

The Jurisprudence of Making Decisions Affecting Children: An Argument to Prefer Duty to Children's Rights and Welfare

*Lucinda Ferguson**

University of Oxford, UK

1. Introduction

Writing in 2000, Michael Freeman argued that, whilst much had been achieved for children in the 20th century, it had not been the century of the child (2000: 553-554). He expressed the hope that the next century would turn out otherwise (2000: 555). In this chapter, I explore the extent to which we are now able to realise this ambition in relation to decision-making affecting children. The need for some measure of state regulation of decision-making about children is beyond doubt. Not all children can make significant decisions for themselves, and we cannot assume that families will always be intact or agree sufficiently to make such decisions for children. This is the case even if we assume that 'families' generally make decisions in their children's 'best interests'.¹ The issue then arises as to the shape of this regulation. The legal decision-making framework employed is critical because it determines both the scope of decisions that can be made without state scrutiny or supervision and the weight that can be placed on particular factors they can take into account, such as religious or cultural concerns.

In order to make this a century of the child, I suggest that we need to reach a common understanding of the reasons why it is important to regard children as a 'special case',² whether this is implemented by thinking of children as rights-holders,³ by prioritising children through a

* I began thinking about what the debate over the legal regulation of children might learn from virtue ethics whilst I was Assistant Professor of Law at the University of Alberta, and am grateful to former colleagues for the lively discussion. I discussed ideas in this chapter in particular at the International Academy for the study of the Jurisprudence of the Family's fifth international symposium at Cardozo Law School, Yeshiva University (10-11 June 2013) and the Law and Michael Freeman Colloquium at University College London's Faculty of Laws (1-2 July 2013); I thank participants for their feedback.

¹ This assumption, which underpins the current law and the child protection threshold for intervention, is itself open to debate insofar as it arises from the acquisition of legal parental status at birth. Dwyer, for example, argues that additional hurdles should be imposed on all parents seeking to acquire legal recognition of the parent-child connection: see Dwyer (2006: ch 8.1).

² For my argument to this effect, see section 2, below.

³ Freeman's (2007b) articulation of such reasons in the context of a rights-based approach is both classic and compelling. For the purpose of my argument, the will and interest theories of rights are taken together as 'rights-

‘best interests’ or welfare perspective, or by focusing on the duties adults owe to children. These three types of approach should be taken together for this purpose because, I argue, they are simply tools – language descriptors, ways of framing individual considerations, processes and frameworks – for working with the same substantive content. Once we have agreed upon the reasons why it is important to treat children as a special case, we need to assess which of these three ways of interacting with the substantive content of decisions affecting children makes achieving these aims most likely. It is the substantive outcome for affected children that holds critical importance. Which approach we prefer or emphasise (where multiple approaches co-exist in any particular context) should thus depend on how well it guides decision-makers towards or makes more likely better outcomes for affected children.

After briefly outlining why current conceptions of children’s rights cannot meet this test, I explain why a welfare or ‘best interests’ approach⁴ is no better suited towards achieving this end.⁵ The remainder of the chapter explores the potential for a duty-based approach. I argue that duty can have three roles: as a tool to give specificity and resolve conflicts in current rights- and welfare-based decision-making; as a theoretical framework, focused on the decision-maker; and as part of the justification for adopting a virtue-inspired understanding of the aim for legal decision-making affecting children – to enable children to flourish on their own terms. I conclude by exploring the practical implications of a duty-based argument and discuss three key examples, namely the Court of Appeal’s decision in *Re A (Conjoined Twins: Surgical Separation)* [2001] 1 Fam 147, the United Nations’ Convention on the Rights of the Child (20 November 1989, 1577 U.N.T.S. 3 [UNCRC]) and private law disputes concerning children.

2. Children as a ‘Special Case’

based’ approaches insofar as they are both ways of trying to articulate what it means to say that children have children’s rights. This is not to suggest that the differences between the theories are irrelevant, just that they both, even in modified form, fail to present a coherent vision of children’s rights, as I have argued elsewhere: Ferguson (2013).

⁴ For present purposes, ‘best interests’ and the ‘welfare principle’ may be treated as interchangeable. This view has been endorsed judicially. See, for example, *Re A (Male Sterilisation)* [2000] 1 FLR 549, Thorpe LJ.: 560, cited with approval: *Portsmouth NHS Trust v. Wyatt* [2005] 1 FLR 21, Hedley J.: [26]; *Re A (Conjoined Twins: Surgical Separation)* [2001] 1 Fam 147, Walker LJ: 242H. Only where I use ‘welfare’ or ‘welfare-based approach’ to reference the framework for decision-making is it interchangeable with the ‘welfare principle’; otherwise, it may also refer to individual competing considerations operating within a different framework.

⁵ This includes the rejection of a relational welfare approach, such as that argued for by Herring (2005) and Herring and Foster (2012).

In this section, I outline what it means to see children as a ‘special case’ and present an account of the justification for approaching the legal regulation of children on the basis that they are a special case.

‘Special Case’ Defined

Seeing children as a ‘special case’ means prioritising children’s interests over those of other parties as recognition of children’s unique position in society. This 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.

The s. 1 Children Act 1989 ‘welfare principle’ assumes children are a special case. Viewing the child’s ‘best interests’ as the only lens through which to problematise complex factual circumstances entails a prior decision that the importance of the context for the child merits determining the issue with the impact on the child as the sole concern. Competing counter-arguments have necessarily been dismissed except to the extent that they can be expressed in terms of the child’s ‘best interests’. As expressed in terms of the oft-cited dicta of Lord MacDermott in *J v. C* [1970] AC 668, the ‘welfare principle’:

connote[s] a process whereby when all the relevant facts, relationships, claims and wishes of the parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child’s welfare (710H-711A).

This holds true even to the extent that the welfare assessment is contextualised rather than, as is often argued, atomistic (see section 4, below).

In relation to rights-based arguments, the idea of seeing children as a special case is evident in the contrast I draw between ‘rights for children’ and ‘children’s rights’. The former comprise fundamental human rights that apply equally to all individuals, children and adults alike; thus, ‘rights for children’ do not treat children as a special case. ‘Children’s rights’, however, employs the language of rights to recognise children as a special case; for children’s

rights, it is critical that the rights-holder is a child (Ferguson, 2013: section 2).⁶ For this reason, re-evaluating the value of children's rights leaves the role for fundamental human rights unaffected. This is significant given that, in practical terms, fundamental human rights have achieved much for children.

It is interesting to ask how we might conceptualise rights protected by the European Convention on Human Rights (ECHR) in this regard. Children are only rarely explicitly mentioned in Convention Articles. A purposive reading of Articles 1 and 14 together, however, means that they are seen as possessing ECHR rights just as adults; children thus have 'rights for children' under the ECHR. In this sense, the ECHR does not on its face see children as a special case. However, it is important to distinguish between 'no conflict' and 'conflict' scenarios as, in its application by the European Court on Human Rights ([ECtHR]) and domestic courts, the ECHR may be employed in a way that assumes children are a special case, whose interests are to be prioritised over those of others.

In a 'no conflict' scenario, the only ECHR rights at stake are those of the affected child or children. In relation to the physical punishment of children, for example, the ECtHR's decision in *A v. UK (Human Rights: Punishment of a Child)* [1998] 2 FLR 959 employed Article 3 of the ECHR to provide greater protection to children than that recognised under domestic law, which the UK government itself conceded ([19]). The requirement that the ill-treatment reach a minimum level of severity in order to fall within the scope of Article 3 ([20]) applies to children and adults alike, though the Court does specifically refer to the entitlement of 'children and other vulnerable individuals, in particular...' to state protection from serious violations of personal integrity ([22]). Yet, this is insufficient to suggest the prioritisation of children's interests, particularly when taken together with the ECtHR's interpretation of Art. 3, which views some physical punishment of children as permissible. But this is not to say 'rights for children' cannot trigger improvements for children's position in society. Prior to the hearing, the UK government undertook to reform the law ([33]). In addition to featuring prominently in the debate over the

⁶ Freeman (2006: 89; 2007b: 7) disagrees, seeing children's rights as human rights or, in the terminology used here, seeing 'children's rights' as identical with 'rights for children'.

The theoretical basis of 'human rights' is itself now subject to much discussion. Citing Raz, Waldron notes that 'analytically, the whole field is a bit of a mess. The question is not: What does the 'human' in 'human rights' really mean? The question is: what is the more convenient and illuminating use to make of the term in this context?' (2013: 21, emphasis in original). Thus, we should not be surprised at the difficulties of providing a coherent theoretical account of children's rights, with its additional complicating aspect of claiming to focus on the child as rights-holder in a particular child-centred way. Indeed, this may be impossible.

ultimate shape of s. 58 of the Children Act 2004, those in favour of both absolute prohibition and the compromise position ultimately enacted in s. 58 drew on aspects of the ECtHR's reasoning in relation to Article 3 generally and in *A v. UK* in particular (*Hansard*, 2004).

In a 'conflict' scenario, however, the child's ECHR rights compete against either other rights of others or other rights of their own. If the latter, there is a sense in which the conflict is illusory as, properly understood, only one of the child's rights would extend to resolve the issue in question. If the former, and the child's rights are seen as having priority, these rights might be best conceptualised as having acquired the status of 'children's rights' rather than remaining 'rights for children'. For that to be the case, however, children's rights would need to be preferred as the presumptive starting-point, rather than only in the outcome of the balancing exercise.

Rather than clearly evolving over time, the ECtHR's reasoning is currently best understood as inconsistent on this point. In *Johansen v. Norway* (1997) 23 EHRR 33, the Court suggested that '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' ([78]). By contrast, in its later decision in *Yousef v. The Netherlands* (2003) 36 EHRR 20, the Court expressed the relationship differently, reasoning that 'in judicial decisions where the rights under art 8 of parents and those of a child are at stake, the child's rights must be the paramount consideration. If any balancing of interests is necessary, the interests of the child must prevail' ([73]). In *Neulinger v. Switzerland* (2012) 54 EHRR 31, the ECtHR characterised children's interests as being 'the primary consideration', though referred to the Preamble of the Hague Convention on the Civil Aspects of International Child Abduction (25 October 1980) in which children's interests are described as being of 'paramount importance' ([134]). Most recently, in *YC v. United Kingdom* (2012) 55 EHRR 33, the Court stressed that 'the best interests of the child are paramount' when considering terminating familial ties via adoption ([134]).

Taking the case law together, it may be that the Court is coming to distinguish more clearly between a stronger prioritisation in the public law context compared with more significant balancing in the private law context; as yet, the Court has not explicitly articulated this view. The distinction between the stronger and weaker views of the role for children's interests is not just one of extent, but also of kind. The *Johansen* reasoning prioritises children in terms of their welfare in the process of the balancing exercise; in this way, it treats children as

having ‘rights for children’ only. The *Yousef* court, however, prioritises the child’s rights as a starting-point, and presumptively in any balancing exercise, inferring that they should be seen as having ‘children’s rights’. Even this view of the reasoning in *Yousef* must be approached with caution, however, because the Court does not frame its consideration of child-oriented concerns in terms of rights alone, but also adopts the language of interests. Yet the distinction between the two approaches is important to the extent that only the latter, *Yousef*, perspective views children as a special case. If we do not accept there is sufficient justification for seeing children as a special case, we have reason to prefer an ECHR approach, more precisely a version of the ECHR approach that prioritises children only in the outcome, after the weighing of ‘rights for children’ against other competing rights claims.

The Justification for Recognising Children as a ‘Special Case’

Can we justify the assumption within the s. 1 Children Act 1989 ‘welfare principle’ and the perspective inconsistently adopted by the ECtHR on conflicts between ECHR rights that children are a special case? There has been a shift in the academic literature away from an assumption that a consensus for prioritising children meant that there was no need to explore justifications (Reece, 1996: 270).⁷ Some more recent writings question and challenge the nature and extent of the preference for children’s interests. Gilmore and Bainham, for example, argue that ‘[i]t is certainly open to question whether children’s interests should always be given priority’ (2013: 326).

There are two significant theoretical objections to treating children as a special case: first, that childhood is a social construct, hence incapable of comprising a justifiable class of individuals whose interests ought to be prioritised over those of others; second, that there is a strong argument from equality that all individuals’ interests should be given equal consideration and the arguments to justify derogation from such equal consideration are inadequate.

The first concern recognises that, if the distinction between childhood and adulthood is artificial, it cannot support a theoretically sound argument for privileging children. Whilst the

⁷ Dwyer suggests otherwise, arguing that, historically, children have been seen as inferior in social and moral status (2011: 1). Writing in the context of US law, he extends this to the ‘best interests’ principle, suggesting it governs rarely and that, when it does, it frequently masks the predominance of adult interests (2011: 191). In respect of the domestic position in England and Wales, however, his characterisation represents a minority perspective.

existence and embracing 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. The response lies in distinguishing between the definition of childhood and the underlying concept. At the core, childhood as a concept may justify being treated as a special case even if the definitional representation of that for legal purposes is constructed.⁸ If the construction is based on proxies for the conceptual content of childhood, it is itself justifiable. If it is arbitrary, either because the intended proxy is not or is no longer accurate or because the definitional boundary has been drawn based only on other concerns, such as administrative efficiency, that lack of justification 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 more faithfully to serve as a proxy for the underlying concept.

Age is a critical example of the definitional construction. There are both general definitions of childhood based on age and specific age-based rules for particular contexts. Section 105(1) of the Children Act 1989 contains the latter and defines a ‘child’ as ‘a person under the age of eighteen’, excepting Schedule 1 financial relief for children. If the age of 18 represents a sufficiently close proxy for the conceptual idea of childhood, it is justifiable; if not, it might require reform, either generally or in particular contexts, but that does not undermine the conceptual basis of childhood. I return to the concept of childhood below, as that is what underpins the special case of children’s interests.

The second theoretical concern is an argument from equality. 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’ (1997: 2). Yet, as they recognise, equal consideration does not mean identical outcomes: ‘[T]wo people can receive equal moral *consideration* without having exactly the same package of moral rights and duties’ (1997: 2; emphasis in original). In her criticism of the ‘welfare principle’ in English law, Reece

⁸ Tobin draws a similar distinction in relation to the UNCRC. 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 (2013: 400-401). Elsewhere, however, Tobin appears to suggest that the socially constructed aspect of childhood is part of its justification, contending 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’ (2013: 396). Taking his two remarks together, it is not clear whether he would agree with my suggestion that the socially constructed aspect of childhood does not perform a normative function, though it may – as a proxy for conceptual aspects – reflect one.

argues that there is a ‘fallacy [of] equat[ing] priority with protection’ (1996: 277). Once we recognise 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 (1996: 278-279; cf. Dwyer (2011: 12)). Two issues arise from this observation: First, is it unjustifiable to do other than give equal weight to all parties’ interests? Second, does treating children as a special case require us to give unequal consideration to their interests or might it be compatible with equal consideration of all parties’ interests? My answer to the latter means that there is no need to consider the former.⁹ Dwyer notes:

Because 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 (2011: 14).

For that reason, we need to be cautious in concluding that our approach does not demonstrate equal consideration. As Brennan and Noggle explain,

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 (1997: 2).

