

# Whither Children: Protection, Participation, Autonomy?

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THERE CAN BE NO doubt that children are among the most vulnerable and powerless members of our societies today. We are reminded of this in war-torn zones and as each successive dramatic incident of child abuse is brought to public attention. It is perhaps fitting that the vulnerability of children should be associated with parental violence (and now, of course, sexual abuse) because for so long the argument prevailed that parents were the guardians of their children's welfare, making the need for and development of children's rights otiose.<sup>1</sup> It would not render children's rights advocacy redundant even were it true (as, of course, it is for most children most of the time), for the love, nurture, care and protection afforded children would still be that which particular parents deemed appropriate. Children are, in this sense, at their parents' "mercy," and, as Joel Feinberg so fittingly put it, "no amount of love and compassion"<sup>2</sup> is an adequate substitute for the ability to demand what is ours by right.

## I. THE IMPORTANCE OF RIGHTS

RIGHTS ARE IMPORTANT — FEW would deny this. They have been called "valuable commodities,"<sup>3</sup> important moral coinage. They "enable us to stand with dignity, if necessary to demand what is our due without having to grovel, plead or beg."<sup>4</sup> Rights are entitlements: they are not dependent on the discretion or choice of the official or bureaucrat in

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<sup>1</sup> This view has led to the laissez-faire, non-interventionist approach that we tend to associate with J. Goldstein, A. Freud and A. Solnit. See, in particular, their *Before The Best Interests of the Child* (New York: Free Press, 1979).

<sup>2</sup> "Duties, Rights and Claims," (1966) 3 Am. Phil. Q. 1 at 8.

<sup>3</sup> Per R. Wasserstrom, "Rights, Human Rights and Racial Discrimination" (1964) 61 J. of Phil. 628 at 629.

<sup>4</sup> Per B. Bandman, "Do Children Have Any Natural Rights?" (1973) Proceedings of 29th Annual Meeting of Philosophy of Education Society 234 at 236.

control. And rights we cherish have largely been fought for (the vote, trade union power). They are rarely "given" without a struggle. If we have rights, we are entitled to respect and dignity: no amount of benevolence, charity or compassion is an adequate substitute.

## II. TOWARDS CHILDREN'S RIGHTS

THE STRUGGLE FOR RIGHTS long antedates any recognition that children might also be rights-holders. Early legal statements are conspicuously silent on children's rights: the Ten Commandments, arguably the most influential of all legal codes, contain a clear normative pronouncement on parent-child relations ("Honour thy father and mother..."), but it is in terms of respect for parents, and is silent on the obligations of parents to love and nurture children.<sup>5</sup> Is it then surprising that well into early modern times, children were being prosecuted in England before the ecclesiastical courts for abusing parents, but that prosecutions of parents for beating children appear not to have taken place?<sup>6</sup>

One of the earliest recognitions of children's rights is found in the Massachusetts Body of Liberties of 1641: parents are told not to choose their children's mates and not to use unnatural severity against their children.<sup>7</sup> Children, furthermore, are given "free liberty to complain to the Authorities for redress." But this is also the law (and is better known for so being) that prescribes the death penalty for children over 16 who disobey their parents.<sup>8</sup> Note, even 350 years ago, protection of children went hand in hand with adding the power of the state to parental authority.

The next two centuries can hardly be said to be identified with children's rights. There are concerns to protect children, though these are often clumsy or inchoate. It is, I think, pertinent to observe that the documents emanating from the great libertarian revolutions, the American and the French, have nothing specifically to say about children. The nineteenth century saw the birth of the child-saving

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<sup>5</sup> See also P. Silverman, *Who Speaks For The Children?* (Don Mills: Musson, 1978).

<sup>6</sup> See R. Helmholz, "And Were There Children's Rights In Early Modern England?" (1993) 1 Int'l J. of Children's Rts. at 23-32.

<sup>7</sup> See E. Pleck, *Domestic Tyranny* (New York: Oxford University Press, 1987).

<sup>8</sup> There is a discussion of it in J. Hawes, *The Children's Rights Movement* (Boston: Twayne, 1991). He says there is no evidence of children being executed for breach of this law.

movement,<sup>9</sup> the growth of the orphanage, the development of schooling and the construction of separate institutions, including the juvenile court,<sup>10</sup> for delinquent children. Child protection legislation also comes about — a couple of generations after legislation to protect domestic animals, and not without resistance.<sup>11</sup> But cruelty, then as now, is a social construct: not surprisingly, then, founders<sup>12</sup> of societies to protect children from abuse can still vigorously defend corporal chastisement.<sup>13</sup>

It was at this time that lone voices began to advocate children's rights as amounting to more than protection or salvation: Kate Douglas Wiggin in the United States, better known for her children's stories,<sup>14</sup> and Janusz Korczak in Poland, also a children's writer and later to gain fame in the Warsaw Ghetto.<sup>15</sup> Wiggin's view of childhood, a century ago, is refreshingly modern. I like her espousal of "the divine right to be gloriously dirty" justified as a "necessary consequence of direct, useful, friendly contact with all sorts of interesting, helpful things."<sup>16</sup> Wiggin was an early advocate of the end of corporal punishment. "It seems likely," she wrote in 1892, "that the rod of reason will have to replace the rod of birch."<sup>17</sup> Korczak formulated his ideas during the First World War. *How To Love A Child*<sup>18</sup> took

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<sup>9</sup> See A. Platt, *The Child Savers: The Invention of Delinquency* (Chicago: University of Chicago Press, 1969).

<sup>10</sup> On schooling see B. Bailyn, *Education in the Forming of American Society* (Williamsburg: University of North Carolina Press, 1960).

<sup>11</sup> To intervene to protect children was then thought to interfere with the "sacred" right of parents or, more often, of fathers.

