

Does the theoretical framework change the legal end result for mature minors refusing medical treatment or creating self-generated pornography?

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Introduction

The position, protection of and respect afforded to decisions made by those under 18 (the age of majority in England and Wales)¹ has been much debated, particularly in the context of making decisions about health. This is no accident because treatment involves bodily integrity and personal privacy and it would be ‘intolerable if patients had no right to control its delivery.’² Some of the discourse has focused on ideas of children’s rights, and others have explored the concept of best interests, thereby mirroring legal concerns.³ The acknowledgement and protection of (some) rights can be seen in the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) and the UK’s Human Rights Act 1998 (HRA), for example, which place no age restrictions or limitations on those who enjoy the rights protected within.⁴ Thus, everyone has the same right to life, liberty and security of the person, and respect for private and family life.⁵ At the same time, there are other rights which are restricted to adults, including voting, buying alcohol and adopting,⁶ and the rights which specifically focus on children espoused in the United Nations Convention on Rights of the Child 1989 (UNCRC) have still not been incorporated into the UK’s domestic law. This may be because if minors are recognised as ‘fully’ autonomous individuals with legally enforceable rights then this would conflict with the welfare principle (best interests) as set out in the Children Act 1989 (CA).⁷ Although that Act requires the courts to have especial regard for ‘the ascertainable wishes and feelings of the child concerned’ considered in the light of her age and understanding,⁸ critics have argued that as long as courts can demonstrate that the welfare of the child has been the paramount consideration in their decision, legislative provisions pertaining to rights can be glossed over.⁹ Similarly, various endeavours of the United Nations, the Council of Europe and the European Union, for example, to combat child sexual exploitation are framed around *protection*,¹⁰ even though the UNCRC promotes *rights*. This may be because emphasising a protectionist stance towards children is more likely to generate international agreement, but the prominence of concepts such as vulnerability and exploitation makes it easier to perceive

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¹ s 1 Family Law Reform Act 1969 (FLRA).

² J. Fortin, *Children’s Rights and the Developing Law* 3rd ed. (CUP, 2009), p 146.

³ See, for example, *ibid*, ch 5; S. Elliston, *The Best Interests of the Child in Healthcare* (Routledge-Cavendish, 2007).

⁴ Used by under 18s in, for example, *A v. UK* [1998] 2 FLR 959, European Court of Human Rights; *Nielsen v. Denmark* (1988) 11 EHHR 175, European Court of Human Rights.

⁵ Articles 2, 5, and 8.

⁶ s 1 Representation of the People Act 1983; s 146 Licensing Act 2003; s 51 Adoption and Children Act 2002.

⁷ s 1(1).

⁸ s.1(3)(a) Children Act 1989 (CA).

⁹ For example, A. Bainham, ‘Can We Protect Children and Protect their Rights?’ (2002) 32 *Family Law* 279; J Fortin, ‘Accommodating Children’s Rights in a Post Human Rights Act Era’ (2006) 69 *Modern Law Review* 299.

¹⁰ European Council Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography, 2004/68/JHA, Article 1(a), *Official Journal of the European Union* L13 20.01.2004; Council of Europe, *Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, CETS No.201, 2007.

minors as being in need of protection rather than as individuals with autonomy deserving respect.

Nevertheless, in *Mabon v. Mabon* Lord Justice Thorpe stated that:

in the 21st century, there is a keener appreciation of the autonomy of the child and the child's consequential right to participate in decision making processes that fundamentally affect his family life.¹¹

In this article we expose some of the tensions which surround mature minors (16 and 17 year olds) making decisions for themselves. We focus on this group as they are approaching the age of majority and suggest that the dominant paradigms with regards to mature minors in England and Wales remain best interests and protectionism,¹² including ideas of paternalism, sanctity of life, beneficence and non-maleficence. We note that there are obvious differences between these four paradigms, however, we place the latter three under the broader umbrella of protectionism for the purposes of this paper, suggesting that some decisions made in order to protect mature minors reflect an 'adults know best' approach, or can be made with the primary purpose of protecting life, for example.¹³ Our concern is whether the dominance of best interests and protectionism inevitably limits law's recognition of mature minors' rights (particularly autonomy) as explicated in the HRA. We explore this matter via two case studies (refusing treatment and creating self-generated pornography)¹⁴ and by applying best interests, protectionist and rights based approaches to explore whether different results are thereby achieved.¹⁵ On the face of it we are comparing two dissimilar scenarios covered by different branches of law; however, both scenarios involve mature minors' decision-making and behaviour that concern adults because it is (or may be) harmful to health or wellbeing. This could be to the extent that the decision to refuse treatment will result in the mature minor's death or impaired health; or a mature minor's well-being could be affected if, for example, a self-generated image of pornography is disseminated to those she knows against her wishes. Just as in health situations there is a desire to protect the life and health of the patient, one of the purposes of the criminal law is to deter behaviour which is deemed illegitimate or inappropriate, thus protecting individuals.¹⁶ We accept that in these scenarios the interests of parents and/or the state may be different as the desire to preserve the life and health of the minor is at stake in one whereas in the other, broader societal issues, such as protecting children, may also be of concern. Nevertheless, this does not impede our argument.

¹¹ [2005] EWCA Civ 634, [2005] 3 WLR 460, 466.

¹² For an argument that best interests essentially amounts to 'control dressed up as protection' see A. Oakley, 'Women and Children First and Last: Parallels and Differences between Children's and Women's Studies' in B. Mayal (ed.), *Children's Childhoods Observed and Experienced* (Falmer, 1994), p 16.

¹³ On protectionism see, for example, M. Wyness, 'Policy, Protectionism and the Competent Child' (1996) 3 *Childhood* 431; on paternalism see G. Dworkin, 'Paternalism' (1972) 56 *The Monist*, 64; G. Scarre, 'Children and Paternalism' (1980) 55 *Philosophy* 117, and on the 'caretaker thesis' D. Archard, *Children: Rights and Childhood* 2nd ed. (Routledge 2004), pp 77-84.

¹⁴ The images we have in mind in our second case study are *not* images of child sexual abuse and thus we refer to them as self-generated pornography. For discussion of the controversy surrounding the label child pornography see S. Ost, *Child Pornography and Sexual Grooming: Legal and Societal Responses* (CUP, 2009), pp 31-32.

¹⁵ We thus adopt the methodology employed by J. Herring in 'The Human Rights Act and the Welfare Principle in Family Law – Conflicting or Complementary?' (1999) 11 *Child and Family Law Quarterly* 223 and identified in Parker's seminal article: S. Parker, 'Rights and Utility in Anglo-Australian Family Law' (1992) 55 *Modern Law Review* 311.

¹⁶ See A. Ashworth, *Principles of Criminal Law* (OUP, 2009), pp 16-17.

We suggest that best interests in health care law and the protectionist discourse in the criminal law relate to what Parker, in relation to family law, has referred to as the utilitarian approach.¹⁷ He suggested that, in that field, the themes of utility (welfare) and rights were identifiable and that family law had become ‘more centrally concerned’ with the former (see s 1(1) of the CA 1989) than the latter.¹⁸ Thus:

family law became predominantly about weighing interests in some kind of balance, rather than adjudicating over rights ... The most obvious way of accomplishing this balancing act, without destroying the flexibility that the system was designed to achieve, was by conferring overt and broad judicial discretion, to be exercised in the light of certain goals or standards.¹⁹

We argue that while the link between utility and best interests is more evident in family and health law contexts,²⁰ the aim of protecting children similarly leads law makers to take the position that they should criminalise behaviour if it helps to achieve this goal.²¹ We thus examine the validity of Herring’s contention that although ‘in many cases a welfare and rights perspective will produce the same result ... The kind of cases which seem to divide those taking a rights or a welfare approach are those involving autonomy: the extent to which the law should respect the decision of a competent child to do something that harms them.’²² We show that over a decade after its implementation, whether within health care or criminal law, the HRA has yet to significantly alter the ability of mature minors in England and Wales to make decisions for themselves; especially decisions which others may view as ‘harmful’. Rather, best interests and protectionist approaches continue to dominate and so whichever of these theoretical approaches is adopted, there are still some decisions that society is reluctant to allow 16 and 17 year olds to make. Protectionism thus prevails *regardless* of the wishes of the mature minor and, in the context of health and self-generated pornography, best interests in the age of human rights remains alive and kicking.

Scenario one: refusing treatment

Alyssa (16 years and 10 months old) was diagnosed with acute myeloid leukaemia when she was 12. She underwent chemotherapy and, when she was 14, tests revealed that her kidneys had been damaged as a result. The damage was initially minimised by a combination of diet and drugs but dialysis is now required and Alyssa has indicated that she will not consent to it.

Welfare, best interests and utility

Consent to Alyssa’s treatment can be provided by (i) her as she is over 16 and if she is competent,²³ or (ii) someone with parental responsibility for her (usually her parents),²⁴ or (iii) the court.²⁵ The Mental Capacity Act 2005 (MCA) applies to anyone over 16 and there

¹⁷ Parker, above, n 15.

¹⁸ Ibid, p 323.

¹⁹ Ibid, p 324.

