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**Is childhood a 'disability'? Exploring the exclusion of children from age discrimination**

**Simon Flacks**

Westminster Law School, University of Westminster

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# Is childhood a ‘disability’? Exploring the exclusion of children from age discrimination provisions in the Equality Act 2010

*The Equality Act 2010 was enacted with the aim of simplifying existing equality legislation and included extending age discrimination protection beyond the workplace to cover the provision of goods, facilities and services. Under-18s, however, were omitted from such provisions, despite lobbying from a number of different organisations and parliamentarians. This article considers the significance of this exclusion. It both challenges the legitimacy of the decision to exclude children, and considers the difficulties that arise from including under-18s within age discrimination provisions, namely those relating to children’s autonomy, capacity and right to equal treatment. In particular, it asks whether the question of children’s capacity to make decisions, the main ground on which children are denied all the human rights enjoyed by adults, should be revisited in light of the adoption of the Convention on the Rights of Persons with Disabilities,<sup>1</sup> under which a finding of incapacity on the basis of disability constitutes discrimination. It goes on to explore other areas of convergence between childhood and disability studies, and particularly the benefits, and shortcomings, of a ‘social model’ approach to childhood.*

## Introduction

The omission of children<sup>2</sup> from age discrimination protection relating to the provision of goods, facilities and services in the Equality Act 2010 (EA),<sup>3</sup> which came into force on 1 October 2012, attracted relatively little public or political controversy.<sup>4</sup> At the time of the passage of the Bill, Harriet Harman, then Leader of the House of Commons, told MPs: ‘The provisions will not cover people under 18. It is right to treat children and young people differently ... and there is little evidence of harmful age discrimination against young people’.<sup>5</sup> A statement from the Equality Office went on to say that:

‘The vast majority of examples submitted as evidence [of discrimination in the consultation] would already be covered by existing human rights legislation, existing domestic discrimination legislation or more thoroughly dealt with through public sector duties. It was decided that age discrimination legislation is not an appropriate way to ensure that children’s needs are met. It

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<sup>1</sup> Adopted on 13 December 2006.

<sup>2</sup> Children are defined for the purposes of the Act as people under the age of 18.

<sup>3</sup> Section 28(1)(a).

<sup>4</sup> In addition, children’s homes and schools were also excluded from the public sector equality duty, which requires public bodies to have due regard to equality and non-discrimination (s 149).

<sup>5</sup> C Davies, ‘Discrimination “a fact of life for British children”’ (2009) *The Guardian*, 29 March.

is almost always right to treat children of different ages in a way which is appropriate to their particular stage of development. Any such legislation would require a large number of exceptions.’<sup>6</sup>

The ban on age discrimination in clubs and associations, on the other hand, applies to all ages,<sup>7</sup> and neither is protection from discrimination in employment restricted to the over-18s.<sup>8</sup> Service providers include all those involved in the provision of services, goods or facilities to the public, regardless of whether or not a payment is provided. A wide range of activities fall within the scope of section 29, including the provision of medical treatment by the NHS and the sale of finance products by private banks.<sup>9</sup>

In contrast, people with disabilities (among others) are protected from discrimination in all social spheres covered by the EA, including in the provision of goods, services and facilities.<sup>10</sup> As well as considering the justification for excluding children, the purpose of this article is to explore whether any helpful analogies can be drawn between discourse on the rights of children and people with disabilities. The reason for this approach is that the question of age discrimination gives rise to legal and theoretical questions, particularly relating to the conceptual puzzles of equality, capacity and autonomy, which pervade discourse on both children’s rights and disability. This question is particularly pertinent since the adoption of the UN Convention on the Rights of Persons with Disabilities, under which a finding of incapacity on the basis of intellectual impairment constitutes discrimination.

## Justifying the exclusion

There was some opposition to the exclusion of children during the Equality Bill consultation exercise. Despite Harriet Harman’s claim to the contrary, Young Equals, an organisation set up to campaign for protection from age discrimination for children and young people, and composed of organisations including Liberty and Save the Children,<sup>11</sup> submitted a dossier of evidence of age discrimination against children and young people. The report concluded, among other findings, that older children aged 16 and 17 received less favourable treatment from health services than young children or adults, and that age boundaries between services had a particularly negative impact on the most disadvantaged children.<sup>12</sup> There was also criticism about the lack of planned provision for homeless youths (43% of 30 key local authorities did not have a specific strategy for dealing with youth homelessness), and about children being unfairly refused entry to

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<sup>6</sup> UK Government Equalities Office (EO), *Equality Act 2010: banning age discrimination in services, public functions and associations, equality impact assessment* (TSO, 2010), at p 25.

<sup>7</sup> Equality Act, s 28(1)(a).

<sup>8</sup> *Ibid*, s 100.

<sup>9</sup> Equality and Human Rights Commission, *Services, Public Functions and Associations: Statutory Code of Practice* (TSO, 2011).

<sup>10</sup> Equality Act 2010, s 6 and Part 3.

<sup>11</sup> Young Equals, *Making the Case: why children should be protected from age discrimination and how it can be done, proposals for the Equality Bill* (Young Equals, 2009).

<sup>12</sup> *Ibid*, at p 8.

public services such as libraries, leisure centres, museums and art galleries.<sup>13</sup> Children were also routinely found to be refused access to shops.<sup>14</sup> The organisation argued that specific non-discrimination measures might give 16 and 17 year olds equal access to social services and mental health services, prevent shop keepers from installing ‘mosquito’ devices<sup>15</sup> that deter children of all ages from accessing their services, and ensure that children making calls to ambulance services are taken seriously.

The exclusion of children ran contrary to the submissions of a number of other bodies too, including the UK Joint Committee on Human Rights (JCHR), composed of representatives from both the House of Commons and House of Lords, which argued that ‘the total absence of protection against age discrimination for those under 18 in service provision ... means that children who are subject to unjustified discrimination are left with little or no legal protection’.<sup>16</sup> In 2008, the UN Committee on the Rights of the Child specifically identified the Equality Bill that was under consultation at the time, welcoming ‘plans to consolidate and strengthen equality legislation, with clear opportunities to mainstream children’s right to non-discrimination into the UK anti-discrimination law (forthcoming Equality Bill)’.<sup>17</sup>

Although, as discussed further below, age discrimination is arguably distinguishable from other forms of discrimination, it can have profound, perhaps long-lasting effects. Perceptions of stigma, and feelings of shame, may result in diminished self-esteem and other negative mental health outcomes, as well as, for example, delays in seeking treatment for medical problems.<sup>18</sup> From a more positive perspective, it has been argued that encouraging young children to participate actively in decision-making can help to foster autonomy and responsibility in later life.<sup>19</sup> There is, moreover, a good argument favouring children’s inclusion in provisions relating to goods, services and facilities based on their, often underestimated, economic contribution. As Helen Stalford observes, in the context of EU law:

‘there is now a substantial body of research revealing the extent of children’s direct contribution ... both through their engagement in formal, paid employment, as consumers and clients of a vast range of services, notably education, leisure and sport, and in less quantifiable yet equally valid domestic caring and house-working arrangements and community-based

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<sup>13</sup> Ibid, at pp 10 and 14.

<sup>14</sup> Ibid, at p 16.

