

THE TRAFFICKING OF CHILDREN: A COUNTER-NARRATIVE TO THE CRC'S CONSTRUCTION OF 'CARE'

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The Convention on the Rights of the Child imagines the child to be in a particular positional matrix: the family or some similar form of 'care'. This article employs a textual analysis of the CRC to examine this matrix of care; in other words this article examines how the parent, the state, and the child are positioned in relation to each other in the CRC. It argues that the positional matrix portrayed in the CRC is hierarchical, where the adult positioned over the child. As such, the child is only given autonomy and protection rights that buttress this hierarchy. In many instances, the family and parents perform as the CRC imagines they should. However, as trafficking of children illustrates, not all children have a responsible adult who has their best interests as a concern and keeps in mind their evolving capacities. The trafficking of children by parents illustrate that ways in which privileging the family, and thus the position the parent holds over the child, can make certain children more vulnerable. In this way, care, as defined as the adult positioned over the child or 'dependency' (on a parent) and, as such vulnerability become markers of childhood. Unlike other human rights discourses that seek to redress hierarchies; the CRC reinforces and even sustains the inequalities between adults and children. Unlike any other human rights discourse that offers protections from the state, the CRC also offers children protection from themselves, as if children suffer subjugation, inequality, disenfranchisement, and mistreatment from themselves. Unlike the definition of the family in the CRC's Preamble, from which all members of the human family have equal and inalienable rights, the child finds him or herself in this version of family with inequality and rights that are alienable because this person has been defined in the CRC as a 'child'.

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The Convention on the Rights of the Child (hereinafter “CRC”) clearly bans the trafficking of children in Article 37, and requires the state to take all “appropriate measures” to prevent the trafficking of children. The CRC requires parents not only to provide for the child, but also to have the child’s best interests as their basic concern, and to keep in mind the child’s evolving capacities. Further, Article 19 requires the state to intervene and protect the child from “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.”

The CRC is a unique international human rights instrument in that rights of children include a more complicated triad of interested parties: 1) the parent,¹ who

1 While, the term ‘parent’ merely implies biological mother or father, this article will use the terms ‘adult’ or ‘parent’ to indicate the person(s) who is/are responsible for the child. While the Convention mentions parents and ‘other persons having care of the child’, the term ‘parent’ is used most often in the Convention and best reflects the type of relationship envisioned by the Convention.

is protected and respected, and who has rights, responsibilities, and duties, 2) the state as the supra-parent, who can override the parent in exceptional circumstances and 3) the child, who is protected and given a degree of autonomy, but only in accordance with the parents' and/or the state's perception of the child's best interests and capacities. So while the CRC addressed the rights of the child, it at the same time imagines the child to be in a particular positional matrix: within the family or in some similar form of 'care', either by a parent or by the state. This article argues that the configuration of family or 'care' is further defined in the CRC as an adult positioned over the child.

The only justification for uniquely providing/obligating children with/to 'care' lies in a view of children as biologically immature/incapable, requiring children to rely on other groups to act on their behalf in procuring and interpreting their rights.² The law aims to protect the immature child by offering (requiring) adult 'care', for the child's own benefit. As such, the child is only given autonomy and protection rights that buttress this hierarchy. Yet, the requirement of care, in other words the requirement for children to be dependent upon adults not always results in the benefit of the child. Sometimes the requirement of children to be dependent on adults results in children being more vulnerable, as seen in the instance of child trafficking. By making 'care' mandatory, by making dependency on adults mandatory, the CRC can facilitate the trafficking of children by parents. The United States Supreme Court Justice Brennan once argued that romantic paternalism puts a person 'not on a pedestal, but in a cage'.³ He of course was speaking about the category 'women' but this article queries whether such a critique might apply to adult – child relationships. To make this argument, this paper will examine in particular children who are trafficked with the participation of the child's parents.

Section I will examine how the Convention requires and defines 'care'. Section II will explore how the CRC defines the 'family' as the adult positioned over the child. Section III will discuss the argument that the child is given rights that not only support the cohesion of the family, but also the parental rights.

2 Onora O' Neill, *Children's Rights and Children's Lives* in CHILDREN'S RIGHTS RE-VISIONED 24, 39 (Rosalind Ekman Ladd, ed., 1996).

3 *Frontiero v. Richardson* 411 U.S. 677 (1973).

Section IV will examine the limitations on the rights of parents. Finally, Section V will investigate the trafficking of children as a case study.

I. CHILDHOOD AS A PERIOD OF DEVELOPMENT REQUIRING ‘CARE’

The word ‘care’ appears thirty-one times in the Convention. The word ‘care’ in relation to the child appears twenty-three times, three times in the Preamble alone: first, “childhood is entitled to special care and assistance”;⁴ second, “[b]earing in mind that the need to extend particular care to the child”; and 5 third, the child...needs special safeguards and care”.⁶ Article 3(2) requires states to ensure “protection and care as is necessary for [the child’s] well-being”.⁷ Article 7 gives children the right to be cared for (as far as possible) by his or her parents.⁸ Article 19 obligates states to protect children from all forms of abuse by those charged with the child’s care.⁹ These are but a few of the many references to the forms of ‘care’ necessary to protect the child. Thus, ‘care’ appears to be a fundamental right of the child in the CRC.

Martin Woodhouse (hereinafter “Woodhouse”) argues that there lies a complicated array of personal and cultural values alongside empirical claims about childhood.¹⁰ Most common are claims about children truly need. According to the CRC, the child needs ‘care’ for her or his ‘full and harmonious development’.¹¹ Woodhouse argues that ‘need statements’ directs attention away from the particular adult value-position from which such statements are made.¹² When ‘need statements’ are projected onto children they acquire objectivity. Woodhead utilizes the equation ‘X needs Y for Z to follow’ as a method for distilling and analysing who needs what and why in an effort to penetrate the

4 Convention on the Rights of the Child, Preamble, opened for signature Nov. 20, 1989, U.N. Doc. A/RES/44/25 (1989) (entered into force Sept. 2, 1990).

5 *Id.*

6 *Id.*

7 *Id.*

8 *Supra* note 4, art. 7.

9 *Supra* note 4, art. 19.

10 Martin Woodhead, *Psychology and the Cultural Construction of “Children’s Needs”* in GROWING UP IN A CHANGING SOCIETY 37, 49 (Martin Woodhead, Paul Light & Ronnie Carr eds., 1990).

11 *Supra* note 4, Preamble.

12 See Woodhead, *supra* note 10.

'vener of certainty'. Woodhead argues that such questions are often otherwise difficult to ascertain.¹³ Woodhouse argues that abandoning the verbiage of 'needs' would require professionals to make explicit their judgments and unveil their assumptions for external scrutiny.¹⁴ Indeed, neither the Convention nor the *Travaux Préparatoires* unpack their assessment of the category child as 'physically and mentally immature'.¹⁵ More specific to the Preamble, neither the Convention nor the *Travaux Préparatoires* explicate why 'care' and the Convention's definition of 'care' are the CRC's 'solutions' to the child's alleged immaturity. Indeed, beyond mere 'needs', the CRC also states that the child is 'entitled' to care,¹⁶ in other words, the child has the right to be cared. One could argue that the language of entitlement or rights, as found in the CRC, further entrenches the child's 'need' for care, placing the child's need for care beyond scrutiny, as such rights, particularly ones iterated in a human rights convention that has almost universal ratification, cements the common sense assumption that children require 'care' as defined in the CRC.

Nonetheless, Chris Jenks (hereinafter "Jenks"), in his book *Childhood*, argues that the care or the altruism that adults feel towards a child is a social construct: asserting instead that 'care' disguises control,¹⁷ obligating forms of dependency. For Jenks, care and dependency, necessitated by the 'truth' of the immature/developing child, describe not the loving bonds between the child and those who 'care' for the child, but rather describes mechanisms of dependence that serve to sustain particular versions of status quo.¹⁸ Jenks argues that 'care' itself is

13 See Woodhead, *supra* note 10, at 37.

14 See Woodhead, *supra* note 10, at 49

15 Vienna Convention on the Law of Treaties, Article 32, United Nations Treaty Series, Vol. 1155, p. 331 (May 23, 1969) (entered into force Jan. 27, 1980). Article 32: "Recourse may be had to supplementary means of interpretation, including the preparatory work [*Travaux Préparatoires*] of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

16 *Supra* note 4, Preamble. See generally SHARON DETRICK, J. E. DOEK AND NIGEL CANTWELL, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE TRAVAUX PRÉPARATOIRES (1992).

17 CHRIS JENKS, CHILDHOOD: CRITICAL CONCEPTS IN SOCIOLOGY 41 (2005).

18 *Id.*

hegemonic; it possesses the moral high ground, defies opposition and exercises a continual control over the Other (here the child), all in the name of ‘what is best for the child’.¹⁹ In this way, ‘care’ or dependency is realized as a product of social construction and the child’s development through care/dependency becomes an instrument in the process of social and cultural reproduction.²⁰ In this view, the category ‘child’ does not create or cause institutions, discourses, or practices, but rather the CRC creates or causes the category ‘child’ by determining the characteristics that a particular subject should (and should not) have.²¹ This article subscribes to the idea that by asserting that the child is ‘entitled to’ and ‘needs’ ‘care’, the CRC makes dependency/‘care’ and therefore vulnerability markers of childhood. The trafficking of children illustrates how the required dependency of children on adults can make children more vulnerable.²²

To illustrate the centrality of ‘care’ and dependency, a combination reading of Article 3(2) and Article 3(3) suggests that the child will always be in some form of care. Article 3(2) requires states to ‘ensure the child...protection and care’. Article 3(3) requires states to ensure that “institutions, services, and facilities responsible for the care or protection of the child” comply with particular standards. The assumption is that children are or should be in the care of either their parent (Article 3(2)) or the state (Article 3(3)).²³ The blanket requirement of ‘care’ for the CRC’s child is further demonstrated in Article 20, which states that a child ‘temporarily or permanently deprived of his or her family environment,’ shall be entitled to special protection and assistance where states shall ensure alternative care. The obligation on the state to provide care in the event that care is ‘lost’ arguably demonstrates not only ‘care’ as the normative aim of childhood, but also that the child has no choice but to be in ‘care’ (of a parent or the state). Yet, what does ‘care’ entail according to the CRC? If the child must be located within a context of ‘care’, one must then understand the CRC’s construction of ‘care’: what parties are included in the CRC’s version of ‘care’, what are their positions

19 *Id.*

20 *Id.* at 42.

21 Speaking about the category ‘woman’, but applicable more generally to identity categories, see JUDITH BUTLER, *GENDER TROUBLES* 5 (1990).

22 See Section V, *infra*.

23 Article 7(1) also refers to the child’s ‘right to know and be cared for by his or her parents’.

relative to each other, and how this affects the child who is forcibly placed within this context? Unpacking the CRC's definition of 'care' is paramount to understanding the rights given to the child by the CRC. The CRC envisions two types of care: 1) family and 2) the state. The CRC envisions the child to be in the care of parents as the rule, with the state providing care in exceptional cases.

1. State – as Back-up 'Care'

The state is to only provide care in the instance that the family malfunctions. According to Article 20(1), the child 'shall be entitled to *special* protection and assistance provided by the state'. More specifically, according to Article 20(2), states are to "ensure *alternative* care for the child". Article 5 explicitly requires states to 'respect the responsibilities, rights, and duties of parents'. Article 9 states that children 'shall not be separated from his or her parents' before certain procedural safeguards are met. Article 18 states that "parents...have the primary responsibility for the upbringing and development of the child'. Though the role of the state will be discussed in great detail below, it is noteworthy that the state nominates itself as a back-up caretaker or protectorate, an odd positioning of the state in the context of human rights, which normally place limits on the state's power.

2. Family 'Care'

The CRC envisions the family as having primary 'care' of the category 'child', and describes the family as the ideal form of care of the category 'child'. The Preamble characterizes the family in relation to the child in three noteworthy ways. First, the Preamble naturalizes the family, emphasizing the family as particularly important to childhood: 'convinced' that the family is 'the *fundamental* group of society and the *natural* environment for growth and well-being of all its members and *particularly* children'.²⁴ Stating that the family is a fundamental group of society

24 Emphasis added. During the drafting of the Convention the United States delegate articulated that the United States 'attached great importance to the family as the natural and fundamental group unit of society' and that the 'family should be explicitly protected...to emphasize [its] importance and relationship to all other rights contained in the Convention' See DETRICK, DOEK AND CANTWELL, *supra* note 16, at 102, 158. It should be noted that the family, as natural and fundamental, was not discussed during the drafting of the Preamble. The implication is that this conception of the family

is standard international human rights language.²⁵ However, stating that a particular group prospers in the family environment is exceptional to children. Notably, all such language ('fundamental' and 'natural') is absent from Convention on the Elimination of Discrimination against Women (hereinafter "CEDAW").²⁶ Given the historical relationship between both the categories 'woman' and 'child' and the family, how these two Conventions relate their respective subjects to the family offers interesting insights.²⁷ One could imagine if such language was included: the family is 'the *fundamental* group of society and the *natural* environment for growth and well-being of all its members and particularly *woman*'. In labelling the family as 'natural', the CRC legitimates the family through, seemingly, scientific or objective reasoning. This knowledge masquerades as a universal 'truth'.²⁸ Similar to the 'developing child', the family is constructed to have some natural essence.²⁹ Arguably, the process of naturalizing the family puts it beyond question, as it acquires the status of *Truth*. This natural/fundamental-ness of the 'family' as

was roundly accepted by all parties. The major issue of concern was the language in the Preamble that implicated abortion: 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth'.