²⁰ See H. Fenwick, ‘Clashing Rights, the Welfare of the Child and the Human Rights Act’ (2004) 67 *Modern Law Review* 889.

²¹ Ost, above, n 14, ch 2.

²² J. Herring, ‘Farewell Welfare?’ (2005) 27 *Journal of Social Welfare and Family Law* 159, 165.

²³ ‘the consent of a minor who has attained the age of 16 years to any ... medical ... treatment ... shall be as effective as it would be if he were of full age ...’: s 8(1) FLRA 1969.

²⁴ *Re W (A Minor) (Medical Treatment: Court’s Jurisdiction)* [1993] Fam 64, CA.

²⁵ Ibid.

is a presumption of capacity unless there is evidence otherwise.²⁶ Section 2(1) sets out when someone lacks capacity²⁷ and, in order to be able to make a decision, a person must fulfil all of the conditions in section 3 (1).²⁸ It is thus presumed that Alyssa is competent to consent to treatment, but if she lacks capacity under the Act, decisions will be made in her best interests.²⁹ Guidance on this is provided in the MCA and its Code of Practice.³⁰ If, however, Alyssa is unable to make a decision because she is, for example, overwhelmed by the situation then the common law will apply, and consent can then be provided by (ii) or (iii), again acting in her best interests. As for refusals, statute is silent but the common law is clear; where treatment is recommended by health professionals (because in their clinical judgement it is in her best interests to receive it),³¹ Alyssa's refusal of that treatment does not have to be respected and consent can be provided by (ii) or (iii).³² In so doing, any decision should be made on the basis of Alyssa's best interests and although no guidance on this exists for parents, the courts can look to section 1(1) of the CA 1989 if they are involved. This requires that Alyssa's welfare is the paramount consideration when the court determines any question about her upbringing and, in applying this welfare principle (the best interests test)³³ the court should have particular regard to the 'welfare checklist' set out in section 1(3).³⁴ This version of the best interests test will apply if, for example, the court is asked to make a specific issues order to determine whether Alyssa should be treated against her or her parents' wishes.³⁵ Alternatively, the court could exercise its inherent jurisdiction where its authority and powers are 'theoretically limitless' and extend beyond those of parents.³⁶ Indeed, 'if the court's powers are to be meaningful, there must come a point at which the court, while not disregarding the child's wishes, can override them in the child's own best interests, objectively considered.'³⁷

So what does best interests mean? In *Re W*, Nolan LJ said that section 1(1) and (3) of the CA 1989 contained the principles which govern the court's exercise of its inherent jurisdiction,³⁸

²⁶ s 2(5), 1(2) MCA 2005.

²⁷ 'a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.'

²⁸ 'a person is unable to make a decision for himself if he is unable (a) to understand the information relevant to the decision, (b) to retain that information, (c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his decision (whether by talking, using sign language or any other means).'

²⁹ s 1 (5) MCA 2005.

³⁰ s 4; Department for Constitutional Affairs (DCA), *Mental Capacity Act 2005, Code of Practice* (DCA, 2007), ch 5. Chapter 12 discusses how the Act applies to minors.

³¹ 'Doctors should always act in the best interest of children and young people. This should be the guiding principle in all decisions which may affect them': General Medical Council (GMC), *0-18 years: guidance for all doctors* (GMC, 2007), para 8.

³² *Re R (A Minor) (Wardship: Medical Treatment)* [1992] 4 All ER 177, CA; *Re W*, above, n 24.

³³ These terms are used interchangeably in family law see, for example, S. Harris-Short, J. Miles, *Family Law: Text, Cases and Materials* 2nd ed. (OUP, 2011), p 524.

³⁴ 'In the circumstances mentioned in subsection (4), a court shall have regard in particular to (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding); (b) his physical, emotional and educational needs; (c) the likely effect on him of any change in his circumstances; (d) his age, sex, background and any characteristics of his which the court considers relevant; (e) any harm which he has suffered or is at risk of suffering; (f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs; (g) the range of powers available to the court under this Act in the proceedings in question.'

³⁵ s 1(4), s 8(1) CA 1989.

³⁶ *Re W*, above, n 24, p 81 *per* Lord Donaldson MR; p 85 *per* Balcombe LJ. Powers include the ability to authorise the use of reasonable force if necessary: *Re C (Detention: Medical Treatment)* [1997] 2 FLR 180, 189.

³⁷ *Re W*, above, n 24, p 88 *per* Balcombe LJ.

³⁸ *Ibid*, p 93 *per* Nolan LJ.

and that the court should start from the general premise that ‘*the protection of the child’s welfare implies at least the protection of the child’s life ... [i]n general terms ... the present state of the law is that an individual who has reached the age of 18 is free to do with his life what he wishes, but it is the duty of the court to ensure so far as it can that children survive to attain that age.*’³⁹ As W’s circumstances had changed when her case was considered by the Court, her wishes were ‘completely outweighed by the threat of irreparable damage to her health and risk to her life.’⁴⁰ Best interests are, therefore, premised on protecting the sanctity of life, and ‘if the child’s welfare is threatened by a serious and imminent risk that the child will suffer grave and irreversible mental or physical harm, then ... the court when called upon has a duty to intervene.’⁴¹ This stance has been replicated in other cases,⁴² and in *Re J* (not a mature minor case) Taylor LJ stated that there was a ‘strong presumption in favour of taking all steps capable of preserving it, *save in exceptional circumstances.*’⁴³ While in cases not involving mature minors the courts have acknowledged that for a particular individual life is not always preferable to death,⁴⁴ to date ‘judges ... [have] in almost all cases place[d] life itself above all other considerations in considering competent children.’⁴⁵ For example, in *Re P*, the last reported case to explore best interests and mature minors refusing treatment,⁴⁶ Johnson J stated that despite ‘weighty and compelling reasons’ not to make the order authorising the treatment of ‘John’ (a Jehovah’s Witness who was 16 years and 10 months old) against his wishes, ‘looking at the interests of John in the widest possible sense – medical, religious, social, whatever they be – my decision is that John’s best interests in those widest senses will be met if I make an order in the terms sought by the NHS Trust ...’⁴⁷ He held this even though expressing reluctance at overruling John’s wishes⁴⁸ because of his strong and established religious convictions.⁴⁹ This contrasts with the decision in *Re JT* where 25 year old T, who had learning disabilities and ‘extremely severe behavioural disturbance’,⁵⁰ had her refusal of dialysis respected because she was deemed competent under the (then appropriate) *Re C* test.⁵¹ Nevertheless, no case has been reported where a mature minor’s refusal has been respected and they have died, as a minor.

In *Re W* Lord Donaldson MR indicated that best interests are also medically grounded (beneficence), as the court can override the refusal ‘by authorising the doctors to treat the minor in accordance with their *clinical judgement*, subject to any restrictions which the court may impose.’⁵² Where clinical judgement (= best interests?) is relied on, the courts are clear

³⁹ Ibid, p 94, emphasis supplied.

⁴⁰ Ibid, p 80 *per* Lord Donaldson MR. Similarly, pp 88-89 *per* Balcombe LJ.

⁴¹ Ibid, p 94 *per* Nolan LJ.

⁴² For example, *Re E (A Minor) (Wardship: Medical Treatment)* [1993] 1 FLR 386; *Re M (A Child) (Refusal of Medical Treatment)* [1999] 2 FLR 1097; *Re P (Medical Treatment: Best Interests)* [2003] EWHC 2327 (Fam); [2004] 2 FLR 1117. Similarly, see British Medical Association (BMA), *Children and young people toolkit*, (BMA, 2010), Card 5 Best interests, p 19.

⁴³ *Re J (A Minor) (Wardship: Medical Treatment)* [1991] Fam 33, 53, CA, emphasis supplied. Similarly, Lord Donaldson, p 46.

⁴⁴ For example, *Airedale NHS Trust v. Bland* [1993] 1 All ER 831, HL; *Re T (Adult: Refusal of Medical Treatment)* [1993] Fam 95, CA; *Re B (A Minor) (Wardship: Medical Treatment)* [1981] 1 WLR 1421, CA.

⁴⁵ S. Elliston, ‘If You Know What’s Good For You: Refusal of Consent to Medical Treatment by Children’ in S.A.M. McLean, *Contemporary Issues in Law, Medicine and Ethics* (Dartmouth, 1996), p 43.

⁴⁶ *Re P*, above, n 42.

⁴⁷ *Ibid*, para 12, *per* Johnson J.

⁴⁸ *Ibid*, para 11, *per* Johnson J.

⁴⁹ *Ibid*, para 10, *per* Johnson J.

⁵⁰ *Re JT (Adult Refusal of Medical Treatment)* [1998] 2 FCR 662, 663 *per* Ward J.

⁵¹ *Re C (Adult: Refusal of Medical Treatment)* [1994] 1 WLR 290, CA.