<sup>12</sup> Such as Henry Bergh, one of the founders of the New York SPCC. Lord Shaftesbury, of *Factory Act* fame in England, opposed the moves in the 1860s toward compulsory education — education was, he thought, a decision for parents.

<sup>13</sup> Bergh is quoted as believing in "a good wholesome flogging" as appropriate for "disobedient children."

<sup>14</sup> *Children's Rights* (Boston: Houghton Mifflin, 1892).

<sup>15</sup> There is an excellent biography of him by B.J. Lifton entitled *The King of Children* (New York: Farrar, Straus and Giroux, 1988). Ironically, Korczak also is better known in his own country as a children's story-teller.

<sup>16</sup> *Supra* note 14 at 11.

<sup>17</sup> *Ibid.* at 19.

<sup>18</sup> In M. Wolins, ed., *Selected Works of Janusz Korczak* (Warsaw: 1920). See further, P. Veerman, *The Rights of the Child and the Changing Images of Childhood* (Dordrecht: Martinus Nijhoff Publishers, 1992) at 93–111.

as one of its main theses the idea that you cannot possibly love a child — your own or another's — until you see him as a separate being with the inalienable right to grow into the person he was meant to be. More than half a century was to elapse before others began to recognise the importance of a child's autonomy.<sup>19</sup>

### III. EARLY DECLARATIONS

THE FIRST INTERNATIONAL DECLARATION (the Declaration of Geneva of 1924) was more limited in its aspirations. In its preamble, it states that "mankind owes to the child the best it has to give." Its five terse principles emphasise welfare: the requisite means for normal developments, food and medicine, relief in times of distress, protection against exploitation, and socialization to serve others.<sup>20</sup> It was another 35 years before children's rights received international recognition again. We get considerable insight into attitudes towards children's rights in the late 1950s — when civil rights issues were only beginning to make an impact — from the discussions which took place at this time. The French delegate to the Commission on Human Rights in 1959 believed that "the child was not in a position to exercise his own rights" and that a "child had special legal status resulting from his inability to exercise his rights."<sup>21</sup>

Despite ideological conflicts, divisions between what we would now call "North" and "South,"<sup>22</sup> and religious divides,<sup>23</sup> only Cambodia and South Africa were unable to agree to the UN Declaration of the

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<sup>19</sup> In particular J. Holt and R. Farson, considered *infra* notes 32 and 33.

<sup>20</sup> This last principle reflects the aftermath of an imperialist war (see also E. Fuller "Great Britain and the Declaration of Geneva V" in *The World's Children*, VI(7) at 116:

<sup>21</sup> Therefore adults were to exercise rights for the child — as this delegate put it.

<sup>22</sup> Third World countries, for example, not having the means to implement compulsory education. Ironically, at this time many Asian countries would have been on a par with many African nations: for example, South Korea and Ghana had similar per capita GNPs. But South Korea today is at least 10 to 12 times more prosperous. See P. Kennedy, *Preparing For the Twenty-First Century* (New York: Random House, 1993) c. 10.

<sup>23</sup> Though sometimes between countries where the same religion prevailed. Italy and Poland differed on whether discrimination against illegitimate children was acceptable. The Polish (and Israeli view) prevailed — Italy thought an assimilation of the two would undermine the legitimate family, "the foundation of an organised society." Perhaps it was Poland's communism which trumped its Catholicism.

Rights of the Child of November, 1959.<sup>24</sup> The 10 principles adopted were:

1. Non-discrimination.
2. Special protection and opportunities to develop physically and mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. This principle adds, "In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration." (Of interest is the contrast with the 1989 Convention in which "a primary consideration" is substituted for "the paramount consideration.")
3. The right to a name and nationality.
4. The right to the benefits of social security: adequate nutrition, housing, recreation and medical services.
5. The right of a special needs child to the treatment, education and care required by his or her particular condition.
6. The need for love and understanding so that the child, wherever possible, is able to grow in the care and responsibility of his parents, and in an atmosphere of affection and moral and material security. (This principle stresses that payment of state and other assistance toward the maintenance of children of large families is desirable — an interesting observation in the light of the New Jersey policies which Michael Howard supported at the Conservative Party Conference in October 1993).<sup>25</sup>
7. Entitlement to education, free and compulsory, at least in the elementary stages.
8. To be among the first to receive protection and relief.
9. Protection against all forms of neglect, cruelty and exploitation, including that associated with employment.
10. Protection from practices which may foster racial, religious and other forms of discrimination.

The coverage is broader, though there is a distinct overlap with the Geneva Declaration. The emphasis is still firmly on protection and

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<sup>24</sup> They abstained.

<sup>25</sup> On New Jersey's policies, advocated also now in a number of other U.S. states, see *New Jersey Statutes Annotated* (1991) Title 44 (Poor) (effective 1 July 1992).

welfare and on what has been called the "investment motive."<sup>26</sup> There is no recognition of a child's autonomy, no understanding of the importance of a child's views, and no appreciation of the concept of empowerment. The 1959 Declaration had little impact at the time, either on the general public or on policy-makers. It was not deemed a newsworthy event.