- 25 ICCPR Art. 23(1): The family is the natural and fundamental group unit of society and is entitled to protection by society and the State. ICESCR Art. 10(1): 1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses. CRPD Preamble (x): *Convinced* that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, and that persons with disabilities and their family members should receive the necessary protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities.
- 26 Convention on the Elimination of All Forms of Discrimination Against Women, G.A.res. 34/180, UN Doc.A/RES/34/180 (1979).
- 27 See, e.g., Frances E. Olsen, *The Myth of State Intervention in the Family*, 18(4)U. MICH. J. L. REFORM 835, 835(1985). Notably, O'Neil argues that, '[the extension of the human rights momentum to children] is illusory because it exaggerates the analogies between children's dependence and the dependence of oppressed social groups'; see O'Neill, *supra* note 2, at 31, 39.
- 28 BEN GOULDER & PETER FITZPATRICK, *FOUCAULT'S LAW* 38 (2008); REX STANTON ROGERS & WENDY STANTON ROGERS, *STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN* 38 (1992).
- 29 Ashleigh Barnes, *The CRC's Performance of the Child as Developing*, 14 CURRENT LEGAL ISSUES 392(2012).

the form a 'care' required by the child, legitimates and puts beyond question the CRC's family, including its definition (to be discussed below).

Second, the Preamble draws upon certain more conservative strands of developmental psychology to justify its normative position that 'the child, for the full and harmonious *development* of his or her personality, *should grow up in a family environment*'.³⁰ This linkage of the law with not only 'naturalness' (of the family) and 'science' (of developmental psychology) is what makes possible the 'truth' that children by law, require 'care'. The Preamble links the 'natural family' with 'the child-as-developing'; one legitimates and reinforces the other. Both put the CRC's version of childhood, as in a family, beyond question. The emotive force portrayed in this form of 'needs' statement combines with the language of 'development', premised on the idea that the child is in the scientifically proven state of development to further underline the 'truth' that the family is the 'natural' place for childhood in the CRC. Woodhead contends that 'needs' statements convey considerable emotive force, inducing a sense of responsibility, and even feelings of guilt if those statements are not followed. This power, he argues, comes partly from the connotation of helplessness and passivity of any individual who is 'in need' and partly from the implication of the dire consequence that will follow if the need is not met through appropriate intervention.³¹ Here, if the child does not have a family environment, the child will not develop, fully or harmoniously. If the child does not have a family, the child's development will be tumultuous and incomplete. Given that the Preamble notes the aim of the childhood as a preparatory stage where 'the child should be fully prepared to live an individual life in society'; the undeveloped child would be a 'dire consequence'. The aim of childhood (development into a normal adult) would not be reached. The child is in danger of remaining uncivilized, a savage. The focus of the CRC then shifts from protecting the child, to protecting the family.³² The assumed rational is that protecting the family equates the protecting the child. The family, not the child, becomes prioritize.

30 Emphasis added.

31 See Woodhead, *supra* note 10, at 40.

32 Indeed, this sentiment is reflected during the drafting of the CRC when the Australian delegate pointed out "need to secure the rights of the child through support to the family in need". See DETRICK, DOEK& CANTWELL, *supra* note 16, at 135.

Thirdly, to further legitimate the family in the Convention, the Preamble characterizes the family as a place of ‘happiness, love, and understanding’. The CRC is now drawing on visions of Apollonian childhood to cast the family as a safe and harmonious place for the CRC’s developing child.³³ The family is construed as the mechanism by which both society and children will progress. This discourse (fundamental, natural, and necessary for a harmonious development, happy, and full of love and understanding) creates at the outset of the Convention an irrefutable description of ‘truth’ about the family. Hence, our ‘true’ (immature) child requires ‘care’, and our ‘true’ family becomes the natural place of childhood.

While feminist scholarship has critiqued the idea of ‘protection of the family’ as a thinly veiled policy of propping up a particularly hierarchy within the family, the policy of protecting the family as a normative aim persists in the CRC.³⁴ Norma Fields in her article “The Child as Labourer and Consumer: the Disappearance of Childhood in Contemporary Japan” questions whether the protected space of familial and community harmony and innocence ever existed.³⁵ The growing concern with the domain of childhood as threatened, invaded, and polluted by

33 Jenks described two dominant ways of thinking and talking about the child: the Dionysian child and the Apollonian child. See JENKS, *supra* note 17, at 74. Jenks argues that these images are informative of the shifting strategies that Western society has exercised in its increasing need to control, socialize and constrain people in the transition towards modernity. The Apollonian child is angelic, naturally good, innocent, asexual, the best of human nature untainted by the world; such children play and chuckle, smile and laugh. The Apollonian child is perceived as pre-Eve and her apple, pre-‘the Fall’. Under this construction children are not curbed or beaten into submission, they are encouraged, enabled, facilitated. The Dionysian child or the ‘inherently bad’ child, who like this prince of wine, revelry, and nature, represents the idea that children possess an innate evil or corruption, is buttressed in the doctrine of Adamic original sin. If adults allow these children to stray away (from adults), these children’s inherent evil will mobilize. The Dionysian child loves self-gratification and pleasure, and therefore requires moral guidance through physical and disciplinary direction. This headstrong and stubborn subject has to be broken, but all for his or her own good.

34 See generally *supra* note 27; Michael Freeman, *Feminism and Child Law* in FEMINIST PERSPECTIVES ON CHILD LAW 19, 19-20 (Jo Bridgeman & Daniel Monks, eds., 2000); Hilary Lim & Jeremy Roche, *Feminism and Children’s Rights* in FEMINIST PERSPECTIVES ON CHILD LAW 227, 227, 229, 247 (Jo Bridgeman & Daniel Monks, eds., 2000); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1499 (1983).

35 Norma Fields, *The Child as Labourer and Consumer: The Disappearance of Childhood in Contemporary Japan* in Children and the Politics of Culture 51 (Sharon Stephens, ed., 1995).

adults' world, as opposed to a period of temporally restricted economic and bureaucratic transactions, enables the focus on preserving innocence through social values of enduring love and care.³⁶ Similarly, Frances E. Olsen (hereinafter "Olsen"), in her article "Myth of State Intervention" argues that the family is viewed as a "warm nurturant enclave governed by an ethic of altruism and caring – a haven protecting its members from the dangers of an authoritarian state and from the anarchistic intrusions of private third parties."³⁷ She notes that only in exceptional situations is the family viewed as otherwise: "a center of oppression, raw will and authority, violence and brutality, where the powerful economically and sexually subordinate and exploit the powerless."³⁸ Olsen observes that the nuclear family could be seen instead as "a seething hothouse or an oppressive structure that will *often* become destructive of individual members."³⁹ Section V will explore this contention in the context of trafficking of children. Michael Freeman (hereinafter "Freeman") also argues that "a dangerous and false consensus lurks in the shadows" of so called "pro-family anti-interventionism" (i.e. those opposed to state intervention into the family on the basis of children's rights).⁴⁰ Freeman argues that a 'simplistic' support for non-intervention in 'families' based on arguments such as privacy, masks the conflicts and abuses that occur within the family.⁴¹ He writes, "[o]ne only has to substitute 'husband-wife' for 'parent-child'...to realize the untenability of [protecting only the family unit and not the individuals who make up the family]".⁴²

Notably, only one article in the entirety of the Convention, Article 19, addresses the issue of when the family does not live up to the ideal of being happy, loving, and understanding. Though this article will be discussed at greater length later in this article, it is noteworthy that even when the Convention envisions instances of 'abuse, neglect or negligent treatment' of the child by a parent in

36 *Id.*

37 *See* Olsen, *supra* note 27, at 839.

38 *Id.*, citing Martha Minow, *Beyond State Intervention in the Family: For Baby Jane Doe*, 18 U. MICH. J. L. REFORM 933, 948 (1985).

39 *See* Olsen, *supra* note 27.

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

41 *Id.* at 332.

42 *See* Freeman, *supra* note 40, at 332.

Article 19, the CRC mandates protection of the child, including ‘support’ for those who have the care of the child. Put another way, Article 19 treats abuse, neglect, and negligent treatment between parent and child as fundamentally different from actions between strangers, focusing on ‘support’ rather than for example civil or criminal action.⁴³ As such, the ‘truths’ found in the CRC about the family and ‘care’ (child is developing, so childhood requires care, making the family natural) again place limits on the rights of the child. The ‘truths’ associated with the family and ‘care’ limit both the child’s right to autonomy as well as the child’s right to protection. Considering the importance placed on ‘family’ in the CRC, the CRC’s definition of family becomes important to further understand the ways in which the CRC’s ‘family’ places limits on the rights of the child, not just in terms of their autonomy rights but also even in terms of their less controversial protection rights.⁴⁴

II. THE CRC’S DEFINITION OF A FAMILY – PARENT POSITIONED OVER CHILD

This section argues that term ‘family’ in the CRC equates to ‘parental control’. While the Convention does not explicitly define the term ‘family’, the Convention describes only two family members: parents and children.⁴⁵ This article asserts that the coupling or binary of the adult-child seen throughout the Convention

43 See O’Neill, *supra* note 27, at 30; Among family members where ties are even closer than simple friendship, it is suggested, the language of rights should give way to models that stress connection, care, intimacy, and relationship rather than separateness, individuality, and independence. See Section III for further discussion.

44 Basic conceptions of rights relating to children fall into two categories: 1) autonomy rights, and 2) protection rights. Protection or welfare rights include physical care and security. Autonomy rights, or ‘choice rights’, on the other hand, include an individual’s authority to make binding decisions. Bruce C. Hafen and Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV. INT’L L. J. 460 (1996): “Protection rights, which do not depend on any minimum level of capacity, include such safeguards as rights to property, rights to physical care and security, and rights to procedural due process...Choice rights [or autonomy rights], on the other hand, grant individuals the authority to make affirmative and legally binding decisions, such as voting, marrying, making contracts, exercising religious preferences, or choosing whether and how to be educated.”

45 For example, Article 2(1) states that the child shall enjoy rights without discrimination, and Article 2(2) states that the child shall enjoy rights without discrimination on the basis of the child’s ‘parents, parents, or family members’.

emphasizes the role of the family for the rights of the child. The linkage of these two members is in essence the formation of the family. For the CRC's child, the presence of an adult (preferably a parent) is the assumption of the family context. The child without an adult is family-less.

This article argues that the family in the CRC is defined as, not just the presence of an adult and a child, but rather the presence of an adult *positioned over* a child. Thus, the family is by definition the parents who have authority and control over the child. Such control greatly affects the types of rights the child is given under the CRC. Five points will be made: (1) the terms family, care, and parental control became almost synonymous during the drafting of the Convention; (2) the CRC gives primary responsibility over the child to the parent; (3) in addition to requiring the child to be subject to the 'direction' and responsibilities of the parents in relation to the child, the Convention further situates the child as dependent on the parent for the child's everyday physical needs; (4) not only does the CRC make children dependent on parents for their everyday physical needs (with the exception of Article 23), certain articles seem to go further and make children's inner life (e.g. thought, conscience) subject to parental control; and (5) numerous articles in the CRC relate only to children who are assumed to be in a family.

Family, Care and Parental Authority

It is not that the terms 'family', 'care' and 'parent' are synonymous, but rather that 'family', 'care' and 'parental control' were used synonymously. For example, regarding Article 5, the Canadian delegate noted concern that "in protecting the family from the state, *the family must not be given arbitrary control over the child*. Any protection from the state given to the family must be equally balanced with the protection of the child within the family."⁴⁶ The Canadian delegate argued that the Convention was a "delicate balance between the rights of the child and the correlative rights of the parents."⁴⁷ The Canadian delegate at first refers to the family and the child, and then refers to the parents and the child. Further, the Canadian delegate expressed the fear that 'the family' must not be given arbitrary control over the child. As the family is only made up of parents and children, the

46 See DETRICK, DOEK AND CANTWELL, *supra* note 16, at 160 (emphasis added).

47 *Id.*

Canadian delegate must have meant that the *parents* must not be given arbitrary control. 'Parental control' becomes interchangeable with the term 'family'.

