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THE IMPORTANCE OF THINKING THAT CHILDREN HAVE RIGHTS

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ABSTRACT

In declaring that children have rights, the United Nations may have been unaware that philosophers and jurists have differed among themselves over the basis for conceiving that children may have rights. It is suggested in this paper that the problem is compounded by the practice of framing policy towards children in the form of general duties to promote their welfare. It is argued that legal relationships of this kind exclude the essential features of rights-based relationships. The paper offers a theoretical basis on which assertions that children have rights may be grounded and an explanation of the social significance of making such assertions. It closes by placing the United Nations Convention on the Rights of the Child within this framework.

PART ONE

Suppose that all adults were held to be under a duty (legal or moral) to promote the welfare of all children. The analytic proposition that duties entail rights¹ would compel the conclusion that the children would have a right that the adults should promote their welfare. It will be argued that this formalistic perception of rights conceals the centrally significant feature about thinking that people have rights and, furthermore, that that feature is absent in the circumstances hypothesized in the opening sentence. I will then examine the implications of this argument for difficult issues in child law and, finally, for the United Nations Convention on the Rights of the Child.

A A Socialist Vision of Rights

In *The Left and the Rights* (1983) Tom Campbell wished to rebut the 'revolutionary' socialist argument that legal rights and socialism were incompatible. His strategy was first to identify those elements in 'bourgeois' concepts of rights to which the revolutionary objects: these are that the idea of rights is *necessarily* associated with (1) a society governed by rules; (2) a system of social coercion; (3) the recognition of

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selfish individual interests and (4) an acceptance of moral values outwith the social structure. His next step was to *assume* the possibility of a 'truly' socialist society in which: (1) as in a paradigm of the family, the motivation for action is not rule-based, but springs from spontaneous care for others; (2) coercion is therefore irrelevant; (3) individuals are not concerned with advancing their selfish interests and (4) moral claims outside social behaviour are not acknowledged.

Campbell then argued that, even within such a society, there will be a place for a system of rights. Rights will be possible, or even necessary, as organizational measures to ensure the distribution of social resources. But they will not be identified by reference to the 'selfish' interests of individuals but by reference to *those things in which the individual 'is interested' (in the sense of 'concerned')*. These need not necessarily be things which are in his selfish interest, and in socialist society, would not be.

... while the 'selfish' interpretations of 'interests', in which it is assumed that a person's interests are self-regarding (that is, directed towards benefiting himself) are characteristic of a society in which 'individualism' implies the propriety of each seeking his own benefit except in so far as he is constrained by custom or law from harming others in the process, *it would not be so in a society such as the socialist envisages*. (Campbell, 1983:95). (emphasis supplied)

Furthermore, since individuals will be acting altruistically and not out of self-interest, the obligation to respect these rights will be non-coercive (Campbell, 1983:187). But, and this was Campbell's thesis, these will nevertheless be rights and obligations, conceptually related to present juristic analyses, though operating within a socialist society. Campbell advances the idea that rights can be conceptualized in terms of objects which people may be 'interested in' because he wished to salvage the idea of rights within a society in which people are not motivated by selfishness. But if I am interested, in this disinterested way, in your welfare, who has the right? Campbell seemed to say that it is my right.

It is not being argued, however, that just any interest in a person or event will be an adequate ground for the acquisition of a right, but only that such interests are candidates for having the protection of right-conferring rules. And in those cases where the interests in question do not relate to a condition which involves the right-holder it still remains the case that the right is his because its justification relates to the fact that it is his interest in the person or event that is the grounds (sic) for establishing and maintaining the right. (Campbell, 1983:101).

Campbell observed that this right may be compatible with a right held by the person in whom I am interested, but added:

It is not hard to give examples of existing rights which are based on the individual's concern for others, such as the rights which parents may have for support in the care of their children.

In socialist society, this will be the 'standard' type of right. He went on:

The fact that it may seem strange to regard the standard right as arising from a non-self-centred interest may derive more from the fact that in the societies with which we are most familiar self-directed interests are those which are most prized and protected. But there is no logical reason why this should be so.

Such a right, Campbell concluded 'accords well with the socialist ideal of man as an active, project-pursuing and creative being'.

