



uOttawa

L'Université canadienne
Canada's university

**FACULTÉ DES ÉTUDES SUPÉRIEURES
ET POSTDOCTORALES**



**FACULTY OF GRADUATE AND
POSTDOCTORAL STUDIES**

Katherine Vandergrift

AUTEUR DE LA THÈSE / AUTHOR OF THESIS

M.A. (Public Ethics)

GRADE / DEGREE

Faculty of Philosophy

FACULTÉ, ÉCOLE, DÉPARTEMENT / FACULTY, SCHOOL, DEPARTMENT

**The Best Interests and Human Rights of Children : An ethical-Philosophical Framework Based on
Martha Nussbaum's Capabilities Framework and Alan Gewirth's Community of Rights**

TITRE DE LA THÈSE / TITLE OF THESIS

G. Walters

DIRECTEUR (DIRECTRICE) DE LA THÈSE / THESIS SUPERVISOR

CO-DIRECTEUR (CO-DIRECTRICE) DE LA THÈSE / THESIS CO-SUPERVISOR

EXAMINATEURS (EXAMINATRICES) DE LA THÈSE / THESIS EXAMINERS

C. Archibald

M. Caré

R. Jahae

Gary W. Slater

Le Doyen de la Faculté des études supérieures et postdoctorales / Dean of the Faculty of Graduate and Postdoctoral Studies

**The Best Interests and Human Rights of Children:
An Ethical-Philosophical Framework Based on Martha Nussbaum's
Capabilities Framework and Alan Gewirth's Community of Rights**

Katherine Vandergrift

**Thesis submitted to the
Faculty of Graduate and Postdoctoral Studies
In partial fulfillment of the requirements
For the MA degree in Public Ethics**

**Faculty of Philosophy
Saint Paul University**

© Katherine Vandergrift, Ottawa, Canada, 2009



Library and Archives
Canada

Published Heritage
Branch

395 Wellington Street
Ottawa ON K1A 0N4
Canada

Bibliothèque et
Archives Canada

Direction du
Patrimoine de l'édition

395, rue Wellington
Ottawa ON K1A 0N4
Canada

Your file *Votre référence*
ISBN: 978-0-494-65980-9
Our file *Notre référence*
ISBN: 978-0-494-65980-9

NOTICE:

The author has granted a non-exclusive license allowing Library and Archives Canada to reproduce, publish, archive, preserve, conserve, communicate to the public by telecommunication or on the Internet, loan, distribute and sell theses worldwide, for commercial or non-commercial purposes, in microform, paper, electronic and/or any other formats.

The author retains copyright ownership and moral rights in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

In compliance with the Canadian Privacy Act some supporting forms may have been removed from this thesis.

While these forms may be included in the document page count, their removal does not represent any loss of content from the thesis.

AVIS:

L'auteur a accordé une licence non exclusive permettant à la Bibliothèque et Archives Canada de reproduire, publier, archiver, sauvegarder, conserver, transmettre au public par télécommunication ou par l'Internet, prêter, distribuer et vendre des thèses partout dans le monde, à des fins commerciales ou autres, sur support microforme, papier, électronique et/ou autres formats.

L'auteur conserve la propriété du droit d'auteur et des droits moraux qui protègent cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

Conformément à la loi canadienne sur la protection de la vie privée, quelques formulaires secondaires ont été enlevés de cette thèse.

Bien que ces formulaires aient inclus dans la pagination, il n'y aura aucun contenu manquant.


Canada

Abstract

The Best Interests and Human Rights of Children: an Ethical-Philosophical Framework Based on Martha Nussbaum's Capabilities Framework and Alan Gewirth's Community of Rights

Canada signed the Convention on the Rights of the Child twenty years ago, but a recent Senate study concludes that children's rights are not embedded in Canadian law, public policy, or the national psyche. This thesis identifies three ethical tensions about children's rights that hinder implementation of the Convention, and it asks if it is possible to develop a more robust ethical foundation to resolve them. Do children's rights protect their interests, their freedom, or some combination of both? What is the balance between the role of parents, the state, and young people themselves in realizing their rights? Can the tension between universal rights and respect for cultural and religious diversity in raising children be resolved?

The study focuses on a core principle of the Convention, the Best Interests of the Child, which is identified as a primary consideration for all policies and decisions relating to children. It examines four approaches to application of this principle that try to resolve the basic tensions about children's rights but fall short. These are family autonomy, liberal paternalism, dynamic self-determination, and utilitarianism.

Looking beyond theories of children's rights, this thesis argues that the capabilities framework articulated by Martha Nussbaum in *Women and Development* and the mutuality of rights theory articulated by Alan Gewirth in *The Community of Rights* can provide a stronger ethical foundation for children's rights. Gewirth's focus on prospective productive agency and Nussbaum's holistic approach to developing core capabilities provide greater ethical specification for the meaning of the best interests of children. Gewirth's Principle of Generic Consistency and articulation of the mutuality of rights and responsibilities provide a sound basis for a policy framework on children's rights. A clear focus on developing capabilities and what is most needful for human action can ethically ground guidelines for determining best interests and less adversarial processes to resolve conflicts between different interests.

Table of Contents

	Page
Acknowledgements	i
Introduction	1
Chapter 1 Ethical Foundations for Children’s Rights	4
Research Question	8
Thesis Statement	9
Methodology and Structure	9
Chapter 2 Tensions in the Implementation of Children’s Rights in Canada	12
Reasons for Lack of Implementation	15
Ethical Tensions Inherent in the Convention	19
Protection or Self-determination: the Nature of Children’s Rights	20
Children, Parents, and the State: Subjects and Duty-Bearers	23
Cultural Diversity and Children’s Rights: the Context for Implementation	26
Chapter 3 Best Interests of the Child	29
Definition, Meaning, and Role of Best Interests	31
Best Interests and Public Policy Decisions	33
Best Interests of the Child and Other Interests	35
Different Approaches to Application of Best Interests Principle	35
Family Autonomy	37
Liberal Paternalism	40
Dynamic Self-determination	44
Utilitarian Approach to Best Interests	46
Chapter 4 Capabilities Framework and Best Interests of the Child	48
Nussbaum’s Capabilities Framework	48
Capabilities Framework and Children’s Rights	51
Capabilities Framework and Parental Autonomy	54
Capabilities and Liberal Paternalism	57
Capabilities and Dynamic Self-determination	58
Capabilities and Utilitarian Approach to Best Interests	59
Summary of Comparison	59
Chapter 5 Community of Rights and Best Interests of the Child	61
Principle of Generic Consistency and Children’s Rights	62
Children as Prospective Productive Agents	65
Community as Duty-bearers	66
Teaching Children about Rights and Responsibilities	69

Resolving Conflicts: Criterion of Degrees of Needfulness for Action	70
Ethical Justification for Economic and Social Rights	73
Community of Rights and Parental Autonomy	76
Community of Rights and Liberal Paternalism	77
Community of Rights and Dynamic Self-determination	78
Community of Rights and a Utilitarian Approach to Best Interests	79
Summary of Comparison	80
Chapter 6 Capabilities, Community of Interests, and Interpretation of Best Interests	81
Stronger Ethical Justification for Children's Rights	81
Greater Ethical Specification of the Content of the Best Interests of the Child Principle	83
Greater Clarity and Consistency in Processes for Determining the Best Interest of the Child	86
Conclusion	87
References	89

Acknowledgements

This study grows out of my work with children whose rights are violated, in Canada and in zones of armed conflict. My prayer is that it contributes to deeper ethical roots and more robust action to realize children's rights, for the benefit of all children.

With deep gratitude, I acknowledge the advice and support of Dr. Gregory Walters in the development of this thesis. Thanks go to St. Paul University for establishing the Masters of Public Ethics Program, which provides space for thinking about the ethical dimensions of public policy issues. I want to thank Dr. Mona Pare, Faculty of Law, University of Ottawa, for reviewing the thesis and providing helpful critique from the perspective of international law. I would like to thank Dr. Raymond Jahae and Dr. Clinton Archibald, from St. Paul's University, for reviewing the thesis and probing the ethical challenges involved in children's rights.

Thank you to my husband, Larry Vandergrift, for supporting me in a return to academic studies, and to my children and grandchildren who continually renew my dedication to building a world that is fit for children because it will be a world fit for all of us.

Introduction

In 2008 the children born in the year that Canada adopted the Convention on the Rights of the Child turned eighteen. Its adoption in 1990 and speedy ratification by almost all member states in the United Nations reflected global optimism for a new era of respect for the rights of children. Now questions are being asked about whether recognition of the rights of children has made much difference for children in Canada and elsewhere.

An extensive study by the Standing Senate Committee on Human Rights concludes that the rights of children have not been incorporated into Canadian public policy and programming. According to the committee's final report,

“there is a real gap between rights rhetoric and the reality of children's lives in Canada – many people in Canada and elsewhere continue to resist full implementation of the Convention The Committee's investigations have firmly led us to the conclusion that the Convention on the Rights of the Child is not solidly embedded in Canadian law, in policy, or in the national psyche”(Standing Senate Committee on Human Rights, 2007, xi).

At the same time UNICEF Canada released a report showing that many children in Canada suffer from lack of respect for their rights. The report concludes:

“UNICEF Canada took the temperature of this generation and we find that, while there has been some progress for some children in some places, for too many children we've stalled or even regressed in some aspects of their health, development, and protection” (UNICEF Canada, 2008, i).

These reports illustrate three levels of concern: (1) lack of impact in the daily lives of children; (2) failure to incorporate children's rights into public laws and policies; and (3) general resistance to the concept of children's rights. Advocacy for greater acceptance of children's rights in Canada has primarily addressed the first two levels, documenting issues and proposing public policies to address them. A closer look at the content of the Convention on the Rights of the Child itself (hereafter the Convention) and the history of implementation, however, also reveals on-going tensions between different conceptions of children's rights, tensions that hamper effective implementation.

This thesis explores the reasons for the gap between the rhetoric about children's rights and the reality for children in Canada, at the level of ethical principles.

Understanding the resistance to children's rights at this level adds an important layer to existing analysis of the context in which advocacy is done. Based on that analysis, alternative approaches will be explored to provide a stronger foundation for the concept of children's rights. If possible, development of a more robust ethical foundation will contribute to a stronger framework for public policy formation and public advocacy for the rights of children.

Conceptual Tensions at the Root of Implementation Issues

Conceptual tensions will be identified in three aspects of children's rights: tensions in interpretation of the content and meaning of children's rights; tensions between the roles of various actors, such as parents, the state, and children themselves; and tension between universalism and respect for cultural and religious diversity. In Canada too, reluctance to incorporate the Convention into legislation and public programming is

rooted in a continuing debate about the nature of the rights of children, how they relate to the rights of parents and other authorities, and how they relate to religious and cultural diversity.

Various attempts to resolve the foundational tensions within children's rights will be illustrated in different interpretations of the principle of best interests of the child, one of the core principles in the Convention. In 2003 the UN Committee on the Rights of Child asked Canada to address a lack of consistency in its implementation of the best interests of the child (hereafter BIC). This thesis will review four approaches to interpretation of the BIC that attempt to resolve the tensions within children's rights by giving priority to one theme within the Convention over others.

Instead of resolving tensions through compromise, this thesis will explore the possibility of resolution through appeal to ethical principles that can integrate the various approaches in a deeper foundation for children's rights. In particular, the work of Martha Nussbaum and Alan Gewirth will be explored to provide a more robust ethical foundation for acceptance of children's rights and implementation of the Convention in Canada.

Chapter 1

Ethical Foundations for Children's Rights

Children as persons, separate from their families, with rights of their own, did not receive much attention in the writings of philosophers until recent times. In 1989 Geoffrey Scarre opened a book on *Children, Parents, and Politics*, with this statement: “*The moral and political status of children has been something less than a dominant theme of Western philosophical thought*” (Scarre, 1989, ix). In 2002, David Archard and Colin Macleod, two philosophers who write about children, introduced a collection of essays by stating: “*Children have not been the subject of any extended philosophical discussion until recent years*” (Archard and Macleod, 2002, 1). In Canada in 2007 Samantha Brennan concluded: “*at the present time, we lack a coherent, fully worked-out theory of childhood and of the moral and political status of children*” (Brennan, 2007, xxi).

Children's rights have received more research attention in other fields, such as law, social policy, and psychology. The history of ethical approaches to children's issues has been summarized by Katherine Covell, a psychologist, as falling into three stages: social laissez-faire, paternalistic protection, and children's rights (Covell and Howe, 2001, 16-20). In the first stage children were considered objects under parental authority or appendages of the father in patriarchal families. Although parents were expected to look after their children, they were essentially seen as family possessions, part of the private domain of parents, without protection or provision in law and public policy. In the second stage, the approach to children shifted from parental property to a class of

immature persons, with a need for some state protection. In this approach, society has a duty to protect children from maltreatment and provide a social environment conducive to their development, but children remain objects of care, not subjects of rights. This approach was used to justify child welfare legislation that allowed the state to intervene if families abused children, but only as a last resort, and it justified the gradual provision of more public services for children, such as public education and public health care. The third approach, considering children as persons with dignity and rights of their own, gained prominence after the Second World War, when there was increased attention to human rights in general.

There are exceptions to this general summary. A historical survey, done by Michael Freeman, identifies an early article with the title, "The Rights of Children," in 1852, and in 1892 Kate Douglas Wiggin published a book entitled *Children's Rights*, but its theme was building Christian character in children through play. In 1879 Jean Valles dedicated a novel, *L'Enfant*, to all oppressed children, as part of a movement to protect children in Paris. These are early roots of the movement to save children from harm, which dominated into the twentieth century. It is only after the First World War and especially after the Second World War that notions of children as subjects of rights become part of the public discourse (Freeman, 1983, 6-17).

The notion of children's rights remains contentious in philosophical literature. At the broadest level, arguments can be grouped into two categories. One stream of thought contends that the concept of rights does not belong to children. Another stream recognizes children's rights, but there are significant conceptual differences about the nature of such rights and their implementation.

The dominant view until the twentieth century was that the language of rights does not apply to children because they are not yet rational agents. In more recent literature, however, children's rights continue to be questioned for other reasons. Onara O'Neil, for example, argues that only the language of obligations should be used in relation to children because of their dependency (O'Neill, 1988, 445-463). Others, such as Ferdinand Shoeman, assert that talk of children's rights is dangerous because it undermines authority within the family through an implied contractual approach to relationships (Shoeman, 1980, 6 –19). Purdy, on the other hand, cautions that ascribing rights to children early undermines the discipline required for healthy development and therefore is harmful for children themselves (Purdy, 1992, 223-241). Later this thesis will show how the cautions in these writings can be addressed through the ethical frameworks developed by Nussbaum and Gewirth.

An important subset of arguments against recognition of children's rights comes from advocates of a public ethics based on care and interdependency rather than rights, represented by the writings of Carol Gilligan (1982) and Annette Baier (1987, 41-56). Later this thesis will show that an ethics of care can be accommodated in Nussbaum's capabilities framework.

The literature that recognizes children's rights is based on two main theories about human rights in general. One school of thought approaches rights as protection of individual choice and liberty to act as autonomous persons. Children's rights, in this approach, are limited or develop gradually (Brighouse, 2002, 31 – 52). Others argue that parents or guardians should exercise children's rights on their behalf until they are mature enough to make their own decisions (Archard, 2003).

