
The Legal Construction of the Child in the United Nations Convention on the Rights of the Child

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The Legal Construction of the Child
in the United Nations Convention on the
Rights of the Child

Ashleigh Barnes
1998

This thesis is entirely my original work.

Ashleigh Barnes

(Signature) Ashleigh Barnes



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Abstract: While the United Nations Convention on the Rights of the Child (CRC) has been extensively analysed since its inception and the category 'child' has been critiqued for even longer, it seems the critiques made about the category 'child' continue to have limited purchase regarding the CRC's construction of the category 'child'. This project was inspired by the seemingly dominant perception that there exists *something* fundamental to the category 'child', a view held even by those who dismiss the same perspective regarding the category 'woman' for example. Put another way, the legs upon which the CRC's category 'child' stands have been dismantled for all other human categories (capacity as a precursor for rights; the existence of 'essential' and 'natural' characteristics shared by all persons who make up an identity category). This thesis aims to understand how these 'legs' nonetheless continue to prop up the category 'child'. This thesis critiques the CRC's articulation of the category 'child', the taken for granted/self-evident assumption that children are fundamentally different from adults, and that this 'difference' justifies their differential and submissive positioning in relation to adults under the banner of children's rights. It seeks to examine the vision of the 'child' articulated in the CRC by employing a postmodern deconstructionist analysis, which draws heavily on Michel Foucault and Judith Butler. This thesis argues that the CRC's vision of the child as 'developing' and thus in need of 'care' enables the regulation and effective control of childhood. As such, the CRC does not describe or provide for the 'true' childhood. Rather, the CRC prescribes vulnerability and dependency as the markers of childhood.

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CHAPTER 1

INTRODUCTION

The first part of the book is devoted to the study of the basic properties of the real numbers. The second part is devoted to the study of the real numbers as a complete ordered field. The third part is devoted to the study of the real numbers as a topological space. The fourth part is devoted to the study of the real numbers as a metric space. The fifth part is devoted to the study of the real numbers as a Banach space.

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OUTLINE

- I. BACKGROUND TO THE CRC
- II. OUTLINE OF THESIS
- III. LIMITATIONS OF THESIS
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While the United Nations Convention on the Rights of the Child (CRC or Convention)¹ has been extensively analysed since its inception and the category 'child' has been critiqued for even longer, it seems the critiques made about the CRC's construction of the category 'child' continue to have limited purchase. This project was inspired by the seemingly dominant perception that there exists *something* fundamental to the category 'child', that the child has some level of incapacity, and that the child's incapacity is relevant to the child's rights, views held even by those who dismiss the same perspective regarding the category 'woman' for example. Put another way, the legs upon which the CRC's category 'child' stands have been dismantled for all other human categories (capacity as a precursor for rights; the existence of 'essential' and 'natural' characteristics shared by all persons who make up an identity category). This thesis aims to grapple with understanding how these 'legs' nonetheless continue to prop up the category 'child'. Judith Butler argues that,

[w]e think things are the way they must be because they've become naturalised. [We must] make the taken-for-granted world seem spectral, strange. [The process of critically examining the 'natural' word is] a painful process, and not everybody wants to undergo it. It may well be that we want to construct a fiction. . .²

Certainly, critiquing the category 'child' articulated in the CRC often meets strong resistance. This thesis argues that the category 'child' in the context of international law continues to appear 'natural' and is taken-for-granted. This thesis aims to deconstruct the category 'child' to make it appear strange, or at least curious. This thesis argues that the CRC's vision of the category 'child' as 'developing' and thus in need of 'care' enables the regulation and effective control of childhood. As such, the CRC does not describe or provide for *the* 'true' childhood. Rather, the CRC prescribes vulnerability and dependency as markers of childhood. The CRC defines what a 'true' childhood should be.

This thesis does not argue that the CRC encapsulates or even is capable of encapsulating a single fixed childhood. This thesis focuses on the dominant discursive constructions of the child in the CRC: 1) childhood as a period of development, and 2) childhood as a period of dependency or 'care' on particular adults. Every treaty is indeed replete with indeterminacy; the CRC is no exception, as is examined later in this thesis regarding concepts such as the evolving capacities of the child or best interests of the child. Nonetheless, this thesis spends considerable time arguing that these two particular fundamental

¹ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3. See Appendix I.

² Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted THE JUDITH BUTLER READER, 329 (Sara Salih ed., 2004).

understandings of childhood, development and 'care', are indeed dominant understandings of childhood pervasive in the drafting of the CRC as well as in interpretations of the CRC. This thesis then argues that it is through these two dominant 'truths' about childhood, in other words through these definitions of childhood, that the CRC prescribes vulnerability and dependency as markers of childhood. Other constructions of the child are possible. It is precisely because other constructions of childhood are possible that this projects aims to point out dominant constructions of childhood in the CRC, so we can then begin to look for alternative models.

The first section of this chapter outlines the background to the CRC, starting with the first international document on children and leading to the CRC's third Optional Protocol. Section II provides an outline for this thesis, offering a roadmap and method for each chapter. Section III lays out the limits of this thesis and anticipates possible critiques. Finally this chapter ends with a discussion of the role of deconstruction as an academic project. This chapter aims to outline the framework for this thesis, to be filled out in subsequent chapters.

I. BACKGROUND TO THE CRC

The first attempt to codify norms later found in the CRC preceded the Second World War and the founding of the United Nations.³ It followed the rise in concern regarding child labour, compulsory primary education, and the notion of juvenile justice in Western industrialised states.⁴ The 1924 Declaration on the Rights of the Child (1924 Declaration) was the first human rights declaration adopted by any inter-governmental organisation and preceded the Universal Declaration on Human Rights (UDHR) by twenty four years.⁵ It was adopted in 1925 by the League of Nations after being drafted in Geneva in 1923 by Eglantyne Jebb, the founder of Save the Children.⁶ It contained a mere five paragraphs:

³ Mark Ensalcaco, *The Right of the Child to Development*, in CHILDREN'S HUMAN RIGHTS, 10 (Mark Ensalcaco and Linda Majka eds., 2005).

⁴ See generally VIVIANA ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN (1985); GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN, 8 (1998) (Van Bueren notes that the first international instrument protecting children was the Minimum Age (Industry) Convention adopted by the International Labour Conference in 1919); David Tanenhaus, *Between Dependency and Liberty: The Conundrum of Children's Rights in the Gilded Age*, 23 LAW & HISTORY 351, 369-370 (2005) ('By the early twentieth century, the child-saving movement had legitimated an enhanced role for the state in child protection that paved the way for expanded compulsory education, laws, juvenile courts, child labour laws, and public health measures'); MICHAEL KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 113-45 (1986); Barbara Woodhouse and Sarah Katz, *The Martyrs, The Media, and the Web: Examining a Grassroots Children's Rights Movement Through the Lens of Social Movement Theory*, 5 WHITTIER JOURNAL CHILD & FAMILY ADVOCACY 121 (2005); Norma Fields, *The Child as Labourer and Consumer: The Disappearance of Childhood in Contemporary Japan*, in CHILDREN AND THE POLITICS OF CULTURE (Sharon Stephens ed., 1995).

⁵ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948). See also GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN, 6 (1998).

⁶ Mark Ensalcaco, *The Right of the Child to Development*, in CHILDREN'S HUMAN RIGHTS, 10 (Mark Ensalcaco and Linda Majka eds., 2005).

By the present Declaration of the Rights of the Child commonly known as the 'Declaration of Geneva', men and women of all nations, recognising mankind owes to children the best it has to give, declare and accept it as their duty that beyond and above all considerations of race, nationality, and creed.

1. The child must be given the means requisite for its normal development, both materially and spiritually.
2. The child that is hungry must be fed, the child that is sick must be nursed, the child that is backward must be helped, the delinquent child must be reclaimed, and the orphan and the waif must be sheltered and succoured.
3. The child must be the first to receive relief in times of distress.
4. The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation.
5. The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men.⁷

While the 1924 Declaration is entitled 'Rights of the Child', it only provides for children's economic, psychological, and social needs, and as such relates to only to child welfare or protection rights.⁸ The 1924 Declaration establishes the claim that 'mankind owes to the child the best it has to give', which is restated in the 1959 Declaration on the Rights of the Child⁹ and the CRC.¹⁰ In drafting the 1924 Declaration, Jebb wanted to give a focus to a growing interest in international child welfare, as children began to be seen as the most important part of humankind, its future.¹¹ Jebb argued that,

If [children] are allowed to grow up stunted or neglected or strangers to moral values, or are ignored in their misery by the more fortunate, they will inevitably grow up to hate and destroy, and tomorrow's world can only end up in disaster, politically and economically.¹²

At the unanimous adoption of the 1924 Declaration, the President of Assembly, Giuseppe Motta, stated that 'the Assembly's approval of the Declaration makes it, so to speak, the Children's Charter of the League'.¹³ Geraldine Van Bueren argues that the Declaration however did not place any obligations on a state.¹⁴ She contends that,

⁷ Records of the Fifth Assembly, Supplement No. 23 League of Nations Official Journal 1924.

⁸ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 7 (1998)

⁹ Declaration of the Rights of the Child, Dec. 10, 1959, G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. (No. 16).

¹⁰ CRC Preamble. See also GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 7 (1998)

¹¹ YVES BEIGBEDER, *THE ROLE AND STATUS OF INTERNATIONAL HUMANITARIAN VOLUNTEERS AND ORGANIZATIONS*, 195 (1991).

¹² YVES BEIGBEDER, *THE ROLE AND STATUS OF INTERNATIONAL HUMANITARIAN VOLUNTEERS AND ORGANIZATIONS*, 195 (1991).

¹³ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 8 (1998), citing League of Nations Doc. Records of the Fifth Assembly, 177.

¹⁴ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 7 (1998).

[t]he duty to provide the child with 'the best it has to give' was placed by the League on men and women in other words, adults, to ensure the welfare of children, because it was then assumed without question that children could and should rely upon adults to ensure that their rights as defined in the Declaration were protected. Children were regarded as recipients of treatment rather than as the holders of specific rights.¹⁵

Under the 1924 Declaration, children were perceived as the object and not the subject of international law. Deirdre Fottrell characterises the 1924 Declaration as 'essentially paternalistic and welfare oriented', stressing vulnerability and protection.¹⁶ While Fottrell contends that the 1924 Declaration was largely symbolic, Van Bueren argues that nonetheless it was significant as a foundation for the future international children's rights movement and further that it hedges against the claim that the protection of children's rights is a new development in international law.¹⁷ Indeed the protection of children's rights (where children are objects not subjects of international law) preceded all other international human rights documents.¹⁸

The UDHR of December 1948 was the first universal statement of human rights in the post-war era.¹⁹ It was adopted with forty-eight states in favour and none against, eight abstaining.²⁰ While the UDHR proclaims to apply to 'all human beings' and therefore implicitly to children, only two articles explicitly refer to children. Article 25 provides that '[m]otherhood and childhood are entitled to special care and assistance' and '[a]ll children, whether born in or out of wedlock, shall enjoy the same social protection'. Article 26 provides that elementary education shall be free and compulsory and 'shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms'. Article 26 also provides that parents have a 'prior right to choose the kind of education that shall be given to their children'. While not explicitly relating to children, Article 16(3) recognises that 'the family is the

¹⁵ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 7 (1998).

¹⁶ DEIDRE FOTTRILL, *One Step Forward or Two Steps Sideways? Assessing the First Decade of the United Nations Convention on the Rights of the Child*, in *REVISITING CHILDREN'S RIGHTS*, 2 (2000).

¹⁷ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 8 (1998); DEIDRE FOTTRILL, *One Step Forward or Two Steps Sideways? Assessing the First Decade of the United Nations Convention on the Rights of the Child*, in *REVISITING CHILDREN'S RIGHTS*, 2 (2000).

¹⁸ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 8 (1998). Van Bueren notes that the first international instrument protecting children was the Minimum Age (Industry) Convention adopted by the International Labour Conference in 1919. Van Bueren admits that the CRC was the first to introduce children as subjects of international law.

¹⁹ Mark Ensalcado, *The Right of the Child to Development*, in *CHILDREN'S HUMAN RIGHTS*, 10 (Mark Ensalcado and Linda Majka eds., 2005).

²⁰ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 17 (1998), citing UN Doc A/111.

natural and fundamental group unit of society and is entitled to protection by the society and the State'.²¹ This language is restated in the CRC.²²

Over a decade after adoption of the UDHR, the UN General Assembly adopted the 1959 Declaration of the Rights of the Child (1959 Declaration) along with its ten Principles.²³ In contrast to the UDHR, the 1959 Declaration was adopted without abstention.²⁴ During the drafting of the 1959 Declaration some states expressed a preference for a convention, rather than a declaration.²⁵ Nonetheless, the Netherlands expressed the prevailing sentiment that,

the great economic, social and cultural difference and the greatly divergent views on morality and religion prevailing in the various Members States [would] give rise to many problems which must, at least for the time being, be considered to be insoluble.²⁶

The 1959 Declaration, like its predecessor, was aspirational.²⁷ The 1959 Declaration makes reference in its Preamble to both the UN Charter and the UDHR. Reference to the UDHR was made because states recognised 'with such exceptions as are necessitated by its age the child shares in the claims to human rights set forth in that document'.²⁸ The 1959 Declaration establishes the principle that children are entitled to 'special protection', where 'the best interests of the child . . . shall be the paramount consideration'.²⁹ A number of additional rights were proposed, but failed to be incorporated, such as safeguards for children in court proceedings, a ban on corporal punishment in schools, and the concept that children not only have rights but also responsibilities.³⁰ There is great overlap between the 1959 and 1924 Declarations with both

²¹ The binding nature of the UDHR has been debated but will not be discussed here. This section aims to track the development of children's rights in international law, not debate the specifics of the binding nature of the UDHR. In any case, the UDHR is not primarily about children's rights.

²² Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, Preamble.

²³ Declaration of the Rights of the Child, Dec. 10, 1959, G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. (No. 16). See Appendix II.

²⁴ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 10 (1998).

²⁵ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 11 (1998).

²⁶ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 11 (1998), citing UN Doc E/CN.4/780.

²⁷ DEIDRE FOTTELL, *One Step Forward or Two Steps Sideways? Assessing the First Decade of the United Nations Convention on the Rights of the Child*, in *REVISITING CHILDREN'S RIGHTS*, 2 (2000).

²⁸ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 10 (1998).

²⁹ Declaration of the Rights of the Child, Article 2, Dec. 10, 1959, G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. (No. 16). See also GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 11 (1998), citing UN Doc E/CN.4/L.52.

³⁰ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 11 (1998), citing UN Doc E/CH.5/111/Add. 1.3 and UN Doc A/C.3/L.729.

focusing on paternalism and welfare, although the 1959 Declaration did not address delinquency and the 1924 Declaration did not explicitly mention education.³¹

During the 1970s a 'coherent and robust movement' emerged in support of children's empowerment.³² Fottrell characterises this period as a move away from a purely welfare-oriented paternalism towards a more radical liberation-oriented approach.³³ In 1979, the International Year of the Child, Poland initiated a proposal for the drafting of the CRC, which would be legally binding on state parties.³⁴ Many states, UN agencies, and some fifty non-governmental organizations (NGOs) assisted in drafting the Convention.³⁵ Van Bueren notes that at the beginning of the drafting of the CRC, states did not regard the Convention as a high priority.³⁶ The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT) was still being negotiated at the same time.³⁷ Van Bueren argues that the change in attitude since the adoption of the 1959 Declaration in support of a convention occurred because states themselves had undergone a fundamental change in their attitude towards children in their national laws whereby it was viewed that children's special vulnerability and immaturity required a higher standard of protection in some areas of their lives than that which was found in existing international law.³⁸

In 1979, the Commission on Human Rights established a pre-sessional Working Group to draft the CRC.³⁹ The group was established as an open-ended Working Group so that states which were not members of the Commission on Human Rights were able to participate fully.⁴⁰ The Polish text was initially the basic working document of the group.⁴¹ In February 1988, nine years after the drafting process had begun, the Working Group completed its first reading of the

³¹ Van Bueren argues that Paragraph 4 of the 1924 Declaration could be argued to imply some sort of requirement of education as necessary for a child to be 'put in a position to earn a livelihood'. See GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 11-12 (1998).

³² DEIDRE FOTTRILL, *One Step Forward or Two Steps Sideways? Assessing the First Decade of the United Nations Convention on the Rights of the Child*, in *REVISITING CHILDREN'S RIGHTS*, 2 (2000). See for example JOHN HOLT, *ESCAPE FROM CHILDHOOD* (1974); RICHARD FARSON, *BIRTHRIGHTS* (1974); Hillary Rodham, *A Legal Perspective*, in *CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES* (Patricia Vardin and Ilene Brody eds., 1979).

³³ DEIDRE FOTTRILL, *One Step Forward or Two Steps Sideways? Assessing the First Decade of the United Nations Convention on the Rights of the Child*, in *REVISITING CHILDREN'S RIGHTS*, 2 (2000).

³⁴ YVES BEIGBEDER, *THE ROLE AND STATUS OF INTERNATIONAL HUMANITARIAN VOLUNTEERS AND ORGANIZATIONS*, 196 (1991).

³⁵ YVES BEIGBEDER, *THE ROLE AND STATUS OF INTERNATIONAL HUMANITARIAN VOLUNTEERS AND ORGANIZATIONS*, 196 (1991).

³⁶ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 13 (1998).

³⁷ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 13 (1998).

³⁸ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 13-14 (1998). Van Bueren also notes that states recognised the need for a comprehensive and uniform international document for children and that the year of the child acted as an emotional magnet drawing states towards the idea of a convention.

³⁹ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 14 (1998).

⁴⁰ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 14 (1998).

⁴¹ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 14 (1998).

Convention.⁴² In order to complete its second reading the Working Group held twelve meetings from 28 November to 9 December 1988.⁴³ Van Bueren states that,

[t]he overwhelming and understandable desire of the Group was to complete the second reading, otherwise the momentum would have been lost. Inevitably this approach led to a rushing of the work, with several important issues failing to be discussed fully, in particular the consent of the child to medical treatment, and the implication of medical experimentation for children.⁴⁴

As indicated in the duration of drafting and the number of parties involved in the drafting, the CRC is a result of negotiations between states and NGOs. The substance reflects the agendas, beliefs, and political considerations of those negotiators. Ultimately, as with any international convention, the CRC was a result of compromise. Certain issues were too controversial to include (for example, the beginning of childhood, the banning of children ages 15-17 to take part in direct combat), while others were brought up too late in the process to be addressed (for example, the specific relationship between the CRC and the other existing international human rights conventions).⁴⁵ Fottrell also notes that other issues such as the beginning of childhood (the beginning of life), the parameters for autonomy as it relates to the freedom of religion, the minimum age for child soldiers⁴⁶, and so on proved difficult to negotiate.⁴⁷ Fottrell argues that the drafting process was encumbered by balancing traditional attitudes about children, cultural particularities, and 'radical proposals for the empowerment of children'.⁴⁸ In this way, adults, NGOs, states, have enacted their vision of childhood through the CRC.

After much amendment, the Working Group adopted its report on 21 January 1989 and the report was sent to the Commission on Human Rights for consideration and transmission to the

⁴² GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 14 (1998).

⁴³ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 14 (1998).

⁴⁴ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 15 (1998).

⁴⁵ SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 26-27, 130 (1992).

⁴⁶ Andorra's only declaration upon its being a party to the CRC was the following: '[t]he Principality of Andorra deplors the fact that the [said Convention] does not prohibit the use of children in armed conflicts. It also disagrees with the provisions of article 38, paragraphs 2 and 3, concerning the participation and recruitment of children from the age of 15'. Spain declared that, Spain, wishing to make common cause with those States and humanitarian organizations which have manifested their disagreement with the contents of article 38, paragraphs 2 and 3, of the Convention, also wishes to express its disagreement with the age limit fixed therein and to declare that the said limit appears insufficient, by permitting the recruitment and participation in armed conflict of children having attained the age of fifteen years. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&midsg_no=IV-11&chapter=4&lang=en#EndDec. Colombia, Netherlands, Uruguay, and Argentina made similar reservations or declarations.

⁴⁷ DEIDRE FOTTRILL, *One Step Forward or Two Steps Sideways? Assessing the First Decade of the United Nations Convention on the Rights of the Child*, in *REVISITING CHILDREN'S RIGHTS*, 3 (2000).

⁴⁸ DEIDRE FOTTRILL, *One Step Forward or Two Steps Sideways? Assessing the First Decade of the United Nations Convention on the Rights of the Child*, in *REVISITING CHILDREN'S RIGHTS*, 3 (2000).

UN General Assembly.⁴⁷ On 20 November 1989 the UN General Assembly adopted the CRC without a vote; it was opened for signature on 26 January 1990.⁴⁸ Sixty-one states signed it immediately and by September 40 states had ratified it, twice as many required for the treaty to enter into force.⁴⁹ By 1995, 176 states had ratified or acceded to the CRC. By 2006, 193 states had become party to the CRC, leaving only the United States, Somalia, and as of July 2011 South Sudan who have yet to ratify it.⁵⁰ As such, the CRC is the most widely and rapidly ratified international human rights convention in history.⁵¹

There have been three optional protocols to the CRC. The first protocol to enter into force addresses the sale of children, child prostitution and child pornography⁵² and the second addresses the involvement of children in armed conflict was adopted in 2000.⁵³ Notably, on 2 November 2011 the UN General Assembly adopted the Human Rights Council's Report, the third Optional Protocol to the CRC, and recommended that it be opened for signature in 2012.⁵⁴ The third Optional Protocol, if adopted, would allow for an individual or a group of individuals within the jurisdiction of a state party to the CRC, to submit a written complaint to the Committee on the Rights of the Child.⁵⁵ The Committee would then request interim measures and/or make recommendations to the state party.⁵⁶ The state party would then be required to submit a written response, including information on any actions taken and envisaged in the light of the view and recommendations of the Committee.⁵⁷ One of the most common criticisms laid against the CRC is its enforcement mechanism, which has been characterised as 'weak'.⁶⁰ This

⁴⁷ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 15 (1998).

⁴⁸ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, A/RES/44/25.

⁴⁹ Mark Ensalcado, *The Right of the Child to Development*, in CHILDREN'S HUMAN RIGHTS, 10 (Mark Ensalcado and Linda Majka eds., 2005).

⁵⁰ Mark Ensalcado, *The Right of the Child to Development*, in CHILDREN'S HUMAN RIGHTS, 12 (Mark Ensalcado and Linda Majka eds., 2005); UNICEF, *(Almost) The Entire World Endorses Child Rights*,

<http://volunteers.unicefusa.org/activities/advocate/convention-on-the-rights-of-the-child.html>. In 2009, the transitional government of Somalia announced that it would ratify the CRC, but has yet to do so. See REUTERS, *Somalia to Join Child Rights Pact: UN*, November 20, 2009, <http://af.reuters.com/article/topNews/idAFJOE5AJ01T20091120>.

⁵¹ See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&midsg_no=IV-11&chapter=4&lang=en.

⁵² Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Jan. 18, 2002, A/RES/54/263, <http://www2.ohchr.org/english/law/crc-sale.htm>.

⁵³ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Feb. 12, 2002, A/RES/54/263 <http://www2.ohchr.org/english/law/crc-conflict.htm>.

⁵⁴ Optional Protocol to the Convention on the Rights of the Child on the Communications Procedure, November 2, 2011, A/C.3/66/L.66, <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/N11/577/92/PDF/N1157792.pdf?OpenElement>.

⁵⁵ Article 5 of the 3rd Optional Protocol.

⁵⁶ Article 10 of the 3rd Optional Protocol.

⁵⁷ Article 11 of the 3rd Optional Protocol.

⁶⁰ DEIDRE FORTIN, *One Step Forward or Two Steps Sideways? Assessing the First Decade of the United Nations Convention on the Rights of the Child*, in REVISITING CHILDREN'S RIGHTS, 6 (2000). See also Kirsten Backstrom, *The International Human Rights of the Child: Do They Protect the Female Child?*, 30 GEORGE WASHINGTON JOURNAL OF INTERNATIONAL LAW & ECONOMICS 541 (1996); Cynthia Price-Cohen, *Implementing the U.N. Convention on the Rights of the Child*, 21 WHITTIER LAW REVIEW 95 (1999-2000); Mary Donnelly and Ursula Kilkelly, *Child-Friendly HealthCare: Delivering on the Right to Be Heard*, 19 MEDICAL LAW REVIEW 27, 45 (2011): [W]hile the clarity of the CRC approach and the level of detailed guidance provided is undoubtedly helpful in framing policy, as Jane Fortin notes, the absence of direct methods of formal enforcement is a weakness in the CRC.' JANE FORTIN, CHILDREN'S RIGHTS AND THE DEVELOPING LAW, 46

mechanism would address the argument that the CRC is ineffective as compared to other international human rights regimes (for example, CAT) that combine reporting with some kind of quasi-judicial processes, allowing for individual petition.⁶¹ Currently, the CRC requires state parties to file regular progress reports on compliance.⁶² A committee of ten experts elected by the states that have ratified the CRC review the national reports, ask for more information as needed, and inform the UN General Assembly every two years on the status of compliance.⁶³

Briefly turning to the substance of the rights in the Convention, the CRC is said to concern the 'Three Ps': Provision (of assistance for basic needs), Protection (against discrimination and all forms of neglect and exploitation), and Participation (of children in decisions that affect their lives).⁶⁴ The inclusion of participation rights was the most significant and arguably the most controversial of the 'P's', as this was the first time the child's right to participate was recognized in international law.⁶⁵ This controversy will be taken up in Chapter 3. The CRC covers a full range of civil, political, economic, social and cultural rights.⁶⁶ It includes rights applicable during peace time as well in times of conflict.⁶⁷ It is considered the fullest legal statement of children's rights to be found anywhere.⁶⁸ Chapter 2 of this thesis surveys a full range of scholarly views on the CRC. Many have argued that the Convention itself is a touchstone for research

(2009). Donnelly and Kilkelly contrast the CRC to the United Nations Convention on the Rights of Persons with Disabilities where ratification of the Optional Protocol allows for a direct right of petition to the Committee on the Rights of Persons with Disabilities. Notably a third Optional Protocol has been drafted and submitted to the General Assembly which would allow for such direct petition to the Committee on the Rights of the Child. Report of the Human Rights Council 2 November 2011 A/C.3/66/L.66.

⁶¹ DEIDRE FOTRELL, *One Step Forward or Two Steps Sideways? Assessing the First Decade of the United Nations Convention on the Rights of the Child*, in REVISITING CHILDREN'S RIGHTS, 7 (2000). Fottrell makes this argument against the CRC.

⁶² Article 44.

⁶³ Article 43 and Article 44.

⁶⁴ BOB FRANKLIN, *The Case for Children's Rights: A Progress Report*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE, 16 (1995). Van Bueren has categorised the CRC as encompassing the Four Ps, including 'prevention'. GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN, 15 (1998). Fottrell refers to 'five key principles': 1) best interests of the child, 2) the evolving capacities of the child, 3) the right to expression, 4) non-discrimination, and 5) the right of life, survival and development'. See DEIDRE FOTRELL, *One Step Forward or Two Steps Sideways? Assessing the First Decade of the United Nations Convention on the Rights of the Child*, in REVISITING CHILDREN'S RIGHTS, 5 (2000).

⁶⁵ GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN, 15 (1998); Bruce Hafén and Jonathan Hafén, *Abandoning Children to Their Autonomy: The United Nations CRC on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449 (1996).

⁶⁶ PHILIP ALSTON AND JOHN TOBIN, LAYING THE FOUNDATIONS FOR CHILDREN'S RIGHTS, ix (2005); BOB FRANKLIN, *The Case for Children's Rights: A Progress Report*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE, 16 (1995); Pe Miljeteig-Olssen, *Advocacy of Children's Rights—The Convention as More than a Legal Document*, 12 HUMAN RIGHTS QUARTERLY 148 (1990).

⁶⁷ GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN, 16 (1998).

⁶⁸ Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277 (2000); Pe Miljeteig-Olssen, *Advocacy of Children's Rights—The Convention as More than a Legal Document*, 12 HUMAN RIGHTS QUARTERLY 148 (1990); Enid Fourie, *The United Nations Convention on the Rights of the Child and the Crisis for children in South Africa: Apartheid and Detention*, 12 HUMAN RIGHTS QUARTERLY 106.

about and activism for children.⁶⁹ As such, the CRC is seen as a significant tool for advocacy regarding children. Given the significance of the CRC, this thesis analyses the CRC as a significant discourse about children. The next section details the how the thesis will do so.

II. OUTLINE OF THE THESIS

This thesis engages in a postmodern and in particular a Foucauldian/Butlerian critique of the construction of the child in the CRC. This thesis argues that the category 'child' is predicated upon a string of unexplicated knowledges regarding 'difference' in childhood.⁷⁰ It is as if the basic ontological questions, 'what is a child' and 'how is a universal child possible' were satisfactorily answered as axiomatic, and then summarily dismissed, all without input from those nominated as children.⁷¹ Just as the self-appraised civilised person 'knew' the savage to be different, and thus worthy of study, rational adults recognise the child as different, less developed and in need of explanation.⁷² Both of these proceed from a pre-established but tacit ontological theory: a theory of what makes up the being of the Other, be it savage or child. These unspoken forms of knowledge, these tacit commitments to difference give rise to the accepted ideas of the savage or the child as 'natural'.⁷³ These theories render the adult-child continuum as utterly conventional and take for granted the assumptions upon which they are based. This thesis argues that, when viewed through the lens of power, the CRC relates little to the protection of the rights of the child, and at times even the protection of the child. Rather, the rights accorded to children in the CRC relate to the regulation and control of childhood, making dependency and vulnerability markers of childhood. This thesis argues that the CRC does not contest, but rather reinforces power relations (adults over children; state over family/parents). As such, the rights of children found in the CRC perpetuate these power relations.⁷⁴

Chapter 2 canvasses a range of perspectives on the CRC with a view towards questioning the legal construction of the child in the CRC. This chapter argues that dominant perspectives on the CRC fundamentally accept that the central issue regarding children's rights is the child's capacity, yet disagree on whether the CRC captured the 'true' child. Most insist that their

⁶⁹ Anonymous, 'Editorial: The CRC as a Touchstone for Research on Childhoods' 6(4) *Childhood*, 403; Enid Fourie, *The United Nations Convention on the Rights of the Child and the Crisis for children in South Africa: Apartheid and Detention*, 12 HUMAN RIGHTS QUARTERLY 106, 114; Thomas Hammarberg, *The Rights of the Child – Much More than Charity*, in 18 CANDLESTICKS THE CONVENTION ON THE RIGHTS OF THE CHILD REACHING MAJORITY, 113 (Jane Connors et al. eds., 2005).

⁷⁰ CHRIS JENKS, CHILDHOOD (2005).

⁷¹ CHRIS JENKS, CHILDHOOD (2005).

⁷² CHRIS JENKS, CHILDHOOD (2005).

⁷³ CHRIS JENKS, CHILDHOOD (2005).

⁷⁴ David Bell et al., *All Hyped Up And No Place To Go*, 1(1) GENDER, PLACE AND CULTURE 31, 33 (1994).

perception of the child is more accurate, as indicated in their assessment of whether the CRC adequately provided for the 'true child'. Similarly, by adopting a notion of a 'universal' child, the CRC engages in its own iteration of the 'true' (and universal) category 'child'. This disagreement over the identity 'child' did not and has not resulted in questioning whether the identity 'child' is possible or even helpful. Discussion in the context of international law continues to focus rather on who best 'knows' the fundamental 'child'. Chapter 2 argues that the rights of the child in the CRC and dominant perspectives about the CRC are based on the assumption that there exists some 'universal' and 'true' category 'child', and that category 'child' requires further or more scrupulous investigation. In addition to exploring mainstream perspectives that accept a fundamental difference of childhood from adulthood, Chapter 2 also explores the work of certain academics who argue that the child's alleged immaturity/incapacity has no relevance to the discussion of the child's rights. Such perspectives include the critique of capacity as a precursor to rights, or that the CRC's commitment to the protection of the child's rights and at times even the protection of the category child goes only so far as such rights do not blur what it means to be an adult (capable) and what it means to be a child (incapable).⁷⁵

When one speaks of 'the child' or 'the rights of the child', one is using an identity category to distinguish those who fall into the category 'child' from others who do not (adults). The major theoretical perspectives this paper employs to deconstruct the identity of the child in the CRC are Michel Foucault and Judith Butler. Chapter 3 explores certain parts of the theoretical perspectives of Foucault and Butler to argue that identity categories are inevitably based on a set of alleged 'natural' characteristics that those within the category uniformly share. Much critical work has focused on deconstructing identity categories such as gender, race and sexual orientation, through the process of exposing the unnaturalness and difference within a category. In attempting to examine the relatively unexplicated identity category 'child', a variety of theoretical tools that have been 'successfully' deployed to deconstruct other identity categories are discussed and selectively utilised to make the argument that the category 'child' is not based upon some 'natural' characteristics that those who are aged 0-18 possess.

To better understand how the child is cast as fundamentally different from adults in the CRC, Chapter 4 examines the rights of other identity categories that have also been singled out from the human family as in need of 'special' attention, in other words given their own international human rights document. Through this comparison Chapter 4 argues that no other international

⁷⁵ Maria Grahn-Farley, *Beyond Right and Reason: Pierre Schlag, The Critique of Normativity, and the Enchantment of Reason: A Theory of Child Rights*, 57 UNIVERSITY OF MIAMI LAW REVIEW 867 (2003).

human rights document identifies that the problems faced by an identity category result exclusively from the category's 'biological' or 'inherent' difference, as opposed to some socially constructed difference. Further, no other category of persons is required to relinquish certain fundamental rights as the remedy for such difference. Put another way, no other identity category is constructed as wholly biologically immature/incapable and thus required to cede certain fundamental rights to another identity category (read adults/parents). Chapter 4 argues that despite similarities in how the law constructs the categories 'woman', 'person with disabilities', 'elder' and 'child', the law's differential treatment ('remedy', or 'rights') of the category 'child' reflects not some inherent difference of childhood, but rather reflects and upholds the adult-child binary, where adults are presumed capable and children incapable. What is made possible through this construction of the child-as-incapable/immature/dependent, far from shoring up of autonomy and participation, as done with all other identity categories, is that vulnerability and dependency become markers of childhood. In a context where other identity categories have been deconstructed as narratives that serve political purposes, Chapter 4 notes that the CRC evades critique for its engagement in universalising the 'child' based on some biological 'facts' of childhood.

Chapter 5 then surveys various critical perspectives on the category 'child' emerging from the field of sociology that help identify certain 'truths' alleged about childhood that make possible the differential treatment of the category 'child' in the CRC described in Chapter 4. These critical perspectives reflect the theoretical method outlined in Chapter 3. Chapter 5 first examines literature that argues that the category 'child' is a social construct, not a biological given. Chapter 5 then considers three 'truths' that have been identified by certain sociologists that appear to rationalise the differential treatment of the category 'child' in the CRC: 1) childhood is a period of development, 2) children are uniquely vulnerable and thus in need of unique protection, and 3) childhood is a time defined by needs. These 'truths' are reflected in the CRC's construction of the category 'child', as will be elaborated in Chapters 6 and 7. Finally Chapter 5 explores the ways in which these 'truths', and therefore the category 'child', are constructed through the adult – child binary. This chapter argues that to understand what characterises the category 'child', one must understand the category 'adult'. To be a 'good' child, one must not be an adult. A 'child' *is*, only to the extent that a 'child' *is not* an 'adult'. The identities of the opposition enable and therefore fundamentally depend upon each other's

existence. Nonetheless, the binary relation is never equitable.⁷⁶ Rather the relationship between the two terms of the opposition is laden with values that assume one has dominance over the other; one is normal the other abnormal, one is simple the other is complex, one is the rule the other is the exception.⁷⁷ In the adult-child, adulthood is associated with privileged or valued characteristics such as rationality or mindfulness, whereas childhood is associated with irrationality or recklessness.

With these 'truths' and binaries in mind, Chapters 6 and 7 inquire as to how the CRC constructs, not only the category 'child', but also the child's 'needs', in light of the third truth identified in Chapter 5 (childhood as a period defined by needs). Chapter 6 deconstructs the CRC's 'truth' that the category 'child' is developing, through the use of Martin Woodhead's 'needs' equation (X [the child] needs Y [a particular thing that is secured in the form of a right] for Z [to accomplish some measure]⁷⁸). Chapter 6 examines specific rights in the Convention that reference the child's development, examining how development operates, in other words what the term 'development' makes possible. Chapter 6 argues that to be a 'true' or 'real' child according to the CRC, a person nominated a child must be 'developing'. This chapter then seeks to explicate how this 'truth' of the 'child-as-developing' permits a particular hierarchy of power surrounding the child.⁷⁹ This chapter argues that CRC, in its allocation of 'rights' to children, sustains and supports a hierarchy of power, where adults (parents, and the state as a back-up parent) are positioned over the child, in the name of protection and even as a fulfilment of the 'rights of the child'. This hierarchy of power is made possible, and even 'necessary' by constructing childhood as a state of development.

Chapter 7 then investigates the 'truth' in the CRC that the child requires protection or 'care', as a result of the child's state of development. Chapter 7 argues that the CRC imagines the child to be in a particular positional matrix: the family or some similar form of 'care'. This chapter employs a textual analysis to examine how the parent, the state, and the child are positioned in relation to each other. Chapter 7 argues that the positional matrix portrayed in the CRC is hierarchical. The family or 'care' is defined in the Convention as the adult positioned over the

⁷⁶ Sarah Holloway and Gill Valentine, *Spatiality and the New Social Studies of Childhood*, 34(4) SOCIOLOGY 763, 765-766 (2000); LEENA ALANEN, MODERN CHILDHOOD: EXPLORING THE 'CHILD QUESTIONS' IN SOCIOLOGY (1992); Anne Oakley, *Women and Children First and Last: Parallels and Differences Between Women's and Children's Studies*, in CHILDREN'S CHILDHOODS: OBSERVED AND EXPERIENCED (Berry Mayall ed., 1994).

⁷⁷ Jack Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE LAW REVIEW 743, 747 (1987).

⁷⁸ MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in GROWING UP IN A CHANGING SOCIETY, 37 (1990).

⁷⁹ Thomas Hammarberg, *The UN Convention on the Rights of the Child and How to Make It Work*, 12 HUMAN RIGHTS QUARTERLY 97, 101 (1990): "The triangular relationship between the child, the guardians, and the state was of course a sensitive problem during the drafting".

child, in support of the adult – child binary. As such, the child is only given autonomy and protection rights that buttress the adult – child binary. In this way, family/‘care’ (the adult positioned over the child) or ‘dependency’ (on a parent) and, as such vulnerability become markers of childhood. Unlike other human rights discourses that seek to *redress* hierarchies, the CRC *reinforces* and even *sustains* the inequalities between adults and children. Unlike any other human rights discourse that offers protections *from the state*, the CRC also offers children protection *from themselves*, as if children experience subjugation, inequality, disenfranchisement, and abuse from themselves. Unlike the definition of the family in the CRC’s Preamble where all members of the human family have equal and inalienable rights, the child finds him/herself in a family of unequals and with rights that are unavailable because this person has been defined in the CRC as a ‘child’.

Chapter 8 then examines the ways in which the vision of category ‘child’ articulated in the CRC, as developing and in need of ‘care’, is produced and enforced through the CRC’s exercise of both juridical power (particularly through incarceration and corporal punishment), as well as disciplinary power (particularly through the gaze over the child through compulsory education and mandatory ‘care’). This chapter argues that through its performance of the ‘child’ as developing and ‘in care’, the CRC makes possible the regulation and control of childhood. Structuring in everyday life enables the social reproduction of the category ‘child’.⁸⁰ In this way, the islands of ‘care’ and ‘education’ become the means through which the CRC’s normative childhood is enforced and produced. As will be examined in Chapter 3, this process of moulding is what Foucault refers to as the technologies of governmentality: calculated preoccupation with activities directed at shaping, channelling and guiding the conduct of persons through the production, dissemination, and utilisation of knowledge.⁸¹ As will be argued in Chapters 3 and 5, these ‘truths’ masquerade as neutral descriptions of subjects (objective statements about what the child fundamentally is), as opposed to prescriptions (political statements about what the child should be). Butler argues that identity categories are not the *cause* or basis, but rather the *effects* of institutions, practices discourses, with multiple and diffused points of origin.⁸² These ‘truths’ serve the basis for activities that are directed at moulding the subject. According to a Foucauldian critique, the developmental framework, to be discussed in Chapter 6, operates as a regime of ‘truth’ or a system of beliefs and procedures used to construct a norm and the normal. As discussed in Chapter 3, these norms govern behaviour and thinking,

⁸⁰ BERRY MAYALL, TOWARDS A SOCIOLOGY FOR CHILDHOOD: THINKING FROM CHILDREN’S LIVES, 20 (2002).

⁸¹ JUDITH BUTLER, GENDER TROUBLE, 26–27 (1990).

⁸² JUDITH BUTLER, GENDER TROUBLE, viii–ix (1990), original emphasis.

and work to exclude certain ways of acting or being. Alternative 'truths' are marginalised, diversity is reduced to abnormality. The developmental framework determines who and what a child is, and which children and what concerns will be disregarded. Establishing 'truths' about children also means specifically that certain children's needs will be taken into consideration while others will be disregarded. As explored in Chapters 3, 5, and 6 this thesis argues that there is no single universal pattern of development, and no universal childhood. As such, children who fail to meet that which is defined as normal are excluded and/or 'require' intervention.

Finally, Chapter 9 explores children that are marginalised, ignored, and/or stigmatised by the CRC's vision of childhood. As will be discussed in Chapter 3, Foucault and Butler both utilise the technique of genealogy, which investigates local, discontinuous, disqualified, illegitimate knowledges against the claims of a universal 'truth'.⁸³ Foucault describes his method as an effort 'to question over and over again what is postulated as self-evident, to disturb people's mental habits'.⁸⁴ Chapter 9 argues that the CRC's performance of childhood is exclusionary. This chapter argues that, in universalising the child, the CRC not only sustains certain power relations, but also expels certain childhoods from human rights discourse. The CRC's performance of the child dictates which children matter, which children will be problematised, and which children will be ignored. Chapter 9 first examines literature that critiques the CRC as only applicable to children in the west. This chapter then argues that the critique of the CRC as inapplicable to children in the global south is equally applicable to children in the west. Chapter 9 explores various childhoods in the west and in the global south that defy the CRC's performance of childhood as a period of irresponsibility/immaturity and performance of the family as responsible, happy, and safe. It is through this examination of these excluded knowledges, these excluded children, parents, states, families, cultures, and traditions, that only expose international law's difficult with imagining difference, but also lays bare some of the politics behind choosing one 'child' as deserving/unproblematic and all others as undeserving/problematic.

III. LIMITATIONS OF THIS PROJECT

This thesis has certain limitations. First, this thesis primarily focuses on the text and the *Travaux Préparatoires* of the CRC. It could be argued that a more 'thorough' or 'better' examination of the CRC would focus instead on the Committee on the CRC and its interpretation of the CRC. It

⁸³ BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 32 (2009); JUDITH BUTLER, *GENDER TROUBLE*, 44 (1990).

⁸⁴ MICHEL FOUCAULT, *POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 1977-1984*, 265 (Alan Sheridan trans, Laurance Kritzman ed., 1988).

could be argued that some if not all of the critiques made in this thesis about the CRC could be alleviated by looking not to the text of the CRC per se, but rather the interpretation of the text by the Committee. While reference to the Committee's General Comments is made when relevant, the Committee's General Comments are not binding on state parties. For example, while the Committee has repeatedly and unequivocally condemned any use of corporal punishment, state parties still widely practice it.⁸⁵ While this discussion will be taken up further in Chapter 8, according to the Vienna Convention on the Law of Treaties, the subsequent practice of states parties in the application of the treaty shall be taken into account in the interpretation of a treaty.⁸⁶ As such, because the CRC does not explicitly ban corporal punishment, the practice of state parties suggests corporal punishment is not prohibited under the Convention. It would seem that the text of the Convention remains of primary importance, despite the input of the Committee. The CRC Committee's recommendations at times do not reflect *lex lata*, and quite possibly not even *lex ferenda*.

Nonetheless, it is important to note that this thesis does not endeavour to engage in black letter law analysis.⁸⁷ Rather, this thesis seeks to examine how the category 'child' is constructed by the CRC, as 'the most significant recent policy development intended to promote and protect children's rights'.⁸⁸ As such, the rights that are included and excluded, as well as rights that are modified in this Convention, are all of interest. The specific bundle of rights, and therefore the

⁸⁵ Committee on the Rights of the Child, General Comment No. 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment, U.N. Doc. CRC/C/GC/8 (Mar. 2, 2007). See also Michael Freeman, *Upholding the Dignity and Best Interests of Children: International law and the Corporal Punishment of Children*, 73 LAW AND CONTEMPORARY PROBLEMS 211, 250 (2010). For updated statistics, see Global Initiative to End All Corporal Punishment of Children Home Page, available at: <http://www.endcorporalpunishment.org/pages/frame.html> (accessed May 30, 2012) (listing twenty-five countries that have abolished Corporal punishment completely).

⁸⁶ Vienna Convention on the Law of Treaties, Article 31 (3) (b), May 23, 1969, 1155 U.N.T.S. 331.

⁸⁷ If so, an easy counter-argument would be that rights given under other international conventions, such as the International Convention on Economic, Social and Cultural Rights and the International Convention on Civil and Political Rights would be applicable to children. Though this counter-argument has met disagreement, even by the drafters of the CRC, this paper does not look to engage in such an analysis. Germany suggested that 'All states shall ensure a) that all human rights recognized by them also apply to children, b) that general human rights as enshrined in the ICCPR even apply to children, if a state party to the present convention is not a party to the Covenant'. In the final stages of drafting the CRC, Germany argued that many of the rights in the International Covenants already apply to children, were included again specifically in the draft convention, but on the other hand not all the rights guaranteed by the Covenants appeared in the draft convention, for example the right of self-determination, the equal rights of men and women, the ban on slavery, the right of person arrested or detained to be brought promptly before a judge, even though they also should apply to children. The delegate said that this selective double-regulation of rights would create problems and even contradictions with the Covenants and a general clause ensuring the application of general human rights to children should be substituted for the present Article 1. Australia said that to do so was totally new, bringing into question the whole approach of the Convention to existing rights. It may well have been a better way to proceed had it been introduced years before, but that had not happened and now its acceptance would only serve to delay adoption of the Convention. Ultimately Germany withdrew its proposal. SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 130-131 (1992).

⁸⁸ BOB FRANKLIN, *The Case for Children's Rights: A Progress Report*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE, 16 (1995).

unique bundle of issues and needs identified for the 'child' in the CRC, tell a very specific tale about childhood, contrasting with the story told of adult right-holders in other conventions.⁸⁹

It is important to note that this project is not arguing that the category 'child' and 'care' can only be defined as will be outlined in Chapters 6 and 7, nor that these are the 'correct' definitions of the category 'child' and 'care'. Rather, this thesis argues that when viewed through the lens of power, the CRC and dominant interpretations of the CRC can be seen as problematic for certain children because both largely assume that children are in a state of development and thus require a particular kind of adult care. Are there other interpretations of the CRC? Absolutely. Dominant meanings attributed to the category child and care can be dislodged and dismantled and new or marginalized understandings of both are possible. Yet before seeking out new possibilities for the legal construction of the category child, the dominant assumptions or claims-to-truth, must be identified and questioned.

The second possible criticism of this thesis is that it constitutes yet another project that 'speaks for' children. This thesis critiques the CRC as unlike any international convention, the drafting process did not include one person who is the subject of the CRC, in other words it did not include one child in the drafting process. In literature surrounding the CRC, the fact that children were not involved in the drafting of the CRC is identified and regretted, but quickly dismissed. A major critique made by the 'new' sociological perspectives is that the dominant ways of speaking about children comprise discourses about 'others; about lives, problems, and situations which are not lived or shared but merely observed externally by the speaking subjects' (adults).⁹⁰ This project also is engaging in that which it is critiquing. Put another way, as an adult, this author too is 'speaking for' children. Yet, in another 'speaking for', this thesis argues that the notion of unqualified participation in the political process is essential for the category

⁸⁹ SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 130-131 (1992): Indeed the German delegate expressed concern that certain rights from other human rights conventions were included in the CRC while others were not (citing the right to self-determination, the ban on slavery, the equal rights of men and women, the right of a person arrested or detained to be brought promptly before a judge). The delegate pointed out that this selective double-regulation of rights would create problems and even contradictions with the other human rights conventions. Ultimately the German delegate argued that there should be a general clause noting the applicability of general human rights to children. The Australian delegate argued that if the German delegate's suggestion was followed, this would be a whole new approach to the Convention, and would derail the entire process, particularly at such a late stage in the drafting process. Ultimately the German delegate withdrew its proposal. Given this discussion, one could argue that even under a black letter law analysis it is uncertain the effect of the CRC's selective 'double-regulation'.

⁹⁰ Benno Glauser, *Street Children: Deconstructing a Construct*, in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD, 144 (Allison James and Alan Prout eds., 1997); MICHAEL WYNESS, CONTESTING CHILDHOOD, 358 (2000); Jens Qvortrup, *A Voice for Children in Statistical and Social Accounting: A Plea for Children's Right to be Heard*, in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD, (Allison James and Alan Prout eds., 1997).

'child'; a controversial idea in the context of law.⁹¹ This thesis 'speaks for' children to highlight that doing so, particularly in the context of human rights, is problematic.

Another limitation of this thesis is that the genealogy developed in Chapter 9 relies on the empirical work of other authors to make the argument that certain children are ignored or problematised by the vision of childhood articulated in the CRC.⁹² This thesis project was never intended to be other than theoretical. As such, focus was placed on the development of a theoretical perspective to examine the CRC from a set of theoretical antecedents. Further, as this thesis was formulated, there appeared to exist a wealth of thorough empirical research on those children who are excluded and/or marginalised by the CRC,⁹³ but less on theoretical

⁹¹ Chapter 6 will take up this issue more. At this point it should be noted that Article 12 only allows children to express their views in matters affecting them, but only to the extent that they are judged by adults to have sufficient maturity. See Chapter 6 for further discussion.

⁹² For examples of academics who critique the CRC for being exclusionary see Erica Burman, *Local, Global or Globalised? Child Development and International Child Rights Legislation* 3 CHILDHOOD 45, 45-66 (1992); Olga Nieuwenhuys, *Editorial: Is There an Indian Childhood*, 16 CHILDHOOD 147, 147-153 (2009); Vanessa Pupavac, *Misanthropy Without Borders: The International Children's Rights Regime*, 25(2) DISASTERS 95, 95-112 (2001); Annette Ruth Appell, *Child-Centred Jurisprudence and Feminist Jurisprudence: Exploring the Connections and Tensions*, 46 HOUSTON LAW REVIEW 703, 703 (2009) (speaking about how childhood in the United States is based on a Western conception of childhood, and arguing that the CRC largely matches such a conception); Sonia Harris-Short, *International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child*, 25 HUMAN RIGHTS QUARTERLY 130, 130 (2003) (based on an empirical student of the discussion of the Committee on the Rights of the Child, argues that the Convention is still subject to cultural imperialism); John Tobin, *Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights*, 21 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 86, 86 (2005) (discussing the ways that the CRC and the children's rights paradigm is in some ways western, but in other ways not); Sonia Harris-Short, *Listening to "the Other": The Convention on the Rights of the Child*, 2 MELBOURNE INTERNATIONAL LAW JOURNAL 304, 334 (2001) (argues that the Committee has "with only very limited exceptions, presented non-Western cultural values and practices in an entirely negative light"); Paolo G. Carozza, *From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights*, 25(2) HUMAN RIGHTS QUARTERLY 281, 311 (2003); PHILIP ALSTON, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, in THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS (1994); Judith Ennew, *Outside Childhood: Street Children's Rights*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE (Bob Franklin ed., 1995); John Tobin, *Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation*, 23 HARVARD HUMAN RIGHTS JOURNAL 1, 1-50 (2010) (discussing this issue in relation to both human rights generally and the CRC specifically); Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277, 282 (2000); Jo Boyden, *Childhood and the Policymakers: A Comparative Perspective in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD*, 144 (Allison James and Alan Prout eds., 1997); Jo Boyden, *Children's Experience of Conflict Related Emergencies: Some Implications for Relief Policy and Practice*, 18(3) DISASTERS 254, 265 (1994); Maria Grahn-Farley, *Neutral Law and Eurocentric Lawmaking: A Postcolonial Analysis of the U.N. Convention on the Rights of the Child*, 34 BROOKLYN JOURNAL OF INTERNATIONAL LAW 1, 1 (2008) ('The colonial legacy of international law is not simply a matter of inclusion or exclusion. Nor is it only a matter of neutrality or non-neutrality. Even though the CRC was drafted, adopted, and ratified with the possibility of the inclusion and involvement of almost every country in the world, the colonial structure is still present, not in the substantive legal outcome, but in the legislative process itself'); Frances E. Olsen, *Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child*, 6 INTERNATIONAL JOURNAL ON LAW AND THE FAMILY 192, 215 (1992) ('The concerns of post-modern feminism that bear most closely on the Convention on the Rights of the Child include the whole notion of a universal document to deal with all children, throughout the world; the concern that such an effort will almost inevitably result in a western oriented document that merely purports to be universal'); REX STANTON ROGERS and WENDY STANTON ROGERS, *STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN*, 51 (1992); Michael Freeman, *The Sociology of Childhood and Children's Rights*, 6(4) INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 433, 433-444 (1998); Berry Mayall, *The Sociology of Childhood in Relation to Children's Rights*, 8 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 243, 243-259 (2000); Jo Boyden, *Childhood and the Policy Makers: A Comparative Perspective on the Globalisation of Childhood*, in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD (Allison James and Alan Prout eds., 1997); CHRIS JENKS, *CHILDHOOD (2005)*; Norma Fields, *The Child as Labourer and Consumer: The Disappearance of Childhood in Contemporary Japan*, in CHILDREN AND THE POLITICS OF CULTURE (Sharon Stephens ed., 1995); MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in GROWING UP IN A CHANGING SOCIETY, 37 (1990).

⁹³ See for example Judith Ennew, *Outside Childhood: Street Children's Rights*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE (Bob Franklin ed., 1995); Olga Nieuwenhuys, *Editorial: Is There an Indian*

approaches to grapple with why such exclusions were made possible in the first place. Chapter 2 Section II explores a few such theoretical critiques of the CRC.

Finally, it is important to note that this thesis does not argue that the CRC is ineffectual for all children; it does not argue that parental and state care agencies are always abusive. Instead this thesis notes that the CRC can be ineffectual for some (perhaps too many) children, that parental and state care agencies can be abusive, particularly given the hierarchical relationship that the CRC embraces between adults and children. Just as importantly, this thesis does not argue that children should be treated as adults. The thesis attempts to deconstruct the assumptions made about the category 'child' (in particular the child as 'developing' and in need of 'care'), questions the basis for such assumptions, and finally questions the power hierarchies that depend on what is assumed to be 'truth' about the category 'child' in the CRC. The question of what should be done next after we have done this deconstruction suggests at the need to justify the role of deconstruction as a project in and of itself. The next section attempts to do so.

IV. THE ROLE OF DECONSTRUCTION

This section seeks to briefly explore the project of deconstructionism and its place in critical academia. Deconstruction is a continuous critique of a certain metaphysical search for 'the real, true, valuable, appropriate'.⁹⁴ A deconstruction aims to 'lay low what was once high'; to reverse and resituate.⁹⁵ Pierre Schlag argues that a deconstruction seeks to challenge and subvert our image of the political, by engaging our tacit understanding of what constitutes the political.⁹⁶ Schlag contends that a deconstruction of law engages traditional legal discourse to subvert the categorical regimes in force within that discourse.⁹⁷ Aubrey Neal argues that deconstructionists have no confidence in any natural standpoint from which to view the world, and suspect, even

Childhood, 16 CHILDHOOD 147 (2009); Elsbeth Robson, *Hidden Child Workers: Young Carers in Zimbabwe*, 36(2) ANTIPODE 227 (2004); Kearney Backett-Milburn et al., *Challenging Childhoods: Young People's Accounts of "Getting By" in Families with Substance Use Problems*, 15 CHILDHOOD 461 (2008); Tatek Abebe and Asbjorn Aase, *Children, AIDS, and the Politics of Orphan Care in Ethiopia: The Extended Family Revisited*, 64(10) SOCIAL SCIENCE & MEDICINE 2058 (2007); Caroline Nicholson, *The Impact of Child Labour Legislation on Child-Headed Households in South Africa*, 30 THOMAS JEFFERSON LAW REVIEW 408 (2008); Nura Taci, *The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Child*, 17 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 360 (2009); Ladan Askari, *The Convention on the Rights of the Child: The Necessity of Adding a Provision to Ban Child Marriage*, 5 ILSA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 123 (1998-1999); DEIDRE FOTTRELL, *One Step Forward or Two Steps Sideways? Assessing the First Decade of the United Nations Convention on the Rights of the Child*, in REVISITING CHILDREN'S RIGHTS (2000).

⁹⁴ Jack Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO LAW REVIEW 1613, 1626 (1995).

⁹⁵ Jack Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO LAW REVIEW 1613, 1626 (1995).

⁹⁶ Pierre Schlag, *The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO LAW REVIEW 1631, 1635 (1995).

⁹⁷ Pierre Schlag, *The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO LAW REVIEW 1631, 1635 (1995).

fear, an authoritarian perspective from those who do.⁹⁸ Neal argues that deconstruction evolved out of the perceived failure of a positivist methodology.⁹⁹ Deconstruction raises a debate over whether concepts like market, labour, value, fiction, fact, language, and so on are neutral tools that represent an objectively given world, or whether all such structuring devices are tacitly hierarchical.¹⁰⁰ For the deconstruction project, an 'objective' account of anything is infected with hidden intentionalities of a pre-given political worldview. Neal contends that many consumerist, careerist, chauvinist, racist, and elitist behaviours are embedded in perspectives in such claims to objectivity, with violence built into the narrative of language.¹⁰¹ Neal notes that a deconstruction can be seen as an aggressive term; controverting 'truth' often 'arouses the ire of dedicated professionals'.¹⁰² She continues that it is not the fault of the postmodernist messenger that the nineteenth century system of interpretation has broken down.¹⁰³ Further, she contends that deconstruction can be used by anyone who wishes to describe the politics behind a school of interpretation.¹⁰⁴

Nonetheless, deconstruction does not alleviate the existence of a set of political commitments.¹⁰⁵ First, a deconstruction is itself a political endeavour, as one chooses where to begin and where to end, which turns of phrase to subvert and which to leave untouched. Jack Balkin contends that 'without pre-existing values, purposes, or commitments, deconstruction cannot begin'.¹⁰⁶ The author chooses where to 'grind our ax' and where to refrain from doing so, which metaphors and arguments to leave unquestioned.¹⁰⁷ Deconstruction can never be other than political. One deconstructs a particular text because the author has some philosophical, ideological, moral or political 'problem' with it. Certainly this thesis fails to account for *all* children adversely affected and *any* children positively affected by the CRC's vision of childhood. This thesis too focuses on, not only the CRC, but also only certain parts of the CRC, while leave other untouched, such as the limitation on life imprisonment.

Second, deconstruction when performed by individuals, is itself a political practice subject to hubris.¹⁰⁸ Schlag maintains that,

⁹⁸ Aubrey Neal, *The Promise and Practice of Deconstruction*, 30 CANADIAN JOURNAL OF HISTORY 49 (1995).

⁹⁹ Aubrey Neal, *The Promise and Practice of Deconstruction*, 30 CANADIAN JOURNAL OF HISTORY 49 (1995).

¹⁰⁰ Aubrey Neal, *The Promise and Practice of Deconstruction*, 30 CANADIAN JOURNAL OF HISTORY 49 (1995).

¹⁰¹ Aubrey Neal, *The Promise and Practice of Deconstruction*, 30 CANADIAN JOURNAL OF HISTORY 49 (1995).

¹⁰² Aubrey Neal, *The Promise and Practice of Deconstruction*, 30 CANADIAN JOURNAL OF HISTORY 49 (1995).

¹⁰³ Aubrey Neal, *The Promise and Practice of Deconstruction*, 30 CANADIAN JOURNAL OF HISTORY 49 (1995).

¹⁰⁴ Aubrey Neal, *The Promise and Practice of Deconstruction*, 30 CANADIAN JOURNAL OF HISTORY 49 (1995).

¹⁰⁵ Jack Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO LAW REVIEW 1613, 1628 (1995).

¹⁰⁶ Jack Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO LAW REVIEW 1613, 1629 (1995).

¹⁰⁷ Jack Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO LAW REVIEW 1613, 1628 (1995).

¹⁰⁸ Jack Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO LAW REVIEW 1613, 1629 (1995).

[i]n [deconstruction's] worst moments, it succeeds quasi-comically in dogmatically establishing the [critical legal studies] thinker as a radically free subject while reducing everyone else to the unenviable status of a mere vehicle for the reiteration of fairly crude structuralist patterns: radical individual subjectivism for me and objectified mindlessness for you... (I win-you lose).¹⁰⁹

The author is put outside the challenge of the deconstruction and thus remains 'a self-assured, coherent, integrated, rational, originary source of moral and political action'.¹¹⁰ According to Schlag, to put one's self outside the deconstruction remands it as a metaphysical project.¹¹¹ Indeed Derrida argued with Foucault that, 'to question the western understanding of the world with a view to stepping entirely outside it, is only to duplicate the structure of the understanding which is in question'.¹¹² While this thesis does not claim a particular version of childhood as the true childhood, undoubtedly, this thesis argues that what is 'best for children', is what has been identified in international human rights discourse as best of all other humans: the right to unqualified participation. As such, this author too is engaging in the political assessment of what is best *for* children, as assessed by yet another adult.

Another potential critique of the deconstructionist project is that one might tear apart, in this case the CRC, with relative facility, leaving the outstanding issue, what is to come next. Such a question implicitly conveys that a deconstructionist project is insufficient without a reconstruction, or in the case of this thesis, a plan for the future of children's rights. This thesis argues that before thinking about a reconstruction, the 'truths' articulated about children in the CRC and in commentaries about the CRC must first be deconstructed, as these 'truths' have particular believability and as such too often defy critical inquiry. The CRC's ontology of what it means to be a 'child' is a normative injunction that is imposed insidiously by setting the CRC's vision of the category 'child' as a necessary foundation.¹¹³ It seems that normative judgments about what it means to be a 'real' child were made in the drafting process of the CRC without critically interrogating how the CRC's construction of the 'child' could result in violent exclusions. This 'rush to decision-ism and to strong normativity' has failed to consider what is

¹⁰⁹ Pierre Schlag, *The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO LAW REVIEW 1631, 1634 (1995).

¹¹⁰ Pierre Schlag, *The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO LAW REVIEW 1631, 1634 (1995).

¹¹¹ Pierre Schlag, *The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO LAW REVIEW 1631, 1634 (1995).

¹¹² Aubrey Neal, *The Promise and Practice of Deconstruction*, 30 CANADIAN JOURNAL OF HISTORY 49, (1995), citing ROY BOYNE, FOUCAULT AND DERRIDA: THE OTHER SIDE OF REASON, 98 (1991).

¹¹³ JUDITH BUTLER, GENDER TROUBLE, 148 (1990). See also JEREMY MOSS, *Introduction: The Later Foucault*, in THE LATER FOUCAULT: POLITICS AND PHILOSOPHY, 98-99 (1998). Butler's analysis refers to gender, but as will be argued in this thesis has relevance to the construction of the category 'child' in the CRC.

meant by some of the very basic terms the CRC's vision of childhood assumes.¹¹⁴ Normativity results in a violent circumscription of the possible (what lives are considered lives, what capacities are considered human), for which the CRC is often not held accountable.¹¹⁵ This 'rush' is particularly true in the context of children's rights. One continually finds the realm of children's rights dominated by normative judgments about what it means to be a 'true' child and therefore what should be the aim and content of children's rights (as will be discussed in Chapter 2). These normative judgments are made even before the field of possibilities for childhood and children's rights has been interrogated.¹¹⁶

While this thesis will not engage in a reconstruction of the category 'child' as articulated in the CRC, it seeks to highlight elements of a possible reconstruction. In particular, the child's right to participate (the 'right to express [his/her] views freely in all matters affecting the child') found in Article 12 seems a basic starting point for any reconstructive endeavour. Again, it is noteworthy that the category 'child' has thus far not been allowed to form a political identity of its own. When 'we' speak about the category 'child' in the CRC, it is the product of an entirely different category of persons, adults. A second element could be the notion of a coalition, as will be discussed in Chapter 3. Ever so briefly, Butler envisages a new configuration of politics as an anti-foundational coalition politics that would accept the need to act within the tensions produced by contradiction, fragmentation and diversity.¹¹⁷ Butler has argued that the notion of universality is based on foreclosure: there must be something that is not included within the universal.¹¹⁸ She notes, however, that universality is a discourse that can and must be driven into crisis again and again by the foreclosures that it makes.¹¹⁹ In this way, the discourse is forced to rearticulate itself.¹²⁰ Universality then would not be violent or totalising. Butler argues that the task of politics would be to keep the process of universality open, to keep it as a contested site of persistent crisis, and to not let it be settled.¹²¹ Dianne Otto has argued that by not 'seeking and maintaining unity at all costs against monolithic understandings of domination', a coalition relies

¹¹⁴ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted THE JUDITH BUTLER READER, 355 (Sara Salih ed., 2004).

¹¹⁵ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted THE JUDITH BUTLER READER, 355 (Sara Salih ed., 2004).

¹¹⁶ CHRIS JENKS, CHILDHOOD, 3 (2005): 'It is as if the basic ontological questions, "what is a child?" and "how is the child possible as such?", were, so to speak, satisfactorily answered in advance of the theorising and then summarily dismissed'.

¹¹⁷ JUDITH BUTLER, GENDER TROUBLE, 20 (1990).

¹¹⁸ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted THE JUDITH BUTLER READER, 340 (Sara Salih ed., 2004).

¹¹⁹ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted THE JUDITH BUTLER READER, 340 (Sara Salih ed., 2004).

¹²⁰ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted THE JUDITH BUTLER READER, 340 (Sara Salih ed., 2004).

¹²¹ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted THE JUDITH BUTLER READER, 340 (Sara Salih ed., 2004).

on the possibility of dialogue across vast differences in power and knowledge.¹²² In this way, her concept of coalition gives up 'the desire and the apparent safety of certainty and prescription', as well as arguably at least some political purchase, and learns 'how to live and act so that differences and incommensurabilities can inform and contest the practices of individual identities and collective solidarities.'¹²³ A coalition for the category 'child' would necessarily involve the first element, children's participation. Beyond that, this thesis is uncertain as to what such a coalition would look like; but that it could not require an essential identity category.

This thesis has a particular 'ax to grind' with the CRC's articulation of the category child: the taken for granted/self-evident assumption that children are fundamentally different from adults; and that this difference justifies their differential and submissive positioning in relation to adults, all under the banner of rights of the child. Interestingly, it seems that the unknowability of childhood (that childhood is a state of development or state of change) somehow works against the category 'child'. Possibly, the alleged state of change/development/malleability of childhood makes the category child in need of even greater control.

¹²² Dianne Otto, *Sexualities and Solidarities*, 8 AUSTRALIAN GAY AND LESBIAN LAW JOURNAL 27, 34 (1999).

¹²³ Dianne Otto, *Sexualities and Solidarities*, 8 AUSTRALIAN GAY AND LESBIAN LAW JOURNAL 27, 34-35 (1999).

CHAPTER 2

PERSPECTIVES ON THE CRC

OUTLINE

- I. VIEWS ON THE CRC BASED ON THE ASSUMPTION THAT THE CHILD'S CAPACITY IS RELEVANT TO THE DISCUSSION OF CHILDREN'S RIGHTS
 - a. Perspectives That Reject the CRC
 - i. The CRC Gives Children Autonomy Rights - Children are Not Capable
 - ii. The CRC Gives Children State Protection of Their Autonomy
 - 1. Parents are Best Positioned to Provide for the Children's Autonomy
 - 2. Removing Age-Based Classification Lacks Clarity
 - 3. Removing Age-Based Classification Increases Intervention into the Family
 - b. Perspectives That Embrace the CRC – Parents and the State Should Protect Children's Autonomy
 - c. Perspectives That Embrace the CRC – But Argue That Children Need to be Viewed by the State and Parents as More Capable
 - d. Perspectives That Reject the CRC – Children are Capable

- II. VIEWS ON THE CRC THAT REJECT THE CHILD'S CAPACITY AS RELEVANT TO THE DISCUSSION OF CHILDREN'S RIGHTS
 - a. Perspectives That Reject the CRC – Capacity Should Not be a Precursor to Rights, the Policy of Protectionism Does More Harm than Good, and Children's Capacities are Unknown
 - b. Perspectives That Reject the CRC – Universalisation of the Category 'Child' is Too Exclusionary
 - c. Perspectives That Reject the CRC – CRC Merely Reifies Adult-Centrism

- III. CONCLUSION

This chapter canvasses a range of perspectives on the CRC with a view towards questioning the legal construction of the child in the CRC. This chapter argues that dominant perspectives on the CRC fundamentally disagree on whether the CRC captured the 'true' child and thus articulated the 'correct' or appropriate rights for children. For example,

[t]he [CRC] is undoubtedly the most significant recent policy development intended to promote and protect children's rights. The Convention incorporates civil, social, and cultural rights. The 54 Articles of the Convention constitute a mixed but highly desirable bag of rights which have been grouped into three broad categories and labelled the three Ps: provision, protection, and participation.

[T]he [CRC] takes a "quantum leap" beyond the UN's 1959 Declaration [on the Rights of the Child] by adopting and promoting "an 'autonomous' view" of children's rights that is "more based on choice than needs" of children. The new "civil rights" provisions of the CRC reject the "integrative" character of the 1959 Declaration, which had emphasised the "integration of persons into society," and instead provides children with a sphere of autonomy and freedom from control. While there is much to praise in the CRC's approach to child protection . . . the CRC's vision of child autonomy is misguided.²

As the above quotes indicate, views about the CRC vary greatly, and elicit passionate reactions.³ Nonetheless, the CRC is the most widely ratified convention in history.⁴ The Convention includes so-called first and second generation rights,⁵ and is considered the most extensive legal statement of children's rights to be found anywhere.⁶ Many have argued that even if one does not agree with the provisions within the Convention, the Convention itself is a touchstone for research about and activism for children.⁷ Others have called the Convention a feminist

¹ BOB FRANKLIN, *The Case for Children's Rights: A Progress Report*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE, 16 (1995), original emphasis.

² Bruce Hafen and Jonathan Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449, 451 (1996).

³ SARA DILLON, INTERNATIONAL CHILDREN'S RIGHTS, 3 (2010): 'Questions relating to children and their rights elicit powerful reactions across the political and cultural spectrum'.

⁴ Only the United States (who has signed the CRC), Somalia, and South Sudan have yet to ratify the CRC. See: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=IV-11&chapter=4&lang=en.

⁵ PHILIP ALSTON and JOHN TOBIN, LAYING THE FOUNDATIONS FOR CHILDREN'S RIGHTS, ix (2005); BOB FRANKLIN, *The Case for Children's Rights: A Progress Report*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE, 16 (1995); Pe Miljeteig-Olssen, *Advocacy of Children's Rights—The Convention as More than a Legal Document*, 12 HUMAN RIGHTS QUARTERLY 148 (1990).

⁶ Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277 (2000); Pe Miljeteig-Olssen, *Advocacy of Children's Rights—The Convention as More than a Legal Document*, 12 HUMAN RIGHTS QUARTERLY 148 (1990); Enid Fourie, *The United Nations Convention on the Rights of the Child and the Crisis for children in South Africa: Apartheid and Detention*, 12 HUMAN RIGHTS QUARTERLY 106 (1990).

⁷ Anonymous, *Editorial: The CRC as a Touchstone for Research on Childhoods*, 6(4) CHILDHOOD 403 (1999); Enid Fourie, *The United Nations Convention on the Rights of the Child and the Crisis for children in South Africa: Apartheid and Detention*, 12 HUMAN RIGHTS QUARTERLY 106, 114 (1990); Thomas Hammarberg, *The Rights of the Child – Much More than Charity*, in 18 CANDLES THE CONVENTION ON THE RIGHTS OF THE CHILD REACHING MAJORITY (Jane Connors et al. eds., 2005).

landmark because of, for example, its gender-neutral language.⁸ If nothing else, the Convention is seen by many as an expression of good will as opposed to 'hard law', reflecting lofty moral language rather than enforceable legal language.⁹ The Convention is unsurprisingly not without its critics. Those who may not take issue with the substance of the rights found in the Convention, argue that the Convention lacks 'real' enforcement mechanisms.¹⁰ Others argue that the Convention is pragmatically impossible for most countries to put into practice, rendering much of the Convention meaningless.¹¹ Some contend that the Convention focuses too much on liberty rights, giving children dangerous freedoms and undermine respect for those in authority positions over the child, encouraging children to be greedy, selfish, and irresponsible, and insufficiently on the protection of children.¹² By contrast, others argue that far from granting children overstated freedoms and rights, the Convention is too modest a proposal that fails to meet minimal criteria of social justice.¹³ Unrelated to the child, still others argue that while the discrimination provisions in the Convention are to be applauded, the protection of children by the state allows for the control and surveillance of women.¹⁴ These opinions are but a glimpse into discourses regarding the CRC.

Views about the Convention explored in this chapter divide on whether the CRC successfully captured the 'essential' or 'true' child. Indeed, one's perception of who qualifies as the 'true' child dictates whether one views the CRC as an accurate or inaccurate portrayal of the category 'child'. Given that perceptions of the 'child', and therefore of rights owed to the 'child' vary

⁸ Cynthia Price-Cohen, *The CRC: a Feminist Landmark*, 3 WILLIAM & MARY JOURNAL OF WOMEN AND THE LAW 29 (1997); Moushira Khattab, *Gender Based Discrimination: Have the Challenge been Met?*, in 18 CANDLES THE CONVENTION ON THE RIGHTS OF THE CHILD REACHING MAJORITY, 61 (Jane Connors et al. eds., 2005).

⁹ Anonymous, *Editorial: The CRC as a Touchstone for Research on Childhoods*, 6(4) CHILDHOOD 403 (1999); Kirsten Backstrom, *The International Human Rights of the Child: Do They Protect the Female Child?*, 30 GEORGE WASHINGTON JOURNAL OF INTERNATIONAL LAW & ECONOMICS 541, 566 (1996); P Cynthia Price-Cohen, *Implementing the U.N. Convention on the Rights of the Child*, 21 WHITTIER LAW REVIEW 95 (1999-2000); PHILIP ALSTON and JOHN TOBIN, *LAYING THE FOUNDATIONS FOR CHILDREN'S RIGHTS* (2005).

¹⁰ For example see Kirsten Backstrom, *The International Human Rights of the Child: Do They Protect the Female Child?*, 30 GEORGE WASHINGTON JOURNAL OF INTERNATIONAL LAW & ECONOMICS 541 (1996); Cynthia Price-Cohen, *Implementing the U.N. Convention on the Rights of the Child*, 21 WHITTIER LAW REVIEW 95 (1999-2000); Mary Donnelly and Ursula Kilkelly, *Child-Friendly HealthCare: Delivering on the Right to Be Heard*, 19 MEDICAL LAW REVIEW 27, 45 (2011); '[W]hile the clarity of the CRC approach and the level of detailed guidance provided is undoubtedly helpful in framing policy, as Jane Fortin notes, the absence of direct methods of formal enforcement is a weakness in the CRC'. JANE FORTIN, *CHILDREN'S RIGHTS AND THE DEVELOPING LAW*, 46 (2009). Donnelly and Kilkelly contrast the position to that in the United Nations Convention on the Rights of Persons with Disabilities where ratification of the Optional Protocol allows for a direct right of petition to the Committee on the Rights of Persons with Disabilities. Notably a 3rd Optional Protocol has been drafted and submitted to the General Assembly which would allow for such direct petition to the Committee on the Rights of the Child. Report of the Human Rights Council 2 November 2011 A/C.3/66/L.66.

¹¹ Erica Burman, *Local, Global or Globalised? Child Development and International Child Rights Legislation* 3 CHILDHOOD 45, 50 (1992).

¹² Bruce Hafen and Jonathan Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449, 452-453 (1996); Priscilla Alderson, *UN Convention on the Rights of the Child: Some Common Criticisms and Suggested Responses*, 96 CHILD ABUSE REVIEW 439 (2000).

¹³ Olga Nieuwenhuys, *Editorial: The Ethics of Children's Rights*, 15(1) CHILDHOOD 4, 8 (2008).

¹⁴ Frances E. Olsen, *Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child*, 6 INTERNATIONAL JOURNAL ON LAW AND THE FAMILY 192, 199 (1992).

widely, the belief that the category 'child' is sufficiently unique to justify its own grouping is in itself interesting.¹⁵ Even the name of the Convention, 'The Convention on the Rights of the *Child*', suggests that there exists a unitary category 'child'. The existence of the Convention suggests that the category 'child' is sufficiently collectively unique to necessitate a separate delineation of rights.¹⁶ Sharon Detrick writes that Convention did not make children into a special group, but rather the CRC was concluded,

because of the realisation, seventy years ago, that children's specific needs and vulnerability demanded particular responses from the international community. We can note in that regard that global human rights instruments were not drawn up with children in mind, that they have been developed over a period of decade, and that as a whole they therefore contain a number of inconsistencies and certainly do not reflect current knowledge and experience with regard to children's issues. But in addition . . . is the usefulness for promoting knowledge and understanding of children's issues.¹⁷

Detrick seems to suggest that, at the very least, there are particular issues that are unique to the category 'child'. In a cycle of self-affirmation, Detrick's reference to 'children's issues' suggests a sufficiently collective experience to justify the 'uniqueness' of childhood in contrast to other identity categories. In similar fashion, the CRC presents a unitary vision for the category 'child', as will be discussed in Chapters 5 and 6 of this thesis. Chapter 3 will explore in more detail the theoretical consequence of assigning a fundamental unity to the category child, a category tethered by 'children's issues'.

This thesis endeavours to query the assumption that there exists a 'true' unitary category 'child' that flows from the fundamental truths that the child is developing and that the child is in 'care'. This thesis argues that the identity 'child' has merely congealed over time to produce the appearance of some 'natural' being that is alleged to have been there all along. This chapter lays the foundation for the chapters to follow by arguing that the defining characteristic of the category 'child' and the greatest source of debate regarding the 'true' child is the child's capacity. The 'child's' capacity is central to the discussion regarding the universal child. What makes a

¹⁵ Certainly there have been authors who reject the idea of a single conception of childhood (to be discussed in Section II below). Nonetheless, this thesis argues that regardless, the Convention and dominant discourses surrounding the Convention maintain a singular normative view of childhood, an issue to be discussed at length in Chapters 6, 7, and 9.

¹⁶ For a similar critique of the Convention on the Elimination of Discrimination Against Women, see Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICHIGAN JOURNAL OF INTERNATIONAL LAW 1 (2008).

¹⁷ SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 29 (1992).

person a 'true' child is his or her immaturity/incapacity, leaving issues of difference within the category marginal.

Following critiques of this hegemonic approach to the category 'child',¹⁸ this chapter argues that difference within the category 'child' is either not identified or cursorily acknowledged by dominant discourses regarding the CRC.¹⁹ Authors simply do not state for example, 'The child I am referring to is in a state of development that resembles Piaget's developmental model,²⁰ and who is middle-class, male, with two heterosexual non-abusive parents, who lives in a country that provides universal education, 'sufficient' health care, and a legal system that ensures that children are not abused'. Most often this has to be surmised. As such, the categorisation of the child behind the authors surveyed in this chapter is determined according to the much more frequently discussed issue of capacity. In commentary regarding the CRC, the identity of the child behind the rights is often contingent on the issue of capacity and whether the Convention effectively reflects the 'true' capacity of 'the child'. That is not to relinquish the importance of interrogating the category 'child', a major goal of this thesis. This thesis argues that determining the child behind a set of rights conferred by the CRC is fundamental to understanding *why* one set of rights is chosen over another. More importantly, determining the 'child' behind a set of rights is fundamental to understanding what is made possible through a particular vision of the category 'child'. After identifying which 'child' is being utilised, the next question must be *why* this particular 'child' over another. If there is no unitary 'child', choosing one 'child' to represent all children (for example, the white 'home child' in Canberra, Australia over the 'street child' in New Delhi, India) is a political decision, as will be discussed in Chapters 3, 6, 7, and 9. However, the purpose of this chapter is to highlight particular discussions that relate to whether the CRC

¹⁸ See for example Judith Ennew, *Outside Childhood: Street Children's Rights*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE (Bob Franklin ed., 1995); Benjamin Shmueli, *What Has Feminism Got to Say about Corporal Punishment* 2 WISCONSIN WOMEN'S LAW JOURNAL 177 (2007); Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277, 282 (2000); REX STANTON ROGERS and WENDY STANTON ROGERS, STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN, 51 (1992); Michael Freeman, *The Sociology of Childhood and Children's Rights*, 6(4) INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 433 (1998); Vanessa Pupava, *Misanthropy Without Borders: The International Children's Rights Regime*, 25(2) DISASTERS 95, 100 (2001); Berry Mayall, *The Sociology of Childhood in Relation to Children's Rights*, 8 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 243 (2000); Jo Boyden, *Childhood and the Policymakers: A Comparative Perspective in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD* (Allison James and Alan Prout eds., 1997); CHRIS JENKS, CHILDHOOD (2005). Critiques of this hegemonic approach to the category 'child' will be taken up in Section II and in Chapter 9.

¹⁹ When the category 'child' is spoken about in the CRC or otherwise, this 'child' has no age, gender, ethnicity, or sexual orientation; or more accurately this child is white, male, heterosexual, upper-middle class. That the CRC is exclusionary to certain children will be discussed further in Chapter 9.

²⁰ See generally James Garbarino, *The Child's Evolving Capacities: Articles 4 and 15*, in CHILDREN'S RIGHTS IN AMERICA: UN CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW, 26 (Cynthia Price-Cohen and Howard Davidson eds., 1990); 'Much of our thinking about how children develop intellectually relies upon the pioneering work of the Swiss psychologist Jean Piaget'; MARY JOHN, CHILDREN'S RIGHTS AND POWER: CHARGING UP FOR A NEW CENTURY, 120 (2003).

captured the 'true' universal child.²¹ Disagreement on the issue of capacity, so strongly linked to questions of identity in the category 'child' lays the basis for theoretical engagement with the strangely unitary category 'child' in Chapter 3.

Before examining various perspectives about the CRC, the type of rights that are being discussed for children should be noted. Basic conceptions of rights relating to children fall into two categories: 1) autonomy rights, and 2) protection rights. Protection or welfare rights include physical care and security.²² Autonomy rights, or 'choice rights', on the other hand, include an individual's authority to make binding decisions.²³ It is worth previewing the contention that the CRC's 'autonomy' rights are still quite different from rights given to adults. The child's so called 'autonomy' rights are instead what this author calls 'qualified autonomy rights'. Though this will be discussed further in Chapters 4, 6, and 7, the child receives certain autonomy rights²⁴ in the CRC qualified by 1) an adult determination that the child is mature enough to enjoy such rights (see for example Articles 5 and 12), 2) an adult determination of the child's best interests (see for example Articles 3 and 18), and 3) the parents responsibility to guide and direct the child in the child's enjoyment of the rights under the Convention (see for example Article 18). Such qualifications place limits on the child's so-called autonomy rights. That these rights limit the child's rights is uncontroversial. These limitations on the child's autonomy rights found in the CRC are generally justified on the grounds of the child's immaturity, or capacity. Vanessa Pupavac argues that,

Under the classical conceptualisation of rights, children 'by reason of . . . physical and mental immaturity' were considered to lack capacity for rights and their interests were held to be represented by their parents or guardians. As we have seen, contemporary notion of children's rights, too, takes this lack of capacity as its starting-point. The impulse for the institutionalisation of children's rights is the vulnerability and incapacity of children. Inherent in children's rights is the need for advocacy on behalf of the child.²⁵

²¹ As a result, it should be noted that this chapter does not seek to discuss every article in the Convention in depth.

²² Bruce Hafén and Jonathan Hafén, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449, 460 (1996): 'Protection rights, which do not depend on any minimum level of capacity, include such safeguards as rights to property, rights to physical care and security, and rights to procedural due process'.

²³ Bruce Hafén and Jonathan Hafén, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449, 460 (1996): 'Autonomy rights, which do not depend on any minimum level of capacity, include such safeguards as rights to property, rights to physical care and security, and rights to procedural due process grant individuals the authority to make affirmative and legally binding decisions, such as voting, marrying, making contracts, exercising religious preferences, or choosing whether and how to be educated'.

²⁴ Though it will be discussed in Chapter 6, there are certain autonomy rights that the child does not receive in the CRC, for example the right to work.

²⁵ Vanessa Pupavac, *Misanthropy Without Borders: The International Children's Rights Regime*, 25(2) DISASTERS 95, 100 (2001).

Pupavac asserts that while the child is treated as the rights-holder under the Convention, the child is not regarded as the moral agent who determines those rights, as shown in for example, Articles 3 of the Convention.²⁶ Under Article 3, it is 'the best interests of the child', not the child's views, that 'are to be of primary consideration'. It is important to be cognisant of what is meant by 'autonomy rights' in the context of children's rights: qualified autonomy rights. Again this classification of the rights for children as different from rights given to adults is not controversial, but rather seen as a *lex specialis*.²⁷ Indeed the entire impetus of the CRC was to provide 'special consideration' to children.²⁸ This chapter attempts to give a range of views about the vision of the category 'child' in the CRC. Such disagreement leads to querying the assumption of a universal and fundamental category child.

Section I explores views about the CRC that are based on the assumption that the child's purported capacity is relevant to the discussion of children's rights. This section includes perspectives that reject, endorse, or endorse in part the articulation of the child's rights in the CRC, all based on varying views of the child's capacity. Section II examines views about the CRC that reject that the child capacity is relevant to the discussion of children's rights. Such perspectives include arguments that capacity remains irrelevant to any discussion of rights, including children's rights, protectionism does more harm than good, and the current regime found in the CRC merely reifies adult-centrism.

I. VIEWS ON THE CRC BASED ON THE ASSUMPTION THAT THE CHILD'S CAPACITY IS RELEVANT TO THE DISCUSSION OF CHILDREN'S RIGHTS

This section explores perspectives on the CRC that define the category 'child' as incapable of exercising capacity as a result of the child's immaturity. As such, the perspectives overviewed in this section argue that children require parental and/or state authority to ensure the child's protection. The concept of minority legal status, or the legal category 'child', is argued to protect children from their own temporary lack of capacity, giving 'children advantages designed to protect them from abuse and nurture them toward maturity'.²⁹ The perspectives explored in this

²⁶ Vanessa Pupavac, *Misanthropy Without Borders: The International Children's Rights Regime*, 25(2) DISASTERS 95, 100 (2001).

²⁷ Bruce Abramson, *Article: 2. The Right of Non-Discrimination*, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, ix (Andre Alen et al. eds., 2008).

²⁸ Bruce Abramson, *Article: 2. The Right of Non-Discrimination*, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, ix (Andre Alen et al. eds., 2008). The Preamble of the CRC notes that 'childhood is entitled to special care and assistance'.

²⁹ Bruce Hafén and Jonathan Hafén, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449, 452-453, 460 (1996).

section agree that primarily parents, but sometimes that state should provide protection to children. However, perspectives diverge on the issue of whether the parents and the state should be empowered to protect the child's autonomy. Put another way, the rights or the remedial measures needed to address the child's alleged inherent state of immaturity and thus dependency, vary from exclusive parental control over the child's autonomy to a shared control, where the state is a fall back in the event that the child and parent disagree about the child's autonomy.

a. Perspectives That Reject the CRC

This section will primarily focus on the authors Bruce Hafen and Jonathan Hafen.³⁰ These authors have been selected because their work is representative of a larger category of perspectives on children's capacity, and therefore children's rights.³¹ It should be noted that this perspective will be surveyed in detail, largely because it represents a foil for the majority of responses that defend the CRC's account of children's rights.³² As a consequence, this perspective initiates a discussion regarding basic political forces underlining the debates about children's rights. Further, it should be noted that unlike the rest of the perspectives that will merely be described in this chapter, this sub-section will not only outline Hafen and Hafen's perspectives, but also critique them, along with the perspective outlined in Section I (d) (which argues that all children are capable). The rest of the perspectives put forward in Section I will simply be described in this chapter, but will be critiqued alongside the CRC in latter chapters because the same critiques apply to the CRC apply to the perspectives merely described in this chapter. Hafen and Hafen's perspective on the CRC, as well as the perspective that argues that all children are capable present unique criticisms, and as such will be examined in this chapter.

³⁰ Bruce Hafen and Jonathan Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449 (1996).

³¹ Bruce Hafen and Jonathan Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449, 465 (1996). See generally Joseph Goldstein, *Medical Care for the Child at Risk: On Supervisor of Parental Autonomy*, 86 YALE LAW REVIEW 645 (1977); Jeffrey Blustein, *Children Rearing and Family Interests*, in HAVING CHILDREN: PHILOSOPHICAL & LEGAL REFLECTIONS ON PARENTHOOD (Onora O'Neill and William Ruddick eds., 1979); Michelle Hall, *Convention on the Rights of the Child: Has American Closed Its Eyes?*, 17 NEW YORK LAW SCHOOL JOURNAL OF HUMAN RIGHTS 923 (2000-2001); Barbara J. Nauck, *Implications of the United States Ratification of the United Nations Convention on the Rights of the Child: Civil Rights, the Constitution and the Family*, 42 CLEVELAND STATE LAW REVIEW 675, 702 (1994); Kevin Smith, *The United Nations Convention on the Rights of the Child: The Sacrifice of American Children on the Altar of Third-World Activism*, 38 WASHBURN LAW JOURNAL 111 (1998-1999); David P. Stewart, *Ratification of the Convention on the Rights of the Child*, 5 GEORGETOWN JOURNAL ON FIGHTING POVERTY 161 (1997-1998); Richard G. Wilkins et al., *Why the United States Should not Ratify the Convention on the Rights of the Child*, 22 SAINT LOUIS UNIVERSITY PUBLIC LAW REVIEW 411, 412 (2003); Lynn Wardle, *Essay: The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Child*, 27 LOYOLA UNIVERSITY CHICAGO LAW JOURNAL 321, 321-348 (1996); Susan Kilbourne, *The Wayward Americans - Why the USA has not Ratified the UN Convention on the Rights of the Child*, 3 CHILD & FAMILY LAW QUARTERLY 243, 243-256 (1998) (notes that that Convention has been variously characterised as 'the ultimate program to annihilate parental authority', 'a tool for perverts' and a 'malignant vampire').

³² See generally Priscilla Alderson, *UN Convention on the Rights of the Child: Some Common Criticisms and Suggested Responses*, 96 CHILD ABUSE REVIEW 439 (2000); Lainie Rutkow and Joshua Lozman, *Suffer the Children?: A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARVARD HUMAN RIGHTS JOURNAL 161 (2006).

Generally, in this perspective, the CRC quite rightly accepted the child as incapable, but as in a state of progress or development into full capacity (adulthood).³³ Protection rights, such as those found in Article 3³⁴, are also deemed appropriate. In this perspective, however, the CRC errs when it moves beyond protection rights to the provision of (even qualified) autonomy rights for children, such as those found in Article 5.³⁵ In this view, children's incapacity renders them incapable of holding autonomy rights. Accordingly, this perspective argues that children's autonomy rights should be supervised exclusively by the child's parents, restrained by the state only when those parents are 'demonstrably unfit'.³⁶ Interestingly, the state of being 'unfit' relates only to whether the parents are providing the child protection (food, shelter, abuse-free environment), not whether parents are respecting the autonomy of children.

i. The CRC gives Children Autonomy Rights - Children are Not Capable

Hafen and Hafén first argue that rights for children should not be designed to increase children's personal choice, but to protect children against the abuse of unchecked adult discretion. Interestingly, Hafén and Hafén do not find unchecked adult discretion regarding the child's autonomy problematic. Hafén and Hafén argue that children's relative lack of adult-level capacity enhances the need for such protections.³⁷ Further, they argue that the denial of autonomy rights is,

not a way of discriminating against children, but is a way of protecting them, and society, from the long-term consequences of a child's immature choices and from exploitation by those who would take advantage of a child's unique

³³ Bruce Hafén and Jonathan Hafén, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449, 450 (1996).

³⁴ Article 3 states that the best interests of the child will be a primary consideration in all decisions concerning the child.

³⁵ Bruce Hafén and Jonathan Hafén, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449, 450 (1996). Article 5 includes reference to the evolving capacities of the child.

³⁶ Bruce Hafén and Jonathan Hafén, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449, 465 (1996). See generally Joseph Goldstein, *Medical Care for the Child at Risk: On Supervisor of Parental Autonomy*, 86 YALE LAW REVIEW 645 (1977); Jeffrey Blustein, *Children Rearing and Family Interests*, in *HAVING CHILDREN: PHILOSOPHICAL & LEGAL REFLECTIONS ON PARENTHOOD* (Onora O'Neill and William Ruddick eds., 1979); Michelle Hall, *Convention on the Rights of the Child: Has American Closed Its Eyes?*, 17 NEW YORK LAW SCHOOL JOURNAL OF HUMAN RIGHTS 923 (2000-2001); Barbara J. Nauck, *Implications of the United States Ratification of the United Nations Convention on the Rights of the Child: Civil Rights, the Constitution and the Family*, 42 CLEVELAND STATE LAW REVIEW 675, 702 (1994); Kevin Smith, *The United Nations Convention on the Rights of the Child: The Sacrifice of American Children on the Altar of Third-World Activism*, 38 WASHBURN LAW JOURNAL 111 (1998-1999); David P. Stewart, *Ratification of the Convention on the Rights of the Child*, 5 GEORGETOWN JOURNAL ON FIGHTING POVERTY 161 (1997-1998); Richard G. Wilkins et al., *Why the United States Should not Ratify the Convention on the Rights of the Child*, 22 SAINT LOUIS UNIVERSITY PUBLIC LAW REVIEW 411, 412 (2003); Lynn Wardle, *Essay: The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Child*, 27 LOYOLA UNIVERSITY CHICAGO LAW JOURNAL 321, 321-348 (1996).