Similarly, when discussing Article 10, the Australian delegate suggested that the original text ("[t]he parents shall have the right to specify the place of the child's residence unless, guided by his best interest, a competent state organ is authorized, in accordance with national law, to decide in this matter"⁴⁸) should be deleted because a provision concerning parental rights had no place in a human rights convention for children.⁴⁹ The United States delegate, though stating agreement, insisted that family reunification should be included.⁵⁰ Another speaker pointed out that it was not the rights of parents that were being emphasized by family reunification, but rather the best interests of the child.⁵¹ Here, parental control becomes 'family', which equates with the best interests of the child. 'Family' in the Convention describes a positional matrix in which the adult is positioned over the child. The nebulous best interests of the child principle is then used as a further rationalization, or another term that helps defy criticism of the adult's claim to power over the child.⁵²

The Convention then appears to support, not parental rights (in other words, the right of the parents to have control over their child), but rather the more politically effective best interests of the child and the family. By explicitly naturalizing the 'family', the Convention implicitly naturalizes the parents' power over the child. As such, the idealization, the naturalization, the protection, and the ensuring of the family could in turn, equally describe the idealization, the

48 See DETRICK, DOEK AND CANTWELL, *supra* note 16, at 163.

49 *Id.*

50 See DETRICK, DOEK AND CANTWELL, *supra* note 16, at 163-164.

51 *Id.*

52 Michael Freeman, *Article 3: The Best Interests of the Child Conflicts* in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 1, 2 (Alen, A. *et al.* eds., 2007): 'The best interests principle is, of course, indeterminate. One of the dangers of this is that, in upholding the standard, other principles and policies can exert an influence from behind the 'smokescreen' of the best interests principle. It can cloak prejudices, for example anti-gay sentiments. It can also be merely a reflection of 'dominant meanings'. Robert Mnookin highlights, 'deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself' in Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & COTEMP. PROBS. 226, 260 (1975).

naturalization, the protection, and the ensuring of the power dynamics of the parent over the child. Olsen notes that implicit in the law generally, is not just respect for the 'family'.⁵³ She argues that laws shape and reinforce the roles of those who make up the family by assigning power and responsibility within the family.⁵⁴ Barbara Woodhouse, in her article 'The Dark Side of Family Privacy' describes the dangers of viewing the family as a single 'entity', including the subjugation of women's will to husbands, the inability of a child to exit abusive family situations, and the condoning of domestic violence.⁵⁵ She notes that treating the family as a 'unit' bestows power on the strong members of the entity.⁵⁶ As the discussions above indicate, is then not just the 'family' that the CRC is supporting; the CRC is supporting a particular power structure within the family of the parent positioned over the child. As such, children are made dependent upon and thus vulnerable to parents, as will be illustrated below in the discussion regarding the trafficking of children by parents.

The CRC gives primary responsibility over the child to the parent.

Article 3(2) mandates that the rights and duties of the parent must be taken into account when ensuring protection and care of the child.⁵⁷ This article reaffirms the importance of the role of the parent and mandates the consideration of parent's interests. Article 5 obligates states to respect the responsibilities, rights, and duties of parents and even members of the child's extended family and community, to provide direction and guidance to the child in the child's exercise of *every right in the Convention*.⁵⁸ Such sweeping oversight could encumber the child's ability to exercise her/his rights in the Convention. The parent's 'duty' or 'responsibility' to guide the child in the exercise of every right provided by the CRC locates the parent over the child and results in the child being explicitly dependent on such guidance. The child's rights become conditioned upon the parent's 'direction'. 'Responsibility for'

53 See Olsen, *supra* note 27, at 848.

54 See Olsen, *supra* note 27, at 848; See also *supra* note 34; *supra* note 34, at 227, 229, 247; See Olsen, *supra* note 34, at 1499.

55 Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247, 1251-1259 (1999).

56 *Id.* at 1254.

57 *Supra* note 4, at art. 3(2).

58 *Supra* note 4, at art. 5.

becomes a grant of power to the parent over the child, where parents are empowered to impose their beliefs and opinions on the child.

Similarly, Article 18 notes that ‘both parents have common responsibilities for the upbringing and development of the child’.⁵⁹ This article not only locates the parent over the child as the parents have ‘responsibility for’/control over the child, but also can be read to legitimize the dominance of the parent. Article 18 states that, ‘[t]he best interests of the child *will be* their (i.e. the parents’) basic concern’ (emphasis added).⁶⁰ This has two possible effects: the article dictates what the parents’ concerns must be (normative), and/or when read in the context of the entire convention, could also solidify the dominant role of parents by justifying the parents’ dominant role by explaining what the parents’ primary concern is (descriptive). When read as the latter, Article 18 has a potential legitimizing affect, as parents are assumed to have the best interests of the child as a primary consideration in the exercise of their authority over children. This description of the parent is yet another ‘truth’ projected by the CRC; a ‘truth’ which is at odds with the experience of many children whose parents do not or cannot act in their best interest, as in seen in for example parents who participate in the trafficking of their children.⁶¹

In addition to requiring the child to be subject to the ‘direction’ and responsibilities of the parents in relation to the child, the Convention further situates the child as dependent on the parent for the child’s everyday physical needs.

The child is required to attend school under Article 28 and is not envisioned by the CRC as normally engaged in paid work.⁶² Instead, parents are to provide

59 *Supra* note 4, at art. 18.

60 *Id.*

61 *See generally* Kathryn Backett Milburn et al., *Challenging Childhoods: Young People’s Accounts of ‘Getting by in Families with Substance Use Problems*, 15 *CHILDHOOD* 461, 461 (2008); Caroline Nicholson, *The Impact of Child Labour Legislation on Child-Headed Households in South Africa*, 30 *T. JEFFERSON L. REV.* 407, 408 (2008); Judith Ennew, *Outside Childhood: Street Children’s Rights in The Handbook of Children’s Rights: Comparative Policy and Practice* (Bob Franklin, ed., 1995); *See Olsen, supra* note 27, *citing* Minow, *supra* note 38, at 948.

62 *See generally* Vanessa Pupavac, *Misanthropy Without Borders: The International Children’s Rights Regime*, 25(2) *DISASTERS* 95 (2001); *See Fields, supra* note 3; *See Woodhead, supra* note 10.

for the everyday physical needs of the child according to Article 18 and all state assistance is to be directed through the parents according to Articles 24 and 27. Article 24 states that the realization of the enjoyment of the highest attainable standard of health is mediated through the child's parents. Article 27 states that the parents have primary responsibility, which the state must assist, for securing an adequate standard of living for the child. In both articles, without parents there is no one who holds primary responsibility, and there is no one for the state, who has secondary responsibility, to assist. In the CRC's vision of childhood, a child simply cannot exercise such responsibility on her or his own behalf. It may be argued that the CRC obligates states under Article 20 to find or act as the parent/parent, and as such the child never requires direct assistance to support her or himself. Certainly, there are academics who argue that the only right a child is entitled to is the right to an autonomous parent.⁶³ Yet, there are many children in both the developed and developing world that have no responsible parent as envisioned by the CRC, whether a family or as provided by the state.⁶⁴ The child, who is responsible for him or herself (much less others), is not contemplated in this article or anywhere else in the Convention. By constructing childhood in this way, the CRC makes the family/adults necessary for the realization of certain rights in the Convention. If the child desires assistance from the state, she/he must be part of a family, i.e. the child must have a parent.

Even within the CRC, there are other, incongruent constructions of the adult – child relationship. Article 23(2) is unique within the Convention. Article 23 mandates that assistance be given to 'the eligible child [with disability] and those responsible for his or her care.' Notably, this is the only article that explicitly provides that assistance offered by the state should be directed towards the child

63 JOSEPH GOLDSTEIN ET AL., *BEFORE THE BEST INTERESTS OF THE CHILD* 9 (1979); *see also* for a discussion of this view, Freeman, *supra* note 40.

64 Jenny Kitzinger, *Who Are You Kidding? Children, Power and the Struggle Against Sexual Abuse*, in *CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD* 157, 162 (Allison James and Alen Prout, eds., 1997); Tatek Abebe & Asbjorn Aase, *Children, AIDS, and the Politics of Orphan Care in Ethiopia: The Extended Family Revisited*, 64(10) *SOCIAL SCIENCE & MEDICINE* 2058, 2058 (2007); Elsbeth Robson, *Hidden Child Workers: Young Carers in Zimbabwe*, 36(2) *ANTIPODE* 227, 227 (2004); *see* Nicholson, *supra* note 61, at 408; Kathryn Backett Milburn et al., *Challenging Childhoods: Young People's Accounts of 'Getting by in Families with Substance Use Problems*, 15 *CHILDHOOD* 461, 461 (2008); *See* Ennew, *supra* note 61, at 202.

as well as the parent. This article also states that the child should live in conditions that ‘promote self-reliance and facilitate the child’s active participation in the community.’ During the drafting of Article 23, the Polish delegate proposed that the terms ‘self-reliance’, ‘active participation’, and ‘dignity’ be included in Article 23.⁶⁵ These otherwise controversial terms, at least in relation to the CRC’s child, were included without discussion.⁶⁶ The discussions focused not on the balancing of parental control versus the child’s autonomy rights, but on who would bear the financial responsibility to realize the obligations under Article 23. One must ask: why did the drafters give this child with disability more subjectivity and autonomy as compared to other children? It would seem that because of a greater likelihood of dependence of the child with a disability, the aim is to ensure the respect for the child’s autonomy. Why is this approach not more globally applicable for the child in the CRC? If the CRC desires to couple the child with the parent, as the definition of family, why not put the two members of the family on more equal footing? This child with disability, envisioned to require greater reliance on ‘care’ might have presented less of a ‘threat’ to the positioning of the parent with active control over the needs and best interests of the child. Again, this article is the only article in the CRC that envisions the child and parent on a more equal plane.

Not only does the CRC make children dependent on parents for their everyday physical needs (with the exception of Article 23), certain articles seem to go further and make children’s inner life (e.g. thought, conscience) subject to parental control.

While Article 5 already empowers parents to ‘guide’ and ‘direct’ the child’s exercise of all the rights in the Convention, Article 14 reiterates the parental right to ‘guide’ and ‘direct’ the child specifically in relation to the right to freedom of thought, conscience, and religion.⁶⁷ This extension of the grant of parental discretion could represent an even greater intrusion into the child’s exercise of rights under the CRC. Eva Brems (hereinafter “Brems”), in her article “Article 14: The Right to Freedom of Thought, Conscience, and Religion,” notes the

65 See DETRICK, DOEK AND CANTWELL, *supra* note 16, at 332-333.

66 See DETRICK, DOEK AND CANTWELL, *supra* note 16, at 246.

67 International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

confusion over not only the inclusion of the parental right to guide and direct the child in Article 14, but also how this inclusion alters the child's rights under the International Covenant on Civil and Political Rights (hereinafter "ICCPR").⁶⁸ Notably, the discussion during the drafting of Article 14 did not relate to the protection of the choice of religion vis-à-vis state, as is the focus of other international human rights conventions.⁶⁹ Rather, disagreement focused on the existence of a child's own right, vis-à-vis his or her parents. Originally, the article positioned children on equal footing with the parents: "The state parties shall equally respect the liberty of the child and his parents and where applicable, parents, to ensure the religious and moral education of the child in conformity with convictions of their choice."⁷⁰

Such equality was ultimately rejected by the drafters.⁷¹ Geraldine Van Bueren explains that the disagreement over the extent of the child's right, in particular to religious freedom, risked obstructing the drafting and adoption of the entire Convention.⁷² Brems argues that it is not self-evident to recognize children as autonomous bearers of this right, since several international conventions, specifically Art 18(4) of the ICCPR and Article 13(3) of the International Covenant on Economic, Social and Cultural Rights (hereinafter "ICESCR")⁷³, recognize the right of parents to ensure the religious education of their children in conformity with the parents' own conviction.⁷⁴ Even the Committee for the CRC emphasizes that "the human rights of children cannot be realized independently from the human rights of their parents, or in isolation from society at large," in relation to Article 14.⁷⁵ The specific inclusion of the parents' right to direct the

68 Eva Brems, *Article 14: The Right to Freedom of Thought, Conscience, and Religion*, in A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 1, 1 (Andre Alen et al., eds., 2006).

69 See DETRICK, DOEK AND CANTWELL, *supra* note 16, at 247.

70 See DETRICK, DOEK AND CANTWELL, *supra* note 16, at 246.

71 See DETRICK, DOEK AND CANTWELL, *supra* note 16, at 247.

72 GERALDINE VAN BUEREN, *THE INTERNATIONAL LAW ON THE RIGHTS OF CHILDREN* 155 (1998).

73 International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.

74 See Brems, *supra* note 68.

75 *Ibid.* at 5, citing CRC Committee, *Concluding Observations: Uzbekistan* (UN Doc. CRC/C/15/Add.167, 2001), para. 6; *Concluding Observations: Saudia Arabia*, CRC Committee,

child in Article 14 reflects greater oversight given to parents in the child's right to religion than in other conventions. By requiring states to 'respect' the rights and duties of parents to provide this type of direction to the child, the CRC is forcing the child to be beholden to her or his parent's decisions extending to the type of views the child should hold and what religion the child should practice. For many, such 'direction' is uncontroversial. Brems states that the child's capacity to choose one's religion is 'probably' acquired at a later age, thus justifying greater parental oversight of the 'incapable' child.⁷⁶ Yet, if we were to substitute any other identity category to dislodge the 'obviousness' of such power given to the adult over the child (consider male-female, master-slave, or colonizer-colonized), one wonders whether such oversight could withstand scrutiny.

