

Enfranchising Minors and the Mentally Impaired

1. Introduction

The disenfranchisement of children and mentally impaired persons continues to be a matter of controversy in many countries around the world. Yet this is often thought to be a narrow policy issue of little interest for political philosophy. The exclusion of these classes of persons from the electorate strikes many as being philosophically settled at the core, though politically open at the margins. The growing literature on this subject, however, suggests that this conventional picture is controversial. Martha Nussbaum's recent call for a serious debate on the matter was long due, particularly given the standing of the franchise as the most emblematic of all political rights in a representative democracy.¹

Political philosophers have typically bypassed the critical issues when defending the disenfranchisement of minors and the mentally impaired. Robert Dahl, for instance, argued that they are denied the right to vote for an obvious reason: "they are not yet fully qualified."² Yet Dahl failed

¹See Martha Nussbaum, "The Capabilities of People with Cognitive Disabilities," *Metaphilosophy* 40 (2009): 331-51. Also on this subject, see Ludvig Beckman, "Political Equality and the Disenfranchisement of People with Intellectual Impairments," *Social Policy and Society* 6 (2007): 13-23; and Barbara B. Green and Nancy K. Klein, "The Mentally Retarded and the Right to Vote," *Polity* 13 (1980): 184-206. On the enfranchisement of children, see David Archard, *Children: Rights and Childhood* (New York: Routledge, 2004); Ludvig Beckman, *The Frontiers of Democracy* (New York: Palgrave, 2009); Carl Cohen, "On the Child's Status in the Democratic State," *Political Theory* 3 (1975): 458-63; Michael S. Cummings, "Children's Right to Vote," in Kenneth M. Dolbeare and Michael S. Cummings (eds.), *American Political Thought*, 5th ed. (Washington, D.C.: CQ Press, 2004), chap. 58; John Harris, "The Political Status of Children," in Keith Graham (ed.), *Contemporary Political Philosophy: Radical Studies* (Cambridge: Cambridge University Press, 1982), chap. 2; Stefan Olsson, "Children's Suffrage," *The International Journal of Children's Rights* 16 (2008): 55-76; Andrew Rehfeld, "The Child as Democratic Citizen," *The Annals of the American Academy of Political and Social Science* 633 (2011): 141-66; Francis Schrag, "The Child's Status in the Democratic State," *Political Theory* 3 (1975): 441-57, and "Children and Democracy: Theory and Policy," *Politics, Philosophy & Economics* 3 (2004): 365-79.

²Robert A. Dahl, *Democracy and Its Critics* (New Haven: Yale University Press, 1991), p. 127.

to answer these questions: Is it necessary that *all* voters be qualified? Is it necessary that they be *fully* qualified? What idea of competency should inform our judgment? Why exactly should the alleged unqualified be excluded? To protect the quality of electoral outcomes? To guarantee a fair electoral process? Do current age and sanity requirements for voting actually serve well any of these goals?

I shall advance three central claims regarding these matters.³ First, I shall argue (section 2) that we lack good reasons to accept the idea that the quality of electoral results would suffer in the long run if current age and sanity requirements for voting were relaxed or even abolished altogether. In other words, the mainstream epistemic-instrumentalist case for these prerequisites is weak and inconclusive. My argument, however, also rules out the opposite instrumentalist case, namely, that minors and the mentally impaired should be given the vote because politicians would then take their interests more seriously and outcomes would improve.⁴ If my claims are correct, it follows that the evaluation of current age and sanity requirements for voting should be made (at present) exclusively on the basis of noninstrumental or fairness considerations.

Second, I shall argue (section 3) that fairness requires the inclusion of all and only those members of the polity who have what I call the *franchise capacity*: the minimum necessary cognitive and moral powers to experience the benefits of having the franchise or the harms of disenfranchisement. For the purposes of this article, I shall take the boundaries of the polity for granted, that is, I shall bracket the question of who should be a “member of the polity” in the first place. The requirement to enfranchise all and only those with this capacity follows from two different considerations: fairness in the allocation of the franchise and fairness in the operation of the electoral process.

My third central claim (section 4) is that current age and sanity prerequisites for voting in most places fail to meet the demands of fairness and ought to be revised. Developmental studies suggest that persons acquire the franchise capacity much earlier than current age prerequisites suppose, and the blanket exclusion of all persons with a mental condition—the most common practice—is unacceptably overexclusive. This is not to say that there is a uniquely fair policy for all countries, since the threat to the fair operation of the process stemming from overinclusive measures is not uniform. But there are limits on what polities can legitimately establish, and current requirements for voting seem to violate those limits.

³I shall focus exclusively on the right to vote for representatives, not for initiatives in referenda or other instances of direct democracy.

⁴See, for instance, Philippe Van Parijs, “The Disfranchisement of the Elderly and Other Attempts to Secure Intergenerational Justice,” *Philosophy & Public Affairs* 27 (1998): 292-333.

2. Instrumental Considerations: The Case Against Input Minimalism

The standard argument for disenfranchising those who are not considered minimally fit for political decision-making is instrumental in the epistemic sense: the goal is to protect the quality of electoral outcomes. I shall focus on this consequentialist consideration.⁵ According to Jeremy Waldron, for instance, the disenfranchisement of children shows that democrats do recognize “the importance of securing appropriate outcomes.”⁶ What distinguishes democratic exclusions is the undemanding character of the conditions for enfranchisement. Their point is merely to ensure “a *modicum* of mature judgment at the polls.”⁷

Advocates of input minimalism, as I call the previous view, face a fundamental difficulty: namely, proving the stability of their position. This is a twofold task. At one end, they have to show that the case for more-than-minimal electoral qualifications can be defeated. Indeed, the reasons for establishing *some* requirements might suggest that we should not stop short of maximizing the quality of input at the polls.⁸ At the other end, assuming that we should indeed resist the maximizing logic, the supporter of input minimalism has to show that minimum requirements make a difference, namely, that they are better than unconditional, truly universal enfranchisement.⁹

The first part of the stability problem has preoccupied democratic theorists for a long time. Indeed, it relates to the classical aristocratic idea that only “the best” should rule. For my purposes, I shall assume that democrats have dealt with this part of the problem successfully. I shall take for granted that universal sane adult suffrage has been properly justified relative to less inclusive, aristocratic alternatives. My claim here is that input minimalism succumbs to the second part of the difficulty. The available theoretical and empirical evidence is insufficient to establish (even presumptively) that relaxing or abolishing current minimal age and

⁵I shall not address other consequentialist factors. Another potentially important consideration, for instance, is the (sociological) legitimacy of a political arrangement, which some have argued would suffer if age and sanity requirements for voting were relaxed. However, as Francis Schrag observes, “the legitimacy argument cuts both ways: why should adolescents accept laws that profoundly restrict their freedom if they were not party to the process?” (“Children and Democracy,” p. 369). For reasons of space, and because even more imponderables are at stake, I leave aside alternative consequentialist factors such as this.