Indeed, I suggest that we do not need to have unequal consideration for children’s interests in order to see them as a special case; we can prioritise children’s interests in a way that does not fall foul of this equality concern. Complying with the equal consideration constraint means that

⁹ By contrast, Dwyer (2011) presents a case for prioritising children’s interests in the sense of giving them unequal – greater – consideration compared to the consideration given to the interests of others. 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. In arguing against the ‘egalitarian impulse of modern liberalism’ (143), however, a key contention is that unequal consideration ought to at least ‘shake us loose finally from traditional assumptions of children’s inferiority’ (143). In other words, excessive correction in theory should lead to moderate, justifiable, correction in practice. Given this aim is based on a current regime that views children as inferior, this argument may not be directly applicable to the English context where excessive correction via unequal consideration in theory may lead to unjustifiable, unequal, outcomes in practice.

our approach to recognising children's interests is compatible with fundamental human rights. Translating equal consideration into outcomes leads to prioritising children's interests because 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, 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'.

Recent academic proposals for law reform generally do not treat children as a special case in the way that I suggest is envisaged by the 'welfare principle' and 'children's rights'. Eekelaar argues for a 'least detrimental alternative' approach to the process of decision-making in contexts currently governed by the welfare principle. When discussing his qualifications to this approach, he distinguishes between children's interests being 'privileged' and children's interests being 'given priority' (Eekelaar, 2002: 244). As a result, 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 (244). 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 (244). Eekelaar does not believe it necessary to see children as a special case in order to explain this privileging. In respect of children's rights in particular, he suggests that they:

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 (249).

However, I would argue that even the privileging in the weighing of competing interests is hard to justify if we do not see children as a special case. On Eekelaar's account, 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 to be applied to situations of detriment for children. The distinction he draws between privileging and prioritising the child's interests is one between

allowing the weighing at all and not. Choudhry and Fenwick similarly argue for a ‘parallel analysis’ approach (2005: 481) that starts by seeing children’s and adults’ interests ‘on a presumptively equal footing’ (2005: 471, 479). Making use of Eekelaar’s language, they suggest that children’s interests would be ‘privileged within the processes of reasoning’ (2005: 485). Whilst the distinction between ‘privileging’ and ‘prioritising’ is thus an important one, I suggest its significance relates only to the *extent* to which children are seen as a special case, rather than, as Eekelaar’s reference to children’s rights as people’s rights implies, to whether they are a special case *at all*.

At this point, it is important to distinguish the two ways in which we prioritise children’s interests: first, by providing children with additional legal protection to that available to others; second, by prioritising children’s interests in conflicts with other parties’ interests. The compatibility with equal consideration is most straightforward where children are being afforded additional recognition of rights and interests in law. For example, we recognise that all individuals are vulnerable and are equally concerned about the vulnerability of all, but there are certain contexts in which the child’s vulnerability is greater than that of adults. Article 24 of the UNCRC provides a helpful illustration. It recognises 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’ (para. 1). Yet children are particularly vulnerable to the imposition on them of ‘traditional practices prejudicial to ... health’ (para. 3), so their interests are specifically recognised 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 is a way of implementing *equal* consideration.

Compatibility with equal consideration is more difficult where children’s interests are being prioritised in conflicts with other parties’ interests. The ‘welfare principle’ might be best seen as a framework for decision-making that prioritises children’s interests in conflicts with those of others. It does not fall foul of the equal consideration concern, however, 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 prioritised. As a result of this recognition of the need to prioritise, 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 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 (1996: 281, 285).

The foregoing makes clear that what becomes critical are the factors that, when approached with equal consideration for all parties’ interests, necessitate prioritising children’s interests. These factors can be identified within the concept of childhood. I consider one here: the vulnerability of children,¹⁰ by which I mean the lack of capacity, means and opportunity for children to protect their own interests. This idea is reflected in the UNCRC’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’ (2013: 401). Whilst vulnerability can be empirically demonstrated, what is critical is that we are entitled to assume that 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.

Herring acknowledges a role for vulnerability, but does not see it as capable of justifying treating children as a special case. He contends that ‘[t]he law in its treatment of children based on vulnerability exaggerates the vulnerability of children and exaggerates the capacity of adults’ (2012: 250). Beyond suggesting that everyone is vulnerable (2012: 253, 257), he draws on the interdependency of caring relationships to conclude that ‘it is wrong to regard [children] as especially vulnerable’ (2012: 262). I disagree; whilst we can redefine vulnerability to include the complex ways in which particular groups of adults, and adults in general, are also vulnerable, that does not eliminate the unique vulnerability of children. Indeed, Reece notes – in the course of her argument against treating children as a special case – that ‘[i]t is self-evident that, as a general rule, children need more protection than adults’ (1996: 277). In fact, it is that need for greater protection that she believes has confused academics into assuming children’s interests need to receive unequal consideration from adults’.

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

¹⁰ There may be other aspects of the concept of childhood that have a similar impact on the translation of equal consideration into the legal recognition and regulation of children’s interests.

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 illustrates the distinctive nature and extent of their vulnerability as a class. The extent of these 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 recognising children's intended and actual increasing capacities and children's significant and intimate dependence on adults for large measures of their well-being. When equal consideration of all parties' interests is applied to the concept of childhood, we are entitled to assume that the unique character of the vulnerability is possessed by all children. As a consequence, we are justified in adopting a legal approach that prioritises children's interests. Which legal approach best recognises this priority becomes the key issue.

3. Three Approaches to Treating Children as a 'Special Case', Criteria for Preferring One Approach, and the Rejection of 'Children's Rights'

Three Approaches – Three Ways to Organise the Same Content Considerations

As concepts, children's rights, welfare and duties owed to children all enable us to treat children as a special case and prioritise their interests. As I have argued elsewhere (Ferguson, 2013: section 6), these approaches do not exist discretely. This is an important point as it allows us to see the potential for concepts other than children's rights to give effect to the reasons for thinking that children have children's rights. Self-evidently, these three concepts are distinctive language descriptors. Yet when each is employed as a framework and/or used to articulate individual considerations within a broader framework for decision-making about children, they work with the same substantive content.

For example, all three concepts incorporate consideration of the child's autonomy. Within a welfare framework, the nature and extent of the child's developing capacities for decision-making is a factor specifically referenced in the welfare checklist in s. 1(3) of the Children Act 1989. In the children's rights context, it serves as the basis of the child's right to express their views in matters affecting them contained in Article 12(1) of the UNCRC. If we

focus on duties owed to children, Article 12(1) takes on a different character with the emphasis on the requirement that states assure that right to capable children. Article 12(2), which seeks to secure the implementation of the state's duty to assure the child's right to be heard, is similarly framed in terms of duty – that of the state to provide the child with the opportunity to be heard in judicial and administrative proceedings affecting them.

This overlap in content is inevitable, as the concepts of children's rights, welfare and duty seek to capture deeper moral concerns that are inherent within children's unique position in society. Further, there is also significant overlap in the way that these concepts articulate the framework for decision-making and individual considerations to be included in the analysis. In situations involving a conflict of rights, typically parents' rights and children's rights, a rights-based framework cannot determine outcomes without drawing on welfare-based reasoning. In relation to the application of the ECHR, for example, this is evident in the role given to Article 8(2) in determining residence and contact disputes in which the parties rely on their Article 8(1) rights.¹¹ Duties are also intrinsic to the successful implementation of children's rights as evident in the previous reference to Article 12 of the UNCRC. Reference to children's rights has also been used to ascribe a particular role for the child's autonomy within the welfare-based framework of the Children Act,¹² though the same outcome has also been achieved without invocation of the language of rights.¹³

With a rights-based framework, the interplay with other concepts is inevitable; a welfare-based framework need not specifically integrate rights. The need for domestic compatibility with the ECHR may mean implicit reference to rights under the current law and duty-based reasoning remains a necessary part of implementation. This co-mingling between concepts (in both working with the same substantive content and being integrated together into decision-making frameworks) highlights that we cannot assume that the reasons for viewing children through the lens of children's rights are specific to that concept. In fact, they may be better seen as reasons for treating children as a special case more generally. The three concepts of children's rights, welfare and duty compete only in the sense of emphasis. Once we have decided which of

¹¹ As I discuss in section 2, above, the ECtHR's jurisprudence is inconsistent in terms of how welfare is employed to weigh children's rights and interests in the balance. Cf. *Hokkanen v. Finland* (1994) 19 EHRR 139; *Johansen v. Norway* (1996) 23 EHRR 33; *Yousef v. Netherlands* [2002] 3 FCR 577 (ECtHR); *Kearns v. France* [2008] 1 FLR 888 (ECtHR). Fortin (2009: 70-71) also provides a neat discussion of the interpretive point.

¹² See, for example: *Gillick v. West Norfolk and Wisbech Area Health Authority* [1986] AC 112; *Mabon v. Mabon* [2005] EWCA Civ 634 [Mabon].

¹³ *Re R (A Child)* [2009] EWCA Civ 445 [Re R].

the reasons for seeing children as a special case are important to us, we have reason for preferring one form of conceptual emphasis.

Reasons to Prefer One Conceptual Approach

The justification for treating children as a special case affects the criteria according to which we should evaluate the various competing approaches to the legal recognition of children's interests and regulating of decision-making about children. These criteria need to reflect the way in which children are a special case.

Elsewhere (Ferguson, 2013), I have argued that there are three types of criteria according to which we can evaluate the success or failure of a particular approach to prioritising children's interests. These comprise the expressive aspect of employing a particular concept or conceptual framework, the process of decision-making required by that conceptual approach and the extent to which, if at all, that conceptual approach impacts on outcomes reached. Whilst the rights and children's rights literature I discuss (2013) treats the three types of reason as separable, I suggest that the first two types of criteria – expressive and procedural – are contingent on the value of the third – the impact on substantive outcomes. As a result, it is the potential for ensuring the better outcome from the child's perspective that should determine which approach or approaches we prefer.

These criteria also embrace the justification for treating children as a special case. When the language of rights is employed, the expressive aspects highlight the equal consideration to children and adults; use of the 'welfare principle' and children's rights, however, makes clear that applying that equal consideration to the conceptual content of childhood may lead to differential outcomes. Outcome-oriented reasons for preferring one approach to another are grounded in the conceptual core of childhood to which equal consideration has been applied. The extent to which the outcome satisfactorily recognises children's vulnerability, for example, is taken into account here. Process-oriented criteria can be distilled either into expressive aspects which, depending on the particular procedural feature, highlight equal consideration or the conceptual aspects of childhood, or into the potential to impact on outcomes, hence draw on the factors within childhood that require equal consideration to lead to differential outcomes.

The Rejection of Children's Rights as the Preferred Approach

Before examining in detail the potential for a welfare-based approach to regulating decision-making affecting children, I briefly outline my argument, made at greater length elsewhere (Ferguson, 2013), as to why children's rights cannot successfully withstand evaluation against my three criteria.

In this context, the expressive aspect refers to the value of the language of children's rights. More particularly, that usually the language of children's rights recognises the dignity of children, a key aspect of Freeman's (2007b: 7) argument as to the value of children's rights.¹⁴ The procedural aspect refers to the way that decisions are reached, whether in relation to the framework used and/or the content given to that the framework. The idea is that reasoning in terms of children's rights in at least one of these two senses is preferable to reasoning any other way. I suggest that these two types of reason depend on the third, final type of reason: that thinking of children in terms of children's rights improves outcomes for children.¹⁵ Without better outcomes or the likelihood of better outcomes, the signalling and process value of thinking of children in terms of children's rights loses its normative force.¹⁶

What we might mean by 'better' or 'improved' outcomes is open to question, yet we cannot escape the need for normative judgment.¹⁷ For the purpose of my argument, I understand this to have two components. First, this is a necessarily child-centred evaluation. In other words, whether the outcome is better than the outcome that would have been attained under an alternative approach falls to be assessed from the child's perspective. Second, the child's perspective entails maximising opportunities for that child's future subject to limits imposed by the child themselves directly commensurate with their developing autonomy. The broad idea

¹⁴ But that dignity explanation does not save it from being contingent upon improved outcomes.

¹⁵ Freeman (2007b) does not categorise arguments as I do, seeing each as powerful argument in favour of thinking of children as rights-holders.

¹⁶ Indeed, Baroness Hale (2013: 13), speaking extra-judicially, comments that:

the family judiciary, and the family justice council, have taken the view that, even though children may be encouraged to come to court and see where their futures will be decided, this is more in the nature of a public relations exercise – reassuring the child that she is seen as a real person and enabling her to learn more about who goes on in court – rather than an exercise in helping the judge to make the right decisions.

¹⁷ For broader discussion about the inevitability of normative judgments in legal reasoning, see Singer (2013: especially 8, 11).

here is not controversial,¹⁸ though the firm requirement directly to reflect the child's capacity might be to the extent that it places more weight on autonomy than leading accounts of children's rights (Eekelaar, 1992, 1994, 1998; Freeman, 1983, chs 2-3)¹⁹ and 'best interests'.²⁰ As autonomy is being taken seriously, a high threshold for capacity is applied.²¹ But, once satisfied, the child's decision is to be respected. Focusing on maximising opportunities for the child's future also ensures a strong focus on empirical evidence about what contextual circumstances benefit children, in what ways, and to what extent when compared with alternatives. This practical enquiry is critical once we accept that the choice between children's rights, welfare, and duties is, in actuality, an assessment of the correct emphasis to take to the substantive considerations that underpin decision-making that affects children.

I argue that there is no good evidence that children's rights, at least as currently understood, and as expressed as the content of a decision-making exercise, the framework within which decisions regulating children are made, or both *necessarily* leads to better outcomes for children (Ferguson, 2013: sections 4-5). In fact, there is no evidence that children's rights *necessarily* even render more likely better outcomes for children. There are some cases, such as the Court of Appeal's decision in *Mabon*,²² in which the court itself suggests that it would or might have reached a different decision without the additional role for children's rights within the welfare-based framework where exercises of autonomy are at stake. But it is not clear that there was anything in the reference to rights that made that difference; the content ascribed to it might have, but that was not a necessary consequence of using the term 'children's rights'. It is not possible to make the reference to children's rights truly child-centred in the way that a theory of children's rights would require. This means that any improved outcome has in fact come through a misunderstanding that there exists this phenomenon called 'children's rights' that requires a particular outcome. The recent Court of Appeal decision in *Re R* makes this clear; the

¹⁸ In the sense that the child's wishes and feelings are specifically referenced in s. 1(3)(a) of the welfare checklist in the Children Act 1989 and Article 12 of the UNCRC, as well as featuring as a key element of the leading theories of children's rights such as Eekelaar's (1992, 1994, 1998) 'working principle', which includes 'autonomy interests' as one of children's three types of interests.

¹⁹ Freeman (1997b:38) sets the limit as follows: 'The question we would want to ask ourselves is: what sort of action or conduct would we wish, as children, to be shielded against on the assumption that we would want to mature to a rationally autonomous adulthood and be capable of deciding on our own system of ends as free and rational beings?'

²⁰ Article 12 of the UNCRC, for example, has never been interpreted as requiring that a child's autonomous decision be determinative.

²¹ For discussion of what considerations this might include, see Ferguson (2005: Part 4).