I wish to stress the primacy afforded in this analysis to the 'right' of A to enhance B's welfare. It is true that it somewhat mitigated when, later in his book, Campbell offered arguments according to which socialists could commend specific rights (Campbell, 1983:ch 7). An important one was that needs should be met. The needy clearly have rights (these must be self-regarding) but, since in socialist society no one is privileged, they have the right to provide also for others. Campbell assumed, however, that A wants to give B what A thinks B needs and that B wants exactly what A thinks he needs, no more, no less. This assumption of perfect congruence between all members of this utopian society, however, prevented Campbell from exploring the possibility that B might conceive his or her needs differently from the way A conceived them. This leads to the central issue of this paper: if someone has the right to determine my welfare, do I have rights in any meaningful sense?

B A Counter-Vision

I shall begin my attempt at answering this question from an oblique and, apparently, distant point. In an important article published in 1981 Dworkin began with a critique of the Report of the Committee on Obscenity and Film Censorship (1979), chaired by the eminent philosopher, Bernard Williams, which reported in 1979 (and remains unimplemented). The Committee proposed that a distinction should be drawn between certain kinds of pornography which should be totally prohibited, and other kinds, which should be permitted but subjected to various restrictions (especially regarding publicity). The basis on which the Committee grounded this distinction was that the law should seek to promote the welfare of society and that this was best done by encouraging a society 'that is most conducive to human beings making intelligent decisions about what the best lives to them to lead are, and then flourishing in those lives' (Dworkin, 1981:180).² The Committee accepted J. S. Mill's insistence that, because knowledge is uncertain, human flourishing is best promoted by the free flow of ideas. Although this did not in itself justify pornography, the difficulties in framing restrictive laws warranted a very powerful presumption against censorship. This could be overcome only if the acts or publications in question very clearly impeded human flourishing.

Dworkin's critique proceeded simultaneously from opposite directions. He tried to demonstrate that the Committee's reasoning could justify either total freedom or total prohibition. It could be maintained that *any restrictions* (for example, those which allow private consumption of pornography but prohibit public displays) reflect evaluations of current moral judgements (here, of the proper boundaries between the public and the private) which is just the kind of issue which, according to the Committee's basic premises, should be subject to scepticism and free-flowing experimentation. But equally it could be argued that *total prohibition* of pornographic experience, even in private, would be justified because, if the advocates of this form of society are to be given a fair opportunity to 'test' their perception of the best context for human flourishing, this option should not be closed to them. In the result, the Committee's strategy collapses into incoherence. Because the basic criterion for intervention is a perception of what is best for the flourishing of society, and this is treated as being inherently uncertain, the justification for any laws against pornography can only be a society's particular view of human flourishing at a specific point in time.

As an alternative strategy, Dworkin argued that individuals have a *right* to 'moral independence', which must (unless there are strong justifications) be respected *even if the community would be better off if they did not exercise it* (and, although Dworkin did not develop this point, presumably even if the community believes the individual is worse off by exercising it). The 'right' to consume pornography, at least in private, can be seen as an aspect of this moral independence. The right to moral independence is defended because it is only in this way that individual preferences can be given equal respect to those of each other person in the community. It is not my intention to trace the defence Dworkin makes of his position against a more straightforward utilitarian political theory. My purpose in referring to Dworkin's piece is to set the idea of rights found there against the concept of rights elaborated by Campbell. For Dworkin, the whole *point* of introducing the concept of rights into theoretical discourse is to make provision for, first, recognizing that individuals may wish to engage in activities and organize their lives inconsistently with societal preferences and, second, securing social arrangements whereby those individuals may live their life as they choose. For Campbell, the position is reversed. The predominant idea of 'right' lies in the social recognition of the desires of the community to enhance its members' well-being.

Further analysis indicates that Dworkin's position may be more 'goal-based' than his argument suggests (Allan, 1983).³ He did not, of course, suggest that commitment to recognition of everyone's moral independence demands social toleration of *anything* any individual may want to do. You have to weigh the degree to which an individual's actions might inhibit the development others wish for themselves. This

could allow restrictions 'provided the damage done to those who are affected adversely is not serious damage, even in their own eyes' (Allan, 1983:206). But this balancing will inevitably reveal a vision of what is believed to be a desirable form of social ordering. It is noticeable that, when he discussed the 'right' to moral independence, Dworkin slid away from using indulgence in pornography as examples and focused upon homosexuality. But how do we react to the claim a child pornographer might make to moral independence? Apart from the risks of lapses from fantasy into practice, the very availability of pornographic materials implies exploitation of children. There may be some forms of 'moral independence' whose very existence threaten important rights of others and a community's self-image.⁴