⁵² *Re W*, above, n 24, p. 81, emphasis supplied.

in their refusal to go behind this, and patients cannot demand the treatment they desire.⁵³ Best interests seemingly sit behind clinical decisions, as doctors only recommend treatment which, in their clinical judgement, is necessary and in a patient's best interests (beneficence). This conflation of "best" with "medical" was criticised by the Law Commission,⁵⁴ and was supposed to have been eradicated as its' recommendations on the issues to be regarded when determining best interests for adults without capacity were largely replicated in the MCA 2005.⁵⁵ Indeed, beyond the context of the CA 1989, the notion of best interests has been refined by the courts so that it encompasses medical and emotional issues,⁵⁶ 'broader ethical, social, moral and welfare considerations',⁵⁷ and 'every kind of consideration capable of impacting on the decision. These include, non-exhaustively, medical, emotional, sensory (pleasure, pain and suffering) and instinctive (the human instinct to survive) considerations.'⁵⁸ The General Medical Council (GMC) and British Medical Association have produced non-exhaustive lists of factors to be considered in best interests assessments,⁵⁹ and the weight attached to each factor will depend on the case.⁶⁰

As this is so, it is logical to distinguish between the ability of a mature minor to say yes but not no,⁶¹ especially where the treatment is designed to benefit the patient and her refusal could/would lead to permanent injury or death.⁶² This argument appears to be further predicated on the idea that 'the best interests test ... logically ... give[s] only one answer',⁶³ even though in considering best interests the doctor may have to choose the best option from a range of options.⁶⁴ However, as Douglas notes,⁶⁵ there is often more than one view on whether treatment *is* in a patient's interests (as recognised in *Bolam*),⁶⁶ and even where there appears to be agreed medical opinion another view can exist.⁶⁷ There is thus a qualitative difference between consent and refusal, so that '[o]vercoming a refusal means having to interfere with a person's autonomy, both intellectual and bodily. On this basis ... a person's refusal should be given *greater weight* ... than a consent.'⁶⁸ Gilmore and Herring have recently argued that in refusal of treatment cases there may be two different scenarios at

⁵³ *Re J (A Minor) (Child in Care: Medical Treatment)* [1993] Fam 15, 26-27, CA per Lord Donaldson; *R (On the Application of Burke) v. General Medical Council* [2005] EWCA Civ 1003; [2005] 3 WLR 1132, paras 31, 49-55 per Lord Phillips MR.

⁵⁴ Law Commission, *Mental Incapacity* (Law Com 231, 1995), para. 3.26.

⁵⁵ *Ibid*, para. 3.28.

⁵⁶ *Re A (Medical Treatment: Male Sterilisation)* [2000] 1 FCR 193, 200, CA, per Dame Butler-Sloss P.

⁵⁷ *Re S (Adult Patient: Sterilisation)* [2001] Fam 15, 28, CA per Dame Butler-Sloss P. Similarly, *R (On the Application of Burke) v. General Medical Council* [2004] EWHC 1879 (Admin); [2005] 2 WLR 431, para. 90 per Munby J.

⁵⁸ *NHS Trust v. MB* [2006] EWHC 507 (Fam), para. 16 per Holman J.

⁵⁹ GMC, *0-18 years*, above, n 31, para. 12, reference removed; BMA, *Children*, above, n 39, Card 5 Best interests.

⁶⁰ GMC, *0-18 years*, above, n 31, para. 13.

⁶¹ Fortin, above, n 2, p. 155; J.K. Mason, G.T. Laurie, *Law and Medical Ethics* 8th ed. (OUP, 2010), para 4.27; J. Pearce 'Consent to Treatment During Childhood: The Assessment of Competence and Avoidance of Conflict' (1994) 165 *British Journal of Psychiatry* 713.

⁶² N. Lowe, S. Juss, 'Medical Treatment – Pragmatism and the Search for Principle' (1993) 56 *Modern Law Review* 865, 871-872.

⁶³ *Re SL (Adult Patient) (Medical Treatment)* [2000] 2 FCR 452, 464, per Dame Butler-Sloss P. Similarly, T.L. Beauchamp, J.F. Childress, *Principles of Biomedical Ethics* 6th ed. (OUP, 2009), p 138. For a critique of one option only see S. Holm, A. Edgar, 'Best Interest: A Philosophical Critique' (2008) 16 *Health Care Analysis* 197.

⁶⁴ *Re SL*, above, n 63, p 464, per Dame Butler-Sloss P.

⁶⁵ G. Douglas, 'The Retreat from *Gillick*' (1992) 55 *Modern Law Review* 569, 576.

⁶⁶ *Bolam v. Friern Hospital Management Committee* [1957] 1 WLR 582.

⁶⁷ For example in *Re D (A Minor) (Wardship: Sterilisation)* [1976] Fam 185.

⁶⁸ Douglas, above, n 65, p 576, emphasis in original.

issue; the mature minor is *only* refusing a particular proposed treatment or she is refusing *all* treatment.⁶⁹ The patient's capacity to do the former does not necessarily mean she has capacity to do the latter and, if that is so, it is vital for parental responsibility to be used to enable another to provide consent to treatment. The decision in *Re W* might thus be distinguished and they partially defend Lord Donaldson's statement that consent can concurrently be held by the mature minor and her parents.⁷⁰ Additionally, it is in their best interests to give minors 'the maximum degree of decision-making which is prudent. Prudence does not involve avoiding all risk, but it does involve avoiding taking risks which, if they eventuate, may have irreparable consequences or which are disproportionate to the benefits which could accrue from taking them.'⁷¹ This approach was 'wholly consistent' with the philosophy of section 1(3)(a) of the CA 1989 in particular;⁷² thus, paternalism (protectionism) is also evident in this best interests test. Indeed, although best interests should involve respecting the mature minor's wishes,⁷³ this is countered by the court's need to protect the sanctity of life. Where there is a risk of 'grave and irreversible mental or physical harm', the mature minor's wishes are therefore given '[d]ue weight' but are not binding;⁷⁴ (qualified autonomy). In *Re P*, Johnson J said that 'there may be cases as a child approaches the age of 18 when his refusal would be determinative. A court will have to consider whether to override the wishes of a child approaching the age of majority when the likelihood is that all that will have been achieved will have been the deferment of an inevitable death and for a matter only of months.'⁷⁵ This mirrored Balcombe LJ's comments in *Re W* ten years earlier,⁷⁶ but Johnson J provided no guidance on 'determinative' cases and no judge has yet acted on these dicta.

It is evident that the notion of best interests espoused in the CA 1989 rests on ideas about the vulnerability of children and, as such, 'it has great resonance in the current political climate in which vulnerability generally attracts priority.'⁷⁷ However, it has been criticised for, amongst other things, its indeterminacy, uncertainty, lack of transparency, lack of consideration of the interests of others, and for not recognising children's rights.⁷⁸ Eekelaar has sought to reconstruct the best interests test to 'bring a child to the threshold of adulthood with the maximum opportunities to form and pursue life-goals which reflect as closely as possible an autonomous choice',⁷⁹ by perceiving best interests through objectivization and dynamic self-determinism. Thus, the 'decision-maker [should] draw on beliefs which

⁶⁹ S. Gilmore, J. Herring, 'Children's Refusal of Medical Treatment: Could *Re W* be Distinguished?' (2011) 41 *Family Law* 715.

⁷⁰ For a critique see J. Wallbank, E. Cave, 'Minors' Capacity to Refuse Treatment: A Reply to Gilmore and Herring' (2012) 20 *Medical Law Review* 423, and the response to this S. Gilmore, J. Herring, 'Children's Refusal of Treatment: The Debate Continues' [2012] *Family Law* 973.

⁷¹ *Re W*, n 24, above, pp 81-82 *per* Lord Donaldson MR.

⁷² *Ibid*, p 82 *per* Lord Donaldson MR.

⁷³ Elliston, above, n 45. Similarly, *Re W*, *ibid*, p 84 *per* Lord Donaldson MR; pp 88-89 *per* Balcombe LJ.

⁷⁴ *Re W*, above, n 24, p 94 *per* Nolan LJ.

⁷⁵ *Re P*, above, n 42, para. 9.

⁷⁶ *Re W*, above, n 24, p. 89.

⁷⁷ H. Reece, 'The Paramountcy Principle? Consensus or Construct?' (1996) 49 *Current Legal Problems* 267, 277.

⁷⁸ The seminal article is R.H. Mnookin, 'Child-Custody Application: Judicial Functions in the Face of Indeterminacy' (1975) 39 *Law and Contemporary Problems* 226. Subsequent discussions include J. Eekelaar, 'The interest of the child and the child's wishes: The role of dynamic self-determinism' (1994) 8 *International Journal of Law and the Family* 42; Reece, *ibid*; J. Herring, 'The Welfare Principle and the Rights of Parents' in A. Bainham, S. Day Sclater, M. Richards (eds.) *What is a Parent? A Socio-Legal Analysis* (Hart, 1999); J. Eekelaar, 'Beyond the welfare principle' (2002) 14 *Child and Family Law Quarterly* 237; Herring, above, n 22. In the health context see S. McGuiness, 'Best Interests and Pragmatism' (2008) 16 *Health Care Analysis* 208.

