



Philosophical Foundations of Children's and Family Law

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CHAPTER

11 An Argument for Treating Children as a 'Special Case'

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Abstract

This chapter's argument stems from the premise that legal language should speak for itself. The 'paramouncy' principle suggests the prioritisation of children's interests, and 'children's rights' suggests some aspect of distinctiveness to children's interests. But there is academic consensus in respect of both that children's interests cannot and should not be prioritised over those of others. This chapter examines the justification for the contrary perspective, and for treating children as a prioritised 'special case' in all legal decisions affecting them. Four key counter-arguments frame the discussion. First, the 'social construct' objection: as a social construct, childhood cannot sustain the prioritisation of children's interests over those of others. Second, the 'vulnerability' objection: children's vulnerability is either not unique or suggests dependency or interdependency, not prioritisation. Third, the 'family autonomy' objection: parents' rights and the family unit justify deference of children's interests. Fourth, the 'equality' objection: equal moral consideration makes prioritisation unjustifiable.

Keywords: [paramouncy principle](#), [best interests](#), [children's rights](#), [childhood](#), [social construct](#), [vulnerability](#), [parental rights](#), [equality](#), [equal moral consideration](#)

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Introduction

This chapter's argument stems from the premise that legal language should speak for itself. The 'paramouncy' principle² suggests the prioritization of children's interests, and 'children's rights' suggests some aspect of distinctiveness to children's interests. But there is academic consensus in respect of both that children's interests cannot and should not be prioritized over those of others, though they might be 'privileged'³ in the factual balancing exercise.⁴ This chapter examines the justification for the contrary perspective, and for treating children as a prioritized 'special case' in all legal decisions affecting them. Given the current legal language, anyone taking the consensus view needs to justify why the words of prioritization cannot speak for themselves in relation to children.

Four key counter-arguments frame the discussion. First, the ‘social construct’ objection: as a social construct, childhood cannot sustain the prioritization of children’s interests over those of others. Second, the ‘vulnerability’ objection: children’s vulnerability is either not unique or suggests dependency or interdependency, not prioritization. Third, the ‘family autonomy’ objection: parents’ rights and the family unit justify deference of children’s interests. Fourth, the ‘equality’ objection: equal moral consideration makes prioritization unjustifiable.

I. Prioritization and ‘Special Case’ Defined

To see children as a ‘special case’ means to prioritize their interests over those of other parties as recognition of children’s unique position in society. Elsewhere, I explain that

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[t]his prioritisation can take two forms, namely providing children with additional legal protection over that available to others and, when there is a conflict between ↴ children’s interests and other parties’ interests, prioritising children’s interests in the resolution of the dispute.⁵

For non-lawyers, a brief explanation of legal reasoning helps demonstrate this distinctive use of the term ‘prioritization’. In reasoning to resolve a particular case, matters of law determine the applicable legal rule(s) or principle(s) that govern, but any rule(s) or principle(s) can only decide the outcome in a particular case through subsequent application to the facts. Thus a legal presumption might be rebutted on the facts. Considerations that relate to the legal phase are of a different, normative nature to those that relate to the factual analysis.

In this chapter, I use the term ‘prioritization’ to demarcate an approach that favours children’s interests at the *outset* of any decision-making exercise, in other words that prefers children’s interests as a matter of *law*. This is to be contrasted with all alternative approaches to children’s interests, which include both treating their interests just the same as the interests of any others and approaching them the same as a matter of law whilst *privileging* them—placing more weight on them—in the *factual* balancing exercise of competing considerations. In this way, the argument for children as a ‘special case’ is an argument for recognizing that children’s interests have a distinctive *nature*, not just that the *extent* of weight to be attached is greater.

Prioritization is a critical issue because the idea of ‘children’s rights’, properly understood in contrast to ‘rights for children’, requires us to see children as a ‘special case’.⁶ Within a welfare-based perspective, the *language* of ‘paramountcy’ suggests such prioritization, whilst the *language* of ‘primacy’ does not. As I discuss below, however, the language employed in legislation or judicially is only an indicator of the approach possibly adopted, making the language used simultaneously critical and irrelevant. It is for this reason that my argument cuts across both the larger labels of ‘children’s rights’, ‘rights for children’, ‘welfare’, ‘duty’, as well as the language descriptors selected within categories, such as ‘paramountcy’ and ‘primacy’. My fundamental concern is how children’s interests have been conceptualized regardless of the specific framework under discussion, and how this impacts on reasoning about—and outcomes for—particular children affected by legal decision-making.

What if the same outcome might be reached in individual cases regardless whether the child’s interests are either prioritized as a matter of law or privileged in the factual balancing of competing interests? Why then might it remain essential to determine whether we can justify treating children as a ‘special case’? I suggest that the answer lies in the reality that it is only through ‘special case’ prioritization that we can ensure that children’s interests are not susceptible to being unjustifiably overridden in the outcome reached.

II. Legal and Academic Intuitions

A. Children as a ‘special case’ in the governing law

Whilst we cannot assume that the way that the language is being used necessarily aligns with the conceptual approach taken by a particular court, one might wonder if courts’ choice of legal labels suggests any intuition about whether children should be seen as a ‘special case’. The same question might be asked of the governing legislation and international conventions.

Can we justify the assumption within the Section 1 of the Children Act 1989 ‘welfare’ principle that children are a ‘special case’? Whilst it is not always clear that the judicial application thereof does likewise,⁷ the general understanding of the ‘paramountcy’ principle is clear. This may be further complicated by context-specific judicial interpretation of the ‘paramountcy’ principle. How it is understood judicially in the context of medical treatment decision-making, for example, may be quite distinct to the meaning ascribed in relation to relocation disputes or in relation to immigration.

How should we understand the requirement in Section 25(1) of the Matrimonial Causes Act 1973⁸ that — when deciding whether to make any financial orders in the context of divorce or separation and, if so, which orders to make — ‘first consideration’ is to be given to the welfare of any minor child of the family? In the Court of Appeal decision in *Suter v Suter and Jones*,⁹ Lord Justice Cumming-Bruce reasoned that ‘first consideration’ did not mean the ‘paramount’ consideration, but that it was an ‘important consideration’ to be borne in mind throughout the consideration of all the circumstances, including those specified in Section 25(2)¹⁰. Cumming-Bruce LJ further commented that the court was also to ‘try to attain a financial result which is just as between husband and wife’.¹¹

This judicial understanding of Section 25(1) rests on an uncertain view of the status of children’s interests. Children’s interests need not be the only consideration in order to treat children as a prioritized ‘special case’, and prioritization does not of itself signal the irrelevance of adults’ interests even as regards the content of children’s interests. But what is the nature of the balancing envisaged by Cumming-Bruce LJ’s encapsulation of the Section 25A ‘clean-break’ principle? As a procedural concern, one might argue that it cannot be directly weighed against the substantive concerns that inform the Section 25 exercise. Equally, however, the Section 25(1) ‘first consideration’ cannot override the Section 25A duty, hence it cannot underpin an outcome that is not also ‘just and reasonable’ to the spouses. This arguably suggests a certain judicial ambivalence about the nature of children’s interests as ‘first consideration’.

Beyond the domestic position, what of the perspective adopted by the ECtHR on whether children are a ‘special case’ in relation to conflicts between ECHR rights? Here, I consider conflicts between children’s and parents’ rights and interests. The ECtHR ↵ adopts a ‘fair balancing’ formulation in *Johansen v Norway*, which acknowledges that ‘[i]n carrying out this balancing exercise, the Court will attach particular importance to the best interests of the child, which, depending on their nature and seriousness, may override those of the parent’.¹² By contrast, in *Yousef v The Netherlands*, the Court reasons that ‘the child’s rights must be the paramount consideration’ in such conflicts, such that ‘[i]f any balancing of interests is necessary, the interests of the child must prevail’.¹³ The *Yousef* formulation sees children as a ‘special case’, yet the *Johansen* formulation has been preferred academically.¹⁴ The expression of preference highlights that language is seen to matter. Yet, the inconsistency in the language adopted by the ECtHR suggests the relative unimportance of language in practice, a view further reinforced by the wide range of language descriptors employed by the ECtHR, such as children’s interests being ‘of crucial importance’.¹⁵

To what extent should we see the United Nations’ Convention on the Rights of the Child¹⁶ as treating children as a ‘special case’? Archard argues that

[t]here is a straightforward reason to prefer a statement of the welfare principle that is specified in terms of primacy not paramountcy. This is that it is implausible to think that in every case, in which we must determine what is done for or to a child, the child's interests outweigh those of all others.¹⁷

Contrast General Comment No 14, in which the United Nations' Committee on the Rights of the Child explains its approach to the 'primary consideration' aspect of Art 3(1) as follows:

The expression 'primary consideration' means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness. Children have less possibility than adults to make a strong case for their own interests and those involved in decisions affecting them must be explicitly aware of their interests. If the interests of children are not highlighted, they tend to be overlooked.¹⁸

p. 231 In suggesting that children's interests 'may not be considered on the same level as all other considerations', this seems to treat children as a 'special case'. Yet, the conclusion to that paragraph immediately casts doubt on such a reading: the Committee is concerned to ensure that children's interests are not overlooked, rather than that they are prioritized. We might compare the Committee's choice of language and aims to that of leading academics, discussed below. Dixon and Nussbaum reason that the Convention gives 'special priority' to children's welfare or socio-economic rights¹⁹ but, as will be discussed below, it is not clear that that translates to treating children as a 'special case'. This analysis highlights the contrast between the clarity in legal language and the uncertain and varying relationship between the language itself and conceptual understanding it may be thought to invoke.