#### IV. THE LIBERATION MOVEMENT

IN THE PERIOD IMMEDIATELY following, the world woke up to the evils of discrimination, initially against blacks and other ethnic minority groups and then against women. Within a decade, this consciousness of discrimination had embraced the status occupied by children. The term "Toward the Liberation of the Child" appears for the first time as a sub-title of the collection *Children's Rights*, published in 1971.<sup>27</sup> Writing in the book, Ollendorf argues for the adolescent's rights to self-determination and to participation. This reads today as an extraordinary essay, a diatribe against Authority and the Establishment from a psychiatrist who grew up in Hitler's Germany. He sees rightless adolescents taking their revenge on society as women "who were rightless and sexless chattels" are now "outbitch[ing] the sons-of-the-bitches."<sup>28</sup> He calls for the adolescent to have "a right to find his own way and determine on his own how he is going to learn, what he wants, what he rejects, what kind of art he likes, what kind of art he dislikes, what books he wants to read, in which way, if any, he wants to worship."<sup>29</sup> He demands society embrace a willingness to allow adolescents to participate in decision-making concerning themselves. The manifesto looks tame now, but at the time, the book, oozing the sentiments of Summerhill<sup>30</sup> and Woodstock, was thought radical, if not dangerous.

The writing of John Holt<sup>31</sup> and Richard Farson<sup>32</sup> had a greater

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<sup>26</sup> Per P.B. Meyer, "The Exploitation of the American Growing Class" in D. Gottlieb, ed., *Children's Liberation* (Eaglewood Cliffs: Prentice Hall, 1973).

<sup>27</sup> P. Adams, ed., *Children's Rights: Toward the Liberation of the Child* (New York: Praeger, 1971).

<sup>28</sup> "The Rights of Adolescents," *ibid.* at 91-118.

<sup>29</sup> *Ibid.* at 120.

<sup>30</sup> See A.S. Neill, *Summerhill: A Radical Approach to Child Rearing* (New York: Hart Publishing Company, 1960).

<sup>31</sup> *Escape From Childhood* (New York: E.P. Dutton, 1974).

impact. It was self-determination that Farson saw as at the root of all other rights that children were entitled to claim. Responding to the anticipated criticism that such rights might not be "good" for children, for children's rights hitherto had been geared to furthering "the good" for children, he argued:

Asking what is good for children is beside the point. We will grant children rights for the same reason we grant rights to adults, not because we are sure that children will then become better people, but for more ideological reasons, because we believe that expanding freedom as a way of life is worthwhile in itself. And freedom, we have found, is a difficult burden for adults as well as for children.<sup>33</sup>

Farson in *Birthrights* lists nine rights, all of which he sees as derived from the right to self-determination. They are:

1. The right to alternative home environments allowing the child to "exercise choice in his own living arrangements."<sup>34</sup> (The pertinency of this to the current debate about children "divorcing"<sup>35</sup> parents should be noted.)
2. The right to information that is accessible to adults, for example the right to inspect records kept about them.
3. The right to educate oneself: he favoured the abolition of compulsory education. As part of this right, he included freedom from indoctrination, with children choosing their own "belief systems."<sup>36</sup>
4. The right to sexual freedom: pornography would be made available to children as it is to adults, and children would be allowed to experiment with their sexuality without fearing punishment.
5. The right to economic power, including the right to work, to develop a credit record and to achieve financial independence.<sup>37</sup>

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<sup>32</sup> *Birthrights* (New York: Macmillan, 1974).

<sup>33</sup> *Ibid.* at 31.

<sup>34</sup> *Ibid.* at 62.

<sup>35</sup> With the *Gregory K* case in the U.S.A. (see J.D. Manasco, "Parent-Child Relationships: The Lawyers Behind the Gregory K Decision" (1993) 17 L. & Psy. Rev. 243 and G.H. Russ, "Through the Eyes of a Child" (1993) 27 Fam. L.Q. 365. (Russ was the attorney for Gregory K and is now his foster/adoptive father.) There are a number of cases in England too.

<sup>36</sup> *Supra* note 32 at 110.

<sup>37</sup> *Ibid.* at 154.

6. The right to political power, including the right to vote. Nothing, he suggests, indicates that children will "vote less responsibly than adults."<sup>38</sup>
7. The right to responsive design.<sup>39</sup>
8. The right to freedom from physical punishment.<sup>40</sup>
9. The right to justice.<sup>41</sup>

Holt's list is not dissimilar, but it includes the right to travel,<sup>42</sup> to drive,<sup>43</sup> to use drugs,<sup>44</sup> as well as the rights enumerated by Farson.

It is easy to ridicule Farson, Holt and the liberation school of the 1970s and, indeed, it has been criticised.<sup>45</sup> But it must be remembered that when they were writing, child sexual abuse had yet to be "discovered,"<sup>46</sup> and drugs were not seen as the social problem they constitute today.<sup>47</sup>

Attitudes to pornography were also very different.<sup>48</sup> We would want to protect children from premature exposure to sex and from contact

<sup>38</sup> *Ibid.* at 182. See also B. Franklin, *The Rights of Children* (Basil Blackwell, 1986).

<sup>39</sup> See also C. Ward's impressive thesis in *The Child In The City* (London: Architectural Press, 1978).

<sup>40</sup> Five countries have now outlawed this. Sweden was the first in 1979, followed by the other three Nordic countries and then Austria. Germany is contemplating following this lead. In Scotland, there is talk of outlawing the use of an implement, preserving the "ordinary, safe smack" (*sic* — or perhaps here, sick).

<sup>41</sup> See also *Re Gault* 387 U.S. 1 (1967).

<sup>42</sup> *Supra* note 31 at 195.

<sup>43</sup> *Ibid.* at 266.

<sup>44</sup> *Ibid.* at 249.

<sup>45</sup> Among others by B. Hafen, "Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth To Their Rights" (1976) *Brig. Young U.L. Rev.* 605; M.D.A. Freeman, *The Rights and Wrongs of Children* (London: Frances Pinter, 1983); and L. Purdy, *In Their Best Interest? The Case Against the Equal Rights for Children* (Ithaca: Cornell University Press, 1992).

<sup>46</sup> This happened only in the early 1980s. In England, for example, there was little perception of the problem before the Cleveland affair of 1987.