A survey of those who advocate for children's rights would not be complete without noting a small number of thinkers, described as children liberationists, who argue that children as a group should have the same rights as adults (Farson, 1974; Holt, 1975). John Holt popularized this view in a book entitled *Escape from Childhood* in 1975. Mary John, based on child liberation, adds to the literature an important discussion of power dynamics in relation to empowerment of children to exercise their rights (John, 2003, 195-255). Later this thesis will explore how the evolving concepts of self-determination and child participation, which reflect elements of this stream of thought, come into tension with the second major approach to children's rights outlined below, particularly in relation to implementation of the core principle of the best interests of the child.

The other main approach is that children's rights are protection of the interests of children, such as survival needs, emotional needs, and social needs. The literature includes discussion of such issues as negative and positive rights for children, perfect and imperfect obligations, and debates about who has the duty to protect children's interests.

Over time more writers seek to combine these two main perspectives and develop approaches to children's rights that either balance the broad categories of protection of interests and right to self-determination or argue for a progression from welfare rights based on interests at a young age to self-determination at a later age (Archard and Macleod, 2002, 19-70). Chapter two will analyze in more detail how tensions between these different approaches to children's rights affect the interpretation, implementation, and public acceptance of children's rights in Canada.

Overall, the literature reveals limited attention to children's rights from an ethical perspective and a lack of consensus at the conceptual level; that is the context for this

thesis. The literature suggests a need to explore the possibility of resolving the conceptual conflicts in a way that provides more firm ethical grounding for implementation of the Convention. It also suggests that it might be valuable to look outside writings on children's rights specifically to identify ethical frameworks that are relevant for the issues raised and can contribute alternative approaches for their resolution.

Research Question

Is it possible to develop a deeper philosophical justification for the principle of the best interests of the child, one that reduces the tensions between different approaches to children's rights, contributes to greater acceptance of the concept of the rights of children, and provides firm grounds for implementation of the Convention in Canada?

Because of the limited attention to children's rights within philosophical literature, this thesis will look to ethical theories developed for other areas of human rights to identify alternative conceptual frameworks that might be capable of resolving on-going tensions in the implementation of children's rights.

Within ethical studies of women's rights, Martha Nussbaum addresses similar issues as those that arise in relation to the rights of children. Her capabilities framework, published in *Women and Development* in 2000, a decade after the Convention was adopted, will be considered as an alternative approach for implementation of children's rights (Nussbaum, 2000).

Attempts to respond to ethical critiques of human rights in general also provide conceptual frameworks of interest for children's rights. Alan Gewirth, for example, was

motivated by the search to reconcile the concepts of individual human rights and community. In doing so, his theory of human rights, developed after the Convention was adopted, also has relevance for children's rights. In particular, his articulation of the mutual relationship between rights and responsibilities, in *The Community of Rights*, provides guidance for implementing the general concept of the BIC.

Thesis Statement

A robust philosophical framework for a core principle in children's rights, known as the best interests of the child, can be developed by applying the capabilities framework of Martha Nussbaum, as articulated in *Women and Development*, and Alan Gewirth's theory of human rights as articulated in *The Community of Rights*. A robust framework will reduce the ambiguity associated with the concept of best interests, increase understanding of the basic tenets of the Convention on the Rights of the Child, and provide an ethical foundation for fuller implementation of the Convention in Canada. This thesis argues that Martha Nussbaum's capabilities framework and Alan Gewirth's articulation of the mutuality of rights and duties can resolve conceptual tensions inherent in the Convention and provide stronger ethical justification for children rights, greater ethical specification for interpreting the best interests of children, and guiding principles for consistent and coherent implementation.

Methodology and Structure

Analysis of the question, in chapter two, begins with understanding the reasons for lack of implementation of the Convention in Canada and the historical context.

Conceptual tensions that influenced development of the Convention at the international level are highlighted. This leads to closer examination of the main, different interpretations of the rights of children in general and the BIC in particular.

Chapter three focuses on understanding the BIC and how the tensions inherent in the Convention affect implementation of the BIC, one of its core principles. Closer examination will focus on four different approaches to implementation that attempt to resolve the tensions by giving one theme greater priority than the others.

Rather than debating the relative merits of the different perspectives as conflictual or adversarial approaches, this thesis applies James Sterba's peace building approach to ethics (Sterba, 2005). The analysis will attempt to reconcile the various perspectives by searching for an alternative conceptual framework that can resolve the tensions inherent in them. Two theories developed since the adoption of the Convention will be explored to provide richer ethical justification and ethical specification for the BIC and children's rights in general. Common elements and complementary aspects of the two concepts will be identified in relation to the BIC.

In chapter four, Nussbaum's capabilities theory, as articulated in *Women and Development* is explored as a possible ethical framework for the BIC. Can Nussbaum's capability theory help to justify children's rights, address common objections, and strengthen implementation?

In chapter five attention turns to Alan Gewirth's concept of mutuality of rights and duties, as articulated in *The Community of Rights*, to provide greater ethical specification for application of the BIC. Can Gewirth's mutuality concept ground the claims and obligations involved in application of the BIC?

Finally, the thesis will discuss implications of Nussbaum and Gewirth for three key aspects of the BIC: 1) its content or meaning; 2) the roles of various actors in relation to the BIC; and 3) the processes used to apply the BIC for individual children and in public policy decisions for children as a group within society.

Chapter 2

Tensions in the Implementation of Children's Rights in Canada

The adoption of the Convention on the Rights of the Child was a defining moment in the history of children's rights, internationally and in Canada. There was an air of optimism as eighty-one members of the United Nations agreed to an integrated framework for the rights of children (Freeman, 1996,1). Final agreement on the text in 1989 climaxed over ten years of negotiations in which more than forty countries from all regions played an active role. Speedy ratification by twenty nations brought the convention into force in 1990; by 2004, 197 states had ratified the Convention. It is the most widely ratified treaty in human history; only Somalia and the United States have not ratified it (Gerschutz and Karns, 2005, 31).¹

Adoption of the Convention was accompanied by the first World Summit for Children in 1990, which issued a global action plan for the survival, protection, and development of children (World Summit for Children, 1990). It was based on the principle that children should have first call on the resources of nations. Canada played a significant role in both the Convention and the summit. Government diplomats and Canadian citizens played an active role in drafting and negotiating the text of the Convention and Canada's former Prime Minister Brian Mulroney co-chaired the summit.

¹ Somalia has not had a functioning national government during much of this time, due to armed conflict. The United States played an active role in negotiating the Convention, but it has not ratified it. Reasons given include opposition to codifying economic and social rights, concern that enforcement might interfere with parental rights and individual state rights, conflicts between some US laws and provisions in the Convention, and political resistance from organized groups who fear that recognition of children's rights undermines parental authority. See explanation by Rosemary Sarri and Jeffrey Shook, "Human Rights and Juvenile Justice in the United States," in *Children's Human Rights: Progress and Challenges for Children Worldwide*, edited by Mark Ensalcaco and Linda Majka, pp. 197-227.

At the national level, parliament adopted an all-party resolution to end child poverty by 2000, as a specific expression of the Canadian government's commitment to realize the rights of children in Canada. Canada ratified the Convention in 1991, although Alberta did not formally agree until 1999.²

Historical context is important to understand the significance of these developments. The Universal Declaration of Human Rights, adopted in 1948, recognized the unity of all rights and was supposed to lead to one integrated international treaty. Post-war solidarity, however, dissolved into Cold War divisions, including disputes about the importance of different kinds of rights. This resulted in the adoption of two international covenants in 1966, one for political and civil rights and another for economic, social, and cultural rights. Negotiations on the rights of children began in the context of these disputes during the Cold War era. The Convention managed to bridge the gap to include political, civil, social, and economic rights in one integrated framework. It also included humanitarian law, grounded in the Geneva Conventions. In this way, it set an important precedent for future development in human rights generally. One of the results, however, is that general language in many of the provisions, designed to obtain support from diverse nations, leaves the door open for different interpretations and inconsistent implementation.

Adoption coincided with the end of the Cold War and the hope for diversion of resources from military deployments to development, the so-called peace dividend.

² After many years of objections, in 1999 Alberta Premier Ralph Klein sent a letter to Prime Minister Chretien indicating that Alberta officially supports the Convention.

Children, it was agreed, should have first call on those resources as an investment in a peaceful future (World Summit for Children, 1990, Article 9).

Two decades later, the general assessment is that little changed for the first generation of children. This assessment is reflected in a 2008 UNICEF report on the situation of children in Canada. It notes, for example, that basic indicators, such as the mortality rate of children under five, have not improved much, and the percentage of children living in poverty is the same as 1989 (UNICEF, 2008, ii). A more comprehensive study was completed by the Senate Human Rights Committee in 2007. Based on three years of research and evidence from more than three hundred witnesses, the committee concluded that the Convention has largely been ignored:

“At the ground level, children’s rights are being pushed to the side and even violated in a variety of situations – one only needs to take a brief survey of the issue of child poverty or the situation of Aboriginal or special needs children to realize that this is true. The Convention has been effectively marginalized when it comes to direct impact on children’s lives” (Standing Senate Committee on Human Rights, 2007, ix).

This assessment is confirmed in analysis done by the Canadian Coalition on the Rights of Children (CCRC) and submitted to the UN Human Rights Council in 2008. It points out that basic mechanisms for implementation have not been put into place in Canada and recommendations from previous reviews before the UN Committee on the Rights of the Child have been completely ignored (CCRC, 2007). While children’s rights do not receive a lot of attention in the study of philosophy and ethics in Canada, those who do write about children’s rights agree that the concept of children’s rights has not taken hold in this country (Brennan, 2006, ix-xxi). This leads to the question: why?

This chapter will consider explanations for the gap between the rhetoric about children's rights and reality for children. Important reasons for limited implementation include: lack of political will, limited public awareness, structural challenges in Canada's federal system of government, and weak international mechanisms for enforcement. At the root of these, however, are different ethical approaches to the concept of children's rights. Three major ethical tensions, inherent in the Convention and prevalent in the literature on children's rights, will be discussed because they are at the heart of barriers to effective implementation of children's rights today. In chapters four and five, this thesis will suggest an alternative framework for resolution of these tensions, one that might ground more effective implementation.

Reasons for Limited Implementation

The first decade of advocacy after adoption of the Convention was characterized by global campaigns to expand international norms, resulting in the adoption of two optional protocols to the Convention, one prohibiting sexual exploitation of children and another prohibiting the use of children as child soldiers. Awareness of the limited implementation of the Convention on a global level grew during preparations for the 2001 UN Special Session on Children, ten years after the World Summit for Children. When implementation of existing norms becomes the goal of advocacy, rather than expanding norms, there is a need for more reflection and analysis of the barriers to implementation.

Explanations for the lack of implementation can be provided at a number of levels. Awareness is the first level. Surveys continue to show that most young people and

their communities have not been informed about their rights, as required in the Convention (Howe and Covell, 2005, 35-42). Awareness is a major component of every effort to implement human rights. Children and young people do not have resources of their own for public education, compared to other groups such as women. Unique to children is the fact that members of the group grow out of the group. That means a limited time frame for activism motivated by self-interest. Once children become adults, their own interests often do not include children's rights as a priority. The self-help approach to implementation is less applicable for children.

The Convention mandates governments to make children aware of their rights in Article 42, but it is not in the self-interest of governments to do so, when it will likely lead to increased demands. This was especially true in Canada during the 1990's when fighting the deficit drove federal policy, and funding was sharply reduced for civil society organizations engaged in policy analysis and advocacy work. Because advocacy is not considered charity, advocacy groups face challenges raising private donations. At present, the largest child rights advocacy group in Canada is an umbrella organization of charities and individuals, the Canadian Coalition for the Rights of Children, but it has severely limited resources.

Lack of political will is cited by political and social scientists (Howe and Covell, 2007; Grover, 2007) and philosophers (Brennan, 2006) as a reason for lack of implementation. Several elements in the current structure of government in Canada present barriers to making children's rights a political priority. One obvious factor is that children, citizens under the age of 18, cannot vote and therefore have no voice in the electoral process.

Canada's system of federalism also creates significant barriers for implementation of children's rights. Divisions of responsibilities between federal and provincial governments, some of them enshrined in the constitution, make it difficult to hold any one level of government responsible for implementation. This is particularly true for children's issues. The federal government is responsible for compliance with international agreements, but most of the issues addressed in this Convention are under provincial jurisdiction. Federal government officials point to the challenge of federal-provincial jurisdictional issues for implementation of children's rights, as explanation or excuse for inaction. There is no doubt that Canada's federal system complicates implementation, but other issues of combined jurisdiction have received attention and mechanisms are found to effectively coordinate federal and provincial policies. Other federalist states, such as Germany and Australia, have found mechanisms to more effectively coordinate between levels of government. Failure to do so in Canada suggests deeper reasons for the lack of attention to children's rights.

There are also structural barriers within the federal government. The executive branch is responsible for international agreements, without a requirement for legislation in parliament. Changes in the executive offices after elections can shift priorities, and political parties in Canada pay very little attention to the implementation of international human rights agreements. At present, the senior body responsible for compliance is called the Continuing Committee of Officials, from both provincial and federal governments, who meet privately and infrequently. There is no public accountability for implementation of international human rights agreements in Canada.

Canada has not put in place the general implementation mechanisms that other countries have used to advance children's rights. Monitoring is sporadic, and public reporting is minimal, with no provisions for filing complaints or investigation of evidence of violations. "No body is in charge of ensuring that the Convention is effectively implemented in Canada, and the political will is lacking" (Senate Human Rights Committee, 2007, 193). The recently adopted federal Code of Ethics, as another example, makes no mention of obligations to comply with any of the international human rights standards. The Senate report cited earlier contains a number of recommendations to address these structural issues, but they are not being taken seriously.

At the international level, the reporting and accountability mechanisms are weak. Canada is required to file a report once every five years, which is reviewed by the UN Committee on the Rights of the Child. The concluding observations of these reviews provide suggestions for action, but they can easily be ignored. International commentary on children's rights focuses on the weak implementation mechanisms. "If the main strength of the Convention is its vision, its chief weakness lies in its mechanisms for implementation" (International Save the Children Alliance, 2001, 18). Preliminary discussions are underway on the establishment of an international process for hearing complaints from groups of children. While this would add a new mechanism, it would only apply to those countries that agree to be bound by it. Given the low priority accorded to the Convention in Canada, it is likely that at least another generation will grow up before Canadian children have access to an international complaint mechanism to claim their rights.

At a deeper level, although Canada officially ratified the Convention, the rights of children remain a contentious issue within the broader Canadian culture (Howe and Covell, 2008, 8). Recent evidence of that is found in the results of focus groups on child rights education in British Columbia; 57% of the participants were fearful that talk about children's rights would undermine parental control or lead to more intervention by authorities in family life (Chandler, 2008, 8). The factors highlighted in these results reflect tensions that exist within the Convention itself and continue to hamper acceptance of children's rights as an essential element of public ethics in Canadian culture.

Ethical Tensions Inherent in the Convention

The Convention was adopted as a political compromise and became part of international law. As a compromise agreement, it reflects different approaches to the concept of children's rights (Freeman, 1983, 32-60; Brennan, 2002, 53-70). The tensions within the Convention have continued in the discourse about children's rights internationally and within Canada. Continuing debates about the nature and scope of children's rights occur in the context of continuing debate about the ethical foundations for all human rights. More clarity and cohesion at the foundational level would contribute to building a stronger foundation for implementation. As stated by Michael Freeman, a prominent writer on children's rights and editor of the *International Journal on Child Rights*,

“The Convention is a beginning, but only a beginning. Those who wish to see the status and lives of children improved must continue the search for the moral foundation of children's rights. Without such thinking there would not have been a Convention: without further critical insight there

will be no further recognition of the importance to children's lives of according them rights" (Freeman, 1992, 60).