<sup>15</sup> These devices emit a high-pitched noise which causes discomfort to anyone under 25, and are used in public to disperse groups of teenagers. See Liberty, *Press FAQs Mosquito device* (Liberty, 2010), accessible at: <http://www.liberty-human-rights.org.uk/media/factsheets/top-facts-on-the-mosquito-device.pdf>.

<sup>16</sup> JCHR, *Legislative Scrutiny: Equality Bill, twenty-sixth report of session 2009*, House of Lords and the House of Commons (TSO, 2009), at p 23.

<sup>17</sup> UNCRC, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, CRC/C/GBR/CO/4 (United Nations, 2008), at p 6.

<sup>18</sup> P Corrigan and A Watson, ‘The paradox of self-stigma and mental illness’ (2002) 9 *Clinical Psychology: Science and Practice* 35; B Link and J Phelan, ‘On stigma and its public health implications’ (2006) 367(9509) *Lancet* 528.

<sup>19</sup> S Dodds, ‘Choice and Control in Feminist Bioethics’, in C Mackenzie and N Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford University Press, 2000), at pp 213–235.

voluntary activities.’<sup>20</sup>

It seems difficult to marry, therefore, the recognition of children as consumers<sup>21</sup> with the refusal to afford them the opportunity to challenge instances of unfair treatment. It is notable that children are presumed to be incapable of entering into contracts, and will not be bound even if this is to the detriment of the other contracting party. A minor is thus able to cancel any contract made before they reach the age of majority, and for a reasonable time thereafter.<sup>22</sup> Minors are, however, legally bound when acquiring goods and services considered essential for living, or beneficial to them, including contracts for services.<sup>23</sup> So although minors may enter into binding agreements with providers of goods and services, they have no express protection if these providers treat them unfairly because of their age. The practical reasons for excluding children, provided by the Equality Office, above, are also unconvincing. The government said it was concerned that:

‘certain age-based services for children could be withdrawn by service providers in the mistaken belief that they were no longer lawful; or the law might be used as a convenient excuse to withdraw services that would have been withdrawn anyway.’<sup>24</sup>

Yet it would be strange, as noted elsewhere<sup>25</sup> for service providers working in the interest of their clients to withdraw services without properly considering the EA’s provisions. A given provider can defend its decision if it can show that its conduct is a ‘proportionate means of achieving a legitimate aim’,<sup>26</sup> a test which would be satisfied were the provider able to prove that the services were being supplied to specific age groups because of particular, identified needs, and that the means used were fair.<sup>27</sup> The guidance suggests that possible legitimate aims could include enabling particular social groups to socialise together, to enjoy activities together or to enjoy peace and quiet.<sup>28</sup> In Australia, the Age Discrimination Act 2004 applies to children under 18, including in the provision of goods and services albeit subject to certain exemptions, but has seemingly not given rise to any systematic difficulties for service providers.<sup>29</sup>

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<sup>20</sup> H Stalford, *Children and the European Union: Rights, Welfare and Accountability* (Hart, 2012), at pp 9–10.

<sup>21</sup> For a discussion of children as consumers, see R Brusdal and I Frønes, ‘Children as Consumers’, in G Melton et al (eds), *The Sage Handbook of Child Research* (Sage, 2013).

<sup>22</sup> J O’Sullivan and J Hilliard, *The Law of Contract* (OUP, 5th edn, 2012). See also the Minors’ Contracts Act 1987.

<sup>23</sup> Sale of Goods Act 1979, s 3. T Cockburn, ‘Authors of their own lives? Children, contracts, their responsibilities, rights and citizenship’ (2013) 21 *International Journal of Children’s Rights* 377.

<sup>24</sup> *Ibid.*

<sup>25</sup> S Flacks, ‘Deviant disabilities: the exclusion of drug and alcohol addiction from the Equality Act 2010’ (2012) 21(3) *Social & Legal Studies* 395.

<sup>26</sup> Equality Act 2010, s 13(2).

<sup>27</sup> However, harassment or victimisation because of a person’s age is not capable of justification.

<sup>28</sup> Equality and Human Rights Commission, *Services, Public Functions and Associations: Statutory Code of Practice* (TSO, 2011).

<sup>29</sup> JCHR, *Legislative Scrutiny: Equality Bill, twenty-sixth report of session 2009*, House of Lords and the House of Commons (TSO, 2009). See also J Hemingway, *Roadmap to ADA: The Age Discrimination Act 2004* (Australian Human Rights Commission, 2007).

Moreover, there is already a long list of exceptions to section 29 of the EA, both in the act itself and the Age Exceptions Order which accompanies the Act.<sup>30</sup> There are general exceptions applying to age-based (and other forms of) discrimination including where another piece of legislation allows or requires people to be treated differently because of their age, for example, regarding state benefits, adopting and fostering, winter fuel allowances and so on. Exceptions also apply where a charity provides benefits only to people of a particular age or age group. Were under-18s to be included in the provisions, it would thus remain lawful to refuse to sell alcohol to children or for a charity to provide services aimed only at under-16s, for example. In addition, there are some lawful exceptions which relate specifically to age, including the provision of financial services such as insurance, and ‘beneficial concessions’ in services such as free travel. ‘Positive action’<sup>31</sup> which treats people differently according to their age is also allowed. This is action in which certain disadvantages experienced by a particular group are prevented or compensated for. This might include, for example, specialist young people’s services which have been set up to improve literacy and employability.

The argument about the adequacy of existing legislation to cope with such claims is also weak, since the same claim could be made in respect of older people. It is true that under the Children Acts 1989 and 2004, it is already the case that provision must be based on need rather than age, but these existing provisions do not specifically preclude age discrimination for under-18s. Clear legislative provisions would be more likely to effect change and redress unfair instances of different treatment, according to Young Equals.<sup>32</sup> A public sector equality duty<sup>33</sup> requires that public authorities have ‘due regard’ to the need to eliminate unlawful discrimination, harassment and victimisation, to advance equality, and to foster good relations. Yet schools and children’s homes were omitted from this duty, again contrary to the submissions of Young Equals<sup>34</sup> and the JCHR,<sup>35</sup> with the former arguing that ‘children’s services and schools have an established role in challenging inequalities’.<sup>36</sup> It is notable that no such exclusions were enacted for homes or institutions for people with disabilities. Finally, some of the arguments from the Equality Office would seem to justify the exclusion of children from all age discrimination provisions. Why, then, are they excluded from some and not others? A likely explanation is that, since under-18s were already included within the purview of the Employment Equality (Age) Regulations 2006, for example, and that the ban on age discrimination in clubs and associations is confined to fairly limited social circumstances,

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<sup>30</sup> Equality Act 2010 (Age Exceptions) Order 2012 (SI 2012/2466).

<sup>31</sup> Equality Act 2010, s 158.

<sup>32</sup> Young Equals, *Making the Case: why children should be protected from age discrimination and how it can be done, proposals for the Equality Bill* (Young Equals, 2009), at p 5.

<sup>33</sup> Equality Act 2010, s 149.

<sup>34</sup> Young Equals, *Making the Case: why children should be protected from age discrimination and how it can be done, proposals for the Equality Bill* (Young Equals, 2009).

<sup>35</sup> JCHR, *Legislative Scrutiny: Equality Bill, twenty-sixth report of session 2009*, House of Lords and the House of Commons (TSO, 2009), at p 3.