B. The academic consensus against prioritization

There has been a marked shift in attitude in the English academic literature in relation to the private law treatment of children. Formerly, the consensus for prioritizing children's interests was generally unquestioned, with little concern felt to additionally justify the approach.²⁰ That says nothing, of course, about how those interests were interpreted and applied in practice. Reece thus comments that 'while everybody agrees that children's welfare should be paramount, nobody knows what children's welfare demands'.²¹ This approach has transformed to the current questioning and challenging of the nature and extent of the preference for children's interests. Thus, Gilmore and Bainham argue that '[i]t is certainly open to question whether children's interests should always be given priority'.²²

p. 232 This shift should be read in the context of a widespread *belief* that, prior to the current approach—regardless whether one sees the current law as requiring prioritization—children were treated as the property of their parents.²³ This common belief is particularly important in relation to the 'welfare' or 'paramountcy' principle in the Children Act 1989, given that the language of 'paramountcy' preceded the Act.²⁴ Reece disagrees with the accuracy of this characterization of the earlier approach: she argues that parental rights did not see children as property and suggests that it was 'crystal clear that ... the law treated parental rights as existing for the benefit of the child, not the parent'; the 1989 Act reforms were, she proposes, aimed at further emphasizing this approach.²⁵

But, to the extent that this belief in the devaluation of children was widespread, one might wonder if the legal language of prioritization was embraced as a means of *equalization*, rather than genuinely signalling that children were a 'special case'. This might be said to be reflected in Archard's comment that

Under whatever label it might be captured, some version of the best interests or welfare principle is essential if we are as decision-makers to give some consideration to the child as a distinct human

being with her own needs, character, feelings, desires and future. Otherwise, we are in danger, as law was once, of ignoring the child, seeing it as having no distinct or special claim upon us, or as recognising only the powers of the child's guardians.²⁶

Archard thus appears to see 'best interests' as a means of avoiding the devaluation of children, rather than as a means of prioritizing their interests. If the intention was to equalize children's treatment from a perceived 'children-as-property' approach, perhaps this explains why, even though the language of 'special case' has remained unchanged, the questioning as to whether it really means 'special case' has taken hold.

By contrast, in the American academic literature, the current general view is that of 'children's subjugation'.²⁷ Dwyer argues that, historically, children have been seen as inferior in social and moral status.²⁸ In terms of children's current treatment, Appell contends that, rather than children being prioritized for their vulnerability, they are 'distrust[ed]'.²⁹ Dwyer suggests that the 'best interests' principle governs rarely and that, when it does, it frequently masks the predominance of adult interests.³⁰ We might relate children's ongoing place as 'the objects of adult authority'³¹ to the constitutional status of the parental rights doctrine in American law.³² In the context of subjugation, equal treatment is as much of a leap forward as prioritization is in the context of equal treatment.³³

p. 233 The broader American perspective also colours the interpretation of the CRC. Appell, for example, contends that the Convention 'fails to challenge, or even problematize, the structural subversion of and the privatization of childhood'.³⁴ In support, Appell references Rehfeld's comment that 'the CRC prioritizes the welfare of children'.³⁵ Given the CRC's status as a Convention on rights, this is problematic if, as I have argued elsewhere, it is theoretically sound to reason in terms of children's welfare but not children's rights.³⁶ Once we acknowledge that difficulty, as well as that labels are less important than the conceptualization of children's interests within those labels, it is not at all clear that prioritizing welfare necessarily devalues children's status in the way Appell assumes.

Consideration of this American academic response to the CRC suggests a further possible explanation for the lack of fit between the current legal language, and the interpretation of that language together with outcomes for children. Rather than being due to a strategic aim, the language employed in contexts such as the English 'paramountcy' principle may simply reflect a desire to value children whilst not carefully considering what that language requires for practice. Such a conclusion also accords with the relative lack of attention to children in moral and political philosophy.³⁷ In respect of Rawls, for example, Brennan notes that '[i]n the course of a very thick book, [*A Theory of Justice*], children are only found in a few places and the subject of justice-based obligations to them is not addressed at all'.³⁸

C. The academic convergence on equal treatment

Recent English academic proposals for law reform generally do not treat children as a 'special case' in the way that I suggest is envisaged by the English 'welfare' principle and the idea of 'children's rights'. In terms of recognizing children's rights, Freeman contends that they are 'no more or less important than rights generally'.³⁹ To the non-specialist, this might be baffling. Should the distinctive language not itself indicate the intention of a distinctive approach? Why argue for distinctive language to ground a claim for equal treatment? And yet, the academic consensus is that the language of prioritization should be interpreted otherwise.

Eekelaar argues for a 'least detrimental alternative' approach to the process of decision-making in contexts currently governed by the welfare principle. But his model for balancing the competing interests of children and other parties is a qualified one. An outcome can be adopted that is not the least detrimental alternative for the child if it is much less damaging for the affected parent or parents than the alternative, which would have enhanced the child's interests to a larger extent at great expense to the parent or parents.⁴⁰

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In developing his qualifications to this approach, Eekelaar distinguishes between children's interests being 'privileged' and children's interests being 'given priority'.⁴¹ The child's position is privileged to the extent that no solution that actively diminishes the child's interests can be chosen unless all options would do so.⁴² Eekelaar sees his approach as entailing the privileging of children's interests only, and not their prioritization, because of the weighing process.

But I would suggest that even the privileging in the weighing of competing interests is hard to justify if we do not see children as a 'special case'. As outlined, the envisaged weighing is permitted in only two scenarios: first, where the impact on the child's interests for various alternatives are all differing degrees of benefit; second, where all of the alternative outcomes would negatively impact on the child. In a scenario in which one or more outcome is positive for the child's interests, the decision-maker cannot select an outcome that has negative consequences for the child. In this way, I would argue that it is not the particular facts of the case that lead to more weight being placed on the child's interests in the outcome, but rather a principle of privileging, which protects children from situations of active detriment where feasible. In other words, 'privileging' seems to be a matter of law for Eekelaar. As a result of the incorporation of this principle into Eekelaar's model, his distinction between 'privileging' and 'prioritizing' is arguably better seen as one of the extent to which children are a 'special case', rather than one that determines whether they are a 'special case' at all. The difference in extent is that 'privileging' permits some weighing, whereas 'prioritization' does not.

Even if my analysis of the implications of Eekelaar's account is correct, however, it does not accord with his intention. Like Freeman, Eekelaar reasons that children's rights

should be seen as a species of people's rights . . . In themselves, these rights are no different from adults' rights. Due allowance being made for issues of competence and children's special vulnerability, they should be respected just like adults' rights should be; certainly no less, but also no more.⁴³

In this way, he also sees the language of prioritization—of 'children's rights'—as a means of achieving equal and *only equal* treatment with adult interests.

Choudhry and Fenwick argue for a 'parallel-analysis' approach⁴⁴ that starts by seeing children's and adults' interests 'on a presumptively equal footing'.⁴⁵ Making use of Eekelaar's language, they suggest that children's interests would be 'privileged within the processes of reasoning',⁴⁶ and that the court would ask whether an 'especially "core" aspect of a child's [Article 8 ECHR] private or family life' is at stake.⁴⁷ Yet, when they describe the process of reasoning the 'ultimate balancing act',⁴⁸ they do not suggest any 'privileging' along the lines of the two exceptions envisaged by Eekelaar. For this reason, I would suggest that they understand the language of 'privileging' to refer simply to weighing more heavily in the factual balancing exercise, rather than as a matter of law. Their supporting reference to Eekelaar might thus be a misdirection, which highlights the importance of interrogating the language descriptors individual academic arguments employ. That said, their mention of the need to have regard to affected 'core' aspects of children's rights does also hint in the direction of prioritization. Overall, Choudhry and Fenwick may best be described as embracing the notion of equal treatment of children's and others' interests.

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The domestic English-reform argument in favour of securing no more than equal treatment for children's interests is in line with American reform arguments to improve to achieve equal treatment for children's interests. As a result, one might conclude that the normative debates in both jurisdictions have converged on equality. Yet Appell's rejection of an 'equal rights approach'⁴⁹ highlights the need to be precise when discussing equality. The account she rejects is one that would remain based on negative rights only,⁵⁰ yet her 'accommodation model'⁵¹ for reform does not itself appear to argue for greater respect for children's interests than those of others. Moreover, Fineman sounds a note of caution in relation to any convergence

on equality; she argues that ‘equality of treatment has provided [...] the passive toleration of inequality and complicity in the conferral of often unwarranted privilege on the few’.⁵²

Taking Appell’s and Fineman’s analyses together demonstrates the need to be precise when discussing equality, especially because, as discussed below, it may be possible to have equal concern or moral consideration for children without equal treatment. As this distinction does not inform the legal literature, this also suggests the need for caution when considering legal academic arguments about equality. In any event, the broader convergence on equal treatment highlights that any case for genuine prioritization of children’s interests such as presented in this chapter needs weighty arguments to underpin it.

III. The ‘Social Construct’ Objection

A. The meaning-making of the social construction of childhood

Given the academic convergence on the idea of treating children’s and adults’ interests with equal regard, on what basis can we justify the argument that children should instead be treated as a ‘special case’ and their interests prioritized? I frame the discussion through counter-arguments as it is in the rejection of objections that the argument for prioritization can take shape. The first relates to childhood, and the view that, if childhood is a social construct, it is incapable of comprising a justifiable class of individuals whose interests ought to be prioritized over those of others. In responding to this concern, I develop an account of the concept of childhood centred around children’s unique vulnerability, which justifies treating children as a ‘special case’ in law.

This first concern recognizes that, if the distinction between childhood and adulthood is artificial, it cannot support a theoretically sound argument for prioritizing children. Whilst the existence and embrace of an artificial—socially constructed—distinction highlights a societal choice to value the content of that construct, it does not of itself give a reason to value that content.

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B. The concept of childhood, its social construction, and normative basis

A two-fold response is required. Firstly, it is necessary to distinguish between the definition of childhood, namely its construction, and the underlying concept. Secondly, it is critical to determine the normative basis of the concept of childhood and whether it is justifiable. Whilst it falls outside the scope of this chapter, we would need to add a third step if we wanted to determine the extent to which the current law, the current legal construction of childhood, is justified. This would entail an examination of the nature of the relationship between any established justifiable basis for the concept and the current social construction thereof.