A review of the literature reveals three major tensions within the Convention itself and within the discourse on children's rights. These occur in response to three basic questions. What is the nature of children's rights? Who are the subjects and duty-bearers? How do children's rights fit into the cultural context where they need to be implemented?

Protection or Self-determination: the Nature of Children's Rights

The Convention contains components that reflect two basic theories about the nature of human rights in general and the rights of children in particular. One theory, variously called the interests or welfare theory, understands human rights as primarily protection of a person's basic needs and interests, a claim on others to have the basic elements that people need to survive and function as human beings (Brighouse, 2002). Another basic theory of human rights, variously called the will, choice, or autonomy theory, understands human rights as protection for the liberty and freedom of human beings to make choices and determine their own future. This approach emphasizes competency to make rational choices and autonomy to make decisions for oneself (Griffin, 2002). Discourse on children's rights prior to adoption of the Convention includes extensive debate about the relevance of these two approaches for children, especially the question of whether self-determination or rights of choice applied to children or not. Not surprising, a compromise was reached.

Two of the four basic principles in the Convention reflect a notion of human rights as protection of interests and two reflect a notion of human rights as self-determination.

The four basic principles are: non-discrimination (Article 2); the best interests of the child (Article 3); a right to survival and development (Article 6); and a right of participation (Article 12). The best interests principle, Article 3 of the Convention, most strongly reflects the theme of protection of interests, along with the right to survival and development, Article 6, which addresses basic needs. The principle of participation, Article 12, most strongly reflects the growing focus on self-determination as a basis for children's rights, along with non-discrimination, Article 2, which is a common principle in human rights agreements based on liberty and freedom of choice.

The debate continues and is complicated by the fact that children, defined as all persons under the age of 18, are at very different stages of development from infancy to age 18. Arguments that it makes no sense to even talk about the rights of children are primarily based on two grounds: dependency on others, therefore lacking the necessary autonomy; and incompetency, lacking adequate capacity for rational reasoning to make moral choices (O'Neill, 1988; Purdy, 1994). These arguments stem primarily from an understanding of human rights as freedom of choice and self-determination.

To address the welfare interests of children, some argue in favour of obligations or duties toward children by adults who have autonomy and reason, but not rights-claims on the side of the recipients (Purdy, 1994). If one assumes that rights and duties are correlatives, then children must have interest rights as the basis for the duties others have toward them. Some argue that it is important to recognize that children have interest rights, but they are exercised by substitute agents, such as parents or guardians, who are trustees until children reach maturity to exercise their rights themselves (Archard, 2003,

98-99). Often called welfare rights, there are different views on the scope of legitimate claims by children and who has the duty to respond to the claims of children.

Over time approaches that combine interests and self-determination have become more prevalent than total rejection of self-determination by children. The focus has shifted to discussion of such topics as how they can be combined, different views on the scope of self-determination rights for children, or a gradual shift from one to the other as a child grows up. Fairly typical is the argument of Samantha Brennan: when a child is young, interest rights dominate and as a child reaches age 18, choice rights increase (Brennan, 2002, pp. 53-69).

At the self-determination end of the spectrum, for the purpose of comparison, is the view of Cynthia Price Cohen, who argues that the Convention ended the core debate:

“Once adopted, articles Article 12–16 conclusively settled the child’s protection vs. autonomy question. The Convention, backed by the world community, has come down on the side of a child’s right to dignity, respect, and to the rights of individual personality” (Cohen, 1992, 65-66).

A popular way of categorizing the combination in the Convention itself is the following typology: 1) Provision rights to protect basic needs; 2) Protection rights to prevent abuse and exploitation; and 3) Participation rights to give young people a voice in decisions that affect them. Later in this thesis, the theory of Alan Gewirth will be explored as an alternative approach that integrates these categories, described as generic rights to well being and generic rights of freedom, in one core principle.

Children, Parents, and the State: Subjects and Duty-Bearers

The discourse on children's rights reveals on-going debates about the role of parents, the state, and children themselves, especially in the teenage years. The Convention recognizes and respects all three roles; the questions are ones of priority and balance in implementation.

The Convention recognizes and respects the rights and responsibilities of parents as the primary caregivers for children. Article 5 of the Convention states that:

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 guardian, 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.”
(Convention on the Rights of the Child, Article 5)

This emphasis is reinforced in nine articles, reflecting the primary role of the family for child rearing in all societies (McGillvary, 1992, 222). The Convention has been unfairly characterized as anti-family in some challenges to the concept of children's rights (Butler, 2000). Fear that the Convention will undermine the authority of parents often stems from lack of knowledge about what the Convention actually says about the role of parents.

The Convention also recognizes the responsibility of the state to protect the rights of children as persons and citizens in their own right. As an agreement between states, governments are the main duty-bearers in the Convention, but the modes of protection vary significantly from encouragement through enabling and facilitating to enforcement.

As mentioned earlier, one of the core principles in the Convention is the right of children to be heard and have their views considered, depending on age and level of

development. There are wide variations in interpretation and implementation of children's participatory rights. The variations reflect different perspectives on the relative weight to be given to the views of children relative to parents and other authorities.

The question is one of balance. What is the right balance between the rights and responsibility of parents to make decisions about how their children will be raised, the freedom for young people to make decisions for themselves in some areas of life, and the role of the state in relation to the family unit and individual children? This remains a contentious issue in both theory and practice. How the tensions are resolved varies widely by specific issue, time, and context.

For many years following Aristotle, children were seen exclusively as part of the private realm of the family, under the control of their parents (Freeman, 1992, 58). As people became more aware of the exploitative use of children as labourers and abuse of children within families, the role of the state as protector of children expanded. In Canada a minimalist view of the role of the state is still a prominent view: the state only intervenes as a last resort, if there is a severe breakdown in the parent-child relationship that threatens the basic security and well being of the child.

Over time a more positive approach to the role of the state in support of the role of parents led to the development of public services such as public education for all children and children's health care agencies. There is growing recognition that the state has its own interests in the development of children as its citizens, future workers and leaders. In recent years, more attention to young people in economic and education policy has resulted from demographic concerns about an aging work force and reliance on future

workers to maintain benefits for a growing number of elders. The emerging environmental ethic makes children a policy focus through its argument that societies need to leave for the next generation an environment that is as clean as the one enjoyed by the current generation. Security concerns also focus attention on youth crime, the role of young people in terrorism and other threats, and the use of children as soldiers.

The balance between the roles and responsibilities of the parent, state, and children themselves varies widely in different areas of Canadian public policy at both federal and provincial levels. Sometimes the relationship is characterized by adversarial disputes, such as parents challenging the power of the state in public education and health care, or court cases to determine if the state has a right to intervene in a particular family. At other times, the relationship is discussed in complementary language, such as how the state can support parents or how the family prepares children for citizenship. The rigidity or flexibility of the boundaries between the roles also varies widely across issues and jurisdictions. The current debate about child care, for example, reveals several different perspectives on the roles of family and state, in relation to who should decide on the form and quality of child care and who should pay the costs. There is no consistency on the age at which young people can make their own decisions, without parental consent; it varies issue by issue. There is also a lack of clear rationale, which sometimes results in arbitrary decisions and challenges in enforcement. Current policy debates in youth justice, for example, focus on whether to lower the minimum age for adult sentencing, using arguments of deterrence without clear evidence or a systematic rationale.

Tensions between the roles of different actors will be explored in more detail in the next chapter, in relation to implementation of the BIC, one of the core principles of the

Convention. In chapters four and five, approaches offered by Martha Nussbaum and Alan Gewirth will be explored to identify a framework that can resolve these tensions through integration of complementary roles in a unifying principle rather than balancing adversarial roles.

Cultural Diversity and Children's Rights: the Context for Implementation

Closely related to the tension between the rights of parents to make decisions for their children and the right of young people to decide for themselves are tensions between respect for cultural diversity in child-raising and universal rights for all children. This is part of a general increase in attention to the tensions between the notion of universal human rights and cultural and religious pluralism. Early marriage is an example that pits traditional cultural values against the rights of girls to have equal chances for development as persons in their own right. In Canada, aboriginal child welfare programs are continually dealing with tensions between traditional cultural ways of raising children and contemporary expectations. While the Convention is a statement of universal rights, it reflects the on-going tension with provisions that protect a child's right to cultural identity and heritage, on the one hand, and on the other hand, provisions that call for ending traditional practices that are harmful for children.

Passing on religious beliefs and cultural traditions to the next generation is an important element of raising children. The tension between the notion of universal human rights and cultural relativism is reflected in the discourse on children's rights. In general terms, those who take a communitarian approach reject the notion of universal rights that apply to all children and argue that each religious and cultural group should be able to

determine how their children will be raised. Those who support the concept of universal rights argue that young people, at some age, should have freedom to decide for themselves and not have their options restricted by cultural traditions.

Considerable debate, for example, focuses on whether there are limits to the control parents should have in the name of religion or cultural values and what such limits are. In health care, for example, Canadian laws permit intervention in parental decisions to protect children from physical harm, violence, and risk of loss of life. Young people's right to access information is another area of tension between the Convention's recognition of a child's freedom of thought, conscience, and religion in Article 14, and its respect for parental guidance in the exercise of these rights. Recently, the residential schools issue raised awareness about damages done when the state took aboriginal children away from their families and cultural communities with the intention of improving their life chances. There is a growing emphasis on children's right to their cultural heritage and how states should protect that right, especially for minority and aboriginal groups. This is a complex area, with a wide range of considerations, especially in the areas of health care, education of children, and media and electronic communication.

The tension between respect for cultural diversity and universality of human rights also affects implementation of the BIC. Later this thesis will argue that the capabilities framework advanced by Martha Nussbaum helps to resolve cultural tensions in a way that supports rather than impedes implementation of the Convention.

Before turning to Nussbaum, chapter three will analyze the BIC as it occurs in the Convention and consider how it has been interpreted and implemented. The analysis will

show that the ethical tensions in children's rights generally, discussed in this chapter, are reflected in different approaches to implementation of the BIC.

Chapter 3

The Best Interests of the Child

The best interests of the child principle (hereafter BIC), one of four basic principles in the Convention, is articulated in Article 3:

“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.

States parties undertake to ensure that 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 appropriate legislative and administrative measures” (Convention on the Rights of the Child, Article 3).

The BIC is repeated eight times in the Convention, dealing with a wide range of matters in the lives of children. BIC is the only reason for separation from parents (Convention, Article 9.1) and the only reason for denial of contact with a non-custodial parent (Convention, Article 9.3). Article 18, one of the articles on parental responsibility states that “the best interests of the child will be their basic concern.” Article 20 links the BIC with the right to cultural identity by explicitly stating that the BIC for children under state care includes “due regard” for “the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.” In article 21 the Convention makes BIC the paramount principle for adoption. Articles 37 and 40 use the BIC as a threshold factor within the criminal justice sector. When children are detained, Article 37 uses the BIC as the test for any exception to separating children and adults in

detention facilities. Article 40 refers to the BIC in relation to protection of the rights of children in court proceedings under penal laws.

Implementation of the BIC remains a challenge, starting with different interpretations of the meaning of the principle and how it fits with other principles and provisions in the Convention. With regard to implementation in Canada, the UN Committee on the Rights of the Child asked Canada to develop guidelines and more consistently apply this principle. The report at the end of Canada's second review process included the following recommendation:

That the principle of the "best interests of the child" of article 3 be appropriately analyzed and objectively implemented with regard to various situations of the child, groups of children, and integration in all revisions of legislation concerning children, legal procedures in courts, as well as in judicial and administrative decisions and in projects, programs and services which have an impact on children. The committee encourages the State party to ensure that research and educational programs for professionals dealing with children be reinforced and that article 3 of the Convention is fully understood and that this principle is effectively implemented" (Committee on the Rights of the Child, 2003, paragraph 25).

Full understanding, objective analysis, and consistent implementation of something as vague as the BIC constitutes a major challenge. It is key to implementation of the Convention, and therefore warrants closer examination.

This chapter will first discuss the definition, meaning and role of the BIC in the Convention, drawing on the text and context at the time of negotiation. It is not surprising that the ambiguity of the concept leads to challenges and variations in interpretation, which are related back to the tensions that permeate the Convention as a whole. Further analysis identifies four main approaches to implementation that resolve

the major tensions in children's rights by giving priority to one or another of the elements in tension. These are parental autonomy, liberal paternalism, dynamic self-determination, and utilitarianism. Analysis of each one clarifies the ethical choices involved and provides a basis for a subsequent comparison with alternative theories, to determine if they are better able to resolve the tensions and guide implementation.

Definition, Meaning, and Role of Best Interests

There is no definition of the BIC in the Convention and little guidance in the deliberations of its text. It was taken from the 1959 Declaration on the Rights of Child and it was an accepted principle in the national legislation of several nations involved in negotiation of the Convention, but it was a new concept in international law. In Canada it was part of custody and adoption law in some provinces before the Convention was adopted, with a limited scope compared to its role in the Convention.

A wide range of definitions give priority to different factors, such as material needs, development needs, or religious and cultural factors. A more comprehensive definition, developed by John Eekelaar, describes the BIC as:

“basic interests, for example to physical, emotional, and intellectual care; developmental interests to enter adulthood as far as possible, without disadvantage; and autonomy interests, especially freedom to choose a lifestyle of their own” (Eekelaar, 1992, 230-231).

Another position is that the rest of the Convention, articles 4 through 45, defines what is in the best interests of children (Freeman, 2007). The relationship between the BIC and the rest of the Convention seems to flow both ways in commentaries: the BIC is used to interpret the other provisions; and the other principles and provisions are used to

inform interpretation of the BIC. While the indeterminate nature of the concept allows flexibility to respond to different realities for children, it creates problems of ambiguity and lack of consistency in definition.

As well as various definitions, the BIC is also used for a variety of purposes. It is used to settle disputes when there are competing claims between different rights and to address gaps and areas not specifically addressed in the Convention. Sometimes it is cited as a threshold or rationale for intervention on behalf of a child in a particular case. In other contexts, such as custody cases, it functions as a standard of reasonableness. At other times, it is held up as an ideal or goal to be achieved by a program or organization. While flexibility can be an advantage, given the broad scope of application, the BIC runs the risk of losing its value because it can be used to justify almost any decision about children.

The lack of clear meaning is further complicated by the inclusion of the future interests of children, as well as current interests. This raises significant ethical questions about how to determine future interests and who has the right and responsibility to make decisions now that affect a child's future. When should choices be made to sacrifice present best interests in order to protect or achieve future best interests? These are challenging choices in parenting and public policy and different interpretations of the BIC provide a variety of approaches to this question.

One concept that emphasizes future interests is the notion of protecting a child's right to an open future (Feinberg, 2004). Choices made by parents and the state during childhood, argues Feinberg, should be guided by the goal of keeping future options open for children until they are self-determining adults able to make their own choices.

Feinberg goes on to discuss potential conflicts between religious rights of parents and children's right to an open future. In such cases, the state may be justified in exercising its role of "*parens patriae*" to protect the future interests of children (Feinberg, 2004, 213-241). "*Parens patriae*" refers to a commonly held principle that the state has a parental responsibility for those in its jurisdiction who are not able to care for themselves.