<sup>47</sup> See also E.M. Zamora Chavarria, "The Rights of the Child In Democratic Societies" in M.D. Fortuyn & M. deLangen, eds., *Towards The Realization of Human Rights of Children* (Defence for Children International Netherlands, 1972) at 65.

<sup>48</sup> Even feminists then held to the liberal line, still propagated by Ronald Dworkin, for example. But see C. MacKinnon, *Only Words* (Cambridge: Harvard University Press, 1993).



with drugs. Indeed, we would look askance at the attitudes to work and education that we find in these charters. But protection was not in the vocabulary of the 1970s' advocates. Thus, Holt, writing of drugs, says: "I don't think that we should 'protect' children against whatever drugs their elders use, and in a society in which most of their elders do use drugs and many use them excessively and unwisely, I don't see how we can."<sup>49</sup>

## V. THE ARGUMENT FOR LIBERATION

IT IS WORTHWHILE GOING back to the child liberationist literature to explore the arguments posited in it for child liberation.<sup>50</sup> In part, it attacks what it sees as the false assumption that there are morally relevant differences between children and adults.<sup>51</sup> The central morally relevant difference is, most would say, the capacity for instrumental rationality.<sup>52</sup> But proponents of child liberation are not convinced that this constitutes a satisfactory dividing line. Thus, John Harris points out, quite rightly, that there are "bold, quick, ingenious, forward and capable young people"<sup>53</sup> and neither they nor "dull-witted, incompetent adults" are a "rarity." The principle of universalizability is thus said to mandate equal rights.<sup>54</sup> Howard Cohen's *Equal Rights for Children* appears to be similarly based, but ultimately turns on a utilitarian judgment that the possible harm of giving children equal rights would not outweigh the benefits provided by those rights.<sup>55</sup> This latter justification is countered by Onora O'Neill, who claims that the costs of seeing children's rights as fundamental

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<sup>49</sup> *Supra* note 31 at 194 and 201.

<sup>50</sup> A good recent precis is D. Archard, *Children: Rights and Childhood* (New York: Routledge, 1993).

<sup>51</sup> For example, H. Cohen, *Equal Rights for Children* (Totowa: Littlefield, Adams, 1980).

<sup>52</sup> See L. Purdy in (1994) 2 Int'l J. of Children's Rts. [forthcoming].

<sup>53</sup> "The Political Status of Children" in K. Graham, ed., *Contemporary Political Philosophy* (Cambridge: Cambridge University Press, 1982) at 37.

<sup>54</sup> This is clear in Cohen, *supra* note 51; and found also in Farson & Holt, *supra* notes 32-33.

<sup>55</sup> His argument is initially based on justice, but rests ultimately on consequentialist considerations, as indicated in the text.

outweigh the advantages.<sup>56</sup> O'Neill prefers to look to the obligations of others towards children: a construction made from the agent's perspective may, she believes, deliver more. But O'Neill cannot be right when she asserts that the child's "main remedy is to grow up."<sup>57</sup> This underestimates the capacities and maturities of many children. Both in moral and cognitive development, many children reach adult levels between twelve and fourteen, though the ability to reason improves quite obviously through adolescence.<sup>58</sup> We are prepared to impose criminal responsibility on ten-year-olds,<sup>59</sup> even, it seems, under the latest proposals, prepared to lock them up.<sup>60</sup> But we are less willing to accept the correlativity of responsibility and rights. O'Neill also ignores the impact on adult life that parenting and socialization leave: persons, deprived of rights when children, will grow into different adults from those upon whom rights have been conferred.<sup>61</sup>

The issue of child liberation and its place in the scheme of children's right will be returned to. But the threads of the children's rights story must be first picked up.

## VI. THE UN CONVENTION ON THE RIGHTS OF THE CHILD

THIRTY YEARS SEPARATE THE UN Declaration and the UN Convention on the Rights of the Child. The thinking of the period in between is to some extent reflected in the differences. The initiative for a convention came from Poland, though it would have been satisfied with the

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<sup>56</sup> Her article "Children's Rights and Children's Lives" appeared originally in (1988) 98 *Ethics* 445. It is now found in P. Alston *et al.*, eds., *Children, Rights and the Law* (Oxford: Clarendon Press, 1992) at 24 (to which source my references refer).

<sup>57</sup> *Ibid.* at 39.

<sup>58</sup> See M.D.A. Freeman, *The Rights and Wrongs of Children* (London: Frances Pinter, 1983) at 46, and see the references cited there.

<sup>59</sup> In England in November 1993, two 11-year-old boys were convicted of the brutal murder (when 10) of a two-year-old (the case of *R v. Thompson and Venables* is exhaustively covered in the newspapers of November 25, 1993 — see especially *The Independent* and *The Guardian*. There is a short note on the case in (December, 1993) 102 *Childright* 2 and a longer narrative piece by B. Morrison, "Children of Circumstance" (14 February 1994) *The New Yorker* 48.

<sup>60</sup> *Criminal Justice Bill* 1993–94.

<sup>61</sup> A point made by the author in "Taking Children's Rights More Seriously" in P. Alston *et al.*, eds., *supra* note 56 at 52 and 59. Tom Campbell in the same collection makes much the same point (see "The Rights of the Minor" 1 at 12–16).

