

## Justifying Children's Rights

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### Abstract

The conceptual foundations of children's rights remain under theorized. This paper develops a social interest theory of rights to offer a justification for the conception of rights under the UN Convention on the Rights of the Child. It reveals that this conception is capable of producing a culturally sensitive, dynamic, inclusive and relational conception of rights that remedies many of the deficiencies associated with the traditional conception of human rights as being Western, individualistic trumps.

### Keywords

children's rights; philosophy; international law

### Introduction

Can the idea of human rights for children be justified? Does an answer to this question really matter? Children's rights are, after all, already recognised in international law, most notably the Convention on the Rights of the Child. They are increasingly included in national constitutions (Tobin, 2005) and considered by judicial bodies at the international, regional and domestic levels (Tobin, 2009; Sloth Nielsen, 2008). They are also increasingly used as a policy framework by governments (Lundy, 2012; Stalford, 2011), a research paradigm by scholars (Reynaert, 2009) and as an advocacy tool by civil society worldwide (Fernando, 2001; Tobin, 2011).

Despite this widespread engagement with the discourse of children's rights some still believe that the idea of children's rights has 'failed to secure a coherent ... intellectual foundation' (Minow, 1995; Guggenheim, 2005, *ix*) and

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\* Special thanks to Philip Alston, John Eekelaar, Laura Lundy, Michael Freeman, Doris Schroeder, Jason Pobjoy, Chris Dent and Elliot Luke for their helpful comments on earlier drafts of this article. All errors remain the author's own. Thanks also to Elliot Luke for his excellent research assistance. Research funding for this paper was provided by the Australian Research Council Discovery Grant, DP12014 'Children's Rights: From Theory to Practice'.

'remains largely under-theorised' (Dixon and Nussbaum, 2012). This is not to suggest that the conceptual foundations of children's rights have been entirely neglected. This may have been the case 25 years ago, when Michael Freeman lamented the absence of a 'reasoned normative thesis' to explain the moral grounds for children's rights. (Freeman, 1987, 300). In the intervening years, scholars, including Freeman himself, have increasingly sought to answer his question, 'what is the moral justification for giving rights to children?' (Freeman, 1987, 304). The literature tends to fall into three broad camps – those who support the idea of rights for children because of its role in securing their dignity (Freeman, 1992, 2007, 2010; Archard, 2004; Eekelaar, 2008); those who oppose the idea of rights for children because of their lack of capacity (Purdy, 1994; Griffin, 2009); and those who oppose the idea because of concerns such as the impact of rights on the family structure (Goldstein *et al.* 1998; Guggenheim, 2005; Seymour, 2005), the Western origins of human rights, or a preference for alternative discourses such as obligations (O'Neill, 1988, 2002) or an ethic of care (King, 1997; Arneil, 2002).

This paper aims to interrogate some of the central questions posed by these competing theories and assess whether the idea of human rights for children can be justified. It consists of three parts. Part I considers the preliminary question of whether such an inquiry is necessary. It concludes that an examination of the conceptual foundations of children's rights serves two critical functions – one practical the other philosophical. From a practical perspective, it has the capacity to assist in resolving broader dilemmas with respect to the meaning of these rights and encourage more reflective practice by proponents of children's rights (Reynaert, 2012, 156). It also has the potential to dampen opponents' scepticism about the idea of children's rights by establishing a 'secure intellectual standing' that can address its 'conceptual doubts.' (Sen, 2004, 317.)

Part II explores whether the idea of human rights for children under the CRC can be justified. A focus on the CRC has been adopted because, although this instrument has been described as 'the unavoidable contemporary context for thinking about the status of children' (Archard, 2004, 218), its conceptual foundations have escaped the close attention of commentators. It will be argued that there is an overlapping consensus as to the conceptual foundations of children's rights under the CRC. This consensus is facilitated by a *conception* of dignity in which all human beings, including children, have unique value and a *conception* of children as being vulnerable relative to adults yet possessing an evolving capacity for agency and autonomy. It is this *conception* of children, which is empirically grounded and socially constructed, that provides the foundation for the 'special' human rights that are granted to children under international law.

Moreover, this conception of human rights for children is grounded in an *interest* theory rather than the rival *will* theory of rights. Children may sometimes lack the capacity to exercise their rights but it is their *interests*, not their *capacity*, which found their rights. With respect to the determination of which *interests* justify elevation to the status of a human right, a *social interest* theory is preferred to other explanations, such as an 'urgent' (Beitz, 2005, 109–10) or 'basic' interest theory (Buchanan and Hessler, 2009, 213). This social interest theory consists of both *descriptive* and *substantive* dimensions. The former refers to the deliberative process by which interests are elevated to the status of rights, whereas the latter demands that this process should *include* both rights-holders and duty-bearers. However, this requirement creates a serious dilemma when seeking to justify the CRC conception of rights, because the drafting process was dominated by Western states and completely excluded children. Part III therefore uses the social interest theory of right to assess whether the conception of rights under the CRC can be justified. It concludes that this is the case and that this instrument is capable of producing a culturally sensitive, dynamic, inclusive and relational conception of rights that remedies many of the deficiencies associated with the traditional conception of human rights as being Western, adult-centric, individualistic trumps.

### 1. The need to establish the conceptual foundations of children's rights

During the drafting of the CRC, there was no discussion about the moral rights of children. The explanation for this is ostensibly pragmatic. According to Geraldine Van Bueren, '[i]n the context of the silent emergency of childhood deaths from malnutrition and disease, philosophical dialogue can appear too much like a game' (Van Bueren, 1995, 6). Philosophers would rightly take umbrage at this suggestion whose interest in the conceptual foundations of human rights is motivated by a desire to enhance the legitimacy of this concept. However, given the urgent need to address the tragic experiences of so many of the world's children, the extent to which there is a need to establish the conceptual foundations of children's rights is debatable when the concept is already recognised in international, regional and domestic legal systems, and is increasingly drawn upon by advocates seeking to address the needs of children.

The view taken here is that to evade this question 'demonstrates a lack of intellectual responsibility' (Freeman, 1994, 493) by neglecting a fundamental element of the human rights idea, thereby jeopardizing its legitimacy. This argument rests on the proposition that the human rights of children

consist of three interconnected dimensions—*legal*, *political*, and *moral* (Frost, 2010, 711). The justification of the *legal* dimension rests on the premise that they are recognised as legitimate standards within legal systems, the most significant of which is the CRC (Griffin, 2009, 203). The *political* dimension relates to advocates' use of this idea as a tool to assess the legitimacy of measures that have an impact on the experiences of children within and between states (Archard, 2004, 218; King, 2004, 275). The justification for this approach draws on the claim that the idea of human rights for children is a global enterprise that provides the 'settled norms of political discourse' (Beitz 8; Frost, 1996; Moyn, 2010, 222) whereby states voluntarily accept relevant treaty obligations as the standards by which the legitimacy of their efforts to secure children's interests will be assessed.

But relying solely upon legal and political justifications risks overlooking the reality that, despite states' apparent acceptance of this idea, (signified by treaty ratification), there remains widespread disagreement as to the *moral* status of human rights generally and children's rights, specifically. As such, there is a need to address the perceived 'softness' of human rights [for children] and its 'conceptual doubts', if 'the idea of human rights [for children] is to command reasoned loyalty and establish a secure intellectual foundation' (Sen, 2004, 317). In this light, the supposed 'self-evident' nature of human rights (Henkin, 1990, 2) is problematic. Indeed, in the absence of a secure conceptual foundation, children's rights risk becoming invisible to, or rejected by, those for whom they are not self-evident. They also become vulnerable to conscious or unconscious manipulation by those who wish to use them as a rhetorical device by which to advance a subjective vision of what children's rights should mean (Kennedy, 2002). A right for which there is no recognised conceptual foundation quickly risks becoming an empty rhetorical vessel into which subjective preferences or political agendas may be poured.

In such circumstances, there is a pressing need for a firm conceptual foundation and moral justification for the idea of human rights for children. The resultant inquiry seeks to advance their status by offering an 'intellectually compelling' case to justify their inclusion within the lexicon of international human rights (Sen 317; Griffin 204; Archard and MacLeod, 2002, 15; Fortin, 2009, 3). Thus, the need to justify the idea of human rights for children serves two critical and complementary functions – one philosophical and one practical. It seeks to address the concerns of those who are sceptical of the conceptual foundations of this idea. At the same time, it also serves to ground and constrain the enthusiasm of those for whom this idea and the meaning of such rights are already self-evident (Reynaert, 2012, 155), *and* those who would manipulate the meaning of children's right to align with their own political agendas.

## 2. The conceptual foundations of the CRC

### A. *Looking for foundations in incompletely theorized agreements*

How then can the idea of rights for children under the CRC be justified? The first problem raised by this question is that the CRC, like all international legal instruments, is an example of an 'incompletely theorized' agreement. This term, coined by Cass Sunstein, describes the process by which a common agreement is reached by consensus in circumstances where there is disagreement as to the reasons or principles underlying the agreement (Sunstein, 1995). The concept of incompletely theorized agreements aptly reflects the nature of international human rights instruments, which are generated by processes that must accommodate 'a moral universe that is diverse and pluralistic', and allow for agreement between states without the need for adherence to a particular theory of general principles (Sunstein, 1995, 1748).

In practice this means that states were able to agree on the inclusion of children's rights within the CRC without formal agreement on the *specific* principles or moral theory justifying this approach. This reflects what Sunstein would describe as mid-level, principled, agreement (Sunstein, 1739). Although states may have had differing theories with respect to why children's rights are justified or why a specific right may be justified, they put aside these differences for the sake of achieving consensus on the need to recognise *the idea* of children's rights. The incompletely theorized nature of the CRC does not mean, however, that it is devoid of *any* moral content. This invites a question as to which conception of children's rights is reflected in the agreement of states parties to the CRC.

### B. *The concept and conceptions of childhood under international law*

It is customary to hear the contention that childhood is a social construct. Moreover, in the opinion of commentators such as Ariés, the concept of childhood is a relatively recent development (Ariés, 1962). However, as Archard has explained, the idea of childhood has been known to all societies throughout history (Archard, 2004, 19–24). Where societies have differed is in their *conception* of childhood; that is, where the distinction between childhood and adulthood lies and the social and legal consequences that attach to being a child (Archard, 2004, 27–36).

International law is no different. The first ILO Conventions adopted in 1919 and 1920, sought to regulate the night work of young persons, generally defined as someone under the age of 18, and stipulated 14 as a minimum age for work

at sea and agriculture.<sup>1</sup> In contrast, the more recent ILO Conventions 138 and 182, insist on 18 as the age at which childhood ends.<sup>2</sup> Additional Protocols I and II to the Geneva Conventions maintain 15 years of age as the point below which states and armed groups cannot recruit or use children in armed conflict.<sup>3</sup> Both the 1924 and 1959 Declarations on the Rights of the Child provide specific rights for children but fail to define the child. Moreover, the Universal Declaration of Human Rights ('UDHR') and the International Covenants for Civil and Political Rights ('ICCPR') and Economic Social and Cultural Rights (ICESCR'), which each provide specific protection for children, also fail to define the child.<sup>4</sup> Thus the concept of childhood is a constant feature of the international legal landscape but its conception differs.

With respect to the CRC, Article 1 defines a child as any person under the age of 18 years, unless the age of majority is defined earlier under domestic law. This is a classic illustration of the incompletely theorized nature of the CRC. States agreed on the *concept* of childhood but were unable to agree on its *boundaries*, that is, the point in time at which childhood began and ended. Unsurprisingly, deep philosophical differences as to when life begins between Catholic states and the Holy See on the one hand and Western states on the other, almost derailed the drafting process. It was consequently left to individual states to determine when childhood should begin (Alston, 1990).

Deep cultural differences between states also made agreement on the end of childhood elusive and the best that could be achieved was to create a rebuttable presumption in conceptualisation of 18 years as the upper threshold (Legislative History 301-12). Given this lack of certainty with respect to when childhood begins and ends, a question arises as to whether this particular conception of childhood under the CRC can be justified. It is certainly incompletely theorized but this does not mean that it is necessarily incoherent or arbitrary. This is because the CRC creates a process by which a state can determine the beginning and end of childhood within its own jurisdiction.

However, a further issue exists as to whether the concept of childhood can actually be justified. The point to stress here is that although the outer

<sup>11</sup> See the ILO Convention concerning the Night Work of Young Persons Employed in Industry, 1919; ILO Convention Fixing the Minimum Age for Admission of Children to Employment at Sea, 1920; ILO Convention concerning the Age for Admission of Children to Employment in Agriculture, 1921; and ILO Convention concerning the Compulsory Medical Examination of Children and Young Persons Employed at Sea, 1921.

<sup>12</sup> See ILO Convention concerning Minimum Age for Admission to Employment, 1973, Arts. 3 and 9; ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999, Art. 2.

<sup>13</sup> See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Art. 77; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, Art. 3.

<sup>14</sup> UDHR, Art. 25(2); ICCPR, Art. 24 and ICESCR, Arts. 10 and 12(2).

boundaries of the concept remain socially constructed and flexible under international law, there remains agreement among states as to the concept of childhood. As will be argued below, the deliberative process by which this agreement was achieved provides a good, albeit imperfect, moral justification for the idea of childhood. Importantly, this social agreement has also an empirical foundation.<sup>5</sup> Although children have greater cognitive capacity than was previously believed, their *evolving* cognitive and physical development means that they will often remain dependent on others for their care and protection. This empirical reality justifies the idea expressed in the preamble of the CRC that childhood is a period of 'special vulnerability [relative to older persons] during which children are in need of special protection.'