The BIC is a maximizing principle. It does not set out a lowest common denominator, minimum requirements, or basic needs of children. It calls for actions to fulfill the best interests of children. This is particularly reflected in Article 4, which recognizes limitations in resources of less wealthy countries, but calls on states to make children a priority and allocate the most resources possible to fulfill the Convention. In practice, however, decisions using the BIC in child welfare or child custody cases often come closer to choosing the least detrimental option (Freeman, 2007, 62).

Best Interests and Public Policy Decisions

The text of Article 3 in the Convention refers to both the best interests of the individual child and children as a group and it applies to all actions relating to children. This broad scope is significant. The principle is frequently applied in legal cases involving individual children, under provincial child welfare legislation, in family law, particularly custody cases, and more recently, in the Immigration Act. The principle can also apply for children as a group. The context of the Convention suggests that an important function of the BIC is to establish a priority for children in relation to other groups when it comes to allocation of the resources available to the state (Freeman, 2007).

The rationale for this understanding of the role of the BIC is explicitly stated in the global plan of action adopted at the World Summit for Children, which immediately followed adoption of the Convention. A dominant theme is giving priority to the needs of children because of their vulnerability and as hope and investment for the future: “The children of the world are innocent, vulnerable and dependent. They are curious, active, and full of hope. . . . Their future should be shaped in harmony and co-operation ” (World Summit for Children, *World Declaration on the Survival, Protection, and Development of Children*, Article 2). In Article 9 of the World Declaration nations committed to use the resources released by disarmament for the benefit of children, and in Article 19 political leaders commit to “give high priority to the rights of children, to their survival and to their protection and development.” Why? “This will also ensure the well-being of all societies” (World Declaration, Article 19).

It is ironic, in light of this beginning, that use of the BIC in relation to public policy decisions has had little attention. A few states have adopted mechanisms such as child impact assessments of national legislation and national budgets to ensure that the interests of children are a priority in the allocation of national resources (Freeman 2007).

In philosophical literature, this aspect of the BIC has received almost no attention. In chapter five, this thesis will draw on the principles developed by Alan Gewirth to provide a stronger ethical foundation for using the BIC in public policy decision-making processes, with particular attention to economic and social policy aspects of the BIC.

Best Interests of the Child and Other Interests

The BIC is designated as “a primary consideration,” not paramount, in the Convention. This introduces another level of uncertainty for implementation of the principle. In the 1959 *Declaration on the Rights of the Child*, the BIC was paramount, but the provisions themselves were few and very general. The choice for a lower level of obligation in the text of the Convention was a matter of considerable debate during the negotiations. Some states wanted the paramouncy principle carried over from the 1959 Declaration, while others were strongly opposed for widely different reasons. Some wanted the flexibility to give security or other objectives priority over children’s rights in some areas of public policy or specific situations; others wanted more weight given to the principle of participation and self-determination, which stands in tension with the best interests provision.

The compromise was found through the inclusion of specific articles on most aspects of children’s lives and leaving some flexibility by making the BIC a primary consideration, but not paramount (Freeman, 2007). In practice, this adds to the ambiguity that makes it difficult to develop more specific guidelines for the BIC, as recommended to Canada by the UN Committee on the Rights of the Child, and difficult to apply consistently.

Different Approaches to Application of the Best Interests Principle

Critiques of the BIC focus on its indeterminate nature in the Convention and the possibility of wide variation in its application. Given its ambiguity, it easily becomes an avenue for application of the dominant ideology about children within a particular state or

culture, at a particular time in history, or by stakeholders with power to enforce their views within the decision-making structures. Stronger critiques refer to it as an empty vessel or an alibi for the exercise of power in the lives of children through family control, arbitrary decisions by judges or professionals in individual cases, or the dominant ideology of governing bodies in social policy for children (They, 1989).

Another important question is who has the right to decide what is in the best interests of a child. Because of its indeterminate content, the focus often shifts from content to debates or power struggles over who has the right to decide. Increasingly the focus is shifting to the role of the young person in the decision-making process. How much weight should be given to the young person's views or voice in determinations of the best interests? At what age should young people be able to make decisions about what is in their best interests in a particular area of application? How much power should parents have in decisions that affect the child's future interests as well as present interests? Who decides when there are disputes about what is in the best interests of a child?

Different approaches to application of the BIC illustrate how compromises between different interpretations are made in content and process; these can be linked to the foundational tensions within the Convention that were discussed in chapter two. This thesis identifies four theories that illustrate the range of attempts to develop an ethical approach to the BIC by balancing competing elements and giving priority to one or another. At one end of a spectrum, family autonomy is emphasized. Liberal paternalism balances protective elements and self-determination, while dynamic self-determination gives greater priority to the child's own views. Utilitarianism, on the other hand, makes

the common interests of a majority of children the test of best interests. Further discussion of each of these theories highlights how they resolve the conceptual tensions in children's rights, identified in chapter two.

This analysis provides the basis for comparison in subsequent chapters. In chapter four, the capabilities framework of Martha Nussbaum will be compared with these four theories to identify what it can contribute to a more satisfactory resolution of existing tensions. In chapter five, the principles of Alan Gewirth will be similarly compared to these four theories. The result of this analysis is identification of alternative approaches that have the potential to provide an ethical basis for a more consistent and coherent application of the BIC.

Family Autonomy

The foundation of family autonomy is the idea that parents are the best judges of the best interests of their children. The state's role is to respect and protect the autonomy of the family. There should be no interference with the family unit, or only as a last resort and as little as necessary to protect the physical safety of children (Goldstein, Solnit, and Freud, 1979). In social policy, this approach draws from evidence in the field of psychology about the importance of bonding between parent and child as the most important relationship for development of the child. Cross-cultural studies reveal wide variations in what are considered the best practices in child rearing, tied to the values of particular cultures. From the perspective of political philosophy, this approach is attractive to those who support a minimal role for the state and maximum freedom for families and adult citizens.

Emphasis on family autonomy is prominent among theistic approaches to ethics, which emphasize teachings about family found in sacred scriptures. Drawing on Thomas Aquinas, assertions of family autonomy are based on the belief that God instituted the family as the primary social unit; parents have rights over children, with obligations to provide for their needs and responsibility to teach them to follow the norms established in natural laws and divines laws found in sacred Scripture (Freeman, 1992, 58).

Family autonomy is reflected in many areas of public policy, especially provincial child welfare policy. In the absence of demonstrated abuse or neglect, common law in Canada presumes that parents should make all significant choices affecting their children and gives them general liberty to do so:

This role translates into *a protected sphere of parental decision-making* which is rooted in the presumption that parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because *the state is ill-equipped to make such decisions itself*. Moreover, individuals have a deep personal interest as parents in fostering the growth of their own children (Ahdar, 2002, 101-102).

A significant critique of family autonomy is that, in practice, it means autonomy for the most powerful person in the family. Other individuals within the family can suffer as a result and have no avenue for rescue or redress. During the nineteenth century, increased awareness of child labour and violence within the family led to calls for increased state intervention in family life to protect the interests of children, but only when it was evident that families were neglecting or abusing children. Advocacy for child labour laws, public education, and child welfare programs for children in need, referred to as the child-saving movement in history, appealed to protection of the interests

of children as justification for expansion of the state's role in the lives of children.

Children, in this appeal to BIC, were perceived as objects for intervention to protect their interests when parents did not do so, but they were not regarded as subjects with their own rights (Freeman, 1983, 18-19 and 73-77).

Separation between a private world of the family where individual rights were not considered relevant and liberal notions of a public society based on individual rights came under later critique by feminist thinkers, because it failed to give women equal respect and opportunity in society. The focus on equal rights to empower women is seen by many as a precursor to the focus on children's rights (Arniel, 2002, 70-94).

Feminist critiques that support a central role for the family but challenge the notion of autonomy are significant in relation to interpretations of the BIC and children's rights. Interdependence and care of others should replace independence and autonomy as the norm for social relationships, argue proponents of an ethics of care (Gilligan, 1982; Baier, 1987; Minnow, 1986). Giving priority to care over justice, Baier finds the whole concept of rights inappropriate and unhelpful for children (Baier, 1987). Minnow, on the other hand, argues for a more inclusive concept of rights that protects and supports relationships and care giving, rather than basing rights on the notions of autonomy and independence (Minnow, 1986). Children are not autonomous by reason of age and dependence; parents as adults are not autonomous, either, if caring and relationships are recognized as an essential part of being human and are considered as important as individual freedom for the way society is structured and governed.

Most approaches to the BIC based on family autonomy allow only a very limited role for the state as a last resort or enforcer if parents fail; some do suggest that the state

has a positive responsibility to actively support parents and enable care giving, while still respecting the role of parents as determiners of the BIC. Conceived in a more holistic way, the BIC and the Convention can lead to a more integrated and interdependent view of the role of parents, the state, and children, rather than seeing rights as adversarial relationships between these actors (Arneil, 2002).

Questions about the relationship between individual rights and community prompted Alan Gewirth's work. He rejected the prevalent notion of an adversarial relationship between individual rights and community and developed a theory of human rights that encompasses both. Chapter five will discuss the relevance of his work for this debate in children's rights.

Liberal Paternalism

Articulation of liberal paternalism in relation to children's rights responded to the development of a child liberation movement, which itself was a response to the protectionist child-saving movement and parental autonomy. In the 1970's, a small group of philosophers responded to the dominant protectionist approach to BIC by asserting that children should be accorded the same rights of self-determination as adults have (Holt, 1975; Farson, 1974). Taking a cue from other liberation movements, such as women's liberation and the liberation of slaves, John Holt popularized what became known as the child liberationist movement in *Escape from Childhood* (Holt, 1975). Children should be able to determine for themselves what is in their best interests and all paternalism toward children was characterized as oppression. The child liberationist

movement drew attention to the concept of children's rights but also undermined support for it, because their approach was seen as unrealistic and dangerous for young children.

Rejection of the approach promoted by child liberationists draws on both moral argument and empirical evidence. Children can be treated as fully persons and still recognize that they do not have the same capacity for making decisions as adults because of developmental factors. The destructive consequences of allowing children full rights of self-determination argue against the theory; children, for example, can do harm to themselves because of lack of knowledge of the impact of choices they make. In a thorough critique of child liberation theory, Laura Purdy develops the argument that it is not in the best interests of children to grant them equal rights with adults. Protection is not necessarily oppression. Limits on freedom for children that are not applied to adults are justified if they help children develop their ability to make judgments, such as compulsory education. Appropriate limits, argues Purdy, should be developed on an issue-by-issue basis, and they should differ by age of the child (Purdy 1994).

Michael Freeman, a prominent writer on the rights of children, responded to the arguments of the child liberationists by articulating a theory of liberal paternalism, which recognizes that there is a tension between protecting children and recognizing their rights as persons to determine for themselves what is in their best interests, but both are essential (Freeman, 1983). "To take children's rights seriously requires us to take seriously both protection of children and recognition of their autonomy" (Freeman, 1992, 37). In another place he refers to liberal paternalism as equal attention to "nurturance and self-determination"(Freeman, 1992, 39). The goal of child development, in this view, is the liberal notion of becoming a rational independent decision-maker, and the

responsibility of the parent is to prepare the child for this. Protection of children's best interests, especially future interests, may require that children not be given full rights to self-determination. Instead, parents make decisions with the goal of self-determination in mind. As children mature, it is the duty of parents and teachers to develop children's critical thinking skills and encourage adolescents to make more decisions on their own. If child development is seen as a spectrum, then protection melds into self-determination along the spectrum.

Freeman draws on the normative principles of equality and autonomy, as articulated in *A Theory of Justice* by John Rawls (1972), to ground the notion of liberal paternalism. The two basic principles of justice that Rawls derives from his "original position" are equal liberty and opportunity and arrangement of social and economic inequalities so they benefit the least advantaged in relation to positions that are open to all with fair equality and opportunity (Rawls, 1972). These principles should guide the paternalism of parents and caretakers of children in determination of their best interests. "We must choose for others," wrote Rawls, "as we have reason to believe they would choose for themselves if they were at the age of reason and deciding rationally" (Rawls, 1972, 209). In keeping with Rawls, caretakers of children should also try to adopt an objective stance to determine the best interests of children on the path to autonomy.

A common approach to implementation of the BIC, growing out of liberal paternalism, is the objectivist approach, which uses the scientific method to identify all the possible options for a child, assess the likelihood and impact of each, and then make a scientific determination of what is in the best interests of children. As a child matures, the balance gradually shifts from protecting the child's interests to the development of the

child's critical thinking and encouraging the adolescent to make decisions for himself or herself (Archard, 2002). One of the motives for Freeman's articulation of a theory of liberal paternalism was concern that the children's liberation movement was undermining support for the concept of children's rights. A prolific writer, Freeman has used the liberal paternalism approach as an ethical basis to promote the Convention.

Understanding BIC as a progression from protection in the early years to self-determination as a child approaches adulthood is reflected in the wide variety of ages of permission for adolescents to engage in adult activities, such as permission to drive, drinking age, age for a right to marry without the consent of parents, age of sexual consent, and the contentious issue of the appropriate age for assuming adult responsibility for crimes committed with adult sentences. One critique is that there is no consistency or common rationale behind the different age limits for different activities. In a thought-provoking paper on liberty and paternalism for children, Laurence Houlgate, for example, argues that the age of majority is much too high for most activities, denying children opportunities to develop their judgments through trial, in the name of protection. This approach to BIC, argues Houlgate, "unjustly restricts the liberty of many persons under the age of eighteen when the sole reason for the restriction is preventing them from harming themselves or promoting their good" (Houlgate, 1979, 278). This example illustrates some of the difficulties in applying liberal paternalism to the BIC.

A more fundamental critique of liberal paternalism is that what passes as objective assessment is in fact influenced by prior opinions of the person or institution making the assessment. Careful analysis of best interest decisions provides evidence of the influence of factors such as: assumptions of professionals, child welfare workers, and

medical staff doing the assessments; the dominant thinking of the culture; the perspective of parents; and personal perspectives of judges (Piper, 2000). Those who emphasize cultural diversity challenge the possibility of an objective assessment because it inevitably involves putting a higher value on one way of living than another.

Dynamic Self-determination

John Eekelaar strikes a different balance in a theory labeled dynamic self-determination (Eekelaar, 1994). Eekelaar developed this approach in a deliberate effort to give greater recognition to the right to self-determination in compromise with the protectionist elements of the BIC. Self-determination is given priority, but there is recognition that some limits are needed during childhood, to protect future options for the child. Full exercise of autonomy by young children, for example, can conflict with the child's own basic or developmental interests. Age and developmental factors are dynamic elements to be considered on a case-by-case basis; as children become older, they should have a greater role in making decisions about what is in their best interests. Children, argues Eekelaar, should not only have their views heard and others make the decision; children should be part of making the decisions. Developed in the context of custody cases, Eekelaar argues that objective assessments of a child's best interest have value, but they are not reliable for two reasons: first, they rely on a consensus of values that may not apply in a particular situation; and second, the outcome of a specific determination is affected by the way the child interacts with what has been determined as best, introducing a variable that cannot be predicted. For this reason, Eekelaar introduces a new element of dynamism, that decisions remain open to change because the child, one of the factors

involved, changes. Court dispositions in custody cases, for example, should not be a final outcome, but allow for review and change based on changes in the family dynamics that result from the determination. This theory recognizes that the child's own assessment of his/her best interests may also change, and allows room to accommodate that within a defined process.