²² Indirect evidence can also be garnered from cases decided outside of the s. 1 Children 1989 context, such as *Re Roddy* [2003] EWHC 2927 (Fam).

court here employed a welfare-based approach to achieve the same respect for autonomy and an improved outcome in that child-centred sense.²³

In the absence of evidence that a children's rights perspective makes better outcomes more likely, it is prudent to ask if we can gain benefits in relation to one or more of the three aspects of recognising children as a special case by instead emphasising either of the other conceptual approaches. The reasons why would like to think of children in terms of children's rights are important, but the present understanding of the concept of children's rights is unable to attain these goals. In this way, the force of Freeman's arguments in favour of taking children's rights seriously might be better interpreted as both justification for seeing children as a special case and a call to explore non-rights based alternative approaches to enable the aims of seeing children as a special case to be more readily fulfilled. Arguments in favour of a welfare-based approach also focus on similar expressive and procedural benefits.²⁴ This further illustrates the value of understanding the three competing conceptual approaches for seeing children as a special case as simply three ways for placing normative emphasis on the same substantive content.

4. Difficulties with Welfare as the Preferred Approach

In English law, many decisions that affect children are made within a 'best interests' framework under the 'welfare principle' set out in s. 1 of the Children Act 1989. If a welfare-based approach were to be emphasised, it would entail either integrating the 'welfare principle' with the approach taken in other contexts in which s. 1 does not apply²⁵ or developing a coherent account that justifies emphasising welfare in some contexts and children's rights and duties in others.

²³ The majority in the Supreme Court of Canada's decision in *AC v. Manitoba (Director of Child and Family Services)* 2009 SCC 30 presented an approach to respect for children's autonomy within a welfare-based framework that appears to go further than the rights-within-welfare reasoning in *Gillick*. Justice Abella explains how '[t]he "best interests" standard operates as a sliding scale of scrutiny, with the adolescent's views becoming increasingly determinative depending on his or her ability to exercise mature, independent judgment' ([22]).

²⁴ See, for example, Herring (2005: 168), who stresses the symbolic message it sends to use the welfare principle; the impact its use can have on the procedure adopted by the court; the significance of the language adopted.

²⁵ Excluded contexts include the decision whether to order genetic testing in a paternity dispute. Yet, the child's 'best interests' provides the basis upon which the court may decline to hear such an application: s. 55A(5), Family Law Act 1986. Ward L.J.'s comment in *Re H (Paternity: Blood Test)* [1996] 2 FLR 65 that, 'every child has the right to know the truth unless his welfare justifies the cover up' (82) reflects the current general approach well. Our

The current welfare-based approach is not without its critics.²⁶ I argue that there are two types of criticism against welfare-based approaches: on the one hand, those that should be seen as related to the *conception* of ‘best interests’ currently embodied in the s. 1 Children Act 1989 ‘welfare principle’; and on the other, those that are better seen as deeper, *conceptual* reservations about a welfare-based approach. These different types of concern are blended together in the existing literature but there are two reasons it is important to keep them distinct. First, it might be that only the former, but not also the latter, are capable of being remedied. Second, in specifically focusing on conceptual concerns, we can test the value of exploring alternative actual and potential welfare-oriented accounts other than the current conception of the ‘welfare principle’.

Generally, the response to criticisms of ‘best interests’ and the ‘welfare principle’ is either to advocate for a move to regulating children in terms of children’s rights²⁷ or, less commonly, to argue that the suggested defects of the ‘welfare principle’ can be remedied through modification of the principle itself.²⁸ I reject the first response because any argument for shifting to a rights-based approach assumes that welfare and rights are conceptually discrete. At first glance, there are certain differences between the s. 1 Children Act 1989 conception of welfare and the ECHR conception of a rights-based approach, particularly: the absence of an explicit balancing exercise under s. 1; the starting-point to the analysis; and whether the prioritisation of children’s rights or interests depends on their nature and seriousness.²⁹ However, as discussed above, these differences do not prevent both approaches from reaching the same outcome. This is because, at the conceptual level, it is a ‘contradiction in terms’ (Fortin, 2009: 26) to see rights and welfare as ‘diametrically opposed’ (Fortin, 2009: 25, discussing the role for the child’s wishes in both approaches). Fortin explains:

conceptual understanding of ‘welfare’ is critical for how we approach legal decision-making in such cases, especially because there is no guidance beyond the language of welfare and ‘best interests’ such as that offered in s. 1 Children Act 1989 to aid us in its interpretation and application.

²⁶ In relation to the ‘welfare principle’ in s. 1 Children Act 1989, as well as more theoretical concerns, see, for example, Reece (1996). In relation to ‘best interests’ in Article 3 UNCRC see, for example, Freeman (1997a, 2007a, 2011).

²⁷ Choudhry and Fenwick (2005), for example, ground their argument in the context of the current law rather than the broader conceptual debate. They argue for a shift from a s. 1 Children Act 1989 framework to one based squarely in ECHR rights. Reece (1996) argues for the replacement of the s.1 Children Act 1989 exercise with a framework that balances the interests of the affected parties. Eekelaar (2002) proposes moving to a similar balancing approach, but one which privileges children’s interests within the balancing exercise.

²⁸ Herring (1999, 2005), for example, proposes shifting to a ‘relationship-based’ welfare model, discussed below.

²⁹ For discussion of the differences in approach, see Choudhry and Fenwick (2005).

The rights contained in the European Convention are formulations, albeit sometimes in awkward phraseology, of aspects of the good life, not the bad and should be interpreted in a way that enhances a person's life. Admittedly, a person may suffer a deficit in well-being if his or her rights are displaced by those of another, but no concept of rights can prevent the occurrence nor can the courts always balance the rights of one person against another in ideal fashion.

Developing this notion, and adopting an interest theory of rights as a basis for the proposition that children are rights holders, it follows that a child's welfare cannot be inconsistent with his rights (Fortin, as cited in Fortin, 2009: 26).

If the fundamental distinction is one of emphasis rather than discreteness, the first response should nevertheless be rejected because, as I have outlined above, there is no coherent case to be made that regulating children in terms of children's rights either improves or makes more likely improved outcomes. Given that I have already rejected the possibility of the first response, it remains to reject the latter. This requires a brief exploration of the criticisms levelled at welfare-based approaches, in order to assess whether the best way forward is in fact to emphasise a modified welfare-based approach to legal regulation affecting children.

Criticisms of the Current Conception

Perhaps (somewhat ironically) the criticism that has attracted most academic support is that the s. 1 'welfare principle' is too focused on the particular child before the court. Critics are not suggesting that the principle is too child-centred – surely, that is precisely what we would want – but merely that other parties' interests are unjustifiably significantly or entirely excluded from affecting the outcome achieved. This is most commonly expressed as a charge that the principle is too 'individualistic' (e.g. Herring, 1999)³⁰ or 'atomistic' (e.g. Herring and Foster, 2012: 491). This represents a criticism of the current conception, rather than a conceptual concern, because there is nothing within the idea of a welfare-based approach that requires the exclusion of other parties' interests in this way. All individuals necessarily exist within a context.³¹

³⁰ He argues that, under the current law, '[t]he child and his or her welfare are viewed without regard for the welfare of the rest of his or her family, friends and community. The claims of the other members of the family and of the community are only relevant to the extent they directly affect the child's welfare' (unpaginated).

³¹ I have discussed this in relation to a different legal issue: Ferguson (2012, especially section 6).

An overlapping substantive concern is that the principle takes too narrow a view of the child's welfare, which would include insufficient consideration of the significance of particular adult relationships for the child's welfare. The issue is to what extent and in what manner the decision-making framework accommodates the child's context. On its terms, the language of s. 1 and the limited reference to the child's parents and caregivers (s. 1(3)(f), Children Act 1989) invites the 'atomistic' critique. In practice, what this would mean is that:

if one option would slightly improve the child's welfare but would have a disastrous effect on the parents, while the other option would slightly harm the child's welfare but would be greatly beneficial to the parents, under the paramountcy principle the former option should be taken (Reece, 1996: 275).

But how often does that actually occur in practice? Would the child's interests really be read so narrowly? It is certainly true that s. 1 need not be interpreted so narrowly. The child's s. 1(3)(b) 'emotional needs', for example, might readily accommodate significant attention to the parents' well-being. Lord Justice Munby made clear this potential breadth of contextual understanding in his analysis in *Re G (Children)* [2012] EWCA Civ 1233. In his reflective, philosophically-rich judgment, Munby L.J. proposed that:

evaluating a child's best interests involves a welfare appraisal in the widest sense, taking into account, where appropriate, a wide range of ethical, social, moral, religious, cultural, emotional and welfare considerations. Everything that conduces to a child's welfare and happiness or relates to the child's development and present and future life as a human being, including the child's familial, educational and social environment, and the child's social, cultural, ethnic and religious community is potentially relevant and has, where appropriate, to be taken into account. The judge must adopt a holistic approach ([27]).

He proceeded to discuss the significance of the child's relationships:

The well-being of a child cannot be assessed in isolation. Human beings live within a network of relationships. ... Our characters and understandings of ourselves from the earliest days are charted by reference to our relationships with others. It is only by considering the child's network of

relationships that their well-being can be properly considered. So a child's relationships, both within and without the family, are always relevant to the child's interests; often they will be determinative ([30]).

Yet, there are natural limits to this contextual approach. It remains child-centred or, rather, it remains an attempt to be child-centred. There is a distinct contextual approach that does not require altruism on the part of the child. Children's interests, interpreted contextually, are intended to take precedence over those of others. As such, we are on a slippery slope if we consider that that includes the child being required to be altruistic, making 'sacrifices' for the benefit of others in the family.³²

We might get to the same outcome in a different way where we can read the child's interests sufficiently broadly to mean that it is genuinely³³ better for them in the longer term or in some larger understanding of immediate benefit. But there is a child-centred dividing line between being able to describe an outcome as in the child's 'best interests', broadly read, and describing it as an 'altruistic' 'sacrifice' on their part.³⁴ Objecting to this dividing line as it applies to how one thinks about the child's context is actually an objection to children as a special case, rather than to welfare-based approaches. Seeing children as a special case, through any of the three currently-available concepts, necessarily entails children's interests taking precedence over parents' interests though, on my account, also necessarily incorporates parents' interests as part of the contextual analysis of the child's position. This is precisely why Reece, who believes that children are not a special case (1996: 276), highlights this concern as part of her argument that the 'welfare principle' is 'regressive' (1996: 302).

More weight should be placed on empirically-grounded arguments about the apparently individualistic or relationally skewed nature of s. 1 determinations. Critical voices suggest both mothers' and fathers' interests are unjustifiably overlooked: Choudhry and Fenwick contend that the 'welfare principle' has 'paradoxically gradually elevated the mother's rights above those of

³² As argued for by Herring (2005); Herring and Foster (2012).

³³ In setting out the 'main virtue' of the 'welfare principle,' Eekelaar explains that 'it would be inconsistent with the welfare principle to make a decision that is *overtly* justified by reference to the way the outcome benefited some *other* interest or interests' (2002: 240; emphasis in original). To the extent that there is a difference, my reference to the genuineness of the benefit to the child is intended to signal that it is a substantive, not semantic requirement.

³⁴ Elster's criticism of the 'best interests' standard as failing sufficiently to accommodate parents' rights and interests, coupled with his acknowledgement that, were the approach modified to have more regard to parents' position, children needed special protection in any balancing between parents' and children's interests (as summarised and discussed in Breen, 2002: 59, 61-62).

the father' (2005: 458); elsewhere, Choudhry *et al* reason that s. 1's 'focus on the child in isolation from those caring for him' (2010: 8) creates a risk of concealing the burdens of caregiving, so that fathers' rights groups can strengthen their arguments for residence and contact by putting them in terms of welfare. In addition, Reece argues that a policy of 'supporting normality *per se*' (1996: 293) has resulted in gay and lesbian parents being treated unfairly in the application of s. 1.

Does the co-existence of these apparently contradictory concerns undermine the weight to be attached to any of them individually? If the 'welfare principle' is being criticised from all sides in terms of the outcomes reached, perhaps that suggests that the question asked may be impossible of uncontroversial resolution, or at least that no particular decision can satisfy everyone. However, as suggested below, even if controversial decisions are inevitable, these critical perspectives may be unnecessarily exacerbated by the process within which the 'welfare principle' operates. Further, one might conclude that the potential for diminishing a large range of parties' interests suggests that the 'welfare principle' is simply 'unfair' in practice (e.g. Eekelaar, 2002: 238).

This last substantive concern is allied to criticisms that focus on the process by which these decisions are reached: that the principle leaves too much discretion for the decision-maker (e.g. Fortin, 2006: 314), which can lead to lazy reasoning (e.g. Eekelaar, 2002: 248) and over-reliance on expert evidence (e.g. Eekelaar, 2002: 248); that there is insufficient transparency in the reasoning (e.g. Eekelaar, 2002: 237; Choudhry and Fenwick, 2005: 471); and that the principle operates as a 'smokescreen' (Reece, 1996: 296) for the underlying basis of the decision made, including subjective decision-making (e.g. Reece, 1996: 273) and judicial bias (e.g. Herring, 2005: 161-162; Reece, 1996: 273). To the extent that these process concerns have weight, they reinforce the potential for substantive exclusion of other parties' interests.³⁵

Rather than focusing on these process concerns individually, we might simply view them as a consequence of or enabled by³⁶ the uncertainty of the 'welfare principle' in practice. If these

³⁵ These process concerns are particularly troubling if they make negotiation more difficult, litigation more likely and resolution more costly. There is no evidence for increased costs or litigation as a result of the current conception of a welfare-based approach to decision-making about children. Further, as Herring notes, 'the legal principles are relatively clear' in relation to residence and contact disputes (2005: 163). Those 'bargaining in the shadow of' the much-criticised 'welfare principle' arguably have no more need to litigate than if the principle were in fact a set of rules.

³⁶ The 'smokescreen' charge provides a good example here, suggesting that only certain types of considerations are appropriate, and that the uncertainty of the 'welfare principle' has enabled it to be used as a smokescreen.

conception-based concerns were the real problem with the ‘welfare principle’, however, further specifying the s. 1 principle in one or more various ways might straightforwardly remedy them and introduce a more certain approach to determining what was best. We might, for example, take seriously Munby L.J.’s articulation of the ‘welfare principle’, discussed above, which would require judges to articulate their understanding of the significance of a wide range of considerations extending beyond those on the s. 1(3) checklist. Or we might make the application of the s. 1(3) checklist mandatory in all circumstances³⁷ or require judges to explicitly work through each and every subsection of the checklist in every case, as Baker J. demonstrates in his judgment in *CW v. NT and another* [2011] EWHC 33: [58-71].³⁸ Given that these appear to be straightforward remedies, it is important to ask why we have not further specified the s. 1 principle. This is particularly because, as Dwyer notes, ‘we should be suspicious of arguments for abandoning the best-interests test that give no serious consideration to the possibility of improving its implementation’ (2006: 239).

Arguably, the critical difficulty is that greater concretisation requires consensus about how to interpret empirical evidence about what is ‘best’ for children of various competing alternatives. The benefits assumed to stem from applying the checklist, benefits which would be extended if the checklist were made mandatory in every case and every item on the checklist required to be explicitly considered, depend on a common understanding of how to both assess each item and weigh them against each other, possibly via an implicit hierarchy of considerations. When Baroness Hale in *Re G (Children) (Residence: Same Sex Partner)* [2006] UKHL 43 outlines the role of the checklist in difficult cases, she assumes that systematic application would have avoided the particular outcome reached below ([39]) and that the checklist and other considerations would be factored in ‘so as to ensure that no particular feature of the case is given more weight than it should properly bear’ ([40]).