International Year of the Child in 1979 being celebrated by turning the Declaration of 1959 into a Convention.<sup>62</sup>

A lot has been written on the Convention. Only a few comments will be made here. I agree with Philip Veerman who characterises the Convention as “an important and easily understood advocacy tool — one that promotes children’s welfare as an issue of justice rather than one of charity.”<sup>63</sup> The Convention contains:

1. General rights, such as the right to life,<sup>64</sup> the prohibition against torture,<sup>65</sup> freedom of expression,<sup>66</sup> thought, conscience and religion,<sup>67</sup> the right to information and to privacy;<sup>68</sup>
2. Rights requiring protective measures, including measures to protect children from economic and sexual exploitation,<sup>69</sup> to prevent drug abuse and other forms of neglect and abuse;<sup>70</sup>
3. Rights concerning the civil status of children, including the right to acquire nationality,<sup>71</sup> the right to preserve one’s identity,<sup>72</sup> the right to remain with parents<sup>73</sup> unless the best interests of the child dictate otherwise, and the right to be reunited with the family;<sup>74</sup>

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<sup>62</sup> See P. Veerman, *The Rights of the Child and the Changing Image of Childhood* (Dordrecht: Martinus Nijhoff Publishers, 1992).

<sup>63</sup> *Ibid.* at 184.

<sup>64</sup> See Article 6. Article 1 defines a child as every human being below the age of 18. The starting point of childhood is deliberately left open to avoid embroiling the Convention in the thorny issue of abortion.

<sup>65</sup> Article 37.

<sup>66</sup> Article 13. A controversial infringement of which in England is the *Local Government Act*, 1988, s. 28 (limiting reading about homosexuality).

<sup>67</sup> Article 14.

<sup>68</sup> Article 16.

<sup>69</sup> Articles 32 (child labour), 34 (sexual exploitation). See also Articles 35 and 36, respectively dealing with sale, trafficking and abduction and other forms of exploitation.

<sup>70</sup> Articles 33 and 19.

<sup>71</sup> Article 7.

<sup>72</sup> Article 8. There is an excellent exploration of this by G.A. Stewart, “Interpreting the Child’s Rights to Identity in the UN Convention in the Rights of the Child” (1992) 26 *Fam. L.Q.* 221.

<sup>73</sup> Article 9 (but see Articles 10 and 11).

<sup>74</sup> Article 10.

4. Rights concerned with development and welfare, including the child's right to a reasonable standard of living,<sup>75</sup> the right to health and basic services,<sup>76</sup> the right to social security,<sup>77</sup> the right to education<sup>78</sup> and the right to leisure;<sup>79</sup>
5. Rights concerning children in special circumstances or "in especially difficult circumstances."<sup>80</sup> These extend to such children as handicapped children,<sup>81</sup> refugee children<sup>82</sup> and orphaned children.<sup>83</sup> Included are special regulations on adoption,<sup>84</sup> the cultural concerns of minority and indigenous children,<sup>85</sup> and rehabilitative care for children suffering from deprivation,<sup>86</sup> as well as a prohibition on the recruitment of soldiers under 15 years of age.<sup>87</sup>

The Convention goes beyond earliest formulations which emphasised the duties of adults and the state to emphasise child participation in decision-making. It is the first convention to state that children have a right to "have a say" in processes affecting their lives.

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<sup>75</sup> Article 27.

<sup>76</sup> Article 24. The Convention is, however, less than positive on traditional practices such as female genital mutilation (see Article 23(3)).

<sup>77</sup> Article 26.

<sup>78</sup> Article 28. And see S.H. Bitensky, "Theoretical Foundations for a Right to Education under the U.S. Constitution" (1992) 86 *Northwestern U.L. Rev.* 540.

<sup>79</sup> Including recreation and cultural activities (see Article 31).

<sup>80</sup> Hence appropriate measures are to be taken to promote physical and psychological recovery and social re-interpretation of a child victim. See Article 39.

<sup>81</sup> Article 23.

<sup>82</sup> Article 22.

<sup>83</sup> Article 20.

<sup>84</sup> Article 21. The Convention recognises that not all countries have the institution of adoption.

<sup>85</sup> Article 30.

<sup>86</sup> Article 39.

<sup>87</sup> Article 38(2) and (3). See also F. Krill "The Protection of Children in Armed Conflicts" in M. Freeman & P. Veerman, eds., *The Ideologies of Children's Rights* (Dordrecht: Martinus Nijhoff Publishers, 1992) at 347-356.

The child, as Marta Pais puts it, is thus conceived of as a “principal” in the Convention.<sup>88</sup>

Article 12, the article providing for a child’s participation in decisions affecting him or her, is, I believe, the linchpin of the Convention. In the perspective of history, it will surely prove the most significant. It is, of course, a development from the child liberation philosophy of the 1970s. It is in line with the *Gillick* decision in the English House of Lords in 1985<sup>89</sup> (surely it is one of the ironies of contemporary history that Victoria Gillick will be remembered as a child liberator) and is one strand in the English *Children Act* of 1989.<sup>90</sup> The Article states:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The right enunciated here is significant not only for what it says, but because it recognises the child as a full human being, with integrity and personality and with the ability to participate fully in society. It is important, as John Eekelaar acknowledges, that “the generality of the first paragraph of this article should not be overshadowed by the particularity of the second.” The first applies to “all matters affecting children,”<sup>91</sup> where children’s view should be given “due weight.” The views of children are, in other words, to count when decisions ranging from education to the environment, from social security to secure accommodation, from transport to television are being taken. It is much easier to pick up on the second paragraph and

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<sup>88</sup> “The United Nations Convention on the Rights of the Child” 91 *Bulletin of Human Rights* at 75–82.

<sup>89</sup> [1986] A.C. 112.

<sup>90</sup> See M. Freeman, “In The Child’s Best Interests? Reading the *Children Act* Critically” (1992 Annual Review) 45 *Curr. Legal Probs.* at 173–211.

<sup>91</sup> See “The Importance of Thinking that Children Have Rights” in P. Alston *et al.*, eds., *Children, Rights and the Law* (Oxford: Clarendon Press, 1992) 221 at 234.

expostulate on *Gillick* and the *Children Act* than to recognise the real shortcomings in our approach to the ideals of the first paragraph of Article 12.