⁶Jeremy Waldron, “The Core of the Case Against Judicial Review,” *The Yale Law Journal* 115 (2006): 1346-406, p. 1378.

⁷*Ibid.*

⁸See Richard Arneson, “Democracy is Not Intrinsically Just,” in Keith Dowding, Robert E. Goodin, and Carole Pateman (eds.), *Justice and Democracy: Essays for Brian Barry* (Cambridge: Cambridge University Press, 2004), pp. 40-58.

⁹I mean “unconditional” exclusively in terms of decision-making ability.

sanity requirements for voting in most polities would hurt the quality of outcomes. Notice exactly what defenders of input minimalism have to show: that the case against more inclusive measures is so decisive that it would be wrong to give them a try. The enfranchisement of minors and the mentally impaired can certainly be undone if the results prove to be undesirable. My claim is that the results cannot be successfully shown to be undesirable *ex ante*.

Now, to turn to the argument, it is important to point out first that advocates of input minimalism cannot succeed by simply showing that the reasons for rejecting an exclusive, aristocratic franchise do not go far enough to justify an absolute, unconditional franchise. For instance, it does not suffice to show that the methods for identifying the alleged most competent (e.g., competency tests, educational standards, and so on) are fatally defective in ways that age and sanity considerations are not.¹⁰ Supporters of input minimalism have to show further that the exclusion of minors and the mentally impaired actually benefits the outcomes. And the mere fact (let us assume it is one) that these individuals have inferior capacities compared to sane adults is insufficient to conclude that their inclusion would hurt the results. We need to know more, as James Mill pointed out in his critique of a *minimal* property requirement for voting:

If the whole mass of the people who have some property would make a good choice, it will hardly be pretended that, added to them, the comparatively small number of those who have none, and whose minds are naturally and almost necessarily governed by the minds of those who have, would be able to make the choice a bad one.¹¹

Children and the mentally impaired, though they are a minority in most places, certainly have the numerical capacity to affect outcomes, especially when elections are close or where the electoral system is proportional rather than majoritarian. But are these groups likely to affect results in a negative way over time? To determine this, as Mill's analysis suggests, we need to ponder how they would vote and the status of results under the alternative system we are considering—universal sane adult suffrage.

The case for input minimalism would be strongest if it were true both (a) that children and the mentally impaired would regularly make bad choices, and (b) that universal sane adult suffrage is a procedure that almost always selects the best option on the ballot. In fact, either of these

¹⁰As Rehfeld points out, "a general age requirement corresponds reasonably well to the fact that the cognitive and moral prerequisites to democratic citizenship closely correspond to age; moreover, it is hard to manipulate, and it applies to all." See Rehfeld, "The Child as Democratic Citizen," p. 149.

¹¹James Mill, "Government," *Supplement to the Encyclopedia Britannica* (London, J. Innes, 1825), p. 22.

would suffice for a decent case. Suppose that the current system rarely failed to select the best option on the ballot. Then, even if children and the mentally impaired were not prone to make bad choices (but merely suboptimal ones, say), we would have reason not to enfranchise them, since they would occasionally affect the outcome in a negative way (under the given premises). Now suppose to the contrary, as some democratic theorists have suggested, that sane adult suffrage is barely better (if at all) than a random procedure. If children and the mentally impaired nevertheless tended to vote for dreadful options, they would only swing good outcomes, and this would count against their enfranchisement.

My claim is that neither (a) nor (b) can be successfully established given the current state of our knowledge. Let me begin with (a). Among the points made by advocates of lowering the voting age is that “there are no wrong votes.”¹² Of course, this is false in the sense that the options on any given ballot hardly ever are morally identical. But the slogan has a plausible reading. If a party is considered to be reasonable enough to be allowed to compete, its supporters ought to be considered reasonable enough to be allowed to vote for it. Indeed, if we had reason to disenfranchise a class of individuals because they would tend to vote for a certain party, we would have reason to ban the party in the first place. And the latter would be the more natural policy, as it achieves the same goal in a more direct, costfree way. After this is done, however, there is no longer a reason to exclude any voters on account of their partisan preferences.

It would be more plausible to argue that children and the mentally impaired would tend to vote for options that, while not dismissible *ex ante* as clearly unacceptable, often turn out to be inappropriate from the perspective of an uncontroversial normative standard. For instance, suppose the idea were that they would vote for persons who are likely to abuse their power for personal gain, regardless of partisan or ideological affiliation. Yet the problem here is that we simply have no reason to believe that children and the mentally impaired would tend to behave in such a way. There is no empirical evidence to that effect, and the most common conjectures about the behavior of these groups do not support the claim: for example, that they would not vote; that they would cast random votes; that they would be influenced by their primary caregiver; or that they would vote their myopic self-interest.

Alternatively, it could be suggested that members of these groups would systematically react to extraneous or dangerous electoral offers, such as candy subsidies or less school. Here again, however, the claim

¹²National Youth Rights Association, “Top Ten Reasons to Lower the Voting Age,” <http://www.youthrights.org/vote10.php#9>, accessed July 19, 2010.

has several problems. First, we have no conclusive reason to believe that these potential voters would be motivated to satisfy their immediate wants, whatever they are. One could simply invoke another unproven yet plausible theory and retort that crazy promises such as free candy would never be made—and even less acted upon—due to the influence of primary caregivers on these voters (not to mention the fact that, most likely, sane adult voters would seriously punish at the polls anyone daring to make such proposals).

Second, even if we assume for the sake of argument that many of these fears are empirically well grounded, it would remain uncertain that “the global, net, long-term, equilibrium effects,” to use Jon Elster’s well-known phrase, would be negative.¹³ Some considerations suggest, to the contrary, that the quality of outcomes might be improved in the long run. For instance, even if we conceded that the votes of children would have a negative effect in the short term, enfranchisement at an early age could help democracy in the long term by creating a more engaged and public-spirited citizenry. “Misuse of the ballot,” W.E.B. Du Bois argued in an interesting little-known essay, “is perhaps the most effective way of teaching its right use.”¹⁴ As Andrew Rehfeld put it more recently and in direct relation to the present subject: “since having power is an extremely good way to train one for its use, this becomes a reason to provide children with political power as a way to cultivate their political maturity.”¹⁵

In the end, conflicting claims over the consequences of enfranchising children and the mentally impaired can only be settled through empirical evidence that is not currently available and can only be obtained by actually enfranchising these groups. Existing studies are few and limited. Regarding the mentally impaired, some have found that they tend to vote in significantly smaller numbers than sane adults.¹⁶ If true, the probability that they could affect the outcomes of elections would be even lower than expected from demography alone. Moreover, scholars who have

¹³Jon Elster, *Solomonic Judgements* (Cambridge: Cambridge University Press, 1989), p. 183.

¹⁴W.E.B. Du Bois, *Disfranchisement* (New York: National American Woman Suffrage Association, 1912), p. 5.

¹⁵Rehfeld, “The Child as Democratic Citizen,” p. 151.