³⁷ Bruce Hafén and Jonathan Hafén, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449, 460 (1996).

vulnerability. To confer the full range of choice rights on a child is also to confer the burdens and responsibilities of adult legal status, which necessarily removes the protection rights of childhood.³⁸

Hafen and Hafen take issue with certain articles of the Convention: 13 (right to freedom of expression), 15 (right of association and peaceful assembly), Article 14 (right to religious freedom), and Article 16 (right to privacy).³⁹ The central arguments against the CRC's grant of autonomy rights in this perspective are 1) children are too immature to exercise autonomy rights, and 2) autonomy rights in the CRC are incompatible with dominant positivist perspectives on law, in other words the CRC with its 'new and provocative personal autonomy dimensions' is inconsistent with current United States law regarding children.⁴⁰ While Hafen and Hafen are cognisant of the recognition in Article 5 and 18 given to the role of parental rights in guiding the child in her/his exercise of all rights under the Convention, they deem autonomy rights an unnecessary step away from protection rights. Hafen and Hafen contend, by way of example,

[i]f free speech is to be meaningful, a citizen must not only be free to speak but should have something worth saying, together with the maturity, insight, and skill needed to say intelligibly. To develop the capacity for autonomous action, children must submit their freedom temporarily to the schoolmaster of education and training, the developmental processes that create the tools and skills that are essential for responsible and self-determined action.⁴¹

One not only wonders who gets to decide whether a saying is worthy, but also whether many 'worthy' adults would pass muster. In what will become an important theme in Chapter 6, Hafen and Hafen's conclusion that children lack capacity/require development is never much substantiated beyond noting that American (adult) society has never recognised autonomy rights for children.⁴² As will be elaborated, this lack of justification for one's version of childhood is endemic to most discourse about the rights of the child. That the category 'child' is different from the category 'adult' on the basis of the child's lack of capacity and the adult's possession of capacity is assumed universally true, a 'truth' that will be critiqued throughout this thesis.

³⁸ Bruce Hafen and Jonathan Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449, 460 (1996).

³⁹ Bruce Hafen and Jonathan Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449, 468-450 (1996).

⁴⁰ Bruce Hafen and Jonathan Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449, 467 (1996).

⁴¹ Bruce Hafen and Jonathan Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449, 468-450 (1996).

⁴² Bruce Hafen and Jonathan Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449, 457 (1996).

ii. The CRC Gives the Children State Protection of Their Autonomy

Second, Hafen and Hafen take issue with the CRC's grant of 'subjective autonomy', as seen in Article 5 and Article 14. Subjective autonomy according to Hafen and Hafen is the right of the child to have the state protect the child's capacity/autonomy, as they develop, rather than the child having no state protection of autonomy until the date of maturity (age 18 or as otherwise specified by law). Hafen and Hafen argue that the 'subjective autonomy' model 'undermines the very autonomy-building process of education and nurturing that every child needs'.⁴³ Notably, it is not the grant of autonomy to the child that undermines the 'autonomy-building process' that occurs in childhood. The empowerment of the state, along with parents, to determine the child's capacity is what 'abandons children to their childhoods'. It is noteworthy that Hafen and Hafen's usage of 'subjective' implies that children determine for themselves their own autonomy. Such a characterisation does not accurately describe the rights in the CRC nor describe the problems that Hafen and Hafen have with the CRC. Possibly, characterising the rights given to children in the CRC as 'subjective' makes the CRC seem more controversial, with a 'kiddie-libbing' agenda. Rather, it is the empowerment of another group of adults other than the child's parents (the state in its various capacities) that determine the child's autonomy that is deemed problematic. Hafen and Hafen argue against this empowerment of the state for three reasons: 1) parents are in the best position to judge and evaluate the child's capacity for autonomy, 2) the lack of clarity that results from determining a child's capacity on a case by case basis, and 3) the involvement of the state in such matters would increase, unnecessarily, intervention into the home.

1. Parents are Best Positioned To Provide for the Children's Autonomy

Hafen and Hafen's main argument is that the subjective autonomy model (children acquire legally enforceable autonomy rights as the develop capacity, not at the age of majority) undermines the parental role because it shifts the ability to determine maturity to a person other than the parent. They argue that providing for the child's burgeoning autonomy is the parents' primary task.⁴⁴ Interestingly, Hafen and Hafen admit that 'maturity as a concept is hopelessly

⁴³ Bruce Hafen and Jonathan Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449, 476 (1996).

⁴⁴ Bruce Hafen and Jonathan Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449, 465 (1996).

complex and subjective . . . so many choices are laden with heavy personal value preferences'.⁴⁵ For Hafén and Hafén, caregiver control, as opposed to state control, over children's autonomy is necessary precisely because 'judges hardly know the children whose maturity they must judge'⁴⁶, as if in all other cases judges have intimate relationships with those embroiled in cases before them. Similarly, a judge should then not make decisions about, for example, marital assets. Rather the judge should leave the decision to the husband, as a judge does not have an intimate relationship with the wife to be able to make such a 'subjective' and 'value laden' determination. It is in part *because* judges do not know those before them, that they are deemed better fit to make such complex, subjective, and value laden decisions.

As stated above, it appears that Hafén and Hafén's argument that children's rights should only be directed towards 'unchecked adult discretion' simply does not apply to unchecked adult discretion regarding the child's autonomy, even though the same arguments could apply. Further, Hafén and Hafén fail to acknowledge that either system (age-based or subjective) does precisely that: leave children to unchecked adult discretion. The only question that remains is which adults exercise this discretion (age based – only parents; subjective – parents plus those adult empowered by the state). Pupavac contends that the underlying imperative to institutionalise children's rights is an implicit mistrust of the child's parents.⁴⁷ One might ask whether women's rights contain an implicit mistrust of their male counterparts and whether such 'mistrust' is problematic. Underlining Hafén and Hafén's position appears to be the belief that parent-child relationships are somehow fundamentally different. Chapter 7 and Section 3 below will more thoroughly address this point. Pupavac argues that the overall impact of children's rights results is the empowerment of outside professionals to represent the interests of the child, displacing the child's family (parents) as advocates for the child's interest.⁴⁸ Indeed, this grant of power to adults and rarely to the child is curious and will be further discussed in Chapter 7.

⁴⁵ Bruce Hafén and Jonathan Hafén, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449, 466 (1996). Pupavac also contends that the underlying imperative to institutionalise children's rights is an implicit mistrust of the child's parents. See Vanessa Pupavac, *Misanthropy Without Borders: The International Children's Rights Regime*, 25(2) DISASTERS 95, 100 (2001).

⁴⁶ Bruce Hafén and Jonathan Hafén, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449, 466 (1996). See also ROSALIND EKMAN LADD, *Introduction: Some Theoretical Issues*, in CHILDREN'S RIGHTS RE-VISIONED, 12 (1996).

⁴⁷ Vanessa Pupavac, *Misanthropy Without Borders: The International Children's Rights Regime*, 25(2) DISASTERS 95, 100 (2001).

⁴⁸ Vanessa Pupavac, *Misanthropy Without Borders: The International Children's Rights Regime*, 25(2) DISASTERS 95, 100 (2001).

2. Removing Age-Based Classification Lacks Clarity

Hafen and Hafen also argue that removing age-based classifications results in a lack of clarity, as children would reach legal capacity at difference ages. These authors pretend that lack of clarity is not found throughout law, whether the 'reasonable person' or determining whether an elderly person possesses similar competence to be able to exercise his/her autonomy, as will be discussed in Chapter 4. Interestingly, no similar law exists regarding elderly persons. For example all persons above the age of 70 are not presumed incompetent and their children for example given exclusive rights to 'protect' and 'provide' (exercise capacity on their behalf). All jurisdictions known to this author require courts to make a case-by-case determination regarding the capacity of the elderly (see Chapter 4 for further discussion). Why is 'lack of clarity' in the contexts of children's rights uniquely an issue? It seems that exclusive parent control over autonomy is merely a matter of convenience for parents, as the lack of clarity to which Hafen and Hafen refer is not resolved. The question of when children obtain enough capacity to exercise autonomy is not answered by having clear cut age classifications. Parents and children are still left to struggle over whether the child has obtained capacity before the age of maturity. The only clarity that is afforded is that only certain adults (parents) have exclusive control over the child's exercise of autonomy; all based on the idea that children cannot do so for themselves.⁴⁹ This kind of 'clarity' merely results in children being left with no remedy when their views regarding autonomy conflict with their parents, or 'abandoned' to their parent's unchecked discretion. Hafen and Hafen themselves acknowledge that, in the words of the United States Supreme Court Justice Stevens, 'it is perfectly obvious that such a yardstick [age-based legislation] is imprecise and perhaps even unjust in particular cases'.⁵⁰ Yet, these authors support this age-based classification for maturity merely by stating a positivist perspective of law.⁵¹ One might forget that rights are supposed to be fundamental; much less that *all persons* are supposed to be guaranteed these rights, under United States, as well as international law.⁵² At the very least, this acknowledged 'unjust'-ness would seem to induce Hafen and Hafen, and for that matter Justice Stevens, a bit more pause for consideration.

⁴⁹ See generally GARETH MATTHEWS, *THE PHILOSOPHY OF CHILDHOOD* (1994).

⁵⁰ *Planned Parenthood v. Danforth*, 428 U.S. 52, 104-05 (1976) (Stevens, J. dissenting in part).

⁵¹ Bruce Hafen and Jonathan Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449, 457 (1996).

⁵² Rights have been interpreted to exclude certain groups throughout history, but state inclusive language for *all* 'mankind', humans, persons, or so on.

3. Removing Age-Based Classification Increases Intervention into the Family

Giving children autonomy rights is viewed as undermining, not just the ability of parents to make decisions, but also the entire structure of the family.⁵³ According to this perspective, rights are viewed as distancing otherwise connected persons, valuing individualism and selfishness over collectivity and responsibilities.⁵⁴ Children are given the right, increasingly, to make choices under the CRC. The argument according to this perspective is that autonomy rights, when read together in the context of the entire Convention, place children and parents on the same plane as 'co-autonomous persons in their relationship with the state'.⁵⁵ Hafen argues that ultimately such rights give way to a lower threshold for intervention into 'intact' families.⁵⁶ What Hafen means by 'intact' would be interesting, particularly for the children who have different conceptions about their capacities, their religion, their sexuality, regardless of whether these children are well fed, well housed, well educated.

Although this discussion will be taken up more in Chapter 7, the notion of family protection through non-intervention has been heavily critiqued.⁵⁷ Michael Freeman notes that anti-intervention into the family is argued to afford citizens individual freedom and human dignity.⁵⁸ However, Freeman argues that anti-intervention misses whose freedom and whose dignity this ideology upholds.⁵⁹ An enormous problem with anti-intervention is that without piercing the veil of cushy words like 'community', 'family', and even 'non-intervention', as has been argued in relation to women and the family, critical inquiry is foreclosed.⁶⁰ Those who exist in the shadows of these veiled words are forced to remain, while presuming that family relationships exist in

⁵³ Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277 (2000).

⁵⁴ See for example, MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991). Note that it will be argued in Chapter 7 that family in the CRC can serve as a synonym for the hierarchical relationship of the parent over the child. So here undermining the family means undermining the parental authority over the child.

⁵⁵ Bruce Hafen and Jonathan Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449, 464 (1996).

⁵⁶ Bruce Hafen and Jonathan Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449, 463 (1996).

⁵⁷ See generally Frances E. Olsen, *Myth of State Intervention in the Family*, 18(4) UNIVERSITY OF MICHIGAN JOURNAL OF LAW 835, 835 (1985); Michael Freeman, *Feminism and Child Law*, in FEMINIST PERSPECTIVES ON CHILD LAW 19, 19-20 (Jo Bridgeman and Daniel Monks, eds., 2000); Hilary Lim and Jeremy Roche, *Feminism and Children's Rights*, in FEMINIST PERSPECTIVES ON CHILD LAW 227, 227, 229, 247 (Jo Bridgeman and Daniel Monks, eds., 2000); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARVARD LAW REVIEW 1497, 1499 (1983).

⁵⁸ Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277, 280 (2000), quoting Lynn Wardle, *Essay: The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Child*, 27 LOYOLA UNIVERSITY CHICAGO LAW JOURNAL 321, 321-348 (1996).

⁵⁹ Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277, 280 (2000), quoting Lynn Wardle, *Essay: The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Child*, 27 LOYOLA UNIVERSITY CHICAGO LAW JOURNAL 321, 321-348 (1996).

⁶⁰ Olsen argues that the family is viewed as, 'a warm nurturing enclave governed by an ethic of altruism and caring – a haven protecting its members from the dangers of an authoritarian state and from the anarchistic intrusions of private third parties'. Frances E. Olsen, *Myth of State Intervention in the Family*, 18(4) UNIVERSITY OF MICHIGAN JOURNAL OF LAW 835, 839 (1985).

utopias. Lynn Wardle argues that 'defining parent-child relationships in terms of rights misses the point and undermines the real needs of the parties themselves'.⁶¹ Freeman counters that this assumes all parties define 'needs' in the same way.⁶² Freeman argues that one needs only to substitute 'husband-wife' for 'parent-child' to appreciate just how untenable this anti-intervention position is.⁶³

It should be noted that this thesis roundly rejects that idea that the CRC puts parents and children on a 'co-autonomous' plane. What has been argued in the context of woman/wives and men/husbands, equality, has been largely rejected in discourses about children's rights, and rejected in the CRC, as will be discussed in Chapters 4, 6, and 7. In the CRC, the child's opinion is only taken into account to the extent that the child is deemed mature by adults. If parents were on the same plane, parents' opinions would only be taken into account to the extent that the adult is deemed mature, or parents and children's opinions would be given equal weight. This simply is not the case under the CRC, as will be further explored in Chapters 6 and 7.

Even if we pretend that parents and child are on the same plane in the CRC and if we use the analogy of women's rights, one must ask whether 'lowering' the threshold for state intervention by making the wife and the husband co-autonomous before the state was a 'good' or 'bad' thing. One must ask whether including the voice of a person to have a say in his or her autonomy matters. Was giving the wife a voice to make a claim against her husband a 'good' intervention? More importantly, what or who is the bar to intervention into the home protecting, the husband and the parents?⁶⁴ Who suffers as a result of the unwillingness of the state to intervene within the privacy of the home, in only certain instances?⁶⁵ The wife and children?⁶⁶ Most importantly,

⁶¹ Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277, 280 (2000), quoting Lynn Wardle, *Essay: The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Child*, 27 LOYOLA UNIVERSITY CHICAGO LAW JOURNAL 321, 321-348 (1996).

⁶² Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277, 280 (2000).

⁶³ Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277, 280 (2000).

⁶⁴ MICHAEL FREEMAN, *THE RIGHTS AND WRONGS OF CHILDREN*, 47 (1983).

⁶⁵ It has been argued that the state indeed intervenes into the privacy of the home, whether regarding the regulation of who may marry, or which genders may engage in sexual intercourse. These topics have been discussed at length and will not be discussed here. See generally Frances E. Olsen, *Myth of State Intervention in the Family*, 18(4) UNIVERSITY OF MICHIGAN JOURNAL OF LAW 835. Olsen refers to the intervention versus non-intervention discussion as the 'incoherence argument'. She argues that 'as long as the state exists and enforces any laws at all, it makes political choices . . . even the staunchest supporters of *laissez faire* always insisted that the state protect their property interests and courts enforce [them]'. She argues that it is a matter of choice the extent to which laws get taken for granted (and thus allow for the myth of *laissez faire* to masquerade) and which law gets marked as intervention. Interestingly Olsen discusses further that the 'staunchest opponents of state intervention in the family will insist that the state reinforce parents' authority over their children'. Olsen includes examples such as, returning runaway children, courts with incorrigible children, parent consent to non-emergency surgery, if the neighbours take the child on vacation without parental consent. This will be further discussed in Chapter 7.

⁶⁶ Carol Gilligan argues that the family is the most dangerous place for both woman and children. See Zvi Trigger, *To Dare to Look at the God of Love: Conversation with Carol Gilligan*, in *TRAILS OF LOVE*, 557, 564 (Orna Ben Naftali and Hannah Naveh eds., 2005).

if 'our' concern is about the 'protection' of children, we must ask hard questions, such as where does most abuse or mistreatment occur. The General Comment No. 13 notes that while laws may prohibit the abuse of children, '[w]idespread social and cultural attitudes and practices condone violence.'⁶⁷ General Comment No. 13 further notes that,

[c]hildren may be subjected to violence by primary or proxy caregivers and/or by others against whom their caregiver does provide protection (for example neighbours, peers and strangers). Furthermore, children are at risk of being exposed to violence in many settings where professionals and State actors have often misused their power over children, such as schools, residential homes, police stations or justice institutions. All of these conditions fall under the scope of article 19, which is not limited to violence perpetrated solely by caregivers in a personal context.⁶⁸

While Article 19 and General Comment No. 13 discuss intra-family/care mistreatment, Chapter 7 will argue that the CRC gives limited protection to the child in 'care', as the CRC emphasises 'care' as the natural place for childhood. One author writes, 'the CRC's reinforcement of the sanctity of the family unit tends to disregard the fact that infanticide, genital surgeries, and domestic abuse often occur within the family unit.'⁶⁹ See Chapter 7 for further discussion. Beyond assuming children as inherently incapable and adults as inherently capable, what seems curious is the idea that other people (parents) can be trusted to act in other peoples' best interest (children's) all or even most of the time. If this was in fact true, then there would be no need for laws and indeed rights. A person could trust that her/his employer would not take advantage of her/his junior status to overwork him/her and her/his gender to underpay him/her. A person could trust that her partner will not try to take more than half of the shared resources in the event that the relationship dissolves. These are nice stories that are at times true. They are also stories that not always are not cognisant with every person's experience. Even in the context of the family, in light of domestic abuse or fighting over resources after the death of a parent, one could hardly argue that 'family members act on behalf of each other's best interests'. How is it that in the context of the parent-child relationships, 'we' (adults) are comfortable with this assumption that adults will act in the best interest of the child, when this assumption is not made in any other relationship, when virtually all mistreatment of children happens at the hands of

⁶⁷ General Comment No. 13 (2011) 'The Right of the Child to Freedom from All Forms of Violence' CRC/C/GC/13, 6.

⁶⁸ General Comment No. 13 (2011) 'The Right of the Child to Freedom from All Forms of Violence' CRC/C/GC/13, 13-14.

⁶⁹ Kirsten Backstrom, *The International Human Rights of the Child: Do They Protect the Female Child?*, 30 GEORGE WASHINGTON JOURNAL OF INTERNATIONAL LAW & ECONOMICS 541, 566-576 (1996).

those responsible for them⁷⁰, and when 'we' (adults) cannot agree on the best interests in the first place.⁷¹ Again these issues will be taken up again and in more detail in Chapter 7.

b. Perspectives That Embrace the CRC – Parents and the State Should Protect Children's Autonomy

Frances Olsen writes that '[w]hatever criticisms I may have of the Convention, I believe it is better for it to be ratified and enforced than for it not to be'.⁷² This embrace of the CRC is what this chapter will argue to be the dominant perspective of the CRC: the CRC is a tremendous statement about children's rights; the international community need only to tweak the Convention to better enforce and to better realise those rights.⁷³ Those tweaks relate to, for example, the CRC's allowance of children ages 15-17 to participate in direct combat or, that traditional practices prejudicial to the child's health are not banned by the Convention. However, probably the most common critique of the CRC, as per the usual critiques of human rights or international law generally, is that the CRC lacks true enforcement mechanisms, and

⁷⁰ This is particularly curious when, as Valentine has pointed out, statistically children are more at risk in private space from people they know. Gill Valentine, "Oh Yes I Can." "Oh No You Can't": *Children and Parents Understandings of Kids Competence to Negotiate Public Space Safely*, 29 ANTIPODE 69 (1997).

⁷¹ Robert Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW AND CONTEMPORARY PROBLEMS, 260 (1975); Robert Mnookin asserts that, 'deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself'. Hafen and Hafen also argue that the Convention in no way reflects 'United Nations' approaches to children's needs or rights, nor did [the CRC] originate in requests initiated by delegates from UN member nations'. Hafen deems it problematic that the Convention 'consciously breaks new ground' by creating a 'totally new right of individual personality' and involved 'an unusually direct role of non-state parties in helping to draft the CRC'. This positivist approach fails to recognise basic concepts of international law and its sources. Regardless of who was involved in the creation of the Convention, states nonetheless ratified it and therefore consented to the Convention. Thus the critique that non-state parties were involved lacks significance. See Bruce Hafen and Jonathan Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449, 458-459 (1996).

⁷² Frances E. Olsen, *Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child*, 6 INTERNATIONAL JOURNAL ON LAW AND THE FAMILY 192, 217 (1992).

⁷³ See generally PHILIP ALSTON and JOHN TOBIN, LAYING THE FOUNDATIONS FOR CHILDREN'S RIGHTS (2005); Frances E. Olsen, *Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child*, 6 INTERNATIONAL JOURNAL ON LAW AND THE FAMILY 192 (1992); Cynthia Price-Cohen, *The CRC: a Feminist Landmark*, 3 WILLIAM & MARY JOURNAL OF WOMEN AND THE LAW 29 (1997); Priscilla Alderson, *UN Convention on the Rights of the Child: Some Common Criticisms and Suggested Responses*, 96 CHILD ABUSE REVIEW 439 (2000); Anonymous, *Editorial: The CRC as a Touchstone for Research on Childhoods*, 6(4) CHILDHOOD 403 (1999); Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277, 280 (2000); 566-576; Michael Freeman, *The Sociology of Childhood and Children's Rights*, 6(4) INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 433 (1998); Ladan Askari, *The Convention on the Rights of the Child: The Necessity of Adding a Provision to Ban Child Marriage*, 5 ILSA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 123 (1998-1999); Thomas Hammarberg, *The UN Convention on the Rights of the Child and How to Make it Work*, 12 HUMAN RIGHTS QUARTERLY 97 (1990); Cynthia Price-Cohen, *Implementing the U.N. Convention on the Rights of the Child*, 21 WHITTIER LAW REVIEW 95 (1999-2000); GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN, (1998); Pe Miljeteig-Olssen, *Advocacy of Children's Rights—The Convention as More than a Legal Document*, 12 HUMAN RIGHTS QUARTERLY 148 (1990); Enid Fourie, *The United Nations Convention on the Rights of the Child and the Crisis for children in South Africa: Apartheid and Detention*, 12 HUMAN RIGHTS QUARTERLY 106 (1990).
⁷³ See generally PHILIP ALSTON and JOHN TOBIN, LAYING THE FOUNDATIONS FOR CHILDREN'S RIGHTS (2005); Anonymous, *Editorial: The CRC as a Touchstone for Research on Childhoods*, 6(4) CHILDHOOD 403 (1999); Enid Fourie, *The United Nations Convention on the Rights of the Child and the Crisis for children in South Africa: Apartheid and Detention*, 12 HUMAN RIGHTS QUARTERLY 106 (1990); Kirsten Backstrom, *The International Human Rights of the Child: Do They Protect the Female Child?*, 30 GEORGE WASHINGTON JOURNAL OF INTERNATIONAL LAW & ECONOMICS 541, 566 (1996).

that non-compliance is the major issue.⁷⁴ As such, for a majority of practitioners and academics, it is not the substance of the Convention that is seen as problematic, but the lack of willingness on the part of states and state agencies to enforce the Convention.⁷⁵ That the Convention and its 'substance' were designed by states to lack this enforceability appears to be beyond inquiry.⁷⁶ Regardless, the CRC is generally deemed progressive because it is argued to have gone beyond just protection rights to include autonomy rights as well for children. For example, Freeman writes:

It is barely a quarter of a century since Hillary Rodham described children's rights as 'a slogan in search of a definition'. The [Convention] gave us a definition. It offered us the fullest legal statement of children's rights to be found anywhere. The world's first international legal instrument on children's rights was the product of ten years of negotiation among government delegations, inter-governmental organisations and non-governmental organisations. There had been previous Declarations, in Geneva in 1924 and by the UN in 1959, but these had been aspirational and the emphasis paternalistic. There was no recognition of a child's autonomy, of the importance of a child's views, nor any appreciation of the concept of empowerment.⁷⁷

According to this perspective, those who reject the CRC on the basis that the Convention does not sufficiently take into account parental rights (for example Hafén and Hafén) simply do not understand the CRC. Likewise, it is argued that those who contend that the CRC does not give the child enough autonomy simply do not understand the category 'child'. Indeed, the Convention is lauded because it does not merely make children into adults. Freeman argues that 'the 'kiddie-libbing' movement of the 1970s [which sought to give children the same rights as adults] has been transcended by the now dominant model of participation found in [the CRC's]

⁷⁴ See generally PHILIP ALSTON and JOHN TOBIN, *LAYING THE FOUNDATIONS FOR CHILDREN'S RIGHTS* (2005); (1999); Anonymous, *Editorial: The CRC as a Touchstone for Research on Childhoods*, 6(4) *CHILDHOOD* 403 (1999); Enid Fourie, *The United Nations Convention on the Rights of the Child and the Crisis for children in South Africa: Apartheid and Detention*, 12 *HUMAN RIGHTS QUARTERLY* 106 (1990); Kirsten Backstrom, *The International Human Rights of the Child: Do They Protect the Female Child?*, 30 *GEORGE WASHINGTON JOURNAL OF INTERNATIONAL LAW & ECONOMICS* 541, 566 (1996).

⁷⁵ Notably, on 2 November 2011 the UN General Assembly adopted the Human Rights Council's Report, the Third Optional Protocol to the CRC, and recommended that it be opened for signature in 2012. The 3rd Optional Protocol, if adopted, would allow for an individual or a group of individuals within the jurisdiction of a state party, to submit a written complaint to the Committee on the Rights of the Child. The Committee would then request interim measures and/or make recommendations to the state party. The state party would then be required to submit a written response, including information on any actions taken and envisioned in the light of the view and recommendations of the Committee. This mechanism would address the argument that the CRC is ineffective as compared to other international human rights regimes (e.g. CAT) that combine reporting with some kind of quasi-judicial processes, allowing for individual petition from persons within the jurisdiction of the state. See Optional Protocol to the Convention on the Rights of the Child on the Communications Procedure, November 2, 2011, A/C.3/66/L.66, <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/N11/577/92/PDF/N1157792.pdf?OpenElement>.

⁷⁶ See for example David Kennedy, *The International Human Rights Movement: Part of the Problem?* 15 *HARVARD HUMAN RIGHTS JOURNAL* 120 (2002).

⁷⁷ Michael Freeman, *The Future of Children's Rights*, 14 *CHILDREN & SOCIETY* 277 (2000).

Article 12.⁷⁸ Embracing views of the child offered by traditional strains of developmental psychology, the CRC is deemed successful because it envisions the child not as statically incapable, but as evolving/developing into capacity/maturity throughout his/her childhood. The CRC's vision of the child as 'developing' (the child as inherently incapable, but developing/evolving towards capacity) is viewed, according to this perspective, as a giant leap forward for children's rights. A full discussion of the role of developmental psychology in the development of, and responses to the CRC will take place in Chapter 6. For the purposes of the chapter, it will only be noted that those who embrace the CRC do so because the CRC accepts the version of childhood that certain traditional strains of development psychology purport to be 'true'.⁷⁹

It is argued that the CRC better respects the developing child in a variety of ways. First the CRC promotes the voice of the child in Article 12. The inclusion of the voice of the child in the Convention is heralded by some as the pinnacle of progression for children's rights.⁸⁰ The General Comment No. 12 states that '[t]he right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention'.⁸¹ The issue of how much weight should be given to the child's views is, according to this perspective, rightfully dictated by the maturity of the child and thus should not be held to strict age restrictions. In deciding how much weight to give the child's preference, the adult authorised to make such a determination will take into account the child's maturity. Second, the Convention explicitly recognises in Articles 5 and 14 that the child develops capacity over the course of childhood and that capacity requires recognition. One of the best known proponents for of perspective is Freeman.⁸²

⁷⁸ Michael Freeman, *The Sociology of Childhood and Children's Rights*, 6(4) INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 433, 435 (1998).

⁷⁹ See generally for a discussion of the role of developmental psychology in the construction of childhood CHRIS JENKS, *CHILDHOOD* (2005); Stuart Aitken & Thomas Herman, *Gender, Power and Crib Geography: Transitional Spaces and Potential Places*, 4 GENDER, PLACE AND CULTURE 63, 63-68 (1997); Berry Mayall, *Values and Assumptions Underpinning Policy for Children and Young People in England*, 4(1) CHILDREN'S GEOGRAPHIES 9 (2006); Catherine McDonald, *The Importance of Identity in Policy: The Case For and Of Children*, 23 CHILDREN & SOCIETY 241 (2009); James, A. and Prout, A. (1990) 'Constructing and Reconstructing Childhood: Contemporary issues in the Sociological Study of Childhood: Contemporary Issues'; ALAN PROUT, *THE FUTURE OF CHILDHOOD: TOWARDS THE INTERDISCIPLINARY STUDY OF CHILDREN* (2005); REX STANTON ROGERS and WENDY STANTON ROGERS, *STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN* (1992).

⁸⁰ See for example GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, (1998); Nick Lee, *The Challenge of Childhood: Distributions of Childhood's Ambiguity in Adult Institutions*, 6 CHILDHOOD 455 (1999); Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277 (2000); PHILIP VEERMAN, *THE RIGHTS OF THE CHILD AND THE CHANGING IMAGE OF CHILDHOOD*, 184 (1992).

⁸¹ General Comment No. 12 (2009) 'The Right of the Child to be Heard' CRC/C/GC/12, 5: 'The Committee on the Rights of the Child (the Committee) has identified article 12 as one of the four general principles of the Convention, the others being the right to non-discrimination, the right to life and development, and the primary consideration of the child's best interests, which highlights the fact that this article establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights'.

⁸² See generally MICHAEL FREEMAN, *THE RIGHTS AND WRONGS OF CHILDREN* (1983); MICHAEL FREEMAN, *Taking Children's Rights more Seriously*, in FREEMAN'S RIGHTS VOLUME I (2003); Michael Freeman, *Why it Remains Important to Take Children's Rights Seriously*, 15(1) INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 5 (2007).

Freeman explains the evolving capacities theory as outlined by the House of Lords in the *Gillick* case⁸³; now known as Gillick competence.⁸⁴ In 1985, The House of Lords upheld the right of a child under the age of 16 to obtain confidential medical advice regarding contraception, contrary to the wishes of her parents, so long as the child has 'sufficient understanding and intelligence'.⁸⁵ Lord Fraser stated that while the age of maturity is 18 under the laws of the United Kingdom, the age of maturity prior to that time is 'a dwindling right which the courts will hesitate to enforce against the wishes of the child (and the more so) the older he is. It starts with a right of control and ends with little more than advice'.⁸⁶ Both Article 5 and 14 are applauded for reflecting the 'true' child, who is not in a period of stasis throughout the period of childhood, but is developing greater capacity, a dynamic which should be respected by parents and the state.⁸⁷

Finally, the inclusion of qualified autonomy rights, as discussed in the previous sections, Article 12 (right to be heard), Article 13 (right of expression), Article 14 (right of religion), Article 15 (right of association), and Article 16 (right of privacy), are all viewed as positive steps in respecting the child as a right holder. Yet, under the CRC, the child is able to participate and have these freedoms only to the extent that that child has evolved into maturity: the greater the maturity the greater the autonomy. The level of maturity is determined by those in positions of authority, whether the parent or the state. These rights are qualified by Article 5's grant of responsibility to parents provide direction to the child in the child's exercise of the rights in the Convention 'in accordance with the evolving capacities of the child'. Thus, far from 'abandoning children', the CRC is argued to have struck the proper balance between respecting the child as a subject before the law (by respecting the child inherent burgeoning capacity) and the parent's primary responsibility to guide and direct the child.⁸⁸ The CRC's embrace of the certain views expressed in of the discipline of developmental psychology is argued to better describe the developing child, or in the words of the CRC to better prepare the child 'to live an individual life

⁸³ *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402 (HL).

⁸⁴ Michael Freeman, *The Sociology of Childhood and Children's Rights*, 6(4) INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 433, 436 (1998).

⁸⁵ *Gillick v. West Norfolk and Wisbech Area Health Authority*, [1985] 3 All ER, 409-10 (HL). The Court states that, '[t]he child must be capable of making a reasonable assessment of the advantages and disadvantages of the treatment proposed, so the consent, if given, can be properly and fairly described as true consent'.

⁸⁶ *Gillick v. West Norfolk and Wisbech Area Health Authority*, [1985] 3 All ER, 412 (HL).

⁸⁷ See PHILIP ALSTON and JOHN TOBIN, LAYING THE FOUNDATIONS FOR CHILDREN'S RIGHTS, 49 (2005); Priscilla Alderson, *UN Convention on the Rights of the Child: Some Common Criticisms and Suggested Responses*, 96 CHILD ABUSE REVIEW 439, 440 (2000); Michael Freeman, *The Sociology of Childhood and Children's Rights*, 6(4) INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 433, 435 (1998).

⁸⁸ See PHILIP ALSTON and JOHN TOBIN, LAYING THE FOUNDATIONS FOR CHILDREN'S RIGHTS, 49 (2005); Priscilla Alderson, *UN Convention on the Rights of the Child: Some Common Criticisms and Suggested Responses*, 96 CHILD ABUSE REVIEW 439, 440 (2000); Michael Freeman, *The Sociology of Childhood and Children's Rights*, 6(4) INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 433, 435 (1998).

in society'.⁸⁹ Most importantly, this perspective assumes that the child's maturity is merely a question to be answered objectively and based on mere observation.⁹⁰ Always, as a given, this 'true' child has a 'good' and 'willing' adult to 'enable' and instruct the child. When that 'good' and 'willing' adult is proven in fact 'not good' and 'unwilling', there exists a state entity that will stand in as the 'good' and 'wiling' adult for this 'true' child (to be discussed further in Chapters 6 and 7). The main issues that remain in this view relate to realisation and enforcement of rights. Critical inquiry about the existence of the CRC's fundamental 'child' is considered irrelevant. The obviousness of the child as universally 'developing' begs no question. Instead, the focus is on enhancing compliance with the CRC's provisions and its Committee's recommendations.

c. Perspectives That Embrace the CRC – But Argue That Children Need to be Viewed by the Court and Parents as More Capable

Certain academics agree with those in the previous section that the child is developing capacity/maturity, and that the state *and* the parents should arbitrate the child's increasing capacity. However, this perspective also argues that children have much greater capacity than society is currently willing to attribute to them. As a result, children should be enabled to participate to a greater extent in choices that affect them. Notably, this perspective does not argue for outright respect for capacity, but rather greater expectations regarding the child's capacity for autonomy. Authors of this persuasion argue that while the CRC is a step in the right direction towards realising the true rights of the child, the subsequent interpretations of the CRC have been inaccurate for failing to take more seriously the autonomy of the child. The Convention provided the correct rights for the category 'child', society however has failed to more fully challenge childhood as a site of development and therefore incapacity. It should be noted that many of those who argue that the child should be considered more generally capable, tend to regard the CRC as a step in the right direction when compared to the 1959 Declaration. Ultimately, this perspective argues that children should be able to participate and exercise their autonomy as they acquire capacity, and that the state should be able to review autonomy based

⁸⁹ Preamble. See generally MICHAEL FREEMAN, *THE RIGHTS AND WRONGS OF CHILDREN*, 46 (1983); Jeremy Roche, *Children: Rights and Participation and Citizenship*, 6 *CHILDHOOD* 475 (1999).

⁹⁰ *Neilson v Denmark*, a case before the European Court of Human Rights, presents an interesting counter example to the claim that determining the child's maturity is a straight forward assessment. In *Neilson*, the applicant's mother consented to the child's hospitalization for the protection of the child's health, and not merely to keep the child away from his father. The Court held that Article 8 of the European Convention on Human Rights (right to privacy and family life) provided a broad range of parental rights and responsibilities in regard to the care and custody of children. On the matter of the child's own views and their relevance to the child's hospitalisation, the majority considered that '[the child] was still of an age at which it would be normal for a decision to be made by the parent even against the wishes of the child'.⁹⁰ See *Neilson v Denmark A 144* (1988); 11 EHRR 175 para 72 PC. As one author notes, given that the child was 12 years old, this reflects a 'peculiarly authoritarian view of the parental role'.⁹⁰ See JANE FORTIN, *CHILDREN'S RIGHTS AND THE DEVELOPING LAW*, 101 (2009).

conflicts, as outline in the CRC. In short, this perspective argues that adult society must take children's autonomy more seriously.⁹¹

Berry Mayall argues that children must be 'extracted from their care-givers, their family, and professionals – to study childhood; to study them as people, not becomings'.⁹² She contends that childhood is a political issue, and that child development and children's needs are not somehow an apolitical, formulaic determination.⁹³ Further, Mayall argues that by defining children as inferior, as objects of adult socialisation, adults deny children their right to participate in structuring their own lives.⁹⁴ Jeremy Roche further argues that children are often rendered silent and invisible by the attitudes and practices of adult society.⁹⁵ He argues that 'the "not-yet-fully-formedness" of the child is not the only obstacle in the way of a respectful recognition of children as social actors'. Quoting Judith Ennew, he observes that 'modern recognition of children constructs children *out* of society, mutes, their voices, denies their personhood, and limits their potential'.⁹⁶ The evacuation of children from society, per Roche, appears to emerge from a concern to protect; a commitment to the welfare of children in a world that is perceived as being increasingly hostile and dangerous.⁹⁷ The overwhelming imagery surrounding children and young people is negative; they either need to be better protected (better policed from the evils of the adult world) or better controlled (because of the failure of certain families to police properly their children).⁹⁸ Chapter 8 will take up this discussion in further detail. Roche contends that children who take on very serious responsibility are rendered invisible and mute by adults, an assertion which will be explored in much greater depth in Chapter 9. Roche makes the following three contentions in support of his point:

⁹¹ See for example Berry Mayall, *The Sociology of Childhood in Relation to Children's Rights*, 8 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 243 (2000); Jeremy Roche, *Children: Rights and Participation and Citizenship*, 6 CHILDHOOD 475 (1999); Olga Nieuwenhuys, *Editorial: The Ethics of Children's Rights*, 15(1) CHILDHOOD 4 (2008); Michael Freeman, *The Sociology of Childhood and Children's Rights*, 6(4) INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 433 (1998). It should be noted that Freeman is quoted in this section and the previous one. It is argued that the earlier works of Freeman were less critical of the CRC and the latter began to focus more on the influence of sociological perspectives on childhood, to be discussed in Chapter 5; perspectives that critiqued a more protectionist position.

⁹² Berry Mayall, *The Sociology of Childhood in Relation to Children's Rights*, 8 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 243 (2000).

⁹³ Berry Mayall, *The Sociology of Childhood in Relation to Children's Rights*, 8 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 243, 244 (2000).

⁹⁴ Berry Mayall, *The Sociology of Childhood in Relation to Children's Rights*, 8 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 243, 245 (2000).

⁹⁵ Jeremy Roche, *Children: Rights and Participation and Citizenship*, 6 CHILDHOOD 475, 476 (1999).

⁹⁶ Jeremy Roche, *Children: Rights and Participation and Citizenship*, 6 CHILDHOOD 475, 477 (1999), quoting Judith Ennew, *Outside Childhood: Street Children's Rights*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE, 125-143 (Bob Franklin ed., 1995).

⁹⁷ Jeremy Roche, *Children: Rights and Participation and Citizenship*, 6 CHILDHOOD 475, 477 (1999), quoting Judith Ennew, *Outside Childhood: Street Children's Rights*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE, 125-143 (Bob Franklin ed., 1995).

⁹⁸ Jeremy Roche, *Children: Rights and Participation and Citizenship*, 6 CHILDHOOD 475, 477 (1999), quoting Judith Ennew, *Outside Childhood: Street Children's Rights*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE, 125-143 (Bob Franklin ed., 1995).

- 1) Many adult professionals are unable to deal (or unused to dealing?) with children as partners. Practices of speaking with children, listening to them and involving them in the process of coming to a decision is unknown to too many professions,
- 2) The ideology of family privacy results in family members being seen to 'volunteer' to do a range of tasks that omit the family from public scrutiny so long as the family is able to function reasonably. In the case of child carers, for example, their actions need not be taken seriously, as they are just 'helping out'
- 3) 'Adulthood' the oppression of children and young people by adults which may operate in the lives of young people with a similar power dimension to racism and sexism.⁹⁹

Roche ultimately argues that except for the 'child liberationists', no one argues that children are identical to adults or that they should enjoy the same bundle of civil and political rights as adults.¹⁰⁰ Rather, the demand that children be given autonomy rights is simply a request that children be seen as more prominent members of society, with a legitimate perspective and valuable voice.¹⁰¹ Participation, according to Roche, is 'about making sure that children do not simply become exhibits in a show of concern or fear'.¹⁰² Given the Convention's emphasis on protecting the family and parental rights (discussed in Chapter 7), the Convention is critiqued for not correspondingly challenging ideas about children and their incapacity. As a baseline, however, this perspective argues that without change in social views on children, current disempowering and exclusive practices will persist.¹⁰³

Hillary Rodham advocates a reversal in the presumption against the child's capacity.¹⁰⁴ Rodham argues that the law should presume children capable of autonomous legal action unless proven otherwise.¹⁰⁵ Rodham contends that to combat bias regarding children's (in)capacity, a reversal of onus is required, where it is the child's incapacity that should be proven, as opposed to requiring the child to assert her/his competence. While some academics view Rodham's argument as distinct from the more 'radical' 'kiddie-libbing' movement, this author wonders whether Rodham's burden shift has the pragmatic effect of conferring on children adult rights.

⁹⁹ Jeremy Roche, *Children: Rights and Participation and Citizenship*, 6 CHILDHOOD 475, 476 (1999). It is interesting that Roche terms this oppression of youth 'adulthood'. As an analogy, masculine hegemony results in sexism, which feminism aims to address. The hegemony of adults results in what could be labelled ageism, which childism could have as its aim to address. Why adulthood and not ageism? It reflects (unintentionally?) the centrality of adults. He does not use a mutually applicable term like ageism, arguably a term that reflects the mentality it attempts to describe.

¹⁰⁰ Jeremy Roche, *Children: Rights and Participation and Citizenship*, 6 CHILDHOOD 475, 479 (1999).

¹⁰¹ Jeremy Roche, *Children: Rights and Participation and Citizenship*, 6 CHILDHOOD 475, 479 (1999).

¹⁰² Jeremy Roche, *Children: Rights and Participation and Citizenship*, 6 CHILDHOOD 475, 488 (1999).

¹⁰³ See Michael King, *The Child, Childhood, and Children's Rights Within Sociology*, 15 KING'S LAW JOURNAL 273 (2004). King offers an interesting critique of the idea that children rights can right the wrongs experienced by children.

¹⁰⁴ Hillary Rodham, *A Legal Perspective*, in CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES 21, 33 (Patricia Vardin and Illene Brody eds., 1979).

¹⁰⁵ Hillary Rodham, *A Legal Perspective*, in CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES 21, 33 (Patricia Vardin and Illene Brody eds., 1979).

For, if the law presumes children as possessing capacity, as in the case of adults, they should enjoy the same rights. Generally, however, in holding that the child should be viewed by the law (including the CRC) and by society as *more* capable, the perspectives outlined in this sub-section continue to rely on the existence of a universal/fundamental 'child' that is incapable subject to developing capacity. Indeed, dominant perspectives about children's rights (in sub-sections a-c) rely on such an assumption, yet fail to justify this portrayal of childhood; this portrayal that forms the basis upon which the CRC was drafted signed, and ratified by all but three countries in the world.

d. Perspectives That Rejects the CRC – Children are Capable

The discussion of which adults should act as an intermediary for the child's interests becomes moot if one believes that children hold adult capacities. The alleged fundamental difference between children and adults, according to this viewpoint, is fictional or irrelevant to the discussion about children's rights. As such, if there is no difference between adults and children in their capacity for autonomy, there should be no difference in the rights granted to these identity categories. However, very few academics argue that children should have the same legal and political rights held by adults *because* children are in fact competent.¹⁰⁶ Interestingly, the notion that children are capable is rarely analysed in detail, if mentioned at all. The idea that children are capable and therefore deserve the same rights as adults is particularly controversial. Most telling is Jason Sorens' argument that:

There are those 'children's rights' advocates who argue that children have the same rights as adults. Rather than engaging in a lengthy refutation, I will simply assume that they are wrong. No liberal theory wishes to treat adults as children.¹⁰⁷

Similarly, Laura Purdy acknowledges that 'the human track record with respect to [making distinctions about who can exercise rationality] is shameful . . . given this history, the appeal of erring on the side of generosity is understandable'.¹⁰⁸ Nonetheless, Purdy continues that the difficulty of exacting distinctions on the basis of rationality might seem persuasively alluring in the context of children, yet, she argues that,

¹⁰⁶ Indeed, this author does not know of any. Some academics may refer to RICHARD FARSON, *BIRTHRIGHTS* (1974) or JOHN HOLT, *ESCAPE FROM CHILDHOOD* (1974), but neither argue that children *are* capable. The next section will flesh out their perspectives.

¹⁰⁷ JASON SORENS, *LIBERTARIAN THEORY AND CHILDREN'S RIGHTS THE FIDUCIARY MODEL, RATIONALITY, INTERESTS AND THE CHALLENGE OF ABORTION* (2001). <http://www.libertarian.co.uk/lapubs/philn/philn061.pdf>, 1.

¹⁰⁸ LAURA PURDY, *IN THEIR BEST INTEREST?*, 32 (1992).

refusing to make distinctions can cause us to treat unlike cases alike – ignoring differing needs, capacities, and desires. . . In short, in some situations such as this one [children], we must resist the charms of generosity and return to the hard labour of making distinctions trusting democratic discussions to protect against oppression.¹⁰⁹

Viewing children as ‘different’ and casting the differential treatment of children as uniquely acceptable is indeed a common trend, even among the most critical of scholars. While the argument that children are capable is intriguing and could be useful for challenging social views about children, it easily falls prey to stalemate.¹¹⁰ Federle rightly points out that to argue that children have capacity opens the door for opponents of granting children autonomy rights to claim that children do not have capacity; and that for their own protection they should not and do not have political and legal rights.¹¹¹ As Chapter 5 will argue, since there is no definitive psychological, sociological, or even legal statement about children’s competence, the capacity of the child to obligate others is centrally disputed by rights theorists.¹¹² Certainly those who opposed autonomy rights for children find support in the psychological and sociological literature, just as proponents rely on similar research to contravene those findings.¹¹³ This ‘going – back – and – forth’ about who holds the most ‘accurate’ painting of the category ‘child’, the most accurate portrayal of the child’s capacity, the most correct needs of and rights for children is laid out in this chapter.

II. VIEWS ON THE CRC THAT REJECT THE CHILD’S CAPACITY AS RELEVANT TO THE DISCUSSION OF CHILDREN’S RIGHTS

In contrast to Section I where the child’s capacity was central to the discussion regarding their rights, this section outlines a handful of academics reject the assumption that the child’s capacity is relevant to the discussion of children’s rights. This section will review first the arguments put forth by the ‘kiddie-libbers’ of the 1970s that argue that the child deserves the same rights as adults because capacity should never be a precursor to rights, protectionism does more harm to children than good, and adult society does not know the capacities of the child. This section will also review authors who criticise the CRC for envisioning a universal ‘child’ that is exclusionary,

¹⁰⁹ LAURA PURDY, *IN THEIR BEST INTEREST?*, 32 (1992). One wonders whether Purdy implies that such ‘democratic discussions’ should include children.

¹¹⁰ MICHAEL KING and CHRISTINE PIPER, *HOW THE LAW THINKS ABOUT CHILDREN*, (1995).

¹¹¹ Katherine Federle, *Rights Flow Downhill*, 2 INTERNATIONAL JOURNAL OF CHILDREN’S RIGHTS 349 (1994).

¹¹² Katherine Federle, *Rights Flow Downhill*, 2 INTERNATIONAL JOURNAL OF CHILDREN’S RIGHTS 349 (1994); MICHAEL KING and CHRISTINE PIPER, *HOW THE LAW THINKS ABOUT CHILDREN*, (1995).

¹¹³ Katherine Federle, *Rights Flow Downhill*, 2 INTERNATIONAL JOURNAL OF CHILDREN’S RIGHTS 349 (1994), quoting Michael Wald, *Children’s Rights: A Framework for Analysis?*, 255 UNIVERSITY OF CALIFORNIA DAVIS LAW REVIEW 255, 274-75 (1979).

and serve to institutionalise the adult's position over the child in the CRC. The argument that there is no 'true' universal category 'child' proves an important theme throughout this thesis. So too is the claim that the project of universalising the child in the CRC is about the regulation and control of childhood through the sustainment of hierarchical power relations of adults over children.

a. Perspectives That Reject the CRC – Capacity Should Not be Precursor to Rights, the Policy of Protectionism Does More Harm than Good, and Child's Capacities are Unknown

This sub-section will explore the works of John Holt and Richard Farson. While their work does not address the CRC, this section will apply their perspectives to the CRC. Both authors argue that children should be given the option of full adult rights, a rejection of fundamental premises in the CRC.¹¹⁴ Notably, Holt and Farson are generally characterised as 'radical' in their views. Neither author argues that children should be given autonomy rights because children hold adult capacity. A closer inspection of the justifications presented for their perspectives will prove important for ongoing themes in this thesis. This section contends as a starting point that the ideas of Holt and Farson have been oversimplified and/or mischaracterised. Franklin notes that,

[w]hat is important in all this is that the case for [full political rights for children] is dismissed, not by systematic, closely reasoned or coherent argument, but rather on the basis of implicit and taken-for-granted assumptions; as sort of self-evident common sense which concludes the matter to be unworthy of serious consideration and thereby precludes discussion.¹¹⁵

This section attempts to flesh out their opinions within the range of perspectives identified in this chapter. Three important points should be made. First, Farson argues that capacity should never be a precursor to rights.¹¹⁶ While such a statement is uncontroversial in the context of race or gender, such a statement is undoubtedly controversial in the context of maturity, or children. When one speaks about capacity as an insufficient or unjustifiable precursor to children's rights, such statements are met with accusations of 'abandoning children to their rights' or ignorance of current literature on children, particularly in the area of developmental psychology.

¹¹⁴ One could argue that the option for rights is indeed what adults have. We do not always employ our rights all of the time. Rather, on the occasion that one requires such rights we 'fall back' on them. See for example, Jeremy Waldron, *When Justice Replaces Affection: the Need for Rights*, 11 HARVARD JOURNAL OF LAW AND PUBLIC POLICY 625, 643 (1988).

¹¹⁵ BOB FRANKLIN, *THE RIGHTS OF CHILDREN*, 26 (1986).

¹¹⁶ RICHARD FARSON, *BIRTHRIGHTS*, 31-32 (1974).

Second, these authors argue that the methodology of protectionism is insufficient, harmful, and potentially abusive. Holt argues that viewing the child as an object of protection does most young people more harm than good, and he instead proposes that all rights, duties and responsibilities of adult citizens be 'made *available* to any young person, of whatever age, who wants to make use of them'.¹¹⁷ It is worth dwelling on Holt's quite controversially contention that protectionism is more harmful than Hafen and Hafen's fear of 'abandoning children' to their rights. Holt's perspective is likely combustible to those whose work depends on the altruism upon which protectionism depends that one category of persons will look out for the best interests of another category; an altruism that has been heavily criticised in the context of all other (adult) identity categories. As a result of the greater harm caused by protectionism, Holt argues that autonomy rights should be made available to children who want to make use of them. As this section repeatedly notes, this perspective is quite different from one that contends children as capable. Further, Holt is not arguing that all children should be 'abandoned' to their autonomy rights, if indeed affording autonomous rights could ever amount to abandonment. Holt contends that,

[m]ost people who believe in the institution of childhood as we know it see it as a kind of walled garden in which children, being small and weak, are protected from the harshness of the world outside until they become strong and clever enough to cope with it. Some children experience childhood in just that way. I do not want to destroy their garden or kick them out of it. If they like by, by all means let them stay in it. But I believe that most young people, and at earlier and earlier ages, being to experience childhood not as a garden but as a prison. What I want to do is put a gate, or gates, into the wall of the garden, so that those who find it no longer protective or helpful, but instead confining and humiliating, can move out of it and for a while try living in a larger space. If that proves too much for them, they can always comb back into the garden. Indeed, perhaps we all ought to have walled gardens to take refuge in when we feel we must.¹¹⁸

Holt's vision for children's rights is more nuanced than simply stating that all children should be given autonomy rights. Holt's version of rights refuses to place a veil of ignorance around the family and around parent-child relationships by acknowledging that at times these relationships are not in the best interests of the child and/or do not respect the child's autonomy. The role of the family in the CRC will be further discussed in Chapter 7.

¹¹⁷ JOHN HOLT, *ESCAPE FROM CHILDHOOD*, 4 (1974).

¹¹⁸ JOHN HOLT, *ESCAPE FROM CHILDHOOD*, 26-27 (1974).

Third, Holt contends that the 'child' is viewed by adult society as 'wholly subservient and dependant', 'a mixture of expensive nuisance, slale, and super-pet'.¹¹⁹ Farson appears to concur with Holt on this point, arguing that despite holding fundamental beliefs about the category 'child', society simply does not know about the capacities of children and therefore should lean towards granting autonomy rather than protection.¹²⁰ Farson maintains that the fundamental barrier to granting children autonomy rights is,

our deeply-held belief in the innocence and helplessness of children. . . While it is certain that society actually creates innocence and helplessness in children, we do not, and cannot, know if there are in fact any characteristics that are inherent in children. . . Rather than debating the issue, a more valuable and pertinent task might be to evaluate the consequences and risks involved in granting children the right to self-determination.¹²¹

While agreeing that adult society does not 'know' the capacities and potential of children, this thesis argues that one can never 'know' the category 'child', much less the capacities of each and every child. This argument will be developed throughout this thesis, particularly in Chapter 3. Ultimately this thesis will argue that 'objective' or 'fundamental' knowledge about any identity category, including children is impossible. As such, critical inquiry should focus on what is being accomplished by claiming such 'truths'. This discussion is pursued in Chapters 6, 7, and 8. Farson argues that it is time to admit that no one 'knows how to grow people':¹²²

[p]erhaps no single group of people has been studied more than children, both scientifically and clinically. A large body of literature on children and childhood has developed and a complete and separate discipline has emerged. Research has given us a more comprehensive understanding of the through processes, attitudes, behaviour, developmental stage, and interpersonal dynamics of children that we have of any other class of people. Recognising the politics of childhood, however, may force us back into the laboratory and clinic to re-evaluate our research on children for the simple reason that research done on any group of people in an atmosphere of prejudice and subjugation is bound to be full of systematic error.¹²³

This thesis builds on the more nuanced views of Holt and Farson to explore the politics of the CRC's construction of childhood in Chapters 6 and 7 by examining certain 'truths' about the category 'child' presented in the CRC. The Foucauldian/Butlerian theoretical lens used in this

¹¹⁹ JOHN HOLT, *ESCAPE FROM CHILDHOOD*, 4 (1974).

¹²⁰ RICHARD FARSON, *BIRTHRIGHTS*, 9 (1974).

¹²¹ RICHARD FARSON, *BIRTHRIGHTS*, 32-33 (1974).

¹²² RICHARD FARSON, *BIRTHRIGHTS*, 29 (1974).

¹²³ RICHARD FARSON, *BIRTHRIGHTS*, 11 (1974).

thesis to deconstruct the politics of the CRC's version of childhood is outlined in Chapter 3. Chapter 4 considers sociological perspectives that have critiqued an essentialist version of the category 'child'.

b. Perspectives That Reject the CRC – Universalisation of the Category 'Child' is Too Exclusionary

A primary critique of the CRC is that the CRC is based on a particular version of childhood that is not enjoyed by every child and, as a result, further marginalises and stigmatises those not included in the CRC's vision. Chapter 9 will explore various childhoods that are excluded and/or stigmatised by the CRC's normative 'child'. Generally, this thesis contends that childhood cannot be understood outside the context of other variables such as gender, class, ethnicity, culture, sexuality, and so on. If childhood is a social construction (see Chapter 3, 5 and 9 for further discussion), then there are 'childhoods', rather than a single, universal, cross-cultural phenomenon. The CRC adopts, however, a universalist approach to the category 'child'.¹²⁴ Similar arguments have been laid at the feet of Convention on the Elimination of All Forms of Discrimination of Against Women (CEDAW)¹²⁵. Janet Halley has argued that CEDAW too is a positivist, identity-driven construction that reflects what Janet Halley calls 'Feminist Universalism'.¹²⁶ In this way, CEDAW presumes universality for the category 'women', a universal term that conveys an obvious meaning to most people in most cultures, without interrogation. Dianne Otto notes that the term 'woman' created a cross-cultural site that was able to resist other identity traits, such as nationality, class, race and religion.¹²⁷ It could be argued (and will be argued in Chapters 8 and 9) that the CRC's identity-driven construction reflects a normative 'Child Universalism' that ignores and resists other non-normative identity traits. One must ask whether the Convention beyond imagining childhood as anything but Eurocentric and phallogocentric.¹²⁸ As will be argued in Chapters 3, 8, and 9, probably the more important question is whether any identity category can function without exclusivity. Freeman writes,

¹²⁴ Michael Freeman, *The Sociology of Childhood and Children's Rights*, 6(4) INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 433, 438 (1998). See generally regarding rights: David Kennedy, *The Critique of Rights in Critical Legal Studies' in Left Legalism/Left Critique*, 188 (Janet Halley and Wendy Brown eds., 2002): 'Rights are a key element in the universalisation projects of ideological intelligentsias of all stripes. A universalisation project takes an interpretation of the interests of some group, less than the whole polity, and argues that it corresponds to the interests or to the ideals of the whole. Rights arguments do this: they restate the interests of the group as characteristics of all people'.

¹²⁵ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S.13.

¹²⁶ Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICHIGAN JOURNAL OF INTERNATIONAL LAW 1, 6 (2008).

¹²⁷ Dianne Otto, *Discovering 'Masculinities': Reinventing the Gendered Subject(s) of International Human Rights Law*, in INTERNATIONAL LAW: MODERN FEMINIST APPROACHES, 106 (Doris Buss and Ambreena Manji eds., 2005).

¹²⁸ Judith Ennew, *Outside Childhood: Street Children's Rights*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE (Bob Franklin ed., 1995).

[d]o human rights documents such as the [CRC] lose their meaning in cases where a child has failed to experience any of the rights enshrined therein? It seems that they work reasonably well when a person enjoys almost all of his or her rights – when a person comes up short on only one count, it is relatively easy to petition that this violation be rectified using international norms and covenants as a referent. But when a person is denied not one, not two, but most of the rights outlined in the documents, the question is not just where to begin, but whether the entire document has meaning left at all.¹²⁹

This sub-section will briefly explore three perspectives that question the CRC on this basis. The first, represented by Ennew, argues that the CRC excludes non-Western childhoods. Ennew argues the Convention's text and implementation is based on a Western, modern childhood, which has globalised through colonialism and then through the imperialism of international aid.¹³⁰ Adopting a slightly different approach, Freeman argues that the Convention to some extent recognises different types of children, such as those 'in especially difficult circumstances' or children from cultural minorities and indigenous children.¹³¹ Freeman suggests that for children who would not be included as a 'normal' child under the Convention by virtue of the child's culture, a variety of articles could apply. For example, Article 17(d) requires states to, '[e]ncourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous'. Article 20(1) states that when considering whether to place the child outside the home, 'due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background'. Article 30 provides for ethnic, religious and linguistic minorities and persons of indigenous origins. Whether these articles translate to the inclusion of cultural and ethnic minorities is not the focus of this chapter, although it is worth noting that Freeman certainly does not think so.¹³² In this, Freeman would be in line with literature that holds the CRC to privilege Western assumptions about the developmental trajectory of the child.¹³³ In these views, the CRC reflects an effort to globalise the notion of Western developmentalism, where

¹²⁹ Michael Freeman, *The Sociology of Childhood and Children's Rights*, 6(4) INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 433, 436-437 (1998).

¹³⁰ Judith Ennew, *Outside Childhood: Street Children's Rights*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE, 202 (Bob Franklin ed., 1995).

¹³¹ Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277, 282 (2000). See Article 30, Article 24(3), Article 17(d) and Article 20(1).

¹³² Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277, 282 (2000).

¹³³ See for example REX STANTON ROGERS and WENDY STANTON ROGERS, STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN (1992); Michael Freeman, *The Sociology of Childhood and Children's Rights*, 6(4) INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 433 (1998); Vanessa Pupavac, *Misanthropy Without Borders: The International Children's Rights Regime*, 25(2) DISASTERS 95, 100 (2001); Berry Mayall, *The Sociology of Childhood in Relation to Children's Rights*, 8 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 243 (2000); CHRIS JENKS, CHILDHOOD (2005); Jo Boyden, *Childhood and the Policymakers: A Comparative Perspective in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD* (Allison James and Alan Prout eds., 1997).

biologically-based relations between parents and children are more fundamental and natural than other sorts of family or community relations.¹³⁴ Michael King and Christine Piper contend that the law relating to children is enslaved to children's welfare and development discourse.¹³⁵ Pupavac argues that the CRC assumes that there is a model of childhood development that is universally applicable, 'that there are universal needs, such as the need for rehabilitations, and that there is consensus both domestically and internationally on what policies should be in place to realise the best interests of the child'.¹³⁶ How the Convention deals with development, and how the developmental trajectory of the Convention is simultaneously 'universal' and marginalising, will be discussed in detail in Chapters 6 and 9.

The second allegation of exclusion levied against the CRC concerns issues deemed specific to the girl-child, such as absence of a provision regarding minimum age for marriage¹³⁷ or the suggestion that the gender-neutral language of the Convention's protection of education, health, or participation does not adequately take into account the implications of gender difference.¹³⁸ It is argued that the Convention does not address when harsher punishments are sought reflecting the enforcement of gender stereotypes that, for example deal with sexual activity or being beyond parental control.¹³⁹ In fact, one author argues that the inclusion of the girl-child in the CRC was too controversial.¹⁴⁰ The girl-child will be discussed at length in Chapters 6, 7, and 9.

As a third category of critique from this perspective, Ennew advances a convincing argument that the rights enshrined in the CRC are at times incompatible with the reality of marginal children's existence.¹⁴¹ In particular, Ennew contends that Convention fails to account for children who exist outside the care of adults, thereby marginalising them. Ennew argues that under the Convention, the place for childhood is 'inside': inside society, a family, a private dwelling.¹⁴² Those not inside, according to Ennew, are the ultimate outlaws, 'placed outside of

¹³⁴ Michael Freeman, *The Sociology of Childhood and Children's Rights*, 6(4) INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 433 (1998).

¹³⁵ MICHAEL KING AND CHRISTINE PIPER, HOW THE LAW THINKS ABOUT CHILDREN, 79 (1995).

¹³⁶ Vanessa Pupavac, *Misanthropy Without Borders: The International Children's Rights Regime*, 25(2) DISASTERS 95, 101 (2001).

¹³⁷ Benjamin Shmueli, *What Has Feminism Got to Say about Corporal Punishment* 2 WISCONSIN WOMEN'S LAW JOURNAL 177, 191 (2007).

¹³⁸ Nura Taefi, *The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Child*, 17 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 360 (2009).

¹³⁹ Nura Taefi, *The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Child*, 17 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 360 (2009).

¹⁴⁰ Nura Taefi, *The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Child*, 17 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 360, 361 (2009).

¹⁴¹ Judith Ennew, *Outside Childhood: Street Children's Rights*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE, 211-212 (Bob Franklin ed., 1995).

¹⁴² Judith Ennew, *Outside Childhood: Street Children's Rights*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE, 211-212 (Bob Franklin ed., 1995).

childhood'.¹⁴³ These children are portrayed as vulnerable and in danger. Thus, children have lost the freedom to explore the world of peer group relationships and the geography of their community, according to Ennew.¹⁴⁴ Instead, children are required to exist *out* of society, to be mute, and have their time filled up and scheduled completely.¹⁴⁵ Ennew contends that the predominant perception is that,

[t]he unhappy child does not have an adult to depend on – to be powerful on its behalf or, if it needs to be rescued, to put it back into childhood which, in ideological terms, stands for happiness, play innocence and some kind of essential goodness in human nature.¹⁴⁶

Ennew argues that the Convention privileges the modern conception of the modern nuclear family in which many children do not exist. Ennew then delineates how the articles of the CRC do not apply to street children. For example, under Article 3, state provision for street children is undertaken less in their best interests and more in the interest of cleaning the streets of their presence.¹⁴⁷ Another example includes Article 2's protection against discrimination. Ennew argues that the stigma and guilt generated by merely being on the 'street' means that street children are often discriminated against as they are targeted by state action without having done anything legally wrong.¹⁴⁸ Ennew maintains that not only was the CRC drafted with a particular 'child' in mind, it treats those outside this model as marginal. As a result, per Ennew, the Convention does not fully engage with the entire class of persons who are defined as children. She argues that even when certain articles of the CRC attempt to target these marginal children (for example labour or sexual exploitation); it only succeeds in further marginalising them. This occurs because these articles and others may be ambiguous and/or contradictory in the face of the real experiences of these children. Ennew's lasting contention is that if we define childhood as a space for economic and social dependence on the family and claim for all children the 'right'

¹⁴³ Judith Ennew, *Outside Childhood: Street Children's Rights*, in *THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE*, 211-212 (Bob Franklin ed., 1995).

¹⁴⁴ Judith Ennew, *Outside Childhood: Street Children's Rights*, in *THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE*, 211-212 (Bob Franklin ed., 1995).

¹⁴⁵ Judith Ennew, *Outside Childhood: Street Children's Rights*, in *THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE*, 215 (Bob Franklin ed., 1995).

¹⁴⁶ Judith Ennew, *Outside Childhood: Street Children's Rights*, in *THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE*, 202 (Bob Franklin ed., 1995).

¹⁴⁷ Judith Ennew, *Outside Childhood: Street Children's Rights*, in *THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE*, 203 (Bob Franklin ed., 1995).

¹⁴⁸ Judith Ennew, *Outside Childhood: Street Children's Rights*, in *THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE*, 203 (Bob Franklin ed., 1995).

to such a situation, we exclude millions of street and working children altogether from membership in the analytical category 'child'.¹⁴⁹

If the Convention is grounded in a particular construct of childhood, some argue that it is no surprise that the CRC has proven of limited efficacy in enforcing the rights of individuals who do not fit within the traditional roles assigned them in this (patriarchal) structure.¹⁵⁰ Yet if human rights are intended to apply to all peoples, this thesis grapples with understanding why and how the CRC chooses one 'childhood' over another. The perspectives in this section, unlike the perspectives in Section I, argue that there is no universal/essential child. As such, the CRC's acceptance of the universal child can function to exclude and marginalises those who are deemed children, but do not live up to the normative vision of the category 'child' articulated in the CRC, a position this thesis will underscore in Chapter 9.

c. Perspectives That Reject the CRC – CRC Merely Reifies Adult-Centrism

Finally, some argue that far from granting children overstated freedoms and rights, the CRC is rather a too modest proposal to meet minimal criteria of social justice.¹⁵¹ It is argued that the CRC's commitment to remedying the vulnerability unique to childhood can only go so far as its rights do not blur what it means to be an adult (capable) and what it means to be a child (incapable). As such the CRC is argued to merely uphold the position of the adult over the child.¹⁵² Considering this claim is crucial for this thesis. Again, this claim posits that the CRC will give the child rights and even protection *only* to the extent that those rights and that protection do not blur the distinct appearance of the categories 'adult' and 'child'. One example of this limitation on autonomy rights granted to the child is found in Article 12, the right of the child to have a say in matters concerning the child. Article 12 is argued to be the most controversial and paradigm-shifting articles in the CRC, as it recognises the child as a subject of rights and not merely an object of care based on needs.¹⁵³ Nonetheless, Maria Grahn-Farley argues that Article 12 stops short of the point at which the image of the 'child' articulated in the CRC would be threatened, where the incapacity of the child would be questioned. Article 12

¹⁴⁹ Michael Freeman, *The Sociology of Childhood and Children's Rights*, 6(4) INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 433, 437 (1998).

¹⁵⁰ Michael Freeman, *The Sociology of Childhood and Children's Rights*, 6(4) INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 433, 437 (1998).

¹⁵¹ Olga Niewenhuis, *Editorial: The Ethics of Children's Rights*, 15(1) CHILDHOOD 4 (2008).

¹⁵² Maria Grahn-Farley, *Beyond Right and Reason: Pierre Schlag, The Critique of Normativity, and the Enchantment of Reason: A Theory of Child Rights*, 57 UNIVERSITY OF MIAMI LAW REVIEW 867 (2003).

¹⁵³ Freeman argues that many commentators on the CRC believe Article 12 to be its 'linchpin'. Michael Freeman, *The Sociology of Childhood and Children's Rights*, 6(4) INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 433, 439 (1998).

stops short of giving the child the right to be heard by stating that 'the views of the child [must be] given due weight in accordance with the age and maturity of the child'. Thus, far from grounding-breaking, the Convention merely gives the child the heavily qualified right to be heard based on the perceived quality of the speech (as measured by adults).¹⁵⁴ Indeed the General Comment No. 12 states that Article 12 of the [CRC] is a unique provision in a human rights treaty; it addresses the legal and social status of children, who, on the one hand lack the full autonomy of adults but, on the other, are subjects of rights'.¹⁵⁵ This double standard regarding such a fundamental right is justified on the basis of the view that the category 'child' is incapable and the category 'adult' is capable.

Grahn-Farley also critiques the right to freedom of expression found in Article 13; the right to freedom of thought, conscience, and religion found in Article 14; and the right to freedom of association and to freedom of peaceful assembly found in Article 15.¹⁵⁶ Grahn-Farley argues that each of these articles are limited not by what is relevant to the fulfilment of the rights described, but rather based on the system of law that seeks to uphold the hierarchical relationship between the adult and the child.¹⁵⁷ The CRC states in Article 15: '[n]o restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law', the parental rights, public order, or morals'. Grahn-Farley argues that this means that the rights have an internal limitation that ends where law and order begin.¹⁵⁸ Simply put, so long as the restriction on rights is done in conformity with the requirements of law (notably exclusively adult controlled) and does not impose on parental rights, such restrictions are permissible. Children may have rights only to the extent that those rights do not step on the toes of parental rights, which are grounded in upholding the appearance of the adult-as-capable and the child-as-incapable. The focus in the CRC is then about upholding the parent or adults position over the child. The parent-child binary relationship will be discussed in Chapters 5 and 7.

¹⁵⁴ Alderson argues that, 'the CRC does not grant to children the liberty or autonomy rights which adults in democracies take for granted . . . Instead, the CRC enshrines some half-way-to-autonomy rights, such as Article 12'. Priscilla Alderson, *UN Convention on the Rights of the Child: Some Common Criticisms and Suggested Responses*, 96 CHILD ABUSE REVIEW 439, 440 (2000). See Nick Lee, *The Challenge of Childhood: Distributions of Childhood's Ambiguity in Adult Institutions*, 6 CHILDHOOD 455, 457 (1999): '[Article 12] finds itself juggling two different approaches towards children. These approaches have been described as the 'being' and the 'becoming' view of children', citing Jens Qvortrup, *Introduction*, in CHILDHOOD MATTERS: SOCIAL THEORY, PRACTICE AND POLITICS (Jens Qvortrup et al. eds., 1994): 'Although the principle of non-discrimination that the Article advances is to be applauded, in light of the considerations of age and maturity the Article remains ambivalent about children's ability to represent themselves, and thus ambivalent about their place in decision-making'.

¹⁵⁵ General Comment No. 12 (2009) 'The Right of the Child to be Heard' CRC/C/GC/12, 5.

¹⁵⁶ Maria Grahn-Farley, *Beyond Right and Reason: Pierre Schlag, The Critique of Normativity, and the Enchantment of Reason: A Theory of Child Rights*, 57 UNIVERSITY OF MIAMI LAW REVIEW 867, 909 (2003).

¹⁵⁷ Maria Grahn-Farley, *Beyond Right and Reason: Pierre Schlag, The Critique of Normativity, and the Enchantment of Reason: A Theory of Child Rights*, 57 UNIVERSITY OF MIAMI LAW REVIEW 867, 909 (2003).

¹⁵⁸ Maria Grahn-Farley, *Beyond Right and Reason: Pierre Schlag, The Critique of Normativity, and the Enchantment of Reason: A Theory of Child Rights*, 57 UNIVERSITY OF MIAMI LAW REVIEW 867, 909 (2003).

Grahn-Farley goes so far as to argue that even protection of the child is granted to children in the CRC only to the extent that such protection does not blur the adult – child distinction. She argues that the protection against exploitation is mediated by adults, not by breaking down legally and socially constructed limitations on children's access to what Grahn-Farley argues to be effective human, organisation, and economic resources.¹⁵⁹ Rather than some essence inherent to the child, she argues that it is the disproportionately poor allocation of resources given to those deemed a child that makes them 'vulnerable' and thus exploited. She identifies rights as a resource.¹⁶⁰ Grahn-Farley argues that the CRC does not connect the fact that children are not living under the CRC's imagined conditions for a child, but under various limitations placed on children for being children. She writes,

[t]he CRC is inconsistent on its own terms. . . . When a child is not granted extra protection as a consequence of its mental and physical immaturity, the CRC does not adjust its rights to fit the child that is being exploited . . . by equipping the child with extra resources that would recognise and remedy the fact that the child is living in even harsher situations than would be legally and socially accepted for adults. The CRC still treats every child according to the same standard: the self-justified master norm, a norm of adults as adults and children as children . . . even when adults do not really behave in ways that adults are imagined to behave in relation to children. [T]he child is not allowed access to its own protection; instead, the child is forced to seek protection based on the good will of adults. The fact that adults do not fulfil their end of the deal does not change the rules for the children.¹⁶¹

Even in the instance that the child does not receive the extra protection and care that she/he should receive as a consequence of being a child/assumed mentally and physically immature, Grahn-Farley argues that the exploited child is not exempt from the rules that render the child powerless to stand against adult exploitation on the child's own. She maintains that the child is thought to be exploitable and the response, incredibly, is to maintain the exploitability of the child unless the child finds another adult's good will.¹⁶² The child, then, is made vulnerable in the name of his/her supposed natural vulnerability. The child is denied access to the means of the child's own protection in the name of the child's need for protection.¹⁶³ It is through the withholding of, in this case, rights from children that Grahn Farley asserts that the construction

¹⁵⁹ Maria Grahn-Farley, *Beyond Right and Reason: Pierre Schlag, The Critique of Normativity, and the Enchantment of Reason: A Theory of Child Rights*, 57 UNIVERSITY OF MIAMI LAW REVIEW 867, 909 (2003).

¹⁶⁰ Maria Grahn-Farley, *Beyond Right and Reason: Pierre Schlag, The Critique of Normativity, and the Enchantment of Reason: A Theory of Child Rights*, 57 UNIVERSITY OF MIAMI LAW REVIEW 867, 917 (2003).

¹⁶¹ Maria Grahn-Farley, *Beyond Right and Reason: Pierre Schlag, The Critique of Normativity, and the Enchantment of Reason: A Theory of Child Rights*, 57 UNIVERSITY OF MIAMI LAW REVIEW 867, 910 (2003).

¹⁶² Maria Grahn-Farley, *Beyond Right and Reason: Pierre Schlag, The Critique of Normativity, and the Enchantment of Reason: A Theory of Child Rights*, 57 UNIVERSITY OF MIAMI LAW REVIEW 867, 910-911 (2003).

¹⁶³ Maria Grahn-Farley, *Beyond Right and Reason: Pierre Schlag, The Critique of Normativity, and the Enchantment of Reason: A Theory of Child Rights*, 57 UNIVERSITY OF MIAMI LAW REVIEW 867, 911 (2003).

of the child can be made 'real'.¹⁶⁴ As such, this language of rights does not evacuate children from places that are perceived as exploitive and abusive by adults. Children are not abused and exploited because there is an over-representation of children possessing rights or because they are abandoned to their rights. Rather, children are vulnerable because they are under-represented.¹⁶⁵ Children are not exploited because they exist 'outside' socially constructed norms for children (without a protective adult), but rather because children are forced 'inside' socially constructed norms for children and therefore 'behind' an equally fictitious 'good' and 'willing' adult.

By maintaining the clear categories adult (capable) and child (incapable), the CRC demonstrates its commitment, not to eliminating the unique vulnerability of childhood, but rather to upholding the position of the adult over the child, where the child is required to rely on the adult for protection. Grahn-Farley's critiques here are persuasive particularly when considering the CRC's version of rights through a Foucauldian-Butler lens (discussed in chapter 3, applied in Chapters 6, 7, 8, and 9). The differential treatment of children, as experienced through child's rights relates little to who the child 'really' is, much less who the adult 'really' is. The lack of justification regarding the perception of the child's incapacity and why that alleged lack of capacity affects the child's allocation of rights is precisely as the old adage goes, 'because [adults] say so'. Similarly to Farson and Holt, Grahn-Farley contends that we do not know what a person categorised as a 'child' is capable of doing; we only know what a child is allowed and not allowed to do.¹⁶⁶ If capacity is no longer central to the discussion of children's rights, the immaturity of children is irrelevant to their claim to autonomy rights. Paternalistic concerns simply cannot justify the state's nor the care-giver's restriction on the child's liberties. It would seem that there is no basis for distinguishing children's rights from adults' rights.¹⁶⁷ The law and its 'truths' about the child make the need to justify gross discrimination against children mute. The essential child, upheld by law, maintains a particularly kind of politics, a particular kind of adult-centric power relations. The examination of the construction of the category 'child' through the lens of power will be discussed further throughout this thesis.

¹⁶⁴ Maria Grahn-Farley, *Beyond Right and Reason: Pierre Schlag, The Critique of Normativity, and the Enchantment of Reason: A Theory of Child Rights*, 57 UNIVERSITY OF MIAMI LAW REVIEW 867, 911 (2003).

¹⁶⁵ Maria Grahn-Farley, *Beyond Right and Reason: Pierre Schlag, The Critique of Normativity, and the Enchantment of Reason: A Theory of Child Rights*, 57 UNIVERSITY OF MIAMI LAW REVIEW 867, 917 (2003).

¹⁶⁶ Maria Grahn-Farley, *Beyond Right and Reason: Pierre Schlag, The Critique of Normativity, and the Enchantment of Reason: A Theory of Child Rights*, 57 UNIVERSITY OF MIAMI LAW REVIEW 867, 911 (2003).

¹⁶⁷ Katherine Federle, *Rights Flow Downhill*, 2 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 349 (1994).

V. CONCLUSION

This chapter sought to canvass accounts of the CRC as a means to begin questioning the legal construction of the child in the CRC. The majority view regarding the CRC's child is that the child is incapable but developing towards capacity. This chapter argues that dominant discourses on the CRC, surveyed in Section I, fail to explicate the category 'child', while each perspective insists that it better knows the 'true' child. Section I examined perspectives that maintain that the child's purported capacity is relevant to the discussion about children's rights. Under this section four distinct views on the CRC were discussed. One perspective rejects the CRC on the count that the CRC empowers children and the state (as opposed to just parents) in relation to the child's autonomy. This perspective argues that, not only are children unable to have autonomy rights, but that parents are in the best position to determine the child's capacity for autonomy. The second perspective discussed in Section I embraces the CRC for its accurate portrayal of the child as developing towards capacity and for empowering the child and the state to protect the child's autonomy as it develops. For this perspective the main outstanding issue for the CRC is its need for better enforcement mechanisms. It should be noted that this perspective is arguably the most dominant discourse concerning the CRC. The third perspective outlined in this section embraces the CRC for empowering the child and state-intervention concerning the child, but argues that society should interpret the CRC in such a way that continues to challenge social views about the child's incapacity for autonomy. The final perspective surveyed in Section I argued that children are indeed capable and therefore deserve all rights given to adults.

Section II overviewed perspectives that do not engage in conventional disagreement over whether the CRC adequately captured the 'true' child's capacity. Rather this section examined three perspectives that reject the CRC and its universal child. The first perspective rejects protectionism within the CRC, claiming that a failure to give children adult rights results in more harm than good, particularly because the capacities of the child are unknown and because capacity should never be a precursor to the grant of rights. The second perspective argues that CRC's universal 'child' has an exclusionary effect. For these authors, children who do not live up to the normative framework of the CRC are excluded from and stigmatised by the Convention. The examples of the non-western child, the girl child, and the child without a responsible adult were briefly discussed to explore how the Convention is irrelevant and unhelpful to a large swath of children living outside the conditions imagined for childhood in the CRC. The final perspective discussed in Section II rejects the CRC because the Convention is

seen to merely reify the hierarchy of adults over children. According to this perspective the Convention grants children rights and protection only to the extent the child-adult distinction is not blurred. The Convention will only grant children rights to the extent that those rights maintain the appearance of the incapable child and the capable adult.

This chapter has attempted to investigate why so many different perspectives about the CRC exist. It is argued that the reason for such varying views about the CRC is precisely because there exists remarkably different answers to the question: 'what is a child?'. The answer to the question 'what is a child?' will largely dictate the answer to the question 'what rights should children have'. A central contention for this thesis is that in questioning the child behind the rights, one is able to query assumptions made regarding the child's 'true' identity. Further, one is able to query what is accomplished by constructing the child in a certain way as opposed to others.

Generally, this chapter raises the following questions:

1. Why is it assumed that the categories 'child' and 'adult' are fundamentally different, most times without any justification?
2. What is the basis for assuming the child lacks or possesses maturity/capacity?
3. Why is the child's lack of capacity determinative of what rights he/she is given?
4. What is the basis for assuming the adult's possession of capacity and good-will?
5. Why are there so many versions of the 'true'/'universal' children?
6. Considering the various and numerous claims to knowing the 'true' children, why are academics (and drafters of the CRC), most times, unwilling or unable to identify, much less justify, the children to which they refer? Does the illusion of *the* 'true' child have too much political purchase?
7. What are the implications of particular constructions of the category 'child' and the corresponding rights?

Holt, Farson, Ennew, and Grahn-Farley adopt perspectives on the CRC that go beyond the 'capacity debate', which dictates most mainstream discussions about children and their rights. All of these perspectives argue that the CRC's universalisation of the child and the privilege status given to adults is at the expense of those labelled 'child'. These critiques of the CRC are exceptionally persuasive, but nonetheless lack 'mainstream' purchase. Agitating the appearance of an essential identity category has been employed in the context of various 'Others'; yet those same critiques are virtually ignored regarding the category 'child'. Chapters 3 will examine critiques of constructing identity categories or 'truth' in the contexts of the law and in particular in the context of rights. Grappling with understanding how these critiques are so effectively

ignored in the context of the category 'child' is aided by the theories of Michel Foucault and Judith Butler, discussed in the next chapter.

CHAPTER 3

THEORETICAL TOOLS: GRAPPLING WITH POSTMODERN PERSPECTIVES ON IDENTITY AND LAW

OUTLINE

I. FOUCAULT AND BUTLER ON IDENTITY

- a. Discourse/Truth-Claims: Hidden Ideologies
- b. Truth-Claims/Knowledge/'Truth'/Power
- c. Binary Oppositions: How 'Truths' Are Created
- d. Governmentality
- e. Genealogy: A Method

II. CRITIQUES OF FOUCAULT AND BUTLER

- a. Foucauldian/Butlerian Theory Kills the Subject – How Can Docile Bodies Engage in Resistance?
- b. Foucauldian/Butlerian Theory Have No Normative Framework – Why Resist and against Whom?
- c. Foucauldian/Butlerian Theory Renders Political Action Impossible – How Can One Engage in Politics without Universal Identities?

III. CONCLUSION

This chapter lays out the theoretical lens of this thesis that is employed in later chapters. Much critical work has focused on deconstructing identity categories such as gender, race and sexual orientation, through the process of exposing the unnaturalness and difference within a category.¹ While a good deal of academic work has aimed to deconstruct the category 'child' in and outside the discipline of law,² this thesis argues that dominant legal discourses about children's rights remain dependent upon some fundamental category 'child'. Ze'ev Falk notes that, '[t]here is a certain irony in the fact that at this "post-modern" time rejecting all other ideologies, the ideology of "children's rights" and "children's autonomy" has gained a lot of authority'.³ Karin Lesnik-Oberstein argues that 'the child has a tendency to recur as a foundational or essential real, even in some queer and feminist theoretical writings which express an explicit commitment to questioning essentialist notions of identity'.⁴ Butler's statement, regarding the category 'woman', has particular purchase for the category 'child':

[w]e think things are the way they must be because they've become naturalised. [We must] make the taken-for-granted world seem spectral, strange. [The process of critically examining the 'natural' world is] a painful process, and not everybody wants to undergo it. It may well be that we want to construct a fiction. . . .⁵

In attempting to examine the relatively unexplored identity category 'child', a variety of theoretical tools that have been 'successfully' deployed to deconstruct other identity categories will be discussed. This chapter will argue that many of these same theoretical tools can be applied to the category 'child' to make the argument that, contrary to the CRC's vision of a universal category 'child', the category 'child' cannot be based on a set of 'natural' characteristics common to those who are below the age of eighteen years.⁶ When we speak of the category 'child' or the 'rights of the child', we assume that there exists a group of persons sufficiently and

¹ See generally JUDITH BUTLER, *GENDER TROUBLE* (1990); GAYATRI SPIVAK, *IN OTHER WORLDS* (1998); RATNA KAPUR, *EROTIC JUSTICE* (2004); Dianne Otto, *Discovering 'Masculinities': Reinventing the Gendered Subject(s) of International Human Rights Law*, in *INTERNATIONAL LAW: MODERN FEMINIST APPROACHES* (Doris Buss and Ambreena Manji eds., 2005); BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* (1981); Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 *MICHIGAN JOURNAL OF INTERNATIONAL LAW* 1 (2008).

² See generally ALLISON JAMES, CHRIS JENKS, AND ALAN PROUT, *THEORISING CHILDHOOD* (1998); Jo Boyden, *Childhood and the Policymakers: A Comparative Perspective in Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (Allison James and Alan Prout eds., 1997); Berry Mayall, ed., *CHILDREN'S CHILDHOODS: OBSERVED AND EXPERIENCED* (1994); BERRY MAYALL, *TOWARDS A SOCIOLOGY FOR CHILDHOOD: THINKING FROM CHILDREN'S LIVES* (2002); Judith Ennew, *Outside Childhood: Street Children's Rights*, in *THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE* (Bob Franklin ed., 1995).

³ Ze'ev Falk, *Rights and Autonomy – or the Best Interests of the Child?*, in *Children's Rights and Traditional Values*, 111 (Gillian Douglas and Leslie Sebba eds., 1998).

⁴ Karin Lesnik-Oberstein, *Childhood, Queer Theory, and Feminism*, 11 *FEMINIST THEORY* 309, 309 (2010).

⁵ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted *THE JUDITH BUTLER READER*, 329 (Sara Salih ed., 2004).

⁶ Article 1 of the CRC states that, 'a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'.

inherently unique to be categorised 'child' in contrast to those categorised 'adult'. Identity categories are inevitably based on alleged 'natural' characteristics uniformly shared by those within a category. If there is no unitary, much less 'natural', subject represented by the category 'child', the basis on which the 'child' is constructed is in need of question. More importantly, if there is no essential childhood, what is made possible through the construction of a universal singular childhood in the CRC must be critically examined. Ultimately, these questions seek to identify the power relations that depend on the CRC's fictitious 'child'. To deconstruct the identity of the child in the CRC, this chapter draws upon the theoretical perspectives of Michel Foucault (Truth/Power/Knowledge, Genealogy), and Judith Butler (Performativity, Genealogy, Binary oppositions).

Foucault's perspectives on discourse, truth, knowledge, power, and governmentality contribute to an understanding of how a diverse group of persons are ascribed 'natural' characteristics and made into a unitary identity category. If no common experience/voice/identity/category exists, Foucault's perspectives help change the focus to power configurations that are perpetuated by the appearance of a unitary category (here the fictitious category 'child'). Most importantly, his conceptions of power not only enable the means for understanding how power can work, but also the ways in which power can work for those who find themselves less able to exercise it. Woven throughout this discussion of Foucault's perspectives on power, will be Judith Butler interpretation of Foucauldian ideas as they specifically apply to identity. In particular, Butler's use binary oppositions will also be utilised to better understand how meaning, and therefore identity, is constructed.

One might wonder, 'why Butler?' Surely there are many other feminist (and non-feminist) interpretations of identity. The answer lies in a vocabulary, buried deep within her prose, that is akin to donning a pair of glasses when one's vision is not terrible, but neither is it 20-20. You know that something is out there; something is making you uncomfortable, but you cannot quite pinpoint that which you sense. While 20-20 vision is never be possible, Butler seems able to cast one perspective, one moment of clarity upon the troubling case of identity, giving a vocabulary with which to conceptualise it. Ultimately, both Foucault and Butler better clarify the vision of this author, affording tools to examine the category 'child' in not simply a unique way (for what of uniqueness?), but in a way that initiates, at the very least, a discussion about the category 'child', which seems to be so far beyond discussion; everywhere taken for granted, rarely explicated.

This chapter will first discuss the theoretical tools developed by Foucault and Butler. Section I will examine the ways in which 1) discourse/truth-claims operate as vehicles for hidden ideologies, 2) truth-claims become 'knowledge' and even 'truths', 3) binary oppositions operate to fashion these 'truths', and 4) 'truths' are enforced through disciplinary and juridical power and finally 5) a genealogical method can help investigate who is omitted by the deployment of certain 'truths'. Section II will explore three much-discussed critiques of both Butler and Foucault, namely that their perspectives: 1) kill off the subject, making agency and resistance impossible, 2) lack a normative framework to guide us in why we should resist and against whom, and finally 3) make political mobilisation impossible.

Ultimately this chapter will argue that because no one is exempted from a colonising gaze, the Butler-Foucauldian lens enables the questioning of identities, independent of the stated aims of a movement (protection, securing rights of the child, emancipation, and so on). Too often, even movements that seek to include voices of the 'other' (for example, feminism, post-colonialism, third-world perspectives on international law) have failed in the sense that they too marginalise other voices. Catherine MacKinnon famously wrote that she was 'here to speak for those, particularly women and children, upon whose silence the law . . . has been built'.⁷ Postmodern, and particularly post-colonial, critiques of MacKinnon's category of 'woman', though numerous, will not be outlined here.⁸ The relevant point is that not only does MacKinnon claim to be speaking for all women; she also authorises herself to speak for all children in a quest for emancipation. As Rex and Wendy Stainton-Rogers note, '[w]omenhood does not confer immunity against being ageist nor does it prevent oppression and mistreatment of the young'.⁹ To believe that any account/quest/category is only emancipatory becomes another colonising endeavour.¹⁰ Does this postmodern acknowledgement render the task of hearing/speaking moot? No. What it does do is to engage in the task of ensuring that when a movement or unitary 'voice' is presented, that it too stays on its toes, that it too is held responsible for its acts of marginalisation. To brush off 'postmodernism' is to engage in the belief that a certain voice is incapable of marginalisation.

⁷ CATHERINE MACKINNON, *On Collaboration*, in *FEMINISM UNMODIFIED*, 198, 204 (1987).

⁸ See generally GAYATRI SPIVAK, *IN OTHER WORLDS* (1998); RATNA KAPUR, *EROTIC JUSTICE*, 4 (2004): 'Postcolonial feminism is in part a challenge to the systems of knowledge that continue to inform feminist understandings of women and the subaltern subject in the postcolonial world, and seeks to create a project of inquiry and interrogation that will better inform feminist projects that speak to and for these subjects'.

⁹ REX STAINTON ROGERS and WENDY STAINTON ROGERS, *STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN*, 190 (1992).

¹⁰ Angela Harris, *Race and Essentialism in Feminist Legal Theory*, in *CRITICAL RACE THEORY, THE CUTTING EDGE* (Richard Delgado, ed., 1995). JUDITH BUTLER, *GENDER TROUBLE*, 19 (1990).

I. FOUCAULT AND BUTLER ON IDENTITY¹¹

a. Discourse/Truth-Claims: Hidden Ideologies

Discourse is any act, verbal or non-verbal, that involves a form of communication, whether intended or unintended. What one does and says, as well as events, objects, names, persons, and so on, are filled with meanings that the actor, intends and/or that the viewer understands. Thinking of discourse in this way enables us to see its prevalence. We 'see' and experience the world through the lens of discourse.¹² Nevertheless, discourse does not simply and objectively name or label an external objective reality.¹³ Instead, because our social world is experienced through language, discourse contains a set of complex associations.¹⁴ The ambit of discourse includes associations that come to mind when one engages in or experiences an event or object and mediates how we understand that object or event. For example, the term 'wife' does not simply denote a particular legal relationship, but includes what it means to be a wife in a particular culture and at some particular point in time.¹⁵ As will be discussed in the Chapter 5, the word 'child' also does not just denote those below the age of eighteen. The term 'child' connotes what it means to be a child in a particular culture and at some particular point in time.¹⁶

¹¹ It should be noted that it is not alleged here that Butler and Foucault share the same theoretical perspectives. Rather, this thesis draws upon certain elements of both Butler's and Foucault's theoretical perspectives for the purposes of deconstructing the identity 'child' in the CRC.

¹² RICHARD DELGADO, *Legal Storytelling: Storytelling for Oppositionist and Others: A Plea for Narrative*, in CRITICAL RACE THEORY, THE CUTTING EDGE, 69 (1995).

¹³ BEN GOULDER and PETER FITZPATRICK, FOUCAULT'S LAW, 7 (2009).

¹⁴ SARA MILLS, MICHEL FOUCAULT, 55 (2003): 'Discourse does not simply translate reality into language; rather discourse should be seen as a system which structures the way that we perceive reality'.

¹⁵ BEN GOULDER and PETER FITZPATRICK, FOUCAULT'S LAW, 7 (2009).