However, this conception of children as being vulnerable yet evolving in their autonomy raises two further considerations. First is the need for special protection consistent with a conception of childhood that is presumed to end at 18 years. Can this particular conception of childhood be justified? Does a child of 15, 16 or 17 years really need special protection relative to adults, or are their physical and mental capacities sufficiently aligned with the capacities of persons over 18 of age? Although this issue is addressed in detail in Part III, it is sufficient to note here that the presumptive nature of the definition of a child under the CRC is sufficiently flexible to accommodate the evolving nature of children's capacities and as such can be justified.

The second consideration is whether granting human rights to persons who may lack the capacity to exercise them is justified. Competency is more complex and fluid concept than is often assumed and children's competency in all areas of life has historically been undervalued (Freeman, 2007, 12–13). At the same time, young children do not enjoy the same competencies (in terms of reasoning and understanding) as adults are assumed to possess. This raises the question of whether the idea of human rights for children has a *moral* justification.

### *C. The idea of human rights for children – does capacity matter?*

There are competing theories with respect to the question of who is entitled to rights. The most common theory used to deny rights for children is the *will or choice* theory, under which the capacity to exercise rights is a prerequisite to

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<sup>5</sup> Research concerning children's development is extensive. It is acknowledged that this literature remains problematic and commentators have warned of the dangers associated with developmental theory: (Mayall 2000; Cordero 2012). However, the position taken here is that children's cognitive and physical development cannot be reduced to a *mere* social construction. It is also a biomedical fact – children's cognitive and physical development evolves over time. The real issue is how we interpret this difference and the consequences for understanding the relationship between adults and children.

entitlement. It reflects a traditional Western liberal understanding of rights and is deeply embedded in the ideas of reason and autonomy. For proponents of this model, such as Harry Brighouse, '[t]he further an agent departs from the liberal model of the competent rational person, the less appropriate it seems to attribute rights' (Brighouse, 2002, 31). For Brighouse, given that children depart from this model they should not be entitled to fundamental *agency* rights (Brighouse, 2002, 31–32). Thus, under a will theory of rights, as Onora O'Neill famously declared, a child's 'main remedy is to grow up' (O'Neill, 1988, 463).

Similarly, James Griffin denies human rights to *infants* on the basis that they are 'not normative agents' (Griffin, 2009, 83). For Griffin, infants lack personhood because they lack consciousness and must therefore be seen as *potential* agents rather than actual agents (Griffin, 2009, 84). As such they are not entitled to human rights. Moreover, for Griffin, children's vulnerability does not provide a justification for their rights. He concedes that their vulnerability 'imposes substantial obligations on us not imposed by those able to look after themselves. But one must not 'run together a justification of an obligation and a justification of a right' (Griffin, 2009, 85). This last point may be convincing – not all moral obligations should be human rights – but his reliance on agency to justify human rights is problematic for three reasons.

First, it denies human rights for the least powerful members of society. Infants may not have the capacity to claim rights, but Griffin's approach would deny infants the right to have others assist them to claim their entitlements on their behalf. He would force infants to rely on other sources of obligation to motivate others to address their needs and satisfy their interests, such as charity, ethics, or equity. Although it is important to recognise moral obligations arising from alternative conceptions of justice, even Griffin himself has recognised that '[i]f one can claim a right, one is not dependent upon the grace or kindness or charity of others' (Griffin, 2009, 92). Moreover, if it is accepted that the idea of rights is motivated by a desire to create systems of accountability that regulate the exercise of power by constraining the powerful and empowering the disempowered (Federle, 2011, 449; Cordero 2012, 367), then Griffin's approach is problematic. If rights are contingent on capacity or competency, they become 'exclusive and exclusionary' and children, who are 'unable to define themselves as competent beings', are effectively denied access to the discourse of rights and its capacity for empowerment and accountability (Federle, 2011, 448).

Second, Griffin's motivation for excluding infants from human rights is ultimately more strategic than philosophical. He aims to restrict the 'ballooning of the discourse', and to develop 'criteria for correct and incorrect use of the term' and 'end the damaging indeterminateness of sense of the term "human right"' (Griffin, 2009, 92–93). But his insistence on the idea of a 'correct use' only makes rights more exclusionary, and excluding infants from the benefits of

human rights will not counteract the indeterminacy of rights. If indeterminacy is his real concern, then he needs to focus more on the process by which agreement is arrived at with respect to the *meaning of a right*, as opposed to excluding an entire cohort of persons from an entitlement to rights (Tobin, 2010).

The third problem with Griffin's model is that it represents a foundationalist or essentialist understanding of human rights, in which rights are grounded in *his* understanding of the values *he* considers essential to personhood: autonomy, liberty and minimum provision (Griffin, 2009, 51). Scholars have increasingly challenged naturalist or foundationalist theories in favour of allowing for a multiplicity of justifications (Beitz, 2009; Mitchell, 2010; Eekelaar, 2011; Chase, 2012) – a position that is consistent with the idea of the CRC as an incompletely theorized agreement. John Eekelaar makes this point well in his critique of Griffin's thesis in light of the reality that the CRC provides rights for all children:

If children without agency are given the same protections in the same circumstances by the same bodies and in the same documents as children with agency, what is gained by insisting that only the protections of children with agency are grounded in human rights while those lacking it have right of a different kind, differently grounded in an independent obligation? (Eekelaar, 2011, 234)

Thus, for Eekelaar, it is more prudent to conclude that states' acceptance of the idea of human rights for children, 'may rest on a number of grounds, of which personhood is but one' (Eekelaar, 2011, 234).

A further problem with Griffin's model is that his understanding of personhood, which emphasises normative agency, reflects a will or agency theory of human rights. Although autonomy is a central feature of the literature on the foundations of human rights, a will theory and the idea that capacity is a prerequisite to entitlement, is not the only basis upon which to ground rights. The main alternative is the interest theory (Brennan, 2002), under which 'it does not matter that rights-holders are not in a position to assert rights... what it is to be a right-holder... is merely to be a direct intended beneficiary of someone else's duty bound performance' to recognise the interests of the right holder (Goodin and Gibson, 1997, 188). Significantly, not only do many scholars endorse this model (MacCormick, 1976; Raz, 1984; Kramer, 1998; Freeman, 2010), it is also the preferred theory of rights reflected in international instruments, including the CRC. The only prerequisite for an entitlement to human rights *under international law* is that a claimant is a human being. International law recognises children as human *beings* and not merely *becomings* and they are therefore entitled to human rights, irrespective of their capacity to exercise them. Children may lack capacity to exercise their rights but they do not lack interests, and it is their *interests*, not their *capacity*, which form the foundation of rights under an interest theory.

However, offering a theory which provides a moral justification for *granting* human rights to children (and indeed to any persons who lack capacity) does not resolve deeper questions about whether the actual *idea of human rights* itself can be justified and if so, which *interests* of children should be recognised as rights. It is to these questions that I now turn.

#### *D. Grounding human rights – the persistence of natural rights*

Historically, human rights were founded upon notions of natural law and the inherent dignity of Man (sic). Traces of this approach can be detected in the text of the international human rights instruments. For example, the preambles to the UDHR, ICESCR, ICCPR and CRC each refer to the '*inalienable rights of all members of the human family*' (emphasis added). Since Bentham's attack on the idea of natural rights as being nonsense upon stilts, the legitimacy of these metaphysical foundations has been repeatedly challenged (Beitz 49–59; Sen 316; Stammers, 1999; Eekelaar, 2011; Chase, 2012). At the same time, persistent references to this origin cannot be ignored.

There are two potential responses to this dilemma. First, such references might be considered to reflect the personal values and preferences of the drafters. John Humphrey, who headed the UN body tasked with drafting the UDHR, has recounted his concern at the inclusion of philosophical concepts in the UDHR at the behest of French drafter, René Cassin. With respect to Article 1 of the UDHR, Humphrey reflected that, '[a]part from the fact that at least part of this statement is of questionable truth, it is purely hortatory and adds nothing to the authority of the Universal Declaration of Human Rights' (Humphrey, 1984, 44). Thus, given the diverse moral and cultural perspectives of the states drafting the UDHR, it is possible that many representatives may have assumed that such references were to have no substantive impact on the nature of obligations under the UDHR.

A second way to view these references is to focus on their strategic purpose rather than to treat them as an exposition of the theoretical foundations of human rights (Rosenblum, 2002, 305). Under this approach, it is the political attraction of the idea of inalienable human rights for all members of the human family, including children, that is significant. The famous international law scholar, Hersch Lauterpacht, was committed to grounding rights in natural law (Lauterpacht, 1950, 74). But in his 1950 commentary, *International Law and Human Rights*, he described the 'renaissance of the law of nature' at the beginning of the 20<sup>th</sup> century as an 'unmistakable result of the urge to find a spiritual counterpart to the growing power of the nation state' (Lauterpacht, 1950, 112). For Lauterpacht, the subsequent rise of the German state meant that 'the law of nature became once more a vital element in the affirmation of the

sanctity of the individual and in the craving to find a basis of the law more enduring than the enforceable will of the sovereign' (Lauterpacht, 1950, 112).

This insight reveals the political and strategic role of the idea of natural or inalienable rights. It also suggests that following World War II, overtures to inalienable rights could be interpreted as a moral and political strategy to constrain the power of the nation state and to elevate the status of human rights. Moreover, as this strategy had sufficient appeal among those drafting the UDHR, it was not met with any substantive resistance. In subsequent years, given the absence of any reason to abandon this strategy, this commitment to the idea of inalienable rights in the UDHR became acculturated as a permanent feature of all subsequent instruments, including the CRC.

However, this only provides a possible explanation for the persistence of natural and inalienable rights within the lexicon of international human rights law. It does not provide a sufficient moral justification for the idea of human rights. This is not to dismiss the significance of the idea of natural law because, as Lauterpacht's comments indicate, its inclusion is intimately connected with ideas about the need to regulate the power of the state and elevate the status of the individual. However, if we are seeking a secure conceptual foundation for the idea of human rights generally, including children's rights, then we must look elsewhere. In this respect, the concept of dignity has become something of a default position.

#### *E. The concept of dignity as both coterminous and foundational*

The idea of inherent dignity occupies a revered place within human rights law, but its role remains conflicted and problematic. In the case of the UDHR, ICCPR and CRC, human rights and dignity are stated to be coterminous (UDHR: 'Whereas recognition of the inherent dignity *and* of the equal and inalienable rights . . .' (emphasis added); ICCPR and CRC: 'recognition of the inherent dignity *and* of the equal and inalienable rights of all members of the human family' (emphasis added)). In contrast, inherent dignity is treated as the foundation of human rights in the preamble to the ICESCR ('Recognizing that these rights *derive* from the inherent dignity of the human person . . .' (emphasis added)). It is hard to conceive of a more striking example of incomplete theorization; rights being simultaneously – both coterminous with and derived from dignity.

Moreover, the idea of *inherent* dignity within human rights instruments is also incomplete. It is generally taken to reflect the Kantian notion of dignity, which posits that dignity is the inviolable property of all human beings (Schroeder, 2010), but this is problematic for three reasons. First, it is unaccompanied by a moral justification (Schroeder, 2010). Second, if dignity is

inalienable, it can never be lost. For Killmister, this presents the risk that human rights will offer 'little in the way of guidelines for action' because 'there is nothing to fear from those acts which are sometimes said to threaten us'. Third, and especially relevant to the idea of children's rights, is what Schroeder refers to as the Kantian *cul de sac*. By this she means that under Kant's theory, dignity belonged to human beings 'because of their reasoning faculties which give them the freedom and ability to distinguish moral from immoral actions' (Schroeder, 2012, 329). According to this account of dignity, children, at least younger children, who are not 'morally self legislative', would be denied rights (Schroeder, 2012, 330). Thus, dignity, at least in the Kantian sense, may only offer a 'thin' philosophical justification for children's rights (Schroeder, 2010, 124). Indeed, Schroeder has suggested that it may be more advisable to 'achieve contractual agreement on specific human rights and dispense with a reference to dignity in constitutions' altogether (Schroeder, 2010, 116). It is a confronting argument given the special status of inherent dignity within human rights discourse.

A dilemma therefore exists with respect to the role of dignity in justifying the idea of children's rights. Should we embrace the view expressed by scholars such as Habermas that human dignity provides 'the moral source from which all rights derive their meaning' (Habermas, 2010, 466) or is Schroeder's plea to 'separate the conjoined twins' more convincing? Habermas' suggestion that '[h]uman dignity is one and the same everywhere and for everyone' and thus 'grounds the indivisibility of all human rights' is difficult, if not impossible, to reconcile with the reality of a world characterized by difference (Habermas, 2010, 468). At the same time, Schroeder's approach may be excessive given the special place of dignity human rights discourse.

One possible means of addressing this dilemma is to adopt an intermediary position which neither embraces dignity as the foundation of all human rights nor banishes it entirely from discussion. This approach could involve the acknowledgement that, just as the notion of inherent rights played an important political role in transcending philosophical differences during the drafting of the UDHR, so too did the idea of *inherent* dignity. Habermas himself has acknowledged that 'the concept of human dignity undoubtedly made it easier to reach an overlapping consensus ... during the founding of the United Nations and more generally when negotiating human rights agreements' (Habermas, 2010, 467). Indeed, the widespread use of this concept in national constitutions, philosophical writings, religious beliefs and contemporary social movements has turned it into a 'rallying cry' for the international human rights movement (McCrudden, 2008, 677–78). Thus, the appeal to dignity arose because of its capacity to be 'used as a linguistic-symbol' that could represent 'different outlooks thereby justifying a concrete political agreement on a seemingly shared ground'. But as McCrudden has explained, '[u]nlike

in linguistics ... where a placeholder carries no semantic information, dignity carried an *enormous amount of content, but different content for different people*' (McCrudden, 2008, 678). Thus, while commentators have labeled dignity a 'useless' (Macklin, 2003, 1419) and a 'deeply obscure' concept (Griffin, 2009, 203), McCrudden has distilled an overlapping consensus consisting of three broad elements: first, that 'every human being possesses an intrinsic worth merely by being human'; second that this 'worth should be recognised and respected by others' and third, that 'the State should be seen to exist for the sake of the individual human being and not vice versa' (McCrudden, 2008, 679).