The critique of dynamic self-determination is that it opens a door to impulse decisions based on short-term circumstances and does not take enough account of the need to protect future interests of children. Eekelaar's response to critiques of dynamic self-determination relies on the checks provided by the more objective process used to determine best interests. It remains a balance between elements based on the concept of protection of interests and elements based on choice and self-determination. Eekelaar emphasizes that dynamic self-determinism does not delegate decision-making to children, but it respects them as active participants in the decision-making process and leaves open the possibility of changes in life-path decisions, based on development of a child's capacity to determine best interests and provide an explanation for choices. Self-determination, in this approach, is a process that develops children's ability to perceive what is in their best interests over time (Eekelaar, 1994).

Expanding from custody cases to the Convention as a whole, Eekelaar suggests that this approach provides a way to see the BIC as a mode of behaviour that enhances self-determination and autonomy rather than being in tension with it (Eekelaar, 1994,58).

Utilitarian Approach to Best Interests

The Convention also contains a few elements of a utilitarian approach to the BIC. In this approach, the best interest is what is in the interests of a majority of children. The focus on generalized standards of care is reflected in the last paragraph of Article 3, which articulates that services for children should conform to a set of standards set by competent authorities.

Approaches that set standards based on a majority and then define best interests in relation to such standards are critiqued for their failure to take into account the unique situation of individual children, such as children with disabilities or children with different learning styles. There are continuing tensions between the best interests of individual children and the best interests of a majority.

This debate within children's rights is similar to the on-going debate in moral philosophy between basing ethics on utility or individual rights, leading to schools of thought characterized as consequentialism or deontology. Allan Gewirth's response to utilitarianism and its relevance for children's rights will be discussed in chapter six.

All of these theories are attempts to reconcile protection and self-determination by making compromises on one side or the other. In practice, the critiques of these approaches illustrate limitations in their ability to resolve the concerns about lack of clarity and consistency in implementation of the BIC. The next chapters will explore whether there is an alternative ethical framework that could better integrate protectionist elements in the concept of BIC with the goal of self-determination, taking full account of the development of children from infancy to age 18. In chapter four the capabilities theory developed by Martha Nussbaum will be compared to the four theories in this

chapter to see if it provides a more satisfactory framework for the content of the BIC. To address tensions relating to who should be the decision-makers and what should be the decision-making process for the BIC, chapter five will draw on the human rights theory developed by Alan Gewirth. This thesis argues that his theory, grounded in generic rights to freedom and well-being and the basic principle of generic consistency, provides both stronger justification and more detailed specification for implementation of the BIC.

Chapter 4

Capabilities Framework and Best Interests of the Child

The previous chapter identified different approaches to the BIC that attempt to resolve the tensions between different concepts of children's rights in general. This chapter will consider the capabilities theory of Martha Nussbaum as an alternative framework for interpretation of the BIC and children's rights.

Martha Nussbaum developed her capabilities framework in the context of working on ethical issues related to women's rights in developing countries; as such, it deals with similar issues to those that arise in relation to children's rights. This is especially true for the book entitled *Women and Development*, which is the major resource for this analysis (Nussbaum, 2000). Practical application of capability theory is reinforced in another publication, *Women, Culture, and Development* (Nussbaum and Glover, 1995).

After outlining Nussbaum's basic theory, it will be compared with the four approaches to the BIC identified in the previous chapter, to determine how it would deal with the major ethical challenges in implementation of the BIC.

Nussbaum's Capabilities Framework

Martha Nussbaum bases her political philosophy on two core principles: each person should be treated as an end, not a means to the ends of others; and, the full range of capabilities of each person should be developed and respected. Capabilities, according to Nussbaum, are what people are able to do and be as human beings. Central or core capabilities are essential for living in dignity; therefore they are a minimum of what

society should strive to achieve for every person within that society. The basic role of political structures and public policies is to promote the development of the capabilities of every person.

Nussbaum's list of core capabilities describes universal elements of being human, derived from experience and identified and verified through cross-cultural, empirical research. The list remains flexible and open for modification, through dialogue between people, as long as the core principles are respected. In this way it combines universality and respect for cultural diversity. It is presented in different forms in various publications. For the purposes of this thesis, the list of core capabilities published in *Women and Development* is outlined in Table I (Nussbaum 2000, 78-80).

Nussbaum's list of core capabilities relates to all aspects of life, from material needs to social relationships, spirituality, and political participation. The list separates distinct components that enable human functioning; Nussbaum argues that all of them are essential and cannot be interchanged. More economic resources, for example, cannot be traded for political voice. At the same time, they are inter-related and the degree of development in one will have impacts for development of others.

Among the core capabilities, some play different roles than others. Nussbaum explains that practical reason and affiliation are central because they are used in applying and organizing the others. Practical reason is the ability to form a view about what is good and think critically about one's actions. Affiliation is the capacity to form social relationships of mutual care. While the core capabilities are primarily internal and individual, in some cases external conditions are included in the list as protection for the exercise of the related capability.

Table I

Nussbaum's List of Central Human Functional Capabilities

1. **Life:** Being able to live to the end of a human life of normal length; not dying prematurely.
2. **Bodily Health:** Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.
3. **Bodily Integrity:** Being able to move freely from place to place; having one's bodily boundaries treated as sovereign, i.e. being able to be secure against assault, including sexual assault, child sexual abuse, and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.
4. **Sense, Imagination, and Thought:** Being able to use the senses, to imagine, think, and reason – and to do these things in a “truly human” way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing self-expressive works and events of one's own choice. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to search for the ultimate meaning of life in one's own way. Being able to have pleasurable experiences, and to avoid non-necessary pain.
5. **Emotions:** Being able to have attachments to things and people outside ourselves; to love those who love and care for us; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by overwhelming fear and anxiety, or by traumatic events of abuse or neglect.
6. **Practical Reason:** Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (This entails protection for liberty of conscience.)
7. **Affiliation:** A. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another and have compassion for that situation; to have the capability for both justice and friendship. (This means protecting institutions that nourish such forms of affiliation, freedom of assembly and political speech.) B. Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails protections against discrimination on the basis of race, sex, sexual orientation, religion, caste, ethnicity, or origin.
8. **Other Species:** Being able to live with concern for and in relations to animals, plants, and the world of nature.
9. **Play:** Being able to laugh, to play, and to enjoy recreational activities.
10. **Control over one's environment:** A. Political. Being able to participate effectively in political choices that govern one's life; having the right of political participation. B. Material. Being able to hold property, not just formally but in terms of real opportunity; having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure.

Capabilities Framework and Children's Rights

Nussbaum's framework responds to some of the central issues raised in relation to the rights of children. The focus on capabilities fits well with the developmental nature of childhood, and the comprehensive nature of Nussbaum's list of core capabilities fits with the integrated development of children and the comprehensive provisions of the Convention. While the framework focuses on the capabilities of each individual person, it gives a central role to the capacity for forming relationships based on affection and care, such as family relationships. In this way it integrates respect for the rights of each child with the essential role of love and care in families and communities. It includes spiritual development and respect for cultural diversity within the list of central capabilities. In this way it accommodates the desire of parents to pass on religious and cultural teachings to their children, while preserving a central focus on the development of each child's own beliefs and the right to express them. Nussbaum's framework addresses political, civil, economic, and social rights in one comprehensive framework. It is flexible and allows for progressive realization.

Nussbaum focuses on capabilities, rather than goods or functions, to allow for different views of how capabilities are used and what constitutes a good life. Her framework maximizes liberty and choice within a pluralistic context, while maintaining a common basis for public policy. The capability of every person to function is a more appropriate focus for public policy, according to Nussbaum, than the choices people make in using their capabilities. When choices impact core capabilities, however, the state may have to intervene in actual functioning. This is particularly true for children in

developmental stages when choices will affect future capability. Compulsory education is an example where the present choices of a child are justifiably limited by public policy to protect future capabilities.

The focus on capabilities can help to resolve some of the tensions between protection and self-determination. Interventions to protect children, according to Nussbaum, need to be for the purpose of developing their capabilities, not other motivations. A capabilities framework, for example, could provide a more coherent framework for determining the appropriate age of self-determination for various activities. At present in Canada we have diverse ages for a variety of functions, without a coherent framework or rationale for such decisions. A more coherent focus on the capabilities of young people in relation to the various functions could provide a more rational basis for decision-making. It would not remove debate, but it would focus the debate on capability-based criteria rather than arbitrary age criteria or the interests of other actors in the society.

A clear focus on developing the capabilities of a child can also help to resolve child-rearing tensions between parents and/or other caregivers in a less adversarial way. Nussbaum's framework helps to resolve tensions between parental rights, religious beliefs, cultural norms, and the developing capacity of young people to make their own decisions. There will still be conflicts, but questions and criteria based on capabilities open more creative space for resolving such conflicts, rather than pitting claims against one another.

In Nussbaum's thinking, capabilities provide a basis for claims based on rights, without some of the tensions that have developed around rights language. In the book

Women and Development, Nussbaum reflects on some of the controversies that have developed since the adoption of rights instruments (Nussbaum, 2000, 96-101). The focus on capabilities takes a step back to ask what is at the basis of the debate. In doing so, Nussbaum's work helps to address some of the barriers to acceptance of children's rights. It is easier to find consensus on the notion of developing children's capabilities as a core objective that is shared by parents and states. A focus on capabilities relates closely to the way actual lives are lived and provides a strong ethical justification for claims for certain goods.

For children, the descriptors of the core capabilities would be adjusted, based on the input of young people themselves, just as the current list was developed through consultation. The language of rights and responsibilities is necessary for children's issues to clarify who has claims and obligations, but a capabilities framework can provide ethical justification for such claims by appealing to something more basic for every child.

In addition to justification of children's rights, the list of central capabilities provides an ethical framework for asking what is in the best interests of children. The components of the capabilities framework provide content for the BIC that is based on empirical research across cultures and responds to the reality of daily living. It can provide ethical specification for the concept of the BIC.

As a test of the capabilities framework, it is useful to compare it with the four approaches to the BIC described earlier. How well can Nussbaum's framework resolve the tensions between protection and self-determination in application of the BIC?

Capabilities Framework and Parental Autonomy

Nussbaum's capabilities framework includes the capability to form family relationships of love and care as a central capability to be nurtured in every person, including children. Nussbaum does this in explicit response to the debate that some feminists raised about the relationship between care and love within the family and full development and autonomy of the individual (Nussbaum, 2000, 241-290). Rather than approaching these as conflictual goals, factors to be balanced, or goods that are trade-offs in policy decisions, they are integrated into one larger framework.

For children, families are most important because children are "captive within the family" (Nussbaum, 2000, 274). The family plays a central role in fostering or hindering the development of the capabilities of children. For this reason, the state has a greater interest in the family than in some other institutions, according to Nussbaum.

The family, in Nussbaum's view, is a complex social structure, not a pre-political or natural institution. This is substantively different than the most prevalent philosophical foundation for family autonomy, which is that the family is a natural institution while the state is a social construction. She cites as evidence the different shapes of families in different cultures and the role of law and public policy in determining the shape of family life. In an imaginary dialogue with Rawls, Nussbaum writes, "You didn't just find the family lying around, you constituted it in one way, through property law; now we shall constitute it in another way, one that protects women's capabilities"(Nussbaum, 2000, 274). One consequence is that there is not a sharp private-public distinction in the capabilities framework. The central question for

Nussbaum is not protecting societal institutions, such as the family, but how each institution contributes to the development of the full range of capabilities of each individual.

Since government policy plays a central role in constructing family life, asserts Nussbaum, it should focus on doing it well, actively supporting the family in its role to develop the capabilities of children (Nussbaum, 2000, 281). While there is space and respect for cultural traditions and religious diversity within the core capabilities, state intervention is justified, if necessary for the purpose of protecting the central capabilities of an individual family member, particularly a child who is dependent, vulnerable, and has no choice about being part of a particular family. The family is not autonomous, but state intervention is prescribed by a specific focus and purpose.

As an illustration, Nussbaum discusses the issue of early marriage. While traditional marriage is valued as cultural heritage, the state has a responsibility to intervene if particular practices harm the core capabilities of young girls. Using this example, Nussbaum articulates the following principle:

“The state should not intervene in the conduct of family members without a compelling interest, but such a compelling interest is always supplied by the protection of the central capabilities – including, of course, the individual capabilities to choose relationships of love and care” (Nussbaum, 2000, 275).

Beyond intervention in specific cases, Nussbaum argues that respect for the central capabilities of every person should be incorporated into public laws that shape family life. In Canada, adoption of a principle similar to this would provide much greater consistency in the interpretation of the BIC in the area of family law.

Nussbaum is also attuned to the importance of other affiliations, such as women's cooperatives in India, as important social spaces where many women develop capabilities. The state should actively support these, argues Nussbaum, as much as families, because of their role in developing women's capabilities. For children in Canada, a parallel would be Boys and Girls Clubs or other voluntary associations that provide social space where children develop their capabilities. The state, argues Nussbaum, should focus on developing capabilities and then make policy and program choices that will achieve that objective within the local social context.

Nussbaum pays particular attention to cultural considerations. Her argument against cultural relativism in defense of universal values is worth noting in relation to BIC. In response to cultural determinism, Nussbaum points out that there is not agreement on essential ethical choices within any culture. In addition, she argues, there is an inherent contradiction in cultural relativism: in the name of cultural relativism, people are asked to support traditions that claim to be absolutes and do not respect diversity. "Relativism asks us not to follow relativism" (Nussbaum, 2000, 74). In contrast, Nussbaum integrates flexibility for cultural and religious diversity within the capabilities framework, but orients them toward the development of the capabilities of each person, which she considers universal. In this way Nussbaum resolves the tension between universalism and cultural diversity on the level of principles rather than compromise between competing principles at the level of public policy formation, programming, or individual case management.

Capabilities and Liberal Paternalism

Nussbaum self-identifies her work with the liberal tradition and defends many elements of typical liberal approaches to political philosophy, such as personal liberty as a central social goal. She also critiques some typical elements of liberal approaches, such as the dominance of rational thought over emotion and imagination as sources of knowledge and the basis for decision-making. The goal of development for children is similar to that articulated by Michael Freeman in liberal paternalism, to become independent moral decision-makers, but the comprehensive nature of Nussbaum's core capabilities responds to concerns about individualism and over-emphasis on reason at the expense of other human traits. Nussbaum takes on board the feminist critique of liberal autonomy by including emotions, affiliation, and the ability to form attachments of love and care within the core capabilities. Senses, emotions and imagination, as well as reason, are essential capabilities to be used, not sidelined, in making choices.

At the same time Nussbaum strongly defends the liberal notion of universal individual rights against paternalism. Rather than paternalism, she argues, "we should prefer a universal normative account that allows people plenty of liberty to pursue their own conceptions of value, within limits set by the protection of the equal worth of the liberties of others." Protection includes "forms of economic empowerment that are crucial to making the liberties truly available"(Nussbaum, 2000, 55). While protecting capabilities justifies elements of protection in raising children, it is always directed toward their evolving ability to fully exercise all of their capabilities.

Like liberal paternalism, and in contrast to parental autonomy, a capabilities framework includes a positive role for the state, to support the development of abilities and ensuring conditions for the exercise of them.

The focus on capabilities resolves the tension between protection and self-determination through integration within one framework for the BIC rather than through progression from protection to self-determination, as articulated in liberal paternalism. In this way, Nussbaum's capability framework provides a more coherent ethical justification and a more detailed specification of what constitutes the best interests of children than liberal paternalism does.

Capabilities and Dynamic Self-determination

The focus of Eekelaar's approach to the BIC is on making choices and self-determination. Nussbaum's focus is on the capabilities of each child, which includes a full range of capabilities as well as practical reason. Nussbaum shares Eekelaar's emphasis on dynamic relationships and open process through support for continually developing capabilities as the focus for public policy.