Continuing an investigation of the CRC's construction of the parent positioned over the child, Article 28, addresses the child's 'right' to education. Interestingly, the child's 'right' to education, includes that such education is compulsory.⁷⁷ A right is exceptionally coupled with a positive obligation to exercise this right on the part of the right holder.⁷⁸ Not only is the child required to attend, at least primary school, the child's right to education is further limited by the parents' right to choose the child's education. In parallel, this regulation applied to adults would equate to adults having the right to work, then being required by law to work, and having the type of work dictated by another category of persons. Nonetheless, Article 28 is also lauded as a major step in rights of the child as it does not make the child's right to education explicitly subject to the wishes of the

26th Session, Jan. 26, 2001, para. 31, UN Doc. CRC/C/15/Add.148, 2001); Concluding Observations: Iran, CRC Committee, 24th Session, para. 35, UN Doc. CRC/C/15/Add.123 (June 28, 2000). In that respect, it has recommended the enactment of protective legislation and the rescinding of legislation that is overly restrictive of religious freedom in general. (Concluding Observations: Uzbekistan CRC Committee, CRC Committee, para. 6-7, UN Doc. CRC/C/15/Add.167, 2001 (Nov. 7, 2001); Concluding Observations: Saudia Arabia, CRC Committee, para. 31-32, UN Doc. CRC/C/15/Add.148 (2001); Concluding Observations: Iran, CRC Committee, 24th Session, para. 35-36, UN Doc. CRC/C/15/Add.123 (June 28, 2000).

76 See Brems, *supra* note 68, at 30.

77 Art. 28(1)(a).

78 A notable exception occurs where certain jurisdictions require citizens to vote (such as in Australia).

parents.⁷⁹ Notably, no discussion took place on the issue of whether Article 28 altered, or should alter, the parent's right to choose the child's education.⁸⁰ Nor should Article 28 be interpreted in isolation.⁸¹ When necessarily read in light of Article 29 and Article 5, both arguably modify any increased emancipation with respect to a child's independent right to choose his or her education in Article 28, returning the child to the dominant CRC paradigm: dependent upon parental 'guidance' for the exercise of rights.⁸² Under Article 29, it could be argued that if parents do not believe that a particular education facility sufficiently develops respect for the parents, cultural identity, language, and values, the parents could choose to send the child elsewhere.

Further, Article 5 mandates that in the child's exercise of all rights in the Convention, the state will respect the direction and guidance of the parents.⁸³ It would seem that this direction and guidance would include the right to choose which school the child should attend. When read within the context of the entire Convention, can Article 28 be said to chip away at the broad parental discretion over education? The step that appears lauded within the CRC is the move from an explicit parental determination of education to an implicit one, thus not altering in any way parental control over, in the guise of 'responsibility for', the child's choice in education. Van Bueren has argued that Article 12, the child's right to express her or his views in all matters regarding the child, helps ensure that the child's education is in accordance to the child's own beliefs/

79 Mieke Verheyde, *Article 28: The Right to Education*, in *A Commentary on the United Nations Convention on the Rights of the Child* 47 (Andre Alen et al. eds., 2007) citing ICESCR Art. 13(3): States shall have respect for the liberty of parents and, when applicable, parents to choose for their children's schools.

80 See DETRICK, DOEK AND CANTWELL, *supra* note 16, at 382-387. Discussions focused rather on the cost to the state if education was made compulsory.

81 *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, 331, available at <http://www.unhcr.org/refworld/docid/3ae6b3a10.html> (accessed 26 July 2011); Art. 32(1): 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Art. 32(2): 'The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes; See Verheyde, *supra* note 79.

82 See Verheyde, *supra* note 79.

83 *Supra* note 4, at art. 5.

opinions.⁸⁴ The child's right to express her or his views is still subject to an adult determination of the child's maturity.⁸⁵ It is first for the parent to make such a determination. It could be said that the child has only the right of review the parent's determination of the child's capacity in the instance the state feels such review is necessary. Ultimately, the child remains subject to an adult's preference for the child's education or/and subject to an adult's assessment of the child's capacity.

Numerous articles in the CRC relate only to children who are assumed to be in a family.

For example, Article 5 states that the parents, extended family, and the community's responsibilities must be protected.⁸⁶ Article 7(2) states that children have the right to know and be cared for by his or her parents.⁸⁷ Article 9 elaborates the right not to be separated from the family.⁸⁸ These articles assume that the child has such persons in his/her family, and therefore, these articles are only applicable if the child has a family. Article 10 provides for reunification of families and deals with parents who are located in a different state from that of the child.⁸⁹ Article 22(2) states the obligation of the party and the UN to help trace and reunify families.⁹⁰ It would seem that the child must have a family to enjoy such right to aid for reunification or separation. Article 29 states that the focus of education should develop respect for 'parents,' in addition to cultural identity, language, values, and national values. Again the assumption is that there exist parents for which respect should be developed.⁹¹

84 See VAN BUEREN, *supra* note 72, at 243; See also Geraldine Van Bueren, *Education: Whose Right is it Anyway?* in HUMAN RIGHTS: A EUROPEAN PERSPECTIVE 339, 339 (Liz Hefferman, ed., 1994).

85 Art. 12(1): 'State Parties shall assure to the child who is capable of forming his or her views the right to express those views freely in all matters affecting the child, *the views of the child being due weight in accordance with the age and maturity of the child* (emphasis added).

86 *Supra* note 4, at art. 5.

87 *Supra* note 4, at art. 7(2).

88 Article 9(3) states the right to maintain personal contact with the family and to gain essential information regarding whereabouts of the family.

89 *Supra* note 4, at art. 10.

90 *Supra* note 4, at art. 22(2).

91 *Supra* note 4, at art. 29.

By assuming that children are in a family, the CRC only makes available rights for and duties owed to children who are in a family context. Many of the rights enumerated in the CRC simply do not make sense for children without a parent/family. Street children present an example of children who do not live in 'care' as envisioned in the CRC.⁹² As will be examined below, children who are trafficked illustrate families that are not happy and safe, and parents who do not have their child's best interests as their primary concern. The Convention is presented as a description of childhood, where all children live within families. In this construction, the child must first meet the qualifications for being a child; in this case the child must have a family, before rights can be extended. The rights of the child are mediated through the requirement/restraint of being in a family as defined as the child who is subject to parental authority. Children are only given rights that relate to maintaining the family environment (including a right not to be separated from the family), an environment defined by the child who is subject to parental authority. Similar to the idealizing of the family as a place of "happiness, love, and understanding," Freeman has argued that envisioning the protection of parental rights as the means to afford protection of the child, assumes that childhood is a golden age and that adults already relate to children in terms of love, care, and altruism.⁹³ Benjamin Shmueli and Ayelat Blecher-Prigat argue that two presumptions underlie this particular parent-child relationship: 1) that children lack maturity and 2) that the 'natural bonds of affection lead parents to act in their child's best interests.'⁹⁴ Freeman further contends that idealizing adult-child relations only emphasizes that parents have the best interests of the child at heart and results in a *laissez-faire* attitude towards the family, discussed above.⁹⁵ Leena Alanen and Berry Mayall characterize the parent- child relationship as asymmetrical, where children are subordinated to adults/parents.⁹⁶ Martha

92 See Ennew, *supra* note 61.

93 Michael D.A. Freeman, *Taking Children's Rights More Seriously* in CHILDREN, RIGHTS AND THE LAW 52, 55-56 (David Archard et al., eds., 1993).

94 Benjamin Shmueli & Ayelat Blecher Prigat, *Privacy for Children* 42 COLUM. HUM. RTS. L. REV. 759, 761-762 (2011).

95 See Freeman, *supra* note 93.

96 Leena Alanen, *Childhoods: the Generational Ordering of Social Relations* in CHILDHOOD IN GENERATIONAL PERSPECTIVE 27 (Berry Mayall & Helga Zeiher, eds., 2003); Berry Mayall, *Childhood and Generation: Explorations of Agency and Structure* in CONCEPTUALIZING ADULT-CHILD RELATIONSHIPS 129 (Leena Alanen & Berry Mayall, eds., 2000).

Minow, in her article “Interpreting Rights, An Essay for Robert Cover,” argues that the trivialization of children’s rights fails to recognize the position of power parents generally have over children.⁹⁷ She contends that:

*too often, the vulnerability of children is forgotten in a culture that assigns responsibility for their care, in the first instance, to the private sphere of particular parents. This pattern exonerates anyone but the child’s parents from responsibility for the care and needs of the child and shields the child from public view.*⁹⁸

Vulnerability then is not one’s experiences as a result of ‘being’ a child. Rather, vulnerability flows from the assignment of responsibility of the child to adults, since these adults are then shielded from review. Certainly the CRC sidesteps the need to justify the vast possibility of control given to the family, in other words parents. Why does the Convention use the term ‘care’, even when referring to those adults who abuse and neglect the child in Article 19, as opposed to the term ‘custody’? This article argues that the term ‘care’ is altruistic, disguising notions of possession and control upheld by the CRC. This article argues that ‘care’ demands dependency of the child on adults, rationalized by childhood as a biological state of development. The CRC’s requirement of dependency reinforces vulnerability. ‘Care’ by parents and ‘development’ for/immaturity of children makes sense only according to the adult – child binary. The CRC’s ‘claim-to-truth’ regarding the family (natural and ideal), the child (developing and immature), and parents (always acting according to the child’s best interests), disguises the political choices being made in the designation of such ‘truths’. In turn, these versions of ‘truth’ place limits on what it means to be a child, making dependency and therefore vulnerability markers of childhood.

III. CHILDREN’S RIGHTS RELATE PRIMARILY TO KEEPING THE FAMILY INTACT

The CRC promotes keeping the family together, a bias that reinforces/increases parental control. This section will examine a variety of articles in the CRC that reinforce the structure of the family. For example, Article 22 obliges

97 Martha Minow, *Interpreting Rights, An Essay for Robert Cover*, 96 YALE L.J. 1860, 1860 (1986-1987).

98 *Id.* at 1869.

states and even the United Nations to cooperate to trace and reunify families of refugee children.⁹⁹ Under Article 7(1) the child has the right to know and be cared for by his or her parents.¹⁰⁰ Notably, the opposite of neither of these articles is included: the right not to be traced, not to be known, or not to be cared for by parents. Article 16 which includes the child's right to privacy, a right that would seemingly shed light on Article 7, contains the same language as its corollary in the ICCPR.¹⁰¹ During the drafting of Article 16, one delegate expressed concern that Article 16 might have 'repercussions on the rights of parents to guide and educate their children and consequently have repercussions on the family, the basis of society'.¹⁰² As discussed above, not only does this delegate define the family as the ability of parents to guide and educate their children, the delegate designates such an arrangement as a fundamental and essential truth: 'the basis of society.' By putting forth these 'truths' and thus circumventing discussion regarding their implications, the representative noted that children are generally treated differently than adults under domestic law.¹⁰³ The justification for differential treatment is the inherent difference of childhood. The adult-child binary justifies the understanding that a child's right to privacy should be fundamentally different from an adult's right to privacy. The adult-child binary rationalizes the 'education' and 'guidance' of children by adults. It is noteworthy that Article 16 is also subject to Article 5's provision for parents to 'guide' and 'direct' the child in her or his exercise of the right to privacy. Quite possibly, though not discussed or acknowledged during the drafting of the Convention, the CRC's inclusion of autonomy rights for children, while intending to make children both subjects as well as objects of the law, at the same time ensured that even children's autonomy rights were also firmly subjected to parental control.

In addition to lacking the right to refuse knowledge of one's own parents, the child does not have the absolute right to know her or his parent. The right

99 *Supra* note 4, art. 22.

100 *Supra* note 4, art. 7(1).

101 ICCPR art.17: 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.

102 *See* DETRICK, DOEK AND CANTWELL, *supra* note 16, at 260-261.

103 *See* DETRICK, DOEK AND CANTWELL, *supra* note 16, at 261.

to know one's parents is dependent on the parent's desire to know the child. Article 7(1) only includes the right to know and be cared for by parents 'as far as possible'.¹⁰⁴ While the child, regardless of her or his wishes, must know the parent, the parents however may choose whether they want to know their child. The inclusion of the language 'as far as possible' reflected the drafters' decision that the child's right to know her or his parents was predicated on the wishes of the parents.¹⁰⁵ During the drafting of Article 7, the Egyptian delegate, on behalf of ten other countries, articulated the view that part of the right to identity was the right to know one's parents.¹⁰⁶ The Egyptian delegate also noted that knowing one's parents was also justified on the basis of the child psychological stability.¹⁰⁷ The issues of 'secret adoption' or closed adoption (where the parent remains unknown to their child based upon the parents' wishes) was raised and accepted as an impediment to the child's absolute right to know her or his parents.¹⁰⁸ Egypt, and all the delegates, eventually accepted that the child had the right to know her or his parents only 'as far as possible'.¹⁰⁹ This means that the child is obligated, even against his or her wishes to know, reunite, and be cared for by her or his parents. The parent's duties and responsibilities, while primary, are dispensable according to the parent's wishes. Although it is not obvious from the explicit wording of Article 7, when read in light of the *Travaux Préparatoires*, it becomes clear that children have no choice but to be in a family, whereas parents do not. As suggested before, it seems that the family or in other words the parents' rights are being prioritized instead of the child's. The rights of parents become more important than the so-called rights of the child.

Similarly, Article 9 provides the child the right not to be separated from the child's parents against the parent's will, and the right to maintain personal contact and that both the child and the parents have the right to know the whereabouts of another member of the family. Once more, it is notable that the child does not have the right to 'divorce', remain in an undisclosed location, and refuse personal

104 *Supra* note 4, art.7(1).

105 *See* DETRICK, DOEK AND CANTWELL, *supra* note 16, at 127-128.

106 *See* DETRICK, DOEK AND CANTWELL, *supra* note 16, at 127.