³⁷ The checklist currently applies only in the circumstances specified in s. 1(4) of the Act. That said, the court in *Dawson v. Wearmouth* [1997] 2 FLR 629 (EWCA) suggested that the judge hearing an application not covered by s. 1(3) would ‘invariably have regard to the considerations identified in s. 1(3) in his search for welfare as the paramount consideration even if under no specific statutory duty to do so’ (635). This suggests that this particular reform might be of little consequence in practice.

³⁸ However, in *B v. B (Residence Order: Reasons for Decisions)* [1997] 2 FLR 602 (EWCA), Holman J. agreed that it was ‘not always necessary or appropriate for a judge laboriously to go, item by item, through the checklist’ but also suggested that ‘the checklist does represent an extremely useful and important discipline in ensuring that all relevant factors in a case are considered and balanced’ (607-608). Setting aside the potential excess administrative burden of applying a strict interpretation of the checklist in every case, what is the basis of this balancing exercise?

Yet, the unresolved debate over which parties' interests have been unjustifiably neglected in applying s. 1 reveals the current lack of consensus, a problem that becomes self-reinforcing. Failure to work towards agreeing on beneficial outcomes for children undermines the current conception of 'best interests'; the weak conception suggests individualised justice in a way that denies the need for research into generalised or categorised benefits and detriments of particular outcomes. Yet, without that research, we should be careful to trust that decision-makers dispensing individualised justice have appropriately considered and weighed *all* of the right, and *only* the right, factual circumstances.

In addition, specificity requires consensus about the nature of the debate. Van Krieken suggests that, in relation to residence and contact disputes at least, the 'best interests' standard is really about governing disputes between parents, yet:

the belief [is] apparently built into the development of Western family law that it fulfils this function more effectively when such a recognition is never made explicit, and the focus remains on the best interests standard as a proxy or code for that function (2005: 45).

If this is correct, and the dispute is essentially one between parents, we could not straightforwardly incorporate that into a more detailed child-focused 'best interests' assessment. The current 'best interests' discretion adds an extra layer to the analysis, which avoids the need to confront this issue directly. Further, even if we could specify resolution of that dispute between parents, how could the same more specific test also apply to situations which are much more readily seen as truly child-focused? This is especially acute in the debate over whether to grant a s. 8 specific issue order that authorises medical treatment against the wishes of the child and/or parents. This analysis makes clear that it is not uncertainty itself that is the difficulty for the 'welfare principle', but rather the failure to recognise that the concept is normative all the way down. Those normative choices need to be specifically addressed in order to justify any particular conception of a welfare-based approach.

Inherent, Conceptual Concerns

There are two significant conceptual concerns to address: first, that the ‘welfare principle’ is indeterminate (e.g. Reece, 1996: 271, also citing Mnookin; Freeman, 2007a: 2; Todres, 1998: 174, citing Parker), a charge which has received significant attention in the literature; second, that the ‘welfare principle’ is insufficiently or not at all child-centred, an argument that, surprisingly, has received very little attention.

The indeterminacy argument is sometimes blended with discussion of the principle’s uncertainty. Herring, for example, discusses ‘complaints of indeterminacy’ under the heading of ‘uncertainty’ (2005: 161).³⁹ Yet it is important to keep the two charges distinct because only the former is of itself terminal to the viability of the ‘welfare principle’. If the principle is indeterminate, it is impossible to determine its concept and it should be abandoned. If it is merely uncertain, however, it is simply difficult, but not impossible, to give content to the concept. An uncertain ‘welfare principle’ is one that is under-determined. Freeman suggests otherwise, arguing that, whilst the concept itself is indeterminate, one might articulate a particular conception at any one time (2011: 19-20). Similarly, Choudhry *et al* cite a practical response to indeterminacy, noting that court decisions are actually more predictable than often assumed (2010: 7). But, whether set out in precise detail or vague outline, articulating a workable conception in such circumstances only presents the chimera of justifiability because the more specified conception nevertheless lacks a normative basis. A more certain approach without normative underpinning can only be seen as arbitrary.

Is the ‘welfare principle’ conceptually indeterminate? I argue it is, and that the underlying values needed to give content to particular conceptions of the principle are not inherent within the principle itself. Reece discusses the value-laden nature of the principle (1996: 272) but also comments that ‘while everybody agrees that children’s welfare should be paramount, nobody knows what children’s welfare demands’ (1996: 271, citing Cretney).⁴⁰ If the principle were truly value-laden, how could it also be indeterminate? Underlying values might suggest a basis for shaping a particular conception. However, this is not the case for the

³⁹ Similarly, Choudhry *et al* discuss the ‘unpredictable’ application of the principle under the heading of ‘indeterminacy’ (2010: 7).

⁴⁰ The inability to answer this question also underpins a related criticism, namely that the ‘welfare principle’ asks an unrealistic question as it is often impossible to make the order that is best for the child (Herring, 2013: 447). Yet, there is arguably real value in asking what is best, and then implementing as best as we can on the facts. Indeed, when we ask what is best, we may already be thinking in terms of implementable solutions, namely what is best all things considered, rather than what is best ideally. For discussion of this, see Dwyer (2006: 213).

conceptually thin ‘welfare principle’, given content by inherently incommensurable, yet competing, fundamental values.

In her analysis, Breen argues that the ‘best interests’ standard ‘may be regarded as being a weave of social and legal traditions in addition to being an interpretive tool in the analysis of these social and legal traditions’ (2002: 87). The potential for its underlying values to make the principle determinate depends on social consensus over how to reconcile and weight those values. Weakening consensus has made indeterminacy a more significant problem (van Krieken, 2005: 32). As the principle is normative all the way down, this problem extends to the underlying substantive content and our understanding of why children are a special case, hence how to realise that through children’s rights, welfare or duty.

The second important conceptual concern is that the ‘welfare principle’ is either insufficiently or not at all child-centred. This is not an argument that the principle does not sufficiently focus on the child; rather that it does not, and cannot, govern decision-making affecting children from the child’s own perspective. This might seem counter-intuitive to the extent that the child’s position is the sole consideration under the ‘welfare principle’. Yet the outcome of the welfare exercise is determined externally to the child. At best, the outcome is based on the decision-making adult’s reflective and researched estimation as to what is ‘best’ for the child; at worst, the outcome is based on the adult’s assumptions as to what is best, regardless of the particular interests – including the developing autonomy – of the child before them. Yet the danger in the ‘welfare principle’ is not unique: as I have argued elsewhere (Ferguson, 2013), we also have no theoretically coherent way of expressing a children’s rights approach in child-centred terms.

Further, the problem is not just that the ‘welfare principle’ is not child-centred but that, as with current theories of children’s rights, this external aspect of assessing the child’s position is not made explicit. It is for this reason that the conceptual indeterminacy and uncertainty in practice are significant concerns. Whilst suggesting throughout that the outcome is truly ‘best’ for the child because it focuses exclusively on the child, they allow outcomes to be dictated by excessive weight placed on other parties’ interests and/or on only particular externally-preferenced interests of the child, hidden from scrutiny by the smokescreen of ‘best interests’.

Yet, moving to present the ‘welfare principle’ as a non-child-centred approach would be an insufficient remedy. The framework would remain one layer removed from the critical

decision-making exercise. Under an explicitly non-child-centred approach, the parties would argue for their external view as to what outcome would be best for the child, thereby implicitly acknowledging that their view may be influenced by other factors such as what is best for them personally. Giving that role to external non-child-centred factors, however, would make the use of the terminology of ‘best interests’ and the ‘welfare principle’ counter-intuitive. In addition, these arguments then have to be weighed and translated into a single outcome by a decision-maker. How that decision-maker approaches these arguments is the most critical part of making decisions affecting children. Neither the ‘welfare principle’ nor children’s rights provide inherent child-oriented limits of interpretation and application. A duty-based approach focuses directly on this decision-maker, which provides good reason to consider whether a duty-based approach might be a preferable way to structure our analysis of substantive concerns affecting decision-making about children.

5. The Potential for a Duty-Based Approach: The Decision-Maker, Virtue and Flourishing

Three Roles for Duty

I argue that there are three potential roles for a duty-based approach. Individually, or in combination, each is valuable in enabling us to provide the correct emphasis to substantive concerns that underpin decision-making about children. First, duty can be used as a tool, a mechanism, to be applied within the current law to determine how to resolve apparent conflicts of rights and children’s rights; to help apply rights and children’s rights in practice;⁴¹ or to help give certain content and specificity to the welfare exercise. If we cannot determine what ‘best interests’ means in any particular case – which its indeterminacy makes a real issue – we can ask what a virtuous decision-maker would understand it to require on the facts.

⁴¹ In his discussion of the changing role for human rights, Raz stresses the importance of the task of ‘establish[ing] a case for holding others to be under a duty to secure, at least to some degree or in some ways, the right-holders’ enjoyment of the rights’ (2010: 43). He explains that ‘[t]he value of the right to its possessor is its ground. It is that value which justifies holding others to be duty-bound to secure or at least not interfere with the right-holder’s enjoyment of the right, and it is only when such duties exist that the right exists. It exists because it gives rise to such duties’ (2010: 36). Thus, even for rights theorists such as Raz, duty is fundamental and critical to the existence and application of rights.

Second, a duty-based approach constitutes a theoretical framework of itself, squarely focused on the decision-maker and the correlative outcomes for the child that a ‘judicial parent’ would expect to accrue to that child. There is no need for the additional layer of children’s rights or welfare when a duty-based approach is understood in its fullest sense. Given that each approach addresses the same content (hence why rights-based decisions usually reach the same outcome as welfare-based decisions), this makes sense. Preferring duty is thus about preferring this particular way of framing and weighting the content. As individuals making decisions affecting children, parents would be bound by the same duties as judges. The governing legal regime would proceed on the assumption that parents made decisions bound by the duty-based framework, unless or until challenged or otherwise subject to judicial or administrative intervention.

Third, the duty concept provides the purpose of the exercise of a duty-based framework. The nature of the decision-maker’s duty is conceptually linked to a specific understanding of outcomes for children through a virtue ethics perspective. In that domain, the virtuous decision-maker strives to enable the subject of their decisions to flourish on their own – the subject’s own – terms.⁴² We will need to consider and approve of this purported inherent connection between duty and flourishing; if we do, virtue ethics may then assist us in our attempt to establish a framework for decision-making that *necessarily* leads to better outcomes for children.

O’Neill (1998) provides the leading philosophical argument for preferring an obligation- to a rights-based approach⁴³ when considering ethical issues affecting children’s lives. These arguments relate to all three of the ways in which duty may add to our understanding of how legally to regulate children in a way that leads to better outcomes. She reasons:

⁴² In this way, my duty-based approach avoids the apparent conflict between current and future-oriented interests, which Freeman (2007a: 3) considers as a difficulty in relation to ‘best interests’ within the terms of Article 3, UNCRC. Under my duty-based approach, what is required for flourishing at any current moment is necessarily viewed through a future-oriented lens: one cannot flourish in terms of short-term benefits alone. The two apparent types of interest are thereby integrated without any conflict.

⁴³ O’Neill does not distinguish between ‘rights’ and ‘children’s rights’ but uses both terms in her discussion. She does, however, distinguish between children’s ‘positive rights’ and children’s ‘fundamental rights’ (1998: 445-446, 448): the latter seems to be similar to my view of children’s ‘rights’ *qua* fundamental human rights, though the former does not correspond to my use of ‘children’s rights’ (Ferguson, 2013). In that sense, O’Neill is not concerned, as I am, with the significance of the fact that it happens to be a child that is the rights-holder.

When we take rights as fundamental in ethical issues in children's lives we ... get an indirect, partial and blurred picture. ... If a clearer, more direct and more complete view of ethical aspects of children's lives is available, we have good reason to prefer it (O'Neill, 1998: 445).

O'Neill explains how imperfect obligations occupy an ethical space outside of that within which (perfect) obligations correspond with rights (1998: 449-451). For that reason, '[i]f we think imperfect obligations important,' she suggests, 'we cannot see a choice between obligation-based and rights-based theories as mere choice of perspective' (1998: 451-452).

I agree that there are difficulties with children's rights, but disagree that, once we recognise these concerns, the selection of perspectives on the underlying substantive content cannot remain a choice. In fact, I suggest that preferring children's rights represents a choice to reject particular considerations *ab initio* as important and worthy of influencing outcomes in relation to any future individual decisions. Whether that part of the substantive background on which certain duties draw is dismissed at the outset or distinguished at the end, it is nevertheless accounted for on both perspectives. It is then a question as to how significant we consider those substantive concerns to be.

In addition, it is O'Neill's distinction between imperfect and perfect obligations (1998: 447-448) that underpins her argument for the need to shift to an obligation-based approach. On her view, no one has a right to the former being performed (1998: 463) yet, as they are important to the ethical aspects of children's lives, it is critical to include them in our ethical scheme. Focusing on obligations directly does that, though she explicitly takes no view on the legal enforceability of imperfect obligations (1998: 458). However, as I see imperfect and perfect obligations as simply part of the obligations landscape that constitutes the choice to prefer duty over children's rights or welfare, I am not bound to agree with O'Neill that there are a cluster of obligations for which no right to performance exists.⁴⁴

⁴⁴ To comment on this briefly, I have some difficulty with O'Neill's distinction (*supra*, note 36) between perfect and imperfect obligations insofar as she sees universal obligations owed to all children as perfect, yet sees obligations potentially owed to all children – she names the obligation to be kind and considerate in dealing with children – as imperfect because it could not be discharged if owed to all. The criterion of universality for one of the two types of perfect obligation – the other type is grounded in special relationships between the parties – does not of itself require capacity for implementation without more. O'Neill recognises that 'no act description can be fully determinate' (1998: note 2). If implementation without more were required, it is not clear which obligations would straightforwardly qualify and which would not; the line between the two types is ambiguous. Yet, without placing weight on determinacy, it is not clear how O'Neill can distinguish between perfect and imperfect obligations, as her examples of the latter are also universal in their phrasing (1998: 448 – care; 450 – kindness and consideration),

Critically, I have a different aim to O'Neill in turning to duty. We both consider children's rights (or, for O'Neill, rights more generally) might not be the best way to regulate children's lives. Whereas O'Neill focuses on the idea of obligation as a larger ethical concept to capture the full range of ways in which we want children to be provided for, I focus on the moment at which a decision has to be made between differing outcomes and consider the value of the duty concept in relation to the assigned decision-maker's task.

Virtue, Duty and the Decision-Making Exercise

The conceptual link between duty and the aim enabling children's flourishing lies in understanding the decision-maker's role in terms that draw on insight from virtue ethics. Virtue ethics is a term of art to describe the third branch of normative ethics, which emphasises virtues or moral character.⁴⁵ As Hursthouse explains, this means that it is not capable of precise definition (1999: 4-5).⁴⁶ Cimino suggests that '[t]he very idea of 'virtue' seems intuitively too lofty, too vague, too ambitious, and too indeterminate for law' (2009: 281). But that criticism is to misunderstand the purpose of virtue ethics and to overlook its current state of development.⁴⁷ It is not aimed at establishing rules and rigid decision-making procedures (Hursthouse, 1999: 18),⁴⁸ but enabling individuals with particular character features (Hursthouse, 1999: 12) to employ those aspects of their character to guide their decision-making, exercising practical wisdom.⁴⁹ Hursthouse, for example, proposes that '[a]n action is right if it is what a virtuous agent would characteristically (i.e. acting in character) do in the circumstances' (1998: 22).

though she suggests that they could not be owed to everyone. It is not clear why such obligations could not be owed to all, with performance required based on interactions with others. Relying on the presence or absence of a corresponding right presents only circular reasoning. As Coady (1992: 45) argues, it is not clear why one cannot have a right to something such as kindness and consideration.