¹⁶See, for instance, A. Bosquet, A. Medjkane, D. Voitel-Warneke, P. Vinceneux, and I. Mahé, “The Vote of Acute Medical Inpatients,” *Journal of Aging and Health* 21 (2009): 699-712; Y. Melamed, A. Nehama, and A. Elizur, “Hospitalized Mentally Ill Patients Voting in Israel,” *Journal of Forensic Psychiatry* 11 (2000): 691-95; H. Keeley, M. Redley, and I.C.H. Clare, “Participation in the 2005 General Election by Adults with Intellectual Disabilities,” *Journal of Intellectual Disability Research* 53 (2008): 175-81; J.H. Karlawish, D.H. Casarett, B.D. James, K.J. Propert, and D.A. Asch, “Do Persons with Dementia Vote?” *Neurology* 58 (2002): 1100-1102; and B.R. Ott, W.C. Heindel, and G.D. Papandonatos, “A Survey of Voter Participation by Cognitively Impaired Elderly Patients,” *Neurology* 60 (2003): 1546-48.

studied the voting behavior of the mentally impaired have found little differences with the broader electorate—although, for reasons discussed above, it would be unjustifiable in any case to disenfranchise persons on the grounds of partisan preferences.¹⁷ The bottom line is that there are no studies suggesting that eliminating qualifications for voting based on mental competence (as occurred in Canada in 1993) makes it more likely that plainly bad things will happen, such as corrupt candidates getting elected more often or politicians enacting harmful policies.

As for minors and young adolescents, since they have never been enfranchised, there is no relevant evidence to consider. Some institutions have organized interesting mock elections for children, and surely other experiments could be conducted.¹⁸ However, the resulting evidence would not be reliable. The reason is simply that some of the alleged issues with the enfranchisement of children stem from the behavior of individuals other than children themselves—behavior that we have no reason to expect in experimental settings. Consider the worry that candidates would offer free candy and increase recess time in public schools, or the worry that parents and teachers would try to indoctrinate children. If these negative consequences were not observed in experimental studies, the opponent of children suffrage could easily dismiss the exercises as flawed on the grounds that the incentives for the objectionable behavior were not present, precisely because it was a mock election and there was nothing at stake.

Now I turn to (b)—the claim that universal sane adult suffrage normally succeeds in selecting the best option. A cursory look at the results of elections around the world (not to mention the familiar scene of voters taking bribes, deciding on the basis of bigotry and fanaticism, supporting candidates solely for their looks, fueling clientelism, and so on) invokes the thought of Tocqueville: “those who regard universal suffrage as a guarantee for good choices are under a complete illusion.”¹⁹ Yet there is

¹⁷See K. Duckworth, S. J. Kingsbury, N. Kass, et al., “Voting Behavior and Attitudes of Chronic Mentally Ill Outpatients,” *Hospital and Community Psychiatry* 45 (1994): 608-9; G. Jaychuk and R. Manchanda, “Psychiatric Patients and the Federal Election,” *Canadian Journal of Psychiatry* 36 (1991): 124-25; G. Howard and R. Anthony, “The Right to Vote and Voting Patterns of Hospitalized Psychiatric Patients,” *Psychiatric Quarterly* 49 (1977): 124-32; and M.M. Klein and S.A. Grossman, “Voting Competence and Mental Illness,” *American Journal of Psychiatry* 127 (1971): 1562-65. One study did find that mentally impaired voters in a location in Germany were more likely to support the left. See J. Bullenkamp and B. Voges, “Voting Preferences of Outpatients with Chronic Mental Illness in Germany,” *Psychiatric Services* 55 (2004): 1440-42.

¹⁸See Cummings, “Children’s Right to Vote.”

¹⁹Alexis de Tocqueville, “Of the Government of Democracy in America,” in *Democracy in America: Historical-Critical Edition*, Vol. 2, ed. Eduardo Nolla (Indianapolis: Liberty Fund, 2010).

one salient principle that seems to validate this illusion: the Condorcet Jury Theorem (CJT). What it says, basically, is that large groups deciding through majority rule are virtually certain to choose the best option if its individual members are, on average, more likely to do so than a random device.²⁰ If the CJT is applicable, the outcomes of political elections based on sane adult suffrage could not be any better, all else being equal. In these circumstances, we would have reason not to expand the franchise any further unless we were confident that outcomes would not vary.

But appeals to the CJT to justify the disenfranchisement of minors and the mentally impaired can be challenged in a number of ways. Robert Goodin and Joanne Lau, for instance, argue that the CJT actually supports the opposite conclusion.²¹ They show that even if the average voting competence of sane adults were barely better than random, we could enfranchise many incompetent persons without affecting the results—provided that their number and average (in)competence remain within certain limits. The problem, however, is that we cannot reliably determine whether this provision is met. Indeed, the general difficulty with invoking the CJT for political justification, one way or another, is that everything depends on assumptions that are hard to validate. In particular, as David Estlund contends, there is no conclusive evidence that voters are indeed (on average) better than random.²² To be clear, I am not claiming that voters lack the required competence. We do not know. It is, at best, an article of faith. And on this basis we cannot justify the disenfranchisement (or enfranchisement, for that matter) of an entire class of persons.

Consider that elections are often very close and the margin of victory varies much from one contest to the next. According to the CJT, this means that the average voter competence often gets close to the critical threshold of .5, and that it fluctuates greatly.²³ To merely assume without evidence (or, more exactly, despite the evidence about people's lack of political information, decision-making biases, and so on) that in these unstable circumstances the ball always or normally falls on the right side of the line, so to speak, is unwarranted. At any rate, it is surely insufficiently warranted to guide our decisions about who ought to have the

²⁰For a discussion and generalization, see Christian List and Robert E. Goodin, "Epistemic Democracy," *The Journal of Political Philosophy* 9 (2001): 277-303.

²¹Robert E. Goodin and Joanne Lau, "Enfranchising Incompetents: Suretyship and the Joint Authorship of Laws," *Ratio* 24 (2011): 154-66.

²²See David Estlund, *Democratic Authority* (Princeton: Princeton University Press, 2008).

²³If an option wins with 57% of the votes, we know that the average competence in the group was either .57 or .43. For the explanation, see Robert E. Goodin and David Estlund, "The Persuasiveness of Democratic Majorities," *Politics, Philosophy & Economics* 3 (2004): 131-42.

right to vote.

In the end, the case for input minimalism rests on a weak basis. There are no good reasons to believe that universal sane adult suffrage is so decisively superior to its more inclusive alternatives, from the perspective of the quality of outcomes, that we should not experiment with new arrangements. If anyone were to propose the electoral exclusion of a subset of sane adults on the basis of similar evidence, no one would accept the case as compelling. Of course, the previous skeptical argument also rules out the possibility of justifying greater or even unconditional inclusiveness on the basis of its possible long-term advantages. We simply do not know enough, and it is difficult to imagine a way of producing the required evidence without enfranchising the excluded classes in the first place. *Ex ante*, the case for current arrangements fails.