Article 12 is a key provision and it gets ideological support from the two articles which follow it: Article 13 which constitutes as part of "freedom of expression" "the right to seek, receive and impart information and ideas of all kinds," and Article 14 which emphasises "freedom of thought, conscience and religion." But attention has also focused on Article 3 which states, in its first paragraph, that: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Articles 12 and 3 encapsulate a tension in the whole debate which has been examined here. Article 12 emphasises the centrality of a child's views, Article 3 the priority to be given to concerns of welfare. The principle in Article 12 is not overriding (a Polish attempt to make welfare paramount failed), but its imperative and the philosophy of Article 12 are in potential conflict. Eekelaar sees in the second paragraph of Article 12 a "counterweight"<sup>92</sup> to the welfarist concerns of Article 3. But the conflict is a real one, as has been seen in England in the last couple of years as the implications of *Gillick* are teased out in the interplay with the real life problems (*Gillick* was a "hypothetical") of anorexics and psychotics in the cases of *Re W*<sup>93</sup> and *Re R*<sup>94</sup> (and compare the *Fox*<sup>95</sup> case, in which the anorexic was 37, with *W*).

## VII. WHICH CHILDREN'S RIGHTS?

AS WE HAVE SEEN, there has been talk of children having rights for about a century. Early discussion focused on child salvation, on protection, on furthering the individual child's welfare. Only in the 1970s did the movement to liberate children emerge, with the emphasis on doing away with the distinction between adults and children.

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<sup>92</sup> *Ibid.*

<sup>93</sup> [1992] 4 All E.R. 627.

<sup>94</sup> [1991] 4 All E.R. 177. See also M. Freeman, "Removing Rights from Adolescents" (1993) 17 *Adoption and Fostering* at 14-21.

<sup>95</sup> "*Riverside Mental Health NHS Trust v. Fox*" *The Times* (28 October 1993).

Rights perform various functions. The protective rights can be divided into rights against the world and rights of protection from inadequate care.<sup>96</sup> "Liberating" rights may be sub-divided into conferring adult legal status and rights against parents.<sup>97</sup>

Children's rights against the world assert the general importance of providing them with the conditions they need to flourish, although no specific persons are entrusted with this duty ("Mankind owes...," as the Geneva Declaration put it). Rights against inadequate care, however, do assign duties to particular individuals. But these kinds of rights assume that children's incapacities warrant special protection. They protect by providing for goods and services normal adults must procure for themselves. They also protect by frustrating children's desires when these conflict with what those "protecting" children consider to be immediate or long-term good. In this sense we protect children by making them go to school, because we believe that education is for children's benefit both now and in the long-term. Children may not want to go to school, but we say their desires will stultify their future development.<sup>98</sup>

"Liberating" rights, by contrast, facilitate the opportunities for children to act upon their desires. Such rights presuppose that their subjects know what they are doing when they choose to exercise them, even if doing so is risky to themselves or harmful to others. Many adult rights are of this kind: adults can legally vote, drink, have sexual relations, choose medical treatment and commit themselves to binding contracts concerning work, marriage and other financial arrangements. The absence of such rights in children either precludes or renders illegal such acts for them.

Too much of the literature on children's rights has dichotomised. There have been the child salvationists and the child liberators. A division has been created between those who, to quote Farson, wish

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<sup>96</sup> This classification follows M. Wald, "Children's Rights: A Framework for Analysis" (1979) 12 U. Calif. Davis L. Rev. 255.

<sup>97</sup> Even though, as Rena Uviller puts it, "[t]o liberate them from their parents is simply to assign them to another, potentially more oppressive protection." ("Children Versus Parents: Perplexing Policy Questions for the A.C.L.U." in O. O'Neill & W. Ruddick, eds., *Having Children: Philosophical and Legal Reflections on Parenthood* (New York: Oxford University Press, 1979) 214 at 215.

<sup>98</sup> Compare A. Aviram, "The Justification of Compulsory Education: The Still Neglected Moral Duty" (1986) 20 J. Phil. Educ. 51 and L. Purdy, *In Their Best Interest?* (Ithaca: Cornell University Press, 1992).

to protect children and those who wish to protect children's rights.<sup>99</sup> There is a "nurturance" orientation and one which emphasises "self-determination" or autonomy.<sup>100</sup>

There is general acceptance of the importance of protection rights, though there remains dispute regarding their content. But on the question of autonomy there is less agreement.

To believe in autonomy is to believe that anyone's autonomy is as morally significant as anyone else's.<sup>101</sup> And autonomy does not depend on the stage of life that a person has reached. The extent to which we allow them to exercise it may, but that is a separate question. There is considerable convergence of legal and philosophical thought about what it is about human beings that makes them persons. For Haworth it is "critical competence,"<sup>102</sup> for Lindley it is a capacity for reasoning.<sup>103</sup> These tests are not unlike that constructed by Lord Scarman in the *Gillick* case in 1985.<sup>104</sup> Lord Scarman offered no guidelines as to when a child reached what we now call "Gillick-competence," and, in terms of age, legal commentators since have assumed that this was reached during adolescence. It is, however, clear once criteria for personhood are examined that many children acquire critical competence considerably earlier. I think a good account of the criteria is in Lindley's *Autonomy*. He says:

Certainly consciousness is a requirement. More specifically a person is a creature which has beliefs and desires, and acts on its desires in the light of its beliefs. However, this is insufficient for personhood. What is required in addition is the capacity to evaluate and structure one's beliefs and desires, and to act on the basis of these evaluations.<sup>105</sup>

He also approves Frankfurt's account of freedom of will and the concept of a "person."<sup>106</sup> According to Frankfurt, to be a person, a creature must have "second-order volitions," that is, desires about

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<sup>99</sup> *Birthrights*, *supra* note 32 at 9.