When viewed within this framework, the fact that dignity is stated to be both coterminous and foundational is largely irrelevant. Its inconsistent treatment merely reflects the incompletely theorized nature of international human rights instruments. What matters is that an overlapping consensus exists with respect to the values that underlie its inclusion – a moral commitment to the 'unique' worth (Habermas, 2010, 474) of the individual child; the need to respect this worth (Archard, 2004, 218; Habermas, 2010, 469); and the role of the state in securing this conception of children. Moreover, given the inclusion of provisions such as Articles 5 and 12 of the CRC, children are also 'acknowledged as having agency and as having a voice that must be listened to' (Archard, 2004, 58). Their voice may be not be determinative and their capacity remains evolving, but given the historical invisibility and silencing of children, this consensus is, as Archard observes, 'no mean achievement' (Archard, 2004, 58).

This overlapping consensus is also consistent with the interest theory of rights adopted under international standards. If all human beings have worth purely by virtue of being human, and rights are the means by which this worth is realised, then an entitlement to rights need not depend on the capacity to exercise them. But while this discussion provides some insight into the role played by dignity in justifying the idea of human rights, it says very little about the justification of those *interests* that are elevated to the status of human rights. In the following sections I therefore examine the basis upon which to determine which interests ought to be recognised as human rights.

#### *F. Grounding rights in interests*

Commentators offer a variety of tests to determine the basis upon which interests can be justified as rights. Joseph Raz, for example, argues that only those interests that are of 'ultimate value' to the wellbeing of an individual are sufficient to form a right (Raz, 1988, 176–83). James Griffin contends that an interest is only sufficient to be recognised as a right if it can be established as a component of normative agency (Griffin, 2009, 179–87). Allen Buchanan and Kristen

Hessler understand human rights as 'moral claims grounded in basic human interests' (Buchanan and Hessler 213), while Charles Beitz argues that only 'urgent individual interests' against certain predictable dangers qualify (Beitz 109–110).

The concept of childhood and the varying conceptions of childhood leads commentators to identify differing interests that are seen as being peculiar to children relative to adults, yet still suitable for recognition as human rights. John Eekelaar, for example, suggests that there are three types of interest – basic, developmental, and autonomy – which justify children's rights (Eekelaar, 1986, 161), while Neil MacCormick argues that children have an 'uncontestable interest in being cared for, nurtured and loved' which is worthy of protection (MacCormick 305). Ruth Adler identifies a set of basic and intrinsic interests for children that are deserving of the status of rights (Adler, 1985, 458). Whilst Goodin and Gibson identify shelter, education, basic health care, and care by a loving adult as interests that can be attributed to all children (Goodin and Gibson 38).

Despite such variance, the theme that unites these theorists is that they all offer a vision of rights that is linked to those interests considered as essential for achieving their vision of what it means to be a human being and entitled to a *life of dignity* and *self-worth*, and the *role of rights* in securing that vision. This is not the place to undertake a critical analysis of the various interest theories advanced by commentators to justify the particular interests which they consider deserving of the status of human rights. Rather, the focus of this inquiry is to determine whether a persuasive account can be offered to justify the inclusion of the various interests of children under the CRC as being suitable for recognition as human rights. In addressing this question, the first point to make is that given the incompletely theorized nature of the CRC, and the contested nature of those theories that seek to offer comprehensive accounts as to the proper nature and content of human rights, there is a need to ensure that the search for the perfect does not become the enemy of the good.

With this in mind, in order to justify using various interests of children to ground human rights, it is not necessary to identify a comprehensive moral theory (the 'perfect' justification which in any event is incapable of implementation given the inevitability of incompletely theorized agreements in international law). It is recognised that this approach is at odds with that adopted by someone like Griffin, who is concerned that there is *no* agreement under international law on the criteria by which rights are derived from the idea of what it means to be human (Griffin, 2009, 16). Thus, he is anxious to provide human rights, and by implication the special rights accorded to children, with a substantive conceptual foundation. But there is a *prima facie* question as to whether the underlying assumption upon which he bases his endeavour is

sound. Is there really *no agreement* as to the foundations of the rights granted to children under the CRC?

### G. Using a 'social' interest theory to justify children's rights

The argument made here is that, although incompletely theorized, a level of moral agreement underlies the CRC as reflected in the deliberative process which leads to the recognition of particular interests for children as human rights. The theoretical basis for this agreement may remain incomplete, but this should not preclude it from possessing a *good* justification. Given the incompletely theorized nature of the CRC, the interests that ground and justify children's rights can never be considered inherent or capable of determination by reference to a single test or moral theory. Instead, the identification of these interests will always be contested, negotiated, historically contingent, and produced by particular social processes. Hence, the idea of a *social* interest theory of rights to capture the social and deliberative process by which rights are created and recognised.

This social interest theory of rights carries three considerations for the conceptual foundations of human rights for children. First, there is a need to consider not simply the interests that ground a right but also the obligations of the duty bearer responsible for the fulfilment of those interests; second, an explicit recognition of the struggle to regulate power in the production of rights; and third, an awareness of the need for reflective practice when examining the foundations of human rights for children in a world characterised by diversity.

#### *The need to justify both interests and obligations*

In its most basic form, a right is as an entitlement of X that gives rise to duties or obligations that can be claimed against Y (Raz 166). Under an interest theory, a human right is a species of the genus *rights* that is granted to, or recognised for a person by virtue of being a human where, in the case of international law, the duty bearer is the state. Characterised thus, it is not simply the interest that must be justified, but also the *actual* obligation or duty with respect to the realisation of the interest that has been elevated to the status of a right. This requirement ought to provide comfort to scholars like Griffin who are concerned at the 'ballooning' of human rights (Griffin, 2009, 12) because under a social interest theory, a mere claim that an interest should be elevated to the status of a human right is insufficient because the duty bearer must also accept an obligation with respect to the claim before a human right can be justified.

#### *Recognising the role of power*

Second, in focusing on a theory to explain the moral foundations of human rights, there has been a tendency to overlook the organic role that rights have

assumed in the regulation of power *and* the deliberative nature of how human rights are produced (Stammers 981). As Habermas explains, 'human rights have always been the product of resistance to despotism, oppression and humiliation' (Habermas, 2010, 466). It has been the desire to respond to human suffering and the experiences of perceived injustice within states that has contributed to both the *idea of* and the *claim to* human rights (Lauren, 2003; Hunt, 2007, 15–34; Tobin, 2012, 14–43). A social interest theory of rights recognises this organic and political process.

Importantly, children's rights, like all human rights, also emerged as a tool to regulate the relationship between the powerful and the powerless, between the governed and the governing – to respond to the perceived failings and excesses of particular approaches to governance and power distribution within society, whether in public or private setting (Stammers 980; Guggenheim, 5; Farson, 1974; Holt, 1974; Eekelaar, 1986). Of course, this view is contrary to a trend within some of the contemporary critical literature on children's rights, which perceives this idea as a tool for the regulation of childhood (Grahn-Farley, 2003; Nakata, 2012; Barnes, 2013). This literature certainly raises some interesting questions about how the discourse of children's rights can be (mis)understood, but it is entirely decontextualised in the sense that it overlooks the historical motivations for the emergence and development of the idea of children's rights.

Although this is a complex story, historically children were seen simply as the property of their fathers – a legacy of the Roman doctrine of *patria potestas* – with little role for the state unless children were abandoned. It was not until the late 19<sup>th</sup> and early 20<sup>th</sup> centuries that this proprietary model was challenged when evidence of the harm suffered by children in both private and public settings led to a welfare model committed to the best interests principle. To be fair, this principle was 'very beneficial for children' because it demanded a reorientation away from an exclusive focus on parental and adult interests to a consideration of children's interests (Eekelaar, 2008, 159). It also legitimised state intervention in the private sphere, where this was necessary to secure a child's best interests.

However, the welfare principle also had its 'dark side' (Eekelaar, 2008, 159) and regularly operated as a 'code' or 'proxy' (van Krieken 39) for the interests of others, in circumstances where children's voices were largely absent from any assessment of their best interests. As a new sociology of childhood emerged in the 1970s and 1980s in which children were viewed as *beings* and not merely *becomings*, the claim of human rights for children became stronger (Freeman, 2010, 9–19). Children were no longer passive objects in need of assistance but rather, subjects with evolving agency and an entitlement to participate in matters affecting them. When viewed within this historical context, rather than seeking to regulate childhood, the idea of children's rights emerged as an

explicit challenge to the systems and processes that had previously been used to govern, regulate, subordinate and silence children. A social interest theory of rights locates discussion of the foundations of children's rights within this historical context and recognises the social process that led to the development of the idea of human rights of children.

### *The need for reflective practice*

In a pluralistic world in which values, preferences and experiences vary widely, it is dangerous to insist upon the idea that the list of interests justifying rights must be derived from a comprehensive and internally coherent theory (Young, 2010, 14). Reflective practice requires awareness that as individuals we are restricted in our conception of which interests matter for all human beings, including children. A social interest theory of rights recognises the need to mitigate the impact of individual values and preferences in the identification of those interests that are deemed worthy of being rights.

It therefore requires a much more deliberative and inclusionary process by which interests, and the attendant duties imposed on states, are identified as suitable for designation as rights. This deliberative process provides a 'means of collective problem solving which derives its legitimacy from the wisdom, ideas and criticisms reflected in the diverse opinions of those who participate in such a practice' (Young, 2010, 6). Importantly, this model is also consistent with an inclusionary vision of human rights, as opposed to alternative models that restrict rights on the basis on capacity, or restrict those interests deemed suitable for recognition as rights based on a particular theory reflecting individual sensibilities and preferences. But in this sense, a social interest theory consists of two dimensions – a descriptive dimension and a substantive dimension – both of which have consequences for the justification of the conception of children's rights under the CRC.

### *H. The substantive dimension of a social interest theory*

The *descriptive* dimension of a social interest theory refers to the deliberative process by which agreement is achieved on those interests that are elevated to the status of a right. It recognises that such agreement, although incompletely theorized, reflects a level of moral consensus amongst participants in the drafting process. But a social interest theory of rights also has a *substantive* dimension that demands that the identification of the interests deemed suitable for recognition as rights and the attendant duties imposed on states, should each occur via a collaborative and deliberative process that *includes* both rights-holders (or their representatives) and duty-bearers (or their representatives). This is consistent with Iris Marion Young's theory of deliberative decision-making to the extent that a 'decision is normatively legitimate only if

all those *affected* by it are included in the process of discussion and decision-making' (Young, 2010, 23). Moreover, by focusing on the identity of the parties involved in identifying the interests suitable for recognition as rights, the substantive dimension of the social interest theory also addresses Eekelaar's concern that proponents of 'interests formulations of rights are notably reticent in stating how the "rights holders" interests are constructed and by whom' (Eekelaar, 2008, 136).

At this point, a major obstacle to the justification of the rights for children under the CRC arises. The deliberative process that led to the adoption of this instrument after ten years of negotiations did not include children. According to Freeman, '[t]he Convention thus encodes a set of rights and takes an image of childhood from the perspective of the adult world looking in almost as an external observer on the world(s) of children' (Freeman, 1998, 439). On reflection, this may be overstating the impact of the exclusion of children's voices from the drafting process. Ultimately, the experience of childhood also belongs to all adults, and with age comes wisdom (hopefully) and an understanding of life that most of us would concede would have been of benefit in our younger years. At the same time, the nostalgic perspectives of adults provide at best a partial insight into the interests of children. Moreover, even if we rely on the collective perspective of adults to identify children's interests, this presumes that children as a cohort, and indeed individual children themselves, necessarily lack capacity, insight and expertise with respect to their interests, when evidence tells us that this is not the case.

However, this does not mean that the idea of children's rights under the CRC has *no* conceptual foundation. The deliberative process that led to the adoption of the CRC still produced an agreement, albeit an incompletely theorized one, on the fundamental idea that children are entitled to human rights. However, the exclusion of children's views produces a dilemma under the substantive dimension of a social interest theory. Thus, in the final section of this paper I will draw on the social interest theory to examine not only the implications of this deficiency but also those other concerns that are routinely raised to challenge the conceptual foundations of the CRC and its conception of children's rights.

### 3. Using a social interest theory to critique the conception of children's rights under the CRC

When examining the CRC through the lens of a social interest theory, the exclusion of children's voices – what I have termed the adult construction dilemma – is not the only source of concern. Western dominance during drafting also challenges the inclusiveness of the process. Thus, the present

discussion analyses both the adult construction dilemma and the relativist challenge in order to determine the extent to which the conception of children's rights is compromised under the terms of a social interest theory. It reveals that the significance of each of these critiques is overstated and that the malleability of the text of the CRC allows for both the views of children and diverse cultural perspectives to inform the understanding and implementation of children's rights.

The remainder of part III uses the social interest theory to examine the legitimacy of those concerns and objections that are routinely raised to challenge the conception of children's rights under the CRC. These concerns are described as the anti-family concern and the liberationist and protectionist objections. The conclusion drawn is that much of the conceptual opposition to children's rights is associated with a preference for a *will theory* of rights; a failure to read the actual text of the CRC; or insistence on a particular interpretation of the CRC that overlooks the potential for an alternative and persuasive interpretation that would address the cause for concern.