It could be objected that since we are fairly satisfied with the functioning of sane adult suffrage, and precisely because we cannot reliably anticipate the consequences of expanding the electorate, we should not take any risks with experimental measures. In conditions of uncertainty about the effects of reform and satisfaction with the status quo, we should probably do nothing if (i) the potential effects of reform were catastrophic, (ii) the harm and its causes were irreversible, and (iii) there were no reasons for the change in the first place. However, this is not the situation we face. First, though we do not know how children and the mentally impaired will behave at the polls, we have little reason to believe that an otherwise unthinkable catastrophe would become a possibility. All we can seriously expect is that, occasionally, close electoral outcomes will go the other way—much like they are already affected by extraneous factors such as the weather on election day. Second, if the balance of effects became visibly negative in the long run, these groups could then be disenfranchised. Finally, there is indeed a positive reason based on fairness considerations, if not to entirely abolish age and sanity requirements, at least to seriously relax those currently in place in most countries. The next sections advance this case.

3. Fairness Considerations: Allocative Justice and Integrity

Political philosophers have recently debated whether political institutions should be assessed only on account of their consequences or also for their “intrinsic fairness.” For reasons I cannot fully develop here, it seems that much of this debate rests on a trivial disagreement about the meaning of “intrinsic fairness.” No one seems to deny that institutions are to be evaluated solely for the morally relevant ways in which people are treated as a result of adopting them. Further, everyone seems to agree that people can be relevantly affected not only by the outcomes of a deci-

sion procedure—the concrete decisions it produces and other operational effects—but also by some features of the decision procedure itself. For instance, a political procedure would be objectionable if it disenfranchised half of the population *for no other reason* than their gender. Richard Arneson, for instance, claims that “the calculation of outcomes must be inclusive.”²⁴ He explains that just like an act-utilitarian must take into account, in evaluating the permissibility of torture, the harm that would be done to the person tortured (not only the good that torturing him would allegedly bring about), similarly the “immediate consequences” of institutions, as he calls them, should be weighed when comparing alternative arrangements. Well, this seems to be exactly what those who speak of the “intrinsic fairness” of institutions have in mind.²⁵

As Brian Barry has put it, in addition to certain outcomes, justice requires “a fair procedure, fairly conducted.”²⁶ This double requirement of “intrinsic fairness” (a concept that Barry explicitly adopts) consists of two specific considerations for the purposes of our inquiry. First, the *allocation* of the right to vote, as such, has to comply with the demands of justice. This means, I shall argue, that all members of the polity who have the capacity to enjoy the benefits of enfranchisement (or to experience the harms of disenfranchisement) should have the right to an equal vote. For the purposes of the present discussion, I shall ignore the further question of defining the proper grounds for distinguishing members from nonmembers. The exclusion of those who lack the said capacity is permitted but not necessary on the basis of allocative justice alone. The second consideration is that the *operation* of the electoral process must also be fair. If the disenfranchisement of those who lack the franchise capacity were necessary to protect the integrity of the process, it would then be *prima facie* required.

Before pursuing these matters in more detail, it is important to get a common argument out of the way. People contend very often that it is not unjust to disenfranchise children, because their condition is temporary and universal.²⁷ (Similarly, it could be argued that a person with, say, Alzheimer’s or dementia has already had the right to vote for most of her life and that anyone could develop these illnesses.) By contrast, to disenfranchise people on account of their race, for instance, is to disenfranchise them for life to the unfair advantage of people of different rac-

²⁴Richard J. Arneson, “Democratic Rights at the National and Workplace Levels,” in David Copp, Jean Hampton, and John E. Roemer (eds.), *The Idea of Democracy* (Cambridge: Cambridge University Press, 1995), chap. 3, p. 121.

²⁵See Thomas Christiano, “The Authority of Democracy,” *The Journal of Political Philosophy* 12 (2004): 266-90.

²⁶Brian Barry, *Justice as Impartiality* (Oxford: Oxford University Press, 1995), p. 150.

²⁷Albert Weale, *Democracy* (New York: St. Martin’s Press, 1999), pp. 154-55.

es. Minors will eventually get the vote; all they have to do is wait. Hence, their exclusion is just.

Reasonable as it sounds, I find this popular argument defective. If it were correct, it would not be unjust to establish the voting age at, say, sixty, since people will eventually become enfranchised and the requirement would apply to all. And it would also be just to disenfranchise blacks if all humans happened to be born with a black skin that turns white late in life. The fact that a certain (mis)treatment applies to everyone and eventually ends does not make it just. This is not to deny that relying on age (and to a lesser extent on sanity) is in many ways preferable to other methods from the perspective of justice. Compared to competency tests, for instance, age requirements are less vulnerable to abuse and corruption. My point is simply that the demands of fairness are not entirely met simply because childhood is a universal and temporary condition.

To put it differently, suppose human beings mature only to a certain point—randomly varying by person—and stay there for the rest of their life. Would it be acceptable to disenfranchise for life a person that gets stuck mentally and physically at age P as we know it? (Since we are no longer considering instrumental factors, let us assume that people end up dispersed around different ages in such a way that the quality of electoral choices remains constant over time.) If the answer is “yes,” then the current exclusion of persons of age P is justifiable. But if the answer is “no,” we must conclude that people of that age are currently being unduly harmed and ought to be enfranchised. The fact that they will eventually get the vote is irrelevant. The following analysis provides a basic framework to assess whether some individuals are being mistreated by current age and sanity requirements for voting.

3.1. Allocative justice and the franchise capacity

The allocation of the right to vote raises concerns of justice for two (not mutually exclusive) reasons. In the first case, the moral importance of the allocation of the franchise derives from the value of the right to vote as a personal good or resource. The allocation of voting rights matters to the extent that voting rights matter as a commodity. If having the vote provides a personal advantage, its distribution raises concerns of justice. Disenfranchisement could thus be harmful by depriving individuals of something valuable. Call this a *commodity-dependent injustice*. The second reason why the allocation of the franchise matters from the perspective of justice is that even if the right to vote could not be plausibly regarded as personally beneficial in any way, the allocation itself—the way people are treated in the process—is morally significant. I might not

care at all about the right to vote, but the reason why it is being denied to me matters greatly. In this case, the distributive process itself could mistreat persons, regardless of the value of what is being distributed. Call this a *commodity-independent injustice*.

The central idea I want to advance in what follows is that all members of the polity who are capable of being mistreated in these ways have the “franchise capacity” and, from the (sole) point of view of fairness, ought to be enfranchised. To substantiate this idea, let me say more about these potential harms. There are two cases of commodity-dependent injustice to consider, since the franchise can be a commodity on account of having both nonpositional and positional value. The main nonpositional advantage of enfranchisement is that it promotes our individual agency. Given how laws and policies affect our quality of life, the franchise enables us to better fulfill our obligations to others and to claim what is due to us.²⁸ Lacking voting rights would be detrimental for an individual seeking to advance justice. A person might have a conception of the good such that her plan of life prizes or requires political action. An altruistic person, for instance, would value the opportunity to shape laws and policies in order to promote, within the limits permitted by justice, a certain noble cause. Moreover, having the opportunity to act in concert to advance these ends widens our freedom, whether or not we use it. All this amounts to the standard liberal account, which I have only been able to sketch here. In short, to deny people the opportunity to live a nonpolitical life would be as harmful to their interests as to deny them the opportunity to engage in public affairs.