⁷⁹ Eekelaar (1994), *ibid*, p 53.

indicate conditions which are deemed to be in the child's best interests', beliefs derived from the professionals themselves and their own social beliefs, and children should make an increasing number of decisions as they grow up but should not be able to make decisions which unduly restrict their life choices when they reach adulthood.⁸⁰ Similarly, Herring has long called for best interests to be reconceptualised to recognise that the interests of others is, and should be, part of a child's welfare.⁸¹ Notably, the *maximisation* of a minor's capacity has not, to date, been expressly included in the test, but Cave has persuasively argued that it should incorporate consideration of the child's capacity, particularly regarding 'the emotional harms which flow from coercive treatment which will be raised significantly by virtue of the child's competence.'⁸² This is important because '[adolescents] are fast reaching maturity, but society has an interest in ensuring that they take responsibility for decision-making over important aspects of their lives. Furthermore, they are being taught to value their status as rights-holders and can justifiably argue that they, like adults, have the right to make choices over their medical treatment, if competent to do so.'⁸³ We endorse this because without the inclusion of this consideration it is unclear how it is hoped that on turning 18 decision-making capacity arrives intact and fully functional.

Under a best interests assessment, Alyssa's refusal is likely to be legally overridden by her parents or the court if it is deemed to be in her best interests to start dialysis. As dialysis will prolong her life this is a likely conclusion, despite her wishes, because of the importance accorded to protecting the sanctity of life of minors and the fact that clinical judgement supports this conclusion. This is so even though in *Re JT* the realities of forcing dialysis were noted by one of T's doctors: '[d]ialysis with restraint would be extremely dangerous and would make resuscitation, if necessary, impossible. Such restraint would make monitoring and safety controls impossible to implement and it would constitute dangers to both nurses and the patient.'⁸⁴ Additionally, '[h]aemodialysis is not a one off treatment. It is not simply a case where one surgical intervention is necessary or a diagnostic procedure. Haemodialysis will need to be maintained for the whole of [T]'s life.'⁸⁵ However, as noted above, the courts have never accepted a refusal of treatment that will lead to the death of a mature minor. We thus conclude that, in the light of the principles which appear (often unacknowledged) to sit behind best interests tests, Kennedy's critique remains pertinent:

The best interests formula may be beloved of family lawyers but ... it is not really a test at all. Instead, it is a somewhat crude conclusion of social policy. It allows lawyers and courts to persuade themselves and others that theirs is a principled approach to law. Meanwhile, they engage in what to others is clearly a form of '*ad hocery*'.⁸⁶

Rights

⁸⁰ Ibid, p 46.

⁸¹ In, for example, *What is a Parent?*, above, n 78; 'The Human Rights Act and the Welfare Principle in Family Law – Conflicting or Complementary?' (1999) 11 *Child and Family Law Quarterly* 223; (2005), above, n 22. Also, Reece, above, n 77 and, in the health context, see McGuinness, above, n 78; J. Bridgeman 'A Response to "Death and Best Interests"' (2009) 4 *Clinical Ethics* 15.

⁸¹ Eekelaar (1994), above, n 78, p 53.

⁸² E. Cave, 'Maximisation of Minor's Capacity' (2011) 23 *Child and Family Law Quarterly* 431, 448.

⁸³ Fortin, above, n 2, p 146.

⁸⁴ *Re JT*, above, n 50, p. 665.

⁸⁵ Ibid, p. 666.

⁸⁶ I. Kennedy, *Treat Me Right: Essays in Medical Law and Ethics* (Clarendon Press, 1992), p 395, emphasis supplied.

Four Articles of the ECHR and HRA 1998 might be relevant to Alyssa in a refusal of treatment situation; 3, 5, 8, and 14, but there is, as yet, no European Court of Human Rights jurisprudence on mature minors refusing treatment;⁸⁷ thus, reliance must be placed on decisions involving adults. Article 8 will be of primary importance for Alyssa and the European Court has recognised that this includes the right to autonomy,⁸⁸ and so could support her refusal of dialysis. However, Alyssa's rights can be interfered with, under Article 8(2), provided this interference is prescribed by law, necessary to protect health or morals, or the rights and freedoms of others, and is necessary and proportionate. It may thus be justifiable to breach Article 8(1) because refusing dialysis constitutes a serious threat to Alyssa's life, and the interference with her rights is necessary to protect her health, and is proportionate to the risks involved if she is not dialysed (i.e. death) and to the infringement of her autonomy.⁸⁹ Furthermore, if Alyssa's parents do not support her position, they could also engage Article 8 to argue that *their* right to private and family life should be respected by ensuring that Alyssa is treated even if this is against her wishes. The court will try to balance each family member's Article 8 rights in the light of the facts of the case.⁹⁰ Despite this and the reach of ECHR rights, in some areas 'children are still seen as little more than adjuncts of their parents'⁹¹ and health care is one of these, particularly when life-saving or prolonging treatments are at issue. It is likely then that a court will hold that Alyssa's parents' Article 8(1) rights will be breached if her refusal is respected, and that this breach cannot be justified under Article 8(2).⁹² As Sedly LJ has stated, the purpose of Article 8 is not to jeopardise welfare but to 'assure within proper limits the entitlements of individuals to the benefit of what is benign and positive in family life.'⁹³ Nevertheless, Hall has suggested that:

[p]arents' Art 8 rights are now readily overridden where the child's welfare amounts to a sufficient justification as to fall within Art 8(2) (eg, *Johnasen v. Norway ...; Hoppe v. Germany ...*) ... It has however been squarely stated in *Yousef v. The Netherlands ...* that in a dispute between the Art 8 rights of parents and children, those of the child will prevail.⁹⁴

Added to this, domestically in *Axon*, Silber J said that the 'autonomy of the young person must undermine any article 8 rights of a parent to family life,'⁹⁵ and the parental right to family life ceases when a child is *Gillick* competent.⁹⁶ Yet the autonomy rights of mature minors refusing medical treatment have not been, and are unlikely to be, privileged in this way because of their apparent conflict with the minor's other Convention rights.

⁸⁷ Although it is clear that minors are entitled to the protection offered by the Convention: *Re Roddy (A Child) (Identification: Restriction on Publication)* [2003] EWHC 2927 (Fam); [2004] 2 FLR 949, para 37.

⁸⁸ *Pretty v. United Kingdom* (2002) 35 EHHR 1, ECHR.

⁸⁹ Similarly with regards to an incompetent adult see *Herczegfalvy v. Austria* (1992) 15 EHHR 437, ECHR.

⁹⁰ For an argument that the balancing act under Article 8 is not dissimilar to that conducted under s 1(3) CA 1989 see Fenwick, above, n 20. Also *Re B (A Child) (Adoption By One Natural Parent)* [2001] UKHL 70; [2002] WLR 258, para 31 *per* Lord Nicholls.

⁹¹ J. Fortin, 'Children's Rights: Are the Courts Now Taking Them More Seriously?' (2004) 15 *King's College Law Journal* 254.

⁹² Fortin has critically argued that where there is a conflict between adults and children's rights, the Court routinely only analyses those of the former: Fortin, above, n 9, pp 302-303.

⁹³ *Re F (Adult: Court's Jurisdiction)* [2001] Fam 38, 58, CA.

⁹⁴ A. Hall, 'Children's Rights, Parents' Wishes and the State: The Medical Treatment of Children' [2006] *Family Law* 317, 320-321.

⁹⁵ *R (On the Application of Axon) v. Secretary of State for Health (Family Planning Association intervening)* [2006] EWHC 37 (Admin); [2006] 2 WLR 1130, para 130.

⁹⁶ *Ibid*, para 131.

With regards to Article 3, Alyssa could argue that forcing her to undergo dialysis against her wishes constitutes inhuman or degrading treatment. However, this may be easily dealt with by following the reasoning in *Herczegfalvy v. Austria* that forcing an adult without capacity to undergo treatment does not breach Article 3 if that treatment is standard and health professionals deem it medically necessary (clinical judgement again).⁹⁷ What then of Article 5, as Alyssa will need to be restrained in order to be dialysed and so her liberty will necessarily be restricted, and on a regular basis? Alyssa may find more merit with this as the European Court has held that restraint or detention even for short periods may breach Article 5, and whether it is a breach will depend, *inter alia*, on the type, duration, effects and how it is performed.⁹⁸ There is a defence if Alyssa is of ‘unsound mind’,⁹⁹ but if she is competent this cannot apply. Furthermore, ‘courts are traditionally most reluctant to allow children to martyr themselves. Consequently, any court confronted with such a situation might surely conclude that it has a duty to protect the teenager’s right to life under Article 2, on his behalf, even at the cost of his rights to liberty under Article 5 and to physical integrity under Article 8.’¹⁰⁰ Although Fortin was writing about mature minors with religious objections to proposed treatment, a court may adopt this stance with Alyssa, particularly given the strength of medical need and sanctity of life arguments combining in the all-powerful best interests argument. Finally, without a breach of a substantive right under any other Articles, Alyssa’s claim under Article 14 will necessarily fail since this Article only has effect in relation to other Convention rights.