#### A. *The adult construction dilemma*

The history of *rights* discourse reveals a vision of an adult (and more specifically a male adult) as the subject of rights. Irrespective of whether the origins of this discourse are traced to religious texts or the Enlightenment, capacity for reason and autonomy have historically been linked with an entitlement to rights. As children have been assumed to lack this capacity, they have been denied rights. But as discussed above, this capacity or will theory has been increasingly challenged by an interest theory of rights in which the only prerequisite for rights is the status of being a human being. Moreover, the interest theory is the model conceptualised under the international human rights instruments that have been negotiated and agreed upon by states.

The granting of human rights to children, however, has not been accompanied by their involvement in the identification of those interests that should be elevated to the status of rights. This process has been undertaken entirely by adults, which is contrary to the terms of the social interest theory. This does not mean that international human rights law is blind to the particular interests of children. This criticism might be leveled at the early human rights instruments, such as the UDHR, ICCPR and ICESCR, which largely reflect an adult catalogue of interests. However, the CRC and its optional protocols were specifically drafted to accommodate the lived experiences of children. Thus, it cannot be said that the discourse of human rights has been constructed with only the *adult* human in mind (*cf* Cordero, 2012, 365).

Moreover, the interests identified as suitable for recognition as human rights for children are invariably informed by the lived experiences of children,

albeit as interpreted and understood by adults. For example, working children were and continue to be subject to exploitation (ILO, 2010), thus Article 32 of the CRC prohibits *exploitative* child labour; and children were and continue to be subject to violence, neglect and abuse within the home (World Report on Violence Against Children, 2006) thus Article 19 demands protection against violence. Moreover, developments in the psychological and sociological literature concerning conceptions of childhood during the latter part of the 20<sup>th</sup> century have also challenged assumptions about children's capacity and provide support for recognition of their evolving capacities and their right to have their views heard under Articles 5 and 12, respectively.

Thus, the interests recognised as rights in the CRC do not simply reflect adult interests, but reflect an understanding or conception of children's interests, which is interpreted and construed by adults. But this is still problematic under the *substantive* dimension of a social interest theory, which requires that the identification of those interests deemed suitable for recognition as rights involves a deliberative process drawing on the perspectives of both the beneficiaries of those rights and of the duty bearers. A question therefore exists as to whether this deficiency can be addressed. In response to this dilemma four points are made.

(a) *A rebuttable presumption*

First, the presumption in favour of the inclusion of rights beneficiaries in drafting is rebuttable. As Upendra Baxi has warned, the 'ritualistic invocation of the mantra of "participation" simply bypasses some further hard problems' (Baxi, 2010, 12). This warning is particularly apt with respect to children and especially very young children who will often lack the interest and/or physical and intellectual capacity to participate, either directly or indirectly through representatives, in the deliberative process. The CRC is sensitive to this reality and requires, under Article 12(1), that states' obligation to assure to children the right to express their views in all matters affecting them is only applicable to those who are 'capable' of forming a view. But even in the case of older children who will be capable of forming views on many matters that affect them, there are still logistical and conceptual challenges to the facilitation of their effective and representative involvement. Participation requires time and resourcing. Issues also arise with respect to the extent to which the views of a child or a group of children can be taken as representative of the views of all children (of course, the same challenges also exist with respect to the participation of adults).

In such circumstances, Eekelaar has argued that the rights recognised for such persons, whether adults or children, can still be justified if these rights 'refer to protection of interests, which we can *safely say they would recognise as theirs*' (emphasis added) (Eekelaar, 2008, 137). This seems reasonable but it

does not address concerns associated with an adult-centric deliberative process. As a minimum, those who do take part in the deliberative process, whether adults or children, and who purport to represent children's interests, must ensure that they do not simply substitute their own interests. In this respect, Article 3 of the CRC, which demands that children's best interests be a primary consideration in all matters concerning them, is critical. But something more is required if the identification of children's best interests is to accommodate what children actually believe to be in their interests.

(b) *The role of participatory research in mitigating the risk of proxy interests*

It is suggested that the risk that children's representatives might substitute their own interests for those of children can be mitigated when the identification of children's interests is empirically founded. Such evidence draws on the lived experiences of children rather than assumptions and speculation about their interests to justify their rights. Thus, if there was evidence that demonstrated that children 'consciously repudiated an alleged interest, its protection could not be said to be in furtherance of their rights' (Eekelaar, 2008, 137). But caution must still be exercised here because research with children cannot be seen as a panacea to the child participation deficit in the CRC. As Cordero has warned, 'we cannot speak of merely making children's rights dependent on the sociology, psychology or anthropology of childhood ... when these are *disciplines also exclusively driven by adults*' (emphasis added) (Cordero 2012, 367). Faced with this dilemma, for Cordero the solution is to 'make the rights of children *dependent on children's voices*' (Cordero 2012, 367).<sup>6</sup> But such an approach risks swinging the pendulum too far and is incompatible with a social interest theory of rights.

The rights of any group cannot be entirely dependent on the voices of that group. Apart from the reality that children do not speak with one voice, under the substantive dimension of a social interest theory, rights are produced (and understood) as a result of a deliberative process involving all interested parties, beneficiaries and duty-bearers. To make rights for children dependent *solely* on the voices of children is to ignore the collaborative nature of the rights exercise. Thus, adults who play a role in the realisation of children's rights, whether as parents, state officials, professionals working with children, cultural or religious representatives, must be involved (either directly or through representatives) in this process. Children too have a critical role to play and their views must be given due weight in accordance with their age and maturity (more on this later).

Equally importantly, research concerning children, which allows for the identification of their interests *and* the measures required for their realisation,

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<sup>6</sup> *Id.*

must also be performed in a manner that perceives children as active collaborators rather than passive objects of inquiry. If adults are to understand the lived experiences and interests of children fully, there is a need for research projects and participatory research methodologies that allow adults to understand children's interests and what it means to be a child, '*as lived by and understood by children themselves*' (Cordero 2012, 368). This approach, which is increasingly referred to as a rights-based approach (Lundy and McEvoy, 2012), seeks to re-conceptualise the relationship between researcher and subject such that research is undertaken *with* rather than *on* children. It is not without its own methodological, conceptual and logistical challenges. However, for present purposes, it is sufficient to note that participatory research methodologies with children have the capacity to reveal diverse conceptions of childhood, promote respect for children, empower children and offer a rich empirical basis for policy and action which recognises children's lived experiences and the interests which children themselves prioritise (Beazley, 2011, 159). As such, this research has the capacity to address many of the deficiencies arising from the exclusion of children's views during the drafting of the CRC.

(c) *Reading the CRC as an illustrative list of children's interests*

The third point to be made in relation to the adult construction of the CRC is that the list of interests recognised as rights should be read as *illustrative* rather than exhaustive. Commentators often criticise the CRC for the marginalisation of certain childhoods and omission of rights that may have been included had children been involved in drafting, such as the rights to work or be loved (Ennew, 1995, 202; Freeman, 2000; Nieuwenhuys, 2009). But such a criticism overlooks the potential of Article 3 to provide a mechanism by which children themselves can agitate for additional interests beyond those already listed.

There has been a tendency to interpret Article 3 simply as restating the welfare principle; that is, that children's best *interests* must be a primary consideration in all matters concerning them. Historically, adults have been the sole arbiters of what constitutes a child's *interest*. But such an approach is inconsistent with the Article 3 requirement that children themselves be entitled to play a role in the identification of those *interests* (Eekelaar, 2006, 160–62). This is because Article 12 of the CRC, which provides children with a right to express their views in all matters affecting them, demands that an understanding of children's best interests must be informed by children themselves where they have the capacity to make such a contribution. Children are therefore entitled to demand that those interests, which they prioritise, but which may not be listed as rights in the CRC, must nonetheless remain a primary consideration in all actions concerning them. The interpretation of Article 3 must not play 'into a savior vision of human rights' in which children's interests 'are determined exclusively by those with power to provide to those less privileged'

(Chase, 2012, 515). On the contrary, children's rights, and by implication their interests, represent 'objects of struggle that can be seized from below and in that process redefined' (Chase, 2012, 515). Under a social interest theory of rights, children must be part of this process and Article 3 of the CRC provides a normative foundation to demand such an approach.

(d) *The role of children's views in the interpretation and implementation of their rights*

The final point to make with respect to the adult construction of the CRC is that the meaning of many of the rights enumerated in this instrument and the measures required for their *implementation* are anything but settled. Elsewhere I have outlined a model for what I describe as a constructive approach to treaty interpretation (Tobin, 2010), a core element of which is the idea that the relevant interpretative community has an interest in and must contribute to the accepted understanding of a particular right and the measures required for its implementation. Children must be considered a part of this interpretative community with respect to both the interpretation and the measures required for the implementation of their rights under the CRC.

To take one example, Article 19 protects children against all forms of violence, abuse and neglect but provides no definition of these terms. Thus there is a risk that adult conceptions of violence and abuse will be used exclusively to inform the understanding of this obligation when children themselves may have different conceptions of what amounts to violence (Saunders and Goddard, 2008; Morris and Hegarty 2012). It is within this context that the CRC Committee has explained that, 'in conceptualizing violence ... the critical starting point and frame of reference must be the experience of children themselves' (CRC/C/111 para 704). The reality is that many children, especially young children, will often be unaware that they have been the victims of conduct that violates Article 19. Moreover, as the CRC Committee has recognised, socio-cultural barriers often impede children from expressing their experiences or seeking assistance and states must therefore take measures to alleviate these barriers (CRC Committee, 2011 paras 12 & 63).

However, Article 12 still creates a normative expectation with respect to children's role in the interpretation and implementation of their rights. It requires that states assure children who are capable of forming views with the right to express those views in *all matters affecting* them. This provision remains clouded by ambiguity, but a persuasive argument can be made that the interpretation of the rights under the CRC is, itself, a matter '*affecting*' children. This is because the interpretation of a human right granted to children will inform the measures adopted to implement it, which in turn will *affect* children.

Importantly, Article 12 imposes a positive duty on states to take reasonable measures to create mechanisms that will enable children with appropriate

capacity to play a constructive role in the determination of those measures necessary to secure the implementation of their rights (CRC Committee, 2009, paras. 48–49). It does, however, qualify the relevance of a child's views which need only be given due weight in accordance with the child's age and maturity. Commentators have interpreted this as rendering the evaluation of a child's view subject to 'the particular theory of development' held by the adult interpreter (Smith, 2002, 75). It is conceded that there is always the risk that Article 12 could be interpreted to allow 'adults to retain authority over children' (Archard, 2004, 66) or to allow the CRC to operate as an 'instrument for the denial of children's citizenship' (Milne, 2005, 41). But there is also the prospect that a persuasive and alternative interpretation of Article 12 could be offered to demand that adults cede their authority over children *and* actively facilitate their citizenship. I will address this point in further detail below but first I wish to turn my attention to the relativist challenge.

### *B. The relativist challenge*

Unlike children, who were never invited to take part in drafting, all states were invited to participate in the Working Group that drafted the CRC. In reality, however, drafting was dominated by Western states (Legislative History 933–937). States from Africa, the Asia-Pacific, the Middle East and Latin America were present but 'extremely poorly represented' (Harris-Short, 2001, 304; Le Blanc, 1995, 27–37). Moreover, many of the non-Western states lacked the resources and support services to match those enjoyed by Western states. Thus, from the perspective of a social interest theory of rights, this lack of *effective* participation by many states remains problematic and undermines the legitimacy of this instrument.

This concern is generally understood as the relativist challenge and represents a constant obstacle to efforts to justify all international human rights, including children's rights. The preamble to the Universal Declaration of Human Rights may proclaim 'a common standard of achievement for all peoples' but for many, international human rights simply reflect Western values and preferences. It is within this context that the *concept* of human rights for children is said to be alien to non-Western cultures and the CRC is said to reflect a Western *conception* of childhood (Burman, 1992; Ennew, 2002; Harris-Short, 2003; Appell, 2009; Pupavac, 2011). The general universal/relativist debate has been canvassed in detail elsewhere and need not be repeated here. Instead it is sufficient to make six observations in the context of children's rights from a social interest theory perspective.

#### *(a) A normative commitment to culture*

Despite Western dominance during the drafting of the CRC, as observed by Sonia Harris-Short, 'the determined and constructive participation throughout

the drafting process of states such as Algeria, Argentina, Senegal and Venezuela, ensured that the CROC reflected at least to some extent, a diversity of cultural traditions' (Harris-Short, 2001, 322). Indeed, a close examination of the text of the CRC reveals a stronger commitment to cultural diversity than is generally assumed. Article 1 provides states with flexibility in relation to when childhood begins and ends; Article 5 requires states to respect the rights, responsibilities and duties of parents, members of the extended family or community, as provided for by local custom; Article 17 requires states to disseminate material of cultural benefit to the child with respect to children's linguistic needs; Article 29 requires that education be directed not only to respect for a child's parents, but also respect for his or her 'own cultural identity, language and values' and the national values of the country in which the child is living; Article 30 recognises a child's right to enjoy his or her own culture and language; and Article 31 respects the child's right to participate fully in cultural life.

Thus the CRC should not be interpreted as advocating an atomistic, Western, liberal conception of childhood that severs children from the associated cultural values and practices into which they are born (cf Mayall 245). On the contrary, the CRC conception of childhood and understanding of how children's rights are to be understood and realised is culturally sensitive. There are, however, limits to the level of cultural deference permissible under the CRC. For example, Article 5 only tolerates the exercise of parental rights and practices accepted under local custom to the extent that this discretion is exercised subject to a child's evolving capacity and designed to provide appropriate *direction and guidance* in a child's exercise of his or her rights.

This conception of childhood clearly conflicts with alternative conceptions under which children are deemed either to lack capacity or to remain subject to the exclusive control of their parents. However, these alternative conceptions will be held not just *within* non-Western states, but also Western states. Indeed, it is worth recalling that the USA is one of only three states, along with Somalia and South Sudan, not to have ratified the CRC. Moreover, an Australian inquiry into the CRC revealed that 51 per cent of submissions opposed it (Australian Senate Inquiry, 1998). Thus, it is an oversimplification to suggest that the CRC reflects a Western conception of childhood. A more accurate assessment is that it reflects a normative commitment to a conception of childhood in which the rights of children are understood and mediated by reference to the cultural practices in they live.