The value of the right to vote can also be positional. In the most common account, enfranchisement is sometimes important as a public affirmation of a person’s equal worth and full membership in the polity.²⁹ Conversely, disenfranchisement can be stigmatizing and hurt an individual’s self-respect. In this view, the very point of enfranchisement is expressive: a way of publicly affirming the dignity of persons. In a context where the right to vote has taken this meaning, most people would suffer an injustice if disenfranchised. But not everyone. For the same reason that in certain polities disenfranchisement “may be a trivial matter”³⁰ in general, denying voting rights to certain individuals may not be an expression of contempt, even in countries where it does have a general

²⁸For an argument, see Jeremy Waldron, “Participation: The Right of Rights,” *Proceedings of the Aristotelian Society* 98 (1998): 307-37.

²⁹See, for instance, Charles Beitz, *Political Equality* (Princeton: Princeton University Press, 1990), pp. 109-10.

³⁰Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1988), p. 410. Ronald Dworkin makes the same point in *Sovereign Virtue* (Cambridge, Mass.: Harvard University Press, 2000), p. 201.

symbolic value. This was precisely Judith Shklar's point in an argument directly relevant to our subject. She dismissed the reduction of the voting age to 18 years—the Twenty-Sixth Amendment to the American Constitution—as follows: “A frivolous exercise, it was based on a complete misunderstanding of the value of enfranchisement.”³¹ Shklar believed that the enfranchisement of younger individuals was not necessary to signal their equal status because being young, unlike being black, for instance, was not regarded as a sign of inferiority in American society.

However, Shklar failed to notice that young people did have grounds for reasonable complaint. To explain why, I now turn to the other sense in which disenfranchisement can be harmful, that is, as a form of commodity-independent injustice. The way people are treated in the process of allocating the franchise is ethically important, even if the franchise could not be plausibly conceived as a personal good.³² Being arbitrarily disenfranchised can be harmful even if there were no good reasons to care about the franchise as such. In the case at hand, *pace* Shklar, the fact that being young was not considered to be degrading was not sufficient to disenfranchise those under 21 without harm. A relevant piece of information is missing in her analysis: namely, that there were other groups whose status was not considered to be inferior either (e.g., adult white males) and yet they had the vote. Young people had a reasonable complaint about the way they were treated relative to groups such as these. Notice that my point is not that they were publicly degraded and stigmatized as moral unequals—we can grant Shklar that they were not thought to be inferior and hence did not need the franchise to improve their social standing. My point instead is that young persons were not counted properly in the process of allocating the franchise, for whatever reason, and that gave rise to a reasonable complaint. It could have been only a mistake, as one might forget to invite a friend to a party. In any case, there is a harm and reason for complaint.

Having outlined the moral significance of enfranchisement, let me be more precise about the idea of the “franchise capacity.” Anyone (any being) who is capable of experiencing both a commodity-dependent and a commodity-independent injustice has a *full* franchise capacity and ought to be enfranchised. In other words, in a context in which instrumental considerations are not an issue, those who have the capacity to enjoy, for example, the agency-enhancing benefits of the franchise would be wronged by disenfranchisement. This is because they would be deprived of something valuable without a good reason. The full franchise

³¹Judith N. Shklar, *American Citizenship* (Cambridge, Mass.: Harvard University Press, 1998), p. 18.

³²See Joel Feinberg, “Noncomparative Justice,” *The Philosophical Review* 83 (1974): 297-338.

capacity hence presupposes certain intellectual and moral powers. Specifically, it presupposes the faculties to understand and value the act of voting—what an election is about, what the options stand for, and so on. Otherwise a person would be unable to understand that voting, for instance, allows us to promote (even if only in a limited way) a certain social ideal, and she could not experience a commodity-dependent injustice. Consider Peter Singer's argument regarding animals: despite their relative intelligence and basic moral equality with all human beings, pigs and dogs are, like some persons, "incapable of understanding the significance of voting, so they cannot have the right to vote."³³ We do not treat them unjustly (in the commodity-dependent sense) by not recognizing them as voters. The same is true about some humans.

Some persons, however, lack the required intellectual and moral powers to suffer a commodity-dependent injustice but are nevertheless capable of becoming victims of a commodity-independent injustice in the allocation of the franchise. These persons would have a *partial* franchise capacity. The implication is that their disenfranchisement is not necessarily unjust—contrary to what is true in the case of those with a full franchise capacity—although it could be unjust in some circumstances. The reason why it is not necessarily an injustice to disenfranchise them is that there is a nonarbitrary reason for doing so, namely, that they lack the powers to experience the value of the franchise as a commodity. To be sure, nothing in the world would change, for better or worse, if in the end those with a partial franchise capacity were allowed to vote (ignoring the concerns of integrity to be discussed in the next section). But this is as much a reason to actually enfranchise them as a reason not to do so. However, one could imagine situations in which the reason for disenfranchising these persons is something else that is morally objectionable. In these cases, although enfranchisement would repair the commodity-independent injustice, it is not a *necessary* measure.

To explain this further, let me contrast my position with the one recently advanced by Martha Nussbaum. In her view, even the disenfranchisement of persons who have only a partial franchise capacity is always "disrespectful and wrong."³⁴ But Nussbaum, it seems to me, confuses possibility with actuality in this matter. The disenfranchisement of these persons could be disrespectful in certain contexts, whether or not those affected have the capacity to be aware of the harm. But disenfranchisement is not necessarily harmful, specifically as a signal of unequal worth (on this point Shklar is surely right).

³³Peter Singer, "All Animals are Equal," in Peter Singer (ed.), *Applied Ethics* (Oxford: Oxford University Press, 1986), pp. 215-28, at p. 216.

³⁴Nussbaum, "The Capabilities of People with Cognitive Disabilities," p. 348.

To illustrate: the fact that no law recognizes the right of males to breastfeed their children at work is not currently a stigma of inferiority. Perhaps one can imagine a radical feminist society in which males would be explicitly deprived of this and other rights they could not actually exercise with the deliberate intention of expressing their unequal status relative to women. But the exclusion itself, taken out of context, does not allow us to speak of disrespect or some other harm. To cite Singer again: "Since a man cannot have an abortion, it is meaningless to talk of his right to have one."³⁵ The same is true about the voting rights of those who lack the full franchise capacity. For simplicity, unless otherwise stated, from now on I shall use "franchise capacity" to refer to the *full* franchise capacity.