<sup>100</sup> See C.M. Rogers & L.S. Wrightsman, "Attitudes Toward Children's Rights: Nurturance or Self-Determination?" 34 *J. Social Issues* 59 at 61.

<sup>101</sup> The classic statement, of which is John Stuart Mill's *On Liberty*, was first published in 1859.

<sup>102</sup> *Autonomy* (New Haven: Yale University Press, 1986).

<sup>103</sup> *Autonomy* (New York: Macmillan, 1986).

<sup>104</sup> *Supra* note 89.

<sup>105</sup> *Supra* note 103 at 122.

<sup>106</sup> "Freedom of the Will and the Concept of a Person" (1981) 68 *J. Phil.* 829.



which desires she wants to become her will. As Lindley puts it, "People have will, insofar as they do not necessarily act on their strongest inclinations, but have the general ability to act on the results of their deliberation."<sup>107</sup> He argues that a crucial requirement is the possession of the concept of "a self:" someone has to be able to think of himself "as a being with a future and a past, a subject of experience, a possessor of beliefs and desires."<sup>108</sup> Of course, it is not clear exactly when children acquire these concepts, and there may be gender and class differences, but at seven it would not be uncommon, and at ten it may be thought that most children have become persons in the sense depicted here.

To respect a child's autonomy is to treat that child as a person, and as a rights-holder. It is clear that we can do so to a much greater extent than we have assumed hitherto. But it is also clear that the exercise of autonomy by a child can have a deleterious impact on that child's life-chances. It is, of course, true that adults make mistakes (and also mistakes when interfering with a child's autonomy), but having rights means being allowed to take risks and make choices. As Dworkin has famously announced, if we take rights seriously we must accept that rights-holders will sometimes do things that we do not think are good for them (or perhaps even for us).<sup>109</sup>

There is reluctance to interfere with an adult's project.<sup>110</sup> This reluctance is tempered when the project pursuer is a child by the sense that choice *now* may harm choice *later*. As Lomasky puts it: "What counts as damage...is determined by what will likely further or diminish its eventual success in living as a project pursuer."<sup>111</sup>

This is to recognise that children are different. Many of them have lesser capacities and abilities. Many of them are more vulnerable than adults. They need protection. If welfare rights are not recognised, they will not be in a position to exercise autonomy. Of course, all this is true, but it is not as true as we have come to believe. Children are different, but they are not all that different. There is a "developmental trajectory" through which we all pass. Age is often a suspect classification. If we are to apply a double standard, we must justify it. Double

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<sup>107</sup> *Supra* note 103 at 122–23.

<sup>108</sup> *Ibid.* at 160.

<sup>109</sup> *Taking Rights Seriously* (London: Duckworth, 1977) at 188–89.

<sup>110</sup> Paternalism is usually scorned and requires a strong and reasoned defence.

<sup>111</sup> *Persons, Rights and The Moral Community* (New York: Oxford University Press, 1987) at 160.

standards are not necessarily unjustifiable: things which appear to be different may, on further reflection, not be as different as they looked initially. The onus lies on those who wish to discriminate. Hitherto, it has to be said they have not discharged this burden very convincingly. How many of the structures, institutions and practices established, it is said, to "protect" children have actually done so? Think of the youth (juvenile) court?<sup>112</sup> The care system? Observation and assessment centres? Reporting systems where abuse has been identified?<sup>113</sup> Child protection registers for children "at risk"? The official version of the truth rarely withstands critical examination. But ask also whether, and to what extent, we are prepared to encourage children to participate in decisions regarding their life choices. It is much easier to assume abilities and capacities are absent, than to take cognizance of children's choices.

If we are to make progress, we have to recognise the moral integrity of children. We have to treat them as persons entitled to equal concern and respect,<sup>114</sup> and entitled to have both their present autonomy recognised insofar as it exists, and their capacity for future autonomy safeguarded. And this is to recognise that children, particularly younger children, need nurture, care and protection.

In looking for a children's rights programme, we must thus recognise the integrity of the child, and his or her decision-making capacities, but at the same time note the dangers of complete liberation. Too often writers on children's rights see rights in "either-or" terms: there is either salvation or liberation, nurturance or self-determination. But to take children's rights more seriously requires us to take more seriously both the protection of children and recognition of their autonomy, both actual and potential.

Inevitably, this imposes limitations on a child's autonomy. The paternalism that we associate with protection advocates offers a framework for seeing autonomy as well. We cannot allow children the

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<sup>112</sup> See generally A. Platt, *The Child Savers: The Invention of Delinquency* (Chicago: University of Chicago Press, 1969); S. Schlossman, *Love and the American Delinquent: The Theory and Practice of "Progressive" Juvenile Justice* (Chicago: University of Chicago Press, 1977); and S. Tiffin, *In Whose Best Interest? Child Welfare Reform in the Progressive Era* (Westport: Greenwood Press, 1982).

<sup>113</sup> See generally A. Solnit, "Too Much Reporting, Too Little Service: Roots and Prevention of Child Abuse" in G. Gerbner *et al.*, eds., *Child Abuse: An Agenda for Action* (New York: Oxford University Press, 1980) at 135-46.