Nussbaum would agree with the focus on process and active participation of children articulated in dynamic self-determination. The focus of the decision-making process in a best interest determination would be more clearly on developing capabilities than on what goods might be in the best interest of the child at the moment. Nussbaum's capabilities framework provides greater clarity about the criteria and focus for decision-making in the continuous process articulated in the theory of dynamic self-determination.

Capabilities and a Utilitarian Approach to Best Interests

The core principle of Nussbaum's theory is each person or child as an end, not a means to the end of others. That is a rejection of utilitarianism because it is inadequate to protect the rights of each child. Based on her work with oppressed women, living in poverty, Nussbaum provides a detailed critique of traditional welfarism as inadequate because of its roots in utilitarian thinking; it does not pay enough attention to the individual circumstances and capabilities of each woman. As an alternative, she highlights the value of social services delivered through women's networks, precisely because of their focus on understanding and support for each person's circumstances.

The same would apply for children. The strong focus on developing the capabilities of each, unique child would find inadequacies in programs that are driven by generalizations about children and designed to fit all children in one mode. A capabilities framework would focus on the best interests of each child more than the notion of compliance with program standards based on an average circumstance of all children.

Summary of Comparison

Nussbaum's capabilities framework provides a more robust ethical justification for the BIC and more practical specification of both content and process than the four approaches described in chapter three. Putting development of the capabilities of every child at the center and using a comprehensive framework for defining core capabilities provides more substantive, normative content than parental autonomy and it offers a focus for cooperation between family and state instead of potential adversarial relationships. The capabilities framework, which is based on essential elements and

relationships for daily living, avoids the concerns about over-emphasis on rationality and individualism raised by liberal paternalism. While active participation in decision-making is essential for developing capabilities, as it is in dynamic self-determination, the object is not choice itself but development of abilities and relationships with others. Finally, a capabilities framework gives priority to helping every child develop his or her potential, in contrast to utilitarian approaches.

Nussbaum's framework, however, gives limited attention to the correlative obligations that are essential for implementation of children's rights. Following the liberal tradition, Nussbaum frames her concept as a social contract between individuals and the state. In keeping with that, a few of the capabilities identify legal measures and public policies to enable their realization. Using all the core capabilities as the basis for rights claims raises many questions about obligations that are not answered adequately. Who is responsible for ensuring that a child has an adequate education and opportunity for artistic expression? Are there limits to what a child can claim on the grounds of developing core capabilities? If all the core capabilities for all persons are essential, how does one settle inevitable conflicts between reasonable claims on justifiable grounds for equally important capability development? These are the kind of questions that Alan Gewirth took up in response to critics of human rights. They are addressed in his project to reconcile the concept of individual rights with the requirements for community life. For this reason, it is important to also consider the work of Alan Gewirth in relation to the BIC and children's rights.

Chapter 5

Community of Rights and Best Interests of the Child

Nussbaum's capabilities framework provides a strong ethical foundation for the meaning and interpretation of the BIC. Development of the core capabilities of each child, based on each child being an end with inherent value, provides a framework for application of the BIC in specific situations. It does not, however, adequately address the question about correlative obligations, which is particularly important for children. A stronger ethical foundation is needed for questions related to obligations and duty-bearers in the implementation of children's rights.

A related concern about BIC and children's rights is that they can lead to excessive demands and foster a self-centered individualism, without a balanced focus on responsibility. This is especially true of the BIC because it is a maximizing principle, calling for the best, rather than establishing minimum standards for care of children. The inclusion of care for others and social relationships within Nussbaum's core capabilities helps to address this concern, but there is limited attention to broader social responsibilities within the capabilities framework.

To address these factors on the obligation side, it is useful to consider the work of Alan Gewirth, who focused attention specifically on the relationship between individual rights and the importance of community. In his book, *The Community of Rights*, Gewirth sets out to show that the concepts of human rights and community are not in opposition to each other. For Gewirth, human rights are relationship rights between people, based on

claims and obligations of each party, leading to a mutuality of rights and responsibilities within community (Gewirth, 1996).

This chapter will examine the relevance of Gewirth's approach to human rights for BIC and children's rights in general. In particular, this chapter will consider three core elements of Gewirth's thinking: how the principle of generic consistency relates to children's rights; how the criterion Gewirth develops to resolve conflicts between rights claims applies to the BIC; and how Gewirth's ethical justification for economic and social rights strengthens the case for applying the BIC to public policy decisions for children as a group. Then Gewirth's theory will be compared with the four approaches to implementation of the BIC presented in chapter three, to determine if Gewirth's theory provides a more satisfactory resolution of the tensions inherent in the Convention.

Principle of Generic Consistency and Children's Rights

Gewirth develops a moral justification for human rights based on human action. Every person, argues Gewirth, is a "prospective purposive agent," defined as someone who acts or can act to achieve purposes determined by the agent. In order to act, argues Gewirth, every person needs certain conditions; these can be summarized as freedom and well-being. Freedom, according to Gewirth, captures the procedural conditions for action, which are often associated with civil rights; and well-being captures basic human needs in order to be able to act, such as food and shelter, which are associated with economic and social rights.

If person A recognizes that he/she needs freedom and well-being for purposeful action, then A also needs to recognize that every other person also needs similar

conditions. This analysis provides a logical basis for claiming freedom and well-being as generic rights for every person (Gewirth, 1996, 8-26). To reject any point in Gewirth's logical progression from human action to generic human rights would lead to internal inconsistency. As Gewirth states it, the undeniable basis of his line of reasoning provides strong grounding for human rights:

“I do X for end or purpose E.” This is a statement-form that, given certain minimal assumptions about rationality, no agent can rationally deny about himself, so that it has a certain necessity within the sphere of human action” (Gewirth, 1996, 356).

This leads Gewirth to identify a basic moral principle called the Principle of Generic Consistency: “Act in accordance with the generic rights of your recipients as well as of yourself” (Gewirth, 1996, 19). Since all humans are prospective or potential agents, all humans have a rightful claim for freedom and well-being that makes purposeful action possible. All humans also have obligations to respect and help realize the right of others to freedom and well-being. This principle has similarities with what is called the Golden Rule, do unto others as you would have them do to you, or the Christian principle of neighbor love, love your neighbor as yourself. A major difference is that Gewirth's moral imperative is not grounded in an external command from a higher being or a notion of moral virtues. Gewirth provides a practical, undeniable reason for acting morally in his theory of human rights, grounded in necessary conditions for action and the productive agency of every person. To deny the existence of human rights, under this argument, is to contradict oneself. The name given to his basic moral imperative, the Principle of Generic Consistency, embodies the importance of non-contradiction.

Gewirth provides a strong rationale for individuals to claim rights to freedom and well-being. The core of his project, however, is to reconcile individual rights with community, in response to the common perception of an adversarial relationship between rights claims and requirements for strong communities. To do that, Gewirth develops his argument further, through step-by-step logical deduction, to arrive at the concept of the mutuality of rights and responsibilities. Everyone has both rights and duties within a community of rights (Gewirth, 1996, 19-20). In this way Gewirth's theory of human rights differs from theories based on a notion of autonomous individuals. It also responds to the critique of human rights as being too individualistic, without regard for interdependence and social relationships.

For Gewirth, human rights are inter-personal relationships, and the duty to respect rights is the duty of every person, not just or primarily the state. The state has responsibility for the general conditions that enable fulfillment of rights, acting as an instrument of the people, but the primary duty-bearers remain every person in relation with every other person. This is what Gewirth develops as a community of rights, people who live together in relationships of rights and responsibilities, and, as a consequence, develop social structures that promote and protect freedom and well-being for every person (Gewirth, 1996, 81-101).

Gewirth's approach to human rights is relevant for children's rights conceptually and practically. In particular, this thesis will consider three matters: the implications of considering children as prospective productive agents; application of Gewirth's principle for resolving conflicting claims; and educating children about rights and responsibilities.

Children as Prospective Purposive Agents

Gewirth's concept of a prospective, purposive agent as a descriptor of children highlights both the dignity and worth of every child and the developmental aspect of childhood. Gewirth's basic structure for human rights is the following: A (the subject or right-holder) has a right to X (the object/nature of the right) against B (the correlative duty-bearer) by virtue of Y (the justification for the claim) (Gewirth, 1996, 8). Applied to children, it might read: Child A has a right to the necessary conditions for development of his or her capacity for purposive action against B, parents, the community and the state, by virtue of C, status as a prospective, productive agent. The inclusion of the notion of prospective agent along with purposive agent provides a strong ethical basis for the basic notion that children have rights. It also links children's rights to adult rights. It does not set children in opposition to adults as a different category or not-yet adults; the moral status as purposive agents is the same, but a different relationship to action is taken into consideration in the term prospective.

With specific reference to children, Gewirth states that the goal for children should be "to enable the child to develop her productive capacities at least sufficiently to be self-supporting" (Gewirth, 1996, 159). The focus on capacities is similar to Nussbaum's focus on capabilities; while Nussbaum focuses on maximum development of potential, Gewirth puts more emphasis on a minimum base that could be guaranteed. Beyond that, he argues, each person should be able to use freedom to develop in his/her own way because of different aptitudes and interests.

It is useful to consider Gewirth's elaboration of the generic right to freedom as one of the necessary conditions for human action. Gewirth makes distinctions between

occurrent freedom, which refers to particular freedom at a particular point, and dispositional or long-range freedom, and also between the relative importance of different objects of freedom (Gewirth, 1996, 46-49). Gewirth argues that it may be necessary to interfere with a particular freedom, such as traffic lights that restrict the freedom of a driver, in order to protect the larger freedom for everyone using the street. These distinctions are relevant for application of the BIC in cases where restrictions on a particular young person's immediate freedom may be necessary to protect longer-term dispositional freedom or create opportunity for action for less advantaged children. Later Gewirth's principle for resolving such conflicting claims will be discussed.

Gewirth expands the basis for rights claims beyond survival to conditions necessary for a person to be productive and self-supporting, but he also limits the scope of rights claims to what is necessary for action and not more. Gewirth, conscious of the concern about overloading duties associated with rights claims, sets limits and focuses on essentials and minimum conditions for every person (Gewirth, 1996, 101-105), more than on the concept of maximum development for an individual. This approach responds to the concern about BIC that it is a vague, maximizing principle without enough specification to be taken seriously as a basis for obligations on others.

Community as Duty-bearers

Another area of relevance for BIC is Gewirth's focus on the whole community as duty-bearers. This concept is reflected in the Convention on the Rights of the Child as well. While states are identified as primary duty-bearers because the Convention is an agreement between states, many provisions recognize the essential role of parents,

families, other institutions, and civil society organizations within the community, when it comes to fulfilling the rights of children. The BIC is normative for parents in article 18 of the Convention, as an example, as well as being an obligation of the state. The Convention is unique among human rights agreements in giving a formal role to community-based organizations in the structure that implements and monitors progress on children's rights. The multiplicity of duty-bearers is an under-explored dimension of the Convention, because the primary focus in human rights advocacy is on governments as duty-bearers. Multiplicity of duty-bearers is central to Gewirth's community of rights.

The concept of a community of rights adds legitimacy to the protection aspects of the BIC, something that rights discourse based on liberal autonomy has difficulty accepting. Everyone has both rights and duties to protect the rights of others. Self-determination and protection are not contradictions for Gewirth; but the nature of any protection activity is focused on what is necessary to protect the conditions of action, not a paternalism based on the notion that parents, the state, or professionals know best or have the right to determine the best interests of children because of their status.

The individual is the primary focus for Gewirth, as it is for Nussbaum, but the individual is always in relationship with others in the community of rights. With regard to children, protecting them from violations of their rights by others is a matter of personal and social ethics, as well as state responsibility, in Gewirth's community of rights. More than that, Gewirth presents a strong argument to support positive rights, which refer to the active provision of goods and support to help people exercise their productive agency. Starting from purposive human action again, Gewirth develops a logical sequence to justify positive rights, with the following conclusion:

On the basis of the necessity of freedom and well-being for action and successful action in general, no actual or prospective agent can rationally deny that she has a positive right to these necessary goods and that she has a duty to provide for others when they need such help and she is in a position to give it without comparable cost. (Gewirth, 1996, 40)

Gewirth makes clear that the duty to actively provide assistance applies when other persons are unable to attain freedom and well-being by their own efforts. Positive rights, in Gewirth's theory of human rights, require personal responsibility on the part of those seeking help, and the duty to help does not extend beyond reasonable cost to one's own ability to attain freedom and well-being (Gewirth, 1996, 42).

Gewirth's careful articulation of positive rights is particularly important for children because they fall into the category of humans who cannot achieve the necessary conditions for action without assistance from others. Positive rights are the area of greatest dispute for implementation of the BIC and children's rights in general. Gewirth's justification of the principle that everyone has duties to help others who cannot attain freedom and well-being on their own, as well as to refrain from harming them, strengthens the ethical foundation for the provision of public services for children. This is also an area of conflict between competing rights claims, for which Gewirth provides an important principle for resolution of conflicts between competing claims and setting priorities. Before considering this matter, it is important to consider the implications of the community of rights concept for teaching children about rights and responsibilities.

Teaching Children about Rights and Responsibilities

Gewirth's focus on the mutuality of rights and duties is an important consideration for teaching children about their rights and responsibilities. One of the reasons for resistance to accepting children's rights is a fear that they will become self-centered, demanding persons. If children are taught about mutuality – rights and responsibilities go hand in hand - then demands are immediately balanced with duties and children grow up with as much awareness of obligations within community as of claims on the community.

This approach has been effective in schools that develop a rights-respecting culture as a way of teaching children about their rights. In Hampshire County in the United Kingdom, for example, a program was designed to teach children about their rights by creating a rights-respecting culture in public schools. Regular evaluations of this program show that children who have learned about their rights are more likely to show responsible and respectful behaviour toward others than children who did not participate in learning about their rights (Covell and Howe, 2008).

This rings true with my own personal experience in international development work. Children who become aware of their rights often take a lead in community projects for others. After teaching a group of children in Sri Lanka about the rights of children, for example, a child from one of the majority population groups rallied her community to build a shelter for a homeless mother and child from a minority population group in conflict with the majority. She did it because she understood and persuaded others that every child should have shelter. Rights-awareness prompted selfless behaviour in circumstances where claims for herself would have been appropriate.

Mutuality needs to be taken into account in implementation of the BIC. It is in the best interests of children to learn that rights and responsibilities go together.

Resolving Conflicts: the Criterion of Degrees of Needfulness for Action

Whenever rights are implemented there will be conflict between different claims based on recognized rights. Gewirth's community of rights is not an idealistic notion of community where affection prevents conflict, nor is it a notion of community based on traditional or cultural power structures, where individual rights have little place. In his discussion of community, Gewirth addresses the objections of communitarians to human rights and the objections of those who argue that care, affection, and benevolence are superior to rights-based relationships. While benevolence and affection are important, Gewirth argues that anytime community relationships become systematized, rights and duties cannot be ignored. Any political community, argues Gewirth, needs to be able to manage conflicting interests and rights claims (Gewirth, 1996, 79-96).

Gewirth's principle for resolution of competing rights claims is rooted in the core concept of purposeful action. Gewirth argues that the conditions most necessary for action have priority over other claims: "When two rights are in conflict, the rights take precedence whose object is more needed for action"(Gewirth, 1996, 45). A child's claim for basic food, for example, or freedom from violence would have priority over other claims because it is more needful for every child's right to become a purposive agent.