It is vital to distinguish between the conceptual core and the social construction thereof before assessing the claim that it is justifiable to treat children as a ‘special case’. At the core, childhood as a concept may justify treating children as a ‘special case’ even if the definitional representation of childhood for legal purposes is constructed. Age is a critical example of the definitional construction, and there are both general definitions of childhood based on age and specific age-based rules for particular contexts. I argue that the social construction does not and cannot play an independent normative role because it neither relates to, nor seeks to engage directly, with the content of (the concept of) childhood. Whilst the socially constructed aspect of childhood does not perform a normative function, it may—as a proxy for conceptual aspects—reflect one.

Where the social construction straightforwardly reflects the concept's normative core, it is not itself making a normative claim, but simply seeking to reflect the natural limits of the concept, whatever its content. In this way, if the concept's normative basis is justifiable, the social construction is justifiable, but only parasitically, not independently. But the social construction can be arbitrary, either because the intended proxy is not or is no longer accurate, or because the definitional boundary has been drawn for explicitly non-normative reasons that do not seek to connect the construct to the concept.

If the proxy is not or is no longer accurate, such as a legislative rule intended to encapsulate decision-making capacity, the full extent of the construction is not justifiable. That lack of justification, however, does not of itself undermine the normative value of the conceptual core; it might suggest, of course, that reform to the definition is required in order for it to more faithfully serve as a proxy for the underlying concept. By way of contrast, administrative efficiency provides a good example of a non-normative concern⁵³ that may determine the construct, such as in relation to the voting or driving age. Its use may be justifiable, even if non-normative, because it can be grounded in fundamental concerns about the operation of law as a social construct more generally. Thus any proxy for the requisite capabilities can be rigidly applied regardless of individual differences. It seeks to uphold both the value of consistency and respect for individuals' status.

p. 237 Distinguishing between the social construction and the concept of childhood is not unusual. Where the argument in this chapter differs, however, is in the lack of significance attached to the social construct. Writing in the context of the CRC, Tobin also separates the two aspects of childhood,⁵⁴ but appears to suggest that the socially constructed element of childhood is part of its justification. He contends that the 'empirically grounded and socially constructed [conception of childhood] ... provides the foundation for the "special" human rights that are granted to children under international law'.⁵⁵ As I argue above, however, the social construction does not seek to and cannot provide this type of foundation.

In her discussion, Appell also separates the concept from the social construct, though less explicitly so; she reasons:

While acknowledging the 'natural' differences between many children and most adults, I challenge the totalizing categorical distinction between adulthood and childhood, the extent of the limitation on children's agency, and their segregation from public life.⁵⁶

In noting 'natural' differences, Appell identifies factors that might underpin the core of the concept of childhood. She then proceeds to focus on the social construction of childhood, particularly its negative consequences for children, viewing the social construction as responsible for creating rigid, unjustifiable limits on children's treatment in society.

As a strategy for securing better treatment for children, Appell's approach makes sense. The constructed aspect of childhood is isolated and critiqued so that a move from the devalued status of children—generally adopted in the American literature—to a more equal status for children might be justified. Yet, understanding the motivations for this delineation highlights a critical assumption Appell's argument makes about the social construction of childhood, namely that the social construction is *not* tied to the concept of childhood. Otherwise, it would not be possible to assume that the mere fact that the construction draws rigid dividing lines is itself criticizable. As I contend above, however, there are multiple ways in which the social construct might be related to the concept of childhood that could support the justifiability of the construct. As a result, any separation of the social construct from the concept does not necessarily prevent the basis and limits of the construct from depending on the concept: we need to determine whether it is a separation of degree or kind. The former may permit us to question the rigidity of the application of the construction, but only the latter can lead us to reject it. Moreover, it may be that the concept of childhood with which we are concerned should be situationally specific.

IV. The ‘Vulnerability’ Objection

The foregoing makes clear that what becomes critical to an argument for treating children as a ‘special case’ is the identification of distinctive factors that inhere to the concept of childhood, respect for which requires the prioritization of children’s interests. This may be reflected in the CRC’s Preamble reference to the ‘United Nations ha[ving] proclaimed that childhood is entitled to special care and assistance’, which Tobin contends is justified by ‘empirical reality’.⁵⁷ I argue that children’s vulnerability can provide a strong foundation. There are two objections to this positive account of the role for vulnerability: firstly, that children are neither more vulnerable nor uniquely vulnerable compared to other groups; secondly, that, even if children are uniquely vulnerable, the negative consequences to children that result from focusing on their vulnerability outweigh any case to the contrary.

A. ‘Everyone is vulnerable’

Writing in the Australian context, Seymour contends that ‘[c]hildren are not just another disadvantaged group (like a racial minority). Children are vulnerable. Until they are of an age and capacity to make informed judgments for themselves, the state has a role to play in protecting them’.⁵⁸ But, are children more or uniquely vulnerable?

In respect of the extent of children’s vulnerability, we might readily concede that adults could be just as or more vulnerable in certain respects such as in the case of elderly individuals’ loss of physical mobility or capacity, and both children and adults can suffer from disabilities. More generally, we can define and redefine vulnerability, of course, to include the complex ways in which particular groups of adults, and adults in general, are also vulnerable. But, as Reece notes—in the course of her argument against treating children as a special case—‘[i]t is self-evident that, as a general rule, children need more protection than adults’.⁵⁹ In fact, it is that need for greater protection that she believes has confused academics into assuming children’s interests need to be prioritized over adults’. The critical issue is whether children need more protection because they are uniquely vulnerable.

In order for children’s vulnerability to justifiably underpin the prioritization of children’s interests through legal regulation, however, that vulnerability must be unique.⁶⁰ This is a conceptual point, grounded in the nature, and not the extent of vulnerability. But what of the fact that, as Fineman reasons, ‘[v]ulnerability is inherent in the human condition’?⁶¹ She suggests that seeing vulnerability as a characteristic of only certain groups ‘is not only misleading and inaccurate, it is also pernicious’.⁶² Whilst Herring acknowledges a role for vulnerability, he does not see it as capable of justifying treating children as a ‘special case’. He argues that ‘[t]he law in its treatment of children based on vulnerability exaggerates the vulnerability of children and exaggerates the capacity of adults’.⁶³ Alderson reasons that ‘vulnerability and the need for protection occur at any age or level of competence’.⁶⁴ Appell also notes adult vulnerability, as part of her conclusion that the current focus on children’s vulnerability underpins age discrimination against children.⁶⁵ Beyond suggesting that everyone is vulnerable,⁶⁶ Herring draws on the interdependency of caring relationships to conclude that ‘it is wrong to regard [children] as especially vulnerable’.⁶⁷

In seeing everyone as vulnerable, however, are we not in danger of not truly seeing anyone’s vulnerability? In this way, might we argue that the feminist perspective offers valuable insight into children’s position, but cannot of itself provide the necessary solution?⁶⁸ Fineman avoids this concern in her ‘vulnerability paradigm’ by moving beyond recognition of the universality of vulnerability to focus on the inevitable differences between individuals, including how individuals are embodied and embedded within societal institutions and social relationships.⁶⁹ Difference permits the possibility for children being elevated to a ‘special case’ and highlights how focus on vulnerability need not collapse into formal equality.

Alternatively, in focusing on children's vulnerability in particular, might we be inappropriately marking out children as excessively dependent? What if focus on children's vulnerability is not necessarily beneficial for children? Or might it entail overlooking the necessary interdependency within families?⁷⁰ In discussing the treatment of children in the CRC, Tobin argues that:

Indeed the 'children's first' slogan is a highly problematic model which does not reflect a rights based approach. As Cantwell explains, it places children 'on a kind of "more equal than others" pedestal', which reflects a 'charity based approach to children, where sentimentality over children's vulnerability leads to facile 'separate' responses: never mind human rights let's help children' (Cantwell 2004).⁷¹

p. 240 I suggest that this risk can be avoided if the case for prioritization grounded in children's special vulnerability is not just negative, but also positive. In particular, I understand ↵ 'vulnerability' as comprising not only the lack of capacity, means, and opportunity for children to protect their own interests, but also the richness of aspects of the intrinsic goods of childhood.⁷² Responding to the former enables us to secure the child's 'right to an open future'⁷³ and protect children's potentiality. The latter is intended to capture intrinsic goods of childhood such as innocence, imagination,⁷⁴ wonder, and trust.⁷⁵ In this way, potentiality is intended to move beyond the merely forward-looking notion of the child's 'right to an open future' and to recognise the value of the present, lived childhood.

Conventional reference to vulnerability focuses on its negative aspects, such as lack of capacity. But that arguably requires us to assume an oppositional, 'othering' relationship between children's autonomy or agency and vulnerability.⁷⁶ Moreover, such an account turns on accepting impoverished conceptions of both autonomy and vulnerability for mutual exclusion and reinforcement whereas, as Macleod notes, the reality is 'surprisingly complex'.⁷⁷ In any event, as highlighted by the previous discussion on the extent of children's vulnerability compared to adults', it is not at all clear that the distinctiveness of children's vulnerability lies in its negative aspects. That is not to say, however, that the dependency on others generated by such vulnerability may not be unique. In the context of a capabilities approach, Dixon and Nussbaum argue that

By itself, children's physical vulnerability, therefore, will also be insufficient in most cases to justify any *special priority*—as opposed to special scope—for the rights of children, as compared to adults, under a [capabilities approach]. Instead, what is needed is an account that focuses on the more or less unique vulnerability of children to the decisions of others—that is, those adults legally and economically responsible for their care.⁷⁸

Finally, a deficit account of vulnerability might also encourage us to seek to hasten children's development, which would undermine recognition of the value of the intrinsic goods of childhood.⁷⁹

p. 241 In terms of the positive account of vulnerability, a child's sense of imagination is something that we value for its own sake, but it also makes them vulnerable in their interactions with others since it entails trusting others and being open to adventure. ↵ Whilst adults also have a sense of imagination, there is arguably something unique about children's; as an intrinsic good of childhood it is necessarily positive. This distinctive feature of children's vulnerability means that children are not just *more* vulnerable but *uniquely* vulnerable in their relationships within their families and society more generally. If we accept the distinctiveness of children's vulnerability, it can underpin the justification of prioritization without disregarding or devaluing their interdependent relationships, particularly with their parents.