⁴⁵ This revival began with Anscombe (1958).

⁴⁶ Kochan concludes that 'there is no single virtue ethics' (2014: 316). MacIntyre, however, argues that we can give a unifying core definition to virtue, which brings together earlier accounts, though the definition is necessarily complex (1985: 186, 191).

⁴⁷ Unlike deontology and consequentialism, 'virtue ethics in its modern development is still in its infancy. It should not therefore be shackled by preconceived ideas about its progeniture and nature' (Swanton, 2003: 5).

⁴⁸ Cimino explains that, within virtue ethics, we focus on 'making choices about courses of action based on what acts will best help each actor become her best self (or 'flourish'), not to follow rules' (2009: 289).

⁴⁹ Practical wisdom is an Aristotelian concept; itself both an intellectual and moral virtue, it is also a master virtue that enables an individual to use the other virtues to guide action. See Aristotle (1992, trans. Ross, D.: Book VI chapter 5).

Similar arguments are made within virtue jurisprudence⁵⁰ about legal decision-making and the justifiability of legal decisions. Cimino explains that ‘[v]irtue jurisprudence [is] ... much less about virtue as a substantive *source* of law than it is about a method of reasoning *about* law’ (2009: 299, emphasis in original). Whilst much attention in the developing literature focuses on judging (e.g. Solum, 2003; Duff, 2003), this also naturally supports focus on process.

I propose that a particular decision-making process should be employed. This is not the kind of codification that is troubling to advocates of virtue ethics such as Hursthouse (1999: 56-57), as there is no suggestion of a particular ranking of underlying substantive factors. As a neo-Aristotelian approach, the rightness of the chosen outcome of the decision-making exercise is not derived from the process used and the individual decision-maker, but exists ‘as in some measure independent of agent evaluations’ (Slote, 1995: 84); the virtuous decision-maker perceives which is the right decision because it is the right thing to do (Slote, 1994: 83).

The first requirement is that the full range of substantive factors is taken into account by the decision-maker. In particular, the goal that the child will be better enabled to flourish on their own terms necessitates incorporating empirical evidence as to which factual situations benefit children and in what ways. What do we know, for example, about outcomes for children whose parents separate when they are young and raise their children through court-ordered shared parenting arrangements? How does that compare to outcomes for similarly-placed children who reside principally with one parent? This should also encourage more research into children’s lives and lived experience.

Second, the decision-maker must be transparent in the way that the decision is reached, which entails detailing the reasoning employed in examining and evaluating the underlying substantive issues, as well as the reasons for the weighting ultimately reached. This process enables duty to fulfil the guiding role I suggested for it, above, as well as constitutes the content of its proposed framework role. In relation to the former, for example, conflicting legal rights claimed by parents and children may be included as factors in the presumed-virtuous decision-maker’s flourishing-oriented analysis and, viewed through that aim, be more readily reconciled or weighted.

⁵⁰ The nature of the relationship between virtue ethics and virtue jurisprudence is not uncontested. Farrelly and Solum comment that ‘[t]he connection ... certainly does not rise to the level of entailment’ (2008: 6). The directness or otherwise of this relationship is outside the scope of my discussion as I am drawing on insights from virtue theory, rather than claiming to apply a particular instantiation thereof, whether in virtue ethics or virtue jurisprudence.

These two requirements embody and enable the exercise of the virtues of justice⁵¹ and practical wisdom.⁵² Decision-makers are enabled to exercise particularised judgment based on the facts and empirical evidence about outcomes for children. This fits with the way that the ‘best interests’ exercise is conceived within s. 1 of the Children Act 1989, giving discretion to the decision-maker to determine what is best for the particular child as long as particular considerations – the s. 1(3) welfare ‘checklist’ – are taken into account.

The need to incorporate empirical research goes further than s. 1 and provides one restriction on the type of decision that can be reached: a decision-maker will be prevented from preferring a possible outcome when empirical evidence indicates an alternative outcome would be more likely to enable the child to flourish on their own terms. Of course, flourishing is not to be understood as simply physical health, so the decision-maker might prefer an alternative outcome where they take the view that they would enable to flourish in a broader sense. Viewing the judge’s need for solid expert and empirical evidence as critical to making good decisions also has consequences for the place of other actors in the court process. It suggests a particular role for expert witnesses as part of the necessary foundations for the virtuous judge’s decision-making. As evinced in the Children and Families Act 2014, the place of expert witnesses and evidence for court is currently in flux in both the public law and private law contexts. Whilst legislative and practice reform suggests a reduced role for experts, a duty-based approach highlights the need to be cautious about the extent to which we limit the potential for courts to draw on external expertise. A virtuous decision-maker, of course, would also have regard to delays for children, so might be better placed to strike the right balance than legislated confinement.

In the case of irresolvable dilemmas (Hursthouse, 1999: 63), decision-makers may reach different conclusions and yet have still acted well (ibid: 68-71) because their character underpins

⁵¹ There is debate over how to understand ‘justice’ as a virtue. Solum, for example, explores two possibilities, ‘justice as fairness’ and ‘justice as lawfulness,’ preferring the latter (2008: 174-180). This debate goes beyond the scope of my argument, though my duty-based approach reduces freedom for the private and emphasises the public aspects of justice, as under a lawfulness conception.

⁵² In terms of Aristotle’s understanding of the virtue of justice, my requirements relate to ‘universal justice’ rather than ‘particular justice’ (Aristotle, 1992: Book V). Swanton discusses the ‘virtues of practice,’ which are to be employed in making decisions: ‘[T]he aim is to get things right by acting in an overall virtuous way in integrating constraints on solutions to problems’ (2003: 253). She envisages three types of virtue: focus, creative solution-oriented thinking; and dialogue. She elucidates personal features and aspects of how virtuous decision-makers should make decisions, whereas my procedural requirements focus on the public aspects of decision-making and enable inclusion of all decision-makers, regardless of their personal virtue.

their reasoning. This focus on the decision-maker directly makes it more likely that they explicitly treat these dilemmas as such and explore their resolution, which is important for the child's sense that their situation has been treated justly and fairly. In her virtue jurisprudence exposition of the good character traits of judges, Sherry explains that it is not the decision-maker's personal character that is critical, but their judicial character (2008: 91). My virtue-inspired account goes further and treats decision-makers and third parties interacting with children as if they possess these features in their character, even though it is possible that they may not. Assuming decision-makers are virtuous, they are under a duty to take into account empirical evidence, reason transparently and provide an account of their reasoning. These requirements make it more likely that they will reach the better outcomes that a virtuous decision-maker would reach.

Fulfilling the requirements of exercising virtue makes the decision reached more justifiable.⁵³ Being virtuous enables the decision-maker to flourish as practical wisdom is acquired through practice; it is in everyone's interest that they are treated as if they are virtuous.⁵⁴ As Foot argues, '[i]t seems clear that virtues are, in some general way, beneficial. Human beings do not get on well without them' (1978: 2).⁵⁵ For the virtuous decision-maker, these requirements frame their decision-making but impose no restrictions on the process they would otherwise employ. I consider how this duty-based approach might be applied in particular cases in section 6, below.

⁵³ Amaya makes a similar argument in respect of the 'connoisseurship' model of legal reasoning, arguing that positing a normative ideal of virtuous decision-making best explains legal justification (2013: 51-66, especially 58, 65).

⁵⁴ There is debate over the implications of the view that being virtuous enables the possessor to flourish, but this is outside the scope of this discussion. Does it 'provide a motivating reason ... for being virtuous ... in accordance with the standard list of virtues'? Or might it provide a means for 'critical reflection on the standard list'? (Hursthouse, 1999: 170 *et seq.*)

⁵⁵ As Foot notes, this may be more obvious for some virtues, such as courage, temperance and wisdom, than others. Charity and justice, she notes, require sacrifice, yet generally still benefit the possessor (1978: 3). MacIntyre's understanding of the concept of virtue also supports this view:

Every practice requires a certain kind of relationship between those who participate in it. Now the virtues are those goods by reference to which, whether we like it or not, we define our relationships to those other people with whom we share the kind of purposes and standards which inform practices. (1985: 191)

The decision-maker reluctant to explain their reasoning in the detailed and transparent terms required by my duty-based approach, for example, would nevertheless do so as they understood that that was their contribution to the decisions that needed to be made, was expected of them by others affected by those decisions and helped define their role within that group of affected individuals as one who treated others justly.

Duty and the Aim of Flourishing

The aim of my duty-based approach directly flows from its virtue-inspired process. Virtues are character traits that a person needs in order to flourish (Hursthouse, 1998: 23) and constitutive of flourishing (Hursthouse, 1999: 136). In this way, the child flourishing on their own terms becomes the necessary aim of a virtue-inspired approach. Flourishing means living a ‘good human life,’ which ‘is a life of human excellence, and we treat people well when we help them to become more excellent humans’ (Keller, 2013: 102). Whichever understanding of decision-making capacity one adopts, only some children are sufficiently autonomous to be treated as adults; children’s flourishing is thus best seen as empirically-driven. This underpins the requirement to focus on the individual child, the need to avoid rule-based decision-making and to base decisions on empirical evidence and research regarding outcomes for children. We might also see the approach to flourishing in virtue ethics as empirically-driven. Foot, for example, reasons that,

[t]o determine what is goodness and what defect of character, disposition, and choice, we must consider what human good is and how human beings live: in other words, what kind of a living thing a human being is. (2001: 51)

Natural goodness requires an in-depth understanding of outcomes for individuals and empirical evidence on what makes it more likely that someone will develop into such a person.

Does this understanding of flourishing capture all that we might hope for children’s potential future lives? For example, might one argue that there is no place for appreciation for, or a devotion to, the arts or music? Within virtue ethics, this is a subject of debate: to what extent does flourishing consist of both moral and non-moral virtues? (Swanton, 2003: 84). How should the two be weighed against each other? Flourishing requires a balance between different virtues and recognition that individuals ‘may fail to flourish because of factors virtuous *forgone*, such as physical and mental health, contentment and lack of stress’ (Swanton, 2003: 88, emphasis in original). Paying attention to empirical evidence as to what makes and has the most

potential to make children ‘deeply happy’ (Foot, 2001: 88)⁵⁶ creates space for balancing such competing concerns. It also enables us to see how the child’s short-term preferences and interests may be reconciled against their long-term interests in a way that removes any apparent conflict between the two. When the short-term is read in light of the longer-term goal of enabling and maximising flourishing, any conflict between the two dissipates. We might see this as akin to integrating the child’s wishes through the lens of psychosocial maturity (discussed: Ferguson, 2005: Part 4).

Such an empirically-driven, but virtue-oriented, aspect encourages us to be explicitly evaluative. This can only be a positive, given the criticism that the ‘welfare principle’ currently operates as a ‘smokescreen’ in practice, as discussed in section 4, above. This approach also meshes well with s. 1, acting to direct the weighing of various considerations within the s. 1(3) checklist and to ensure that ‘best interests’ is understood in broad terms. In writing about the value of persons, Keller reasons that:

it is possible that a single story about the value of persons could incorporate the importance of welfare, flourishing, and autonomy. Perhaps, for example, a concern with a person’s flourishing, properly understood, will turn out to include within it both concern for her best interests and respect for her autonomy (2013: 103-104).

It is this potential for flourishing and its natural connection to a duty-based approach that marks it out as capturing more of the relevant substantive content underpinning decision-making about children and more readily enabling the particularisation of such content than either children’s rights or welfare.

Reasons to Prefer Duty

Aside from the theoretical appeal of my virtue-based approach, there are other strong reasons to prefer my duty account in comparison to the two predominant alternatives of children’s rights and welfare when considering which framework should be adopted. The value of these

⁵⁶ This does not refer to happiness in the sense of contentedness, but rather in a non-superficial sense, which entails the basics of good living such as friendship, family and work.

arguments is contingent on their potential to increase the likelihood of improved outcomes for children.

First, looking initially to the decision-maker, not the child, more readily enables prioritisation of the child's position than adopting an ostensibly child-centred approach. Both children's rights and welfare are propounded as the latter yet, as discussed above, they are theoretically incapable of being so. Inaccurately presenting the two alternative accounts as child-centred means less scrutiny is applied to the decision-making process and outcome than if the approach were explicitly non-child-centred. This makes it easier to reach decisions that prefer interests of others or a subjective view of the best outcome for children with insufficient scrutiny thereof. This may seem counter-intuitive, but we should recall that, as O'Neill argues, a significant part of the reason for the prominence of children's rights as an approach is historical (1998), rather than conceptual or based in substantive improvements achieved for children. Further, the welfare approach was in its origins itself focused on the decision-maker: the 'best interests' principle grew out of the Court of Chancery's *parens patriae* jurisdiction which, as van Krieken explains, focuses on the judicial decision-maker, acting as parent (2005: 27).

Freeman argues that an obligations argument 'places parents, not children, centre stage' (2007b: 10), yet this is only true at first glance. The initial focus on the decision-maker within a duty-based approach, whether parents (as Freeman notes) or others, immediately turns to the child about whom the decision must be made, and the need for transparent, evidence-based reasoning about the best outcome for that child. As Keller argues,

[a]s a parent, you will show special concern for your child's welfare, but you are also likely to have a separate special concern for her flourishing. Much of what we do as parents is directed towards making our children good and virtuous people. We teach them to care about others and tell the truth, and we encourage them to develop their minds and cultivate their talents. We may believe that a virtuous child will grow into a happy adult or that in bringing up good children we are bringing up children who will be better off, but, for many of us, the concern with a child's flourishing cannot be straightforwardly reduced to a concern with her welfare. It makes perfect sense to want your child to be a good person, even if you doubt that being a good person is the best strategy for achieving happiness. (2013: 104)

Flourishing is a natural concern for decision-makers, particularly parents, and focusing on them as decision-maker makes it more likely it will be achieved.

Second, a duty-based account more readily enables particularisation to the individual child. Bainham criticises both the ‘welfare principle’ and rights for their indeterminacy, arguing that best interests are ‘dependent, ultimately, on determination by judges’ (2002: unpaginated) and children’s UNCRC rights are ‘meaningless until their content is judicially determined and applied’ (2002: unpaginated). Rather than requiring translation from either the conceptual expression of individual rights or the ideal understanding of ‘best interests’, the decision-maker acting under duty exercises practical wisdom,⁵⁷ as discussed above. This is empirically-driven and focuses on the circumstances of the individual child affected to determine what, on the particular facts, will most enable that child to flourish. In this sense, it also sees the child as a contextualised subject,⁵⁸ which requires, enables, and justifies the incorporation of other parties’ interests in a necessarily limited capacity. As I explain elsewhere, a contextualised analysis ‘remains focused on the child as a subject throughout, rather than on the predicates that comprise their [...] backgrounds’ (Ferguson, 2014: 74). The nature of this contextualised focus ensures that my duty-based account is not vulnerable to the charge of excessive individualism made against the ‘best interests’ standard, discussed above, regardless of the extent to which one accepts the validity of this criticism.