A court may, however, ‘hesitate before asserting its own duty to preserve the life of a resisting patient if it considers that the patient is legally capable of making up his or her own mind over that matter’,¹⁰¹ but this has yet to occur. Indeed, ‘a court might maintain that it cannot ignore its duty to save the life of a desperately ill adolescent, despite his or her own strong opposition to treatment.’¹⁰² This is, of course, the status quo and is supported by the right to life set out in Article 2 and the positive obligation on the state to take appropriate steps to safeguard life.¹⁰³ Thus, it is not inevitable that a mature minor’s refusal of treatment will now be successfully protected under the Convention, particularly given the margin of appreciation and the doctrine of proportionality which can be seen as ‘requiring a balance of community and individual interests.’¹⁰⁴ Mason and Laurie thus argue that ‘[t]he English courts have made a concerted effort to demonstrate their desire to find a balance in [mature minor] cases and there is little in the jurisprudence of the European Court of Human Rights that would lead them to upset that delicate equilibrium.’¹⁰⁵ In contrast, Garwood-Gowers doubts whether denying competent minors autonomy would meet the requirement of proportionality. He suggests that as it is not legal to force treatment on competent adults, it amounts to age discrimination to do so to competent minors, thus breaching Article 14.¹⁰⁶ However, although children’s rights have gained increasing recognition in European and

⁹⁷ n 89 above.

⁹⁸ *X and Y v. Sweden Application No 7376/76* (1977-78) 7 DR 123, ECHR; *X v. Austria Application No 8278/78* (1979) 18 DR 154, ECHR; *Guzzardi v. Italy* (1980) 3 EHHR 333, ECHR.

⁹⁹ Article 5 ECHR and HRA 1998.

¹⁰⁰ Fortin, above, n 91, p 261, references removed.

¹⁰¹ Fortin, above, n 2, p 152.

¹⁰² Fortin, above, n 2, p 162.

¹⁰³ See, for example, *X v. Germany Application No 10565/83* (1984) 7 EHHR 152, ECHR.

¹⁰⁴ Mason and Laurie, above, n 61, para 4.28.

¹⁰⁵ *Ibid.*

¹⁰⁶ A. Garwood-Gowers, ‘Time for Competent Minors to Have the Same Right of Self-Determination as Competent Adults with Respect to Medical Intervention?’ in A. Garwood-Gowers, J. Tingle, T. Lewis (eds.), *Healthcare Law: The Impact of the Human Rights Act 1998* (Cavendish, 2001), pp. 225-242, p. 231 and p. 239.

domestic jurisprudence,¹⁰⁷ and ‘views about the decision-making abilities of adolescents have changed considerably since the late 1980s’,¹⁰⁸ the rights which are protected in the HRA 1998 (and apply regardless of age) do not automatically translate into Alyssa’s autonomy being protected under the Act.

Thus, applying the best interests test as espoused in both statute and the common law is likely to enable Alyssa’s refusal of treatment to be overridden by either the court, under its inherent jurisdiction, or her parents exercising their parental responsibility. Similarly, her autonomy rights under the HRA 1998 can be infringed to save and protect her life. For mature minors then, it does not matter which theoretical approach is employed; courts in England and Wales are unlikely to support their refusal of life-saving treatment.¹⁰⁹ Is this also true for our second scenario?

Scenario two: creating self-generated pornography

Alyssa has a boyfriend Ronan (17). They have been in a relationship for six months. They see each other regularly and often stay the night with each other at their parents’ houses. They have an active, expressive sexual relationship. Alyssa wants to take a photograph of Ronan engaging in sexual behaviour (to which he freely consents) purely for their own private sexual purposes.

Protectionism and utility

As minors who have reached the age of sexual consent, Alyssa and Ronan do not commit any offence by engaging in sexual activity. However, if Alyssa goes ahead and takes the photograph of Ronan she will commit a criminal offence because under the Protection of Children Act (PCA) 1978, it is an offence to take, make or permit to be taken an indecent photograph of a child.¹¹⁰ A photograph of a child is ‘indecent’ if ordinary people would view it as such, by applying recognised standards of propriety.¹¹¹ For the purpose of the laws regarding indecent photographs of children, a child used to be defined as an individual under the age of 16; however, and significantly, the Sexual Offences Act 2003 (SOA) redefined a child as those under 18.¹¹² This change brought English law into line with the definition of a child in the UNCRC and the European Council Framework Decision on Combating the Sexual Exploitation of Children and Child Pornography.¹¹³ A defence exists if the child in the photograph is over 16 and married to, in a civil partnership with, or living together as partners with the defendant in an ‘enduring family relationship’.¹¹⁴ Sufficient evidence must be adduced that the child consented to the taking of the photograph, or that the defendant

¹⁰⁷ For example, *Yousef v. The Netherlands* (2003) 36 EHHR 345, ECHR; *Hoppe v. Germany* [2004] 38 EHRR 15, ECHR; *Johansen v. Norway* (1997) 23 EHHR 33, ECHR; *Axon*, above, n 90; *Re Roddy*, above, n 87.

¹⁰⁸ J. Fortin, ‘The HRA’s Impact on Litigation Involving Children and Their Families’ (1999) 11 *Child and Family Law Quarterly* 237.

¹⁰⁹ Note that under the Age of Legal Capacity (Scotland) Act 1991 competent over 16s can consent to *and* refuse treatment (s 1(1)), and under 16s can consent to treatment (s 2(4)). Given this statutory recognition of a right to refuse, it remains to be seen how Scottish courts will deal with a human rights challenge brought by a mature minor refusing *life sustaining treatment*.

¹¹⁰ s 1(1)(a).

¹¹¹ *R v. Graham-Kerr* [1988] 1 WLR 1098. For a detailed consideration of the laws surrounding child pornography see Ost, above, n 14.

¹¹² s 7(6) Protection of Children Act (PCA) 1978 as amended by s 45 Sexual Offences Act (SOA) 2003. See further Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* (HMSO, 2000), para. 7.6.2.

¹¹³ Article 1 UNCRC; Council Framework Decision 2004/68/JHA, above, n 10.

¹¹⁴ s 1A PCA 1978. The exception does not apply when an individual in the photograph is someone other than the child or the individual who takes the photograph: s 1A(3) PCA 1978.

‘reasonably believed that the child so consented.’¹¹⁵ This defence thus only offers protection to a mature minor’s expression of her sexual liberty in a very specific context¹¹⁶ and, on our facts, does not apply to Alyssa. Moreover, Ronan appears to have committed an offence if he *permits* her to take the photograph.¹¹⁷ Although it might be assumed that the offence was targeted at an adult permitting another to take an indecent image of the child, this is not made clear in the legislation.

The criminalisation of Alyssa’s intended behaviour sits uncomfortably with the law surrounding the age of sexual consent; it is illogical and inconsistent that Alyssa and Ronan’s sexual acts are lawful but their recording of these acts is not.¹¹⁸ The Government emphasised that the SOA’s expansion of the criminal law to 16 and 17 year olds would be accompanied by prosecutorial discretion,¹¹⁹ but the existence of such discretion does not change the fact that what Alyssa proposes to do is deemed to be *criminal* behaviour.¹²⁰ The expansion of offences regarding indecent photographs of children to 16 and 17 year olds’ creation of self-generated pornography evidences a protectionist discourse surrounding children within the criminal law, in which their personal autonomy rights are ignored when adults perceive their decisions to be harmful to their well-being. Criminalising this behaviour is considered to serve society’s goal of protecting children from the dangers of sexual exploitation and harm and thus reflects a utilitarian legal approach¹²¹ in the same way as the application of best interests does in our first scenario. Yet, at the same time, since the age of consent is set at 16, Alyssa and Ronan can give valid consent to any number of acts of unprotected sex that potentially could be very harmful and might result in a possible unwanted pregnancy.¹²² While the recognition of mature minors’ sexual liberty rights may have resulted in a reduction in the age of consent, Parliament chose to apply an ‘adults know best’, protectionist approach to re-shape the definition of a child under the law in this area. This may have been because continuing with the lower age definition of a child would have risked our criminal law facing the criticism that it was not tackling the sexual exploitation of 16 and 17 year olds through the production of images of child sexual abuse. Indeed, our society is anxious to cover *all* children with the same shield against potential and perceived harm.¹²³ In this regard, protectionism takes the form of a version of paternalism and outweighs mature minors’ autonomy rights concerns in this context. The limited defence available does little to offset this discounting of children’s autonomy rights, especially since it ‘shows no recognition for the realities of teenage sexuality.’¹²⁴ In addition, the defence effectively

¹¹⁵ s 1A(4) PCA 1978.

¹¹⁶ Also A.A. Gillespie, ‘The Sexual Offences Act 2003 (3) Tinkering With ‘Child Pornography’ [2004] *Criminal Law Review* 361, 364.

¹¹⁷ s 1(1)(a) PCA 1978.

¹¹⁸ Gillespie, above, n 116, p 364. The criminalisation of consenting children brought about by the SOA more generally has been critiqued see, for example, M. Waites, *The Age of Consent: Young People, Sexuality and Citizenship* (Palgrave Macmillan, 2005).

¹¹⁹ Home Office, above, n 112; Home Office, *Protecting the Public*. Cm 5668 (HMSO, 2002). During the House of Lords reading of the Sexual Offences Bill, Lord Falconer commented (in respect of the offences generally) that ‘[w]e are keen to ensure that proper protection be given ... to children ... That will mean, as it does now in relation to current offences, that one must criminalise certain activities that, on the facts of a particular case, would never merit a prosecution because it would not be in the public interest for there to be one. Hansard, HL Deb, 13 February 2003: columns 875-876.