(b) *The incompletely theorized concept of culture*

Despite this explicit deference to culture, the concept of culture itself is not defined in the CRC. This is yet further evidence of the incompletely theorised nature of this instrument. In practice, much of the relativist debate within the human rights space refers to either an 'essentialized' conception of culture or a conception of culture as 'national identity' (Merry, 2006, 6-16). The former

views culture in negative and backward terms and uses it as a basis for intervention to address harmful cultural practices. Within this context, the universal standards of the CRC are interpreted in light of dominant Western values as a civilising discourse, which is used to critique children's treatment in non-Western states. In contrast, the idea of culture as national identity is used to resist attempts to enforce CRC standards on the assumption that this instrument reflects values that have no place within the culture of non-Western states.

A further understanding of culture, which is preferred by anthropologists such as Sally Merry, understands culture to be contentious and fluid (Merry, 2006, 14–16). It will always be contested as social practices within a community shift over time in response to changing power dynamics. This view rejects the essentialised and national identity conceptions of culture, but accepts that there will always be dominant social practices within a society, which are embedded in systems of power (Merry, 2006, 14–16).

This conception aligns with the ideas unpinning a social interest theory of rights. It demands that when speaking about the relativist challenge, there will always be a need first to enquire as to the status and identity of both those who advocate *and* resist calls for the implementation of children's rights. It makes no assumptions about the legitimacy or otherwise of dominant cultural practices but, as with a social interest theory, requires an inquiry into the social process by which these practices have been adopted and agreed upon. Moreover, the legitimacy of such practices, and the extent of deference to them, must be assessed in light of the extent to which those affected are included in the process leading to adoption.

(c) *The fallacy of a Western and non-Western conception of childhood*

An examination of the relativist debate by reference to the idea that culture is contentious also reveals that it is misleading to talk about a Western and a non-Western *conception* of childhood. A more accurate approach, and one that is consistent with a social interest theory of rights, is to acknowledge that there are various *conceptions* of childhood *within* both Western and non-Western states which will always remain contentious, dynamic and historically contingent. At times certain conceptions are more dominant and have a greater impact on social practices and regulatory policies relating to children.

Within the context of the relativist challenge to international human rights law, there is a tendency to assume that the *dominant* Western conception of childhood is 'based on the idea that children should be protected from the adult world'; that 'childhood is a time of play and training for adulthood' and that children are entitled to rights without the burden of responsibilities' (Pupavac, 1998). In contrast, under the dominant non-Western counterpart, children are said to have duties to family and the broader community, while

the realities of poverty often mean that they must work and engage in activities that are demonised in Western states (Pupavac, 1998). Regardless of whether these conceptions actually reflect the dominant Western and non-Western notions of childhood, a question arises as to whether the CRC promotes this alleged Western conception of childhood to the exclusion of a non-Western conception.

The preamble and text of the CRC certainly view children as being in need of special protection because of their vulnerability relative to adults. The nature of this protection, and whether it can be justified, is discussed in further detail below. At this point it is sufficient to note that this conception of childhood is also the foundation for the *African Charter on the Rights and Welfare of the Child*.<sup>71</sup> It is therefore misleading to suggest that this conception is peculiar to Western states. Moreover, the text of the CRC does not necessarily seek to *exclude* children from the adult world but rather to protect them from *exploitation* upon entry into it. For example, Article 32 does not protect children from work *per se*, but from *economic exploitation*, Article 34 does not protect children from prostitution or pornography but from their *exploitative use* in these activities and Article 36 protects them from all forms of exploitation prejudicial to their welfare. Thus, the CRC seeks to protect children from *exploitation* in the adult world, but it does not necessarily seek to exclude them from that world.

The perception that the CRC reflects an individualistic conception of childhood which excludes a non-Western understanding of children having broader family and community responsibilities is also unsupported by the drafting history and text of the CRC. During drafting, Senegal recommended the inclusion of an Article to the effect that the 'child has the duty to respect his parents and give them assistance in case of need' (Legislative History 363). Significantly, the values underlying this proposal received wide support among members of the working group (Legislative History 363). However, resistance to its inclusion arose due to a concern that this was a moral obligation that could not be given legal substance because it would be impossible to enforce in practice (Legislative History 353). The resultant compromise was to include the 'development of respect for a child's parents' as one of the aims of education under Article 29 (Legislative History 363). Importantly, this demands that states take active measures to realise this aim in the development of their education systems (CRC Committee, 2001 para 22).

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<sup>71</sup> The fourth preambular paragraph of the African Charter provides that 'the situation of most African children remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger, and on account of the child's physical and mental immaturity he/she needs *special safeguards and care*' (emphasis added).

(d) *The role of culture in interpreting children's rights*

The final point to make with respect to the relativist challenge is that a social interest theory of rights anticipates that the ambiguity in the text of the CRC provides scope for cultural practices and values to be considered for interpretive purposes *and* in the context of measures for implementation. There will always remain a risk that children's rights might be used and interpreted in a hegemonic way to displace, devalue or colonise competing agendas, including non-dominant cultural values (Kennedy, 2002, 108–09). Indeed, there is evidence to suggest that the CRC Committee has tended to interpret the CRC in a way that is not sufficiently accommodating of cultural differences. For example, its identification of traditional practices that are harmful to children (under Article 24(3)) tends to focus almost exclusively on non-Western practices such as female genital cutting, forced marriages and traditional adoption practices (Harris Short, 2001, 332–349; Tobin, 2009, 378–86). But it has failed to classify practices, which are common in the West, such as corporal punishment (Tobin, 2009, 381) and the sexualisation of young girls (Rush and La Nause, 2006), as being harmful traditional practices. The result is that the traditions and culture of non-Western states 'are constantly presented as a "problem", while those of Western states remain unproblematised (Harris-Short, 2001, 350).

An alternative interpretation is to adopt an approach that is more collaborative and less dismissive of non-Western conceptions of childhood. The lens through which the CRC is interpreted need not, and indeed should not, focus on dominant Western values and experiences. Moreover, cultural diversity has a legitimate and critical role to play in identifying the measures required for the implementation of a right. I have discussed this requirement elsewhere as the principle of 'local context sensitivity' (Tobin, 2010, 40–43), which disapproves of the automatic transfer of Western expectations and understandings with respect not only to the meaning of a right but also to the measures for its implementation. It accepts that these measures will not be universal and require sensitivity to the social, cultural and political practices, thereby allowing a degree of discretion for states.

At the same time, this does not allow for cultural or traditional practices to be invoked as in defence of alleged violations of a child's rights. As Philip Alston has explained, '[j]ust as culture is not a factor which must be excluded from the human rights equation so too must it not be accorded the status of a metanorm which trumps human rights' (Alston, 1994, 20). Accordingly, Article 24(3) demands that '[s]tates parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children'. The measures required for the elimination of such practices, however, are not to be imposed or defined exclusively by reference to Western values or expectations. On the contrary, a context-sensitive approach

favours local collaboration and consultation rather than the imposition of hegemonic visions of the content and scope of children's rights (Tobin, 2009).

The preceding discussion demonstrates that when viewed through the prism of a social interest theory, much of the anxiety arising from the view that the CRC is Western-dominated and adult-centric is exaggerated. This instrument may remain incompletely theorized, but it still has a clear commitment to accommodating cultural diversity and the views of children. Addressing the challenges presented to the idea of children's rights by the adult construction dilemma and the relativist challenge, however, still leaves this idea vulnerable to critique from other perspectives. It is to these that I now turn.

### C. *The anti-family concern*

A strong source of objection to the concept of children's rights generally and the CRC conception of rights is the perception that they undermine the family unit by promoting a conception of childhood that is severed from, and potentially antithetical, to the idea of the family. An examination of this critique reveals two central deficiencies. First, it is unsupported by the actual text of the CRC. Second, it is informed by a *will theory* of rights, which is inconsistent with the *interest theory* of rights adopted under the CRC.

#### *A normative commitment to the family and parents*

Under the CRC, children and the realisation of their rights are very much situated within the context of the family (Tobin, 2005). The family is identified in the preamble to the CRC as being 'the fundamental group of society and the natural environment for the growth and wellbeing of all its members and particularly children'. As such, the family is to be 'afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community'. The preamble also states that children 'should grow up in a family environment, in an atmosphere of happiness, love and understanding.'

Moreover, the text of the CRC provides that states must respect the rights, duties and responsibilities of parents with respect to their children (Art. 5); education is to be directed to respect for a child's parents (Art. 29); parents have primary responsibility for the care of their children (Arts. 18 and 27); states must assist parents in the performance of this responsibility; (Arts. 18 and 27); and children must not be removed from their parents unless necessary to secure a child's best interests (Art. 9). In light of these provisions, there is no textual foundation for the argument that the CRC undermines the family unit. Indeed, it offers a conception of rights, which is deeply relational when compared with the individualist conception traditionally associated with rights discourse (Federle 460-62; Minow, 1986).

### *A relational conception of rights*

Children's rights under the CRC are not claims to be asserted against the state to be enjoyed in isolation from parents and family. On the contrary, there is an expectation that the realisation of children's rights will be deeply connected and interdependent with the exercise of parental rights, responsibilities and local customary practices. As such, the family, and indeed the community and culture in which a child lives, will be the context in which their rights will be understood, mediated and enjoyed. Moreover, this relational conception of rights is consistent with children's own conception of their relationship with adults. As sociologist Berry Mayall has observed, '[c]hildren recognise the central importance of child-family relationships... They emphasise interdependence and reciprocity, rather than lonely autonomy as central values' (Mayall, 2000, 254). Thus, whereas 'Western liberal thinkers have regarded the autonomous independent moral agent as the highest form of life, children regard relationships as the cornerstone of their lives' (Mayall, 2000, 256). Significantly, the CRC recognises the special relationship between children and parents and indeed the culture in which they live. It therefore challenges an individualistic and masculinist orthodoxy by offering a conception in which the young person's autonomy is both evolving and relational.

It is important to acknowledge that for some commentators, the CRC's deference to adults is still considered unwarranted and reflects an overly protective and paternalistic conception of children's rights. Since the legitimacy of this particular critique will be examined in the next section, it is sufficient to note here that the contention that the CRC is anti-family has no basis.

### *The conception of family under the CRC – due deference with limits*

A more accurate assessment of the CRC is that it reflects a particular conception of the family *and* the parent-child relationship, which is hostile to alternative conceptions of these ideas. Tension arises in at least five areas. First, although the CRC allows for deference to parental rights and responsibilities, this remains subject to the child's evolving capacities and is only permissible where parental powers are exercised so as to *guide and assist* the realisation of children's rights. This approach is inconsistent with a conception of the family in which parents maintain exclusive *power and control* over a child and are not required to respect their evolving capacities.

Second, the CRC tolerates no violence, abuse or neglect towards a child in the care of a parent or guardian (CRC Committee, 2011). This conception contrasts sharply with those in which a reasonable level of violence (and more specifically, corporal punishment) is accepted as a legitimate disciplinary technique for children (cf *Plonit v. Attorney General*, 2000; *Canadian Foundation for Children and Youth and the Law v. Canada*, 2004; CRC Committee,

2007). Third, Article 1(1) of the CRC demands that parents share common responsibilities for a child's upbringing and development. This conception contrasts with those who embrace gendered responsibility for child rearing. Fourth, the CRC offers no definition of 'family' or 'parents' – a further example of its incompletely theorized nature. Thus, the possibility remains that these terms may be interpreted to challenge dominant and traditional understandings of the 'family' and 'parents'. For its part, the CRC Committee has observed that '[w]hen considering the family environment the Convention reflects different family structures arising from the various cultural patterns and emerging familial relationships' and 'it would seem hard to argue for a single notion of the family' (CRC Committee, 1994, 2.1). It is within this context that I have also argued elsewhere that an interpretation of the terms 'parent' and 'family' that is informed by and consistent with the best interests of a child, demands recognition of the possibility and legitimacy of single or same-sex parented families, and the possibility that a child may have multiple parents (Tobin, 2004, 11–12). The CRC therefore offers a conception of the family and the idea of parents that will conflict with alternative conceptions.

Fifth, the CRC offers what could be termed a *collaborative* or *cooperative* conception of the relationship between state and family as regards children's upbringing. This sits somewhere between the liberal *individualist* conception of the family, in which the state must not interfere with a family unless a child is at risk, and the *collectivist* conception, in which child-rearing is under direct control of the community (Archard, 2004, 167–191). Under a collaborative/cooperative model, parents have primary responsibility for children's upbringing but the state (and by implication the broader community from which the state will draw its resources) plays a critical role in assisting parents. Thus, Article 18(2) provides that states 'shall render appropriate assistance to parents ... in the performance of their child rearing responsibilities' and Article 27(3) requires states to take appropriate measures, in accordance with national conditions and within their means, to assist parents and others who are responsible for a child's development, including through the provision of 'material assistance and support programmes particularly with regard to nutrition, clothing and housing.' As such, the CRC advocates a model that enables parents to make claims upon the state and by implication the broader community to take reasonable measures to provide them with necessary assistance to satisfy their parental responsibilities.

In light of such provisions, any suggestion that children's rights under the CRC threaten the integrity and communal fabric of effective family functioning is without foundation. Instead of pitting the rights of parents against those of children, the CRC actually offers a relational rather than individualistic conception of rights. It recognises that as children's autonomy evolves, the role of

parents in assisting in the realisation of children's rights, will diminish. But an understanding as to the meaning of children's rights cannot be separated from their family and indeed the culture in which they live.