The whole question whether to endow individuals with rights to 'moral independence', and which individual wants are to count as such rights,⁵ seems to turn on what vision is held of the appropriate balance between conflicting claims and of what is a desirable social ordering. If this is so, does a rights-based approach ultimately collapse into a welfarist one: that people have, or are to be thought of having, only such rights which are consistent with the community's vision of its own welfare? Does the fact that the ascription of rights is controlled by a concept of community well-being lead to the conclusion that everyone is ultimately obliged to further the community's best interests as communally perceived and that rights, if they exist at all, do so only as subordinate facets of the general duty?

C Rights as Claims

It is this scenario which Feinberg (1980) sketched for Nowheresville. There everyone acted benevolently towards each other. They were under a duty to do so but this duty was owed, not to one another, but to an external source. Feinberg wished to demonstrate how such a society might seem deficient. He thought that its deficiency lay in the absence of any sense that its individual members made *claims*. He refers here not to claims that X is the case (these are *assertions*) but to claims *to* X. Unless people do this, Feinberg says, they have no sense of their own moral worth. To make such a claim 'enables us to "stand up like men", to "look others in the eyes"'. For the rest of the community, 'to respect a person, and to think of him as possessed of human dignity, simply *is* to think of him as a potential maker of claims' (Feinberg, 1980:151).

A perception of this kind must form part of an undisclosed background to Dworkin's argument for 'moral independence'. There must indeed be a profound distinction between a social order which acts under the normative directive that the community must enhance the welfare of its members (in accordance with the perception held by some members of a community of what constitutes that community's welfare) and one which regards each of its members as potential makers of

claims. This latter orientation does not, of course, commit the community to the realization of everyone's claim (in Feinberg's terms: to treat all claims as 'valid'). For one thing, they may conflict one with another. But it does allow the perception of the community's welfare to be *constructed around* the corpus of such claims. To the extent that a claim is recognized, it can be said to have fructified into a right. Of course it is also true that the differential accordance of the status of rights to various claims in any particular community reflects a particular social vision: perhaps even a vision of the community's welfare. But, unlike the welfarist vision, this normative order results from the admixture of claims recognized at any particular moment. A normative order constructed in this way may or may not be attractive. That issue is not my present concern. I wish only to emphasize the centrality of the ideas of rights to this process. Either the process generates an idea of rights, or ideas of rights impel a society towards this process.

Why should the idea of rights be associated with giving effect to people's claims and not with what are believed to be their interests, which could be ascertained by empirical observation or *a priori* conceptions of human nature? It has been recently argued that the idea of rights could be conceived in either sense and that there is no conclusive argument in favour of either (Lucy, 1990). But the presence or possibility of the exercise of choice will standardly be found to determine the appropriateness of thinking whether or not people have rights. For if it were sufficient for my having a right only that another had a duty to advance my interests, and it turned out that the other mistakenly assessed my interests, I would have had a right that my interests should be prejudiced. This seems strange, and would seem stranger still had I disputed the assessment of my interests. If, under the guise of advancing my interests, the other had, consciously or otherwise, promoted interests other than mine, I would have had the right to have been the agent for the advancement of others at my expense. We cannot avoid these conclusions by stipulating that I have had a right only if the action turns out to have been in my interests. For at what point do we assess whether the action was in my interests? And we do not normally wait until we know how things turn out before deciding whether we have rights. We more characteristically think of people having rights when they choose an action irrespective of whether that choice eventually promotes their interests or not.

Is the idea that some rights are inalienable inconsistent with this position? We comfortably think that some rights (to life, to marry, to vote) may be held by, or conferred on, a population even if it is unaware it has them. But in so thinking, we surely assume that, when fully informed, the people would choose to have these rights. It would be meaningless to describe as rights options which we know *no one* would wish to exercise. Moreover, if individuals were compelled to live, marry,

vote etc against their will, these would not be rights but duties. But they are rights because they may be chosen. Choice implies the possibility of rejection. Individuals may, exceptionally, reject choice itself (by deciding according to lot, or delegation to another) but to do so in significant life events would substantially diminish the person as a human agent. Conversely, to grant people choice in such matters is central to recognition of their human worth. Hence, if I cannot formulate for myself what my interests are, but leave them to others to determine, have I not abdicated my humanity?