¹²⁰ See, generally, Waites, above, n 118, pp. 199, 202. On prosecutorial discretion, see A.A. Gillespie, *Child Pornography: Law and Policy* (Routledge, 2012), p. 225.

¹²¹ Parker, above, n 15.

¹²² Gillespie, above, n 120, p 18.

¹²³ Home Office, above, n 112, para 7.6.3.

¹²⁴ Gillespie, above, n 120, p 228.

‘say[s] that it is acceptable for some [mature minors to take photographs of each other] but dangerous for others.’¹²⁵ But it cannot be right that simply being in one of the categories of relationship stated within the defence legitimates or makes safe behaviour that is considered potentially harmful enough to criminalise where such a relationship does not exist.

So what are the (possible) harms that could occur as a consequence of mature minors taking sexually explicit photographs of each other that might justify the protectionist stance taken by the criminal law? The first matter to note is a crucial difference between health care law and criminal law: unlike the former, the latter cannot be decided on a case-by-case basis, although prosecutorial discretion involves some degree of individualised decision-making.¹²⁶ In the particular case before the civil court, the issue of best interests is considered solely in respect of the mature minor who is refusing treatment, even though regard will be had to previous decisions. But sexually explicit photographs of children are more than just an individual matter and so whereas the best interests approach as applied in scenario one focuses on harm to Alyssa, the protectionist discourse to be found in the criminal law surrounding such photographs is focused on harm to the children in the images *and* to children as a group, broadly conceived. Bearing this in mind, we begin with the possible harms to Ronan. Imagine that Alyssa takes the photograph with her mobile phone and later sends it to her friend without Ronan’s consent, or that he and Alyssa split up acrimoniously and Alyssa posts the photograph on the web out of spite. Gillespie highlights the potential easy misuse of self-generated material once the photograph has been sent to another teenager by ‘sexting’ via mobile phones or by email.¹²⁷ The photograph can quickly be passed onto others and Alyssa’s control over who sees the image is rapidly lost. Research suggests that adolescents may not realise the potential risks that self-generated pornographic photographs pose; for instance, Ronan might be solicited if the image is traced back to him, he might suffer damage to his reputation and, in the future, suffer damage to his career if the photograph surfaces.¹²⁸ While it may be true that some 16 and 17 year olds do not consider these risks, this is also true for some adults. Take the recent well-publicised example of a camera-phone film of pop celebrity Tulisa Contostavlos engaged in consensual, sexually explicit behaviour. She has obtained an injunction banning publication and distribution of the film.¹²⁹ One journalist described the release of the film as ‘merciless, destructive bullying’, stating that the distributor acted ‘out of malice, and out of a wish to exploit Contostavlos’s embarrassment and hurt for money.’¹³⁰ Thus, the existence of a recording of someone engaged in sexually explicit acts which they have recorded themselves or allowed to be recorded, can put the individual at risk of exploitation and other negative consequences such as bullying and blackmail *regardless* of their age. Such risks thus do not *in themselves* justify criminalising Alyssa’s actions when such behaviour would not be criminalised if Ronan were 18. Moreover, any showing or dissemination of indecent photographs of children is prohibited under the PCA 1978,¹³¹ and so it is not the case that allowing mature minors to express their sexual liberty by creating pornographic photographs of themselves for their own use would

¹²⁵ Ibid.

¹²⁶ Consider, for example, the Director of Public Prosecution’s policy on assisted suicide: Crown Prosecution Service, *Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide* (Crown, 2010).

¹²⁷ Gillespie, above, n 120, pp 221 and 224.

¹²⁸ Ibid, pp 224-225. Also A.A. Gillespie, *Child Exploitation and Communication Technologies* (Russell House Publishing, 2008), p 96; *A.H. v. State of Florida* 949 So.2d 234 (District Court of Appeal of Florida 2007), 239.

¹²⁹ *Contostavlos v. Mendahun* [2012] EWHC 850 (QB).

¹³⁰ D. Orr, ‘Why look at Tulisa Contostavlos when she asks you not to?’, *The Guardian*, 31 March 2012.

¹³¹ s 1(1)(b). Note that the ‘marriage/civil partnership/living together in an enduring family relationship’ defence only applies to showing or distribution to the child in the photograph, s.1A(5) PCA.

mean that subsequent distribution and the potential associated harms are permitted by the criminal law.

However there is not just potential harm to Ronan; other teenagers and children might be harmed if the photograph is subsequently used for grooming.¹³² The photograph could end up in the hands of a groomer if, for example, Alyssa and Ronan split up and she posts it on the web. Indeed, the addition of this photograph on the web increases the amount of sexually explicit images of children available, and so Alyssa's actions could encourage the market in such material¹³³ and the perception that children can be used as sexual objects.¹³⁴ Or Alyssa and Ronan might decide to sell this and other photographs of each other that they subsequently take to make a profit by creating a website for interested paying parties.¹³⁵ But these are all *speculative* harms that are more remote to the initial consensual creation of the photograph for personal use by two mature minors above the age of consent.¹³⁶ The risk of these harms is more directly connected to the distribution of the photograph(s), which, as we have already noted, is prohibited.¹³⁷ However, a protectionist legal response of safeguarding mature minors against these potential harms is evidenced in an interesting American case that offers an example of adolescent self-produced pornography comparable to our scenario. This case is not of this jurisdiction and a similar case in England and Wales might be decided differently; however, we utilise it to demonstrate the assumptions underlying the criminalisation which has occurred both here and in the US. In *A.H. v. State of Florida*, a girlfriend (AH, aged 16) and boyfriend (J, aged 17) took photographs of themselves naked and engaged in sexual behaviour and then emailed the photographs to J's computer.¹³⁸ Their intention throughout was to keep the photographs for their own personal use. AH and J were both charged with offences relating to producing child pornography. AH was adjudicated delinquent¹³⁹ by the trial court and appealed this decision, arguing that her behaviour was protected because her privacy interests were implicated. The District Court of Appeal of Florida affirmed the trial court's decision, and Wolf J stated that the 'compelling state interest in protecting children from sexual exploitation... exists whether the person *sexually exploiting* the child is an adult or a minor...'. He went on to say that 'The State's purpose in [the relevant statute] is to protect minors from exploitation by anyone who *induces* them to appear in a sexual performance and shows that performance to other people.'¹⁴⁰

There are three questionable assumptions in this statement justifying the protectionist legal approach adopted. First, that AH sexually exploited J. None of the characteristics associated with exploitative behaviour are present since neither AH or J used each other wrongfully

¹³² The process which would-be child sex abusers may use to gradually make the child compliant and willing to engage in sexual behaviour with them. See further Ost, above, n 14, pp 32-39.

¹³³ Although there is no empirical evidence to support this: *ibid*, pp 113-118.

¹³⁴ S. Ost, 'Criminalising Fabricated Images of Child Pornography: A Matter of Harm or Morality?' (2010) 30 *Legal Studies* 230, 243-245.

¹³⁵ See, generally, M.G. Leary, 'Self-Produced Child Pornography: The Appropriate Societal Response to Juvenile Self-Sexual Exploitation' (2007) 15 *Virginia Journal of Social Policy and the Law* 1. Also Gillespie, above, n 120, pp 94-95.

¹³⁶ D. Baker, 'The Moral Limits of Criminalizing Remote Harms' (2007) 10 *New Criminal Law Review* 370-391.

¹³⁷ See the text accompanying n 131 above.

¹³⁸ *A.H. v. State of Florida*, above, n 128.

¹³⁹ Under the US juvenile justice system, rather than being found guilty, juveniles are 'adjudicated delinquent' in juvenile court.

¹⁴⁰ *A.H. v. State of Florida*, above, n 128, pp 236 and 238, emphasis supplied.

and/or solely as a means to an end.¹⁴¹ Not all would agree and Leary, for example, contends that ‘self-exploitation by minors... is the creation by a minor of visual depictions of that minor and/or other minors engaged in sexual explicit conduct.’¹⁴² Therefore, according to Leary’s position, the self-creation of such images in any situation constitutes (self) exploitation. However, absent some kind of wrongful misuse, the label of exploitation is not appropriately attached to AH’s behaviour.¹⁴³ Secondly, there is no evidence in the judgment to suggest that AH induced J to appear in the photographs and, finally, AH did not show the photographs to anyone else other than J. Nevertheless, in explicating the possible future harms to mature minors who self-produce pornography, Wolf J noted (without supporting evidence) the future risk of damage to their careers or personal lives and asserted that ‘[m]ere production of these... pictures may also result in psychological trauma to the teenagers involved.’¹⁴⁴ Paternalistic, almost condescending, attitudes towards teenage sexual relationships were evident elsewhere in the judgment. Thus, it is unsurprising that the majority held that the state had a compelling interest in preventing the production of the photographs despite AH and J’s intentions only to use them for private use, since it was reasonable to expect that, in the future, AH or J would share the photographs with others:

Minors who are involved in a sexual relationship unlike adults who may be involved in a mature committed relationship, have no reasonable expectation that their relationship will continue and that the photographs will not be shared with others intentionally or unintentionally... A reasonably prudent person would believe that if you put this type of material in a teenager’s hands that, at some point either for profit or bragging rights, the material will be disseminated.¹⁴⁵