<sup>36</sup> Young Equals, *Making the Case: why children should be protected from age discrimination and how it can be done, proposals for the Equality Bill* (Young Equals, 2009), at p 6. There is scope for exploring this exclusion in more detail, but more space would be needed to do it justice.

extending equal rights to children in the large and complex sphere of goods, facilities and services required a greater commitment to children's equality.

In addition to the practical utility of the legislation, the 'expressive value' of rights recognition, notes Lucinda Ferguson, should not be discounted as mere semantics.<sup>37</sup> She writes:

'The statement that a child has a particular right is both an expression of an existing social norm that recognises the importance of the content of that legal right to the child, as well as a means of changing social norms to be more reflective of that importance.'<sup>38</sup>

Moreover, an integral quality of children's rights, and human rights in general, is their proposed value in redressing power imbalances.<sup>39</sup> For a country in which studies and reports repeatedly reveal the extent of the stigmatisation of children, particularly teenagers,<sup>40</sup> the right to non-discrimination on the basis of an age-based status might constitute both an avenue of redress and an expressive means with which to challenge the attitudes of the powerful adult majority.

It is arguable, then, that although the government's decision to exclude children was stated to be partly based on practical justifications, the long list of exceptions and, perhaps most importantly, a justification defence, would seem to satisfy such reservations. The reference to children's 'needs' rather than rights, and the professed necessity for treating children differently, display a reluctance for enshrining the parity of individuals aged under 18 with those who are older. Although it is possible that the government simply overestimated the practical difficulties involved in including children, Harriet Harman emphasised that children *are* different from adults, and so must be treated appropriately.

The next section explores the notion of equal treatment further. Although obviously relevant, I do not intend to duplicate well-established arguments about, or reasons for, adult resistance to children as rights-holders, nor do I have anything further to add to the corpus of literature on the nuances between, and importance of, different theories of children's rights.<sup>41</sup> However, since the attribution of equal rights for both children and people with disabilities have historically been contingent on (contested) notions of capacity, vulnerability and, relatedly, autonomy,<sup>42</sup> I want to use the question of age

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<sup>37</sup> L Ferguson, 'Not merely rights for children but children's rights: the theory gap and the assumption of the importance of children's rights' (2013) 21 *International Journal of Children's Rights* 177.

<sup>38</sup> *Ibid.*, at p 183.

<sup>39</sup> J Tobin, 'Justifying children's rights' (2013) 21(3) *International Journal of Children's Rights* 410.

<sup>40</sup> See P Kelly, 'Growing up as risky business? Risks, surveillance and the institutionalized mistrust of youth' (2003) 6(2) *Journal of Youth Studies* 165; Echo, *Women in Journalism: Teenage Boys and the Media* (2009) available at: <http://66.151.177.92/data/File/pdf/WiJ%20charts%20Echo%20Version.pdf>.

<sup>41</sup> See, for example, D Archard, *Children: Rights and Childhood* (Routledge, 2nd edn, 2004); J Eekelaar, 'The emergence of children's rights' (1986) 6 *Oxford Journal of Legal Studies* 161; J Tobin, 'Justifying children's rights' (2013) 21(3) *International Journal of Children's Rights* 410. M Freeman, 'The human rights of children' (2010) 63(1) *Current Legal Problems* 1.

<sup>42</sup> See S Gilmore and J Herring, "'No" is the hardest word: consent and children's autonomy' [2011] CFLQ 3; J Bridgeman, *Parental Responsibility: Young Children and Healthcare Law* (Cambridge University Press, 2007); V

discrimination to furrow the shared ground between disability and childhood studies, with the subject of non-discrimination remaining central to the discussion.

## Discrimination, rights and capacity

Although there is little doubt that discrimination in respect of both children and older people, the latter having formed the basis of almost all discussion on the subject, is harmful,<sup>43</sup> age discrimination is in general understood to be different from other forms of unfair treatment. In particular, Sandra Fredman adds that, unlike race or gender (and presumably disability), age ‘does not define a discreet group’. She writes:

‘We have all been young, and we will all, if we are fortunate, become old. Thus, the basic opposition between “self” and “other” which marks much of racism and sexism is not present in the same way.’<sup>44</sup>

Although this highlights an important conceptual distinction between disability and childhood which will be discussed in due course, there are also analogies to be made. Jonathan Herring notes that the question of autonomy, which is afforded on the basis of capacity, ‘distinguishes the variety of theoretical approaches towards children’,<sup>45</sup> and that discourse has evolved from the notion of whether children should have any rights at all, to whether children have the right to make mistakes. Autonomy is understood to refer to the *capacity* to be ‘one’s own person’, free from distorting influences,<sup>46</sup> although the (idealistic) idea of the autonomous subject has also been subject to extensive critique, including philosophical, feminist and sociological interrogation from Michel Foucault,<sup>47</sup> Robert Young<sup>48</sup> and Jennifer Nedelsky,<sup>49</sup> among others.

Liberal moral philosophy has historically framed personhood and identity according to (adult) measures of capacity and rationality, thereby excluding children from the status of rights holder,<sup>50</sup> as well as women, non-whites and people with disabilities.<sup>51 52</sup> According to Archard, ‘childhood is defined as that which lacks the capacities, skills and powers of

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Chico and L Hagger, ‘The Mental Capacity Act 2005 and mature minors: wise legislation or a missed opportunity?’ (2011) 33(2) *Journal of Social Welfare and Family Law* 157.

<sup>43</sup> D Price, ‘The poverty of older people in the UK’ (2006) 20(3) *Journal of Social Work Practice* 251; S Fredman and S Spencer, *Age as an Equality Issue: Legal and Policy Perspectives* (Hart, 2003).

<sup>44</sup> S Fredman, ‘The Age of Equality’ in Fredman and Spencer *ibid.*

<sup>45</sup> J Herring, ‘Children’s Rights for Grown Ups’, in Fredman and Spencer *ibid.*, at p 146.

<sup>46</sup> J Christman, ‘Autonomy in Moral and Political Philosophy’, *Stanford Encyclopedia of Philosophy* (2009), accessible at: <http://plato.stanford.edu/entries/autonomy-moral/>.

<sup>47</sup> M Foucault, ‘Two Lectures’, in C Gordon (ed), *Power/Knowledge: Selected Interviews and other Writings 1972–1977* (Pantheon Books, 1977).

<sup>48</sup> R Young, *Autonomy: Beyond Negative and Positive Liberty* (St Martin’s Press, 1986).

<sup>49</sup> J Nedelsky, ‘Reconceiving autonomy: sources, thoughts, and possibilities’ (1989) 1(1) *Yale Journal of Law and Feminism* 7.

<sup>50</sup> J Locke, *An Essay Concerning Human Understanding*, P H Nidditch (ed) (Oxford University Press, 1987).

<sup>51</sup> P Alderson, ‘Researching Children’s Rights to Integrity’, in B Mayall (ed), *Children’s Childhoods: Observed and Experienced* (Falmer Press, 1994).

