 1999). The discomfort that the powerful feel when others claim rights is palpable. One tactic utilised to weaken
such rights is to argue that the claiming of a right may be fair, but with it comes responsibilities to act in certain ways. This is simply a mechanism to weaken the right held by the right holder. As Judith Ennew remarks, quoting the work of Paul Sieghart:

> In all legal theory and practice, rights and duties are symmetrical. It is a popular fallacy that this symmetry applies within the same individual: that if I have a right, I must also have a correlative duty. This is not so: if I have a right, someone else must have a correlative duty; if I have a duty, someone else must have a corresponding right.  

*(Paul Sieghart cited in Ennew, 1986, p. 36)*

The importance of this is that what is *not* being claimed for children here is a simple right to do as they please online. It may be that their behaviour will offend or disappoint at times, but the correlative responsibility on adults – parents and others – is to ensure that children are able to fully develop their rights online, rights which embrace their right to an identity and to transgress norms as a means of improving their situation, and also quite simply the right to play. The advancement of such rights may shift the norms of behaviour online and in society in many ways, but this is not of itself a bad thing.

Christian Fuchs argues that cyberspace cannot be understood without also understanding its political economy (Fuchs, 2015). Clearly, much of the articulation of responsibility online, and of steering children towards the ‘positive’ and away from the ‘negative’ areas of digital media, has the hallmarks of ensuring that children grow up to be productive consumers and compliant workers. It is only recently, and after much public campaigning, itself often annoying to government and corporations, that debate has begun to move away from a simple concern about how much privacy people have in relation to each other online, and what large social media corporations do with personal and private information (Vaidhyanathan, 2018). A citizenry that claims the right to speak out about such behaviour will be annoying to those who benefit from the profits of data-mining. However, such rights may be the only bulwark against the erosion of civil liberties.

So far, legal discourse on children and digital media has tended to focus on the consequences of social media that relate to traditional notions of legal harm (such as bullying, identity fraud, and loss of privacy) rather than attempting to regulate it in a way that addresses the rights of others, and especially the rights of children, in their fullest sense. It is easy to see the rights of children only in terms of protection from harm and harmful online content as this has historically been the dominant discourse. But that concern relates to legal tests that were as much about denying children a voice or a place as they were about actually protecting children. Those tests also handed unaccountable power to adults to act in the child’s best interests that could then be used by adults to protect and disguise their own interests. Digital technology empowers children on a practical level to articulate their own wants and needs. It allows them to transgress norms, often in spite of the law. In this new age, the challenge for the law is not to simply prevent such usage, but to frame the law in such a manner that it preserves the rights that children can now claim in relation to media as one aspect of how it is possible to protect children’s interests. In that regard, young people such as Michelle Carter are neither immature nor knowingly wicked, but individuals that present the opportunity for the whole community to demand more sophisticated laws in this space, as uncomfortable as that exercise may be.

References


**Legislation**

European Union General Data Protection Regulation.

**Cases**

*In re Gault* 387 US 15.
*Re Kelvin* [2017] FamFC 258.

**Treaties**


**Other**