Third, a duty-based approach reduces the potential for the reasoning to be vague, insufficiently articulated, or act as a ‘smokescreen’ for the actual rationale. With the focus squarely on the decision-maker, the empirical orientation of both the process of reasoning – practical reasoning – and the goal to be attained – flourishing – means the decision-maker is more likely to provide detailed reasoning that justifies the decision reached. This benefits both affected parties and broader society. In addition to increasing the decision’s legitimacy, more detailed, fact-oriented reasoning helps the affected child and other relevant parties understand the decision reached. Greater articulation of the reasoning also increases the likelihood of the reasoning being transparent. These are key advantages compared with children’s rights and welfare frameworks.

⁵⁷ Amaya, citing Wallace, explains how practical reason involves focusing on situation-specific reasons for action, rather than applying general principles or rules (2013: 64). These situation-specific reasons are necessarily grounded in the particular facts, here the child’s factual circumstances.

⁵⁸ Cimino describes practical wisdom as embodying ‘contextualism’ when contrasted with deontology and consequentialism (2009: 282).

Fourth, and relatedly, in the public gaze of more detailed, transparent reasoning, the judge's explicit consideration of all relevant concerns is more likely to result in a better balance being struck between competing concerns. Take a child's refusal of critical medical treatment as an example. Being required to explain the decision to apply a cognitive-only capacity test or the choice to draw on evidence concerning other aspects of capacity, such as psychosocial development, should make the decision reached more likely to reflect the child's true capacity and more legitimate in the eyes of the child and other interested parties. This represents an improvement upon the current position, which includes assumptions about both what the child must understand in order to be permitted to refuse,⁵⁹ and how capacity to consent is related to capacity to refuse.⁶⁰

Fifth, in considering all relevant factors as part of a duty-based approach, the decision-maker is more likely to draw on the relevant empirical evidence, hence reach more empirically-grounded judgments. Could we not achieve the same openness and detailed, empirically-grounded reasoning within the s. 1(1) Children Act 1989 exercise or in the application of rights-based arguments to particular facts?⁶¹ There is precedent, of course, for courts explicitly exploring the empirical research and how it relates to the question of law they are being asked to resolve. A well-known example is the Court of Appeal's examination of pertinent research findings regarding contact and domestic violence in its decision in *Re L, V, M, and H* [2000] EWCA Civ 194 in relation a s. 8 Children Act 1989 contact dispute. Whilst the social science literature was considered, however, it is unclear that it was correctly assessed (cf. Gilmore, 2008)

⁵⁹ *Re E (A Minor) (Wardship: Medical Treatment)* [1992] 2 FCR 219 (EWHC) provides a good example. As I explain elsewhere (Ferguson, 2013: note 15 and corresponding main text), a 15-year-old was adjudged cognitively capable of refusing critical medical treatment for leukaemia, but held to lack the capacity overall to refuse based on other matters that had not been tested on the facts. Mr Justice Ward reasoned that 'in my judgment A does not have a full understanding of the whole implication of what the refusal of that treatment involves' (224). Yet, this absence of 'full understanding' was based on an assumed inability to understand the impact of the full process of dying, particularly seeing his family's distress (224) and the particular details of the pain and fear that he would suffer as he died – the frightening struggle for breath, of which neither the treating physician nor Ward J. had informed him (224).

⁶⁰ There was no differentiation in the leading case of *Gillick*; the facts were concerned solely with consent. Yet more recent cases such as *Re R (A Minor) (Wardship: Consent to Treatment)* [1991] 4 All ER 177 (EWCA) and *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1992] 2 FCR 785 (EWCA) were decided on the basis that such a distinction exists. This is now the subject of a reinvigorated debate. Gilmore and Herring (2011, 2012) seek partially to justify this distinction, supported by a parallel argument in ethics, though without consideration of empirical evidence about the nature of decision-making capacity. Cave and Wallbank (2012) suggest that the asserted potential distinction between the capacity required to make decisions about particular treatment and to refuse all treatment is not so straightforward, and argue for a contextual approach to all medical decision-making.

⁶¹ Thanks to an anonymous reviewer for posing this reply.

or weighed. No particular hierarchy of or methodology for weighing competing considerations can be derived from the s. 1 exercise itself.

This is what makes the virtue-inspired approach particularly powerful. It guides decision-makers in how to weigh competing considerations without unjustifiably restricting the discretionary exercise, namely by asking them to weigh factors against each other as regards their ability to attain the normatively rich aim of the child's flourishing. Simply mandating that decision-makers explain their application of s. 1 does not achieve this, yet going further to focus on substantive matters immediately imposes an unjustifiable gloss on the legislation.

More generally, the centrality of the informed decision-maker to the duty-based approach emphasises that what matters is not so much which language descriptor for ethical considerations we employ – children's rights, welfare, or duty – to mediate state regulation of children, but whether we have the tools to enable the decision-maker to determine which outcome or range of outcomes really is best for any particular child or children. This encourages us more accurately to develop our body of knowledge concerning the content of 'better' or 'best' outcomes for children in empirical terms. Whilst a children's rights or welfare-oriented perspective can accommodate this consideration of empirical research, neither approach of itself makes it central to justifiable decision-making in the way that immediate focus on the decision-maker does.

Sixth, a duty-based approach removes an unnecessary layer of complexity from the process of reasoning. At first glance, it might seem to add a further layer given that it does not focus directly on the child, but first on the decision-maker.⁶² Yet the reverse is true. As O'Neill explains, '[t]hose who urge respect for children's rights must address not children but those whose action may affect children' (1998: 462; see also 463). If we focus directly on the child, as children's rights and welfare do, we need to add in an additional layer of reasoning in order to translate the determination of what is best for the child, or what balancing various competing rights claims means, into adult action to bring that to fruition. Under a duty-based approach, the decision-maker is invariably the adult actor concerned, so that this additional step is unnecessary. This applies to my fifth point: whilst we can make consideration of the empirical research and what we know about good outcomes for children part of the requirements of the s. 1 Children Act 1989 welfare exercise carried out by a judge, that nevertheless requires an additional stage of

⁶² Thanks to Helen Reece for raising this argument.

reasoning to be realised. As that additional stage comprises the judge's actions, why not focus directly on the judge?

Further, given that we cannot even focus directly on the child in a child-centred way under children's rights or welfare, that first layer of reasoning itself involves unnecessary confusion through presenting non-child-centred interests and concerns in child-centred terms. In the absence of any additional reason to use children's rights or welfare as a framework, there is no rationale for introducing this additional complexity to making decisions affecting children.

Seventh, focusing directly on the decision-maker in this way is also proactive, not reactive. A duty-based approach imposes positive obligations on those making decisions affecting children to do so virtuously and to take positive steps to benefit the child. By contrast, children's rights and welfare are reactive approaches. Until particular children's rights or conceptions of welfare have been translated into duties imposed on adults, neither children's rights nor welfare themselves require any action. Only when there is an assertion by a rights-holder or a dispute over what is in a particular child's 'best interests' are the approaches applied and translated into duties to act.

6. Current and Potential Roles for Duty in Practice

In this section, I explore how a duty-based approach underpins aspects of the current law, as well as how it might work if incorporated into new areas. The selected examples serve to highlight its potential to fulfil the three roles outlined above, namely, as a tool for enabling the resolution of conflicts of interest in difficult cases where children's rights and/or welfare-based reasoning runs out; as a theoretical framework itself; and as the foundation of a virtue-led normative approach to the legal regulation of children that necessarily has flourishing as its goal.

*Re A (Children) (Conjoined Twins: Surgical Separation) (2001)*⁶³

Re A is a well-known, difficult case in which a hospital applied to court for a declaration that it could lawfully separate conjoined twin girls without their parents' consent. The parents' refusal

⁶³ Thanks to an anonymous reviewer for suggesting discussion of this decision.

was based at least in part on their devout Roman Catholic beliefs. If the parents' wishes were respected and the operation was not carried out, both girls would die within a few months. If the court authorised the separation, it would lead to the certain death of the weaker twin, Mary, but provide the possibility of a relatively normal life to the other, Jodie. As I have explained elsewhere (Ferguson, 2013: 203), the Court of Appeal employs interwoven rights- and welfare-based reasoning in reaching their conclusion to uphold the order of the court below, which authorised the operation to separate the twins. Blended rights- and welfare-based reasoning is necessary, and even the different blend in each judgment perhaps unsurprising, because neither approach can accurately characterise the nature of the conflict on the facts.

Whilst rights can be weighed against each other, the nature of the rights at stake here cannot, at least without risking artificial construction of the content of particular rights. Thus, Ward L.J. discusses the right to life, based on the understanding that 'each life has inherent value in itself and ... is equal for all of us' (*Re A*: 186H; cf. 187H-188A). For that reason, the right to life is both central to the case and incapable of resolving the conflict. Lord Justice Walker, however, considers that not separating the twins 'would be to deprive them of the bodily integrity and human dignity which is the right of each of them' (*Re A*: 258D). Yet, he makes this point to explain why, in addition to it being in Jodie's best interests, it would also be in Mary's best interests to separate them. Lord Justice Walker's interpretation of the right to life, however, might well be argued to be 'illusory' in its application to Mary, as Ward L.J. himself contends (*Re A*: 184C). Whilst Brooke LJ argues that separation would respect the sanctity of life of each, he does not phrase this in terms of the right to life (*Re A*: 240E). As Brooke L.J. concurs with Ward L.J.'s view that separation is preferable because Jodie's best interests outweigh Mary's (*Re A*: 205D), his comments about separation supporting each twin's sanctity of life are unable to be weighed in the balance of interests and become merely an additional buttressing reason for separation. Rights are not determinative either alone or within a welfare-based framework.

The s. 1 Children Act 1989 'welfare principle' contemplates the individual child before the court, rather than the sum of balancing one child's 'best interests' against those of another. The welfare-based approach thus does not of itself accommodate conflicts between the interests of particular children. Whilst Walker L.J. recognises that there are cases in which courts have balanced different children's 'best interests' (*Re A*: 242H-243C), he also notes that these cases did not involve the right to life. Unless one adopts Brooke L.J.'s artificial interpretation of the

right to life, its equal, inherent value disrupts the potential to see the twins' interests as capable of being weighed against each other. For that reason, Walker L.J. finds himself required to reach the artificial conclusion that it is in the 'best interests' of each that they be separated when, as Ward L.J. explains, it is clearly not in Mary's 'best interests' to be separated as '[i]t denies her inherent right to life' with 'no countervailing advantage for her at all' (*Re A*: 190D).

Lord Justice Ward resolves the case by balancing each twin's interests against the other's, however, and concludes that Jodie's interests outweigh Mary's (*Re A*: 192F-G); as noted, Brooke L.J. agrees with this approach. Yet the balancing cannot come from the 'welfare principle' itself, but must be externally constructed. It is a mistake to treat this resolution as part of the 'best interests' analysis since, whilst it is a pragmatic solution, the s. 1 evaluation of what is 'best' for a particular child contemplates its implementation and does not envisage subsequent counterbalancing. In that way, it is distinct from the 'double proportionality' approach more straightforwardly employed in respect of ECHR rights arguments in relation to which the rights at stake admit of justifiable infringement. Resolving the case by balancing the interests of one twin against those of the other is just as artificial as suggesting that the best interests of each supports separation. Neither rights nor welfare, taken alone or together, are able to accommodate the nature of the conflict here.

A duty-based approach may enable us to cut the Gordian knot and both recognise and resolve the conflict in a less artificial way. In preferring Jodie's interests to Mary's, Ward L.J. reasons in terms of duty:

If the duty of the court is to make a decision which puts Jodie's interests paramount and that decision would be contrary to the paramount interests of Mary, then, for my part, I do not see how the court can reconcile the impossibility of properly fulfilling each duty by simply declining to decide the very matter before it. That would be a total abdication of the duty which is imposed upon us. Given the conflict of duty, I can see no other way of dealing with it than by choosing the lesser of the two evils and so finding the least detrimental alternative. A balance has to be struck somehow and I cannot flinch from undertaking that evaluation, horrendously difficult though it is (192F-G).

Viewed in context, Ward L.J.'s balancing of one twin's 'best interests' against the other's is better seen not as part of a broader welfare assessment – akin to the relationship between 'double

proportionality’ and individual rights – but as a distinct role for a duty-based approach being exercised by a virtuous decision-maker. Picking up on Ward L.J.’s reference to the duties at stake, the conflict might be better represented as a conflict in the duties owed to each child than as a conflict between each of the twin’s ‘best interests’. Understanding the conflict in duty-based terms enables balancing in a way that neither a welfare nor rights perspective does: not only is the court under a larger duty to resolve cases referred to them (*Re A*, Ward LJ: 174C), but the conflicting duties are to enable each child to flourish on her own terms. Hard though it is, it is less artificial to recognise that the only circumstance in which either twin’s chances for flourishing are increased is via separation, which increases Jodie’s potential to flourish. This is the evaluation which we ‘cannot flinch from undertaking’, reasoned more transparently than the smokescreen judgment that separation either is in the best interests or respects the right to life of each twin.

In addition, approaching either the resolution of conflicting ‘best interests’ determinations or the exercise as a whole through the lens of duty clarifies the role for other decision-makers involved, particularly the parents and the treating doctors and hospital. Lord Justice Ward comments:

It would, nevertheless, have been a perfectly acceptable response for the hospital to bow to the weight of the parental wish however fundamentally the medical team disagreed with it. Other medical teams may well have accepted the parents’ decision. Had [the treating hospital] done so, there could not have been the slightest criticism of them for letting nature take its course in accordance with the parents’ wishes (173G-H).

Yet this would not be supported by a duty-based approach. If Ward L.J. is correct that the court must not flinch from its duty to decide this case, and if exercise of that duty requires preferring Jodie’s interests to Mary’s, can he also be correct that the treating doctors and hospital did not have a duty to intervene? This is a critical issue because of Ward L.J.’s further comment that, if the medical team chose to respect the parents’ refusal, they would not need to refer the case to court:

[W]hilst I would not go so far as to endorse a faint suggestion made in the course of the hearing that, in fulfilment of that duty of care, the hospital were under a further *duty* to refer this impasse

[between the medical team and the parents] to the court, there can be no doubt whatever that the hospital are entitled in their discretion to seek the court's ruling. In this case I entertain no doubt whatever that they were justified in doing so (173H-174A; emphasis in original).

If there is a right answer for the court and there is a duty to intervene and protect Jodie from harm and inevitable death, might the medical team not also be under that same duty?⁶⁴ Or might the medical team at least be under a duty to subject to judicial scrutiny any decision not to intervene?

Parents are under a duty to seek medical advice – not to do so would constitute neglect: s. 1, Children and Young Persons Act 1933 – and then consent to or refuse medical treatment. Medical practitioners and the parents work in partnership, with the authority, and responsibility, for the final decision resting with the parents. Where both agree on intervention, as is most commonly the case, they can proceed without independent legal review. If the parents refuse to consent to recommended treatment, their decision-making is subject to the court's independent review (*Re A*, Ward L.J.: 178F-179A).