<sup>52</sup> N Naffine, ‘Sexing the Subject (of Law)’, in M Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995).



adulthood. To be a child is to be not yet an adult'.<sup>53</sup> Katherine Federle notes that the reversion to capacity sustains children's powerlessness, and the perception that the child lacks the capacities of a legal subject has allowed him or her to be constructed as problems or objects of intervention, rather than as legal subjects.<sup>54</sup> Yet according to Donnelly, the requirement of legal capacity is treated as fact, in spite of its inherent normativity:

'Whether or not a person has capacity to make a particular decision depends on whether she reaches a designated standard in respect of specified abilities. What is required, both in respect of the standard to be reached and in respect of the necessary abilities, depends on the view of autonomy which we hold.'<sup>55 56</sup>

There is therefore no objective, 'scientific' test for capacity. Rather, established assessments are calibrated according to the norm of the able-bodied (male) 'adult'. As such, the approach to children's capacity is rooted in an individualistic, bio-medical view of developing capacities which revolves around cognitive functioning. This social construction of capacity aligns with the social construction of childhood, an observation that will be discussed in due course.

Of course, capacities do evolve with age, yet children may develop abilities at different ages depending on cultural, familial and social circumstances. It is now well established that 'adults consistently underestimate children's capacities',<sup>57</sup> while Weithorn and Campbell conclude that most 14 year olds have equivalent competence to adults.<sup>58</sup> Priscilla Alderson<sup>59</sup> has also argued that treating children with respect can raise competence levels, drawing to mind Honoré's suggestion that being responsible for the outcome of our conduct is essential for our identity formation, and 'to deny people's responsibility for their actions is to strike at their identity'.<sup>60</sup> Article 5 of the UN Convention on the Rights of the Child (UNCRC), as discussed further below, refers to the exercise of children's rights according to the 'evolving capacities of the child'. The UN Committee on the Rights of the Child has elaborated, to some extent, its view of the meaning of capacity in a General Comment on the right of the child to be heard.<sup>61</sup> It emphasises that state parties 'cannot begin with the presumption that a child is incapable

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<sup>53</sup> D Archard, *Children: Rights and Childhood* (Routledge, 2nd edn, 2004), at p 39.

<sup>54</sup> K Federle, 'On the road to reconceiving rights for children: a post-feminist analysis of the capacity principle' (1993) 42 *De Paul Law Review* 983.

<sup>55</sup> M Donnelly, *Healthcare Decision-making and the Law: Autonomy, Capacity and the Limits of Liberalism* (Cambridge University Press, 2010), at p 3.

<sup>56</sup> *Ibid*, at p 2.

<sup>57</sup> G Lansdown, *The Evolving Capacities of the Child* (UNICEF/Innocenti Research Centre, 2005), at p 30.

<sup>58</sup> L Weithorn and S Campbell, 'The competency of children and adolescents to make informed treatment decisions child development' (1982) 53(6) *Early Adolescence* 1589.

<sup>59</sup> P Alderson, 'Rights of Children and Young People', in A Coote (ed), *The Welfare of Citizens* (IPPR/Rivers Oram Press, 1992), at pp 153–180.

<sup>60</sup> T Honoré, *Responsibility and Fault* (Hart, 1999), at p 10.

<sup>61</sup> UN Committee on the Rights of the Child, *General Comment No 12: The right of the child to be heard* (2009), CRC/C/GC/12.

of expressing his or her own views. On the contrary, State parties should presume a child has the capacity to form her or his own views...’ (paragraph 20).

Questions regarding children, capacity and autonomy tend to boomerang back to ‘Gillick’ competency, which originally referred to the circumstances under which children under 16 can consent to medical treatment, particularly obtaining contraception, without parental knowledge.<sup>62</sup> There is not space here to delve deeply into the case and subsequent decisions,<sup>63</sup> but the law on competency to make healthcare decisions encapsulates the struggle between a liberal veneration of individual autonomy and the paternalistic exigency for child protection. It has been argued that a paternalistic desire to protect children, in particular, has ‘legitimised routine and endemic discrimination against children on grounds of age’.<sup>64</sup> The autonomy/protection dichotomy, and the issues of capacity and discrimination, have also permeated discourse on the rights of persons with intellectual disabilities.

## Disability and childhood: a case for ‘equal rights’?

Discrimination against people with intellectual disabilities has historically been widespread,<sup>65</sup> with presumed incapacity informing routine human rights violations. Peter Bartlett notes that ‘People with mental health problems are often found to lack capacity on the flimsiest of evidence, sometimes without notice that [any] proceedings are occurring’.<sup>66</sup> The Convention on the Rights of Persons with Disabilities (CRPD), adopted in 2006, was therefore an important landmark for addressing the ways in which people with disabilities are marginalised and excluded. Article 12(2) states that signatories must ‘recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life’. Moreover, Article 2(3) provides that: ‘States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity’. This provision also has relevance for the rights of children.

The focus of Article 12 is thus on providing support in order for people with disabilities to be able to make their own decisions. In light of this article, a finding of legal incapacity on the basis of disability constitutes discrimination. Bach and Kerzner suggest that: ‘The language of Article 12 represents a shift from the traditional dualistic model of [mental] capacity versus [mental] incapacity and is viewed as an equality-based approach

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<sup>62</sup> *Gillick v West Norfolk and Wisbech Area Health Authority and Department of Health and Social Security* [1986] AC 112. For a recent discussion, see E Cave, ‘Goodbye Gillick? Identifying and resolving problems with the concept of child competence’ (2013) 34(1) *Legal Studies* 103. It should be noted that capacity is distinct from legal competence. Although capacity might be required for competence, legal competence concerns the degree of mental capacity necessary to make decisions about a specific issue or to carry out a specific act.

<sup>63</sup> See also S Gilmore and J Herring, ‘“No” is the hardest word: consent and children’s autonomy’ [2011] CFLQ 3, and E Cave and J Wallbank, ‘Minors’ capacity to refuse treatment: a reply to Gilmore and Herring’ (2012) 20(3) *Medical Law Review* 423; E Cave, ‘Maximisation of minor’s capacity’ [2011] CFLQ 431.

<sup>64</sup> H Stalford, *Children and the European Union: Rights, Welfare and Accountability* (Hart, 2012), at p 52.

<sup>65</sup> See, for example, A Cooper, C Melville and J Morrison, ‘People with intellectual disabilities. Their health needs differ and need to be recognised and met’ (2004) 329 *BMJ* 414.

<sup>66</sup> P Bartlett, ‘The United Nations Convention on the Rights of Persons with Disabilities and mental health law’ (2012) 75(5) *Modern Law Review* 761.

to legal capacity'.<sup>67</sup> Bartlett cautions that capacity tests are not inherently problematic. He writes: 'The fact that [the capacity test] is used inappropriately in large parts of the world – perhaps including England and Wales – does not necessarily mean all its uses are discriminatory'.<sup>68</sup> The more important debate, contends Bartlett, concerns the nature of support offered to individuals in making decisions.<sup>69</sup>

Bach and Kerzner<sup>70</sup> invoke Amartya Sen's capabilities approach<sup>71</sup> to maintain that capacity tests should be replaced by measures of 'decision-making capability'.<sup>72</sup> Such measures cannot be based on disability status and include both assessment of individual decision-making and an understanding of the supports and accommodations needed to exercise legal capacity in relation to others including entering agreements and making contracts.<sup>73</sup> The point is again that support and accommodation may be supplied so that different decision-making abilities can be turned into decision-making capabilities in order to exercise legal capacity. Bach and Kerzner explain:

'The question can no longer be: Does a person have the mental capacity to exercise their legal capacity? In other words, mental capacity can no longer serve as a proxy for legal capacity. Rather, the question is: What types of supports are required for the person to exercise his or her legal capacity?'<sup>74</sup>

Similarly, a shift from capacity to capability within children's rights assessments would reflect a focus on their abilities rather than a 'deficit approach' to childhood. There is also potentially a negative, non-discrimination obligation on states to remove restrictions on children's rights based on mental capacity assessments. This would reflect the growing jurisprudential respect for children's autonomy within the law in general.<sup>75</sup> Parents or guardians are usually entrusted as the individuals providing decision-making support, and Bach and Kerzner contend that: 'in a positive liberty view of autonomy we do not

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<sup>67</sup> M Bach and A Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity* (Law Commission of Ontario, 2010), at p 30.