Surely, as Nussbaum points out, a person lacking the requisite cognitive abilities may "exercise" the right to vote through a guardian, and this would be meaningful in a way that having an abortion by proxy could not be.³⁶ Hence it could be argued that since proxy voting is a way of counting the interests of these persons, failing to implement such a device would not only hurt their interests, but would signal that *they* do not count. This seems plausible, and it would be largely convincing were it not for the fact that proxy voting is neither a necessary nor an effective device for protecting the interests and signaling to society at large the equal worth of beings deprived of the capacity to vote. It may be said that the same is true about other groups. Why did we have to enfranchise blacks or women if there were other ways of protecting their interests and expressing their equal status? The answer is simply that unlike those who lack the franchise capacity, they had the same interest as others in enfranchisement *as such*, since the vote can be important to them in the ways discussed above. By contrast, if a person cannot understand and value the process of voting, she cannot complain, for instance, about lacking the opportunity to contribute to the making of a more just society through the election of the right kind of representatives.

To be clear, the preceding argument is not an all-things-considered case against proxy voting or the direct enfranchisement of those who have a partial franchise capacity (or not even that). The point is simply that these measures are not morally *required* from the perspective of fairness. That said, I do believe there are difficulties in Nussbaum's argument for proxy voting. Her reasons would justify the measure for all moral patients that cannot vote, including cats, pigs, and cows, and not only for humans with a *disability*. While she strongly believes that ani-

³⁵Singer, "All Animals are Equal," p. 217.

³⁶For an excellent analysis of proxy voting, see Rehfeld, "The Child as Democratic Citizen."

mals have interests that morally constrain the way we can treat them, and therefore that institutions can signal whether these beings count, she also maintains that “the denial of the right to vote is not a harm for nonhuman animals.”³⁷

To conclude this section, let me address a potential objection. Enfranchisement might not only be a commodity, but also a burden, and those who barely have the franchise capacity might be made worse off overall by enfranchisement. Ludvig Beckman has advanced an argument along these lines. He opposes enfranchising children on the basis that “voting is associated with shouldering a host of responsibilities” that undermine the basic interest of children to engage in playful activities.³⁸ I take him to be making two different points. First, he suggests that children would be left with an insufficient amount of time to play if they were to exercise the franchise responsibly. Beckman draws a comparison with children in poor countries who have to take adult responsibilities such as having to work or look after sick parents. But to compare this with voting, in my view, is inaccurate. While we could imagine formal and informal social institutions that would place an excessive burden on children—and Beckman usefully calls our attention to this danger—they need not and should not be in place. Children should be expected to participate in elections only at a level of responsibility within their capacity and not contrary to their interests. We should not force them to spend hundreds of hours gathering information and debating before elections. We might not even expect them to vote at all, and in countries where voting is mandatory an exception can be made. Justice does not require that we share social burdens equally. The poor carry lesser responsibility for the finances of the state than the rich, and most of us think it is right. Enfranchisement need not take away from children *any* significant amount of their time to play.

Yet Beckman advances another challenging argument. He also suggests that the mere fact of being enfranchised would make children responsible along with adults for the future of society (whether or not they vote, since not voting is a decision that affects electoral outcomes). This imposes a psychological cost in the quality, not the quantity, of play: “playfulness is suppressed by the burdens of responsibility.”³⁹ I have two criticisms. First, Beckman cites no direct or indirect evidence that this psychological effect would follow. I do not think it is true even for adults. I, for one, do not feel responsible and hence burdened for the decisions of elected officials in my country (and I do not think I should).

³⁷Martha Nussbaum, *Frontiers of Justice* (Cambridge, Mass.: Harvard University Press, 2006), p. 380.

³⁸Beckman, *The Frontiers of Democracy*, p. 115.

³⁹*Ibid.*, p. 117.

Second, and more importantly, if the argument were correct, children would already be thus burdened by other political rights, such as the right to freedom of political speech and association. To my knowledge, children have these rights in all democracies. In exercising these rights or not, children are already responsible for the future of society, since these rights are not only relevant in the process of electoral competition, but also in the regular process of legislation. Yet no one has ever complained and suggested that children should be deprived of these rights on the grounds that they affect the quality of their playtime and development.

3.2. *Electoral integrity*

I now turn to the second part of the fairness formula: political procedures must not only be fair, but also “fairly conducted.” The upshot of the previous discussion was that it is permissible to exclude those who cannot be harmed by disenfranchisement, and that we are required to enfranchise those who can. Yet, what positive reason could there be for *not* enfranchising those who lack the franchise capacity, since they could not vote? Why care if they are formally enfranchised as a way of underlining society’s consideration for them (which does not imply, as I have argued, that their exclusion is necessarily unjust)?

The relevance of this question becomes apparent when we realize that lacking the franchise capacity does not entail lacking the capacity to show up at the polls and deposit a ballot in the box (or pick an option in the voting machine). Chimpanzees and perhaps some species of parrots, to mention the extreme cases, could be *trained* to select one of the alternatives in a given contest.⁴⁰ Yet they lack the necessary powers for the franchise capacity. They cannot vote, properly speaking, since they lack the capacity to understand (a) what an election is about (i.e., that laws are made and enforced by rulers, and that voting means choosing among candidates for the position of rulers), and (b) the moral and rational aptitude to rank political alternatives according to some criterion and choose accordingly. Some humans lack these capacities, even though they could be instructed to cast a ballot in a way that mimics true voting. I will call this the problem of *instruction*.

Instruction violates the integrity of the electoral process. It is a way, like vote-buying, of getting more votes than our fair share. Of course, instruction may alter electoral outcomes if practiced on a large scale and by some groups more than others. Thus, since not all votes would be independent or authentic, one worry is the distortion of the will of the people. However, the argument here is not about the consequences. It is a

⁴⁰Archard, *Children*, p. 100.

matter of *fairness* not to allow some people to buy votes or train parrots to vote in a certain way. These practices offend honest citizens, even if the outcomes are not affected. The offense, to be clear, does not only come from the dishonest citizens. An authority that tolerates this sort of fraudulent practice fails to give due respect to everyone.

The difference between *instruction* and *influence* is important. Training a “voter” as one programs a robot is one thing. Persuading an agent to vote in a certain way is quite another. Of course, there are illegitimate means of influence and they should be controlled for the same reasons that instruction should be avoided. But we want voters to respond to certain influences, rather than forming entirely solipsistic political preferences. It is not unfair or undesirable to allow people to influence each other on political matters. And the fact that some people are more easily influenced than others is by no means sufficient to disenfranchise them—adults and nonadults, the sane and the insane alike.

The problem of instruction requires us to distinguish between two types of persons who lack the franchise capacity: indeed, those who are susceptible to being trained (such as infants within a certain age range and some mentally impaired persons) and those who are not thus vulnerable (such as newborns or persons in a coma). So we have three relevant groups: those who have the franchise capacity, those who have the instruction handicap, and the rest. Fairness allows but does not *require* us to disenfranchise any of those who lack the franchise capacity—not even those who have the instruction handicap. This is because it is possible that, for a number of reasons, instruction would not be a serious concern in places where the law is strictly respected and enforced.