B. Objections even if children are uniquely vulnerable

Those who agree with the foregoing argument that children are distinctively vulnerable might yet raise two objections against a focus on vulnerability. The first concern is that there might be other aspects of childhood that should be seen as just as, or more important than children's vulnerability. Appell, for example, refers to children's participation, growth, and membership (of groups, such as a family).⁸⁰ She reasons that

The construction of childhood as private, dependent, unwise, and vulnerable belies the rich, active, and productive lives of children and deprives them and the state of important and active constituents who are central in shaping society and who perform labor inside and outside home and school.⁸¹

But this opposition between vulnerability and valued status in society makes two contentious assumptions. Firstly, it unjustifiably assumes that children's distinctive vulnerability can only serve as the basis for subjugation. Hence, vulnerability is downplayed to secure better treatment. Secondly, it further assumes that the normative basis for treating children as a 'special case' must then become the sole guide to the application of the 'special case' approach in resolving individual cases. As I argue below, this is mistaken: the argument for seeing children as a 'special case' may be grounded in children's unique vulnerability, whilst the limits of its application on the particular facts of a dispute may be determined by other considerations.

The second objection lies in the consequences of focusing on children's unique vulnerability. Whilst it is a core aspect of the concept of childhood, and can thereby set justifiable limits on the construct of childhood, there is a risk that this vulnerability could be relied on to over-extend the construct. Herring has expressed similar concerns over the paternalistic interpretation of children's interests and the role of vulnerability as a basis for 'quietening' children's participation in legal decision-making.⁸² Unless we can eliminate this risk, this might be said to provide good reason not to ground legal regulation in children's vulnerability. One immediate reply lies in the positive account of the distinctiveness of children's vulnerability developed above: emphasis of the intrinsic goods of childhood, rather than the deficits, does not invite the same oppressive interaction with children since, for example, their developing agency is valued in and of itself for its ability to access intrinsic goods.

p. 242 A broader concern remains. Does the institutional response to vulnerability create additional, imposed unjustifiable dependency? Appell comments that some child ↳ protective and development-oriented interventions are justified by children's vulnerability and inexperience.⁸³ Rather than seeing vulnerability as belonging to the child, however, she argues that their vulnerability resides in political and legal systems,⁸⁴ in other words the social construction of that vulnerability. It is not clear what advantage is gained by describing the liberal institutional response to vulnerability as itself comprising vulnerability, particularly if the intention is to highlight the importance of how we respond to the empirical differences.⁸⁵ But Appell's larger point is a good one. As Rosenbury argues, the institutional response to vulnerability may create legal incapacity;⁸⁶ it may impose dependency on children in a way that is not inevitable⁸⁷ and goes beyond what their vulnerability either demands or excuses.

But, given that the institutional response to vulnerability is not inevitable, why can we not simply ensure that the construct does not unjustifiably over-extend and excessively concretize the conceptual core? Arguably we can and concern to the contrary is driven by preoccupation with vulnerability as implying only institutional dependency⁸⁸ and marginalization. Whilst well-intentioned, this concern is misplaced because it overlooks the possibility for the state to respond positively, in an enhancing, empowering, and enabling way, to children's unique vulnerability. For the foregoing reasons, the 'vulnerability' objection is arguably defeated by a proper understanding of the positive aspects of children's unique vulnerability.

V. The ‘Family Autonomy’ Objection

A. The range of ‘family autonomy’ counter-arguments

The third counter-argument is grounded in family autonomy and the ‘right’ to be a parent, and applies even if children are uniquely vulnerable. Archard and Macleod argue that

It no longer seems possible to posit a simple harmony between the interests of children and those charged with the responsibility of rearing them, such that the existence of authority over children during their development of maturity can be viewed as a fairly straightforward matter. Instead the challenge is to deepen our understanding of children’s interests and to explore how the conceptualization of children’s interests affects the character of the moral claims they have.⁸⁹

Where children’s and parents’ rights and interests conflict, the concern is that children’s interests cannot be prioritized over those of either the adults or larger family raising them. Rather than vulnerability being seen to demand prioritization, it is seen as justifying deference to familial, especially parental, decision-making.

p. 243 The ‘family autonomy’ objection contains a cluster of views. Putting the case in child-oriented terms, we might take the view that parents are best placed to know what is in their children’s ‘best interests’. For example, in his judgment in the House of Lords’ seminal decision in *Gillick v West Norfolk and Wisbech Area Health Authority*,⁹⁰ Lord Fraser reasons that ‘[n]obody doubts, certainly I do not doubt, that in the overwhelming majority of cases the best judges of a child’s welfare are his or her parents’.⁹¹ Alternatively, understanding the issue in parent-centred terms, we might see deference to parents as a consequence of liberal neutrality that respects ‘the distinctive contribution that parent–child relationships make to the well-being or flourishing of adults’.⁹² We might also consider a ‘dual-interest’ theory, namely one that captures both children’s and parents’ interests, which settles on a parent–child relationship that does not permit prioritization to children’s interests.⁹³ Finally, considering all parties in relational terms, we might suggest that children’s interdependent relationship with their parents means that there may be circumstances in which they may be required to act altruistically in favour of their parents’ or the family’s interests.⁹⁴

B. Responding to ‘family autonomy’

There are strong countervailing arguments to each way of framing the ‘family autonomy’ objection to treating children as a ‘special case’. What of the child-oriented objection to prioritization on the basis that parents and other caregivers are best placed to give content to their child’s ‘best interests’? In respect of the CRC, for example, the Preamble ‘explicit[ly] naturaliz[es.] the family’⁹⁵ and Article 18(1) ascribes to parents or guardians the ‘primary responsibility for the upbringing and development of the child’ and establishes ‘the best interest of the child [as] their basic concern’. In such CRC provisions, ‘[c]hildren are not first of all addressed as part of a public sphere, but as dependents of their parents in need of protection and guidance within the private sphere’.⁹⁶

But is this characterization justifiable? No proxy decision-making can perfectly encapsulate any decision the child would make if mature, not least because there is no such ‘mature’ child: we can only hypothesize an instantaneously mature child or imagine the child as an adult looking back, neither of which is satisfactory.⁹⁷ In that context, the pragmatic resort to parental guidance seems sensible. Yet, whilst parents generally have more exposure to their children’s thoughts, beliefs, and behaviours than others, this does not mean that they should be assumed capable of representing them impartially. This is especially so

where the child's views may conflict with those of one or both of their parents, and it is for this reason that children may be appointed independent representation⁹⁸ or a children's guardian⁹⁹ in cases affecting them.

The absence of legal mechanisms for separating the representation of children's and parents' interests in other situations invites one of two possible explanations. On the one hand, the situation could be seen as low-risk in terms of potential consequences for the child, hence the concession to the parental role is limited. Alternatively, the situation could be seen to reflect the fact that, as Lotz reasons, '[m]any liberals seem simply to assume that parents will seek to instil their substantive values in their children'.¹⁰⁰ This requires us to consider the parent-oriented account of the 'family autonomy' objection.

Altman presents such a case in his contribution to this collection, grounded in the parental interest in nurturing, counselling, and educating, in which parents must be able to be authentic.¹⁰¹ His intention is to provide a stronger normative foundation for 'parental control rights' rather than change outcomes in practice. For this reason, it is not clear that it precludes the prioritization of children's interests to the extent they have already been prioritized in law. At a conceptual level, however, it is more difficult to reconcile 'parental control rights' with treating children as a 'special case'. Rather than reconciling the two, however, we may conclude that an account of 'family autonomy' grounded in parental interests alone is unjustifiable in any event.

Altman argues that '[a]uthorship of goals and means—the defining aspect of authenticity—requires significantly more discretion and therefore provides the basis for a more robust parental control right'.¹⁰² But children's unique vulnerability to their parents' decisions and actions highlights the risk of parental domination to which the same liberal values that suggest respect for the parental role in shaping their children's values and opportunities ought to be inimical.¹⁰³ This is so even where the values sought to be inculcated are not pernicious.¹⁰⁴ I suggest it is difficult to make the case for 'parental control rights' without some form of child-oriented limits.

Brighouse and Swift seek to present such a case. Their argument for the value of the family highlights its role in protecting and promoting both children's interests as well as parents' interest in being parents, grounded in their uniquely valuable, fiduciary relationship with their children.¹⁰⁵ Their account is particularly noteworthy because the proposed resolution that justifies the parental role to shape their children's values contains inherent limits that ensure that it does not violate the liberal principles of equality of opportunity and meritocratic selection.¹⁰⁶ Brighouse and Swift achieve this move by characterizing the parental interest in their fiduciary role as 'deeply connected to the content of that role. It is because of *what* children need from their parents that adults have such a weighty interest in giving it to them'.¹⁰⁷ Yet, the account remains dualist because children are not seen to have an interest in the relationship being one in which 'parents always act with their "best interests" in mind'.¹⁰⁸ Instead, the type of fiduciary relationship in which the child has an interest is one in which the parent '[has] her own interests and enthusiasms, and the discretion to pursue them to some extent'.¹⁰⁹

Does this understanding of 'family autonomy' permit the prioritization of children's interests? The normative role for children's interests in Brighouse and Swift's account itself prioritizes children's interests but brings parental interests within a proper understanding of children's interests. Seeing children as a 'special case' does not of itself render parental interests irrelevant since the content of children's interests can be contextualized: the focus remains the child as subject, but the complexity of their lives is included as it impacts on them.¹¹⁰ Such a contextualized approach may be reconcilable with this account of the 'family autonomy' objection.