<sup>68</sup> P Bartlett, 'The United Nations Convention on the Rights of Persons with Disabilities and mental health law' (2012) 75(5) *Modern Law Review* 761, at p 763.

<sup>69</sup> It should be noted that the Mental Capacity Act 2005 (MCA), which applies only to those aged 16 and over, strays close to the obligations under the CRPD in presuming that over-16s are capable of making a decision. Although the MCA is relevant, there is not space for a discussion here. See Bartlett *ibid*, at p 766.

<sup>70</sup> M Bach and A Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity* (Law Commission of Ontario, 2010).

<sup>71</sup> See, for example, A Sen, *Commodities and Capabilities* (Amsterdam: North Holland, 1985).

<sup>72</sup> Gerard Quinn, the disability academic, also questions whether the notion of capacity should be disposed of altogether in favour of a new language to address decision-making. See G Quinn, 'Personhood and legal capacity: perspectives on the paradigm shift of Article 12 CRPD', concept paper delivered at the HPOD Conference, Harvard Law School, 20 February 2010.

<sup>73</sup> M Bach and A Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity* (Law Commission of Ontario, 2010), at p 71.

<sup>74</sup> *Ibid*, at p 58.

<sup>75</sup> See E Cave, 'Goodbye Gillick? Identifying and resolving problems with the concept of child competence' (2013) 34(1) *Legal Studies* 103. Cave, also suggests a universal test for capacity, for both minors and people with disabilities, may be appropriate in the healthcare context. See also A McFarlane, 'Mental capacity: one standard for all ages' [2011] *Fam Law* 479.

exercise our self-determination as isolated, individual selves, but rather “relationally,” interdependently and intersubjectively with others’.<sup>76</sup> Tensions between different conceptions of autonomy revolve around the role of the person who is assisting with decision-making.<sup>77</sup>

There are deeper challenges to pursuing a supported decision-making approach to children’s rights. Although there has been much concern about the guardianship of adults with disabilities, and the potential for violating autonomy rights, scholarship relating to the participation and independence of children has tended to be more equivocal in accepting the necessity for parental decision-making *on behalf of* children, rather than pressing for a supported decision-making role within parenthood.<sup>78</sup> For example, some states and countries have begun to amend their guardianship laws in order to reflect the CRPD and a focus on supported decision-making, including British Columbia in Canada.<sup>79</sup> The UNCRC, however, does not go so far as to suggest changing parenthood laws to reflect children’s capacity to make decisions,<sup>80</sup> and the UN Committee on the Rights of the Child has expressly recognised that ‘parents (and other caregivers) are normally the major conduit through which young children are able to realise their rights’.<sup>81</sup> Although, in recent years, and since the enactment of the Children’s Acts in 1989 and 2004<sup>82</sup> and ensuing case-law,<sup>83</sup> the UK has seen a greater focus on the wishes and participation of children, there is nonetheless a reluctance to give children’s decision-making too much weight in case this is deemed contrary to their best interests.<sup>84</sup> There is certainly a branch of commentary in childhood studies that advocates for greater participatory rights for children, particularly from ‘child liberationists’<sup>85</sup> and particularly in the health sphere,<sup>86</sup> but it rarely goes so far as to demand changes to the law on

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<sup>76</sup> Ibid, at p 40.

<sup>77</sup> P Bartlett, ‘The United Nations Convention on the Rights of Persons with Disabilities and mental health law’ (2012) 75(5) *Modern Law Review* 761.

<sup>78</sup> Notwithstanding the fact that these roles frequently overlap; many parents act as legal guardians for their children with disabilities.

<sup>79</sup> See A Kanter, ‘The promise and challenge of the United Nations Convention on the Right of Persons with Disabilities’ (2007) 34 *Syracuse Journal of International Law* 287.

<sup>80</sup> Article 5 states that states must respect those responsible for children to provide, in conformity with the evolving capacities of the child, ‘appropriate direction and guidance’ in exercising children’s rights.

<sup>81</sup> UN Committee on the Rights of the Child, *General Comment No 7 on implementing child rights in early childhood*, at para 16, available at <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/GeneralComment7Rev1.pdf>.

<sup>82</sup> Children Act 1989, s 1(3), and the Children Act 2004, s 53, place a duty on courts and local authorities to ascertain the child’s wishes and feelings when making decisions.

<sup>83</sup> See, for example, *Re S (A Minor) (Independent Representation)* [1993] Fam 263; *Mabon v Mabon* [2005] EWCA Civ 634, [2005] 3 WLR 460.

<sup>84</sup> The welfare of the child is after all the paramount consideration under s 1 of the Children Act 1989. Thomas Bingham MR in *Re S*, *ibid*, argued that: ‘... a child is, after all, a child. The reason why the law is particularly solicitous in protecting the interests of children is because they are liable to be vulnerable and impressionable, lacking the maturity to weigh the longer term against the shorter...’.

<sup>85</sup> Child liberationists are loosely defined as a subset of children’s rights activists and theorists who have advocated for the freedom of children from oppressive societal norms. See, for example, J Holt, *Escape from Childhood* (Dutton, 1974).

<sup>86</sup> P Alderson, *Young Children’s Rights: Exploring Beliefs, Principles and Practice* (Jessica Kingsley, 2000).

parenting in order to shift towards a more advocacy role for parents. Federle suggests that appointing parents to act as agents for children ‘overlooks the potential for conflict between a parent’s role as agent and as duty bearer’, and that parents might consequently wave their responsibilities to children.<sup>87</sup> She suggests that a system of child agents would be also problematic in application since ‘it is unclear how every child could have access to such an agent each time the child’s rights are affected’.<sup>88</sup> In contrast, there has been a groundswell of support for reforming guardianship laws in the context of disability, and an acceptance that people with disabilities may require independent advocates who are able to support decision-making and enable rights-claiming.<sup>89</sup>

## A ‘social model’ of childhood

Having largely focused thus far on the question of capacity, the discussion will now turn to broader comparative issues relating to disability and childhood. An emphasis on normative arguments can cloud the often politicised nature of ‘rights talk’, and the recognition that both disability and childhood act as repositories for essentially contested principles and values relating to beliefs about care, needs, duties, responsibilities and citizenship, as well as rights. Sociological scholarship on both disability and childhood has proliferated in recent years, and has in particular included observations about ambivalent representation and constitution. Children are characterised as innocents and deviants, autonomous consumers and passive recipients and, although they also escape such dichotomous categorisation, they are often portrayed as objects of curiosity or (at least potential) abnormality.<sup>90</sup> Images of people with disabilities can also be classified according to a limited number of designations, most notably ‘brave’ and ‘inspiring’ heroes or tragic victims, but invariably depicting ‘sufferers’, and rarely invoking images of ‘normality’.<sup>91</sup> Both children and people with disabilities act as sites onto which ‘capable’ adults’ anxieties and fantasies are projected, including fears about death, vulnerability and social disorder as well as retrospective desires for a romanticised childhood and prospective hopes for society.<sup>92</sup>

The requirement, under Article 12 of the CRPD, that people with disabilities are provided

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<sup>87</sup> K Federle, ‘Looking ahead: an empowerment perspective on the rights of children’ (1995) 68 *Temple Law Review* 1585.