However, from a practical point of view there seems to be a *presumptive* case for enfranchising all and only those who have the franchise capacity. To see this, consider the rival case for unconditional inclusion. If a parrot actually shows up at the polls and “votes,” it would unmistakably indicate that it has been trained to do so. One option is to have the vote counted and punish the trainer, assuming he can be found. This is exactly what happens in cases of vote-buying. While it is impossible to identify and nullify the corrupt ballots, the persons involved could be sanctioned. More generally, as Beckman has argued, we can establish measures to minimize instruction just as we establish measures to address other types of fraud.⁴¹ However, the most effective and costless way to prevent instruction would be simply to disenfranchise those who have the instruction handicap. Moreover, given (i) that it would be hard to sort out these persons from the rest of those who lack the franchise

⁴¹Beckman, “Political Equality and the Disenfranchisement of People with Intellectual Impairments,” pp. 20-21.

capacity (or at least more costly than excluding them all), and (ii) that fairness allows the disenfranchisement of all those who lack the franchise capacity, there seems to be a presumptive practical case for only enfranchising all those with the franchise capacity. In short, it is not the case that the best way to address the integrity concern is through unconditional inclusion combined with policing institutions and measures to ensure the equal value of political rights. Of course, we might prefer this solution all things considered if our ability to identify those who lack the franchise capacity were not as good as our ability to sanction and prevent electoral fraud. But this depends on the circumstances. Let us look at this in more detail.

4. Policy Implications

At the level of theory, the upshot of the previous discussion is that those who have the franchise capacity ought to be enfranchised, and that there is a *prima facie* case for the exclusion of everyone else. At the level of practice, however, there are two issues to be addressed.⁴² First, we need to identify the circumstances under which the *prima facie* case for the disenfranchisement of those who lack the franchise capacity could be defeated in favor of a system of unconditional inclusion. Second, assuming that in the end there is a good case against extending voting rights to those who lack the franchise capacity in a given society, there would still be moral limits on the specific age and mental requirements that can be established: indeed, nothing has been said so far regarding the morally legitimate boundaries of the franchise capacity in terms of age and mental impairment. In this section I address these issues in turn.

Is unconditional inclusion (i.e., dropping all age and sanity requirements for voting) justified in certain circumstances? Consider the following argument. For Rawls, having the minimum capacity for a sense of justice is sufficient for being entitled to the protection of justice. Although he leaves aside whether it is also necessary, he makes the following claim: “Even if the capacity were necessary, it would be unwise *in practice* to withhold justice on this ground. The risk to just institutions would be too great.”⁴³ Rawls does not elaborate on this idea, but I take his point to be the following. In the case of human beings, we should not attempt to single out the relatively few individuals who lack the capacity for justice, given that (a) any method for doing so is likely to be imper-

⁴²For a useful discussion of the difference between principle and policy in relation to enfranchisement, see Rehfeld, “The Child as Democratic Citizen.”

⁴³Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), p. 506 (my emphasis).

fect and hence some persons who have the capacity would be left out, and (b) the harm done to those who would be improperly denied justice would be greater than the harm, if any, of including all those who lack the capacity for justice. In these circumstances, we ought to establish universal inclusion, even if something short of this were preferable in theory.

A similar line of argument may apply for certain societies regarding the enfranchisement of minors and the mentally impaired. Suppose that the operation of the electoral process is expected to be reasonably fair, regardless of how the franchise is allocated. In other words, let us assume that the inclusion of those who lack the franchise capacity would not affect the integrity of the process. In these circumstances, our only concern from the perspective of fairness would be to ensure that the distribution of voting rights is a just distribution. We achieve this, as I argued above, by giving an equal vote to all persons who have the franchise capacity. And since age and mental conditions are imperfect indicators of this capacity, under the given premises (that is, for societies meeting the aforementioned characteristics) justice would be best served by abolishing all requirements for voting based on age and mental aptitude.

Some advanced democracies where the rule of law is strong may be in that situation. This is not to say that there would be absolutely no “instruction” in these polities. But its incidence could be trivial, as is actually the case with other types of fraudulent electoral behavior that cannot be entirely eliminated. In fact, some countries have already adopted the policy of unconditional enfranchisement for the mentally impaired. Canada, Ireland, Italy, and Sweden do not establish any kind of restrictions on the basis of mental impairment.⁴⁴ The same is true about some local governments in federal countries, such as Alaska, Colorado, North Carolina, Pennsylvania, and Vermont in the United States.⁴⁵ To my knowledge, this practice has never been repealed out of a concern for the integrity of the electoral process, or any other reason for that matter. To be clear, I am not retracting the *prima facie* argument against the enfranchisement of those who lack the franchise capacity. My point is merely that unconditional enfranchisement may be the preferred policy in some real cases. But there are no general formulas: whether it would be the preferred policy indeed has to be determined on a case-by-case basis.

⁴⁴Louis Massicotte, André Blais, and Antoine Yoshinaka, *Establishing the Rules of the Game: Election Laws in Democracies* (Toronto: University of Toronto Press, 2004), p. 27. On this subject, see also Jason H. Karlawish and Richard J. Bonnie, “Voting by Elderly Persons with Cognitive Impairment: Lessons from Other Democratic Nations,” *McGeorge Law Review* 38 (2007): 879-916.

⁴⁵Sally Balch Hurme and Paul S. Appelbaum, “Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters,” *McGeorge Law Review* 38 (2007): 931-1014.

I now turn to a discussion of the second issue mentioned at the beginning of this section: What are the boundaries of the franchise capacity in terms of age and sanity? Let me begin with a note on the method that is typically adopted: the *categorical* inclusion and exclusion of those who are, respectively, above and under a given age or level of impairment. However, there are at least two alternatives. First, a *presumptive* model may be adopted. We can presume different classes of individuals to be competent or incompetent, leaving a window open for individual appeals in the courts. In many polities a mentally impaired individual is actually presumed competent to vote unless a judge rules the opposite. In general, as the threat to integrity increases, we would move from a presumption of competence to categorical disenfranchisement.

Second, there is Andrew Rehfeld's recent proposal: a system of weighted voting that would enfranchise younger people but discount their votes. In this system, people would start at age 12 with 1/7 of a vote. While Rehfeld's system seeks to minimize the harm that the votes of children might have, it could be adopted for the purposes of mitigating concerns of integrity. The advantage over the presumptive model is that it would allow us to retain any benefits that early enfranchisement might have in terms of citizenship education.

In any case, regardless of our preferred model, the central matter is the following: the fact that integrity may require the disenfranchisement of those who lack the franchise capacity, and hence may justify age and sanity requirements for voting, does not mean that *any* requirements would be acceptable. Under-inclusiveness is morally objectionable because all persons with the franchise capacity should be allowed to vote. Over-inclusiveness, on the other hand, is objectionable from the perspective of integrity. Thus, we would ideally devise age and sanity requirements to include *exactly* all those with the franchise capacity and exclude all those who lack it. Of course, this is not actually possible. Some under- or over-inclusiveness is likely to occur. But we can try to minimize these problems, and this requires a serious effort to identify when the franchise capacity is acquired and lost. What follows is such an effort, although only a preliminary one.