It is necessary to keep clear that the reasons for believing oneself to be obligated towards others may be quite independent from the claims/choices those others may make.⁶ I have elsewhere (Eekelaar, 1991a) tried to outline a moral basis underlying parental duties towards their children. Such duties may coincide with the informed wishes of mature children, and could therefore be said to respect their rights. But they need not do so. If your (moral or legal) duty towards me conflicts with my claim, it may still bind you (morally or legally), but not consequential to any right of mine. So if you believe yourself morally obliged to refuse to assist someone's suicide bid, your obligation holds, but cannot be presented as supporting the other's 'right'. Similarly, I may perceive my actions towards non-human life in terms of moral obligation without conceding that such life has rights, except perhaps metaphorically.

It is also necessary to note the obvious point that, just as moral duties may exist independently of the recognition of claims, the fact that claims are made does not compel their recognition. 'Righthood' is achieved only when sufficient duties or powers are conferred on others that the claim can realistically be realized. So, while owing duties to others does not necessarily imply that the others have rights (except in a formalistic sense), no one can have rights unless the claims which they embody are protected by duties on others (Eekelaar, 1986). The process of transition from social recognition of claims to their legal protection treads the borderline between legal and social reality which is rich in theoretical debate. I have elsewhere (Eekelaar, 1989) suggested that the key might lie in the current perception of where the public interest lies. I mean the expression in a very broad sense. It will comprise a perspective of the 'proper' ordering of relationships and, crucially for present purposes, the extent to which children's claims should be secured against the countervailing claims of adults. Rights have also a fundamental, residual, quality in that they determine the ultimate entitlements of actors 'at the end of the day'. The social fabric consists of more than the mere assertion of claim and counter-claim. A woman may have the 'right' to divorce her husband, but morality, sensitivity and humanity may dictate that all avenues should be explored before its exercise.

PART TWO

Summary Thus Far

My arguments so far have sought to show: first, that a fundamental distinction can be drawn between actions motivated solely by the purpose of promoting the welfare of another (which I call 'welfarism') and actions consequential to recognizing claims made by another; second, that the idea of rights is in some way related to the perception that people make claims and, third, that a claim simply that people should act to further my welfare as they define it is in reality to make no claim at all. Running behind these explicit propositions lies the suggestion that to treat someone fully as an individual of moral worth implies recognizing that that person makes claims and exercises choices: that is, is a potential right-holder. But rights do not constitute the sole source of justifications for holding that people owe duties to one another (or to non-humans) and many considerations are relevant to the translation of claims into rights.

D Children's Rights

It is now necessary to consider how far the general theoretical discussion can be applied to the idea of children's rights. The structural relationship will be immediately obvious. A general legal injunction to an actor to act towards a child in accordance with the actor's perception of the child's welfare may be seen to correspond to the welfarist model discussed above. The primary right lies in the disinterested provider of welfare; there is assumed to be no conflict between this and the 'interests' of the child. The discussion has, however, suggested not only that this assumption cannot be made, but also that it fails to give proper respect to the human worth of the child.

The starting-off point, then, of any rights-based approach to social policy is to have regard to claims which people make and to provide opportunities for claims to be made. What these claims actually are is an empirical matter. This is not simply a theoretical point. It involves the process, so easy for politicians, welfare professionals and even academics to forget: *listening to people*. No social organization can hope to be built on the rights of its members unless there are mechanisms whereby those members may express themselves and wherein those expressions are taken seriously. *Hearing what children say* must therefore lie at the root of any elaboration of children's rights. No society will have begun to perceive its children as rightholders until adults' attitudes and social structures are seriously adjusted towards making it possible for children to express views, and towards addressing them with respect.