<sup>88</sup> *Ibid.*

<sup>89</sup> In addition to M Bach and A Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity* (Law Commission of Ontario, 2010), see also Mental Disability Advocacy Centre, *Supported Decision-making: an alternative to guardianship*, Budapest: Mental Disability Advocacy Centre, accessible at: [http://mdac.info/sites/mdac.info/files/English\\_Supported\\_Decision-making\\_An\\_Alternative\\_to\\_Guardianship.pdf](http://mdac.info/sites/mdac.info/files/English_Supported_Decision-making_An_Alternative_to_Guardianship.pdf). For a more critical read that is nonetheless supportive of the shift to supported decision-making, see N Kohn, J Blumenthal and A Campbell, ‘Supported decision-making: a viable alternative to guardianship?’ (2013) 117(4) *Penn State Law Review* 1111.

<sup>90</sup> See, for example, D Olson and G Rampaul, ‘Representations of Childhood in the Media’, in D Lemish (ed), *The Routledge International Handbook of Children, Adolescents and Media* (Routledge, 2013).

<sup>91</sup> See eg, S French and J Swain, ‘Whose Tragedy? Towards a Personal Non-Tragedy View of Disability’, in C Barnes, S French, J Swain and C Thomas (eds), *Disabling Barriers – Enacting Environments* (Sage, 2nd edn, 2004), at pp 34–39.

<sup>92</sup> *Ibid.*, and D Archard, *Children: Rights and Childhood* (Routledge, 2nd edn, 2004). See also T Shakespeare, ‘Cultural representation of disabled people: dustbins for disavowal?’ (1994) 9(3) *Disability and Society* 283.

with support in order that they may exercise their legal capacity is one rooted in the 'social model' of disability which incorporates efforts to reframe discourse on disability to one of enablement rather than abnormality. This model demands consideration of the barriers to the equitable participation of people who have physical or mental 'impairments' in the social sphere, and suggests that the 'disabling environment' created by the division between disabled and 'non-disabled' is responsible for them, rather than any inherent affliction or condition.<sup>93</sup> Disability itself, which defies a universal and accepted definition,<sup>94</sup> is understood as a social construction rather than a 'natural' state. The model therefore rests on a fundamental difference between 'impairment', a neutral body/mind affliction, and 'disability', which results from subsequent interaction with society.

The CRPD has adopted the social model approach, emphasising that persons with disabilities include those with impairments who may be prevented from full participation in society due to interactions with barriers.<sup>95</sup> The drafters of the EA in fact fell back on the 'medical model' of disability, through which a person's disability is defined by individual diagnosis or pathology, by including the meaning and definition of the mental or physical impairment as fundamental facets for any claim.<sup>96</sup> In other countries favouring a social model, there is less emphasis on the person's impairment with the focus shifting to determining whether a discriminatory act has actually occurred.<sup>97</sup> That said, the EA amends provisions under the Disability Discrimination Act 1995 by removing the list of 'capacities' that comprised the definition of disability.<sup>98</sup> However, this was explained as being for practical reasons since the list had been identified as serving little purpose in helping to confirm that a person should have protection, and as complicating the definition of disability. It was also argued that people with mental health conditions 'had found it hard to show how their impairment had affected one of the listed capacities'.<sup>99</sup> This latter complaint reflects the priority accorded to physical disabilities rather than mental impairments.<sup>100</sup>

More recently, activists and scholars in the field of disability studies have been enmeshed in an ongoing argument about how far this social constructionist revision of disability extends. Commentators have questioned whether disability can be 'reduced' to the social when there are quite clearly 'biological facts' relating to particular impairments borne by

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<sup>93</sup> C Barnes, 'Disability activism and the struggle for change: disability, policy and politics in the UK' (2007) 2 *Education, Citizenship and Social Justice* 203; M Oliver, *Understanding Disability: From Theory to Practice* (Macmillan, 1996).

<sup>94</sup> S Linton, *Claiming Disability: Knowledge and Identity* (New York University Press, 1998), at p 10; R Breman and K Woodfield, *Review of Disability Estimates and Definitions* (TSO, 2004), at p 4.

<sup>95</sup> Article 1 of the CRPD.

<sup>96</sup> Equality Act 2010, s 6.

<sup>97</sup> C Pearson and N Watson, 'Tackling disability discrimination in the United Kingdom: the British Disability Discrimination Act' (2007) 23(95) *Washington University Journal of Law and Policy* 95.

<sup>98</sup> These capacities included mobility, memory or ability to concentrate, learn or understand, or perception of the risk of physical danger, among others (para 4 of Sch 1 to the Disability Discrimination Act 1995).

<sup>99</sup> Equalities Office, *Equality Act Impact Assessment Final Version* (TSO, 2010), at p 106.

<sup>100</sup> J Mulvany, 'Disability, impairment or illness? The relevance of the social model of disability to the study of mental disorder' (2000) 22(5) *Sociology of Health and Illness* 586.

a minority of people.<sup>101</sup> The originators of the social model have tended to resist the suggestion that there is any biological or natural element of disability at all. However, Bickenbach et al, argue that:

‘The nature of the link between impairment and disability is an important issue for any social theory of disablement, since without some researchable connection it would not be possible to distinguish the socially-created disadvantages of disablement from those of race, gender, class or economic status ... Disablement is essentially, conceptually, linked to a health status (or the perception of a health status).’<sup>102</sup>

Similarly, Vehmas and Makela write that: ‘there is nothing oppressive in admitting that impairment includes both physical and social dimensions’.<sup>103</sup>

The field of childhood studies has been beset with comparable arguments, pivoting on the apparently binary nature of the biology/culture distinction.<sup>104</sup> The suggestion that childhood is a socially constructed phenomenon rather than a ‘natural’ state has spawned a body of academic commentary.<sup>105</sup> In this context, ‘age’ can be aligned with ‘impairment’. The question is the same: how much are age or impairment ‘natural’ givens and biological realities, or alternatively social constructs? It has been argued that those who have affirmed childhood to be (only) a socially constructed phenomenon also neglect consideration of the physical and biological facts, or differences, that distinguish (particularly young) children from adults.<sup>106</sup> Archard writes that:

‘The child liberationists overstate their case when they represent all childhood incapacity as mere conventional, enforced dependency. Some of it is natural. Being very young does mean being small and weak, even if the contrast between dependent child and independent adult can be exaggerated.’<sup>107</sup>

Archard goes on to argue that, just because *conceptions* of childhood differ between cultures, it does not mean that the *concept* of children is purely socially constructed. He notes that: ‘All societies – save the last – have children. Every society does not have to understand what it is to be a child in the same way as the others’.<sup>108</sup> Child liberationists have long argued that according rights on the basis of age alone would be

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<sup>101</sup> See B Hughes and K Patterson, ‘The social model of disability and the disappearing body: towards a sociology of impairment’ (1997) 12(3) *Disability and Society* 325; S Flacks, ‘Deviant disabilities: the exclusion of drug and alcohol addiction from the Equality Act 2010’ (2012) 21(3) *Social & Legal Studies* 395.