¹⁶ Various academics have argued that the concept 'child' has varied throughout time and across cultures. See generally PHILIPPE ARIES, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE (1962); DAVID ARCHARD, CHILDREN: RIGHTS AND CHILDHOOD (2nd ed. 2004); DAVID ARCHARD, CHILDREN, FAMILY AND THE STATE (2003); Michael Freeman, *The Sociology of Childhood and Children's Rights*, 6(4) INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 433 (1998); ERIK ERIKSON, CHILDHOOD AND SOCIETY (1977); Sarah L. Holloway & Gill Valentine, *Spatiality and the New Social Studies of Childhood*, 34(4) SOCIOLOGY 763 (2000); John Holt, *Escape from Childhood* (1974); Allison James, *Confessions, Concoctions and Conceptions*, 10(2) JOURNAL OF THE ANTHROPOLOGY SOCIETY OF OXFORD 83 (1979); ALLISON JAMES, CHRIS JENKS, AND ALAN PROUT, THEORISING CHILDHOOD (1998); Allison James and Chris Jenks, *Constructing Childhood Sociologically*, in AN INTRODUCTION TO CHILDHOOD (Mary Jane Kehily, ed., 2004); ALLISON JAMES AND ADRIAN JAMES, CONSTRUCTING CHILDHOOD: THEORY POLICY, AND SOCIAL PRACTICE; CHRIS JENKS, *Constituting the Child*, in THE SOCIOLOGY OF CHILDHOOD – ESSENTIAL READINGS (1982); Chris Jenks, *Child Abuse in the Postmodern Context: An Issue of Social Identity*, 2(3) CHILDHOOD 111 (1994); Chris Jenks, *The Post-Modern Child*, in CHILDREN IN FAMILIES: RESEARCH AND POLICY (Julia Brannen & Margaret O'Brien, eds., 1996); BERRY MAYALL, TOWARDS A SOCIOLOGY FOR CHILDHOOD: THINKING FROM CHILDREN'S LIVES (2002); Alan Prout, *Children's Participation: Control and Self-Realisation in British Late Modernity*, 14(4) CHILDREN AND SOCIETY 304 (2000); ALAN PROUT, THE FUTURE OF CHILDHOOD, TOWARDS THE INTERDISCIPLINARY STUDY OF CHILDREN (2004); JENS QVORTRUP, *Varieties of Childhood*, in STUDIES IN MODERN CHILDHOOD: SOCIETY, AGENCY AND CULTURE (2005); JENS QVORTRUP, CHILDHOOD AS A SOCIAL PHENOMENON AN INTRODUCTION TO A SERIES OF NATIONAL REPORTS (1993); REX STANTON ROGERS AND WENDY STANTON ROGERS, STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN, (1992); PHILIP VEERMAN, THE RIGHTS OF THE CHILD AND THE CHANGING IMAGE OF CHILDHOOD (1992); Gill Valentine, *Angels and Devils: Moral Landscapes of Childhood*, 14 ENVIRONMENT AND PLANNING SOCIETY AND SPACE 581, 581-599 (1996); Gill Valentine, *Boundary Crossings: Transitions from Childhood to Adulthood*, 1(1) CHILDREN'S GEOGRAPHIES 37 (2003); VIVIANA ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN (1985).

Foucault argues that 'we must conceive of discourse as a violence which we do to things or in any case as a practice which we impose on them; and it is in this practice that the events of discourse find the principle of their regularity'.¹⁷ According to Foucault, there are no single truth, or an all-encompassing description, just indeterminate interpretations or impositions.¹⁸ Embedded in discourse are perceptions of events or objects, a hidden ideology, or notions about what is and what should be.¹⁹ In other words, discourse generates truths, or at least 'truth-claims': certain ways of thinking about something that appears to be objective.²⁰ In this way, discourse restricts our perceptions. Unlike the traditional liberal conception of truth, Foucault's truth is neither produced impartially, nor is it uncovered through the 'scrutiny of scrupulous inquiry'.²¹ Neither is truth counterpoised to falsity or error. Instead, truth-claims assert what is true and what is false, through the exclusion, marginalisation and even prohibition of other competing truths.²² Society participates in producing that which it appears to be merely describing.²³ Using this understanding of 'discourse' enables us to see the ways in which identity categories are produced through characteristic ways of associative thought.²⁴ Most importantly it enables us to understand the conditions in which certain ways of 'knowing' are made possible and others rendered impossible. Returning to the label 'wife', with what do we associate it? What is the essence of being a 'wife'? Mother, domestic servant, cook? What about bread-winner, Olympic athlete, President?²⁵ Likewise, what is the essence of being a 'child'? Student, playful, care-free? What about head of the household, care-giver, soldier?

Relating Foucault's theory of discourse to the concept of identity, Butler describes identity as serving a 'normative function of a language which is said either to reveal or to distort what is assumed to be true about [women]'.²⁶ An identity does not describe some objective essence of womanhood. According to Butler, gender²⁷ identities are constructed and constituted by

¹⁷ Michel Foucault, *The Order of Discourse*, in UNTYING THE TEXT, 67 (Robert Young, ed., 1981).

¹⁸ RICHARD DELGADO, *Legal Storytelling: Storytelling for Oppositionist and Others: A Plea for Narrative*, in CRITICAL RACE THEORY, THE CUTTING EDGE, 65 (1995).

¹⁹ RICHARD DELGADO, *Legal Storytelling: Storytelling for Oppositionist and Others: A Plea for Narrative*, in CRITICAL RACE THEORY, THE CUTTING EDGE, 66 (1995).

²⁰ BEN GOULDER and PETER FITZPATRICK, FOUCAULT'S LAW, 14 (2009).

²¹ BEN GOULDER and PETER FITZPATRICK, FOUCAULT'S LAW, 11 (2009), citing MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEW AND OTHER WRITINGS 1972-1977, 31 (Colin Gordon ed., 1980).

²² BEN GOULDER and PETER FITZPATRICK, FOUCAULT'S LAW, 11 (2009).

²³ RICHARD DELGADO, *Legal Storytelling: Storytelling for Oppositionist and Others: A Plea for Narrative*, in CRITICAL RACE THEORY, THE CUTTING EDGE, 66 (1995).

²⁴ BEN GOULDER and PETER FITZPATRICK, FOUCAULT'S LAW, 7 (2009).

²⁵ It is even interesting which of those labels are capitalised and which are not.

²⁶ JUDITH BUTLER, GENDER TROUBLE, 3-4 (1990).

²⁷ JUDITH BUTLER, GENDER TROUBLE, 8 (1990): '[S]ex by definition will be shown to have been maker all along'. The interchangeability of the terms 'sex' and 'gender' is intentional and reflects the argument Butler makes in *Gender Trouble*, that 'gender' masquerades as 'sex' and that both are socially constructed.

language, which mean there is no gender identity that preceded language.²⁸ There was no 'woman' that existed before language; rather language formed 'woman'. The subject is constructed in discourse by the acts it performs and the acts performed upon it. Gender is an act that brings into being what it names.²⁹ In her theory of performativity, the subject is therefore something we 'do' rather than something we 'are'.³⁰ 'Gender' is a verb, not a noun.³¹ Identity, in this case 'woman', is unstable, or 'in-process, a becoming, a constructing that cannot rightfully be said to originate or to end'.³² Gender merely 'congeals' over time to produce the appearance of a natural subject that has been there all along.³³ While Butler's focus remains on gender/sex, her analysis could be extended to other categories of identity. The identity 'child' serves a normative function that is claimed alternatively to reveal or distort what is assumed to be true about the 'child'. As such, there is no objectively accurate 'child'. Rather, the identity 'child' brings into being what is understood as a 'child'. In this way, the 'child' is not some 'being', but is rather unstable and in-process, a becoming. The identity 'child', has merely congealed over time to produce the appearance of some 'natural' being that is alleged to have been there all along. These fundamental arguments will be reiterated through the course of this thesis.

In sum, discourse nominates what gets included and excluded: it authorises some views to be taken seriously, while others are marginalised, derided, excluded and even prohibited.³⁴ Discourses generate truths, or rather claims to truth. Truth-claims are produced with what Foucault calls 'will to truth':

[e]ach society has its regime of truth, its 'general politics' of truth: that is, the type of discourse which it accepts and makes function as true; the mechanisms and instances which enable one to distinguish true and false statements, the means by which each is sanctioned; the techniques and procedures accorded value in the acquisition of truth; the status of those who are charged with saying what counts as true.³⁵

²⁸ JUDITH BUTLER, *GENDER TROUBLE*, 24-25 (1990).

²⁹ JUDITH BUTLER, *GENDER TROUBLE*, 24-25 (1990).

³⁰ JUDITH BUTLER, *GENDER TROUBLE*, 43-44 (1990).

³¹ JUDITH BUTLER, *GENDER TROUBLE*, 33 (1990).

³² Rather than a pre-existing metaphysical traveller. JUDITH BUTLER, *GENDER TROUBLE*, 4 (1990).

³³ JUDITH BUTLER, *GENDER TROUBLE*, 43 (1990): 'Certain cultural configurations of gender take place of 'the real' and consolidate and augment their hegemony through that felicitous self-naturalisation'.

³⁴ BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 8-9 (2009).

³⁵ MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEW AND OTHER WRITINGS 1972-1977*, 131 (Colin Gordon ed., 1980).

Discourses produce what it is possible to think, speak, and do.³⁶ For example, Chapter 2 discussed perspectives on the CRC that assumed the category child to be incapable/immature and at the same time developing towards capacity/maturity. Chapter 2 argued that the assumptions made about essential 'child' (described in Section I) were rarely justified. When the CRC's 'child' is viewed as a discourse, an entirely different lens of analysis is enabled. The CRC's performance of the child is no longer an 'objective' description of childhood, but rather a particular discourse that has been 'included', 'taken seriously', while others have been marginalised and excluded. Chapters 5 – 7 discuss further certain 'truths' assumed about the category 'child'. Chapter 9 specifically examines children marginalised by the CRC's version of childhood.

b. Truth-Claims/Knowledge/'Truth'/Power

Foucault's notion of knowledge as a privileged form of discourse conceptualises how certain discourses are entrenched within society. Knowledge is, in this way, the next generation (in the technological sense) of truth-claim, or 'Truth-Claim 2.0'. Knowledge is a dominant truth-claim. A particular 'discipline' states that A is B or A needs C based upon certain tests and observations. An 'objective description' of reality is presented as a given. According to Foucault the process of testing and observing does not reveal objective knowledge.³⁷ Rather, testing informs us about the ideology within which the test has been conceived. Observations at most result in a kind of representation as the observer has to interpret/give weight to the observed.³⁸ Nonetheless, the impossibility of 'objective' knowledge has not prevented knowledges (in other words, truth-claims with particular force) from using objective-style vocabulary. These knowledges masquerade as what is universally, naturally 'true', in some instances with far-reaching impact upon the way people lead their lives.³⁹ What appears to be merely an epistemic order, a way of ordering the world, does not readily admit the constraints by which that ordering takes place.⁴⁰ Simply put, dominant knowledges acquire the level of *Truth*, that which is understood as the natural, innate, essence of that which is being described.

³⁶ BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 8-9 (2009).

³⁷ Michel Foucault, *The Order of Discourse*, in *UNTYING THE TEXT*, 59 (Robert Young, ed., 1981): 'A discipline is not the sum of all that can be truthfully said about something; it is not even the sum of all that can be accepted about the same date in virtue of some principle of coherence or systematicity . . . For a proposition to belong to botany or pathology, it has to fulfil certain conditions, in a sense stricter and more complex than pure and simple truth; but in any case, other conditions'.

³⁸ BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 16-18 (2009).

³⁹ BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 18 (2009); REX STANTON ROGERS and WENDY STANTON ROGERS, *STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN*, 38 (1992).

⁴⁰ Judith Butler, *What is Critique*, in *THE JUDITH BUTLER READER*, 314-315 (Sara Salih ed., 2004).

In the context of the category 'child' in the CRC, Foucault's notion of knowledge proves insightful. Although it will be discussed in much further detail in Chapters 5 and Chapter 6, the CRC grounds its vision of the category 'child' or 'truth-claim' regarding childhood in the 'discipline' of developmental psychology. Certain more traditional strains of developmental psychology have argued (with amazing success) for the concept of development as a 'natural' process encoded within a series of benchmarks or normative structures for children made conventional within the adults' world.⁴¹ Childhood, characterised by state of development, has become an objective 'truth' that is reflected in the CRC's version of childhood.⁴² As a result, the Convention's 'truth-claims' about childhood become, in effect, non-controvertible. Notably, the drafters of the CRC never discussed whether childhood should be characterised by development.⁴³ Yet, how does a claim to truth, then, become dominant? If discourses are merely 'truth-claims' and certain of those 'truths' predominant, the next step involves understanding the conditions that make such predominance possible. Foucault's perspective on truth/knowledge in relation to power is useful as it aims to illustrate the ways in which certain discourses possess such seemingly strong truth-claims.

Unlike traditional liberal theories, Foucault argues that truth is not separated from power; rather it is one of the most important vehicles and expressions of power, as power is exercised through the production and dissemination of truth.⁴⁴ Since the metaphysical quest for truth is doomed, Foucault urges focus on the task of identifying techniques of truth and power.⁴⁵ Understanding Foucault's conception of power (ironically) involves first understanding that which power is not (perhaps not so ironic?). Importantly, power is not equated with repression, negativity or something that is bad (or good for that matter).⁴⁶ Equally importantly, power is not something that is possessed, that certain persons 'have' and others 'have not'.⁴⁷ Power is not a zero-sum

⁴¹ Catherine McDonald, *The Importance of Identity in Policy: The Case For and Of Children*, 23 CHILDREN & SOCIETY 241, 244 (2009); CHRIS JENKS, CHILDHOOD, 39 (2005); REX STANTON ROGERS and WENDY STANTON ROGERS, STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN (1992).

⁴² The CRC uses the word 'development' eighteen times, fourteen of which refer to the child's development. See Chapter 6 for further discussion.

⁴³ See generally SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES' (1992).

⁴⁴ MICHEL FOUCAULT, DISCIPLINE AND PUNISHMENT, THE BIRTH OF THE PRISON, 27-28 (Alan Sheridan trans., 1995): 'We should admit . . . that power produces knowledge (and not simply by encouraging it because it serves power or by applying it because it is useful); that power and knowledge directly imply one another; that there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations'. See also ALAN HUNT and GARY WICKHAM, FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE, 11 (1994).

⁴⁵ ALAN HUNT and GARY WICKHAM, FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE, 14 (1994).

⁴⁶ MICHEL FOUCAULT, DISCIPLINE AND PUNISHMENT, THE BIRTH OF THE PRISON, 194 (Alan Sheridan trans., 1995): 'We must cease once and for all to describe the effects of power in negative terms: it 'excludes', it 'represses', it 'censors', it 'abstracts', it 'masks', it 'conceals'. In fact, power produces; it produces reality; it produces domains of objects and rituals of truth'. See also BEN GOULDER and PETER FITZPATRICK, FOUCAULT'S LAW, 15 (2009).

⁴⁷ BEN GOULDER and PETER FITZPATRICK, FOUCAULT'S LAW, 14 (2009).

game. It is because of these features that Foucault insists that power is unstable, and thus capable of redirection.⁴⁸ Foucault's understanding of power is of particular use when conceptualising how those who are less able to exercise power retain the potential to exercise power without necessarily needing to perform a 'power grab' from the 'powerful'. The idea that power is not a zero-sum game is particularly important in the context of children's rights where the popular misconception seems to prevail that the rights of children can only be won at the expense of denying rights to others, whether parents, practitioners, and others who work with children.⁴⁹

Foucault does not suggest we should be, or that it is even possible to be, neutral about power. Rather, he stresses that the play of power produces systematic power relationships.⁵⁰ He suggests that we should 1) identify the relevant powers at work, and 2) evaluate of the interplay of these powers by making judgments about whether the cumulative effects give rise to domination and subordination, particularly by listening to excluded voices.⁵¹ When thinking about the category 'child' in the CRC, identifying the power relations that are made possible through the CRC's production and dissemination of universal 'truths' about childhood (cemented by the 'discipline' developmental psychology) is essential as we consider whether (and when) the Convention gives rise to domination and subordination. This thesis argues that the CRC enables and sustains the regulation of the childhood through the hierarchical relationship of the adults over children. See Chapters 5, 6, 7, and 8 for further discussion.

c. Binary Oppositions: How 'Truths' Are Created

The next step to the deconstruction of truth-claims/identities is grappling with how 'truths' are created. To understand the meaning of, in this case, an identity, one must understand what an identity is not. Supplementing Foucault's analysis of 'truths', this section highlights the value of another theoretical concept, that of binary oppositions. The notion of binary oppositions is

⁴⁸ MICHEL FOUCAULT, *HISTORY OF SEXUALITY VOLUME I*, 101 (Robert Hurley trans., 1980): '[I]t is in discourse that power and knowledge are joined together . . . we must not imagine a world of discourse divided between the accepted discourse and excluded discourse, or between the dominant discourse and the dominated one; but as a multiplicity of discursive elements that can come into play in various strategies . . . discourse can be both an instrument and an effect of power . . . Discourse transmits and produces power; it reinforces it, but also undermines and exposes it, renders it fragile and make it possible to thwart it'. See also ANTHONY BECK, *Foucault and Law: The Collapse of the Law's Empire*, 16(3) OXFORD JOURNAL OF LEGAL STUDIES 489, 490 (1996).

⁴⁹ BOB FRANKLIN, *The Case for Children's Rights: A Progress Report*, in *THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE*, 5 (1995).

⁵⁰ Michel Foucault, *The Ethic of Care for the Self as a Practice of Freedom*, in *THE FINAL FOUCAULT*, 19 (James Bernauer and David Rasmussen eds., 1988). See also ALAN HUNT and GARY WICKHAM, *FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE*, 15 (1994).

⁵¹ ALAN HUNT and GARY WICKHAM, *FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE*, 15 (1994).

theorised as the foundation for dominant discourses in 'Western thought'.⁵² Quite simply, binary opposition means, in the context of identity, that there is no identity that stands alone; an identity is created in relation to some other identity.⁵³ Identity depends on difference because one identity cannot *be* unless it can be different from something else.⁵⁴ Using the above example, to feel like a wife (homemaker, jogger, 1st Lady) requires differentiation from what stands as its opposite, a husband (bread-winner, Olympic athlete, President). Butler has illustrated this in her discussion of the category 'female' in relation to the category 'male'.⁵⁵ Butler argues that one is a particular sex only to the extent that one is not the other sex.⁵⁶ To feel and to act like a woman or man requires differentiation from the opposite sex. Likewise, to feel like an adult (mature, independent, capable) requires differentiation from what stands as its opposite: a child (immature, dependent, incapable). The identities of the opposing identity categories enable and therefore fundamentally depend upon each other's existence. Neither term of the opposition can be original and fundamental because both are related to each other in a system of mutual dependences and differences.⁵⁷ Nonetheless, this relation is not equitable. Rather the relationship between the two terms of the opposition is laden with values that assume one has dominance over the other; one is normal the other abnormal, one is simple the other is complex, one is the rule the other is the exception.⁵⁸ The coupling includes 1) a subject: an agent that is viewed positively, according to dominant discourses (for example, the rational) and 2) the 'other': the abnormal, the undesirable, everything the subject is not (for example, the emotional).⁵⁹

For Butler, in the context of gender, the internal coherence and unity of either identity requires both a stable and oppositional heterosexuality and therefore limits gender possibilities within that oppositional binary gender system. Butler describes this as a repressive heterosexual matrix that violently forecloses internal incoherence, which is demonstrated by the fact that when people

⁵² Jack Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE LAW REVIEW 743, 748 (1987). The structural linguist Ferdinand de Saussure posited that language is a system of differences within an arena with no positive, concrete forms. For Saussure, there is no inherent connection between the *sign* (e.g. the word chair) and its *referent* (e.g. the thing that I am sitting on now). The *sign* only acquires meaning from its position within a system of language as a whole. Jacques Derrida developed this idea into his notion of *différance*, which means both difference and deferral, referring to the way in which signification is both dependent on what is absent, and absent of self-referent meaning. From this theoretical background, the term 'binary opposition' has evolved. See generally Clare Dalton, *An Thesis in Deconstruction of Contract Doctrine*, 94 YALE LAW REVIEW 997 (1985); JONATHAN CULLER, ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM (1994); CHRISTOPHER NORRIS, DECONSTRUCTION: THEORY AND PRACTICE (2002); Jonathan Culler, *Jacques Derrida, in STRUCTURALISM AND SINCE* (John Sturrock ed., 1979); JACQUES DERRIDA, OF GRAMMATOLOGY, ix (Gayatri Spivak trans., 1976).

⁵³ JUDITH BUTLER, GENDER TROUBLE, 30 (1990).

⁵⁴ Jack Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE LAW REVIEW 743, 748 (1987).

⁵⁵ JUDITH BUTLER, GENDER TROUBLE, 6-7 (1990).

⁵⁶ JUDITH BUTLER, GENDER TROUBLE, 6-7 (1990).

⁵⁷ Jack Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE LAW REVIEW 743, 751 (1987).

⁵⁸ Jack Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE LAW REVIEW 743, 747 (1987).

⁵⁹ JUDITH BUTLER, GENDER TROUBLE, 6-7 (1990).

'do' their gender incorrectly, they are punished by cultures and laws.⁶⁰ This process defines yet another binary opposition of what it means to be a 'good' woman (homemaker, wife, mother) or a 'bad' one (motherless, single mother, career woman). As such, binary oppositions serve a particular political ideology and are enforced through the requirement of internal coherence of each of the oppositional terms.⁶¹

Although it will be discussed in much greater depth in Chapter 5, the adult – child binary serves as the basis for understanding what it means to be a child, and likewise what it means to be an adult. The adult is mature, capable, and responsible, whereas the child is immature, incapable, and irresponsible. Similarly, the good-child – bad-child binary operates such that the 'bad' child is one that manifests adult-like qualities. Take, for example, the ten-year old child who commits intentional murder.⁶² Will this person be tried in a court of law as incapable of capacity (*mens rea*) or will the law decide that the child is now an adult, a person who has capacity, who must be held responsible, and therefore who receives the maximum penalty if found guilty? This child has violated the norms of what it means to be a child. Because of the 'violence' this child has done to the cohesion of the category 'child', violence to the 'essence of being a child', this child is often made into an adult (in other words, tried as an adult) to keep up the appearance of two oppositional coherent categories: adult-child.⁶³ The binaries operating within the category child will be discussed at length in Chapter 5.

Suffice it to say here that with the binaries of both men/women and adult/child, there is this insatiable desire to distribute, classify, force these persons into this binary frame, despite the overwhelming internal incoherence of the oppositions. The appearance of internal coherence

⁶⁰ JUDITH BUTLER, *GENDER TROUBLE*, 27-33 (1990). Sara Salih ed., *THE JUDITH BUTLER READER*, 93 (2004).

⁶¹ JUDITH BUTLER, *GENDER TROUBLE*, 27-33 (1990).

⁶² Issues related to gender, race, caste, class, and so on will be examined in Chapter 8.

⁶³ See for example *State of Florida v. Lionel Tate*, Case No. 4D01-1306 (Fla. 4th DCA). Tate was convicted for first-degree murder and sentenced to life imprisonment without the possibility of parole for, at the age of 12, battering a girl to death. In sentencing Tate to life imprisonment, Judge Lazarus of Broward County Circuit Court said that "[t]he acts of Lionel Tate were not the playful acts of a child. The acts of Lionel Tate were not born out of immaturity. The acts of Lionel Tate were cold, callous and indescribably cruel." The sentencing was overturned on appeal to one year's house arrest and 10 year probation. Quite possibly there are racial implications for this case as well. Kenneth Nunn has argued that "[i]nsofar as African American boys and girls are concerned, it is somewhat inaccurate to speak of an 'end of adolescence' . . . the concept of a group of young people who were entitled to special treatment because they were impetuous and immature was never extensive enough to include African American children. . . . When adolescence began for white children in 1880 [in the US], African American children remained slaves". . . Kenneth Nunn, *The Child as Other: Racial Differential Treatment in the Juvenile Justice System*, 51 *DEPAUL LAW REVIEW* 679, 679-680 (2002). A famous case in the United Kingdom involving the death of James Bulger is another illustration. See MICHAEL FREEMAN, *The James Bulger Tragedy: Child Innocence and the Construction of Guilt, in THE MORAL STATUS OF CHILDREN: ESSAYS ON THE RIGHTS OF THE CHILD*, 235 (1997). Also during the drafting of Article 37 in the CRC, the United States delegate stated that "it was implicitly understood that a child committing an offence which, if committed by an adult, would be criminal could be treated as an adult. SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 465-466 (1992).

becomes so important to our understandings of what is 'true' about identity categories, instances of incoherence are ignored, made exceptional, or turned into a case that requires remedy. The theory of binary oppositions is an important conceptual tool that demonstrates in greater detail how 'truths' are constructed, and more importantly how 'common sense' associations with specific identities are rebuttable. The deconstructionist project involves 1) the identification of hierarchical oppositions, 2) followed by an illustrated reversal of the hierarchy in order to demonstrate that the privileged status of one of the terms is an illusion, precisely because the terms are mutually dependent.⁶⁴ The aim of doing so is to wrench us from our accustomed modes of thought to be able to question the political ideologies at work; an approach rarely employed in any context, and even more rarely employed in the context of children.

d. Governmentality

Thus far, Section I has described how discourse appropriates 'truths' that form 'knowledge', structured and reinforced by oppositional identity categories. The next step in an investigation into how 'truth-claims' become perceived as 'natural', relates to the enforcement of 'truths'. Foucault's notion of governmentality is helpful in understanding how certain norms become accepted and followed. The term governmentality can be understood as the distinctive mentalities of government or governmental rationality which involve a calculating preoccupation with activities directed at shaping, channelling and guiding the conduct of persons through the production, dissemination, and utilisation of knowledge.⁶⁵ At its most general, governmentality refers to any manner in which people think about, and put into practice calculated plans for governing themselves and others.⁶⁶ Notably, Foucault emphasises that the state is not a centralised structure, but rather 'a tricky combination in the same political structures of individualisation techniques and of totalisation procedures'.⁶⁷ In this way governmentality: 1) examines how governments have recourse to 'processes by which the individual acts upon him [or her] self' (technologies of self),⁶⁸ and 2) allows scrutiny of the close relationship between techniques of power and forms of knowledge, as governmental practices make use of particular

⁶⁴ Jack Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE LAW REVIEW 743, 746 (1987).

⁶⁵ BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 26-27 (2009).

⁶⁶ BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 30 (2009).

⁶⁷ Michel Foucault, *The Subject and Power*, in *POWER: ESSENTIAL WORKS OF MICHEL FOUCAULT*, Vol. 3, 332 (James Faubion ed., 2002).

⁶⁸ Michel Foucault, *My Body, This Paper, This Fire*, in *POWER: ESSENTIAL WORKS OF MICHEL FOUCAULT*, Vol. 2, 203 (James Faubion ed., 1998).
Vol. 2, 203.

types of rationality.⁶⁹ Simply put, governmentality is the way in which 'good citizens' are fashioned.

According to Foucault there are two mechanisms that ensure the internalisation of certain norms/'truths' (in other words, how 'good citizens' are produced: 1) juridical power (for example, physical punishment or incapacitation) and 2) disciplinary power (for example, 'the gaze').⁷⁰ Disciplinary power does not aim to punish subjects for their transgressions of a pre-given law (as is done in the exercise of juridical power), but rather for failure to attain an evolving and immanent normality, to function in a manner deemed positive and productive.⁷¹ With the rise of the liberal state, Foucault argues that there has been a move from external regulation or the exercise of juridical power, to inner production or the exercise of disciplinary power. Foucault argues that it is not through the resort to juridical mechanisms (for example, physical punishment or incapacitation) that the resultant compliant modern subject (or docile body) is forged, though these forms have not disappeared. Rather, the constitution of the modern subject of discipline is achieved through new and different disciplinary techniques: spatial distributions, hierarchical observations, normalising judgments, constant surveillance, and examinations.⁷² In this way, the liberal art of government does not directly affect individual and collective agents' freedom. Rather, the liberal art of government intervenes indirectly to structure the fields of possibility.⁷³

To produce the modern subject of discipline or to produce what Foucault calls 'a reality fabricated by this specific technology of power that I have called 'discipline''⁷⁴, Foucault discusses a number of different disciplinary techniques.⁷⁵ For Foucault, Jeremy Bentham's 'Panopticon' is emblematic of the functioning of disciplinary power: 'the major effect of the Panopticon is to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power'.⁷⁶ Disciplinary power is argued to be more effective because its power does not actually have to be enforced, it is automatic as the disciplined individual

⁶⁹ ULRICH BROCKLING et al., GOVERNMENTALITY: CURRENT ISSUES AND FUTURE CHALLENGES, 2 (2011).

⁷⁰ BEN GOULDER and PETER FITZPATRICK, FOUCAULT'S LAW, 30 (2009).

⁷¹ BEN GOULDER and PETER FITZPATRICK, FOUCAULT'S LAW, 30 (2009).

⁷² For a fuller discussion see MICHEL FOUCAULT, DISCIPLINE AND PUNISHMENT, THE BIRTH OF THE PRISON, 135-228 (Alan Sheridan trans., 1995); BEN GOULDER and PETER FITZPATRICK, FOUCAULT'S LAW, 19 (2009).

⁷³ ULRICH BROCKLING et al., GOVERNMENTALITY: CURRENT ISSUES AND FUTURE CHALLENGES, 5 (2011).

⁷⁴ BEN GOULDER and PETER FITZPATRICK, FOUCAULT'S LAW, 19 (2009), quoting MICHEL FOUCAULT, DISCIPLINE AND PUNISHMENT, THE BIRTH OF THE PRISON, 217 (Alan Sheridan trans., 1995).

⁷⁵ MICHEL FOUCAULT, DISCIPLINE AND PUNISHMENT, THE BIRTH OF THE PRISON, 135-228 (Alan Sheridan trans., 1995); also discussed in BEN GOULDER and PETER FITZPATRICK, FOUCAULT'S LAW, 19 (2009).

⁷⁶ MICHEL FOUCAULT, DISCIPLINE AND PUNISHMENT, THE BIRTH OF THE PRISON, 201 (Alan Sheridan trans., 1995); BEN GOULDER and PETER FITZPATRICK, FOUCAULT'S LAW, 20-21 (2009).

assumes that the guard in the tower is watching and modifies his or her behaviour accordingly.⁷⁷ Whilst under similar disciplinary conditions the schoolchild, the patient, the soldier, or the prisoner is directed to perform a homogenising norm.⁷⁸ The specificity of the disciplinary gaze actually affords a greater individualisation of the subject of discipline.⁷⁹ Individuals are turned into 'cases' and their relative distance from the norm is ranked hierarchically in the disciplinary regime.

Supplementing his formulation of disciplinary power, Foucault notes that while disciplinary power focuses on the individual body in need of correction, bio-power focuses at the level of a population.⁸⁰ Like disciplinary power, bio-power is also productive (in other words, unlike sovereign power, which is vengeful and violent). It is the 'entry of life into the order of politics' or the emergence of 'society in which political power has assigned itself the task of administering life' (related to propagation, birth, mortality, health, life expectancy, and so on).⁸¹ Biopower is well illustrated by the case of child-rearing practices which, while highly individualised, exhibit distinct patterns that are heavily influenced by a succession of child-rearing experts.⁸² Bio-power is concerned with the 'well-being' of the population. The combination of disciplinary power and bio-power aims to harness life for particular political aims. Notably, the population becomes the political object of governmentality, and it is towards the population that the techniques of governmentality are brought to bear.⁸³

This thesis will ultimately examine how the law works as a specific form of governmentality, an expression of both disciplinary and juridical power. Many issues come to the fore when speaking about the role of law and disciplinary power in modernity. Much debate has taken place on the role of law in modernity.⁸⁴ For the sake of time and space, this debate will not be fully laid out here. As outlined by Ben Goulder and Peter Fitzpatrick,

[l]aw . . . facilitates the operation of [knowledges] by constituting spaces which are then transversed and invested by the disciplines . . . Far from receding in importance, then, the law in modernity comes to be ever more constantly

⁷⁷ BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 20 (2009).

⁷⁸ BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 20 (2009).

⁷⁹ BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 20 (2009).

⁸⁰ See generally MICHEL FOUCAULT, *HISTORY OF SEXUALITY VOLUME I* (Robert Hurley trans., 1980).

⁸¹ MICHEL FOUCAULT, *HISTORY OF SEXUALITY VOLUME I*, 139 (Robert Hurley trans., 1980).

⁸² BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 27 (2009).

⁸³ BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 20-21, 30 (2009).

⁸⁴ See for example ALAN HUNT and GARY WICKHAM, *FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE* (1994); GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 22 (2009).

involved in deploying and harnessing the disciplines – a kind of constitutive compatibility of law and discipline.⁸⁵

This quote represents the perspective adopted in this thesis: that law's interaction with discipline has the ability to cement knowledges as 'truth'. One needs only to consider Herbert Hart's separability thesis to appreciate that certain academics', judges' and practitioners' desire for the law to have the same 'objective' quality as is alleged in the sciences.⁸⁶ Further, Foucault utilises a law from 1838 regarding the handling of the 'insane' to demonstrate the relationship between what he labels 'disciplines' and the law. He argues that by defining a certain law, the 'specialised medical character' of the confinement, '[t]he law consecrated psychiatry as a medical discipline, but also as a specialised discipline within the field of medical practice,⁸⁷ and 'sanction[ed] the role of psychiatry as a particular scientific and specialised technique of public hygiene'.⁸⁸ These two objective 'truths' (law and a discipline) have the power to fortify and reinforce each other.

To begin thinking about how the law operates in relation to identity, it is important to note that the law itself potently encapsulates both forms of power: juridical (punishment-power to enforce) and disciplinary (productive/form of knowledge/truth). Drawing on Foucault, Butler contends that although juridical notions of power found in law appear to regulate political life only in negative terms (through prohibition, regulation, control, and so on), the subject is actually positively formed, defined, and reproduced by these structures in accordance with its requirements.⁸⁹ In the domains of political and linguistic representation, the qualifications for being a certain subject must first be met before representation can be extended.⁹⁰ Discussed at length in Chapters 6-8, the CRC, when viewed through this lens, is not about giving children rights, but rather producing what it means to be a child through limiting the field of possibility for childhood.

Juridical power ultimately produces that which it claims to merely represent.⁹¹ The law not only produces the subject, but further conceals its productive nature to legitimate the law's own

⁸⁵ BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 27-28 (2009). The authors go to great length to argue, in response to Hunt and Wickham that the law, according to Foucault, actually does not recede into unimportance in modernity.

⁸⁶ HERBERT HART, *THE CONCEPT OF LAW* (1994).

⁸⁷ BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 27 (2009), quoting MICHEL FOUCAULT, *ABNORMAL: LECTURES AT THE COLLEGE DE FRANCE 1974-1975*, 141 (Graham Burchell trans., 2003).

⁸⁸ MICHEL FOUCAULT, *ABNORMAL: LECTURES AT THE COLLEGE DE FRANCE 1974-1975*, 141 (Graham Burchell trans., 2003).

⁸⁹ JUDITH BUTLER, *GENDER TROUBLE*, 4 (1990), quoting MICHEL FOUCAULT, *HISTORY OF SEXUALITY VOLUME I* (Robert Hurley trans., 1980).

⁹⁰ JUDITH BUTLER, *GENDER TROUBLE*, 4 (1990).

⁹¹ JUDITH BUTLER, *GENDER TROUBLE*, 5 (1990).

regulatory hegemony.⁹² As such, the subject does not create or cause institutions, discourses, or practices, but laws create or cause the subject by determining the characteristics that a particular subject should (and should not) possess.⁹³ Simply put, the subject is an effect of institutions, discourses, or practices, not the cause. Recoding, counting, tabulating, calculating, comparing have become both the means by which governmental intervention expands, as well as one of its chief by-products.⁹⁴ Disciplinary power becomes the means through which the subject is produced and regulated. In this way, children are not merely described in the CRC, nor are the institutional framework and practices that surround the international discourse on the rights of the child merely in reaction to a fundamental, universal child. Quite the opposite: the child is produced through CRC, and its related institutions and practices. This thesis will further argue that the juridical and disciplinary power exercised on the category 'child' is quite unique. It will be argued that the period of childhood experiences greater levels of juridical and disciplinary power. It will be argued in Chapter 8 that the exercise of disciplinary power over the category 'child' has a substantial and unique role in the CRC.⁹⁵ For example, the child is always subject to the adult gaze, whether by compulsory schooling or compulsory 'care' (parents or in the absence of parents, the state, as elicited in Chapters 6 and 7).⁹⁶ Also, according to the CRC the child acceptably experiences unique forms of juridical power such as corporal punishment or incapacitation.⁹⁷ See Chapter 8 for a more thorough discussion.

c. Genealogy: A Method

Thus far this chapter has considered the impossibility of 'objective' truth, instead identifying dominant 'knowledges', which are cemented by modalities of governance. The genealogical approach is helpful in so far as it enables the challenging of so-called 'objective facts'. A genealogical approach is useful to question a set of knowledges and how these knowledges were made possible. Foucault described this approach to history as a 'history of the present'⁹⁸: not a search for what 'really' and 'factually' happened, but how a particular way of contemporary

⁹² JUDITH BUTLER, *GENDER TROUBLE*, 5 (1990).

⁹³ SARA SALBI, JUDITH BUTLER, 10 (2002).

⁹⁴ SARA SALBI, JUDITH BUTLER, 27 (2002).

⁹⁵ See for example Article 28(2) allows for corporal punishment against children while in school and Article 28(a) makes primary education (a particular form of 'gaze', examination, testing) compulsory for all children. Other examples will be discussed at length in Chapter 8.

⁹⁶ See Article 28(a) and though the argument that children are required by the CRC to be in the 'care' of some adult will be discussed in Chapter 7, see also Article 19(1), which does not make sense if the child is not in 'care'.

⁹⁷ See for example Article 28(2) allows for corporal punishment against children while in school.

⁹⁸ MICHEL FOUCAULT, *LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEW* (Donald Bouchard, ed., 1977); BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 31 (2009). See also Amy Alder, *The Perverse Law of Child Pornography*, 101 COLUMBIA LAW REVIEW 209 (2001).

thinking and speaking came about.⁹⁹ The aim is not to discover the origins, but to 'identify the accidents, the minute deviations - or conversely, the complete reversals . . . that gave birth to those things that continue to exist and have value for us'.¹⁰⁰

A genealogy is intended to give expression to subjugated knowledges, to give voice to histories that have been lost or neglected.¹⁰¹ Foucault and Butler both utilise the technique of genealogy, which investigates local, discontinuous, disqualified, illegitimate knowledges against the claims of a universal 'truth'.¹⁰² The technique of genealogy is based on the desire to escape from the pervasive features of orthodox history, such as assumptions of linearity, teleology, evolution, and progress.¹⁰³ The aim is to first disturb the obviousness of presently 'understood' knowledges.¹⁰⁴ Foucault described his method as an effort 'to question over and over again what is postulated as self-evident, to disturb people's mental habits'.¹⁰⁵ Butler, in turn, argues that no biological, psychological, or economic fate determines the figure that the human female presents; it is civilisation as a whole that produces this creature described as feminine.¹⁰⁶ The fundamental aim of *Gender Trouble*¹⁰⁷ and Butler's theory of performativity is to call into question the existence of the unitary category 'woman'.¹⁰⁸

The second aim of a genealogy is to then desolidify or deconstruct an identity by enquiring how an identity has become so widely accepted as an ontological given.¹⁰⁹ As Butler puts it, a 'genealogy investigates the political stakes in designating as an *origin* and *cause* those identity categories that are in fact the *effects* of institutions, practices discourses, with multiple and diffused points of origins'.¹¹⁰ Believing that certain political stakes are served in the construction of identity, one must consider what configuration of power exists, and therefore what forms of power restrain and regulate the subject. Put another way, a genealogical inquiry is about

⁹⁹ BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 46 (2009), citing VIKKI BELL, INTERROGATING INCEST: FEMINISM, FOUCAULT, AND THE LAW, 2 (1993).

¹⁰⁰ BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 46 (2009), citing PAUL RABINOW, *THE FOUCAULT READER*, 81 (1984).

¹⁰¹ MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEW AND OTHER WRITINGS 1972-1977*, 84 (Colin Gordon ed., 1980).

¹⁰² BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 32 (2009); JUDITH BUTLER, *GENDER TROUBLE*, 44 (1990).

¹⁰³ BARRY SMART, *FOUCAULT, MARXISM, AND CRITIQUE*, 75 (1983).

¹⁰⁴ See for example MICHEL FOUCAULT, *QUESTIONS OF METHOD: AN INTERVIEW WITH MICHEL FOUCAULT, IDEOLOGY AND CONSCIOUSNESS*, 6 (1981): '[I]t wasn't as a matter of course that mad people came to be regarded as mentally ill; it wasn't self-evident that the only thing to be done with a criminal was to lock him up; it wasn't self-evident that the causes of illness were to be sought through the individual examination of bodies'.

¹⁰⁵ MICHEL FOUCAULT, *POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 1977-1984*, 265 (Alan Sheridan trans, Laurence Kritzman ed., 1988).

¹⁰⁶ JUDITH BUTLER, *GENDER TROUBLE*, 4 (1990).

¹⁰⁷ JUDITH BUTLER, *GENDER TROUBLE* (1990).

¹⁰⁸ JUDITH BUTLER, *GENDER TROUBLE*, 3-4, 19 (1990); Sara Salih ed., *THE JUDITH BUTLER READER*, 90 (2004).

¹⁰⁹ JUDITH BUTLER, *GENDER TROUBLE*, 4 (1990).

¹¹⁰ JUDITH BUTLER, *GENDER TROUBLE*, viii-ix (1990), original emphasis.

discourses surrounding the subject, how they function, and the political aims they fulfil.¹¹¹ For Butler, regarding women, the political forces at work are phallogentrism and heterosexuality.¹¹² In sum, the aim is not to investigate if practices conform to 'objective' rationalities (the epistemological endeavour), but to discover which kind of rationality or 'truth' is being used,¹¹³ and to inquire what political aims are being served. By calling into question the 'essence' of an identity put forth as 'truth', one is then able to investigate the powers that are served in a particular 'truth'.

Though it will be more thoroughly elaborated in subsequent chapters, this thesis seeks to disrupt the appearance of the universal category 'child', in part, through the agitation of certain 'truths' about childhood (see Chapters 5, 6, and 7) that are enforced through the exercise of juridical and disciplinary power (see Chapter 8), but also through the examination of discourse/knowledges/claims to 'truth' that are excluded from the CRC's purview. Chapter 9 will endeavour to query who is left out, disqualified, delegitimised by the CRC's version of childhood. Chapter 9 will argue that the CRC's normative framework not only regulates what it means to be a 'good' child and 'good' adult, but does so through the sustainment and expansion of particular power relations that emphasise adult power over children, while solidifying the dominant role of the state in the matrix of family relations.

II. CRITIQUES OF FOUCAULT AND BUTLER

The first section of this chapter has set out the theoretical methodology that will be employed throughout this thesis. However, before employing that methodology, it is necessary to justify its use, in light of certain criticism commonly levelled at both Foucault and Butler. This section seeks to explore three of the major critiques of Foucault and Butler: 1) Foucauldian/Butlerian Theory Kills the Subject – How Can Docile Bodies Engage in Resistance?, 2) Foucauldian/Butlerian Theory Has No Normative Framework – Why Resist and against Whom?, and 3) Foucauldian/Butlerian Theory Renders Political Action Impossible – How Can One Engage in Politics without Universal Identities? Although other critiques have been made,¹¹⁴ this section will focus on the ones deemed most relevant to this thesis.

¹¹¹ JUDITH BUTLER, *GENDER TROUBLE*, 5 (1990).

¹¹² JUDITH BUTLER, *GENDER TROUBLE*, 5 (1990).

¹¹³ REX STAINTON ROGERS and WENDY STAINTON ROGERS, *STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN*, 226 (1992).

¹¹⁴ For example, Foucault was critiqued by Hartsock for writing as a coloniser, or as a person from the dominant group (i.e. male). Nancy Hartsock, *Foucault on Power: A Theory for Women*, in *FEMINISM/POSTMODERNISM*, 171 (Linda Nicholson ed., 1990). McLaren has countered that Hartsock is privileging gender in her analysis and ignoring homosexuality. See MARGARET McLAREN, *FEMINISM, FOUCAULT, AND EMBODIED SUBJECTIVITY* (2002). Nussbaum, for example, argues that 1)

a. Foucauldian/Butlerian Theory Kills the Subject – How Can Docile Bodies Engage in Resistance?

Some scholars argue that Foucault's version of power reduces individuals to docile bodies, or objects rather than subjects of power.¹¹⁵ Linda Alcoff, for example, argues that Foucault's understanding of power excludes agency, and this denial of agency is argued to be incompatible with the emancipatory project.¹¹⁶ Resistance by the subject might then be conceived as merely a ruse of power, as the subject is argued to be wholly determined by social forces.¹¹⁷ Alcoff argues that,

[g]iven the enormous productive efficacy Foucault accords to power/knowledge or the dominant discourse, there could be agency only if human beings were given the causal ability to create, affect, and transform power/knowledge or discourses, but Foucault does not concede to us this capacity... if Foucault's analysis of subjectivity is correct, a feminist emancipatory project is in trouble.¹¹⁸

Similarly, one of the many critiques of Butler is that she has, through her theorising, made individuals into mere objects that lack agency.¹¹⁹ Gender performances are argued to be subjectless productions, as the individual does not have the ability to choose her or his gender.¹²⁰

i. Butler's Response

By way of response, Butler asserts that she does not go as far as saying that agency is illusory.¹²¹ Butler has said that she neither discounts the possibility of agency nor the limitations on

Butler is not arguing anything new (just using a new vocabulary) and 2) that Butler's perspective is purely academic: 'The great tragedy in the new feminist theory in America is the loss of a sense of public commitment . . . Hungry women are not fed by this, battered women are not sheltered by it, raped women do not find justice in it, gays and lesbians do not achieve legal protections through it'. Martha Nussbaum, *The Professor of Parody*, THE NEW REPUBLIC (1999), <http://www.tnr.com/archive/0299/022299/nussbaum022299.html>. Lloyd has responded that Butler highlights that the very norms that Nussbaum champions (transparency or accessibility) serve certain interests and obscures the operations of power. See MOYA LLOYD, JUDITH BUTLER (2007).

¹¹⁵ Nancy Hartsock, *Foucault on Power: A Theory for Women*, in FEMINISM/POSTMODERNISM, 171-172 (Linda Nicholson ed., 1990).

¹¹⁶ SEYLA BENHABIB, SITUATING THE SELF: GENDER, COMMUNITY AND POSTMODERNISM IN CONTEMPORARY ETHICS (1992); Linda Alcoff, *Feminist Politics and Foucault: The Limits to a Collaboration*, in CRISES IN CONTINENTAL PHILOSOPHY (Arlene Dallery and Charles Scott eds., 1990).

¹¹⁷ Seyla Benhabib, *Feminism and Post Modernism: An Uneasy Alliance*, in FEMINIST CONTENTIONS: A PHILOSOPHICAL EXCHANGE, 20 (Seyla Benhabib et al. eds., 1995).

¹¹⁸ Linda Alcoff, *Feminist Politics and Foucault: The Limits to a Collaboration*, in CRISES IN CONTINENTAL PHILOSOPHY, 75 (Arlene Dallery and Charles Scott eds., 1990).

¹¹⁹ See for example Lois McNay, *Subject, Psyche and Agency: The Work of Judith Butler*, 16(2) THEORY, CULTURE, AND SOCIETY 175 (1999); Alan Schrift, *Foucault's Reconfiguration of the Subject: From Nietzsche to Butler, Laclou Mouffe and Beyond* 41(1) PHILOSOPHY TODAY 153 (1997); Lisa Schwartzman, *Hate Speech, Illocution, and Social Context: A Critique of Judith Butler* 33(3) JOURNAL OF SOCIAL PHILOSOPHY 421 (2002).

¹²⁰ Geoff Boucher, *The Politics of Performativity: A Critique of Judith Butler*, 1 PARRHESIA 112, 116 (2006).

¹²¹ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted THE JUDITH BUTLER READER, 334 (Sara Salih ed., 2004).

agency.¹²² According to Butler, however, a description of agency is not one in which a person stands outside one identity and simply selects it.¹²³ She argues that doing so would be impossible, since one is already one's gender and one's choice of 'gender style' is limited from the start. Instead, Butler asserts that,

to choose a gender is to interpret received gender norms in a way that organises them anew. Less a radical act of creation, gender is a tacit project to 'renew' one's cultural history in one's own terms . . . something we have been endeavouring to do all along.¹²⁴

In an interview in 2000, Butler describes in detail the issue of the agency-less subject. She states that the subject is born into a network of language and uses language but is also used by it.¹²⁵ The question becomes whether agency has been vanquished altogether.¹²⁶ Butler explains that while we are constituted socially through certain kinds of limitations, exclusions, and foreclosures, we are not constituted for all time in that way.¹²⁷ She argues that it is possible to undergo an alteration of the subject that permits new possibilities that would have been thought psychotic or 'dangerous' in an earlier phase of life.¹²⁸ Butler contends that while we are clearly born into a world in which certain limitations constrain the possibility of one's subjecthood, those limitations are not there as structurally static features of one's self.¹²⁹ Limitations are subject to renewal. One performs (mainly unconsciously or implicitly) that renewal in the repeated acts of one's person.¹³⁰ She states that,

[e]ven though my agency is conditioned by those limitations, my agency can also thematise and alter those limitations to some degree. This doesn't mean that I will get over limitation – there is always a limitation; there is always going to be a

¹²² Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted *THE JUDITH BUTLER READER*, 325 (Sara Salih ed., 2004).

¹²³ SARA SALIH, *JUDITH BUTLER*, 46 (2002). Though gender is the focus for Butler, her theory is applicable to other identity categories, as is argued in this thesis.

¹²⁴ JUDITH BUTLER, *VARIATIONS ON SEX AND GENDER*, 131 (1987).

¹²⁵ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted *THE JUDITH BUTLER READER*, 332 (Sara Salih ed., 2004).

¹²⁶ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted *THE JUDITH BUTLER READER*, 333 (Sara Salih ed., 2004). Butler notes that the issue of agency contrasts American philosophical traditions that assume an agency to the self and that resonate strongly with forms of American individualism and notions of self-making. Butler states that she finds herself caught between an American political context and a French intellectual one (specifically referring to Jacques Lacan).

¹²⁷ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted *THE JUDITH BUTLER READER*, 334 (Sara Salih ed., 2004).

¹²⁸ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted *THE JUDITH BUTLER READER*, 334 (Sara Salih ed., 2004).

¹²⁹ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted *THE JUDITH BUTLER READER*, 334 (Sara Salih ed., 2004).

¹³⁰ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted *THE JUDITH BUTLER READER*, 334 (Sara Salih ed., 2004).

foreclosure of some kind or another – but I think that the whole scene has to be understood as more dynamic than it generally is.¹³¹

In this way, Butler disagrees that the possibilities of agency are set up as a binary opposition: to have or to not have agency.¹³² Butler contends that there are limitations on agency, but that those limitations do not render the subject subject-less.¹³³ Butler's version of agency appears when dominant gender norms fail to eradicate gendered expressions that defy the internal coherence of gendered norms.¹³⁴ However, Butler argues that liberation as a term that promises radical freedom from constraint is impossible. Holding onto this conception of liberation, she argues, will just redeliver us to new constraints and plunge us into forms of political cynicism.¹³⁵

In approaching the problems of what and how to change, Butler again notes that we are already within the confines of discourse and an institutional apparatus that will orchestrate for us (the limits of?) what will and will not be possible.¹³⁶ Though some would suggest that anything we seek to change only augments the power of the order and that we are co-opted and contained in advance Butler argues that this account is incomplete.¹³⁷ Extending the power regime does not mean extending it always in the same form; it could mean reiterating it in new forms.¹³⁸ Power, according to Butler, can produce unanticipated effects.¹³⁹ She contends that while we can certainly extend existing power, we can also extend it into an unknown future.¹⁴⁰ In this way, political insurrection is based on a citation of existing norms, but also has potential to produce something new. She does not call this 'liberation', but rather a 'critical subversion', or a 'radical resignification':

¹³¹ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted *THE JUDITH BUTLER READER*, 334 (Sara Salih ed., 2004).

¹³² Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted *THE JUDITH BUTLER READER*, 334 (Sara Salih ed., 2004).

¹³³ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted *THE JUDITH BUTLER READER*, 334 (Sara Salih ed., 2004).

¹³⁴ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted *THE JUDITH BUTLER READER*, 334 (Sara Salih ed., 2004).

¹³⁵ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted *THE JUDITH BUTLER READER*, 334 (Sara Salih ed., 2004).

¹³⁶ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted *THE JUDITH BUTLER READER*, 334 (Sara Salih ed., 2004).

¹³⁷ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted *THE JUDITH BUTLER READER*, 335 (Sara Salih ed., 2004).

¹³⁸ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted *THE JUDITH BUTLER READER*, 334 (Sara Salih ed., 2004).

¹³⁹ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted *THE JUDITH BUTLER READER*, 335 (Sara Salih ed., 2004).

¹⁴⁰ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted *THE JUDITH BUTLER READER*, 335 (Sara Salih ed., 2004).

[i]t does not engage in the fantasy of transcending power altogether, although it does work within the hope and the practice of replaying power, of restaging it again and again in new and productive ways.¹⁴¹

In the instance of both the individual and political movements being seized by existing structures of power, Butler rejects the subject - object binary, where one is either or. Rather she acknowledges the vast limitations on individuals and movements in their quests for resignification, but she does not foreclose the possibility of its occurrence.

ii. Foucault's Response

Whereas in his earlier genealogies Foucault emphasised the processes through which individuals were subjected to power, in his later writings he turned his attention to practices of self-constitution or 'practices of freedom', which he called ethics. According to Foucault, 'there are no relations of power without resistances; the latter are all the more real and effective because they are formed right at the point where relations of power are exercised'.¹⁴² Foucault argues that power has a dual function: to both limit and create possibilities for persons.¹⁴³ Foucault writes that,

in power relations there is necessarily the possibility of resistance because if there were no possibility of resistance (of violent resistance, flight, deception, strategies capable of reversing the situation), there would be no power relation at all.¹⁴⁴

Foucault notes that the term 'domination' is 'what we ordinarily call power'.¹⁴⁵ Yet even in the event of domination, in other words, asymmetrical relationships of power in which subjects have limited ability to exercise power, Foucault argues that these subordinated persons still have the ability to exercise power, albeit in a manner 'extremely limited'.¹⁴⁶ For Foucault, resistance means the ability to alter how one fits within a particular set of power relationships or even the alteration of power relations themselves. Arguably, agency is implicitly embedded in Foucault's

¹⁴¹ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted *THE JUDITH BUTLER READER*, 335 (Sara Salih ed., 2004).

¹⁴² MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEW AND OTHER WRITINGS 1972-1977*, 142 (Colin Gordon ed., 1980).

¹⁴³ Michel Foucault, *The Subject and Power*, in *POWER: ESSENTIAL WORKS OF MICHEL FOUCAULT*, Vol. 3, 341 (James Faubion ed., 2002).

¹⁴⁴ Michel Foucault, *The Ethics of Concern for the Self as a Practice of Freedom*, in *THE ESSENTIAL WORKS OF FOUCAULT, VOLUME I*, 292 (Paul Rabinow ed., 1994).

¹⁴⁵ Michel Foucault, *The Ethic of Care for the Self as a Practice of Freedom*, in *THE FINAL FOUCAULT*, 19 (James Bernauer and David Rasmussen eds., 1988).

¹⁴⁶ Michel Foucault, *The Ethic of Care for the Self as a Practice of Freedom*, in *THE FINAL FOUCAULT*, 12 (James Bernauer and David Rasmussen eds., 1988).

notion of power.¹⁴⁷ In his discussion of ethics, Foucault does not suggest that individuals may only react against power. Rather, he suggests that individuals may alter power relationships in ways that expand their possibilities for action.¹⁴⁸ Thus, Foucault's work on ethics can be linked to his concern to counter domination, that is, forms of power that limit the possibilities for the autonomous development of the self's capacities.¹⁴⁹ By distinguishing power relations that are mutable, flexible and reversible, from situations of domination in which resistance is 'extremely limited, Foucault seeks to encourage practices of liberty 'that will allow us to play ... games of power with as little domination as possible'.¹⁵⁰ Foucault notes the importance of establishing new behaviour and attitudes that empower those who find themselves less able to exercise power, thus ensuring that mutable relations of power do not congeal into states of domination:

[i]f there are relations of power in every social field, this is because there is freedom everywhere. In a great many cases, power relations are fixed in such a way that they are perpetually asymmetrical and allow an extremely limited margin of freedom.¹⁵¹

Sawicki argues that Foucault's notion of practices of freedom has the potential to broaden our understanding of what it is to engage in emancipatory politics.¹⁵² In Foucault's conception of freedom as a practice aimed at minimising domination, Sawicki discerns an implicit critique of traditional emancipatory politics that tends to conceive liberty as a state free from every conceivable social constraint.¹⁵³ Following Foucault, Sawicki argues that the problem with this notion of emancipation is that it does not go far enough, for 'reversing power positions without altering relations of power, is rarely liberating. Further, it is not a sufficient condition of liberation to throw off the yoke of domination'.¹⁵⁴ Ultimately, for Sawicki, the value of Foucault's late work for feminism consists in the conceptual tools that it provides to think beyond traditional emancipatory theories and practices. Similarly, for Moya Lloyd, the Foucauldian practice of critique allows for alternative practices of the self and, thus, for more

¹⁴⁷ Michel Foucault, *The Subject and Power*, in MICHAEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS (Hubert Dreyfus and Paul Rabinow eds., 1982). See also LOIS McNAY, FOUCAULT: A CRITICAL INTRODUCTION (1994).

¹⁴⁸ Michel Foucault, *The Ethic of Care for the Self as a Practice of Freedom*, in THE FINAL FOUCAULT, 298 (James Bernauer and David Rasmussen eds., 1988).

¹⁴⁹ Michel Foucault, *The Ethic of Care for the Self as a Practice of Freedom*, in THE FINAL FOUCAULT, 298 (James Bernauer and David Rasmussen eds., 1988).

¹⁵⁰ Michel Foucault, *The Ethic of Care for the Self as a Practice of Freedom*, in THE FINAL FOUCAULT, 298 (James Bernauer and David Rasmussen eds., 1988).

¹⁵¹ MARGARET McLAREN, FEMINISM, FOUCAULT, AND EMBODIED SUBJECTIVITY, 40 (2002).

¹⁵² Jana Sawicki, *Feminism, Foucault and "Subjects" of Power and Freedom*, in THE LATER FOUCAULT: POLITICS AND PHILOSOPHY, 102 (Jeremy Moss ed., 1998).

¹⁵³ Jana Sawicki, *Feminism, Foucault and "Subjects" of Power and Freedom*, in THE LATER FOUCAULT: POLITICS AND PHILOSOPHY, 102 (Jeremy Moss ed., 1998).

¹⁵⁴ Jana Sawicki, *Feminism, Foucault and "Subjects" of Power and Freedom*, in THE LATER FOUCAULT: POLITICS AND PHILOSOPHY, 102 (Jeremy Moss ed., 1998).

autonomous experiments in self-formation.¹⁵⁵ Foucauldian resistance, thus, cannot be found outside power. Rather resistance relies upon and emerges from the power against which a particular resistance struggles. Foucault's understanding of resistance as internal to power refuses the utopian dream of achieving total emancipation from power.¹⁵⁶ In the place of total liberation Foucault envisages more specific, localised struggles against forms of subjection aimed at loosening the constraints on possibilities for action.¹⁵⁷

It would appear that Foucault allows more scope for agency/liberty in his conception of power. In fact, it seems that Foucault's description of domination is Butler's version of power. Yet, one could argue that Butler is merely describing an instance of domination (in other words, gender), in which agency is extremely limited. Where they do share common ground, both Foucault and Butler describe a less absolute form of 'liberation'/agency. The notion of absolute liberation/agency may seem more comfortable, it is more likely to gain political purchase, and makes 'sense' based on the binary opposition to 'have' or 'not have' agency. However, Foucault and Butler's version of agency and liberation or 'radical resignification' resonates with this author's view of how agency and liberation operate. When one thinks of Honi Haber's example of the woman who goes to the gym to discipline her body so that she complies with the latest beauty requirement for females (toned body), she might just find her newfound strength a source of empowerment.¹⁵⁸ Most likely this woman is not now 'liberated' from social views about what her body should look like. Nonetheless, a resignification has occurred.

Within the context of the CRC, the criticism that the theories of Butler and Foucault render the subject agentless requires an arguably more complicated analysis. First, Foucault and Butler theories on power are not the only ones which are argued to deny agency to children. The dominant discourse on children, the CRC, denies agency, as given to adults, to children.¹⁵⁹ Put another way, the CRC does not offer children the same agency that is offered to adults in other

¹⁵⁵ Moya Lloyd, *A Feminist Mapping of Foucauldian Politics*, in *FEMINISM AND FOUCAULT: REFLECTIONS ON RESISTANCE*, 250 (Irene Diamond and Lee Quinby eds., 1988).

¹⁵⁶ Michel Foucault, *The Ethics of Concern for the Self as a Practice of Freedom*, in *THE ESSENTIAL WORKS OF FOUCAULT, VOLUME I*, 292 (Paul Rabinow ed., 1994).

¹⁵⁷ Michel Foucault, *The Ethics of Concern for the Self as a Practice of Freedom*, in *THE ESSENTIAL WORKS OF FOUCAULT, VOLUME I*, 292 (Paul Rabinow ed., 1994).

¹⁵⁸ Honi Haber, *Foucault Pumped: Body Politics and the Muscled Woman*, in *FEMINISTS INTERPRETATIONS OF MICHEL FOUCAULT*, 147 (Susan Hekman ed., 1996). See also Sandra Bartky, *Foucault, Femininity, and the Modernization of Patriarchal Power*, in *FEMININITY AND DOMINATION: STUDIES IN THE PHENOMENOLOGY OF OPPRESSION* 63-82 (Irene Diamond and Lee Quinby eds., 1990); Susan Bordo, *Anorexia Nervosa: Psychopathology as the Crystallization of Culture*, in *FEMINISM AND FOUCAULT: REFLECTIONS ON RESISTANCE*, 87-117 (Irene Diamond and Lee Quinby eds., 1988).

¹⁵⁹ The issue of having the same agency as adults was discussed in Chapter 2. While the CRC is argued to not just present the child as an object of care, this dissertation argues that the CRC, particularly in light of Article 5, does not conceive of the child as a subject deserving responsibilities and duties. See Chapter 4 for further discussion.

international human rights documents, as will be discussed in Chapter 4. As will be discussed in Chapter 2, few academics and practitioners advocate for children to have legal agency, as given to adults.¹⁶⁰ Second, children rights do not just address children themselves, but also those who speak 'for' children. For example, the CRC enables others to act on behalf of, exercise autonomy on behalf of, and even speak for the child, something done with no other identity category, as will be discussed in Chapters 4, 6, and 7. Indeed, no child participated in the drafting of the CRC. As such, one could argue that the issue of as reducing children to docile bodies, at least to some degree, would not present a problem for current discourse on children's rights.¹⁶¹

Nonetheless, this thesis could be critiqued for engaging an interpretative lens that results in that which it is critiquing. Put another way, by accepting Foucauldian/Butlerian theories of power, it could be argued that this thesis reduces children to docile bodies/agentless subjects, in the same way that this thesis is critiquing the CRC for doing so. By way of response, this thesis first does not argue that the CRC reduces children to docile bodies. Rather, this thesis argues that the CRC limits the possibilities of what it means to be a child in unique ways that would be unimaginable for other categories of humans, as will be discussed in Chapters 4 and 7 (in other words, mandating 'care' or requiring the 'child' give away their own agency to their binary opposition – adults). Second, this thesis's utilisation of Foucauldian/Butlerian theories of power acknowledges that absolute agency is unlikely. Agency will always have limitations. This version of power does not render the subject docile, but instead views agency as restricted, not impossible.

b. Foucauldian/Butlerian Theory Has No Normative Framework – Why Resist and against Whom?

It has been argued that Foucault's critique of Enlightenment rationality and humanism results in relativism and nihilism. Nancy Fraser argues that if one rejects the precepts of Enlightenment, one is neither left with a basis upon which to criticise current conditions of power,¹⁶² nor an

¹⁶⁰ Only a handful of academic have advocated as such: RICHARD FARSON, *BIRTHRIGHTS* (1974); JOHN HOLT, *ESCAPE FROM CHILDHOOD* (1974).

¹⁶¹ See Chapter 2 for various perspectives on the sliding scale of the extent to which children are believed to possess capacity/autonomy/agency.

¹⁶² Nancy Fraser, *Michel Foucault: A Young Conservative?*, in *FEMINISTS INTERPRETATIONS OF MICHEL FOUCAULT* (Susan Hekman ed., 1996). See also Nancy Hartsock, *Postmodernism and Political Change: Issues for Feminist Theory*, in *FEMINISTS INTERPRETATIONS OF MICHEL FOUCAULT* (Susan Hekman ed., 1996); Michael Waltzer, *The Politics of Michel Foucault*, 30 *DISSENT* 481 (1983).

explanation as to why these current conditions should be resisted.¹⁶³ Further, one is left with no way to identify systematic unequal relations of power.¹⁶⁴ Similarly, one of the most common critiques of Butler's work is a 'lack of normative framework'.¹⁶⁵ It is argued that Butler refers to new possibilities, but that she does not indicate which possibilities are worth pursuing, and which are perverse. Put another way, Butler does not have a set of strong norms that instruct which possibilities to actualise and which not. Butler herself has said that not all possibilities should be realised.¹⁶⁶ So why not distinguish amongst them?

i. Butler's Response

Butler responds by arguing,

[w]hat worries me is that we very often make decisions about what life to pursue and what possibilities to realise without ever asking how our very notions of 'what is possible', 'what is liveable', 'what is imaginable' are constrained in advance, and maybe in some very politically consequential ways.¹⁶⁷

Butler argues that an ontology of gender is not a foundation, but 'a normative injunction that opposes insidiously by installing itself into political discourse as its necessary ground'.¹⁶⁸ She asks what it means to make a normative judgment without critically interrogating how the field of possibility is itself constituted through often violent exclusions.¹⁶⁹ Butler argues that she is concerned with, what she calls, the 'rush to decision-ism and to strong normativity'.¹⁷⁰ She argues that often this rush fails to consider what is meant by some of the very basic terms it assumes.¹⁷¹ In a sense, political normativity is missing a critical dimension.¹⁷² Normativity results

¹⁶³ NANCY FRASER, UNRULY PRACTICES: POWER, DISCOURSE AND GENDER IN CONTEMPORARY SOCIAL THEORY, 29 (1989).

¹⁶⁴ Nancy Hartsock, *Foucault on Power: A Theory for Women*, in FEMINISM/POSTMODERNISM, 160 (Linda Nicholson ed., 1990); Nancy Hartsock, *Community/Sexuality/Gender: Rethinking Power*, in REVISIONING THE POLITICAL: FEMINIST RECONSTRUCTIONS OF TRADITIONAL CONCEPTS IN WESTERN POLITICAL THEORY, 39 (Nancy Hirschmann and Christine Stefano eds., 1996); ZILLAH EISENSTEIN, THE FEMALE BOGY AND THE LAW, 16-20 (1988); Lisa Schwartzman, *Hate Speech, Illocution, and Social Context: A Critique of Judith Butler*, 33(3) JOURNAL OF SOCIAL PHILOSOPHY 421 (2002).

¹⁶⁵ See for example Martha Nussbaum, *The Professor of Parody*, THE NEW REPUBLIC (1999),

<http://www.tnr.com/archive/0299/022299/nussbaum022299>.

¹⁶⁶ See for example Martha Nussbaum, *The Professor of Parody*, THE NEW REPUBLIC (1999),

<http://www.tnr.com/archive/0299/022299/nussbaum022299>.

¹⁶⁷ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted THE JUDITH BUTLER READER, 365 (Sara Salih ed., 2004).

¹⁶⁸ JUDITH BUTLER, GENDER TROUBLE, 148 (1990). JEREMY MOSS, *Introduction: The Later Foucault*, in THE LATER

FOUCAULT: POLITICS AND PHILOSOPHY, 98-99 (1998).

¹⁶⁹ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted THE JUDITH BUTLER READER, 355 (Sara Salih ed., 2004).

¹⁷⁰ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted THE JUDITH BUTLER READER, 355 (Sara Salih ed., 2004).

¹⁷¹ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted THE JUDITH BUTLER READER, 355 (Sara Salih ed., 2004).

¹⁷² Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted THE JUDITH BUTLER READER, 355 (Sara Salih ed., 2004).

in a violent circumscription of the possible (what lives are considered lives, what capacities are considered human), for which we are not accountable.¹⁷³

This 'rush' is particularly true in the context of children's right. One continually finds the realm of children's rights dominated by normative judgments about what it means to be a child and therefore what should be the aim and content of children's rights (as discussed in Chapter 2). These normative judgments are made even before the field of possibilities for childhood and children's rights has been interrogated.¹⁷⁴ It will be argued throughout this thesis that the CRC, the most prominent international discourse on children's rights, has been constituted through some violent exclusions, while what is possible for the category 'child' has never been critically interrogated (see Chapters 5, 6, 7, and 8).¹⁷⁵

ii. Foucault's Response

It has been argued that Foucault neither reject nor embraces the Enlightenment, but rather adopts a critical attitude by examining what 'reason is', what its effects are, and why we use it.¹⁷⁶ Critical questioning does not amount to wholesale rejection, but rather rejects the use of a universal moral and political judgment. It is the critical attitude of problematisation that is important to the process of critical inquiry and transcending binary logic (understanding through binary oppositions as discussion above in Section I(c)).¹⁷⁷ It would seem that the process of engaging in practices that limit domination is in fact a normative position.

The claim that Butler and Foucault lack a normative framework denotes at least a level of discomfort in the absence of absolutes. Both reject 'domination' and encourage 'inclusion' through exposing unequal power relations through utilisation of the genealogical method. While it might often be more comfortable to know who and what is 'bad' and who and what is 'good', there simply is no 'axis of evil', except where such a label is 'objectively' conferred. The project of continually questioning hegemony and the damage (exclusion and marginalisation) resultant in the use of norms is the normative aim. What becomes important is not *what* to resist because all

¹⁷³ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted THE JUDITH BUTLER READER, 355 (Sara Salih ed., 2004).

¹⁷⁴ CHRIS JENKS, CHILDHOOD, 3 (2005): 'It is as if the basic ontological questions, 'what is a child?' and 'how is the child possible as such?', were, so to speak, satisfactorily answered in advance of the theorising and then summarily dismissed'

¹⁷⁵ During the ten-year drafting process for the CRC, such discussions never took place. See generally SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES' (1992).

¹⁷⁶ Michel Foucault, *The Ethics of Concern for the Self as a Practice of Freedom*, in THE ESSENTIAL WORKS OF FOUCAULT, VOLUME I, 313 (Paul Rabinow ed., 1994).

¹⁷⁷ LADELLE McWHORTER, BODIES AND PLEASURES: FOUCAULT AND THE POLITICS OF SEXUAL NORMALIZATION, 71 (1999).

forms of domination are not identified (or identifiable); rather it is the *method* that is important. The moment one claims what is bad/what is good as *Truths*, (for example 'all children are immature', or for that matter 'all children are mature'), one participates in the process of marginalisation and exclusion. The focus of critical inquiry, as opposed to the discovery of a foundational *Truth*, is an entirely different project. The latter forecloses critical inquiry (as will be argued throughout this thesis regarding the CRC), whereas the former makes continual questioning its premise.

c. Foucauldian/Butlerian Theory Renders Political Action Impossible – How Can One Engage in Politics without Universal Identities?

A third category of critique argues that Butler and Foucault's refusal of identity politics makes collective political action impossible. In this critique, since Foucault and Butler's theories threaten the stability of an identity, they thereby undermine the ability of an identity category to mobilise support. Joan Cocks argues that Foucault's greatest weakness is 'the inability to support any movement that through its massiveness and disciplined unity would be popular and yet powerful enough to undermine an entrenched legal-political arena'.¹⁷⁸ For Nancy Hartsock, Foucault's perspective functions to preclude the possibility of feminist politics which, she claims, is necessarily an identity-based politics grounded in a conception of the identity, needs and interests of women.¹⁷⁹ Similarly, Butler is critiqued for making political movements impossible because of her critique that identity representation is inherently violent.¹⁸⁰ It is argued that one cannot engage in political representation without an identity category.

i. Foucault's Response

Foucault's critique of identity does not deny the reality of identity politics, but rather demonstrates its limitations and dangers.¹⁸¹ Instead of politics based on some perceived essence, Foucault argues that political action can be based on 'creating a new cultural life, or common

¹⁷⁸ JOAN COCKS, *THE OPPOSITIONAL IMAGINATION: FEMINISM CRITIQUE AND POLITICAL THEORY*, 74 (1989). See also Nancy Hartsock, *Postmodernism and Political Change: Issues for Feminist Theory*, in *FEMINISTS INTERPRETATIONS OF MICHEL FOUCAULT*, 44 (Susan Hekman ed., 1996).

¹⁷⁹ Nancy Hartsock, *Postmodernism and Political Change: Issues for Feminist Theory*, in *FEMINISTS INTERPRETATIONS OF MICHEL FOUCAULT* (Susan Hekman ed., 1996).

¹⁸⁰ See for example Nancy Fraser, *Pragmatism, Feminism, and the Linguistic Turn*, in *FEMINIST CONTENTION: A PHILOSOPHICAL EXCHANGE*, 195 (Linda Nicholson ed., 1995).

¹⁸¹ MICHEL FOUCAULT, *HISTORY OF SEXUALITY VOLUME I*, 25, 142 (Robert Hurley trans., 1980).

interest'.¹⁸² Moving beyond identity politics recognises that identities are constructions. This, in turn, increases opportunities for resistance because it allows individuals,

to locate strategies of subversive repetition enabled by those constructions, to affirm the local possibilities of intervention through participating in precisely those practices of repetition that constitute identity and, therefore, present the immanent possibility of contesting them.¹⁸³

In this way the key to political struggle is to fracture the limitations imposed by normalising identity categories.

ii. Butler's Response

According to Butler, feminists should be wary of political representation that requires a uniform idea of women's nature and interests. Simply put, when creating a political category (for example, woman) a movement has constructed what it means to be a woman, and thus defined which women matter, and which women do not. Butler argues that,

[t]he premature insistence on a stable subject of feminism, understood as a seamless category of women, inevitably generates multiple refusals to accept the category. These domains of exclusion reveal the coercive and regulatory consequences of that construction, even when the construction has been elaborated for emancipatory purposes. Indeed, the fragmentation within feminism and the paradoxical opposition to feminism from "women" whom feminism claims to represent suggest the necessary limits of identity politics.¹⁸⁴

Butler argues that the subject woman is neither stable nor distinct, and as such is subject to multiple power relations (race, class, sexuality, and so on).¹⁸⁵ Gender is simply not constituted coherently or consistently in different contexts. By treating white, middle-class, female experiences as universal, feminism alienates women that do fall in this description.¹⁸⁶ As such, feminist identity politics reproduces the harm it seeks to alleviate: that of marginalisation and exclusion. Butler argues that Foucault's work provides feminists with the resources to think beyond the strictures of identity politics. In Foucault's presentation of identity as an effect, Butler sees new possibilities for feminist political practice, possibilities that are precluded by

¹⁸² Michel Foucault, *The Ethics of Concern for the Self as a Practice of Freedom*, in THE ESSENTIAL WORKS OF FOUCAULT, VOLUME I, 114 (Paul Rabinow ed., 1994).

¹⁸³ JUDITH BUTLER, GENDER TROUBLE, 187-188 (1990).

¹⁸⁴ JUDITH BUTLER, GENDER TROUBLE, 4 (1990).

¹⁸⁵ JUDITH BUTLER, GENDER TROUBLE, 3-5, 298 (1990).

¹⁸⁶ Monique Deveaux, *Feminism and Empowerment: A Critical Reading of Foucault*, in FEMINIST INTERPRETATIONS OF MICHEL FOUCAULT, 232 (Susan Hekman ed., 1996).

positions that take identity to be fixed or foundational. One of the distinct advantages of Foucault's understanding of the constituted character of identity is, in Butler's view, that it enables feminism to politicise the processes through which stereotypical forms of masculine and feminine identity are produced.

Butler argues that Foucault's characterisation of identity as constructed does not mean that it is completely determined or artificial and arbitrary. Rather, a Foucauldian approach to identity production demonstrates the role played by cultural norms in regulating how we embody or perform our gender identities. According to Butler, gender identity is simply 'a set of repeated acts within a highly rigid regulatory frame that congeal over time to produce the appearance of substance, of a natural sort of being'.¹⁸⁷ The regulatory power of the norms that govern our performances of gender is both disguised and strengthened by the assumption that gendered identities are natural and essential.¹⁸⁸ Thus, for Butler, one of the most important feminist aims should be to challenge dominant gender norms by exposing the contingent acts that produce the appearance of an underlying 'natural' gender identity.¹⁸⁹ Against the claim that feminist politics is necessarily an identity politics, Butler suggests that,

[i]f identities were no longer fixed as the premises of a political syllogism, and politics no longer understood as a set of practices derived from the alleged interests that belong to a set of ready-made subjects, a new configuration of politics would surely emerge from the ruins of the old.¹⁹⁰

Butler envisages this new configuration of politics as an anti-foundational coalition politics that would accept the need to act within the tensions produced by contradiction, fragmentation and diversity.¹⁹¹ Butler has argued that the notion of universality is based on foreclosure: there must be something that is not included within the universal.¹⁹² She notes, however, that universality is a discourse that can and must be driven into crisis again and again by the foreclosures that it makes.¹⁹³ In this way, the discourse is forced to rearticulate itself.¹⁹⁴ The process of universality is made open-ended by being brought into crisis again and again by what is outside of itself.

¹⁸⁷ JUDITH BUTLER, *GENDER TROUBLE*, 33 (1990).

¹⁸⁸ JUDITH BUTLER, *GENDER TROUBLE*, 43 (1990).

¹⁸⁹ JUDITH BUTLER, *GENDER TROUBLE*, 9 (1990).

¹⁹⁰ JUDITH BUTLER, *GENDER TROUBLE*, 149 (1990).

¹⁹¹ JUDITH BUTLER, *GENDER TROUBLE*, 20 (1990).

¹⁹² Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted *THE JUDITH BUTLER READER*, 340 (Sara Salih ed., 2004).

¹⁹³ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted *THE JUDITH BUTLER READER*, 340 (Sara Salih ed., 2004).

¹⁹⁴ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted *THE JUDITH BUTLER READER*, 340 (Sara Salih ed., 2004).

Universality then would not be violent or totalising. Butler argues that the task of politics would be to keep the process of universality open, to keep it as a contested site of persistent crisis, and to not let it be settled.¹⁹⁵ Butler contends that,

the open-endedness that is essential to democratisation implies that the universal cannot be finally identified with any particular content, and that this incommensurability (for which we do not need the Real) is crucial to the futural possibilities of democratic contestation.¹⁹⁶

Admittedly, this criticism of Butler and Foucault seems to this author to have the greatest merit, though does not for this author defeat the efficacy of their theories. Foucault and Butler rightfully argue that a group of persons do not need to share a common essential identity. Rather, all that is necessary are shared interests. Compromise will always result, whether at the point of constructing a universal identity (compromises are made in the defining of an identity category, the *Travaux Préparatoires* of the CRC demonstrates this quite well, as is discussed in Chapter 6 and 7)¹⁹⁷ or at the determination of common interests.¹⁹⁸ So then why is essential identity required, when we are quite aware of difference even within a category? It seems that there is this understanding that an essential united identity postured against some essential united form of domination, yields one the floor, yields one the space to have a voice, or as Butler has said 'you've achieved recognition, status, legitimation; and that is the end of your struggle . . . becoming sayable is the end of politics'.¹⁹⁹ Dianne Otto has argued that by not 'seeking and maintaining unity at all costs against monolithic understandings of domination', a coalition relies on the possibility of dialogue across vast differences in power and knowledge.²⁰⁰ In this way, her concept of coalition gives up 'the desire and the apparent safety of certainty and prescription', as well as arguably at least some political purchase, and learns 'how to live and act so that differences and incommensurabilities can inform and contest the practices of individual identities

¹⁹⁵ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted THE JUDITH BUTLER READER, 340 (Sara Salih ed., 2004).

¹⁹⁶ Sara Salih ed., THE JUDITH BUTLER READER, 272 (2004).

¹⁹⁷ During the drafting of the CRC, one of the longest debates that took place pertained to the definition of the category 'child'. The issue revolved around whether the foetus would be protected by the CRC. A resolution was reached by not including the foetus specifically in Article 1, though also not specifically excluding the foetus ('a child means every human being below the age of eighteen years'). The Preamble however states that the child 'needs special safeguards . . . before as well as after birth'. See SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 102 (1992).

¹⁹⁸ Another discussion took place on the issue of whether female genital alteration should be included specifically in Article 24(3). It was ultimately accepted that girls face practices that affect their health more than just female genital alteration. See SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 352 (1992).

¹⁹⁹ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted THE JUDITH BUTLER READER, 337 (Sara Salih ed., 2004).

²⁰⁰ Dianne Otto, *Sexualities and Solidarities*, 8 AUSTRALIAN GAY AND LESBIAN LAW JOURNAL 27, 34 (1999).

and collective solidarities'.²⁰¹ While Butler acknowledges that she could only see the violent and exclusionary character of universality in *Gender Trouble*, she has 'become more convinced in recent years that there is an open-ended sense to universality that can be affirmed'.²⁰² Butler argues that universals can be affirmed in to far that they are 'empty' when they are said, but given meaning when applied and redeployed in way that cannot be fully anticipated.²⁰³

What the refusal to accept an 'essential' and 'natural' identity category does is this: by acknowledging that categories are not natural and are exclusionary, categories are more open to evolve and change because they are *more open* to criticism. The CRC is a perfect example of how the fiction of a universal and natural category (child) forecloses critical inquiry about *whose interests* are being represented and along *what political lines*. By insisting that the CRC represents the essential universal child as opposed to the interests of those, in particular states and adults, who have deeply political aims, the CRC evades the interrogation of how those interests are manifested. Again, it is noteworthy that the category child has thus far not been allowed to form a political identity of their own.

III. CONCLUSION

This chapter sought to outline and justify the theoretical method to be employed throughout this thesis. Further, this chapter sought to explore Foucault and Butler's theoretical perspectives on identity and forecast their relevance to the identity category 'child'. This chapter has argued that these perspectives on identity are useful to unpacking the ways in which the child is constructed in the CRC. Given the discussion in the previous chapter on how dominant discourses about the child, including the CRC, forever assume that an essential, 'natural' child does indeed exist, these theoretical perspectives allow us to take a step back to examine the ways in which the CRC deploys this fiction (of a universal natural child). This theoretical lens enables us to begin to query the existence of a universal child, and to begin to critically examine the operation of 'truth' and power in the CRC, an examination that has largely been foreclosed by the appearance and assumption of a 'natural' child. By disturbing the existence of a universal child, one is able to query what is made possible, and who is excluded, by the CRC's particular vision of the category 'child'.

²⁰¹ Dianne Otto, *Sexualities and Solidarities*, 8 AUSTRALIAN GAY AND LESBIAN LAW JOURNAL 27, 34-35 (1999).

²⁰² Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted THE JUDITH BUTLER READER, 339 (Sara Salih ed., 2004).

²⁰³ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted THE JUDITH BUTLER READER, 339 (Sara Salih ed., 2004).

Section I explored Foucault and Butler's theories of 'truth/knowledge/power, binary oppositions, governmentality, and genealogies to aid in the understanding of how certain identities become understood as 'natural'. Section II explored the three major critiques of Foucauldian/Butlerian theory, namely that it: 1) kills the subject, 2) lacks a normative framework, and 3) renders political action impossible. Section II explored Foucault and Butler's response to these criticisms, including commentary by this author. Ultimately it was argued that whatever criticism laid against this theoretical lens could not only be theoretically overcome, but more importantly the value of agitating 'truths' by exposing relations of power and examining excluded claims to 'truth' was greater than any of the 'problems' created by this theoretical lens. While one might be uncomfortable with uncertainty, exclusion through the creation of fictionalised identities in the name of certainty seems fundamentally problematic.

The theoretical vocabularies developed in this chapter will be applied throughout this thesis to the category 'child'. In particular, Chapter 5 will discuss certain 'truths' about childhood and the various binaries in operation regarding the category 'child'. Chapter 6 will specifically explore the 'truth' posited by the CRC that describes the child as developing. Chapter 7 will examine another 'truth' of the CRC: that the child is always or should always be in 'care'/in a family. Chapter 8 will explore the operation of juridical and disciplinary power in the CRC. Finally, Chapter 9 will engage in a genealogy of the CRC's child. These theoretical tools allow a critical engagement with the CRC. As argued in the previous chapter, dominant discourses surrounding the CRC and the CRC itself uncritically accept not only the existence of a universal child, but also accept a *particular version* of that universal child. The CRC, as an international human rights convention that has almost universal acceptance, is undoubtedly important as one of the most prominent and authoritative discourse on the rights of the child. Stepping back to critically examine the CRC's vision of the category 'child' enables assessment of a set of fundamental questions: 1) 'what is a child?', 2) 'how is the CRC's acceptance of a particular child possible?', 3) 'how is the denial of what has been identified as *fundamental* rights possible?', and 4) 'what are the hierarchical oppositions upon which the CRC grounds itself?', and 5) 'how can we reverse these hierarchy to expose the privilege status of one of the binary oppositions as an illusion (and rather mutually dependent)?'.

Before applying the theoretical method laid out in this chapter to the category 'child', the next chapter (Chapter 4) examines other categories that have been separated from the human family for their own international human rights document. The purpose of doing so is to discern the

ways in which children are constructed as 'fundamentally different' from all other categories of humans, even those who are also identified as vulnerable, disempowered, unequal, and in some instances also possessing less than 'normal' capacity. Chapter 4 will argue that the law's different treatment of the category 'child' reflects not some sort of inherent difference of childhood, but rather reflects and upholds the adult – child binary, where adults are presumed capable and children incapable.

CHAPTER 4

RIGHTS FOR CHILDREN VS. RIGHTS FOR OTHER 'SPECIAL' CATEGORIES: INVESTIGATING A BASIS FOR DIFFERENTIAL TREATMENT

OUTLINE

- I. REMEDIES FOR INEQUALITY, DISEMPOWERMENT, AND VULNERABILITY – CEDAW and CRPD
 - a. Why Are These Groups Separated from the Human Family?
 - b. How are the Reasons for Separation Addressed in the Context of CEDAW and CRPD?
 - c. What are the Implications for the Rights of the Child?

- II. REMEDIES FOR CHANGING CAPACITY – ELDERHOOD
 - a. Why Are These Groups Separated from the Human Family?
 - b. How are the Reasons for Separation Addressed in the Context of UNPOP?
 - c. What are the Implications for the Rights of the Child?

- III. CONCLUSION

Chapter 2 argued that dominant perspectives about children's rights and the vision of the 'child' articulated in the CRC assume that there are 'natural' or 'essential' characteristics to the category 'child'. The disagreement over whether the CRC captured the 'true' child has not led to fundamentally questioning whether such a 'true' child exists. Chapter 3 built on some of the critiques of the CRC explored in Chapter 2 that reject the knowability of the category 'child' and focus instead on the lines of power enabled by casting the 'child' as immature, dependent, and developing. Chapter 3 outlined a Foucauldian/Butlerian theoretical perspective that aims to agitate the appearance of a 'unitary' and 'natural' identity category. Before this theoretical perspective is applied to the category 'child' in the CRC, this chapter seeks to briefly examine how international law treats other identity categories that have also been singled out from the human family as in need of 'special' attention, in other words given their own international human rights document. This chapter examines the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW),¹ the *Convention on Rights of Persons with Disabilities* (CRPD),² and the *United Nations Principles on Older Persons* (UNPOP),³ comparing these instruments to the CRC. This chapter argues that no other international human rights document characterises the problems faced by an identity category as resulting exclusively from the category's 'biological' or 'inherent' difference, in contrast to socially constructed difference. Further, no other category of persons is required to relinquish certain fundamental rights as the remedy for such difference. Put another way, no other 'vulnerable' identity category is constructed as wholly biologically immature/incapable, with the consequence that they turn over certain fundamental rights to another identity category (adults/parents).

CEDAW, CRPD, and UNPOP mention, to varying degrees, the role that social construction and social discrimination play in making the categories 'woman', 'person with disability', and 'elder' vulnerable, dependent, and unequal. Even when these international instruments contemplate their subject as 'inherently' less capable/immature (particularly elderhood), the remedies for such incapacity (in other words, the rights) aim to enhance respect for autonomy and increasing participation.⁴ This is in sharp contrast to the CRC's requirement that the child surrender her or his autonomy rights until the child can demonstrate to adults her or his maturity, an exercise no other identity category is required to perform. It would seem that where conceptions of social

¹ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S.13.

² International Convention on the Rights of Persons with Disabilities, May 3, 2008 G.A. Res. A/RES/61/106.

³ United Nations Principles for Older Persons, Dec. 16, 1991, G.A. Res. A/RES/46/91, <http://www.un.org/documents/ga/res/46/a46r091.htm>.

⁴ This thesis will not address the issues involved with the implementation of these conventions, or other such critiques. This chapter will only examine the discourse used in the text of these conventions as they relate to the questions asked in this chapter. The author is aware that these conventions and principles are not in themselves unproblematic.

discrimination in the case of women, persons with disabilities, and elders result in international documents that aim to shore up autonomy and participation, 'biological' immaturity/incapacity yields a convention that requires the subject to relinquish the subject's autonomy to an entirely different person, to an entirely different category of persons. Yet, to the extent that persons with disabilities or elders are constructed as biologically immature/legally incapable, neither CRPD nor UNPOP require their respective subjects to relinquish autonomy, as done in the CRC.

This chapter argues that a comparison of CEDAW, CRPD, and UNPOP with the CRC reveals that the unique requirement for children to surrender their autonomy rights in the CRC makes 'sense', not because of some unique or inherent difference of children (in other words, a period of changing maturity/capacity, dependency, lack of maturity/capacity) as compared to adults. Rather, the unique allocation of rights makes 'sense' only within the regulatory framework that adopts the adult/capable – child/incapable binary opposition, which is more thoroughly discussed in the next chapter. What is made possible through this construction of the child-as-incapable/immature/dependent is not the protection of the child's autonomy and participation, as done with all other identity categories, or in some cases even the protection of the child her or himself.⁵ Instead, vulnerability and dependency are made markers of childhood. This chapter concludes that in offering children 'special assistance' to address the 'special' problems of childhood, the CRC alters the rights of the child in ways that would be unimaginable for all other (human) identity categories. The argument that children will simply grow up, or that adults never have to fear returning to childhood, should not be barriers to the agitation of the construction of the category 'child' and thus the hierarchy of power in the CRC.

To compare CEDAW, CRPD, and UNPOP to the CRC, this chapter will engage in a textual analysis and will examine these four identity groups with the following questions in mind: 1) why are these groups separated from the human family?, 2) how are the reasons for separation addressed in the respective documents?, and 3) what are the implications for the rights of the child? It should be noted that dominant discourses surrounding the 'child', including the CRC, maintain that there is no analogy between the category 'child' and other oppressed social groups. Onora O'Neill argues that even the extension of human right to children is illusory because doing so exaggerates the analogies between children's dependence and the dependence of other

⁵ Certainly there are instances where the child's protection is provided for in the Convention, but there are also instances when the child's protection is sacrificed for the protection of parental rights or the state's rights. See Chapter 9 for further discussion.

oppressed social groups.⁶ O'Neill assumes some inherent 'difference' of childhood versus that of adulthood, without justifying such a differentiation.⁷ Again this thesis is not arguing that children *should* be treated as adults. Rather, this thesis is querying the foundations that lurk beneath the highly political belief that children *should not* be treated as adults. Section I aims to compare both the 'problems' identified and the remedies suggested in CEDAW and CERD with those found in the CRC. Section II compares conceptions of elderhood in UNPOP with conceptions of the child in the CRC. Elderhood, this paper argues, is constructed similarly to childhood as a period of changing (declining as opposed to increasing) capacity. However, the rights and remedies proffered are vastly different.

I. REMEDIES FOR INEQUALITY, DISEMPOWERMENT, AND VULNERABILITY – CEDAW AND CRPD

This section will focus on the discourses of 'inequality', 'disempowerment' and 'vulnerability' in CEDAW and CRPD, as compared to the CRC. The preambles of the conventions will constitute a focus as this chapter examines the 'stories' told in the various conventions about why these groups have unique 'problems' and how these problems should be addressed. It is the view of this author that the preambles best 'tell the stories' about the subject of a convention, considering the aim of a preamble is to contextualise the focus and purpose of a convention.⁸

a. Why Are These Groups Separated from the Human Family?

The question 'why are these groups separated from the human family' aims to inquire, in basic terms, what is deemed 'wrong' with these groups sufficient to require a separate human right convention. Why is separation or 'special treatment' required? In the Preamble of CEDAW, women are deemed to warrant special treatment because of the extensive discrimination against them, and because discrimination adversely affects women's full and equitable participation in

⁶ Onora O'Neill, *Children's Rights and Children's Lives*, in CHILDREN'S RIGHTS-RE-VISIONED, 39 (Rosalind Ekman Ladd ed., 1996).

⁷ See also SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 29 (1992). Detrick argues that, 'global human rights instruments were not drawn up with children in mind, that they have been developed over a period of decade, and that as a whole they therefore contain a number of inconsistencies and certainly do not reflect current knowledge and experience with regard to children's issues. But in addition . . . is the usefulness for promoting knowledge and understanding of children's issues.'