We now confront the problem faced by all children's rights theorists: children may be too young to say anything. Even if they are not, their opinions may be coloured by ignorance or parental influence. Yet they

surely have rights. We may be tempted, then, to abandon the claim theory entirely.⁷ But we should remember the example given above where rights are conferred on or held by an ignorant population. They take their force as rights only to the extent that it can reasonably be assumed that, when fully informed, the people will wish to exercise them. If this is implausible (for example, a 'right' granted to a rebellious populace to serve in the army) we cannot sensibly think that a right has been conferred at all. So adults' duties towards young children cannot be convincingly perceived as reflecting rights held by the children unless it can be plausibly assumed that, if fully informed of the relevant factors and of mature judgement, the children would want such duties to be exercised towards them.

This hypothetical judgement is necessary in order to maintain theoretical coherence with the central character of rights asserted here. As a construct, it is partly an artefact constrained by the assumptions of full information and maturity. This precludes contemplating the conditioning of children so as to ensure that when they reach adulthood they will always approve of whatever was done to them during their childhood. The assumptions of information and maturity incorporate into rights-based decision-making regarding young children the requirement that such decisions promote the goal of maturity, which is taken to be the ability to confront the truth and exercise self-determination. Maturity opens up options; it does not close them down.

Despite these external constraints, the hypothetical judgement does not abstract the child from his or her context. On the contrary, it stipulates a *process* which requires serious attention to be given to what *the child in question*, of his or her gender, ethnicity and other personal and social characteristics, is likely to have wanted if fully informed and mature. This has important consequences. General theories of what comprises children's best interests will not in themselves suffice as grounds for decision-making. Also, since children mature gradually, it will always be necessary to observe the child closely for indications of what is important *for that child*, and why. This is in direct opposition to the devastating neglect of children's own opinions which has characterized much of the welfarist approach hitherto. Finally, the process looks forward to the future adult. It is easy (though not inevitable) that the welfarist approach should emphasize short-term effects over potential long-term consequences. A child's immediate contentment is of course important to the development of an integrated adult personality. But the hypothetical viewpoint demands serious attention to be paid also to the social and cultural environment into which the child is likely to grow. What is important about this is not so much the particular answer given in a particular case, but in the territory which this process opens up. Decisions which are taken about children will need to be justified by articulating how they may plausibly relate to the child's

hypothesized viewpoint. This carries with it the discipline of precise specification. It could never be enough to assert simply that an action will be in the child's welfare.⁸ We now need to think how the action could be one which the child might plausibly want. We need to consider closely the child's individual circumstances, to separate the child's claims from competing claims and relate the proposed action to both.

Since the reference to the hypothetical viewpoint is a process and not an end-result (as in the welfarist model) it will not always reveal a clear-cut conclusion. On such occasions we can assume only that the child would expect adults to make their best assessment of his or her welfare according to their own lights. But the process could lead to a re-evaluation of some current assumptions of welfarist thinking. For example, the concealment from a child of information about its birth by artificial insemination is usually justified on the ground that this is in the child's best interests. But the rights perspective poses the question: would that child, as an adult, be likely to choose to live his or her life on the basis of a deliberate deception about his or her origins? It would also ask: would a child born as a result of embryo donation choose to be brought up into the family of its gestational or its genetic parents? Similar re-framing could have significant consequences in the context of inter-racial adoption or fostering placements. It could be important also in decisions about secular and religious education and the exposure of children to literature and ideas.

As the creation of children can now be engineered by technological means as a deliberate act of social policy, it is important to protect the human rights of people so created. It is therefore inadequate to require, as s 13 (5) of the United Kingdom Human Fertilisation and Embryology Act does, merely that regard should be paid to other people's perception of the welfare of any child who may be so born. It could be claimed that it must almost always be better to be born than not.⁹ The only way such rights can be addressed is by asking whether a person would *choose* to be born into a context and in the circumstances contemplated. This compels some regulation of these procedures.

It is intrinsic to rights-based thinking that the question: 'what claims may children make?' is essentially an empirical one. Evidence can be acquired, and must be continually revised, about what people want when they are young and how they later feel adults should have behaved towards them when they were young. I have advanced a framework of the kinds of claims which it seems children may plausibly make or wish to make if they could (Eekelaar, 1986). There is no originality in this; the list is very similar to Freeman's (1983:56). Indeed, if these representations of what children actually claim or may plausibly be thought to want to claim have any accuracy, one would expect this, although it is important to remember that such a list must always be open to discussion and revision in the light of empirical evidence. Under my ordering,

the claims revolve around children's 'basic' interests (to physical, emotional and intellectual care); their 'developmental' interests (that their potential should be developed so that they enter adulthood as far as possible without disadvantage) and their 'autonomy' interests (the freedom to choose a life-style of their own). The first of these has pre-eminent status. The other two can reasonably be compromised. For example, surely no one would have wanted, when very young, to have been left uncontrolled in dangerous situations. But the plausibility of the claim that children would wish to be provided with equal life-chances has the potential for considerable social impact.