107 *See* DETRICK, DOEK AND CANTWELL, *supra* note 16, at 127-128.

108 *See* DETRICK, DOEK AND CANTWELL, *supra* note 16, at 127.

109 *Supra* note 4, art. 7.

contact with his or her parent in the Convention. The child may be separated from and not have contact with parents, but not according to the child's wishes. Article 9 presents not only the idea that the child cannot determine his or her own best interests, but also contains another interesting layer. The child may only be separated against the parents' wishes if the following procedural hurdles are met: 1) the decision must be necessary for the best interests of the child, 2) determined by a competent authority, 3) subject to judicial review, and 4) in accordance with applicable law and procedures.¹¹⁰ However, if the separation is according to the parents' wishes but against the child's wishes, there are no similar procedural hurdles included in the Convention.

During the drafting of Article 9, the Norwegian delegate suggested that separation, even in the event that parents' wishes to separate, should only occur if the state determines that separation is in the best interests of the child, thus limiting the right of the parents to divorce or separate from their child.¹¹¹ Thorough discussion took place on how to resolve the issue of which family members may separate, and when.¹¹² Ultimately all parties accepted it, and the procedural hurdles listed above were included in the Convention which only apply when the state is considering separating children from parents against parents' will. The child, however, does not have a comparable right to separate if such separation is against the parents' wishes; she or he can only hope for the issue to come before the state, that the state meets those four procedural hurdles listed above and finds that such separation is in accordance with the best interests principle, discussed further in sub-section (iv) of this article. Further, if the parent desires to separate from the child, the child does not have to right to those same procedural hurdles, including a best interests of the child determination. It seems that this article merely supports the parental right to leave whenever the parent so desires, and the parental right to have custody of the child with as little state intervention as possible. Parental rights, here, are dressed up in the discourse of best interests of the child, but appear to clearly support parental preferences. One could argue that it cannot be in the child's best interests to stay with parents that do not want

110 *Supra* note 4, art. 9(3).

111 *See* DETRICK, DOEK AND CANTWELL, *supra* note 16, at 188-189.

112 *See* DETRICK, DOEK AND CANTWELL, *supra* note 16, at 188-189.

them, particularly given the child's dependence on the parent. Nonetheless, how is this not true in the reverse, when a child does not desire to stay with a parent? Put another way, how is it in the child's best interests to force the family to stay together when the parent is unwanted. Certain assumptions are being made; roles and responsibilities are assumed and supported. Most importantly, certain 'truths' about children (immature and therefore cannot act according to their best interests much less care for themselves) and parents (responsible and will always act in the child's best interests) are being made.

Notably, even Article 19, which addresses abuse by parents, does not specifically provide for separation, although the article does empower the state to take 'all appropriate legislative, administrative, social and educational measures to protect the child' from abuse by parents. These 'protective measures' should 'provide necessary support for the child and those who have the care of the child'. Obviously such support could include separation, yet there seems to be reluctance to provide such a right explicitly to children, even when the state has determined that abuse has occurred. It seems that Article 19 treats abuse perpetrated by those who care for the child as less serious than abuse perpetrated between strangers. By less serious, 'physical or mental violence, injury, or abuse, maltreatment or exploitation, including sexual abuse' between any other individuals would give rise to criminal or civil action. However, Article 19 appears to call for 'support' for both the child and the perpetrator. This reading is supported and reflected in the discussions that took place during the drafting of Article 19. The discussion during the drafting of this article focused on the need to providing non-punitive measures for parents or parents who abuse their children. For example, the Ukrainian delegate stated that Ukraine would not support a proposal that was principally focused on judicial and punitive measures.¹¹³ While agreeing, the delegate from the Defense for Children argued that implicit in the term 'judicial involvement' was the provision of services for prevention and follow-up. Ultimately, paragraph (2) of Article 19 makes clear the type of 'protective measures' the state should offer in the instance of child abuse by parents: prevention, identification, reporting, referral, investigation, treatment, and follow-up. While the explicit limitation on punitive action against parents who abuse or neglect their children cannot be

113 See DETRICK, DOEK AND CANTWELL, *supra* note 16, at 275.

found in Article 19, the language, as well as the discussions during the drafting of Article 19, indicate that while similar abuses between strangers and children as well as between adults give rise to criminal or civil action, between parents and child, the focus should rather be on reconciliation. Again this differential treatment of parents suggests not special protection of children, but rather a prioritization of the protection of parental rights.

Article 19 is hailed as a major step forward for rights of the child as the first acknowledgment of the positive role of the state to interfere in the family in the instances of abuse.¹¹⁴ Yet, Article 19 appears to be a mere 'baby' step in the direction of 'special care and assistance'.¹¹⁵ Considering the dominant position given to parents in the CRC, Article 19 is the only article out of 54 articles that addresses any sort of abuse that may occur as a result of the parent's dominant position in the family over the child. Further, as noted above, this article does not explicitly provide for separation, instead that 'necessary support' to be given to the family. While reconciliation and support may be necessary in certain circumstances, the seemingly predominant, if not exclusive focus on reconciliation and support in Article 19 harkens back to some assumption that the parent-child relationship, even in the instance of abuse, is fundamentally different from all other relationships. Onora O'Neill, in her Article 'Children's Rights and Children's Lives' notes, "among family members where ties are even closer than simple friendship, it is suggested, the language of rights should give way to models that stress connection, care, intimacy, and relationship rather than separateness, individuality, and independence."¹¹⁶

While reconciliation and support may be positive in instances of abuse and neglect between parents and children, the question still remains why this assumption is not 'true' for the abuse and neglect between all humans, regardless of their relationship. The family is viewed as fundamentally different from all other relationships because of the many 'truths' of the family and parents accepted in the Convention: the family is the 'natural' place for children; the family environment

114 The article is not, however, without critique that it oversteps too much on parental rights. *See* Hafen and Hafen, *supra* note 44.

115 *Supra* note 4, Preamble.

116 *See* O' Neill, *supra* note 2, at 30.

is ‘an atmosphere of happiness, love and understanding;¹¹⁷ the best interests of the child will be the parents’ ‘basic concern’.¹¹⁸ These ‘truths’ place limits on the rights of the child, and as such, these ‘truths’ relegate childhood to a state of dependency, and thus, arguably greater vulnerability, as illustrated below regarding child trafficking. At the risk of being repetitive, it is important to note that children were not involved in the drafting of the Convention. One wonders whether this article would be so ‘forgiving’ of parents had children been involved. Certainly such ‘forgiveness’ is not obligated in the context of children and strangers,¹¹⁹ and between adults. The rights that children find in the CRC trend towards bolstering, rather than limiting parental rights. The rights that children find in the CRC trend towards limiting, rather than bolstering their own rights. These limitations are in accordance with certain ‘truths’ about childhood, justifying the regulation of childhood, where dependency and vulnerability become markers of childhood.

IV. STATE AS BACK-UP CARE: WHEN THE ‘FAMILY’ BREAKS DOWN – RESTRICTIONS ON PARENTAL RIGHTS

Before discussing limitations placed on parents in the exercise of their parental rights, it should be noted again that human rights for children give rise to vastly different rights, obligations, and responsibilities than human rights for other, vulnerable (adult) groups. Human rights traditionally protect persons from the power of the state by guaranteeing the adult certain autonomy rights. The human rights of children are protected in the CRC by systemically empowering adults to protect the child. The rights of children appear to bestow third party private individuals (parents) with ‘duties’ and responsibilities.¹²⁰ The CRC gives such private individual, in other words parents, authority to such an extent that this article argues that ‘care,’ ‘needs,’ and ‘protection’ serve as terms of art that reflect parental control over children. Here, the child is only protected from the

117 See generally *supra* note 35; See Olsen, *supra* note 27; See Minow, *supra* note 38, at 948.

118 See Jenks, *supra* note 17.

119 See generally Kitzinger, *supra* note 64.

120 The US’s position on the importance of the family, mentioned above, can be contrasted with the statement by the US delegate noting that placing responsibilities on private individuals, here parents, was ‘strange’ for an international covenant, which is only to create binding obligations for ratifying states. See DETRICK, DOEK AND CANTWELL, *supra* note 16, at 270.

state through the parent and the parent's right to have primary responsibility for the child. In the instances where the 'family' malfunctions, the child does not acquire her or his own autonomy rights that will protect the child from the state and private third parties. Instead, according to the CRC, the state is empowered to function only as a pseudo- or back-up parent, in the instance that the state determines such (self-) empowerment is necessary.¹²¹ Further, the only right the child has to be protected from the state, once in the care of the state, is for the state to review its treatment of the child.¹²² It seems that rights of the child in the CRC limit not the state intervention into the life of the child, but rather limit state intervention in the parents' exercise of their parental rights.

Although the parent is located above the child in the construction of the CRC's concept of family, it is important to note in turn the restrictions placed on parental rights, as these restrictions more comprehensively sketch the relative roles of the parent and the state towards the rights of the child. First, the Convention is praised as a challenge to the monopoly of power parents traditionally held on deciding the best interests of the child by obliging the state to intervene in Article 19, thereby making the decisions of the parents reviewable by the state.¹²³ Second, parents are subject to restrictions in their dominant role within the family by two principles: 1) the best interests of the child and 2) the evolving capacities of the child. As Article 19 has already been examined above, this section will examine the best interests and evolving capacities principles. These two principles are argued to have "profound significance for the triangular relationship between the child, the family, and the State. The Convention, for the first time in international law, establishes a direct relationship between the child and the State that challenges the presumption that parents have rights of ownership over the child."¹²⁴

According to Article 3(1), the best interests of the child are "a primary consideration." The original text stated that "in all actions concerning the child...

121 Art. 20.

122 Art. 25.

123 See VAN BUEREN, *supra* note 72, at 45-49.

124 GERISON LANSDOWN, THE EVOLVING CAPACITIES OF THE CHILD ix (2005), *citing* Barbro Holmberg & James Himes, *Parental Rights and Responsibilities* in CHILDREN'S RIGHTS: TURNING PRINCIPLES INTO PRACTICE (Petren, Alfhild & James Himes, eds., 2005).

the best interests of the child would be *the paramount concern*.” During the discussions that took place when drafting Article 3, issue was taken with the words ‘the’ and ‘paramount’.¹²⁵ A number of delegations questioned whether the best interests of the child should be *the* primary consideration in all actions concerning the child. It was noted that there are situations in which the competing interests of justice or of society at large should be of at least equal, if not greater importance than the interests of the child.¹²⁶ The language of Article 3(1) was changed to include the phrase ‘a primary consideration’. The significance of this alteration is that not only the opinion of the child is not determinative in matters that concern the child, but also even the best interests of the child are not determinative.¹²⁷ The category ‘child’ involves other competing interests that must be taken into account. While the delegates mentioned only justice and society, one could also imagine that the ‘family’ and the parents must be considered as well. Nonetheless, the best interests principle is a mode of interpretation in all matters concerning the child.¹²⁸ Thus, parents are at all times restricted in matters concerning the child to take into account the best interests of the child as ‘a’ primary consideration under Article 3. Additionally, Article 18 states that the best interests of the child will be the parents’ basic concern. Article 9 also allows for separation of the child from the ‘parents’ if necessary for best interests of the child, and states that if personal contact with ‘parents’ is contrary to best interests of the child, such contact will not be permissible.

Notably, the best interest principle does not mean ‘best rights’.¹²⁹ Freeman has argued that it may seem incongruous that in a convention about rights, best interests should feature so prominently.¹³⁰ The best interest principle is paternalistic, as it is viewed from an adult perspective; Article 3(1) makes no reference to the child’s views.¹³¹ The best interests principle is not a right that a

125 See DETRICK, DOEK AND CANTWELL, *supra* note 16, at 132-133 (emphasis added).

126 See DETRICK, DOEK AND CANTWELL, *supra* note 16, at 137. Notably, no examples of such situations were given.

127 See Freeman, *supra* note 52, at 4.

128 See VAN BUEREN, *supra* note 72, at 45-49.

129 See Freeman, *supra* note 52, at 4.

130 See Freeman, *supra* note 52, at 4.

131 Article 12 does require state parties to ensure that the child, who is capable of forming her or his own views, the right to expression those views. See Freeman, *supra* note 52, at 50-51.

child may claim. The child's claim '[something] is not in my best interests' will not trump the parents' determination of the best interests of the child. The only expression that can overturn a parents' assessment of the child's best interests is the state's determination of the best interests of the child. It is not for the child to determine his/her own best interests. It is first for the parent to do so, making this 'right' more like a mere self-imposed restriction on the rights of parents that results in broad discretion for parents.¹³² The child is then left to depend on the state's determination of the child's best interests. Either way, the child is dependent on others (adults) to determine the child's best interests. This gives the parent and the state the authority to substitute their perspective for that of the child. If the best interests principle challenges the monopoly of power parents traditionally held over children, it seems to do so to only a small degree: 1) the right of review of the decisions made by parents by (*another adult*) the state, *if* the state determines such review is necessary, and 2) the right to have (*another adult*) the state makes its own determination of the best interests of the child. The child is given only the right to have a greater number of adults (the state) review the parent's decisions and actions towards the child, *if* those other adults (the state) deem such review necessary.