#### *D. The liberationist and protectionist objections*

The CRC is routinely challenged on the grounds that it offers a conception of childhood in which children are either abandoned to their autonomy (Hafen and Hafen, 1996) or subject to an excessively protectionist regulatory agenda that is controlled by adults (Cordero 2012, 68; Barnes, 2013; Federle 82). Neither of these claims withstands scrutiny. The liberationist objection, like its anti-family counterpart, is underpinned by the assumption that the CRC reflects a will theory of rights (and thus grants children full autonomy) when in fact it reflects an interest theory (that recognises their evolving and relational autonomy). For its part, the protectionist objection displays no understanding of the idea that protection rights, and not simply autonomy rights, are an underlying feature of *all* international human rights and not just children's rights.

The contemporary liberationist objection traces its origins to the early childhood liberationist agenda of the 1970s in which commentators such Holt (1974) and Farson (1974) advocated a radical conception of childhood in which children were to enjoy the same rights as adults. But this idea has never gained traction among political and philosophical commentators (Purdy, 1992; Archard, 2004, 70–77). Nor does the CRC support this vision. On the contrary, as discussed above, a central part of the moral justification for the CRC is the special vulnerability of children relative to adults and the need to protect them. This protective justification actually consists of two parts – a position that has not been recognised in the literature. First, the idea that children must be protected against potential harm (both physical and non-physical) from others – the *risk of exogenous harm* – and second, the idea that children must be protected against potential harm from themselves – the *risk of endogenous harm*.

#### *Exogenous harm*

The risk of exogenous harm is actually a fundamental feature of *all* human rights instruments and is not peculiar to the CRC. Examples of these general protective rights include the right to life, the prohibition against torture, cruel inhuman and degrading treatment, the right to humane detention conditions and the prohibition of discrimination. The justification for such rights arises because of an acceptance that all individuals, whether adults or children, can find themselves in relationships in which a power differential renders them vulnerable to harm. The interest in avoiding such harm founds recognition of such rights, which oblige states to take reasonable measures to protect

individuals. It is thus incorrect to suggest that '[a]dults are not protected against exploitation, abuse, neglect or negligent mistreatment' (Archard, 2004, 60) and that *protection rights* are peculiar to children's rights. Human rights law seeks to protect *all human beings*, adults and children, from harm and abuse.

The CRC acknowledges a greater range of scenarios in which children are considered in need of special protection against exogenous harm. As such, there is an issue as to whether the inclusion of these scenarios can be justified. For example, do children need the development of appropriate media guidelines to guard against information and material that is injurious to their wellbeing (Art. 17)? Do children need states to take measures to protect them against all forms of violence and abuse while in the care of parents (Art. 19)? Do children deprived of their family environment, refugee children and children with disabilities require special protective measures (Arts. 20, 22 and 23)? Do working children need to be protected against exploitation (Art 32)? It is not necessary to examine the justification for each of these rights here and it is sufficient to note that the lived experiences of children provide an empirical basis for requiring states to take special measures to protect children in these circumstances. The tragic reality is that children's physical vulnerability and cognitive ability relative to adults exposes them to abuse, violence, harm and exploitation which is not restrained by cultural or temporal boundaries.

However, the fact that the CRC demands protection against exogenous harm does not *necessarily* infantilise children or construct them as mere objects for regulation, intervention and control by adults. It is important to recall that human rights law also requires protective measures for adults when they are in vulnerable situations. The real issue arises with respect to the *identification* and *implementation* of the protective measures and the extent to which the views of the intended beneficiaries, whether adults or children, are taken into account. Are they perceived simply as victims in need of salvation or are they seen as exploited individuals who possess agency but have been forced to make choices in conditions not of their choosing? (Phoenix, 2002, 362).

In addressing this dilemma, the CRC actually offers more guidance than other human rights instruments. This is because Article 12 requires the views of children to be taken into account in all matters affecting them. The scope of this provision must extend to the measures adopted by adults for children's protection because such measures will, to borrow the words of Iris Marion Young, 'significantly condition' a child's 'options for action' (Young, 2010, 145). As such, the CRC promotes a more inclusive and consultative model of decision-making with respect to matters affecting children than other treaties, which are silent as to the process by which states must determine appropriate measures to secure human rights. Thus, the CRC rejects a conception of children that renders them objects or victims in need of protection, in favour of a one

in which their evolving agency and capacity must be taken into account. At the same time, it is important to acknowledge that for many, the alleged autonomy offered by Article 12 remains deeply problematic. I address their concerns below. However at this point I turn to the issue of endogenous harm.

### *Endogenous harm*

The CRC does not actually explicitly demand that adults ensure that children do not harm themselves. However, this is implied in the text of Article 5, which provides that states must respect the rights and responsibilities of parents and guardians to provide *direction and assistance* to children in the exercise of their rights. The CRC therefore concedes that children do not always have the same capacity as adults and that adults will often have to exercise a child's right on his or her behalf. Thus, whilst adults are presumed to know what is in their own best interests, no such presumption exists for children. A question arises as to whether this distinction is justified.

In short, the answer is, yes. Intuition tells us what the evidence confirms. Children do not always act consistently with their best interests. A young child may only see the ball on the road whereas an older person will (hopefully) see the oncoming car; a young child may see the gratification that comes from eating candy whereas an older person will (hopefully) see the health consequences; an adolescent may see the peer acceptance that comes with taking drugs or drinking alcohol but an older person will (hopefully) see the health and lifestyle consequences. Of course, adults routinely and repeatedly indulge in activities that are self-harming – however human rights law makes no attempt to prevent them from undertaking such activities. This is because adults are *presumed* to have the capacity to understand the consequences of their actions and are thus free to consent to involvement in activities even when they present a risk to their own interests.

This presumption does not apply to children, whose capacities are presumed to evolve with age, an idea that Eekelaar refers to as 'dynamic self-determinism' (Eekelaar, 1994, 54). Thus Articles 3, 5 and 18 of the CRC presume that there will be occasions when parents and adults must act to secure children's best interests. However, this presumption is rebuttable and does not provide adults with absolute power to regulate every aspect of a child's life until they turn 18. On the contrary, this power remains subject to a child's, evolving capacities, which anticipates occasions when the views of a child with sufficient understanding must be respected, even though they conflict with the views of a parent. In other words, the conception of childhood under the CRC entertains that, for children who demonstrate competency with respect to a particular issue, there will be a point where the assessment of the child's best interests is aligned with and determined by reference to the child's *own* views. This flexibility allows for the CRC to address the concern raised

above as to the justification for the conception of children being all persons under the age of 18. This is because the CRC does not treat children as a homogeneous group and the powers that are granted to adults to regulate their lives must accommodate children's evolving capacities (Archard, 2004, 65).

#### *Radical or regressive – the conception of children's autonomy under Article 12*

The obligation to assure that children's views are heard in the decision-making process *and* to ensure that these are weighed according to age and maturity presents a radical departure from previously held conceptions of childhood. For example, under the doctrine of *patria potestas*, children were literally the property of their father and were neither seen nor heard, whereas under the welfare model, children may have been seen but there was no expectation that they be heard. In contrast, the conception of childhood under the CRC demands that children are both seen and heard.

However, as noted above, many commentators doubt the extent to which the CRC, and in particular Article 12, recognises children's evolving autonomy. For them, children's participatory rights are ultimately subordinated to the interests of adults who have the power to determine how children express their views, the matters upon which children express their views and the weight to be accorded to them. As such, adults remain the sole arbiters of children's best interests and far from being a tool of empowerment, the CRC is seen as an instrument for the continued subjugation for children. This fear may well be aligned with the reality that many contemporary practices that seek to promote children's participation and autonomy in decision-making, remain tokenistic. But such an outcome is neither necessary nor compatible with a contextual interpretation of Article 12 of the CRC and this is so for five reasons.

#### *The role of evidence*

First, the weight to be given to a child's views under Article 12 is not to be determined subjectively. Where the evidence supports a finding that a child is competent or has the capacity to understand an issue, as is often the case with respect to issues like medical treatment, there is no longer a moral justification to treat the child differently to an adult. The special vulnerability that provided the justification for special protection ceases to exist.

#### *The broad scope of Article 12*

Second, the scope of children's participatory rights under Article 12 extends not just to matters that directly concern them, but to *all matters affecting* them. Thus, there is the potential for the rights of other persons, whether adults or other children, to be involved in measures taken by a state which may also affect a child, such as planning laws, social security laws and sentencing laws.

In such circumstances, the views of an individual child will not necessarily be determinative since Article 3 provides only that children's best interests are a primary consideration. But Article 12 demands that a decision maker must still take a child's views into account in the decision-making process – an expectation that most of us would have with respect to the views of any adults who may also be affected, but which is not generally recognised explicitly in human rights treaties. In this sense, Article 12 demands a transformation of the decision-making process to be more inclusive and deliberative – an approach that is consistent with the substantive dimension of a social interest theory of rights and represents an advance on general human rights treaties which do not impose such a specific demand upon states (CRC Committee, 2009; Young, 2010, 53).

### *Reconceptualising participation*

Third, the obligation to *assure* to children an opportunity to express their views demands that states must take positive measures to enable children to express their views appropriately for their age and level of maturity. Traditional adult-centric methods to facilitate participation in decision-making will not always be accessible or appropriate for children. To adapt the words of Iris Marion Young, the 'terms of the discourse' may make 'assumptions' that children do not share, and the interactions may privilege adult styles of expression to the exclusion of children's modes of expression (Young, 2010, 53). Thus, Article 12 demands new conceptions of participation that have the capacity to transform the decision-making process and make it more *inclusive* by bringing into play views that would otherwise go unheard (Thomas, 2007).

### *The nexus between development rights and autonomy rights*

Fourth, critiques of Article 12 and the other participatory rights under the CRC tend to overlook the impact of developmental rights on children's ability to participate in deliberative decision-making. For example, ensuring that children are healthy, housed and have access to a high quality education empowers children, who are better equipped to assert their claims for rights, including their right to participate in decision-making about matters that affect them (Eekelaar, 2006, 156; Young, 2010, 31). Thus, to read the CRC as simply an instrument that entrenches adult power is to overlook the cumulative impact of the rights provided for in this instrument on a child's development and capacity for effective participation. It is also to forget that the human rights enterprise is concerned with empowering the disempowered and regulating the exercise of power over vulnerable persons, whether they are adults or children. As such, Article 12 must be interpreted to affirm, rather than undermine, these objectives by demanding an inclusive form of deliberative decision-making.

*In support of children's citizenship*

Finally, to interpret the CRC as a 'substantial and thorough instrument for the denial of children's citizenship' (Milne, 41) is to arrive at an interpretation that remains entirely detached from the text of the CRC. Article 12 demands positive measures to facilitate and encourage children to *express their views* in line with their evolving capacity – hardly a vision that is inconsistent with active citizenship. Moreover, to subordinate such views automatically to the interests and perceived 'expertise' of adults is inconsistent with the right to development under Article 6, which extends beyond physical and mental development to a child's social development. As Eekelaar has argued, the 'duty of a child's carers is to establish the most propitious environment for the child [and] further to develop the personality growing within him or her' (Eekelaar, 2008, 156–57). The infantilisation of children and dismissal of their views cannot be reconciled with a child's social development when research demonstrates that devolving responsibility and listening to children actually enhances their self-esteem and understanding of citizenship (Hart 1992, 4; Flekkøy and Kaufman, 1997, 55; Lansdown 2001, 6; Chawla, 2002, 14; UNICEF, 2003, 4).

Moreover, Article 29 provides that a child's education shall be directed to the development of respect for human rights and preparation for a *responsible life* in society in the spirit of understanding, peace and tolerance. An approach to decision-making that dismisses a person's competency and insights based simply on their age promotes a conception of citizenship that is difficult, if not impossible, to reconcile with the aims of a child's education under the CRC. If the idea that children have *value* simply by being human is accepted, it becomes incongruous to *devalue* their views, insights and opinions simply because they are children. To value children because they are human beings demands that their views, when expressed, must also be respected and not simply dismissed because of assumptions about their lack of expertise and understanding (Mayall, 2000, 245 & 257).

*A radical reconceptualisation of the adult/child relationship*

Thus, Article 12 presents a radical re-conceptualisation of the adult-child decision-making relationship (Lansdown 2001, 1). Indeed, it has the capacity to satisfy Iris Marion Young's assertion that 'the normative legitimacy of a democratic decision depends on the degree to which those affected by it have been included in the decision-making processes *and* have had the opportunity to influence the outcomes' (Young, 2010, 5–6). Although it places a burden on adults to act in children's best interests, it also demands that adults must not be considered the sole arbiters of a child's best interests. It also requires that adults work with children to create inclusive communication systems and processes that allow for children's views to be heard in all matters affecting

them; that the views of children must be taken into account and treated seriously in decision-making processes; and that decision-makers must explain to children why certain decisions have been made. It accepts that there will be occasions when adults must take sole responsibility for making decisions that are in children's best interests, but there will be others when adults and children must undertake the decision-making process collaboratively and even more controversially when adults must devolve the decision-making process to children themselves (Hart 1992; Treseder, 1997; Shier, 2001; Thomas, 2007; Hinton, 2008).