E The UN Convention and Children's Rights

I now turn to the UN Convention on the Rights of the Child and evaluate how far it reflects a concept of children's rights consistent with the viewpoint adopted in this paper. The Convention imposes a series of duties on contracting states which are owed sometimes to children and sometimes to adults. Article 3 states:

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.

Interpreted in the light of the paragraph in the Preamble which runs:

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child

the way seems open for almost unrestricted welfarism by the injection of adult values into a conception of what constitutes the 'best interests' of the child. But Article 3 requires only that the children's interests shall be 'a' primary consideration, not 'the' primary consideration. What is the significance of this?

The obvious answer (supported by the history of the preparation of the Convention) (McGoldrick, 1991) is that the child's 'welfare' may in some cases need to be compromised in the light of 'cultural values and traditions'. But it must also be read in the context of the series of explicit rights which the Convention protects. These are: 'the inherent right to life' (Art 6); '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' (Art 7); 'the right of the child to preserve his or her identity, including nationality' (Art 8); '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 con-

trary to the child's best interests' (Art 9(3): cf also Art 10(2)); 'the right (of a child who is capable of forming his or her own views) 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' (Art 12); 'the right to freedom of expression' (Art 13); 'the right of the child to freedom of thought, conscience and religion' (Art 14(1); subject to Art 14(2)); 'the rights of the child to freedom of association and to freedom of peaceful assembly' (Art 15); 'the right to the protection of the law against (arbitrary or unlawful interference with his or her privacy, family, home or correspondence and unlawful attacks on his or her honour and reputation)' (Art 16); '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' (Art 24); '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' (Art 25); 'the right to benefit from social security' (Art 26); 'the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development' (Art 27); 'the right of the child to education' (Art 28); 'the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language' (Art 30); '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' (Art 31); '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' (Art 32); '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' (Art 40).¹⁰

The whole edifice can be seen as elaborations of the trilogy of claims I suggested children may plausibly be taken to make or wish to make. They are not only of a 'protective' nature. The right to 'know' his or her parents (Art 7(1)) and the right to 'preserve his or her identity' can be characterized as human rights which transcend the immediate welfare of a young child. The constituents of 'freedom of expression' as defined in Article 13 (which include the 'right to seek, receive and impart information and ideas of all kinds'), and the right in Article 14 to 'freedom of thought, conscience and religion' also look forward to the adult human being.

The rights in the Convention are all subject to 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.

This article recognizes that the Convention is not simply an exercise in abstraction. These interests are part of real life. They are not self-enforcing, or even immediately self-evident to children. The article therefore *assumes* that certain adults are entrusted with the role of ensuring that these interests are promoted and requires that states must 'respect' the exercise of this role by those adults. No doubt all communities constitute categories of such adults for most of their children (usually, of course, the parents); the implication of the rest of the Convention is that, if there are classes of children with respect to whom no adults have been so assigned, this should be done. But the greater difficulty lies in the assumption that these adults will promote these rights. The article allows the adults 'direction and guidance': but this must be *in the exercise* of the rights, not in derogation of the rights. Similarly, in regard to the 'right of the child to freedom of thought, conscience and religion', Article 14(2) requires states to respect the 'rights and duties of parents and, when applicable, legal guardians to provide direction *in the exercise of his or her right* in a manner consistent with the evolving capacities of the child'. The directions cannot therefore be inconsistent with the rights. Parents are not given a free hand.

It seems, therefore, that neither the 'responsible' adults, nor the State itself in pursuance of its duty under Article 3, nor an invocation of the 'welfare principle' of Article 3(1), which is not overriding, can cut down on the substance of the specific rights insofar as such rights are delineated in the Convention. Yet is this enough to ensure that the Convention itself is soundly based on a defensible concept of children's rights? Has the adult world merely met together and given children a package which adults think is good for them? How are we to know if children want the 'rights' which the Convention gives them? They may want more, or different, rights. Very importantly, they may believe that their protection is imperfect: that the 'direction' given by adults in their exercise of these rights is no longer guidance but obstruction.