Additionally, the best interests principle is argued to be indeterminate.¹³³ Robert Mnookin famously states that asking what constitutes the best interests of the child is like asking about what is the meaning of life, for the list of interests are infinite.¹³⁴ Different societies at different times will not agree. Freeman uses the example of corporal punishment, and how views have changed throughout history, but also between different cultures today.¹³⁵ Views about child labour are yet another example.¹³⁶ Van Bueren argues that the flexibility of best interests principle desires to cope with the demands of justice in each case when rights collide.¹³⁷ On the other hand, Freeman argues that this principle can also be a

132 See VAN BUEREN, *supra* note 72, at 45-49.

133 See Freeman, *supra* note 52, at 2.

134 See Mnookin, *supra* note 52, at 260.

135 See Freeman, *supra* note 52, at 27.

136 See Nicholson, *supra* note 61; Berry Mayall, *The Sociology of Childhood in Relation to Children's Rights*, 8 INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 243, 245 (2000); See Woodhead, *supra* note 10.

137 See VAN BUEREN, *supra* note 72, at 45-49.

smokescreen: a mere reflection of ‘dominant meanings’ (e.g. heteronormativity). Freeman rightly notes that given the complexity of the best interests principle, a lengthy debate during the drafting stages of Article 3 would be expected.¹³⁸ As with so many other foundational concepts (the child as developing, the child as immature, and so on) the ‘delegates were happy to accept the concept without debating its meaning or its problems’.¹³⁹ As such, the best interests principle underlines the child as both an object of law and provides a ‘smokescreen’ for parent and state control.

The second limitation on the parent’s dominant role within the family, and another tenet of the CRC, is the principle of the evolving capacities of the child. Article 5, which mandates state parties to respect the rights of parents to provide direction and guidance, requires parents to provide such direction and guidance ‘in a manner consistent with the evolving capacities of the child’.¹⁴⁰ While neither the Convention nor the *Travaux Préparatoires* define the evolving capacities principle, at its most basic the principle acknowledges the child’s gradual accumulation of maturity and thus provides for a gradual accumulation of capacity/autonomy. One scholar writes that the evolving capacities principle recognizes, ‘the changing relationship between parents and children as they grow up, and focusing on capacity rather than age as the determinant in the exercise of human rights’.¹⁴¹ In turn, the parent has less claim to exercise responsibility over and capacity on behalf of the child. While the evolving capacities principle aims to balance the rights of the child with the rights of the parents,¹⁴² the focus in Article 5 nonetheless appears to be about the parent’s rights and duties, as opposed to the evolving capacities of the child. While the state is required to ‘respect’ the rights, responsibilities, and duties of the parent, the parent is not required to ‘respect’ the evolving capacities of the child, but rather provide guidance and direction ‘in manner consistent with the evolving capacities of the

138 See Freeman, *supra* note 52, at 26.

139 See Freeman, *supra* note 52, at 26, citing Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, 8 INT’L J. OF LAW & THE FLY. 1, 11 (1994). See also DETRICK, DOEK AND CANTWELL, *supra* note 16, at 137.

140 *Supra* note 4, at art. 5.

141 See LANSDOWN, *supra* note 124, at vii.

142 See generally Alston, *supra* note 139, at 1.

child'. The evolving capacity principle is also embodied in Article 12 (1) where a child capable of forming an opinion shall be able to express it, and where due weight is given to expression based on age and maturity of the child. Article 14 (2) provides parents with the right to direct freedom of thought, conscience, or religion. However, parents are restricted to the extent that they may only do so 'in a manner consistent with the evolving capacities of the child.' Like the best interest principle, this is not a right the child gets to claim under her/his own perception of his/her own capacity. Rather, the parent gets to determine the child's capacity, subject to review by the state.

It could be argued that it is not in fact the child's right or the child's opinion per se that limits the power of parents over children, but rather the state's supra-parental power. On one level, parents are guided in their own view of what a child's rights should entail by appropriating their perception of the best interests of the child and the evolving capacities of the child on behalf of the child. Arguably, the parent's determination carries with it a considerable amount of weight, with the parent given rarely reviewable respect, responsibility, and power under the CRC. On another arguably higher level, the parents are not limited by strict deployment of child's rights, but rather by the state's perception of the best interests of the child and the evolving capacities of the child. The child's challenge to parental monopoly of power over the child in the CRC amounts to merely the authorization of the state/other adults to review the parents' decisions. For example, the European Court of Human Rights has found that parents have the right 'to decide where the child must reside and also impose, or authorize others to impose, various restrictions on the child's liberty' in accordance with the right to family life under Article 8.¹⁴³ In *Neilson*, the Court reviewed the mother's decision to hospitalize her child. The Court held that Article 8 provided a broad range of parental rights and responsibilities in regard to the care and custody of children. On the matter of the child's own views, the majority considered that 'he was still of an age at which it would be normal for a decision to be made by the parent even against the wishes of the child'.¹⁴⁴ As one author notes, given that the child was 12 years old, the Court's assessment of the child's capacities

143 *Neilson v. Denmark* 144 (1988); 11 EHRR 175 para.61 PC.

144 *Id.* at para.72 PC.

reflects a ‘peculiarly authoritarian view of the parental role’.¹⁴⁵ Some argue that the rationale for the court’s decision in *Nielson* is that there is an implied limitation to the right to liberty in Article 5 that follows from the conjunction of Article 5 and 8 (right to private and family life) as regards the ‘responsible’ exercise of parental rights in the interests of the child.¹⁴⁶ Notably, both the best interests of the child and the evolving capacities of the child principles, and therefore the child’s own wishes regarding the child’s protection and autonomy, are mediated through and conditioned upon the perceptions of those who are positioned over/hold power over the child: adults. In this way the Convention again provides for the child’s complete dependency on the parent (and where applicable the state). The child’s ability to exercise his/her rights is dependent upon these adults’ (parents and where applicable the state) right to determine the child’s best interests and the child’s capacities, under the presumption of the child’s incapacity.

Gerison Lansdown (hereinafter “Lansdown”), in his report ‘The Evolving Capacities of the Child’, contends that understanding the evolving capacities of the child requires coming to grips with the ‘very essence of childhood.’ Lansdown continues that understanding the evolving capacities principle, “necessitates bringing together what is known about childhood from many perspectives, including child psychology, physiology, anthropology, sociology, law and early childhood development, in order to help understand how children’s rights can be most effectively realized and the role that children themselves play in that process.”¹⁴⁷ The CRC reflects these knowledges and posits that children are in a state of development, and thus acquire competencies over the duration of childhood. Lansdown contends that the evolving capacities principle provides the basis for an appropriate respect for children’s agency without exposing them prematurely to the full responsibilities normally associated with adulthood.¹⁴⁸ Implicit in concept of evolving capacities is the tacit commitment to a particular version of childhood, replete with assumptions about childhood: development is a universal process, adulthood is a normative goal, and childhood is a unique

145 JANE FORTIN, CHILDREN’S RIGHTS AND THE DEVELOPING LAW 101 (2009).

146 DAVID HARRIS, MICHAEL O’ BOYLE, EDWARD BATES & CARLA BUCKLEY, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 128 (2009).

147 See LANSDOWN, *supra* note 124, at vii.

148 See LANSDOWN, *supra* note 124, at ix.

period of dependency where children are objects of adult protection.¹⁴⁹ The evolving capacities principle is also inherently and admittedly indeterminate. The Convention, while defining the category child as those below the age of eighteen years, contemplates that children will reach various stages of maturity throughout childhood. However, it seems that the indeterminacy of the evolving capacities principle works against the category child as they begin from a position where they are presumed incapable and are largely viewed as incapable. Again, given that the evolving capacities principle was a new concept under international law, and given vagueness of the term, some discussion by the drafter would be expected. Yet, none took place; the evolving capacities of the child must have been too obvious to require discussion.

Finally, the evolving capacities principle requires that which would today be unimaginable for other human rights holders. These articles require a child to prove that she or he has acquired maturity by demonstrating that she or he makes 'good' decisions. Many adults would not pass such a (rather subjective) test. Further, these articles uphold the much-criticized idea that to have legal capacity, one must be autonomous and independent. Capacity cannot be the precondition for rights regardless of category (age, gender, sexual orientation, class, caste, ethnicity, and so on), because even those who are considered as having 'capacity' would not meet such a condition. The rational autonomous man making decisions for himself, in his own interests does not exist. Feminists have criticized autonomy as precondition for rights by noting that the man in the ivory tower depends on other people to feed him and keep him clean, and even to keep him company.¹⁵⁰ These preconditions are nonetheless required of the child in the CRC.

Central to unpacking the family in the CRC is an understanding of the role of the parent (power to direct, guide, protect, and so on) and the limitations placed upon the role of the parent (best interests principle, evolving capacities principle, and the state as a supra-parent). This conception of 'care' then allows for the location of the child within this mandatory family matrix as the submissive, dependent member. The child is located in and dependent upon the family under

149 See LANSDOWN, *supra* note 124, at x.

150 See Mayall, *supra* note 136, at 249, *quoting* JEAN GRIMSHAW, *FEMINIST PHILOSOPHERS: WOMEN'S PERSPECTIVES ON PHILOSOPHICAL TRADITIONS* (1986).

the parent by virtue of the powers given to the parent over the child. Then, the state, as the supra-parent, is given ultimate (though reluctant) power over the child. This power and rights allocation results in further restraint over the rights of the child by forcing the child into this hierarchical family structure. This analysis continues to suggest discrepancy between the child, as a right-holder in the CRC, and the practical consequence of provisions that confer upon other parties (parents and the state) the right to exhaustively determine the child's maturity/capacity to exercise these rights.

V. COUNTER-NARRATIVES: TRAFFICKING OF CHILDREN

This section argues that contrary to the CRC's depiction of parent-child relationships as fundamentally happy and safe, and its depiction of the state as adequately protecting children when parents cannot or do not protect them, trafficking of children by parents is a clear counter-narrative to the story told by the CRC. More importantly, the CRC's depiction of parent-child relationships as fundamentally happy and safe places limits on the protection and rights offer to children, adversely impacting children who do not experience these relationships according to the CRC's definition.

The trafficking of children has been defined as, 'the act of recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation regardless of the use of illicit means, either within or outside a country.'¹⁵¹ The consent of a child victim of trafficking to the intended exploitation is irrelevant.¹⁵² Threat of force or other coercive means does not have to be present.¹⁵³ Such exploitation includes prostitution or other forms of sexual

151 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, Art.3, Nov. 15, 2000, <http://www.ohchr.org/english/law/protocoltraffic.htm>.

152 UNICEF, Guidelines on the Protection of Child Victims of Trafficking (2006), 7, http://www.unicef.org/ceecis/0610-Unicef_Victims_Guidelines_en.pdf; United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, Art. 3, Nov. 15, 2000, <http://www.ohchr.org/english/law/protocoltraffic.htm>.

153 Consent is irrelevant even if none of the following methods are not used: even if none of the following illicit means have been used: force or other forms of coercion, abduction,

exploitation, forced labour or services, slavery or practices similar to slavery or servitude, the removal of organs, use of children associated with armed groups or forces, begging, illegal activities, sport and related activities,¹⁵⁴ illicit adoption, early marriage or any other forms of exploitation.¹⁵⁵ In a report by the International Labour Organization (hereinafter "ILO"), it was estimated that in 2002 1.2 million children were trafficked.¹⁵⁶ Children are trafficked from all over the world but in particular figures show that the majority come from China, Eastern Africa, Russia, and Eastern Europe.¹⁵⁷

fraud, deception, the abuse of power or of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person. UNICEF, Guidelines on the Protection of Child Victims of Trafficking (2006), 7, http://www.unicef.org/ceecis/0610-Unicef_Victims_Guidelines_en.pdf; International Labour Organization, Training Manual to Fight Trafficking in Children for Labour, Sexual and Other Forms of Exploitation, Textbook 1, 9, (2009), http://www.ilo.org/ipec/areas/Traffickingofchildren/WCMS_111537/lang-en/index.htm.

154 Such as the use of children in Camel Jockey related activities.

155 UNICEF, Guidelines on the Protection of Child Victims of Trafficking (2006), 7, http://www.unicef.org/ceecis/0610-Unicef_Victims_Guidelines_en.pdf; United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, Art. 3, Nov. 15, 2000, <http://www.ohchr.org/english/law/protocoltraff.htm>; *supra* note 4, art. 34.

156 International Labour Office, Every Child Counts New Global Estimates on Child Labour, Apr. 2002, <http://www.ilo.org/ipecinfor/product/viewProduct.do?productId=742>. Some have argued that the use of child soldiers and in some cases international adoption should also be viewed as trafficking of children. See Susan Tiefenbrun, *Child Soldiers, Slavery, and the Trafficking of Children*, 31 FORDHAM INT'L L. J. 415 (2008); David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 Val. U.L. Rev. 281 (2004); Patricia J. Meier & Xiaole Zhang, *The Baby Market: Sold Into Adoption: The Hunan Baby Trafficking Scandal Exposes Vulnerabilities in Chinese Adoptions to the United States*, 39 Cumb. L. Rev. 87 (2008). It is estimated that there are 300,000 children who serve as soldiers. See Susan Tiefenbrun, *Child Soldiers, Slavery, and the Trafficking of Children*, 31 FORDHAM INT'L L. J. 415 (2008); Abigail Leibig, *Child Soldiers in Northern Uganda: Do Current Legal Frameworks Offer Sufficient Protection?*, 3 NW. U.J. INT'L HUM. RTS. 6 (2005). Between 1999 and 2011 there have been 233,934 adoptions to the United States alone, 9,320 just in 2011. Bureau of Consular Affairs, U.S. Department of State, FY 2011 Annual Report on Intercountry Adoption (Nov. 2011), http://adoption.state.gov/content/pdf/fy2011_annual_report.pdf; Bureau of Consular Affairs, U.S. Department of State, Intercountry Adoption Statistics, http://adoption.state.gov/about_us/statistics.php.