Thus, to suggest that under the CRC, adults 'retain final authority over children' (Archard, 2004, 66) is neither a necessary nor persuasive interpretation of this instrument. Contrary to Archard's suggestion, there is no 'may' in the text of Article 12 to qualify the obligation to give a child's views due weight (Archard, 2004, 66). It simply refers to 'the views of the *child being given* due weight'. Thus Article 12 is capable of being interpreted to offer more than simply a 'right to have an *opportunity to influence* the person who will otherwise choose for the child' (emphasis added) (Archard, 2004, 66). It can also be interpreted to require that a child's views *must* be given due weight, in which case the CRC anticipates that the views of a child of sufficient maturity and understanding will be determinative of his or her best interests. Importantly, such an interpretation is not only consistent with the text of Article 12, but also consistent with the conceptual foundations of children's rights. If a child demonstrates competence equivalent to that of an adult with respect to a particular issue, then the justification for special measures to protect the child against endogenous harm no longer exists.<sup>8</sup>

#### 4. Conclusion – more than the offer of a chocolate frog

In a recent child protection case in Victoria Australia, an issue arose regarding the capacity of two girls aged 9 and 11 to provide instructions to their lawyer.<sup>9</sup> The case involved allegations of domestic violence and drug abuse by their mother. The girls provided instructions to the effect that they did not wish to live with their mother and wanted to remain with their aunt and uncle. The mother subsequently raised an allegation of sexual abuse against the uncle.

<sup>8</sup> This does not mean that bright line age restrictions are unjustifiable with respect to the regulation of children's behaviour *as a class*. As Eekelaar has explained, in such circumstances 'general age restrictions can be placed on the attainment of legal competence because it would be unreasonable to expect individual assessments of actual competence in each case' (Eekelaar 2008, 157). For a fuller discussion of children's evolving capacities and the issue of age based restrictions see: Lansdown, Gerison, *Innocenti Insight: The Evolving Capacities of the Child* (2005).

<sup>9</sup> *A B v. Children's Court of Victoria* [2012] VSC 598 (Austl.).

The girls indicated that they wished to see their uncle but were unable to provide any instructions on the sexual abuse claims. The Magistrate was far from satisfied with this approach and declared:

I may as well ask them, 'Do you want a chocolate frog in your morning tea tomorrow?' It is not going to assist me that they get on well with [the uncle] or they get on badly with him ... The fact remains these children can't participate in one of the two key issues in terms of instructing. They are not mature enough.<sup>10</sup>

The Magistrate then proceeded to appoint an independent children's lawyer for the children who was not required to act on their instructions. However, the matter was appealed to Supreme Court of Victoria, where the judge overturned the Magistrate's ruling and declared that '[i]t is sufficient that the child be mature enough to give instructions on one of more the issues that arise or may arise in the hearing or proceeding.'<sup>11</sup> The children's views were not necessarily determinative of the legal issues at hand but they had a right for their views to be heard and treated seriously by the judge.

You may ask, what is the relevance of this case to the issue of whether the idea of human rights for children can be justified? The answer is that it reflects differences in the treatment of children that arise when autonomy is conceived of in absolute terms, rather than being conceived of as evolving. Children's lack of capacity (both real and perceived) has and continues to provide the bedrock upon which many commentators would deny human rights for children. Moreover, this denial of rights infantilises children and reduces them to mere objects in need of protection. The offer by the Magistrate to provide a chocolate frog in the children's morning tea indicates not only a lack of respect for these children but also implies suspicion with respect to the value of their views regarding those matters on which they could provide instructions. In contrast, the decision of the appeal court demonstrates a commitment to respect the rights of children, including their right to be heard within the context of their evolving capacities.

But this paper has sought to demonstrate more than the idea that autonomy need not be conceived of in absolute terms. It has advanced the idea of a social interest theory of rights to offer a good, albeit imperfect justification for the idea of human rights for children, as expressed under the CRC. Ultimately, this theory of rights reflects Sally Merry's idea that human rights is primarily a cultural system – fluid and contentious (Merry, 2006, 16) – that produces and constructs rather than discovers some metaphysical vision of the rights to which children are entitled. Thus, the preamble to the CRC may assert the

<sup>10</sup> *Id.*, ¶¶ 20–21.

<sup>11</sup> *Id.*, ¶ 106 (also noting that in many proceedings an adult may also be able to give instructions with respect to a limited number of issues: ¶107).

inherent dignity and inalienable rights of every child, but this instrument cannot be taken to reflect a comprehensive theory of human dignity for children or 'the existence of a universal human nature' (Rorty, 1993, 116). Rather, it reflects a historically contingent and contested understanding of the rights to which states have agreed, albeit under an incompletely theorized agreement, that will shift and change over time. This dynamism does not, however, produce an arbitrary theory of human rights for children, but one that is contingent on the 'anthropological realities' and 'contemporary political conditions' that characterise the environment in which the CRC was negotiated (Freeman, 1994, 513–14).

For commentators like Griffin, who are eager to fix the parameters of human rights, the malleability of the CRC is problematic. But in many respects this malleability is its greatest strength. Indeed without it, the legitimacy of the CRC would be seriously compromised under the substantive dimension of a social interest theory because of its adult, Western-centric origins. Provisions such as Articles 3 and Article 12 allow for children to play a constitutive role in shaping the meaning of their rights under the CRC and express their views on which additional interests are deserving of protection. Thus, far from being a settled catalogue of rights and interests, the CRC offers the potential for a dynamic and inclusive evolution of children's rights in which children must play an active role, consistent with their evolving capacities.

This potential will not be realised, however, if contemporary social systems fail to recognise children's right to be both seen and heard. As John Eekelaar explains, '[n]o society will have begun to perceive its children as rights holders until adults' attitudes and social structures are seriously adjusted towards making it possible for children to express views and towards addressing them with respect' (Eekelaar, 1992, 228). This is the practical challenge that threatens the effective implementation of the vision for children offered in the CRC; a vision in which they are no longer conceived of in purely instrumental terms or as objects in need of protection, but as human beings in possession of rights and unique and equal value, just like their adult counterparts. It is a vision that demands more than simply the offer of a chocolate frog.

## References

### 1 Journal Articles

- Alderson, P., 'Young children's human rights: A sociological analysis', *International Journal of Children's Rights* 20(2) (2012): 177–198.
- Alston, P., 'The unborn child and abortion under the draft convention on the rights of the child', *Human Rights Quarterly* 12(1) (1990): 156–178.
- Appell, A., 'Child-Centred jurisprudence and feminist jurisprudence: Exploring the connections and tension', *Houston Law Review* 46(3) (2009): 703–759.

- Buchanan, A., 'The egalitarianism of human rights', *Ethics* 120(4) (2010): 679–710.
- Burman, E., 'Local, global or globalised? Child development and international child rights legislation', *Childhood* 3(1) (1992): 45–66.
- Chase, A., 'Legitimizing human rights: Beyond mythical foundations into everyday resonances', *Journal of Human Rights* 11(4) (2012): 505–525.
- Chawla, L., 'Insight, creativity and thoughts on the environment: Integrating children and youth into human settlement development', *Environment and Urbanisation* 14(2) (2002): 11–21.
- Coady, M., 'The continuing importance of thinking that children have rights', *Australian Journal of Professional and Applied Ethics* 7(1) (2005): 47–235.
- Cordero Arce, M., 'Towards an emancipatory discourse of children's rights', *International Journal of Children's Rights* 20(3) (2012) 365–421.
- Dixon, R., & Nussbaum, M., 'Children's rights and a capabilities approach: The question of special priority', *Cornell Law Review* 97(3) (2012): 549–593.
- Eekelaar, J., 'The emergence of children's rights', *Oxford Journal of Legal Studies* 6(2) (1986): 161–182.
- Eekelaar, J., 'The importance of thinking that children have rights', *International Journal of Family Law* 6(1) (1992): 221–235.
- Eekelaar, J., 'Naturalism or pragmatism? Towards an expansive view of human rights', *Journal of Human Rights* 10(2) (2011): 230–242.
- Evans, T., 'International human rights law as power/knowledge', *Human Rights Quarterly* 27(3) (2005): 1046–1068.
- Ferguson, L., 'Not merely rights for children but children's rights: The theory gap and the assumption of the importance of children's rights', *International Journal of Children's Rights* 21(2) (2013) 177–208.
- Fernando, J., 'Children's rights: Beyond the impasse', *Annals of the American Academy of Political and Social Science* 575 (2010): 8–24.
- Fortin, J., 'Children's rights: Are the courts now taking them more seriously?', *King's Law Journal* 15(2) (2004): 253–272.
- Franks, M., 'Pockets of participation: Revisiting child centred participation research', *Children and Society* 25(1) (2011): 15–25.
- Freeman, M., 'Taking children's rights seriously', *Children and Society* 1(4) (1987): 299–319.
- Freeman, M., 'Taking children's rights more seriously', *International Journal of Law and the Family* 6(1) (1992): 55–71.
- Freeman, M., 'The philosophical foundations of human rights', *Human Rights Quarterly* 16(2) (1994) 491–514.
- Freeman, M., 'The future of children's rights', *Children and Society* 14(4) (2000): 277–293.
- Freeman, M., 'Why it remains important to take children's rights seriously', *International Journal of Children's Rights* 15(1) (2007): 5–23.
- Freeman, M., 'The human rights of children', *Current Legal Problems* 63(1) (2010): 1–44.
- Frost, R., 'The justification of human rights and the basic right to justification: A reflexive approach', *Ethics* 120(4) (2010): 711–740.
- Goodin, R., & Gibson, D., 'Rights, young and old', *Oxford Journal of Legal Studies* 17(2) (1997): 185–203.
- Grahn-Farley, M., 'Beyond right and reason: Pieter schlag, the critique of normativity and the enchantment of reason: A theory of child rights', *University of Miami Law Review* 57(3) (2003): 867–398.
- Habermas, J., 'The concept of human dignity and the realistic utopia of human rights', *Metaphilosophy* 41(4) (2010): 465–480.
- Hafen, B., & Hafen, J., 'Abandoning children to their autonomy: The united nations convention on the rights of the child', *Harvard International Law Journal* 37(2) (1996): 449–491.
- Harris-Short, S., 'Listening to the other? The convention on the rights of the child', *Melbourne Journal of International Law* 2(2) (2001): 304–350.
- Harris-Short, S., 'International human rights law: Imperialist, inept and ineffective? Cultural relativism and the UN convention on the rights of the child', *Human Rights Quarterly* 25(1) (2003): 130–181.

- Hinton, R., 'Children's participation and good governance: Limitations of the theoretical literature', *International Journal of Children's Rights* 16(3) (2008): 281–285.
- Kennedy, D., 'The international human rights movement: Part of the problem?', *Harvard Human Rights Journal* 15 (2002): 101–125.
- King, M., 'The Child, childhood and children's rights within sociology', *King's Law Journal* 15(2) (2004): 273–300.
- Lundy, L., & McEvoy, L., 'Children's rights and research processes: assisting children to (in) formed views', *Childhood* 19(1) (2011): 129–144.
- Lundy, L., McEvoy, L., & Bronagh, B., 'Working with young children as co-researchers: An approach informed by the united nations convention on the rights of the child', *Early Education and Development* 22(5) (2011): 714–736.
- MacKlin, R., 'Dignity is a useless concept', *British Medical Journal* 327 (2003): 1419–1420.
- Mayall, B., 'The sociology of childhood in relation to children's rights', *International Journal of Children's Rights* 8(3) (2000): 243–158.
- McCrudden, C., 'Human dignity and the judicial interpretation of human rights', *European Journal of International Law* 19(4) (2008): 655–724.
- Milne, B., 'Is participation as it is described by the united nations convention on the rights of the child the key to children's citizenship?', *Journal of Social Science* 9 (2005): 31–42.
- Minow, M., 'Rights for the next generation: A feminist approach to children's rights', *Harvard Women's Law Journal* 9 (1986): 1–24.
- Minow, M., 'Whatever happened to children's rights?', *Minnesota Law Review* 80(2) (1995): 267–298.
- Mitchell, M., 'Justifying human rights: Perry, kohen and the overlapping consensus', *Journal of Human Rights* 9(3) (2010): 363–372.
- Morris, A., Hegarty, K. and Humphreys, C., 'Ethical and safe: Research with children about domestic violence', *Research Ethics* 8(2) (2012): 125–139.
- O'Neill, O., 'Children's rights and children's lives', *Ethics* 98(3) (1988): 445–463.
- Phoenix, J., 'In the name of protection: Youth prostitution reforms in england and wales', *Critical Social Policy* 22(2) (2002): 353–375.
- Pupavac, V., 'The infantilisation of the south and the UN convention on the rights of the child', *Human Rights Law Review* 3(2) (1998): 1–6.
- Pupavac, V., 'Misanthropy without borders: The international children's rights regime', *Disasters* 25(2) (2011): 95–112.
- Purdy, L., 'Why children shouldn't have equal rights', *International Journal of Children's Rights* 2(3) (1994): 223–241.
- Reynaert, D. et al., 'Between "believers" and "opponents": Critical discussions on children's rights', *International Journal of Children's Rights* 20(1) (2012): 155–168.
- Rosenblum, P., 'Teaching human rights: Ambivalent activism, multiple discourses and lingering dilemmas', *Harvard Human Rights Journal* 15(1) (2002): 301–316.
- Schroeder, D., 'Dignity: One, two, three, four, five, still counting', *Cambridge Quarterly Healthcare Ethics* 19(1) (2010): 118–125.
- Schroeder, D., 'Human rights and human dignity: An appeal to separate the conjoined twins', *Ethical Theory and Moral Practice* 15(3) (2012): 323–335.
- Sen, A., 'Elements of a theory of human rights', *Philosophy and Public Affairs* 32(4) (2004): 315–356.
- Seymour, J., 'Parental rights and the protection of children: A presumption against state intervention?', *Australian Journal of Professional and Applied Ethics* 7(2) (2005): 16–30.
- Shier, H., 'Pathways to participation: Openings opportunities and obligations', *Children and Society* 15(2) (2001): 107–117.
- Smith, A. B., 'Interpreting and supporting participation rights: Contributions from sociological theory', *International Journal of Children's Rights* 10(1) (2002) 73–88.
- Stammers, N., 'Social movements and the social construction of human rights', *Human Rights Quarterly* 21(4) (1999) 980–1008.