In his *dicta*, but not on the facts, Ward L.J. envisages the situation in which both the parents and the medical team agree on non-intervention. At common law, courts have recognised circumstances in which medical practitioners have authority to decide not to intervene (*Re J (A Minor) (Wardship: Medical Treatment)* [1991] Fam 33 (EWCA); *Re J (A Minor) (Child in Care: Medical Treatment)* [1993] Fam 15 (EWCA); *NHS Trust v. MB* [2006] EWHC 507 (Fam); *Re A*, Walker L.J.: 248H). Professional guidance similarly recognises a limited number of situations in which it may be justifiable to withhold or withdraw treatment (Royal College of Paediatrics and Child Health, 2004: 10-11). These are situations in which intervention is in some sense futile. However, this authority is in fact rooted in duty. As Lord Donaldson explains in *Re J* (1993), requiring the medical practitioner 'to adopt a course of treatment which in the bona fide clinical judgment of the practitioner concerned is contra-indicated as not being in the best interests of the patient' would be requiring them 'to act contrary to the fundamental duty which he owes to his patient' (26H-27A).

⁶⁴ Bridgeman (2007: 93) disagrees. Citing Ward L.J.'s comments (173G-H, above), she suggests that there is a range of views as to what is in the 'best interests' of a child, including each of the twins, such that a reasonable refusal by the parents, as the medical team, will discharge their duty to the child.

Recognising that the authority to choose not to intervene is based in the duty owed to the individual patient suggests that Ward L.J. may have erred in his representation of the medical team's freedom not to treat. As he recognises elsewhere (192F-G), there is a conflict of duties owed to each twin precisely because it is only Mary's medical situation that is futile, not Jodie's. The duty owed to Jodie is one to intervene and operate. Given that duty, it is not at all clear why there could be no criticism of the medical team if they had opted not to intervene, and possibly also not sought court authorisation not to intervene.

What if the medical practitioner grounded their judgment not strictly on physical well-being, but on broader ethical concerns? There is judicial authority that ethically-grounded concerns can justify a medical practitioner's decision not to treat (*Re B* (2006), Holman J. at [24]). But the recognised duty to intervene should have already accommodated such ethical concerns to the extent they are relevant. A duty-based approach calls into question the assumption, noted by Morris (2009: 355, citing Holman J. in *NHS Trust v. MB* (2006): [24]), that medical practitioners, and not the courts, are equipped to consider these ethical aspects. In its immediate focus on the decision-maker, rather than the outcome prior to translation back into obligations on the decision-maker, a duty-based approach better represents the contributions of each actor to attaining the best outcome. It enables us to explicitly recognise the contributions of each – parents, medical team, and court – to assessing the best outcome based on their own unique perspectives.

Lord Justice Ward explains that '[t]his court is a court of law, not morals, and our task has been to find, and our duty is then to apply, the relevant principles of law to the situation before us' (*Re A*: 155E). By contrast, focusing directly on the outcome to be achieved, the child's 'best interests', assumes each actor can approach the determination of the preferred outcome objectively, equally able to take into account the full range of considerations, without exploring the detail of how that translates into their practical reasoning – their duty to decide in practice. As Ward L.J.'s comments show, that is not the case.

A duty-based perspective removes the conflict and emphasises the partnership between different actors' assessments of the way forward. There is no longer an assumption of conflicting accounts of what is best for the child, but rather a view that each is contributing, via exercise of their duty, to a larger discussion of which outcome will enable the child to flourish on their own terms. It also becomes easier to explain why decision-makers might reach differing views –

because the duty to make the decision that most enables flourishing embraces the distinctive competencies of each actor. Thus, where parents and the medical team reach different conclusions on the preferred outcome, as here, we need not see their views as conflicting, but rather multiple, partial perspectives on flourishing, with the independent review of the court available to provide a fuller perspective. In the end, rather than a conflict between different decision-makers' perspectives, we are simply left with the conflict between duties owed to each twin. This has the benefit of more closely corresponding to the conflict of duties owed by the medical team in criminal law (cf. *Re A*, Ward L.J.: 201G, 202H-203D; Walker LJ: 255G).

Of course, all of this remains a criticism of one particular legal construction of the medical team's duties here; best practice and good practice may well be different, and it is important not to overlook that.

The United Nations' Convention on the Rights of the Child

The speed and extent of the ratification of the UNCRC is often seen as evidence of the importance of children's rights; Freeman, for example, cites it as 'the best-known example' of 'political initiatives' in 'the case for children's rights' (2007b: 19-20). Whilst it might seem somewhat counter-intuitive, the Convention itself provides strong support for regulating children's lives through a direct focus on the decision-maker. There are two aspects to consider here: first, the language and concepts employed in the Convention; second, the existing approach to domestic incorporation.

There are a large number of Articles, expressed in duty-based terms, that prescribe what 'States Parties shall [do]' for the children within their jurisdiction. For example, consider Article 11, paragraph 1, which requires signatories to 'take measures to combat the illicit transfer and non-return of children abroad' or Article 19, paragraph 1, which mandates that 'States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence'. There is no mention of rights; the language of duty alone is used as the most effective means to convey the underlying relationship between the child and desired outcome. This is not unusual phrasing for a United Nations'

Convention,⁶⁵ but it is significant as it highlights the role already being played by duty-oriented reasoning in improving outcomes for children. Adopting a virtue-inspired approach to the duty owed also helps concretise an otherwise uncertain obligation; the goal of flourishing enables us to determine a natural limit to the measures required.

In addition to Articles expressed exclusively in terms of obligation, other Articles blend rights- and duty-based reasoning, with the latter emphasised as a means to implement the former. Article 12, paragraph 1, for example, states that ‘States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child’. This highlights the existing role for duty as a means for concretising and giving effect to children’s rights. Duty similarly interacts with welfare-based reasoning in Article 3, which is one of the four guiding principles of the Convention and secures the child’s ‘best interests’ as ‘a primary consideration’. Paragraph 2 thus begins that ‘States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being’.

Implementation of the UNCRC is also expressed in terms of particular duties and obligations, regardless whether the Article is expressed in rights-based terms, as demonstrated in UNICEF’s *UNCRC Implementation Handbook* (Hodgkin and Newell, 2007). For each Article, the authors provide detailed guidance from a number of sources, particularly the Committee on the Rights of the Child, on the interpretation of the provision in question, concluding with a checklist of general and specific measures to which State action needs to be held. It is not unusual to employ duty-based reasoning and obligations in this way, to implement broader aims. However, for a number of Articles this involves translating our aims from the language of rights into duties.

Arguments for better implementation are often couched in terms of stronger duties, as well as greater weight to be placed on, and a greater respect for, the content of these duties. Speaking extra-judicially, Baroness Hale, for example, critically compares the duty contained in s. 11(2) of the Children Act 2004 to ‘make arrangements for ensuring that their functions are discharged’, ‘having regard to the need to safeguard and promote the welfare of children’ to s. 1

⁶⁵ See, for example, the United Nations’ Convention on the Rights of Persons with Disabilities (UN General Assembly, A/61/611), which, as Bartlett explains, is centred on ‘the re-articulation of rights found in other treaties in ways that will make those rights meaningful to people with disabilities’ (2012: 752-753). Yet, as the UNCRC, it also expresses the relationship between persons with disabilities and the goals to be achieved in a mixture of rights-based reasoning and obligations, including Articles, such as Article 11, worded just in terms of the duty imposed on signatory states.

of the Rights of Children and Young People (Wales) Measure 2011, which imposes a duty on Welsh Ministers to ‘have due regard to the requirements of Part I of the Convention’ (2013: 18-20). As Baroness Hale explains, the Welsh duty ‘goes much further than the English duty, because it covers the whole range of government activity and the broad sweep of the Convention rights’ (2013: 20).

The potential for improved outcomes for children in Wales is thus a product of an enhanced duty. We might wonder if governments would be more responsive to the demands of the Convention if no translation from the language of children’s rights to duty were involved, and their performance were straightforwardly measured against the extent to which they fulfilled their duties. Might thinking directly in terms of duties resonate more with governments in terms of the obligations they owe children? Yet what of the argument, standardly raised in the theoretical context that, without corresponding perfect rights in every case, individual children would not be able to challenge in court the failure by state actors to fulfil their duties? Does this not create difficulties for a duty-based approach to regulating children’s lives?⁶⁶ As a strict matter of theory, that seems correct. Yet the expression of children’s fundamental interests as duties, not rights, in the Convention, and the translation of those expressed as rights into duties at the implementation stage reveals that children’s fundamental interests are not readily capable of expression solely in terms of rights. This concern thus rests on overlooking the significant difficulties of articulating the delicately complex nature of flourishing in terms of children’s rights.

Private Law Disputes Concerning Children

Lord Justice Munby’s reasoning in *Re G* suggests the potential to focus more on the decision-maker within the current welfare-based framework, so that duty and virtue might operate in the first sense discussed above, as an aid to application of the current law, giving certain content and specificity to the welfare exercise. The decision concerned a private dispute between the estranged parents of five children, framed in terms of a specific issue order and residence order under s. 8 of the Children Act 1989.

⁶⁶ Thanks to Jim Dwyer for raising this point.

At the time of the appeal, the three girls were 11, 8 and 5 years old, and the two boys, 9 and 3 years old. The parents had both been members of the ultra-Orthodox Chassidic Jewish community. After separation, however, the mother had become more moderate, though still remained (on her view) an Orthodox Jew. The dispute was over the education of the children although, as Munby L.J. noted, this was in effect over the rules by which one lives for the ultra-Orthodox father ([4]). The mother wanted the children to receive a more liberal Jewish education, in order to maximise the children's, particularly the girls', career and life opportunities ([54]). The father was concerned that the children's relationship with their grandparents and other relatives would be detrimentally affected by being educated outside of the community, particularly when taken with a more liberal home life. That was also set against the negative outcome for the relationship with the mother if they persisted in the ultra-Orthodox lifestyle, which would implicitly criticise the mother's more liberal choices. Lord Justice Munby was quite clear that the court was addressing the issue solely because the parents had specifically put the issue before the court ([91-92]).

In articulating how to give content to welfare, Munby L.J. focuses on the decision-maker and asks:

[w]hat in our society today, looking to the approach of parents generally in 2012, is the task of the ordinary reasonable parent? What is the task of a judge, acting as a 'judicial reasonable parent' and approaching things by reference to the views of reasonable parents on the proper treatment and methods of bringing up children? What are their aims and objectives? ...

In the conditions of current society there are, as it seems to me, three answers to this question. First, we must recognise that equality of opportunity is a fundamental value of our society: equality as between different communities, social groupings and creeds, and equality as between men and women, boys and girls. Second, we foster, encourage and facilitate aspiration: both aspiration as a virtue in itself and, to the extent that it is practical and reasonable, the child's own aspirations. Far too many lives in our community are blighted, even today, by lack of aspiration. Third, our objective must be to bring the child to adulthood in such a way that the child is best equipped both to decide what kind of life they want to lead – what kind of person they want to be – and to give effect so far as practicable to their aspirations. Put shortly, our objective must be to maximise the child's opportunities in every sphere of life as they enter adulthood. And the corollary of this, where the decision has been devolved to a 'judicial parent',

is that the judge must be cautious about approving a regime which may have the effect of foreclosing or unduly limiting the child's ability to make such decisions in future ([79-80]).

By concentrating directly on the judge's role, Munby L.J. employs duty-based reasoning to determine the best outcome on the facts. Cutting through the difficulty of giving content to the 'best interests' of the child, the judge is instead asked to reflect explicitly on their own views, assumed to be those of a judicial parent. Lord Justice Munby carefully reviews the expert report from CAFCASS, and concludes that, on the particular facts, the children's opportunities would be maximised by attending the more liberal schools proposed by the mother.

This focus on the duties of the decision-maker is particularly valuable in *Re G* because it enables the court to resolve a conflict in relation to which both parties' competing views are acceptable. In this sense, the duty-based perspective acted as the mechanism to resolve an extremely difficult 'best interests' question. The decision in *Re G* also highlights the potential for the duty-based approach to act as a mechanism for resolving disagreements grounded in cultural norms and practices. In addition to the judge being treated as a virtuous decision-maker, both parents should be treated as 'ideal' parents, such that the outcome for the child reflects the decision that 'ideal' parents would have made. Obviously, seeing the parents as virtuous decision-makers is a construct, and what it really means is that the child is entitled to be treated in such a manner as if all her interactions were 'ideal'. In this way, the duty-based approach has real potential to remove the conflict between the parents that exists when we posit the debate through the prism of rights, or the uncertainty as to whose perspective on the child's 'best interests' should count when we posit the debate through the prism of the welfare principle.

Under the duty-based approach, both parents are constructed as virtuous, thus each must make any necessary sacrifices in order to achieve the preferred outcome for children. However, there is also a real sense in which these are not real sacrifices. As Foot explains, 'there is a way in which a loving parent does not really separate *his or her good* from the good of the children' (2001: 102, emphasis in original). Yet, parents should also take into account both self-oriented and other-oriented concerns (Swanton, 2003: 244, 295) so that they are not excessively self-sacrificing. Parents' flourishing is thus inherently and complexly related to children's flourishing.

Herring and Foster propose the opposite implication of this connection between flourishing and sacrifice, contending that ‘there will be circumstances in which it is in the child’s/the incapacitous adult’s best interests/welfare to act towards a third part in a way in which, viewed objectively, seems altruistic’ (2012: 482). Elsewhere, Herring suggests that ‘there will be occasions on which children will be required to make sacrifices as part of a beneficial ongoing relationship’ (2005: 166). But their argument overlooks what fundamentally underpins and connects all three conceptual approaches to regulating children’s lives – children’s rights, welfare, and duty. These approaches are premised on the view that children are a special case. Only if we abandon that view can we explain parental or judicial decisions that require children to make sacrifices as part of their relationships with their families. In drawing on virtue ethics to conceptualise flourishing as the aim of any particular approach, whether duty or welfare, we must be careful not to lose sight of the consensus to prioritise children’s position.

Clearly, there will be difficult cases, as exemplified within the current law. However, this approach enables us more readily to justify to the parties involved why a father might need to be treated as if he accepts that shared residence is not best for his children, or why a recalcitrant mother, despite her hostilities, would need to agree to a schedule of increasing contact as time went on, as any virtuous parent would. As the complex reasoning in *Re G* also illustrates, the advantages of a duty-based approach may not make it any easier, only more predisposed to determine the outcome most likely to enable the particular child to flourish.

7. Conclusion

Farrelly and Solum argue that ‘contemporary normative legal theory, despite its vibrancy and sophistication, is stuck in certain recurring patterns of irresolvable argument’ (2008: 6). In particular, they cite the treatment over time of the antinomies of rights and consequentialism, as well as realism and formalism as support (2008: 4-5). In this chapter, I have sought to break the stranglehold of the rights-welfare binary on thinking about how to regulate children’s lives. I have contended that children’s rights, welfare and duty are all simply tools for working with the same substantive content affecting outcomes for children.