What do we know about the boundaries of this capacity in terms of age and mental impairment? As for the latter, unfortunately, there is no general answer. There are many different kinds of mental conditions, and individual variation within them is significant. For this reason I shall concentrate on the voting age. To be specific, I want to identify its legitimate limits on the basis of the previous normative framework and the most recent and relevant scientific evidence.

Two caveats are in order. First, there are no studies tuned to measuring the franchise capacity as I have defined it. Second, current studies on

moral and cognitive development, even those that have concentrated on the specific domain of politics, measure children's actual level of development in a certain social context, not on their *potential* level based on natural brain capacity. In evaluating who may be unjustly excluded, we must consider natural capacity, not actual development. These two points suggest that we must be cautious about conservative inferences from the current literature on cognitive and moral development.

The influential work of Jean Piaget and Lawrence Kohlberg broke with the view that moral development was nothing more than the passive internalization of social conventions (e.g., Durkheim and Freud). They showed that people actively engage in the construction of their moral principles, but not their conventions. For Piaget, as cognitive abilities develop, the critical event in a child's transition from a stage of passive rule-following to one of critical reflection is the free interaction with peers. In this theory, post-conventional moral thinking begins around the age of ten. Kohlberg, by contrast, proposes that the most relevant factor in moving from one stage of moral development to another is the person's exposure to more sophisticated moral views. For Kohlberg, the stage of post-conventional moral thinking could only be reached by mature adults, and most people never actually get there.

Most scholars recognize the contributions of Kohlberg and Piaget, but their work has been criticized along three main lines. First, there is broad consensus that these authors, particularly Kohlberg, underestimated the moral and cognitive capacities of children and adolescents by conducting studies on the basis of open-ended questions about very complex moral problems.⁴⁶ Second, it is now common to recognize that "social knowledge" develops differently in various domains. The basic idea is that social conventions and moral principles form different domains with a corresponding path of development, rather than a single category of issues.⁴⁷ Finally, it has been argued that these theories are too rationalistic and need to incorporate emotions such as empathy to fully explain why exposure to another's views and claims can lead people to reconsider their views.⁴⁸

The evidence against Kohlberg's early findings that young children are incapable of moral thinking is overwhelming.⁴⁹ Recent studies on the

⁴⁶Judith G. Smetana and Myriam Villalobos, "Social Cognitive Development in Adolescence," in Richard M. Lerner and Laurence Steinberg (eds.), *Handbook of Adolescent Psychology*, Vol. 1 (Hoboken: Wiley, 2009), pp. 187-228, at p. 191.

⁴⁷See Elliot Turiel, *The Development of Social Knowledge: Morality and Convention* (Cambridge: Cambridge University Press, 1983); and Larry P. Nucci, *Education in the Moral Domain* (Cambridge: Cambridge University Press, 2001).

⁴⁸Martin L. Hoffman, *Empathy and Moral Development: Implications for Caring and Justice* (Cambridge: Cambridge University Press, 2000), p. 243.

⁴⁹For a recent survey, see Elliot Turiel, "The Development of Morality," in William

development of judgments about social justice and democracy are particularly relevant to the question of the boundaries of the franchise capacity in children. One of the pioneer studies revealed that systematic thinking on social justice appeared “relatively early.”⁵⁰ According to one scholar, “even very young children (beginning around three years of age) distinguish moral rules, based on justice and concern for others’ welfare, from social conventional rules and customs.”⁵¹ Charles Helwig has found that at six years of age individuals are able to provide arguments on “issues of rights and the justice of various political decision-making procedures.”⁵² Specifically, the participants in this study were able to reason and argue about the desirability of different forms of government and the importance of free speech. In a more recent article, Helwig and Urzula Jasiobedzka found that children of this age were able to make “clear distinctions between unjust and socially beneficial laws in reasoning about laws and legal compliance.”⁵³ Based on his own studies and a broad knowledge of the literature, Martin Hoffman suggests that at eight years of age we are already somewhat capable of understanding the life condition of others, and experience an empathic emotion that becomes “a powerful motive not only to comfort but also to rectify injustice.”⁵⁴

I cannot provide a more detailed survey here, but the preceding should suffice for the present purpose of providing a tentative threshold to evaluate the morality of current age requirements in most countries. The best available evidence on moral and cognitive development suggests that at ten years of age all normal children have the capacity to understand the idea of electing representatives and to adopt a position of their own, however rudimentary, on both the morality of the process and the alternatives at a given contest. (The cited studies suggest that the age limit should be lower than this, but I want to leave a wide margin for error.) If this is correct, individuals above this age cannot be legitimately disenfranchised. This is not to say that ten-year-olds should have the

Damon, Richard M. Lerner, and Nancy Eisenberg, *Handbook of Child Psychology*, Vol. 3 (Hoboken: Wiley, 2006), pp. 789-857. See also the survey in Lerner and Steinberg (eds.), *Handbook of Adolescent Psychology*.

⁵⁰William Damon, “Early Conceptions of Positive Justice as Related to the Development of Logical Operations,” *Child Development* 46 (1975): 301-12, p. 302.

⁵¹Charles Helwig, “The Moral Judgment of the Child Reevaluated,” in Cecilia Waynrib, Judith G. Smetana, and Elliot Turiel (eds.), *Social Development, Social Inequalities, and Social Justice* (New York: Lawrence Erlbaum, 2007), pp. 27-52, at p. 37.

⁵²Charles Helwig, “Children’s Conceptions of Fair Government and Freedom of Speech,” *Child Development* 69 (1998): 518-31, p. 529.

⁵³Charles Helwig and Urzula Jasiobedzka, “The Relation between Law and Morality: Children’s Reasoning about Socially Beneficial and Unjust Laws,” *Child Development* 72 (2001): 1382-93, at p. 1390.

⁵⁴Hoffman, *Empathy and Moral Development*, p. 243.

right to vote according to these studies. It is likely that their authors would say “No way.” But this would result from their political philosophy, not because they believe that a typical ten-year-old child lacks the franchise capacity.

5. Conclusion

In a context in which the vast majority of the population already enjoys the right to vote, outcome-based arguments for disenfranchising minors and the mentally impaired are not sufficiently supported by current theoretical and empirical considerations. From the perspective of fairness, those who have the capacity to be harmed by disenfranchisement in the ways explained above ought to be allowed to vote. As for those who lack the franchise capacity thus defined, their exclusion is permissible and *prima facie* required to protect the integrity of the process. The policy implications are significant. In countries where there is no serious threat to integrity, age and sanity requirements for voting lack any rationale. As for the rest of the countries, while there is no clear threshold to be derived from the franchise capacity in terms of mental sanity, the best available evidence suggests that the age for voting has to be substantially reduced to satisfy the minimal requirements of fairness.⁵⁵

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