- Sunstein, C., 'Incompletely theorized agreements', *Harvard Law Review* 108(7) (1995): 1733–1772.
- Thomas, N., 'Towards a theory of children's participation', *International Journal of Children's Rights* 15(2) (2007): 199–218.
- Tisdall, K., 'The challenge and challenging of childhood studies? Learning from disability studies and research with disabled children', *Children and Society* 26(3) (2012): 181–191.
- Tobin, J., 'Increasingly seen and heard: The constitutional recognition of children's rights', *South African Journal of Human Rights* 21(1) (2005): 86–126.
- Tobin, J., 'Parents and children's rights under the convention on the rights of the child: Finding reconciliation in misunderstood relationship', *Australian Journal of Professional and Applied Ethics* 7(2) (2005): 31–46.
- Tobin, J., 'Judging the judges: Are they adopting the rights approach in matters involving children', *Melbourne University Law Review* 33(2) (2009): 579–625.
- Tobin, J., 'The international obligation to abolish traditional practices harmful to children's health: What does it mean and require of states?', *Human Rights Law Review* 9(3) (2009): 373–396.
- Tobin, J., 'Seeking to persuade: A constructive approach to human rights treaty interpretation', *Harvard Human Rights Journal* 23(1) (2010): 1–50.
- Tobin, J., & McNair, R., 'Public international law and the regulation of private spaces: Does the convention on the rights of the child impose an obligation on states to allow gay and lesbian couples to adopt?', *International Journal of Law, Policy and Family* 23(1) (2009): 110–131.
- van Krieken, Robert, 'The best interests of the child and parental separation: On the civilizing of parents', *Modern Law Review* 68(1) (2005): 25–48.

## 2 Books

- Adler, R., *Taking Juvenile Justice Seriously* (Edinburgh: Scottish Academic Press, 1985).
- Alderson, P., *Young Children's Rights: Exploring Beliefs, Principles and Practice* (London: Jessica Kingsley, 2008).
- Alston, P., & Gilmour-Walsh, B., *The Best Interests of the Child: Towards a Synthesis of Children's Rights and Cultural Values* (Florence: UNICEF, 1996).
- Alston, P., *The Best Interests of The Child: Reconciling Culture and Human Rights* (Oxford: Oxford University Press, 1994).
- Archard, D., *Children: Rights and Childhood* (London: Routledge, 2004).
- Ariès, P., *Centuries of Childhood: A Social History of Family Life* (London: Vintage Books, 1965).
- Beitz, C., *The Idea of Human Rights* (Oxford: Oxford University Press, 2009).
- Eekelaar, J., *Family Law and Personal Life* (Oxford: Oxford University Press, 2006).
- Farson, R., *Birthrights* (New York: Macmillan, 1974).
- Flekkøy, M., & Kaufman, N., *The Participation Rights of the Child: Rights and Responsibilities in Family and Society* (London: Jessica Kingsley, 1997).
- Fortin, J., *Children's Rights: The Developing Law* (Cambridge: Cambridge University Press, 2009).
- Frost, M., *Ethics in International Relations: A Constitutive Theory* (Cambridge: Cambridge University Press, 1996).
- Gilligan, C., *In a Different Voice: Psychological Theory and Women's Development* (Boston: Harvard University Press, 1982).
- Goldstein, J. et al., *Beyond the Best Interests of the Child* (New York: The Free Press, 1973).
- Goldstein, J. et al., *Before the Best Interests of the Child* (New York: The Free Press, 1980).
- Goldstein, J. et al., *The Best Interests of the Child* (New York: The Free Press, 1998).
- Griffin, J., *On Human Rights* (Oxford: Oxford University Press, 2009).
- Guggenheim, M., *What's Wrong with Children's Rights* (Boston: Harvard University Press, 2005).
- Guzman, I., *Parent Police: The UN wants your Children* (Lafayette: Huntington House, 1991).

- Hart, J. et al., *Children Changing their World: Understanding and Evaluating Children's Participation in Development* (London: Plan UK, 2004).
- Hart, R., *Children's Participation: From Tokenism to Citizenship* (Florence: UNICEF, 1992).
- Henkin, L., *The Age of Rights* (New York: Columbia University Press, 1990).
- Hobbes, T., *The Elements of Law, Natural and Politic* (Oxford: Oxford University Press, 1994).
- Holt, J., *Escape from Childhood: The Needs and Rights of Children* (Dutton: Boston, 1974).
- Humphrey, J., *Human Rights and the United Nations: A Great Adventure* (Dobbs Ferry, NY: Transnational, 1984).
- Hunt, L., *Inventing Human Rights: A History* (New York: W.W. Norton & Company, 2007).
- King, M., *A Better World for Children?* (London: Routledge, 1997).
- Kleninig, J., *Philosophical Issues in Education* (London: Croom Helm, 1982).
- Lansdown, G., *Promoting Children's Participation in Democratic Decision-Making* (Florence: UNICEF, 2001).
- Lansdown, G., *Innocenti Insight: The Evolving Capacities of the Child* (Florence: UNICEF, 2005).
- Lauterpacht, H., *International Law and Human Rights* (London: Stevens & Sons, 1950).
- Le Blanc, L., *The Convention on the Rights of the Child: United Nations Law Making on Human Rights* (Lincoln, NE: University of Nebraska Press, 1995).
- Lundy, L. et al., *The United Nations Convention on the Rights of the Child: A Study of the Legal Implementation in 12 Countries* (London: UNICEF, 2012).
- Macnaughton, G., Hughes, P., & Smith, K., *Young Children as Active Citizens: Principles, Policies and Pedagogies* (Newcastle: Cambridge Scholars, 2008).
- Merry, S., *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: University of Chicago Press, 2006).
- Moyn, S., *The Last Utopia* (Boston: Harvard University Press, 2010).
- Purdy, L., *In Their Best Interest? The Case Against Equal Rights for Children* (Ithaca, NY: Cornell University Press, 1992).
- Raz, J., *The Morality of Freedom* (Oxford: Oxford University Press, 1986).
- Rosemond, J., *A Family of Value* (Kansas City, MO: Andrews & McMeel, 1995).
- Tobin, J., *The Right to Health in International Law* (Oxford: Oxford University Press, 2012).
- Treseder, P., *Empowering Children and Young People Training Manual: Promoting Involvement in Decision-Making* (Dunfermline: Carnegie UK Trust, 1997).
- Van Bueren, G., *The International Law on the Rights of the Child* (Leiden: Martinus Nijhoff, 1995).
- Young, I., *Inclusion and Democracy* (Oxford: Oxford University Press, 2010).

### 3 Edited Books

- Alston, P., 'The best interests principle: Towards a reconciliation of culture and human rights'. In *The Best Interests of the Child: Reconciling Culture and Human Rights*. ed. P. Alston (Oxford: Oxford University Press, 1994) 1.
- Arneil, B., 'Becoming versus being: A critical analysis of the child in liberal theory'. In *The Moral and Political Status of Children*. eds. D. Archard & C. Macleod (Oxford University Press: Oxford, 2002) 70.
- Baxi, U., 'The place of the human right to health and contemporary approaches to global justice'. In *Global Health And Human Rights: Legal And Philosophical Perspectives*. eds. J. Harrington & M. Stutterford (New York: Routledge, 2010) 1.
- Beazley, H. et al., 'How are the human rights of children related to research methodology?' In *The Human Rights of Children: From Visions to Implementation*. eds. A. Invernizzi & J. Williams (Ashgate: Farnham, 211) 159.
- Brennan, S., 'Children's choices or children's interests: Which do their rights protect?'. In *The Moral and Political Status of Children*. eds. D. Archard & C. Macleod (Oxford University Press: Oxford, 2002) 53.

- Brighthouse, H., 'What rights (if any) do children have?'. In *The Moral and Political Status of Children*. eds. D. Archard and C. Macleod (Oxford University Press: Oxford, 2002) 31.
- Buchanan, A., & Hessler, K., 'Specifying the content of the human right to health care'. In *Justice and Health Care: Selected Essays*. eds. A. Buchanan & K. Hessler 213 (Oxford: Oxford University Press, 2009) 203.
- Chrstensen, P., and James, A., *Research With Children: Perspectives and Practices* (Routledge: New York, 2008).
- Eekelaar, J., 'The interests of the child and the child's wishes: The role of dynamic self-determinism'. In *The Best Interests of The Child: Reconciling Culture and Human Rights*. ed. P. Alston (Oxford: Oxford University Press, 1994) 54.
- Ennew, J., 'Outside childhood: Street children's rights'. In *The Handbook of Children's Rights: Comparative Practice*. ed. B. Franklin (New York: Routledge, 2001) 202.
- Freeman, M., & Veerman, P., eds., *The Ideologies of Children's Rights* (Leiden: Martinus Nijhoff, 1992).
- Federle, K., 'Rights flow downhill'. In *Children's Rights: Progress and Perspectives*. ed. M. Freeman (Leiden: Martinus Nijhoff, 2011) 447.
- Gross, B., & Gross, R., eds., *The Children's Rights Movement: Overcoming The Oppression of Young People* (Garden City, NY: Anchor Books, 1977).
- Kramer, M., 'Rights without trimmings'. In *A Debate over Rights: Philosophical Enquiries*. eds. M. Krmaer, N. H. Simmonds, & H. Steiner (Oxford: Oxford University Press, 2000) 7.
- Lundy, L., & McEvoy, L., 'Childhood, the united nations convention on the rights of the child and research: What constitutes a rights-based approach?'. In *Law and Childhood Studies*. Vol. 14. ed. M. Freeman (Oxford: Oxford University Press, 2012) 75.
- MacNaughton, G., & Smith, K., 'Children's rights in early childhood'. In *An Introduction to Childhood Studies*. ed. M. J. Kehily (Maidenhead: McGraw International, 2009) 161.
- Mason, J., & Falloon, J., 'Some sydney children define abuse: Some implications for agency and childhood'. In *Conceptualising Child-Adult Relations*. eds. L. Alanen & B. Mayall (New York: Routledge, 2001) 99.
- Rorty, R., 'Human rights, rationality and sentimentality'. In *On Human Rights*. eds. S. Shute & S. Hurley (New York: Basic Books, 1993) 111.
- Saballa, M., MacNaughton, G., & Smith, K., 'Working with children to create policy: The case of the australian capital territory's children's plan'. In *Young Children as Active Citizens: Principles, Policies and Pedagogies*. eds. G. MacNaughton, P. Hughes, & K. Smith (Cambridge: Cambridge Scholars Publishing, 2008) 62.
- Stalford, H., & Drywood, E., 'Using the CRC to inform EU law and policy making'. In *The Human Rights of Children: From Visions to Implementation*. eds. A. Invernizzi & J. Williams (Farnham: Ashgate, 211) 179.

#### 4 Reports

- Australian Senate Inquiry, *United Nations Convention on the Rights of the Child* (Parliament of Australia, Joint Standing Committee on Treaties Australia 17th Report Commonwealth of Australia 1998).
- Committee on The Rights of The Child, *Discussion Day on the Role of The Family in The Promotion of The Rights of The Child* (1994).
- International Labour Organization, *Accelerating Action Against Child Labour: Global Report Under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work* 2010 (2010).
- Tobin, John, *The Convention on the Rights of The Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction* (Victorian Law Reform Commission Occasional Paper 2004).
- UNICEF, *World Report on Violence Against Children* (2006).

## 5 Theses

Barnes, A., *The Legal Construction of the Child in the United Nations Convention on the Rights of the Child*, PhD Thesis, College of Law, Australian National University, Canberra.

Nakata, S., *Governing Childhood: The Politics of Becoming Adult*, PhD Thesis, School of Social and Political Sciences, University of Melbourne, Melbourne.

## 6 Cases

*A B v. Children's Court of Victoria* [2012] VSC 598 (Australia).

*Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* [2004] 1 SCR 76 (Canada).

*Plonit v. Attorney General* [2000] 54(1) IsrSC 145 (Israel).

## 7 International Treaties

*Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 U.N.T.S. 287.

*International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 U.N.T.S. 171.

*International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 U.N.T.S. 3.

*International Labour Organization Convention Concerning Minimum Age for Admission to Employment*, adopted at the 58th ILC Session, 26 June 1973.

*International Labour Organization Convention Concerning the Age for Admission of Children to Employment in Agriculture*, adopted at the 3rd ILC Session, 16 November 1921.

*International Labour Organization Convention Concerning the Compulsory Medical Examination of Children and Young Persons Employed at Sea*, adopted at the 3rd ILC Session, 11 November 1921.

*International Labour Organization Convention Concerning the Night Work of Young Persons Employed in Industry*, adopted at the 1st ILC Session, 28 November 1919.

*International Labour Organization Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, adopted at the 87th ILC Session, 17 June 1999.

*International Labour Organization Convention Fixing the Minimum Age for Admission of Children to Employment at Sea*, adopted at the 2nd ILC Session, 9 July 1920.

*Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 U.N.T.S. 3.

*Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 8 June 1977, 1125 U.N.T.S. 609.

*Universal Declaration of Human Rights*, G.A. Res. 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, U.N. Doc. A/RES/217A (III) (10 December 1948).

*Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 U.N.T.S. 331.

## 8 Treaty Body Materials

Committee on the Rights of the Child General, *General Comment No 8: The Right of the Child to Be Protected Against Corporal Punishment and Any Other Cruel or Degrading Forms of Punishment*, CRC/C/GC/8 (2007).

Committee on the Rights of the Child, *General Comment No 12: The Right of the Child to Be Heard*, CRC/C/GC/12 (2009).

Committee on the Rights of the Child, *General Comment No 13: The Right of the Child to Freedom from All Forms of Violence*, CRC/C/GC/13 (2011).

## 9 *Other*

Rush, E., & La Nauze, A., *Corporate Paedophilia* (Australia Institute Discussion Paper No 90, 2006).

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