Applying this broad-brush protectionist approach, the majority judgment contrasted teenage sexual relationships to mature, committed *adult* relationships and, significantly, failed to consider the possibility that some teenage relationships can be mature and committed, in the same way that some adult relationships can lack these characteristics. The majority judgment presented teenagers as being in need of protection from themselves, otherwise they will sexually exploit each other for profit or to enhance their sexual reputations. According to Padovano J, the dissenting judge, whether AH should have a reasonable expectation of privacy was being ‘measured by the collective wisdom of appellate judges who have no emotional connection to the event.’¹⁴⁶

There is a parallel here with the best interests approach taken in refusal of medical treatment cases in that, just as the durability of mature minors’ strongly held religious beliefs are routinely questioned,¹⁴⁷ so too is the longevity of their sexual relationships. Furthermore, the protectionist discourse evident in this area of law is even less supportive of mature minors’ autonomy than the utility approach centred on best interests under health law. This is

¹⁴¹ For a consideration of what constitutes exploitative behaviour, see Ost, above, n 14, ch 3; S. Ost, H Biggs, ‘‘Consensual’ Sexual Activity between Doctors and Patients: A Matter for the Criminal Law?’ in A. Alghrani, S. Ost, R. Bennett (eds.), *The Criminal Law and Bioethical Conflict: Walking the Tightrope?* (CUP, 2012), p 102. Also Gillespie, above, n 120, p 229, and the dissenting judge’s view in *A.H. v. State of Florida*, above, n 128, pp 240-241.

¹⁴² Leary, above, n 135, p 20.

¹⁴³ Also J. A. Humbach, ‘‘Sexting’ and the First Amendment’ (2010) 37 *Hastings Constitutional Law Quarterly* 433, 466 n 186.

¹⁴⁴ *A.H. v. State of Florida*, above, n 128, p 239.

¹⁴⁵ *Ibid*, p 237, *per* Wolf J.

¹⁴⁶ *Ibid*, p 241.

¹⁴⁷ See, for example, *Re E* [1993], n 42 above.

because the former encapsulates a broader idea of harm to other children beyond the mature minor and because, in the context of sexually explicit images of minors, even if such material is created consensually by minors themselves, a risk of future sexual exploitation suffices to restrict mature minors' rights. In the context of the existing defence, there is evidence of a moralistic discourse feeding into the law's protectionist stance because being married to or living with the individual who takes the mature minor's photograph cannot in itself ensure that the mature minor is not exploited. Thus, the criminal prohibition placed on Alyssa's behaviour, albeit accompanied by prosecutorial discretion, appears to be an example of the criminalisation of behaviour which adults consider to be wrong or inappropriate.¹⁴⁸ It is also important to bear in mind that following the increase in the age of a child for the purposes of the offences related to indecent photographs of children, the criminalisation of mature minors' behaviour in this context essentially punishes those whom the legislation was designed to protect.¹⁴⁹

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for young people grappling with issues of sexual identity and self-awareness, private expression of a sexual nature may be crucial to personal growth and sexual maturation.¹⁵⁰

The rights engaged here are those under Articles 8, 10 and 14 of the ECHR, the rights to privacy and personal autonomy, freedom of expression and, potentially, Alyssa's freedom from discrimination. Case law has demonstrated that (private) sexual behaviour is protected under Article 8.¹⁵¹ However, neither of these rights is absolute and we have already noted when infringement can be justified under Article 8(2).¹⁵² Indeed, to date, attempts to bring a human rights challenge to the offence of making an indecent photograph of a child under these Articles have failed. In *R v. Smethurst*, for instance, the objective of protecting children justified infringing the rights espoused in these Articles:

The exception in Article 10(2) covers this case. In our judgment, the requirement to protect children justifies the terms of the offence... It is there for the prevention of crime, for the protection of morals, and in particular for the protection of children from being exploited.¹⁵³

Therefore it is clear that in cases of child sexual abuse and exploitation through images of child sexual abuse, protectionist arguments outweigh any concerns that rights to privacy and freedom of expression are being violated. But the differences between sexual abuse and exploitation through such images and our case study of consenting mature minors exercising their sexual expression to create self-generated pornography are important. It is surely true that 'no viable comparison exists between adults who molest children and record their monstrous exploits and adolescents who memorialize their sexual experiences with each

¹⁴⁸ See also A. F. Kimpel, 'Using Laws Designed to Protect as a Weapon: Prosecuting Minors under Child Pornography Laws' (2010) 34 *New York University Review of Law & Social Change* 299, who notes 'the uneasy relationship adults have with children's sexuality', p 312.

¹⁴⁹ Ibid, p 315; R.H. Wood, 'The Failure of Sexting Criminalization: A Plea for the Exercise of Prosecutorial Restraint' (2009) 16 *Mich Telecomm Tech L Rev* 151, p 171.

¹⁵⁰ *R v. Sharpe* 2001 SCC 2, para 107 per McLachlin CJ.

¹⁵¹ See, for example, *Dudgeon v. UK* [1981] ECHR 5; *Biriuk v. Lithuania*, App. No. 23373/03, (ECHR, 25 Nov 2008).

¹⁵² See the text accompanying nn 89-94 above. The same reasons for legitimate violation exist under Articles 8(2) and 10(2), as do additional reasons that are irrelevant for our purposes.

¹⁵³ [2002] 1 Cr. App. R. 6, para. 24.

other.¹⁵⁴ In the former, the idea that privacy rights could trump the state's interest in criminalisation for the purposes of child protection is outrageous. However, in the latter, provided the self-produced photograph is used privately by the two minors only, there has been no exploitation or sexual abuse and thus privacy and freedom of expression based claims are more compelling.¹⁵⁵ The argument that Article 8 and Article 10 rights can be legitimately violated in order to protect children from harm is consequently weaker. Moreover, because those over 18 are permitted to create self-generated photographs, provided her rights under Article 8 or 10 are engaged,¹⁵⁶ Alyssa could have a claim under Article 14 that she is being discriminated against on the basis of age.¹⁵⁷

Interestingly, it was rights based concerns that led to the creation of the existing defence; however, the focus was on possible violations of the privacy of a marital or enduring relationship under Articles 8 and 12.¹⁵⁸ It thus seems that mature minors rights claims are most likely to be accepted if they are involved in a relationship sanctified by law.¹⁵⁹ So how likely is it that the courts would accept these claims beyond relationships deemed to warrant protection from an invasion of privacy? As Johnson has observed, '[c]hild pornography pushes the furthest boundaries of the principle of freedom of expression, as such content tends to fall outside almost any argument for the value of protecting what people wish to write, say or draw.'¹⁶⁰ Recognising the privacy and sexual expression rights of mature minors over the age of sexual consent to take pornographic photographs of themselves for their personal use, would go against the tide of the continual push towards increasing criminalisation of any material deemed to pose a (potential) threat to children.¹⁶¹ Moreover, in defence of continued criminalisation, it is impossible to eliminate the risk that the photograph Alyssa takes is seen by others; especially if it is stored on her mobile phone or computer.¹⁶² As such, her rights under Articles 8 and 10 could be justifiably violated in order to protect other children's rights to be free from the harms of sexual abuse and exploitation which could follow distribution of the image. And when it comes to protecting children from the harms of sexual exploitation, no risk, however small, is considered worth taking. This is what differentiates this scenario from other contexts where it has been suggested that mature minors' freedom of expression rights should outweigh more paternalistic welfare concerns.¹⁶³

Furthermore, despite the harms consequent on distribution being speculative, the fact that they are a possibility suggests that Alyssa is making an unwise decision; indicating an immaturity of mind. She thus may have a right to be protected from her own unwise decisions, in line with the interest theory of rights '... which affirms the part to be played by

¹⁵⁴ Wood, above, n 149, p 176.

¹⁵⁵ See Padovano J's dissenting judgment in *A.H. v. Florida*, above, n 128, pp 239-240.

¹⁵⁶ The right under Article 14 only has effect in relation to other convention rights.

¹⁵⁷ Ost has previously argued that the criminal law could take greater account of the rights of 16 and 17 year olds in this context by altering the existing defence so that provided the minor consents to the photograph being taken and it is used only by her and the other minor and shown to no one else, no offence is committed. There would thus be no need to establish one of the required relationships with Ronan under the current defence: Ost, above, n 14, pp 63-66. Similarly, Gillespie, above, n 120, p 234.

¹⁵⁸ Gillespie discusses the explanation provided by the then Parliamentary Under-Secretary of State: above, n 120, p 227.

¹⁵⁹ See *A.H. v State of Florida*, above, n 128, p 237.

¹⁶⁰ T. Johnson, 'Child Pornography in Canada and the United States: The Myth of Right Answers' (2006) 29 *Dalhousie Law Journal* 375, 377.

¹⁶¹ See Ost, above, n 14, ch 2.; Ost, above, n 134.

¹⁶² See *A.H. v. State of Florida*, above, n 128, p 239.