Might this mean that seeing children as a 'special case' is also compatible with a relational account of the 'family autonomy' objection? Whilst the 'umbrella'¹¹¹ nature of 'relational' here means that we cannot critique specific arguments, the relational aspect on any account requires that social conditions are seen as

conceptually necessary to the self, rather than merely contributory factors.¹¹² As a consequence, it is not clear that a relational perspective can accommodate seeing children as a ‘special case’: the focus becomes one of maintaining those relations that are constitutive of the self,¹¹³ which may simply reinforce a legal framework that ‘keeps [children] in their place’.¹¹⁴

Moreover, it is not clear that there are independent reasons to seek to make the approaches compatible. One of the key benefits of a relational approach is argued to be that it takes a long-term perspective whereas the conventional approach, particularly in terms of the ‘welfare’ principle, can risk a ‘snap-shot’ view being taken.¹¹⁵ But it is not at all clear why treating children as a ‘special case’ whether via the ‘paramountcy’ principle or otherwise cannot similarly accommodate a long-term view of the child’s interests. Indeed, this is a legislative requirement in respect of ‘welfare’ in the adoption context.¹¹⁶ A further key aspect, hence also benefit, of a relational approach is the inculcation of particular values in the child. Herring argues:

It is beneficial for a child to be brought up in a family that is based on relationships which are fair and just. A relationship based on unacceptable demands on a parent is not furthering a child’s welfare.¹¹⁷

p. 246 But a contextualized understanding of the child’s interests, properly understood, could and would need to accommodate the impact on parents as it will necessarily also affect the child;¹¹⁸ the landscape is more complex than the opposition of the atomistic, isolated self and the metaphysical,¹¹⁹ fully relational self. Whilst treating children as a ‘special case’ does not require a contextualized approach to children’s interests, it can accommodate it.

VI. The ‘Equality’ Objection

The fourth and final objection to treating children as a ‘special case’ is an argument from equality. The concern is that equality, expressed as equal moral consideration, has no space for prioritizing children’s interests as a matter of law. This entails an examination of two issues: first, how equal moral consideration relates to the status and treatment of children compared to adults; second, whether we can justify not only privileging children’s interests in the factual outcome but also preferring children’s interests at the outset, namely as a matter of law.

A. The idea of equal moral consideration

There is a strong argument from equality that all individuals’ interests should be given equal consideration, and there exists only inadequate arguments to justify derogation from such equal consideration. Equal consideration means seeing children’s and adults’ interests as of equal moral value. As I have discussed elsewhere, treating children as a ‘special case’ needs to be compatible with equal moral consideration.¹²⁰

At first glance, we might be concerned that prioritizing children’s interests means they are being regarded unequally, and unjustifiably so. The very idea of ‘children’s rights’ suggests the possibility of distinctive outcomes that favour children, namely unequal outcomes. Whilst they may be underpinned by equal moral consideration, the distinct terminology that delineates children from adults highlights the potential for differential results. Yet, as Brennan and Noggle recognize, equal consideration does not mean identical outcomes: ‘two people can receive equal moral *consideration* without having exactly the same package of moral rights and duties’.¹²¹ For that reason, we need to be cautious in concluding that the approach being explored in this chapter, namely prioritizing children’s interests, does not demonstrate equal consideration. Understanding why the conceptual basis for seeing children as a ‘special case’ does not fall foul of the equal

consideration argument enables us to see the natural limits of any account of what it means to treat children as a 'special case'.

p. 247 In writing about the moral status of children, Brennan and Noggle argue for the 'equal consideration thesis', namely that '[c]hildren are entitled to the same moral consideration as adults'.¹²² Equal moral consideration captures the interrelated aspects of formal and substantive equality that affect the legal regulation of individuals. In terms of formal equality, it suggests that, to the extent that children and adults as groups are alike, the law should treat them alike. Brennan and Noggle explain this in terms of equal moral status:

[A] certain moral status attaches generally to all persons, including children. To deny this would be to claim either that persons do not derive moral status from their status as persons, or that children are not persons. Because neither of these claims is particularly plausible, it does not seem plausible to deny the Equal Consideration Thesis.¹²³

As children and adults are humans, formal equality underpins children and adults as holders of fundamental human rights, who should be accorded equal respect. But this assumes that 'children's rights' are nothing more than a repackaged reference to fundamental human rights. More precisely, it implies that we have changed the label because that is the only way to ensure sufficient attention is paid to children. Are we using the markers of difference to achieve a measure of sameness?

If, as I have argued elsewhere,¹²⁴ it is important to recognize when it is a child who is the rights-holder, namely that there is a difference between 'rights for children' and 'children's rights', this entails having regard to substantive equality. Likewise, if 'best interests' are anything more than an articulation of the need to take children's interests into account just like the interests of others. Drawing on the substance of 'children's rights' and 'best interests', this represents a definitional claim that substantive equality is also critical to determining the criteria against which to evaluate whether children can justifiably be treated as a 'special case'. The recognition that equal moral consideration also includes substantive equality enables us to evaluate the criteria for likeness under formal equality. It also provides an independent basis for justifying outcomes and determining when equal treatment is required. Equal moral consideration thus offers a lens through which to evaluate whether equal treatment or unequal treatment is justified. Unequal treatment may be justified only if it does not undermine the equal respect—the equal moral status—that the law needs to express for children and adults.

B. Superior moral status, equal and unequal outcomes

The foregoing makes clear that we should not approach the evaluation of children's status on the basis that equal respect necessarily means equal treatment. As Dwyer explains,

p. 248 [b]ecause equal moral consideration can produce unequal treatment and unequal moral consideration can allow for equal legal protection, it is often difficult to determine when decision makers are systematically treating one group as occupying a lower moral status than another, or are instead treating them as moral equals.¹²⁵

Drawing on this insight, Dwyer argues for unequal moral status in order to achieve equal treatment:

Recognizing children's superior moral status, if the best account of moral status yields that conclusion, might simply push government officials to give children's interests more or less equal weight to that of adults and make adult society somewhat more reluctant to disparage and discriminate against children.¹²⁶

If children and adults necessarily have equal moral status, however, only equal or unequal treatment that does not violate that status is permissible.

Dwyer presents a case for prioritizing children's interests in the sense of giving them unequal—greater—moral consideration compared to the consideration given to the interests of others.¹²⁷ He does not use the socially constructed class of children to delineate those whose interests are to be preferred, but instead argues for placing greater moral weight on the characteristics of youthfulness, which are typically possessed by children.¹²⁸ In arguing against the 'egalitarian impulse of modern liberalism',¹²⁹ however, a key contention is that unequal consideration ought to at least 'shake us loose finally from traditional assumptions of children's inferiority'.¹³⁰ In other words, excessive correction at a theoretical level may only lead to moderate, justifiable correction in practice.¹³¹ Dwyer's aim and prediction is rooted in an account of the current regime that views children as inferior.¹³² For this reason, his argument may not be directly applicable to the English context where excessive correction via unequal consideration in theory may lead to unjustifiable, unequal factual outcomes. According greater moral status to children is thus not a necessary means of achieving equal treatment in practice.

More fundamentally, I suggest the resort to unequal moral status is neither necessary nor justifiable as a matter of theory. Dwyer reasons that 'children's superior moral status would mean favoring children even when adults have much at stake'.¹³³ But, as I proceed to explain, children's interests can be preferred both in the outcome and at the outset without needing to see them other than as having equal moral status with adults. This reply needs to engage with the hypothetical scenario envisaged by Dwyer in which 'a child and adult have *equal but mutually incompatible* interests at stake and fairness considerations do not dictate a particular outcome'.¹³⁴ The child prefers one activity and the adult another, such as in relation to dinner choices or vacation destinations, or the child prefers one expenditure and the adult another, such as play equipment or sports equipment for the adult.¹³⁵ One way to resolve the conflict, Dwyer suggests, is to reason that the child's preferences should be respected because the child is morally superior ↪ such that their interests matter more than the adult's.¹³⁶ He contends that those who see children as having an equal moral status to adults cannot found an argument for respecting the child's preference in that theoretical stance.¹³⁷

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We might test this by examining a dilemma of the type Dwyer contemplates. Imagine that the decision entails choosing whether to go on a beach holiday or take a city break packed with museums. The child expresses a clear preference for the former and the adult for the latter. But it is not clear in what sense the child's and the adult's interests can be said to be 'equal' such that an additional device—children's moral superiority—is needed to determine the outcome on the facts. Having equal respect for individuals' views regardless of their content would suggest equal moral status, hence Dwyer must mean they are equally weighty when applied to the facts.

Yet, in application to the facts, we are tasked to consider not just each individual's expressed preference but the justificatory arguments for not giving effect to that preference. Even if the initial expression of the child's and adult's interests appears equal, therefore, that does not hold true after the interests have been contextualized to the individual expressing them, including justifications for not giving effect to their expression. For example, the aims of the city break might just as well be accomplished through family outings to museums at weekends, whereas the ocean might be too far away to make weekend trips possible. What is evident is that equal moral consideration for the individual expressing the preference does not mean that we cannot prefer one party's view. In her criticism of the 'welfare' principle in English law, Reece argues that there is a 'fallacy ... [of] equat[ing] priority with protection'.¹³⁸ Once we recognize this, she argues, we can see that decisions which, in the outcome give more weight to one party's interests than those of others, may have given equal weight to all parties' interests in the process by which that outcome was reached.¹³⁹

The basis for determining which view is to be preferred does not need to derive directly from the idea of equal moral status, but from the range of arguments available to justify *not* giving effect to one party's preference in the context of the other party's known preference. It is because we know the two preferred holiday types and their aims that we can consider in relation to which we can more readily accomplish its aims just on weekends. It is in the justification for infringement of each individual's *prima facie* equally respected interests that these interests acquire their full content and are rightly no longer seen as of equal weight, all things considered. This resembles the way in which courts resolve conflicts of parties' Article 8 ECHR rights.¹⁴⁰ As a result, whilst Dwyer's aims of improving the treatment of children in the United States are to be supported, any argument in favour of seeing children as having superior moral status should, at the least, be confined to that context.