⁸ Vienna Convention on the Law of Treaties, Article 31(2), May 23, 1969, 1155 U.N.T.S. 331: 'The context for the purpose of the interpretation of a treaty shall comprise in addition to the text, including its preamble and annexes.' See also IAN MCTAGGART SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES, 128 (1984): '[T]he preamble is the normal place in which to embody, and the natural place in which to look for, an express or explicit general statement of the treaty's objects and purposes,' citing Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and other Treaty Points*, 33 BRITISH YEARBOOK OF INTERNATIONAL LAW 203, 228 (1957).

society.⁹ CEDAW notes that in situations of poverty women usually live in worse conditions as they have the least access to that which is necessary for survival.¹⁰ CEDAW's Preamble also states that the contribution made by women to the welfare of the family and the development of society has yet to be fully recognised.¹¹ In sum because of certain views about women, women are vulnerable to discrimination, which has severe adverse impacts on women's participation and livelihood.

The Preamble of the CRPD outlines many of the reasons why persons with disabilities are deemed vulnerable. Persons with disabilities face 'multiple or aggravated forms of discrimination'.¹² The CRPD also states that the majority of persons with disabilities live in conditions of poverty,¹³ and notes that despite the current human rights regime, 'persons with disabilities continue to face barriers in their participation as equal members of society and violations of their human rights in all parts of the world'.¹⁴ Additionally, CRPD underlines an important point in the Preamble. In paragraph (e) the Preamble states:

disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.

It seems that this paragraph is hedging against the idea that 'disability' is purely a result of some biological condition.¹⁵ This paragraph argues that it is rather how certain conditions (for example, blindness) are viewed and thus provided for by society (for example, stop lights that also have an accompanying sound that indicates when to proceed across a street). In CRPD it is

⁹ See for example, the Preamble of CEDAW states: 'Concerned, however, that despite these various instruments extensive discrimination against women continues to exist'; 'Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity'; 'Aware that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women'.

¹⁰ 'Concerned that in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs'.

¹¹ 'Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognised, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole'.

¹² (p) 'Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status'.

¹³ (i) 'Highlighting the fact that the majority of persons with disabilities live in conditions of poverty, and in this regard recognising the critical need to address the negative impact of poverty on persons with disabilities'.

¹⁴ Preamble.

¹⁵ See for example Michael Ashley and Janet Lord, *Future Prospects for the United Convention on the Rights of Persons with Disabilities*, in THE UNITED CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES: EUROPEAN AND SCANDINAVIAN PERSPECTIVES, 25-26; 31-39 (Gerard Quinn & Oddny Mjoll Arnardottir eds. 2008).

not some inherent biological state that impairs an individual from participation and equal rights, rather social views about certain physical, mental or emotional traits, that impair persons with disabilities participation and enjoyment of equal rights. Both CEDAW and CRPD focus on the ways in which society discriminates against both women and persons with disabilities and how that discrimination affects their full, effective, equal participation and enjoyment of equal rights.

The Preamble of the CRC, on the other hand, states that the special treatment of children is necessitated 'by reason of [the child's] physical and mental immaturity'. The CRC's Preamble also notes that there are children living in exceptionally difficult conditions. What may be more interesting, however, is what is omitted from the CRC's Preamble. Although the Preamble mentions that everyone is entitled to the rights of the CRC without distinction of any kind and that all 'members of the human family' enjoy 'equal and inalienable rights,' the CRC neither explicitly mentions that the child in particular enjoys equal or full rights to other identity categories, nor does it mention that children suffer from exceptional discrimination based on their status as a 'child'.¹⁶ The aim of the CRC, one could argue, is not towards protection of the children's claim to equal rights (in other words, equal rights as compared to the rights given to adults) and freedom from discrimination (in other words, freedom from discrimination based on their status as 'children').¹⁷ The CRC does not mention any social barriers that children experience that inhibit their full participation. Rather, the CRC mentions only the child's (physical and mental) immaturity. If not equal rights and full participation, what does the CRC guarantee children, now that the CRC has identified children as biologically and essentially immature? As will be argued throughout this thesis, the CRC guarantees dependency and vulnerability as markers of childhood.

¹⁶ Interestingly, the issue of discrimination on the basis of age is viewed as beyond discussion. One of the academics that makes the argument that children should not be discriminated against as an identity category relates to corporal punishment: 'Article 2 forbids justifying corporal punishment of children just because they are children'. See Angela Bartman, *Spare the Rod and Spoil the Child? Corporal Punishment in Schools around the World*, 13 INDIANA INTERNATIONAL & COMPARATIVE LAW REVIEW 283, 293 (2002). Such a reading is rarely employed, and would have clear impact on a number of articles in the CRC that enable the differential treatment of children.

¹⁷ Meaning that while a state cannot discriminate based on race or gender for example, it may do so on the basis of age. In this way, the state may discriminate against all children, but may not discriminate among children. Many international children's right scholars agree that the law should treat the child differently, based on the idea that children are fundamentally different and thus require different protections and rights altogether. See for example Geraldine Van Bueren, *Article 40: Child Criminal Justice*, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, 19 (Andre Alen et al. eds. 2006); Bruce Abramson, *Article: 2. The Right of Non-Discrimination*, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, ix (Andre Alen et al. eds. 2006); (The author does not recognize the differential treatment of children as a form of discrimination. The authors states 'generally speaking, people understand that human rights include children. In addition, because of their particular position, children have been given special provision; the CRC can be considered *lex specialis* with regard to the Universal Declaration of Human Rights'. Emphasis added.); Herdis Thorgeirsdottir, *Article 13: The Right to Freedom of Expression*, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, 4 (Andre Alen et al. eds. 2006): 'Affording children this right [to expression] in a special instrument in addition to the other instruments that do not distinguish between children and adults in being holders of this right, is a recognition of the significance of children acquiring cognitive, emotional, social, and moral competencies absorbing influence from the environment and expressing their reaction, opinions, and sentiments'.

b. How are the Reasons for Separation Addressed in the Context of CEDAW and CRPD?

CEDAW's Preamble envisions certain entitlements to rectify discrimination and to remedy its adverse effects. Women are repeatedly granted 'full equality with men': worded as 'equality of rights of men and women' two times, 'full enjoyment of rights of men and women,' and 'equal rights of men and women'. 'Equality' and 'equal rights' of men and women are mentioned at least eight times in the Preamble alone. In the realisation of this equality women are entitled to have 'maximum participation of women on equal terms with men in all fields'. Further, according to CEDAW's Preamble, the traditional roles of men and women are to be changed, and even a 'new international economic order based on equity and justice' is to be established with the goal of promoting equality between men and women. The Preamble states that women are entitled to the elimination of discrimination 'in all its forms and manifestations'. Interestingly, CEDAW's Preamble states that the 'full and complete development of a country' and even the 'welfare of the world and the cause of peace' require the maximum participation of women on equal terms with men'. It seems that even larger goals that exist beyond of the goal of women's equality depend upon women's participation. As such, it seems that according to CEDAW's Preamble the equal participation is almost a dire requirement for humanity. While many articles could be examined beyond the Preamble, it is already apparent that the evident focus of CEDAW is on enabling equality and participation, as compared to men, through addressing the ways in which society discriminates against women.¹⁸

The Preamble of the CRPD states that persons with disabilities are entitled to: 1) the full enjoyment of human rights (not just those mentioned in the CRPD)¹⁹, 3) full protection, 3) freedom from discrimination, 4) full participation (mentioned twice), 'including [for] those who

¹⁸ This chapter is not arguing that CEDAW is unproblematic. Indeed many have argued very similar critiques of CEDAW. Mackinnon inquired whether separating the category 'woman' (in CEDAW) from human rights discourse makes women's rights non-human. See CATHERINE MACKINNON, *ARE WOMEN HUMAN?: AND OTHER DIALOGUES* (2006). Many others have argued that the universalisation of the category woman has further marginalised those who do not fit into CEDAW's normative framework of what it means to be a woman (much like what is being argued here regarding children). See generally Dianne Otto, *Discovering 'Masculinities': Reinventing the Gendered Subject(s) of International Human Rights Law*, in *INTERNATIONAL LAW: MODERN FEMINIST APPROACHES* (Doris Buss and Ambreena Manji eds., 2005 BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* (1981); Janet Halley, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 *MICHIGAN JOURNAL OF INTERNATIONAL LAW* 1 (2008). Nonetheless it is argued here that while the category 'woman' has been heavily criticised, similar critiques of the child, in the context of law, have little footing.

¹⁹ While the Preamble states that the UNDR and other international covenants on human rights apply to everyone, Article 41 of the CRC states that 'nothing in the present Convention shall affect any provisions which are more conducive to the realisation of the rights of the child and which may be contained in: (a) the law of a State party; or (b) international law in force for that State'. The statement 'more conducive to the realisation of the rights of the child', is interesting, if not utterly confusing. Indeed the relationship of other human rights found in other conventions was considered by some during the drafting of the CRC as unclear SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 130 (1992).

require more intensive support', 5) individual autonomy and independence with the ability to freely make their own choices, 6) the opportunity to be actively involved in decision-making processes, even those that do not directly affect them, 7) assistance provided by the state to both the family and the disabled person for the full enjoyment of the disabled person's rights, and 8) protection of rights and dignity of the person with disability with the aim to help address the profound social disadvantages they face. Further, CRPD's Preamble states that, states should equalize opportunities for persons with disabilities and notes the importance of mainstreaming disability issues. Similar to CEDAW, the Preamble of CRPD also states that the promotion of human rights and of full participation of persons with disabilities will result not only in their enhanced sense of belonging, but also will result in 'significant advances in the human, social and economic development of society and the eradication of poverty.' As with CEDAW, it seems that not only do persons with disabilities benefit for their own participation, but also their participation benefits society as well. The focus in the CRPD appears to be on enabling equality and participation of persons with disabilities. Though the barriers to realising equality and participation for women and persons with disabilities may differ, and therefore are addressed in different ways, the aim of both CEDAW and CRPD appears to be promoting equality and full participation.

c. What are the Implications for the Rights of the Child?

If children are not deemed a special group because they experience social discrimination by virtue of being categorised a 'child', then why separate them from the human family? According to the CRC, children are separated from the human family, not because of social discrimination, but rather because of their own 'physical and mental immaturity'. Although future emancipation is the envisioned goal of childhood,²⁰ the immediate practical result of the rights package conferred on the category 'child' is that inequality, vulnerability, and disempowerment are not 'corrected' by making children a special category in the CRC; rather they are rather reinforced. This entrenchment of inequality, vulnerability, and disempowerment is accomplished by a variety of means in the CRC, five of which will be discussed here.

First, the Preamble of the CRPD, CEDAW, and the CRC recognise full entitlement to the rights and freedoms 'in the Universal Declaration of Human Rights and in International Covenants on Human Rights' without distinction of any kind. While the CRC states that discrimination is

²⁰ Preamble: 'Considering that the child should be fully prepared to live an individual life in society'. See also Berry Mayall, *Values and Assumptions Underpinning Policy for Children and Young People in England*, 4(1) CHILDREN'S GEOGRAPHIES 9, 11 (2006); Catherine McDonald, *The Importance of Identity in Policy: The Case For and Of Children*, 23 CHILDREN & SOCIETY 241, 247 (2009).

prohibited on the grounds of 'the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status',²¹ the child is not specifically protected from discrimination on the basis of her/his status as a 'child' in the CRC.²² Both the CRPD²³ and CEDAW²⁴ explicitly prohibit discrimination on the basis of disability and gender respectively. The CRC does not explicitly prohibit discrimination on the basis of 'maturity'. Moreover, in the CRC, the word 'equal' is mentioned only once²⁵, and then only in relation to all members of the 'human family', never specifically with regard to the child. In contrast, the CRPD and CEDAW both underline the importance of equality numerous times. The implication appears familiar: children are not entitled to such equality during the period of childhood.

Second, the child's delayed participation contrasts with calls for the woman's 'maximum' participation and the persons with disabilities' 'full' participation. It is interesting that while the CRPD contemplates that certain persons with disabilities may be more vulnerable to discrimination because they may require more support, the CRPD does not then require its subject to give away her or his autonomy. Rather, the CRPD reaffirms the need to protect and assist the person with disability's right to autonomy in light of the possibility of discrimination in the course of dependence. Such autonomous participation is simply not conceived for children in the CRC. For example during the drafting of Article 12, it was roundly accepted that the child should only be given the right of participation in matters that affected the child and only as the child matured.²⁶ The debate focused on in *what* instances the child should have the right to participate, conditioned upon the adult's determination of the child's maturity, not whether qualified participation was either fair or appropriate.²⁷ While Article 12 gives a child the right to

²¹ The nebulous 'other status' leaves open the possibility for the age category 'minor' to be a status for discrimination, although this has not been interpreted as such to date.

²² It is noteworthy that in Bruce Abramson, *Article: 2. The Right of Non-Discrimination*, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (Andre Alen et al. eds., 2008), the issue of discrimination against the category 'child' is not addressed. Also the *Travaux Préparatoires* is silent on this issue SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 141 (1992). Discrimination based on one's status as a 'child' seemingly does not necessitate discussion.

²³ CRPD Preamble: 'Recognizing also that discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person'.

²⁴ Article 1 of CEDAW states, '[f]or the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field'.

²⁵ The Preamble states that, 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.

²⁶ SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 224-228 (1992).

²⁷ It was eventually decided, in 1989, that the child, if deemed at the appropriate level of maturity by an adult, should have a say in all matters affecting the child. Notably, Article 12 of the CRC places two conditions on the child's ability to participate 1) that the child is determined to have a requisite maturity, and 2) that the matter is determined to directly affect the child.

participate, the overriding assumption remains that children should have a very limited right to participate, at least as a starting point. This point is further made clear in the next section, as well as in Chapters 6 and 7.

Third, the role of the family in the CRC as compared to the CRPD is noteworthy. Like the CRC, the CRPD envisions a person with disability to be in the care of the family.²⁸ The CRPD Preamble states that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the state'. The CRC states that 'the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance'. Though both conventions describe the family as fundamental, they feature divergent conceptualisations of how the family functions within the rights matrix of each category. The CRC identifies only the family unit as entitled to assistance and protection, whereas in the CRPD both the person with disability and the family are given protection and assistance. In the CRC the purpose of conferring assistance and protection to the family is to enable '[the family to] fully assume its responsibilities within the community,' making the child more of an object of law, rather than a subject. The child will only become a full subject (with the right to participate and the right to equality before the law), according to the Preamble, after the duration of childhood.²⁹

Arguably, CRPD's aim, even within the family context, is to ensure the full and equal rights of the person with disability. This is in contrast to the CRC's conception of assistance to the family as a means of preparing the child for eventual enjoyment of their rights. There is no mention of the family being given assistance and protection contingent on a mandate to help the child realise her or his full and equal rights, as done in the CRPD. The focus for family care is rather ensuring the 'full and harmonious development of [the child's] personality', by necessitating the delay in the attainment of full and equal rights for children.³⁰ The Preamble of the CRC, by turn,

Neither of these conditions is placed on any other category of humans. See generally SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 224-228 (1992).

²⁸ CEDAW too envisions a woman as being a part of a family. Nonetheless, a women's maternal role or biological difference are not to affect her equal status within the family or at home. The Preamble of CEDAW states that, '[b]earing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognised, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole'.

²⁹ '[T]he child should be fully prepared to live an individual life in society'. According to Article 5, the child too may acquire adult rights as the child demonstrates (to adults) his or her evolution into maturity. This will be discussed further in Chapters 6 and 7.

³⁰ Berry Mayall, *The Sociology of Childhood in Relation to Children's Rights*, 8 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 243, 243-244 (2000). Regarding the idea that the focus of childhood always regards the future person/adult as opposed to the present person/child, see generally ALLISON JAMES, CHRIS JENKS, AND ALAN PROUT, *THEORISING CHILDHOOD* (1998); ERIC ERIKSON, *CHILDHOOD AND SOCIETY* (1977).

grants children: 'special care and assistance,' 'particular care,' 'special safeguards and care'. The child's vulnerability, immaturity, and dependence as a result of being inherently 'immature', are remedied in the CRC through 'care'. 'Care' translates into the child's 'right' (or requirement) to grow-up in a family environment, which as will be argued in Chapter 7, results in the child being subject to the hierarchical structure of the family. Though this will be discussed more thoroughly in Chapter 7, 'care' in the CRC translates into a requirement that certain adults exercise the child's autonomy on behalf of the child. The net result is that the child's immaturity, dependence, and vulnerability are remedied by providing the child with care, which in the CRC's view necessitates the child relinquishing, to a large extent, autonomy rights in exchange for rights that are deemed more appropriate for children (for example, right to play, right to care). Chapters 6 and 7 expand this discussion.

Fourth, to underscore the difference in how these conventions treat their subject, it is important to note that in the Preambles of the CRPD and CEDAW, persons with disabilities and woman are given responsibilities and duties to their community and other individuals. Children, in contrast are envisioned as being incapable of having duties and responsibilities³¹ due to their 'physical and mental immaturity'. Only adults hold responsibilities in the CRC.³² Finally, while CEDAW and CRPD urges that not only will their respective subjects benefit from their participation and full enjoyment of human rights, but so too will society. Indeed, CEDAW and CRPD arguably cast society's future (its development, process) as dependent upon such participation and enjoyment. In contrast, the CRC seems to present the idea that deferring certain human rights for the period of childhood benefits not only children (protects children from their own 'physical and mental immaturity' by offering 'special assistance'), but also benefits society as the child is currently not 'fully prepared to live an individual life in society' and does not yet know 'the ideals proclaimed in the Charter of the United Nations'.³³ It seems that society and the category 'child' require this period where children must have limited and qualified set of rights ('care', 'assistance' and so on as mentioned in the previous paragraph). Chapter 8 discusses how childhood becomes a site of regulation, a period where the child is disciplined into what it means to be a child according to the CRC. That moulding process, in other words turning children into productive citizens, is what benefits not only children but also society.

³¹ The child's inability to have responsibilities and duties was not discussed during the drafting of the CRC. The child's immaturity and thus incapacity must have been too obvious to debate. SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'* (1992).

³² The Preamble refers to the family as having responsibilities, Article 5, for example, states that parents have responsibilities, but nowhere does the CRC speak about the child as having responsibilities.

³³ Preamble.

In sum, the litany of difference in rights envisioned for and conferred upon subjects of CEDAW and CRPD versus the subjects of the CRC could highlight an alternative, non-emancipatory reading of the CRC, where children suffer: discrimination on the basis of age, delayed participation, subordination in the family context (to parents), and a lack of recognised duties or responsibilities. In contrast to the normative aims of the CEDAW and CRPD, in support of other 'vulnerable' categories, it would appear that goals such as assistance towards participation, equality, and freedom from discrimination by virtue of being a 'child' are not the aim of the CRC. The aim is rather assistance into the context of the family and 'care', which, as will be further discussed in Chapter 7, can result in limited participation and inequality. In the context of the category 'child', it would appear that differential treatment is viewed as eminently acceptable because children are 'fundamentally different'. Fundamental difference is a worryingly familiar claim. Bob Franklin argues that,

it is clear that the case for the exclusion of different groups from full political rights has never been cogently argued and could withstand no more than cursory examination. Political history is littered with examples: women, property-less, black, and slaves have all been the victims of common sense. It was argued that women lacked the rationality, judgment and knowledge of the political world necessary to exercise the obligations of citizenship, which those without property had proven their inability to direct their own affairs by their very property-less-ness. In democratic societies the presumption must always be against exclusion, and the burden of proof must rest with those who propose to disfranchise.³⁴

While many argue that there is limited or no analogy between the critiques of other human categories and the category 'child', it is nonetheless notable how many times the 'biological' differences in 'rationality, judgment and knowledge' between children and adults been cited, most notable in the Preamble of the CRC. Yet, as the previous chapter examined, that which is perceived as 'facts', in this case about childhood, are but one story or version of childhood (see Chapters 5, 6, and 7 for further discussion). The CRC's requirement of dependency and vulnerability for childhood also makes 'sense' when viewed through the lens of power, through the adult – child binary, explored in the next chapter. An examination of how international discourse views elderhood further makes this point.

II. REMEDIES FOR CHANGING CAPACITY – ELDERHOOD

³⁴ BOB FRANKLIN, *THE RIGHTS OF CHILDREN*, 26 (1986).

The issue of capacity is central to a discussion about children's rights, as discussed in Chapter 2. The internal 'problem' children possess is the child's inherent lack of maturity, and thus legal capacity. While the issue of capacity has been challenged in the context of gender and in a post-colonial critique of rights, capacity nonetheless remains central to the discussion of children and their rights. Section I drew an analogy between the rights given to women, persons with disabilities, and even elders, groups constructed as 'vulnerable', 'disempowered', and 'unequal'. Elderhood, however, provides a further basis for comparison with childhood. Elderhood, in contrast to adulthood and more like childhood, is a period in which an adult is perceived as having varying capacity, as opposed to static capacity.³⁵ Despite similarities in how the law constructs the capacity of children and the capacity of elders, this section argues that incapacity for children yields the relinquishment of autonomy rights, whereas incapacity for elders results in greater respect for autonomy rights. If varying capacity is at issue with both of these categories, why does the law treat these two categories differently? This section posits that the law's differential treatment of these two categories reflects not some inherent difference of childhood, but rather the CRC's adherence to the adult – child binary (discussed in the next chapter), where adults are presumed capable and children incapable. The adult – child binary upholds the hierarchical position of the adult over the child, despite the law's own contradictory position on capacity as it relates to the child and the elder.

Two broad similarities can be identified when comparing childhood and elderhood: 1) both are a temporary state and 2) all persons at one point in their life can reasonably expect to fall into these identity categories. These congruencies give further insight into the political forces that come into play in the CRC's construction and treatment of the category 'child'. Elderhood, like childhood, is a definitive period of time; a person has not always been an elder. While all adults have been a child, a large number of adults will become an elder (or at least expect to become an elder). Though similar in their temporal nature, childhood and elderhood fall at distinguishable periods in a lifecycle. Children will graduate, unlike elders, many persons with disabilities, women. Our savage will be civilised.³⁶ Our child will become an adult. It could be argued that the temporary, yet receding, state of childhood is one of the possible reasons why the subjugation of children is deemed less important. Children will simply grow up.³⁷ The elder will,

³⁵ Jenks notes that, '[i]n the obvious . . . all people 'need' others in order to generate a meaningful environment for change, stasis, or whatever; quite simply we cannot make sense alone. Adults, however, are assumed within social theory to operate with a degree of basic reciprocity of perspectives and interchangeability of standpoints in terms of processes of meaning giving and meaning receiving'. CHRIS JENKS, *CHILDHOOD*, 40-41 (2005).

³⁶ CHRIS JENKS, *CHILDHOOD*, 3 (2005).

³⁷ Onora O'Neill, *Children's Rights and Children's Lives*, in *CHILDREN'S RIGHTS-RE-VISIONED*, 31 (Rosalind Ekman Ladd ed. 1996).

however, remain an elder for the rest of his or her life. Further, most adults will eventually enter elderhood, adults will never again return to childhood. This section will suggest that unlike childhood, a state that adults do not have to fear returning to, entering elderhood is highly likely. Who would support the disenfranchisement of a category that we will one day join? The political stakes in keeping up the appearance of the adult – child binary, a self-interested endeavour, become even more apparent.

Here, the focus is on contrasting sets of rights surrounding the notion of (in)capacity. As with the previous section, the discussion will here centre on why elders, as compared to children, are singled out for special mention in the law, what remedies are afforded to the group, and what implications may arise for the rights of the child. UNPOP is representative of the discourse of international rights/international agendas on the elderly.³⁸ This document was not conceived as a full statement of the rights for persons who are elderly; no such document currently exists.³⁹ However, these principles give substantial indication of how elders are conceived in international human rights law discourse.

a. Why Are These Groups Separated from the Human Family?

The Preamble of UNPOP does not directly use the words ‘discrimination’ and ‘equality’; yet it makes some interesting points related to social discrimination, capacity, and diversity. First, unlike the CRC, the wording of UNPOP suggests that elders face discrimination based on societal views, similar to the Preambles of the CRPD and CEDAW. UNPOP identifies that social perception of disability plays a role in the discrimination that elders face, stating that ‘scientific research disprov[es] many stereotypes about inevitable and irreversible declines with age’. UNPOP even employs ‘science’ to underline the point that ‘declines with age’ are neither inevitable nor irreversible, casting doubt on a relationship that could correlate increasing age with decreasing rights. See Chapter 6 for a discussion of how ‘science’, in particular certain more traditional strains of developmental psychology, is employed to support the notion that

³⁸ Great Britain, *The Human Rights of Older People in Healthcare: Eighteenth Report of Session 2006-2007*, 124: ‘Although not binding on governments, the UN principles are designed to influence national programmes for older people and provide a useful framework for policy makers’. See also 1982 *Vienna International Plan of Action on Aging*, adopted by the World Assembly on Aging, available: <http://www.un.org/ageing/documents/Intlday/pgme08.pdf>; 2002 *Madrid International Plan of Action on Aging*, adopted by the World Assembly on Aging, http://www.c-fam.org/docLib/20080625_Madrid_Ageing_Conference.pdf.

³⁹ There have been calls for such a convention. See for example CONCO Committee on Ageing, (2008) *A Call for a Convention on the Rights of Older Persons*, <http://www.un.org/ageing/documents/Intlday/pgme08.pdf>; Jan Williams, *An International Convention on the Rights of Older People?*, in *Emerging Areas of Human Rights in the 21st Century*, 128 (Odello, M. & Cavandoli, S. eds., 2011).

increasing age/maturity for children should be a precondition for the grant of autonomy rights to children.

Second, while both the CRC and UNPOP refer to variation in capacity of their respective subject, UNPOP starts with the very strong assumption that elders possess capacity, whereas the CRC starts out with the assumption that children are immature, both physically and mentally, and are thus incapable.⁴⁰ The CRC goes on to recognise that children may acquire maturity in Articles 5 and 18, by recognising the 'evolving capacities of the child'.⁴¹ Nonetheless, these differences in constructing identities based upon notions of default capacity, reveal very different conceptions of the identities of children and elders, and as such become the basis for differential treatment. Third, UNPOP notes that there is 'tremendous diversity in the situation of older persons, not only between countries but within countries and between individuals that require a variety of policy responses'. This is interesting particularly as the principles themselves admit that while elderhood is being made into a distinct category, there still exists 'tremendous' diversity within the category itself. As discussed in Chapter 2, there are some those who criticise the CRC's attempt to universalise the category child with the result that it recognises only certain versions of childhood.⁴² Chapter 9 argues that the CRC's construction of a universal 'child' is an exclusionary process that recognises very little diversity within the category 'child'.

Finally, the Preamble acknowledges that the 'strains on family life . . . require support for those providing care to frail older persons'. In this, UNPOP acknowledges the potential biological or inherent causations exist for an elder's differential treatment. This picture drawn of elderly persons, as a drain on the family, describes elders as more 'child-like', as 'burdens' for those who have to care for/provide for/be responsible for the elder. It is true that the result is a requirement of 'support' for those care-takers in UNPOP. Nonetheless, UNPOP specifies a focus on 'frail' older persons, not on all older persons. In this way, the diversity within the category 'elder' is again underlined, making the role of the family, and the construction of the elder's identity (as exceptionally 'in need'), quite different than that envisioned for children (see

⁴⁰ The Preamble of UNPOP states that 'opportunities must be provided for willing and capable elders to participate in and contribute to the ongoing activities of society'. Here UNPOP refers to the possibility that some elders may be 'incapable'. If opportunities must only be provided to those willing and capable, there must be some that are not willing and not capable.

⁴¹ The notion of 'evolving capacities', found in Article 5 of the CRC, means that the child's capacities will progress and develop over the period of childhood and thus as the child develops capacity, the child's autonomy and responsibilities should increase accordingly. See for example GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 53 (1998); Michael Freeman, *Article 3: The Best Interests of the Child Conflicts*, in *A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD*, 65 (Andre Alen et al.eds. 2007); Michael Freeman, *The Future of Children's Rights*, 14 *CHILDREN & SOCIETY* 277, 289 (2000).

⁴² See generally Erica Burman, *Local, Global or Globalised? Child Development and International Child Rights Legislation* 3 *CHILDHOOD* 45 (1992); Olga Nieuwenhuys, *Editorial: Is There an Indian Childhood*, 16 *CHILDHOOD* 147 (2009); Vanessa Pupavac, *Misanthropy Without Borders: The International Children's Rights Regime*, 25(2) *DISASTERS* 95, 101 (2001).

Chapters 2 and 6 for further discussion). For the CRC's child there is very little diversity recognised within the category children (elaborated in Chapter 9). In the case of the CRC's 'child', 'science', in particular certain more conservative strains of developmental psychology are employed to rationalise the assumption that the child lacks inherent capacity. As a result, social discrimination, so prevalent as a context envisioned for the rights of elders, women, and the disabled, is not identified as a primary issue for children's rights. Rather, in the CRC, it is the child's 'internal' biological immaturity that remains the primary hurdle to the exercise of rights, a hurdle that must be overcome with the help of the CRC (in other words, adults). Unlike CEDAW and more like CERD, UNPOP's principles regarding elders identify certain internal conditions that elder face that make them vulnerable. The next subsections discuss the ways in which these 'internal problems' are addressed through rights differently in the case of children as they are in the case of elders.

b. How are the Reasons for Separation Addressed in the Context of UNPOP

To remedy the discrimination faced by elders, UNPOP addresses five principles: independence, participation, care, self-fulfilment, and dignity. Under independence, the elder 'should have access to food water, shelter, clothing, and health-care through the provision of income, family and community support, and *self-help*'.⁴³ In paragraphs 2 and 3, the elder is entitled to access to work or 'income-generating opportunities', as well as the ability 'to participate in determining when and at what pace withdrawal from the labour force takes place'. Self-help, access to income-generating opportunities, and participation in the determination of when to leave the labour force are not envisioned as possible in the context of the CRC's child. As will be argued in Chapters 6 and 7, the CRC's child is to be predominantly envisioned as not engaged in paid labour. The child is to be provided for by adults,⁴⁴ and required to instead attend (unpaid) primary education.⁴⁵ As such, the child has little say regarding her or his entry into the work force.

Under the principle of participation, the elder is entitled to remain integrated in society and to participate actively. Here the focus is on participation of elders, unlike the CRC's qualified participation for children. While children under the CRC have the right to participate in all decisions that directly affect them, children's participation is subject to an adult's assessment of

⁴³ Paragraph 1, emphasis added.

⁴⁴ See Articles 5, 18, and 27 for example.

⁴⁵ Article 38(a) mandates primary education.

the child's 'evolving capacities' (in other words, how mature they really are).⁴⁶ UNPOP also speaks of the elder's ability to form movements or associations of older persons. While the child is given the 'right' to assemble and associate, this right, and all other rights in the Convention, are limited by the direction and guidance of parents (which will be argued in Chapters 6 and 7 amounts to substantial control).⁴⁷

Unlike the child, elders have the right to social and legal services that enhance their autonomy, protection, and care. The child is not guaranteed the right to legal services, even when she/he is involved in penal matters.⁴⁸ UNPOP also delineates that elders' dignity, beliefs, needs, and privacy be fully respected, as well as the right to make decisions about their care and the quality of their lives. Not only are these same rights for the child subject first to the parents 'responsibility' to 'guide' the child in her/his decisions, nowhere in the Convention is *the child* to be respected by adults carers, whether their parents or state carers.⁴⁹ This discussion will be taken up further in Chapter 7. The 'best interests of the child' remain the omniscient and primary consideration⁵⁰. The child must respect the parents.⁵¹ The state must respect the responsibilities of the parents.⁵² The state must respect the rights of the child.⁵³ But never are adults required to respect the child.⁵⁴ In this way, the CRC casts the child as requiring not

⁴⁶ Article 5.

⁴⁷ Article 5.

⁴⁸ This point will be taken up more thoroughly in Chapter 8. The main argument for having 'appropriate assistance' is that such provision is alleged to reflect a 'move towards a child centred justice system'. See Geraldine Van Bueren, *Article 40: Child Criminal Justice, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD*, 7 (Andre Alen et al. eds. 2006). Van Bueren argues that '[o]veremphasis should not necessarily be placed on legal or non-legal qualifications of the child's representative; it is the quality of the representation which is important'. Geraldine Van Bueren, *Article 40: Child Criminal Justice, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD*, 19 (Andre Alen et al. eds. 2006). Chapter 8 will argue that only the 'difference' of childhood could explain this rationale as justified for children, even when such rationale would be considered entirely inappropriate for any other identity category. Article 40: 1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. 2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that: (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians'. Emphasis added.

⁴⁹ Referring to the child who is imprisoned for a penal matter, Article 37 (c) does state that '[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age'.

⁵⁰ Article 3.

⁵¹ Article 29.

⁵² Article 5.

⁵³ Article 2. Also according to Article 37(c), the state shall ensure that when detained, the child 'shall be treated with humanity and respect for the inherent dignity of the human person'.

⁵⁴ Article 39, which refers to social reintegration for child victims, is the only time that the child's dignity and respect (notably – *self-respect*) is mentioned: '[s]tates Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, *self-respect and dignity of the child*'. Emphasis added.

autonomy, respect or privacy, but rather 'direction' and guidance' given by a family (read adults) to 'help' the child (read regulate the child) in her or his exercise of the child's heavily qualified rights in the Convention.

c. What are the Implications for the Rights of the Child?

UNPOP's usage of discourses similar to those used in CRC, such as changing capacity, vulnerability, burdens to families, does not result in the relinquishment of autonomy rights for elders, as is required of children. Even when UNPOP refers to a similar discourse regarding 'development', by noting in paragraph 15 that 'older persons should be able to pursue opportunities for the full development of their potential,' the deployment of the term 'development' does not, as it does in the CRC (discussed in Chapter 6), become the basis for diminishing the elder's right to autonomy. This differential treatment of the identity category 'elder' and 'child' appears to be based on the difference perceived between the 'adult' and the 'child'. While children and elders are in a period of changing capacity, childhood as developing capacity and elderhood as declining capacity, these conceptions of the time at the beginning and at the end of one's life fit into accepted norms about adults being capable and children being incapable. This difference is based on the central issue of 'capacity'. This section explains that, unlike CEDAW and CRPD, UNPOP recognises elders as potentially lacking capacity. Nonetheless, for elders there is a presumption that the elder has capacity, whereas for children there is a presumption that the child lacks capacity. The latter involves a very high burden of proof, if not practically a conclusive presumption, as a result of social views about the capacities of children.⁵⁵

A consequence of differential views regarding the elder's and the child's capacity, elder law focuses on enhancing participation and autonomy, whereas child law focuses on 'care' or protecting the child from the child's own immaturity until he or she reaches adulthood. As was discussed in Chapter 2, the graduation from childhood is normally premised on the child reaching a particularly age. Indeed, the child is defined in the CRC as 'every human being below the age of eighteen years.'⁵⁶ An age-based classification (premised on the idea that the child

⁵⁵ See generally Hillary Rodham, *A Legal Perspective*, in CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES, 21, 33 (Patricia Vardin and Ilene Brody eds., 1979); Jeremy Roche, *Children: Rights and Participation and Citizenship*, 6 CHILDHOOD 475 (1999); Michael Freeman, *The Sociology of Childhood and Children's Rights*, 6(4) INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 433 (1998); Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277 (2000).

⁵⁶ According to Article 1 of the CRC, the child becomes an adult at 18 years of age or as otherwise specified by law.

obtains legal capacity at a certain age) has no counterpart in elder law. The closest conception of children's capacity that is *not* based on age, but rather on a case by case assessment of capacity is encapsulated in the 'evolving capacities' concept of the CRC⁵⁷ and in one of the most noteworthy interpretations of this principle, the *Gillick* decision.⁵⁸ Both represent the idea that as a child matures, she/he should be given increasing responsibility and autonomy. *Gillick* related to the question of whether a minor could consent to her own medical treatment without parental permission. The House of Lords decided that, '[a]s a matter of law the parental right to determine whether or not their minor child . . . will have medical treatment terminates if and when the child achieves sufficient understanding and intelligence to understand fully what is proposed.'⁵⁹ Even if *Gillick*, and to some degree Article 7 of the CRC, represent a more flexible and autonomy-enabling criteria for children (as opposed to a mere age-based criteria), there remains a presumption of incapacity, a hurdle that no other category of persons need clear. Further, given social views about children as incapable, the presumption of capacity becomes an even larger hurdle.⁶⁰ Notably, the *Gillick* decision has been subject to significant retraction in subsequent decisions in favour of lingering parental rights.⁶¹

In recent human rights history, for no identity category other than children has diminution of autonomy rights been the 'remedy' for alleged 'difference'. This contrast becomes even more striking when the problems identified amongst identity categories are substantially similar.⁶² Even when similar discourses are employed (dependence, development, family) and when similar

⁵⁷ Generally speaking the idea of evolving capacities is that the child gains responsibilities/autonomy as the child matures. Article 7: States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the *evolving capacities of the child*, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention. Emphasis added.

⁵⁸ *Gillick v. West Norfolk and Wisbech Area Health Authority* [1985] All ER 402 (HL).

⁵⁹ *Gillick v. West Norfolk and Wisbech Area Health Authority* [1985] All ER 402 (HL).

⁶⁰ Hillary Rodham, *A Legal Perspective*, in CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES, 21, 33 (Patricia Vardin and Ilene Brody eds., 1979); Jeremy Roche, *Children: Rights and Participation and Citizenship*, 6 CHILDHOOD 475 (1999); Michael Freeman, *The Sociology of Childhood and Children's Rights*, 6(4) INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 433 (1998); Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277 (2000).

⁶¹ *Re R* [1991] 4 All ER 177, CA and *Re W* [1992] 4 All 627, CA, (especially Lord Donaldson) weaken the *Gillick* decision. From these, and subsequent cases, it is clear that although the parental right to veto treatment ends, parental powers do not 'terminate', as suggested by Lord Scarman in *Gillick*. Rather, *Gillick* competency grants the child an ability to consent but does not affect the power of the parent. That is, if a child is *Gillick* competent both she and her parent will be able to consent. As a result, a child can be legally treated in circumstances where they refuse/resist treatment. See generally MICHAEL FREEMAN, CHILDREN'S HEALTH AND CHILDREN'S RIGHTS (2006); Michael Freeman, *The Child in Family Law*, in LEGAL CONCEPTS OF CHILDHOOD, 187-196 (Julia Fionda ed. 2001).

⁶² Yet, the contrasting approaches in human rights law is taken as self-evident. Tony Campbell author writes: '[a]nd yet, it scarcely makes sense to apply some of the rights in the UDHR to small children. Has a child the right to marry and found a family? The right to work? The right to democratic participation? The child has a present interest in none of these things. These interests and the rights they generate apply to mature individuals, not to people at all stages of their development and in some cases they decline'. Tom Campbell, *The Rights of the Minor: As Person, As Child, As Juvenile, and Future Adult*, in CHILDREN, RIGHTS, AND THE LAW, 17 (David Archard et al. eds., 1993). This statement represents the widely held belief that children are fundamentally different from adults and thus should not have the same human rights, in particular autonomy rights. At the same time however, it is generally believed that those who have declining capacity, only in exceptional circumstances should such rights not be available. The differential treatment is curious and left unexplained by Campbell.

problems are identified (difference that is alleged to originate in part from biological difference opposed to purely social discrimination, temporary category opposed to a category that one will be for one's entire life, a period of changing opposed to stable capacity), the law's treatment of the child is quite different. Probably the most notable is the CRC's failure to endorse equality before the law. Indeed this has been identified as 'odd'.⁶³ Freeman argues that providing for equality before the law should be a prerequisite of any international human rights convention.⁶⁴ Such a lack might be precisely because the category 'child' is unequal before the law, even at the level of 'formal equality'. Comparing discourse on elders that uses a similar vocabulary of dependency and (declining) capacity, the goal remains to ensure greater participation and protect autonomy rights to the greatest extent possible. This is simply not the case for children, who as a result of being cast in the CRC as 'immature' and thus 'incapable', are required to be dependent on those adults who are empowered by the CRC to act on behalf of the child (discussed in Chapter 7).

III. CONCLUSION

This chapter has sought to compare the 'rights stories' told in certain international human rights conventions and declarations about women, persons with disabilities, and elders with those told about children in the CRC. When the CRC is considered alongside other specialised human rights conventions and declarations (CEDAW, CRPD, and UNPOP), there are remarkable differences in the 'problems' identified and remedies mandated for children, despite arguably remarkable similarities between the rights categories. Section I compared the separation of the child from the human family with other arguably analogous groups likewise identified as vulnerable, unequal, and disempowered: women and persons with disabilities. Section II examined the analogy produced by UNPOP in describing elders as another category in a state of transitioning capacity.

More specifically, Sections I and II examined how discourses that relate to disempowerment (inequality, vulnerability, and capacity) are recruited in CEDAW, CRPD, and UNPOP, as compared to the CRC. Unlike CEDAW, CRPD, and UNPOP, the CRC locates the 'problems' that children face (in other words, the basis for having a specific human rights convention dedicated to the category child) as the result of the internal, inherent, and fundamental immaturity/incapacity that children possess. Unlike CEDAW, CRPD, and UNPOP, the CRC

⁶³ Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277, 289 (2000).

⁶⁴ Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277, 289 (2000).

does not acknowledge 1) that children face discrimination as a result of their status as a 'child', and 2) that children are entitled to equality before the law, specifically on the basis of their status as 'children'. From this comparison, it is arguable that the category 'child' is unique in being ascribed rights that fail to address the discrimination and powerlessness children experience because of social factors that exist external to the child. Instead, the CRC locates the vulnerability and powerlessness of the child as internal and inherent result of 'being' a 'child'.

Even when the CRPD and UNPOP imagine that their respective subjects as potentially lacking varying degrees of capacity, the aim of the rights and goals in the CRPD and UNPOP remain firmly rooted in the maximisation of participation and autonomy. As discussed in Chapter 3, human identities are not stable. In the context of maturity, it is imagined that once humans reach the penultimate level of development, adulthood, they stay on that plane for the rest of their lives.⁶⁵ Adulthood is assumed to be internally coherent. Yet, adults not only have varying capacity over the course of their lives, they also may have degenerative capacity, as discussed above. Elderhood too is a temporary state where the court and the law determine capacity. However, unlike childhood, no age-based classification for elders is considered, much less deemed appropriate for consideration. During childhood one is presumed incapable; during elderhood one is presumed capable. Indeed, the goals of elderhood law are seen in maximising the autonomy of elders and minimising the intrusion to the elder's right to autonomy. An alternative 'rights-story' that explains the differential treatment of the elder as compared to the treatment of the child relates not to the issues of varying capacity, but rather to the political aims relevant to disciplining the child (for example, heterosexuality, gender, 'good' citizen) who will become the adult. The elder will simply not become anything else, in the sense of their role in society. Elders cannot simply grow up, for they are 'grown'. Children are marginalised and will indeed have a place in society; they will grow up. The entire aim of the child's marginalisation could be described as a process of becoming 'fully prepared to live an individual life in society'.⁶⁶

The argument for the child's bundle of rights in the CRC seems implicitly that in providing guidance and direction, the child is more enabled to exercise her/his rights when and as his/her capacities evolve into adulthood (as discussed in Chapter 2). The abdication of the child's right to autonomy (an inherent right by virtue of being classified 'human') to another category of persons (in other words, adults/parents/professionals/courts) is thereby made justifiable. Regardless, this concept of enabling future emancipation is still the denial of rights in the

⁶⁵ CHRIS JENKS, CHILDHOOD, 40-41 (2005).

⁶⁶ CRC Preamble.

immediate where the only practical remedy is to merely grow-up.⁶⁷ The problem that remains is that human rights are deemed fundamental and inalienable, even the CRC proclaims as much. In no other (human rights) context is 'protection', much less 'the protection of rights' still equated with such paternalism.⁶⁸ Put another way: protection nowhere else yields being required to relinquish one's own rights *for* one's own protection. The United States Supreme Court Justice Brennan's once argued that romantic paternalism puts a person 'not on a pedestal, but in a cage'.⁶⁹ He of course was speaking about the category 'women' but the thesis queries whether such a critique might apply to adult – child relationships. When comparing rights accorded to the other identity categories described in this chapter (women, persons with disabilities, and elders), one must ask: what makes the category 'child' fundamentally different from all other human categories to allow deviation from so-called 'fundamental rights'? If identity categories have been subject to heavy deconstructionist critique, how is it that the CRC more successfully evades critique for its engagement in universalising the 'child' based on biological 'facts' of childhood? The next chapter engages with some critical perspectives on the category 'child' emerging from the field of sociology that help identify certain 'truths' about childhood that make possible the differential legal treatment of the category 'child' described in this chapter.

⁶⁷ Onora O'Neill, *Children's Rights and Children's Lives*, in CHILDREN'S RIGHTS-RE-VISIONED, 31 (Rosalind Ekman Ladd ed., 1996). O'Neill argues that if children do not like the rights given to them, they should merely grow up. For further discussion see MICHAEL FREEMAN, THE RIGHTS AND WRONGS OF CHILDREN, 5-8 (1983).

⁶⁸ See Eva Brems, *Children's Rights and Universality*, in DEVELOPMENTAL AND AUTONOMY RIGHTS OF CHILDREN: EMPOWERING CHILDREN, CARE-GIVERS, AND COMMUNITIES, 21 (Jan C. M. Willems ed., 2002) reproduced in SARA DILLON, INTERNATIONAL CHILDREN'S RIGHTS (2010). She notes that 'protection' was used by bourgeois society over the working class, men over women, and colonial powers over natives to justify control.

⁶⁹ *Frontiero v. Richardson* 411 U.S. 677 (1973).

CHAPTER 5

THE CONSTRUCTION OF THE CHILD AS FUNDAMENTALLY DIFFERENT: TRUTHS ABOUT CHILDHOOD

OUTLINE

- I. CHILDHOOD AS A SOCIAL CONSTRUCT

- II. CLAIMS TO TRUTH ABOUT CHILDHOOD
 - a. Truth #1: Childhood=State of Development
 - b. Truth #2: Child=Uniquely Vulnerable, and Thus in Need of Unique Protection
 - c. Truth #3: Childhood=Period Defined by Children's Needs

- III. BINARY OPPOSITIONS: HOW THE 'TRUE' CHILD IS CONSTRUCTED
 - a. Adult – Child Binary
 - b. Good Child – Bad Child Binary

- IV. CONCLUSION

While assumptions underlying other identity categories (for example, 'woman' or 'persons with disabilities') have been deconstructed, the category 'child' in the context of children's rights appears to remain comparatively intact. While a good deal of academic work has aimed to deconstruct the category child in and outside the discipline of law,¹ this thesis argues that dominant legal discourses about international children's rights remain dependent upon some fundamental category 'child'. Ze'ev Falk notes that, '[t]here is a certain irony in the fact that at this "post-modern" time rejecting all other ideologies, the ideology of "children's rights" and "children's autonomy" has gained a lot of authority'.² Karin Lesnik-Oberstein argues that 'the child has a tendency to recur as a foundational or essential real, even in some queer and feminist theoretical writings which express an explicit commitment to questioning essentialist notions of identity'.³ As noted in the previous chapter, even within the international human rights discourse, the CRPD in a point of contrast with the CRC includes in its Preamble a rejection of essentialist notions of identity, even while the CRPD embraced the category 'persons with disabilities'.⁴ The drafters of the CRPD appear to have recognised disability as a fluid, relational concept that changes over time, nearing a description of disability as a social construct. Similarly, could social views about children and their 'impairments' define the boundaries of what it means to be a 'child'? As discussed in Chapter 2, even the most conservative of children's activists would acknowledge that the legal definition of childhood is arbitrary.⁵ The more important question, however, addressed by this thesis is whether the CRC, by embracing a particular image of the category 'child' and portraying that image as biological or inherent to the category 'child', functions to regulate what a child is required to be? Simply put, does the description of the child in the CRC serve as a prescription of what the category 'child' must be? This thesis argues that in universalising a particular 'child', the CRC also contributes to the regulation of the category 'child'.

¹ See generally ALLISON JAMES, CHRIS JENKS, and ALAN PROUT, *THEORISING CHILDHOOD* (1998); Jo Boyden, *Childhood and the Policymakers: A Comparative Perspective in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD* (Allison James and Alan Prout eds., 1997); BERRY MAYALL, ed., *CHILDREN'S CHILDHOODS: OBSERVED AND EXPERIENCED* (1994); BERRY MAYALL, *TOWARDS A SOCIOLOGY FOR CHILDHOOD: THINKING FROM CHILDREN'S LIVES* (2002); Judith Ennew, *Outside Childhood: Street Children's Rights*, in *THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE* (Bob Franklin ed., 1995); MICHAEL FREEMAN, *THE RIGHTS AND WRONGS OF CHILDREN*, 6 (1983).

² Ze'ev Falk, *Rights and Autonomy – or the Best Interests of the Child?*, in *CHILDREN'S RIGHTS AND TRADITIONAL VALUES*, 111 (Gillian Douglas and Leslie Sebba eds., 1998).

³ Karin Lesnik-Oberstein, *Childhood, Queer Theory, and Feminism*, 11 *FEMINIST THEORY* 309, 309 (2010).

⁴ International Convention on the Rights of Persons with Disabilities, Preamble, May 3, 2008 G.A. Res. A/RES/61/106: 'Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation'.

⁵ See for example Bruce Hafen and Jonathan Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 *HARVARD INTERNATIONAL LAW JOURNAL* 449, 457 (1996).

Considerable literature existing predominantly outside the discipline of law argues that the 'child' and childhood are social constructs.⁶ A body of literature self-labelled as the 'new' sociological perspectives regarding the category 'child' encompasses 'a robust and complex body of interdisciplinary work'.⁷ This 'new' sociology of childhood combined with the theoretical approach to childhood laid out in Chapter 3, combine to highlight particular 'truths' accepted about the category 'child' in the CRC. This chapter attempts to import insights from the new sociology of childhood building on the theoretical perspectives outlined in Chapter 3 to examine the CRC's articulation of the category 'child'. While discussed more thoroughly in Chapter 3, three key arguments regarding truth/knowledge/power function as a starting point for this analysis: 1) society participates in producing what appears to be merely described, 2) certain ways of thinking (or ideologies) structure which views are taken seriously and which are marginalised, and as such, 3) dominant ways of thinking dictate which children are to be problematised and which children ignored. As one author writes,

[a]bout children, it might seem there are real 'facts' that can be established, a 'true knowledge' to be told . . . For example, we may consider 'facts' such as the finding that child prostitutes and some sexually abused children show 'precocious' sexual development. However, such a 'fact' can only be 'discovered' within certain social regards, in which there is a prescribed appropriate or normal age to be a thing called sexual – it is this which creates the reality of 'precocious sexual development'; which may be then variously represented, for example: as a

⁶ See generally PHILIPPE ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE* (1962); DAVID ARCHARD, *CHILDREN: RIGHTS AND CHILDHOOD* (2nd ed. 2004); DAVID ARCHARD, *CHILDREN, FAMILY AND THE STATE* (2003); Michael Freeman, *The Sociology of Childhood and Children's Rights*, 6(4) *INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS* 433 (1998); ERIC ERIKSON, *CHILDHOOD AND SOCIETY* (1977); Sarah L. Holloway & Gill Valentine, *Spatiality and the New Social Studies of Childhood*, 34(4) *SOCIOLOGY* 763 (2000); JOHN HOLT, *ESCAPE FROM CHILDHOOD* (1974); Allison James, *Confections, Concoctions and Conceptions*, 10(2) *JOURNAL OF THE ANTHROPOLOGY SOCIETY OF OXFORD* 83 (1979); ALLISON JAMES, CHRIS JENKS, and ALAN PROUT, *THEORISING CHILDHOOD* (1998); Allison James and Chris Jenks, *Constructing Childhood Sociologically*, in *AN INTRODUCTION TO CHILDHOOD* (Mary Jane Kehily, ed., 2004); ALLISON JAMES AND ADRIAN JAMES, *CONSTRUCTING CHILDHOOD: THEORY POLICY, AND SOCIAL PRACTICE* (2004); CHRIS JENKS, *Constituting the Child*, in *THE SOCIOLOGY OF CHILDHOOD – ESSENTIAL READINGS* (1982); Chris Jenks, *Child Abuse in the Postmodern Context: An Issue of Social Identity*, 2(3) *CHILDHOOD* 111 (1994); Chris Jenks, *The Post-Modern Child*, in *CHILDREN IN FAMILIES: RESEARCH AND POLICY* (Julia Brannen & Margaret O'Brien, eds., 1996); BERRY MAYALL, *TOWARDS A SOCIOLOGY FOR CHILDHOOD: THINKING FROM CHILDREN'S LIVES* (2002); Alan Prout, *Children's Participation: Control and Self-Realisation in British Late Modernity*, 14(4) *CHILDREN AND SOCIETY* 304 (2000); ALAN PROUT, *THE FUTURE OF CHILDHOOD, TOWARDS THE INTERDISCIPLINARY STUDY OF CHILDREN* (2004); JENS QVORTRUP, *Varieties of Childhood*, in *STUDIES IN MODERN CHILDHOOD: SOCIETY, AGENCY, AND CULTURE* (2005); JENS QVORTRUP, *CHILDHOOD AS A SOCIAL PHENOMENON AN INTRODUCTION TO A SERIES OF NATIONAL REPORTS* (1993); REX STANTON ROGERS AND WENDY STANTON ROGERS, *STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN*, (1992); PHILIP VEERMAN, *THE RIGHTS OF THE CHILD AND THE CHANGING IMAGE OF CHILDHOOD* (1992); Gill Valentine, *Angels and Devils: Moral Landscapes of Childhood*, 14 *ENVIRONMENT AND PLANNING SOCIETY AND SPACE* 581, 581-599 (1996); Gill Valentine, *Boundary Crossings: Transitions from Childhood to Adulthood*, 1(1) *CHILDREN'S GEOGRAPHIES* 37 (2003); VIVIANA ZELZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN* (1985); NEIL POSTMAN, *THE DISAPPEARANCE OF CHILDHOOD* (1994); MARTIN HOYLES, *THE POLITICS OF CHILDHOOD* (1989).

⁷ Catherine McDonald, *The Importance of Identity in Policy: The Case For and Of Children*, 23 *CHILDREN & SOCIETY* 241, 244 (2009), referring to Allison James and Alan Prout eds., *CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD* (1997). See also CHRIS JENKS, *CHILDHOOD* (2005); BERRY MAYALL, *TOWARDS A SOCIOLOGY FOR CHILDHOOD: THINKING FROM CHILDREN'S LIVES* (2002); Prout, A. (2005) *The Future of Childhood*.

personal pathology to be treated; a social problem to be tackled; or a 'turn on' to be savoured.⁸

As argued in Chapter 2, how one answers the question 'what is a child?' will dictate how one constructs what is 'true' about childhood, and therefore what rights are appropriate for children. While the argument that childhood is a social construction is persuasive and over 40 years old, questioning the stability of childhood in the context of law is particularly difficult because it questions certain ideologies masquerading as 'truth'.⁹ Drawing from Foucault, Chapter 3 describes the dissemination of 'truth' as one of the most important vehicles of power.¹⁰ As a consequence, questioning 'truths' about childhood may be arduous precisely because it questions certain warrants to power; power that enables the nominations of certain truth-claims as 'real' and others 'absurd'.

This chapter will investigate various 'truths'/knowledges about children that have been identified in interdisciplinary and non-legal literature. Section I explores literature that alleges that the category 'child' is a social construct. Section II then examines various 'truths' about childhood that could explain why children are treated so dissimilarly in the CRC as compared to other international human rights documents, discussed in the previous chapter. Section II explores the question: 'what is inherent to the category child'. This section will look specifically at the work of academics who have identified and agitated specific 'truths' associated with childhood and the conception of the 'universal' child. More specifically, Section II will examine the following 'truths' about childhood: 1) childhood is a period of development,¹¹ 2) children are uniquely vulnerable and thus in need of unique protection, and 3) childhood is a time defined by children's needs.¹² Drawing upon the theory of binary oppositions discussed in Chapter 3, Section III will examine how the 'truths' described in Section II are constructed. Section III argues that the child is constructed through both the adult – child binary, as well as the bad-child – good-child binary.¹³ To understand what a child *is*, one must understand what a child *is not* (in other words, an adult). Ultimately this chapter argues that certain 'truths' about children are accepted by the CRC. These 'truths' in turn rationalise the differential treatment of children.

⁸ REX STANTON ROGERS and WENDY STANTON ROGERS, *STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN*, 7 (1992).

⁹ REX STANTON ROGERS and WENDY STANTON ROGERS, *STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN*, 9 (1992).

¹⁰ ALAN HUNT and GARY WICKHAM, *FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE*, 11 (1994).

¹¹ REX STANTON ROGERS and WENDY STANTON ROGERS, *STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN*, 7 (1992).

¹² MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in *GROWING UP IN A CHANGING SOCIETY*, 37 (1990).

¹³ CHRIS JENKS, *CHILDHOOD* (2005).

The CRC mandates that vulnerability yields even greater dependency on the child's binary opposite (in other words, adult), rather than greater protection of child's own ability to participate in society and greater protection against social discrimination. At the risk of being redundant, this thesis argues that the assumptions underlying 'truths' regarding children remain largely unquestioned within law, even as these assumptions heavily affect the rights package conferred on children, even as these assumptions stand apart from the critical interrogation of childhood in other disciplines, and even when such assumptions are considered unthinkable for all other identity categories in the context of international human rights.

I. CHILDHOOD AS A SOCIAL CONSTRUCT

This section surveys literature that argues that the category 'child' is a social construct as opposed to some biological given, as is accepted in the CRC. Chris Jenks contends that childhood is a social construct that makes reference to a social status variably delineated by boundaries that differ through time and from society to society.¹⁴ Allison James and Alan Prout argue that '[c]omparative and cross cultural analysis reveal a variety of childhoods rather than a single and universal phenomenon'.¹⁵ This literature contends that childhood relates to a particular cultural setting.¹⁶ As such, the child is viewed as socially constructed rather than biologically determined.

As one way of illustrating the variety in childhoods, a group of authors examine how childhood has been viewed historically and how those views have changed with time. Philippe Aries famously claims that the characteristics ascribed to the child have changed dramatically over time.¹⁷ In his widely-cited passage, Aries claims that 1) there was no awareness of the idea of childhood in medieval society, for the concept did not exist,¹⁸ and 2) the essence of modern childhood was not discovered until the seventeenth century.¹⁹ According to Aries, persons under seven simply 'did not count' as parents had little attachment to them because of high

¹⁴ CHRIS JENKS, CHILDHOOD, 7 (2005).

¹⁵ ALLISON JAMES and ALAN PROUT, *A New Paradigm for the Sociology of Childhood? Provenance, Promise and Problems*, in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD, 8 (1997).

¹⁶ CHRIS JENKS, CHILDHOOD, 7 (2005). For further discussion see Sarah Holloway and Gill Valentine, *Spatiality and the New Social Studies of Childhood*, 34(4) SOCIOLOGY 763 (2000); MARTIN HOYLES, *THE POLITICS OF CHILDHOOD* (1989).

¹⁷ PHILIPPE ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE* (1962). Colin Heywood writes, 'in the beginning was Aries', who was one of the first to write on historical conceptions of childhood. COLIN HEYWOOD, *A HISTORY OF CHILDHOOD: CHILDREN AND CHILDHOOD IN THE WEST FROM MEDIEVAL TO MODERN TIMES*, 11 (2001).

¹⁸ PHILIPPE ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE*, 11 (1962).

¹⁹ PHILIPPE ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE*, 11 (1962).

mortality rates.²⁰ When a person developed motor skills sufficient to perform most tasks, approximately around the age of seven, they were accepted into the world of adults, to a much greater extent than is the case today.²¹ Aries maintains as a general theme that there was less contrast between persons over seven years of age and adults than exists today.²² As a result, persons approximately over the age of seven were dressed like adults and everything was permitted in their presence, including coarse language. Aries argues that these persons 'heard everything and [saw] everything'. Adults exposed children to sexual situations, which could also include the child.²³ Under this theory, children could not be 'tainted' because no one thought that childhood innocence really existed.²⁴ Children played and worked with adults, where education was carried out by apprenticeship.²⁵ Therefore, according to Aries, what we call 'childhood', a period of transition that is, as Viviana Zelizer describes, 'economically worthless but emotionally priceless'²⁶, did not exist.

Aries contends that around the seventeenth century, notions about childhood began to alter as a result of various contemporary religious and philosophical forces. Children were increasingly seen as innocent, one with nature, fresh from God, unsullied, and so on.²⁷ Aries argues that as a result, children were increasingly treated as different from adults. For example, clothing began to differ depending on the child's age group.²⁸ Further, the notion of 'soiling' the child through exposure to sexual references gained purchase.²⁹ The aim for child-rearing became increasingly oriented towards preservation of innocence and suppression of ignorance and weakness.³⁰ Children came to be viewed as requiring special treatment, which included being 'quarantine[d]' before they were deemed ready to join the world of adults.³¹ Aries also argues that the change in attitudes towards children accompanied a shift in which 'parents began to realise the pleasure they got from children'.³² Interestingly, Aries argues that this transformation in ideas about children saw the situation of children worsen as he describes the modern family as oppressive

²⁰ PHILIPPE ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE*, 128 (1962).

²¹ HUGH CUNNINGHAM, *CHILDREN AND CHILDHOOD IN WESTERN SOCIETY SINCE 1500*, 4 (1995), quoting PHILIPPE ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE*, 127 (1962).

²² HUGH CUNNINGHAM, *CHILDREN AND CHILDHOOD IN WESTERN SOCIETY SINCE 1500*, 4 (1995), quoting PHILIPPE ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE*, 127 (1962).

²³ PHILIPPE ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE*, 106 (1962).

²⁴ PHILIPPE ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE*, 106 (1962).

²⁵ PHILIPPE ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE*, 366 (1962).

²⁶ VIVIANA ZELIZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN*, 3 (1985).

²⁷ PHILIPPE ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE*, 122 (1962).

²⁸ PHILIPPE ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE*, 122 (1962).

²⁹ PHILIPPE ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE*, 122 (1962).

³⁰ PHILIPPE ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE*, 122 (1962).

³¹ PHILIPPE ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE*, 122 (1962).

³² PHILIPPE ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE*, 10, 125-30, 186, and 395-396 (1962).

³³ PHILIPPE ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE*, 127 (1962).

and intolerant of children.³³ He characterised education as quarantine, in contrast to a previous era in which children 'naturally' intermingled with adult society.³⁴ While Aries thought modern history saw the deterioration of the situation of children, others saw it as progress. Lloyd deMause argued that the 'further back in history one goes, the lower the level of child care, and the more likely children are to be killed, abandoned, beaten, terrorised, and sexually abused'.³⁵ His is most cited for contending that 'the history of childhood is a nightmare from which we have only recently begun to awaken'.³⁶

While Aries and deMause both acknowledge that the treatment of children changed drastically during the seventeenth century in Europe, James Schultz contends that pre-seventeenth century adults were not quite as indifferent to or ignorant of childhood as Aries and deMause argue.³⁷ Yet, the constant in these historical accounts of childhood is a fluency in the characteristics and understandings of childhood. In fact, Colin Heywood and David Archard contend that 'a' childhood was never discovered.³⁸ Heywood contends that no one period has managed to discover some 'supposed timeless qualities associated with childhood—least of all innocence and dependence'.³⁹ Schultz, concurs with the list of scholars surveyed thus far, James, Prout, and Jenks, that, [t]he knowledge of childhood is the culturally constructed meaning of childhood, as articulated in discourses, practices and institutions'.⁴⁰

³³ PHILIPPE ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE*, 127 (1962).

³⁴ PHILIPPE ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE*, 320-321 (1962).

³⁵ LLOYD DEMAUSE, *The Evolution of Childhood*, in *THE HISTORY OF CHILDHOOD*, 1 (1995).

³⁶ LLOYD DEMAUSE, *The Evolution of Childhood*, in *THE HISTORY OF CHILDHOOD*, 1 (1995).

³⁷ JAMES SCHULTZ, *THE KNOWLEDGE OF CHILDHOOD IN THE GERMAN MIDDLE AGES*, 10 (1994).

³⁸ See generally DAVID ARCHARD, *CHILDREN: RIGHTS AND CHILDHOOD*, (2d. Ed. 2004); COLIN HEYWOOD, *A HISTORY OF CHILDHOOD: CHILDREN AND CHILDHOOD IN THE WEST FROM MEDIEVAL TO MODERN TIMES* (2001).

³⁹ COLIN HEYWOOD, *A HISTORY OF CHILDHOOD: CHILDREN AND CHILDHOOD IN THE WEST FROM MEDIEVAL TO MODERN TIMES*, 40 (2001).

⁴⁰ JAMES SCHULTZ, *THE KNOWLEDGE OF CHILDHOOD IN THE GERMAN MIDDLE AGES*, 10 (1994). Schultz critiques Aries for neglecting to define his 'idea of childhood' and his 'awareness of the particular nature of childhood'. Schultz argues that Aries must mean only a modern idea of childhood, thus judging the past based upon modern ideas, as opposed to seeing them as merely different. Considering the polarising perspectives outlined in Chapter 2, this chapter likewise queries how Schultz defines this 'modern awareness' of childhood, as he seems to assume that this conception of childhood not only exists, but is sufficiently understood such that it is not in need of a definition. Further, Both Heywood and Archard state that there has always been the concept of childhood (an empty shell of sorts), but the conception of childhood (how that shell is filled with meaning) has changed. It is interesting that in Heywood's and Archard's theory there has always been a 'concept of the child', but different 'conceptions'. Thus the concept of the 'child' is an empty shell that has existed throughout time. How this shell is imbued has varied according to cultural differences. The major problem seems to surround discerning what this empty shell actually means. There seems to be great analogy here with Butler's assessment that gender merely masquerades as sex. JUDITH BUTLER, *GENDER TROUBLE*, 8 (1990): '[S]ex by definition will be shown to have been gender all along'. This empty shell of what is means to be a child masquerades as some fundamental qualities that seem to always be apparent. Indeed, Heywood notes that 'young people have a marvellous faculty of either dying or adapting themselves to circumstances'. What is interesting is that this facility is seen as unique to children. Contrary to Heywood's contention that childhood is a social construct, this view imports elements of universality. Thus Heywood too supposes a timeless quality about children and their resiliency, rather than a quality attributable to any disempowered group. It would seem that the concept of the child itself acknowledges that there is something essential, natural, and universal about childhood. See generally Sarah Holloway and Gill Valentine, *Spatiality and the New Social Studies of Childhood*, 34(4) *SOCIOLOGY* 763 (2000) (where the authors outline the difference between the Social Structural Approach (childhood=structural category—an enduring feature of the social structure of all societies. Thus while there is recognition that the conditions of childhood vary

When thinking about the CRC, acknowledging the diversity within the category 'child' contests the CRC's claim to a universal unitary category 'child'. This thesis argues that the CRC embraces a normative and universal vision of childhood; one that is characterised by notions of development and protection. Yet, the literature surveyed in Section I presents tension between conceiving the category 'child' as a social construct, and the CRC's reliance on at least a roughly construed universal 'child' (Chapter 9 will extend this problem to the diversity within the category child today). If post-modern accounts of the category 'child' contend that the 'child' is a social construction,⁴¹ how then is the 'child' constructed? The next section explores the work of certain sociologists who have identified several 'truths' or assumptions made about childhood that appear to be embraced in the CRC's vision of childhood.

II. TRUTH CLAIMS/KNOWLEDGE/TRUTHS OF CHILDHOOD

If one is to accept that the category 'child' is a social construct as opposed to a biological given, what then is understood as 'true' regarding children? What are the fundamental characteristics of childhood? This section explores three basic 'truths' of childhood that arguably have particular relevance to the CRC: 1) childhood is a state of development, 2) the child is uniquely vulnerable and therefore in need of unique protection, and 3) childhood is a period defined by children's needs. These three assumptions about childhood that have been critiqued by certain sociologists are easily identifiable in the CRC. Indeed this thesis argues that these three assumptions are foundational to the CRC's vision of the category 'child'. The operation of these truths in the CRC will be discussed in detail in Chapters 6 and 7.

a. Truth #1: Childhood=State of Development

The vision of the child as developing matches dominant knowledges about childhood: from psychological to 'common sense' understandings of childhood.⁴² Developmental psychology, the study of the psychology of childhood, was one of the first branches of psychology to be established, precisely because childhood was seen as the prime location to investigate how

between times and places – as the cultural, social and economic characteristics of societies vary – childhood itself is seen as a universal category) and the Socially Constructed child approach (reject taken-for-granted assumptions about childhood and the existence of social structure which shape an identifiable childhood form and 'are more likely to be of the view that children are not formed by natural and social forces but rather that they inhabit a world of meaning created by themselves and through their interaction with adults)).

⁴¹ See generally Stuart Aitken and Thomas Herman, *Gender, Power and Crib Geography: Transitional Spaces and Potential Places*, 4 GENDER, PLACE AND CULTURE 63 (1997).

⁴² REX STANTON ROGERS and WENDY STANTON ROGERS, *STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN*, 51 (1992).

nurture impinged on nature; in other words, how we, as people, became socialised, civilised, and acculturated.⁴³ The mainstream developmental approach to childhood, provided by psychology is based on the idea of natural growth.⁴⁴ This approach is essentially an evolutionary model: the child-to-adult continuum represents a progression from simplicity to complexity of thought, from irrational to rational behaviour.⁴⁵ The persuasiveness of this particular psychological reasoning is attributed to developmental psychology's heavy reliance on ways of thinking already found particularly influential in natural sciences.⁴⁶ In this account, socialisation is portrayed as a process analogous to the creation of a compound out of base elements:

Sodium + Chloride = Salt;

Heredity + Environment = Socialised Individual.⁴⁷

However, some academics contend that, unlike the chemist, but like the alchemist, these psychologists have never had any clear idea of how their metaphorical process (the melding of nature and nurture) actually operates.⁴⁸ These psychologists can only speculate in vague terms about the way socialisation may operate, let alone how it may fail, be reversed, break down, and so on.⁴⁹ The interplay between nature and nurture, unlike chemical elements, requires theoretical and moral resolutions and extrapolations, rather than some objective observation and description.⁵⁰ This thesis embraces the argument that development does not signify a 'natural' process, but makes reference to a socially constructed sense of change during childhood, which

⁴³ REX STAINTON ROGERS and WENDY STAINTON ROGERS, *STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN* (1992).

⁴⁴ ALLISON JAMES and ALAN PROUT, *A New Paradigm for the Sociology of Childhood? Provenance, Promise and Problems, in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD*, 10-11 (1997). It should be noted that there are competing perspectives within the discipline of developmental psychology that have moved away from the idea of childhood as merely a single and simple trajectory towards adulthood. See for example REX STAINTON ROGERS and WENDY STAINTON ROGERS, *STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN* (1992). Nonetheless, this thesis argues that the CRC adopts the more mainstream or conservative developmental psychology approach that envisions the 'child' as an adult-in-progress, as will be argued in Chapter 6. GERISON LANSDOWN argues that, '[t]heories in developmental psychology have moved beyond these traditional prescriptive models to embrace a more cultural, social and contextual understanding of how children grow up. However, these ideas have not sufficiently permeated the wider world to influence law, policy and practice impacting on children's lives'. GERISON LANSDOWN, *THE EVOLVING CAPACITIES OF THE CHILD*, 13 (2005).

⁴⁵ ALLISON JAMES and ALAN PROUT, *A New Paradigm for the Sociology of Childhood? Provenance, Promise and Problems, in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD*, 10-11 (1997).

⁴⁶ REX STAINTON ROGERS and WENDY STAINTON ROGERS, *STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN*, 38 (1992); BERRY MAYALL, *The Sociology of Childhood in Relation to Children's Rights*, 8 *INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS* 243, 244 (2000).

⁴⁷ REX STAINTON ROGERS and WENDY STAINTON ROGERS, *STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN*, 38 (1992).

⁴⁸ REX STAINTON ROGERS and WENDY STAINTON ROGERS, *STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN*, 38 (1992).

⁴⁹ REX STAINTON ROGERS and WENDY STAINTON ROGERS, *STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN*, 38 (1992).

⁵⁰ REX STAINTON ROGERS and WENDY STAINTON ROGERS, *STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN*, 39 (1992).

is encoded within a series of benchmarks made relevant by predominate discourses/knowledges placed on the child.⁵¹

While the process of development is argued to be no more than a story or 'truth-claim', some maintain that it has become a story with such compelling plausibility it has overwhelmingly acquired the status of incontrovertible truth: development during the course of childhood is the way children *really are*.⁵² 'Natural children' are then tracked and plotted as they 'develop' through the 'socialisation process' into adulthood, which is itself taken for granted in the prevailing social order.⁵³ The psychologists Rex Stainton Rogers and Wendy Stainton Rogers label this account of childhood development as 'developmentalist hegemony' on account of its potency.⁵⁴ Jenks argues that while social sciences have critically addressed and debunked dominant ideologies of, for example, capitalism in relation to social class, colonialism in relation to race, and patriarchy in relation to gender, the ideology of development in relation to childhood has remained relatively intact.⁵⁵

Moving beyond psychology, our everyday understandings of children and childhood have been more broadly monopolised by a knowledge industry manufactured by the practitioner and academic entrepreneurs working in the fields of education, anthropology, sociology, social work, and others.⁵⁶ The dominant forms of knowledge in some sense 'manufactured' by these industries can be said to legitimate a particular set of discourses upon the child. Following Foucault, these 'legitimate' discourses can function to represent their knowledge as fundamental, invariable 'truths' about the nature of all children, past and present.⁵⁷ This thesis argues that the CRC, and indeed its associated institutions such as the Committee on the Rights of the Child, UNICEF, inter-governmental organisations, and NGOS function as persuasive knowledge manufacturers, legitimating a particular set of discourses on the 'child'. The CRC produces and legitimates its vision of childhood as fundamental, invariable truth about the category 'child'. As will be more thoroughly examined in the next chapter, the CRC assumes that there is a model of

⁵¹ CHRIS JENKS, CHILDHOOD, 39 (2005).

⁵² REX STAINTON ROGERS and WENDY STAINTON ROGERS, STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN, 38-39 (1992).

⁵³ REX STAINTON ROGERS and WENDY STAINTON ROGERS, STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN, 51 (1992).

⁵⁴ REX STAINTON ROGERS and WENDY STAINTON ROGERS, STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN, 51 (1992).

⁵⁵ CHRIS JENKS, CHILDHOOD, 4 (2005). See also Stuart Aitken and Thomas Herman, *Gender, Power and Crib Geography: Transitional Spaces and Potential Places*, 4 GENDER, PLACE AND CULTURE 63 (1997).

⁵⁶ REX STAINTON ROGERS and WENDY STAINTON ROGERS, STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN, 51 (1992).

⁵⁷ REX STAINTON ROGERS and WENDY STAINTON ROGERS, STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN, 51 (1992).

childhood development that is universally descriptive of all children.⁵⁸ The CRC's claim to 'truth' that the child is developing masquerades as a description of 'how things are', rather than a production/prescription of 'how things must be'.

The innocuousness of 'development' as a truth of childhood is undermined by a group of sociological and philosophical scholars. One author writes that the undeveloped child is incomplete, lacking full maturity, and unfinished.⁵⁹ In this way the child is defined negatively, in the sense of what the child lacks.⁶⁰ Archard argues that the defining feature of childhood is that the child is unfinished relative to a human *telos*:

[i]n the biology, the child is viewed as unfinished in his or her growth as a human animal; in the ethics, unfinished in the training of virtue; in the politics, unfinished in the education for adult life as a responsible citizen.⁶¹

Children are viewed as 'becoming' rather than being.⁶² The focus of adults then is not on childhood in and of itself, but on how the desired characteristics of adulthood are acquired.⁶³ Put another way, the fixation on childhood is on the process of development. Development teleology condemns children to being viewed exclusively as developmentally adaptive, hence correct, or developmentally defective, hence incorrect.⁶⁴ The focus is then on what children 'need'. As was argued in Chapter 4 and will be developed further in Chapter 6, because children are 'inherently' or 'biologically' immature, children require or 'need' something quite different from adults. As will be argued in the next section and in Chapter 7, the vision of the 'child' as

⁵⁸ See Eva Brems, *Children's Rights and Universality*, in *DEVELOPMENTAL AND AUTONOMY RIGHTS OF CHILDREN: EMPOWERING CHILDREN, CARE-GIVERS, AND COMMUNITIES* (Jan C. M. Willems ed., 2002) reproduced in SARA DILLON, *INTERNATIONAL CHILDREN'S RIGHTS* (2010). For a critique see Vanessa Pupavac, *Misanthropy Without Borders: The International Children's Rights Regime*, 25(2) *DISASTERS* 95, 101 (2001); Jo Boyden, *Children's Experience of Conflict Related Emergencies: Some Implications for Relief Policy and Practice*, 18(3) *DISASTERS* 254, 256 (1994). The universal application of the CRC will be discussed in Chapter 9.

⁵⁹ JULIA FIONDA, *Legal Concepts of Childhood: An Introduction*, in *LEGAL CONCEPTS OF CHILDHOOD*, 12 (2001).

⁶⁰ David Archard, *Philosophical Perspectives on Childhood*, in *LEGAL CONCEPTS OF CHILDHOOD*, 43 (Julia Fionda ed., 2001), referring to HARRY HENDRICK, *CHILDREN, CHILDHOOD, AND ENGLISH SOCIETY, 1880-1990* (1997).

⁶¹ David Archard, *Philosophical Perspectives on Childhood*, in *LEGAL CONCEPTS OF CHILDHOOD*, 43 (Julia Fionda ed., 2001), quoting Gareth B. Matthews, *Socrates Children*, in *The Philosopher's Child: Critical Essays in the Western Tradition*, 21 (S. M. Turner and Gareth B. Matthews eds., 1998). See also PIERRE ERNY, *CHILDHOOD AND COSMOS: THE SOCIAL PSYCHOLOGY OF THE BLACK AFRICAN CHILD*, 11 (1973): 'The child is distinguished from the adult by the fact that he[*she*] has not yet reached maturity. He[*she*] is still in a stage of development, on the way to completion. From this reason he[*she*] cannot be described in his full and stable state, since he[*she*] is essentially a dynamism, a tension, progress toward a more perfect state. Neither the child nor his personality can be considered under any aspect but that of becoming'.

⁶² David Archard, *Philosophical Perspectives on Childhood*, in *LEGAL CONCEPTS OF CHILDHOOD*, 43 (Julia Fionda ed., 2001); Alan Prout, *Children's Participation: Control and Self-Realisation in British Late Modernity*, 14(4) *CHILDREN & SOCIETY* 304, 306 (2000).

⁶³ David Archard, *Philosophical Perspectives on Childhood*, in *LEGAL CONCEPTS OF CHILDHOOD*, 43-44 (Julia Fionda ed., 2001); Berry Mayall, *Values and Assumptions Underpinning Policy for Children and Young People in England*, 4(1) *CHILDREN'S GEOGRAPHIES* 9, 11 (2006).

⁶⁴ Tom Campbell, *The Rights of the Minor: As Person, As Child, As Juvenile, and Future Adult*, in *CHILDREN, RIGHTS, AND THE LAW*, 17 (David Archard et al. eds., 1993).

developing enables the 'truth' that children 'need' adults who have responsibility for/power over children. The child's 'need' for a 'responsible' adult significantly alters the child's rights, even rights that are considered to be fundamental for all humans. In the context of the CRC this thesis argues that the CRC's performance of the 'child' as a unique state of development is the basis for deviating from the 'equal and inalienable rights of all humans'.⁶⁵

Notably, whether rights are an adequate 'solution' for any subordinated category has been widely discussed; however a full discussion will not take place here.⁶⁶ Regardless of whether one agrees with the efficacy of rights, how these rights are constructed contribute to the production of an identity for the category 'child'. The identity or presentation of a 'true child,' places limits not only on the rights of the child, but also what is made possible during childhood for those marked a 'child'. Some argue that the CRC reinforces and reifies the systematic oppression of young people.⁶⁷ As will be discussed in Chapter 8, it is argued that the child becomes a site for progress, a reflection of the community's progress and therefore an object of regulation.⁶⁸

If the basis upon which we (read adults) 'know' children is an unessential, unnatural social construction, how can we (read adults) validate how children are talked about and therefore treated in the CRC? By portraying the child as incomplete/developing and therefore in need of his/her wiser counterparts (read adults, to be discussed briefly in the next sub-section and thoroughly in Chapter 7), the CRC not only justifies the restriction of some very basic rights, but entrenches a vastly inequitable relationship between the child and his/her family and his/her community. Quite simply, casting the child-as-developing allows the CRC (adults, states, institutions, discourses) to side step what would be considered unthinkable for any other category of persons within the human family.

⁶⁵ Preamble.

⁶⁶ See generally Maria Grahn-Farley, *Beyond Right and Reason: Pierre Schlag, The Critique of Normativity, and the Enchantment of Reason: A Theory of Child Rights*, 57 UNIVERSITY OF MIAMI LAW REVIEW 867 (2003): 'The rights of a person tell us more about that person's place in society than about the rights themselves. Rights are signs of what the human has been made to not be. Rights are the void. Rights are emptiness. Rights are the emptiness that remains when a person is made to be less than human. The language of rights takes the place of the unspeakable pain and suffering that is inflicted on people, by people. Rights are the bandages on already-inflicted injuries. Bandages do not heal; they cover and hide wounds. Instead of seeing the harms inflicted, one sees the bandages. Instead of seeing the pain and suffering, one sees the right'.

⁶⁷ REX STANTON ROGERS and WENDY STANTON ROGERS, *STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN* (1992).

⁶⁸ CHRIS JENKS, *CHILDHOOD*, 3 (2005); Maria Grahn-Farley, *Beyond Right and Reason: Pierre Schlag, The Critique of Normativity, and the Enchantment of Reason: A Theory of Child Rights*, 57 UNIVERSITY OF MIAMI LAW REVIEW 867 (2003).

b. Truth #2: Child=Uniquely Vulnerable & Thus in Need of Unique Protection

As argued in Chapter 4, the child's vulnerability means something vastly different than vulnerability for any other identity category. The vulnerability of other identity categories, such as women and persons with disabilities is not deemed the result of some biological or essential characteristic that these identity categories might possess. Rather, the vulnerability of these other categories is deemed the result of social discrimination. As such, inequality and disempowerment are remedied, in theory, by the shoring up of autonomy and participation through rights. According to the CRC and as was argued in Chapter 4, the child's vulnerability, however, is largely perceived as a result of the child's own immaturity, not a result of social discrimination that the child might experience.⁶⁹ As a consequence, the child's vulnerability is remedied by requiring the child to relinquish autonomy and participation to the category 'adult'. This differential treatment, in other words, the unique requirement that children give away their autonomy and ability to participation to a particular adult, is argued to be necessary because of the child's innate or biological immaturity/incapacity. The 'logical' extension of the image of the innately immature, passive child is an effective mandate that the child be completely reliant on adult protection. Again this is in stark contrast to, for example, elders who also may have variable capacity, yet maintain the rights associated with participation and equality. The child simply does not require protection from the intrusion of others and the state into the child's exercise of autonomy. Fundamentally, the child needs protection from her or himself rather than protection against social discrimination. Viewing children as vulnerable best serves the need for adults acting in children's 'best interests'/'for their own good'. Childhood is then viewed as a period that is entitled to 'special treatment', in other words, adult supervision.⁷⁰

The focus becomes one of guarding the child, necessitating greater parental or state control of the child. It is then no surprise that many argue the proper place for childhood to be the home and the family or secondarily state care, where this protection can be provided.⁷¹ This sentiment

⁶⁹ It should be noted that this thesis does not adopt this position. Literature on child labour in particular highlights the ways in which social discrimination operates to create not only vulnerability but also exploitation and abuse. See for example NGO GROUP FOR THE CRC SUB-GROUP ON CHILD LABOUR, *THE IMPACT OF DISCRIMINATION ON WORKING CHILDREN AND ON THE PHENOMENON OF CHILD LABOUR* (1993).

⁷⁰ Kenneth Nunn argues that '[I]nsofar as African American boys and girls are concerned, it is somewhat inaccurate to speak of an 'end of adolescence' . . . The concept of a group of young people who were entitled to special treatment because they were impetuous and immature was never extensive enough to include African American children. . . . When adolescence began for white children in 1880 [in the US], African American children remained slaves'. Kenneth Nunn, *The Child as Other: Racial Differential Treatment in the Juvenile Justice System*, 51 DEPAUL LAW REVIEW 679, 679-680 (2002).

⁷¹ See generally Jeremy Seakbrook, *The Decay of Childhood* (1987).

is reflected in the CRC.⁷² Chapters 6 and 7 will discuss in detail how protection in the context of the CRC translates to the requirement for the child to continually be 'in care'. It is parents, or the state who are empowered to act on the child's behalf and to protect the child. For the purposes of this section, however, this protectionist prescription is critiqued for imagining that relations between adults (whether parents or state officials charged with the care of the child) and children as rarely abusive, predominately unproblematic.⁷³ It has been argued that the potential result is the 'protective exclusion of children in real life'.⁷⁴ Jenny Kitzinger illustrates how the 'lock up your child' philosophy has the potential to make those confined more vulnerable.⁷⁵ This 'locking up' methodology is curious given that much abuse takes place within the home, and thereby increases children's isolation.⁷⁶ Reforms which impose restrictions on children ('for their own good') are routinely turned against the very people they are meant to protect (in other words, children) and divert attention away from the ways in which the oppression of young people can be socially constructed.⁷⁷ Nonetheless, this brand of protection remains the dominant discourse regarding children's rights and is repeatedly embraced in the CRC.

The mere existence of this protectionist ideology as a goal is not problematic. Protectionism can, however, become problematic for two reasons: 1) it justifies the uncritical control and regulation of children,⁷⁸ and 2) it seems to be the 'only show in town'. Protectionism is argued to currently monopolise any discussion about children and finds support across a wide-spectrum of political opinion because it claims to put children first. No other 'story' is comprehensible. Protectionism is characterised as progressive and enlightened, giving priority to, protecting and promoting children's welfare, in contrast to their economic utility, their duties and obligations.⁷⁹

⁷² Preamble: 'Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children.'

⁷³ Jeremy Seakbrook, *The Decay of Childhood*, 186 (1987).

⁷⁴ Jens Qvortrup, *A Voice for Children in Statistical and Social Accounting: A Plea for Children's Right to be Heard*, in *CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD*, 79-80 (Allison James and Alan Prout eds., 1997).

⁷⁵ Jenny Kitzinger, *Who Are You Kidding? Children, Power and the Struggle Against Sexual*, in *CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD*, 167 (Allison James and Alan Prout eds., 1997).

⁷⁶ Jenny Kitzinger, *Who Are You Kidding? Children, Power and the Struggle Against Sexual*, in *CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD*, 167 (Allison James and Alan Prout eds., 1997).

⁷⁷ Jenny Kitzinger, *Who Are You Kidding? Children, Power and the Struggle Against Sexual*, in *CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD*, 167 (Allison James and Alan Prout eds., 1997).

⁷⁸ Bob Franklin write that '[e]ven cocoons can stifle and oppress as well as comfort'. BOB FRANKLIN, *The Case for Children's Rights: A Progress Report*, in *THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE*, 4-5 (1995).

⁷⁹ BOB FRANKLIN, *The Case for Children's Rights: A Progress Report*, in *THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE* (1995).

The persuasiveness and political purchase of protectionism can be seen in the adoption the 1959 Declaration, which was adopted more quickly than any other General Assembly Resolution in history.⁸⁰ This 1959 Declaration has but 10 'principles'. Unlike the CRC, the 1959 Declaration addresses only the protection of the child.⁸¹ While the CRC and its inclusion of qualified autonomy have met some resistance and took ten years to draft, the Declaration and its exclusive focus on protection did not.

As will be discussed in Chapter 9, even the real life experiences of children marginalised by the CRC's prescriptions cannot seem to dislodge the story of children in need of a particular kind of 'protection' (read regulation enacted by certain adults and thus not self-empowerment). One author notes that instances such as the 1976 Soweto Riots in South Africa, child labourers, and street children are all examples of children whose actions contest that children 'need' adult protection.⁸² Alternative tales of the lives and experiences of children that do not fit within the story told by protectionism do not seem to exist in the sense that they are not 'how things are' or 'how childhood should be'. These stories do not exist in the sense that they are apparently not believed; they are not addressed, or seem as aberrant problems to be solved.⁸³ These children must have their 'innocence' restored; they must return to their childhood, in other words, they must be put back under adult protection. The same bandage, 'protection by parents and the state for the child' is doled out, even when that protection does not exist or is not desired. Chapter 6 will discuss the ways in which the CRC constructs the child as immature, utilising a more persuasive vocabulary of 'developing'. Chapter 7 will examine what is made possible by constructing the child as 'developing'. Chapter 7 will argue that the 'care' of some adult is made mandatory for the category 'child'. Chapter 9 will explore those who are excluded or stigmatised by the CRC's vision of childhood.

⁸⁰ Declaration of the Rights of the Child, Dec. 10, 1959, G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. (No. 16).

⁸¹ Unlike the CRC, it should be noted that the 1959 Declaration is not a binding legal document, which also would affect the speed of its adoption. Nonetheless, the argument that the 1959 Declaration and its welfare principles was more palatable to the international community still seems persuasive given the lengthy and contentious drafting process of the CRC.

⁸² CLAUDIA MITCHEL and JACQUELINE REID-WALSH, RESEARCHING CHILDREN'S POPULAR CULTURE: THE CULTURAL SPACES OF CHILDHOOD, 7 (2002).

⁸³ Jeremy Roche, *Children: Rights and Participation and Citizenship*, 6 CHILDHOOD 475, 484 (1999): 'Of course, both in the UK and in the international context children are social participants - participating in homeworking, child labor, political protest, caring, keeping the family 'on the road', and so on. However, often these activities are either redefined by 'concerned' adults as simply exploitative and requiring action to protect better the child or denied though not talking about them/non-recognition. . . . The traditional response to children traps them in the position simply of being governed'.

c. Truth #3: Childhood=Period Defined by the Children's Needs

Beyond simply 'needing' protection, the alleged precarious state of childhood (vulnerable, dependent, incapable, and developing) enables discussions about children to centre predominately around 'the needs of children' generally. The term 'needs' in the context of children (particularly as the 'needs' of children are expressed on behalf of children) has some interesting implications. Martin Woodhead writes specifically about the notion of 'needs', and how the term itself reflects the status given to children in twentieth-century Western societies.⁸⁴ Woodhead argues that the authority of 'need' statements come not only from their apparent straightforward descriptive quality, they also convey considerable emotive force (accompanied by a sense of responsibility, even guilt).⁸⁵ This power comes partly from the connotation of helplessness and passivity of any child who is 'in need', and partly from the implication that dire consequences will follow if the need is not met through appropriate intervention. Woodhead asserts that this combination of descriptive and imperative authority provides a persuasive basis for defining policy and can be seen throughout legal texts.⁸⁶ Indeed, the CRC frequently deploys the term 'needs' in reference to the CRC's universal child. For example, the Preamble states that the child needs 'particular care', 'special safeguards', and 'special consideration'. Chapter 6 will explore the 'needs' of the category 'child' in the CRC.

Woodhead asserts that 'needs' may also serve as a credible veil for uncertainty and even disagreement about what is in the 'best interest' of the child. Michael King and Christine Piper argue that the child is often only seen as 'a bundle of needs', yet parents and state agencies dispute the definition of such needs and the ability to provide for them.⁸⁷ These authors agree with a fundamental premise of this thesis that in any dispute regarding a child, 'the conflict is over *whose conception of the child's needs should prevail*'.⁸⁸ As such, it is not a problem of designating institutions capable of enforcing children's as some would argue,⁸⁹ but the problem is rather of generating

⁸⁴ MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in GROWING UP IN A CHANGING SOCIETY, 37 (1990).

⁸⁵ MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in GROWING UP IN A CHANGING SOCIETY, 37 (1990).

⁸⁶ MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in GROWING UP IN A CHANGING SOCIETY, 37 (1990).

⁸⁷ MICHAEL KING and CHRISTINE PIPER, HOW THE LAW THINKS ABOUT CHILDREN, 64 (1995).

⁸⁸ MICHAEL KING and CHRISTINE PIPER, HOW THE LAW THINKS ABOUT CHILDREN, 79 (1995), original emphasis.

⁸⁹ See for example Robert Dingwall and John Eckelaar, *Rethinking Child Protection*, in STATE, LAW AND THE FAMILY, 93 (Michael Freeman ed., 1984); Anonymous, *The CRC as a Touchstone for Research on Childhoods*, 6(4) CHILDHOOD 403 (1999); Kirsten Backstrom, *The International Human Rights of the Child: Do They Protect the Female Child?*, 30 GEORGE WASHINGTON JOURNAL OF INTERNATIONAL LAW & ECONOMICS 541, 556 (1996) Cynthia Price-Cohen, *Implementing the U.N. Convention on the Rights of the Child*, 21 WHITTIER LAW REVIEW 95 (1999-2000); PHILIP ALSTON and JOHN TOBIN, LAYING THE FOUNDATIONS FOR CHILDREN'S RIGHTS (2005).

universally accepted 'needs'.⁹⁰ It seems that the ambiguity of childhood is the source of such conflict.⁹¹ Indeed, Chapter 2 explored disagreement not only regarding the CRC, but also about what is considered 'appropriate' for childhood and therefore which rights are appropriate for children. In other words, Chapter 2 explored disagreement about what children need or, more specifically, what is a 'child'.⁹² Nonetheless, the identification of needs appear to describe a timeless/universal child that is knowable from mere empirical study, whether by a psychologist, professional, or parent.⁹³

Further, 'children's needs' also may serve as a very credible veil for adult agendas.⁹⁴ Woodhead uses the equation 'X needs Y for Z to follow', but states that Z is rarely made explicit.⁹⁵ She argues that the first step in evaluating a 'need' statement is to identify the outcome (Z) and test the descriptive claim that some measure (Y) is necessary to achieve it.⁹⁶ In this process, Woodhead argues that one can find that statements about children's needs convey an element of judgment about what is good for them and how this 'good' can best be achieved. The self-evident aspect of such statements imbues them with emotive force, implying an imperative for action.⁹⁷ Chapter 6 canvasses the ways in which the determination of the child's 'needs' dictate the rights that they are given. These claims to the know-ability of children's needs masquerade as if these needs are universal and universally accepted. The CRC is no exception. In the CRC, the word 'need' is mentioned 14 times in relation to children.⁹⁸ The Preamble states that,

Recognising that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,⁹⁹

⁹⁰ MICHAEL KING and CHRISTINE PIPER, *HOW THE LAW THINKS ABOUT CHILDREN*, 79 (1995).