In his elaboration of the criterion for resolving conflicts, Gewirth draws on the distinction between occurrent freedom and dispositional freedom discussed earlier. Restrictions or interference with particular freedoms are justified to help others in need

attain a basic degree of freedom and well-being. As an example, Gewirth justifies restricting the freedom of wealthy persons to use their wealth as they wish through taxes that support basic opportunities for the least advantaged persons to engage in purposive action. If the tax burden for particular persons is so heavy that it seriously harms their dispositional or long-term freedom, then it may violate the basic right to freedom for purposive action (Gewirth, 1996, 46). These are difficult judgments to make, but Gewirth provides helpful specification that is missing in the indeterminate nature of the BIC and the general provisions of the Convention for children's rights.

Criteria based on degrees of needfulness for action are also useful for competing claims under the generic right to well-being. Again, Gewirth elaborates distinctions between three categories of conditions for action to help in resolving disputes and setting priorities. The basic level is pre-conditions necessary for action, such as life, food, shelter, and physical integrity. The second level is labeled non-subtractive to describe conditions needed to maintain one's current level of action. The third level is additive, conditions that increase one's capacity for taking particular actions and fulfilling identified purposes (Gewirth, 1982). In applying criteria based on needfulness for action, claims in the area of basic well-being would have priority over additive claims, depending on careful analysis of the particular issue and particular situation.

Criteria based on degrees of needfulness for action can help to resolve conflicts and set priorities for action in the field of children's rights. Gewirth recognizes that duties cannot be open-ended obligations in response to all the possible claims of all children; he argues for a limited set of obligations that can be implemented through public policies to actively contribute toward realization of the most needful rights claims

(positive rights) and protection against violations of children's rights by other actors in society (negative rights). The public policies are developed through democratic dialogue in community. Gewirth deals extensively with the objection that human rights lead to excessive demands, what he calls an overload of duties. This is also one of the objections to children's rights. Gewirth illustrates his principle with detailed analysis of specific issues in economic and social rights. They provide examples of how to think through specific challenges in application of the BIC (Gewirth, 1996, 166-308).

Gewirth's careful attention to the question of how to set priorities among rights claims also addresses one of the important international challenges in children's rights, as well as other fields of human rights. At the Second United Nations World Conference on Human Rights in 1993, the Vienna Declaration reinforced the notion that all human rights are indivisible, interdependent, and equal in importance (*Vienna Declaration and Programme of Action*, 1993). This was important for the principle of the universality of rights and strategically important to resist the historic division between political/civil rights and economic/social rights. At the same time it has been used by opponents of human rights to argue that right-based approaches to public policy are unrealistic and unable to help in setting needed priorities for allocation of limited resources.

In reality, for example, the deprivation and violence experienced by some children is in a different category than rights claims by children in more advantaged positions in society, although they are all grounded in the Convention and theoretically, according to the Vienna Declaration, equally important and indivisible. Gewirth's approach is helpful in that the principle for making difficult choices is based, not on one category of rights over another, the status of children, or proximity between the claimant and duty-bearer,

but on the purpose for having rights, human action. This is very helpful for children's rights, which span a whole range of matters from the most basic needs to the complexities of childhood in advanced societies.

Henry Shue responded to the same question of priorities in the field of human rights by identifying a limited number of basic rights, and designating the others for progressive realization as resources allowed. Although similar in some ways, Gewirth's approach has a stronger ethical justification and more flexibility by focusing on actions, not particular goods (Shue, 1996).

For children's rights, using a test based on "degree of necessity for action" provides a more robust basis for adjudicating claims in the field of children's rights than the notion of BIC. This will be discussed in more detail later by comparing Gewirth's theory with the four approaches presented in chapter three. But first it is important to consider Gewirth's justification for economic and social rights.

Ethical Justification for Economic and Social Rights

Gewirth argues that economic and social rights are as essential as civil and political rights, because basic needs are as necessary as freedom for taking purposeful action. But Gewirth is also a strong critic of state welfare programs and centrally planned, controlled economies because they foster dependency on the state and deny freedom (Gewirth, 1996, 106-127). He argues they are violations of the rights of productive agency of every person. Gewirth asserts that the Principle of Generic Consistency is "fundamentally different from both libertarianism and socialism" (Gewirth, 1996, 43). Persons are helped by social institutions to become closer to the

goal of being an independent, productive agent, not to become dependent on the state (Gewirth, 1996, 96-101).

Publicly funded education and public policies that create employment opportunities are a high priority in Gewirth's approach to social policy. Developed in the context of the United States, Gewirth places a strong emphasis on the right of employment as a way to ensure that every person has access to resources to be a productive agent with maximum freedom. For Gewirth, the goal of any public assistance program should be the development of self-controlling, self-developing, productive agents, not supporting dependent, passive recipients that only benefit from the contributions of others.

The primary focus for Gewirth is realizing the rights of those who are unable to fulfill their rights by their own efforts, which includes children. He is particularly concerned with addressing the situation of people who live in deprivation and lack basic opportunities to exercise their productive agency. A key question for economic policy is what it would take to move persons from deprivation to productive agency.

To illustrate how Gewirth links personal action and state action to address deprivation, it is useful to consider his concept of an economic biography on the individual side and an economic constitution for the state. An economic biography is:

a sequence whereby even the poorest can gradually surmount their economic and related afflictions and move closer to equality by, among other things, developing relevant abilities, but also by appropriate and justified macroeconomic policies and institutions" (Gewirth, 1996, 99).

The counterpart, an economic constitution:

"will provide for the progressive fulfillment of the economic rights of persons who need help to overcome their economic deprivations. Thus what from the individual standpoint is a biography, from the social

standpoint is a constitution that incorporates, in a stable legal institutional form, the policies that foster the biographical development” (Gewirth, 1996, 100).

For young people living in deprivation, an economic biography might be a sequence of actions that helps them move from economic dependency by reason of age and level of development to being able to exercise their own productive agency and achieve self-sufficiency. Gewirth’s link between economic rights and productive agency avoids the notion of entitlements that often fosters resistance to rights talk.

Gewirth’s approach to economic and social rights as they affect children is illustrated in his elaboration on the subject of education. The purpose of education is to enable children to develop their productive capacities in all areas of living, but with a minimum goal of developing the ability to be self-supporting. The main concern, for Gewirth, is the ability of education to improve the life chances of the poor and lift children out of deprivation (Gewirth, 1996, 152). The example he holds up with particular appreciation is the Headstart program that addresses a variety of the needs of young children growing up in poverty.

In all the dimensions of children’s rights discussed above, Gewirth’s theory provides a different focus for the BIC than the four theories described in chapter three. A closer comparison with each of them clarifies what Gewirth’s approach contributes to strengthen implementation of the BIC and children’s rights in general.

Community of Rights and Parental Autonomy

In Gewirth's approach, parents are duty-bearers, but the focus of their obligation is to support and encourage the productive agency of children, not control their lives. Gewirth recognizes the important role of families within a community of rights, but each person within the family also has integrity and rights apart from the family. Gewirth explicitly rejects the notion of an organicist family where family members are seen as parts of one another and individuality is lost (Gewirth, 1996, 125-126). The notion of parental autonomy has no place in Gewirth's approach. In this way, Gewirth's approach is similar to that of Nussbaum, but with more specification on duties and obligations, as part of reconciling individual rights claims with life in community.

The role of parents, however, is important and not contested. When the goal for child development is productive agency, not autonomy, children's rights are less directly challenging of parental authority. As a consequence, the tension between authority and self-determination is not the major focal point for attention.

The role of the state is to help parents foster the development of their children as productive agents through social institutions and social policies. Gewirth uses the Headstart program as a good example because parents and local communities are involved in a state program to help children with less opportunity develop their own abilities. This kind of program is a priority for Gewirth because of his focus on ending deprivation and because it actively engages the community in fulfilling rights.

If necessary, however, the state may need to intervene in parental decisions to protect a child's right to productive agency. Gewirth provides an example of this in his discussion on the importance of education for the development of productive agency. If

the right to education comes into conflict with religious claims of parents, for example, Gewirth applies the principle of ethical individualism and the criterion of most needful for action to arrive at a judgment that:

“in accordance with the ethical individualism of the principle of human rights, the children’s rights to development of their general abilities of productive agency overrides the parents’ rights, based on religion, to prevent that development”(Gewirth, 1996, 163-164).

Elsewhere Gewirth distinguishes between ethical individualism and egoism; ethical individualism acknowledges that the productive agency of each person is the ultimate end, but social relationships are essential and they are governed by the Principle of Generic Consistency, so no person can live for themselves and disregard the rights of others (Gewirth, 1996, 96-98).

These examples illustrate how Gewirth’s careful delineation of his approach to human rights provides sound, logically consistent direction, compared to the vagueness of the BIC. It also provides practical principles for resolving conflicts in ways that contribute to mutual support rather than adversarial contests of wills.

Community of Rights and Liberal Paternalism

The goal of child development, in Gewirth’s theory, is becoming a productive agent; in liberal paternalism the goal is becoming a rational, independent decision-maker. While reason and freedom to make moral judgments are part of being a productive agent, they are means to the goal of purposive action, not ends in themselves.

Gewirth’s theory emphasizes mutuality of rights and obligations, which is neither a paternalism nor individual autonomy. Every person, young and old, has both rights

claims to the necessary conditions for productive agency and obligations to protect the rights of the others to similar conditions.

The focus on being a prospective, productive agent is more helpful than focusing on self-actualization when it comes to BIC and children's rights. It shifts the focus for determining best interests to purposive action, the prospects for purposive action, the potential for successful action, and the conditions for action rather than the nature of the self or personal needs. The criteria for resolving conflicts under BIC illustrate the difference. For Gewirth it is needfulness for action, not a reliance on professional, clinical assessments of children in abstraction, the typical tools that grow out of liberal paternalism.

Together the concepts of productive agency, mutuality of rights and obligations, and the criterion of needfulness for action provide a more focused ethical justification and specification than liberal paternalism does for implementation of the BIC.

Community of Rights and Dynamic Self-determination

Gewirth's approach is focused on productive agency rather than self-determination. Freedom, one of the necessary conditions for productive agency, is defined by Gewirth as the ability of a person to control his or her behaviour by unforced choice, which is similar to the definition of self-determination in Eekelaar's approach. Gewirth also puts emphasis on the necessary correlative of respecting the freedom of others, which adds a communal duty not found in the notion of dynamic self-determination for the individual child. Gewirth's approach is also a dynamic one with an

emphasis on active participation in creating and continuously changing the conditions for productive agency.

While Gewirth emphasizes personal responsibility, the focus of action goes beyond individual choices to cooperative action and democratic participation in developing public policies that increase the ability of every person to exercise productive agency. The process for determining the BIC, within Gewirth's framework, would focus on the necessary conditions to help a child develop his/her ability for productive action and include appropriate components of obligations for others. It would also increase the focus on economic and social policies that affect the life chances of every child.

Community of Rights and a Utilitarian Approach to Best Interests

Given Gewirth's appreciation for the importance of community, one might expect him to be more sympathetic to the utilitarian emphasis on benefiting the most people. Gewirth strongly rejects a utilitarian focus on the most benefit for the most people in favour of a clear focus on the rights and responsibilities of each person. As Gewirth states it, "If A has a right for her own sake, then it is not for the sake of society" (Gewirth, 1996, 12). Best interests of each child cannot be subsumed in averaging for the greatest good of all children.

For the application of the BIC to children as a group, Gewirth's analysis of the difference between collective rights and utilitarian benefits is relevant. Collective rights, he argues, ultimately go back to each person in the group; they are not fulfilled by overall utility that does not take account of each member of the group. Gewirth articulates four differences between collective rights and utilitarian benefits. First, collective rights have

a distributive aspect because they are designed to benefit individuals rather than a collective entity. Second, collective rights segment specific and distinct kinds of goods whereas utilitarianism focuses on overall utility. Third, the objects of collective rights are specific goods linked to agency whereas utilitarian benefits focus on group desires or preferences. Fourth, collective rights are owed to people while utilitarian benefits are a means to maximize overall utility (Gewirth, 48-49).

For children, the difference between Gewirth's approach and utilitarian approaches to BIC is that the development of every child, in relationship with others, is the measure of progress rather than general standards based on averages for all children.

Summary of Comparison

Through comparison it becomes clear that Gewirth's complex articulation of human rights and obligations in a community of rights builds on previous theories. It also deliberately responds to many of the objections to human rights, especially economic and social rights. In doing so, Gewirth adds helpful ethical justification and more specific principles to guide implementation of the general concept of the BIC.

The concepts of prospective productive agency, the mutuality of rights and obligations, and the criterion of degree of needfulness for action require amplification for children to be applicable for implementation of the BIC. Applied with care, Gewirth's approach has potential to help resolve some of the inherent tensions in the Convention and more effectively implement the BIC and children's rights in general. The implications of Gewirth's work, along with that of Nussbaum, for the justification of the

BIC, the content of the BIC, and the processes for determining the BIC will be considered in the next chapter.

Chapter 6

Capabilities, Community of Rights, and Implementation of Best Interests

The previous chapters have analyzed the interface between BIC and Nussbaum's capabilities theory and then between BIC and Gewirth's community of rights, at a conceptual level. The outcome of this analysis highlights how each of them would address some of the tensions inherent in the BIC and the Convention and how they respond to more general objections to the notion of children's rights. Each of them, in some way, is able to go beyond the tensions in the Convention by appealing to different foundational concepts. In the case of Nussbaum, the foundational concept is the capabilities framework. In the case of Gewirth, the central focus on purposive action by productive agents leads to the Principle of Generic Consistency in a community of rights. Each of them has relevance and something important to contribute to the on-going discourse about children's rights. Together they provide a more robust ethical foundation for ongoing efforts to effectively implement the BIC and the Convention in Canada.

This chapter will discuss the implications of the theories of Nussbaum and Gewirth for three essential areas: ethical justification for the BIC and children's rights; the substance or content of the BIC and children's rights claims; and the process used for determining the BIC.

Stronger Ethical Justification for the BIC and Children's Rights

Martha Nussbaum's capabilities framework, rooted in the basic principles that every child is of value as an end and that the capabilities of each child should be

developed and respected, provides an integrated and holistic framework for thinking about the rights of children. Applying Gewirth's concept of prospective purposive agent to the situation of children helps to explain why children have rights claims that need to be respected and the Principle of Generic Consistency provides a foundation for both rights and the correlative duties that are so essential for the fulfillment of children's rights because of age and dependency on others.

In both theories the moral status of children is of the same nature as adults, that of full persons and moral agents worthy of respect; adults and children differ only in stage of development, not in fundamental status. At the same time, both of these theories accommodate the developmental aspect of children's rights: Nussbaum in continual development of capabilities and Gewirth in the notion of prospective productive agency.

For implementation, Nussbaum and Gewirth together provide a consistent framework for implementation. Nussbaum's focus on capabilities can help to shape the content of claims under the BIC; Gewirth's mutuality of rights and responsibilities can help to shape policy on the obligations side of the BIC. Going one step further, Gewirth's theory specifically deals with the concern that recognition of children's rights can lead to excessive demands; he provides a principle for resolving conflicts between rights claims.

Development of capabilities and the Principle of Generic Consistency together provide a more clear ethical foundation for the progressive realization of children's rights by states, as outlined in the Convention. They also provide useful criteria to measure progress toward full implementation of the BIC, as requested by the Committee on the Rights of the Child.

While neither philosopher focuses specifically on children's rights, their work could be adapted to provide conceptual grounding and frameworks for decision-making processes and public policy formation.