The only provision in the Convention which has a bearing on these issues is 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.

It is very important that the generality of the first paragraph of this article should not be overshadowed by the particularity of the second. The second paragraph is, indeed, very important. It provides a counterweight to the broad provisions of Article 3 that, in all 'actions' concerning children (including administrative and legal actions), 'the best interests of the child shall be a primary consideration', for it allows the children a voice in such actions. But the first paragraph goes further. Children who are capable of forming their views must be 'assured' the 'right' to express them *on all matters affecting children*, and these views must be given 'due weight'. It seems unlikely that the framers of the Convention followed their own precepts and consulted with children. But the implications of the Article could, and should, be far-reaching. It may be that the prospect of the formation of children's pressure groups (that is, pressure groups *run by children*) and representative committees looks unattractive and even unrealistic. But lines of communication with children are being opened up. Specialist newspapers aimed at youthful readership are seriously canvassing their readers' opinions. Organizations such as (in England) 'Childline' (a confidential telephone service for children) and the Children's Legal Centre have been able to bring to public attention children's feelings and wishes.¹¹

F CONCLUSION

It would be logically possible to have framed the Convention on the Rights of the Child as a list of duties owed by adults to children. But that would have revealed a negative, suspicious, view of human nature; it would have seen people as servile, responding best to restraint and control. The strength of the rights formulation is its recognition of humans as individuals worthy of development and fulfilment. This is not an appeal to narrow self-interest. On the contrary, it recognizes the insight that people can contribute positively to others only when they are respected and fulfilled. And to recognize people as having rights from the moment of their birth continuously into adulthood could turn out, politically, to be the most radical step of all. If all *young people* are secured all the physical, social and economic rights proclaimed in the Convention, the lives of millions of adults of the next generation would be transformed. It would be a grievous mistake to see the Convention as applying to childhood alone. Childhood is not an end in itself, but part of the process of forming the adults of the next generation. The Convention is for all *people*. It could influence their entire lives. If its aims can be realized, the Convention can truly be said to be laying the foundations for a better world.

NOTES

¹ The perception of such a logical relationship derives from Hohfeld (1919).

² I adopt Dworkin's statement of the Committee's strategy because this is the starting point of his theoretical discussion.

³ Allan questions Dworkin's analysis from the opposite direction when he suggests that the position of the Williams Committee may be not so far removed from that of Dworkin.

⁴ A similar argument, that pornography harms society by degrading women, can also, of course, be made.

⁵ Dworkin has argued that a distinction should be drawn between holding a moral position and mere prejudice or emotion (Dworkin, 1977: ch 10). In his essay on pornography, he does not explain whether a claim to 'moral independence' requires holding a 'moral position' and whether an individual who wishes to indulge in pornography can be said to hold such a position.

⁶ See O'Neill (1992), arguing that rights analysis fails to account for 'imperfect obligations' towards children and Raz (1984b), who argues against a rights-based foundation of moral obligation. I agree, but argue that thinking that children have rights can significantly influence the content of the obligations held to be owed towards children.

⁸ This argument has serious implications for the way in which courts make many decisions about children. On the view taken here, it is insufficient to base a decision on broad welfarist grounds. For a fuller discussion, see Eekelaar (1991b:136-8; 1991c:386-9).

⁹ But see Morgan (1990) who proposes that abortion may sometimes be justified on the ground that this is in the best interests of the child in question on analogy with withholding life-sustaining measures from living children. The idea that people might be entitled to cause the death of others because *they think* that is in those others' best interests is perhaps the most dangerous form of welfarism. In *re J* [1990] 3 All ER 930 the Court of Appeal authorized the withholding of life-sustaining measures from a severely brain-damaged child on the basis of the 'assumed point of view of the patient', rather than of the decision-makers.

¹⁰ There may be no significance in the decision to express those interests in the language of rights, whereas other interests, such as that of protection against sexual exploitation and abuse, are found within the imposition of various protective duties upon States (Art 34). The creation of such specific duties might also, then, be thought of as expressing rights.

¹¹ In 1991 a call was made that a Children's Rights Commissioner should be established in the United Kingdom, Rosenbaum and Newell (1991).