⁹¹ Nick Lee, *The Challenge of Childhood: Distributions of Childhood's Ambiguity in Adult Institutions*, 6 *CHILDHOOD* 455, 465 (1999).

⁹² JULIA FIONDA, *Legal Concepts of Childhood: An Introduction*, in *LEGAL CONCEPTS OF CHILDHOOD*, 3 (2001): 'We all imagine we know what childhood is and who children are. In basic terms it may be seen as a biological or psychological phase of life somewhere between infancy and adulthood. However, the fact that there is constant disagreement even at the level of public discourse over where childhood begins and ends illustrates that childhood is not a concrete or objectively defined "truth" and is in fact a complex social construct. Or indeed a series of them'.

⁹³ MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in *GROWING UP IN A CHANGING SOCIETY*, 40 (1990).

⁹⁴ See generally Martha Minow, *Children's Rights: Where We've Been, and Where We're Going*, 68 *TEMPLE LAW REVIEW* 1573 (1995); Berry Mayall, *The Sociology of Childhood in Relation to Children's Rights*, 8 *INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS* 243 (2000); Fiona Raitl, *The Children's Rights Movement: Infusions of Feminism*, 22 *CANADIAN JOURNAL ON FAMILY LAW* 11, 26 (2005).

⁹⁵ MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in *GROWING UP IN A CHANGING SOCIETY*, 37 (1990).

⁹⁶ MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in *GROWING UP IN A CHANGING SOCIETY*, 41 (1990).

⁹⁷ MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in *GROWING UP IN A CHANGING SOCIETY*, 42 (1990).

⁹⁸ The needs of children were listed three times just in the Preamble. The needs of developing countries occurred thrice.

⁹⁹ MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in *GROWING UP IN A CHANGING SOCIETY*, 37 (1990).

Thus, X [the child] **needs** Y [a family environment] **for** Z [full and harmonious development].

It is important to note that the ‘truths’ presented by the Preamble regarding not only development, but also the family, are difficult to argue against. If children are in a state of development, then families provide an atmosphere of happiness, love and understanding. The CRC does not state why development is the goal, nor does it explain how families enable development; both are assumed ‘truths’; ideas so well-known and accepted they require no explanation or illustration. Jenks has argued that childhood defined by the family environment and development is taken for granted. He argues that ‘[childhood]’s utter “thereness” seems to foster a complacent attitude about the widespread tendency to routinise and naturalise childhood’.¹⁰⁰ Childhood, then, is taken for granted as necessary, inevitable,¹⁰¹ and even ‘banal’.¹⁰² Chapter 6 will explore how the CRC constructs childhood as a state of development and will use Woodhead’s equation to break down how ‘development’ is used in the CRC and what is made possible through its construction. Chapter 7 will examine the role of the family in the CRC, examining what is made possible through its construction. Both chapters aim to examine what is taken for granted, what is being assumed to be ‘true’, and the effect of these ‘truths’.

The parade of literature that seems not to be accounted for by commentators on the CRC continues. Prout and James state that ‘the immaturity of childhood is a biological fact of life but the ways in which this immaturity is understood and made meaningful is a fact of culture’.¹⁰³ Jenks acknowledges that children do practically ‘need’ their parents’ material, physical, and emotional assets.¹⁰⁴ However, he argues that these ‘needs’ are always realised within particular socio-historical, and cultural, settings.¹⁰⁵ Freeman has argued that ‘childhood, like adulthood or old age, is to a large extent a social construct . . . a product of historical accidents and responses to particular pressure at particular times’.¹⁰⁶ All people ‘need’ others in order to generate a meaningful environment for change, stasis, or and so on.; quite simply we cannot make sense

¹⁰⁰ CHRIS JENKS, CHILDHOOD, 8 (2005).

¹⁰¹ CHRIS JENKS, CHILDHOOD, 8 (2005).

¹⁰² John Horton and Peter Krafl, *Not Just Growing Up, But Going On: Materials, Spacings, Bodies, Situations*, 4(3)

CHILDREN’S GEOGRAPHIES 259, 260 (2006).

¹⁰³ ALLISON JAMES and ALAN PROUT, *A New Paradigm for the Sociology of Childhood? Provenance, Promise and Problems*, in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD, 7 (1997).

¹⁰⁴ CHRIS JENKS, CHILDHOOD, 40-41 (2005).

¹⁰⁵ MARTIN WOODHEAD, *Psychology and the Cultural Construction of “Children’s Needs”*, in GROWING UP IN A CHANGING SOCIETY, 37 (1990).

¹⁰⁶ MICHAEL FREEMAN, THE RIGHTS AND WRONGS OF CHILDREN, 6 (1983).

alone.¹⁰⁷ Adults, however, are assumed within social and liberal rights theory to operate with a degree of basic reciprocity, autonomy, and capacity.¹⁰⁸ In this way, children are viewed a uniquely 'needy' or uniquely 'dependent' by virtue of their immaturity. This immaturity is then aligned with the idea that children cannot have legal capacity.

Rationality, immaturity, or moral agency has been critiqued as a measure for legal capacity for other identity groups. Freeman notes that feminist moral theory questioned the deeply held assumption that moral agency and full citizenship require a person to be autonomous and independent.¹⁰⁹ The argument that capacity is irrelevant to the grant of autonomy rights is premised on the idea that capacity for any human being, regardless of category (age, gender, sexual orientation, class, caste, ethnicity, nationality), cannot be the precondition for rights as even those who are considered as having 'capacity' would not meet such a condition. The rational autonomous man making decisions for himself does not exist. Feminists have criticised the rational autonomous man, as he too depends on other people to feed him and keep him clean, and even to keep him company.¹¹⁰ Iris Young contends that one cannot imagine a society in which some people including children would not need to be dependent on others at least some of the time.¹¹¹ In this way, all humans have 'needs' and as such will be dependent. Young argues that that the exclusion of women, children, the working class, and the mentally disordered from the liberal order on the basis of their lack of autonomy is now only barely hidden beneath the surface.¹¹² Yet, somehow the 'needs' of children, in other words, their alleged lack of autonomy, are viewed as fundamentally different from adults and result in the unique 'protection'. As will be discussed in Chapter 6, these 'truths' of childhood construct the child as incapable, immature, but with the hope of 'developing' into being capable and mature. These 'truths' of childhood have such a strong foothold in the CRC, that they defy opposition not based on some 'objective' merit, as such does not exist, but rather for political reasons that are rarely addressed and seriously challenged. While this section sought to overview certain critiques of assumptions made about childhood that are also reflected in the CRC's vision of childhood, the next section seeks to examine the ways in which these 'truths' are constructed. Quite simply, binary opposition means, in the context of identity, that there is no identity that

¹⁰⁷ CHRIS JENKS, CHILDHOOD, 40–41 (2005).

¹⁰⁸ CHRIS JENKS, CHILDHOOD, 40–41 (2005). See generally MARTHA NUSSBAUM, SEX AND SOCIAL JUSTICE (1999).

¹⁰⁹ Michael Freeman, *The Sociology of Childhood and Children's Rights*, 6(4) INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 433, 440 (1998).

¹¹⁰ Berry Mayall, *The Sociology of Childhood in Relation to Children's Rights*, 8 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 243, 249 (2000), quoting JEAN GRIMSHAW, FEMINIST PHILOSOPHERS: WOMEN'S PERSPECTIVES ON PHILOSOPHICAL TRADITIONS (1986).

¹¹¹ IRIS YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE, 54 (1990).

¹¹² IRIS YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE, 54 (1990).

stands alone; an identity and its associated 'truths' are created in relation to some other identity.¹¹³ Identity depends on difference because one identity cannot *be* unless it can be different from something else.¹¹⁴ As such, to understand what is 'true' about the 'child', one must understand what the child is not.

III. BINARY OPPOSITION: HOW THE 'TRUE' CHILD IS CONSTRUCTED

The theory of binary oppositions is a theoretical tool, first introduced in Chapter 3, that helps explicate how the above mentioned 'truths' about the category 'child' are constructed, and more importantly how 'common sense' associations with specific identities are rebuttable (to be taken up in Chapter 9). According to the theory of binary oppositions, the CRC does not (cannot) just relate to one child, or even the category 'child'. Rather, the CRC relates to a multiplicity of persons (and entities): the adult and the child.¹¹⁵ What it means to be a 'child' can only be understood by comprehending what it means to be an adult. Through the adult-child binary, we come to understand what it means to be a 'good' child and a 'good' adult. The CRC does not just describe one child and one adult (the 'good'/normative), but simultaneously describes others (child=the juvenile, the parentless, and so on; adult=the irresponsible, and so on.). This section will examine the adult – child and the good child – bad child binary oppositions at work in the CRC. This thesis argues that the adult – child binary enables the performance of a normative/universal/'true' child and normative/universal/'true' childhood.

a. Adult – Child Binary¹¹⁶

The child's difference from the adult is the definition of what it means to be a child. What it means to be an adult is understood in terms of what it means to not be a child. As was argued in Chapter 3, no identity stands alone; an identity is created in relation to other identities.¹¹⁷ Identity depends on difference because one identity it is only distinguishable because it is different from something else.¹¹⁸ To feel like an adult (wage-earner, burdened, responsible) requires differentiation from what stands as its opposite: the child (care-free, imaginative, and

¹¹³ JUDITH BUTLER, *GENDER TROUBLE*, 30 (1990).

¹¹⁴ Jack Balkin, *Deconstructive Practice and Legal Theory*, 96 *YALE LAW REVIEW* 743, 748 (1987).

¹¹⁵ The 'adult' could refer to both the parent and the state, in the sense that both are viewed as non-children, or rational, responsible, and so on. For the purpose of this thesis, adult will implicitly focus on the 'parent', as the CRC most often envisions this coupling. See Chapter 7 for further discussion.

¹¹⁶ The term 'adult' in this section refers both to the parent/care-taker and the state/care-taker. While the state and the parent have separate functions, rights, and responsibilities under the CRC, both 'adults' are constructed in opposition to the child.

¹¹⁷ JUDITH BUTLER, *GENDER TROUBLE*, 30 (1990).

¹¹⁸ Jack Balkin, *Deconstructive Practice and Legal Theory*, 96 *YALE LAW REVIEW* 743, 748 (1987).

irresponsible).¹¹⁹ The identities of the opposition enable, and therefore fundamentally depend upon each other's existence. Neither term of the opposition can be original and fundamental because both are related to each other in a system of mutual dependences and differences.¹²⁰ Nonetheless, this binary relation is not equitable.¹²¹ Rather the relationship between the two terms of the opposition is laden with values that assume that one has dominance over the other: one is normal the other abnormal, one is simple the other is complex, one is the rule the other is the exception.¹²² The binary opposition coupling includes 1) a subject: an agent that is viewed positively in dominant discourses (for example, rational) and 2) the 'other': the abnormal, the undesirable, everything the subject is not (for example, irrational).¹²³ In the adult-child binary, 'adulthood' is associated with privileged or valued characteristics such as rationality or mindfulness, whereas childishness is associated with irrationality or recklessness. Archard argues that the child's nature is defined negatively not so much in terms of what it is in and of itself but rather in terms of what the child lacks.¹²⁴ The child lacks maturity, lacks 'adulthood'.

The internal coherence of either identity requires an oppositional construction of maturity. This oppositional binary maturity system therefore limits possibilities for autonomy and dependency for children, as well as for adults. This maturity matrix violently forecloses internal incoherence, which is demonstrated by the fact that when people 'do' their maturity incorrectly, they are punished by cultures and laws. Examples of children doing their maturity 'wrongly' include when children exercise criminal intent to murder or when girls (in particular) display 'mature' sexuality.¹²⁵ In both instances, these persons no longer remain children, but are often made into adults.¹²⁶ Binary oppositions serve a particular political ideology and are enforced through the

¹¹⁹ Yanghee Lee, *18 Candles*, in *18 CANDLES THE UNCRC REACHES THE AGE OF MAJORITY*, 12 (Jane Connors et al. eds., 2007): 'For a very long time, there existed the implicit binarism of the psychological model which viewed children as immature, irrational, incompetent, asocial and acultural. On the other hand, adults were viewed as mature, rational, competent, social, and autonomous'.

¹²⁰ Jack Balkin, *Deconstructive Practice and Legal Theory*, 96 *YALE LAW REVIEW* 743, 751 (1987).

¹²¹ Sarah L. Holloway & Gill Valentine, *Spatiality and the New Social Studies of Childhood*, 34(4) *SOCIOLOGY* 763, 765-766 (2000); Leena Alanen, *MODERN CHILDHOOD: EXPLORING THE 'CHILD QUESTIONS'* IN *SOCIOLOGY* (1992); Anne Oakley, *Women and Children First and Last: Parallels and Differences Between Women's and Children's Studies*, in *CHILDREN'S CHILDHOODS: OBSERVED AND EXPERIENCED* (Berry Mayall ed., 1994).

¹²² Jack Balkin, *Deconstructive Practice and Legal Theory*, 96 *YALE LAW REVIEW* 743, 747 (1987).

¹²³ Judith Butler, *GENDER TROUBLE*, 6-7 (1990).

¹²⁴ David Archard, *Philosophical Perspectives on Childhood*, in *LEGAL CONCEPTS OF CHILDHOOD*, 43 (Julia Fionda ed., 2001).

¹²⁵ Chris Jenks, *CHILDHOOD*, 120 (2005). Jenks points out the radical disruption that occurs to the category 'child' when children commit violent crimes. Also during the drafting of Article 37, the USA delegate stated that 'it was implicitly understood that a child committing an offence which, if committed by an adult, would be criminal could be treated as an adult'. Sharon Detrick, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PREPARATOIRES'*, 465-466 (1992).

¹²⁶ For example: *State of Florida v. Lionel Tate*, Case No. 4D01-1306 (Fla. 4th DCA). Tate was convicted for first-degree murder and sentenced to life imprisonment without the possibility of parole for, at the age of 12, battering a girl to death. In sentencing Tate to life imprisonment, Judge Lazarus of Broward County Circuit Court said that '[t]he acts of Lionel Tate were not the playful acts of a child. The acts of Lionel Tate were not born out of immaturity. The acts of Lionel Tate were cold, callous and indescribably cruel'. The sentencing was overturned on appeal to one year's house arrest and 10 year probation.

requirement of internal coherence of each of the oppositional terms. Children must act like children, or quite simply they are made into adults.

Michael King argues that the entire children's rights movement relies upon the clear distinction between children and adults.¹²⁷ The movement, he argues, assumes that it possible and meaningful to make this distinction. One is simply a child or an adult.¹²⁸ In the CRC, the assignment of roles and identities is laid out through the allocation of particular rights given to the adult and the child. While Chapters 6 and 7 will thoroughly explore the relationships within the family and between the parents and the state, this sub-section will briefly survey how these two identities (adult – child) are constructed in the CRC. The Preamble starts off by recognising that 'all members of the human family' have 'inherent dignity' and 'equal and inalienable rights'. However, the CRC quickly moves to distinguish the child from the rest of the 'human family'. Article 1 sets out strict qualifications for a child: those under 18 years of age, unless specified otherwise by law. In the Preamble itself, the CRC begins to describe the normative child. The Preamble normatively outlines the following for the child: 1) the child requires a family for development; 2) the 'child should be fully prepared to live an individual life in society', 3) 'childhood is entitled to special care and assistance', and 4) 'the child, by reason of his physical and mental immaturity, needs special safeguards and care'. Accordingly, the child is cast as developing, unprepared for individual life, in need of adult assistance, and physically and mentally immature.

Article 3 states that parents are the adults who are to have primary responsibility to 'assist' and 'care for' the child. The adult's right and duty is spelled out more explicitly in Article 5: '[s]tates Parties shall respect the responsibilities, rights and duties of parents'. The child has the 'right' to know and be cared for by her/his parents, according to Article 7; to freedom of 'thought, conscience and religion' but parents have the 'right and duty' to direct the child in the exercise of the child's 'freedom' under Article 15; parents are responsible for the upbringing and development of the child according to Article 18; any assistance from the state that is aimed at the child is to be given to the parents, who have primary responsibility under Article 27; and children must develop respect for their parents in the course of their education according to Article 29. As such, the adult, according to the CRC, is developed, prepared for individual life,

In the famous case in the United Kingdom involving the death of James Bulger is another illustration. See MICHAEL FREEMAN, *The James Bulger Tragedy: Child Innocence and the Construction of Guilt*, in *THE MORAL STATUS OF CHILDREN: ESSAYS ON THE RIGHTS OF THE CHILD*, 235 (1997).

¹²⁷ Michael King, *The Child, Childhood, and Children's Rights Within Sociology*, 15 KING'S LAW JOURNAL 273 (2004).

¹²⁸ Michael King, *The Child, Childhood, and Children's Rights Within Sociology*, 15 KING'S LAW JOURNAL 273, 282 (2004).

capable of assisting, physically and mentally mature, responsible, capable of possessing 'duties', and requires respect (specifically from the child) in excess of that given to all members of the human family for merely being human.

The vision of the child in the CRC is defined through this adult – child opposition. At the same time, this opposition functions to situate the adult over the child, where the child is deemed lesser. It is notable that the explicit normative aim of childhood is to become an adult.¹²⁹ In this way, only by engaging in a performance appropriate for a child (in other words, acting like a child, and not acting like an adult) is the child enabled to become an adult. This thesis argues that while the CRC purports to guard the interests and rights of children around the world, the CRC's protection and rights stop where the line between adult and child is at risk of becoming unclear.¹³⁰ This thesis argues that maintaining the adult –child binary is one of the primary functions of the CRC. This line of argument will be taken up further in Chapter 9. What is clear here is that the territory of both being an adult and a child is clearly demarcated in the CRC. The CRC rests on the child – adult binary, rests on the difference between adulthood and childhood as fundamental. The normative child is cannot be an adult. The normative child is to be the good child, the non-adult.

b. Good Child – Bad Child: Child= Innocent & Passive but also Demonic & Subversive

The 'good' child is by definition the non-adult because the 'good' child does not demonstrate adult-like qualities: independence, responsibility, sexuality, and subjectivity. While holding onto the picture of childhood characterised by innocence, passivity, dependence, and vulnerability, this is not the only picture of the child that is presented in the CRC. Ironically, children are also characterised as evil, primitive, and therefore in need of discipline. To understand the 'natural' child, one must understand what the 'natural' child is not. This process defines yet another binary opposition of what it means to be a 'good' child (innocent, passive, and dependent) or a 'bad' one (knowledgeable, independent, and active).¹³¹ Jenks describes two dominant ways of

¹²⁹ Preamble: 'Considering that the child should be fully prepared to live an individual life in society'.

¹³⁰ Maria Grahn-Farley, *Beyond Right and Reason: Pierre Schlag, The Critique of Normativity, and the Enchantment of Reason: A Theory of Child Rights*, 57 UNIVERSITY OF MIAMI LAW REVIEW 867, 908 (2003).

¹³¹ Some authors also include in this binary, the view that one child is connected to nature and rural life, whereas the other is connected to modernity and urban areas. See Karen Nairn et al., *Destabilizing Dualisms: Young People's Experiences of Rural and Urban Environments*, 10(1) CHILDHOOD 9, 9–42 (2003). Indeed the Apollonian child is portrayed as connected with the natural environment.

thinking and talking about the child: the Dionysian child and the Apollonian child.¹³² These two versions of the child form a binary frame that is the basis for what is or is not appropriate and even 'natural' for being a child. This binary opposition delineates what a 'good' child must be, and what he/she must not be.

The Apollonian child is angelic, naturally good, innocent, asexual, the best of human nature untainted by the world; such children play and chuckle, smile and laugh.¹³³ The Apollonian child is perceived as pre-Eve and her apple, pre-'the Fall'.¹³⁴ Under this construction children are not curbed or beaten into submission, they are encouraged, enabled, facilitated. This can be seen for example in the CRC's Preamble when it speaks of 'happiness' and love' as childhood's proper environment. Innocence has a very specific face: lack of knowledge of sexuality and desire for any type of sexual expression. Because the child does not possess any sexual knowledge, children are denied access to certain information¹³⁵, such as preventing children from seeing or hearing 'corrupting' influences. For example, the CRC's Article 17(e) requires the state to protect children from 'information and material injurious to [the child's] well-being'. The implicit motivation for the article seems to be protecting the child's innocence, in this case their 'well-being'. The Committee to the CRC in its General Comment 4, paragraph 28 states that in light of certain articles of the CRC, including Article 17, 'State parties should provide adolescents with access to sexual and reproductive information, including on family planning and contraceptives, the dangers of early pregnancy, the prevention of HIV/AIDS and the prevention and treatment of sexually transmitted diseases (STDs)'.¹³⁶ Importantly General Comment 4 further notes that, 'In addition, States parties should ensure that they have access to appropriate information, regardless of their marital status and whether their parents or guardians consent.'¹³⁷ Nonetheless, paragraph 32 notes that the child's maturity and the child's best interests, both assessed by an adult determination of what is or is not appropriate for childhood and thus hinge upon adult assumptions, dictate the child's access to information. More fundamentally, implicit in the assessment that certain information and material will be injurious to the child's well-being

¹³² CHRIS JENKS, *CHILDHOOD*, 74 (2005). Jenks argues that, '[t]hese images are informative of the shifting strategies that Western society has exercised in its increasing need to control, socialise and constrain people in the transition towards modernity'.

¹³³ CHRIS JENKS, *CHILDHOOD* (2005).

¹³⁴ CHRIS JENKS, *CHILDHOOD* (2005).

¹³⁵ CHRIS JENKS, *CHILDHOOD*, 161 (2005).

¹³⁶ General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child, paragraph 28, July 1, 2003, Committee on the Rights of the ChildUN. Doc. CRC/GC/2003/4.

¹³⁷ General Comment No. 4: Adolescent health and development in the context of the Convention on the Rights of the Child, paragraph 28, July 1, 2003, Committee on the Rights of the ChildUN. Doc. CRC/GC/2003/4.

is the Apollonian child, for how else could certain information and material being inappropriate for any human but the unknowing, innocent child.

Interestingly and contrarily, Article 34 places an obligation on the state to prevent 'the *exploitative* use of children in prostitution or other unlawful sexual practices' and 'the *exploitative* use of children in pornographic performances and materials'. The CRC at least contemplates that not all child prostitution and pornographic performances are exploitative, whereas the Optional Protocol prohibits 'the sale of children, child prostitution and child pornography'.¹³⁸ Notably, 166 states have ratified this Optional Protocol.¹³⁹

Kitzinger points out that in the name of protecting innocence, denying children access to knowledge and power actually increases their vulnerability to abuse.¹⁴⁰ It is the notion of innocence which, for example, discourages educating children about incest, lest they 'corrupt' the few years of innocence that should be every child's right.¹⁴¹ The idea of innocence appears premised on the idea that children have no interest in their sexuality (until or unless they are 'corrupted').¹⁴² In the name of innocence, children's own expressions of sexuality such as masturbation or consensual sexual activity are repressed; children are denied control of their own bodies, including the denial of contraceptives or abortions.¹⁴³ One of the implications of childhood being characterised by innocence is that it stigmatises the knowing (non-innocent) child. The romanticisation of childhood innocence excludes those who do not conform to the ideal. Kitzinger notes that if the violation of innocence is the criterion against which the act of sexual abuse is judged then the violation of a 'knowing' child becomes a lesser offence than violating an 'innocent' child.¹⁴⁴

¹³⁸ Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, Article 1, Jan. 18, 2002, A/RES/54/263, <http://www2.ohchr.org/english/law/crc-sale.htm>.

¹³⁹ https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11-c&chapter=4&lang=en. 154 states have ratified the Optional Protocol relating to Child Soldiers. [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11-c&chapter=4&lang=enhttps://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en).

¹⁴⁰ Jenny Kitzinger, *Who Are You Kidding? Children, Power and the Struggle Against Sexual*, in *CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD*, 161 (Allison James and Alan Prout eds., 1997).

¹⁴¹ Jenny Kitzinger, *Who Are You Kidding? Children, Power and the Struggle Against Sexual*, in *CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD*, 161 (Allison James and Alan Prout eds., 1997).

¹⁴² Jenny Kitzinger, *Who Are You Kidding? Children, Power and the Struggle Against Sexual*, in *CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD*, 160-161 (Allison James and Alan Prout eds., 1997).

¹⁴³ Jenny Kitzinger, *Who Are You Kidding? Children, Power and the Struggle Against Sexual*, in *CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD* (Allison James and Alan Prout eds., 1997).

¹⁴⁴ Jenny Kitzinger, *Who Are You Kidding? Children, Power and the Struggle Against Sexual*, in *CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD*, 160-161 (Allison James and Alan Prout eds., 1997).

The cherub-faced Apollonian child is not simply characterised by asexual innocence; he/she also lacks ability and autonomy. This cherub is merely a passive object.¹⁴⁵ Kitzinger contends that, looking at the dramatic imbalance of power and the socially sanctioned routine subordination of children means that they are often made objects of victimisation.¹⁴⁶ However, contrary to the notion of the child being merely a passive victim, at some stage many children rebel against total dictation with all the resources they have available.¹⁴⁷ Despite instances of children demonstrating agency, this Apollonian child is viewed as merely passive.¹⁴⁸ As such, the perception of the child as innocent and passive justifies the child being denied access to information, justifies the child's inability to have control over their own bodies, and justifies other people acting on children's behalf.¹⁴⁹

The Dionysian child or the 'inherently bad' child, who like this prince of wine, revelry, and nature, represents the idea that children possess an innate evil or corruption, is buttressed in the doctrine of Adamic original sin.¹⁵⁰ If adults allow these children to stray away (from adults), these children's inherent evil will mobilise.¹⁵¹ The Dionysian child can be seen in even the early stages of the international children's rights movement. In urging the international community to focus on child protection, Jebb, who drafted the 1924 Declaration, argues that,

[i]f [children] are allowed to grow up stunted or neglected or strangers to moral values, or are ignored in their misery by the more fortunate, they will inevitably

¹⁴⁵ Jenny Kitzinger, *Who Are You Kidding? Children, Power and the Struggle Against Sexual*, in *CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD* (Allison James and Alan Prout eds., 1997).

¹⁴⁶ Jenny Kitzinger, *Who Are You Kidding? Children, Power and the Struggle Against Sexual*, in *CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD* (Allison James and Alan Prout eds., 1997).

¹⁴⁷ Jenny Kitzinger, *Who Are You Kidding? Children, Power and the Struggle Against Sexual*, in *CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD*, 161 (Allison James and Alan Prout eds., 1997). Here Kitzinger is referring to sexual abuse, but his analysis could be applicable more generally, for example against curfews.

¹⁴⁸ Jeremy Roche, *Children: Rights and Participation and Citizenship*, 6 *CHILDHOOD* 475, 477 (1999). Roche argues that children that take on serious responsibility are rendered invisible and mute by adults because many adults are not used to dealing with children as equals, do not see children's contribution as 'serious', and refuse to see themselves (adults) as having the same power dimension in the lives of young people as racism or sexism.

¹⁴⁹ Though children are given the right to information in Article 13, that right is limited by the parents' right to guide and direct the child's exercise of the rights in the CRC in Article 5, and by Article 17(e) discussed above; Chapters 5 and 6 will more fully discuss how adults are empowered to act on behalf of children. Chapter 7 will discuss the regulation of the child's body.

¹⁵⁰ Jenny Kitzinger, *Who Are You Kidding? Children, Power and the Struggle Against Sexual*, in *CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD* (Allison James and Alan Prout eds., 1997). See also BOB FRANKLIN, *The Case for Children's Rights: A Progress Report*, in *THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE*, 4-5 (1995).

¹⁵¹ Jenny Kitzinger, *Who Are You Kidding? Children, Power and the Struggle Against Sexual*, in *CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD* (Allison James and Alan Prout eds., 1997).

grow up to hate and destroy, and tomorrow's world can only end up in disaster, politically and economically.¹⁵²

Adults are required to impart these moral values and to ensure the child is not stunted. This Dionysian child loves self-gratification and pleasure, and therefore requires moral guidance through physical and disciplinary direction. This headstrong and stubborn subject has to be broken, but all for his or her own good.¹⁵³ The Dionysian child can also be seen in the CRC in, for example Article 28(2)'s, which does not ban corporal punishment while at school. In the text of the CRC¹⁵⁴, corporal punishment is not banned, at school nor at home; the Dionysian child may be 'smacked' back into line. Article 40 (3)(b) and (4) speak to situations where children who have infringed penal law should be dealt directing away from judicial proceedings. However, the Article includes 'whenever appropriate and desirable' and 'proportionate both to their circumstance and the offence' and thus encapsulate the Apollonian child who should be given 'care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care' and those Dionysian children for whom prison is appropriate and desirable.¹⁵⁵ In Article 5 it is the parents' responsibility to guide and direct the child in application of the child's right to freedom, expression, religion, amongst others. Article 5 mandates that the adult to forever¹⁵⁶ guide the child, including guide the child against the child's own potential wrong doing. Article 3 mandates that the child will always be in 'care' of an adult, and as such this child should never stray. Chapter 7 will discuss further what will be argued that the CRC's requires an adult for every child for the duration of childhood. In this way, the child can never stray away, from adults.

This sub-section describes the performance of the child in the CRC through the utilisation of the good child – bad child opposition. The extent, to which a person is a good child, is precisely the extent to which the person is not a bad child. Indeed the good child – bad child binary has a lot in common with the adult – child binary, where the attributes of the 'bad' child are also the

¹⁵² YVES BEIGBEDER, THE ROLE AND STATUS OF INTERNATIONAL HUMANITARIAN VOLUNTEERS AND ORGANIZATIONS, 195 (1991).

¹⁵³ Jenny Kitzinger, *Who Are You Kidding? Children, Power and the Struggle Against Sexual*, in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD, 167 (Allison James and Alan Prout eds., 1997).

¹⁵⁴ The Committee has condemned corporal punishment, yet the CRC itself does not. General Comment No. 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment, U.N. Doc. CRC/C/GC/8 (Mar. 2, 2007), para. 11; available at www2.ohchr.org/english/bodies/crc/comments.htm.

¹⁵⁵ Article 40 (3)(b) and (4).

¹⁵⁶ Article 5 contains that caveat that the adult may only guide the child 'in a manner consistent with the evolving capacities of the child'. See Chapter 7 for a critique of the concept of 'evolving capacities' in the CRC.

attributes of the 'adult'. The normative child is not to be an adult. The normative child is to be the good child, or the non-adult. In this way, the child is better able to become an adult. Chapter 3 discussed how the terms of a binary opposition are not equal, even though they equally depend on each other for their meaning. These oppositions (good child/bad child and adult/child) situate the adult over the child, where the child is deemed lesser. This construction of the good child/bad child binary makes sense in the context of ensuring the appearance of difference between the categories 'adult' and 'child'. For it is this difference between the categories 'adults' and 'children' that is fundamental to rationalising international human rights' differential treatment of those classified 'adults' and those classified 'children', discussed in Chapter 4. Yet, this thesis argues that the rights given to the child and the 'truths' told in the CRC about 'childhood' relate not to any biological or internal characteristics that the 'child' might possess, but rather to upholding the adult – child binary.

IV. CONCLUSION

Employing Foucault and Butler, this thesis argues that there is no unitary identity behind the category 'child'. To begin unpacking 'truths' about childhood that would justify such differential treatment in the context of international human rights discussed in Chapter 4, this chapter canvassed a particular stream of child sociology. The first section argued that childhood is a social construct. Section II argued that certain 'truths' about childhood underpin dominant perceptions of the child. Although these 'truths' will be discussed further in Chapters 6, 7, and 8, Section II alluded to how these 'truths' are embedded in the CRC's construction of the child. It was argued that childhood is characterised by three 'truths': 1) childhood as a time for development, 2) children as uniquely vulnerable and thus in need of unique protection, and 3) childhood as a time of being particularly 'needy'.

Section III discussed the ways in which the normative 'child' is constructed through the adult – child binary, as well as the good-child – bad-child binary. This section argued that the CRC gives the child rights and protection only to the extent that those rights and protection do not blur the appearance of these strict binaries. While the identity of the adult is equally dependent on the identity of the child, the child is constructed as lesser. The CRC's adherence and acceptance of this child – adult binary, means that it too constructs the child as lesser. Further, the CRC is an adult-centric version of rights for children. Richard Delgado, a critical race theorist, has argued that a dominant group (here the category 'adult') creates its own stories to remind itself and

others of the dominant group's status, and provides that story as a shared reality, where the dominant group's own superior position is seen as natural.¹⁵⁷ Childhood's 'difference' may be understood in terms of power, though Jenks has argued that the grounds of power are not purely aged-based (necessarily involves consideration of race, class, gender, caste, and so on).¹⁵⁸ Jenks argues that the altruism or care that an adult feels towards a child too is a social construct. This care, as will be discussed in Chapter 6, can be read as ideological and thus the appearance of care has the ability to disguise the possibility of control. Jenks argues that dependency then is seen not as spontaneous loving bonds, but mechanisms that serve a particular version of the status quo. By accepting the 'truths' described in this chapter, the CRC also sustains the adult – child binary, where status quo power relations of adults positioned over children remains the norm. Simply put, these 'truths' about childhood rationalise the hierarchical relationship of adults over children. The next two chapters will discuss in particular how the 'truths' that the child is 'developing' and thus requires 'care', operate in the CRC.

¹⁵⁷ RICHARD DELGADO, *Legal Storytelling: Storytelling for Oppositionist and Others: A Plea for Narrative*, in CRITICAL RACE THEORY, THE CUTTING EDGE, 64 (1995).

¹⁵⁸ CHRIS JENKS, CHILDHOOD, 41 (2005).

CHAPTER 6

A 'TRUTH' OF THE CRC: THE DEVELOPING CHILD

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*A substantially similar version of this chapter was published, see Ashleigh Barnes, *The CRC's Performance of the Child as Developing*, 14 CURRENT LEGAL ISSUES 392 (2012).

OUTLINE

- I. PREAMBLE
- II. ARTICLE 6: RIGHT TO LIFE
- III. ARTICLE 18: STATE RECOGNITION THAT PARENTS HAVE PRIMARY RESPONSIBILITY FOR THEIR CHILD(REN)
- IV. ARTICLE 27: RIGHT TO ADEQUATE STANDARD OF LIVING
- V. ARTICLE 29: FOCUS OF EDUCATION
- VI. ARTICLE 32: RIGHT TO BE FREE FROM EXPLOITATIVE AND HAZARDOUS WORK
- VII. ARTICLE 23: RIGHTS OF THE CHILD WITH DISABILITY
- VIII. CONCLUSION

The CRC appears to assume that there is a universal model of childhood development.¹ The CRC uses the word 'development' eighteen times, fourteen of which refer to the child's development.² Childhood as the site of development was accepted without discussion in the drafting of the Convention.³ The acceptance of childhood as a state of development is neither explained in the Convention nor by the drafters, excepting perhaps this statement in the Preamble: 'bearing in mind that, as indicated in the Declaration on the Rights of the Child, the child, by reason of his physical and mental immaturity, needs special safeguards and care'.⁴ Childhood characterised as a unique state of development resulting from the child's immaturity is presented as a 'truth' in the CRC, apparently too obvious to necessitate discussion. As discussed in Chapters 4 and 5, children are assumed immature, and thus in need of development. As discussed in Chapter 5, the performance of the child as developing matches dominant knowledges about childhood, including certain psychological and even 'common sense' understandings of childhood.⁵ The Convention's version of childhood as a unique period of development makes possible, even necessary, the unique protection of childhood. Put another way, the construction of childhood as a period of development makes 'care' by adults necessary for all children, as will be discussed in Chapter 7. In this chapter, and the following, this thesis will examine two 'truths' of the CRC: 1) childhood is a state of development, and 2) children require the 'care' of certain adults.⁶ This chapter will discuss how the notion of 'development' operates within the Convention. Chapter 7 discusses how the child's development justifies the child's 'need' for protection or 'care'.

The agitation of a universal identity, or a categorisation based upon alleged 'natural' characteristics, has occurred in the context of gender, race, sexual orientation, and so on, to expose the unnaturalness of and difference within a category. In an attempt to explore a similar

¹ See Eva Brems, *Children's Rights and Universality*, in DEVELOPMENTAL AND AUTONOMY RIGHTS OF CHILDREN: EMPOWERING CHILDREN, CARE-GIVERS, AND COMMUNITIES (Jan C. M. Willems ed., 2002) reproduced SARA DILLON, INTERNATIONAL CHILDREN'S RIGHTS (2010). For a critique see Vanessa Pupavac, *Misanthropy Without Borders: The International Children's Rights Regime*, 25(2) DISASTERS 95, 101 (2001); Jo Boyden, *Children's Experience of Conflict Related Emergencies: Some Implications for Relief Policy and Practice*, 18(3) DISASTERS 254, 256 (1994). The universal application of the CRC will be discussed in Chapter 9.

² Other references to 'development' relate to the state's obligation to develop programs, institutions, and so on. For example Article 18(2) states, '[f]or the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children'.

³ See generally SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES' (1992).

⁴ Convention on the Rights of the Child, Preamble, Nov. 20, 1989, 1577 U.N.T.S. 3. See generally SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES' (1992).

⁵ REX STANTON ROGERS and WENDY STANTON ROGERS, STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN, 51 (1992).

⁶ MICHAEL KING and CHRISTINE PIPER, HOW THE LAW THINKS ABOUT CHILDREN, 79 (1995). Piper and King argue that children's rights law 'is enslaved to child welfare and child development experts'.

critique of the category 'child', a variety of theoretical tools discussed in Chapter 3 will be recruited to make the argument that the category 'child' is not based on a set of natural or fundamental characteristics shared by those aged 0-18; the operating presumption about the child in the CRC. Indeed, the category 'child' is a grouping deemed by the international community to be sufficiently and collectively unique to justify the creation of a singular category in the context of international law, regardless of gender, class, ethnicity, nationality, and so on. While other fields of study have agitated the 'naturalness' of the 'developing child' some forty years ago,⁷ as discussed in Chapter 5, international legal discourse on the child and rights of the child remains stuck on the 'developing child'. This chapter focuses on the concept of 'development', arguing it as one of the most influential and universally subscribed 'truths' about childhood.⁸ This chapter argues that the term 'development' holds important interpretive value for other dominant discourses/'truths' regarding childhood. The term 'development' encapsulates, explains, and even 'cures' (in other words, provides the means to surmount) the child as passive, incapable, dependent, vulnerable, subversive, and in need of discipline. The term 'development' accounts for the 'need' for adult intervention in the lives of both the Apollonian and Dionysian child, outlined in Chapter 5. While the terms vulnerability, incapacity, dependence and passivity lack a certain concreteness (and result in a never-ending discussion),⁹ development (and the child's need for it) is virtually unquestionable.¹⁰ Notably, the discussions

⁷ See generally PHILIPPE ARIES, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE (1962); DAVID ARCHARD, CHILDREN: RIGHTS AND CHILDHOOD (2nd ed. 2004); DAVID ARCHARD, CHILDREN, FAMILY AND THE STATE (2003); Michael Freeman, *The Sociology of Childhood and Children's Rights*, 6(4) INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 433 (1998); ERIK ERIKSON, CHILDHOOD AND SOCIETY (1977); Sarah L. Holloway & Gill Valentine, *Spatiality and the New Social Studies of Childhood*, 34(4) SOCIOLOGY 763 (2000); JOHN HOLT, ESCAPE FROM CHILDHOOD (1974); Allison James, *Confections, Concoctions and Conceptions*, 10(2) JOURNAL OF THE ANTHROPOLOGY SOCIETY OF OXFORD 83 (1979); ALLISON JAMES, CHRIS JENKS, and ALAN PROUT, THEORISING CHILDHOOD (1998); Allison James and Chris Jenks, *Constructing Childhood Sociologically*, in AN INTRODUCTION TO CHILDHOOD (Mary Jane Kehily, ed., 2004); ALLISON JAMES and ADRIAN JAMES, CONSTRUCTING CHILDHOOD: THEORY POLICY, AND SOCIAL PRACTICE (2004); CHRIS JENKS, *Constituting the Child*, in THE SOCIOLOGY OF CHILDHOOD - ESSENTIAL READINGS (1982); Chris Jenks, *Child Abuse in the Postmodern Context: An Issue of Social Identity*, 2(3) CHILDHOOD 111 (1994); Chris Jenks, *The Post-Modern Child*, in CHILDREN IN FAMILIES: RESEARCH AND POLICY (Julia Brannen & Margaret O'Brien, eds., 1996); BERRY MAYALL, TOWARDS A SOCIOLOGY FOR CHILDHOOD: THINKING FROM CHILDREN'S LIVES (2002); Alan Prout, *Children's Participation: Control and Self-Realisation in British Late Modernity*, 14(4) CHILDREN AND SOCIETY 304 (2000); ALAN PROUT, THE FUTURE OF CHILDHOOD, TOWARDS THE INTERDISCIPLINARY STUDY OF CHILDREN (2004); JENS QVORTRUP, *Varieties of Childhood*, in STUDIES IN MODERN CHILDHOOD: SOCIETY, AGENCY, AND CULTURE (2005); JENS QVORTRUP, CHILDHOOD AS A SOCIAL PHENOMENON AN INTRODUCTION TO A SERIES OF NATIONAL REPORTS (1993); REX STAINTON ROGERS and WENDY STAINTON ROGERS, STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN, (1992); PHILIP VEERMAN, THE RIGHTS OF THE CHILD AND THE CHANGING IMAGE OF CHILDHOOD (1992); Gill Valentine, *Angels and Devils: Moral Landscapes of Childhood*, 14 ENVIRONMENT AND PLANNING SOCIETY AND SPACE 581, 581-599 (1996); Gill Valentine, *Boundary Crossings: Transitions from Childhood to Adulthood*, 1(1) CHILDREN'S GEOGRAPHIES 37 (2003); VIVIANA ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN (1985); NEIL POSTMAN, THE DISAPPEARANCE OF CHILDHOOD (1994); MARTIN HOYLES, THE POLITICS OF CHILDHOOD (1989).

⁸ MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in GROWING UP IN A CHANGING SOCIETY (1990).

⁹ See Chapter 2 for an overview of such discussion.

¹⁰ See for example REX STAINTON ROGERS and WENDY STAINTON ROGERS, STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN (1992); CHRIS JENKS, CHILDHOOD (2005); David Archard, *Philosophical Perspectives on Childhood*, in LEGAL CONCEPTS OF CHILDHOOD (Julia Fionda ed., 2001); Bery Mayall, *The Sociology of Childhood in Relation to Children's Rights*, 8 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 243, 245 (2000).

that led up to the drafting of the CRC were not about whether a child should be construed as developing, but rather about identifying parties in the best position to guide the child through this 'golden' but dangerous time.¹¹ Further, the discussion surrounding the drafting of the CRC, and the Convention itself, does not centre on whether the child's alleged state of development should affect the child's bundle of rights, but rather on the extent to which the child's development should affect the child's bundle of rights.¹²

This chapter posits that the derogation of 'fundamental' rights, which are allegedly available to all humans on the basis of their humanness, for children requires conceptually sturdy ground on which to stand. This chapter argues that justifying the child's bundle of rights on the basis of the persuasive (and scientific) 'truth' of 'development' has greater political purchase than other possible 'truths' established in the Convention (for example, that children are immature). Ultimately, this chapter argues that the CRC's construction of the child as developing, through its mediated allocation of 'rights' to children, sustains and supports a hierarchy of power of the state (as a back-up parent) and the parent over the child. This hierarchy of power is made 'ok'/condonable/even 'necessary' through the deployment of knowledges regarding the child's 'development'. Further, this hierarchy of power makes possible the regulation and control of childhood to be discussed in Chapters 7 and 8. This thesis argues that the CRC is a highly persuasive knowledge manufacturer, legitimating a particular set of discourses on the child. The CRC produces and legitimates its performance of childhood as a fundamental, invariable truth about the category 'child'. In this way, the CRC's claim to 'truth' (child=developing) arguably masquerades as a description of 'how things are', rather than a production/prescription of 'how things must be'.

In an attempt to unpack the operation of 'development' in the Convention, this section will utilise Woodhead's 'needs equation'. As was discussed in Chapter 5, Woodhead argues that childhood is predominantly conceptualised in terms of needs; a term that he argues conceals a

¹¹ GERISON LANSDOWN, *THE EVOLVING CAPACITIES OF THE CHILD*, x (2005): 'Assumptions about child development and evolving capacities of the child Conventional child development theory influence current thinking based on five key assumptions: 1) Child development is a universal process, 2) Adulthood has normative status, 3) Development goals are universal, 4) Deviation from the norm indicates risk for the child, 5) Childhood is an extended period of dependence in which children are passive recipients of adult protection, training, wisdom and guidance rather than contributors to their social environments'.

¹² See for example Eva Brems, *Children's Rights and Universality*, in *DEVELOPMENTAL AND AUTONOMY RIGHTS OF CHILDREN: EMPOWERING CHILDREN, CARE-GIVERS, AND COMMUNITIES* (Jan C. M. Willems ed., 2002) reproduced in SARA DILLON, *INTERNATIONAL CHILDREN'S RIGHTS* (2010); Frances E. Olsen, *Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child*, 6 *INTERNATIONAL JOURNAL ON LAW AND THE FAMILY* 192 (1992); Pe Miljeteig-Olssen, *Advocacy of Children's Rights—The Convention as More than a Legal Document*, 12 *HUMAN RIGHTS QUARTERLY* 148 (1990).

complex practice of latent assumptions and judgments about children.¹³ His equation, 'X needs Y for Z', is a method for analysing and breaking down who needs what and why, questions often difficult to ascertain in a complex social context that contain what are perceived as basic 'truths' about children. The potency of this method lies in its simplicity. It offers an opportunity to deconstruct assumptions, rooted in axiomatic language. As applied to the CRC, X [the child] needs Y [a particular thing that is secured in the form of a right] for Z [to accomplish some measure].¹⁴ This analysis will be used even when the 'need' is implied.

To examine the CRC's 'child', this chapter explores the shape of rights given to the child. When these rights diverge from the rights given to (or emphasised for¹⁵) all other humans, this chapter examines the justification provided by the CRC. These justifications illuminate the CRC's 'true' child. In a sense, this thesis is seeking to understand Pinocchio's goal: what it means to be a 'real' [child], in this case a 'real child' according to the CRC. The chapter argues that to be a 'true' or 'real' child, a person nominated a child must be 'developing'. This chapter then seeks to explicate how this 'truth' of the 'child-as-developing' facilitates a particular hierarchy of power surrounding the child.¹⁶ Each section below examines specific articles in the Convention that

¹³ MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in *GROWING UP IN A CHANGING SOCIETY*, 37, 40 (1990). Woodhead maintains that children might be better served if 'children's needs' were outlawed from all professional discourse, policy recommendations, and popular psychology. As discussed in Chapter 4, Woodhead argues that 'needs' often serve as a very credible veil for uncertainty and even disagreement about what is 'in the best interest' of the child.

¹⁴ MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in *GROWING UP IN A CHANGING SOCIETY*, 37 (1990).

¹⁵ It was noted during the drafting of the Convention, 'there are still those who believe that a convention on the rights of the child was not necessary – that children's rights were, if not totally, at least adequately covered by existing human rights instruments applicable to all, and that it is dangerous or unwarranted to pinpoint children as a special and separate category of human beings. We can recall that it was not because of the Convention that children were singled out as a special group, but because of the realisation, seventy years ago, that children's specific needs and vulnerability demanded particular responses from the international community. We can note in that regard that global human rights instruments were not drawn up with children in mind, that they have been developed over a period of decade, and that as a whole they therefore contain a number of inconsistencies and certainly do not reflect current knowledge and experience with regard to children's issues. But in addition . . . is the usefulness for promoting knowledge and understanding of children's issues'. SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE "TRAVAUX PREPARATOIRES"*, 29 (1992). Germany suggested that '[a]ll states shall ensure a) that all human rights recognised by them also apply to children, b) that general human rights as enshrined in the ICCPR even apply to children, if a state party to the present convention is not a party to the Covenant'. Germany argued that many of the rights in the International Covenants already apply to children, were included again specifically in the draft convention, but on the other hand not all the rights guaranteed by the Covenants appeared in the draft convention, for example the right of self-determination, the equal rights of men and women, the ban on slavery, the right of person arrested or detained to be brought promptly before a judge, even though they also should apply to children. The delegate said that this selective double-regulation of rights would create problems and even contradictions with the Covenants and a general clause ensuring the application of general human rights to children should be substituted for the present Article 1. Australia said that to do so was totally new, bringing into question the whole approach of the Convention to existing rights. It may well have been a better way to proceed had it been introduced years before, but that had not happened and now its acceptance would only serve to delay adoption of the Convention. Ultimately Germany withdrew its proposal. SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE "TRAVAUX PREPARATOIRES"*, 131 (1992).

¹⁶ Thomas Hammarberg, *The UN Convention on the Rights of the Child and How to Make It Work*, 12 *HUMAN RIGHTS QUARTERLY* 97, 101 (1990): 'The triangular relationship between the child, the guardians, and the state was of course a sensitive problem during the drafting'.

reference the child's development. The goal is to examine how development operates (in other words, what the term 'development' makes possible) within each of those articles.

As a reminder, this thesis does not endeavour to engage in black letter law analysis. If so, an easy counter-argument would be that rights given under other international conventions, such as the ICESR and ICCPR, would be applicable to children. Though this counter-argument has met disagreement, even by the drafters of the CRC,¹⁷ this paper does not look to engage in such an analysis. Rather, this paper seeks to examine the story told about the 'child' by the CRC. As such, the rights that are included and excluded, as well as rights that are modified in this Convention, are all of interest. The specific bundle of rights, and therefore the unique bundle of issues and needs identified for the 'child' in the CRC, tell as very specific tale about childhood, contrasting with the story told of adult right holders in other conventions.¹⁸

I. PREAMBLE¹⁹

The Preamble reads,

the child, for the full and harmonious **development** of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding . . . taking due account of the importance of traditions and cultural values of each people for the protection and harmonious **development** of the child.

Applying Woodhead's 'needs equation' to these two sentences,²⁰

¹⁷ SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 130 (1992). Note in particular the German delegates statements that the CRC's 'selective double regulation of rights [for children] would cause problems and even contradictions with other international covenants'.

¹⁸ SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 130-131 (1992): 'Indeed the German delegate expressed concern that certain rights from other human rights conventions were included in the CRC while others were not (citing the right to self-determination, the ban on slavery, the equal rights of men and women, the right of a person arrested or detained to be brought promptly before a judge). The delegate pointed out that this selective double-regulation of rights would create problems and even contradictions with the other human rights conventions. Ultimately the German delegate argued that there should be a general clause noting the applicability of general human rights to children. The Australian delegate argued that if the German delegate's suggestion was followed, this would be a whole new approach to the Convention, and would derail the entire process, particularly at such a late stage in the drafting process. Ultimately the German delegate withdrew its proposal. Given this discussion, one could argue that even under a black letter law analysis it is uncertain the effect of the CRC's selective "double-regulation".'

¹⁹ The legal significance of the Preamble as compared to the articles themselves will not be discussed here, as this thesis investigates the performance of the child in the Convention in its entirety, rather than its importance to black letter law.

²⁰ MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in GROWING UP IN A CHANGING SOCIETY (1990).

X	needs	Y	for	Z
the child		a family environment (defined as an atmosphere of happiness, love and understanding) that takes into account traditions and cultural values		full and harmonious development

According to this statement, the result required for the child is 'full and harmonious development'. During the drafting of the Convention, no discussion took place as to what was meant by any of these three terms: 'full', 'harmonious' or 'development'.²¹ As will become a theme, the non-discussion of the usage of the term 'development' in relation to the child is consistent throughout the drafting of the Convention. Apparently, the term was too obvious to require discussion. The terms 'full' and 'harmonious' are interesting adjectives used to describe the child's development. What do 'full' and 'harmonious' mean (much less their modified noun, 'development')? Harmonious could mean 'appropriate' or 'agreeable'. Yet, what is 'appropriate' for the child's development? Is there agreement/could there be agreement regarding what is or is not suitable for the child's development? Gerison Lansdown argues that there is no such agreement.²² Lansdown contends that,

[i]t is clear that a universal, prescriptive and deterministic conception of a linear process of child development applicable to all children is inadequate to reflect the complex realities of children's acquisition of competencies. Indeed, the concept of child development, as well as the concept of childhood itself is, to a very large extent, a social rather than a biological construct.²³

How one defines 'harmonious' would likely depend on one's vision of what childhood should be. Given that the Preamble notes that the aim of childhood is where 'the child should be fully prepared to live an individual life in society', one definition of 'full' likely implies the time at which the child graduates from childhood into adulthood. Outside of the legally delineated time defined in Article 1 of when the child graduates, what does a fully developed child look like? 'Full' seems to imply the point at which the child fully reaches its binary opposition: adulthood/a state of responsibility. If the answer is an adult, what then does an adult look like? The picture drawn of the child in this article is that the child is inherently incomplete, lacking, and insufficient, and thus requires development. By attaching 'full' and 'harmonious', the CRC not

²¹ To see what was discussed see SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 102-110 (1992).

²² GERISON LANSDOWN, THE EVOLVING CAPACITIES OF THE CHILD, 10-13 (2005).

²³ GERISON LANSDOWN, THE EVOLVING CAPACITIES OF THE CHILD, 10 (2005), citing MARTIN WOODHEAD, IS THERE A PLACE FOR CHILD WORK IN CHILD DEVELOPMENT (1997).

only makes adulthood the normative aim of childhood, but indicates that the development process itself has to meet certain norms of what is or is not appropriate for childhood. In this way, the process of development becomes an object of regulation (it must be full and harmonious); the child becomes a site of regulation. As will be discussed in Chapter 8, Berry Mayall argues that the perceived 'need' to monitor children's development has led to unprecedented surveillance of childhood, whether at school or at home.²⁴

Here, the child seems to 'need' two things: 1) to develop, and 2) a family environment. More specifically, the child needs the family *for* his or her development. As was pointed out in Chapter 5, 'needs' statements (here the child needs full and harmonious development) carry authority not simply due to their straightforward descriptive quality.²⁵ Woodhead contends that 'needs' statements convey considerable emotive force, inducing a sense of responsibility, and even feelings of guilt if those statements are not followed. This power, she argues, comes partly from the connotation of helplessness and passivity of any individual who is 'in need' and partly from the implication of the dire consequence that will follow if the need is not met through appropriate intervention.²⁶ Here, if the child does not have a family environment in line with traditions and cultural values, the child will not develop, fully or harmoniously. If the child does not have a family, the child's development will be tumultuous and incomplete. Given that the Preamble notes the aim of the childhood as a preparatory stage where 'the child should be fully prepared to live an individual life in society'; the undeveloped child would be a 'dire consequence'. The aim of childhood (development into a normal adult) would not be reached. The child is in danger of remaining uncivilised, a savage, if children,

are allowed to grow up stunted or neglected or strangers to moral values, or are ignored in their misery by the more fortunate, they will inevitably grow up to hate and destroy, and tomorrow's world can only end up in disaster, politically and economically.²⁷

As a consequence of these rapidly accumulating 'needs' assessments, the family becomes the 'proper' place for childhood. The portrayal of the child as developing makes possible and even necessary the family. In the Convention, the family and the community comprise hierarchical

²⁴ Berry Mayall, *The Sociology of Childhood in Relation to Children's Rights*, 8 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 243 (2000).

²⁵ MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in GROWING UP IN A CHANGING SOCIETY, 40 (1990).

²⁶ MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in GROWING UP IN A CHANGING SOCIETY, 40 (1990).

²⁷ YVES BEIGBEDER, THE ROLE AND STATUS OF INTERNATIONAL HUMANITARIAN VOLUNTEERS AND ORGANIZATIONS, 195 (1991).

relationships of adults over children, as will be argued in Chapter 7.²⁸ For example, traditions, cultural values, and parent's²⁹ judgment trump the child's right to information, thought, and religion,³⁰ and even the right to be free from abusive traditional practices or as the Convention more lightly puts it 'traditional practices that are prejudicial to the health of children'.³¹ Although this point will be further discussed in Chapter 7, by making the family a requirement of childhood, the CRC solidifies and rationalises the hierarchical relationship of adults (in particular parents and the state as a back-up parent) over children. The CRC's Preamble appears to indicate that the child and her/his development are in need of regulation (the parties to this regulation are discussed further in Chapter 7).

II. ARTICLE 6: RIGHT TO LIFE

The first article that includes the word development is the right to life in Article 6, which states,

1. State Parties recognise that every child has the inherent right to life.
2. State Parties shall ensure to the maximum extent possible the survival and **development** of the child.

Analysing Article 6 according to Woodhead's model,

X	needs	Y	for	Z
the child		the state		the child to be able to survive and develop and thus to be able to enjoy the right to life

This article relates to the child's inherent right to life. Yet, the required result is the 'survival and development' of the child. What does development mean, alongside survival? Further, how exactly do 'survival' and 'development' relate to the right to life? During the drafting of this

²⁸ See for example Article 18, which states that parents have the primary responsibility for ensuring the upbringing and development of the child. Additionally, many of the articles that mandate the state to provide assistance to the child require such assistance to be provided to the parent.

²⁹ The words 'parents' and 'care-givers' are used interchangeably. The terms 'adult' and 'parents' are used interchangeably in this thesis, and mean to refer to those who have responsibility for the child. The issue of the Convention giving preference to biological parents will not be pursued here.

³⁰ See Article 14(2), and 17(e).

³¹ See Article 24(3), particularly when read with Article 18: '[s]tate parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children'. Interestingly, given that the Convention presents children as vulnerable, in need of protection, etc., the state is not required to ensure the abolishment of traditional practices. Further, given that corporal punishment is widely practiced, one wonders if children were allowed to participate whether both measures regarding traditional practices and 'smacking' might be different. But then again, 'smacking' probably could be justified under the need for development, in particularly as outlined in Article 29, to develop respect for one's parents. See Chapter 7 for further discussion.

article there was concern expressed that the concept of survival was not legally defined and could be 'harmful' to the concept of the right to development.³² The Italian representative noted that,

the two words "survival" and "development" had come to acquire the special meaning of ensuring the child's survival in order to realise the full development of his or her personality, both from material and spiritual points of view.³³

This 'special' meaning was not elaborated upon by the Italian representative and arguably is not obvious from the Convention or the discussions that took place during the drafting of the Convention.

In a commentary on Article 6, Manfred Nowak takes a positive view of the coupling of the right to life/survival with development in Article 6, arguing that such coupling illustrates that the right to life was interpreted in a comprehensive manner.³⁴ Though Nowak does not expound on what he means by 'comprehensive', he does go on to argue that concept of development in the CRC would be better understood through Article 1 of the United Nations Declaration on the Right to Development (UNDRD).³⁵ Article 1 of the UNDRD defines the right to development as,

an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.³⁶

Nowak argues that the right to development has been characterised as a participatory process which ultimately leads to the full realisation of all human rights and fundamental freedoms.³⁷ While similar vocabularies are being used in the CRC and the UNDRD, a vastly different paradigm of rights is being articulated. As discussed in Chapter 4, throughout this chapter, and as again will be discussed in Chapter 7, far from full participation in economic, social, cultural and political development, the child's development in the CRC relates little to full participation even in matters that directly relate to the child.

³² SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 120 (1992).

³³ SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 123 (1992).

³⁴ Manfred Nowak, *Article 6: The Right to Life, Survival and Development*, in *A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD*, 2 (Andre Alen et al. eds., 2005).

³⁵ Declaration on the Right to Development, U.N. GAOR, 41st Sess., Supp. No. 53, at 183, U.N. Doc. A/RES/41/128 (1986).

³⁶ Manfred Nowak, *Article 6: The Right to Life, Survival and Development*, in *A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD*, 47 (Andre Alen et al. eds., 2005).

³⁷ Manfred Nowak, *Article 6: The Right to Life, Survival and Development*, in *A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD*, 47 (Andre Alen et al. eds., 2005).

Interestingly, while the right to life under the CRC refers to 'survival and development,' the ICCPR requires only freedom from arbitrary deprivation of life.³⁸ Article 6 of the CRC seems to suggest that unlike adults, children must universally struggle to survive. This conclusion is reinforced by the CRC Preamble, which states that children around the world are living in exceptionally difficult circumstances. As discussed in Chapter 4, given that the Convention does not recognise that children suffer from social discrimination³⁹ and at the same time recognises that children are fundamentally immature, the child's struggle to survive appears to be a result of the child's inherent immaturity, at least as understood in the Convention. The child needs the state to ensure her/his survival and development, as if the latter is an obvious and necessary corollary to the child's right to life. This pairing conjures up images of the Apollonian child, too innocent and too passive to worry about life being arbitrarily deprived by the state.⁴⁰ It is this Apollonian child that needs to be encouraged (towards development) and protected (to survive).

While the ICCPR refers to the deprivation of life, the CRC's Article 6 carries with it more positive obligations relating to survival and development.⁴¹ What the state is required to do in the name of 'survival and development' is unclear. The inclusion of a positive obligation, while potentially viewed as 'progressive', correspondingly permits greater control. By requiring the state to ensure the child's development and survival, the child becomes an object of regulation by the state. As states are charged with this task of ensuring survival and development, the state is at once given the power to define what both 'survival' and 'development' mean, as well as define what measures need to be taken to ensure that the state's definitions of 'survival' and 'development' are realised. In this way, Article 6's use of development envisions the child as a virtually helpless and innocent object requiring state intervention. While the Preamble's usage of development authorised the control of children by the family (in other words, parents), in Article

³⁸ International Covenant on Civil and Political Rights, Article 6, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

³⁹ See Maria Grahn-Farley, *Beyond Right and Reason: Pierre Schlag, The Critique of Normativity, and the Enchantment of Reason: A Theory of Child Rights*, 57 UNIVERSITY OF MIAMI LAW REVIEW 867, 910 (2003): 'The CRC does not connect the fact that children are not living under the CRC's imagined conditions for a child but under various limitations placed on children for being children. The CRC is inconsistent on its own terms. The CRC imagines and is based on the child's mental and physical immaturity and its need of extra protection due to its immaturity'.

⁴⁰ CHRIS JENKS, *CHILDHOOD*, 69-73 (2005). As outlined in Chapter 5, Jenks argues that the Apollonian and Dionysian images of the child are informative of the shifting strategies that Western society has exercised in its increasing need to control, socialise and constrain people in the transition towards modernity.

⁴¹ SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 121 (1992). It was noted that right to survival carried with it more positive obligations than the right to life such as prolonging the child's life. The right to life was argued to be so important that its inclusion should be necessary and should be extended to positive obligations on the state. The representative of Venezuela felt that the inclusion of paragraph 2 would diminish the concept of the right to life conferred on all human beings in existing international instruments and requests thought be given to that.

6 the child's state of development enables the state to exercise greater control and regulation of childhood; an argument that will be made throughout this chapter and the next.

III. ARTICLE 18: STATE RECOGNITION THAT PARENTS ARE RESPONSIBLE FOR THEIR CHILD(REN)

Article 18 provides that,

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and **development** of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and **development** of the child. The best interests of the child will be their basic concern.
2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

According to Article 18,

X		Y		Z
the child	needs	responsible adults that are assisted by the state	for	the child's development and upbringing

The result or goal of Article 18 is the child's development and upbringing. Immediately (and again) these words portray the child as incomplete. In this conception, a responsible adult is required to oversee the development and upbringing of the child. During the drafting of this article the focus of the discussion related to ensuring that parents had the primary role in the development and upbringing of the child, and thus minimising state intervention in the relationship between the parent and child.⁴² Additionally, the discussions revolved around not simply protecting the position of the parent in relation to the child, but also minimising the state's obligation in relation to providing for the child.⁴³ In this way, Article 18 buffers parents from state intervention. Yet, while Article 18 talks in terms of responsibility, 'responsibility for' another person is an enactment of power, and as such responsibility represents a right held by an

⁴² SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 265-267 (1992).

⁴³ SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 265-267 (1992).

adult to exercise power over the child. This responsibility endorses the adult to determine and dictate what is or is not in the best interests of the child. Parents' 'responsibility' over the child arguably trumps the child's right to information, thought, and religion,⁴⁴ and even the right to be free from 'traditional practices that are prejudicial to the health of children'. Article 18 secures the hierarchical matrix of the parent over the child, with the state as a reluctant backup over the parent, to be discussed in Chapter 7.

One can imagine if CEDAW included, for example, the 'responsibility' of a woman's husband to provide for the woman (the subject of the convention) and therefore had responsibility for all of her financial matters.⁴⁵ 'Responsibility for', in the context of man and woman, becomes more easily equated with 'power over'. In a convention that addresses the rights of the child, it is telling (and indeed supportive of this chapter's argument) that the Convention contains rights of those who are given control over children. Indeed, during the drafting of this article, the American delegate noted that it was 'strange' for an international human rights convention to place 'responsibilities' on private individuals (in other words, parents) when a convention can only create binding obligations for ratifying states.⁴⁶ If 'responsibility for' is read as the right to have power over another human, this article is indeed 'strange'. However, when viewed in line with the right to family privacy for adults, as in provided for in the ICCPR Article 17,⁴⁷ this article may in fact be less about obligating parents, and more about recognising the parents' right to privacy.⁴⁸

The child's state of development in Article 18 again makes necessary the hierarchical relationship between the parent and the child. Ultimately this thesis will query that if the vision of child development articulated in the CRC is but one version of childhood, then why is the hierarchical relationship between the parent and the child relationship necessary? For the moment, however, Article 18 is notable in that the rights of those who are on the upper side of this power equation (in other words, adults) are included in a convention that is supposed to address the rights of children. Interestingly, parents appear in almost every article as a right holder, further enmeshing

⁴⁴ See Article 14(2), and 17(e).

⁴⁵ If one views the child as fundamentally different from adults, and thus inherently immature, one would argue that analogy to the category 'woman' would be irrelevant. This thesis rejects the idea that there exists some fundamental, universal, inherent 'child'. Thus, as there is no essential woman, there too is no essential child.

⁴⁶ SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 270 (1992).

⁴⁷ Article 17(1): 'No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation'.

⁴⁸ See generally Bruce Hafén and Jonathan Hafén, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449, 450 (1996).

'responsibility for' with a right to exercise power over children.⁴⁹ The rights of the child seem to be mediated by the protection of parental rights.

IV. ARTICLE 27: RIGHT TO ADEQUATE STANDARD OF LIVING

Article 27 enumerates that,

1. States Parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social **development**.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's **development**.
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

As such, according to Article 17,

X		Y		Z
the child	needs	parents, supported by the state, to ensure an adequate standard of living	for	the child's physical, mental, spiritual, moral and social development

Similar to Article 6's right to life, the right to adequate standard of living is heavily linked to the child's development. Further, development in Article 27 uniquely includes a laundry list of the specific areas in which the child needs to develop: physically, mentally, spiritually, morally and socially. 'Adequate' attaches to the living conditions necessary for the child's physical, mental, spiritual, moral and social development.⁵⁰ Why is this laundry list necessary for the child's right to an adequate standard of living? The focus on this iterated, standardised aspect of

⁴⁹ Parents are rights holders 16 times whereas children are 22 times (most of which include rights to protection).

⁵⁰ Asbjorn Eide, *Article 27: The Right to an Adequate Standard of Living*, in *A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD*, 17 (Andre Alen et al. eds., 2006).

development seems to underline the assumed precarious nature of being a child. Reference to development here not only casts the child as incomplete/immature, development is portrayed yet again as an essential 'truth' of the child. The child as immature/incapable could be seen to in turn underscore the child as in need of development, thus underscore children's difference from adults. Yet, is the standard of living that is adequate for a six-year-old different from a fifty-year-old? The assumption is always: yes. The needs of the six-year old, who is immature and must develop maturity, will be quite different from a fifty year old, who is mature and does not require any further process of development. However, are the basic needs of all children, those which would make possible an 'adequate' standard of living, really that much different from adults? Put another way, are the needs of all six-year olds so similar, as well as the needs of all fifty-year olds? After all, Chapter 5 argued that childhood is a set of experiences neither more nor less internally coherent than those of adults.⁵¹ A comparison of Article 27 with the ICESCR's Article 11 gives insight into how the CRC answers this question in the affirmative. While Article 11 of the ICESCR has been interpreted to focus on housing and food, Article 27 of the CRC has been interpreted to focus on development. Asbjorn Eide writes that Article 27 means that the 'child shall enjoy conditions which facilitate its development into a fully capable and well-functioning adult person'.⁵² Article 27, like Article 11 of the ICESCR, mandates the right to an adequate standard of living.⁵³ However, unlike the ICESCR, a motivating reason for having such a right is included in the CRC: the child's development. By contrast, the right to an adequate standard of living in the ICESCR is self-explicit, requiring no further justification.⁵⁴

Additionally, the means for realisation of the right to an adequate standard of living differs under the two conventions. In the CRC, the focus is providing parents with assistance to provide for

⁵¹ See generally Tom Campbell, *The Rights of the Minor: As Person, As Child, As Juvenile, and Future Adult*, in CHILDREN, RIGHTS, AND THE LAW (David Archard et al. eds., 1993).

⁵² Asbjorn Eide, *Article 27: The Right to an Adequate Standard of Living*, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, 17 (Andre Alen et al. eds., 2006). The usage of the term 'it' in relation to a person is a usual and possibly insightful reference, which may indicate some sort of sub-human status ascribed to the category 'child'.

⁵³ International Covenant on Economic, Social and Cultural Rights, Article 11, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3; Article 11: '1. The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international co-operation based on free consent. 2. The States Parties to the present Covenant, recognising the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed: (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilisation of natural resources; (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need'.

⁵⁴ ICESCR, Article 11.

the child,⁵⁵ while in the ICESCR the focus is much more pragmatically focused on how to make food and shelter more readily available.⁵⁶ It would appear that Article 27 further embeds the dependency of the child's rights on a conception of development. As children are incomplete/immature and thus require development, and indeed per Article 27, require development in a variety of personal and physical manifestations, the child needs parents to secure their right to an adequate standard of living. Again development justifies the positioning of adult responsibility over the child.⁵⁷ As such, the inclusion of multiple areas of the child's 'development' (in other words, inclusion of the multiple areas of the child's deficiencies) in this article could be construed to justify the child's 'need' for an intermediary to secure the child's right to an adequate standard of living.

In this regard, most of the discussion during the drafting of this article focused on the extent of the obligation placed on the state to provide assistance, and not whether the child should also be provided direct, rather than mediated, assistance by the state.⁵⁸ Article 27 insists that the caregiver has the primary responsibility for ensuring this standard of living, and that the state 'shall take appropriate measures' to assist those responsible for the child. It bears repeating that under the ICESCR Article 11, the right holder does not require any such intermediary. As was argued with regard to Article 18, 'responsibility for' the child could be construed as a grant of power over the child, as it requires the child to be dependent on the responsible adult. Giving parents' 'primary responsibility' in the context of Article 27 has been interpreted to,

protect parents . . . against excessive state intervention . . . [and] indicate that parents . . . could not expect the State always to intervene, because the provision of the conditions of living necessary for the child's development is primarily [the parents'] responsibly.⁵⁹

⁵⁵ Article 27(2-4).

⁵⁶ ICESCR, Article 11(2).

⁵⁷ David Cowan and Nick Dearden, *The Minor as (a) Subject: the Case of Housing Law*, in *LEGAL CONCEPTS OF CHILDHOOD* (Julia Fionda ed., 2001). These authors note that the political agenda in the welfare system which seeks to reinforce the dependence of the child is 1) to restrict access to declining resources, or 2) to discipline/punish those who cannot or will not fit within the norms of childhood. One could argue that because of the political purchase of the term 'development', the laundry list of areas in which the child must develop was included to underscore the importance of providing for the child's standard of living, particularly given that children experience poverty at higher rates compared to adults. Another interpretation, the one taken in this thesis, is that development is employed to justify authorising certain adults as the means by which children are to acquire an adequate standard of living. Certainly, the child's right to adequate standard of living could be secured in other ways. Indeed, requiring children to rely on adults to provide for them could also be the cause for children's higher rates of poverty. Chapter 9 discusses the ways in which this paradigm of relying on adults is inapplicable, unhelpful, and at times abusive for certain children.

⁵⁸ SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PREPARATOIRES'*, 371-377 (1992).

⁵⁹ Ashbjørn Eide, *Article 27: The Right to an Adequate Standard of Living*, in *A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD*, 19 (Andre Alen et al. eds., 2006), citing SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PREPARATOIRES'*, 459 (1992).

In his commentary on this article, Eide argues that under Article 27 the child is the right holder and the parent is the duty holder.⁶⁰ Yet he does not conceptualise the state's obligation not to intervene in the parents' exercise of primary responsibility as a 'right' the parents hold.⁶¹ As argued in relation to Article 18, this Article also includes the parent's right to privacy. The child is made dependent on the parent, rather than being provided direct assistance to secure adequate housing for her or himself. What about children who do not or cannot rely upon any adult? Such a discussion will be taken up on Chapter 9.

One could argue that because of the political purchase of the term 'development', the laundry list of areas in which the child must develop was included in Article 27 to underscore the importance of providing for the child's standard of living, particularly given that children experience poverty at higher rates compared to adults. Another interpretation, the one taken in this thesis, is that development is employed to justify authorising certain adults as the means by which children are to acquire an adequate standard of living. Certainly, the child's right to adequate standard of living could be secured in other ways. Indeed, requiring children to rely on adults to provide for them could also be the *cause* for children's higher rates of poverty. Chapter 9 discusses the ways in which this paradigm of relying on adults is inapplicable, unhelpful, and at times abusive for certain children.

V. ARTICLE 29: FOCUS OF EDUCATION

Article 29 states that,

1. States Parties agree that the education of the child shall be directed to:
 - (a) The **development** of the child's personality, talents and mental and physical abilities to their fullest potential;
 - (b) The **development** of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
 - (c) The **development** of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilisations different from his or her own;
 - (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
 - (e) The **development** of respect for the natural environment.

⁶⁰ Ashbjørn Eide, *Article 27: The Right to an Adequate Standard of Living*, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, 19 (Andre Alen et al. eds., 2006).

⁶¹ Ashbjørn Eide, *Article 27: The Right to an Adequate Standard of Living*, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, 19 (Andre Alen et al. eds., 2006).

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

As such,

X		Y		Z
the child	needs	→ to be directed to the development of: <ol style="list-style-type: none"> 1. The child's self 2. respect for human rights 3. respect for the child's parents 4. respect for her/his own cultural identity, language and values 5. respect for national values 6. respect for her/his country 7. respect for other civilizations 8. respect for the environment → to be directed to prepare for responsible life	for	???—does not say

Article 29 is one of two articles that address the child's education.⁶² The curriculum posited by the Convention in this article seems strange when compared to other human rights conventions. According to the General Comment No. 1 by the Committee to the CRC, the goal of Article 29 'is to empower the child by developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence'. This article seems to embrace education as a developmental concept that represents progress of the child towards the acquisition of full adult rationality in distinct incremental stages, each appropriate to a certain age band, each defined in terms of a particular set of abilities and skills, and each representing a clear advance upon the preceding stage.⁶³ Four of the five paragraphs in Article 29(1) focus on education that ensures development. The other is aimed at 'preparation', depicting the child as incomplete and unready for 'free society'. The first aim of education, therefore, appears to ensure the development of the 'child's personality, talents, and mental and physical abilities to their fullest potential'. This article designates the child as in a state of incompleteness, the remedy for which is education, a perspective discussed further in Chapter 8.

⁶² See also Article 28.

⁶³ David Archard, *Philosophical Perspectives on Childhood*, in *LEGAL CONCEPTS OF CHILDHOOD*, 46 (Julia Fionda ed., 2001).

This article describes goals that reach beyond the role of education as a response to developmental incompleteness or empowering the child, in the words of the General Comment No. 1. Outside of the critique describing children as merely 'incomplete', this article's educational aims are not just focused upon 'developing' the child 'potential', but also about fostering the child's respect for other people, entities, and ideas. The next developmental aims are about developing the child's respect 1) for human rights, 2) for the child's parents, culture, country, national values, and other civilisations, and 3) for the 'natural environment'. In the context of Chapter 3's theoretical lens, these educational aims could constitute thinly veiled code words that aim to discipline the subject. Under this lens, fostering respect for this particular list has nothing to do with developing the child's 'potential' but could instead function to place normative limits on the rights of the child. Requiring the child to acquire respect for this list of cultural values arguably contributes to the child's submissive positioning in the CRC. In this view, the assertion of these educational aims demonstrates the breadth and arbitrariness of what is justified in the name of 'development'.⁶⁴ As a first example, the child needs to *learn* respect for her/his parents (the child's more powerful binary opposite). During the drafting of the Convention, the Yugoslavian and Canadian delegates proposed the addition of respect for parents, which was adopted without comment.⁶⁵ Respect for parents was not in the original draft.⁶⁶ Again thinking of CEDAW, how would an article about the need for women to respect men (women's more powerful binary opposite) be perceived? Such a unilateral requirement would most likely be an impossibility. Notably, not once in the Convention are parents or any adults required to 'respect' children.⁶⁷

Second, that children's education is to be directed towards fostering (again this word) 'respect' for the 'natural environment' in a treaty about children's rights seems misplaced, in the sense that

⁶⁴ Minow argues in, Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, in CHILDREN'S RIGHTS RE-VISIONED, 44 (Rosalind Ekman Ladd ed., 1996): 'However appealing [the justification that care and custody is provided when a child is incompetent and rights and autonomy when they are competent] may be as a normative theory, it fails to describe the current legal universe. It seems bizarre to justify the variable treatment of young people currently manifested in the patchwork of legal regulations as though it expressed careful judgments about their competencies for various tasks and responsibilities. Why would an eighteen-year-old be competent to consent to her abortion but not entitled to miss school from her doctor's appointment without parental permission? Why would the seventeen-year-old be competent to be treated as an adult in criminal court but not competent to sign a contract?'

⁶⁵ SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 406 (1992).

⁶⁶ SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 406 (1992).

⁶⁷ Article 5 of the CRC only articulates that, '[s]tates Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention'. Emphasis added.

it is not required explicitly of any other category of persons.⁶⁸ The value of engendering respect for the natural environment is itself not in discussion here. What is of interest instead is that the development of this particular form of respect is uniquely required of children. Nowhere in the ICCPR or in the ICESCR is respect for the natural environment enshrined. Rather, states are required to respect the right of peoples to dispose of natural resources as part of the right to self-determination.⁶⁹ Notably, this requirement does not include teaching those peoples to respect their environment. Through the lens of this thesis, it could be argued that the inclusion of this pedagogical goal was to encourage educators to ensure that the Apollonian child is exposed to his/her 'natural' environment (in other words, nature), or conversely, to ensure that the Dionysian child is taught to restrain from harming his/her 'natural' environment. The inclusion of this educational aim from the beginning of the drafting of the CRC is curious, particularly as it arguably preceded environmentalism becoming more of concern to the international community.⁷⁰

Third, Article 29's focus on developing the child's respect for human rights is also notable in the sense that human rights conventionally focus on protecting the individual from the state. ICCPR, for example, obligates the state to respect human rights, procuring protection from the state. Article 29 of the CRC, by contrast, is about *teaching the right-holders* (in other words, children) to respect *human rights*, their culture, and other cultures. The CRC presents a very different conception of the child rights holder, as compared to the adult rights holder. The CRC's requirement that the *child should learn respect for* what the CRC is supposed to be *providing the child*, again makes sense only if the child is envisioned as vacuous, as developing.

Fourth, Article 29 requires the inculcation of respect for one's state, or 'national values'. As in the previous paragraph, rights generally focus on the protection of individuals from the state, in a sense the obligation of the state to respect the individual. However, in the CRC, it is the child that must learn respect for his/her state. By mandating that the child learn respect for her/his state, the state becomes included and entrenched in the CRC's hierarchy of power. Where

⁶⁸ The original text read 'in harmony with nature'. SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 400 (1992).

⁶⁹ Article 1 Paragraph 2 & 3 of the ICCPR states: '(2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. (3) The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations'.

⁷⁰ The initial draft stated that the child should be educated 'in harmony with nature'. The final draft stated that the child should be educated to develop 'respect for the natural environment'. SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 400 (1992).

human rights typically restrict the state's power over the individual, the CRC requires the *teaching* of the *right holder* respect for *the state*.

In a final analysis, Article 29 does not include *any* rights for the child. Article 29 does not require states and/or parents to finance a child's education or for the state to make available education, as is done in Article 28. The child has no right to an education or curriculum of her or his own choice. The article does not include the right of the child to be respected at school, by the state, or by parents. Instead, the article appears to function in a paternalistic manner, helping an ignorant, incomplete child to learn respect for her/his parents, the natural environment, human rights, and the state. As elsewhere, it is the term 'development' in Article 29 that justifies the curriculum and focus of the child's education. While 29(1)(a) relates to the child's development, 29(1)(b-c) relate to the development of respect, a goal that seems scantily connected to the child's development, much less any right the child might possess. Through the interpretive lens of this thesis, Article 29 would seem to underline the parent-state hierarchy that surrounds the child, conveying a strikingly consistent narrative of abrogated, mediated rights, justified by the child's need for development. Important to this argument is the conflation of the child as developing/lacking/incomplete, making the superior positioning of the adult over the child 'necessary'.

VI. ARTICLE 32: RIGHT TO BE FREE FROM EXPLOITATIVE AND HAZARDOUS WORK

Article 32 asserts that,

1. States Parties recognise the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social **development**.
2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:
 - (a) Provide for a minimum age or minimum wages for admission to employment;
 - (b) Provide for appropriate regulation of the hours and conditions of employment;
 - (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

According to Woodhead's 'needs equation',

X	needs	Y	for	Z
the child		protection from economic exploitation and performing work that is hazardous		development and education

Article 32 is peculiar especially when read in relation to comparable rights in the ICCPR and the ICESCR. Often, the CRC is portrayed as a hybrid of these two covenants, modified to accommodate what the CRC deems unique to the category 'child'. The focus of the CRC's rights relating to work, including their conception and construction, tell a very different tale for the 'needs' of the child as opposed to the 'needs' of the working adult.⁷¹ Comparison with the ICCPR and the ICESCR is particularly interesting given that this article, unlike most other articles, asserts that state parties must take into consideration the 'relevant provisions of other international instruments'.⁷² This unusual mechanism within the CRC raises several questions. Why were other international instruments explicitly mentioned in this case, and how was the determination made as to which were considered relevant? Why must states 'in particular' focus on that which is listed in 32(2)(a-c)? Does that mean that states may ignore that which is not listed in Article 32(2)? Four points will be made here.

First, and fundamentally, this article does not include the right to work, as found in the ICESCR's Article 6. The child does not have the right in the CRC to 'the opportunity to gain his [or her] living by work which [she/] he freely chooses or accepts'.⁷³ The denial of such a right could have serious implications for children as they are again forced to be dependent on parents or the state. Further, the focus on protecting the child's development underlines the immaturity, incapacity, and 'special status' of the child, who is as a result made in 'need' of both the parents and the state for support. Might the inclusion of the right to work have been viewed as encouraging children to work, and thus be incongruent with the prevailing identity of the child as dependent and at the same time incongruent with the prevailing identity of the adult as responsible? This thesis argues that the right to work was not explicitly included as it did not match the CRC's prevailing image of the child.

⁷¹ Although already stated, this chapter does not engage in a black letter law analysis. Rather, this chapter focuses on the story told about the child in the CRC by the CRC's allocation of rights.

⁷² This was included on the suggestion of the representative of the International Labour Organisation. SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 422 (1992).

⁷³ Article 6 of the ICESCR: '1. The States Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right. 2. The steps to be taken by a State Party to the present Covenant to achieve the full realisation of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual'.

Second, while the CRC does not prohibit all child labour, Article 32 refers to four types of prohibited work: 1) economic exploitation, 2) work that is 'likely to be' hazardous, 3) work that interferes with the child's education, 3) 'work that is harmful to the child's health or physical, mental, spiritual, moral or social development'. This article speaks nothing about what would qualify as economic exploitation, nor what would be harmful to the child's various streams of development. At what point does doing chores around the house or babysitting for younger siblings become exploitative? At what point does working for the family business become exploitative? Indeed during the drafting of this article one speaker noted that the establishment of a minimum age of employment should not prevent the 'participation of children, under the direction of their parents and so as not to interfere with their education, in culturally related family hunting, fishing, or agricultural activities not regularly employing unrelated workers'.⁷⁴ This speaker also noted that this article was not intended to prohibit family subsistence activities.⁷⁵ Additionally, most curious is that Article 38 of the Convention does not prohibit children between the ages of 15-17 from being directly involved in 'hostilities'. Military service for the state, including direct combat, is not considered by the CRC to be at odds with the child's 'development' nor is it considered 'hazardous'. It seems that if the child is working for the family, working for the state's military, or engaged in some 'cultural' activity, there is less concern about the conditions of the child's labour.

Third, although the ICCPR does not refer to the right to work, it does include the right to be free from slavery and/or servitude (related to economic exploitation).⁷⁶ Interestingly however, the powerful words, 'slavery' or 'servitude', are left out of the CRC.⁷⁷ The implications of this omission abound. For example, although there is a prohibition on trafficking,⁷⁸ the absence of a specific prohibition on slavery is notably as slavery could have analogy for a child whilst in care, quite separate from the issue of being illegally abducted. Additionally, though the CRC includes

⁷⁴ SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 422 (1992).

⁷⁵ SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 422 (1992).

⁷⁶ Article 8 of the ICCPR, a non-derogable right: '1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. 2. No one shall be held in servitude. 3. (a) No one shall be required to perform forced or compulsory labour; (b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court; (c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include: (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention; (ii) Any service of a military character and, in countries where conscientious objection is recognised, any national service required by law of conscientious objectors; (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community; (iv) Any work or service which forms part of normal civil obligations'.

⁷⁷ Notably, the CRC does not include *any* non-derogable rights.

⁷⁸ Article 35.

a prohibition on all forms of exploitation,⁷⁹ the prohibition against slavery has been recognised as *jus cogens*⁸⁰ or at least is universally condemned, and therefore could be a more effective tool in combating some of the situations in which children find themselves whilst 'in care' of a legal guardian. Was this prohibition so clear that it was not deemed necessary to include? Is slavery not a particular problem for children and their development? Or would the inclusion of this prohibition challenge some of the extreme contexts in which children are required to live, considering 1) the few rights given to children to challenge their dependency, and 2) the few restrictions on the parents' dominance over the child? Could making such a linkage be an extremely effective tool against such exploitation and deprivation of rights, as slavery has such political purchase?⁸¹ Would it not be an effective tool to challenge the presumption that the parents *will have* the best interests of the child as their basic concern? Or is that precisely the problem? It seems that the inclusion of a prohibition on slavery and servitude does not match the CRC's image of the family as happy and safe, and therefore was deemed unnecessary.

Fourth, even in the event that the child does work, the child, under the CRC, is not given fundamental safeguards associated with the right to work such as the right to 'fair wages', equal pay for equal work, or 'equal opportunity of promotion'.⁸² Would providing such rights in the Convention be viewed as a feared encouragement to work, a contradiction to the prevailing image of childhood in the CRC? Article 7 of the ICESCR secures not only fair wages and equal opportunity for promotion, but also '[r]est, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays'. The child's right to 'rest, leisure, and play' is an entirely separate article that provides for no other safeguards

⁷⁹ Article 32; Article 34; Article 36.

⁸⁰ Arrest Warrants Case was the first time the International Court of Justice mentioned the term. See *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, 41 ILM 536. The Vienna Convention on the Law of Treaties also provides that if a treaty conflicts with *jus cogens* then the treaty is void. Vienna Convention on the Law of Treaties, Article 53, May 23, 1969, 1155 U.N.T.S. 331. Neither the case nor the Vienna Convention offers examples of norms of *jus cogens*. The International Law Draft Articles on State Responsibility, 1980 YILC, Vol. 34 II, Article 40 does identify the prohibition of slavery as an example of *jus cogens*. Draft Articles on Responsibility of States for Internationally Wrongful Acts, Nov. 2001, International Law Commission, Supplement No. 10 (A/56/10), chp. IV, E.1, <http://www.unhcr.org/refworld/docid/3ddb8f804.html>.

⁸¹ A sort of backlash to Bruce Hafen and Jonathan Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449 (1996). Thus, the CRC is not abandoning children to their rights, but arguably, in some cases, not providing protection for children against their parents even in extreme circumstances.

⁸² Article 7 of the ICESCR: 'The States Parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (a) Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; (b) Safe and healthy working conditions; (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays'.

regarding their work.⁸³ Indeed 'rest' and 'leisure' in all other international conventions refer to working conditions.⁸⁴ In his commentary on Article 31, Paulo David notes that the CRC is the first international human rights instrument that recognises the right to engage in play and recreational activities.⁸⁵ He goes on to state that,

[t]he CRC being drafted during the eighties, it probably largely benefited from the significant body of research that developed during the previous decades within academic, professional and other circles providing evidence on the central role that play has on the development of children. . . Consensus usually exists in the recognition that play can impact positively on children's physical and psychological development.⁸⁶

Why do children need a separate article to ensure their right to 'rest, leisure, and play', when they did not get (at least in the CRC) the right to equal pay for equal work, much less freedom from slavery? Again the idea may be that the drafters of the CRC did not want to in any way encourage child labour, leading to an emphasis on play instead of, for example, competitive pay. Article 32 together with Article 31 (re-) project the view that childhood is a 'golden age' where children should have little responsibility in order to enjoy themselves. This appears to particularly be the case when read together with other articles that deny (or deemphasise) children's responsibility (for example, right to work) and capacity (for example, certain criminal procedural rights).⁸⁷ These articles denote the Apollonian child, frolicking without worry or care. Not only are children then incapable of responsibility, they are encouraged not to 'worry' about responsibility. The CRC's combination of deletions and additions in Articles 32 and 31, as compared to the ICCPR and the ICESCR has strong implications about the 'nature' of the childhood as a safe, warm environment where children 1) have no cares but to rest and play, 2) should not have to work, and 3) have responsible adults to provide for them. While some might argue that this article is aimed at protecting the child, it equally and importantly assumes that in order to development the child must engage in non-paid activities, and as such cements the child's dependency on adults. By envisioning the child in this way, the CRC is at the same time

⁸³ Article 31.

⁸⁴ Paulo David, *Article 31: The Right to Leisure, Play and Culture*, in *A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD*, 3-4 (Andre ALEN et al. eds., 2006).

⁸⁵ Paulo David, *Article 31: The Right to Leisure, Play and Culture*, in *A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD*, 23 (Andre ALEN et al. eds., 2006).

⁸⁶ Paulo David, *Article 31: The Right to Leisure, Play and Culture*, in *A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD*, 23 (Andre ALEN et al. eds., 2006), citing JEAN PIAGET, *PLAY, DREAMS, AND IMITATION IN CHILDHOOD* (C. Gattegno and F. Hodgson trans., 1962).

⁸⁷ Freeman explains how this conception of children is utilised to deny children rights. See Michael Freeman ed., *CHILDREN'S RIGHTS*, Volumes I and II (2004); MICHAEL FREEMAN, *THE RIGHTS AND WRONGS OF CHILDREN* (1983); Michael Freeman, *Why It Remains Important to Take Children's Rights Seriously*, 15(1) *INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS* 5 (2007).

justifying the ‘need’ for a responsible adult. Chapter 9 will explore in detail various children who are left out of this vision of childhood.

VI. ARTICLE 23: RIGHTS OF THE CHILD WITH DISABILITY

The only other article that deals with development, Article 23, focuses on the child with disability, describing as a goal that this child achieve ‘the fullest possible social integration and individual development, including his or her cultural and spiritual development’. This article asserts that,

1. States Parties recognise that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community.
2. States Parties recognise the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child’s condition and to the circumstances of the parents or others caring for the child.
3. Recognising the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child’s achieving the fullest possible social integration and individual **development**, including his or her cultural and spiritual development
4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

Accordingly,

X		Y		Z
the child with disability	needs	the state to provide assistance to the child with disability and to the child’s parent	for	the promotion of self-reliance, facilitation of the child’s active participation in the community, and the achievement of the fullest possible social integration and individual development

Article 23(2) is unique within the CRC. It states that for the child with disability, assistance should be given to 'the eligible child and those responsible for his or her care'. This is the only article in the CRC that explicitly provides for assistance from the state to be given to the child *and* to the parent, as opposed to simply the parent, as done in Article 27 (standard of living) or Article 18 (parent's responsibility for the child). Notably, the original text of this article made no mention of providing assistance to the child's family.⁸⁸ Most of the discussions during the drafting of this article focused on providing support to the child. Not until 1982 (three years into the drafting process) was the child's family included upon the suggestion of Argentina and the United Kingdom.⁸⁹ Furthermore, while this article refers to the child's development, it also states that the child should live in conditions that 'promote self-reliance and facilitate the child's active participation in the community' and the 'fullest possible social integration'. The Polish delegate, in conjunction with the Australian, Canadian, British, and American delegates, pushed for the inclusion of self-reliance, active participation, and dignity.⁹⁰ This language was accepted without discussion.⁹¹ Certainly, no other article so exclusively focuses on the unqualified promotion of self-reliance and full social integration for the child. This article seems to reflect the approach in the CRPD more so than other articles within the CRC: promoting participation and self-reliance in the instance of dependency, as discussed in Chapter 4.

One must ask: why was the child with disability given more autonomy as compared to other children and more equality as compared to the adults responsible for the child with disability? It would seem that due to the likelihood of increased dependence of the child with a disability on parents and the state, the aim was to ensure respect for this more vulnerable child's autonomy. Yet, how is it that this approach did not become applicable to the entire category 'child'? Adopting this thesis' theoretical lens, one possible explanation is that somehow children with disability are deemed to have less capacity to buck the hierarchical relationships that surround the child in the CRC's version of childhood.

VII. CONCLUSION

⁸⁸ SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 332-333 (1992). The original article did take into consideration the circumstances of the child's parents.

⁸⁹ SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 332 (1992).

⁹⁰ SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 332-333 (1992).

⁹¹ SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 332-333 (1992).