C. Prioritizing children's interests as a matter of law

p. 250 Translating equal consideration into outcomes leads to prioritizing children's interests where their interests are elevated within the guiding legal principles and concepts, ↵ rather than just application to the facts. If children's interests were preferred merely at the final stage, they would not be a 'special case'. Where children's interests are expressed in rights-based terms, for example, the shift from preferring children's interests in the application to preferring them at the legal stage is reflected in the distinction between 'rights for children' and 'children's rights'. The critical difficulty here is whether the argument from equal moral consideration can accommodate not only unequal treatment in the outcome but unequal treatment at the outset.

I suggest that the response to this concern lies in the contextualization of children's interests. The 'paramountcy' expressed by the 'welfare' principle, for example, does not apply to all, but only specific contexts involving children's interests; equal moral consideration is expressed prior to that prioritization in the contextualization. This demonstrates how we do not need unequal consideration for children's interests in order to see them as a 'special case'; we can prioritize children's interests in a way that does not fall foul of this equality concern.

Compatibility with equal consideration is most critical where children's interests are being prioritized in conflicts with other parties' interests. The 'welfare' principle might be best seen as a framework for decision-making that prioritizes children's interests in conflicts with those of others. Yet, it does not fall foul of the equal consideration concern because equal consideration conceptually precedes the 'welfare' principle. Just as with additional legal protection, we approach children's and others' interests on the basis that they are of equal value. Where the context implicates children's interests more than adults', children's interests need to be prioritized. As a result of this recognition of the need to prioritize, the 'welfare' principle is applied to these contexts. This is why the 'welfare' principle does not apply to all situations affecting children; if it did, it would be harder to justify it because that would imply there could have been no earlier point at which all parties' interests were regarded equally. Thus, its limited scope is a strength, rather than weakness as Reece suggests.¹⁴¹

Equal consideration of everyone's interests also explicitly allows for consideration of adults' vulnerability. As a factor approached with equal consideration to determine the correct legal approach to regulating children, however, children's vulnerability is distinctive. The inability of young children to make decisions about whether or not to consent to medical treatment or to avoid being taken to a contact session illustrate the distinctive nature and extent of their vulnerability as a class. The extent of children's vulnerability includes the degree of capacity for autonomous decision-making that particular children might have; the distinctive nature of that vulnerability lies in recognizing children's intended and actual increasing capacities as well as their significant and intimate dependence on adults for a large measure of their well-being. When equal consideration of all parties' interests is applied to the concept of childhood, we are

entitled to assume the unique character of the vulnerability is possessed by all children. As a consequence, we are justified in adopting a legal approach that prioritizes children's interests. Which legal approach best recognizes this priority becomes the key issue.

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VII. Implications for the Current Law

A. Fit with the current law

As this account of children as a 'special case' relates to the concept of childhood, it has natural limits that may not accord with the law on the regulation of children in practice. For example, legislative limits that differ may be justifiable for other reasons such as administrative efficiency in respect of a universal rule like the driving age, where there are comparatively low stakes consequences for affected children. More generally, in order that treating children as a 'special case' is workable in a legal context, this account arguably needs to accept that we are entitled to assume that we can consider vulnerability for 'children' as a class, rather than relying on the premise that every child—every member of that class—is vulnerable in a way and to an extent that they require additional protection. Thus, I do not propose a full defence of the current law. At times, the argument presented in this chapter justifies going further, and at times it is more restrictive.

Compatibility with equal moral consideration is most straightforward where children are being afforded additional recognition of rights and interests in law. For example, we recognize that all individuals are vulnerable and are equally concerned about the vulnerability of all, but there are certain contexts in which children's vulnerability is greater than that of adults. Article 24 of the CRC provides a helpful illustration. It is concerned to recognize the child's interest in healthcare. Adults and children alike have an interest in access to the 'highest attainable standard of health and to the facilities for the treatment of illness and rehabilitation of health'.¹⁴² Yet, children are particularly vulnerable to the imposition on them of 'traditional practices prejudicial to ... health',¹⁴³ so their interests are specifically noted in this regard. Recognition of this additional right to protection is not because we have less consideration for adults, but because children are less able to protect themselves against such infringement. In this sense, additional protection, which treats children as a 'special case', is a way of implementing equal consideration.

From an English perspective, the debate over which language descriptors treat or indicate an intention to treat children as a 'special case' is of most concern as regards the compatibility of domestic English 'welfare' principle and the ECtHR's approach to expressing children's relative position within an ECHR framework and balancing exercise. Because the 'welfare' principle does not apply to every situation in which a child is affected by a legal decision, it is clear a decision has been made that particular contexts raise more significant issues for affected children than others, hence their position needs to be prioritized. For example, we do not prioritize children's position when deciding whether to hear an application for a declaration of parentage.¹⁴⁴ Adults' interests are conceived as sufficiently critical here that the child's 'best interests' can only comprise an exception regarding when to hear the application, rather than the presumptive starting-point to the analysis. This serves as a useful illustration of the compatibility between equal consideration and treating children as a 'special case'.

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To test the 'special case' argument against the current law, it is valuable to consider a typical scenario in which interests conflict: relocation of children when their parents are separated. In respect of the first, in the recent Court of Appeal decision in *Re M (Children)*,¹⁴⁵ King LJ reasoned that

There is only one principle in relocation cases and that is that the welfare of the child is paramount; there are no presumptions and any guidance is exactly that, guidance, and, as such,

designed to be of assistance (or not) depending on the circumstances of the case. It is unnecessary and inappropriate to trawl through the myriad of authorities in relation to relocation cases; after all in how many different ways is it necessary or helpful for it to be said that the welfare of the child is the paramount consideration?¹⁴⁶

This seems suggestive of seeing children as a 'special case'. Yet cases are more difficult than dicta. Consider, for example, *Re S (A Child)*,¹⁴⁷ which concerned an appeal by a mother against an order restraining her from relocating internally with her nine-and-a-half-year-old daughter, who had Down's Syndrome, moderate learning difficulties, and other serious medical issues. The mother wanted to move there to be with her new partner, and had been suffering depression since initially being prevented from relocating. The Court had to ask whether the judge at first instance, His Honour Judge Ellis, was entitled to treat this as a 'truly exceptional' case¹⁴⁸ in which it would be justified not to permit the mother to relocate. The Court held that he was, and focused on the daughter's difficulty in understanding and coping with a reduction in contact with her father.

In his analysis of *Re S*, Herring argues that this analysis overlooks the very significant sacrifices the mother has made and would continue to make in caring for the child, and the consequent loss of support of her partner as a result of the dismissal. By contrast, the father, Herring reasons, has been free to remarry and move on with his life. Though it is noteworthy that, in the evidence before the County Court, both families were described as being 'desperate about the situation',¹⁴⁹ and the father was also said to have been unable to work because of the proceedings.¹⁵⁰

Herring criticizes this decision for focusing entirely on the child's welfare at the moment, and failing to take a sufficiently long-term perspective.¹⁵¹ But a view to the future is evident in Butler-Sloss P's reasoning that the case 'turns on the assessment of future risk to the emotional wellbeing of a delightful but seriously disadvantaged child'.¹⁵² Moreover, the fact that the court also weighs in the balance the negative consequences for the father highlights that the court is not viewing the child's interests in isolated atomism. Finally, one could argue that *Re S* was wrongly decided on a conventional understanding of the 'welfare' principle, or it could also simply be a hard case in which, Butler-Sloss P reasons, '[t]here is no obviously correct decision' such that the judge 'was faced with an impossible task'.¹⁵³ Understood in this light, it is not clear that *Re S* evidences any difficulty with the 'paramountcy' of children's 'welfare', hence the possibility of treating children as a 'special case'.

More generally, it should be conceded that there could be a situation in which a relocation dispute is decided in a way that does not secure the ideal outcome for the child because of significant negative consequences for the affected adults, usually their parents. But this would not necessarily undermine seeing children as a 'special case', and prioritizing their interests as a matter of law. Firstly, it would be the extent of the adult's vulnerability that would lead to such an outcome, thus it would not be an assertion that adults' vulnerability has the same nature as children's. Secondly, whilst children's special vulnerability forms the justification for prioritizing children's interests, that is not the same as assuming it is a directly applicable criterion for weighing against other interests in determining individual disputes. Seeing children as uniquely vulnerable, therefore, is not at odds with recognizing adults' vulnerability.

B. Implications for future cases

If we accept this argument that children are a ‘special case’, what does it mean for how cases will be decided? Could this underpin the ‘missing ... coherent vision’¹⁵⁴ that Appleton suggests is a critical difficulty for the recently launched work by the American Law Institute on the legal regulation of children.¹⁵⁵ What would be different? Do we need to be able to point to better outcomes? Or is it enough to render more justifiable apparent, existing inconsistencies? In other words, might we be able to explain that a number of alleged or assumed inconsistencies are not inconsistencies at all?

One key implication is that seeing children as a ‘special case’ obviates the need to resolve the difficult debate over how Article 3 of the CRC relates to domestic English law, most recently highlighted by the Supreme Court’s decision in *SG*,¹⁵⁶ a case concerned with whether the ‘benefit cap’ was discriminatory against women because of the impact on single-parents, hence predominantly single-mother households. If children are a ‘special case’, there is a necessary domestic prioritization required. Thus, we do not need to determine either how Article 3 of the CRC fits with domestic law¹⁵⁷ or whether Article 3 itself views children’s interests as a ‘special case’ either as written or ↵ as interpreted and applied by domestic courts and by the United Nations’ Committee on the Rights of the Child.