<sup>102</sup> J E Bickenbach, S Chatterji, E M Badley and T B Ustun, ‘Models of disablement, universalism and the international classification of impairments, disabilities and handicaps’ (1999) 48 *Social Science and Medicine* 1176.

<sup>103</sup> S Vehmas and P Makela, ‘A realist account of the ontology of impairment’ (2008) 34 *Journal of Medical Ethics* 95.

<sup>104</sup> The difference between ‘sex’ (a supposed biological reality) and ‘gender’ (the social meanings and characteristics ascribed to male and female) has similarly fuelled much scholarship in the field of feminist studies, emerging in particular from the work of Judith Butler. See J Butler, *Gender Trouble* (Routledge, 1990).

<sup>105</sup> See D Archard, *Children: Rights and Childhood* (Routledge, 2nd edn, 2004), at pp 27–36.

<sup>106</sup> D Archard, *Children: Rights and Childhood* (Routledge, 2nd edn, 2004), at p 26.

<sup>107</sup> *Ibid*, at p 95.

<sup>108</sup> *Ibid*, at p 27.

discriminatory.<sup>109</sup> However, as Archard notes, this is not to discount the fact that ‘age may supply *some* guide to one’s relative competence’ (author’s emphasis).<sup>110</sup> In the same way that the precise boundaries of childhood may differ from culture to culture, the term ‘disability’ is inherently ill-defined. Linton asserts that it is ‘a linchpin in a complex web of social ideals, institutional structures and government policies’.<sup>111</sup>

A body of work in both disability and childhood studies has gone on to build on the simplistic dichotomy between social constructionism and biological ‘reality’ to produce a more nuanced conception of childhood and disability. Alan Prout argues that social studies of childhood have in general been beset with oppositional dichotomies including nature/culture, structure/agency, being/becoming and so on.<sup>112</sup> In particular, he notes that ‘children’s capacities are extended and supplemented by all kinds of material artefacts and technologies, which are also hybrids of nature and culture. This shapes the constitution of childhood and the experiences and actions of children’.<sup>113</sup> Similarly, Prout and James conclude that: ‘The immaturity of children is a biological fact but the ways in which that immaturity is understood and made meaningful is a fact of culture’.<sup>114</sup> In the field of disability studies, Mulvany<sup>115</sup> has called for the adoption of the notion of ‘embodied irrationality’ in respect of mental disabilities, which addresses both the bodily experience of mental illness and the social constructions of such illnesses, thus avoiding biological determinism.

In the same way that the social model destabilises the barriers between ‘ability’ and disability’, Herring<sup>116</sup> argues that, rather than relying on the differences between adults and children in order to justify a different legal regime for children, a better approach would be to recognise that adults can be similar to children in terms of vulnerability and dependence. Thus, he concludes, a better case for equality of rights can be based on recognising the dependency and vulnerability of adults, rather than seeking to prove the competence and self-sufficiency of children.<sup>117</sup> Adulthood is therefore not a final state. As Archard also observes: ‘Adulthood as a process is a continual becoming, a never-completed maturing ... there is no guarantee that ageing automatically brings with it maturity ...’.<sup>118</sup>

Like purely constructionist accounts of childhood or disability, a problem with too fluid a

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<sup>109</sup> Ibid, at p 85.

<sup>110</sup> Ibid, at p 86.

<sup>111</sup> S Linton, *Claiming Disability: Knowledge and Identity* (New York University Press, 1998), at p 10.

<sup>112</sup> A Prout, *The Future of Childhood* (Routledge, 2005).

<sup>113</sup> Ibid, at p 4.

<sup>114</sup> A James and A Prout, ‘A New Paradigm for the Sociology of Childhood? Provenance, Promise and Problems’, in A James and A Prout (eds), *Constructing and Reconstructing Childhood* (Falmer, 1990).

<sup>115</sup> J Mulvany, ‘Disability, impairment or illness? The relevance of the social model of disability to the study of mental disorder’ (2000) 22(5) *Sociology of Health and Illness* 586.

<sup>116</sup> J Herring, ‘Children’s Rights for Grown Ups’, in S Fredman and S Spencer (eds), *Age as an Equality Issue: Legal and Policy Perspectives* (Hart, 2003).

<sup>117</sup> Ibid, at p 147.

<sup>118</sup> D Archard, *Children: Rights and Childhood* (Routledge, 2nd edn, 2004), at p 45.



notion of a difference is that there is a danger of ignoring the specific vulnerabilities experienced by certain sections of the population based on ‘natural’ attributes. Herring’s radical proposition aligns with a more fluid, social and contextual approach to capacity which recognises that age distinctions can be arbitrary and deterministic. Similarly, commentators argue that many, if not most, of us will experience some form of disability as our life progresses, whether of the mind or the body. The argument is a persuasive one, but tends towards eclipsing the specificity of (especially young) children’s vulnerability, as well as the needs of people with disabilities, and the particular ways in which children and people with disabilities experience discrimination. It is notable that equality claims through legal categorisation must invariably establish difference in order to be successful.

Christine Overall has considered the connections between age and impairment in respect of older people.<sup>119</sup> She argues that the idea that *both* disability and ageing are biological givens is ‘a fiction that functions to excuse and perpetuate the very social mechanisms that perpetuate ableist and ageist oppression’.<sup>120</sup> For example, she notes that although age is thought to relate to the actual number of years lived, being elderly is a socially acquired identity that may vary across individuals, cultures and historical periods. Although she claims that she is not ‘denying the reality of the body’, she also writes that age, like impairment, is socially constructed ‘conceptually and materially’.<sup>121</sup> While writing in the context of older people, this argument again rests on a biology/culture binary, privileging the social over the natural. It is possible to argue that notions of capacity are contested, and that the nominated ages for acquiring certain rights may be disputed, while also maintaining that there is a biological component to age and childhood. Overall’s observation that ‘there is a lot of cultural flexibility in the designation of the number of years that constitutes old age – and for that matter, youth and middle age’ does not necessarily correspond with her claim that ‘ageing is not a “natural” process’ and that it ‘is in no way outside of culture’.<sup>122</sup> There is surely consensus across cultures and societies that a baby and a 100-year-old are ‘naturally’ young and old respectively. Indeed, Overall expresses concern about cultural reactions ‘infantilising’ older people; this presumably suggests that ‘infants’ are in some way ‘lesser’ or at least biologically different, creating an implicit recognition that there is something determinative about certain ages.<sup>123</sup> This is not to deny the importance of recognising the socially-imbued characteristics of age and disability. However, as others have argued,<sup>124</sup> that should not serve to deny the hybridity of the nature/social components of both disability and age.

A difference, albeit a contested one, in the analogy with disability is that children are

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<sup>119</sup> C Overall, ‘Old age and ageism, impairment and ableism: exploring the conceptual and material connections’ (2006) 18(1) *NWSA Journal* 126.

<sup>120</sup> *Ibid.*, at p 126.

<sup>121</sup> *Ibid.*, at p 134.

<sup>122</sup> *Ibid.*, at p 129.

<sup>123</sup> *Ibid.*, at p 131.