Julia Fionda writes that the undeveloped child is incomplete, lacks full maturity, and is unfinished.⁹² In this way the child is defined negatively, in the sense of what the child lacks.⁹³ Children are viewed as 'becoming' rather than being.⁹⁴ The focus of adults then is not on childhood in and of itself, but on how the desired characteristics of adulthood are acquired.⁹⁵ Put another way, the fixation on childhood is on the process of development, assimilation, and normalisation. Development teleology condemns children to being viewed exclusively as developmentally adaptive, hence correct or developmentally defective, hence incorrect.⁹⁶ The focus is then on what children 'need'. The CRC tells its story of the child. The 'nature' of the child as portrayed in the CRC rests on a foundational 'truth-claim': children are in a state of development. The CRC performs the child as passive, dependent, objects of care and love, requiring the child to be developed towards adulthood. Thus, adults must have responsibility for/control over the child for the duration of childhood.

As was argued in Chapter 4, because children are 'inherently' or 'biologically' immature, children require or 'need' a different rights package than do adults. As was argued briefly in Chapter 4 and will be argued in greater detail in Chapter 7, the CRC's vision of the 'child' as developing enables the 'need' for adults who have responsibility for/power over children. The child's 'need' for a 'responsible' adult significantly alters the child's rights, even rights that are considered to be fundamental for all humans. This thesis argues that the CRC's performance of the 'child' as in a unique state of development is the basis for deviating from the 'equal and inalienable rights of all humans'.⁹⁷ By portraying the child as incomplete/developing and therefore in need of his/her wiser counterparts (read adults, to be discussed in Chapter 7), the Convention not only justifies the restriction of the some very basic rights, but entrenches an inequitable relationship between the child and his/her family and his/her community. Casting the child-as-developing allows the Convention (adults, states, institutions, discourses) to side step what would be considered unthinkable for any other category of persons within the human family. This chapter argued that the CRC presents a rationality that children are in a state of development and that this state of development justifies a hierarchical relationship with the adults charged with the task of 'caring' for those deemed a child. Children must, under the Convention, rely on adults for financial

⁹² JULIA FIONDA, *Legal Concepts of Childhood: An Introduction*, in LEGAL CONCEPTS OF CHILDHOOD, 12 (2001).

⁹³ David Archard, *Philosophical Perspectives on Childhood*, in LEGAL CONCEPTS OF CHILDHOOD, 43 (Julia Fionda ed., 2001), referring to HARRY HENDRICK, CHILDREN, CHILDHOOD, AND ENGLISH SOCIETY, 1880-1990 (1997).

⁹⁴ David Archard, *Philosophical Perspectives on Childhood*, in LEGAL CONCEPTS OF CHILDHOOD, 43 (Julia Fionda ed., 2001).

⁹⁵ David Archard, *Philosophical Perspectives on Childhood*, in LEGAL CONCEPTS OF CHILDHOOD, 43-44 (Julia Fionda ed., 2001).

⁹⁶ Tom Campbell, *The Rights of the Minor: As Person, As Child, As Juvenile, and Future Adult*, in CHILDREN, RIGHTS, AND THE LAW, 17 (David Archard et al. eds., 1993).

⁹⁷ Preamble.

support, yet defer to them about the child's right to freedom of religion, thought, expression, education, in sum the assessment of what is in their best interest, as will be discussed in Chapter 7. The CRC dictates the abdication of a wide spectrum of possibility for autonomy and choice, all in the name of the child's development. This abdication does not square with the lives of certain children. Chapter 9 pursues troubling questions about children forced into roles of responsibility, and about irresponsible adults.

Further, adults are assumed to have at heart the child's best interest. As with the notion of development, the alleged altruism that adults feel towards a child is equally a social construct; the appearance of care disguises the possibility of control under the appearance of care.⁹⁸ Dependency that results from the child's state of development when viewed through the lens of power developed in Chapter 3, relates not to the spontaneous loving bonds, but mechanisms that serve to sustain particular versions of the status quo.⁹⁹ In this conception, the CRC becomes not about 'protecting' children or providing children with rights, but rather portraying a particular 'truth' about children to enable the sustainment of status-quo, propping up the adult-child binary opposition where children are the Other. In this way, the CRC fortifies and rationalises the adult's and the state's ability to intervene in the lives of children on the basis of a 'truth', and in ways that can have nothing to do with 'protecting children' but rather about entrenching the position of adults over children, with the goal of moulding children into what adults and society thinks this category of persons should be. Under this lens of power, development becomes an instrument of social and cultural reproduction.¹⁰⁰ The child's 'need' for development justifies almost anything and evades virtually all critical inquiry, as is indicated by the notes in this chapter relating to the drafting of the articles considered. The notion of development may obscure critical, yet fundamental, questions such as 1) what is meant by development, 2) why is it necessary, and 3) what is made possible by development.

At best development creates a credible veil for uncertainty and even disagreement about what is in the 'best interest' of the child, all without critical inquiry into the idea of speaking 'for' children.¹⁰¹ At worst, it unquestioningly legitimises power hierarchies. To note again, this thesis does not argue that children should be treated as adults. Rather this thesis argues that the foundation upon which the differential treatment of children rests requires thorough and critical

⁹⁸ CHRIS JENKS, *CHILDHOOD*, 42 (2005).

⁹⁹ CHRIS JENKS, *CHILDHOOD*, 42 (2005).

¹⁰⁰ CHRIS JENKS, *CHILDHOOD*, 48 (2005).

¹⁰¹ MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in *GROWING UP IN A CHANGING SOCIETY*, 40 (1990).

inquiry, to gauge whether the differential treatment is justified. If all humans are born free, then how do we explain that some (here children) are less free than others? As Freeman has argued 'a true rethinking of children would also address citizenship rights . . . the [CRC], unsurprisingly, did not do so.¹⁰² As such, children remain 'aliens',¹⁰³ 'serfs',¹⁰⁴ 'passive spectators',¹⁰⁵ and 'savages'.¹⁰⁶ While this chapter examined how 'development' operates in the CRC, the next chapter explores how 'care', the second assumption or 'truth' of childhood, operates in the CRC.

¹⁰² Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277, 287 (2000).

¹⁰³ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 141 (1998).

¹⁰⁴ Ulrick Beck, *Democratisation of the Family*, 4 CHILDHOOD 151, 161 (1997).

¹⁰⁵ Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277, 287 (2000).

¹⁰⁶ CHRIS JENKS, *CHILDHOOD*, 3 (2005).

CHAPTER 7

A 'TRUTH' OF THE CRC: THE CHILD REQUIRES 'CARE'

* Portions of this chapter were included in a publication on trafficking, see Ashleigh Barnes, *The Trafficking of Children: A Counter-Narrative to The CRC's Construction of 'Care'*, 7 INTERCULTURAL HUMAN RIGHTS LAW REVIEW (forthcoming 2012).

OUTLINE

- I. CHILDHOOD AS A PERIOD OF DEVELOPMENT REQUIRING ‘CARE’
 - a. State – as Back-up ‘Care’
 - b. Family – as Ideal ‘Care’

- II. CRC’S DEFINITION OF A FAMILY – PARENT POSITIONED OVER CHILD

- III. CHILDREN’S RIGHTS RELATE PRIMARILY TO KEEPING THE FAMILY INTACT

- IV. WHEN THE ‘FAMILY’ BREAKS DOWN – RESTRICTIONS ON PARENTAL RIGHTS

- V. CONCLUSION

As was introduced in Chapter 5, and argued specifically in relation to the CRC in Chapter 6, the CRC constructs the child as 'developing' towards a state of maturity/adulthood. The child is constructed in the CRC as lacking capacity because of the child's inherent, natural, biological state of immaturity. In this construction, the child's inability to exercise autonomy/capacity does not relate to social discrimination that the child faces, but rather the child's own biological immaturity. Chapter 5 argued that this understanding of children as lacking capacity/maturity based on a set of biological 'truths' about childhood is best understood through the adult – child binary, where adults are assumed mature/capable and children are assumed immature/incapable. As was argued in Chapter 4, unlike other categories of persons whose rights are dealt with in specific conventions/declarations, the child as an immature rights-holder is protected, not through shoring up the child's autonomy and ability to participate, but rather by requiring the child to be in 'care' (in other words, have an adult be responsible for the child). Again, the only justification lies in a view of children as biologically immature/incapable, requiring children to rely on other groups to act on their behalf in procuring and interpreting rights.¹ Consequently, the CRC widens its 'subject' to include a more complicated triad of interested parties: 1) the parent², who is protected and respected, and who has rights, responsibilities, and duties, 2) the state as the supra-parent, who can override the parent in exceptional circumstances and 3) the child, who is protected and given a degree of autonomy, but only in accordance with the parents' and/or the state's perception of the child's best interests and capacities.

The CRC imagines the child to be in a particular positional matrix: within the family or in some similar form of 'care'. This chapter argues that the configuration of family or 'care' is defined in the CRC as an adult positioned over the child. As such, it will be argued that the child is given only those autonomy and protection rights that buttress the adult's position in the family relative to the child. The CRC's depiction of the family and 'care' does not reflect some objective description of the family, the child, or the parent, but rather the adult – child binary and the specific lines of power that it mandates. This hierarchical family is made a marker of childhood through not only the CRC's naturalisation and idealisation of the family, but also through the particular allocation of rights given (and not given) to children, as well as the rights and responsibilities given to the state and the parent. In formulating the rights of the child within the hierarchy of the family/care, the CRC makes mandatory this normative context, arguably limiting

¹ Onora O'Neill, *Children's Rights and Children's Lives*, in CHILDREN'S RIGHTS-RE-VISIONED, 39 (Rosalind Ekman Ladd ed. 1996).

² While, the term 'parent' merely implies biological mother or father, this chapter will use the terms 'adult' or 'parent' to indicate the person(s) who is (are) responsible for the child. While the Convention mentions parents and 'other persons having care of the child', the term 'parent' is used most often in the Convention and best reflects the type of relationship envisioned by the Convention.

the ability of many children to enjoy many of the rights in the Convention (for example, freedom of religion). Furthermore, the CRC's allocation of autonomy and protection rights is thus not only remarkably different from adult human rights discourses, but also inapplicable for children who do not 'enjoy' such 'care'. The child and therefore the child's rights are constructed in the positional matrix of the family based upon certain 'truths' about the family, the parent, the state, and about the child that limit the rights the child may enjoy. Thus, any discussion about the rights of the child in the CRC cannot simply regard the construction of the child as axiomatic. The 'child' is not an originary term, its meaning flows from the adult – child binary. Neither term can be understood in isolation. Instead, this triad, this normative context is examined to understand the outer limits of the so-called 'rights of the child'. Section I will examine how the Convention requires and defines 'care'. Section II will explore how the CRC defines the 'family' as the adult positioned over the child. Section III will make the argument that the child is only given rights that not only support the cohesion of the family, but also the position of the parents over the child. Finally, Section IV will examine the limitations on the rights of parents.

I. CHILDHOOD AS A PERIOD OF DEVELOPMENT REQUIRING 'CARE'

The word 'care' appears thirty-one times in the Convention. The word 'care' in relation to the child appears twenty-three times, three times in the Preamble alone: 1) 'childhood is entitled to special *care* and assistance', 2) [b]earing in mind that the need to extend particular *care* to the child', 3) 'the child . . . needs special safeguards and *care*'. Article 3 (2) obligates states to ensure 'protection and *care* as is necessary for [the child's] well-being'. Article 7 gives children the right to be cared for (as far as possible) by his or her parents. Article 19 obligates states to protect children from all forms of abuse by those charged with the child's care. These are but a few of the many references to the forms of 'care' necessary to protect the child. 'Care' appears to be a fundamental right of the child in the CRC. As discussed in Chapter 6, Woodhouse argues that 'need statements' directs attention away from the particular adult value-position from which such statements are made.³ When 'need statements' are projected onto children they acquire objectivity. Yet beneath the 'vener of certainty', Woodhouse argues that there lies a complicated array of personal and cultural values alongside empirical claims about childhood.⁴ As discussed in Chapter 6, Woodhead utilises the equation 'X needs Y for Z to follow' as a method for distilling and analysing who needs what and why, questions often difficult to

³ MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in *GROWING UP IN A CHANGING SOCIETY*, 49 (1990).

⁴ MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in *GROWING UP IN A CHANGING SOCIETY*, 49 (1990).

ascertain in the social matrix. As applied to the CRC, X [the child] needs Y [a particular thing that is secured in the form of a right] for Z [to accomplish some measure].⁵ According to the CRC, the child needs 'care' for her or his 'full and harmonious development'.⁶ Woodhouse argues that abandoning the verbiage of 'needs' would require professionals to make explicit their judgments and unveil their assumptions for external scrutiny.⁷ As noted in the previous chapter, neither the Convention nor the *Travaux Préparatoires* unpack their assessment of the category child as 'physically and mentally immature'. More specific to this chapter, neither the Convention nor the *Travaux Préparatoires* explicate why 'care' and the Convention's definition of 'care' are the CRC's 'solutions' to the child's alleged immaturity. Indeed, beyond mere 'needs', the CRC also states that the child is 'entitled' to care, (in other words, has the right to care). One could argue that the language of entitlement or rights further entrenches the child's 'need' for care, placing it beyond scrutiny, as such an entitlement cements the knowledges/claims-to-truth of developmental psychology and the common sense assumption that children require 'care' as 'truths' in law. Knowledges produced by certain more traditional stains of developmental psychology and law come together to reinforce each other.⁸ The child is immature and therefore the law 'entitles' the child to 'care'.

Nonetheless, Jenks argues that the care or the altruism that adults feel towards a child is a social construct: asserting instead that 'care' disguises control,⁹ obligating forms of dependency. For Jenks, care and dependency, necessitated by the 'truth' of the developing child, describe not the loving bonds between the child and those who 'care' for the child, but rather describes mechanisms of dependence that serve to sustain particular versions of status quo.¹⁰ Jenks argues that 'care' itself is hegemonic; it possesses the moral high ground, defies opposition and exercises a continual control over the Other (here the child), all in the name of 'what is best for the child'.¹¹ In this way, dependency is realised as a product of social construction and development through dependency becomes an instrument in the process of social and cultural reproduction.¹²

⁵ MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in GROWING UP IN A CHANGING SOCIETY, 37 (1990).

⁶ Preamble.

⁷ MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in GROWING UP IN A CHANGING SOCIETY, 49 (1990).

⁸ MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in GROWING UP IN A CHANGING SOCIETY, 49 (1990).

⁹ As outlined by Ben Goulder and Peter Fitzpatrick, '[J]aw . . . facilitates the operation of [knowledges] by constituting spaces which are then transversed and invested by the disciplines . . . Far from receding in importance, then, the law in modernity comes to be ever more constantly involved in deploying and harnessing the disciplines – a kind of constitutive compatibility of law and discipline'.

¹⁰ CHRIS JENKS, CHILDHOOD, 41 (2005).

¹¹ CHRIS JENKS, CHILDHOOD, 41 (2005).

¹² CHRIS JENKS, CHILDHOOD, 41 (2005).

¹³ CHRIS JENKS, CHILDHOOD, 42 (2005).

In this view, the category 'child' does not create or cause institutions, discourses, or practices, but the CRC creates or causes the category 'child' by determining the characteristics that a particular subject should (and should not) have. This thesis subscribes to the idea that by asserting that the child is 'entitled to' and 'needs' 'care', the CRC depicts childhood as only occurring in 'care', thereby making 'care' and thus dependency markers of childhood.

To illustrate the centrality of 'care' and dependency, a combination reading of Article 3(2) and Article 3(3) suggests that the child will always be in some form of care. Article 3(2) requires states to 'ensure the child . . . protection and care'. Article 3(3) requires states to ensure 'institutions, services, and facilities responsible for the care or protection of the child' comply with particular standards. The assumption is that children are or should be in the care of either their parent (Article 3(2)) or the state (Article 3(3)).¹³ The blanket requirement of 'care' for the CRC's child is further demonstrated in Article 20, which states that a child 'temporarily or permanently deprived of his or her family environment,' shall be entitled to special protection and assistance where states shall ensure alternative care. The obligation on the state to provide care in the event that care is 'lost' arguably demonstrates not only 'care' as the normative aim, but also that the child has no choice but to be in 'care'.

Yet, what does 'care' entail according to the CRC? If the child must be located within a context of 'care', one must then understand the CRC's construction of 'care': what parties are included in the CRC's version of 'care', what are their positions relative to each other, and how this affects the child who is forcibly placed within this context? Unpacking the CRC's definition of 'care' is paramount to understanding the rights given to the child by the CRC. The CRC envisions two types of care: 1) family and 2) the state. The CRC envisions the child to be in the care of parents as the rule, with the state providing care in exceptional cases.

a. State – as Back-up 'Care'

The state is to only provide care in the instance that the family breaks down. According to Article 20(1), the child 'shall be entitled to *special* protection and assistance provided by the state'. More specifically states are to 'ensure *alternative* care for the child', according to Article 20(2). Article 5 explicitly requires states to 'respect the responsibilities, rights and duties of parents'. Article 9 states that children 'shall not be separated from his or her parents' without certain

¹³ Article 7(1) also refers to the child's 'right to know and be cared for by his or her parents'.

procedural safeguards met. Article 18 states that 'parents or, as the case may be, parents, have the primary responsibility for the upbringing and development of the child'. Though the role of the state will be discussed in great detail below, it is noteworthy that the state nominates itself as a back-up carer or protectorate, an odd positioning of the state in the context of human rights, which normally place limits on the state's rights. Notably, the 'special' protection and assistance that the state is to provide children, is unlike any given to adults, indeed would be unimaginable for most (capable) adults: the state is charged with parent-like powers over the child.

b. Family – as Ideal 'Care'

The CRC envisions the family as having primary 'care' of the category 'child', and describes the family as the ideal form of care of the category 'child'. The Preamble characterises the family in relation to the child in three noteworthy ways. First, the Preamble naturalises the family, emphasising the family as fundamental, but also particularly important to childhood: 'convinced' that the family is 'the *fundamental* group of society and the *natural* environment for growth and well-being of all its member and *particularly* children'.¹⁴ During the drafting of the Convention the United States delegate articulated that the United States 'attached great importance to the family as the natural and fundamental group unit of society' and that the 'family should be explicitly protected . . . to emphasise [its] importance and relationship to all other rights contained in the Convention'.¹⁵ This sentiment was accepted by the parties, with this language inserted all but verbatim into the Preamble. Stating that the family is a fundamental group of society is standard international human rights language.¹⁶ However, stating that a particular group prospers in the family environment is exceptional to children. Notably, all such language (in other words, the family is 'fundamental' and 'natural') is absent from CEDAW. Given the historical relationship between both the categories 'woman' and 'child' and the family, how these

¹⁴ Emphasis added.

¹⁵ SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 158 (1992). It should be noted that the family, as natural and fundamental, was not discussed during the drafting of the Preamble. The implication is that this conception of the family was roundly accepted by all parties. The major issue of concern was the language in the Preamble that implicated abortion: 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'. SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 102 (1992).

¹⁶ ICCPR Article 23(1): The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. ICESCR Article 10(1): 1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses. CRPD Preamble (x): *Convinced* that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, and that persons with disabilities and their family members should receive the necessary protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities.

two Conventions relate their respective subjects to the family offers interesting insights.¹⁷ One could imagine if such language was included in CEDAW: the family is 'the *fundamental* group of society and the *natural* environment for growth and well-being of all its member and particularly *woman*'. In labelling the family as 'natural', the CRC legitimates the family through, seemingly, scientific or objective reasoning. Then the CRC uniquely states that this natural family is particularly fundamental for children. As discussed in Chapter 3, knowledges masquerade as universal 'truths'.¹⁸ Similar to the 'developing child' discussed in Chapter 6, the family is constructed to have some natural essence. Arguably, the process of naturalising the family puts it beyond question, as it acquires the status of *Truth*. This natural/fundamental-ness of the 'family' as the form a 'care' required by the child, legitimates and puts beyond question the CRC's family, including its definition (to be discussed below).

Second, the Preamble draws upon developmental psychology to justify its normative position that 'the child, for the full and harmonious *development* of his or her personality, *should grow up in a family environment*'.¹⁹ The Preamble links the 'natural family' with 'the child-as-developing'; one legitimates and reinforces the other. As discussed in Chapter 6, the emotive force portrayed in this form of 'needs' statement combines with the language of 'development', premised on the idea that the child is in the scientifically proven state of development to further underline the 'truth' that the family is the 'natural' place for childhood in the CRC. Thirdly, to further legitimate the family in the Convention, the Preamble characterises the family as a place of 'happiness, love, and understanding'. As discussed in Chapter 5, the CRC is now drawing on visions of Apollonian childhood to cast the family as a safe and harmonious place for the CRC's developing child. The family is construed as the mechanism by which both society and children will progress. This discourse (fundamental, natural, necessary for full and harmonious development, happy, full of love and understanding) creates at the outset of the Convention an irrefutable description of 'truth' about the family. Hence, our 'true' (immature) child requires 'care', and our 'true' family becomes the natural place of childhood.

While feminist scholarship has critiqued the idea of 'protection of the family' as a thinly veiled policy of propping up a particularly hierarchy within the family, the policy of protecting the

¹⁷ See for example Frances E. Olsen, *Myth of State Intervention in the Family*, 18(4) UNIVERSITY OF MICHIGAN JOURNAL OF LAW 835 (1985). Notably, O'Neil argues that, '[t]he extension of the human rights momentum to children] is illusory because it exaggerates the analogies between children's dependence and the dependence of oppressed social groups'. Onora O'Neill, *Children's Rights and Children's Lives*, in CHILDREN'S RIGHTS-RE-VISIONED, 39 (Rosalind Ekman Ladd ed. 1996).

¹⁸ BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 38 (2009); REX STANTON ROGERS and WENDY STANTON ROGERS, *STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN*, 38 (1992).

¹⁹ Emphasis added.

family as a normative aim persists in the CRC.²⁰ Norma Fields questions whether the protected space of familial and community harmony and innocence ever existed.²¹ The growing concern with the domain of childhood as threatened, invaded, and polluted by adults' world, as opposed to a period of temporally restricted economic and bureaucratic transactions, enables the focus on preserving innocence through social values of enduring love and care.²² Similarly, Olsen argues that the family is viewed as a,

[a] warm nurturant enclave governed by an ethic of altruism and caring – a haven protecting its members from the dangers of an authoritarian state and from the anarchistic intrusions of private third parties.²³

She notes that only in exceptional situations is the family viewed as otherwise: 'a centre of oppression, raw will and authority, violence and brutality, where the powerful economically and sexually subordinate and exploit the powerless.'²⁴ Olsen observes that the nuclear family could be seen as 'a seething hothouse or an oppressive structure that will *often* become destructive of individual members'.²⁵ Freeman also argues that 'a dangerous and false consensus lurks in the shadows' of so called 'pro-family anti-interventionism' (in other words, those opposed to state intervention into the family on the basis of children's rights).²⁶ Freeman argues that a 'simplistic' support for non-intervention in 'families' based on arguments such as privacy, masks the conflicts and abuses that occur within the family.²⁷ He writes, '[o]ne only has to substitute 'husband-wife' for 'parent-child' . . . to realise the untenability of [protecting only the family unit and not the individuals who make up the family].'²⁸

Notably, only one article in the entirety of the Convention, Article 19, addresses the issue of when the family does not leave up to the ideal of being happy, loving, and understanding.

²⁰ See generally Frances E. Olsen, *Myth of State Intervention in the Family*, 18(4) UNIVERSITY OF MICHIGAN JOURNAL OF LAW 835 (1985); Michael Freeman, *Feminism and Child Law*, in FEMINIST PERSPECTIVES ON CHILD LAW, 19-20 (Jo Bridgeman and Daniel Monks, eds., 2000); Hilary Lim & Jeremy Roche, *Feminism and Children's Rights*, in FEMINIST PERSPECTIVES ON CHILD LAW, 227, 229, 247 (Jo Bridgeman and Daniel Monks, eds., 2000); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARVARD LAW REVIEW 1497, 1499 (1983).

²¹ Norma Fields, *The Child as Labourer and Consumer: The Disappearance of Childhood in Contemporary Japan*, in CHILDREN AND THE POLITICS OF CULTURE, 9-10 (Sharon Stephens ed., 1995).

²² Norma Fields, *The Child as Labourer and Consumer: The Disappearance of Childhood in Contemporary Japan*, in CHILDREN AND THE POLITICS OF CULTURE, 9-10 (Sharon Stephens ed., 1995).

²³ Frances E. Olsen, *Myth of State Intervention in the Family*, 18(4) UNIVERSITY OF MICHIGAN JOURNAL OF LAW 835, 839 (1985).

²⁴ Frances E. Olsen, *Myth of State Intervention in the Family*, 18(4) UNIVERSITY OF MICHIGAN JOURNAL OF LAW 835, 839 (1985), citing Martha Minow, *Beyond State Intervention in the Family: For Baby Jane Doe*, 18 UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM 933, 948 (1985).

²⁵ Frances E. Olsen, *Myth of State Intervention in the Family*, 18(4) UNIVERSITY OF MICHIGAN JOURNAL OF LAW 835, 839 (1985). Original emphasis.

²⁶ Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277 (2000).

²⁷ Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277, 332 (2000).

²⁸ Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277, 332 (2000).

Though this article will be discussed at greater length later in this chapter, it is noteworthy that even when the Convention envisions instances of 'abuse, neglect or negligent treatment' of the child by a parent in Article 19, the CRC mandates protection of the child, including 'support' for those who have the care of the child. Put another way Article 19 treats abuse, neglect, and negligent treatment between parent and child as fundamentally different from actions between strangers, focusing on 'support' rather than for example civil or criminal action.²⁹ As such, the 'truths' found in the CRC about the family/'care' (child=developing, childhood requires care, family=natural) again places limits on the rights of the child. The 'truths' associated with the family/'care' limits both the child's right to autonomy, as was discussed in Chapter 6, as well as the child's right to protection. Considering the importance placed on 'family' in the CRC, the CRC's definition of family becomes important to further understanding the ways in which the CRC's 'family' places limits on the rights of the child.

II. THE CRC'S DEFINITION OF A FAMILY – PARENT POSITIONED OVER CHILD

This chapter argues that term 'family' in the CRC equates to 'parental control'. While the Convention does not explicitly define the term 'family', the Convention describes only two family members: parents and children. As examples, Article 2(1) states that the child shall enjoy rights without discrimination, and Article 2(2) states that the child shall enjoy rights without discrimination on the basis of the child's 'parents, parents, or family members'. This chapter asserts that the coupling or binary of the adult – child seen throughout the Convention emphasises the role of the family for the rights of the child. The linkage of these two members is in essence the formation the family. For the CRC's child, the presence of an adult (preferably a parent) is the assumption of the family context. The child without an adult is family-less. This chapter argues that the family in the CRC is defined as, not just the presence of an adult and a child, but rather the presence of an adult *positioned over* a child. Six points will be made.

First, interestingly in the discussions that took place during the drafting of the Convention, the terms 'family'/'care' and 'parent' became almost synonymous. It is not that the terms 'family' and 'parent' are synonymous, but rather that 'family' and 'parental control' were used synonymously. For example, regarding Article 5, the Canadian delegate noted the concern that,

²⁹ Onora O'Neill, *Children's Rights and Children's Lives*, in CHILDREN'S RIGHTS-RE-VISIONED, 30 (Rosalind Ekman Ladd ed., 1996): 'Among family members where ties are even closer than simple friendship, it is suggested, the language of rights should give way to models that stress connection, care, intimacy, and relationship rather than separateness, individuality, and independence'.

in protecting the family from the state, *the family must not be given arbitrary control over the child*. Any protection from the state given to the family must be equally balanced with the protection of the child within the family.³⁰

The Canadian delegate argued that the Convention was a 'delicate balance between the rights of the child and the correlative rights of the parents'.³¹ In the first two sentences the delegate refers to the family and the child, and in the third refers to the parents and the child. Further, the Canadian delegate expressed the fear that 'the family' must not be given arbitrary control over the child. As the family is only made up of parents and children, the Canadian delegate must have meant that the *parents* must not be given arbitrary control. 'Parental power' becomes interchangeable with the term 'family'.

Similarly, when discussing Article 10, the Australian delegate suggested that the original text ('[t]he parents shall have the right to specify the place of the child's residence unless, guided by his best interest, a competent state organ is authorised, in accordance with national law, to decide in this matter') should be deleted because a provision concerning parental rights had no place in a human rights convention for children.³² The United States delegate, though stating agreement, insisted that family reunification should be included.³³ Another speaker pointed out that it was not the rights of parents that were being emphasised by family reunification, but rather the best interests of the child.³⁴ Here, parental control becomes 'family', which even equates with the best interests of the child. 'Family' in the Convention describes a positional matrix in which the adult is positioned over the child. The nebulous best interests principle is then used as a further rationalisation, or another term that helps defy criticism of the adult's claim to power over the child.³⁵ The Convention then appears to support, not parental rights (in other words, the right of the parents to have control over their child), but rather the more politically effective best interests of the child and the family. By explicitly naturalising the 'family', the Convention

³⁰ SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 160 (1992). Emphasis added.

³¹ SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 160 (1992).

³² SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 183 (1992).

³³ SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 184 (1992).

³⁴ SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 184 (1992).

³⁵ Michael Freeman, *Article 3: The Best Interests of the Child Conflicts*, in *A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD*, 2 (Andre ALEN et al., eds., 2007): 'The best interests principle is, of course, indeterminate. One of the dangers of this is that, in upholding the standard, other principles and policies can exert an influence from behind the "smokescreen" of the best interests principle. It can cloak prejudices, for example anti-gay sentiments. It can also be merely a reflection of "dominant meanings"'. Robert Mnookin highlights, 'deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself'. See Robert Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 *LAW AND CONTEMPORARY PROBLEMS*, 260 (1975).

implicitly naturalises the parents' power over the child. As such, the idealisation, the naturalisation, the protection, and the ensuring of the family could in turn, equally describe the idealisation, the naturalisation, the protection, and the ensuring of the power dynamics of the parent over the child. Olsen notes that implicit in law, is not just respect for the 'family'.³⁶ She argues that laws shape and reinforce the roles of those who make up the family by assigning power and responsibility within the family.³⁷ Barbara Woodhouse describes the dangers of viewing the family as a single 'entity', including the subjugation of women's will to husbands, the requirement that a child exist in an abusive family situation, and the condoning of domestic violence.³⁸ She notes that treating the family as a 'unit' bestows power on the strong members of the entity.³⁹ As the discussions above indicate, it is then not just the 'family' that the CRC is supporting; the CRC is supporting a particular power structure within the family of the parent positioned over the child.

Second, the CRC gives primary responsibility over the child to the parent. Article 3(2) mandates that the rights and duties of the parent must be taken into account when ensuring protection and care of the child. This article reaffirms the importance of the role of the parent and mandates the consideration of parent's interests. Article 5 obligates states to respect the responsibilities, rights and duties of parents and even members of the child's extended family and community, to provide direction and guidance to the child in the child's exercise of *every right in the Convention*. Such sweeping oversight could encumber the child's ability to exercise her/his rights in the Convention. The parent's 'duty' or 'responsibility' to guide the child in the exercise of every right in the CRC locates the parent over the child and results in the child being explicitly dependent on such guidance. The child's rights become conditioned upon the parent's 'direction'. 'Responsibility for' becomes a grant of power to the parent over the child, where parents are empowered to impose their beliefs and opinions on the child.

Similarly, Article 18 notes that 'both parents have common responsibilities for the upbringing and development of the child'. This article not only locates the parent over the child as the parents have 'responsibility for'/control over the child, but also can be read to legitimise the

³⁶ Frances E. Olsen, *Myth of State Intervention in the Family*, 18(4) UNIVERSITY OF MICHIGAN JOURNAL OF LAW 835, 848 (1985).

³⁷ Frances E. Olsen, *Myth of State Intervention in the Family*, 18(4) UNIVERSITY OF MICHIGAN JOURNAL OF LAW 835, 848 (1985). See also Michael Freeman, *Feminism and Child Law*, in FEMINIST PERSPECTIVES ON CHILD LAW, 19-20 (Jo Bridgeman and Daniel Monks, eds., 2000); Hilary Lim & Jeremy Roche, *Feminism and Children's Rights*, in FEMINIST PERSPECTIVES ON CHILD LAW, 227, 229, 247 (Jo Bridgeman and Daniel Monks, eds., 2000); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARVARD LAW REVIEW 1497, 1499 (1983).

³⁸ Barbara Woodhouse, *The Dark Side of Family Privacy*, 67 GEORGE WASHINGTON LAW REVIEW 1247, 1251-1259 (1999).

³⁹ Barbara Woodhouse, *The Dark Side of Family Privacy*, 67 GEORGE WASHINGTON LAW REVIEW 1247, 1254 (1999).

dominance of the parent. Article 18 states that, '[t]he best interests of the child *will be* their (in other words, the parents') basic concern'.⁴⁰ This has two possible effects: the article dictates what the parents' concerns must be (normative), and/or when read in the context of the entire Convention, could also solidify the dominant role of parents by justifying the parents' dominant role by explaining what the parents' primary concern is (descriptive). When read as the latter, Article 18 has a potential legitimising affect, as parents, of course, will have the best interests of the child as a primary consideration in the exercise of their position of dominance. This description of the parent is yet another 'truth' projected by the CRC; a 'truth' which is at odds with the experience of many children whose parents do not or cannot act in their best interest.⁴¹

Third, in addition to requiring the child to be subject to the 'direction' and responsibilities of the parents in relation to the child, the Convention further situates the child as dependent on the parent for the child's everyday physical needs. As discussed in Chapter 6, the child is required to attend school and is not envisioned by the CRC as normally engaged in paid work. Further, parents are to provide for the child according to Article 18 and all state assistance is to be directed through the parents according to Articles 24 and 27. Article 24 states that the realisation of the enjoyment of the highest attainable standard of health is mediated through the child's parents. Article 27 states that the parents have primary responsibility, which the state must assist, for securing an adequate standard of living for the child. In both articles, without parents there is no one who holds primary responsibility, and there is no one for the state, who has secondary responsibility, to assist. Indeed the state must then step in as a back-up parent and exercise such responsibility. In the normativity of the CRC, a child simply cannot exercise such responsibility on her or his own behalf. It may be argued that the CRC obligates states under Article 20 to find or act as the parent/parent, and as such the child never requires direct assistance to support her or himself. Certainly there are academics who argue that the only right a child is entitled to is the right to an autonomous parent.⁴² As will be discussed in Chapter 9, there are many children in both the developed and developing world who have no parent as envisioned in the CRC, whether a family or as provided by the state. The child, who is

⁴⁰ Emphasis added.

⁴¹ See Chapter 9 for further discussion. See generally Kearney Backett-Milburn et al., *Challenging Childhoods: Young People's Accounts of "Getting By" in Families with Substance Use Problems*, 15 CHILDHOOD 461 (2008); Caroline Nicholson, *The Impact of Child Labour Legislation on Child-Headed Households in South Africa*, 30 THOMAS JEFFERSON LAW REVIEW 408 (2008); Judith Ennew, *Outside Childhood: Street Children's Rights*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE (Bob Franklin ed., 1995); Frances E. Olsen, *Myth of State Intervention in the Family*, 18(4) UNIVERSITY OF MICHIGAN JOURNAL OF LAW 835, 849 (1985), citing Martha Minow, *Beyond State Intervention in the Family: For Baby Jane Doe*, 18 UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM 933, 948 (1985).

⁴² This assumes agreement could be found on the assessment of the child's best interests, a view this thesis largely rejects or at least argues is not as straight forward as the CRC presents. JOSEPH GOLDSTEIN et al. BEFORE THE BEST INTERESTS OF THE CHILD, 9 (1979). For a discussion of this view see Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277 (2000).

responsible for him or herself (much less others), is not contemplated in this article, or anywhere else in the Convention. As such, the CRC makes the family/adults necessary for the realisation of certain rights in the Convention. If the child desires assistance from the state, she/he must be part of a family, in other words, the child must have a parent.

Yet even within the CRC, there are other, incongruent constructions of the adult – child relationship. As discussed in Chapter 6, Article 23(2) is unique within the Convention. Article 23 mandates that assistance be given to ‘the eligible child [with disability] and those responsible for his or her care’. Notably, this is the only article that explicitly provides that assistance offered by the state should be directed towards the child as well as the parent. This article also states that the child should live in conditions that ‘promote self-reliance and facilitate the child’s active participation in the community’. One must ask: why might the drafters have given this child more subjectivity and autonomy as compared to other children? It would seem that because of a greater likelihood of dependence of the child with a disability, the aim is to ensure the respect for the child’s autonomy. Why is this approach not more globally applicable for the child in the CRC? If the CRC desires to couple the child with the parent, as the definition of family, why not put the two members of the family on more equal footing? This child, envisioned to require greater reliance on ‘care’ might have presented less of a ‘threat’ to what this thesis describes as maintenance of the adult – child binary, and the positioning of the parent with active control over the needs and best interests of the child. During the drafting of Article 23, the Polish delegate proposed that the terms ‘self-reliance’, ‘active participation’, and ‘dignity’ be included in Article 23.⁴³ These otherwise controversial terms, at least in relation to the CRC’s child, were included without discussion.⁴⁴ The discussions focused not on the balancing of parental control versus the child’s autonomy rights, but on who would bear the financial responsibility to realise the obligations under Article 23. Again this article is the only article in the CRC that envisions the child and parent on a more equal plane.

Fourth, not only does the CRC make children dependent on parents for their everyday physical needs (with the exception of Article 23),⁴⁵ certain articles seem to go further and make children’s inner life (for example, thought, conscience) subject to parental control. While Article 5 already empowers parents to ‘guide’ and ‘direct’ the child’s exercise of all the rights in the Convention,

⁴³ SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE ‘TRAVAUX PRÉPARATOIRES’*, 332-333 (1992).

⁴⁴ SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE ‘TRAVAUX PRÉPARATOIRES’*, 246 (1992).

⁴⁵ Notably, Article 23 still assumes that a parent will be present. Article 23 is merely different in that it places the child and the parent on more equal footing.

Article 14 reiterates the parental right to 'guide' and 'direct' the child specifically in relation to the right to freedom of thought, conscience, and religion. This extension of the grant of parental discretion could represent an even greater intrusion into the child's exercise of rights under the CRC. Eva Brems notes the confusion over not only the inclusion of the parental right to guide and direct the child in Article 14, but also how this inclusion altered the child's rights under the ICCPR.⁴⁶ Notably, the discussion during the drafting of Article 14 did not relate to the protection of the choice of religion vis-à-vis state, as is the focus of other international human rights conventions.⁴⁷ Rather, disagreement focused on the existence of a child's own right, vis-à-vis his or her parents. Originally the draft article put children on equal footing with that of the parents:

[t]he state parties shall equally respect the liberty of the child and his parents and where applicable, parents, to ensure the religious and moral education of the child in conformity with convictions of their choice.⁴⁸

Such equality was ultimately rejected by the drafters.⁴⁹ Van Bueren explains that the disagreement over the extent of the child's right, in particular to religious freedom, risked obstructing the drafting and adoption of the entire Convention.⁵⁰ Brems argues that it is not self-evident to recognise children as autonomous bearers of this right, since several international conventions, specifically Art 18(4) of the ICCPR and Article 13(3) of the ICESCR, recognise the right of parents to ensure the religious education of their children in conformity with the parents' own conviction.⁵¹ Even the Committee for the CRC emphasises that 'the human rights of children cannot be realised independently from the human rights of their parents, or in isolation from society at large', in relation to Article 14.⁵² The specific inclusion of the parents' right to

⁴⁶ Eva Brems, *Article 14: The Right to Freedom of Thought, Conscience, and Religion, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD*, 1 (Andre Alen et al., eds., 2006).

⁴⁷ SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 247 (1992).

⁴⁸ SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 246 (1992).

⁴⁹ SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 247 (1992).

⁵⁰ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 155 (1998).

⁵¹ Eva Brems, *Article 14: The Right to Freedom of Thought, Conscience, and Religion, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD*, 5 (Andre Alen et al., eds., 2006), citing CRC Committee, *Concluding Observations: Uzbekistan* (UN Doc. CRC/C/15/Add.167, 2001), para. 6; CRC Committee, *Concluding Observations: Saudia Arabia* (UN Doc. CRC/C/15/Add.148, 2001), para. 31; CRC Committee, *Concluding Observations: Iran* (UN Doc. CRC/C/15/Add.123, 2000), paras. 35).

⁵² Eva Brems, *Article 14: The Right to Freedom of Thought, Conscience, and Religion, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD*, 5 (Andre Alen et al., eds., 2006), citing CRC Committee, *Concluding Observations: Uzbekistan* (UN Doc. CRC/C/15/Add.167, 2001), para. 6-7; CRC Committee, *Concluding Observations: Saudia Arabia* (UN Doc. CRC/C/15/Add.148, 2001), para. 31-32; CRC Committee, *Concluding Observations: Iran* (UN Doc. CRC/C/15/Add.123, 2000), paras. 35-36.

direct the child in Article 14 reflects greater oversight given to parents in the child's right to religion than in other conventions. By requiring states to 'respect' the rights and duties of parents to provide this type of direction to the child, the CRC is forcing dependency on parental decisions extending to the type of views the child should hold and what religion the child should practice. For many, such 'direction' is uncontroversial. Brems states that the child's capacity to choose one's religion is 'probably' acquired at a later age, thus justifying greater parental oversight of the 'incapable' child. Yet, if we were to substitute any other identity category to dislodge the 'obviousness' of such power given to the adult over the child (male – female, master – slave, coloniser – colonised), one wonders whether such oversight could withstand scrutiny.

Fifth, continuing an investigation of the CRC's construction of the parent positioned over the child, Article 28, addresses the child's 'right' to education. Interestingly, the child's 'right' to education, includes that such education is compulsory according to Article 28(1)(a). A right is exceptionally coupled with a positive obligation to exercise this right on the part of the right holder.⁵⁵ Not only is the child required to attend, at least primary school, the child's right to education is further limited by the parents' right to choose the child's education. In parallel, this regulation applied to adults would equate to adults having the right to work, then being required by law to work, and having the type of work dictated by another category of persons. Nonetheless, Article 28 is also lauded as a major step in rights of the child as it does not make the child's right to education explicitly subject to the wishes of the parents.⁵⁴ Notably, no discussion took place on the issue of whether Article 28 altered, or should alter, the parent's right to choose the child's education under international human rights law.⁵⁵ Article 28 cannot be interpreted in isolation.⁵⁶ When necessarily read in light of Article 29 and Article 5, both arguably modify any increased emancipation with respect to a child's independent right to choose his or her education in Article 28, returning the child to the dominant CRC paradigm:

⁵⁵ A notable exception occurs where certain jurisdictions require citizens to vote (such as in Australia).

⁵⁴ Sylvain Vite and Herve Boecheat, *Article 21: Adoption*, in *A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD*, 48 (Andre Alen et al., eds., 2008), citing ICESCR Art. 13(3): '[s]tate shall have respect for the liberty of parents and, when applicable, parents to choose for their children's schools'. Further, the UDHR in Article 26 also provides that parents have a 'prior right to choose the kind of education that shall be given to their children'. Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

⁵⁵ SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 382-387 (1992). Discussions focused rather on the cost to the state if education was made compulsory.

⁵⁶ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331. Article 32(1): 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Article 32(2): 'The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes.' Sylvain Vite and Herve Boecheat, *Article 21: Adoption*, in *A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD*, 47 (Andre Alen et al., eds., 2008).

dependent upon parental 'guidance' for the exercise of rights.⁵⁷ Under Article 29, it could be argued that if parents do not believe that a particular education facility sufficiently develops respect for the parents, cultural identity, language, and values, the parents could choose to send the child elsewhere. Further, Article 5 mandates that in the child's exercise of all rights in the Convention, the state will respect the direction and guidance of the parents. It would seem that this direction and guidance would include the right to choose which school the child should attend. When read within the context of the entire Convention, can Article 28 be said to chip away at the broad parental discretion over education? The step that appears lauded within the CRC is the move from an explicit parental determination of education to an implicit one, thus not altering in any way parental control over the child's choice in education in the guise of 'responsibility for'. Van Bueren has argued that Article 12, the child's right to express her or his views in all matters regarding the child, helps ensure that the child's education is in accordance to the child's own beliefs/opinions.⁵⁸ As argued in Chapter 2, the child's right to express her or his views is still subject to an adult determination of the child's maturity. It is first for the parent to make such a determination. It could be said that the child has only the right of review of the parent's determination of the child's capacity in the instance the state feels such review is necessary. Ultimately the child remains subject to an adult's preference for the child's education or/and subject to an adult's assessment of the child's capacity.

Finally, numerous articles in the CRC relate only to children who are assumed to be in a family. For example, Article 5 states that the parents, extended family, and the community's responsibilities must be protected. Article 7(2) states that children have the right to know and be cared for by his or her parents. Article 9 elaborates the right not to be separated from the family. Article 9(3) states the right to maintain personal contact with the family and to gain essential information regarding whereabouts of the family. These articles assume that the child has such persons in his/her family, and therefore, these articles are only applicable if the child has a family. Article 10 provides for reunification of families and deals with parents who are located in a different state from that of the child. Article 22(2) states the obligation of the party and the UN to help trace and reunify families. Obviously, the child must have a family to enjoy such right to state assistance for reunification or separation. Article 29 states that the focus of education should develop respect for 'parents,' in addition to cultural identity, language, values,

⁵⁷ Sylvain Vite and Herve Boechar, *Article 21: Adoption*, in *A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD*, 47 (Andre Alen et al., eds., 2008).

⁵⁸ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 243 (1998). See also Geraldine Van Bueren, *Education: Whose Right is it Anyway?*, in *HUMAN RIGHTS: A EUROPEAN PERSPECTIVE* (Liz Heffernan ed., 1994).

and national values. Again the assumption is that there exist parents for which respect should be developed.

By assuming that children are in a family, the CRC only makes available rights for and duties owed to children who are in a family context. Many of the rights enumerated in the CRC simply do not make sense for children without a parent/family. The Convention is presented as a description of childhood, where all children live within families. In this construction, the child must first meet the qualifications for being a child; in this case the child must have a family, before rights can be extended. The rights of the child are mediated through the requirement/restraint of being in a family as defined as the child who is subject to parental authority. Children are only given rights that relate to maintaining the family environment (including a right not to be separated from the family), an environment defined by the child who is subject to parental authority. Similar to the idealising of the family as a place of 'happiness, love, and understanding', Freeman has argued that envisioning the protection of parental rights as the means to afford protection of the child, assumes that childhood is a golden age and that adults already relate to children in terms of love, care, and altruism.⁵⁹ Benjamin Shmueli and Ayelal Blecher-Prigat argue that two presumptions underlie this particular parent – child relationship: 1) that children lack maturity and 2) that the 'natural bonds of affection lead parents to act in their child's best interests.'⁶⁰ Freeman further contends that idealising adult-child relations only emphasises that parents have the best interests of the child at heart and results in a *laissez-faire* attitude towards the family, discussed above.⁶¹ Alanen and Mayall characterise the parent - child relationship as asymmetrical, where children are subordinated to adults/parents.⁶² Martha Minow argues that the trivialisation of children's rights fails to recognise the position of power parents generally have over children.⁶³ She contends that,

too often, the vulnerability of children is forgotten in a culture that assigns responsibility for their care, in the first instance, to the private sphere of particular parents. This pattern exonerates anyone but the child's parents from

⁵⁹ Michael Freeman, *Taking Children's Rights More Seriously*, in CHILDREN, RIGHTS, AND THE LAW, 55-56 (David Archard et al. eds., 1993).

⁶⁰ Benjamin Shmueli and Ayelal Blecher-Prigat, *Privacy for Children* 42 COLUMBIA HUMAN RIGHTS LAW REVIEW 759, 761-762 (2011).

⁶¹ Michael Freeman, *Taking Children's Rights More Seriously*, in CHILDREN, RIGHTS, AND THE LAW, 55-56 (David Archard et al. eds., 1993).

⁶² Leena Alanen, *Childhoods: the Generational Ordering of Social Relations*, in CHILDHOOD IN GENERATIONAL PERSPECTIVE, 27 (Berry Mayall and Helga Zeiber eds., 2003); Berry Mayall, *Childhood and generation: Explorations of Agency and Structure*, in CONCEPTUALIZING ADULT-CHILD RELATIONSHIPS 129 (Leena Alanen and Berry Mayall eds., 2000).

⁶³ Martha Minow, *Interpreting Rights, An Essay for Robert Cover*, 96 YALE LAW JOURNAL 1860 (1986-1987).

responsibility for the care and needs of the child and shields the child from public view.⁶⁴

Certainly the CRC sidesteps the need to justify the vast possibility of control given to the family, in other words, parents. Why does the Convention use the term 'care', even when referring to those adults who abuse and neglect the child in Article 19, as opposed to the term 'custody'? This chapter argues that the term 'care' is altruistic, disguising notions of possession and control upheld by the CRC. This thesis argues that 'care' demands dependency of the child on adults, rationalised by childhood as a biological state of development. The CRC's requirement of dependency reinforces vulnerability. 'Care' by parents and 'development' for/immaturity of children makes sense according to the adult – child binary. The CRC's 'claim-to-truth' regarding the family (natural and ideal), the child (developing and immature), and parents (always acting according to the child's best interests), disguises the political choices being made in the designation of such 'truths'. In turn, these versions of 'truth' place limits on what it means to be a child, making dependency and therefore vulnerability markers of childhood.

III. CHILDREN'S RIGHTS RELATE PRIMARILY TO KEEPING THE FAMILY INTACT

The CRC promotes keeping the family together, a bias that reinforces/increases parental control. This section will examine a variety of articles in the CRC that reinforce the structure of the family. For example, Article 22 obliges states and even the United Nations to cooperate to trace and reunify families of refugee children. Under Article 7(1) the child has the right to know and be cared for by his or her parents. Notably, the opposite of these articles is not included: the right not to be traced, not to be known, or not to be cared for by parents. Article 16 which includes the child's right to privacy, a right that would seemingly shed light on Article 7, contains the same language as it corollary in the ICCPR.⁶⁵ During the drafting of Article 16, one delegate expressed concern that Article 16 might have 'repercussions on the rights of parents to guide and educate their children and consequently have repercussions on the family, the basis of society'.⁶⁶ As discussed above, not only does this delegate define the family as the ability of parents to guide and educate their children, the delegate designates such an arrangement as a fundamental and essential truth: 'the basis of society'. By putting forth these 'truths' and thus circumventing

⁶⁴ Martha Minow, *Interpreting Rights, An Essay for Robert Cover*, 96 YALE LAW JOURNAL 1860, 1869 (1986-1987).

⁶⁵ ICCPR Article 17: '1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks'.

⁶⁶ SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PREPARATOIRES', 260-261 (1992).

discussion regarding their implications, the representative noted that children generally are treated differently than adults under domestic laws and as such the working group should take note.⁶⁷ The justification for differential treatment is the inherent difference of childhood. The adult – child binary justifies the understanding that a child's right to privacy should be fundamentally different from an adult's right to privacy. The adult – child binary rationalises the 'education' and 'guidance' of children by adults. It is noteworthy that Article 16 is also subject to Article 5's provision for parents to 'guide' and 'direct' the child in her or his exercise of the right to privacy. Quite possibly, though not discussed or acknowledged during the drafting of the Convention, the CRC's inclusion of autonomy rights for children, while intending to make children both subjects as well as objects of the law, at the same time ensured that even children's autonomy rights were also firmly subjected to parental control.

In addition to lacking the right to refuse knowledge of one's own parents, the child does not have the absolute right to know her or his parent. The right to know one's parents is dependent on the parent's desire to know the child. Article 7 (1) only includes the right to know and be cared for by parents 'as far as possible'. While the child, regardless of her or his wishes, must know the parent, the parents however may choose whether they want to know their child. The inclusion of the language 'as far as possible' reflected the drafters decision that the child's right to know her or his parents was predicated on the wishes of the parents.⁶⁸ During the drafting of Article 7, the Egyptian delegate, on behalf of ten other countries, articulated the view that part of the right to identity was the right to know one's parents.⁶⁹ The Egyptian delegate also noted that knowing one's parents was also justified on the basis of the child's 'psychological stability'.⁷⁰ The issues of 'secret adoption' or closed adoption (where the parents remain unknown to their child based upon the parents' wishes) was raised and accepted as an impediment to the child's absolute right to know her or his parents.⁷¹ Egypt, and all the delegates, eventually accepted that the child had to the right to know her or his parents only 'as far as possible'. This means that the child is obligated, even against his or her wishes to know, reunite, and be cared for by her or his parents. The parent's duties and responsibilities, while primary, are dispensable according to the parent's wishes. Although it is not obvious from the explicit wording of Article 7, when read in light of

⁶⁷ SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 261 (1992).

⁶⁸ SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 127-128 (1992).

⁶⁹ SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 127 (1992).

⁷⁰ SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 127 (1992).

⁷¹ SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 127 (1992).

the *Travaux Préparatoires*, it becomes clear that children have no choice but to be in a particular family, whereas parents do have such choice. Here, it is not the best interests of the child that dictate 'as far as possible' but rather parental preference.

Similarly, Article 9(1) provides the child the right not to be separated from the child's parents against the parent's will. Article 9(3) and (4) state that the child has the right to maintain personal contact and that both the child and the parents have the right to know the whereabouts of another member of the family. Once more, it is notable that the child does not have the right to 'divorce', remain in an undisclosed location, and refuse personal contact with his or her parent in the Convention. The child may be separated from and not have contact with parents, but not according to the child's wishes. Article 9 presents not only the idea that the child cannot determine his or her own best interests, but also contains another interesting layer. The child may only be separated against the parents' wishes if the following procedural hurdles are met: 1) the decision must be necessary for the best interests of the child, 2) determined by a competent authority, 3) subject to judicial review, 4) in accordance with applicable law and procedures. However, if the separation is according to the parents' wishes but against the child's wishes, there are no similar procedural hurdles included in the Convention.

During the drafting of Article 9, the Norwegian delegate suggested that separation, even in the event that parents wish to separate, should only occur if the state determines that separation is in the best interests of the child, thus limiting the right of the parents to divorce or separate from their child.⁷² Thorough discussion took place on how to resolve the issue of which family members may separate, and when.⁷³ Ultimately it was accepted by all parties, and was included in the Convention the procedural hurdles listed above only apply when the state is considering separating children from parents against parents' will. The child, however, does not have a comparable right to separate if such separation is against the parents' wishes; she or he only can hope for the issue to come before the state, the state meets those procedural hurdles, and the state finds that such separation is in accordance with the best interests principle. Further, if the parent desires to separate from the child against the child's wishes, the child does not have to right to those same procedural hurdles, not even a best interests of the child determination. It seems that this article merely supports the parental right to leave whenever the parent so desires, and the parental right to have custody of the child with as little state intervention as possible.

⁷² SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 188-189 (1992).

⁷³ SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 188-189 (1992).

Parental rights, here, are dressed up in the discourse of best interests of the child, but appear to clearly support parental preferences. One could argue that it cannot be in the child's best interests to stay with parents that do not want them. Nonetheless, how is this not true in the reverse, when a child does not desire to stay with a parent? Put another way, how is it in the child's best interests to force the family to stay together when the parent is unwanted. Certain assumptions are being made; roles and responsibilities are assumed and supported. Most importantly certain 'truths' about children (immature and therefore cannot act according to their best interests much less care for themselves) and parents (responsible and will always act in the child's best interests) are being made. Chapter 9 aims to dislodge these 'truths' as but claims-to-truth by arguing that the CRC's version of the category 'child' and the category 'adult' does not accord with the experiences of many humans who are nominated into these binary categories.

Notably, even Article 19, which addresses abuse by parents, does not specifically provide for separation, although the article does empower the state to take 'all appropriate legislative, administrative, social and educational measures to protect the child' from abuse by parents. These 'protective measures' should 'provide necessary support for the child and those who have the care of the child'. Obviously such support could include separation, yet there seems to be reluctance to provide such a right explicitly to children, even when the state has determined that abuse has occurred. It seems that Article 19 treats abuse perpetrated by those who care for the child as less serious than abuse perpetrated between strangers. By less serious, it is meant that 'physical or mental violence, injury, or abuse, maltreatment or exploitation, including sexual abuse' between any other individuals would give rise to criminal or civil action. However, Article 19 appears to call for 'support' for both the child and the perpetrator. This reading is supported and reflected in the discussions that took place during the drafting of Article 19. The discussion during the drafting of this article focused on the need to providing non-punitive measures for parents or parents who abuse their children. For example, the Ukrainian delegate stated that Ukraine would not support a proposal that was principally focused on judicial and punitive measures.⁷⁴ While agreeing, the delegate from the Defence for Children argued that implicit in the term 'judicial involvement' was the provision of services for prevention and follow-up. Ultimately, paragraph (2) of Article 19 makes clear the type of 'protective measures' the state should offer in the instance of child abuse by parents: prevention, identification, reporting, referral, investigation, treatment, and follow-up. While the explicit limitation on punitive action against parents who abuse or neglect their children cannot be found in Article 19, the language

⁷⁴ SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 275 (1992).

of Article 19 as well as the discussions during the drafting of Article 19 indicate that while similar abuses between strangers and children as well as between adults give rise to criminal or civil action, between parents and child, the focus should rather be on reconciliation.

Article 19 is hailed as a major step forward for rights of the child as the first acknowledgment of the positive role of the state to interfere in the family in the instances of abuse. Yet, Article 19 appears to be a small step in the direction of 'special care and assistance'.⁷⁵ Considering the dominant position given to parents in the CRC, Article 19 is the only article out of 54 articles that addresses any sort of abuse that may occur as a result of the parent's dominant position in the family over the child. Further, as noted above, this article does not explicitly provide for separation, instead that 'necessary support' to be given to the family. While reconciliation and support may be necessary in certain circumstances, the seemingly predominant, if not exclusive focus on reconciliation and support in Article 19 harkens back to some assumption that the parent-child relationship, even in the instance of abuse, is fundamentally different from all other relationships. O'Neill notes that,

[a]mong family members where ties are even closer than simple friendship, it is suggested, the language of rights should give way to models that stress connection, care, intimacy, and relationship rather than separateness, individuality, and independence.⁷⁶

While reconciliation and support may be positive in instances of abuse and neglect between parents and children, the question still remains why this assumption is not 'true' for the abuse and neglect between all humans, regardless of their relationship. The family is viewed as fundamentally different from all other relationships because of the many 'truths' of the family and parents accepted in the Convention: the family is the 'natural' place for children; the family environment is 'an atmosphere of happiness, love and understanding';⁷⁷ the best interests of the child will be the parents' 'basic concern'.⁷⁸ These 'truths' place limits on the rights of the child, and as such these 'truths' relegate childhood to a state of dependency, and thus, arguably greater vulnerability. At the risk of being repetitive, it is important to note that children were not involved in the drafting of the Convention. One wonders whether this article would be so

⁷⁵ Preamble of CRC.

⁷⁶ Onora O'Neill, *Children's Rights and Children's Lives*, in CHILDREN'S RIGHTS-RE-VISIONED, 30 (Rosalind Ekman Ladd ed. 1996).

⁷⁷ Norma Fields, *The Child as Labourer and Consumer: The Disappearance of Childhood in Contemporary Japan*, in CHILDREN AND THE POLITICS OF CULTURE, 9-10 (Sharon Stephens ed., 1995); Frances E. Olsen, *Myth of State Intervention in the Family*, 18(4) UNIVERSITY OF MICHIGAN JOURNAL OF LAW 835, 839 (1985); Martha Minow, *Beyond State Intervention in the Family: For Baby Jane Doe*, 18 UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM 933, 948 (1985).

⁷⁸ CHRIS JENKS, CHILDHOOD, 41 (2005).

'forgiving' of parents had children been involved. Certainly such 'forgiveness' is not obligated in the context of children and strangers,⁷⁹ and between adults. The rights that children find in the CRC trend towards bolstering, rather than limiting parental rights. The rights that children find in the CRC trend towards limiting, rather than bolstering their own rights. These limitations are accordance with certain 'truths' about childhood, justify the regulation of childhood, where dependency and vulnerability become markers of childhood.

IV. WHEN THE 'FAMILY' BREAKS DOWN – RESTRICTIONS ON PARENTAL RIGHTS

Before discussing limitations placed on parents in the exercise of their parental rights, it should be noted again that human rights for children give rise to vastly different rights, obligations, and responsibilities than human rights for other, vulnerable (adult) groups, as was argued in Chapter 4. Human rights traditionally protect persons from the power of the state by guaranteeing an adult certain autonomy rights. The human rights of children are protected in the CRC by systemically empowering adults to protect the child. The rights of children appear to bestow third party private individuals (in other words, parents) with 'duties' and responsibilities.⁸⁰ It does so to such an extent that this thesis argues that 'care', 'needs' and 'protection' serve as terms of art that reflects parental control over children. Here the child is only protected from the state through the parent and the parent's right to have primary responsibility for the child. In the instances where the 'family' malfunctions, the child does not acquire her or his own autonomy rights that will protect the child from the state and private third parties. Instead, according to the CRC, the state is empowered to function only as a pseudo- or back-up parent, in the instance that the state determines such (self-) empowerment as necessary according to Article 20. Further, the only right the child has to be protected from the state, once in the care of the state is for the state to review its treatment of the child, according to Article 25. It seems that rights of the child in the CRC limit not the state intervention into the life of the child, but rather limit state intervention in the parents' exercise of their parental rights.

⁷⁹ See generally Jenny Kitzinger, *Who Are You Kidding? Children, Power and the Struggle Against Sexual, in* CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD (Allison James and Alan Prout eds., 1997); Gill Valentine, *A Safe Place to Grow Up? Parenting, Perceptions of Children's Safety and the Rural Idyll*, 13(2) JOURNAL OF RURAL STUDIES 137 (1997).

⁸⁰ The US's position on the importance of the family, mentioned above, can be contrasted with the statement by the US delegate noting that placing responsibilities on private individuals, here parents, was 'strange' for an international covenant, which is only to create binding obligations for ratifying states. See SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 270 (1992).

Although the parent is located above the child in the construction of the CRC's family, it is important to note in turn the restrictions placed on parental rights, as these restrictions sketch more comprehensively the relative roles of the parent and the state in the rights of the child. First, the Convention is praised as a challenge to the monopoly of power parents traditionally held on deciding the best interests of the child by obliging the state to intervene in Article 19, thereby making the decisions of the parents reviewable.⁸¹ Second, parents are subject to restrictions in their dominant role in the family by two principles: 1) the best interests of the child, and 2) the evolving capacities of the child. As Article 19 has already been examined above, this section will examine the best interests and evolving capacities principles. These two principles are argued to have,

profound significance for the triangular relationship between the child, the family and the State. The Convention, for the first time in international law, establishes a direct relationship between the child and the State that challenges the presumption that parents have rights of ownership over the child.⁸²

According to Article 3(1), the best interests of the child are 'a primary consideration'. The original text stated that 'in all actions concerning the child . . . the best interests of the child would be *the paramount concern*'.⁸³ During the discussions that took place when drafting Article 3, issue was taken with the words 'the' and 'paramount'.⁸⁴ A number of delegations questioned whether the best interests of the child should be *the* primary consideration in all actions concerning the child. It was noted that there are situations in which the competing interests of justice or of society at large should be of at least equal, if not greater importance than the interests of the child.⁸⁵ The language of Article 3(1) was changed to include the phrase 'a primary consideration'. The significance of this alteration is that not only is the opinion of the child not determinative even in matters that concern the child, but also even the best interests of the child are not determinative.⁸⁶ The category 'child' involves other competing interests that must be taken into account. While the delegates mentioned only justice and society, one could also imagine that the 'family' and the parents must be considered as well. Nonetheless, the best

⁸¹ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 45-49 (1998).

⁸² GERISON LANSDOWN, *THE EVOLVING CAPACITIES OF THE CHILD*, ix (2005), citing BARBRO HOLMBERG and JAMES Himes, *Parental Rights and Responsibilities*, in *CHILDREN'S RIGHTS: TURNING PRINCIPLES INTO PRACTICE* (2000).

⁸³ Also the 1959 Declaration stated that 'the best interests of the child . . . shall be the paramount consideration'. Declaration of the Rights of the Child, Article 2, Dec. 10, 1959, G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. (No. 16).

⁸⁴ SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 132-133 (1992). Emphasis added.

⁸⁵ SHARON DETRICK, *THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES'*, 137 (1992).

⁸⁶ Michael Freeman, *Article 3: The Best Interests of the Child Conflicts*, in *A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD*, 4 (Andre ALEN et al. eds., 2007).

interests principle is a mode of interpretation in all matters concerning the child.⁸⁷ Thus, parents are at all times restricted in matters concerning the child to take into account the best interests of the child as 'a' primary consideration under Article 3. Additionally, Article 18 states that the best interests of the child will be the parents' basic concern. Article 9(1) also allows for separation of the child from the 'parents' if necessary for best interests of the child. Article 9(4) states that if personal contact with 'parents' is contrary to best interests of the child, such contact will not be permissible.

Notably, the best interest principle does not mean 'best rights'.⁸⁸ Freeman argues that it may seem incongruous that in a convention about rights, best interests should feature so prominently.⁸⁹ The best interest principle is paternalistic, as it is viewed from an adult perspective; Article 3(1) makes no reference to the child's views.⁹⁰ The best interests principle is not a right that a child may claim. The expression that '[something] is not in my best interests' by the child will not trump the parents' determination of the best interests of the child, although some academics argue that the child's views plays a significant role in the determination of the child's best interests.⁹¹ The only expression that can overturn a parents' assessment of the child's best interests is the state's determination of the best interests of the child. It is not for the child to determine his/her own best interests. It is first for the parent to do so, making this 'right' more like a mere self-imposed restriction on the rights of parents that results in broad discretion for parents.⁹² The child is then left to depend on the state's determination of the child's best interests. Either way the child is dependent on others (/adults) to determine the child's best interests. This gives the parent and the state the authority to substitute their perspective for that of the child. If the best interests principle challenges the monopoly of power parents traditionally held over children, it seems to do so to only a small degree: 1) the right of review of the decisions made by parents by (*another adult*) the state, *if* the state determines such review is necessary, and 2) the right to have (*another adult*) the state make its own determination of the best interests of the child. The child is given only the right to have a greater number of adults

⁸⁷ GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 45-49 (1998).

⁸⁸ Michael Freeman, *Article 3: The Best Interests of the Child Conflicts*, in *A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD*, 4 (Andre ALEN et al. eds., 2007).

⁸⁹ Michael Freeman, *Article 3: The Best Interests of the Child Conflicts*, in *A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD*, 4 (Andre ALEN et al. eds., 2007).

⁹⁰ Article 12 does require state parties to ensure that the child, who is capable of forming her or his own views, the right to expression those views. Michael Freeman, *Article 3: The Best Interests of the Child Conflicts*, in *A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD*, 50-51 (Andre ALEN et al. eds., 2007).

⁹¹ See for example John Tobin, *Judging the Judges: Are They Adopting the Rights Approach in Matters Involving Children?* 33(2) MELBOURNE UNIVERSITY LAW REVIEW 579 (2009); John Eekelaar, *The Interests of the Child and the Child's Wishes: The role of Dynamic Self-Determination*, 8 INTERNATIONAL JOURNAL OF LAW AND THE FAMILY 42 (1994).

⁹² GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN*, 45-49 (1998).

(the state) review the parent's decisions and actions towards the child, *if* those other adults (the state) deem such review necessary.

Notably, the best interests principle is argued to be indeterminate.⁹³ One author states that asking what constitutes the best interests of the child is like asking about what is the meaning of life, for the list of interests are infinite.⁹⁴ Different societies at different times will not agree. Freeman uses the example of corporal punishment, and how views have changed throughout history, but also between different cultures today.⁹⁵ Van Bueren argues that the flexibility of best interests principle desires to cope with the demands of justice in each case when rights collide.⁹⁶ On the other hand, Freeman argues that this principle can also be a smokescreen: a mere reflection of 'dominant meanings' (for example, heteronormativity). Freeman rightly notes that given the complexity of the best interests principle, a lengthy debate during the drafting stages of Article 3 on the meaning of this principle would be expected.⁹⁷ As with so many other foundational concepts (the child as developing, the child as immature, and so on) the 'delegates were happy to accept the concept without debating its meaning or its problems'.⁹⁸ The best interests principle underlines the child as both an object of law and provides a 'smokescreen' for parent and state control.

The second limitation on the parent's dominant role within the family, and another tenet of the CRC, is the principle of the evolving capacities of the child. Article 5, which mandates state parties to respect the rights of parent to provide direction and guidance, requires parents to provide such direction and guidance 'in a manner consistent with the evolving capacities of the child'. While neither the Convention nor the *Travaux Préparatoires* define the evolving capacities principle, at its most basic the principle acknowledges the child's gradual accumulation of maturity and thus provides for a gradual accumulation of capacity/autonomy. Gerison Lansdown writes that the evolving capacities principle recognises, 'the changing relationship

⁹³ Michael Freeman, *Article 3: The Best Interests of the Child Conflicts*, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, 4 (Andre Alen et al. eds., 2007).

⁹⁴ Robert Mookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW AND CONTEMPORARY PROBLEMS, 260 (1975).

⁹⁵ Michael Freeman, *Article 3: The Best Interests of the Child Conflicts*, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, 27 (Andre Alen et al. eds., 2007).

⁹⁶ GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN, 45-49 (1998).

⁹⁷ Michael Freeman, *Article 3: The Best Interests of the Child Conflicts*, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, 26 (Andre Alen et al. eds., 2007).

⁹⁸ Michael Freeman, *Article 3: The Best Interests of the Child Conflicts*, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, 26 (Andre Alen et al. eds., 2007), citing Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, 8 INTERNATIONAL JOURNAL OF LAW AND THE FAMILY 1, 11 (1994). See also SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 132-137 (1992).

between parents and children as they grow up, and focuses on capacity rather than age as the determinant in the exercise of human rights'.⁹⁹ In turn, the parent has less claim to exercise responsibility over and capacity on behalf of the child. While the evolving capacities principle aims to balance the rights of the child with the rights of the parents,¹⁰⁰ the focus in Article 5 nonetheless appears to be about the parent's rights and duties, as opposed to the evolving capacities of the child. While the state is required to 'respect' the rights, responsibilities, and duties of the parent, the parent nor the state is required to 'respect' the evolving capacities of the child, but rather provide guidance and direction 'in manner consistent with the evolving capacities of the child'. The evolving capacity principle is also embodied in Article 12(1) where a child capable of forming an opinion shall be able to express it, and where due weight is given to expression based on age and maturity of the child. Article 14(2) provides parents with the right to direct freedom of thought, conscience, or religion. However, parents are restricted to the extent that they may only do so 'in a manner consistent with the evolving capacities of the child'. Like the best interest principle, this is not a right the child gets to claim under her/his own perception of his/her own capacity. Rather, the parent gets to determine the child's capacity, subject to review by the state, only if the state deems such review necessary.

Lansdown contends that understanding the evolving capacities of the child requires coming to grips with the 'very essence of childhood'. Lansdown continues that understanding the evolving capacities principle,

necessitates bringing together what is known about childhood from many perspectives, including child psychology, physiology, anthropology, sociology, law and early childhood development, in order to help understand how children's rights can be most effectively realised and the role that children themselves play in that process.¹⁰¹

As argued in Chapter 6, the CRC reflects these knowledges and posits that children are in a state of development, and thus acquire competencies over the duration of childhood. Lansdown contends that the evolving capacities principle provides the basis for an appropriate respect for children's agency without exposing them prematurely to the full responsibilities normally associated with adulthood.¹⁰² Implicit in concept of evolving capacities is the tacit commitment to a particular version of childhood, replete with assumptions about childhood, discussed in

⁹⁹ GERISON LANSDOWN, *THE EVOLVING CAPACITIES OF THE CHILD*, vii (2005).

¹⁰⁰ PHILIP ALSTON, *The Legal Framework of the Convention on the Rights of the Child*, in UNITED NATIONS BULLETIN OF HUMAN RIGHTS: THE RIGHTS OF THE CHILD (1992).

¹⁰¹ GERISON LANSDOWN, *THE EVOLVING CAPACITIES OF THE CHILD*, vii (2005).

¹⁰² GERISON LANSDOWN, *THE EVOLVING CAPACITIES OF THE CHILD*, ix (2005).

Chapter 5: development is a universal process, adulthood is a normative goal, and childhood is unique period of dependency where children are objects of adult protection.¹⁰³ Further, given social views about children as incapable, the presumption of capacity becomes an even larger hurdle.¹⁰⁴ Notably, the *Gillick* decision has been subject to significant retraction in subsequent decisions in favour of lingering parental rights.¹⁰⁵

The evolving capacities principle is also inherently and admittedly indeterminate. The Convention, while defining the category child as those below the age of eighteen years, contemplates that children will reach various stages of maturity throughout childhood. However, it seems that the indeterminacy of the evolving capacities principle works against the category child as they begin from a position where they are presumed incapable, and as discussed in Chapter 4, are largely viewed as incapable. Again given that the evolving capacities principle was a new concept under international law, and given vagueness of the term, some discussion by the drafter would be expected. Yet, none took place; the evolving capacities of the child must have been too obvious to require discussion.

Finally, the evolving capacities principle requires that which would today be unimaginable for other human rights holders. These articles require a child prove that she or her has acquired maturity by demonstrating that she or he makes 'good' decisions. Many adults would not pass such a (rather subjective) test. Further, these articles uphold the much-criticised idea that to have legal capacity, one must be autonomous and independent. As discussed in Chapter 5, capacity cannot be the precondition for rights regardless of category (age, gender, sexual orientation, class, caste, ethnicity, and so on), because even those who are considered as having 'capacity' would not meet such a condition. The rational autonomous man making decisions for himself, in his own interests does not exist. Feminists have criticised autonomy as precondition for rights by noting that the man in the ivory tower depends on other people to feed him and

¹⁰³ GERISON LANSDOWN, THE EVOLVING CAPACITIES OF THE CHILD, x (2005).

¹⁰⁴ Hillary Rodham, *A Legal Perspective*, in CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES, 21, 33 (Patricia Vardin and Ilene Brody eds., 1979); Jeremy Roche, *Children: Rights and Participation and Citizenship*, 6 CHILDHOOD 475 (1999); Michael Freeman, *The Sociology of Childhood and Children's Rights*, 6(4) INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 433 (1998); Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277 (2000).

¹⁰⁵ *Re R* [1991] 4 All ER 177, CA and *Re W* [1992] 4 All 627, CA, (especially Lord Donaldson) weaken the *Gillick* decision. From these, and subsequent cases, it is clear that although the parental right to veto treatment ends, parental powers do not 'terminate', as suggested by Lord Scarman in *Gillick*. Rather, *Gillick* competency grants the child an ability to consent but does not affect the power of the parent. That is, if a child is *Gillick* competent both she and her parent will be able to consent. As a result, a child can be legally treated in circumstances where they refuse/resist treatment. See generally MICHAEL FREEMAN, CHILDREN'S HEALTH AND CHILDREN'S RIGHTS (2006); Michael Freeman, *The Child in Family Law*, in LEGAL CONCEPTS OF CHILDHOOD, 187-196 (Julia Fionda ed. 2001).

keep him clean, and even to keep him company.¹⁰⁶ These preconditions are nonetheless required of the child in the CRC.

It could be argued that it is not in fact the child's rights/the child's opinion per se that limit the power of parents over children, but rather the state's supra-parental power. On one level, parents are guided in their own view of what a child's rights should entail by appropriating their perception of the best interests of the child and the evolving capacities of the child on behalf of the child. Arguably, the parent's determination carries with it a considerable amount of weight, with the parent given rarely reviewable respect, responsibility, and power under the CRC. On another arguably higher level, the parents are not limited by strict deployment of child's rights, but rather by the state's perception of the best interests of the child and the evolving capacities of the child. The child's challenge to parental monopoly of power over the child in the CRC amounts to merely the authorisation of the state/other adults to review the parents' decisions. Notably, both the best interests of the child and the evolving capacities of the child principles, and therefore the child's claims to protection and autonomy, are mediated through and conditioned upon the perceptions of those who are positioned over/hold power over the child: adults. In this way the Convention again provides for the child's complete dependency on the parent (and where applicable the state). The child's ability to exercise his/her rights is dependent upon these adults' (parents and where applicable the state) right to determine the child's best interests and the child's capacities, under the presumption of the child's incapacity.

Central to unpacking the family in the CRC is an understanding of the role of the parent (power to direct, guide, protect, and so on) and the limitations placed upon the role of the parent (best interests principle, evolving capacities principle, and the state as a supra-parent). This conception of 'care' then allows for the location of the child within this mandatory family matrix as the submissive, dependent member. The child is located in and dependent upon the family under the parent by virtue of the powers given to the parent over the child. Then, the state, as the supra-parent, is given ultimate (though reluctant) power over the child. This power and rights allocation results in further restraining the rights of the child by forcing the child into this hierarchical family structure. This analysis continues to suggest discrepancy between the child as a right-holder in the CRC and the practical consequence of provisions that confer upon other

¹⁰⁶ Berry Mayall, *The Sociology of Childhood in Relation to Children's Rights*, 8 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 243, 249 (2000), quoting JEAN GRIMSHAW, *FEMINIST PHILOSOPHERS: WOMEN'S PERSPECTIVES ON PHILOSOPHICAL TRADITIONS* (1986).

parties (parents and the state) the right to exhaustively determine the child's maturity/capacity to exercise these rights.

V. CONCLUSION

Unpacking how the 'family' is constructed in the Convention offers insight into the CRC's construction of the category 'child'. Unpacking how the terms 'family', 'care', 'parents', 'best interests' and 'evolving capacities' operate in the Convention aids the understanding of how the category 'child' is made possible. The family represents another 'truth' accepted by and deployed in the Convention. This chapter has sought to argue that the CRC relegates the child to the context of a family/'care'. At the same time, the CRC also mandates the child, not to a family of equals, but to a family where the child is subject to parental control. This adult – child relationship places limits placed upon children's rights beyond those placed on adult rights. The family (dictated by adult preferences), garbed in the rhetoric of the rights of the child (for example, right not to be separated) and even the best interests of the child, places clear restraints on the child's rights. Indeed, the rights of the child are mediated through the requirement/restraint of being in a family. The child's immaturity justifies the CRC's version of 'care' and 'special assistance': the family as defined as the parent, who has control over the child. Section I sought to explore the CRC's normative framework of 'care' is as first a family, and when the family breaks down, the state is to provide such 'care'.

Section II and III explored further how the parent is constructed in the Convention as the dominant member in the family. The parent's dominance is fortified in the CRC by giving parent responsibility over child, by only providing state assistance via the parent for the care of the child, and finally by promoting family cohesion. The assumption made by the CRC is that first there always exists a parent and secondly that the parent will take into account the best interests of the child and the evolving capacities of the child, or at least not violate them egregiously, when exercising the parent's duties (in other words, providing direction, guidance, adequate standards of living to the child, and so on). By giving the parent such responsibilities and power, the CRC presumes the parent to be the opposite of the child: mature, responsible, and possessing sufficient judgment. Finally, Section IV argued that the power that the parent holds over the child is checked, not by the opinions and wishes of the child, but rather by the state in its determination of the best interests of the child and the evolving capacities of the child. As with the parent, the CRC assumes that the state is mature, responsible and possessing sufficient judgment in its parental capacity. These truths about the parent and the state justify the child being subject to two layers of control. These assumptions contribute to an

interpretation of the CRC that seems not only to be quite an idealistic view of the family, the parent, and the state, but also quite a narrow and paternal view of the child.

While the notion of capacity as a precursor to rights and the public – private dichotomy have been heavily criticised in other contexts, these notions still are exceptionally influential in the context of children's rights. The CRC describes a child that is immature, and asserts that immaturity to require a different set of rights for children, as argued in Chapter 6. Then, because of his or her immaturity, the child requires 'care'. The CRC defines the ideal 'care' as a family, as the family/care is a place of happiness, love, and understanding. Ennew states that,

[t]he unhappy child does not have an adult to depend on – to be powerful on its behalf or, if it needs to be rescued, to put it back into childhood which, in ideological terms, stands for happiness, play innocence and some kind of essential goodness in human nature.¹⁰⁷

This family/care is then defined as a child who has an adult positioned over him or her. The adult, who is responsible, will have the best interests of the child forever in mind, and will take into account the child's burgeoning capacities. Further, the state will have the capacity and willingness to intervene in such a way that respects the family (in other words, parent), and at the same time will consider the best interests of the child as a primary consideration. While the CRC appears to be describing the 'true' child, the 'true' family, the 'true' parent, and the 'true' state, the CRC makes the family/'care', vulnerability, and dependency markers of childhood. The child is only given rights that support the CRC's definition of a family/care: the hierarchical relationship of the parent over the child. This story of childhood dictates which children, childhoods, and issues faced by children will be ignored, and which will be problematised and stigmatised (see Chapter 9 for further discussion). The positional matrix portrayed in the CRC is hierarchical. Unlike other human rights discourses that seek to redress hierarchies; the CRC reinforces and even sustains the inequalities between adults and children. Unlike any other human rights discourse that offers protections *from the state*, the CRC offers children protection *from themselves*, as if children suffer subjugation, inequality, disenfranchisement, and abuse from themselves. Further, the CRC offers greater protection *for those who have control over children*, notably under the rhetoric of 'family' and best interests of the child, as if adults require more protection of their parental rights. Unlike the definition of the family in the CRC's Preamble where all members of the human family have equal and inalienable rights, the child finds

¹⁰⁷ Judith Ennew, *Outside Childhood: Street Children's Rights*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE, 201 (Bob Franklin ed., 1995).

him/herself in this family characterised by inequality and with rights that are alienable because this person has been nominated by the CRC as a 'child' based on assumptions of what is 'true' about childhood. While this chapter and the previous one, have examined the truths that the child is developing and that the child requires 'care', the next chapter will discuss the ways in which such truths are realised. In other words, the next chapter will explore the ways in which the child is moulded into the CRC's vision for childhood.

CHAPTER 8

THE DOCILE BODY: DISCIPLINING THE CATEGORY 'CHILD' IN THE CRC

OUTLINE

I. JURIDICAL POWER IN THE CRC

- a. Corporal Punishment
- b. Incarceration

II. DISCIPLINARY POWER IN THE CRC

- a. Compulsory Education
- b. Mandatory Care

III. CONCLUSION

According to the vision of the category 'child' articulated in the CRC, childhood is always in a state of 'becoming' (in other words, developing).¹ As discussed in Chapters 6 and 7, the CRC's production of the category 'child-as-developing' justifies the relegation of the child to a particular context of 'care', defined as a family, subject to parental control. Though discussed to a lesser extent in Chapter 6, the CRC's 'child-as-developing' paradigm also justifies the relegation of childhood to school in Article 28. The conception of the 'child-as-developing' in the CRC has clear foundations in the rise of the 'innocent' and 'dependent' 'child' in Western industrialised states where 'progressive' reformers advocated for the removal of 'children' from the labour market and their placement into the home and school.² Zelizer argues that, the 'pricelessness' of

¹ Ashleigh Barnes, *The CRC's Performance of the Child as Developing*, 14 CURRENT LEGAL ISSUES 392.

² Erica Burman, *Local, Global or Globalised? Child Development and International Child Rights Legislation* 3 CHILDHOOD 45, 45-66 (1992); Olga Nieuwenhuys, *Editorial: Is There an Indian Childhood*, 16 CHILDHOOD 147, 147-153 (2009); Vanessa Pupavac, *Misanthropy Without Borders: The International Children's Rights Regime*, 25(2) DISASTERS 95, 95-112 (2001); Annette Ruth Appell, *Child-Centred Jurisprudence and Feminist Jurisprudence: Exploring the Connections and Tensions*, 46 HOUSTON LAW REVIEW 703, 703 (2009) (speaking about how childhood in the United States is based on a Western conception of childhood, and arguing that the CRC largely matches such a conception); Sonia Harris-Short, *International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child*, 25 HUMAN RIGHTS QUARTERLY 130, 130 (2003) (based on an empirical student of the discussion of the Committee on the Rights of the Child, argues that the Convention is still subject to cultural imperialism); John Tobin, *Increasingly Seen and Heard: the Constitutional Recognition of Children's Rights*, 21 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 86, 86 (2005) (discussing the ways that the CRC and the children's rights paradigm is in some ways western, but in other ways not); Sonia Harris-Short, *Listening to "the Other": The Convention on the Rights of the Child*, 2 MELBOURNE INTERNATIONAL LAW JOURNAL 304, 334 (2001) (argues that the Committee has 'with only very limited exceptions, presented non-Western cultural values and practices in an entirely negative light'); Paolo G. Carozza, *From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights*, 25(2) HUMAN RIGHTS QUARTERLY 281, 311 (2003); PHILIP ALSTON, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, in THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS (1994); Judith Ennew, *Outside Childhood: Street Children's Rights*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE (Bob Franklin ed., 1995); John Tobin, *Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation*, 23 HARVARD HUMAN RIGHTS JOURNAL 1, 1-50 (2010) (discussing this issue in relation to both human rights generally and the CRC specifically); Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277, 282 (2000); Jo Boyden, *Childhood and the Policymakers: A Comparative Perspective in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD*, 144 (Allison James and Alan Prout eds., 1997); Jo Boyden, *Children's Experience of Conflict Related Emergencies: Some Implications for Relief Policy and Practice*, 18(3) DISASTERS 254, 265 (1994); Maria Grahn-Farley, *Neutral Law and Eurocentric Lawmaking: A Postcolonial Analysis of the U.N. Convention on the Rights of the Child*, 34 BROOKLYN JOURNAL OF INTERNATIONAL LAW 1, 1 (2008) ('The colonial legacy of international law is not simply a matter of inclusion or exclusion. Nor is it only a matter of neutrality or non-neutrality. Even though the CRC was drafted, adopted, and ratified with the possibility of the inclusion and involvement of almost every country in the world, the colonial structure is still present, not in the substantive legal outcome, but in the legislative process itself'); Frances E. Olsen, *Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child*, 6 INTERNATIONAL JOURNAL ON LAW AND THE FAMILY 192, 215 (1992) ('The concerns of post-modern feminism that bear most closely on the Convention on the Rights of the Child include the whole notion of a universal document to deal with all children, throughout the world; the concern that such an effort will almost inevitably result in a western oriented document that merely purports to be universal'); REX STAINTON ROGERS and WENDY STAINTON ROGERS, *STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN*, 51 (1992); Michael Freeman, *The Sociology of Childhood and Children's Rights*, 6(4) INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 433, 433-444 (1998); Berry Mayall, *The Sociology of Childhood in Relation to Children's Rights*, 8 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 243, 243-259 (2000); Jo Boyden, *Childhood and the Policy Makers: A Comparative Perspective on the Globalisation of Childhood*, in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD (Allison James and Alan Prout eds., 1997); CHRIS JENKS, *CHILDHOOD* (2005); Norma Fields, *The Child as Labourer and Consumer: The Disappearance of Childhood in Contemporary Japan*, in CHILDREN AND THE POLITICS OF CULTURE (Sharon Stephens ed., 1995); MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in GROWING UP IN A CHANGING SOCIETY, 37 (1990).

the 20th century child developed hand in hand with the expulsion of the child from the public sphere.³ Ennew contends that,

modern recognition of children constructs children *out* of society, mutes, their voices, denies their personhood, limits their potential – the sociability of the street has given way to the privacy of the family, the ‘filling up’ of children’s time and the scheduling of their lives.⁴

Rose goes even further to argue that,

[c]hildhood is the most intensively governed sector of personal experience existence. In different ways, at different times, and by many different routes varying from one section of society to another, the health, welfare, and rearing of children have been linked in thought and practice to the destiny of the nation and the responsibilities of the state. The modern child has become the focus of innumerable projects that purport to safeguard it from physical, sexual and moral danger, to ensure its ‘normal’ development, to actively promote certain capacities or attributes such as intelligence, educability, and emotional stability.⁵

The CRC’s narrative of the ‘child-as-developing’ is not just about regulating the child to the ‘islands’ of ‘care’ and school.⁶ These ‘islands’, as Rose notes, are to ensure the child’s ‘normal’ development. Whether a child is Apollonian or Dionysian, the CRC tells us that the child must be disciplined to be moulded into its binary opposite: the adult. The ‘child’ in school and at home is to be produced as a future productive adult/citizen. While becoming an adult is the goal of childhood, the model child is a non-adult, immature and developing, and therefore dependent.

As such, the CRC empowers certain actors, particularly school officials and parents or ‘carers’, to carry out this work of producing the future productive adult citizen.⁷ Parents, child-care institutions, and schools interact with children and childhood based upon specific conceptions of a ‘child’ and childhood.⁸ Mayall has argued that the power held by adults to organise the main sites of childhood (school and home) defines children’s experiences, revealing what Mayall terms

³ VIVIANA ZELZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN* (1985).

⁴ Judith Ennew, *Outside Childhood: Street Children’s Rights*, in *THE HANDBOOK OF CHILDREN’S RIGHTS: COMPARATIVE POLICY AND PRACTICE*, 125-143 (Bob Franklin ed., 1995).

⁵ CHRIS JENKS, *CHILDHOOD*, 69 (2005), quoting NIKOLAS ROSE, *GOVERNING THE SOUL: THE SHAPING OF THE PRIVATE SELF*, 123 (1989).

⁶ Alan Prout, *Children’s Participation: Control and Self-Realisation in British Late Modernity*, 14(4) *CHILDREN & SOCIETY* 304, 313 (2000), citing Gill Valentine, *Angels and Devils: Moral Landscapes of Childhood*, 14 *ENVIRONMENT AND PLANNING: SOCIETY AND SPACE* 581 (1996).

⁷ As discussed in Chapter 7, see for example Articles 3 and 5 for how the CRC empowers ‘carers’, both the state and parents. As will be discussed in Section II (a), see also Articles 28 and 29.

⁸ GUNILLA DAHLBERG et al., *BEYOND QUALITY IN EARLY CHILDHOOD EDUCATION AND CARE: POSTMODERN PERSPECTIVES*, 43 (1999).

children's minority status.⁹ Structuring the everyday life and the social reproduction of the category 'child' are inextricably intertwined.¹⁰ However, this power is finite. Although this thesis will not fully explore this issue (this chapter focuses on the production of the category 'child' by the CRC), adults, in their role as parents, are also regulated and controlled by the state through the production of 'good parents'. This chapter does not argue that teachers' and parents' dominant position in the adult – child binary order means that these adults are always powerful. As discussed in Chapter 3, under a Foucauldian conception of power in society, a person never simply holds power. Power is not a zero sum game. That is, teachers and students, parents and children, exist in relation to one another and exert resistance.¹¹ Other actors and institutions also regulate each other through a system of monitoring, as discussed in Chapter 7 (the 'good/unfit parent'; the 'good/unfit teacher'). Instead, adults employ a range of techniques to establish themselves as more able to exercise power, as was argued in Chapter 3.¹²

The 'child-as-developing' justifies the exercise of both juridical power (through corporal punishment and forms of incarceration) and disciplinary power (through constant surveillance in 'care' and at school). In this way, islands of 'care' and 'education' become the means through which the CRC's normative childhood is enforced and produced. Through its construction of the 'child' as developing and 'in care', the CRC makes possible the regulation and control of 'childhood.' As discussed in Chapter 3, this process of moulding is what Foucault refers to as the technologies of governmentality: calculated preoccupation with activities directed at shaping, channelling and guiding the conduct of persons through the production, dissemination, and utilisation of knowledge.¹³ According to Foucault, law is a potent technology of governmentality due to both its juridical (punishment-power to enforce) and disciplinary power (productive/form of knowledge/truth). Foucault argues that it is not through the resort to juridical mechanisms (for example, physical punishment or incapacitation) that the compliant subject (or docile body) is forged, though these forms have not disappeared. Rather, the constitution of the modern subject of discipline is achieved through new and different techniques: spatial distributions,

⁹ BERRY MAYALL, TOWARDS A SOCIOLOGY FOR CHILDHOOD: THINKING FROM CHILDREN'S LIVES, 20 (2002).

¹⁰ BERRY MAYALL, TOWARDS A SOCIOLOGY FOR CHILDHOOD: THINKING FROM CHILDREN'S LIVES, 20 (2002).

¹¹ See for example Jenny Kitzinger, *Who Are You Kidding? Children, Power and the Struggle Against Sexual*, in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD, 161 (Allison James and Alan Prout eds., 1997); Jeremy Roche, *Children: Rights and Participation and Citizenship*, 6 CHILDHOOD 475, 477 (1999); BERRY MAYALL, TOWARDS A SOCIOLOGY FOR CHILDHOOD: THINKING FROM CHILDREN'S LIVES (2002). As Prout emphasises, children have access to power resources that they can draw on to counterbalance the adults' dominance; children are social agents. Alan Prout, *Children's Participation: Control and Self-Realisation in British Late Modernity*, 14(4) CHILDREN & SOCIETY 304, 310-311 (2000).

¹² See generally Allison James and Alan Prout eds., CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD, 161 (1997).

¹³ JUDITH BUTLER, GENDER TROUBLE, 26-27 (1990).

hierarchical observations, normalising judgments, constant surveillance, and examinations.¹⁴ This disciplining/moulding of the child occurs, in part, through the disciplinary technique of constant surveillance: by teachers and staff and by parents or parental figures at home.¹⁵ Building on Foucault, Butler contends that although juridical notions of power found in law appear to regulate political life only in negative terms (through prohibition, regulation, control, and so on), the subject is actually positively formed, defined, and reproduced by these structures in accordance with its requirements.¹⁶

This chapter argues that the exercise of juridical power has a more prominent role in disciplining the CRC's child (as compared to adults). Yet the potency of disciplinary power over the child in the Convention is in no way diminished. The CRC enables the exercise of juridical and disciplinary power, through its condoning of corporal punishment, its requirement of compulsory education and 'care' for all children. Through the exercise of these powers, the CRC is able to produce and enforce its normative conception of childhood. The CRC purports to merely describe, accommodate, and even protect the 'true child' or the 'true family'. Instead, the CRC produces the category 'child' according to a normative framework of what childhood should be. This chapter will map the ways in which the CRC produces or fosters 'disciplinary' and 'juridical' processes governing the production of the child as a future adult. This chapter examines these processes in the context of the CRC's treatment of corporal punishment and confinement, in 'care' and schooling respectively. Section I will discuss the operation of juridical power in the Convention, specifically the corporal punishment of children and what this chapter is terming the 'incarceration' of children through the restrictions placed on the child's liberty. Section II will examine the operation of disciplinary power in the Convention, specifically while in 'care' and while at school.