If we accept that children are a ‘special case’, it may be that we need to categorize contexts in which children’s interests at stake. Might Eekelaar’s distinction between decisions ‘affecting’ children and decisions ‘about’ children be of assistance for this purpose?¹⁵⁸ Alternatively, might we need to distinguish cases involving fundamental human rights from other types of case? But, even if this were a useful starting-point, how would this intersect with any distinction we might wish to draw between disputes between parents and children, and other types of dispute involving children?

Conclusion

One potentially significant objection remains unexplored, namely that grounded in the idea of justice between generations.¹⁵⁹ Might this become a more pressing concern over time? If so, do we need to address it now when determining how to approach children’s interests in particular?

The context for the preceding debate may be critical. It may be that recent academic convergence on equal treatment and debate over the need for prioritization within the ‘welfare’ principle is possible only because of the benefits secured by the politics—the rhetoric and language—of ‘children’s rights’ since the CRC came into force. In this way, arguing for a move away from the language of prioritization *meaning* prioritization may suggest that the rhetoric of ‘children’s rights’ and the ‘welfare’ principle have achieved much of their aims. But have they? If they have not, might there be reason to be cautious about suggesting any approach other than treating children as a ‘special case’? Might there be very practical reasons for this perspective, irrespective of how one evaluates my own conceptual arguments?

Regardless of the conclusion one reaches on whether children are a ‘special case’, we need to have language that clearly fits with its meaning so as to ensure consistent interpretation and application. Otherwise, we risk fragmented, inconsistent developments in the legal regulation of children. This chapter has sought to show what theoretical basis we might have for the current language of prioritization. Whether the case made here is sufficient to sustain that language is another matter.

Notes

- 3 See, eg, J Eekelaar, 'Beyond the Welfare Principle' (2002) 14 *Child and Family Law Quarterly* 237, 244, 249; S Choudhry and H Fenwick, 'Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle Under the Human Rights Act' (2005) 25 *OJLS* 453, 471, 479, 483.
- 4 *ibid* as discussed below in Section II.
- 5 L Ferguson, 'The Jurisprudence of Making Decisions Affecting Children: An Argument to Prefer Duty to Children's Rights and Welfare' in A Diduck, N Peleg, and H Reece (eds), *Law in Society: Reflections on Children, Family, Culture and Philosophy – Essays in Honour of Michael Freeman* (Brill 2015) 143.
- 6 *ibid*.
- 7 See, eg, *Re T (A Minor) (Wardship: Medical Treatment)* [1997] 1 All ER 906 (EWCA); *Re M (Child's Upbringing)* [1996] EWCA Civ 1320.
- 8 c. 18.
- 9 [1987] Fam 111 (EWCA).
- 10 *ibid* 124G (Cumming-Bruce LJ).
- 11 *ibid* 124H (Cumming-Bruce LJ).
- 12 *Johansen v Norway* (1997) 23 EHRR 33 [78].
- 13 *Yousef v The Netherlands* (2003) 36 EHRR 20 [73].
- 14 See, eg, S Choudhry and H Fenwick, 'Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act' (2005) 25 *OJLS* 453.
- 15 See, eg, *Elsholz v Germany* (2002) 34 EHRR 58 [48]. Further highlighting the apparent lack of significance to language, the Court in *Süss v Germany* [2006] 1 FLR 522 (ECtHR) both recites the *Johansen* 'particular importance' formulation ([88]) and describes the child's best interests as of 'crucial importance' ([86]). For more language descriptors adopted by the ECtHR, see L Ferguson and E Brake's chapters, notes 197–201, and corresponding main text.
- 16 20 November 1989, 1577 UNTS 3 [CRC].
- 17 D Archard, 'Children, adults, best interests and rights' (2013) 13 *Medical Law International* 55, 60.
- 18 United Nations' Committee on the Rights of the Child, *General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (29 May 2013) art 3, para 1 [37].
- 19 R Dixon and M Nussbaum, 'Children's Rights and a Capabilities Approach: The Question of Special Priority' (2012) 97 *Cornell Law Review* 549, 553.
- 20 H Reece, 'The Paramountcy Principle: Consensus or Construct?' (1996) 49 *Current Legal Problems* 267, 270 (noting the lack of justification provided, rather than arguing it was unnecessary).
- 21 *ibid* 271.
- 22 S Gilmore and A Bainham, *Children: The Modern Law* (4th rev edn, Jordan Publishing 2013) 326.
- 23 See, eg, BB Woodhouse, '"Who Owns the Child?" Meyer and Pierce and the Child as Property' (1992) 33 *William and Mary Law Review* 995; T Gal and BF Duramy, 'Enhancing Capacities for Child Participation: Introduction' in T Gal and BF Duramy (eds), *International Perspectives and Empirical Findings on Child Participation: From Social Exclusion to Child-Inclusive Policies* (OUP 2015) 1. In the English context, Hale, who was involved in the law-reform process behind the 1989 Act (cf M Maclean with Jacek Kurczewski, *Making Family Law: A Socio Legal Account of Legislative Process in England and Wales, 1985 to 2010* (Hart Publishing 2011) 26 explains that legislation was aimed at 'get[ting] rid of the property lawyers' approach to parenthood as ... in the Children Act 1975, 'at the top [of which] were "parental rights and duties"': See Baroness Hale, 'Family Responsibility: Where Are We Now?' in C Lind, H Keating, and J Bridgeman (eds), *Taking Responsibility, Law and the Changing Family* (Ashgate 2011) 25, 26.
- 24 See Guardianship of Infants Act 1925, s 1; Guardianship of Minors Act 1971, s 1, which describe the welfare of the child as the court's 'first and paramount' consideration.
- 25 H Reece, 'The Degradation of Parental Responsibility' in R Probert, S Gilmore, J Herring (eds), *Responsible Parents and Parental Responsibility* (Hart Publishing 2009) 85, 87.
- 26 Archard, 'Children Adults, Best Interests and Rights' (n 17) 59.
- 27 AR Appell, 'Accommodating Childhood' (2013) 19 *Cardozo Journal of Law & Gender* 715, 717, 730. Appell sees this as a product of the 'development thesis', which 'holds that children are unwise, weak, unreasonable, and wild' 721.
- 28 JG Dwyer, *Moral Status and Human Life: The Case for Children's Superiority* (CUP 2011) 1.
- 29 Appell (n 27).
- 30 Dwyer (n 28) 191.
- 31 LA Rosenbury, 'A Feminist Perspective on Children and Law: From Objectification to Relational Subjectivities' in T Gal and BF Duramy (eds), *International Perspectives and Empirical Findings on Child Participation: From Social Exclusion to Child-Inclusive Policies* (OUP 2015) 17, 20.
- 32 See, eg, *Troxel v Granville*, 530 US 57 (2000). This constitutional perspective arguably contributes much to the notion of 'parental control rights', with which Altman's contribution to this volume is concerned.

- 33 Exceptionally, and as discussed in Section VI, Dwyer argues for the unequal consideration of children's interests.
- 34 Appell (n 27) 717.
- 35 *ibid* note 4.
- 36 Ferguson, 'The Jurisprudence of Making Decisions Affecting Children' (n 5); L Ferguson, 'Not Merely Rights for Children but Children's Rights: The Theory Gap and the Assumption of the Importance of Children's Rights' (2013) 21 *International Journal of Children's Rights* 177.
- 37 S Brennan, 'The Goods of Childhood and Children's Rights' in F Baylis and C McLeod (eds), *Family-Making: Contemporary Ethical Challenges* (OUP 2014) 29, 30.
- 38 *ibid* 31.
- 39 M Freeman, 'Why It Remains Important to Take Children's Rights Seriously' (2007) 15 *International Journal of Children's Rights* 5, 7.
- 40 Eekelaar, 'Beyond the Welfare Principle' (n 3) 244.
- 41 *ibid*.
- 42 *ibid*.
- 43 *ibid* 249.
- 44 Choudhry and Fenwick (n 3) 481.
- 45 *ibid*, 471, 479, 483–84.
- 46 *ibid* 485.
- 47 *ibid*.
- 48 *ibid* 484.
- 49 Appell (n 27) 753.
- 50 *ibid*.
- 51 An 'accommodation model' seeks to enhance children's participation at an earlier stage and in a more meaningful way than a model based on formal equality would do: Appell (n 27) 754–78. Yet, equal respect for children's interests could underpin the demand for accommodation. The critical issue is how we interpret equality and understand its requirements for implementation in the legal regulation of children's lives.
- 52 MA Fineman, 'Equality and Difference – The Restrained State' (2014) 66 *Alabama Law Review* 609, 613.
- 53 As I have discussed elsewhere in relation to children's refusal of critical medical treatment. See L Ferguson, *The End of an Age: Beyond Age-Based Legal Regulation of Minors' Entitlement to Participate in and Make Health Care Treatment Decisions* (Law Commission of Canada 2005) Part 5: III.
- 54 In similar terms to my account, he reasons that

a further issue exists as to whether the concept of childhood can actually be justified. The point to stress here is that although the outer boundaries of the concept remain socially constructed and flexible under international law, there remains agreement among states as to the concept of childhood.

- See J Tobin, 'Justifying Children's Rights' (2013) 21 *International Journal of Children's Rights* 395, 400, 401.
- 55 *ibid* 396.
- 56 *ibid* 718.
- 57 *ibid* 401.
- 58 J Seymour, *Children, Parents and the Courts: Legal Intervention in Family Life* (Federation Press 2016) 175–76.
- 59 Reece, 'The Paramountcy Principle' (n 20) 277.
- 60 The need for 'special vulnerability' also informs the operation of the 'vulnerability' principle as a justification for allocating special priority to children under a capabilities approach: Dixon and Nussbaum (n 19) 573–78.
- 61 MA Fineman, 'Equality, Autonomy, and the Vulnerable Subject in Law and Politics' in MA Fineman and A Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013) 13, 13.
- 62 *ibid* 16.
- 63 J Herring, 'Vulnerability, Children and the Law' in M Freeman (ed), *Law and Childhood Studies: Current Legal Issues Vol 14* (OUP 2012) 243, 250.
- 64 P Alderson, 'Common Criticisms of Children's Rights and 25 Years of the IJCR' (2017) 25 *International Journal of Children's Rights* 307.
- 65 Appell (n 27) 778.
- 66 Herring, 'Vulnerability' (n 63) 253, 257.
- 67 *ibid* 262.
- 68 This is not a criticism of the feminist perspective to the extent that one of feminism's critical aims is to uncover the way in which legal regulation creates difference and subjective experience as well as reflects it. See Rosenbury (n 31) 30.