<sup>124</sup> See A Prout, *The Future of Childhood* (Routledge, 2005) and J Mulvany, ‘Disability, impairment or illness? The relevance of the social model of disability to the study of mental disorder’ (2000) 22(5) *Sociology of Health and Illness* 586.

likely to develop skills in reasoning as they age. The idea of children as developing beings, heavily influenced by the dominance of studies in developmental psychology,<sup>125</sup> differs from the notion of the *potential*, relative stasis of a particular disability. People with intellectual disabilities *may* not gather those attributes relating to capacity that all children tend to acquire eventually, however objectively or subjectively assessed. The danger with this temporal argument for children's rights, in particular the right to non-discrimination, is that it infers that children's future status as adults somehow allows for rights violations in the present. Indeed, were a person, classified as disabled as a result of an intellectual impairment, to later attain 'full capacity' (however that may be determined, and despite the fact that tests for capacity rely on contentious norms), that would not influence the respect for their rights during the period of disability. That said, all children, barring any misfortune, will acquire the rights denied to them on reaching the age of majority. People with disabilities, on the other hand, are often with their condition for life. There is a qualitative distinction, therefore, between being exposed to discrimination in the provision of goods, facilities and services for a matter of several years rather than an entire lifetime. We might therefore be less concerned about assigning incapacity to a 2-month-old baby than to a person with even severe intellectual disabilities, since the baby is at least more likely to acquire capacity in the relatively near future so that a false assignation, however harmful, will be temporary. This relates to Fredman's argument, above, about the fundamental difference with age discrimination, and other forms of discrimination. The absence of a 'basic opposition between "self" and "other"' in respect of children might also render capacity assessments more difficult in respect of people with disabilities than for, say, a 5-year-old child. As such, ageism and ableism are perhaps not as unproblematically connected as Overall suggests.

A further problem with analogising disability and childhood is that activists may well balk at the suggestion that children experience comparative infringements of their right to exercise legal capacity. Many would no doubt argue that the rights violations experienced by people with intellectual disabilities are far more onerous.<sup>126</sup> Indeed, such an argument echoes similar protestations that might be made in respect of discrimination against older people. Yet children are frequently subject to rights infringements because of the belief that they are less able to resist or complain, or because of their relative immaturity. For example, children across the globe have routinely been the subject of harmful age discrimination through the practice of corporal punishment.<sup>127</sup> The UN Committee on the Rights of the Child has furthermore admonished the UK for the perpetration of negative social attitudes towards, and intolerance of, children.<sup>128</sup>

The purpose of this article is in any case not to dilute the specificity of disability rights

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<sup>125</sup> See D Archard, *Children: Rights and Childhood* (Routledge, 2nd edn, 2004). The 'development' model of childhood could be said to align with the 'medical' model of disability in that both tend to reify supposedly scientific or biological givens over social constructions.

<sup>126</sup> People with disabilities in general are also a 'minority group', reportedly the largest. United Nations Department of Economic and Social Affairs (UNDESA), *Some Facts about Persons with Disabilities* (United Nations, 2006), accessible at: <http://www.un.org/disabilities/convention/facts.shtml>.

<sup>127</sup> M Freeman, 'Children are unbeatable' (1999) 13(2) *Children and Society* 130.

<sup>128</sup> UN Committee on the Rights of the Child, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, CRC/C/GBR/CO/4 (United Nations, 2008).

arguments, nor to diminish the hardships experienced by older people. Rather, the aim is to broaden understandings of human fallibility and to provoke consideration of whether denying certain rights to children can be legitimated on the basis of comparison with the rights of other social groups. A 'social model' approach to children's rights might arouse understanding of the ways in which social constructions of childhood unreasonably inhibit children's autonomy, and for example act as an impediment to the realisation of their right to non-discrimination on the basis of age. The model is not just about a social constructionist account of childhood, although that is certainly its foundation, but could prove useful as a political tool for changing law and social policy. For example, the model has been used in disability activism for drawing attention to issues of access, such as to public buildings.<sup>129</sup> Children similarly experience exclusions from these social spaces,<sup>130</sup> and public policy should reflect the fact that such exclusions can result as much from perceptions of childhood as from any innate incapacities. Nevertheless, although the social model potentially provides a powerful form of critique, it must not fail to engage with age since this would relegate the biological component of childhood to the realms of medicine and developmental psychology.

## Conclusion

There is evidence that the UK treats its children badly. In respect of child poverty, it is among the worst performing of all the wealthy nations,<sup>131</sup> and it imprisons the highest proportion of children in Europe.<sup>132</sup> It has been held to account by an international human rights body for the pervasiveness of discriminatory attitudes towards the young,<sup>133</sup> and it is generally agreed that an 'institutionalised mistrust' of youth<sup>134</sup> pervades social policy. We should therefore perhaps not be surprised that under-18s were omitted from age discrimination provisions. Nevertheless, it is hoped that this discussion has helped to counter some of the arguments concerning the exclusion of children from non-discrimination rights. My argument has focused on the questions of equality, autonomy and capacity, since it is these which tend to permeate discussions about extending children's rights protection. It has also used the question of age discrimination to explore the analogies and divergences between childhood and disability studies, although the subject has been far from exhausted with interesting questions relating to citizenship and vulnerability, for example, remaining. An aim has also been to frame the exclusion of children within discourse on the rights of marginalised social groups in general, and to argue for the adoption of a social model approach to children's rights protection.

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<sup>129</sup> See, for example, R Imrie, 'Oppression, Disability and Access in the Built Environment', in T Shakespeare (ed), *The Disability Reader: Social Science Perspectives* (Continuum-3PL, 2000).

<sup>130</sup> See, for example, V Morrow, 'Children's Rights to Public Space: Environment and Curfews', in B Franklin (ed), *The New Handbook of Children's Rights: Comparative Policy and Practice* (Routledge, 2001).

<sup>131</sup> United Nations Children's Fund, *UNICEF Report Card 10: measuring child poverty* (UNICEF, 2012).

<sup>132</sup> B Goldson, 'Taking Liberties: Policy and the Punitive Turn', in H Hendrick (ed), *Children and Social Policy: An Essential Reader* (Policy Press, 2005).

<sup>133</sup> UN Committee on the Rights of the Child, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland, CRC/C/GBR/CO/4* (United Nations, 2008).

<sup>134</sup> P Kelly, 'Growing up as risky business? Risks, surveillance and the institutionalized mistrust of youth' (2003) 6(2) *Journal of Youth Studies* 165.

There are structural impediments to children and young people bringing age discrimination claims. The capacity to exercise rights is contingent on a child-centred legal system in order that children, or their advocates, may claim those rights afforded to them. The recent cuts to legal aid, along with plans to slash funding further, do not bode well for children's rights protection given that children rarely have the independent means to instruct advocates and take cases.<sup>135</sup> This should also be understood in the context of benefits cuts which are liable to affect nine times as many children as adults.<sup>136</sup> Nevertheless, the inclusion of children within the EA could deter unfair treatment, and their continued exclusion suggests that they are less worthy of specific protection than other groups of people who fall within the entire remit of non-discrimination legislation.

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<sup>135</sup> See Children's Rights Alliance for England, *Submission to Transforming Legal Aid Consultation* (CRAE, 2013) available at: <http://www.crae.org.uk/publications-resources/submission-to-transforming-legal-aid-consultation/>.

<sup>136</sup> Children's Society, *The Distributional Effect of the Benefit Cap* (Children's Society, 2011).