I. JURIDICAL POWER IN THE CRC

Juridical power, the power to punish, plays a more prominent role in the CRC as compared to other human rights instruments for adults. This section argues that the CRC allows for greater use of corporal punishment against children and greater restrictions of children's liberty as a

¹⁴ For further discussion see MICHEL FOUCAULT, DISCIPLINE AND PUNISHMENT, THE BIRTH OF THE PRISON, 135-228 (Alan Sheridan trans., 1995); JUDITH BUTLER, GENDER TROUBLE, 19 (1990).

¹⁵ Alan Prout, *Children's Participation: Control and Self-Realisation in British Late Modernity*, 14(4) CHILDREN & SOCIETY 304 (2000): 'On the one hand, there is an increasing tendency to see children as individuals with a capacity for self-realisation and, within the limits of social interdependency, autonomous action; on the other, there are practices directed at a greater surveillance, control and regulation of children'.

¹⁶ JUDITH BUTLER, GENDER TROUBLE, 4 (1990), quoting MICHEL FOUCAULT, Right of Death and Power over Life, in THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION (Robert Hurley trans., 1980).

method of punishment as compared to all other international human rights discourse on adult rights.¹⁷ The treatment of corporal punishment and confinement in the CRC permits or enables actors to exert juridical power in relation to the 'child'. This exertion of power regulates and produces the vision of the category 'child' in the CRC.

a. Corporal Punishment

The CRC does not explicitly prohibit corporal punishment. The drafters of the CRC did not directly discuss its usage.¹⁸ Nonetheless, Article 19 (abuse of children while in care), Article 37 (prohibition against torture) and Article 28(2) (right to education) shed light on the corporal punishment of children. The discussion of whether corporal punishment can ever be in the best interests of the child will not be examined.¹⁹ This section focuses instead on whether the CRC allows adults to use corporal punishment against children. This section argues that the CRC allows for the greater use of corporal punishment as compared to all other human rights conventions and declarations, as a means of producing and then governing the category 'child'. While adult human rights documents contemplate the use of corporal punishment within the limited context of criminal sanctions,²⁰ the CRC contemplates the use of corporal punishment by parents and school officials of children. Empowering one type of person (adult) to exert physical force over another (child) produces a relationship between the two; the nexus being the one's ability to apply legitimate force to the other. The definition of corporal punishment appears to have two elements: 1) 'reasonable' physical violence by an adult directed towards a child that 2) aims to provide direction to/correction of the child.²¹ Shmueli states that,

¹⁷ See Chapter 4 for more discussion on the comparison between the international discourses on adult's rights and children's rights.

¹⁸ See generally SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES' (1992).

¹⁹ While some argue that Article 3 (best interests of the child) is also relevant, the best interests principle is an indeterminate concept as argued throughout this thesis. Freeman has argued '[o]f course, what is in a child's best interests is value-laden, and to some extent indeterminate. But it may be argued that there are some givens and that violence against a child may be considered one matter upon which there should be consensus. The best interests principle can, of course, cloak prejudices'. Michael Freeman, *Upholding the Dignity and Best Interests of Children: International law and the Corporal Punishment of Children*, 73 LAW AND CONTEMPORARY PROBLEMS 211, 216 (2010). As such, depending on how one views 'best interests' will dictate how those interests will be defined. For example, some might argue that 'sparing the rod' is to the detriment of the child's development; while others will argue that corporal punishment violates the child's physical dignity. See for example Peter Newell, *Ending Corporal Punishment of Children*, in REVISITING CHILDREN'S RIGHTS 115 (Deidre Fottrell ed., 2000); Susan H. Bitensky, *The Child's Right to Humane Discipline Under the U.N. Convention on the Rights of the Child: The Mandate Against all Corporal Punishment of Children*, 4 LOYOLA POVERTY LAW JOURNAL 47, 47-53 (1998); Jennifer E. Lansford, *The Special Problems of Cultural Difference in Effects of Corporal Punishment*, 73 LAW & CONTEMPORARY PROBLEMS 89, 89-106 (2010); Angela Bartman, *Spare the Rod and Spoil the Child? Corporal Punishment in Schools Around the World*, 13 INDIANA INTERNATIONAL & COMPARATIVE LAW REVIEW 283, 283-297 (2002). See for example for such overview Andre R. Imbrogno, *Corporal Punishment in America's Public Schools and the U.N. Convention on the Rights of the Child: A Case for Non-ratification*, 29 JOURNAL ON LAW & EDUCATION 125, 125 (2000).

²⁰ See for example Article 7 of the ICCPR.

²¹ Angela Bartman, *Spare the Rod and Spoil the Child? Corporal Punishment in Schools Around the World*, 13 INDIANA INTERNATIONAL & COMPARATIVE LAW REVIEW 283, 285-286 (2002).

corporal punishment occurs when a parent or educator hits a child with the purpose of educating [the child]. It usually consists of a light blow with the open hand on the buttocks or hand because the child has misbehaved, deviated from the right path, failed to comply with the authority's wishes and instructions, or failed to accept that authority.²²

The Committee on the CRC defines corporal punishment as,

any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting ("smacking", "slapping", "spanking") children, with the hand or with an implement - whip, stick, belt, shoe, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, burning, scalding or forcing ingestion (for example, washing children's mouths out with soap or forcing them to swallow hot spices).²³

As the text of the CRC is itself silent on corporal punishment, at issue is whether corporal punishment amounts to a violation of the CRC under Article 19, 37, and 28(2). Article 19 prohibits 'physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation . . . [by adults]'. Article 28(2) requires states to 'take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity'. By condoning the possibility of corporal punishment under the rubric of 'school discipline', the Convention inherently defines the child's 'human dignity' as something invariably different from the adult's.²⁴ Article 37 states that 'no child should be subjected to torture or

²² Benjamin Shmueli, *Corporal Punishment in Educational Systems Versus Corporal Punishment by Parents: A Comparative View*, 73 LAW AND CONTEMPORARY PROBLEMS 283, 281-282 (2010), citing Elizabeth T. Gershoff, and Susan H. Bitensky, *The Case Against Corporal Punishment of Children: Converging Evidence from Social Science Research and International Human Rights Law and Implications for U.S. Public Policy*, 13(4) PSYCHOLOGY PUBLIC POLICY AND LAW 231, 232 (2007). The authors define corporal punishment as the use of physical force, no matter how light, with the intention of causing the child to experience bodily pain so as to correct or punish the child's behaviour. Such physical force typically includes hitting children with either a hand or an object. In the United States, corporal punishment is known by a variety of euphemisms, including spank, smack, slap, pop, beat, paddle, punch, whup/whip, and hit. As for corporal punishment and school, see IRWIN HYMAN, *READING, WRITING, AND THE HICKORY STICK*, 10 (1990). Hyman defines corporal punishment by teachers as 'the infliction of pain or confinement as a penalty for an offense committed by a student'.

²³ The comment pertains specifically to Articles 19, 28(2), and 37. It was adopted by the Committee at its forty-second session in Geneva in May and June of 2006. Comm. on the Rights of the Child, General Comment No. 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment, U.N. Doc. CRC/C/GC/8 (Mar. 2, 2007), para. 11; available at www2.ohchr.org/english/bodies/crc/comments.htm. See Michael Freeman, *Upholding the Dignity and Best Interests of Children: International law and the Corporal Punishment of Children*, 73 LAW AND CONTEMPORARY PROBLEMS 211, 216 (2010).

²⁴ See the Separate Opinion of Judge Sir Fitzerald Fitzmaurice in *Tyrer v. the United Kingdom* (5856/72), Judgment of 25 April 1978, para. 7-11. Tyrer, a 15 year old boy was 'birched' by a policeman, in private in the presence of his father and a doctor. He was made to take down his pants and underwear and bend over a table. (para.9-10) Though this was ruled by the European Court of Human Rights to violate Article 3 (ban on torture or to inhuman or degrading treatment or punishment), Sir Fitzerald Fitzmaurice argued that: 'The fact that a certain form of punishment is an undesirable form of punishment does not automatically turn it into a degrading one. Such punishment does not, in the case of a juvenile, attain a level of degradation needed to constitute it a breach of art. 3, unless of course seriously aggravating circumstances are present over and above the simple fact of the corporal character of the punishment. Consequently, it does not involve the level of degradation required to constitute a breach of art. 3 of the ECHR, when inflicted under proper restrictions and safeguards in consequence of a regularly pronounced judicial sentence, traditionally sanctioned for certain offences by the law of the community to which the offender belongs, and by its public opinion. . . assuming that corporal punishment does involve

other cruel, inhuman or degrading treatment or punishment'. It appears, similar to the best interests principle, that the state is left to determine whether corporal punishment amounts to 'degrading punishment', is 'inconsistent with the child's human dignity', or amounts to 'physical or mental violence'.

While there is no clear prohibition on corporal punishment in the CRC and further that the corporal punishment of children is arguably acknowledged in Article 28,²⁵ some academics infer that corporal punishment is banned under the CRC.²⁶ The basis for such a conclusion is that the CRC Committee has noted numerous times that 'the use of corporal punishment does not respect the inherent dignity of the child nor the strict limits on school discipline [found in Article 28]'.²⁷ The Committee on the CRC has argued that,

corporal punishment is invariably degrading. In addition, there are other non-physical forms of punishment which are also cruel and degrading, and thus incompatible with the Convention. These include, for example, punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child.²⁸

Further, the Committee has explained in its General Comment No. 8 that Articles 19, 28, and 37 do not leave room for any level of legalised violence against children and that, '[c]orporal punishment and other cruel or degrading forms of punishment are forms of violence and States must take all appropriate legislative, administrative, social and educational measures to eliminate

some degree of degradation, it has never been seen as doing so for a juvenile to anything approaching the same manner or extent as for an adult'. Emphasis added.

²⁵ Article 28(2): 'state parties shall take all appropriate measure to ensure that school discipline is administered in a manner consistent with the child's human dignity . . .' See also SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 382-399 (1992).

²⁶ Alice Farmer and Kate Stinson, *Failing the Grade: How the Use of Corporal Punishment in U.S. Public Schools Demonstrates the Need for U.S. Ratification of the Children's Rights Convention and the Convention on the Rights of Persons with Disabilities*, 54 NEW YORK LAW SCHOOL LAW REVIEW 1035, 1035-1069 (2009).

²⁷ For a full discussion of the CRC Committee's approach to corporal punishment see Michael Freeman, *Upholding the Dignity and Best Interests of Children: International law and the Corporal Punishment of Children*, 73 LAW AND CONTEMPORARY PROBLEMS 211, 220-228 (2010). In particular, see Comment 8 and Comment 1, CRC Committee, *General Comment No 1 on the Aims of Education* (UN Doc. CRC/GC/2001/1, 2001, para. 8; Committee on the Rights of the Child, 42d Sess., General Comment No. 8, The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37). For the argument that General Comments by a Committee are considered authoritative interpretations of a treaty see NIGEL WHITE, THE UNITED NATIONS SYSTEMS: TOWARDS INTERNATIONAL JUSTICE, 178 (2002), noting that 'the decisions and views of the HRC are the most authoritative interpretation of its provisions'.

²⁸ The comment pertains specifically to Articles 19, 28(2), and 37. It was adopted by the Committee at its forty-second session in Geneva in May and June of 2006. Committee on the Rights of the Child, General Comment No. 8: The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment, U.N. Doc. CRC/C/GC/8 (Mar. 2, 2007), para. 11; available at www2.obchr.org/english/bodies/crc/comments.htm. See also Michael Freeman, *Upholding the Dignity and Best Interests of Children: International law and the Corporal Punishment of Children*, 73 LAW AND CONTEMPORARY PROBLEMS 211, 216 (2010).

them'.²⁹ The Committee has recommended prohibition of all corporal punishment, including by parents.³⁰ Further, only Singapore has issued a declaration on the use of corporal punishment, one that several states have opposed.³¹ Singapore's declaration reads,

The Republic of Singapore considers that articles 19 and 37 of the Convention do not prohibit . . . *the judicious application of corporal punishment in the best interest of the child.*³²

Notably, despite the CRC Committee's recommendations and the objections by certain states to Singapore's declaration,³³ corporal punishment of children is widespread. Of the 193 state parties to the CRC, only 29 currently outlaw all corporal punishment of children.³⁴ While some argue that the Convention implicitly prohibit corporal punishment,³⁵ one hundred and sixty-six states allow some level of corporal punishment of children, and as such interpret corporal punishment not to amount to 'degrading punishment', nor to constitute 'physical or mental violence', nor to be 'inconsistent with the child's human dignity', in the words of the CRC.

According to the Vienna Convention on the Law of Treaties, the subsequent practice of states parties in the application of the treaty shall be taken into account in the interpretation of a treaty.³⁶ As such, because the CRC does not explicitly ban corporal punishment, the practice of state parties suggests that corporal punishment is not prohibited under the Convention. It would seem that the CRC Committee's recommendations do not reflect *lex lata*, and quite

²⁹ Committee on the Rights of the Child, 42d Sess., General Comment No. 8, The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19, 28, Para. 2; and 37). For the argument that General Comments by a Committee are considered authoritative interpretations of a treaty see NIGEL WHITE, *THE UNITED NATIONS SYSTEMS: TOWARDS INTERNATIONAL JUSTICE*, 178 (2002), noting that 'the decisions and views of the HRC are the most authoritative interpretation of its provisions'.

³⁰ RACHEL HODGKIN and PETER NEWELL, *IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD*, 237-255 (1998).

³¹ A number of states have interpreted Singapore's declaration as a reservation and objected to it as contrary to the object and purpose of the Convention. See, e.g., CRC, adopted Nov. 20, 1989, 1934 U.N.T.S. 383 (Germany registered its objection to Singapore's reservations on Sept. 4, 1996); CRC, adopted Nov. 20, 1989, 1935 U.N.T.S. 449 (Belgium registered its objection to Singapore's reservations on Sept. 26, 1996); CRC, adopted Nov. 20, 1989, 1936 U.N.T.S. 369 (Italy registered its objection to Singapore's reservations on Oct. 4, 1996); CRC, adopted Nov. 20, 1989, 1946 U.N.T.S. 350 (Netherlands registered its objection to Singapore's reservations on Nov. 6, 1996); CRC, adopted Nov. 20, 1989, 1949 U.N.T.S. 387 (Norway registered its objection to Singapore's reservations on Nov. 29, 1996); CRC, adopted Nov. 20, 1989, 1948 U.N.T.S. 433 (Finland registered its objection to Singapore's reservations on Nov. 26, 1996); CRC, adopted Nov. 20, 1989, 1949 U.N.T.S. 388 (Portugal registered its objection to Singapore's reservations on Dec. 3, 1996).

³² Emphasis added.

³³ A global study presented to the General Assembly recommends such prohibition: PAULO PINHEIRO, REPORT OF THE INDEPENDENT EXPERT FOR THE UNITED NATIONS STUDY ON VIOLENCE AGAINST CHILDREN, 5, (2006) delivered to the General Assembly, U.N. Doc. A/61/299 (Aug. 29, 2006), available at: <http://www.violencestudy.org/IMG/pdf/English-2-2.pdf>.

³⁴ See generally Michael Freeman, *Upholding the Dignity and Best Interests of Children: International law and the Corporal Punishment of Children*, 73 LAW AND CONTEMPORARY PROBLEMS 211, 250 (2010). For updated research, see Global Initiative to End All Corporal Punishment of Children homepage: <http://www.endcorporalpunishment.org/pages/frame.html> (last visited March 30, 2012) (listing twenty-five countries that have completely abolished corporal punishment).

³⁵ See for example Susan H. Bitensky, *The Child's Right to Humane Discipline Under the U.N. Convention on the Rights of the Child: The Mandate Against all Corporal Punishment of Children*, 4 LOYOLA POVERTY LAW JOURNAL 47 (1998).

³⁶ Vienna Convention on the Law of Treaties, Article 31 (3) (b) May 23, 1969, 1155 U.N.T.S. 331.

possibility do not even reflect *lex ferenda*. While all forms of corporal punishment of children is banned in only 25 states, corporal punishment of children by educators/teachers is banned in 90 states.³⁷ There seems to be a stronger argument to be made that the corporal punishment of children by educators has reached the level of *lex ferenda*, though not quite *lex lata*.³⁸ Shmueli rightfully notes that this difference in the regulation of corporal punishment on the basis of *who* is administering the corporal punishment, rather than *what* is being administered seems

strange: if it is the right of the child to enjoy dignity and not be harmed bodily or emotionally, this should be a general right, irrespective of whether the person inflicting the punishment is a parent or a teacher. If the arguments in favour of mild corporal punishment as an effective and not-so-harmful way of educating are true, it is also open to question why mild corporal punishment should be prohibited in the educational system yet given license in the family sphere.³⁹

As discussed in Chapter 7 the public – private distinction remains strongly intact in the case of the child, offering a veil of impunity in the guise of a right to family privacy.⁴⁰ Thus the conduct of parents is given less scrutiny as compared to the actions of other adults in relation to each other. Focus on ‘who’ is acting as opposed to ‘what’ is being done, reflects the sustainment of parental power over the child, in support of the adult – child binary. It is curious that the CRC, which purports to address ‘the exceptionally difficult conditions’ of childhood and acknowledges

³⁷ Elizabeth T. Gershoff, and Susan H. Bitensky, *The Case Against Corporal Punishment of Children: Converging Evidence from Social Science Research and International Human Rights Law and Implications for U.S. Public Policy*, 13(4) PSYCHOLOGY PUBLIC POLICY AND LAW 231, 232 (2007).

³⁸ Despite the UN Committee on Economic, Social, and Cultural Rights assessments that: 1) ‘Given the principle of the dignity of the individual that provides the foundation for international human rights law . . . and in the light of Article 10.11 and 10.3 of the Covenant, the Committee recommends that the physical punishment of children in families be prohibited, in line with the recommendation of the Committee on the Rights of the Child’, and 2) ‘corporal punishment is inconsistent with the fundamental guiding principle of international human rights law enshrined in the Preambles to the Universal Declaration of Human Rights and both Covenants: the dignity of the individual. Other aspects of school discipline may also be inconsistent with human dignity, such as public humiliation. Nor should any form of discipline breach other rights under the Covenant such as the right to food’. Committee on Economic, Social and Cultural Rights, General Comment 13: The Right to Education (Art. 13), U.N. Doc. E/C.12/1999/10 para. 41 (Dec. 8, 1999) and Comm. on Econ., Soc. and Cultural Rights, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, P 36, U.N. Doc. E/C.12/1/Add.79 (June 5, 2002). They made a similar recommendation to Malta in 2004, recommending that Malta consider an explicit prohibition on corporal punishment within the family. Committee on Economic, Social and Cultural Rights, Concluding Observations: Malta, PP 22, 40, U.N. Doc. E/C. 12.1/Add.101 (Dec. 14, 2004). See generally Michael Freeman, *Upholding the Dignity and Best Interests of Children: International law and the Corporal Punishment of Children*, 73 LAW AND CONTEMPORARY PROBLEMS 211, 231-232 (2010).

³⁹ Benjamin Shmueli, *Corporal Punishment in Educational Systems Versus Corporal Punishment by Parents: A Comparative View*, 73 LAW AND CONTEMPORARY PROBLEMS 283 (2010).

⁴⁰ Dana Pogach and Lior Barshak, *Between Private and Public: Criminal Law and the Family, Following Cr. A. 4596-98 Anon. v. State of Israel*, 20 LEGAL STUDIES 7, 14-15 (2003); Benjamin Shmueli, *What Has Feminism Got to Do with Children’s Rights? A Case Study on a Ban on Corporal Punishment*, 11 WISCONSIN WOMEN’S LAW JOURNAL 177, 188 (2007): ‘Dana Pogach summarizes her feminist critique regarding the need for legal intervention to prohibit corporal family members may lead to a revolution in basic concepts, similar to the revolution which took place in the status and condition of women. Pogach expressly states the possibility of applying lessons learned in the context of couples to the parent child relationship because of the similarities between the two relationships. Parent-child relationships also involve a relationship of weak versus strong, maybe even more so than relationships between men and women. In addition, feminists address the allocation of power within both society and the family from a perspective that is not necessarily gender-based’.

that ‘the child needs special consideration . . . care and assistance’,⁴¹ at the same time does not ban the physical assault of children. Indeed, no such discussion of whether corporal punishment should be banned took place during the drafting of the Convention.⁴² The Convention does not prohibit such assault within the context of the ‘care’ (private or public),⁴³ and does not prohibit its usage in the context of the child’s schooling.⁴⁴ Further, because the preservation of the family is so highly regarded (as discussed in Chapter 7 and mentioned above), the result is that children can experience physical assault to a much greater extent than would be legal for adults.⁴⁵ For the category ‘child’, the administration of corporal punishment is always carried out by adults, acting on behalf of the state, or by parents. Such ‘correction’ is an effective reminder of one’s place in the hierarchy of adult – child relationships, where a ‘child’ is left less able to resist ‘justifiable’ acts of assault.⁴⁶ Brownlie and Alderson argue that a legal prohibition of ‘smacking’ would prove insufficient, as there also exists a need for a societal shift in what is considered acceptable behaviour towards children.⁴⁷ These authors argue that this societal shift would sideline caregivers’ views on the issue, and instead allow more explicit focus on the power imbalance between children and parents.⁴⁸ Such ‘correction’ plays a unique role in moulding the category child. Under current human rights standards, only the ‘child’ may be disciplined outside of the criminal law context through corporal punishment.

b. Incarceration

As discussed in Chapter 7, the child is required to always be in ‘care’ according to the CRC, either in the ‘care’ of the child’s parents or in the ‘care’ of the state. The CRC does not contemplate such ‘care’ as an undue deprivation of the child’s liberty. This chapter queries whether such restrictions placed on the child through the requirement of ‘care’ could be considered a violation of the child’s liberty. In the context of the CRC, such restrictions are rationalised on the basis of the CRC’s vision of the child as ‘developing/becoming’ and thus in

⁴¹ Preamble.

⁴² See SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE ‘TRAVAUX PRÉPARATOIRES’, 458-478 (1992).

⁴³ The Convention does address abuse of the child by the child’s parents in Article 19, but fails to define such abuse. See Chapter 7 where Article 19 is discussed more fully.

⁴⁴ Article 29.

⁴⁵ Kyli L. Willis, *Willis v. State: Condoning Child Abuse as Discipline*, 14 U.C. DAVIS JOURNAL OF JUVENILE LAW & POLICY 59, 59-105 (2010).

⁴⁶ See Dana Pogach and Lior Barshak, *Between Private and Public: Criminal Law and the Family, Following Cr. A. 4596/98 Anon. v. State of Israel*, 20 LEGAL STUDIES 7, 14-15 (2003).

⁴⁷ Julie Brownlie and Simon Anderson, *Beyond Anti-Smacking Rethinking Parent-Child Relationship*, 13(4) CHILDHOOD 479, 481 (2006).

⁴⁸ Julie Brownlie and Simon Anderson, *Beyond Anti-Smacking Rethinking Parent-Child Relationship*, 13(4) CHILDHOOD 479, 481 (2006).

need of governance/'care'. Article 37(b) states that 'every child shall not be deprived of his or her liberty unlawfully or arbitrarily'. Notably unlike the ICCPR, the CRC does not include an explicit 'right to liberty and security of person'.⁴⁹ Discussions during the drafting of Article 37 did not focus on whether the child has or should have the *right to liberty*.⁵⁰ Arguably, it could be assumed that the child has the right to liberty under other human rights conventions. Nonetheless, there seems to be confusion over how the CRC's provisions interact with other human rights documents.⁵¹ In placing boundaries around and prohibitions on the places that children may go, 'care' places a laundry list of 'thou shall nots' on the child.⁵² Generally, the right of parents to dictate and restrict the child's liberty is widely acknowledged and accepted, largely based on the idea that parents are charged with the task of having responsibility for children, who are characterised by incapacity. This was discussed in Chapter 5, 6, and 7.

At issue here is the child's right to liberty versus the parental rights to custody and care. As discussed in Chapter 7, the CRC requires the child to be in the 'care' of some adult at all times. Further, those adults are authorised to 'direct' and 'guide' the child's exercise of rights in the CRC. Chapter 7 argued that 'responsibility for' the child is an enactment of 'power over' the child. Assuming the child has a right to liberty, at first glance, the parental right to place limits on where the child may go could amount to false imprisonment or a violation of the child's right to liberty if that child was an adult. How is this restriction on the child's liberty, then, justified? The geographical boundaries placed on the children are often defined by parents' assessment of the child's safety.⁵³ While parental actions that amount to abuse and negligent treatment may be subject to state intervention under Article 19, the CRC gives parents a large amount of discretion to regulate the child's space; with the exception that the state is obligated under Article 28 to require children to attend school. This section will briefly examine two types of restrictions on the child's geographical boundaries: 1) home and 2) school. Prout contends that children move from one of these 'islands' of childhood to another.⁵⁴ In this way, the child's geographical

⁴⁹ William A. Schabas and Helmut Sax, *Article 37: Prohibition of Torture, Death Penalty, life Imprisonment, and Deprivation of Liberty*, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, 39-40 (Andre ALEN et al., eds., 2006); SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 462 (1992).

⁵⁰ SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 458-478 (1992).

⁵¹ SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 130 (1992).

⁵² BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 15-16 (2009); MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION, 84 (Robert Hurley trans., 1980).

⁵³ Gill Valentine, "Oh Yes I Can." "Oh No You Can't": Children and Parents Understandings of Kids Competence to Negotiate Public Space Safely, 29 ANTIPODE 65 (1997).

⁵⁴ Alan Prout, *Children's Participation: Control and Self-Realisation in British Late Modernity*, 14(4) CHILDREN & SOCIETY 304, 310 (2000), citing Gill Valentine, *Angels and Devils: Moral Landscapes of Childhood*, 14 ENVIRONMENT AND PLANNING: SOCIETY AND SPACE 581 (1996).

boundaries are restricted by parents outside of school and then by the state by mandatory school attendance.⁵⁵

In an effort to agitate the CRC's dominant conception of 'care' and thus re-examine the child's right to liberty, this section will explore some of the jurisprudence from the European Court of Human Rights (ECHR).⁵⁶ The ECHR not only provides some interesting analogies between the restrictions that the state places on private adults and those placed on children by the CRC, but also deals directly with the issue of parental restrictions on the child's liberty. The ECHR has found that liberty covers the physical liberty of the person,⁵⁷ and that liberty is a fundamental right in a democratic society.⁵⁸ To demonstrate that the applicant's right to liberty has been violated under Article 5 of the European Convention, an applicant must establish both an objective and subjective element: 1) confinement in a particular restricted space for a not negligible length of time⁵⁹ and 2) the detainee must not have validly consented to the confinement in question.⁶⁰ For the subjective element, the Court has found that confinement does not just include imprisonment, but that 'deprivation of liberty may . . . take numerous forms'.⁶¹ The Court's determination of the threshold of what amounts to a deprivation of liberty provides particular insight into how the restrictions on the child's liberty might be viewed as problematic. The Court states that when determining whether certain restrictions amount to a violation of a person's right to liberty, the Court must look at the 'degree and intensity' of the

⁵⁵ It is noted that homeschooling would alter this analysis somewhat. Nonetheless, the fundamental argument is that the child, by being required to be in 'care' and/or 'at school' is always restricted physically.

⁵⁶ See generally <http://www.echr.coe.int/echr/homepage>. The ECHR is the focus as it has dealt specifically with the issues to be discussed here in case law. The Human Rights Committee's General Comment No. 08, *Right to Liberty and Security of Person*, does not refer explicitly to the category 'child'. See ICCPR General Comment No. 8: *Right to Liberty and Security of Person* (Art. 9) 06/30/1982. Online:

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/f4253f9572cd4700c12563ed00483bec?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/f4253f9572cd4700c12563ed00483bec?Opendocument). General Comment No. 17 of the Human Rights Committee recognizes 'the right of every child, without any discrimination, to receive from his family, society and the State the protection required by his status as a minor' (para.1). The Committee then notes that the rights provided in Article 24 are not the only rights available to the child, but at times the ICCPR gives children greater protection (e.g. death penalty may not be imposed on minors). In other instances, the child is protected by greater restrictions, 'provided that such restriction is warranted – of a right recognized by the Covenant' (e.g. right to publicize a judgement in a criminal case), 'from which an exception may be made when the interest of the minor so requires' (para. 2). Paragraph three notes that the measures to be adopted 'in light of the protection needs' of children 'are for States to determine. Paragraph six states that protection of the child lays primarily on the family, until 'parents and the family seriously fail in their duties, ill-treat or neglect the child'. Only then may the state intervene to restrict parental authority. See ICCPR General Comment No. 16: *Rights of the Child* (Art. 24)04/01/1989. Available online:

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/cc0f1f8c391478b7c12563ed004b35e3?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/cc0f1f8c391478b7c12563ed004b35e3?Opendocument). The combination reading of these two general comments by the Human Rights Committee supports the jurisprudence of the ECHR, as discussed in this section. Further, these general comments reflect the understandings found in the CRC of the child's 'developing/becoming' rationalizing 'protection/care'/governance.

⁵⁷ *Engel v Netherlands* A 33 (1976); 1 EHRR 706 para 58 PC.

⁵⁸ *Winterswerp v Netherlands* A 33 (1979); 2 EHRR 387 para 37; *Storck v Germany* 2005-V; 43 EHRR 96 para 102.

⁵⁹ *Storck v Germany* 2005-V; 43 EHRR 96 para 74.

⁶⁰ *Storck v Germany* 2005-V; 43 EHRR 96 para 74.

⁶¹ *Guzzardi v Italy* A 39 (1980); 3 EHRR 33 para 95 PC. The applicant restricted to a remote island for 16 months. He could move about on the island and did have wife and child. He had to report twice daily and had a curfew. The Court found that the applicant's right to liberty under Article 5 had been violated.

restrictions, with attention to the type, duration, effects, and implementation of the restriction.⁶² When considering 'degree and intensity' in *Raimondo*, the ECHR found that, while the applicant was subject to a curfew, had to notify the police whenever he left his home, could not leave his home between 9pm and 7am without a valid excuse, no violation of the applicant's liberty had occurred.⁶³ The Court reasoned that the applicant was able to maintain a relatively normal daily balance between work and home.⁶⁴ In *Guzzardi*, the applicant was restricted to a remote island for 16 months. He could move about on the island and his family was allowed to accompany him. He had to report twice daily and had a curfew. The Court found that given the geographical restriction to the island, the applicant's liberty was sufficiently restricted.

'Care' for the category 'child' is required under the CRC until the child reaches majority, which is either when the child reaches 18, unless otherwise specified under domestic law.⁶⁵ Further, schooling can be up to twelve years, for eight hours a day five to six days a week. The CRC's requirement to attend school at particular times of the day places limitations on the types of employment that the child may pursue (assuming the child is of legal age to engage in employment). One could make analogy with the threshold set in *Raimondo* and *Guzzardi* to children whose 'normal daily balance' is dictated by a requirement to attend school and otherwise be subject to the discretion of their parents. As Prout has argued, school and home become the islands of childhood.⁶⁶ What is considered 'normal' for a child's 'daily balance' is viewed as fundamentally different for adults. Because of the 'nature' of childhood, its vulnerability, its immaturity, parents and educators to large degrees dictate the child's liberty. Valentine argues that being 'unable or unwilling to trust their children to manage their own safety in public places most parents actively control and restrict their children's use of space'.⁶⁷ It seems that it is virtually unquestionable that the CRC affords parents and the state the 'right' to regulate the geographical boundaries of childhood, in ways that would be unimaginable for other (human) identity categories. Put another way, the CRC enables parents and the state to heavily restrict the child's liberty, in ways that could amount to false imprisonment or incarceration for other (human) identity categories. It seems that there is little contention about whether the first

⁶² *Guzzardi v Italy* A 39 (1980); 3 EHRR 33 para 92-93 PC.

⁶³ *Raimondo v Italy* A 28101 (1994); 18 EHRR 237 para 39.

⁶⁴ *Raimondo v Italy* A 28101 (1994); 18 EHRR 237 para 39.

⁶⁵ Article 1.

⁶⁶ Alan Prout, *Children's Participation: Control and Self-Realisation in British Late Modernity*, 14(4) CHILDREN & SOCIETY 304, 310 (2000), citing Gill Valentine, *Angels and Devils: Moral Landscapes of Childhood*, 14 ENVIRONMENT AND PLANNING: SOCIETY AND SPACE 581 (1996).

⁶⁷ Gill Valentine, "Oh Yes I Can." "Oh No You Can't": Children and Parents Understandings of Kids Competence to Negotiate Public Space Safely, 29 ANTIPODE 65, 72 (1997). Valentine also notes that parents will also subtly structure their children's time to prevent children from playing in public spaces with adult supervision. See also Judith Ennew, *Time for Children or Time for Adults?*, in CHILDHOOD MATTERS: SOCIAL THEORY, PRACTICE AND POLITICS (Jens Qvortrup et al. eds., 1994).

element (objective element: confinement in a particular restricted space for a not negligible length of time⁶⁸) would be met for restrictions placed on the category 'child', if applying the standards set for adults, particularly in light of the CRC requirement that children attend school and be in 'care'.

The second element of a right to liberty under the ECHR deals with capacity (in other words, mandating that the detainee must not have validly consented to the confinement in question). As with most discussions of children's rights, an analogy based on claims to adult capacity would be considered more controversial. The discussion returns to the familiar questions of whether children possess 'capacity' and whether the child's alleged lack of capacity justifies such parental and state restrictions on the child's liberty. Chapter 2 establishes the dominant perception that children lack capacity. As such, according to the CRC parents are authorised to exercise consent on the child's behalf. Therefore, parental restrictions on the child's liberty appear to fall within Article 5. Indeed, the ECHR has held that Article 5 was not intended to apply to parental restrictions on the child's right to liberty, provided that such restrictions were imposed legally and for a 'proper purpose'.⁶⁹ Further, the ECHR gives specific exception to the right to liberty for 'the detention of a minor by lawful order for the purpose of educational supervision'.⁷⁰ The Court has found that parents have the right 'to decide where the child must reside and also impose, or authorise others to impose, various restrictions on the child's liberty' in accordance with the right to family life under Article 8.⁷¹ In *Nielson*, the applicant's mother consented to the child's hospitalisation for the protection of the child's health, and not merely to keep the child away from his father. Thus Article 5 was not considered by the Court as the mother's decision was deemed a responsible exercise of her custodial rights in the interests of the child. The Court held that Article 8 provided a broad range of parental rights and responsibilities in regard to the care and custody of children. On the matter of the child's own views, the majority considered that 'he was still of an age at which it would be normal for a decision to be made by the parent even against the wishes of the child'.⁷² Fortin notes, given that the child was 12 years old, this reflects a 'peculiarly authoritarian view of the parental role'.⁷³ Some argue that the rationale for the court's decision in *Nielson* is that there is an implied limitation to the right to liberty in Article

⁶⁸ *Storck v Germany* 2005-V; 43 EHRR 96 para 74.

⁶⁹ DAVID HARRIS, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 127-129 (2009).

⁷⁰ European Convention on Human Rights Article 5(1)(d).

⁷¹ *Neilsen v Denmark* A 144 (1988); 11 EHRR 175 para 61 PC.

⁷² *Neilsen v Denmark* A 144 (1988); 11 EHRR 175 para 72 PC.

⁷³ JANE FORTIN, CHILDREN'S RIGHTS AND THE DEVELOPING LAW, 101 (2009).

5 that follows from the conjunction of Article 5 and 8 (right to private and family life) as regards the 'responsible' exercise of parental rights in the interests of the child.⁷⁴

Neilson reflects the basic principles found in the CRC. First, as discussed in Chapter 4, 6, and 7, parents are given 'responsibility for' the child. As discussed in Chapter 6 and 7, the responsibility given to parents over the child is justified in the CRC on the basis of the child's immaturity. This responsibility enables parents to make decisions on behalf of the child, including the setting of geographical boundaries for the child. Second, as was discussed in Chapter 7, parental rights are restrained by, as the ECHR calls it, 'proper purpose'. 'Proper purpose' is represented in the CRC as the best interests of the child. Further, according to Article 12 of the CRC, the voice of the child is included to the extent to which the child has demonstrated maturity. As a result, parents are granted a high degree of control over the geographical restrictions placed on the child (in other words, the child's liberty) under the CRC justified by the child's lack of maturity/legal capacity, so long as those restrictions are 'in the best interests of the child', as well as 'consistent with the evolving capacities of the child'. Notably, the evolving capacities principle only comes before the courts in matters that are deemed 'serious', such as medical treatment or birth control,⁷⁵ not about, for example, curfews. Further, Article 19 only addresses abuse and neglect, not whether a child should be able to have greater geographical range. As such, the child's liberty is largely dictated by parents, so long as such discretion is exercised in line with the exceptionally vague and indeterminate 'best interests of the child' and 'evolving capacities of the child'.

This thesis has sought to dislodge the *truth* that children are immature and therefore incapable, while at the same time querying why capacity, a heavily critiqued notion in the context of all other human rights discourses, is perceived as a precursor to children having autonomy rights, as well as certain protection rights (in particular against their parents and against the state). Further, this thesis has, wherever relevant, compared children's rights and their justifications (for example, right to 'care' because the child is biologically immature) with adult rights and their justifications (for example, right to equality because of social discrimination). Here, as an

⁷⁴ DAVID HARRIS, *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS*, 128 (2009).

⁷⁵ *Gillick v. West Norfolk and Wisbech Area Health Authority* [1985] All ER 402 (HL). *Gillick* related to the question of whether a minor could consent to her own medical treatment without parental permission. The House of Lords decided that: 'As a matter of law the parental right to determine whether or not their minor child . . . will have medical treatment terminates if and when the child achieves sufficient understanding and intelligence to understand fully what is proposed. Article 12 of the CRC originally included a list of specific areas where the child's right to be heard would apply: 'marriage, choice of occupation, medical treatment, education, and recreation'. This language was ultimately changed to 'all matters affecting the child'. Nonetheless, the issue of whether the child's evolving capacities are being respected usually only comes up in cases such as *Gillick*.'

interesting analogy, in a case before the ECHR involving the placement of a pensioner in a nursing home', Judge Loucaides notes the dangers of applying a test that involves an assessment of the applicant's 'interests' as opposed to the applicant's wishes.⁷⁶ The majority found that placing the pensioner in a nursing home was not a violation of Article 5's right to liberty, as such a placement was in the interests of the pensioner; as the applicant would now have access to necessary healthcare and live in hygienic conditions.⁷⁷ Judge Loucaides in his dissent notes the dangers in relying too heavily upon an 'interests' test (whether the action was intended to serve the interests of the person concerned), because such a test could be abused by the state or 'scheming relatives'. While Judge Loucaides' position has merit that this thesis has pointed to in the context of children's rights, one wonders whether Judge Loucaides would also find overemphasis on an 'interests' test problematic for a child. It seems that curtailing the child's liberty by parents and by state mandated education is roundly accepted. One wonders why these analogous dangers (the substitution of other interests in the name of the pensioner's interests) somehow do not apply to children (the substitution of other interests in the name of the best interests of the child). The CRC is willing to assume that the best interest of the child will be the parents' basic concern. This is particularly curious when, as Valentine has pointed out, statistically children are more at risk in the private space from people they know than in the public sphere.⁷⁸ Finally, Harris *et al.* argues that 'certainly any trend whereby the scope or application of Article 5 is curtailed must be treated with great caution given the importance of the right to liberty.'⁷⁹ Such caution does not seem to apply to the category 'child'. The child is not given a right to liberty in the CRC and the child's liberty is restricted in ways that would be unimaginable for other (human) identity categories. The 'child' is a kind of suspended subject who is 'becoming' an adult (in other words, developing) and thus needs governance (in other words, 'care' by adults) to do this successfully. Only then will she or he become a true (adult) subject with full rights and liberties.

This section has sought to argue that juridical power plays a greater role in regulating and governing the category 'child' under the CRC as compared to adults. While some have argued that corporal punishment is outlawed under the CRC, no such explicit ban can be found in the CRC, or inferred from the *Travaux Préparatoires* of the CRC. Further, given that states widely practice corporal punishment against children, there is no customary international law that would

⁷⁶ *HM v Switzerland* 2002-II; 28 EHRR 17.

⁷⁷ *HM v Switzerland* 2002-II; 28 EHRR 17 para 48.

⁷⁸ Gill Valentine, "Oh Yes I Can." "Oh No You Can't": Children and Parents Understandings of Kids Competence to Negotiate Public Space Safely, 29 ANTIPODE 65, 69 (1997).

⁷⁹ DAVID HARRIS, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 127-129 (2009).

suggest that the CRC should be interpreted in manner preventing corporal punishment. The restriction on the child's liberty represents another form of juridical power that plays a greater role in regulating the category 'child'. While many argue that such restrictions are 'necessary' because of the child's immaturity/incapacity and in light of certain parental rights, the foundations upon which these arguments rest become tenuous when one questions the child's alleged incapacity. Chapter 9 will further discuss the implications of such assumptions about children (as incapable) and parents (as always responsible and always acting in the child's best interests).

II. DISCIPLINARY POWER IN THE CRC

If identities are constructions or claims to 'truth', Foucault argues that such a fabricated 'reality' is produced by a specific technology of power: disciplinary power.⁸⁰ The primary function of disciplinary power is normalisation through the imposition of homogeneity. At the same time disciplinary power individualises by making it possible to measure gaps, to determine levels, to fix specialties and to render the differences useful by measuring these difference to others.⁸¹ Control of behaviour, body, appearance and activities are all elements of what Foucault calls a small penal mechanism and which he conceives as an integral part of all disciplinary systems.⁸² As Foucault underlines, the minutest details of behavior are subject to normalising sanction, and all transgressions, all moves away from the rule, all forms of deviance can be singled out and penalised.⁸³ Foucault argues that "[t]he chief function of the disciplinary power is to 'train', and surveillance serves as one of the primary instruments to achieve that purpose.⁸⁴ For Foucault, Jeremy Bentham's 'Panoptican' is emblematic of the functioning of disciplinary power: 'the major effect of the Panoptican is to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power'.⁸⁵ Disciplinary power is argued by Foucault to be more effective than juridical power because its power does not actually need to be enforced. Disciplinary power is automatic in that the individual subject to discipline assumes that the guard in the tower is watching and modifies his or her behaviour accordingly.⁸⁶ Disciplinary power does not aim to punish subjects for their transgressions of a pre-given law,

⁸⁰ BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 21 (2009), quoting MICHEL FOUCAULT, *DISCIPLINE AND PUNISHMENT, THE BIRTH OF THE PRISON*, 217 (Alan Sheridan trans., 1995).

⁸¹ MICHEL FOUCAULT, *DISCIPLINE AND PUNISHMENT, THE BIRTH OF THE PRISON*, 184 (Alan Sheridan trans., 1995).

⁸² MICHEL FOUCAULT, *DISCIPLINE AND PUNISHMENT, THE BIRTH OF THE PRISON*, 177 (Alan Sheridan trans., 1995).

⁸³ MICHEL FOUCAULT, *DISCIPLINE AND PUNISHMENT, THE BIRTH OF THE PRISON*, 178 (Alan Sheridan trans., 1995).

⁸⁴ MICHEL FOUCAULT, *DISCIPLINE AND PUNISHMENT, THE BIRTH OF THE PRISON*, 135-228 (Alan Sheridan trans., 1995), as also discussed in BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 19 (2009).

⁸⁵ MICHEL FOUCAULT, *DISCIPLINE AND PUNISHMENT, THE BIRTH OF THE PRISON*, 201 (Alan Sheridan trans., 1995); BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 20-21 (2009).

⁸⁶ MICHEL FOUCAULT, *DISCIPLINE AND PUNISHMENT, THE BIRTH OF THE PRISON*, 201 (Alan Sheridan trans., 1995).

but rather for failure to attain an evolving and immanent normality, to function in a manner deemed positive and productive.⁸⁷ Foucault argues that ‘the operation of disciplinary normalisation consists in trying to get people, movements, and actions to conform to [a] model, the normal being precisely that which can conform to this norm, and the abnormal that which is incapable of conforming to the norm’.⁸⁸ A subject does not create or cause institutions, discourses, or practices, but laws (along with other discourses/institutions) create or cause the subject by determining the characteristics that a particular subject should (and should not) have.⁸⁹

a. Compulsory Education

The CRC enables the exercise of disciplinary power through mandating compulsory (primary) education in Article 28(a) for all children. Education becomes a way in which the CRC’s normative child is produced. School, a technology of disciplinary power, plays an important role in the disciplining of the child, aimed at achieving the reproduction of norms for childhood.⁹⁰ School enables the disciplinary gaze over the child, a constant measuring of the child’s academic and behavioural performance. This section argues that the notion of disciplinary power illustrates how children are turned into ‘proper’ students. Through the techniques of distribution, surveillance, and assessment, children learn to comply with certain norms of what it means to be a child.

Foucault maintains that in the 18th century, with the introduction of a system of universal education, normality as a means of coercion became characteristic of education.⁹¹ Children do not attend school merely to spend time there. While the requirement to attend school operates as a restriction on the child’s right to liberty discussed above, school also performs an important disciplinary function. In this perspective, children are moulded into what is deemed appropriate for proper students and proper children. They learn certain behaviour, skills, competences that are desirable and competences which are undesirable. The child’s ability to comply is rewarded and encouraged; the child’s inability or unwillingness to comply is met with negative awards and thus discouraged. Robin Usher and Richard Edwards argue that the power of normalisation is that it appears to be neutral; and in such neutrality appears an objective procedure for

⁸⁷ MICHEL FOUCAULT, DISCIPLINE AND PUNISHMENT, THE BIRTH OF THE PRISON, 201 (Alan Sheridan trans., 1995).

⁸⁸ MICHEL FOUCAULT, ABNORMAL: LECTURES AT THE COLLEGE DE FRANCE 1974-1975, 84 (Graham Burchell trans., 2003).

⁸⁹ Sara Salih ed., THE JUDITH BUTLER READER, 10 (2004).

⁹⁰ See generally Katarzyna Gawlicz, Preschools Play with Power, Constructing the Child, the Teacher, and the Preschool in Two Polish Childcare Institutions (Nov., 2009) (unpublished Ph.D. dissertation, Graduate School in Lifelong Learning, Roskilde University) (on file with Roskilde University Library); IVAN ILLICH, DESCHOOLING SOCIETY (1971).

⁹¹ MICHEL FOUCAULT, DISCIPLINE AND PUNISHMENT, THE BIRTH OF THE PRISON, 184 (Alan Sheridan trans., 1995).

ascertaining inherent 'natural' capacities.⁹² The surveillance by adults of children is a mechanism that is inherent to teaching, and increases its efficiency.⁹³ Whilst under the gaze, the school child is enjoined to perform a homogenising norm; the specification of the disciplinary gaze actually practices a greater individualisation of the subject of discipline. Foucault argues that 'instead of bending all its subjects into a single uniform mass, [disciplinary power] separates, analyses, differentiates, carries its procedures of decomposition to the point of necessary and sufficient single units'.⁹⁴ Individuals are turned into numbers and their relative distance from the norm is ranked hierarchically in the disciplinary regime.

School is seen as a fundamental space for the child's development into adults.⁹⁵ According to the CRC, 'education of the child shall be directed to . . . the development of the child's personality, talents and mental and physical abilities to their fullest potential'⁹⁶ and 'the preparation of the child for responsible life in a free society'.⁹⁷ The task of education is understood as one of 'bringing out', of helping to realise one's potential, so that subjects become fully autonomous and capable of exercising their individual and intentional agency.⁹⁸ Ian Hunter argues that 'state schooling made self-realisation into a central disciplinary objective'.⁹⁹ The normative project of education consists in making children into proper students through intervention and transformation.¹⁰⁰ Through constant and studied repetition these norms are internalised by the student and manifested in her or his conduct.¹⁰¹ According to Foucault, surveillance is a tool for ensuring children's control over their own actions and their adherence to norms and regulations, as well as for reinforcing a hierarchical power structure in which children and adults are inscribed. A 'political anatomy' defines how one may have a hold over others' bodies, not only so that they may do what one wishes, but so that they may operate as one wishes, with the techniques, speed and the efficiency that one determines. Thus discipline produces subjected and practiced bodies, 'docile' bodies.¹⁰² Disciplinary power operates on the level of the body, with the aim of using, transforming and improving it. Techniques of

⁹² Robin Usher and Richard Edwards, *POSTMODERNISM AND EDUCATION*, 103 (1994).

⁹³ MICHEL FOUCAULT, *DISCIPLINE AND PUNISHMENT, THE BIRTH OF THE PRISON*, 176 (Alan Sheridan trans., 1995).

⁹⁴ MICHEL FOUCAULT, *DISCIPLINE AND PUNISHMENT, THE BIRTH OF THE PRISON*, 170 (Alan Sheridan trans., 1995).

⁹⁵ Berry Mayall, *The Sociology of Childhood in Relation to Children's Rights*, 8 *INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS* 243, 245 (2000): 'Education is the influence exercised by adult generations on those that are not yet ready for social life'.

⁹⁶ Article 29(1)(a).

⁹⁷ Article 29(1)(d).

⁹⁸ Robin Usher and Richard Edwards, *POSTMODERNISM AND EDUCATION*, 25 (1994).

⁹⁹ Ian Hunter, *Assembling the School*, in FOUCAULT AND POLITICAL REASON: LIBERALISM, NEO-LIBERALISM AND RATIONALITIES OF GOVERNMENT, 149 (Andrew Barry et al. eds., 1996).

¹⁰⁰ MICHEL FOUCAULT, *ABNORMAL: LECTURES AT THE COLLEGE DE FRANCE 1974-1975*, 50 (Graham Burchell trans., 2003).

¹⁰¹ BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 19 (2009), quoting FRANCOIS EWALD, *A CONCEPT OF SOCIAL LAW*, 46-48 (1986).

¹⁰² MICHEL FOUCAULT, *DISCIPLINE AND PUNISHMENT, THE BIRTH OF THE PRISON*, 138 (Alan Sheridan trans., 1995).

disciplinary power are used to construct obedient, constrained and self-controlled students, such as distribution, surveillance, assessment, comparison, ranking, and a number of means aimed at producing children's 'docile' bodies, in other words, good students. Foucault contends that 'the novice's perfection and merit ultimately consists in considering it a fault to do anything without having received an explicit order to do it'.¹⁰³

The CRC's norms of immaturity and development, discussed in Chapter 6, as well as dependency (on adult 'care'), discussed in Chapter 7, are imposed on the body of the child through education. Educational practices are determined by specific conceptions of a child and childhood.¹⁰⁴ Further, Article 29 includes other norms that the child is to 'develop': 1) respect for human rights, 2) respect for the child's parents, 3) respect for the child's cultural identity, language and values, 3) respect for the national values of the country in which the child is living, 4) respect for the child's country from which she or he may originate, 5) respect for other civilisations different from the child's, 6) respect for the natural environment. As discussed in Chapter 6, these educational aims are thinly veiled code words that aim to discipline the subject by mandating what a proper child should be. Fostering respect for this list may have less to do with developing the child's 'potential' and more to do with placing limits on the child in the name of 'respect'. Article 29 is a proscription about creating docile citizens. Further, requiring the child to learn unilateral respect for this list contributes to the child's submissive positioning relative to adults (parents and the state) in the CRC. Education becomes one of the means through which the CRC's normative child and thus status quo hierarchies of power are reproduced.

b. Mandatory Care

School is not the only place where children are subject to disciplinary power. The child too is subject to it at home, or in 'care'. Some academics argue that children have been increasingly domesticated over the course of the past two centuries.¹⁰⁵ Whether this is accurate for all children, it is argued by some that there has at least been an increase in the belief that the home

¹⁰³ MICHEL FOUCAULT, *ABNORMAL: LECTURES AT THE COLLEGE DE FRANCE 1974-1975*, 228-229 (Graham Burchell trans., 2003).

¹⁰⁴ GUNILLA DAHLBERG et al., *BEYOND QUALITY IN EARLY CHILDHOOD EDUCATION AND CARE: POSTMODERN PERSPECTIVES*, 43 (1999).

¹⁰⁵ MICHAEL WYNESS, *CONTESTING CHILDHOOD* (2000); ALLISON JAMES, CHRIS JENKS, and ALAN PROUT, *THEORISING CHILDHOOD* (1998); Sarah Holloway and Gill Valentine, *Spatiality and the New Social Studies of Childhood*, 34(4) *SOCIOLOGY* 763 (2000).

is where childhood should occur.¹⁰⁶ As discussed in Chapter 7, this sentiment is reflected in the CRC, whereby the CRC makes 'care' mandatory for childhood under the CRC. Chapter 7 argued that the 'care' proposed by the CRC is firstly and preferably in a family, defined as a parent in a hierarchical position over the child. If family-care is not available or is grossly insufficient, the state is obligated to provide 'care' under Article 3. As such, this section argues that the CRC's 'child', who is always in the 'care' of some adult, is also always under the disciplinary gaze of a parent. Shmueli and Prigat argue that 'monitoring has become associated with good parenting, and the surveillance of children has been framed in a language of safety, protection, and care'.¹⁰⁷ These authors argue that today's children are the 'most watched over' generation in recent memory and that the monitoring of children has become a 'central characteristic of modern childhood'.¹⁰⁸ Charlene Elliot argues that surveillance has become a technique of care,¹⁰⁹ where the body of the child 'needs' to be mapped, monitored, and controlled.¹¹⁰ While Elliot focuses on the 'obese child', her arguments can be applied to other 'problems' identified for children.

Certainly one of the most persuasive 'problems' of childhood, is the child at risk. The child alone is considered to be dangerous and inherently associated with risk.¹¹¹ Often pedophiles, child pornographers, commercial predators, drugs and alcohol are identified as the dangers children and childhood face. Allowing children free time and/or time in public spaces without parental supervision is deemed as creating a safety risk.¹¹² Valentine argues that despite the fact that statistically children are more at risk in private space from people they know, children are constructed as 'vulnerable' and 'innocent' in public spaces.¹¹³ Valentine points out how the 'stranger-danger' discourse heightens parents' awareness of risks to children in public spaces.

¹⁰⁶ MICHAEL WYNESS, *CONTESTING CHILDHOOD* (2000); ALLISON JAMES, CHRIS JENKS, and ALAN PROUT, *THEORISING CHILDHOOD* (1998); Sarah Holloway and Gill Valentine, *Spatiality and the New Social Studies of Childhood*, 34(4) *SOCIOLOGY* 763 (2000).

¹⁰⁷ Benjamin Schmuely and Ayelal Blecher Prigat, *Privacy for Children* 42 *COLUMBIA HUMAN RIGHTS LAW REVIEW* 759, 760 (2011).

¹⁰⁸ Benjamin Schmuely and Ayelal Blecher Prigat, *Privacy for Children* 42 *COLUMBIA HUMAN RIGHTS LAW REVIEW* 759, 760-761 (2011), citing NEIL HOWE and WILLIAM STRAUSS, *MILLENNIALS RISING: THE NEXT GREAT GENERATION*, 9 (2000); Trine Fotel and Thyra Uth Thomsen, *The Surveillance of Children's Mobility*, 1(4) *SURVEILLANCE & SOCIETY* 535, 536 (2004).

¹⁰⁹ Charlene Elliot, *Kid-Visible: Childhood Obesity, Body Surveillance, and the Technique of Care*, in *SURVEILLANCE: POWER, PROBLEMS, AND POLITICS*, 33 (Sean P. Hier and Josh Greenberg eds., 2010).

¹¹⁰ Charlene Elliot, *Kid-Visible: Childhood Obesity, Body Surveillance, and the Technique of Care*, in *SURVEILLANCE: POWER, PROBLEMS, AND POLITICS*, 33 (Sean P. Hier and Josh Greenberg eds., 2010). Elliot focuses on the 'obese child', but her argument applies to other 'problems' identified for childhood where greater surveillance is alleged as the 'solution'.

¹¹¹ Benjamin Schmuely and Ayelal Blecher Prigat, *Privacy for Children* 42 *COLUMBIA HUMAN RIGHTS LAW REVIEW* 759, 761-762 (2011), 762.

¹¹² Benjamin Schmuely and Ayelal Blecher Prigat, *Privacy for Children* 42 *COLUMBIA HUMAN RIGHTS LAW REVIEW* 759, 790 (2011).

¹¹³ Gill Valentine, "Oh Yes I Can." "Oh No You Can't": *Children and Parents Understandings of Kids Competence to Negotiate Public Space Safely*, 29 *ANTIPODE* 65, 69 (1997).

Valentine, quoting Katz, refers to this as 'terror talk': 'terrorizing contentions concerning violence against children in the public arena – from abductions and molestations to armed assaults and murders – weigh heavily on the public imagination'.¹¹⁴ As such, children must be sequestered in the home, subject to parental supervision/surveillance. Prout argues that since 1970s there has been a sequestering of children in the family and a decline in children's autonomous movement in the neighbourhood.¹¹⁵ Prout argues that these trends have had a double effect. First, children are excluded from public space, where they were seen increasingly as 'out of place', and as a result are subject to greater regulation and control.¹¹⁶ Second, special locations that concentrate groups of children together for activities under adult surveillance have proliferated.¹¹⁷ As such, Prout contends that children move from one 'island' of childhood to another, enabling the space of childhood to be more specialised.¹¹⁸ In this way, the adult charged with responsibility for (in other words, over) the child ensures that the child is correctly performing her or his role as a child (which includes proper gender, sexual orientation, class, race, and so on). Similar to the CRC's requirement for education, 'care' too becomes a means through which the CRC's normative child and thus status quo hierarchies of power are reproduced. The 'natural' family structure¹¹⁹ and the 'compulsory' school¹²⁰ are two of the foremost devices in the CRC for moulding the category child.¹²¹

III. CONCLUSION

Prout argues that in a world that is perceived as shifting, complex, and uncertain, the child may operate as a vessel or repository for nostalgic longings for stability and certainty or a figure with

¹¹⁴ Gill Valentine, "Oh Yes I Can." "Oh No You Can't": Children and Parents Understandings of Kids Competence to Negotiate Public Space Safely, 29 *ANTIPODE* 65, 69 (1997), quoting Ilan Katz, *Approaches to Empowerment and Participation in Child Protection*, in *PARTICIPATION AND EMPOWERMENT IN CHILD PROTECTION*, 3 (Christopher Cloke and Murray Davies eds., 1995).

¹¹⁵ Alan Prout, *Children's Participation: Control and Self-Realisation in British Late Modernity*, 14(4) *CHILDREN & SOCIETY* 304, 310 (2000).

¹¹⁶ Alan Prout, *Children's Participation: Control and Self-Realisation in British Late Modernity*, 14(4) *CHILDREN & SOCIETY* 304, 310 (2000).

¹¹⁷ Alan Prout, *Children's Participation: Control and Self-Realisation in British Late Modernity*, 14(4) *CHILDREN & SOCIETY* 304, 310 (2000).

¹¹⁸ Alan Prout, *Children's Participation: Control and Self-Realisation in British Late Modernity*, 14(4) *CHILDREN & SOCIETY* 304, 310 (2000), citing Gill Valentine, *Angels and Devils: Moral Landscapes of Childhood*, 14 *ENVIRONMENT AND PLANNING: SOCIETY AND SPACE* 581 (1996).

¹¹⁹ Preamble: 'the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children.' It should be noted that, although it will not be discussed here, children who are under the 'care' of the state provide an interesting insight into the notion of moulding the category 'child' into productive citizens, as the primary goal of 'development'.

¹²⁰ Article 28 (a).

¹²¹ CHRIS JENKS, *CHILDHOOD*, 77 (2005). As Foucault suggests, what has emerged 'into prominence is the family considered as an element internal to population, and as a fundamental instrument in its government'. See David Cowan, and Nick Dearden, *The Minor as (a) Subject: the Case of Housing Law*, in *LEGAL CONCEPTS OF CHILDHOOD*, 99 (Julia Fionda ed., 2001).

redemptive possibility.¹²² As children are seen as 'unfinished' or 'developing', Prout contends that children appear as a good target for controlling the future, or at least a target that still retains wide social credibility.¹²³ The health, welfare, and rearing of children have been linked to the destiny of the state.¹²⁴ The child then becomes the focus of numerous projects that purport to safeguard the 'child' from physical, sexual, and moral danger, to ensure the child's 'normal' development.¹²⁵ As such, it is argued that childhood has become the most intensively governed identity category.¹²⁶ The way in which 'we' treat 'our' children becomes indicative of the state of our social structure, a measure of our achievement of civilisation.¹²⁷ These beliefs inform the 'need' to increase control, socialise, and constrain children.¹²⁸ As John O'Neill writes,

[w]e are compelled to care about the well-being and prospects of other peoples' children as a condition of preserving our nationhood . . . [A] call to recast the ground of public discourse on the collective status of children . . . to recover . . . traditions of common intent essential to sustain our nationhood into the next century.¹²⁹

In drafting the 1924 Geneva Declaration, Jebb argued that,

[i]f [children] are allowed to grow up stunted or neglected or strangers to moral values, or are ignore in their misery by the more fortunate, they will inevitably grow up to hate and destroy, and tomorrow's world can only end up in disaster, politically and economically.¹³⁰

As such, education and 'care', and even corporal punishment will emancipate 'the whole of humanity from ignorance, poverty, backwardness, despotism . . . [and] produce enlightened citizens, masters of their own destiny'.¹³¹ Notably, while participation and equality for other special (adult) human rights identities will enable the progress of society (as discussed in Chapter 4), sequestering, 'spanking', teaching and watching children will enable the progress of society.

¹²² Alan Prout, *Children's Participation: Control and Self-Realisation in British Late Modernity*, 14(4) CHILDREN & SOCIETY 304, 306 (2000).

¹²³ Alan Prout, *Children's Participation: Control and Self-Realisation in British Late Modernity*, 14(4) CHILDREN & SOCIETY 304, 306 (2000).

¹²⁴ CHRIS JENKS, CHILDHOOD, 69 (2005), quoting NIKOLAS ROSE, GOVERNING THE SOUL: THE SHAPING OF THE PRIVATE SELF, 123 (1989).

¹²⁵ CHRIS JENKS, CHILDHOOD, 69 (2005), quoting NIKOLAS ROSE, GOVERNING THE SOUL: THE SHAPING OF THE PRIVATE SELF, 123 (1989).

¹²⁶ CHRIS JENKS, CHILDHOOD, 69 (2005), quoting NIKOLAS ROSE, GOVERNING THE SOUL: THE SHAPING OF THE PRIVATE SELF, 123 (1989).

¹²⁷ CHRIS JENKS, CHILDHOOD, 69 (2005).

¹²⁸ CHRIS JENKS, CHILDHOOD, 69 (2005).

¹²⁹ JOHN O'NEILL, THE MISSING CHILD IN LIBERAL THEORY, vii-x (1994).

¹³⁰ YVES BEIGBEDER, THE ROLE AND STATUS OF INTERNATIONAL HUMANITARIAN VOLUNTEERS AND ORGANIZATIONS, 195 (1991).

¹³¹ Robin Usher and Richard Edwards, POSTMODERNISM AND EDUCATION, 24 (1994).

Children become a conduit through which nationhood is preserved and sustained. More accurately, the disciplining or ensuring of the 'normal' developing of children by adults is one of the foremost devices in how the current hierarchies of power are sustained. Without the control of children, how would proper gender, class, and sexuality be reproduced? Without the regulation of childhood, how would structures of power be sustained? How else would 'respectful' citizens be made? In a sense, controlling childhood becomes controlling the future. The regulation of childhood is the regulation of the future, where status quo hierarchical relationships are maintained.¹³²

The two 'truths' that this thesis has identified in the Convention are 1) the child-as-developing and 2) the child-as-within-a-specific-family-context (in other words, where adults are positioned over children). This thesis went on to discuss the implications of these two 'truths': how these truths operate in the Convention and what these truths make possible (a vastly different bundle of rights for those who are identified as children). As discussed in Chapter 3 and 5, these 'truths' masquerade as neutral descriptions of subjects (objective statements about what the child fundamentally is), opposed to prescriptions (political statements about what the child should be). Butler argues that identity categories are not the *cause* or basis, but rather the *effects* of institutions, practices discourses, with multiple and diffused points of origin.¹³³ These 'truths' serve the basis for activities that are directed at moulding the subject. According to a Foucauldian critique, the developmental and thus requirement of 'care' and education framework in the CRC operates as a regime of 'truth' or a system of beliefs and procedures used to construct a norm and the normal for childhood. As discussed in Chapter 3, these norms govern behavior and thinking, and work to exclude certain ways of acting or being. Alternative 'truths' are marginalized, diversity is reduced to abnormality. The developmental/'care'/education framework determines who and what a child is, and which children and what concerns will be disregarded. Establishing the truth about children also means specifically that certain children's needs are taken into consideration while others are disregarded.

Chapters 1, 3, and 5, argue that the category 'child' is neither 'normal' nor 'natural', but instead always moral and political.¹³⁴ As such, while the CRC claims to merely represent the universal childhood, the CRC instead produces that which the CRC has labelled the 'true' childhood. Vulnerability and dependency are made 'real' through the CRC. The CRC's exercise of

¹³² LEE EDELMAN, *NO FUTURE: QUEER THEORY AND THE DEATH DRIVE*, (2005). Edelman discusses this idea of controlling the present through a view to the future, specifically with the 'child' as the central figure.

¹³³ JUDITH BUTLER, *GENDER TROUBLE*, viii-ix (1990). Original emphasis.

¹³⁴ CHRIS JENKS, *CHILDHOOD* (2005).

disciplinary and juridical power ultimately produces that which it claims to merely represent.¹³⁵ The CRC not only produces the subject, but further conceals its productive nature to legitimate the law's own regulatory hegemony.¹³⁶ Hence, 'the universal child' did not create or cause the CRC: its institutions, discourses, or practices. The CRC creates or causes the child by determining the characteristics that a particular subject should (and should not).¹³⁷ Simply put, the subject is an effect of institutions, discourses, or practices, not the cause. The docile body is achieved through the production and enforcement of the normative child. The so-called 'rights of the child' represents the effects of particular power relations. The production of the 'child' is based on chronological age, the maker of differentiation that is imbued with distinctive qualities of capacity and maturity that then allows the structural production of the categories 'adult' and 'child' and legal-social categories. In the domains of political and linguistic representation, the qualifications for being a certain subject must first be met before representation can be extended. To qualify for the rights under the CRC, the child must be 1) developing and 2) in 'care'. Corporal punishment, 'care', and mandatory education become techniques of both juridical and disciplinary power. Can these 'truths' be contradicted and should they be? If these foundational *Truths*, upon which the CRC rests, are contradicted as merely claims-to-truth, how does the CRC justify the bundle of rights allocated to those nominated a 'child'? This thesis argues that the 'claims-to-truth', upon which the CRC depends, require questioning, particularly given the fundamental nature of so-called human rights. The question that remains is how to desolidify these 'truths' found in the CRC.

Foucault and Butler both utilise the technique of genealogy, which investigates local, discontinuous, disqualified, illegitimate knowledges against the claims of a universal 'truth'.¹³⁸ The technique of genealogy is based on the desire to escape from the pervasive features of orthodox history, such as assumptions of linearity, teleology, evolution.¹³⁹ Simply put, the aim is to disturb the obviousness of presently 'understood' knowledges.¹⁴⁰ Foucault described his method as an effort 'to question over and over again what is postulated as self-evident, to disturb people's mental habits'.¹⁴¹ The second important element to the use of genealogy is to desolidify

¹³⁵ SARA SALIH, JUDITH BUTLER, 10 (2002).

¹³⁶ JUDITH BUTLER, GENDER TROUBLE, 5 (1990).

¹³⁷ SARA SALIH, JUDITH BUTLER, 10 (2002).

¹³⁸ BEN GOULDER and PETER FITZPATRICK, FOUCAULT'S LAW, 32 (2009); JUDITH BUTLER, GENDER TROUBLE, 44 (1990).

¹³⁹ BARRY SMART, FOUCAULT, MARXISM, AND CRITIQUE, 75 (1983).

¹⁴⁰ MICHEL FOUCAULT, QUESTIONS OF METHOD: AN INTERVIEW WITH MICHEL FOUCAULT, IDEOLOGY AND CONSCIOUSNESS, 6 (1981): 'it wasn't as a matter of course that mad people came to be regarded as mentally ill; it wasn't self-evident that the only thing to be done with a criminal was to lock him up; it wasn't self-evident that the causes of illness were to be sought through the individual examination of bodies'.

¹⁴¹ MICHEL FOUCAULT, POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 1977-1984, 265 (Alan Sheridan trans, Laurance Kritzman ed., 1988).

or deconstruct an identity by enquiring how in this case, the child, has become so widely accepted as an ontological given.¹⁴² Believing that certain political stakes are served in the construction of identity, one must consider what configuration of power constructs exist, and therefore what forms of power restrain and regulate the subject. Chapter 9 furthers this investigation.

¹⁴² JUDITH BUTLER, *GENDER TROUBLE*, 3-4 (1990).

CHAPTER 9

A GENEALOGY OF THE CRC

OUTLINE

- I. LESSONS LEARNED FROM CRITIQUES OF THE CRC AS EXCLUDING THE NON-WESTERN CHILD

- II. NORTH-SOUTH-EAST-WEST: THE EXPULSION OF CERTAIN CHILDHOODS FROM THE CRC
 - a. Child as Head of the Household: The Fictitious Responsible Parent – Irresponsible Child
 - i. Parents with Substance Abuse Problems
 - ii. Parents with HIV/AIDS
 - iii. Street Children
 - b. Girl-Child: Gender-Neutrality and The CRC's Performance of the Family & Culture as Happy and Safe
 - i. Debating the Efficacy of the CRC's Gender-Neutral Language
 - ii. Does the CRC Adequately Protect the Girl-Child from Inter-Family/Inter-Cultural Discrimination
 - iii. Application to the Developed World Girl-Child

- III. CONCLUSION

The CRC's performance of childhood is exclusionary.¹ The CRC embraces a particular version of childhood and in doing so stigmatises childhoods that do not live up to the CRC's normative framework, while also ignoring certain problems of the childhoods that do. Elsbeth Robson maintains that,

while acknowledging that conceptualising childhood is problematic, there needs to be less emphasis on northern myths of childhood as a time of play and innocence and more attention on defending children's rights to work as well as to be supported in their work under appropriate circumstances.²

Ennew contends that,

[t]he [CRC] was drafted with a particular type of childhood in mind, and treats children outside this model as marginal. The means that children's right as a concept within the human rights field does not fully engage with the whole range of human beings who are defined as children. A number of articles target children – such as street children – for particular attention, with respect to child labour and sexual exploitation for example – but this in itself can be seen as a marginalising process. These and other articles may be ambiguous or contradictory in the face of the real experiences of these children.³

Olga Nieuwenhuys maintains that, 'perhaps the greatest injustice done to children is claiming ownership over what childhood is or ought to be'.⁴ These quotations hint at the ways in which the CRC's performance of childhood results in marginalisation. Chapter 6 and 7 discussed the norms of childhood in the CRC, and the current chapter endeavours to explore how a variety of childhoods are marginalised by the CRC's normative framework. Chapter 3 engaged the theoretical works of Foucault and Butler, arguing that 'objective truths' are impossible. Instead, Chapter 3 argued that there are dominant 'knowledges' cemented by modalities of governance. Methodologically, this chapter aims to engage in a (limited) genealogy of the CRC. The genealogical approach is useful as a means to question dominant 'knowledges', and the means by which they became dominant. The genealogical approach enables the challenging of so called 'objective facts'. As discussed in Chapter 3, Foucault and Butler both employ the technique of genealogy, which examines 'local, discontinuous, disqualified, illegitimate knowledges against the

¹ While it may be argued that some of the issues of exclusion would be resolved if one were to look to the CRC's Committee and how it has interpreted the text of the Convention. See for example Harris-Short, S. (2003) 'International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child' 25 HUMAN RIGHTS QUARTERLY 130. Nonetheless, the thesis primarily considers the construction of the child in the text of the CRC. Steering clear of the soft-law versus hard-law debate, given the importance place on the text of the CRC, the thesis limits its focus primarily to the text of the Convention.

² Elsbeth Robson, *Hidden Child Workers: Young Carers in Zimbabwe*, 36(2) ANTIPODE 227, 227 (2004).

³ Judith Ennew, *Outside Childhood: Street Children's Rights*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE, 213 (Bob Franklin ed., 1995).

⁴ Olga Nieuwenhuys, *Editorial: Is There an Indian Childhood*, 16 CHILDHOOD 147, 151 (2009).

claims of a universal 'truth'.⁵ Simply put, the aim of a genealogy is to disturb the obviousness of presently 'understood' knowledges.⁶ Foucault described his method as an effort 'to question over and over again what is postulated as self-evident, to disturb people's mental habits.'⁷ This chapter seeks to question 'over and over again' the CRC's self-evident, essential, and universal child, as 'developing' and thus in need of 'care'. Believing that certain political interests are served in the construction of identity, this chapter then considers what configuration of power constructs exists, and what forms of power restrain and regulate the subject.

This chapter furthers the argument that the Convention protects the child and her/his rights only to the extent that those rights and that protection do not rupture the adult-child binary, and thus do not undermine the hierarchy of power described in Chapter 7, where adults are positioned over the child. By calling into question the 'essence' of the identity 'child' put forth as 'truth' thorough a genealogy, one is able to investigate the powers that are served in a particular 'truth'. Part I explores literature that critiques the CRC as being exclusionary of children in the global south. Importantly, Part I argues that those same critiques can be deployed and are just as applicable to the both 'western' and 'non-western' world. Part II focuses on two excluded childhoods: 1) the child as head of the household, and 2) the girl-child. Through examination of the child who is head of the household, Part II(a) agitates the 'truth' that children are irresponsible and adults are responsible. Part II(b) critically examines the family and one's culture as a 'happy' and 'safe' environment by examining the ways in which the girl-child is excluded from (or put below the priorities of family and culture in) the Convention. As a whole, this chapter argues that in universalising the child and thus sustaining certain power relations in the construction of this fictitious category 'child', the CRC expels certain childhoods from the international human rights discourse.

I. LESSONS LEARNED FROM CRITIQUES OF THE CRC AS EXCLUDING THE NON-WESTERN CHILD

The critique that the CRC is in essence 'western' can be distilled into two main arguments. First, some have argued that the notion of rights, including children's rights, is based upon western notions of 'liberty'.⁸ While this viewpoint has been critiqued as un-nuanced and over reliant on

⁵ BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 32 (2009).

⁶ BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 119 (2009).

⁷ MICHEL FOUCAULT, *POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 1977-1984*, 265 (Alan Sheridan trans, Laurance Kritzman ed., 1988).

⁸ See for example Maria Grahn-Farley, *Neutral Law and Eurocentric Lawmaking: A Postcolonial Analysis of the U.N. Convention on the Rights of the Child*, 34 *BROOKLYN JOURNAL OF INTERNATIONAL LAW* 1 (2008).

the western – non-western binaries,⁹ this chapter does not focus on the issue of rights as ‘western’.¹⁰ This section will instead focus on a second argument: the CRC’s conception of or vision for childhood is western. Numerous academics have critiqued the CRC’s universalisation of the category ‘child’ on the basis that the CRC’s ‘universal’ child is a western conception of childhood.¹¹ Ennew has argued that ‘in the drafting process, the resulting text and in its implementation, [the CRC] takes as its starting point Western modern childhood, which has been

⁹ See for example John Tobin, *Increasingly Seen and Heard: the Constitutional Recognition of Children’s Rights*, 21 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 86 (2005); John Tobin, *Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation*, 23 HARVARD HUMAN RIGHTS JOURNAL 1 (2010)

¹⁰ See for example John Tobin, *Increasingly Seen and Heard: the Constitutional Recognition of Children’s Rights*, 21 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 86, 92-93 (2005). Tobin notes that ‘despite its alleged western bias, it still remains the most ratified international human rights treaty. Moreover the African Charter on the Rights and Welfare of the Child 1990, while recognising the duties as well as the rights of a child, largely mirrors, and in some cases extends the rights under the Convention. . . . The point to be made, therefore, is that the recognition of children as rights bearers is not itself a concept that is either foreign to or necessarily inappropriate for developing or transitional states. It therefore remains an issue but not an insurmountable obstacle to the transformation of international standards into national constitutions’.

¹¹ For examples of academics who critique the CRC for being exclusionary see generally Erica Burman, *Local, Global or Globalised? Child Development and International Child Rights Legislation* 3 CHILDHOOD 45, 45-66 (1992); Olga Nieuwenhuys, *Editorial: Is There an Indian Childhood*, 16 CHILDHOOD 147, 147-153 (2009); Vanessa Pupavac, *Misanthropy Without Borders: The International Children’s Rights Regime*, 25(2) DISASTERS 95, 95-112 (2001); Annette Ruth Appell, *Child-Centred Jurisprudence and Feminist Jurisprudence: Exploring the Connections and Tensions*, 46 HOUSTON LAW REVIEW 703, 703 (2009) (speaking about how childhood in the United States is based on a Western conception of childhood, and arguing that the CRC largely matches such a conception); Sonia Harris-Short, *International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child*, 25 HUMAN RIGHTS QUARTERLY 130, 130 (2003) (based on an empirical student of the discussion of the Committee on the Rights of the Child, argues that the Convention is still subject to cultural imperialism); John Tobin, *Increasingly Seen and Heard: the Constitutional Recognition of Children’s Rights*, 21 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 86, 86 (2005) (discussing the ways that the CRC and the children’s rights paradigm is in some ways western, but in other ways not); Sonia Harris-Short, *Listening to “the Other”: The Convention on the Rights of the Child*, 2 MELBOURNE INTERNATIONAL LAW JOURNAL 304, 334 (2001) (argues that the Committee has “with only very limited exceptions, presented non-Western cultural values and practices in an entirely negative light”); Paolo G. Carozza, *From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights*, 25(2) HUMAN RIGHTS QUARTERLY 281, 311 (2003); PHILIP ALSTON, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, in THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS (1994); Judith Ennew, *Outside Childhood: Street Children’s Rights*, in THE HANDBOOK OF CHILDREN’S RIGHTS: COMPARATIVE POLICY AND PRACTICE (Bob Franklin ed., 1995); John Tobin, *Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation*, 23 HARVARD HUMAN RIGHTS JOURNAL 1, 1-50 (2010) (discussing this issue in relation to both human rights generally and the CRC specifically); Michael Freeman, *The Future of Children’s Rights*, 14 CHILDREN & SOCIETY 277, 282 (2000); Jo Boyden, *Childhood and the Policymakers: A Comparative Perspective in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD*, 144 (Allison James and Alan Prout eds., 1997); Jo Boyden, *Children’s Experience of Conflict Related Emergencies: Some Implications for Relief Policy and Practice*, 18(3) DISASTERS 254, 265 (1994); Maria Grahn-Farley, *Neutral Law and Eurocentric Lawmaking: A Postcolonial Analysis of the U.N. Convention on the Rights of the Child*, 34 BROOKLYN JOURNAL OF INTERNATIONAL LAW 1, 1 (2008) (“The colonial legacy of international law is not simply a matter of inclusion or exclusion. Nor is it only a matter of neutrality or non-neutrality. Even though the CRC was drafted, adopted, and ratified with the possibility of the inclusion and involvement of almost every country in the world, the colonial structure is still present, not in the substantive legal outcome, but in the legislative process itself.”); Frances E. Olsen, *Children’s Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child*, 6 INTERNATIONAL JOURNAL ON LAW AND THE FAMILY 192, 215 (1992) (“The concerns of post-modern feminism that bear most closely on the Convention on the Rights of the Child include the whole notion of a universal document to deal with all children, throughout the world; the concern that such an effort will almost inevitably result in a western oriented document that merely purports to be universal.”); REX STANTON ROGERS and WENDY STANTON ROGERS, *STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN*, 51 (1992); Michael Freeman, *The Sociology of Childhood and Children’s Rights*, 6(4) INTERNATIONAL JOURNAL OF CHILDREN’S RIGHTS 433, 433-444 (1998); Berry Mayall, *The Sociology of Childhood in Relation to Children’s Rights*, 8 INTERNATIONAL JOURNAL OF CHILDREN’S RIGHTS 243, 243-259 (2000); Jo Boyden, *Childhood and the Policy Makers: A Comparative Perspective on the Globalisation of Childhood*, in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD (Allison James and Alan Prout eds., 1997); CHRIS JENKS, *CHILDHOOD* (2005); Norma Fields, *The Child as Labourer and Consumer: The Disappearance of Childhood in Contemporary Japan*, in CHILDREN AND THE POLITICS OF CULTURE (Sharon Stephens ed., 1995); MARTIN WOODHEAD, *Psychology and the Cultural Construction of “Children’s Needs”*, in GROWING UP IN A CHANGING SOCIETY, 37 (1990).

'globalised' first through colonialism and then through imperialism of international aid'.¹² One of the fundamental assumptions made in the CRC is that childhood is a universal state of development.¹³ As such the CRC assumes that there is a model of childhood that is universally applicable, that there are universal needs, and that there is consensus both domestically and internationally on how to realise those needs.¹⁴ Pupavac argues that the CRC assumes that there is a model of childhood development that is universally applicable.¹⁵ Chapter 6 supported this assertion by exploring the ways in which the dominant 'knowledge' of the 'child-as-developing' is foundational to the CRC construction of childhood. Further, Chapter 7 discussed that the 'truth' of children as developing rationalises the developing child's dependency on adults.¹⁶ As discussed in both Chapters 6 and 7, by constructing the child as immature the CRC enables two further constructions: 1) the child-as-developing, and 2) the child is in need of (adult) 'care'.

First, As discussed in Chapters 5 and 6, it has been argued that childhood studies (and its recognition of childhood as a social construct) in the west has been hindered by the formidable power of disciplinary strongholds, in particular developmental psychology, that monopolise and solidify their 'irrefutable truths' about childhood by presenting them as natural 'facts'.¹⁷ Mayall has argued that 'the child development industry has cornered the market in knowledge about children'.¹⁸ As argued in Chapters 4 and 6, the CRC does not recognise the category 'child' as a social construct. Instead, the CRC universalises the 'child-as-developing'. As such, the CRC further naturalises the western conception of childhood as a period of development, by institutionalising this particular and western version of childhood in an international human rights convention.¹⁹ As discussed in Chapter 3, the law, here the CRC, facilitates the operation

¹² Judith Ennew, *Outside Childhood: Street Children's Rights*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE, 202 (Bob Franklin ed., 1995).

¹³ Ashleigh Barnes, *The CRC's Performance of the Child as Developing*, 14 CURRENT LEGAL ISSUES 392 (2012); Erica Burman, *Local, Global or Globalised? Child Development and International Child Rights Legislation* 3 CHILDHOOD 45 (1992); Sharon Stephens ed., CHILDREN AND THE POLITICS OF CULTURE (1995); MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in GROWING UP IN A CHANGING SOCIETY (1990).

¹⁴ See also Jo Boyden, *Childhood and the Policymakers: A Comparative Perspective in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD* (Allison James and Alan Prout eds., 1997); Vanessa Pupavac, *Misanthropy Without Borders: The International Children's Rights Regime*, 25(2) DISASTERS 95, 101 (2001).

¹⁵ Vanessa Pupavac, *Misanthropy Without Borders: The International Children's Rights Regime*, 25(2) DISASTERS 95, 101 (2001); CHRIS JENKS, CHILDHOOD, 39 (2005). See also Chapter 5, which argued that the CRC a highly persuasive knowledge manufacturer, legitimating a particular set of discourses on the child. The CRC produces and legitimates its performance of childhood as fundamental, invariable truth about the category child. The CRC's claim to 'truth' (child-as-developing) masquerades as a description of 'how things are', rather than a production/prescription of 'how things must be'.

¹⁶ See also CHRIS JENKS, CHILDHOOD, 48 (2005).

¹⁷ Olga Nieuwenhuys, *Editorial: Is There an Indian Childhood*, 16 CHILDHOOD 147, 151 (2009).

¹⁸ Berry Mayall, *The Sociology of Childhood in Relation to Children's Rights*, 8 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 243 (2000).

¹⁹ Erica Burman, *Local, Global or Globalised? Child Development and International Child Rights Legislation* 3 CHILDHOOD 45, 49 (1992); Jo Boyden, *Childhood and the Policymakers: A Comparative Perspective in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD* (Allison James and Alan

of knowledges, in other words, childhood development, enabling the further deployment of 'truth' of childhood as a period of development and thus a period of unique dependency.²⁰ Burman argues that the naturalisation of particular norms occurs through treating 'expertise' (what has been referred to here as 'knowledges'), such a developmental psychology, as culturally neutral (what has been referred to here as objective or apolitical). Burman contends that international policy (grounded in development psychology), which informs rights of the child discourse, is in fact highly political. The move from the naturalisation of childhood as a state of development (the dominant expertise or knowledge about childhood) to the globalisation of that development follows almost imperceptibly.²¹ Notably, the 'child-as-developing' was made the universal norm for childhood in the CRC; yet there was no discussion of this concept anywhere in the negotiations that led to the CRC.²² Quite possibly, childhood, as a period of development, was too obvious a 'truth' to necessitate discussion.

Second, in constructing the child as immature and 'developing',²³ the CRC largely envisions the child as lacking capacity/agency. Nieuwenhuys argues that despite decades of childhood studies noting that children are neither merely objects nor victims, dominant western disciplines have effectively ignored the idea that children may also be active agents.²⁴ The CRC envisions the child as primarily an object/victim.²⁵ Chapter 6 explored the ways in which the child is made dependant on adults and the family for the realisation of certain rights, as the immaturity of childhood at the very least dictates guidance from adults in the exercise of the child's right, and at most requires total relinquishment of certain rights. Chapter 4 examined the instances where the CRC privileged the protection of child, not through empowering children but rather by making the child an object of 'care' (in other words, empowering an adult to act on their behalf). For example, the Preamble's definition of childhood as a time for 'happiness, love and

Prout eds., 1997); Vanessa Pupavac, *Misanthropy Without Borders: The International Children's Rights Regime*, 25(2) DISASTERS 95, 101 (2001).

²⁰ BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 27-28 (2009). The authors go to great length to argue, in response to Hunt and Wickham that the law, according to Foucault, actually does not recede into unimportance in modernity.

²¹ Erica Burman, *Local, Global or Globalised? Child Development and International Child Rights Legislation* 3 CHILDHOOD 45, 49 (1992).

²² See generally SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES' (1992).

²³ See Chapters 4, 5, 6 and 7 for further discussion. The Preamble 'bears in mind . . . the child, by reason of his [or her] physical and mental immaturity, needs special safeguards and care'.

²⁴ Olga Nieuwenhuys, *Editorial: Is There an Indian Childhood*, 16 CHILDHOOD 147, 152 (2009). In her final sentence, Nieuwenhuys participates in perpetuating this victim-object mentality by stating, 'by opening our . . . own histories and cultures we can learn from India how to rescue our own children from modern childhood'. Her final words of the article paint a portrait of the (global south's) child as the princess locked in a tower waiting for (global south's) adults to take up the sword, jump on horseback and rescue their own child. This rendition of childhood is an all too similar song about the objective child, and is different only in so far as *which adult* should be rescuing this princess.

²⁵ See for example Article 3 (best interests), Article 5 (respect for parents' responsibilities), and Article 19 (protection against abuse)

understanding' arguably imagines children free from work.²⁶ As discussed in Chapter 6, the child's right to rest, leisure and play also invokes a picture of a care-free existence, and limited labour. In aiming to limit and regulate child labour, the CRC stigmatises certain societies that depend on the child's economic contribution to the family.²⁷

As discussed in Chapter 7, in addition to mandating children's dependency on adults, the CRC implies a certain normative arrangement for how that dependency should take place. The CRC implies that biologically-based relations between parents and children 'are more fundamental and natural than other sorts of family or community relations'.²⁸ Again the CRC stigmatises societies where such arrangements are not the norm. As discussed in Chapter 5, certain authors have argued that the CRC constructs childhood through binaries, characterising children who are alternatively: 1) undesirable, who must be addressed/rectified or 2) desirable and thus ignored.²⁹ This binary was discussed in Chapter 5 in terms of the good/'Apollonian' child versus the bad/'Dionysian' child. To rectify the undesirable childhood, disciplines compete for intervention, staking claims that their discipline (developmental psychology, labour studies, medicine, law, and so on) has the only good solution.³⁰ Nieuwenhuys argues that this process marginalises and stigmatises the everyday life of a vast majority of children.³¹ Pupavac argues that societies in the global south are 'cast as child abusers because their children's experiences violate the image of childhood held in the West'.³² It is argued that the result has been the empowerment of 'external (Western) governmental and non-governmental actors driven by a morality of conviction to act as moral agents on behalf of children in the non-Western world'.³³

These critiques of the CRC's universalist approach (in other words, the CRC's universal category 'child') hinge on the argument that the CRC has extremely limited applicability in the global south. It seems that while the CRC's version of the category 'child' as developing and thus in

²⁶ Vanessa Pupavac, *Misanthropy Without Borders: The International Children's Rights Regime*, 25(2) *DISASTERS* 95, 102 (2001); Norma Fields, *The Child as Labourer and Consumer: The Disappearance of Childhood in Contemporary Japan*, in *CHILDREN AND THE POLITICS OF CULTURE* (Sharon Stephens ed., 1995); MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in *GROWING UP IN A CHANGING SOCIETY* (1990).

²⁷ Berry Mayall, *The Sociology of Childhood in Relation to Children's Rights*, 8 *INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS* 243, 245 (2000); MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in *GROWING UP IN A CHANGING SOCIETY* (1990).

²⁸ Berry Mayall, *The Sociology of Childhood in Relation to Children's Rights*, 8 *INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS* 243, 245 (2000).

²⁹ Olga Nieuwenhuys, *Editorial: Is There an Indian Childhood*, 16 *CHILDHOOD* 147, 147-148, 151 (2009).

³⁰ Olga Nieuwenhuys, *Editorial: Is There an Indian Childhood*, 16 *CHILDHOOD* 147, 147, 151 (2009).

³¹ Olga Nieuwenhuys, *Editorial: Is There an Indian Childhood*, 16 *CHILDHOOD* 147, 148 (2009).

³² Vanessa Pupavac, *Misanthropy Without Borders: The International Children's Rights Regime*, 25(2) *DISASTERS* 95, 102 (2001).

³³ Erica Burman, *Intocents Abroad: Western Fantasies of Childhood and the Iconography of Emergencies*, 18(3) *DISASTERS* 241 (1994); Vanessa Pupavac, *Misanthropy Without Borders: The International Children's Rights Regime*, 25(2) *DISASTERS* 95, 102 (2001).

need of 'care' is argued to have limited applicability to the global south, there appears consensus that the 'child' as developing (and the responsible/capable adult, responsible/capable state) is fully applicable to the west, as critique of the exclusionary effect of the Convention seems to focus on the non-western world.³⁴ It is unfortunate that there appears to be little critical engagement regarding the ways in which the vision of the category 'child' in the CRC is exclusionary, even in the west. The idea that the CRC's western version of childhood is just as inapplicable to the children living in the west would seem to strengthen the arguments of those critiquing the CRC's inapplicability to the global south. This chapter argues that the contention that certain childhoods and therefore certain children (and certain adults) are stigmatised by the CRC applies equally to the developed world. Nieuwenhuys' deployment of binaries, the 'undesirable/desirable' childhood proves useful in making the same critiques of the western world. Indeed this argument was previewed in Chapter 4 when speaking about the Dionysian

³⁴ For authors who critique the CRC as being western see Erica Burman, *Local, Global or Globalised? Child Development and International Child Rights Legislation* 3 CHILDHOOD 45, 45-66 (1992); Olga Nieuwenhuys, *Editorial: Is There an Indian Childhood*, 16 CHILDHOOD 147, 147-153 (2009); Vanessa Pupavac, *Misanthropy Without Borders: The International Children's Rights Regime*, 25(2) DISASTERS 95, 95-112 (2001); Annette Ruth Appell, *Child-Centred Jurisprudence and Feminist Jurisprudence: Exploring the Connections and Tensions*, 46 HOUSTON LAW REVIEW 703, 703 (2009) (speaking about how childhood in the United States is based on a Western conception of childhood, and arguing that the CRC largely matches such a conception); Sonia Harris-Short, *International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child*, 25 HUMAN RIGHTS QUARTERLY 130, 130 (2003) (based on an empirical student of the discussion of the Committee on the Rights of the Child, arguing that the Convention is still subject to cultural imperialism); John Tobin, *Increasingly Seen and Heard: the Constitutional Recognition of Children's Rights*, 21 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 86, 86 (2005) (discussing the ways that the CRC and the children's rights paradigm is in some ways western, but in other ways not); Sonia Harris-Short, *Listening to "the Other": The Convention on the Rights of the Child*, 2 MELBOURNE INTERNATIONAL LAW JOURNAL 304, 334 (2001) (argues that the Committee has 'with only very limited exceptions, presented non-Western cultural values and practices in an entirely negative light'); Paolo G. Carozza, *From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights*, 25(2) HUMAN RIGHTS QUARTERLY 281, 311 (2003); PHILIP ALSTON, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, in THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS (1994); Judith Ennew, *Outside Childhood: Street Children's Rights*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE (Bob Franklin ed., 1995); John Tobin, *Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation*, 23 HARVARD HUMAN RIGHTS JOURNAL 1, 1-50 (2010) (discussing this issue in relation to both human rights generally and the CRC specifically); Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277, 282 (2000); Jo Boyden, *Childhood and the Policymakers: A Comparative Perspective in Constructing and Reconstructing Childhood: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD*, 144 (Allison James and Alan Prout eds., 1997); Jo Boyden, *Children's Experience of Conflict Related Emergencies: Some Implications for Relief Policy and Practice*, 18(3) DISASTERS 254, 265 (1994); Maria Grahn-Farley, *Neutral Law and Eurocentric Lawmaking: A Postcolonial Analysis of the U.N. Convention on the Rights of the Child*, 34 BROOKLYN JOURNAL OF INTERNATIONAL LAW 1, 1 (2008) ('The colonial legacy of international law is not simply a matter of inclusion or exclusion. Nor is it only a matter of neutrality or non-neutrality. Even though the CRC was drafted, adopted, and ratified with the possibility of the inclusion and involvement of almost every country in the world, the colonial structure is still present, not in the substantive legal outcome, but in the legislative process itself.'). Frances E. Olsen, *Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child*, 6 INTERNATIONAL JOURNAL ON LAW AND THE FAMILY 192, 215 (1992) ('The concerns of post-modern feminism that bear most closely on the Convention on the Rights of the Child include the whole notion of a universal document to deal with all children, throughout the world; the concern that such an effort will almost inevitably result in a western oriented document that merely purports to be universal'); REX STANTON ROGERS and WENDY STANTON ROGERS, *STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN*, 51 (1992); Michael Freeman, *The Sociology of Childhood and Children's Rights*, 6(4) INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 433, 433-444 (1998); Berry Mayall, *The Sociology of Childhood in Relation to Children's Rights*, 8 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 243, 243-259 (2000); Jo Boyden, *Childhood and the Policy-Makers: A Comparative Perspective on the Globalisation of Childhood, in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD* (Allison James and Alan Prout eds., 1997); CHRIS JENKS, *CHILDHOOD* (2005); Norma Fields, *The Child as Labourer and Consumer: The Disappearance of Childhood in Contemporary Japan*, in CHILDREN AND THE POLITICS OF CULTURE (Sharon Stephens ed., 1995); MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in GROWING UP IN A CHANGING SOCIETY, 37 (1990).

and Apollonian child. This binary is, as argued in Chapter 4, found throughout the Convention, and results in certain children and parents being labelled undesirable and thus in need of intervention, and others desirable and thus not in need of intervention, as discussed below in Section II.