69 Fineman focuses her argument on how the operation of those institutions and relationships have conferred power and privilege. See Fineman, 'Equality and Difference' (n 52) 612–13, 618; Fineman, 'Equality, Autonomy' (n 61) 21–22.

70 Herring (n 63) 263.

71 J Tobin, 'Beyond the Supermarket Shelf: Using a Rights Based Approach to Address Children's Health Needs' (2006) 14 International Journal of Children's Rights 275, 277, 278.

72 Various lists have been proposed. See, eg, Brennan (n 37), especially 42; A Gheaus, 'The "Intrinsic Good of Childhood" and the Just Society' in A Bagattini and CM Macleod (eds), *The Nature of Children's Well-Being: Theory and Practice* (Springer 2015) 35, especially 39–42; CM Macleod, 'Agency, Authority and the Vulnerability of Children' in A Bagattini and CM Macleod (eds), *The Nature of Children's Well-Being: Theory and Practice* (Springer 2015) 53, 59–62. For a general account of the definition of vulnerability, see C Mackenzie, W Rogers, and S Dodds, 'Introduction: What Is Vulnerability and Why Does It Matter for Moral Theory?' in C Mackenzie, W Rogers, and S Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (OUP 2014) 1, 4–9.

73 J Feinberg, 'The Child's Right to an Open Future' in W Aiken and H LaFollette (eds), *Whose Child? Children's Rights* (Rowman and Littlefield 1990) 76.

74 Macleod, 'Agency, Authority' (n 72).

75 D Archard, 'Philosophical Perspectives on Childhood' in J Fionda (ed), *Legal Concepts of Childhood* (Hart Publishing 2001) 43, 45. Archard contrasts innocence, wonder, and trust to vulnerability and dependence, positing the general philosophical approach as one of seeing the former as valuable and the latter as not valuable. By contrast, I suggest that such intrinsic goods are part of children's vulnerability, and hence mean that it should not be understood in a purely negative sense.

76 A Diduck, 'Autonomy and Vulnerability in Family Law: The Missing Link' in J Wallbank and J Herring (eds), *Vulnerabilities, Care and Family Law* (Routledge 2014) 95, especially 97–98.

77 *ibid* 57.

78 Dixon and Nussbaum (n 19) 575 (emphasis in original).

79 Macleod similarly argues for the significance of juvenile agency as contrasted with mature agency: (n 72) 58–59, 63.

80 Appell (n 27) 721.

81 *ibid* 742.

82 Herring (n 63) 246–47.

83 *ibid* 719.

84 *ibid* 718.

85 This might be said to underpin Fineman's 'vulnerability paradigm'. See (n 52) and corresponding main text.

86 Rosenbury (n 31) 21.

87 Appell (n 27) 724.

88 SF Appleton, 'Restating Childhood' (2014) 79 Brooklyn Law Review 525, 526, 541.

89 D Archard and CM Macleod, 'Introduction' in D Archard and CM Macleod (eds), *The Moral and Political Status of Children* (OUP 2002) 4.

90 [1986] AC 112.

91 *ibid* 173D (Lord Fraser).

92 H Brighouse and A Swift, 'The Goods of Parenting' in F Baylis and C McLeod (eds) *Family-Making: Contemporary Ethical Challenges* (OUP 2014) 11, 11.

93 H Brighouse and A Swift, *Family Values: The Ethics of Parent–Child Relationships* (Princeton UP 2014) 51.

94 C Foster and J Herring, *Altruism, Welfare and the Law* (Springer 2015), especially 4. See also J Herring and C Foster, 'Welfare Means Relationality, Virtue and Altruism' (2012) 32 Legal Studies 480.

95 Z Clark and H Ziegler, 'The UN Children's Rights Convention and the Capabilities Approach – Family Duties and Children's Rights in Tension' in D Stoecklin and JM Bonvin (eds), *Children's Rights and the Capability Approach: Challenges and Prospects* (Springer 2014) 213, 226.

96 *ibid*.

97 Discussed in relation to the interest theory of rights: Ferguson, 'Not Merely Rights for Children' (n 35) 193–94.

98 Children Act 1989, s 10(2)(b) and (8). See, eg, *Mabon v Mabon* [2005] EWCA Civ 634.

99 Children Act 1989, s 41.

100 M Lotz, 'Parental Values and Children's Vulnerability' in C Mackenzie, W Rogers, and S Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (OUP 2014) 242, 249–50.

101 See Altman's chapter.

102 *ibid* 226.

103 Lotz (n 100) 260–63.

104 *ibid* 263.

105 Brighthouse and Swift (n 93).

106 For an excellent exposition of this ‘trilemma’, see J Fishkin, *Justice, Equal Opportunity and the Family* (Yale UP 1983).

107 Brighthouse and Swift (n 93) 92 (emphasis in original); see also 121: ‘Parents’ rights and duties, then, are entirely fiduciary. Parents have just those rights and duties with respect to their children that it is in their children’s interests for them to have.’

108 *ibid* 122.

109 *ibid*.

110 I discuss this elsewhere: L Ferguson, ‘“Families in all their Subversive Variety”: Over-Representation, the Ethnic Child Protection Penalty, and Responding to Diversity whilst Protecting Children’ (2014) 63 *Studies in Law, Politics, and Society* 43.

111 C Mackenzie and N Stoljar, ‘Introduction: Autonomy Reconfigured’ in C Mackenzie and N Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (OUP 2000) 3, 4.

112 J Christman, ‘Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves’ (2004) 117 *Philosophical Studies* 143, 147 - 148 (writing in the context of relational autonomy in particular).

113 *ibid* 156.

114 Appell (n 27) 717.

115 J Herring, *Caring and the Law* (Hart Publishing 2013) 205.

116 Adoption and Children Act 2002, c 38, s 1(2).

117 Herring, (n 115) 205.

118 Herring discusses the Court of Appeal’s decision in *Re S (A Child)* [2002] EWCA Civ 1795 to suggest to the contrary: *ibid*, 205–06. I discuss this in Section VII, below.

119 For discussion, see Christman (n 112).

120 Ferguson, ‘The Jurisprudence of Making Decisions Affecting Children’ (n 5).

121 *ibid* (emphasis in original).

122 S Brennan and R Noggle, ‘The Moral Status of Children: Children’s Rights, Parents’ Rights, and Family Justice’ (1997) 23 *Social Theory and Practice* 1, 2.

123 *ibid* 2.

124 Ferguson, ‘Not Merely Rights for Children’ (n 36).

125 Dwyer (n 28) 14.

126 *ibid* 137.

127 *ibid*. Dwyer is clear, however, that his argument is one of the plausibility of children’s moral superiority, and that he ‘make[s] no pretense of advancing a knock-down case’ 148.

128 *ibid* 145–87.

129 *ibid* 143.

130 *ibid*.

131 *ibid* 148, 137.

132 Dwyer (n 28) and corresponding main text.

133 *ibid* 189.

134 *ibid* 184–85 (emphasis added).

135 *ibid* 185.

136 *ibid*.

137 *ibid*.

138 Reece, ‘The Paramountcy Principle’ (n 20) 277.

139 *ibid* 278–79. See also Dwyer (n 28) 12.

140 (n 12) and corresponding main text.

141 Reece, ‘The Paramountcy Principle’ (n 20) 281, 285.

142 CRC, Art 24(1).

143 *ibid* Art 24(3).

144 Family Law Act 1986, c. 55, s 55A (‘best interests’ exception to application for declaration of parentage: ‘[T]he court may refuse to hear the application if it considers that the determination of the application would not be in the best interests of the child.’). A further example where the child’s interests are not paramount is the decision whether a child should give oral evidence in court: *Re W (Children)* [2010] UKSC 12, [24] (Lady Hale).

145 [2016] EWCA Civ 1059.

146 *ibid* [34] (King LJ).

147 See Herring (n 118).

148 *Re S* (n 145) [23] (Butler-Sloss P).

- 149 *ibid* [30] (Butler-Sloss P).
- 150 *ibid* [32] (Butler-Sloss P).
- 151 Herring (n 115) 206.
- 152 *Re S* (n 145) [37] (Butler-Sloss P).
- 153 *ibid*.
- 154 Appleton (n 88) 529.
- 155 The American Law Institute, 'Restatement on Children and the Law: Current Project' (ALI, 15 May 2015) <http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=36>; The American Law Institute, 'The American Law Institute Launches Restatement on Children and the Law' (CISION PR Newswire, 15 May 2015) <<http://www.prnewswire.com/news-releases/the-american-law-institute-launches-restatement-on-children-and-the-law-300044672.html>> .
- 156 *R (on the application of SG) and Others v Secretary of State for Work and Pensions* [2015] UKSC 16.
- 157 *ibid*, whether compatibility with a child's Art 3 'best interests' simply replaces the usual proportionality stage of the analysis under Art 14 ECHR (Lord Reed and Lady Hale (dissenting)), whether Art 3 might be directly enforceable despite not being incorporated (Lord Kerr (dissenting)), or whether compatibility with Art 3 might be a political, rather than legal issue (Lord Carnwath).
- 158 J Eekelaar, 'The Role of the Best Interests Principle in Decisions Affecting Children and Decisions about Children' (2015) 23 *International Journal of Children's Rights* 3.
- 159 Eekelaar, 'Beyond the Welfare Principle' (n 3).