This perspective is evident in recent developments in other areas of family law, notably the replacement of residence orders and contact orders in s. 8(1) of the Children Act 1989 with child arrangements orders set out in s. 12 of the Children and Families Act 2014.⁶⁷ Whilst the change in language is intended to ‘encourage[e] parents to focus on their child’s needs rather than what they see as their own ‘rights’’ (Department for Education, 2013: 13), there is also a sense in which the reform highlights the priority of outcomes over language. With the shift to a single type of order, the court and disputing parties negotiating outside of court are directed to focus exclusively on the best outcome on the facts, without being distracted by perceived status-oriented concerns about the language used to describe their involvement with the child, sustained by the bifurcation into residence and contact. It remains to be seen, however, whether that will be sustainable given the potential for s. 11’s introduction of a presumption of involvement of each parent in the child’s life – via a new s. 1(2A) of the Children Act 1989 – to give rise to the impression of a ‘right’ to involvement. The accompanying s. 1(2B) explicit disavowal of a particular starting-point for division of time to recognise involvement also highlights the centrality of the decision-maker, whether the virtuous judge, mediator, or parents, to reaching the best outcome.

There are three ways in which duty can contribute to this landscape: as a tool to give specificity and resolve conflicts in current rights- and welfare-based decision-making; as a theoretical framework of itself, focused on the decision-maker; and as the basis for anchoring a virtue-led view of the aim for legal decision-making affecting children – to enable children to flourish on their own terms.

As a framework, I have argued that a duty-based approach has a number of distinct benefits. First, it openly acknowledges the impossibility of a truly child-centred approach, which enables us to ensure that child-oriented reasoning cannot be used as a smokescreen for other parties’ interests or the decision-maker’s personal preferences. Instead, the decision-maker needs to ask which outcome is more likely to lead to the child’s flourishing. Recognition that we cannot be genuinely child-centred thus makes it more likely that the child’s interests are at the centre. Second, as a contextualised approach, it is more readily particularised to the individual child’s circumstances. Third, there is reduced scope for vagueness; this is achieved through both the context-oriented role for empirical evidence and the focus on the decision-maker and their

⁶⁷ Thanks to an anonymous reviewer for raising this point.

process of reasoning. Fourth, the greater likelihood of transparent reasoning in turn increases the likelihood of a better balance being struck between competing considerations. Fifth, it emphasises the justifiable and necessary place of empirical research and expert evidence on outcomes. Sixth, it removes an unnecessary layer of reasoning by focusing on those individuals who need to implement outcomes for children. Finally, it suggests a proactive attitude to improving children's circumstances, compared with the reactive children's rights and welfare-oriented perspectives. As a result, my virtue-inspired account better enables us to implement the concern and respect for children upon which thinking in terms of children's rights or welfare is justified.

Giving the keynote address at the Association of Lawyers for Children Annual Conference in November 2012, Ryder J., as he then was, suggested a new role for judges, particularly in the public law context. Noting that the welfare principle was 'arguably too subjective' (2012: 4), he proceeded to suggest that there was a need to adopt 'an investigative rather than an adversarial system of justice' (2012: 6). Within this new approach, judges are to have a more active role in determining the issues for discussion and the evidence needed to reach decisions (2012: 7). Mr Justice Ryder characterises this as a shift 'into the problem solving arena ... [that will] move judges from the Hartian fount of authority, the Zeus who applies fixed rules to Dworkin's Hercules' (2012: 8), a decision-maker who will distil principles out of legal policy (2012: 8). This investigative, evidence-based role for the judiciary fits my duty-based approach. It remains to be seen to what extent, if at all, this will be reflected in the single Family Court reforms, which are now in the hands of Sir James Munby, President of the Family Division. Even if one disputes my framework argument, the fact that a duty-based approach can work within rights-, welfare-, or rights-and-welfare-based approaches, and be used as a tool for implementation, offers a more modest, and theoretically sound, option for reform.

Whilst Freeman may well not agree with my turn to focus on duty, it is in his clear, cogent articulation of the on-going very real reasons in favour of thinking of children in terms of rights that the basis of a non-rights-based approach is born. In this way, his arguments in favour of a rights-based approach unite rights advocates and sceptics: if Freeman is right about all the reasons children's rights matter, whilst children's rights are unable to achieve these reasons, sceptics are left with no choice but to look for a non-rights based methodology for achieving the aims of children's rights. In that way, Freeman's continued call to action was not merely

preaching to the choir, but providing a much-needed challenge to sceptics to strive toward the same goal: improved outcomes for children. At the very least, whether my duty-based argument convinces or not, it follows in Freeman's tradition of 'keep[ing the debate] alive and healthy' (2007b: 19).

References

- Amaya, A. "The Role of Virtue in Legal Justification", in A. Amaya and H. Hock Lai (eds), *Law, Virtue and Justice* (Oxford: Hart Publishing, 2013).
- Anscombe, G.E. "Modern Moral Philosophy", *Philosophy* 1958, 33(124), 1-19.
- Aristotle, *Nicomachean Ethics*, trans. D. Ross (Oxford; Oxford University Press, 1992).
- Bainham, A. "Can We Protect Children and Protect their Rights?", *Family Law* 2002, 32(April), 279-89.
- Bartlett, P. "The United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law", *Modern Law Review* 2012, 75(5), 752-778.
- Breen, C., *The Standard of the Best Interests of the Child: A Western Tradition in International and Comparative Law* (The Hague, Netherlands: Martinus Nijhoff, 2002).
- Brennan, S. and Noggle, R. "The Moral Status of Children: Children's Rights, Parents' Rights, and Family Justice", *Social Theory and Practice* 1997, 23(1), 1-26.
- Bridgeman, J., *Parental Responsibility, Young Children and Healthcare Law* (Cambridge: Cambridge University Press, 2007).
- Cave, E. and Wallbank, J. "'Minors' Capacity to Refuse Treatment: A Reply to Gilmore and Herring", *Medical Law Review* 2012, 20(3), 423-449.
- Choudhry, S. and Fenwick, H. "Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act", *Oxford Journal of Legal Studies* 2005, 25(3), 453-492.
- Choudhry, S., Herring, J. and Wallbank, J. "Welfare, Rights, Care and Gender in Family Law" in J. Wallbank, S. Choudhry, and J. Herring (eds), *Rights, Gender, and Family Law* (Abingdon, UK: Routledge, 2010).

- Cimino, C. F. "Private Law, Public Consequences, and Virtue Jurisprudence", *University of Pittsburgh Law Review* 2009, 71(2), 279-312.
- Coady, C. A. J. "Theory, Rights, and Children: A Comment on O'Neill and Campbell", *International Journal of Law and the Family* 1992, 6(1), 43-51.
- Department for Education, Cm 8540: *Children and Families Bill 2013: Contextual Information and Responses to Pre-Legislative Scrutiny* (London: HMSO, 2013).
- Duff, R. A. "The Limits of Virtue Jurisprudence", *Metaphilosophy* 2003, 34(1-2), 214-224.
- Dwyer, J. G., *The Relationship Rights of Children* (Cambridge: Cambridge University Press, 2006).
- Dwyer, J. G., *Moral Status and Human Life: The Case for Children's Superiority* (Cambridge: Cambridge University Press, 2011).
- Eekelaar, J. "The importance of thinking that children have rights", *International Journal of Law, Policy and the Family* 1992, 6(1), 221-235.
- Eekelaar, J. "The interests of the child and the child's wishes: The role of dynamic self-determinism", *International Journal of Law, Policy and the Family* 1994, 8(1), 42-61.
- Eekelaar, J. "Children's rights: From battle cry to working principle", in J. Pousson-Petit (ed), *Liber Amicorum Marie-Thérèse Meulders-Klein: Droit Comparé Des Personnes Et De La Famille* (Brussels: Bruylant, 1998).
- Eekelaar, J. "Beyond the Welfare Principle", *Child and Family Law Quarterly* 2002, 14(3), 237-250.
- Farrelly, C. and Solum, L. B. "An Introduction to Aretaic Theories of Law" in C. Farrelly and L. B. Solum (eds), *Virtue Jurisprudence* (New York, NY: Palgrave Macmillan, 2008).
- Ferguson, L., *The End of an Age: Beyond Age-Based Legal Regulation of Minors' Entitlement to Participate in and Make Health Care Treatment Decisions* (Ottawa: Law Commission of Canada, 2005), online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=998227> (accessed 12 August 2013).
- Ferguson, L. "'Families in all their Subversive Variety': Over-Representation, the Ethnic Child Protection Penalty, and Responding to Diversity whilst Protecting Children", *Studies in Law, Politics, and Society* 2014, 63, 43-87.

- Ferguson, L. “Not Merely Rights for Children but Children’s Rights: The Theory Gap and the Assumption of the Importance of Children’s Rights”, *International Journal of Children’s Rights* 2013, 21(2), 177-208.
- Foot, P. “Virtues and Vices”, in P. Foot, *Virtues and Vices and Other Essays in Moral Philosophy* (Berkeley: University of California Press, 1978).
- Foot, P., *Natural Goodness* (Oxford, UK: Oxford University Press, 2001).
- Fortin, J. “Accommodating Children’s Rights in a Post Human Rights Act Era”, *Modern Law Review* 2006, 69(3), 299-326.
- Fortin, J., *Children’s Rights and the Developing Law*, 3rd ed (Cambridge: Cambridge University Press, 2009).
- Freeman, M., *The Rights and Wrongs of Children* (London: Pinter, 1983).
- Freeman, M. “The Best Interests of the Child? Is *The Best Interests of the Child* in the Best Interests of Children”, *International Journal of Law, Policy and the Family* 1997a, 11(3), 360-388.
- Freeman, M., *The Moral Status of Children: Essays on the Rights of the Child* (Netherlands: Brill, 1997b).
- Freeman, M. “The End of the Century of the Child?”, *Current Legal Problems* 2000, 58(1), 505-558.
- Freeman, M. “What’s Right with Rights for Children?”, *International Journal of Law in Context* 2006, 2(1), 89-98.
- Freeman, M., *A Commentary on the United Nations Convention on the Rights of the Child, Volume 3: Article 3 – The Best Interests of the Child* (The Hague: Martinus Nijhoff, 2007a).
- Freeman, M. “Why It Remains Important to Take Children’s Rights Seriously”, *International Journal of Children’s Rights* 2007b, 15(1), 5-23.
- Freeman, M. “Culture, Childhood and Rights”, *The Family in Law* 2011, 5(1), 15-33.
- Gilmore, S. “Disputing contact: challenging some assumptions”, *Child and Family Law Quarterly* 2008, 20(3), 285-311.
- Gilmore, S. and Herring, J. “‘No’ is the hardest word: Consent and children’s autonomy”, *Child and Family Law Quarterly* 2011, 23(1), 3-25.
- Gilmore, S. and Herring, J. “Children’s refusal of treatment: the debate continues”, *Family Law* 2012, 42(August), 973-978.

Hale, B., “Who’s Afraid of Children’s Rights?”, Inaugural Lecture for the Wales Observatory on Human Rights of Children and Young People (14 June 2013), online:

<http://www.swansea.ac.uk/media/Baroness%20Hale%20Lecture%20-%20Wales%20Observatory_UNICEF%20lecture%20-%202013.pdf> (accessed: 15 July 2013).

Hansard, HL Deb vol XXX col 518-527 (5 July 2004), available:

<<http://www.publications.parliament.uk/pa/ld200304/ldhansrd/vo040705/text/40705-04.htm>> (accessed 10 July 2013).

Herring, J. “The Human Rights Act and the Welfare Principle in Family Law: Conflicting or Complementary?”, *Child and Family Law Quarterly* 1999, 11(3), 223-235.

Herring, J. “Farewell Welfare?”, *Journal of Social Welfare and Family Law* 2005, 27(2), 159-171.

Herring, J. “Vulnerability, Children and the Law”, in M. Freeman (ed), *Law and Childhood Studies: Current Legal Issues Vol. 14* (Oxford: Oxford University Press, 2012).

Herring, J., *Family Law*, 6th ed (Harlow: Pearson, 2013).

Herring, J. and Foster, C. “Welfare means relationality, virtue and altruism”, *Legal Studies*, 2012, 32(3), 480-498.

Hodgkin, R. and Newell, P., *Implementation Handbook for the Convention on the Rights of the Child*, fully revised 3rd ed (UNICEF, 2007), online:

<http://www.unicef.org/publications/index_43110.html> (accessed 12 August 2013).

Hursthouse, R. “Normative Virtue Ethics”, in R. Crisp (ed), *How Should One Live? Essays on the Virtues* (Oxford: Oxford University Press, 1998).

Hursthouse, R., *On Virtue Ethics* (Oxford: Oxford University Press, 1999).

Keller, S., *Partiality* (Oxford: Princeton University Press, 2013).

Kochan, D.J. “The Mask of Virtue: Theories of Aretaic Legislation in a Public Choice Perspective”, *Saint Louis University Journal* 2014, 58, 295-354.

MacIntyre, A., *After Virtue* (London: Duckworth, 1985).

Morris, A. “Selective Treatment of Irreversibly Impaired Infants”, *Medical Law Review* 2009, 17(3), 347-376.

O’Neill, O. “Children’s Rights and Children’s Lives”, *Ethics* 1998, 98(3), 445-463.

Raz, J. "Human Rights in the Emerging World Order", *Transnational Legal Theory* 2010, 1(1), 31-47.

Reece, H. "The Paramountcy Principle: Consensus or Construct?", *Current Legal Problems* 1996, 49(1), 267-304.

Royal College of Paediatrics and Child Health, *Withholding or Withdrawing Life Sustaining Treatment in Children: A Framework for Practice*, 2nd ed (RCPCH, 2004), online: <http://www.gmc-uk.org/Withholding.pdf_40818793.pdf> (accessed 12 January 2014).

Ryder, E., Association of Lawyers for Children: Annual Conference Keynote Speech <www.alc.org.uk/uploads/Keynote_speech_16_Nov_123.pdf> (2012) (accessed 12 August 2013).

Sherry, S. "Judges of Character", in C. Farrelly and L. B. Solum (eds), *Virtue Jurisprudence* (New York: Palgrave Macmillan, 2008).

Singer, J. W. "Normative Methods for Lawyers", *UCLA Law Review* 2009, 56(4), 899-982.

Slote, M. "Agent-Based Virtue Ethics", *Midwest Studies in Philosophy* 1995, 20(1), 83-101.

Solum, L. B. "Virtue Jurisprudence: A Virtue-Centred Theory of Judging", *Metaphilosophy* 2003, 34(1/2), 178-213.

Solum, L.B. "Natural Justice", in C. Farrelly and L.B. Solum (eds), *Virtue Jurisprudence* (New York: Palgrave Macmillan, 2008).

Swanton, C., *Virtue Ethics: A Pluralistic View* (Oxford: Oxford University Press, 2013).

Tobin, J. "Justifying Children's Rights", *International Journal of Children's Rights*, 2013, 21(3), 395-441.

Todres, J. "Emerging Limitations on the Rights of the Child: The UN Convention on the Rights of the Child and its Early Case Law", *Columbia Human Rights Law Review* 1998, 30(1), 159-200.

Van Krieken, R. "The 'Best Interests of the Child' and Parental Separation: on the 'Civilizing of Parents'", *Modern Law Review* 2005, 68(1), 25-48.

Waldron, J., "Human Rights: A Critique of the Raz/Rawls Approach", *NYU Public Law and Legal Theory Research Paper Series*, Working Paper No 13-32 (2013), online:

<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2272745> (accessed 12 August 2013).