157 Lorinda Norris, *Child Trafficking in the UK: An Examination of Contemporary Approaches*, INTERNET JOURNAL OF CRIMINOLOGY (2008), <http://www.internetjournalofcriminology.com/Norris%20-%20Child%20Trafficking%20in%20the%20UK.pdf>.

1. Parents Who Traffic Their Children

As argued in Section I, the CRC casts the family and therefore parent-child relations as happy, safe, and natural. Only exceptionally does the CRC contemplate that such relations will be otherwise. Nonetheless, parents who traffic their children offer a counter-narrative to the CRC's construction of parent-child relationships. Interestingly, statistics on the extent to which parents participate could not be found.¹⁵⁸ One of the few exceptions that address parents as participating in the trafficking process is the Department of State's 2009 Trafficking in Persons Report.¹⁵⁹ Of the fifty-nine pages, one page is dedicated to the role of parents in child trafficking. The Report, while first acknowledging that parents are often among the victims of child trafficking, states that parents also may play an active role in the trafficking of their children. The Report gives examples such as Albanian Roma parents bringing their children to Greece to beg or sell goods on streets, Roma parents in Greece who sell or rent their children in Greece, Cambodian parents who sell their children into prostitution or domestic servitude to repay debts, Nigerian parents who sell boys to herd cattle.¹⁶⁰

Furthermore, numerous cases, from a range of courts, deal with the parents who traffic their own children.¹⁶¹ Such cases include *United States v. Connor*, in

158 Although, it has been noted that such information would be useful to better understand the nature of trafficking of children. International Labour Organization, Training Manual to Fight Trafficking in Children for Labour, Sexual and Other Forms of Exploitation, Textbook 1, 39, (2009), http://www.ilo.org/ipec/areas/Traffickingofchildren/WCMS_111537/lang--en/index.htm.

159 <http://www.state.gov/documents/organization/123360.pdf>.

160 <http://www.state.gov/documents/organization/123360.pdf>, at 7.

161 *United States of America v. Abdenasser Ennassime*, U.S. District Court United States District Court for the Western District of Washington, 2006 (Uncle and Aunt); *United States v. Abdel Nasser Youssef Ibrahim*, (2006) Federal California Court Central District (The defendants, formerly husband and wife, are Egyptian nationals who purchased the victim from her parents in Egypt. The agreement specified that the victim would participate in a "10-year sponsorship", and the victim's parents would receive 30 USD per month. The agreement was made after the defendants' threatened to turn over the victim's sister, who had been working for the defendants, and would be accused by them of stealing, to the Egyptian police.); Nicole Uribe-Lopez, Jose-Juan Lerma Irene Lerma (The 23-year-old mother, Nicole Uribe-Lopez, and the alleged buyers, Jose-Juan Lerma, 47, and his wife, Irene Lerma, 27, were booked into Pueblo County jail for trafficking in children, a Class III felony. According to Capt. John Barger of the Pueblo Police Department, the "healthy" infant was sold for \$1,500, of which \$500 went for a down payment on a car.)

which a woman and her partner were found guilty of sex trafficking the woman's daughter.¹⁶² The daughter was sold to the landlord in exchange for rent; she was prostituted at local hotels, and was found to be trafficked for a period of approximately two years, where she was between the ages of twelve and fourteen. Another such example includes *Vishal Jeetv. Union of India*, a public interest litigation filed to the Supreme Court under Article 32 of the Indian Constitution.¹⁶³ The Court highlights that many girls in India were being sold to engage in household duties or manual labour, but often end up in force prostitution.¹⁶⁴ Either way, these girl children are being sold, the rationale to justify their parents' action is extreme poverty.¹⁶⁵ The lack of statistics on parental participation in the trafficking of their children may be in part because of the assumption that parents will have their child's best interests as a fundamental concern, discussed in Section I. Such assumption then colours and even blinds the ways in which parental action is perceived. It is not lack of parental love, but rather poverty for example that motivates parents to traffic their children. As David Smolin argues regarding the 'myth' of adoptive parents only being virtuous and loving, such a myth, whether about adoptive parents or biological parents, works against, in particular, children where this myth does not hold true.¹⁶⁶ This myth of the loving parents duped into or forced into trafficking their children, coupled with the right to family including parental rights to dictate much of the lives of their children, means that children are most vulnerable to the very people that assumed to look after their best interests.

Indeed, much of the discussion on parents who do traffic their own children focuses on the causing factors, usually poverty plus other aggravating factors such

162 *United States v. Linda O' Connor, Dean Sacco*, United States Court of Appeal, 2nd District, 2011.

163 *Vishal Jeet v. Union of India* 1990 SCR (2) 861.

164 *Id.* at 843-4.

165 Gender discrimination, however, is not addressed.

166 Interestingly, Smolin argues that the 'adoption myth', the belief that adoptive parents are virtuous and will only benefit the child, works against and silences the children and families where this myth does not hold true. Smolin's adoptive myth is much like what will be termed the 'truth' about families, parents, and care, operating to silence the instances where the CRC's imagined care does not exist, is ineffectual, or even abusive. See David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 VAL. U. L. REV. 281 (2004).

as the head of the household being killed in conflict, one or both parents dying of AIDS, natural disasters that disrupt family finances, violence within the home, discrimination against a particular ethnic group or gender, lack of education, and so on.¹⁶⁷ It seems that while the trafficking discussion vilifies third parties, those labelled ‘trafficker’s’ or intermediaries, as culpable, and parents are on the other hand cast as victims themselves.¹⁶⁸ The International Labour Organization’s Manual on Trafficking depicts these ‘intermediaries’ or ‘traffickers’ as ‘those who are involved in criminal and transnational organizations and those who individually traffic children for their own purposes.’¹⁶⁹ In CEOP’s words, “traffickers vary between the highly organized and linked with other organized crime and those who are individually opportunistic.”¹⁷⁰ While both parties’ (parents and so called traffickers) aims are to earn profit, third parties should be culpable, whereas it seems we should understand that parents traffic their children as a result of poverty and other such reasons. Interestingly, it is at the same time admitted that not all poor parents resort to trafficking their children.¹⁷¹

This double standard for third parties versus for parents is demonstrated in the case *Vishaljeetv. Union of India*, where the Supreme Court of India reasoned that because trafficking resulted from ‘a remarkable degree of ignorance or callousness or culpable indifference’, it was not only ‘a social as well as a socioeconomic problem, the measures that should be taken should be more preventive instead of punitive’. The exception given was that severe and speedy action be taken

167 International Labour Organization, Training Manual to Fight Trafficking in Children for Labour, Sexual and Other Forms of Exploitation, Textbook 1, 23-24, (2009), http://www.ilo.org/ipec/areas/Traffickingofchildren/WCMS_111537/lang-en/index.htm.

168 Undoubtedly, there are instances where parents are tricked into thinking that the child will be taken for education. See, e.g., *O.O.O. and Others v. Commissioner of Police for the Metropolis*, May 5, 2010, EWHC 1246 (QB).

169 Training Manual to Fight Trafficking in Children for Labour, Sexual and Other Forms of Exploitation (2009).

170 International Labour Organization, Training Manual to Fight Trafficking in Children for Labour, Sexual and Other Forms of Exploitation, Textbook 1, 23-24, (2009), http://www.ilo.org/ipec/areas/Traffickingofchildren/WCMS_111537/lang-en/index.htm.

171 See for example International Labour Organization, Training Manual to Fight Trafficking in Children for Labour, Sexual and Other Forms of Exploitation, Textbook 1, 23-24, (2009), http://www.ilo.org/ipec/areas/Traffickingofchildren/WCMS_111537/lang-en/index.htm.

against 'all the erring persons such as pimps, brokers and brothel keepers'.¹⁷² The Court states:

Many unfortunate teen-aged female children (hereinafter referred to as 'the children') and girls in full bloom are being sold in various parts of the country, for paltry sum even by their parents finding themselves unable to maintain their children on account of acute poverty and unbearable miseries and hoping that their children would be engaged only in household duties or manual labour. But those who are acting as pimps or brokers in the 'flesh trade' and brothel keepers who hunt for these teenaged children and young girls to make money either purchase or kidnap them by deceitful means and unjustly and forcibly inveigle them into 'flesh trade'. Once these unfortunate victims are taken to the dens of prostitutes and sold to brothel keepers, they are shockingly and brutally treated and confined in complete seclusion in a tiny claustrophobic room for several days without food until they succumb to the vicious desires of the brothel keepers and enter into the unethical and squalid business of prostitution. These victims though unwilling to lead this obnoxious way of life have no other way except to surrender themselves retreating into silence and submitting their bodies to the dirty customers including even sexagenarians with plastic smiles.

Understanding all underlying causes of trafficking of children is undoubtedly important. Employing a different standard to parents as compared to third party strangers, at least at a preventive and research level is curious, and harkens back to the public private dichotomy certain strands of feminism have already critiqued, discussed in Section I above. If trafficking of children is labelled 'illegal' and 'immoral' – why does it matter the relationship between the perpetrator and the victim? The characterization of parents who traffic their children as somehow less 'bad,' as they are merely struggling with poverty and other such factors, means that analysis of why children are so dependent upon and therefore vulnerable to their parents does not happen. Further, this blind spot also avoids the question of whether there might be a better or at least alternative way to deal with the social and legal disenfranchisement of children. What this article argues makes children vulnerable, not only to 'strangers', but even more so to their parents, who hide behind the public-private divide, in other words family privacy – where members, including the more powerful ones will always look out for the best interests of others within the family unit).

172 *Supra* note 163, at 687.

In another such case before the European Court of Human Rights, a fifteen year old girl had been sent from Denmark to Kenya by her father.¹⁷³ She was forced to work without pay as a servant in a refugee camp taking care of her grandmother, and did not attend school for a period of four years.¹⁷⁴ The Court found that because the father and the mother agreed that the child should go to Kenya, her transfer did not amount to trafficking.¹⁷⁵ The Court states that:

*the exercise of parental rights constitutes a fundamental element of family life, and that the care and upbringing of children normally and necessarily require that the parents decide where the child must reside and also impose, or authorize others to impose, various restrictions on the child's liberty.*¹⁷⁶

In this way, because the parent-child relationship exists behind the parents' right to privacy and family life, it is the parents to whom the child is most vulnerable.¹⁷⁷ Nonetheless, while there are cases against parents who participate in the trafficking of their children, policy discourse and even statistics about trafficking of children seem to operate on the myth that the CRC also embraces: the family is a happy and natural place, parents love and look out for the best interests of the children. This article queries how such assumptions work against the persons (i.e. children) that the law and research regarding trafficking are supposed address, and as such may require further consideration. The international children's rights regime may need to contemplate and accommodate children that do not and will not have a responsible adult over the course of their childhood.

173 *Osman v. Denmark*, Jun. 14, 2011, Application no. 38058/09.

174 *Supra* note 173.

175 *Supra* note 173.

176 *Supra* note 173, at 16-17, para. 64.

177 A case that tests of the limits of such deference given to parents is *United States v. William Alexander Lewis*, (1986) United States District Court for the Western District of Michigan, 840 F.2d 1276. The Defendants were leaders of a religious sect, House of Judah, first established in Chicago. The victims, adolescent boys, lived with their parents at a sect camp in Michigan. In March 1982, sect leader William A. Lewis convinced members of the camp to sign a document whereby they agreed to submit to various forms of physical punishment (including death, banishment, confiscation of material goods, imprisonment, beating, burning, hanging or stoning of both the adult member and that member's children) for failing to adhere to the sect's strict code of behaviour and discipline. The Court rejected the claim by the defendant that because the children were living with their parents cannot become the slaves of someone else, unless their parents are enslaved.

2. The State is Inadequate to Protect Children

While parents' role as perpetrators in the trafficking process, though undeniable, is not a focus of legislation, policy and research on child trafficking, it is also clear that state agencies continuously fail children who are trafficked. This paper argues that child trafficking is not a priority of the state, whether through lack of legislation and policy regarding child trafficking, a lack of programs and emphasis even when such legislation is present, or state agencies and officials are complicit in the trafficking of children whether through failing to act or participating in the process. Contrary to the CRC's vision of the state as willing and able to protect and provide for children when parents do not, trafficking of children illustrates how empowering that state as a 'back-up parent' can also result in greater vulnerability.