Greater Ethical Specification of the Content of the BIC

Both Nussbaum and Gewirth bridge the traditional divisions between political, civil, economic, and social rights in development of their approaches. This is essential for children's lives and it is consistent with the Convention. At the same time, each one has a specific focus that could provide greater clarity and consistency for implementation of the broad and indeterminate BIC.

Nussbaum's capabilities framework combines a comprehensive scope that covers all aspects of daily life with a restricted focus on capacity-building, which makes it helpful for the lives of children. It could be adapted for different ages, based on the input of young people, just as adults were consulted in the development of the list published by Nussbaum. According to Nussbaum, it remains flexible to take into account new empirical evidence and new insights from experience. If it was adapted for children, it could contribute to the development of guidelines for the BIC, as suggested by the UN Committee on the Rights of the Child.

Gewirth's characterization of the conditions for purposeful action is also comprehensive; freedom and well-being are broad concepts that encompass material needs and procedural liberty and fairness. Gewirth focuses, however, on the elements most necessary for action and provides an ethical rationale for establishing priorities for action. This approach provides guidance for the establishment of minimum provisions

that could be guaranteed by public policies developed through democratic dialogue, as Gewirth proposes (Gewirth, 1996, 311-348). Using Gewirth's approach, the BIC could be used to shape public policies for children, as envisioned in the Convention and recommended to Canada in 2003, but rarely put into practice to date.

The focus on central capabilities and the criterion of most needful for action help to provide greater ethical specification for the general and vague principle of BIC and for other general provisions in the Convention. In addition, Gewirth's approach to obligations in a community of rights could be developed for the BIC to fill a significant gap in other approaches, including Nussbaum, and the Convention itself. Application of Gewirth's principles to specific areas of public policy for children would require the kind of detailed analysis that he illustrates for employment, welfare, and property rights, areas of priority for adults. Gewirth's approach to education, discussed in chapter five, illustrates how his approach might apply for children; similar approaches could be developed for child welfare, youth justice, and other areas of policy for children.

A focus on capabilities and mutuality of rights and duties is consistent with the growing acceptance of the categories of provision, protection, and participation as a useful way to think about children's rights, but they would provide more focus within each of those. Discourse on provision rights would benefit from application of Gewirth's approach to economic and social rights for the fields relevant for children. As discussed in chapters four and five, a capabilities framework and the concept of prospective purposive agency help to resolve tensions between protection and participation by appealing to something more basic and at the same time more comprehensive for the development of children. In the case of participation, a capabilities framework provides

greater clarity and consistency to what is a developing field of practice, and perhaps greater public acceptance as well.

Nussbaum and Gewirth both provide greater clarity about the role of parents and the state in relation to the BIC and the rights of children. There is reason to think that a clear focus on developing the capabilities of children in approaches to children's rights could help to increase public acceptance of children's rights, but that would need to be tested. Nussbaum's inclusion of caring relationships as a central capability and the sensitivity to cultural and religious diversity in her capabilities framework addresses the concerns that promoting children's rights might undermine family life, as discussed in chapter two. Using it as a framework could contribute to greater public acceptance of the BIC. Educating children about rights and correlative duties together, as articulated by Gewirth and demonstrated in the current research cited in chapter five, also addresses concerns about fostering egoism, and consequently increases the potential for public acceptance of children's rights by parents and communities.

A positive and supportive role for the state, well beyond last resort, is an important part of both the capabilities framework and the mutuality of rights and obligations. At the same time, both theories give priority to personal liberty and freedom, with consequent limits on state control and the use of significant checks and balances to protect important freedoms.

In addition, both Nussbaum and Gewirth incorporate space and positive roles for other social groups and institutions. This is very important in the field of children's rights because of children's dependency on others and the interdependence of child development with a wide range of elements in a community. This is an important

element of the Convention, not found in other human rights treaties, that would benefit from further development of the approaches promoted by Nussbaum and Gewirth.

Greater Clarity and Consistency in Processes for Determining BIC

A clear focus on developing core capabilities and ability to be productive agents could strengthen current approaches and reduce the space for arbitrary decision-making because of the indeterminate nature of the BIC. Both Nussbaum and Gewirth establish objectives outside power relationships, which could be the basis for development of benchmarks and guidelines for use in decision-making processes. Parents, children, and the state, for example, are more likely to find common ground in a clear focus on developing capabilities than when issues are framed in terms of autonomy and who has authority. This would require further elaboration specifically for young people, involving them in the process of developing such guidelines. Processes based on these objectives would provide more consistency and be more focused than those rooted in liberal paternalism, dynamic self-determination, or utilitarianism, as discussed in chapters four and five.

To deal with conflicts between rights – and there always will be conflicts - development of Gewirth's articulation of criterion of degrees of needfulness for action could be helpful in application of the BIC. It provides a reference point that is outside the parties to conflict, reducing the power struggle element of conflicts between parents, other authorities, and young people.

Conclusion

Nussbaum's capabilities framework and Gewirth's articulation of a community of rights are relevant for children's rights. They both contribute to stronger ethical justification for the BIC, greater ethical specification of its content, and guidance for processes to determine the BIC in different contexts. They provide a basis for resolving the tensions inherent in the Convention, for improving implementation through coherent and consistent public policies, and for building public support for children's rights.

Detailed analysis and engagement with young people is required to elaborate their conceptual frameworks specifically for young people. This is consistent with the right of participation in the Convention, along with protection for the best interests of children.

In addition to her conceptual framework, Nussbaum's work with women's rights provides relevant examples for ensuring that policies and concepts are rooted in the reality of the daily lives of people affected by them. This is also important in the situation of children. In the case of Gewirth, his careful attention to detail in the area of economic and social rights provides examples of practical application to specific issues, without unrealistic demands or rights rhetoric that is not connected to the tangible choices that shape children's lives. Gewirthian concepts, such as the distinctions between occurrent and dispositional freedom, the three levels of need, the criterion of most needful for action, and his answers to objections to human rights all add useful, logically consistent tools for analysis that can enrich the application of the BIC in public policy development and program design. In addition, the integration of rights and duties in

Gewirth's Principle of Generic Consistency provides a foundation for educating children about their rights and the exercise of them within a community of rights.

Nussbaum's dedication to improving the lives of poor and oppressed women and Gewirth's passionate focus on ending deprivation as a top priority add an element of urgency and motivation to the discussion. More effective implementation of the BIC and the rights of children through application of their work could have significant impacts for the lives of children who lack opportunities for development of their potential as persons.

References

- Ahdar, Rex. (2002). The child's right to a godly future. *International Journal of Child Rights*, 10, 89-107.
- Alston, Philip. (1994). The best interests principle: towards reconciliation of culture and human rights. In Philip Alston (Ed.), *The Best Interests of the Child: Reconciling Culture and Human Rights* (pp. 1 –25). Oxford: Oxford University Press.
- Archard, David William. (2003). *Children, Family and the State*. Burlington, Vermont: Ashgate Publishing Ltd.
- Archard, David and Macleod, Colin (Eds.). (2002). *The Moral and Political Status of Children*. Oxford: Oxford University Press.
- Arneil, Barbara. (2002). Becoming versus being: a critical analysis of the child in liberal theory." In David Archard and Colin MacLeod (Eds.), *The Moral and Political Status of Children* (pp. 70-94). Oxford: Oxford University Press.
- Baier, Annette C. (1987). The need for more than justice. In Marsha Hanen and Kai Nielsen (Eds.), *Science, Morality and Feminist Theory* (pp. 41-59). Calgary: University of Calgary Press.
- Brennan, Samantha. (2002). Children's choices or children's interests: which do their rights protect?" In David Archard and Colin MacLeod (Eds.), *The Moral and Political Status of Children* (pp. 53-70). Oxford: Oxford University Press.
- Brennan, Samantha and Noggle, Robert (Eds.). (2007). *Taking Responsibility for Children*. Waterloo: Wilfrid Laurier University Press.
- Brighouse, Harry. (2002). What rights (if any) do children have? In David Archard and Colin MacLeod (Eds.), *The Moral and Political Status of Children* (31-52). Oxford: Oxford University Press.
- Butler, Jennifer. (2000). The Christian Right Coalition and the UN Special Session for Children: prospects and strategies. *The International Journal of Children's Rights*, 8, 351-371.
- Canadian Coalition for the Rights of Children. (2007). *Canada and the Rights of Children: 2003 Review of Canada's Record*. A series of six fact sheets. Retrieved September 15, 2008 from www.rightsofchildren.ca.
- Chandler, Sarah. (2008). *Final Report: Child Rights Awareness Campaign Focus Groups*. May 8, 2008. Available from author.

- Committee on the Rights of the Child. (2003). *Concluding Observations of the Committee on the Rights of the Child: Canada*. October 3, 2003. CRC/C/15/Add.215.
- Covell, Katherine and Howe, R. Brian. (2001). *The Challenge of Children's Rights for Canada*. Waterloo: Wilfrid Laurier University Press.
- Covell, Katherine and Howe, R. Brian. (2008). Final report on the County of Hampshire rights education initiative. September, 2008. Sydney, Nova Scotia: Children's Rights Centre, Cape Breton University. Retrieved November 10, 2008, from [www.http://discovery.cbu.ca/psych/index.php?/children/index/](http://discovery.cbu.ca/psych/index.php?/children/index/)
- Eekelaar, John. (1992). The importance of thinking children have rights. *International Journal of Law and the Family*, 6, 230-231.
- Eekelaar, John.(1994). The interests of the child and the child's wishes: the role of dynamic self-determination. *International Journal of Law and the Family*, 8, 42-61.
- Farson, R. (1974). *Birthrights*. London: Collier Macmillan.
- Feinberg, Joel. (1980). The child's right to an open future. In William Aiken and Hugh LaFollette (Eds.), *Whose Child?* (pp. 124-153). Totowa, NJ: Littlefield, Adams, & Co.
- Freeman, Michael. (1983). *The Rights and Wrongs of Children*. London: Frances Pinter Publishers.
- Freeman, Michael. (1992). Taking children's rights more seriously. *International Journal of Law and the Family*, 6, 52-71.
- Freeman, Michael, Ed. (1996). *Children's Rights: A Comparative Perspective*. Aldershot: Dartmouth Publishing Company.
- Freeman, Michael, Ed. (2004). *Children's Rights, Volume I and II*. Burlington, Vermont: Ashgate Publishing Ltd.
- Freeman, Michael. (2007). *Article 3: The Best Interests of the Child*. Leiden: Martinus Nijhoff Publishers.
- Gerschutz, Jill Marie and Karns, Margaret P. (2005). Transforming visions into reality: the Convention on the Rights of the Child." In M. Ensalaco and L. Majka (Eds.), *Children's Human Rights* (pp.31-51). Lanham: Rowman and Littlefield Publishers..

- Gewirth, Alan. (1996). *The Community of Rights*. Chicago: University of Chicago Press.
- Gewirth, Alan. (1982). *Human Rights: Essays on Justification and Applications*. Chicago: University of Chicago Press.
- Gilligan, C. (1982). *In a Different Voice: Psychological Theory and Women's Development*. Cambridge: Harvard University Press.
- Goldstein, J., Solnit, A., and Freud, A. (1979). *Beyond the Best Interests of the Child*. New York: Free Press.
- Holt, John. (1975). *Escape from Childhood*. Harmondsworth: Penguin Books.
- Houlgate, Laurence D. (1979). Children, paternalism, and rights to liberty. In Onara O'Neill and William Ruddick (Eds.), *Having Children: Philosophical and Legal Reflections on Parenthood*, (pp. 266-278). New York: Oxford University Press.
- Howe, R.B. and Covell, Katherine. (2005). *Empowering Children: Children's Rights Education as a Pathway to Citizenship*. Toronto: University of Toronto Press.
- Howe, R.B. and Covell, Katherine (Eds.). (2007). *A Question of Commitment: Children's Rights in Canada*. Waterloo: Wilfrid Laurier University Press.
- International Save the Children Alliance. (2001). *Children's Rights: Reality or Rhetoric? The UN Convention on the Rights of the Child: the First Ten Years*. London: International Save the Children Alliance.
- John, Mary. (2003). *Children's Rights and Power: Charging Up for a New Century*. London: Jessica Kingsley Publishers.
- Kline, Marlee. (1992). Child welfare law, "best interests of the child" ideology, and first nations. *Osgoode Hall Law Journal* 30(2), 375-425.
- Lindal, Thorhildur et al. (1999). *The Best Interests of the Child in Our Times: A Discussion Paper on the Concept of the Best Interests of the Child in a Nordic Perspective*. Norway: Children's Ombudsman, 21 October 1999.
- McGillvray, Anne. (1992). Reconstructing child abuse: Western definition and non-Western experience. In M. Freeman and P. Veerman (Eds.), *The Ideologies of Children's Rights: International Studies in Human Rights* (pp. 213-236). Dordrecht: Marinus Nijhoff.
- Minnow, Martha. (1986). Rights for the next generation: a feminist approach to children's rights. *Harvard Women's Law Journal*, 9, 1-24.

- Noggle, Robert. (2002). Special agents: children's autonomy and parental authority. In David Archard and Colin MacLeod (Eds.), *The Moral and Political Status of Children*, (97-117). Oxford: Oxford University Press.
- Nussbaum, Martha. (2000). *Women and Development*. Cambridge: Cambridge University Press.
- Nussbaum, Martha and Jonathan Glover (Eds.). (1995). *Women, Culture, and Development*. Oxford: Clarendon Press, 1995.
- O'Neill, Onara. (1988). Children's rights and children's lives. *Ethics*, 98(3), 445-463.
- Piper, Christine. (2000). Assumptions about children's best interests. *Journal of Social Welfare and Family Law*, 22(3), 261-276.
- Purdy, Laura. (1992). *In Their Best Interest? The Case Against Equal Rights for Children*. Ithaca, New York: Cornell University Press.
- Rawls, John. (1972). *A theory of Justice*. Oxford: Oxford Press.
- Scarre, Geoffrey (Ed.). (1989). *Children, Parents, and Politics*. Cambridge: Cambridge University Press.
- Schoeman, Ferdinand. (1980). Rights of children, rights of parents, and the moral basis of the family. *Ethics*, 91(1), 6-19.
- Senate Standing Committee on Human Rights. *Children: the Silenced Citizens; Effective Implementation of Canada's International Obligations with Respect to the Rights of Children*. Final Report. April 2007. Retrieved September 29, 2008, from www.senate-senat.ca/rights-droits.asp.
- Shue, Henry. (1996). *Basic Rights: Subsistence, affluence, and U.S. Foreign Policy*, 2nd edition. Princeton, NJ: Princeton University Press.
- Sterba, James P. (2005). *The Triumph of Practice over Theory in Ethics*. Oxford: Oxford University Press.
- Thery, I. (1989). Interests of the child. In E. Smart and S. Sevenhuijzen (Eds.), *Child Custody and the Politics of Gender*, (pp. 70-90). London: Routledge.
- UNICEF Canada. (2008). *18@18: What's Rights for Some*. Toronto: UNICEF Canada. Retrieved November 20, 2008 from www.unicef.ca/18@18.

Vienna Declaration and Programme of Action. (1993). UN World Conference on Human Rights, UN Document A/CONF.157/23 (1993). Retrieved November 26, 2008 from <http://www.unhchr.ch/html/menu5/d/vienna/htm>.

World Summit for Children. (1990). *World Declaration on the Survival, Protection, and Development of Children.* 30 September, 1990. UNICEF. Retrieved September 29, 2008 from www.unicef.org/wsc.