<sup>114</sup> See Dworkin, *supra* note 109 at 226-29. In *Law's Empire* (Cambridge: Belknap Press, 1986), Dworkin's focus is on equal concern: there is no longer equal respect.

autonomy to indulge in actions or activities which will irreparably damage their full lives as adults. There is a case for interventions in children's lives to cushion them against irrational actions. But what is to be regarded as "irrational" must be strictly confined. The subjective values of the would-be protector cannot be allowed to intrude. What is "irrational" must be defined in terms of a neutral theory capable of accommodating pluralistic visions of the "good."<sup>115</sup> Nor should we see an action as irrational unless it is manifestly so in the sense that it would undermine future life choices or impair interests in an irreparable way. As already indicated, mistakes must be tolerated. We cannot treat persons as entitled to general respect without respecting their capacity to take risks and make mistakes. We would not be taking rights seriously if we only respected autonomy when we considered the agent was doing the right thing. But we would also be failing to recognise a child's integrity if we allowed him to choose an action — using heroin or choosing not to attend school — which would seriously and systematically impair the attainment of full personality and development subsequently.

The test of "irrationality" must also be confined so that it justifies intervention only to the extent necessary to obviate the immediate harm, or to develop the capacities of rational choice by which the individual may have a reasonable chance of avoiding such harms.

The question we should ask ourselves is: what sort of action or conduct would we wish, as children, to be shielded against on the assumption that we would want to mature to a rationally autonomous adulthood and be capable of deciding on our own system of ends as free and rational beings?<sup>116</sup> We would, I think, choose principles that would enable children to mature to independent adulthood. One definition of irrationality would be such as to preclude action and conduct which would frustrate such a good. Within the constraints of such a definition, we would defend a version of paternalism, what I have called "liberal paternalism."<sup>117</sup> This version of paternalism is a double-edged sword in that, since the goal is rational independence,

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<sup>115</sup> See J. Rawls, "On the Idea of an Overlapping Consensus" (1987) 7 *Oxford J. Legal Stud.* 1. See also Rawls' *Political Liberalism* (New York: Columbia University Press, 1993).

<sup>116</sup> The question is posed in a Rawlsian manner and is, therefore, subject to the same difficulties posed by Rawls' hypothetical "original position." But it remains, I believe, a useful jumping-off position.

<sup>117</sup> In my book *The Rights and Wrongs of Children* (London: Frances Pinter, 1983).

those who exercise constraints must do so in such a way as to enable children to develop their full capacities.

All paternalistic restrictions require moral justification. In many cases it is not difficult to adduce sufficient and convincing reasoned argument. Thus, it is not difficult to present the case for protecting children against actions which may lead to their death or to serious physical injury or mental disability. Nineteenth-century legislation which made it illegal for children to go down coal mines or up chimneys or into factories can thus readily be defended — though such legislation may not have been passed to protect children. So can laws designed to protect children from sexual abuse and exploitation. There are clear dangers in the suggestions of writers of the 1970s like Farson and Holt that a child's right to self-determination includes a right to a sexual relationship with whomsoever he or she pleases.<sup>118</sup> The "discovery" of sexual abuse in the 1980s has all but put an end to these demands.<sup>119</sup> On the other hand, "ages of consent" as such are meaningless: the crucial factor is the presence or absence of exploitation, so that the age *difference* may be of greater significance than the age of the child. A system of compulsory education and restrictions on employment can also be defended, though it needs to be said that the content and goals of "education" would need examining through the prism of children's rights.<sup>120</sup>

What should legitimise all these interferences with autonomy is what has been called "future-oriented" consent.<sup>121</sup> The question at its simplest is: can the restrictions be justified in terms that the child would eventually come to appreciate? Looking back, would the child appreciate and accept the reason for the restriction imposed upon him or her, given what he or she now knows as a rationally autonomous and mature adult? This is not an easy test to apply. It involves

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<sup>118</sup> See *supra* note 31 and 32. A more moderate position is taken by D. Evans, (1994) 2 Int'l J. Children's Rts. [forthcoming] and by R. Ives in B. Franklin, ed., *The Rights of Children* (Blackwell, 1986).

<sup>119</sup> See A. Miller, *Thou Shalt Not Be Aware* (New York: Farrar, Straus Giroux, 1984) and B. Nelson, *Incest: Fact and Myth* (Stramullion, 1987).

<sup>120</sup> One interesting attempt to do this is found in F. Schrag, *What Are Schools For?* [forthcoming].

<sup>121</sup> See G. Dworkin, "Paternalism" in R. Wasserstrom, ed., *Morality and the Law* (Wadsworth, 1972).

something close to what Derek Parfit has called "ideal deliberation."<sup>122</sup> As he puts it:

What each of us has most reason to do is what would best achieve, not what he actually wants, but what he *would* want, at the time of acting, if he had undergone a process of "ideal deliberation" — if he knew the relevant facts, was thinking clearly, and was free from distorting influences.<sup>123</sup>

This raises many questions. What are the "relevant facts"? How are hypothetical preferences to be considered? Can distortion of values be eliminated? The answers are not simple. We would not expect them to be. But they are questions worth pursuing for out of the answers will come greater insight in how to understand childhood, its freedoms and its constraints.

What I have argued here is that the dichotomy drawn by writers and to some extent in the UN Convention,<sup>124</sup> and of course legislation like the English *Children Act* of 1989,<sup>125</sup> is a false divide. Dichotomies and other classifications should not divert us away from the fact that true protection of children does protect their rights. It is not a question of whether child-savers or liberationists are right — for they are both correct in emphasising part of what needs to be recognised, and both wrong in failing to address the claims of the other side. To take children's rights seriously requires us to take seriously both welfare and self-determination. It demands of us that we adopt policies, institutional structures, laws and practices which both protect children and their rights.

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<sup>122</sup> *Reasons and Persons* (Oxford: Clarendon Press, 1984).

<sup>123</sup> *Ibid.*

<sup>124</sup> Compare Articles 3 and 12.

<sup>125</sup> On which see M. Freeman, *Children, Their Families and the Law* (Macmillan, 1992).