This paper stipulates that the 'universal child' is not merely exported from the west to the global south. The CRC's 'universal child' is 'exported' or 're-imported' as a 'colonising force' even *within* the west.³⁵ This chapter contends that the CRC's universal child is exclusionary and therefore inapplicable not just to the global south, but also to the west. By stating that these critiques are equally useful when examining the west, this chapter does not simply mean that the child envisioned by the CRC is also forced upon lower socio-economic groups or other racial, ethnic, and religious minorities. Rather, this chapter intends to describe the vision of the child as developing and in need of 'care', the child as only an object or victim, the child as only good or bad, and the adult as capable and willing to be responsible, and the state as capable and willing to be responsible if the adult is not is exclusionary, even within the west world and even within majority cultures. There is no doubt that certain children and adults in the west are unable to live up to the normative childhood described in the Convention. The ways in which certain children in the west are excluded, stigmatised, or silenced is an area that, while surveyed in some domestic academic work, has been seemingly unexplored in the context of international children's rights. As specific examples of childhoods excluded by the CRC, Section II(a) explores instances within both the west and developing world where the child as irresponsible/adult as responsible is inapplicable. Section II(b) explores instances within both the developing and developed world where the family is indeed unhappy and unsafe.

³⁵ It is also notable that the only functioning state that has not ratified the CRC is from the west, the United States. Many who support the United States' position argue that the CRC does not reflect American notions about childhood, which allows for greater parental authority. See John Tobin, *Increasingly Seen and Heard: the Constitutional Recognition of Children's Rights*, 21 SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 86, 93 (2005), who cites Susan Kilbourne, *The Wayward Americans - Why the USA has Not Ratified the UN Convention on the Rights of the Child*, 3 CHILD & FAMILY LAW QUARTERLY 243, 243 (1998) (notes that that Convention has been variously characterized as 'the ultimate program to annihilate parental authority', 'a tool for perverts' and a 'malignant vampire'); Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARVARD INTERNATIONAL LAW JOURNAL 449, 465 (1996); See generally Joseph Goldstein, *Medical Care for the Child at Risk: On Supervisor of Parental Autonomy*, 86 YALE LAW REVIEW 645, 645 (1977); Jeffrey Blustein, *Children Rearing and Family Interests*, in HAVING CHILDREN: PHILOSOPHICAL & LEGAL REFLECTIONS ON PARENTHOOD 115, 121 (O'Neill, O. and Ruddick, W. eds. 1979); Michelle Z. Hall, M., *Convention on the Rights of the Child: has American Closed Its Eyes?* 17 NEW YORK LAW SCHOOL JOURNAL OF HUMAN RIGHTS 923, 923 (2000-2001); Barbara J. Nauck, *Implications of the United States Ratification of the United Nations Convention on the Rights of the Child: Civil Rights, the Constitution and the Family*, 42 CLEVELAND STATE LAW REVIEW, 702 (1994); Kevin Mark Smith, *The United Nations Convention on the Rights of the Child: The Sacrifice of American children on the Altar of Third-World Activism*, 38 WASHINGTON LAW JOURNAL 111, 111 (1998-1999); David P. Stewart, D., *Ratification of the Convention on the Rights of the Child*, 5 GEORGETOWN JOURNAL ON FIGHTING POVERTY 161, 161 (1997-1998); Richard G. Wilkins et al., *Why the United States Should not Ratify the Convention on the Rights of the Child*, 22 SAINT LOUIS UNIVERSITY PUBLIC LAW REVIEW 411 (2003); Lynn D. Wardle, *Essay: The Use and Abuse of Rights Rhetoric: The Constitutional Rights of child*, 27 LOYOLA UNIVERSITY CHICAGO LAW JOURNAL 321, 321 (1996).

II. NORTH-SOUTH-EAST-WEST: THE EXPULSION OF CERTAIN CHILDHOODS FROM THE INTERNATIONAL DISCOURSE ON CHILDREN'S RIGHTS

As discussed in Chapter 3, identity categories are fictional, drawn to fit powerful political ideologies.³⁶ As such, identities categories are exclusive.³⁷ Burman argues that the discourse of rights necessarily invokes general claims.³⁸ For Burman, the discourse of rights functions as an appeal to general entitlements, 'the generality of which is used to strengthen demands for [the particular rights] application in a specific situation'.³⁹ Burman questions how these general statements (in other words, this discourse of rights) are applicable to children in particular contexts. This chapter contends that the CRC, in universalising the child, will be inapplicable to children who do not or cannot live up to the CRC's normative identity 'child' (in other words, developing and 'in care'). By embracing a particular version of childhood as normative, the CRC expels incompatible versions of childhood (for example, street children), which are in turn pathologised and stigmatised. Non-normative versions of childhood, according to the Convention, require intervention; these children must be rescued. On the other hand, childhoods deemed normative (for example, children who are 'in care' of a family) are deemed relatively unproblematic, with the result that problems faced by these children are often ignored. As such, the description of 'inapplicable' childhoods intends to convey an evaluation of the CRC as unhelpful in combating certain types of vulnerability not addressed in the CRC, a critique this section will explore.

This chapter surveys numerous authors who have commented on various children they argue to be problematised or ignored by the CRC's vision of the child: the street child, the girl child, the 'knowing' child (in the context of criminal law), the 'sexual' subject-child (versus the asexual child), the care-taker, the non-Western child, and (to some extent) the child soldier. With such a list, one is tempted to conclude that the CRC's normative childhood applies to very few 'children' indeed. Burman rightfully questions whether the CRC's general statements can even be made about children and whether childhood is generalisable, all highly charged questions.⁴⁰

³⁶ JUDITH BUTLER, *GENDER TROUBLE*, 5 (1990).

³⁷ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted *THE JUDITH BUTLER READER*, 355 (Sara Salih ed., 2004); BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 11 (2009).

³⁸ Erica Burman, *Local, Global or Globalised? Child Development and International Child Rights Legislation* 3 CHILDHOOD 45 (1992).

³⁹ Erica Burman, *Local, Global or Globalised? Child Development and International Child Rights Legislation* 3 CHILDHOOD 45 (1992).

⁴⁰ Erica Burman, *Local, Global or Globalised? Child Development and International Child Rights Legislation* 3 CHILDHOOD 45 (1992).

Indeed, questioning the usefulness of the rights found in the CRC and questioning the CRC's version of childhood is (not so) oddly met with strong resistance. Burman points out that,

[a]ll too often professionals, activists, and policy-makers get so caught up in the pain, distress and needs they work with that the answers to these questions are either assumed or dismissed as irrelevant to practice, as academic luxuries for sociologists and philosophers to muse upon.⁴¹

Certainly, the question of 'what is a child' is continually dismissed as either an academic luxury or, as Jenks argues, a question already adequately answered.⁴² As discussed in Chapter 3, Butler's concern with the 'rush to decision-ism and to strong normativity',⁴³ which fails to consider what is meant by some of the very basic terms it assumes, is applicable to the CRC's category 'child'.⁴⁴ Ironically, the ten year drafting period for the CRC was indeed no rush. Nonetheless, the discussions that led up to the CRC failed to engage in this type of questioning. This questioning of the 'child' behind the CRC's rights discourse is indeed 'painful', as doing so puts into question not only the CRC's acceptance of 'developing child' but also entrenched (adult, cultural, and state centric) lines of power. This thesis argues that the deconstruction of the identity 'child' in the Convention would mean the deconstruction (or at least reconsideration) of the required dependency of childhood, and thus the current roles of parents and state as having responsibility/control over the child. By privileging the family, the state and even culture, the CRC often makes an explicit choice to underline (as opposed to undermine) the unique forms of vulnerability proscribed to childhood. By casting the parent as responsible and the family, culture, and traditions as happy and safe, the CRC fails to be helpful and applicable to the many of those who the CRC categorises as a 'child'.

a. Child as Head of the Household: The Fictitious Responsible Parent – Irresponsible Child

As discussed in Chapter 7, the CRC privileges the family, and therefore the family structure in a variety of ways. Chapter 7 also argued that the Convention defines the family as a child in 'care' of a responsible adult, thereby pathologising childhoods where the child is responsible for the parent, responsible for her or himself, and/or responsible for other children. The CRC does not

⁴¹ Erica Burman, *Local, Global or Globalised? Child Development and International Child Rights Legislation* 3 CHILDHOOD 45 (1992).

⁴² CHRIS JENKS, CHILDHOOD, 3 (2005).

⁴³ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted THE JUDITH BUTLER READER, 355 (Sara Salih ed., 2004).

⁴⁴ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted THE JUDITH BUTLER READER, 355 (Sara Salih ed., 2004).

contemplate these circumstances as 'appropriate' for childhood. As discussed in Chapter 7, according to Article 3, the child is envisioned as always in the 'care' of some adult, whether the parents or state. In this way, the Convention provides no support or protection for a childhood that 'lacks' a responsible adult, other than expelling it to the realm of illegality. Throughout the world, in both the west and global south, the independent child undoubtedly exists.⁴⁵ Note that this section will focus on parents who are incapable of being responsible for the child, and not those who are capable but unwilling. Even if this thesis were to assume all parents are willing, the percentage of children who live with parents who are not able to exercise responsibility for their children remains sufficiently high to be concerned about their exclusion from the Convention. One could argue that, at least in the west, the Convention does provide for children without a responsible parent as the Convention mandates states to intervene in such situations under Article 3, as states in the west have the resources to enable the state to provide for/be responsible for those children without parents. This response assumes a variety of factors: 1) that the state is willing to intervene, 2) that the situation in state care and/or state intervention would be 'better' than the child's current situation, and 3) that the child would rather be in state care. As to the first factor, indeterminacy reigns. Even if the state is willing to intervene, given the disagreement over the best interests of the child principle, that the child's opinion cannot dictate decisions regarding the child, and given the limited resources of every state, the issue of 'intervention' and when to intervene, the child is left vulnerable to decisions that differentially interpret the child's best interests.

Chapter 2 established that the extent to which one agrees with the idea that the child's wishes should dictate decisions made regarding the child and the child's care, will vary quite drastically depending on one's view of the 'true' image of the child and therefore one's view of what rights the child should have. If we are to question the 'fundamental' child, we must re-examine the idea that children cannot and/or should not have the definitive say in matters that relate to them, as is the case for all other humans. Even if one was to disagree (and the CRC certainly does) with the argument that the child should have a definitive say in matters that relate to him/her, one would be exceptionally hard pressed to controvert the idea that states and parents are

⁴⁵ Jenny Kitzinger, *Who Are You Kidding? Children, Power and the Struggle Against Sexual*, in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD, 162 (Allison James and Alan Prout eds., 1997); Tatek Abebe and Ashjorn Aase, *Children, AIDS, and the Politics of Orphan Care in Ethiopia: The Extended Family Revisited*, 64(10) SOCIAL SCIENCE & MEDICINE 2058 (2007); Elsbeth Robson, *Hidden Child Workers: Young Carers in Zimbabwe*, 36(2) ANTIPODE 227 (2004); Caroline Nicholson, *The Impact of Child Labour Legislation on Child-Headed Households in South Africa*, 30 THOMAS JEFFERSON LAW REVIEW 408 (2008); Kearney Backett-Milburn et al., *Challenging Childhoods: Young People's Accounts of "Getting By" in Families with Substance Use Problems*, 15 CHILDHOOD 461 (2008); Judith Ennew, *Outside Childhood: Street Children's Rights*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE (Bob Franklin ed., 1995).

unwilling or unable to provide the CRC's childhood to *all children*. Even if we were to cling to the CRC's ideal childhood, is it fair to require children to keep up their side of the (obligatory) contract found in the CRC (dependency), even when adults and the state do not hold up theirs (responsibility, provide a happy, understanding and safe environment)? The first obvious counterargument is that conventions such as the CRC are intended to be aspirational. Nonetheless, in our aspirational state, we too often fail to consider that some children will not and cannot have a responsible adult. While we might cling to this version of childhood, and perhaps deem it most appropriate for most children, failing to provide for those children that exist outside of adults aspirations (who are arguably most vulnerable, not because of their 'childness', but because of the social discrimination against children) seems to be a glaring inconsistency. Put another way, the child's state of dependency is not aspirational, but rather required. It is only adult (parent and/or state) responsibility that is aspirational.

A second counterargument is that the real issue for the CRC is enforcement; we must condemn states and parents who do not provide for their children in the ways envisioned in the CRC's ideal childhood, as required by Article 3. The response to this argument is a well-rehearsed one; states make conventions and international law. Conventions are politically negotiated, state-centric codes. They are created to lack enforcement mechanisms and are intended to be (most often) aspirational. This thesis favours pragmatic responses to both counterarguments; we cannot afford to pragmatically ignore excluded childhoods on the basis that international conventions are merely aspirational, nor can we ignore the pragmatic reality that international conventions are state-centric in nature, and may never facilitate enforcement in the way envisioned by positivist conceptions of law. Blending pragmatism and aspiration, this thesis contends that withholding criticism of the CRC's 'child' in the hope for better enforcement at some point in history comes at the expense of the category 'child' today. It is essential that we inquire into the implications of our aspirations, even (particularly) those that claim to seek to 'protect' the 'child'. Nor should we demand that children wait for our aspirations to be fulfilled, yet demand their dependency. For, the CRC's version of childhood (the child as in the care of firstly parents, and if not parents the state – all of which are responsible and caring) is not only impossible to obtain, but there is no commitment from states to universally obtain those conditions for *all children*. Article 4 (realisation to the maximum extent to their available resources) implies that at least *some* of the obligations under the Convention are currently impossible. Nonetheless, the CRC does not provide for those children where there are simply not enough responsible adults or state agencies to provide for and be responsible on behalf of

the child. Further, that states maybe be unwilling to provide for certain 'undesirable' children is yet another issue.⁴⁶ States are unwilling or unable to ensure this version of childhood (in other words, unwilling or unable to be responsible for all children within the state's jurisdiction). Parents are likewise unwilling or unable to ensure this version of childhood (in other words, not all parents are responsible for their children). Yet, according to the CRC's visions of childhood, *all children are required* to be dependent on adults, as was argued in Chapter 7. This section will explore three childhoods in which the CRC normative framework is inapplicable, three childhoods that are, as Foucault says – 'local, discontinuous, disqualified, [and] illegitimate . . . against the claims of a universal "truth"'.⁴⁷ These childhoods do not include responsible and capable adults, or children in a state of dependency, but children who are agents, not objects, exercising capacity for themselves and in caring for others, children who are excluded by the allocation of rights in the CRC.

i. Parents with Substance Abuse Problems

Beckett-Milburn notes that, as of 2003, over a million children in the United Kingdom (UK) lived with parents having either alcohol and/or drug use problems.⁴⁸ Based on her interviews with children aged fifteen years or older, Beckett-Milburn focused on how children 'get by' in such situations. While her research focuses on alcohol or drug misuse, one could imagine that her observations could have relevancy to situations where parents have emotional or psychological problems. Beckett-Milburn argues that the ways in which these children 'get by' not only demonstrates the agency of children, but also challenges the 'compulsive urge to refer to childhood as a unitary phenomenon', in other words, as lacking agency.⁴⁹ Agitating the other unitary phenomenon, that adults/parents are responsible, Beckett-Milburn discusses how a large majority of the children that she interviewed said that their substance-misusing parents had not always looked after their basic needs. Half of those interviewed described themselves as the

⁴⁶ See for example Kenneth Nunn, *The Child as Other: Racial Differential Treatment in the Juvenile Justice System*, 51 DEPAUL LAW REVIEW 679, 679-680 (2002). Nunn argues that 'insofar as African American boys and girls are concerned, it is somewhat inaccurate to speak of an "end of adolescence. . . . The concept of a group of young people who were entitled to special treatment because they were impetuous and immature was never extensive enough to include African American children.' Mason goes further to argue that children were divided into four classes: 'natural children, apprentices, illegitimate children, and slaves; each with a different status recognized by descending levels of protection and provisions rights which were enforced by colonial courts'. Mary Ann Mason, *The U.S. and the International Children's Rights Crusade: Leader or Laggard*, 38 JOURNAL OF SOCIAL HISTORY 955, 957 (2005).

⁴⁷ BEN GOULDER and PETER FITZPATRICK, FOUCAULT'S LAW, 32 (2009).

⁴⁸ Kearney Beckett-Milburn et al., *Challenging Childhoods: Young People's Accounts of "Getting By" in Families with Substance Use Problems*, 15 CHILDHOOD 461 (2008).

⁴⁹ Kearney Beckett-Milburn et al., *Challenging Childhoods: Young People's Accounts of "Getting By" in Families with Substance Use Problems*, 15 CHILDHOOD 461, 462 (2008).

active carers, looking after themselves, their parents, and/or siblings.⁵⁰ Other described their siblings as the carers. Contrary to the idea that children lack agency, children interviewed stated that they were in charge of the following tasks: 1) taking care of basic needs (cooking food, cleaning the home, washing dishes), 2) protecting themselves and/or siblings from danger (calling on neighbours or extended family), and 3) protecting the substance misusing parent (making sure parents did not harm themselves while high).⁵¹

Given the number of children who have parents with substance misuse problems in the UK alone, Backett-Milburn's research offers insight into a version of childhood and adulthood that is not contemplated in the Convention. For example, Article 3's best interests principle has as its basis the child as an object/victim, not an agent, as discussed extensively in Chapters 6 and 7. As such Article 3's implication of the 'best interest' of these children would be aimed at getting them into the care of a responsible adult or intervening in a way to assist the adult to resume the responsible parental role. One could argue that in a country like the UK, these children should become wards of the state or that the state should provide programs for rehabilitation for the parent. Obviously these arguments assume that rehabilitation is possible or discounts any possibility that these children would rather stay in their current arrangement, and assumes that state care is 'better'. One would have to define what 'better' means and one could imagine that the child and the state agent might have quite differing opinions.⁵² By way of further example of the Convention's inapplicability to these children, Article 24 (right to health) and Article 27 (right to adequate standard of living) mandate the state to assist the parent to realise these rights for children. Again, as discussed in Chapter 6, the provision of assistance to the child is not contemplated in the CRC. Assistance for children is to always be realised through adults. In instances as described by Backett-Milburn, the remedy would be, according to the Convention, removal from this home and to another that has a responsible adult or intervention into the home such as providing drug treatment services on the basis of neglect (according to Article 19), rather than empowering the child to be responsible.

Beyond the rights allocated to them in the CRC, these children might deem it more appropriate to be provided the following rights: 1) the right not to be labelled (with its ensuing

⁵⁰ Kearney Backett-Milburn et al., *Challenging Childhoods: Young People's Accounts of "Getting By" in Families with Substance Use Problems*, 15 CHILDHOOD 461, 467 (2008).

⁵¹ Kearney Backett-Milburn et al., *Challenging Childhoods: Young People's Accounts of "Getting By" in Families with Substance Use Problems*, 15 CHILDHOOD 461, 467(2008).

⁵² Robert Mnookin highlights, "deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself" in Robert Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW AND CONTEMPORARY PROBLEM, 260 (1975).

discriminatory and violent practices); 2) the right to work and to do so in fair conditions and for fair wages; 3) the right to have one's own support systems (which do not privileged the modern concept of family in which many children do not exist); 4) the right to appropriate and relevant services (which middle class adults do not necessarily know what is best); and 5) the right to be protected from harm inflicted by 'caring' social agencies.⁵³ Though potentially too obvious to state, Backett-Milburn is discussing a state in the west, where children find themselves without a responsible adult, but who do not have access to 'effective' state intervention. Further, there is no reason to assume that these circumstances would be different in other states in the west. Notably, no such discussion took place in the negotiations that took place in the led up to the CRC. Through Backett-Milburn's research we begin to see the relevance and importance of deconstructing the CRC's binary that assumes the adult to be responsible and the child to be irresponsible, even in the west.

ii. Parents with HIV/AIDS

Nicholson highlights the ways in which the HIV/AIDS epidemic impacts children with parents who are sick or have died from this disease.⁵⁴ Before discussing Nicholson's research regarding HIV/AIDS in South Africa,⁵⁵ it is important to note that although HIV/AIDS is a problem of particular relevance to portions of the global south, Nicholson's analysis is also relevant to children in the developed world. Additionally, her arguments are not just applicable to children whose parents have HIV/AIDS (in both the global south and the west), but also could be applicable to children with parents who have any chronic disease or psychological disorder. Nicholson argues that certain children in South Africa need to be allowed to work and that these children desperately need laws that protect them as labourers.⁵⁶ Nicholson contends that the South African government simply cannot administer a social welfare program that would adequately cover the basic needs of all of its children.⁵⁷ It could be further argued that even

⁵³ Judith Ennew, *Outside Childhood: Street Children's Rights*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE, 211-212 (Bob Franklin ed., 1995).

⁵⁴ While other international instruments deal specifically with the issues of child labour, such as the 1999 ILO Convention No. 182 on the worst forms of child labour and the 1973 ILO Convention No. 138 on the minimum age for admission to employment and work, this thesis focuses on the text of the CRC.

⁵⁵ For further reading of the problem of HIV/AIDS in other countries see for example Tatek Abebe and Asbjorn Aase, *Children, AIDS, and the Politics of Orphan Care in Ethiopia: The Extended Family Revisited*, 64(10) SOCIAL SCIENCE & MEDICINE 2058 (2007); Elsbeth Robson, *Hidden Child Workers: Young Carers in Zimbabwe*, 36(2) ANTIPODE 227 (2004); Caroline Nicholson, *The Impact of Child Labour Legislation on Child-Headed Households in South Africa*, 30 THOMAS JEFFERSON LAW REVIEW 408 (2008).

⁵⁶ Caroline Nicholson, *The Impact of Child Labour Legislation on Child-Headed Households in South Africa*, 30 THOMAS JEFFERSON LAW REVIEW 408 (2008). One wonders how Nicholson envisions the process for determining which child may work and which children may not, in such a way that considers the perpetuation of poverty through the lack of education.

⁵⁷ Caroline Nicholson, *The Impact of Child Labour Legislation on Child-Headed Households in South Africa*, 30 THOMAS JEFFERSON LAW REVIEW 408 (2008).

developed states, such as the United States, do not cover the basic needs of all of the children in its jurisdiction.⁵⁸ In this example, Nicholson describes a child that does not have a responsible adult or a responsible state, yet the child remains obligated to dependency and thus must look for extra-legal means to survive. This, according to Nicholson, results in the child either engaging in exploitative work (outside of the realms of regulation with no legal protections that legal workers would otherwise possess) or in criminal activity to support themselves and their families.⁵⁹ Nicholson describes these children as grossly underpaid and as working in exceptionally hazardous conditions, illegally and thus outside regulations that would otherwise protect them (equal pay, constraints on working conditions, and so on as discussed in Chapter 6).⁶⁰

Further, Nicholson argues that these children, often orphaned by HIV/AIDS, are further stigmatised by the infection status of their (deceased) parents, and presumed prone to criminal tendencies and violence.⁶¹ It seems that Article 2's non-discrimination principles do not apply to these children. One wonders how not only the stigma attached to HIV/AIDS, but also the stigma of being an 'independent' child (in other words, a parentless child) combine to create assumptions about the child's presumed criminal and violent tendencies. As discussed in Chapter 5, under a conception of the Dionysian child, the 'bad' child, when left alone (without adults), will be consumed by innate evil.⁶² More importantly, one wonders how the stigma of being an independent child translates to mean that this child does not receive the protections ('care' or 'special assistance') given to those who are not flaunting prescriptions of childhood (immaturity and dependency). In what ways are these independent children made into adults (for example, arrested), without the rights and 'responsibilities' of adulthood (for example, the right to counsel in Article 37)?⁶³ Nicholson argues that in the case of these children, the focus shifts from the problems of poverty to the 'solution' of legal criminal action. This stigmatisation

⁵⁸ As of 2010, 22% of all children in the US lived below the poverty line. Interestingly, of those in families 21% experience poverty; of those not in families, 49.8% experience poverty. 13.7% of adults between 18-64 years old experience poverty. Of those over 64 years of age, 9% experience poverty. See:

<http://www.census.gov/hhes/www/poverty/data/incpovhlth/2010/table4.pdf>. UNICEF, in its Measuring Child Poverty Report, notes that in the 35 richest states, 30 million children live in poverty. The United States ranks second, after Romania.

UNICEF, MEASURING CHILD POVERTY NEW LEAGUE TABLES OF CHILD POVERTY IN THE WORLD'S RICH COUNTRIES (2012).

⁵⁹ Caroline Nicholson, *The Impact of Child Labour Legislation on Child-Headed Households in South Africa*, 30 THOMAS JEFFERSON LAW REVIEW 416 (2008).

⁶⁰ Caroline Nicholson, *The Impact of Child Labour Legislation on Child-Headed Households in South Africa*, 30 THOMAS JEFFERSON LAW REVIEW 408 (2008).

⁶¹ Caroline Nicholson, *The Impact of Child Labour Legislation on Child-Headed Households in South Africa*, 30 THOMAS JEFFERSON LAW REVIEW 416 (2008).

⁶² Jenny Kitzinger, *Who Are You Kidding? Children, Power and the Struggle Against Sexual*, in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD (Allison James and Alan Prout eds., 1997).

⁶³ As discussed in Chapter 6, Article 37 does not provide the right to counsel (rather legal or 'appropriate' assistance).

of the independent child fits easily into the conception of the 'bad' or Dionysian child, who if left alone will be consumed by deviant forces. As mentioned in the previous subsection, Article 24 (right to health) and Article 27 (right to adequate standard of living) are not available to these children, who may not have or may not want an adult to act on their behalf. Amongst other solutions, Nicholson argues that these children should be legally allowed to work, and that these children require the safeguards and protections provided to all other legal workers. In addition to requiring ways in which the child can support her/himself, this child also might require other protections that a head-of-the household might require, for example the ability to enter into contracts (to rent a house), to have those contracts enforced, to have privacy of family life respected, and so on. Beyond the rights allocated to them in the CRC, these children may also deem it more appropriate to be provided the following rights: 1) the right not to be labelled (with its ensuing discriminatory and violent practices); 2) the right to work and to do so in fair conditions and for fair wages; 3) the right to have one's own support systems (which do not privileged the modern concept of family in which many children do not exist); 4) the right to appropriate and relevant services (which middle class adults do not necessarily know what is best); 5) the right to be protected from secondary exploitation (media, human rights, fundraising departments, NGOS who exploit the 'vulnerability' and weakness of children, turning children into victims to garner support); and 6) the right to be protected from harm inflicted by 'caring' social agencies.⁶⁴ The CRC does not include such safeguards and rights. Again these same arguments can be deployed in the west regarding parents with chronic mental or physical illness, as well as HIV/AIDS. These excluded childhoods are intended to highlight that CRC normatively does not contemplate anything other than the adult as responsible, and the child as irresponsible. The CRC does not envision a child 'outside' of care, by the state or by a parent. The child without the responsible adult is stigmatised, and made an object of 'caring' intervention. If this child's concerns fall outside the regime the aims to find this child a responsible adult, these concerns are not addressed. A responsible adult must be found, regardless of this being unwanted or an impossibility.

iii. Street Children

Street children can also serve to contradict the CRC's universal 'child' as lacking maturity. Street children exist, often without a responsible adult, and often are mature enough to survive on their

⁶⁴ Judith Ennew, *Outside Childhood: Street Children's Rights*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE, 211-212 (Bob Franklin ed., 1995).

own.⁶⁵ Nevertheless, Ennew contends that the place for childhood is considered 'inside': inside a society, inside a family, inside a private dwelling.⁶⁶ Ennew argues that consequently street children are society's 'ultimate outlaws' placed 'outside childhood'. As children are increasingly conceptualised as vulnerable and in danger from influence outside the private world of the family so they are increasingly banished from the streets.⁶⁷ Street children are then pathologised, and the answer for intervention into the lives of street children remains focused on 'removing' children from the street. As such, Ennew goes through each article of the CRC and analyses the articles as applicable to the street child.

As Nicholson argues above, Ennew contends that street children are discriminated against in violation of Article 2, as these children are assumed guilty of violence and criminal activity.⁶⁸ She argues that their best interests are not a consideration, as required by Article 3; rather 'cleansing the streets of their presence' is the priority, with little consideration as to 1) the means in which they are 'collected' and 2) where these children end up.⁶⁹ Ennew surveys various other articles, discussing how they are irrelevant to the experiences of street children, and argues that these focus instead on removing these children and less on the issues faced by street children. Ennew's work reinforces the childhood without a responsible adult as problematic. Obtaining and ensuring this adult-over-child relationship is the priority. The 'other' problems faced by children outside of this clear boundary (childhood as under the responsibility of an adult), are ignored. In this way, Ennew echoes the work of Nieuwenhuys in arguing that children who live outside of the CRC's normative context (the private family or public care, in other words, under adult supervision; geographically restricted to the home or school) are constructed as 'problems'. Street children are classified as undesirable and must be rectified. Thus, the lives of street children require intervention, and removal from the streets is the only solution.

Accordingly, Ennew drafts her own rights for street children: 1) the right not to be labelled (with its ensuing discriminatory and violent practices); 2) the right to work and to do so in fair conditions and for fair wages; 3) the right to have one's own support systems (which do not

⁶⁵ Judith Ennew, *Outside Childhood: Street Children's Rights*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE (Bob Franklin ed., 1995).

⁶⁶ Judith Ennew, *Outside Childhood: Street Children's Rights*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE, 202 (Bob Franklin ed., 1995).

⁶⁷ Judith Ennew, *Outside Childhood: Street Children's Rights*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE, 202 (Bob Franklin ed., 1995).

⁶⁸ Judith Ennew, *Outside Childhood: Street Children's Rights*, in THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE, 211-212 (Bob Franklin ed., 1995).

⁶⁹ See also *Plight of Street Children*, G.A. res. 47/126, 47 U.N. GAOR Supp. (No. 49) at 200, U.N. Doc. A/47/49 (1992): 'Profoundly concerned that the killing of street children and violence against them threaten the most fundamental right of all, the right to life'.

privileged the modern concept of family in which many children do not exist); 4) the right to appropriate and relevant services (where middle class adults do not necessarily know what is best); 5) the right to control their own sexuality (instead of being forced to be asexual or 'othered' for previous sexual activity)⁷⁰; 6) the right to be protected from secondary exploitation (such as the media, human rights organisations, fundraising departments, NGOs who exploit the 'vulnerability' and weakness of children, turning children into victims to garner support); and 7) the right to be protected from harm inflicted by 'caring' social agencies (what happens to children when they are cleaned off the streets?).⁷¹ These rights are quite different from those in the CRC, where the child, for example, does not have the 'right to work', where the traditional family is privileged, and the main goal for childhood is that it occur in the presence of a responsible adult. See Chapters 6 and 7 for further discussion. Ennew's approach to children's rights also includes enabling and empowering the child to a much greater extent, whereas the CRC is focuses on enabling others to act on the child's behalf. Ennew's version of rights has less to do with forcing children into the 'care' of adults, and more to do with providing children a greater arsenal for protection against adults, in other words, when necessary enabling children to protect and provide for themselves. Ennew's approach could be to children in western and global south contexts who find themselves without a responsible adult (parents with substance abuse problems, with chronic illness, with psychological illnesses, and so on) who find the 'care' offered by the state (as envisioned by the CRC) to be non-existent, utterly unhelpful, or abusive itself. Again, the normative aims underlining rights discourse dictates which 'true' childhood/which 'true' child is designated. A particular performance of the child dictates which children matter, which children will be problematised, and which children will be ignored. Importantly the normative aims underlining the rights discourse places clear limits on the rights of the child and even the protection of childhood. By requiring 'care' and thus dependency, the CRC delimits the construction of the category child, and therefore delimits the types of rights and protection that will be offered by the CRC. This can be seen when the CRC is applied to children who do not have responsible adults.

⁷⁰ See also Christine Piper, *Historical Constructions of Childhood Innocence: Removing Sexuality*, in *OF INNOCENCE AND AUTONOMY: CHILDREN, SEX, AND HUMAN RIGHTS*, 1, 4 (Eric Heinze ed., 2000). Piper argues that the focus on the asexual child as a victim/deserving and the sexualized child as a criminal/undeserving is persuasive throughout childhood.

⁷¹ Judith Ennew, *Outside Childhood: Street Children's Rights*, in *THE HANDBOOK OF CHILDREN'S RIGHTS: COMPARATIVE POLICY AND PRACTICE*, 211-212 (Bob Franklin ed., 1995).

b. Girl-child: Gender-Neutrality and The CRC's Performance of the Family & Culture as Happy and Safe

In addition to stigmatising certain childhoods such as street children and children who are head of the household, the CRC's vision for childhood also renders certain childhoods a less problematic and thus less visible. The question of whether the Convention has relevance for the girl child has met with mixed reviews. Price-Cohen argues that the Convention 'is so comprehensive in its protection of the girl child that it cannot be fairly compared with [CEDAW].'⁷² In her view CEDAW pales in comparison. On the other hand, Freeman has argued that, while the CRC's non-discrimination principle is indeed fundamental, there has been little improvement in the position of the girl child since the Convention.⁷³ Similarly, in separate articles, Kirsten Backstrom and Savitri Goonesekere argue that neither the CRC nor CEDAW address the unique abuses encountered by the female child.⁷⁴ Fottrell has argued that the girl-child was simply too controversial to include in the CRC, at a time when cohesion within the children's right movement was a focus meant to ensure that an international children's rights convention would be possible.⁷⁵ This section argues that the girl-child is excluded from the CRC's protection, despite the CRC's inclusion of Article 2's non-discrimination principle. Because the CRC has the family (in other words, the child in the 'care' of adults) as the context for its normative childhood, the girl-child and the issues faced by the girl-child within the family are all but ignored. First, far from being a 'feminist landmark', however that might be defined, this section will argue that the CRC's use of gender-neutral language demonstrates the lack of importance and priority given to the girl-child. Second, this section will argue that the CRC's performance of the family and culture as a happy and safe space for children fails to address the discrimination faced by many female children in the context of the family environment that is

⁷² Cynthia Price-Cohen, *The CRC: a Feminist Landmark*, 3 WILLIAM & MARY JOURNAL OF WOMEN AND THE LAW 29, 50-51 (1997).

⁷³ Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277, 284 (2000).

⁷⁴ Kirsten Backstrom, *The International Human Rights of the Child: Do They Protect the Female Child?*, 30 GEORGE WASHINGTON JOURNAL OF INTERNATIONAL LAW & ECONOMICS 541, 542 (1996). See SAVITRI GOONESKERE, THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AND VIOLENCE AGAINST THE GIRL CHILD, 3 (2006), <http://www.un.org/womenwatch/daw/egm/elim-disc-viol-girlchild/Backgroundpaper/Goonesekere.pdf>; Nura Taefi, *The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Child*, 17 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 345, 346 (2009); '[The CRC's] luke-warm provisions for the rights of girl-children and the omission of girl-specific issues have instituted a lacuna in the body of international human rights law'; Ladan Askari, *The Convention on the Rights of the Child: The Necessity of Adding a Provision to Ban Child Marriage*, 5 ILSA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 123 (1998-1999).

⁷⁵ DEIDRE FOTTRELL, *One Step Forward or Two Steps Sideways? Assessing the First Decade of the United Nations Convention on the Rights of the Child*, in REVISITING CHILDREN'S RIGHTS, 10 (2000). Fottrell further argues that steps such as the Vienna Declaration and the Committee's discussion about the girl-child in 1995 indicate that a 'dynamic interpretation' of the CRC by the Committee may allow for certain obligations to be read into the CRC that would promote the rights of girl children. Nonetheless, it is the text of the Convention that is binding on state parties, not the interpretation of the Committee. See also Nura Taefi, *The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Child*, 17 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 345 (2009).

justified on the basis of cultural norms. Finally, this section will explore the ways in which the girl-child in the west is similarly not included in the CRC's protection.

i. Debating the Efficacy of the CRC's Gender-Neutral Language

This section argues that the CRC's use of gender-neutral language does not somehow translate to the inclusion of both genders without distinction. Given the focus of the CRC and the drafting history of the CRC, this section argues that the gender-neutral language instead reflects a male normative framework. Simply put, the child most predominant in the minds of the drafters of the CRC was male, the unmarked [boy] child.⁷⁶ Price-Cohen argues that the CRC is a landmark as a result of the CRC's gender-neutral language.⁷⁷ Notably she does not specify *how* gender-neutral language makes the CRC such a landmark. Gender-neutral language has both potentially positive⁷⁸ and negative repercussions. Focus in the CRC is on the forms of violence and the infringement of protection rights of both boys and girls, without addressing the gender specific violence and exploitation perpetuated against girls in their families, communities and at a national level.⁷⁹ Goonesekere argues that the gender-neutral approach has dominated a children's rights context in which gender-neutral concerns are paramount.⁸⁰ She argues that this can be seen in the traditional protection areas such as child sexual abuse and trafficking, child soldiers, and child labour, where discussions and research has focused on various forms of violence and infringements of protection rights of both girls and boys, without addressing the unique violence and discrimination faced by girls as a result of gender bias in their families, in their communities and at national levels.⁸¹ For example, while the CRC addresses the issue of child soldiers, it remains silent on issues such as child-marriage.⁸² One could argue that by making the child gender-neutral (much less race-neutral, sexual-orientation neutral, socio-economically neutral, and so on), the CRC mutes the different experience of those not covered by the gender-neutral terminology. Yet, even more so, neutrality does not mean that only issues

⁷⁶ DEIDRE FOTTELL, *One Step Forward or Two Steps Sideways? Assessing the First Decade of the United Nations Convention on the Rights of the Child*, in REVISITING CHILDREN'S RIGHTS, 10 (2000).

⁷⁷ Cynthia Price-Cohen, *The CRC: a Feminist Landmark*, 3 WILLIAM & MARY JOURNAL OF WOMEN AND THE LAW 29, 50-51 (1997).

⁷⁸ Frances E. Olsen, *Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child*, 6 INTERNATIONAL JOURNAL ON LAW AND THE FAMILY 192, 198 (1992).

⁷⁹ SAVITRI GOONESEKERE, THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AND VIOLENCE AGAINST THE GIRL CHILD, 7 (2006), <http://www.un.org/womenwatch/daw/egm/elim-disc-viol-girlchild/Backgroundpaper/Goonesekere.pdf>.

⁸⁰ SAVITRI GOONESEKERE, THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AND VIOLENCE AGAINST THE GIRL CHILD, 7 (2006), <http://www.un.org/womenwatch/daw/egm/elim-disc-viol-girlchild/Backgroundpaper/Goonesekere.pdf>.

⁸¹ SAVITRI GOONESEKERE, THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AND VIOLENCE AGAINST THE GIRL CHILD, 7 (2006), <http://www.un.org/womenwatch/daw/egm/elim-disc-viol-girlchild/Backgroundpaper/Goonesekere.pdf>.

⁸² SAVITRI GOONESEKERE, THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AND VIOLENCE AGAINST THE GIRL CHILD, 7 (2006), <http://www.un.org/womenwatch/daw/egm/elim-disc-viol-girlchild/Backgroundpaper/Goonesekere.pdf>; Nura Taefi, *The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Child*, 17 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 345, 346 (2009).

faced by boys and girls are paramount, but instead that the issues faced by boys are paramount. Our gender-neutral child is a male, straight, white, upper class, citizen of a western state.⁸³

To make the point that the issues faced by certain girl-children are not addressed in the CRC, both Backstrom and Goonesekere examine several articles of the Convention in light of various discriminatory practices the girl-child experiences, such as female infanticide, sex-related abortions, servile marriage, dowry murder, a disproportionate work load in the home, denial of education, denial of reproductive health, and forced early marriages.⁸⁴ Far from including the girl-child within the purview of the CRC, the gender-neutral language of the Convention appears to only address the issues that the male child experiences. It is one thing to state that girls are equal to boys, as the CRC does in Article 2. But if the Convention does not address the ways in which girls are made unequal to boys as a matter of discrimination (preferential feeding, preferential education, and so on) then what is gained by this formal equality and gender-neutrality? This chapter argues, as Freeman, Goonesekere, and others have argued, that the allegedly gender-neutrality of the CRC is unconvincing.

By way of illustration, one of the few articles that do address female specific discrimination is Article 24 (right to health). Notably, Article 24 did not originally include any reference to what the Convention eventually calls 'traditional practices prejudicial to the child' until 1987.⁸⁵ Only in 1987 (eight years into the ten year drafting process) was a sex specific practice, characterised as detrimental to the girl-child's health, considered for inclusion.⁸⁶ Notably, only female genital cutting was originally the focus, suggesting that only certain discriminatory practices were considered problematic, while others were not.⁸⁷ Ultimately, during this discussion it was argued that the more general 'traditional practices' was preferred as it would cover, not only female

⁸³ See for further discussion, Ladan Askari, 'Girls' Rights under International Law: An Argument for Establishing Gender Equity as a *Jus Cogens*, 8 SOUTHERN CALIFORNIA REVIEW OF LAW AND WOMEN'S STUDIES 3, 13-15 (1998); DEIDRE FOTTRELL, *One Step Forward or Two Steps Sideways? Assessing the First Decade of the United Nations Convention on the Rights of the Child*, in REVISITING CHILDREN'S RIGHTS, 10-11 (2000). For a similar argument regarding gender-neutrality in the context of adult human rights see for example Hilary Charlesworth, *Human Rights as Men's Rights*, in WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES, 103 (Julie Stone Peters and Andrea Wolpor, eds. 1995); Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AMERICAN JOURNAL ON INTERNATIONAL LAW 613, 621-25 (1991).

⁸⁴ Kirsten Backstrom, *The International Human Rights of the Child: Do They Protect the Female Child?*, 30 GEORGE WASHINGTON JOURNAL OF INTERNATIONAL LAW & ECONOMICS 541, 542 (1996); SAVITRI GOONESEKERE, THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AND VIOLENCE AGAINST THE GIRL CHILD (2006), <http://www.un.org/womenwatch/daw/egm/elim-disc-viol-girlchild/Backgroundpaper/Goonesekere.pdf>.

⁸⁵ SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 351 (1992).

⁸⁶ SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 351 (1992).

⁸⁷ SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 351 (1992).

genital cutting, but also other practices discriminatory practices based on sex, such as preferential feeding.⁸⁸ While Article 24 addresses certain forms of physical violence the girl-child might face, the Convention does not address the discriminatory practices against the girl-child that do not represent an immediate health risk. For example, the Convention sets no minimum age for marriage.⁸⁹ Although early marriage may affect her right to primary education for example, child marriage does not necessarily implicate a risk to the girl's health. Finally, it is notable that, while the drafting process of the CRC began in 1979 (the year of the child), gender neutral language was not introduced until some 10 years later, just before the Convention was adopted in 1989.⁹⁰ One could argue that gender was hardly on the minds of the drafters as a key agenda, but rather an afterthought, as demonstrated in Article 24's development where specific issues that the girl-child faces were not contemplated until the 11th hour of drafting the CRC (when the Convention was virtually complete). At its most basic, the child was a 'he' for almost the entire 10 year period of drafting of the Convention.⁹¹

The argument that the CRC privileges the gender-neutral (read male) child appears to have strength. Nonetheless, what if the limits placed on the rights and even protection of the child are not a result of privileging the boy and his issues (remembering that the Convention allows for him to face direct combat at the age of 15, see below for a further discussion)? What if the limits placed on the rights and protection of the girl-child are rather a reflection of very specific adult, cultural, and state centric lines of power? Undoubtedly, the CRC's version of childhood is masculine, as also indicated for example by the developmental trajectory from irrationality to rationality or from dependence to independence.⁹² The Convention privileges the family (in other words, the adult's power over the child), cultural and traditional values, and the state. As such, the CRC only affords protection and rights to the extent that those rights and that protection do not interfere with these lines of power, even when those lines of power result in the lack of protection of the child (whether the girl or boy child). This limitation on rights and protection is particularly pronounced in the instance of inter-family/cultural violence against the girl-child (discussed in the next section). One could then inquire whether that the privileging of the family, culture, and the state adversely and disproportionately impacts the girl – child, particularly when those lines of power themselves are based upon masculine norms such as the

⁸⁸ SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 3510352 (1992).

⁸⁹ Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277, 284 (2000).

⁹⁰ SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES' (1992).

⁹¹ SHARON DETRICK, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE 'TRAVAUX PRÉPARATOIRES', 110 (1992).

⁹² Erica Burman, and Jackie Stacey, *The Child and Childhood in Feminist Theory*, 11 FEMINIST THEORY 227, 230 (2010).

public versus private domain.⁹³ There seems to be a strong argument to answer this question in the affirmative (discussed in the next section). As with the international law and human rights more generally, the CRC is no exception in its embrace of gender bias in what appears to be gender-neutrality.⁹⁴ However, this chapter argues that greatest bias is given by the CRC, not to the boy child (though this bias holds worrisome implications), but to the family.

ii. Does the CRC Adequately protect the Girl-Child from Inter-Family/Inter-Cultural Discrimination?

This section contends that the CRC deprioritises the girl-child's rights as well as her protection, by privileging the family and cultural value. Although the CRC includes a prohibition on sex discrimination in Article 2, the CRC's privileging of the family and cultural/traditional values places clear limits on the extent to which the girl-child will be given rights and protection. Price-Cohen argues that the Convention effectively addresses inter-family discrimination.⁹⁵ To support these statements she points to language of Article 19 (right to be protected by the state from all forms of mental and physical violence) and Article 31 (right to social reintegration). A restatement of convention articles, however, lacks persuasion. This thesis has repeatedly argued that there is extremely *little* protection provided by the Convention in relation to intra-family (in other words, parent on child) violence, discussed at length in Chapter 7. This lack of protection is particularly clear when one contrasts the protection and power given to parents and the family in the CRC (as discussed in Chapter 7) with the protection given to women in relation the family in CEDAW, where the women's role in and autonomy from the family is comparatively more respected,⁹⁶ if for no other reason than the fact that the woman may enter and exit the family at her own will.⁹⁷ According to CEDAW, a woman has the same rights of autonomy as given to

⁹³ See generally Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AMERICAN JOURNAL ON INTERNATIONAL LAW 613 (1991).

⁹⁴ See generally Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AMERICAN JOURNAL ON INTERNATIONAL LAW 613 (1991).

⁹⁵ Cynthia Price-Cohen, *The CRC: a Feminist Landmark*, 3 WILLIAM & MARY JOURNAL OF WOMEN AND THE LAW 29, 50-51 (1997).

⁹⁶ Backstrom examines how the articles of CEDAW address some of these issues, particularly CEDAW's stronger protection against gender discrimination when it intersects with respecting cultural values. She argues that CEDAW privileges the individual and non-discrimination over the family and culture. Kirsten Backstrom, *The International Human Rights of the Child: Do They Protect the Female Child?*, 30 GEORGE WASHINGTON JOURNAL OF INTERNATIONAL LAW & ECONOMICS 541, 542 (1996). See also Chapter 4 for further discussion.

⁹⁷ Article 16 (1) of CEDAW is particularly interesting when thinking about the relationship between adult and child:
1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(a) The same right to enter into marriage;
(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
(c) The same rights and responsibilities during marriage and at its dissolution;
(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

men. As discussed in Chapter 7 and Chapter 4, this is simply not true for the child.⁹⁸ Also as discussed in Chapter 7, the protection provided by Article 19 assumes that the state is willing and capable to intervene within the family when the family unit breaks down, and that if removal from the home was deemed necessary by the state that such care would be 'better' for the child. More importantly, because of how the family is constructed in the Convention (natural, foundational to society, place of happiness and love, and so on), the family, at least in terms of child-parent relationships, seems to be all but immune from intervention, as discussed in Chapter 7.

The CRC does not protect the girl child from intra-family discrimination, particularly discrimination that is often condoned by culture and communities. For example, while female genital cutting, child marriage, or denial of reproductive health information appear to be covered by Article 24 as prejudicial practices, state parties may simply characterise these practices as cultural positives, measures aimed at fostering family and community solidarity, principles also reinforced by the Convention.⁹⁹ The education provisions of the CRC also call for the promotion of a spirit of equality among the sexes. Yet, Backstrom notes that this goal is undermined by the Convention, which also states that education should be directed at encouraging respect for parents and cultural values, failing to take into account that the girl-child's parents and her culture's values may deny her access to education.¹⁰⁰

Backstrom argues that outside of Article 2's ban on discrimination on the basis of sex and Article 24's condemnation (but not ban) of 'traditional practices', the CRC does little to combat cultural and structural discrimination the female child encounters. Article 24 is argued to be one of the only articles that relate specifically to the issues faced by girls. As discussed above, the

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

⁹⁸ Nura Tacfi, *The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Child*, 17 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 345, 357 (2009); '[w]hereas women are fully autonomous agents, girls' autonomy is tempered by the need to protect their interests. The wealth of scholarship on the concept of 'best interests' emphasises its highly indeterminate nature . . . One of the key concerns for girls is that the best interests principle can cloak prejudicial attitudes within public institutions and other decision-making bodies'.

⁹⁹ Kearney Backett-Milburn et al., *Challenging Childhoods: Young People's Accounts of "Getting By" in Families with Substance Use Problems*, 15 CHILDHOOD 461 (2008). Freeman also notes that female genital alteration is condonable under the Convention, Michael Freeman, *The Future of Children's Rights*, 14 CHILDREN & SOCIETY 277, 284 (2000).

¹⁰⁰ Kearney Backett-Milburn et al., *Challenging Childhoods: Young People's Accounts of "Getting By" in Families with Substance Use Problems*, 15 CHILDHOOD 461, 477 (2008).

Convention does not address the ways in which the girl child is made unequal that do not represent a health risk. The CRC's reinforcement of the sanctity of the family unit tends to disregard the fact much of the discrimination the girl-child faces often occurs within the family.¹⁰¹ The CRC's elevation of culture also fails to acknowledge that, not only are those within the girl-child's family often the primary actors in the discrimination against the girl-child, but that it is often cultural practices that specifically discriminate against the girl child. Cultural values may at times justify the discrimination carried out by families and communities. As such, the Convention arguably protects the rights of the girl-child, providing for her *only* to the extent that those rights and provisions do not undermine the power given to the family (in other words, the parents over the child) and the power given to culture or traditional values. That the girl-child experiences all forms of discrimination on the basis of gender within these spheres is all but overlooked or, condoned.

iii. Application to the Girl-Child in the West

While many academics focus on practices of the global south, this paper argues that the Convention fails to consider not only the global south girl-child, but also the girl-child from the west (and not just the global south girl-child who lives in the west). There are manifold examples of discrimination against the girl-child in the west that go unaddressed in the Convention. Regardless, the critiques of the CRC regarding the girl-child usually, if not always, focus on the girl-child in the developing world.¹⁰² Quite obviously girls in the west face

¹⁰¹ Kirsten Backstrom, *The International Human Rights of the Child: Do They Protect the Female Child?*, 30 GEORGE WASHINGTON JOURNAL OF INTERNATIONAL LAW & ECONOMICS 541, 542 (1996).

¹⁰² For example, SAVITRI GOONESEKERE, THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AND VIOLENCE AGAINST THE GIRL CHILD (2006), <http://www.un.org/womenwatch/daw/egm/elim-disc-viol-girlchild/Backgroundpaper/Goonsekere.pdf>, which states: "[t]his paper draws on the extensive material available on the situation of the girl child in Asia and Africa. Discrimination and violence are experienced by girl children in all regions but the scope of the problem is different. In general, the prevalence of stereotypical social values regarding girls and denial of access to justice and remedies, particularly for male violence, are common problems". Further examples include, Vanessa Campbell and Theodora Van Der Zalm, *Protection of the Female Child: the Mothers of Our Future – Case Studies of India, Pakistan, Bangladesh, and Sri Lanka*, 7 TULSA JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW 177, 177 (1999); Theodora Van Der Zalm, *Protecting the Innocent: Children's Act 38 of 2005 and Customary Law in South Africa – Conflicts, Consequences, and Possible Solutions*, 22 EMORY INTERNATIONAL LAW REVIEW 891, 891 (2008); Karene Jullien, *The Recent International Efforts to End Commercial Sexual Exploitation of Children*, 31 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 579, 579 (2003); Sara K. Andrews, *U.S. Domestic Prosecution of the American International Sex Tourist: Efforts to Protect Children from Sexual Exploitation*, 94 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 415, 415 (2004); Amy Small Bilyeu, *Trokosi – The Practice of Sexual Slavery in Ghana: Religious and Cultural Freedom vs. Human Rights*, 9 INDIANA INTERNATIONAL & COMPARATIVE LAW REVIEW 457, 457 (1999); Sara Dillon, *What Human Right Law Obscures: Global Sex Trafficking and the Demand for Children*, 17 REGENTS OF THE UNIVERSITY OF CALIFORNIA UCLA'S WOMEN'S LAW JOURNAL 121, 121 (2008); Lynne Marie Kohlm, *Suffer the Little Children: How the United Nations Convention on the Rights of the Child has Not Supported Children*, 22 NEW YORK INTERNATIONAL LAW REVIEW 57, 57 (2009); Jordan A. Gilbertson, *Little Girls Lost: Can the International Community Protect Girl Soldiers?*, 29 UNIVERSITY OF LA VERNE LAW REVIEW 219, 219 (2008); Priya Pillai, *A Call to Arms: A Gender Sensitive Approach to the Plight of Female Child Soldiers in International Law*, 15(2) HUMAN RIGHTS BRIEF 23, 23 (2008); Veronica Escobar, *Reclaiming the "Little Bees" and the "Little Bells": Colombia's Failure to Adhere to and Enforce International and Domestic Law Preventing the Recruitment of Child Soldiers*, 26 FORDHAM INTERNATIONAL LAW JOURNAL 785, 785 (2003); Elizabeth Warner, *Behind the Wedding Veil: Child Marriage as a*

discrimination on the basis of their gender. They too are, for example, more likely to be given a disproportionate workload at home, to be discouraged in their education, to earn less, to lack access to reproductive health and sex education,¹⁰³ (both of which impact access to education and earning potential) and to be mistreated while in detention.¹⁰⁴ It is curious, therefore, that international discourses on the girl-child rarely consider the western girl-child. One could imagine that such lack of attention could easily be understood as 1) the west judging the global south without examining the situation of girls within its borders, 2) the call of the global south to examine a group that has been left out the international discourse on children's rights despite the violence and discrimination that girl-child in the west faces, or 3) the perception that the girl-child in the west is better off, and therefore of less concern.¹⁰⁵ While this thesis will not explore this tension in detail, there seems a disconnect between the domestic academic literature emerging from the west regarding the girl-child that discusses the discrimination she faces and academic literature that discusses the girl-child in the context of international children's rights. This seems unfortunate as the critique that the western girl-child is not included in the CRC would seem to also strengthen the arguments that the CRC is exclusionary. It should be noted that this chapter is not arguing that the girl-child from the global south is included in the language of the CRC. This thesis accepts that the global south girl-child is *not* represented in the Convention. Rather, the salient point is that it is not simply the global south girl-child (and global south child more generally) that is excluded from the Convention. The exclusivity of the

Form of Trafficking in Girls, 12 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW 233, 233 (2004); Brent Wible, *Achieving the Promise of Girls' Education: Strategies to Overcome Gender-Based Violence in Beninese Schools*, 36 COLUMBIA HUMAN RIGHTS LAW REVIEW 513, 513 (2004); Angela Wanak, *Educating Girls in Africa: A Case Study of a Nonprofit Organization Working to Ensure the International Human Right to Education*, 16 WILLAMETTE JOURNAL OF INTERNATIONAL LAW AND DISPUTE RESOLUTION 106 (2008); Erika R. George, *Virginity Testing and South Africa's HIV/AIDS Crisis: Beyond Rights Universalism and Cultural Relativism Toward Health Capabilities*, 96 CALIFORNIA LAW REVIEW 1447, 1447 (2008); Christine Forster, *Sexual Offences Law Reform in Pacific Island States: Replacing Colonial Norms with International Good Practice Standards*, 33 MELBOURNE UNIVERSITY LAW REVIEW 833, 833 (2009); Justina Uram, *Les enfants de mauvais souvenir - Conceived Through Violence, Born as Outcasts, Living in Danger: Why Parentless and Orphaned Children of Rape Should Achieve Refugee or Asylum Status*, 26 PENNSYLVANIA STATE INTERNATIONAL LAW REVIEW 935, 935 (2008); Susan Tiefenbrun and Christine J. Edwards, *Gendercide and the Cultural Context of Sex Trafficking in China*, 32 FORDHAM INTERNATIONAL LAW JOURNAL 731, 731 (2009); Patricia J. Meier and Xiaole Zhang, *Sold Into Adoption: The Human Baby Trafficking Scandal Exposes Vulnerabilities in Chinese Adoptions to the United States*, 39 CUMBERLAND LAW REVIEW 87, 87 (2008-2009); Aquila Mazzingly Alvareng., *Who Cares About the Rights of Indigenous Children? Infanticide in Brazilian Indian Tribes*, 22 HASTINGS WOMEN'S LAW JOURNAL 17, 17 (2011).

¹⁰³ See for example Jaime M. Gher, *Abortion as a Human Right - International and Regional Standards*, 8 HUMAN RIGHTS LAW REVIEW 249, 249 (2008); Katie Hatzivramidis, *Parental Involvement Laws for Abortion in the United States and the United Nations Convention on the Rights of the Child: Can International Law Secure the Right to Choose for Minors?*, 16 TEXAS JOURNAL ON WOMEN & THE LAW 185 (2007); Morgane Landel, *Has the U.K. Violated its International Obligations by Failing to Introduce Mandatory Sex Education in Schools?*, 35 BROOKLYN JOURNAL OF INTERNATIONAL LAW 369, 369 (2010).

¹⁰⁴ Daniel Zeno, *Shackling Children During Court Appearances: Fairness and Security in Juvenile Courtrooms*, 12 JOURNAL OF GENDER, RACE AND JUSTICE 257, 257 (2008); Connie De La Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 UNIVERSITY OF SAN FRANCISCO LAW REVIEW 983, 983 (2008).

¹⁰⁵ See for example Kevin Mark Smith, *The United Nations Convention on the Rights of the Child: The Sacrifice of American Children on the Altar of Third-World Activism*, 38 WASHBURN LAW JOURNAL 111 (1998).

CRC can also be seen in the context of the western girl-child (and the western child more generally).

By claiming gender-neutrality through the use of gender-neutral language, the CRC can masquerade as though it is privileging issues faced by both boys and girls. The CRC's version of gender-neutrality translates to mean, not the protection of the girl-child, but something quite the opposite. By privileging the family (in other words, the power of parents over the child), cultural, and state centric lines of power, many of the issues faced by the girl-child are ignored, lost to more important priorities. In privileging the family and culture, the drafters of the CRC decided that the girl-child in relation to discrimination committed by the family and/or rationalised by her culture, does not require intervention and as such can be ignored. Keeping the girl-child within the confines of the family, the culture, and community, as with the agenda of removal of street children discussed above, becomes more important than addressing the specific problems faced behind the cushy veils of the happy and safe family and culture. The combined forces of gender discrimination coupled with the disempowered state of dependency required for the period of childhood, leaves the girl-child open to unique forms of discrimination not addressed in the Convention, or horribly condoned.

This section has sought to dislodge the CRC's claim to address the 'needs' of the universal category 'child' by examining childhoods that are excluded from the enjoyment of the CRC's rights and protection. Put another way, the CRC does not address certain children's 'needs' because 1) they are problematised for their failure to comply with the CRC's requirements of childhood, or 2) they are ignored for they are not deemed problematic to the CRC's vision of childhood. The CRC maintains certain lines of power that are adult, cultural, and state centric. These lines of power demarcate the boundaries of the CRC's protection and rights to the child. As a result, certain children and certain childhoods will be problematised (for example, the street child, the child who is head of the household), while others will be ignored (for example, the girl-child experiencing discrimination within the family). Far from being guided by the rights of the child, much less the protection of the child, the CRC's rights regime is dictated instead by very specific lines of power.

III. CONCLUSION

The CRC's performance of the child dictates which children matter, which children will be problematised, and which children will be ignored. The girl-child, who experiences traditional

practices *prejudicial* to her health, may be overlooked. The 15-17 year old soldier engaged in direct combat may be overlooked.¹⁰⁶ The street child may require intervention. After being 'rescued', the street child and the child soldier, who may now be experiencing secondary abuse from 'caring' agencies, may be overlooked. Intra-family violence, discrimination by family justified by cultural and traditional values are considered low priorities. Responsible children with irresponsible parents, children who must work because they lack both a willing/capable parent and state, may be converted into adults or alternatively must have their childhood restored. This chapter draws upon, and adds to a variety of authors who have written about numerous versions of childhood that are left out of the Convention. These alternative versions of childhood reveal the identity category 'child' to be highly fractured. If that is indeed the case, might it be worth considering the category 'child' in the CRC? The category 'child' may be in itself a fiction, constructed primarily for practical purposes, but the category is constructed along political/ideological lines. Perhaps because no child was involved in the construction of the political category child in international law even greater wariness is appropriate.

Grappling with the exclusivity of the category of the 'child' in the CRC is important to understanding who and what purposes are served in designating the 'developing child' and the 'child in care' as a normative framework for international law's discourse on children's rights. The genealogy developed in this chapter sought to investigate local, discontinuous, disqualified, illegitimate knowledges about the CRC's category 'child' against the CRC's claim of a universal 'truth' about childhood. There are very specific and highly political reasons for performing the child one way over all others. Asking questions such as, 'who is left out' or, asking ourselves 'who matters' or 'who is deserving', and *why*, is an essential critical process. That the Convention excludes or marginalises childhoods that do not fit into the CRC's adult-child binary, that the Convention only gives rights to the child to the extent that those rights do not disrupt the adult-child binary, and finally, that the Convention only protects the child to the extent that such protection does not disrupt the adult-child binary, exposes some harsh political 'realities' of the CRC's rights regime. In this way, the CRC maintains status quo power relations where the adult is positioned over the child, where traditions and values (read inculcating proper gender, sexual orientation, patriotism, and so on) are at times deemed more important than even the protection of the child, and where the state is positioned not only over the child, but as a primary actor in families as well as society. In this way, the status quo power relations of adults, traditions, and

¹⁰⁶ Even the 2nd Optional Protocol does not bar 15-17 year old children from participating from in direct combat. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Feb. 12, 2002, A/RES/54/263 <http://www2.obchr.org/english/law/crc-conflict.htm>.

the state over children is maintained throughout the Convention, and at times even at the cost of protecting the category 'child', to whom it is alleged '[hu]mankind owes . . . the best it has to give.'¹⁰⁷

Far from an objective description of *the* universal childhood, the CRC is a reflection of highly political, highly controversial ideologies. Beyond the critique that the CRC is exclusive (in other words, maintaining adherence to the adult-child binary at the cost of excluding a vast majority of children), it is important to understand the reasons for its exclusivity. It is absolutely essential to understand how those political ideologies are masked within the CRC, through claims that the rights allocated are primarily about children (a slogan for exceptional political purpose), or about families (opposed to sustaining parental control). These are the ways in which the CRC defies criticism. A very political adult-child binary sets limits on what rights and protections will be afforded (by adults) to children. The CRC's absolute commitment to the adult-child binary sets limits on who counts as a child, and therefore who is worthy of rights allocation. The CRC does so to uphold certain dominant claims to power by adults, cultures, and states. The CRC, far from a description of some 'natural' child, is rather a reflection of powerful adult, cultural and state centric political ideologies. If there is no 'natural' child and the CRC instead functions to protect certain status quo lines of power, we must then ask ourselves (and/or actual children) where to from here? To continue to act as though the CRC is merely 'for children', 'about protection', 'inclusive', 'universal in its application', 'possible for all children' risks being willingly blind, a far cry from 'the best [humankind] has to give'.¹⁰⁸

¹⁰⁷ Declaration of the Rights of the Child, Dec. 10, 1959, G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, Preamble.

¹⁰⁸ Declaration of the Rights of the Child, Dec. 10, 1959, G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, Preamble.

CHAPTER 10

CONCLUSION

This thesis critiques the CRC's articulation of the category 'child', the taken for granted/self-evident assumption that children are fundamentally different from adults, and that this 'difference' justifies their differential and submissive positioning in relation to adults; all under the banner of the rights of the child. This thesis was motivated by the perceived lack of theoretical engagement with the CRC's 'child', unlike most other identity categories such as gender, race, and disability. It sought to examine the vision of the child articulated in the CRC by employing a postmodern deconstructionist analysis, which draws heavily from Michel Foucault and Judith Butler. This thesis argues that the CRC's vision of the child as 'developing' and thus in need of 'care' as articulated in the child's allocation of rights enables the regulation and control of childhood. As a result, this thesis argues that the CRC does not describe nor provide for *the* 'true' childhood. Rather, the CRC prescribes *a* 'true' childhood, conferring vulnerability and dependency as markers of childhood. The CRC defines what a 'true' childhood should be, without questioning versions of childhood excluded by this definition. This conclusion revisits the framework of argument presented in this thesis, and considers elements of a possible reconstruction for the CRC's 'child'.

Chapter 2 sought to canvass accounts of the CRC with a view towards questioning the legal construction of the child in the CRC. This chapter argued that dominant discourses on the CRC fail to explicate the category 'child', with each perspective instead insist that it better knows the 'true' child. Dominant perspectives on the CRC simply disagree on whether the CRC captured the 'true' child. By adopting a 'universal' child, the CRC engages in its own iteration of the 'true' (and universal) category 'child'. This disagreement over the identity 'child' did not and has not resulted in the questioning whether an identity 'child' is possible or even helpful. Discussion continues to focus rather on who 'knows' the fundamental 'child' best. In addition to exploring main stream perspectives that accept the fundamental difference of childhood from adulthood on the basis of the child's immaturity/incapacity, Chapter 2 also explored certain academics who have argued that the child's alleged immaturity/incapacity has no relevance to the discussion of the child's rights. Such arguments forecasted some of the positions taken in this thesis: 1) adult society simply does not 'know' children's capacities, and further that capacity should never be a precursor for rights, an idea accepted in the context of other minorities, but rejected in the context of children, 2) the methodology of protection is insufficient, harmful, and potentially abusive; again an idea that has been accepted in the context of other minorities, but rejected in the context of children, 3) the universalisation of the category 'child' is exclusionary as the CRC is based on a particular type of childhood that is not enjoyed by every child and, as a result,

further marginalises and stigmatises those who are not envisioned by the CRC, and 4) finally, the CRC's commitment to remedying the vulnerability unique to childhood goes only as far as rights that do not blur what it means to be an adult (capable) and what it means to be a child (incapable).

When one speaks of 'the child' or 'the rights of the child', one is using an identity category to distinguish those who fall into the category 'child' from others who do not (adults). The major theoretical perspectives this paper employed to deconstruct the identity of the child in the CRC are Michel Foucault and Judith Butler. Chapter 3 explored certain parts of the theoretical perspectives of Foucault and Butler to argue that identity categories are inevitably based on a set of alleged 'natural' characteristics that those within the category uniformly share. In an attempt to examine the relatively unexplored identity category 'child', a variety of theoretical tools that have been 'successfully' deployed to deconstruct other identity categories were discussed with the view to make the argument in later chapters that the category 'child' is not based upon some 'natural' characteristics that those who are aged 0-18 possess.

Notably, the category 'child' is not the only identity category singled out for their own human rights convention. Before engaging in a deconstruction of the category 'child', Chapter 4 sought to examine other categories that have been singled out from the human family for 'special' attention, in other words given their own international human rights document. Through this comparison, Chapter 4 argues that no other international human rights convention identifies that the problems faced by an identity category result exclusively from the category's 'biological' or 'inherent' difference, as opposed to a socially constructed difference. Further, no other category of persons is required to relinquish certain fundamental rights as the remedy for such difference. Put another way, no other identity category is constructed as wholly biologically immature/incapable and thus required to turn over to another identity category (read adults/parents) certain fundamental rights. Chapter 4 argued that despite similarities in how the law constructs the categories 'woman', 'person with disabilities', 'elder' and 'child', the law's differential treatment ('remedy', or 'rights') of the category 'child' reflects not some sort of inherent difference of childhood, but rather reflects and upholds the adult-child binary, where adults are presumed capable and children incapable. What is made possible through this construction of the child-as-incapable/immature/dependent, far from shoring up of autonomy and participation, as done with all other identity categories, is that vulnerability and dependency become markers of childhood. In comparison with the deconstructions brought to bear against

other identity categories, Chapter 4 ultimately noted that the CRC evades critique for its engagement in universalising the 'child' based on some biological 'facts' of childhood.

To better understand the 'facts'/'truths' about childhood, Chapter 5 then explored various critical perspectives on the category 'child' emerging from the field of sociology that help identify certain assumptions made about childhood that make possible the differential treatment of the category 'child' in the CRC described in Chapter 4. These critical perspectives reflect the theoretical method outlined in Chapter 3. Chapter 5 first examined literature that argues that the category 'child' is a social construct as opposed to a biological given, as is accepted in the CRC and indeed by a majority of those who write about the CRC. Chapter 5 then considered three 'truths' that have been identified by certain sociologists that appear to rationalise the differential treatment of the category 'child'. In the CRC: 1) childhood is a period of development,¹ and 2) children are uniquely vulnerable and thus in need of protection, and 3) childhood is a time defined by needs.² Finally Chapter 5 explored the ways in which these 'truths', and thus the category 'child' is constructed through the adult – child binary. It was argued that to understand what the characteristics of the category 'child', one must understand the category 'adult'. To be a 'good' child, one must not be an adult. A 'child' *is*, only to the extent that a 'child' *is not* an 'adult'. Within a binary opposition, neither term can be original and fundamental because both are related to each other in a system of mutual dependences and differences.³ Nonetheless, the binary relation is never equitable.⁴ In the adult-child, Chapter 5 argued, adulthood is associated with privileged or valued characteristics such as rationality or mindfulness, whereas childishness is associated with irrationality or recklessness.

With these 'truths' in mind, Chapters 6 and 7 inquired as to how the CRC constructs, not only the category 'child', but also the child's 'needs', in light of the third 'truth' identified in Chapter 5 (childhood as defined by a period of needs). Chapter 6 deconstructed the CRC's 'truth' of the category 'child' as developing, through the use of Woodhead's 'needs' equation:

¹ REX STANTON ROGERS and WENDY STANTON ROGERS, *STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN* (1992).

² MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in *GROWING UP IN A CHANGING SOCIETY*, 37 (1990).

³ Jack Balkin, *Deconstructive Practice and Legal Theory*, 96 *YALE LAW REVIEW* 743, 751 (1987).

⁴ Sarah Holloway and Gill Valentine, *Spatiality and the New Social Studies of Childhood*, 34(4) *SOCIOLOGY* 763, 765-766 (2000); LEENA ALANEN, *MODERN CHILDHOOD: EXPLORING THE 'CHILD QUESTIONS'* in *SOCIOLOGY* (1992); Anne Oakley, *Women and Children First and Last: Parallels and Differences Between Women's and Children's Studies*, in *CHILDREN'S CHILDHOODS: OBSERVED AND EXPERIENCED* (Berry Mayall ed., 1994).

X [the child] needs Y [a particular thing that is secured in the form of a right] for
Z [to accomplish some measure]⁵.

Chapter 6 examined specific rights in the Convention that reference the child's development and examined how development operates (what the term 'development' makes possible) within each of those articles. Chapter 6 argued that to be a 'true' or 'real' child according to the CRC, a person nominated a child must be 'developing'. This chapter then sought to explicate how this 'truth' of the 'child-as-developing' permits a particular hierarchy of power surrounding the child.⁶ The chapter concluded that the CRC, in its allocation of 'rights' to children, sustains and supports a hierarchy of power, where adults (parents, and the state as a back-up parent) are positioned over the child, in the name of protection and even as a fulfilment of the 'rights of the child'. This hierarchy of power is made possible, and even 'necessary' by constructing childhood as a state of development.

Chapter 7 investigated the 'truth' in the CRC that the child though construction of her/his rights requires protection or 'care', a result of the child's state of development (examined in Chapter 6). Chapter 7 argued that the CRC imagines the child to be in a particular positional matrix: the family or some similar form of 'care'. This chapter employed a textual analysis to examine how the CRC envisions relations between the parent, the state, and the child. The family or 'care' is defined in the Convention as the adult positioned over the child, with the child only given autonomy and protection rights that reinforce the adult – child binary. In this way, family/'care' (the adult positioned over the child) or 'dependency' (on a parent) and, as such vulnerability become markers of childhood. Unlike other human rights discourses that seek to redress hierarchies, the CRC reinforces and even sustains the inequalities between adults and children. Unlike any other human rights discourse that offers protections *from the state*, the CRC also offers children protection *from themselves*, as if children suffer subjugation, inequality, disenfranchisement, and abuse from themselves. Unlike the definition of the family in the CRC's Preamble where all members of the human family have equal and inalienable rights, the child finds him/herself in this family characterised by inequality and with rights that are alienable because she/he has been marked by the CRC as a 'child'.

⁵ MARTIN WOODHEAD, *Psychology and the Cultural Construction of "Children's Needs"*, in GROWING UP IN A CHANGING SOCIETY, 37 (1990).

⁶ Thomas Hammarberg, *The UN Convention on the Rights of the Child and How to Make It Work*, 12 HUMAN RIGHTS QUARTERLY 97, 101 (1990): 'The triangular relationship between the child, the guardians, and the state was of course a sensitive problem during the drafting'.

Chapter 8 then examined the ways in which the CRC's version of childhood is produced and enforced through the CRC's exercise of both juridical power (particularly through incarceration and corporal punishment), as well as disciplinary power (in particular the gaze over the child through compulsory education and mandatory 'care'). This chapter argued that, through its performance of the 'child' as developing and 'in care', the CRC makes possible the regulation and control of childhood. The 'child-as-developing' justifies the exercise of both juridical power (through corporal punishment and forms of incarceration) and disciplinary power (through constant surveillance in 'care' and at school). In this way, the islands of 'care' and 'education' become the means through which the CRC's normative childhood is enforced and produced. Structuring the everyday life enable the social reproduction of the category 'child'.⁷ As discussed in Chapter 3, this process of moulding is what Foucault refers to as the technologies of governmentality: calculated preoccupation with activities directed at shaping, channelling and guiding the conduct of persons through the production, dissemination, and utilisation of knowledge.⁸ As discussed in Chapters 3 and 5, these 'truths' (children are developing and therefore require 'care') masquerade as neutral descriptions of subjects (objective statements about what the child fundamentally is), opposed to prescriptions (political statements about what the child should be). Butler argues that identity categories are not the *cause* or basis, but rather the *effects* of institutions, practices discourses, with multiple and diffused points of origin.⁹ These 'truths' serve the basis for activities that are directed at moulding the subject. According to a Foucauldian critique, the developmental framework, discussed in Chapter 6, operates as a regime of 'truth' or a system of beliefs and procedures used to construct a norm and the normal. As discussed in Chapter 3, these norms govern behaviour and thinking, and work to exclude certain ways of acting or being. Alternative 'truths' are marginalised, diversity is reduced to abnormality. The developmental framework determines who and what a child is, and which children and what concerns will be disregarded. Establishing a 'truth' about children also means specifically that certain children's needs will be taken into consideration while others will be disregarded. As discussed in the Chapters 1, 3 and 5, this thesis argues that there is no single universal pattern of development, and no universal childhood. As such, children who fail to meet that which is defined as normal are excluded and/or 'require' intervention.

Finally, Chapter 9 explored children that are marginalised, ignored, or stigmatised by the CRC's version of childhood. As discussed in Chapter 3, Foucault and Butler both use the technique of

⁷ BERRY MAYALL, *TOWARDS A SOCIOLOGY FOR CHILDHOOD: THINKING FROM CHILDREN'S LIVES*, 20 (2002).

⁸ JUDITH BUTLER, *GENDER TROUBLE*, 26-27 (1990).

⁹ JUDITH BUTLER, *GENDER TROUBLE*, viii-ix (1990), original emphasis.

genealogy, which investigates local, discontinuous, disqualified, illegitimate knowledges against the claims of a universal 'truth'.¹⁰ Foucault described his method as an effort 'to question over and over again what is postulated as self-evident, to disturb people's mental habits'.¹¹ Chapter 9 argued that the CRC's performance of childhood is exclusionary. This chapter contended that, in universalising the child, the CRC not only sustains certain power relations, but also expels or stigmatises certain childhoods from the human rights discourse. The CRC's performance of the child dictates which children matter, which children will be problematised, and which children will be ignored. It is through excluded knowledges, excluded children, parents, states, families, cultures, and traditions that the politics involved in nominating a particular 'true childhood' within international discourse on rights of the child may be understood. Believing that certain political stakes are served in the construction of identity, one must consider what configuration of power constructs exist, and therefore what forms of power restrain and regulate the subject. Chapter 9 sought to explore possible implications of casting the child as irresponsible, the adult as responsible, the family as happy and safe, cultures and traditions as promoting the well-being of the child.

In light of the resiliency of 'truths' surrounding the CRC's child, this thesis sought to understand who benefits from this construction of childhood. Some have argued the CRC's political aims to include limiting the work force to protect access to finite resources, to protect gendered and hetero- norms, to underline the current hierarchy of power: the positioning of the state over adult over child, to underline the centrality of the state, and so on. For example, Prout argues that in a world that is perceived as shifting, complex, and uncertain, the child may operate as a vessel or repository for nostalgic longings for stability and certainty or a figure with redemptive possibility.¹² As children are seen as 'unfinished' or 'developing', Prout contends that children appear a good target for controlling the future, or at least a target that still retains a wide social credibility.¹³ The health, welfare, and rearing of children have been linked to the destiny of the state.¹⁴ The child then becomes the focus of numerous projects that purport to safeguard the 'child' from physical, sexual, and moral danger, to ensure the child's 'normal' development.¹⁵ As

¹⁰ BEN GOULDER and PETER FITZPATRICK, *FOUCAULT'S LAW*, 32 (2009); JUDITH BUTLER, *GENDER TROUBLE*, 44 (1990).

¹¹ MICHEL FOUCAULT, *POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 1977-1984*, 265 (Alan Sheridan trans., Laurance Kritzman ed., 1988).

¹² Alen Prout, *Children's Participation: Control and Self-Realisation in British Late Modernity*, 14(4) *CHILDREN & SOCIETY* 304, 306 (2000).

¹³ Alen Prout, *Children's Participation: Control and Self-Realisation in British Late Modernity*, 14(4) *CHILDREN & SOCIETY* 304, 306 (2000).

¹⁴ CHRIS JENKS, *CHILDHOOD*, 69 (2005), quoting NIKOLAS ROSE, (1989) *GOVERNING THE SOUL: THE SHAPING OF THE PRIVATE SELF* (1989).

¹⁵ CHRIS JENKS, *CHILDHOOD*, 69 (2005), quoting NIKOLAS ROSE, (1989) *GOVERNING THE SOUL: THE SHAPING OF THE PRIVATE SELF* (1989).

such, it is argued that childhood has become the most intensively governed identity category.¹⁶ The way in which 'we' treat 'our' children becomes indicative of the state of our social structure, a measure of our achievement of civilisation.¹⁷ These beliefs inform the 'need' to increase control, socialise, and constrain children.¹⁸ As one author writes,

[w]e are compelled to care about the well-being and prospects of other peoples' children as a condition of preserving our nationhood . . . [A] call to recast the ground of public discourse on the collective status of children . . . to recover . . . traditions of common intent essential to sustain our nationhood into the next century.¹⁹

Children become a conduit through which nationhood is preserved and sustained. The current hierarchy of power is sustained. Without the control of children, how would proper gender, class, and sexuality be reproduced? Without the regulation of childhood, how would structures of power be sustained? How else would 'respectful' and 'productive' citizens be made? In a sense, controlling childhood becomes controlling the future. The regulation of childhood is the regulation of the future, where status quo hierarchical relationships are maintained.²⁰

It is noteworthy that this thesis does not claim to be apolitical. As stated in the introduction, this project is political at the start, first by choosing the CRC as opposed to other documents about children, and then by selecting certain parts of the CRC (for example articles relating to education) while omitting examination of other portions (for example article relating to life imprisonment). This thesis does have an 'ax to grind'²¹ with the CRC's articulation of the category 'child'. It simultaneously does set this author's analysis outside the scope of the deconstruction. Both these elements underline this project as political. However, it is important to highlight the limits of political intent for this project. This thesis does not argue that children should be treated the same as adults. This thesis sought instead to explicate the assumptions made about the category 'child' in the CRC and inquire as to the basis of those assumptions. It may very well be that in certain cases differential treatment of those nominated a 'child' or an 'adult' is preferable. As Holt contends,

¹⁶ CHRIS JENKS, *CHILDHOOD*, 69 (2005), quoting NIKOLAS ROSE, (1989) *GOVERNING THE SOUL: THE SHAPING OF THE PRIVATE SELF* (1989).

¹⁷ CHRIS JENKS, *CHILDHOOD*, 69 (2005).

¹⁸ CHRIS JENKS, *CHILDHOOD*, 69 (2005).

¹⁹ JOHN O'NEILL, *THE MISSING CHILD IN LIBERAL THEORY*, vii-x (1994).

²⁰ LEE EDELMAN, *NO FUTURE: QUEER THEORY AND THE DEATH DRIVE*, (2005), who discusses this idea of controlling the present through a view to the future, specifically with the 'child' as the central figure.

²¹ Jack Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 *CARDOZO LAW REVIEW* 1613, 1628 (1995).

[m]ost people who believe in the institution of childhood as we know it see it as a kind of walled garden in which children, being small and weak, are protected from the harshness of the world outside until they become strong and clever enough to cope with it. Some children experience childhood in just that way. I do not want to destroy their garden or kick them out of it. If they like by, by all means let them stay in it. But I believe that most young people, and at earlier and earlier ages, being to experience childhood not as a garden but as a prison. What I want to do is put a gate, or gates, into the wall of the garden, so that those who find it no longer protective or helpful, but instead confining and humiliating, can move out of it and for a while try living in a larger space. If that proves too much for them, they can always come back into the garden. Indeed, perhaps we all ought to have walled gardens to take refuge in when we feel we must.²²

Quite possibly, differential treatment may at times be needed for individuals in either category. This acknowledgement leads this project to question what might be the nature of that differential treatment, what might a reconstruction for the CRC's child look like. This thesis has primarily focused on deconstructing the assumptions that the child is 'developing' maturity/capacity and that the child requires 'care'. Nevertheless, elements of a possible reconstruction do emerge. In particular, the child's right to participate (the 'right to express [his/her] views freely in all matters affecting the child') found in Article 12 provides a basic starting point for reconstruction. Again, it is noteworthy that the category 'child' has thus far not been allowed to form a political identity of their own. When 'we' (adults) speak about the category 'child' in the CRC, both the category 'child' and the CRC itself are the products of an entirely different category of persons, in other words adults. Participation, even unqualified participation, may be a starting point.

Studying Butler and Foucault's responses to many of the same claims, in particular that their critique of identity politics makes collective political action impossible, one identifies another element of a reconstruction: the coalition. As was argued in Chapter 3, Foucault's critique of identity does not deny the use of identity as a basis for political action, but rather demonstrates its limitations and dangers.²³ Foucault does envision political action based on 'creating a new cultural life, or common interest',²⁴ instead of coalitions built on perceived essences. Moving beyond identity politics recognises that identities are constructions. In this way Foucault suggests that the key struggle is to fracture the limitations imposed on us by normalising identity categories. Butler likewise envisages this new configuration of politics as an anti-foundational coalition politics that would accept the need to act within the tensions produced by

²² JOHN HOLT, *ESCAPE FROM CHILDHOOD*, 26-27 (1974).

²³ MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION*, 25, 142 (Hurley, R. trans., 1978).

²⁴ Michel Foucault, *Polemics, Politics, and Problematizations*, in *THE ESSENTIAL WORKS OF FOUCAULT, VOLUME I*, Paul Rabinow ed., 1994).

contradiction, fragmentation and diversity.²⁵ Per Butler, the process of universality is made open-ended by being brought into crisis again and again by what is outside of itself. Butler argues that the task of politics would be to keep the process of universality open, to keep it as a contested site of persistent crisis, and to not let it be settled.²⁶

The possibility of political action appears too often to rely upon the understanding that an essential united identity postured against some essential united form of domination, yields one the floor, yields one the space to have a voice, or as Butler has said 'you've achieved recognition, status, legitimation; and that is the end of your struggle . . . becoming sayable is the end of politics.'²⁷ Otto has instead argued that by not 'seeking and maintaining unity at all costs against monolithic understandings of domination', a coalition relies on the possibility of dialogue across vast differences in power and knowledge.²⁸ In this way, her concept of coalition gives up 'the desire and the apparent safety of certainty and prescription', as well as arguably at least some political purchase, and learns 'how to live and act so that differences and incommensurabilities can inform and contest the practices of individual identities and collective solidarities'.²⁹ The shape of such a coalition will not be developed here, only identified as a starting point. Yet a coalition, at its most basic, does not require a unified essential identity. The refusal to accept an 'essential' and 'natural' identity category acknowledges that categories are both unnatural and exclusionary. In this view, categories are more open to evolution and change because they are *more open to criticism*. The CRC is a perfect example of how the fiction of a universal and natural category (child) forecloses critical inquiry about *whose interests* are being represented and along *what political lines*. By insisting that the CRC represents the essential universal child as opposed to the interests of those, in particular states and adults, who have deeply political aims, the CRC evades the interrogation of how those interests are manifested, how the child is constructed in the CRC and what rights are given to whom. In contrast, by rejecting a 'universal' and 'essential' identity category and rather relying on shared interests or a coalition that includes the participation of children, a children's political movement may better avoid requiring the normalisation and assimilation of children into a fictional universal category 'child'.

²⁵ JUDITH BUTLER, *GENDER TROUBLE*, 20 (1990).

²⁶ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted *THE JUDITH BUTLER READER*, 340 (Sara Salih ed., 2004).

²⁷ Judith Butler, interview with Gary Olson and Lynn Worsham, (2000) reprinted *THE JUDITH BUTLER READER*, 337 (Sara Salih ed., 2004).

²⁸ Dianne Otto, *Sexualities and Solidarities*, 8 *AUSTRALIAN GAY AND LESBIAN LAW JOURNAL* 27, 34 (1999).

²⁹ Dianne Otto, *Sexualities and Solidarities*, 8 *AUSTRALIAN GAY AND LESBIAN LAW JOURNAL* 27, 34-35 (1999).

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APPENDIX I

Convention on the Rights of the Child

U.N. General Assembly

Document A/RES/44/25 (12 December 1989)

The General Assembly, Recalling its previous resolutions, especially resolutions 33/166 of 20 December 1978 and 43/112 of 8 December 1988, and those of the Commission on Human Rights and the Economic and Social Council related to the question of a convention on the rights of the child,

Taking note, in particular, of Commission on Human Rights resolution 1989/57 of 8 March 1989, by which the Commission decided to transmit the draft convention on the rights of the child, through the Economic and Social Council, to the General Assembly, and Economic and Social Council resolution 1989/79 of 24 May 1989,

Reaffirming that children's rights require special protection and call for continuous improvement of the situation of children all over the world, as well as for their development and education in conditions of peace and security,

Profoundly concerned that the situation of children in many parts of the world remains critical as a result of inadequate social conditions, natural disasters, armed conflicts, exploitation, illiteracy, hunger and disability, and convinced that urgent and effective national and international action is called for,

Mindful of the important role of the United Nations Children's Fund and of that of the United Nations in promoting the well-being of children and their development,

Convinced that an international convention on the rights of the child, as a standard-setting accomplishment of the United Nations in the field of human rights, would make a positive contribution to protecting children's rights and ensuring their well-being,

Bearing in mind that 1989 marks the thirtieth anniversary of the Declaration of the Rights of the Child and the tenth anniversary of the International Year of the Child,

1. Expresses its appreciation to the Commission on Human Rights for having concluded the elaboration of the draft convention on the rights of the child;
2. Adopts and opens for signature, ratification and accession the Convention on the Rights of the Child contained in the annex to the present resolution;

3. Calls upon all Member States to consider signing and ratifying or acceding to the Convention as a matter of priority and expresses the hope that it will come into force at an early date;
4. Requests the Secretary-General to provide all the facilities and assistance necessary for dissemination of information on the Convention;
5. Invites United Nations agencies and organizations, as well as intergovernmental and non-governmental organizations, to intensify their efforts with a view to disseminating information on the Convention and to promoting its understanding;
6. Requests the Secretary-General to submit to the General Assembly at its forty-fifth session a report on the status of the Convention on the Rights of the Child;
7. Decides to consider the report of the Secretary-General at its forty-fifth session under an item entitled "Implementation of the Convention on the Rights of the Child".

61st plenary meeting
20 November 1989

ANNEX

PREAMBLE

The States Parties to the present Convention, Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict,

Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,

Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows:

PART I

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. 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.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 6

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law

and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 2, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 11

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.

2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Article 12

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.

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 15

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

Article 17

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall:

(a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of Article 29;

- (b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
- (c) Encourage the production and dissemination of children's books;
- (d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;
- (e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of Articles 13 and 18.

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.
3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.
2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, *inter alia*, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

- (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
- (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;
- (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
- (d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
- (e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.
2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

Article 23

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.
2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.

3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.

4. States Parties shall promote, in the spirit of international co-operation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations cooperating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breast-feeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Article 25

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 26

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) Make higher education accessible to all on the basis of capacity by every appropriate means;

- (d) Make educational and vocational information and guidance available and accessible to all children;
 - (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
3. States Parties shall promote and encourage international co-operation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

1. States Parties agree that the education of the child shall be directed to:
- (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
 - (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living; the country from which he or she may originate, and for civilizations different from his or her own;
 - (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
 - (e) The development of respect for the natural environment.
2. No part of the present article or Article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in Paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Article 31

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.
2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 32

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

- (a) Provide for a minimum age or minimum ages for admission to employment;
- (b) Provide for appropriate regulation of the hours and conditions of employment;
- (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Article 33

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

Article 36

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Article 37

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 38

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 41

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State Party; or

(b) International law in force for that State.

PART II

Article 42

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

Article 43

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.

2. The Committee shall consist of ten experts of high moral standing and recognized competent in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.

3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters. At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.

7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.

8. The Committee shall establish its own rules of procedure.

9. The Committee shall elect its officers for a period of two years.

10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

Article 44

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights:

(a) Within two years of the entry into force of the Convention for the State Party concerned;

(b) Thereafter every five years. 2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfillment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.

4. The Committee may request from States Parties further information relevant to the implementation of the Convention.

5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.

6. States Parties shall make their reports widely available to the public in their own countries.

Article 45

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

(a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;

(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;

(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

PART III

Article 46

The present Convention shall be open for signature by all States.

Article 47

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 48

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 49

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.
2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

Article 50

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.
2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.
3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

Article 51

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.
2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General.

Article 52

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

Article 53

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

Article 54

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

In witness thereof the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Convention.

APPENDIX II

Declaration of the Rights of the Child (1959)

G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19,
U.N. Doc. A/4354.

Preamble

Whereas the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Whereas the United Nations has, in the *Universal Declaration of Human Rights*, proclaimed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth,

Whereas the need for such special safeguards has been stated in the *General Declaration of the Rights of the Child* of 1924, and recognized in the *Universal Declaration of Human Rights* and in the statutes of specialized agencies and international organizations concerned with the welfare of children,

Whereas mankind owes to the child the best it has to give,

Now therefore,

The General Assembly

Proclaims this *Declaration of the Rights of the Child* to the end that he may have a happy childhood and enjoy for his own good and for the good of society the rights and freedoms herein set forth, and calls upon parents, upon men and women as individuals, and upon voluntary organizations, local authorities and national Governments to recognize these rights and strive for their observance by legislative and other measures progressively taken in accordance with the following principles:

Principle 1

The child shall enjoy all the rights set forth in this Declaration. Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family.

Principle 2

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of

freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.

Principle 3

The child shall be entitled from his birth to a name and a nationality.

Principle 4

The child shall enjoy the benefits of social security. He shall be entitled to grow and develop in health; to this end, special care and protection shall be provided both to him and to his mother, including adequate pre-natal and post-natal care. The child shall have the right to adequate nutrition, housing, recreation and medical services.

Principle 5

The child who is physically, mentally or socially handicapped shall be given the special treatment, education and care required by his particular condition.

Principle 6

The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support. Payment of State and other assistance towards the maintenance of children of large families is desirable.

Principle 7

The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgement, and his sense of moral and social responsibility, and to become a useful member of society.

The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.

The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavour to promote the enjoyment of this right.

Principle 8

The child shall in all circumstances be among the first to receive protection and relief.

Principle 9

The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form.

The child shall not be admitted to employment before an appropriate minimum age; he shall in no case be engaged or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development.

Principle 10

The child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, and in full consciousness that his energy and talents should be devoted to the service of his fellow men.