¹⁶³ *Mabon v. Mabon*, above, n 11.

paternalism to protect future choice...'.¹⁶⁴ In accordance with this theory it is, therefore, the state's duty to protect her significant interest in being safe from harm¹⁶⁵ and this is achieved by preventing her from creating self-generated pornography. However, the decision to create self-produced pornography despite the potential risk of future harm can also be made by adults. Since this suggests that mature minds can make irresponsible decisions, should adults also not have a right to have their important interest in safety from harm protected and thus be safeguarded from their unwise decisions by the state? Moreover, the reality of the situation when mature minors' rights are infringed on the basis of ifs, possibilities and speculative harms must be recognised. In the words of the dissenting judge in *A.H. v. State of Florida*, 'there is always a possibility that something a person intends to keep private will eventually be disclosed to others. But we cannot gauge the reasonableness of a person's expectation of privacy merely by speculating about the many ways in which it might be violated.'¹⁶⁶ In short, as things stand, the state's infringement of mature minors' rights is justified because there is a *possible* risk that their rights might be violated in the future. A parallel with refusal of treatment is thus evident, with protectionism in that context being viewed through the lens of best interests, especially protecting the sanctity of life and respecting clinical judgement.

Conclusion

Bainham has asked whether, in terms of the legal resolution of cases, there is any difference between protecting children's welfare/acting in their best interests and taking account of their rights.¹⁶⁷ In our scenarios there is not. Whichever approach is adopted, the result is likely to be the same; the overriding of adolescent autonomy because receiving treatment is deemed to be in her best interests or because it is considered that she needs to be protected against her own unwise decision and/or this decision would put other children at risk. It seems that whether utility or a human rights approach is adopted, value judgments are at the centre of judicial reasoning when important values clash¹⁶⁸ (privacy, autonomy and freedom of expression versus providing treatment that will save a child's life or criminalising behaviour to protect children). This provides an explanation for the fact that it is easier to find support for children's rights in the context of cases relating to their protection.¹⁶⁹ Indeed, Fortin has argued that 'the claim that a rights-based approach must necessarily be devoid of any element of any paternalism or 'welfare' misconstrues the concept of rights.'¹⁷⁰ Thus, whilst these approaches differ in the focus of who makes the decisions (in the case of rights, the competent child, and in the case of welfare, adults), beyond that there are more similarities than differences. In fact, there is often an element of best interests (welfare/paternalism) in the arguments of many proponents of children's rights;¹⁷¹ but one notable difference is that whereas the best interests of the child *must* be paramount under the CA 1989, best interests may, if relevant, form part of a consideration under an Article of the HRA but the Act does not require it to take precedence. Thus, under the Act 'no one rule (that of the best interests of the child) prevails automatically and ... if the best interests of the child *do* prevail it is only

¹⁶⁴ Fortin, above, n 2, p 155, references removed.

¹⁶⁵ As opposed to her interest in not being criminalised, see D. Baker, *The Right Not to be Criminalized: Demarcating Criminal Law's Authority* (Ashgate 2011).

¹⁶⁶ *A.H. v. State of Florida*, above, n 128, p 240, *per* Padovano J.

¹⁶⁷ Bainham, above, n 9, pp 279-80.

¹⁶⁸ *Ibid*, p 280.

¹⁶⁹ Fortin, above, n 9, p 304.

¹⁷⁰ Fortin, above, n 91, p 259.

¹⁷¹ For example, *ibid*; Fortin, above, n 2; Eekelaar, above, n 78.

after a detailed consideration of all the parties' rights and interests *on an equal footing* has taken place.¹⁷²

At the heart of law and society's response to mature minors' decision-making and behaviour in the contexts we have explored is a paternalistic attitude reflected in the GMC's statement that:

[c]hildren and young people may be particularly vulnerable and need to be protected from harm; they can often find it difficult... defending their rights; and they often rely on others for their well-being. They... may need help to make decisions.¹⁷³

Children can be a vulnerable group in society, but why should this lead to the assumption that mature minors are not capable of making autonomous decisions that could impact adversely on them? The current legal approach ensures that adults' value judgments take precedence, with the consequence that 16 and 17 year olds are prevented from 'lead[ing their] lives in accordance with the values that are theirs'¹⁷⁴ because adults disagree with the decisions that they make.

It is more understandable that a broad brush approach towards protecting children from harm is taken in criminal law because this law is aimed at protecting children as a group and carries with it an imperative of certainty.¹⁷⁵ Yet in health care law when the court is making a decision that is focused on the particular child before the court, this broad brush, status approach is still being adopted where a child's life is at risk because of her refusal of treatment, *regardless* of the child's level of maturity and autonomy. As Elliston has noted, '[t]he present approach of the English courts diverts attention away from the individual and towards the membership of the class of children'.¹⁷⁶ This reinforces assumptions of a generic vulnerability that equates with a (perceived) lack of capacity for all those under 18. For what purpose is this legal approach taken? What and whose interests are being served by saving a mature minor's life at the cost of respecting their autonomy when on their 18th birthday they can make the same decision they have been seeking to make from the day of their 16th birthday; to refuse treatment and take the consequences?¹⁷⁷ And, in the context of self-generated pornography, are we really protecting mature minors from harm when as soon as they reach their 18th birthday they can lawfully create material that they were prohibited from creating the day before? Have the possible negative consequences magically vanished? We suggest that something more is going on here than saving lives and protecting children from harm. As a society we seem to struggle to come to terms with the fact that 16 and 17 year olds are soon going to be independent decision-makers, free from the confining rules set by their parents. More specifically, some parents are afraid of releasing their power over their

¹⁷² S. Choudhry, 'The Adoption and Children Act 2002, the Welfare Principle and the Human Rights Act 1998 – A Missed Opportunity?' (2003) 15 *Child and Family Law Quarterly* 119, 128, emphasis in original. In subsequent publications this has been amended to 'on a *presumptively equal footing*': S. Choudhry, H. Fenwick, 'Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act' (2005) 25 *Oxford Journal of Legal Studies* 453, 479, emphasis in original.

¹⁷³ GMC, *0-18 years*, above, n 31, para. 6.

¹⁷⁴ J. Coggon, 'Best Interests, Public Interest, and the Power of the Medical Profession' (2008) 16 *Health Care Analysis* 219, 223.

¹⁷⁵ See M. Brazier, S. Ost, *Medicine and Bioethics in the Theatre of the Criminal Process* (Cambridge University Press, forthcoming 2013), Ch. 8.

¹⁷⁶ Elliston, above, n 45, p 52.

¹⁷⁷ Note the decision in *Re E*, above, n 42 above, where Ward J authorised the treatment of 16 year old Jehovah's Witness with blood products, treatment which E subsequently refused when he turned 18 and died.

adolescent offspring *because* they are ‘their babies’. They want to continue looking after them, doing things for them; ‘protecting them’. At the same time, the state seems unwilling to surrender its own control over some minors in some contexts, while in others responsibility is ascribed at a much earlier stage.¹⁷⁸ As McK. Norrie cogently argues:

we have to be very clear *why* the law grants its protection ... a residual feeling exists in England that parents can control their children: it is ... a power game in which the balance of power rests with parents. This has little to do with protection of the young person, and more to do with control ... Any explanation is lacking if it does not explain why there is a difference between the mentally mature 17 year old and the 18 year old. A presumption in favour of life may for example explain the legal position, but autonomy is held to override that with the 18 year old and we must discover why autonomy does not override that presumption for the 17 year old ... autonomy is seen by the English courts as a concession by the state, and the state thinks it has an interest to limit those to whom it grants autonomy. The state by definition likes to control people, and though it cannot control adults fully, it retains its control of minors. The consequence of this is that children and young persons in England and Wales live within a totalitarian regime which we as adults would find intolerable.¹⁷⁹

So what is the way forward? If society cannot accept the possible risk of negative consequences that comes with freeing mature minors from the control of adults and the state, then the least it can do is be more honest with those minors about what they are permitted to do in the context of our scenarios.¹⁸⁰ An honest explanation of the legal position would then be as follows:

At 16 or 17 you will be prevented from making a decision or behaving in a way that poses a risk of harm to you or other adolescents and children through an application of a best interests or rights based approach. You are entitled to respect for your rights provided that what you intend to do through your exercise of these rights is judged by adults to be appropriate to your welfare and in your best interests, since this evidences the maturity required to make an autonomous decision. This approach is justified because, until you reach the age of majority (18), adults know what is best for you.

If this is what society wants, then it should be clear about it.

¹⁷⁸ For example, criminal responsibility is currently set at 10 years old in England and Wales: Crime and Disorder Act 1998, s 34.

¹⁷⁹ K. McK. Norrie, ‘Medical Treatment of Children and Young Persons’ in D. Morgan, G. Douglas (eds.), *Constituting Families: A Study in Governance* (Franz Steiner Verlag, 1994), pp 116-117, emphasis supplied.

¹⁸⁰ For a similar call in the health care context see A. Grubb, ‘Refusal of Treatment (Child): Competence – *Re L (Medical Treatment: Gillick Competency)*’ (199) 7 *Medical Law Review* 58, 61; C. Bridge, ‘Religious Beliefs and Teenage Refusal of Medical Treatment’ (1999) 62 *Modern Law Review* 585, 594.