For example in India, trafficking was considered so serious an issue by India's Constituent Assembly, India's Constitutional authors, that Article 23 of the Indian Constitution prohibits 'traffic in human beings' and 'forced labour'.¹⁷⁸ Notwithstanding the Constitutional concern over trafficking, India's primary anti-trafficking act, the 1956 Immoral Trafficking (Prevention) Act, 1956 (ITPA), applies to only trafficking that results in prostitution.¹⁷⁹ Thus, trafficking that does not result in prostitution is not covered by the ITPA. More generally, the Indian Penal Code, 1860 (IPC) contains slavery provisions¹⁸⁰ (buying and selling of persons, and otherwise relies on rape provisions, instances of outraged modesty,¹⁸¹ and displacement from community, or kidnapping).¹⁸² Further, the ITPA fails to distinguish children as separately category of trafficked persons to that of women, except to stiffen penalties for trafficking relating to minors who

178 Article 23 is given primacy in the Constitution through inclusion in the (relatively) short Part I of the Constitution, which outlines fundamental rights.

179 Sec. 5, Immoral Trafficking (Prevention) Act, 1956 (hereinafter 'ITPA').

180 Secs. 372, 373, 374, ITPA.

181 Sec. 354, ITPA.

182 Secs. 361, 362, ITPA; *See generally* P. M. Nair, *Trafficking women and children for sexual exploitation: Handbook for law enforcement agencies in India*, UNODC (2007), available at: http://ecpat.net/EI/Publications/Trafficking/Factsheet_India.pdf. Also note that the Juvenile Justice (Care and Protection of Children) Act, 2000 (JJ Act) considers a trafficked child to be 'vulnerable' and in need of 'care and protection', but makes no further intervention specific to trafficking.

are exploited in commercial sexual activity. In other words, the legislation does not consider it necessary to address anti-trafficking considerations that might be unique to children.¹⁸³

In fact, the only Indian statute that provides a comprehensive definition of child trafficking is state legislation, the 2003 Goa Children's Act (GCA). Under Section 2 (z), "child trafficking" means:

the procurement, recruitment, transportation, transfer, harbouring or receipt of persons, legally or illegally, within or across borders, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving payments or benefits to achieve the consent of a person having control over another person, for monetary gain or otherwise.

However, even the GCA is intended to respond to, not abuse or complicity by family members, but the fear of foreign paedophiles preying on children in one of India's most frequented tourist destinations. The legislation appears intended to focus on the demand for (child) prostitution created by foreigners, rather than any endemic conditions of abuse that face Indian (or Goan) children within the family context. The Indian NGO, the Goa Foundation notes that the GCA was a rushed response to "the pressure on the Goa Government to do something about the paedophiles who frequent the beaches of Goa in search of young, hungry and naive children of poor migrants who have flocked to Goa over the past thirty years".¹⁸⁴

In the case above, *Vishal Jeet v. Union of India*, which notably focused on children sold into prostitution, not only did the Indian Supreme Court refuse to focus on parents' participation in trafficking as culpable perpetrators, it also did not desire to punish state agencies failure to act. The Court stated:

In spite of the stringent and rehabilitative provisions of law contained in Constitution of India, 1950, the Immoral Traffic (Prevention) Act, 1956, Indian Penal Code, 1860 and the Juvenile Justice Act, 1986, it cannot be said that the desired result has been achieved.

183 Presumably, the lack of legislative distinction between anti-trafficking measures addressed at women and children may be attributed to a view that women and children, in certain portions of Indian society, share similar levels of vulnerability to trafficking for sexual exploitation. However, it could also reflect the unspoken view that emphasizes the role of third party criminals and de-emphasizes the role of parents in child trafficking.

184 <http://www.colaco.net/1/gca2003.htm>.

*It cannot be gainsaid that a remarkable degree of ignorance or callousness or culpable indifference is manifested in uprooting this cancerous growth despite the fact that the day has arrived imperiously demanding an objective multi-dimensional study and a searching investigation into the matter relating to the causes and effects of this evil and requiring the most rational measures to weed out the vices of illicit trafficking.*¹⁸⁵

Even after admitting that relevant law prohibits child trafficking, and noting that state agencies have failed to act, the Court argues that having the Central Bureau of Investigation institute an enquiry against the police officers who have jurisdiction over the 'Red Light' areas¹⁸⁶ is 'neither practicable and possible nor desirable' as, 'no useful purpose will be served by issuing any such direction'.¹⁸⁷ Outside of noting the need for legal actions against 'pimps', and so on, as mentioned above, the Court merely finds, 'both the Central and the State Government who have got an obligation to safeguard the interest and welfare of the children and girls of this country have to evaluate various measures and implement them in the right direction.'¹⁸⁸ Such measures suggested by the Court include the mandate for relevant authorities to take 'appropriate and speedy action under the existing laws...without giving room for any complaint of remissness or culpable indifference', to set up an Advisory Committee, and to provide welfare programs for care, protection, rehabilitation and so on for young victims.¹⁸⁹ Even in this instance of having clear legislations regarding children who are traffic for prostitution, the Court refuses to punish anyone but 'pimps'. Even the police officers who have jurisdiction over these Red Light Areas, who at the very least were guilty of failing to act, were not to be held accountable. Somehow, only 'pimps' are culpable, everyone else is merely 'ignorant'. The President of ApneAap, an anti-trafficking NGO in India, noted the social factors involved that make such cases seem less serious, "the less valuable women [and by extension child] who are not expected to maintain the 'purity' of a class, caste or race are the ones most likely to fall prey to human trafficking worldwide".¹⁹⁰

185 *Supra* note 163, at 867.

186 Red Light Areas is an informal way of referring to areas where there is a concentration of prostitution and sex related businesses.

187 *Supra* note 163, at 867.

188 *Supra* note 163, at 867.

189 *Supra* note 163, at 868.

190 Neha Alawadhi, *Up against the epidemic of trafficking*, THE HINDU, April 3, 2012.

In the United States, it is estimated that approximately 18,000 persons are trafficked into the United States every year.¹⁹¹ Yet these estimates, as well as U.S. law focuses almost exclusively on victims of international trafficking.¹⁹² The Trafficking Victims Protection Act, 2000 (TVPA) defines severe forms of trafficking in persons as,

- a. Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
- b. The recruitment, harbouring, transportation, provision or obtaining of a person for labour or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery (8 U.S.C. § 1101).

The findings which motivated Congress to pass such legislation focus on international victims of trafficking.¹⁹³ Nonetheless, a rough estimate based on children who are at risk, including for sexual exploitation, runaway children, child labourers, is argued to give a better sense of the prevalence of domestic trafficking, around a quarter of a million.¹⁹⁴ Notably, there exists no legislation in the U.S. that specifically addresses the trafficking of children. Despite these figures and legislation prohibiting trafficking, according to official administrative data, since 2001, the U.S. Department of Justice has prosecuted 360 defendants in human trafficking cases, and secured 238 convictions.¹⁹⁵

Similar to India, it is argued that even when legislations and services are made available to victims of human trafficking, there exists an overall lack of knowledge

191 United States State Department, *Trafficking in Persons Report* (2003)

192 Heather J. Clawson, Nicole Dutch, Amy Solomon and Lisa Glodblatt Grace, *Human Trafficking into and within the United States: A Review of Literature*, United States Department of Health & Human Services Report, <http://aspe.hhs.gov/hsp/07/HumanTrafficking/LitRev/>.

193 Division A, Section 201(b). Interestingly, TVPA admits that at times, “traffickers also buy children from poor families and sell them into prostitution or into various types of forced or bonded labour”.

194 See Clawson, Dutch, Solomon & Grace, *supra* note 192.

195 See Clawson, Dutch, Solomon & Grace, *supra* note 192.

about human trafficking and importantly, perceptions regarding who is a victim.¹⁹⁶ Heather *et al* note that, for example, there is no consensus on whether to treat juveniles engaged in prostitution as victims or offenders.¹⁹⁷ Further, children who are runaways do not avail themselves of services for a variety of reasons, including fear of being reported to child protective services who may return them to their parents.¹⁹⁸ What becomes an interesting pattern is an alleged ignorance about child trafficking and the corollary blind-spots of legislation, policy and research to be willing to examine child trafficking not in terms of 'stranger-danger' but also vulnerability of children because of the law's requirement of child to be dependent on adults, and in particular parents. The state, in other words its law, its policies, and its agencies then fails to focus on the role that parents play in trafficking of children. In the U.S., this blind spot takes on a new twist: the belief that its own citizens are not trafficked, but rather those who are smuggled into its borders. Further, if the U.S. has only prosecuted under 200 persons since 2001, where a quarter of a million children are at risk, undoubtedly the trafficking of children is not a priority. How can it be said that parents and the state will always look after the best interests of the child, as required by the CRC and by domestic U.S. law? It seems that even when a state has the resources to prevent and protect children against trafficking, as could be argued in the U.S., it fails to prioritize doing so. In two ways, by refusing to focus on the role of parents who participate in the trafficking of their children, and by failing to prioritize the staggering problem of child trafficking, the state, whether developed and developing, can often be said to not adequately live up to the role that it has assigned itself: the back-up parent for the child.

VI. CONCLUSION

This article sought to argue that the CRC relegates the child to the context of 'care'. At the same time, the CRC also mandates the child, not to a family of equals, but to a family where the child is subject to parental control. This adult

196 Heather Clawson, Kevonne M. Small, Ellen S. Go, & Bradley W. Myles, *Needs assessment for service providers and trafficking victims*. National Institute of Justice, Washington, DC: Government Printing Office, (2004).

197 See Clawson, Dutch, Solomon & Grace, *supra* note 192.

198 See Clawson, Dutch, Solomon & Grace, *supra* note 192.

– child relationship places limits upon children’s rights beyond those placed on adult rights. The family (dictated by adult preferences), garbed in the rhetoric of the rights of the child (e.g. right not to be separated) and even the best interests of the child, places clear restraints on the child’s rights. Indeed, the rights of the child are mediated through the requirement/restraint of being in a family. The child’s immaturity justifies the CRC’s version of ‘care’ and ‘special assistance’: the family as defined as the parent, who has control over the child

While the notion of capacity as a precursor to rights and the public – private dichotomy have been heavily criticized in other contexts, these notions still are exceptional influential in the context of children’s rights. Unlike other human rights discourses that seek to redress hierarchies; the CRC reinforces and even sustains the inequalities between adults and children. Unlike any other human rights discourse that offers protections *from the state*, the CRC also offers children protection *from themselves*, as if children suffer subjugation, inequality, disenfranchisement, and abuse from themselves. Unlike the definition of the family in the CRC’s Preamble where all members of the human family have equal and inalienable rights, the child finds him/herself in this family with inequality and rights that are alienable because this person has been defined in the CRC as a ‘child’.

The argument for the child’s bundle of rights in the CRC seems to be that in providing guidance and direction, the child is more enabled to exercise her/his rights when and as his/her capacities evolve into adulthood. The abdication of the child’s right to autonomy (an inherent right by virtue of being classified ‘human’) to another category of persons (i.e. adults/parents/professionals/courts) is thereby made justifiable. Regardless, this concept of enabling future emancipation is still the denial of rights in the immediate where the only practical remedy is to merely grow-up.¹⁹⁹ The problem that remains is that human rights are deemed fundamental and inalienable, even the CRC proclaims as much. In no other (human rights) context is ‘protection’, much less ‘the protection of rights’ still equated with such paternalism.²⁰⁰ Put another way: protection nowhere else

199 MICHAEL FREEMAN, *THE RIGHTS AND WRONGS OF CHILDREN* 5-8 (1983); Freeman criticizes O’Neill, *supra* note 2, at 30. O’Neill argues that if children do not like the rights given to them, they should merely grow up.

200 See Eva Brems, *Child’s Rights and Universality* in *DEVELOPMENTAL AND AUTONOMY RIGHTS*

yields being required to relinquish one's own rights *for* one's own protection. When viewed through the lens of power, it seems that the rights accorded to children in the CRC have less to do with the protection and care of the child, and more to do with retrenching a variety of power/'truths' through the adult-child binary dressed up in the garb of rights of the child.

A good starting point for reimagining what the rights of the child could look like would be, unlike the drafting of the CRC, but enshrined in Article 12, is that children should and must participate in the formulation of their rights. Secondly, the law, and in particular the CRC must not require a particular vision of childhood as normative. Not all children are immature; not all parents are responsible; and not all states are capable and/or willing to intervene when parents are not. It may be that in certain situations children should be empowered over their own lives, with their own means to supports themselves, to makes their own choices, as all other humans have the fundamental right to do. At the very least, imagining that childhood only consists in a happy family adequately protected by the state means that children who's experiences do not match up to this image, such as children who are trafficked by their parents and ignored by the state, seems problematic. Requiring 'care' and dependency upon adults, the CRC sets limits on what rights and protections will be afforded (by adults) to children. The CRC, far from a description of some 'natural' child, is rather a reflection of powerful adult and state centric political ideologies. If there is no 'natural' child and the CRC instead functions to protect certain status quo lines of power, we must then ask ourselves (and/or actual children) where to from here? To continue to act as though the CRC is merely 'for children', 'about protection', 'inclusive', 'universal in its application', 'possible for all children' risks being willingly blind, a far cry from 'the best [humankind] has to give'.²⁰¹

OF CHILDREN 21, 21 (Jan C.M. Williams, ed., 2002). She notes that 'protection' *was* used by bourgeois society over the working class, men over women, and colonial powers over natives to justify control.

201 United Nations Declaration on the Rights of the Child, Preamble, G.A. Res. 1386 (XIV), U.N. Doc. A/RES/1386 (20 November 1959).